

10 of 27 DOCUMENTS

Copyright © 1987 The Harvard Law Review Association.

Harvard Law Review

JUNE, 1987

100 Harv. L. Rev. 1849

LENGTH: 35400 words**ARTICLE:** MARKET-INALIENABILITY.**NAME:** Margaret Jane Radin ***BIO:**

* Professor of Law, University of Southern California Law Center. I gratefully acknowledge the support of the University of Southern California Faculty Research and Innovation Fund in the preparation of this Article. Earlier versions were presented to workshops at the University of Wisconsin School of Law, Northwestern School of Law, and the University of Southern California Law Center, as well as to the Los Angeles Feminist Legal Scholars and to my Spring 1987 seminar in property theory. The Article benefited greatly from the responses of the participants. It also benefited greatly from the willingness of friends and colleagues -- too numerous to name -- to think and argue with me, sharing generously their time and talents. I am grateful to all of them and hope they will take up where I leave off. For making this work possible, I record my thanks to my family: Layne Leslie Britton, Wayland Jeremiah Radin, and Amadea Kendra Britton.

LEXISNEXIS SUMMARY:

... SINCE the declaration of "unalienable rights" of persons at the founding of our republic, inalienability has had a central place in our legal and moral culture. ... Moreover, universal commodification means that everything people need or desire, either individually or in groups, is conceived of as a commodity. ... Universal commodification is characterized by universal market rhetoric and universal market methodology. ... Hegel also cast the argument against alienation of personhood as a "contradiction." ... Concerns about commodification of women and children, however, might counsel permitting only unpaid surrogacy (market-inalienability). Market-inalienability might be grounded in a judgment that commodification of women's reproductive capacity is harmful for the identity aspect of their personhood and in a judgment that the closeness of paid surrogacy to baby-selling harms our self-conception too deeply. ...

HIGHLIGHT: *Things that may be given away but not sold are market-inalienable. In this Article, Professor Radin explores the significance of market-inalienability and its justifications. The author considers and rejects two archetypes that fail to recognize market-inalienability as a separate category of social interaction. One, universal commodification, holds that everything should in principle be subject to market transfer; the other, universal noncommodification, holds that the market should be abolished. Professor Radin also explores and ultimately rejects attempts based on economic analysis and liberal philosophical doctrines to justify particular distinctions between things that are and things that are not appropriately traded in markets. She then offers an alternative justification for market-inalienability that relates it to an ideal of human flourishing. This theory takes into account both the rhetoric in which we conceive of ourselves and our situation in nonideal circumstances. Professor Radin concludes by demonstrating how the theory might be applied to three contested market-inalienabilities: prostitution, baby-selling, and surrogate motherhood.*

TEXT:

[*1849] SINCE the declaration of "unalienable rights" of persons at the founding of our republic, ⁿ¹ inalienability has had a central place in our legal and moral culture. Yet there is no one sharp meaning for the term "inalienable." Sometimes inalienable means nontransferable; ⁿ² [*1850] sometimes only nonsalable. ⁿ³ Sometimes inalienable means nonrelinquishable by a rightholder; ⁿ⁴ sometimes it refers to rights that cannot be lost at all. ⁿ⁵ In this Article I explore nonsalability, a species of inalienability I call market-inalienability. Something that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market.

Controversy over what may be bought and sold -- for example, blood or babies -- pervades our news. Although some scholars have considered whether such things may be traded in markets, they have not focused on the phenomenon of market-inalienability. About fifteen years ago, for example, Richard Titmuss advocated in his book, *The Gift Relationship*, ⁿ⁶ that human blood should not be allocated through the market; others disagreed. ⁿ⁷ More recently, Elisabeth Landes and Richard Posner suggested the possibility of a thriving market in infants, ⁿ⁸ yet most people continue to believe that infants should not be allocated through the market. ⁿ⁹ What I believe is lacking, and wish to supply, is a general theory that can illuminate these debates. Two [*1851] possibilities for filling this theoretical gap are traditional liberalism and modern economic analysis, but in this Article I shall find them both wanting.

The most familiar context of inalienability is the traditional liberal triad: the rights to life, liberty, and property. To this triad, liberalism juxtaposes the most familiar context of alienability: traditional property rights. Although the right to hold property is considered inalienable in traditional liberalism, property rights themselves are presumed fully alienable, and inalienable property rights are exceptional and problematic.

Economic analysis, growing out of the liberal tradition, tends to view all inalienabilities in the way traditional liberalism views inalienable property rights. When it does this, economic analysis holds fast to one strand of traditional liberalism, but it implicitly rejects -- or at least challenges -- another: the traditional distinction between inalienable and alienable kinds of rights. In conceiving of all rights as property rights that can (at least theoretically) be alienated in markets, economic analysis has (at least in principle) invited markets to fill the social universe. It has invited us to view all inalienabilities as problematic.

In seeking to develop a theory of market-inalienability, I argue that inalienabilities should not always be conceived of as anomalies, regardless of whether they attach to things traditionally thought of as property. Indeed, I try to show that the characteristic rhetoric of economic analysis is morally wrong when it is put forward as the sole discourse of human life. My general view deviates not only from the traditional conception of the divide between inalienable and alienable kinds of rights, but also from the traditional conception of alienable property. Instead of using the categories of economics or those of traditional liberalism, I think that we should evaluate inalienabilities in connection with our best current understanding of the concept of human flourishing.

To develop this theory, which will help us to decide what things ought not to be bought and sold, I must lay a rather complex groundwork. In Part I, I articulate the various meanings of inalienability and introduce the idea of commodification. In Part II, I explore an economic view that sees all things as exchangeable, first reflecting generally on the rhetoric and methodology of the market and then examining how inalienability is seen as a method of correcting market failures. In Part III, I consider a critique of the economic view that would reject markets entirely. I find this utopian vision to be flawed by a pervasive problem of transition, but suggest we take seriously its philosophical connection between rhetoric and human flourishing. In Part IV, I consider the traditional liberal divide between market and nonmarket realms and show that the philosophical commitments of the liberal view have tended to push it toward the economic view. [*1852] Finally, in Part V, I advocate a nonideal, pragmatic evaluation of market-inalienabilities based on a conception of personhood or human flourishing that differs from that of traditional liberalism or economics. In developing this analysis, I attempt to address the transition problem that plagues our pursuit of social ideals. To show how the analysis I recommend might illuminate specific issues of market-inalienability that deeply trouble us, I conclude by bringing it to bear on commodification of sexuality and reproductive capacity: prostitution, baby-selling, and surrogacy.

I. MARKET-INALIENABILITY AND NONCOMMODIFICATION

In order to focus effectively on market-inalienability and its moral and social significance, it will be helpful first to have an overview of the range of meanings of inalienability, as well as an idea of the framework connecting alienability and commodification.

A. *Traditional Meanings*

Theorists have seldom recognized that we have no one sharp meaning of inalienability.ⁿ¹⁰ Nevertheless, the traditional meanings of inalienability share a common core: the notion of alienation as a separation of something -- an entitlement, right, or attributeⁿ¹¹ -- from its holder. Inalienability negates the possibility of separation. Meanings proliferate because the separation that constitutes alienation can be either voluntary or involuntary, and can result in the entitlement, right, or attribute ending up in the hands of another holder, or in its simply being lost or extinguished.ⁿ¹² Any particular entitlement, [*1853] right, or attribute may be subject to one or more forms of inalienability.

In one important set of meanings, inalienability is ascribed to an entitlement, right, or attribute that cannot be lost or extinguished. If involuntary loss is its focus, inalienable may mean nonforfeitableⁿ¹³ or noncancelable; if voluntary loss is its focus, inalienable may mean nonwaivableⁿ¹⁴ or nonrelinquishable.

In another important set of meanings, inalienability is ascribed to an entitlement, right, or attribute that cannot be voluntarily transferred from one holder to another.ⁿ¹⁵ Inalienability in these uses may mean nongiveable, nonsalable, or completely nontransferable. If something is nontransferable, the holder cannot designate a successor holder.ⁿ¹⁶ Nongiveability and nonsalability are subsets of nontransferability. If something is inalienable by gift, it might be transferred by sale;ⁿ¹⁷ if it is inalienable by sale, it might be transferred by gift.ⁿ¹⁸ This nonsalability is what I refer to as market-inalienability. In precluding sales but not gifts, market-inalienability places some things outside the marketplace but not outside the realm of social intercourse.

[*1854] Market-inalienability negates a central element of traditional property rights, which are conceived of as fully alienable.ⁿ¹⁹ But market-inalienability differs from the nontransferability that characterizes many nontraditional property rights -- entitlements of the regulatory and welfare state -- that are both nongiveable and nonsalable.ⁿ²⁰ Market-inalienability also differs from the inalienability of other things, like voting rights, that seem to be moral or political duties related to a community's normative life; they are subject to broader inalienabilities that preclude loss as well as transfer.ⁿ²¹ Unlike the inalienabilities attaching to welfare entitlements or political duties, market-inalienability does not render something inseparable from the person, but rather specifies that market trading may not be used as a social mechanism of separation. Finally, market-inalienability differs from the inalienability of things, like heroin, that are made nontransferable in order to implement a prohibition,ⁿ²² because it does not signify that something is social anathema. Indeed, preclusion of sales often coexists with encouragement of gifts. For example, the market-inalienability [*1855] of human organs does not preclude -- and, indeed, may seek to foster -- transfer from one individual to another by gift.ⁿ²³

B. *The Commodification Issue*

Market-inalienability often expresses an aspiration for noncommodification. By making something nonsalable we proclaim that it should not be conceived of or treated as a commodity.ⁿ²⁴ When something is noncommodifiable, market trading is a disallowed form of social organization and allocation. We place that thing beyond supply and demand pricing, brokerage and arbitrage, advertising and marketing, stockpiling, speculation, and valuation in terms of the opportunity cost of production.

Market-inalienability poses for us more than the binary choice of whether something should be wholly inside or outside the market, completely commodified or completely noncommodified. Some things are completely commodified -- deemed suitable for trade in a laissez-faire market.ⁿ²⁵ Others are completely noncommodified -- removed from the market altogether. But many things can be described as incompletely commodified -- neither fully

commodified nor fully removed from the market.ⁿ²⁶ Thus, we may decide that some things should be market-inalienable only to a degree, or only in some aspects.

[*1856] To appreciate the need to develop a satisfactory analysis of market-inalienability, consider the deeply contested issues of commodification that confront us. Infants and children,ⁿ²⁷ fetal gestational services,ⁿ²⁸ blood,ⁿ²⁹ human organs,ⁿ³⁰ sexual services,ⁿ³¹ and services of college athletesⁿ³² are some salient things whose commodification is contested.ⁿ³³ Our division over whether to place a monetary equivalent on a spouse's professional degreeⁿ³⁴ or homemaker services in a divorce; [*1857] or on various kinds of injuries in tort actions, such as loss of consortium, is another form of contest over commodification.ⁿ³⁵ Monetization -- commodification -- of clean air and water is likewise deeply contested.ⁿ³⁶ Moreover, debates about some kinds of regulation can be seen as contested incomplete commodification, with the contest being over whether to allow full commodification (a laissez-faire market regime) or something less. If we see the debates this way, residential rent control, minimum wage requirements, and other forms of price regulation, as well as residential habitability requirements, safety regulation, and other forms of product-quality regulation all become contests over the issue of commodification.ⁿ³⁷

How are we to determine the extent to which something ought to be noncommodified, so that we can determine to what extent market-inalienability is justified? Because the question asks about the appropriate relationship of particular things to the market, normative theories about the appropriate social role of the market should be helpful in trying to answer it. We can think of such theories as ordered on a continuum stretching from universal noncommodification (nothing in markets) to universal commodification (everything in markets). On this continuum, Karl Marx's theory can symbolize the theoretical pole of universal noncommodification, and Richard Posner's can be seen as close to the opposite theoretical pole.ⁿ³⁸ Distributed along the continuum [*1858] are theorists we may call pluralists -- those who see a normatively appropriate but limited realm for commodification coexisting with one or more nonmarket realms. Pluralists often see one other normative realm besides that of the market, and partition the social world into markets and politics,ⁿ³⁹ markets and rights,ⁿ⁴⁰ or markets and families;ⁿ⁴¹ but pluralists also may envision multiple nonmarket realms.ⁿ⁴² For a pluralist, the crucial question is how to conceive of the permissible scope of the market. An acceptable answer would solve problems of contested commodification.

[*1859] Pluralism with its crucial question is a main focus of this Article, because a species of pluralism has been prevalent in liberal thought, and because pluralism is a common-sense position for many people. In order to explore pluralism, both in its traditional form and as it might be reconceived to yield acceptable answers, it will first be necessary to review a modern alternative to pluralism -- universal commodification in the form of economic analysis -- and the critique of this alternative.

II. UNIVERSAL COMMODIFICATION

Under universal commodification, there is no deep question about the appropriate scope of the market, because the market is theoretically all-encompassing. From this point of view, all inalienabilities reduce to market-inalienability, and market theory itself, using a market failure analysis, can determine when things should not be bought and sold.

A. *The Rhetoric and Methodology of the Market*

The term "commodification" can be construed narrowly or broadly. Narrowly construed, commodification describes actual buying and selling (or legally permitted buying and selling) of something.ⁿ⁴³ Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions. Universal commodification embraces this broad construction in its most expansive form, limiting actual buying and selling only by the dictates of market methodology, and solving problems of contested commodification by making everything in principle a commodity.ⁿ⁴⁴

[*1860] 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. Moreover, universal commodification means that everything people need or desire, either individually or in groups, is conceived of as a commodity. "Everything" includes not only those things usually considered goods, but also personal attributes, relationships, and states of affairs. Under universal commodification, the functions of government, wisdom, a healthful environment, and the right to bear children are all commodities. ⁿ⁴⁵

[*1861] Universal commodification is characterized by universal market rhetoric and universal market methodology. In universal market rhetoric -- the discourse of complete commodification -- everything that is desired or valued is conceived of and spoken of as a "good." Everything that is desired or valued is an object that can be possessed, that can be thought of as equivalent to a sum of money, and that can be alienated. The person is conceived of and spoken of as the possessor and trader of these goods, and hence all human interactions are sales.

Market methodology includes a cost-benefit analysis, evaluating human actions and social outcomes in terms of actual or hypothetical gains from trade measured in money. Under universal commodification, market trading and its outcomes represent individual freedom and the ideal for individuals and society. Unrestricted choice about what goods to trade represents individual freedom, and maximizing individual gains from trade represents the individual's ideal. All social and political interactions are conceived of as exchanges for monetizable gains. Politics reduces to "rent seeking" by log-rolling selfish individuals or groups, ⁿ⁴⁶ and the social ideal reduces to efficiency. ⁿ⁴⁷

In seeking efficiency through market methodology, universal commodification posits the laissez-faire market as the rule. Laissez-faire is presumptively efficient because, under universal commodification, voluntary transfers are presumed to maximize gains from trade, and all human interactions are characterizable as trades. Laissez-faire also presumptively expresses freedom, because freedom is defined as free choices of the person seen as trader. ⁿ⁴⁸

[*1862] Universal commodification is an archetype, a caricature. Economic analysts do not explicitly embrace it, but some of them, some of the time, implicitly come close. Posner, for example, suggests that everything ought to be ownable and salable, ⁿ⁴⁹ and he often seems to embrace universal market rhetoric and universal market methodology. Posner speaks in market rhetoric when he says that "the prohibition against rape is to the marriage and sex 'market' as the prohibition **[*1863]** against theft is to explicit markets in goods and services." ⁿ⁵⁰ Posner uses universal market methodology to suggest that a free market in infants should replace the regulated market (adoption mechanisms) we now have and the black market engendered by evasion of it. ⁿ⁵¹

B. Inalienability as a Means of Correcting Market Failure

Universal commodification leads to a characteristic way of understanding inalienability in general and market-inalienability in particular. First, no inalienability or restraint on alienation should exist unless market methodology itself requires it. Second, if inalienability is required, it is accounted for in market terms and described in market rhetoric. These two premises combine to produce a transaction costs model of inalienability, in which inalienability is a means of controlling externalities that prevent the market from achieving an efficient result. Third, market-inalienability is not seen as a subcategory of inalienability. When one supposes, for purposes of explanation and justification, that every human interaction is a sale, then all inalienabilities collapse into nonsalability.

[*1864] The transaction costs model is developed by Guido Calabresi and A. Douglas Melamed in their treatment of "inalienability rules." ⁿ⁵² Even though its discussion of inalienability is limited, their article has been seminal for those who conceive of inalienability in the market mode. ⁿ⁵³ Calabresi and Melamed divide protection of entitlements into property rules, liability rules, and inalienability. Property rules signify a scheme of free transfers between willing sellers and buyers, with no coerced transfers; liability rules signify a scheme of allowable coerced transfers at market prices set by official entities, such as courts. Calabresi and Melamed argue that property rules are prima facie efficient and therefore desirable. Liability rules are an exception to the property-rule regime, justifiable only when transaction costs of various kinds cause market failures to undermine the prima facie efficiency of property rules. ⁿ⁵⁴ Both the property-rule regime and the exception to it are generated by market methodology and the pursuit of efficiency.

Calabresi and Melamed conceive of inalienability as similarly generated by the pursuit of efficiency. In their approach, alienability is prima facie correct or justified, and inalienability must be the exception that proves the rule. Their definition of inalienability collapses all inalienabilities into market-inalienabilityⁿ⁵⁵ by failing to distinguish between prohibiting all loss or transfer and prohibiting sale.

Using market methodology, Calabresi and Melamed argue that external costs might explain or justify inalienability. One category of external cost that might be prevented by inalienability is large-scale social cost that sellers can inflict on the public. Calabresi and Melamed use pollution as an example, but their reasoning could just as well apply to Saturday night specials, heroin, or cigarettes:

For instance, if Taney were allowed to sell his land to Chase, a polluter, he would injure his neighbor Marshall by lowering the value of Marshall's land. Conceivably, Marshall could pay Taney not to sell his land; but, because there are many injured Marshalls, freeloader and information costs make such transactions practically impossible. . . . [W]here there are so many injured Marshalls that the price required under [a] liability rule is likely to be high enough so that no [*1865] one would be willing to pay it, . . . [b]arring the sale to polluters will be the most efficient result because it is clear that avoiding pollution is cheaper than paying its costs -- including its costs to the Marshalls. n56

The argument displays a tendency toward universal commodification in two respects. First, its logic applies to gift transfers as well as sales, but only sales are mentioned, perhaps because all interactions between humans qualify as sales. Second, Calabresi and Melamed describe injury to third parties in market rhetoric; pollution harms people's land value, rather than their health and quality of life.

The other category of external cost that might be prevented by inalienability involves what Calabresi and Melamed call "moralisms." The term "moralism" refers to the assimilation of moral and political right to the market by conceiving of people's moral tenets as goods and assigning them a dollar value. This assimilation represents the ultimate reach of market rhetoric. For example:

If Taney is allowed to sell himself into slavery, or to take undue risks of becoming penniless, or to sell a kidney, Marshall may be harmed, simply because Marshall is a sensitive man who is made unhappy by seeing slaves, paupers, or persons who die because they have sold a kidney. Again Marshall could pay Taney not to sell his freedom to Chase the slaveowner; but again, because Marshall is not one but many individuals, freeloader and information costs make such transactions practically impossible. . . . [And] since the external cost to Marshall does not lend itself to an acceptable objective measurement, . . . liability rules are [also] not appropriate. n57

The authors refer to slavery, spendthrift trusts, and organ-selling, but could just as well have chosen child labor, gambling, or prostitution. This argument, too, evidences a tendency toward universal commodification. Because the argument logically prohibits gifts as well as sales, it may not capture the moral rejection of organ-selling. "Taney" could die just as well from giving away a kidney as from selling it. n58 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 of the "Marshalls" liked slavery, so that the [*1866] prohibition would be a cost rather than a benefit to them, slavery would be efficient and therefore (at least according to this argument) acceptable. This result is the triumph of market methodology. n59

[*1867] Later writers have essentially adopted the Calabresi-Melamed analysis. According to Richard Epstein, the only sound justification for inalienability is "the practical control of externalities." n60 As in Calabresi and Melamed's view, inalienability is the exception that proves the market rule; n61 it comes into being only to achieve what the market "would" achieve but cannot, because of various kinds of transaction costs. n62 Epstein's analysis of vote-selling as an externality problem reveals the scope of his market methodology and market rhetoric. n63 If an entrepreneur could buy the votes to put herself into public office, Epstein argues, she could then pay off the sellers with public money, thus depleting the common pool of assets for her own gain. n64 This argument relies on the universal commodification version [*1868] of interest-group pluralism, conceiving of politics as rent seeking by those who put

their friends and sympathizers in office in order to line their own pockets. ⁿ⁶⁵

Although Epstein's theory purportedly rests on libertarian rights as well as economic efficiency, ⁿ⁶⁶ it differs little from Calabresi and Melamed's. Epstein does not recognize distinctions between market-inalienability and other forms of inalienability, because for him the only real issue is whether a market is under the circumstances self-defeating so that market results must be achieved by other means. For him, the harms caused by treating rights of persons or citizens (such as voting) as alienable commodities are market types of harm -- external costs.

Susan Rose-Ackerman, another scholar who carries forward the view of Calabresi and Melamed, finds three normative rationales for inalienabilities: ⁿ⁶⁷ economic efficiency, "certain specialized distributive [*1869] goals," and incompatibility of unfettered market processes with "the responsible functioning of a democratic state." ⁿ⁶⁸ Unless one of these is implicated, unfettered market trading is presumptively desirable. ⁿ⁶⁹ The efficiency rationale is a broadened transaction costs analysis, adding information and coordination problems to the more familiar externalities. Inalienabilities are "second-best responses" to these market failures. ⁿ⁷⁰

Rose-Ackerman does not present a normative framework for evaluating inalienabilities according to distributive justice. The rationale for inalienability based on distribution is "narrowly focused," referring to situations in which an inalienability can be used to single out recipients of a benefit. ⁿ⁷¹ More generally, Rose-Ackerman argues that using inalienability to achieve distributive goals is unjustified "except to prevent monopoly gains," ⁿ⁷² and that "distributive costs" that arise when efficiency-based restrictions burden a particular group might render the restrictions unjustified. ⁿ⁷³ Although her treatment of the distributive rationale thus seems undeveloped relative to efficiency, ⁿ⁷⁴ Rose-Ackerman's is a hybrid analysis. By raising the issue of distributive justice and and by considering the incompatibility of market processes with democratic functioning, she means to combine economic analysis "with a sensitivity to noneconomic ideas." ⁿ⁷⁵ Her argument connecting certain inalienabilities (such as voting) with ideals [*1870] of citizenship espouses a kind of pluralism, a separation of politics and markets. ⁿ⁷⁶ Nevertheless, it is couched almost exclusively in market rhetoric. ⁿ⁷⁷

In order to evaluate pluralist positions that are not pluralist in rhetoric, it is necessary to consider the normative role of market rhetoric: is commodification in rhetoric tantamount to commodification? ⁿ⁷⁸ As background for considering that question, I turn now to the critique of universal commodification.

III. THE CRITIQUE OF UNIVERSAL COMMODIFICATION

A traditional critical response to universal commodification, at least since Marx, has been a global rejection of commodification. Universal decommodification or noncommodification maintains that the market ought not to exist and that social interactions involving production and consumption should be reconceived in a nonmarket way. Even if one rejects that ideal, however, as I do because of a problem of transition, the critique of universal commodification offers a crucial insight: a world in which human interactions are conceived of as market trades is different from one in which they are not. Rhetoric is not just shaped by, but shapes, reality.

[*1871] A. *Universal Noncommodification*

Universal noncommodification holds that the hegemony of profit-maximizing buying and selling stifles the individual and social potential of human beings through its organization of production, distribution, and consumption, and through its concomitant creation and maintenance of the person as a self-aggrandizing profit- and preference-maximizer. Anticommodifiers tend to assume that we are living under a regime of universal commodification, with its attendant full-blown market methodology and market rhetoric. They also tend to assume that universal commodification is a necessary concomitant of commodification in the narrower sense -- the existence of market transactions under capitalism. Anticommodifiers link rhetoric and reality in their assumption that our material relationships of production and exchange are interwoven with our discourse and our understanding of ourselves and the world. ⁿ⁷⁹

1. *Alienability and Alienation: The Problem of Fetishism.* -- For critics of the market society, commodification simultaneously expresses and creates alienation. The word "alienation" thus harbors an ironic double meaning. Freedom of alienation is the paramount characteristic of liberal property rights, yet Marx saw a necessary connection between this market alienability and human alienation. In his early writings, Marx analyzed the connection between alienation and commodity production in terms of estranged labor; later he introduced the notion of commodity fetishism.ⁿ⁸⁰ In his treatment of estranged labor, Marx portrayed workers' alienation from their own human self-activity as the result of producing objects that became market commodities. By objectifying the labor of the worker, commodities create object-bondage and alienate workers from the natural world in and with which they should constitute themselves by creative interaction. Ultimately, laboring to produce commodities turns the worker from a human being into a commodity, "indeed the most wretched of commodities."ⁿ⁸¹ Marx continued:

The worker becomes an ever cheaper commodity the more commodities he creates. With the *increasing value* of the world of things [*1872] proceeds in direct proportion the *devaluation* of the world of men. Labour produces not only commodities; it produces itself and the worker as a *commodity* -- and does so in the proportion in which it produces commodities generally.ⁿ⁸²

Commodification brings about an inferior form of human life.ⁿ⁸³ As a result of this debasement, Marx concluded that people themselves, not just their institutions, must change in order to live without the market. To reach the post-capitalist stage, "the alteration of men on a mass scale is necessary."ⁿ⁸⁴

The fetishism of commodities represents a different kind of human subjection to commodities (or a different way of looking at human subjection to commodities).ⁿ⁸⁵ By fetishism Marx meant a kind of projection of power and action onto commodities. This projection [*1873] reflects -- but disguises -- human social interactions. Relationships 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. Unless there is a demand for paperweights, they will have no market value, and I cannot produce them for sale. Moreover, I do not decide what price to sell them for, "the market" does. At market equilibrium, I cannot charge more nor less than my opportunity costs of production without going out of business. In disequilibrium, my price and profit are still set by "the market"; my price depends upon how many of us are supplying paperweights in relation to how many people want to buy them and what they are willing to pay for them. Thus, the market valueⁿ⁸⁶ of my commodity dictates my actions, or so it seems. As Marx put it, "[producers'] own social action takes the form of the action of objects, which rule the producers instead of being ruled by them."ⁿ⁸⁷

In an analysis that has profoundly influenced many contemporary anticommodifiers, Georg Lukacs, developing Marx's concept of commodity fetishism, found commodification to be "the central, structural problem of capitalist society in all its aspects."ⁿ⁸⁸ Lukacs linked the trend to commodify the worker with Weberian "rationalization" of the capitalist structure.ⁿ⁸⁹ The more efficient production becomes, the more fungible are the laborers. Moreover, fungibility becomes pervasive:

[T]he principle of rational mechanisation and calculability [embraces] every aspect of life. Consumer articles no longer appear as the products of an organic process within a community (as for example in a village community). They now appear, on the one hand, as abstract members of a species identical by definition with its other members [*1874] and, on the other hand, as isolated objects the possession or nonpossession of which depends on rational calculations.ⁿ⁹⁰

These falsely objectified commodities are said to be reified. According to Lukacs, reification penetrates every level of intellectual and social life.ⁿ⁹¹ False objectification -- false separateness from us -- in the way we conceive of our social activities and environment reflects and creates dehumanization and powerlessness. The rhetoric, the discourse in which we conceive of our world, affects what we are and what our world is. For example, Lukacs thought that the universal commodification of fully developed capitalism underlies physicalist reductionism in science and the tendency to conceive of matter as external and real.ⁿ⁹² He thought that universal commodification also underlies both our rigid

division of the world into subjects versus objects ("the metaphysical dilemma of the relation between 'mind' and 'matter'"), ⁿ⁹³ and the "Kantian dilemma" that places objective reason, purportedly the foundation of metaphysics and ethics, in the noumenal realm forever beyond our reach. ⁿ⁹⁴ For Lukacs, thought and reality are inextricably linked. ⁿ⁹⁵

[*1875] 2. *Inalienability and Noncommodification: The Problem of Transition.* -- Earlier I noted that market-inalienability does not exist as a separate category for universal commodifiers, because nonsalability by definition encompasses the universe of inalienabilities. ⁿ⁹⁶ Likewise, universal noncommodifiers do not distinguish market-inalienability as an analytical category. Market-inalienability posits a nonmarket realm that appropriately coexists with a market realm, and this implicitly grants some legitimacy to market transactions, contrary to the noncommodifier's premise. Thus, only those who think that market and nonmarket realms legitimately coexist -- pluralists -- readily recognize market-inalienability.

Nevertheless, some who espouse universal noncommodification for the long run might espouse pluralism in the short run, if they think that introducing piecemeal market-inalienabilities is a way of making progress toward universal noncommodification. True utopian noncommodifiers, however, would oppose even this interim pluralism; for them, inalienability should be eschewed because it recognizes the legitimacy of alienability, the heart of capitalist property relationships.

I shall call these two approaches to noncommodification evolutionary and revolutionary. The revolutionary approach criticizes, as misguided and as an artifact of capitalism, the entire world view that posits a structure of persons versus objects, and alienable versus inalienable objects. It holds that the capitalist structure permeates not only our world of social interaction and allocation of resources but also our discourse, vocabulary, and conception of human flourishing. By contrast, the evolutionary approach, interim pluralism, recognizes the necessity of working within existing market structures of capitalism to achieve universal noncommodification. It differs from the other pluralist views that seek to curtail the scope of the market only in that it does not condone the remaining market order after piecemeal inalienabilities are in place. These two approaches exemplify a pervasive dilemma for social progress: whether and how existing conceptions and structures, such as commodification, can be used now to ensure they will no longer be used in some better future. This is the problem of transition. ⁿ⁹⁷

The evolutionary approach harbors a transition problem because it does not address how we can progress toward noncommodification using existing social structures and conceptual schemes that are thought to be artifacts of commodification. Partial decommodification [*1876] in the context of a continuing implicit commitment to a dominant market order may mean that any deviations from the market order will only reinforce commodification, by being seen merely as exceptions that prove the market rule. The revolutionary approach also harbors a transition problem because it does not -- indeed, cannot -- suppose that we shall somehow arrive all at once in the promised land of total noncommodification. Yet if radical decommodification is attempted for less than everything, it appears evolutionary, not revolutionary, and it may wreak injustice.

The problem of transition for revolutionary decommodification can be illustrated by examining a universal decommodification argument regarding our system of damage remedies in tort law. ⁿ⁹⁸ Richard Abel advocates replacing the tort system with a system that treats people equally, regardless of whether their misfortunes are caused by their own fault, other people's fault, an unavoidable accident, an illness, or a congenital disability. ⁿ⁹⁹ The system should not compensate for damages to property or individual earning power, because such compensation reaffirms and maintains inequality. ⁿ¹⁰⁰ In addition, it should not compensate for intangible injuries, because this contributes to a cultural view of experience and love as commodities. Damages for pain and suffering "commodify our unique experience;" damages for injuries to relationships, such as loss of consortium or witnessing the injury to a loved one, "commodif[y] love." ⁿ¹⁰¹ Abel explains:

Just as society pays pain and suffering damages to the injured victim who is shunned (so he can purchase the commodified care and companionship that will no longer be given out of love and obligation), so it pays damages to those who loved him, compensating them for their lost "investment" in the relationship (so they can invest in other

human capital).ⁿ¹⁰²

According to Abel, we should not assume that people are willing to undergo suffering or loss for a sum of money, because we should [*1877] not assume that these capacities are alienable.ⁿ¹⁰³ The assumption is dehumanizing and (if one is true to Marx) a self-fulfilling prophecy, bringing about a human world in which people really are estranged from their essential human capacities. By refusing to allow recovery for these kinds of injuries, we would be saying that human life activity, or at least certain aspects of it, ought not to be traded, nor to be conceived of in market rhetoric or evaluated in market methodology. Abel's system is thus a revolutionary proposal to decommodify the law of personal injury.

Many people, even some who deplore commodification, will find the proposal troubling and its agenda unjust. To deny money damages, inadequate though they may be, seems to compound the injury to tort victims under the present social structure, in which we have not put into practice other measures that would take care of them in better ways or prevent their injuries in the first place. This piecemeal decommodification appears unjust in its unredeemed context because of the pervasive dilemma of transition. Abel argues that existing conceptions and structures of tort law cannot be used if we are to achieve a more humane social order, but it also seems unjust not to use them during the transition to the imagined better world. This central dilemma of social change recurs in many contexts involving decommodification. Failure to face it satisfactorily is the primary shortcoming of both revolutionary and evolutionary arguments for universal noncommodification. Revolutionary noncommodification might wreak great injustice and interim pluralism might make no progress.

B. The Moral and Political Role of Rhetoric

Although the problem of transition gives us reason not to accept arguments for universal noncommodification, an implicit but central philosophical commitment of many universal noncommodifiers should be embraced because it plays a necessary role in pluralism as I believe it must now be reconceived. That commitment is the view that our discourse and our reality are interdependent.

"The word is not the thing," we were taught, when I was growing up.ⁿ¹⁰⁴ Rhetoric is not reality; discourse is not the world. Why should it matter if someone conceptualizes the entire human universe as one giant bundle of scarce goods subject to free alienation by contract, especially if reasoning in market rhetoric can reach the same result [*1878] that some other kind of normative reasoning reaches on other grounds? Consider three possible answers: it matters because the rhetoric might lead less-than-perfect practitioners to wrong answers in sensitive cases; it matters because the rhetoric itself is insulting or injures personhood regardless of the result; or -- the implicit philosophical commitment of the anticommodifiers -- it matters because *there is no such thing as two radically different normative discourses reaching the "same" result.*

1. Risk of Error. -- The rhetoric of commodification might lead imperfect practitioners to wrong answers, even if the sophisticated practitioner would not be misled. In other words, commodification-talk creates a serious risk of error in certain cases. To see this, it may be helpful to compare a normative heuristic like cost-benefit analysis to a flat map of the world. Such a map is easy to use at the point of projection, but difficult and misleading at the edges.ⁿ¹⁰⁵ Cost-benefit analysis is not difficult when two firms deal with each other, if we define firms as profit-maximizing black boxes and no difficult externalities exist. By contrast, cost-benefit analysis involving people's subjective well-being is difficult to get right when many different people are involved and we are talking about interests they hold dear.ⁿ¹⁰⁶ For example, the 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. But in practice the analysis proceeds differently.ⁿ¹⁰⁷ Reasoning in market rhetoric, with its characterization of everything that people value as monetizable and fungible, tends to make it easy to ignore these other "costs." Money costs and easily monetizable matters are at the center of the map, and personal and community disruption are at the edges. Because it tends to ignore "costs" that are not readily monetizable, commodification-talk tends to err on the side of alienation.

[*1879] 2. *Injury to Personhood.* -- In some cases market discourse itself might be antagonistic to interests of personhood. Recall that Posner conceives of rape in terms of a marriage and sex market. ⁿ¹⁰⁸ Posner concludes that "the prevention of rape is essential to protect the marriage market . . . and more generally to secure property rights in women's persons." ⁿ¹⁰⁹ Calabresi and Melamed also use market rhetoric to discuss rape. ⁿ¹¹⁰ In keeping with their view that "property rules" are prima facie more efficient than "liability rules" for all entitlements, they argue that people should hold a "property rule" entitlement in their own bodily integrity. ⁿ¹¹¹ Further, they explain criminal punishment by the need for an "indefinable kicker," an extra cost to the rapist "which represents society's need to keep all property rules from being changed at will into liability rules." ⁿ¹¹² Unlike Posner's view, Calabresi and Melamed's can be understood as pluralist, ⁿ¹¹³ but like [*1880] Posner's, their view conceives of rape in market rhetoric. Bodily integrity is an owned object with a price. ⁿ¹¹⁴

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

One basis for this intuition is that market rhetoric conceives of bodily integrity as a fungible object. ⁿ¹¹⁵ A fungible object is replaceable with money or other objects; in fact, possessing a fungible object is the same as possessing money. A fungible object can pass in and out of the person's possession without effect on the person as long as its market equivalent is given in exchange. ⁿ¹¹⁶ To speak of personal attributes as fungible objects -- alienable "goods" -- is intuitively wrong. Thinking of rape in market rhetoric implicitly conceives of as fungible something that we know to be personal, in fact conceives of as fungible property something we know to be too personal even to be personal property. ⁿ¹¹⁷ Bodily integrity is an attribute and not an [*1881] object. We feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object.

Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person. Such a conception makes actual loss of the attribute easier to countenance. For someone who conceives bodily integrity as "detached," the same person will remain even if bodily integrity is lost; but if bodily integrity cannot be detached, the person cannot remain the same after loss. ⁿ¹¹⁸ Moreover, if my bodily integrity is an integral personal attribute, not a detachable object, then hypothetically valuing my bodily integrity in money is not far removed from valuing *me* in money. For all but the universal commodifier, that is inappropriate treatment of a person. ⁿ¹¹⁹

3. *The "Texture of the Human World."* -- The difference between conceiving of bodily integrity as a detached, monetizable object and finding that it is "in fact" detached is not great, because there is no bright line separating words and facts. The modern philosophical turn toward coherence or antifoundationalist theories ⁿ¹²⁰ means that [*1882] we cannot be sanguine about radically different normative discourses reaching the "same" result. Even if everybody agrees that rape should be punished criminally, the normative discourse that conceives of bodily integrity as detached and monetizable does not reach the "same" result as the normative discourse that conceives of bodily integrity as an integral personal attribute. If we accept the gist of the coherence or antifoundationalist theories, facts are not "out there" waiting to be described by a discourse. Facts are theory-dependent and value-dependent. Theories are formed in words. Fact- and value-commitments are present in the language we use to reason and describe, and they shape our reasoning and description, and the shape (for us) of reality itself. ⁿ¹²¹ Hilary Putnam's striking parable of the super-Benthamites illustrates how a view of values can alter one's view of the facts, the discourse in which one conceives and describes both fact and value, and thus the human world. ⁿ¹²² Putnam asks us to suppose that the continent of Australia is inhabited by people whose sole ethical imperative is that one should always act to maximize "hedonic tone." ⁿ¹²³ Because they are single-minded, these people would do what appears to us to be ruthless:

[*1883] [W]hile they would not cause someone suffering for the sake of the greatest happiness of the greatest number if there were reasonable doubt that *in fact* the consequence of their action would *be* to bring about the greatest happiness of the greatest number, . . . in cases where one knows with certainty what the consequences of the actions

would be, they would be willing to . . . torture small children or to condemn people for crimes which they did not commit if the result of these actions would be to increase the general satisfaction level in the long run . . . by any positive [increment], however small. ⁿ¹²⁴

Putnam says that the difference between us and the super-Benthamites is not merely a disagreement about values. ⁿ¹²⁵ Our disagreement about values will entail disagreement about facts and descriptions of facts. For example, super-Benthamites would realize that sometimes the greatest happiness of the greatest number requires telling a lie; it would not count as dishonest in any pejorative sense to tell lies in order to maximize the general pleasure level. Nor would it be wrong to break promises that would not maximize pleasure if kept. The use of the term "honest" among super-Benthamites would be extremely different from our use of that same descriptive term. ⁿ¹²⁶ Terms like "considerate," "good citizen," or "good person" would likewise be subject to different uses. The vocabulary for describing interpersonal situations would vary greatly between us and the super-Benthamites:

Not only will they lack, or have altered beyond recognition, many of our descriptive resources, but they will very likely invent new jargon of their own (for example, exact terms for describing hedonic tones) that are unavailable to us. *The texture of the human world will begin to change.* In the course of time the super-Benthamites and we will end up living in different human worlds.

In short, it will not be the case that we and the super-Benthamites "agree on the facts and disagree about values". In the case of almost all interpersonal situations, the description we give of the facts will be quite different from the description they give of the facts. Even if none of the statements they make about the situation are *false*, their description will not be one that we will count as adequate and perspicuous; and the description we give will not be one that they could count as adequate and perspicuous. In short, even if we put aside [*1884] our "disagreement about the values", we could not regard their total representation of the human world as fully rationally acceptable. ⁿ¹²⁷

Putnam concludes that the super-Benthamites' inability rightly to comprehend "the way the human world is" results from their "sick conception of human flourishing" -- their inferior theory of the good for human beings. ⁿ¹²⁸

Putnam's parable is relevant to the conceptualization of rape as theft of a property right. It suggests that a particular conception of human flourishing is advanced by this pervasive use of market rhetoric. To think in terms of costs to the victim and her sympathizers versus benefits to the rapist is implicitly to assume that raping "benefits" rapists. Only an inferior conception of human flourishing would regard rape as benefiting the rapist. As a reason for criminalizing rape, Posner blandly says, "Supposing it to be true that some rapists would not get as much pleasure from consensual sex, it does not follow that there are no other avenues of satisfaction open to them." ⁿ¹²⁹ 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. ⁿ¹³⁰ In those situations rape would not be morally wrong and might instead be morally commendable.

Market rhetoric, if adopted by everyone, and in many contexts, would indeed transform the texture of the human world. This rhetoric leads us to view politics as just rent seeking, reproductive capacity as just a scarce good for which there is high demand, and the repugnance of slavery as just a cost. To accept these views is to accept the conception of human flourishing they imply, one that is inferior to the conception we can accept as properly ours. ⁿ¹³¹ An inferior conception of human flourishing disables us from conceptualizing the world rightly. Market rhetoric, the rhetoric of alienability of all "goods," is [*1885] also the rhetoric of alienation of ourselves from what we can be as persons. ⁿ¹³²

One way to see how universal market rhetoric does violence to our conception of human flourishing is to consider its view of personhood. In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people. Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied,

fungible, attribute-less entities possessing a wealth of alienable, severable "objects." This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics. ⁿ¹³³

Another way to see how universal market rhetoric does violence to our conception of human flourishing is to consider its view of freedom. Market rhetoric invites us to see the person as a self-interested maximizer in all respects. Freedom or autonomy, therefore, is seen as individual control over how to maximize one's overall gains. In the extreme, the ideal of freedom is achieved through buying and selling commodified objects in order to maximize monetizable wealth. ⁿ¹³⁴ As we have seen, Marx argued with respect to those who produce and sell commodities that this is not freedom but fetishism; what and how much is salable is not autonomously determined. ⁿ¹³⁵ Whether or not we agree with him, it is not satisfactory to think that marketing whatever one wishes defines freedom. Nor is it satisfactory to think that a theoretical license to acquire all objects one may desire defines freedom. ⁿ¹³⁶

To reject the slogan, "The word is not the thing," is not to deny that there is a difference between thought and action. To say "I wish you were dead" is not to kill you. Rather, rejecting the slogan is a way of understanding that the terms in which human life is conceived matter to human life. Understanding this, we must reject universal commodification, because to see the rhetoric of the market -- the rhetoric of fungibility, alienability, and cost-benefit analysis -- as the [*1886] sole rhetoric of human affairs is to foster an inferior conception of human flourishing.

Of course, commodification-talk can still be one rhetoric among others. Yet once we accept the view that the terms of discourse affect our conception of human flourishing, we must decide when it is morally appropriate to think and speak in market rhetoric and when it is not. In this regard a problem arises for the liberal conception of free speech. A pluralist who holds that market rhetoric is inappropriate for describing or reasoning about some valued things might try to forestall the kind of transformation envisaged in Putnam's parable by curtailing some market rhetoric. If such a pluralist holds that market rhetoric should be prohibited in at least some cases, this view would conflict with the liberal ideal of neutrality with respect to choice of discourse. ⁿ¹³⁷

The liberal view of free speech becomes understandably difficult to maintain once one accepts the holistic view of rhetoric I have been discussing. In this view of rhetoric there can be no sharp distinction between speech and action or between content-based and content-neutral regulations. Just as there is no analytic divide between words and facts when rhetoric and reality are fused, so too there is no such divide between words and acts. The holistic view of rhetoric necessitates that we make choices in our discourse for constructing our human world of facts and values, like it or not. There cannot be a stance that is neutral on the good life for human beings. To deny the possibility of neutrality is of course to deny a central liberal tenet. ⁿ¹³⁸ [*1887] Although pluralism -- accepting commodification-talk as one discourse among others -- may be appropriate, we cannot be neutral about whether to conceive of any particular thing in market rhetoric.

IV. PLURALISM: THE LIBERAL HERITAGE

As this Part outlines, pluralism has been a prominent tenet of traditional liberalism. ⁿ¹³⁹ Nevertheless, as this Part also attempts to show, liberal pluralism has borne within it the seeds of universal commodification; indeed, universal commodification is a more coherent liberal position than pluralism. Thus, I ultimately argue that pluralism should now be reconceived.

In order to understand why liberal pluralism should be reconceived, a review of its ideological heritage is necessary. Prominent principles in liberal pluralism include negative liberty, the person as abstract subject, and a conceptual notion of property. These principles [*1888] are basic to the free market and its institutions, private property and free contract. Negative liberty and the subjectivity of personhood underlie convictions that inalienable things are internal to the person, and that inalienabilities are paternalistic. Conceptualism finds alienability to be inherent in the concept of property. These convictions make the case for liberal pluralism uneasy, always threatening to assimilate to universal commodification.

A. *Inalienability and the Concept of Property*

The legal infrastructure of capitalism -- what is required for a functioning laissez-faire market system -- includes not merely private property, but private property plus free contract.ⁿ¹⁴⁰ In order for the exchange system to allocate resources, there must be both private entitlement to resources and permission to transfer entitlements at will to other private owners. Liberal theorists have expressed or reflected this necessity with conceptualist and separatist strategies. In a conceptualist strategy, both necessary characteristics can be incorporated either into the property theory, by claiming that free alienability is inherent in the concept of property, or into the contract theory, by claiming that private entitlement is inherent in the concept of freedom of contract. In a separatist strategy, property and contract split the capitalist indicia between them.ⁿ¹⁴¹

Some writers, such as Hume, Kant, and Hegel, used a separatist strategy to justify private property and free contract.ⁿ¹⁴² In such discussions the justifications for entitlement and alienability, although separate, are interlocking parts of the same picture. Other writers, such as Mill, used a conceptualist strategy to assert that (market) alienability is inherent in the concept of private property.ⁿ¹⁴³ This [*1889] argument structure submerges the issue of alienability and makes justification of it seem less necessary: once property is justified, the task of justifying the market is done.ⁿ¹⁴⁴

The conceptualist strategy faces a problem: it cannot consistently admit any inalienabilities without denying that the objects of them are property. A conceptualist cannot admit that ownership is sometimes justified only when the object owned is beyond the reach of the market. John Stuart Mill's property theory illustrates the problem. Mill declared that "included in the idea of private property" is a right of each person "to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement without force or fraud, from those who produced it."ⁿ¹⁴⁵ The right of property "includes . . . the freedom of acquiring by contract," because to prevent those who produce things from giving or exchanging them as they wish violates the producers' property rights.ⁿ¹⁴⁶ Also "implied in property" is the right to whatever a producer can get for her products "in a fair market."ⁿ¹⁴⁷ Taken together, these declarations establish that Mill's idea of property inherently requires contracts and markets. It would be a logical contradiction for him to postulate inalienable property.

Yet, in other passages, Mill argued for inalienabilities and for restraints on alienation. He argued that the laws of property "have made property of things which never ought to be property, and absolute property where only a qualified property ought to exist."ⁿ¹⁴⁸ He [*1890] thought that public offices, monopoly privileges, professional *brevets* -- and human beings -- should not be considered property.ⁿ¹⁴⁹ In refusing to countenance certain things as property at all, Mill was able to avoid the contradiction that inalienable property poses for his conceptualism. Saying that some things are not property is one way for a liberal to be a pluralist. But Mill also thought that people could justifiably hold only "qualified," and not "absolute," property rights in land and presumably in other natural resources.ⁿ¹⁵⁰ Here he could not avoid the contradiction. What he said about property in land implies some inalienability (and some curtailment of the right to exclude others), thus contradicting his general conceptual vision of property.ⁿ¹⁵¹

One who thinks that some things can be "property," but not fully alienable, is a different kind of pluralist from one who holds that some things are not property at all. A conceptualist can be a pluralist by holding that some things are not property at all, but she cannot consistently be a pluralist by holding that some things that are property are not fully alienable. The logical contradiction invites a move from the latter kind of pluralism toward complete commodification: everything that is property must be fully alienable, because property is necessarily suitable for trade in a laissez-faire market. Mill's "qualified" [*1891] property rights would be qualified only if necessary to avoid externalities that would otherwise create market failure.ⁿ¹⁵² This position leads to the traditional liberal pluralist picture of a laissez-faire market domain walled off from a few exceptions that are completely removed from the market.ⁿ¹⁵³ It approximates universal commodification if the list of things that cannot be property at all is short.

B. *The Subject/Object Dichotomy: The Kantian Person Versus the Thing-In-Itself*

Theorists who do not adopt the conceptual strategy avoid the problem of having to view all restraints on the laissez-faire market as incompatible with property. The separatist strategy practiced by Kant and Hegel justifies property and alienability (free contract) based on their connection with freedom and actualization of the person. ⁿ¹⁵⁴ It asserts that only objects separate from the self are suitable for alienation. [*1892] The problem confronting this separatist strategy is to distinguish things internal from things external to the person -- the subject/object problem.

The subject/object dichotomy metaphysically divides the universe into opposed subjective and objective realms. Kantian personhood is the subject side of the dichotomy. Kantian persons are essentially abstract, fungible units with identical capacity for moral reason and no concrete individuating characteristics. ⁿ¹⁵⁵ They are units of pure subjectivity acting in and upon the world of objects. Pluralism based on this conception of the person founders in trying to draw the distinction between persons and objects; once it does, it gravitates toward universal commodification. The Kantian conception of personhood makes us all interchangeable and thus facilitates liberal political equality. But by postulating such a world of fungible, subjective, autonomous units, it also facilitates conceiving of concrete personal attributes as commodified objects.

The difficulties caused by Kantian personhood can be seen by examining the German theory of property and contract, in which entitlement and alienability are separately justified, relying on the subject/object dichotomy. For Kant and Hegel, private property is necessary to realize or actualize the will of a person in order to achieve freedom. ⁿ¹⁵⁶ The German theory posited that, in order to be free and well-developed selves, we must be able to alienate external things and we must not be able to alienate internal things. ⁿ¹⁵⁷ For Hegel, alienability of property (both transfer and relinquishment) was not inherent in the concept of property, but rather followed from the premise that the presence of a person's will makes something property:

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. ⁿ¹⁵⁸

It followed that whatever is mine but is *not* "a thing external by nature" will be inalienable (nonrelinquishable and nontransferable). [*1893] Substantive characteristics of personality are not things external by nature and are hence inalienable. ⁿ¹⁵⁹

In order to apply this Hegelian argument to delineate inalienabilities, then, we need to draw clearly the distinction between things external by nature and substantive constitutive elements of personality. If something is external by nature, it must be propertizable and alienable so that persons can achieve freedom and proper self-development. ⁿ¹⁶⁰ If something is a substantive characteristic of personality, it must be inalienable for the same reasons. ⁿ¹⁶¹ Thus, inalienability is either required or proscribed, and the decision turns on the distinction between external things and substantive characteristics.

By "things external by nature," Hegel meant objects in the environment that have (or can be thought to have) an existence independent of our will. ⁿ¹⁶² The initial gulf between the abstract will of the person and the world of unowned objects expresses the dichotomy between subject and object. ⁿ¹⁶³ The gulf between subject and object [*1894] creates practical problems in deciding which items belong on which side of the divide; there are cases in which it does not seem intuitively obvious even to one who thinks the subject/object dichotomy itself is intuitively obvious.

Hegel's argument justifying wage labor (property in one's own capabilities for services) exhibits the difficulty. Faced with explaining why wage labor is justified while slavery is not, Hegel merely stated his desired conclusion that wage labor is "external" to personality:

Single products of my particular physical and mental skill and of my power to act I can alienate to someone else and I can give him the use of my abilities for a restricted period, because, *on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being.* By alienating the whole of my time, as

crystallized in my work, and everything I produced, I would be making into another's property the substance of my being, my universal activity and actuality, my personality. ⁿ¹⁶⁴

The argument that wage labor can become external because it is only part of one's creative capabilities and not the whole of them seems to be a non sequitur. Hegel did not claim that for something to be an internal, substantive characteristic of personality it had to be the whole of one's personal capacities. But even assuming the validity of the argument, it does not show that these capabilities are external by nature. Rather they seem to have gone from internal to external. Thus, Hegel's argument seems to contradict his own premise for alienability. ⁿ¹⁶⁵ It is hard to see our work as belonging intrinsically to the object realm.

Hegel's flawed argument perhaps reflects an agenda: justifying the market. The market agenda, however, is not apparent on the face of his property theory. In fact, his theory might seem to be compatible [*1895] with a noncommodified view of society, because it is based upon embodiment of the will in objects and not upon trade, and because it blurs the line between subject and object. ⁿ¹⁶⁶ For Hegel, objects may start out external, but they do not remain so: they become constitutive of personality. Indeed, the right to hold property is an inalienable attribute of personality. ⁿ¹⁶⁷ Here the market agenda surfaces. Because personality is inalienable, one could argue that property might also be inalienable once personality is invested in it and constituted through it; but Hegel's argument is rather that any inalienability of property is itself a violation of inalienable personality rights. ⁿ¹⁶⁸

The underlying market agenda appears more clearly in Hegel's contract theory. Hegel said that "the concept" compels alienation of external objects *qua* property "in order that thereby my will may become objective to me as determinately existent." ⁿ¹⁶⁹ The situation -- contract -- in which this compulsion of the concept is realized is the unity of different wills, and hence "the means whereby one identical will can persist within the absolute difference between independent property owners." ⁿ¹⁷⁰ Other than the need to justify market relations, it is unclear why "reason" or "the concept" compel "gift, exchange, trade, etc.," ⁿ¹⁷¹ just as it was unclear why wage labor is external to the person and why any inalienability of property rights would violate personality. ⁿ¹⁷²

[*1896] Hegel also cast the argument against alienation of personhood as a "contradiction." ⁿ¹⁷³ 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. If I treat "the infinite embodiment of self-consciousness" as something external and try to alienate it, Hegel argued, one of two things results: if I really possess these substantive attributes, they are not external and hence not alienated; if they are alienated, I did not possess them in the first place. ⁿ¹⁷⁴ Hegel might have been trying to say that substantive personhood is simply not capable of objectification. The "contradiction" consists in supposing that one could give up that which, "so soon as I possess it, exists in essence as mine alone and not as something external." ⁿ¹⁷⁵ If this interpretation is correct, then the contradiction poses the same subject/object problems as Hegel's general view of property and alienation: Why is it that personhood cannot be objectified while at the same time personhood requires objectification (in things)? Exactly what items are permanently "inside" the subject and incapable of objectification?

If the person/thing distinction is to be treated as a bright line that divides the commodifiable from the inalienable, we must know exactly which items are part of the person and which not. The person/thing distinction and its consequences seemed obvious to Kant and Hegel, but such is not the case for many modern philosophers. ⁿ¹⁷⁶ One who [*1897] accepts the arguments of modern writers like Kuhn and Rorty ⁿ¹⁷⁷ -- and of Lukacs ⁿ¹⁷⁸ before them -- rejects the metaphysical bright line between what is inside us, in our minds, and some realm of things-in-themselves, a mind-independent reality outside of us. Without the bright line, arguments delineating the market realm on the basis of the subject/object distinction disintegrate. If the person/thing distinction is not a sharp divide, neither is inalienability/alienability. There will be a gray area between the two, and hence the outer contours of both personhood and inalienabilities based on personhood will remain contested. ⁿ¹⁷⁹

Pluralism's problematic reliance on the subject/object distinction can be submerged under universal commodification. Kantian notions of abstract personhood, particularly the conceptions of personhood as autonomous moral agency and persons as completely interchangeable units of subjective will, undergird liberal political ideals: equal

treatment of persons as ends, not means; equality before the law; one person, one vote; and the rule of law. ⁿ¹⁸⁰ These principles were the Enlightenment's great achievements, but a pull toward universal commodification seems to be the dark side of Kantian personhood. If the person is simply pure subjectivity empty of individuating characteristics and personal attributes, then these characteristics and attributes are readily conceived of as separate from the person and possessed by the person. From the view that attributes and characteristics are separate possessions, it is an easy step to conceptualize them as lying on the object side of the subject/object divide. This eliminates inalienabilities based on things internal to the person, because nothing is internal to the person considered as an abstract, subjective unit. Once individuating characteristics and personal attributes are conceptualized as possessions situated in the object realm, ⁿ¹⁸¹ it is another easy step to conceive of them as separable from the person through alienation. ⁿ¹⁸² Finally, once characteristics and attributes are seen as alienable objects, it is not difficult to see them as fungible and bearing implicit money value. ⁿ¹⁸³ Kant no doubt would have abhorred this result; ⁿ¹⁸⁴ nevertheless, universal commodification seems to be facilitated **[*1898]** -- though not entailed -- by his definition of the person. The subject/object problem pulls pluralism toward universal commodification because there is no obvious stopping place short of that. ⁿ¹⁸⁵

C. *Negative Liberty*

Two theories about freedom are central to the ideological framework in which we view inalienability: the notion that freedom means negative liberty, ⁿ¹⁸⁶ 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. The idea that liberty consists in alienability of everything in markets clashes with substantive requirements of personhood, making it difficult, for example, to argue against human commodification. In general, the commitment to negative liberty, like the commitment to the Kantian structure of persons versus objects, has caused confusion in liberal pluralism and has exerted a pull toward universal commodification.

Inalienabilities are often said to be paternalistic. ⁿ¹⁸⁷ Paternalism usually means to substitute the judgment of a third party or the government for that of a person on the ground that to do so is in that **[*1899]** person's best interests. ⁿ¹⁸⁸ For advocates of negative liberty, to substitute someone else's choice for my own is a naked infringement of my liberty. ⁿ¹⁸⁹ Freedom means doing (or not doing) whatever I as an individual prefer at the moment, as long as I am not harming other people. ⁿ¹⁹⁰ To think of inalienability as paternalism assumes that freedom is negative liberty -- that people would choose to alienate certain things if they could, but are restrained from doing so by moral or legal rules saying, in effect, that they are mistaken about what is good for them.

To say that inalienabilities involve a loss of freedom also assumes that alienation itself is an act of freedom, or is freedom-enhancing. ⁿ¹⁹¹ Someone who holds this view and conceives of alienation as sale through free contract is deeply committed to commodification as expressive of -- perhaps necessary for -- human freedom. Insofar as theories of negative freedom are allied to universal commodification, so are traditional discussions of inalienability in terms of paternalism. If we reject the notion that freedom means negative liberty, and the notion that liberty and alienation in markets are identical or necessarily connected, then inalienability will cease to seem inherently paternalistic. If we adopt a positive view of liberty that includes proper self-development as necessary for freedom, then inalienabilities needed to foster that development will be seen as freedom-enhancing rather than as impositions of unwanted restraints on our desires to transact in markets.

[*1900] Joel Feinberg's discussion of the inalienable right to life ⁿ¹⁹² illustrates the traditional link between inalienability and paternalism, as well as the tension caused by the clash between negative liberty and substantive requirements of personhood. Feinberg distinguishes three conceptions of the inalienable right to life, which he calls "the paternalist," "the founding fathers," and "the extreme antipaternalist." ⁿ¹⁹³ In the view he calls paternalist, to say that the right to life is inalienable means that it is a nonrelinquishable mandatory right, one that ought to be exercised, like the right to education. ⁿ¹⁹⁴ In contrast, the view that Feinberg attributes to the founding fathers holds that the inalienable right to life is a nonrelinquishable discretionary right. ⁿ¹⁹⁵ It is discretionary because the individual may choose whether to exercise it. ⁿ¹⁹⁶ For example, the right to own property is a discretionary right because I may choose

to own nothing; it is a nonrelinquishable discretionary right because I cannot morally or legally renounce the right to own property even if I choose not to own any. ⁿ¹⁹⁷ Feinberg concludes that the nonrelinquishable right to life is discretionary, not mandatory:

[W]e have a right, within the boundaries of our own autonomy, to live or die, as we choose [T]he basic right underlying each is the right to be one's own master, to dispose of one's own lot as one chooses, subject of course to the limits imposed by the like rights of others. . . . In exercising my own choice in these matters, I am not renouncing, abjuring, forswearing, resigning, or relinquishing my right to life; quite the contrary, I am *acting* on that right by exercising it one way or the other. ⁿ¹⁹⁸

This passage suggests that the right to life is discretionary because it is parasitic on negative liberty. But Feinberg does not say whether the underlying right to be one's own master is mandatory or discretionary. The omission points to an apparent contradiction in the argument, a contradiction that stems from a commitment to negative liberty. ⁿ¹⁹⁹ If the discretionary right to life is nonrelinquishable, as [*1901] Feinberg claims is the founding fathers' view, then we can infer that the "basic right" to *have* discretion -- liberty -- must be mandatory: one cannot choose not to be one's own master, not to dispose of one's lot as one chooses. But to attribute this mandatory conception of liberty to the founding fathers would apparently be to attribute to them a form of positive liberty, a view that people can be required to be free. ⁿ²⁰⁰ Hence, Feinberg attributes to the founding fathers a discretionary, not mandatory, view of the right to liberty. But if the right to liberty is indeed discretionary, then it seems I could choose *not* to be my own master, *not* to dispose of my lot as I choose, just as I could choose not to own property. And if I could choose that, I could choose not to have any of the other parasitic nonrelinquishable rights, like the right to life. The right to life would then be relinquishable.

This contradiction shows why a commitment to negative liberty pulls liberal pluralists toward universal commodification. The commitment to negative liberty usually attributed to the founding fathers forces those who hold it to choose between submerging a contradiction and moving toward conceiving of everything as relinquishable. If the intellectual descendants of the founding fathers want to maintain a nonrelinquishable discretionary right to life, they must adopt a mandatory right to liberty: we are not free not to be free. But adopting a mandatory right moves toward positive liberty, undermining the negative view that generates the nonrelinquishable, but discretionary, right to life. Holding firm to the view that liberty means negative liberty leads to a view that everything, including one's life, is relinquishable.

In this latter view, that of Feinberg's "extreme antipaternalist," the fully informed autonomous individual could sell herself into slavery or sell her right to life. Thus, the antipaternalist is a universal commodifier. This appears to be a more cogent view, once we grant that rights to life and property are parasitic upon an inalienable, but nonmandatory, right to negative liberty.

Might one hold fast to negative liberty and -- contrary to the argument I have just given -- still claim we are not free not to be free? This difficulty is the root of the tension between pluralism and negative liberty, and of the consequent pressure to give up pluralism. [*1902] Mill's well-known attempt to argue against freedom to sell oneself into slavery directly poses this difficulty:

[B]y selling himself for a slave, [a person] abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom. ⁿ²⁰¹

The argument is obscure. It is hard to see why Mill thought it obvious that the principle of negative freedom could not require the "freedom not to be free;" only positive freedom clearly holds that a person *must* be free. ⁿ²⁰² In general, what in Mill's view is the connection between free alienation and freedom? (Why is alienation of freedom "not freedom"?) Most commentators have viewed Mill's argument against selling off one's freedom as a lapse into paternalism. ⁿ²⁰³

Neither in his conception of freedom nor in his conception of alienability does Mill appear to explain why human beings are noncommodifiable. One could understand him to imply that there is an unstated divide between the realm of the market (free trade) and the realm of politics (liberty).ⁿ²⁰⁴ People must be free in order for a free political order to exist; they cannot be free without such a political order; hence, in the nonmarket realm they cannot, without contradiction, [*1903] be free not to be free. This reconstruction makes Mill a pluralist, as indeed he apparently wished to be; but the reading is not very true to Mill in the way it relinquishes negative liberty.

Again, one way to avoid Mill's problem is to espouse universal commodification. The universal commodifier can hold on to negative liberty and avoid Mill's problem -- espousing negative liberty while eschewing voluntary enslavement -- because under universal commodification freedom itself is seen as monetizable and alienable. Those who tend toward universal commodification may indeed endorse voluntary enslavement.ⁿ²⁰⁵ Those who declare human beings noncommodifiable must do so on the ground of postulated market failure (for example, transaction costs).ⁿ²⁰⁶

We can now see why liberal pluralism should be reconceived. If we are to avoid the tendency toward universal commodification inherent in liberal pluralism, we must cease thinking that market alienability is inherent in the concept of property, and we must modify pluralism's commitments to negative liberty and Kantian personhood. In doing so, we must find a satisfactory way of deciding what market-inalienabilities are justified by the need to protect and foster personhood, and a way of understanding why these inalienabilities seem to us to be freedom enhancing.

V. TOWARD AN EVOLUTIONARY PLURALISM

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

A. *Noncommodification and the Ideal of Human Flourishing*

1. *Rethinking Personhood: Freedom, Identity, Contextuality.* -- Because of the ideological heritage of the subject/object dichotomy, [*1904] we tend to view things internal to the person as inalienable and things external as freely alienable. Because of the ideological heritage of negative liberty, we also tend to think of inalienabilities as paternalistic. A better view of personhood, one that does not conceive of the self as pure subjectivity standing wholly separate from an environment of pure objectivity, should enable us to discard both the notion that inalienabilities relate only to things wholly subjective or internal and the notion that inalienabilities are paternalistic.

In searching for such a better view, it is useful to single out three main, overlapping aspects of personhood: freedom, identity, and contextuality. The freedom aspect of personhood focuses on will, or the power to choose for oneself. In order to be autonomous individuals, we must at least be able to act for ourselves through free will in relation to the environment of things and other people.ⁿ²⁰⁷ The identity aspect of personhood focuses on the integrity and continuity of the self required for individuation. In order to have a unique individual identity, we must have selves that are integrated and continuous over time. The contextuality aspect of personhood focuses on the necessity of self-constitution in relation to the environment of things and other people. In order to be differentiated human persons, unique individuals, we must have relationships with the social and natural world.

A better view of personhood -- a conception of human flourishing that is superior to the one implied by universal commodification -- should present more satisfactory views of personhood in each of these three aspects. I am not seeking here to elaborate a complete view of personhood. Rather, I focus primarily on a certain view of contextuality

and its consequences: the view that connections between the person and her environment are integral to personhood. I also suggest that to the extent we have already accepted certain views of freedom, identity, and contextuality, we are committed to a view of personhood that rejects universal commodification. ⁿ²⁰⁸

[*1905] Universal commodification conceives of freedom as negative liberty, indeed as negative liberty in a narrow sense, construing freedom as the ability to trade everything in free markets. In this view, freedom is the ability to use the will to manipulate objects in order to yield the greatest monetizable value. Although negative liberty has had difficulty with the hypothetical problem of free choice to enslave oneself, ⁿ²⁰⁹ even negative liberty can reject the general notion of commodification of persons: the person cannot be an entity exercising free will if it is a manipulable object of monetizable value. ⁿ²¹⁰

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

Universal commodification undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self. A better view of personhood should understand many kinds of particulars [*1906] -- one's politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes -- as integral to the self. To understand any of these as monetizable or completely detachable from the person -- to think, for example, that the value of one person's moral commitments is commensurate or fungible with those of another, or that the "same" person remains when her moral commitments are subtracted -- is to do violence to our deepest understanding of what it is to be human. ⁿ²¹¹

To affirm that work, politics, or character is integral to the person is not to say that persons cease to be persons when they dissociate themselves from their jobs, political engagements, or personal attributes. Indeed, the ability to dissociate oneself from one's particular context seems integral to personhood. ⁿ²¹² But if we must recognize the importance of the ability to detach oneself, we must recognize as well that interaction with physical and social contexts is also integral to personhood. One's surroundings -- both people and things -- can become part of who one is, of the self. From our understanding that attributes and things can be integral to personhood, which stems mainly from our understanding of identity and contextuality, and from our rejection of the idea of commodification of the person, which stems mainly from our understanding of freedom, it follows that those attributes and things identified with the person cannot be treated as completely commodified. Hence, market-inalienability may attach to things that are personal.

[*1907] 2. *Protecting Personhood: Noncommodification of Personal Rights, Attributes, and Things.* -- In my discussion of possible sources of dissatisfaction with thinking of rape in market terms, ⁿ²¹³ I suggested that we should not view personal things as fungible commodities. We are now in a better position to understand how conceiving of personal things as commodities does violence to personhood, and to explore the problem of knowing what things are personal.

To conceive of something personal as fungible assumes that the person and the attribute, right, or thing, are separate. This view imposes the subject/object dichotomy to create two kinds of alienation. If the discourse of

fungibility is partially made one's own, it creates disorientation of the self that experiences the distortion of its own personhood. For example, workers who internalize market rhetoric conceive of their own labor as a commodity separate from themselves as persons; they dissociate their daily life from their own self-conception. To the extent the discourse is not internalized, it creates alienation between those who use the discourse and those whose personhood they wrong in doing so. For example, workers who do not conceive of their labor as a commodity are alienated from others who do, ⁿ²¹⁴ because, in the workers' view, people who conceive of their labor as a commodity fail to see them as whole persons.

To conceive of something personal as fungible also assumes that persons cannot freely give of themselves to others. At best they can bestow commodities. At worst -- in universal commodification -- the gift is conceived of as a bargain. ⁿ²¹⁵ Conceiving of gifts as bargains not only conceives of what is personal as fungible, it also endorses the picture of persons as profit-maximizers. A better view of personhood should conceive of gifts not as disguised sales, but rather as expressions of the interrelationships between the self and others. To relinquish something to someone else by gift is to give of yourself. Such a gift takes place within a personal relationship with the recipient, or else it creates one. ⁿ²¹⁶ Commodification stresses separateness both between ourselves and our things and between ourselves and other people. To postulate personal interrelationship and communion requires us to postulate people who can yield personal things to other [*1908] people and not have them instantly become fungible. Seen this way, gifts diminish separateness. This is why (to take an obvious example) people say that sex bought and paid for is not the same "thing" as sex freely shared. ⁿ²¹⁷ Commodified sex leaves the parties as separate individuals and perhaps reinforces their separateness; they only engage in it if each individual considers it worthwhile. Noncommodified sex ideally diminishes separateness; it is conceived of as a union because it is ideally a sharing of selves.

Not everything with which someone may subjectively identify herself should be treated legally or morally as personal. ⁿ²¹⁸ Otherwise the category of personal things might collapse into "consumer surplus": anything to which someone attached high subjective value would be personal. The question whether something is personal has a normative aspect: whether identifying oneself with something -- constituting oneself in connection with that thing -- is justifiable. What makes identifying oneself with something justifiable, in turn, is an appropriate connection to our conception of human flourishing. More specifically, such relationships are justified if they can form part of an appropriate understanding of freedom, identity, and contextuality. A proper understanding of contextuality, for example, must recognize that, although personhood is fostered by relations with people and things, it is possible to be involved too much, or in the wrong way, or with the wrong things.

To identify something as personal, it is not enough to observe that many people seem to identify with some particular kind of thing, because we may judge such identification to be bad for people. An example of a justifiable kind of relationship is people's involvement with their homes. This relationship permits self-constitution within a stable environment. An example of an unjustifiable kind of relationship is the involvement of the robber baron with an empire of "property for power." ⁿ²¹⁹ The latter is unjustified because it ties into a conception of the person we can recognize as inferior: the person as self-interested maximizer of manipulative power. ⁿ²²⁰

There is no algorithm or abstract formula to tell us which items are (justifiably) personal. A moral judgment is required in each case. We have seen that Hegel's answer to a similar problem was to fall [*1909] back on the intuition that some things are "external" and some are "internal." ⁿ²²¹ This answer is unsatisfactory because the categories "external" and "internal" should be the conclusion of a moral evaluation and cannot be taken as obvious premises forming its basis. First we must judge whether persons can still be persons if X is considered severable from them; if we judge that they can, we then could call X "external." Hegel's solution is also unsatisfactory because (at least from our present vantage point) we can see that the external/internal distinction is a continuum and not a bright-line dichotomy. Both the tendency to take "external" and "internal" as premises rather than moral conclusions and the tendency to see a bright line between "external" and "internal" are traceable to the prevailing world view that posits persons as subjects in a world of objects. This world view makes it seem intuitively obvious that a thing must be either purely subjective or purely objective, and intuitively obvious into which category it falls. I am suggesting that we relinquish the subject/object dichotomy and rely instead on our best moral judgment in light of the best conception of personhood as

we now understand it. ⁿ²²²

B. Methods of Justifying Market-Inalienabilities

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

The method of justification that correlates most readily with traditional liberal pluralism is a prophylactic argument. For the liberal it makes sense to countenance both selling and sharing of personal things as the holder freely chooses. If an item of property is personal, however, sometimes the circumstances under which the holder places it on the market might arouse suspicion that her act is coerced. Given that we cannot know whether anyone really intends to cut herself off from something personal by commodifying it, our suspicions might sometimes justify banning sales. The risk of harm to the seller's [*1910] personhood in cases in which coerced transactions are permitted (especially if the thing sought to be commodified is normally very important to personhood), and the great difficulties involved in trying to scrutinize every transaction closely, may sometimes outweigh the harm that a ban would impose on would-be sellers who are in fact uncoerced. A prophylactic rule aims to ensure free choice -- negative liberty -- by the best possible coercion-avoidance mechanism under conditions of uncertainty. ⁿ²²³ 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 presume 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 rather risk constraining the exercise of choice by those (if any) who really wish to enslave themselves. ⁿ²²⁴

A liberal pluralist might use a prophylactic justification to prevent poor people from selling their children, sexual services, or body parts. The liberal would argue that an appropriate conception of coercion should, with respect to selling these things, include the desperation of poverty. ⁿ²²⁵ Poor people should not be forced to give up personal things because the relinquishment diminishes them as persons, contrary to the liberal regime of respect for persons. We should presume that such transactions are not the result of free choice.

When thus applied to coercion by poverty, the prophylactic argument is deeply troubling. If poverty can make some things nonsalable because we must prophylactically presume such sales are coerced, we would add insult to injury if we then do not provide the would-be seller with the goods she needs or the money she would have received. If we think respect for persons warrants prohibiting a mother from [*1911] 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. To the extent it equates poverty with coercion, the prophylactic argument requires a corollary in welfare rights. Otherwise we would be forcing the mother to endure a devastating loss in her primary relationship (with her children) rather than in the secondary one (with the personal thing) she is willing to sacrifice to protect the primary one. It is as if, when someone is coerced at gunpoint, we were to direct our moral opprobrium at the victim rather than the gun-wielder, and our enforcement efforts at preventing the victim from handing over her money rather than at preventing the gun-wielder from placing her in the situation where she must. Thus, this aspect of liberal prophylactic pluralism is hypocritical without a large-scale redistribution of wealth and power that seems highly improbable. ⁿ²²⁶ Although we may nevertheless decide to ban sales of certain personal things, the prophylactic argument, insofar as it rests on equating poverty with coercion, cannot be the reason. ⁿ²²⁷

[*1912] A second method of justifying market-inalienability assimilates it to prohibition. If we accept that the commodified object is different from the "same" thing noncommodified and embedded in personal relationships, then market-inalienability is a prohibition of the commodified version, resting on some moral requirement that it not exist.

What might be the basis of such a moral requirement? Something might be prohibited in its market form because it both creates and exposes wealth- and class-based contingencies for obtaining things that are critical to life itself -- for example, health care -- and thus undermines a commitment to the sanctity of life. ⁿ²²⁸ Another reason for prohibition might be that the use of market rhetoric, in conceiving of the "good" and understanding the interactions of people respecting it, creates and fosters an inferior conception of human flourishing. For example, we accept an inferior conception of personhood (one allied to the extreme view of negative freedom) if we suppose people may freely choose to commodify themselves. ⁿ²²⁹

The prohibition argument -- that commodification of things is bad in itself, or because these things are not the "same" things that would be available to people in nonmarket relationships -- leads to universal noncommodification. If commodification is bad in itself it is bad for everything. Any social good is arguably "different" if not embedded in a market society. ⁿ²³⁰ To restrict the argument in order to permit pluralism, we have to accept either that certain things are the "same" whether or not they are bought and sold, and others are "different," or that prohibiting the commodified version morally matters only for certain things, but not for all of them. At present we tend to think that nuts and bolts are pretty much the "same" whether commodified or not, whereas love, friendship, and sexuality are very "different"; we also tend to think that trying to keep society free of commodified love, friendship, and sexuality morally matters more than trying to keep it free of commodified nuts and bolts. ⁿ²³¹

A third method of justifying market-inalienability, the domino theory, envisions a slippery slope leading to market domination. The [*1913] domino theory assumes that for some things, the noncommodified version is morally preferable; it also assumes that the commodified and noncommodified versions of some interactions cannot coexist. To commodify some things is simply to preclude their noncommodified analogues from existing. Under this theory, the existence of some commodified sexual interactions will contaminate or infiltrate everyone's sexuality so that all sexual relationships will become commodified. If it is morally required that noncommodified sex be possible, market-inalienability of sexuality would be justified. This result can be conceived of as the opposite of a prohibition: there is assumed to exist some moral requirement that a certain "good" be socially available. The domino theory thus supplies an answer (as the prohibition theory does not) to the liberal question why people should not be permitted to choose both market and nonmarket interactions: the noncommodified version is morally preferable when we cannot have both.

We can now see how the prohibition and domino theories are connected. The prohibition theory focuses on the importance of excluding from social life commodified versions of certain "goods" -- such as love, friendship, and sexuality -- whereas the domino theory focuses on the importance for social life of maintaining the noncommodified versions. The prohibition theory stresses the wrongness of commodification -- its alienation and degradation of the person -- and the domino theory stresses the rightness of noncommodification in creating the social context for the proper expression and fostering of personhood. If one explicitly adopts both prongs of this commitment to personhood, the prohibition and domino theories merge. ⁿ²³²

The argument that market-inalienabilities are necessary to encourage altruism relies upon the domino theory. With regard to human blood, Richard Titmuss argues that a regime permitting only donation fosters altruism. ⁿ²³³ The altruistic experience of the donor in being responsible (perhaps) for saving a stranger's life is said to bring us closer together, cementing our community in a way that buying and selling cannot. ⁿ²³⁴ The possibility of reciprocity is also a part of this cementing process, because a donor's sense of obligation could be partially founded on the recognition that she could be a recipient some day. From the recipient's perspective, it is said that knowing one is [*1914] dependent on others' altruism rather than on one's own wealth creates solidarity and interdependence, and that this knowledge of dependence better preserves and expresses the ideal of sanctity of life. But why do we need to forbid sales to preserve opportunities for altruism for those who wish to give? In a gifts-only regime, a donor's gift remains nonmonetized, whereas if both gifts and sales are permitted, the gift has a market value. This market value undermines our altruism and discourages us from giving, the argument runs, because our gift is now equivalent merely to giving fifty dollars (or whatever is the market price of a pint of blood) to a stranger, rather than life or health.

The "domino" part of this argument -- that once something is commodified for some it is willy-nilly commodified for everyone -- posits that once market value enters our discourse, market rhetoric will take over and characterize every interaction in terms of market value. If this is true, some special things (for example, blood) must be completely noncommodified if altruism is to be possible. ⁿ²³⁵ But the feared domino effect of market rhetoric need not be true. To suppose that it must necessarily be true seems to concede to universal commodification the assumption that thinking in money terms comes "naturally" to us. ⁿ²³⁶ Most people would probably think the assumption false in light of their common experience. For example, many people value their homes or their work in a nonmonetary way, even though those things also have market value. ⁿ²³⁷

Rather than merely assuming that money is at the core of every transaction in "goods," thereby making commodification inevitable and phasing out the non-commodified version of the "same" thing (or the nonmarket aspects of sale transactions), we should evaluate the domino theory on a case-by-case basis. We should assess how important it is to us that any particular contested thing remain available in a noncommodified form and try to estimate how likely it is that allowing market transactions for those things would engender a domino effect and make the nonmarket version impossible. This might involve judging how close to universal commodification our consciousness really is, and how this consciousness would affect the particular thing in question.

[*1915] *C. The Problem of Nonideal Evaluation*

One ideal world would countenance no commodification; another would insist that all harms to personhood are unjust; still another would permit no relationships of oppression or disempowerment. But we are situated in a nonideal world of ignorance, greed, and violence; of poverty, racism, and sexism. In spite of our ideals, justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us. In doing so we may have to tolerate some things that would count as harms in our ideal world. Whatever harms to our ideals we decide we must now tolerate in the name of justice may push our ideals that much farther away. ⁿ²³⁸ How are we to decide, now, what is the best transition toward our ideals, knowing that our choices now will help to reconstitute those ideals?

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

1. The Double Bind. -- Often commodification is put forward as a solution to powerlessness or oppression, as in the suggestion that **[*1916]** women be permitted to sell sexual and reproductive services. ⁿ²³⁹ But is women's personhood injured by allowing or by disallowing commodification of sex and reproduction? The argument that commodification empowers women is that recognition of these alienable entitlements will enable a needy group -- poor women -- to improve their relatively powerless, oppressed condition, an improvement that would be beneficial to personhood. If the law denies women the opportunity to be comfortable sex workers and baby producers instead of subsistence domestics, assemblers, clerks, and waitresses -- or pariahs (welfare recipients) and criminals (prostitutes) -- it keeps them out of the economic mainstream and hence the mainstream of American life.

The rejoinder is that, on the contrary, commodification will harm personhood by powerfully symbolizing, legitimating, and enforcing class division and gender oppression. It will create the two forms of alienation that correlate with commodification of personal things. ⁿ²⁴⁰ Women will partly internalize the notion that their persons and their attributes are separate, thus creating the pain of a divided self. To the extent that this self-conception is not internalized, women will be alienated from the dominant order that, by allowing commodification, sees them in this light. Moreover, commodification will exacerbate, not ameliorate, oppression and powerlessness, because of the social disapproval connected with marketing one's body. ⁿ²⁴¹

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

These conflicting arguments illuminate the problem with the prophylactic argument for market-inalienability.ⁿ²⁴² If we now permit commodification, we may exacerbate the oppression of women -- the suppliers. If we now disallow commodification -- without what I have called the welfare-rights corollary, or large-scale redistribution [*1917] of social wealth and powerⁿ²⁴³ -- we force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers. Thus, the alternatives seem subsumed by a need for social progress, yet we must choose some regime now in order to make progress. This dilemma of transition is the double bind.ⁿ²⁴⁴

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

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

2. *Incomplete Commodification.* -- One way to mediate the dilemma is through what I shall call incomplete commodification. Under [*1918] nonideal circumstances the question whether market-inalienability can be justified is more complicated than a binary decision between complete commodification and complete noncommodification.ⁿ²⁴⁵ Rather, we should understand there to be a continuum reflecting degrees of commodification that will be appropriate in a given context. An incomplete commodification -- a partial market-inalienabilityⁿ²⁴⁶ -- can sometimes substitute for a complete noncommodification that might accord with our ideals but cause too much harm in our nonideal world.

Before considering examples, it may be helpful to distinguish two aspects of incomplete commodification: participant and social.ⁿ²⁴⁷ The participant aspect draws attention to the meaning of an interaction for those who engage in it. For many interactions in which money changes hands, market rhetoric cannot capture this significance. In other words, market and non market aspects of an interaction coexist: although money changes hands, the interaction also has important nonmonetizable personal and social significance. The social aspect of incomplete commodification draws attention instead to the way society as a whole recognizes that things have nonmonetizable participant significance by regulating (curtailing) the free market.

Work and housing are possible examples of incomplete commodification. With respect to the participant aspect, consider that for many of us, work is not only the way we make our living, but also a part of ourselves. What we hope to derive from our work, and the personal importance we attach to it, are not understandable entirely in money terms, even though we demand and accept money. These ideals about work seem to be part of our conception of human flourishing, and thus the loss of this personal aspect of work would be considered inhumane.ⁿ²⁴⁸ Consider also our attachment of meaning to housing. Although a house has market value and we can express our investment [*1919] in terms of dollars, there is a nonmonetizable, personal aspect to many people's relationships with their homes.

With respect to the social aspect of incomplete commodification, consider the regulation of labor. Although work has not been fully decommodified, 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.ⁿ²⁴⁹ 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.

When we see these regulations as reflecting incomplete commodification, we progress toward conceiving of work and housing in other than market rhetoric.ⁿ²⁵⁰ In this view, work and housing are not conceived of as completely monetizable and fungible objects of exchange that are separated from persons, because to conceive of them in such a way is to adopt an inferior conception of human flourishing.ⁿ²⁵¹ These forms of regulation should instead be seen as an effort [*1920] to take into account workers' and tenants' personhood, to recognize and foster the nonmarket significance of their work and housing.

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.ⁿ²⁵² Regulation can be seen as attempting to ensure that tenants are not forced to move from their homes for ideological, discriminatory, or arbitrary 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.

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.ⁿ²⁵³ Although complete decommodification of work or housing is [*1921] not now possible, these incomplete commodifications can be seen as responses in our nonideal world to the harm to personhood caused by complete commodification of work and housing.

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

I now offer thoughts on how the analysis that I recommend might be brought to bear on a set of controversial market-inalienabilities. It is not my purpose to try to provide the detailed, practical evaluation that is needed, but only to sketch its general contours. The example I shall pursue is the contested commodification of aspects of sexuality and reproductive capacity: the issues of prostitution, baby-selling, and surrogacy.ⁿ²⁵⁴ I conclude that market-inalienability is justified for baby-selling and also -- provisionally -- for surrogacy, but that prostitution should be governed by a regime of incomplete commodification.

Assuming that our ideal of personhood includes the ideal of sexual interaction as equal nonmonetized sharing, we might imagine that the "good" commodified sexuality ought not to exist: that sexual activity should be market-inalienable.ⁿ²⁵⁵ But perhaps prohibition of the sale of sexual services, if it aims to preserve sexuality as nonmonetized sharing, is not justified under current circumstances, because sex is already commodified.ⁿ²⁵⁶ Moreover, in our nonideal world, market-inalienability -- especially if enforced through criminalization of sales -- may cause harm to ideals of personhood instead of maintaining [*1922] and fostering them, primarily because it exacerbates the double bind.ⁿ²⁵⁷ Poor women who believe that they must sell their sexual services to survive are subject to moral opprobrium, disease, arrest, and violence. The ideal of sexual sharing is related to identity and contextuality, but the identity of those who sell is undermined by criminalization and powerlessness, and their ability to develop and maintain relationships is hurt by these circumstances.

Nevertheless, despite the double bind and the harms of the black market to prostitutes, fear of a domino effect could

perhaps warrant market-inalienability as an effort to ward off conceiving of all sexuality as fungible. Many people would say, however, that the known availability of commodified sex by itself does not render nonfungible sexual interactions impossible or even more difficult, and that the prevalence of ideals of interpersonal sexual sharing in spite of the widespread association of sex and money is proof that the domino effect in rhetoric is not to be feared. But we must evaluate the seriousness of the risk if commodification proceeds. What if sex were fully and openly commodified? Suppose newspapers, radio, TV, and billboards advertised sexual services as imaginatively and vividly as they advertise computer services, health clubs, or soft drinks. Suppose the sexual partner of your choice could be ordered through a catalog, or through a large brokerage firm that has an "800" number, or at a trade show, or in a local showroom. Suppose the business of recruiting suppliers of sexual services was carried on in the same way as corporate headhunting or training of word-processing operators. A change would occur in everyone's discourse about sex, and in particular about women's sexuality. New terms would emerge for particular gradations of market value, and new discussions would be heard of particular abilities or qualities in terms of their market value. With this change in discourse would come a change in everyone's experience. ⁿ²⁵⁸ The open market might render subconscious valuation of women (and perhaps everyone) in sexual dollar value impossible to avoid. It might make the ideal of nonmonetized sharing impossible. Thus, the argument for noncommodification of sexuality based on the domino effect, in its strongest form, is that we do not wish to unleash market forces onto the shaping of our discourse regarding sexuality and hence onto our very conception of sexuality and our sexual feelings.

This domino argument assumes that nonmonetized equal sharing relationships are the norm or are at least attainable. That assumption is now contested. Some feminists argue that male-female sexual relationships that actually instantiate the ideal of equal sharing are under current social circumstances rare or even impossible. ⁿ²⁵⁹ According [*1923] to this view, moreover, women are oppressed by this ideal because they try to understand their relationships with men in light of it, and conceal from themselves the truth about their own condition. They try to understand what they are doing as giving, as equal sharing, while their sexuality is actually being taken from them. If we believe that women are deceived (and deceiving themselves) in this way, attempted noncommodification in the name of the ideal may be futile or even counterproductive. Noncommodification under current circumstances is part of the social structure that perpetuates false consciousness about the current role of the ideal. Some feminists also argue that many male-female sexual relationships are (unequal) economic bargains, not a context in which equal sharing occurs. ⁿ²⁶⁰ If that is true, attempted noncommodification means that prostitutes are being singled out for punishment for something pervasive in women's condition, and that they are being singled out because their class or race forecloses more socially accepted forms of sexual bargaining. This returns us to the double bind.

Perhaps the best way to characterize the present situation is to say that women's sexuality is incompletely commodified. Many sexual relationships may have both market and nonmarket aspects: relationships may be entered into and sustained partly for economic reasons and partly for the interpersonal sharing that is part of our ideal of human flourishing. Even if under current circumstances the ideal misleads us into thinking that unequal relationships are really equal, it seems that the way out of such ideological bondage is not to abandon the ideal, but rather to pursue it in ways that are not harmful under [*1924] these nonideal circumstances. Market-inalienability seems harmful, not only because it might be ideologically two-edged, but also because of the double bind. Yet complete commodification, if any credence is given to the feared domino effect, may relinquish our conception of sexuality entirely.

The issue thus becomes how to structure an incomplete commodification that takes account of our nonideal world, yet does not foreclose progress to a better world of more equal power (and less susceptibility to the domino effect of market rhetoric). I think we should now decriminalize the sale of sexual services in order to protect poor women from the degradation and danger either of the black market or of other occupations that seem to them less desirable. At the same time, in order to check the domino effect, we should prohibit the capitalist entrepreneurship that would operate to create an organized market in sexual services even though this step would pose enforcement difficulties. It would include, for example, banning brokerage (pimping) and recruitment. ⁿ²⁶¹ It might also include banning [*1925] advertising. Trying to keep commodification of sexuality out of our discourse by banning advertising does have the double bind effect of failing to legitimate the sales we allow, and hence it may fail to alleviate significantly the social

disapproval suffered by those who sell sexual services. It also adds "information costs" to their "product," and thus fails to yield them as great a "return" as would the full-blown market. But these nonideal effects must be borne if we really accept that extensive permeation of our discourse by commodification-talk would alter sexuality in a way that we are unwilling to countenance. ⁿ²⁶²

A different analysis is warranted for baby-selling. Like relationships of sexual sharing, parent-child relationships are closely connected with personhood, particularly with personal identity and contextuality. Moreover, poor women caught in the double bind raise the issue of freedom: they may wish to sell a baby on the black market, ⁿ²⁶³ as they may wish to sell sexual services, perhaps to try to provide adequately for other children or family members. ⁿ²⁶⁴ But the double bind is not the only problem of freedom implicated in baby-selling. Under a market regime, prostitutes may be choosing to sell their sexuality, but babies are not choosing for themselves that under current nonideal circumstances they are better off as commodities. If we permit babies to be sold, we commodify not only the mother's (and father's) baby-making capacities -- which might be analogous to commodifying sexuality -- but we also conceive of the baby itself in market rhetoric. When the baby becomes a commodity, all of its personal attributes -- sex, eye color, predicted I.Q., predicted height, and the like -- become commodified as well. ⁿ²⁶⁵ This is to conceive of potentially all personal attributes in market rhetoric, not merely those of sexuality. [*1926] Moreover, to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and to create in those people a commodified self-conception.

Hence, the domino theory has a deep intuitive appeal when we think about the sale of babies. An idealist might suggest, however, that the fact that we do not now value babies in money suggests that we would not do so even if babies were sold. Perhaps babies could be incompletely commodified, valued by the participants to the interaction in a nonmarket way, even though money changed hands. Although this is theoretically possible, it seems too risky in our nonideal world. ⁿ²⁶⁶ If a capitalist baby industry were to come into being, with all of its accompanying paraphernalia, how could any of us, even those who did not produce infants for sale, avoid subconsciously measuring the dollar value of our children? How could our children avoid being preoccupied with measuring their own dollar value? This makes our discourse about ourselves (when we are children) and about our children (when we are parents) like our discourse about cars. Seeing commodification of babies as an inevitable and grave injury to personhood appears rather easy. ⁿ²⁶⁷ In the worst case, market rhetoric could create a commodified self-conception in everyone, as the result of commodifying every attribute that differentiates us and that other people value in us, and could destroy personhood as we know it.

I suspect that an intuitive grasp of the injury to personhood involved in commodification of human beings is the reason many people lump baby-selling together with slavery. ⁿ²⁶⁸ But this intuition can be misleading. Selling a baby, whose personal development requires caretaking, to people who want to act as the caretakers is not the [*1927] same thing as selling a baby or an adult to people who want to act only as users of her capacities. Moreover, if the reason for our aversion to baby-selling is that we believe it is like slavery, then it is unclear why we do not prohibit baby-giving (release of a child for adoption) on the ground that enslavement is not permitted even without consideration. We might say that respect for persons prohibits slavery but may require adoption in cases in which only adoptive parents will treat the child as a person, or in the manner appropriate to becoming a person. But this answer is still somewhat unsatisfactory. It does not tell us whether parents who are financially and psychologically capable of raising a child in a manner we deem proper nevertheless may give up the child for adoption, for what we would consider less than compelling reasons. If parents are morally entitled to give up a child even if the child could have (in some sense) been raised properly by them, ⁿ²⁶⁹ our aversion to slavery does not explain why infants are subject only to market-inalienability. There must be another reason why baby-giving is unobjectionable.

The reason, I think, is that we do not fear relinquishment of children unless it is accompanied by market rhetoric. ⁿ²⁷⁰ The objection to market rhetoric may be part of a moral prohibition on market treatment of any babies, regardless of whether nonmonetized treatment of other children would remain possible. To the extent that we condemn baby-selling even in the absence of any domino effect, we are saying that this "good" simply should not exist. Conceiving of any child in market rhetoric wrongs personhood. In addition, we fear, based on our assessment of current

social norms, that the market value of babies would be decided in ways injurious to their personhood and to the personhood of those who buy and sell on this basis, exacerbating class, race, and gender divisions. To the extent the objection to baby-selling is not (or is not only) to the very idea of this "good" (marketed children), it stems from a fear that the nonmarket version of human beings themselves will become impossible. Conceiving of children in market rhetoric would foster an inferior conception of human flourishing, one that commodifies every personal attribute [*1928] that might be valued by people in other people. In spite of the double bind, our aversion to commodification of babies has a basis strong enough to recommend that market-inalienability be maintained.

The question of surrogate mothering seems more difficult. ⁿ²⁷¹ I shall consider the surrogacy situation in which a couple desiring a child consists of a fertile male and an infertile female. ⁿ²⁷² They find a fertile female to become impregnated with the sperm of the would-be father, to carry the fetus to term, to give birth to the child, and to relinquish it to them for adoption. This interaction may be paid, in which case surrogacy becomes a good sold on the market, or unpaid, in which case it remains a gift.

Those who view paid surrogacy as tantamount to permitting the sale of babies point out that a surrogate is paid for the same reasons that an ordinary adoption is commissioned: to conceive, carry, and deliver a baby. ⁿ²⁷³ Moreover, even if an ordinary adoption is not [*1929] commissioned, there seems to be no substantive difference between paying a woman for carrying a child she then delivers to the employers, who have found her through a brokerage mechanism, and paying her for an already "produced" child whose buyer is found through a brokerage mechanism (perhaps called an "adoption agency") after she has paid her own costs of "production." Both are adoptions for which consideration is paid. Others view paid surrogacy as better analogized to prostitution (sale of sexual services) than to baby-selling. They would say that the commodity being sold in the surrogacy interaction is not the baby itself, but rather "womb services." ⁿ²⁷⁴

The different conceptions of the good being sold in paid surrogacy can be related to the primary difference between this interaction and (other) baby-selling: the genetic father is more closely involved in the surrogacy interaction than in a standard adoption. The disagreement about how we might conceive of the "good" reflects a deeper ambiguity about the degree of commodification of mothers and children. If we think that ordinarily a mother paid to relinquish a baby for adoption is selling a baby, but that if she is a surrogate, she is merely selling gestational services, it seems we are assuming that the baby cannot be considered the surrogate's property, so as to become alienable by her, but that her gestational services can be considered property and therefore become alienable. If this conception reflects a decision that the baby cannot be property at all -- cannot be objectified -- then the decision reflects a lesser level of commodification in rhetoric. But this interpretation is implausible because of our willingness to refer to the ordinary paid adoption as baby-selling. ⁿ²⁷⁵ A more plausible interpretation of conceiving of the "good" as gestational services is that this conception reflects an understanding that the baby is already someone else's property -- the father's. This characterization of the interaction can be understood as both complete commodification in rhetoric and an expression of gender hierarchy. The would-be father is "producing" a baby of his "own," ⁿ²⁷⁶ but in order to do so he must [*1930] purchase these "services" as a necessary input. Surrogacy raises the issue of commodification and gender politics in how we understand even the description of the problem. An oppressive understanding of the interaction is the more plausible one: women -- their reproductive capacities, attributes, and genes -- are fungible in carrying on the male genetic line. ⁿ²⁷⁷

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

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

children for them. It might be degrading for the surrogate to commodify her gestational services or her baby, but she might find this preferable to her other choices in life. But although surrogates have not tended to be rich women, nor middle-class career women, neither have they (so far) seemed to be the poorest women, the ones most caught in the double bind. ⁿ²⁷⁸

Whether surrogacy is paid or unpaid, there may be a transition problem: an ironic self-deception. Acting in ways that current gender ideology characterizes as empowering might actually be disempowering. Surrogates may feel they are fulfilling their womanhood by producing a baby for someone else, although they may actually be reinforcing oppressive gender roles. ⁿ²⁷⁹ It is also possible to view would-be [*1931] fathers as (perhaps unknowing) oppressors of their own partners. Infertile mothers, believing it to be their duty to raise their partners' genetic children, could be caught in the same kind of false consciousness and relative powerlessness as surrogates who feel called upon to produce children for others. Some women might have conflicts with their partners that they cannot acknowledge, either about raising children under these circumstances instead of adopting unrelated children, or about having children at all. These considerations suggest that to avoid reinforcing gender ideology, both paid and unpaid surrogacy must be prohibited.

Another reason we might choose prohibition of all surrogacy, paid or unpaid, is that allowing surrogacy in our nonideal world would injure the chances of proper personal development for children awaiting adoption. Unlike a mother relinquishing a baby for adoption, the surrogate mother bears a baby only in response to the demand of the would-be parents: their demand is the reason for its being born. ⁿ²⁸⁰ There is a danger that unwanted children might remain parentless even if only unpaid surrogacy is allowed, because those seeking children will turn less frequently to adoption. ⁿ²⁸¹ Would-be fathers may strongly prefer adopted children bearing their own genetic codes to adopted children genetically strange to them; perhaps women prefer adopted children bearing their partners' genetic codes. Thus, prohibition of all surrogacy might be grounded on concern for unwanted children and their chances in life.

Perhaps a more visionary reason to consider prohibiting all surrogacy is that the demand for it expresses a limited view of parent-child bonding; in a better view of personal contextuality, bonding should be reconceived. Although allowing surrogacy might be thought to foster ideals of interrelationships between men and their children, ⁿ²⁸² it is unclear why we should assume that the ideal of bonding depends especially on genetic connection. Many people who adopt children feel no less bonded to their children than responsible genetic parents; ⁿ²⁸³ they understand that relational bonds are created in shared [*1932] life more than in genetic codes. ⁿ²⁸⁴ We might make better progress toward ideals of interpersonal sharing -- toward a better view of contextual personhood -- by breaking down the notion that children are fathers' -- or parents' -- genetic property. ⁿ²⁸⁵

In spite of these concerns, attempting to prohibit surrogacy now seems too utopian, because it ignores a transition problem. At present, people seem to believe that they need genetic offspring in order to fulfill themselves; at present, some surrogates believe their actions to be altruistic. ⁿ²⁸⁶ To try to create an ideal world all at once would do violence to things people make central to themselves. This problem suggests that surrogacy should not be altogether prohibited.

Concerns about commodification of women and children, however, might counsel permitting only unpaid surrogacy (market-inalienability). Market-inalienability might be grounded in a judgment that commodification of women's reproductive capacity is harmful for the identity aspect of their personhood and in a judgment that the closeness of paid surrogacy to baby-selling harms our self-conception too deeply. There is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized. Surrogates with "better" qualities will command higher prices in virtue of those qualities. This monetization commodifies women more broadly than merely with respect to their sexual services or reproductive capacity. Hence, if we wish to avoid the dangers of commodification and, at the same time, recognize that there are some situations in which a surrogate can be understood to be proceeding [*1933] out of love or altruism and not out of economic necessity or desire for monetary gain, ⁿ²⁸⁷ we could prohibit sales but allow surrogates to give their services. We might allow them to accept payment of their reasonable out-of-pocket expenses -- a form of market-inalienability similar to that governing ordinary adoption. ⁿ²⁸⁸

Fear of a domino effect might also counsel market-inalienability. At the moment, it does not seem that women's reproductive capabilities are as commodified as their sexuality. Of course, we cannot tell whether this means that reproductive capabilities are more resistant to commodification or whether the trend toward commodification is still at an early stage. Reproductive capacity, however, is not the only thing in danger of commodification. We must also consider the commodification of children. The risk is serious indeed, because, if there is a significant domino effect, commodification of some children means commodification of everyone.ⁿ²⁸⁹ Yet, as long as fathers do have an unmonetized attachment to their genes (and as long as their partners tend to share it), even though the attachment may be nonideal, we need not see children born in a paid surrogacy arrangement -- and they need not see themselves -- as fully commodified. Hence, there may be less reason to fear the domino effect with paid surrogacy than with baby-selling. The most credible fear of a domino effect -- one that paid surrogacy does share with commissioned adoption -- is that all women's personal attributes will be commodified. The pricing of surrogates' services will not immediately transform the rhetoric in which women conceive of themselves and in which they are conceived, but that is its tendency. This fear, even though remote, seems grave enough to take steps to ensure that paid surrogacy does not become the kind of institution that could permeate our discourse.

Thus, for several reasons market-inalienability seems an attractive solution. But, in choosing this regime, we would have to recognize the danger that the double bind might force simulations of altruism by those who would find living on an expense allowance preferable to their current circumstances.ⁿ²⁹⁰ Furthermore, the fact that they are not being paid "full" price exacerbates the double bind and is not really helpful in preventing a domino effect. We would also have to recognize that there would probably not be enough altruistic surrogates [*1934] available to alleviate the frustration and suffering of those who desire children genetically related to fathers,ⁿ²⁹¹ if this desire is widespread.

The other possible choice is to create an incomplete commodification similar to the one suggested for sale of sexual services. The problem of surrogacy is more difficult, however, primarily because the interaction produces a new person whose interests must be respected. In such an incomplete commodification, performance of surrogacy agreements by willing parties should be permitted, but women who change their minds should not be forced to perform.ⁿ²⁹² The surrogate who changes her mind before birth can choose abortion; at birth, she can decide to keep the baby.ⁿ²⁹³ Neither should those who hire a surrogate and then change their minds be forced to keep and raise a child they do not want. But if a baby is brought into the world and nobody wants it, the surrogate who intended to relinquish the child [*1935] should not be forced to keep and raise it.ⁿ²⁹⁴ Instead, those who, out of a desire for genetically related offspring, initiated the interaction should bear the responsibility for providing for the child's future in a manner that can respect the child's personhood and not create the impression that children are commodities that can be abandoned as well as alienated.ⁿ²⁹⁵

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

Because the double bind has similar force whether a woman wishes to be a paid surrogate or simply to create a baby for sale on demand, the magnitude of the difference between paid surrogacy and commissioned adoption is largely dependent on the weight we give to the father's genetic link to the baby. If we place enough weight on this distinction, then incomplete commodification for surrogacy, but not for baby-selling, will be justified. But we should be aware, if we choose incomplete commodification for surrogacy, that this choice might seriously weaken the general market-inalienability of babies, [*1936] which prohibits commissioned adoptions.ⁿ²⁹⁶ If, on balance, incomplete commodification rather than market-inalienability comes to seem right for now, it will appear so for these reasons: because we judge the double bind to suggest that we should not completely foreclose women's choice of paid surrogacy, even though we foreclose commissioned adoptions; because we judge that people's (including women's) strong

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

VI. CONCLUSION

Market-inalienability is an important normative category for our society. Economic analysis and traditional liberal pluralism have failed to recognize and correctly understand its significance because of the market orientation of their premises. In attempting to free our conceptions from these premises in order to see market-inalienability as an important countercurrent to our market orientation, I have created an archetype, universal commodification, and tried to show how it underlies both economic analysis and more traditional liberal thinking about inalienability. As an archetype, universal commodification is too uncomplicated to describe fully any actual thinker or complex of ideas, but I believe consideration of the archetype and what it entails is a necessary corrective. The rhetoric of commodification has led us into an unreflective use of market characterizations and comparisons for almost everything people may value, and hence into an inferior conception of personhood.

I have created a contrasting archetype, universal noncommodification, to characterize the utopian vision -- expressed by Marxists and other social critics of the market order -- of a social world free of market relationships and market conceptions. Although this archetype, too, is an oversimplification, I believe it enables us to focus on [*1937] the transition problem that always lies between us and our utopias. If decommodification 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. In attempting to make the hard choices in which both commodification and decommodification seem harmful -- the transition problem of the double bind -- we must evaluate each contested commodification in its temporal and social context, and we must learn to see in the commodification issue the same interconnection between rhetoric and reality that we have come to accept between physical reality and our paradigms of thought.

To the extent that we must not assimilate our conception of personhood to the market, market-inalienabilities are justified. But market-inalienabilities are unjust when they are too harmful to personhood in our nonideal world. Incomplete commodification can help us mediate this kind of injustice. To see the world of exchange as shot through with incomplete commodification can also show us that inalienability is not the anomaly that economics and more traditional liberalism conceive it to be. This perspective can also help us begin to decommodify things important to personhood -- like work and housing -- that are now wrongly conceived of in market rhetoric.

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

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Estates Future Interests Invalid Restraints & Rule Against Perpetuities Real Property Law Landlord & Tenant Rent Regulation General Overview Securities Law Regulation of Securities Markets Trading by Exchange Members

FOOTNOTES:

n1 The Declaration of Independence para. 2 (U.S. 1776).

n2 See, e.g., McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL. 25, 27 (1984) ("That which is inalienable . . . is not transferable to the ownership of another.").

n3 See, e.g., Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller."). For discussion of Calabresi and Melamed's view of inalienability, see pp. 1864-66 below.

n4 See, e.g., Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179, 185 (1986) ("To characterize a right as inalienable is to claim that the consent of the right-holder is insufficient to extinguish the right or to transfer it to another."); Kuflik, *The Utilitarian Logic of Inalienable Rights*, 97 ETHICS 75, 75 (1986) ("An inalienable right is a right that a person has no right to give up or trade away."); Meyers, *The Rationale for Inalienable Rights in Moral Systems*, 7 SOC. THEORY & PRAC. 127, 127 (1981) ("Inalienable rights are rights that cannot be relinquished by the individuals who possess them."). For further definitions of different kinds of inalienability, see pp. 1852-55 below.

n5 See, e.g., D. MEYERS, INALIENABLE RIGHTS: A DEFENSE 4 (1985) ("[A]n inalienable right is one that the right-holder cannot lose regardless of what he does or or how others treat him and even if others are justified in declining to grant him what he demands in exercising his right."); Brown, *Inalienable Rights*, 64 PHIL. REV. 192, 192 (1955) ("[I]f there are any rights properly called 'inalienable,' assertions of these rights cannot, for any reason under any circumstances, be denied.").

n6 R. TITMUS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971).

n7 See, e.g., Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343 (1972).

n8 See Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). Elsewhere Posner said:

That there are many people who are capable of bearing children but who do not want to raise them, and many other people who cannot produce their own children but want to raise children in their homes, suggests the possibility of a thriving market in babies, especially since the costs of production by the natural parents are typically much lower than the value that many childless people attach to the possession of children.

R. POSNER, ECONOMIC ANALYSIS OF LAW 113 (2d ed. 1977). In the most recent edition of this book, the word "thriving" has been deleted from this passage, perhaps indicating that Posner has modified his views. See R. POSNER, *supra*, at 139 (3d ed. 1986). I shall

return to Posner's views on baby-selling below. *See infra* note 51 and accompanying text. (Further references to *Economic Analysis of Law* will be to the third edition.)

n9 *See, e.g.,* Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 348-57 (1984).

n10 Most of the definitions quoted in notes 2-5 above ignore their rivals. Among recent commentators, Susan Rose-Ackerman is exceptional in recognizing many meanings. *See* Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); *infra* note 67 (discussing Rose-Ackerman's approach to the meanings of inalienability).

n11 The traditional conception of alienation as separation of objects from persons is related to the traditional subject/object dichotomy, which I discuss in Section B of Part III below. In what follows, I shall often refer generally to whatever is inalienable as a "thing." This is a necessary shorthand, although it does present the danger of an unwanted connotation of objectness, especially in light of the subject/object dichotomy.

n12 As these two variables suggest, each of four broad categories of separability might be negated by a corresponding form of inalienability: involuntary extinguishment (cancellation, forfeiture of civil rights); voluntary extinguishment (waiver, abandonment); involuntary transfer (condemnation, adverse possession); and voluntary transfer (gift, sale). The negation of involuntary transfer is less likely than the other categories to be conceived of as inalienability; for example, we do not consider the prevention of theft an inalienability. There are other variables that are sometimes significant for understanding inalienabilities. The most important of them are: the sovereign's role in the interaction (whether the sovereign is the instrument of involuntary loss or the recipient of involuntary transfer); the nature of the holder of an inalienable right, entitlement, or attribute (whether the holder is a person or group, and whether the person has an official capacity or the group has special normative significance); and the availability of compensation. These and other variables can be thought either to create a larger matrix or to delineate subcategories in the four broad categories. Market-inalienability is a normatively important subcategory of inalienabilities that negate voluntary transfer, a category delineated by the distinction between monetary exchanges and other voluntary transfers. In the text, I do not seek to elaborate on the matrix of inalienabilities, but rather to set the scene for an exploration of market-inalienability. The taxonomy of inalienabilities I propose here should be compared with that of Susan Rose-Ackerman, cited in note 10 above, at 933-35. *See infra* note 67.

n13 Nonforfeiture is ambiguous. It may refer to an entitlement, right, or attribute that cannot be involuntarily negated, such as certain civil rights; or it may refer to things that cannot be involuntarily transferred to the sovereign without compensation. In the text I use the former meaning.

n14 Waiver is ambiguous. It may refer either to permanent or temporary abrogation of an entitlement, right, or attribute. In the latter meaning, perhaps we should not speak of waiver as "loss." In the text I use the former meaning.

n15 Preclusion of involuntary transfer is not usually conceived of as inalienability. *See supra* note 12.

n16 Something that is inalienable in this sense need not be inalienable in the broader senses detailed above. *See supra* note 12. Something that is nontransferable might still be forfeited, canceled, relinquished, waived, or perhaps involuntarily transferred to the government or its designates.

n17 In addition to transfer by gift and sale, barter also represents a theoretically possible means of transfer. I do not consider barter, however, because it is not a widespread method of exchange in our culture.

n18 There are also subsets of gift transfer: transfer *inter vivos*, and bequest or devise. Although gift transmission at death is not a focus of this Article, market-inalienability may sometimes leave open both kinds of gift transfer; for example, one may will one's body or organs. In other cases, bequest might be irrelevant, as with sexual services. *See infra* pp. 1921-25. Bequest might be prohibited in cases in which it imparts unwanted connotations of property, for example, in the case of relinquishment of children for adoption: a testator can create a guardianship for a child but may not will the child itself to the guardian. *See infra* pp. 1925-28.

n19 Traditional property rights are alienable in all senses except cancellation; they may be forfeited, relinquished, waived, condemned, and transferred by both gift and sale. The unavailability of cancellation is usually not by itself considered inalienability. Yet it is helpful to think of noncancelability as inalienability in order to see the scope of the concept. Indeed, the liberal "inalienable right to property" may just mean that liberal alienable property rights are noncancelable. (It may mean other things as well, for example, that the right of the autonomous individual to be a property holder is both nonrelinquishable and noncancelable. *See infra* p. 1900.

n20 Examples are entitlements to social security and welfare benefits, and many kinds of licenses. I think of these as status-inalienabilities because they rigidify possession, constraining or precluding change, signifying some strong form of inseparability from the holder. Forms of status-inalienability could range from prohibition of voluntary transfers among private parties to prohibition of any kind of loss.

n21 Nontransferable rights that at the same time may implicate affirmative duties fall into a category I think of as community-inalienability. Examples are the right-duty to vote in political elections and the right-duty to become educated. Rights of this kind not only may not be lost through change of hands, extinguishment, or cancellation, but also ought to be exercised. Although community-inalienability is a convenient label for these rights that are simultaneously duties, the more communitarian one's views about the nature of the person and the nature of social life, the more all justifiable inalienabilities will be related to community. For example, Laurence Tribe argues that "rights that are relational and systemic are necessarily inalienable: individuals cannot waive them because individuals are not their sole focus." Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 (1985) (applying this reasoning to the right to choose abortion) (emphasis in original).

n22 Some things are deemed socially unacceptable to possess, give, or sell; their existence is denounced completely by the social order. Heroin is in this class; alcoholic beverages passed into and out of it. The inalienability of things in this class is subsidiary to a social attempt to obliterate them. It is illegal to sell heroin only because we want no one to have anything to do with heroin. Growing heroin, possessing heroin, and giving away heroin are prohibited too. To distinguish inalienabilities incident to prohibitions from other kinds of inalienabilities, the former can be labeled prohibition-inalienabilities.

n23 *See* National Organ Transplant Act of 1984, 42 U.S.C. § 274(e) (1982) (banning organ sales in interstate commerce). Whether organ

sales are morally permissible or should legally be permitted is currently controversial. See Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP., Oct. 1986, at 28, 36 (arguing thoughtfully for a "quasi-property" approach in which "human beings have the right to treat certain physical parts of their bodies as objects for possession, gift, and trade"). In my terms Andrews's position is actually an incomplete commodification, see pp. 1917-21, because it precludes brokering of organs and treatment of one's body parts as property by other people. Cf. Murray, *The Gift of Life Must Always Remain a Gift*, 7 DISCOVER, Mar. 1986, at 90; Comment, *Retailing Human Organs Under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 405 (1983) (arguing that "society should not view the sale of human organs any differently than the sale of other necessary commodities such as food, shelter, and medication"). This debate is an example of contested commodification. See *infra* pp. 1856-58.

n24 As I use it here, the term "commodity" means simply something that is thought appropriate to buy and sell through a market. Later I discuss further complexities of meaning in the term "commodification." See *infra* pp. 1859-60. For now, note that this definition makes it awkward to speak of nonsalable or nonmarket commodities. I think it appropriate to restrict the term "commodity" to monetary trade and its rhetoric, so that when speakers do apply the term to nonmarket activities, we can identify its use as market rhetoric. If someone says, "Love is a scarce commodity," this definition will enable us to see clearly that she is speaking about love as if it were a resource available on the market. Market rhetoric is discussed in Section B of Part III below.

n25 See *infra* p. 1861.

n26 For a discussion of incomplete commodification, see pp. 1917-21 below. Things that are incompletely commodified do not fully exhibit the typical indicia of traditional property and contract. For example, things that are subject to price controls are incompletely commodified because freedom to set prices is part of the traditional understanding of property and contract. See, e.g., *Block v. Hirsh*, 256 U.S. 135, 159 (1921) (McKenna, J., dissenting) (protesting that rent control "is contrary to every conception of leases that the world has ever entertained").

n27 Compare Landes & Posner, *supra* note 8 (suggesting a free market in babies as an experimental solution to the current baby shortage) with Prichard, *supra* note 9 (outlining objections to a free market in babies based on market failure, degradation, and a child-centered view of adoption mechanisms). Baby-selling is discussed at pp. 1925-28 below.

n28 Compare P. SINGER & D. WELLS, *MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION* (1985) (arguing in favor of heavily regulated surrogacy arrangements) with Krimmel, *The Case Against Surrogate Parenting*, 13 HASTINGS CENTER REP., Oct. 1983, at 35 (objecting to the legalization of surrogacy arrangements because they may cause social ills related to eugenics, family breakdown, and psychic harm to children). Surrogacy is discussed at pp. 1928-36 below.

n29 Compare R. TITMUSS, *supra* note 6 (arguing that blood should not be salable because sales repress altruism and erode feelings of community), and Singer, *Freedom and Utilities in the Distribution of Health Care*, in *MARKETS AND MORALS* 149 (G. Bermant, P. Brown & G. Dworkin eds. 1977) (maintaining that a system of voluntary donations of blood is more efficient than a system of sales, and additionally that it fosters feelings of community) with Arrow, *supra* note 7 (criticizing Titmuss's conclusions). The argument that blood should be market-inalienable in order to preserve opportunities for altruism is discussed at pp. 1913-14 below.

n30 See sources cited *supra* note 23.

n31 Compare D. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW 84-127 (1982) (arguing that Kantian autonomy, rightly understood, would permit commercial sex), and Ericsson, *Charges against Prostitution: An Attempt at a Philosophical Assessment*, 90 ETHICS 335 (1980) (arguing that a legalized market would cure many of the evils currently associated with prostitution) with Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 ETHICS 561 (1983) (rejecting Ericsson's argument as based on a misunderstanding of the feminist critique of prostitution). Sale of sexual services is discussed at pp. 1921-25 below.

n32 See D. EITZEN & G. SAGE, SOCIOLOGY OF AMERICAN SPORT 53-68 (3d ed. 1986) (describing the ideal of amateurism in sports); Koch, *A Troubled Cartel: The NCAA*, 38 LAW & CONTEMP. PROBS. 135 (1973); Note, *Compensation for College Athletes: A Run for More than the Roses*, 22 SAN DIEGO L. REV. 701 (1985) (arguing that compensation of college athletes should be regarded as legitimate); *infra* note 262.

n33 In addition, there is a debate over possible sale of sperm, eggs, and embryos. See, e.g., Andrews, *supra* note 23, at 33; P. SINGER & D. WELLS, *supra* note 28. There are numerous other aspects of health care, such as the allocation of artificial organs or kidney dialysis service, whose suitability for a market regime is intensely debated. The debate over the degree to which the indicia of traditional property should attach to a celebrity's "persona" is also an example of contested commodification. See, e.g., Terrell & Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985). Contested commodification can be viewed historically. For example, child labor and public offices used to be bought and sold. They passed through a period of contest and were decommmodified. See V. ZELIZER, PRICING THE PRICELESS CHILD (1985); Nelson, *Officeholding and Powerwielding: An Analysis of the Relationships Between Structure and Style in American Administrative History*, 10 LAW & SOC'Y 187 (1976).

n34 See, e.g., Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980). Compare *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712 (1985) (holding that a medical license acquired during marriage is marital property subject to equitable distribution upon divorce) with *In re Graham*, 194 Colo. 429, 574 P.2d 75 (1978) (holding that an M.B.A. degree acquired during marriage is not an item of property and cannot be distributed at divorce).

n35 The debate over commodification in tort law is touched upon below. See *infra* pp. 1876-77.

n36 See, e.g., S. KELMAN, WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT 27-91 (1981).

n37 For a discussion of this view of regulation, see pp. 1918-21 below. Prohibition debates can also be cast in the form of contested commodification, if one sees the market as encompassing the whole of social life. The Supreme Court once saw the existence of pornography as lowering the "tone of commerce," perhaps equating commerce with markets and markets with the social arena. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

n38 Posner's tendency toward universal commodification can be seen most readily in his "universality" and "transferability" criteria for an appropriate property regime. See R. POSNER, *supra* note 8, at 29-33. His discussion of an economic theory of property

implies that if every valuable (meaning scarce as well as desired) resource were owned by someone (universality), ownership connoted the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and ownership rights were freely transferable, or as lawyers say alienable (transferability), value would be maximized.

Id. at 32. The only limitation Posner places on this claim that everything valuable should be alienable property is that it must be qualified by the costs of implementing such a system. See *id.*

Posner's tendency toward universal commodification can also be seen in his definition of "value" in terms of money. See *id.* at 11; cf. R. POSNER, *THE ECONOMICS OF JUSTICE* 115 (1981) (defending wealth-maximization as "the criterion for judging whether acts and institutions are just or good"). He defines economics globally as "the science of rational choice" in a world of scarce resources, its task being "to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions -- what we shall call his 'self-interest.'" R. POSNER, *supra* note 8, at 3; cf. R. POSNER, *THE ECONOMICS OF JUSTICE*, *supra*, at 1-5 (defending the application of economics to all fields of human activity).

Although it seems that Posner is as close to the universal commodification pole of the hypothetical continuum as any theorist, he occasionally states that economic analysis may have some limits. See, e.g., R. POSNER, *supra* note 8, at 25-26. Even when he admits limits, however, he seems to deny them again, as in this passage:

There may well be definite although wide boundaries on both the explanative and reformative power of economic analysis of law. Always, however, economics can provide value clarification by showing the society what it must give up to achieve a noneconomic ideal of justice. The demand for justice is not independent of its price.

Id. at 26; cf. *id.* at 244 (referring to "corrective justice" as a "commodity").

The writings of Gary Becker also exemplify the universal commodification pole. See, e.g., G. BECKER, *A TREATISE ON THE FAMILY* (1981) (developing an economic approach to marriage, family, and procreation). For further discussion of universal commodification, see Part II below.

Although a typical ideal of universal commodification is, as Posner states in the first passage quoted, that everything scarce that people value should be ownable and salable, Frank Michelman argues that universal entitlement and free alienation are theoretically impossible. See Michelman, *Ethics, Economics and the Law of Property*, in *ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV* 3 (J. Pennock & J. Chapman eds. 1982). Gregory Alexander has shown the tension in nineteenth-century property law caused by this theoretical problem. See Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 *STAN. L. REV.* 1189 (1985).

n39 See, e.g., C. LINDBLOM, *POLITICS AND MARKETS* (1977). Those who speak of *Gemeinschaft* and *Gesellschaft* are also pluralists if these two forms of interaction are conceived of as properly coexisting. See F. TONNIES, *COMMUNITY AND SOCIETY* (C. Loomis trans. & ed. 1963).

n40 See, e.g., A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975).

n41 See, e.g., Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983) (describing and criticizing the prevalent ideology in which the family and the market form a dichotomy, related to ideological dichotomies between the state and civil society and between male and female).

n42 Michael Walzer, one of the more interesting theorists who view society in this compartmentalized way, distinguishes 11 separate spheres of justice: membership (citizenship), security and welfare, money and commodities (the market), office, hard work (distasteful or dangerous but socially necessary tasks), free time, education, kinship and love, divine grace (religious freedom), recognition (equal respect),

and political power. See M. WALZER, SPHERES OF JUSTICE (1983). In my view, Walzer's theory is flawed because it assumes that a free-market sphere is presumptively just. See Radin, *Justice and the Market Domain*, in MARKETS AND JUSTICE: NOMOS XXXI (J. Chapman ed. forthcoming).

n43 There are actually three gradations of commodification in the narrow sense: (1) sales that are legally or morally permitted; (2) sales that take place in spite of illegality or immorality (black markets); and (3) "sales" caused by official monetization of nonmonetary interests (for example, compensation in tort). In this Article I am more interested in the first and third aspects of this narrow view of commodification, because I am concerned with how we might evaluate what things ought not to be commodified, even if some people do violate the strictures. Yet, wholesale violation of the strictures will not be irrelevant to nonideal evaluation. See *infra* p. 1921.

n44 A commodity, at least as I am using the term here, has the following indicia pertaining to individual and social value. From the social point of view, the value of a commodity is defined as its exchange value, often referred to as market value, when it is traded in a laissez-faire market or hypothetically traded in a hypothetical laissez-faire market. Exchange value is expressed in money. Hence, under universal commodification, all social value is capable of being expressed in money terms. Moreover, all commodities are fungible -- capable of being reduced to money without changing in value, and completely interchangeable with each and every other commodity in terms of exchange value.

From the individual point of view, the value of a commodity is defined as either the sum of money the holder will accept in order to relinquish it or the sum of money the potential holder will pay in order to acquire it. See, e.g., R. POSNER, *supra* note 8, at 11. Universal commodification often tends to presume that individual value is equivalent to exchange value. When a possible divergence is recognized, exchange value is often called "objective" value and individual value is often called "subjective" value. Even if it recognizes a difference between "objective" and "subjective" value, universal commodification tends to presume that the two measures of "subjective" value are equivalent. The possible divergence between what an entitled holder would demand to relinquish something and what an unentitled potential holder would pay to acquire it is sometimes called by critics "the offer-asking problem." See Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 32-41 (1975); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401-21 (1981).

The holder of a commodity -- that is, the person viewed as commodity holder -- is defined as being indifferent among holding that particular commodity, some other commodity of equivalent value to her (in money), or the sum of money itself. Hence, under universal commodification, all things of value to the person -- including personal attributes, relationships, and philosophical commitments -- are described in monetary terms and are in principle alienable.

My characterization of universal commodification may be compared with Mark Kelman's description of the "core premises" of legal economics. See Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics"*, 33 J. LEGAL EDUC. 274 (1983); see also Harrison, *Egoism, Altruism and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309 (1986) (arguing against the egoism and narrow self-interest assumptions of economics); Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1039-48 (1978) (arguing against economic reductionism and a reductionist interpretation of the role of courts); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974) (arguing against the rhetoric of human self-interest); cf. A. BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* (1985) (discussing varieties of moral arguments for and against the market).

n45 See, e.g., A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION, AND CONTROL* 17 n.1 (3d ed. 1983) (defining "economic goods" to include "all things that we would like to have -- friendships, cleanliness, health, honesty and the like -- and not merely marketable things like milk, shoes, and cars"); cf. R. POSNER, *supra* note 8, at 26, 244 (quoted in note 38 above) (speaking of justice as a commodity); Johnsen, *Wealth Is Value*, 15 J. LEGAL STUD. 263, 269 n.22 (1987) (speaking of justice as a scarce good and an element of wealth). See generally *ECONOMIC IMPERIALISM: THE ECONOMIC APPROACH APPLIED OUTSIDE THE FIELD OF ECONOMICS* (G. Radnitzky & P. Bernholz eds. 1987); Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53, 53 ("Special Issue" Dec. 1985) (arguing that "economics really does constitute the universal grammar of social science," because its analytical categories of "scarcity, cost, preferences, opportunities . . . are truly universal in applicability"; but economists should become aware of how constraining has been "their tunnel vision about the nature of man and social interactions").

n46 See J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1974); D. MUELLER, *PUBLIC CHOICE* (1979); Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 4 (J. Buchanan, R. Tollison & G. Tullock eds. 1980) ("Rent seeking is designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus."); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 148 (1977-78) (describing the "public choice" model in which "the legislature is conceived as a market-like arena"); Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

n47 Proponents of law and economics often note that they do not endorse the view that efficiency equals justice, because an efficient state (however efficiency is defined) is always efficient relative to an initial wealth distribution, and the initial distribution may be unjust. See, e.g., R. POSNER, *supra* note 8, at 13. But many of them ignore their caveat. See, e.g., *id.* at 25 (stating that efficiency is "perhaps the most common" meaning of "justice").

n48 The conception of the person under universal commodification is discussed at p. 1885 below. The presumptive efficiency and presumptive freedom of laissez-faire suggest that the philosophical premises of theorists whose views tend toward universal commodification may be either utilitarian or libertarian. Many law-and-economics theorists are utilitarians. See, e.g., Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 *WASH. U.L.Q.* 723, 737 (1986) (finding, with approval, that "the deep structure of property law has traditionally been . . . transaction-cost utilitarianism"); Ellickson, *Remarks in Time, Property Rights, and the Common Law* (Round Table Discussion), 64 *WASH. U.L.Q.* 793, 796 (1986) (suspecting that "most of us" law-and-economics scholars are utilitarians at bottom). Posner describes welfare economics as often equated with utilitarianism, but he attempts to dissociate himself at least from the classical version of utilitarianism by embracing "wealth" rather than "utility" as the ethical maximand. See R. POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 38, at 44-88. On the relationship of economics to utilitarianism, see I.M.D. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* 6-14 (2d ed. 1957), and Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 *ETHICS* 649 (1984).

Some theorists whose views tend toward universal commodification see themselves as libertarians, although if pressed, the ethic that drives their analysis seems to be wealth or welfare maximization. See, e.g., J. BUCHANAN, *THE LIMITS OF LIBERTY* (1975); R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 331-50 (1985). Richard Epstein seems to have undergone an odyssey from libertarianism to utilitarianism, passing through a stage in which he tried to embrace both at once. See *infra* note 66. Even a purer kind of libertarian like Robert Nozick tends toward commodification, although Nozickian libertarianism lacks the pervasive rhetoric of monetary cost-benefit analysis and rejects welfare economics. Nozick's first premise is that people have Lockean rights, but for him justice seems to require that these rights all be voluntarily exchangeable. In fact, Nozick's conception of ideal justice, consisting of a theory of just acquisition and a theory of just transfer, is simply the infrastructure of the market: private property plus free contract. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-53 (1974); *cf. infra* p. 1888.

The archetype I characterize as universal commodification is different from mere consequentialism or mere utilitarianism. Consequentialism is a very broad description for the idea of identifying good and bad by results; of course it is possible to do this without making monetization or market trading central to the scheme. Although some utilitarians may be close to universal commodification, others define individual and aggregate social value as utility or welfare maximization without supposing utility to be intrinsically characterizable in money terms and without supposing interpersonal comparisons to be possible. See generally A. SEN, *CHOICE, WELFARE AND MEASUREMENT* (1982). This type of utilitarianism lacks the aspect of fungibility that characterizes universal commodification; economists who accept the possibility of judgments calculating Kaldor-Hicks efficiency are closer to universal commodification than those who do not. See, e.g., R. POSNER, *supra* note 8, at 12-15. Utilitarianism without interpersonal comparisons also tends toward universal commodification, however, because it tends to conceive of the person as an empty receptacle for undifferentiated welfare to be obtained by satisfying preferences, or for interchangeable (although unmonetized) subjective "utils." See *infra* pp. 1884-85.

n49 Posner argues that, but for the costs of implementing a property system, value would be maximized if everything scarce and desired were ownable and salable; he also argues that we ought to act so as to maximize value (wealth). See *supra* note 38. Thus, everything scarce and desirable ought to be ownable and salable.

n50 Posner, *An Economic Theory of the Criminal Law*, 85 *COLUM. L. REV.* 1193, 1199 (1985). The reference to the market for sex and

marriage includes scare quotes presumably only because the market is implicit rather than explicit. Posner says that the purpose of the passage in which this statement occurs is "to point out that economic analysis need not break down in the face of such apparently noneconomic phenomena as rape." *Id.* As another example of Posner's market rhetoric, consider the passages on baby-selling quoted in note 8 above and note 51 below.

n51 See Landes & Posner, *supra* note 8. In their article, Landes and Posner speculate on "the possibility of taking some tentative and reversible steps toward a free baby market in order to determine experimentally the social costs and benefits of using the market in this area." *Id.* at 347; accord R. POSNER, *supra* note 8, at 139-43. In his book, Posner states that "[t]he baby shortage would be considered an intolerable example of market failure if the commodity were telephones rather than babies." *Id.* at 139. He "examine[s] in a scientific spirit the objections to permitting the sale of babies for adoption," *id.* at 141, and finds them all to be unpersuasive. For example, he argues:

Opponents of the market approach also argue that the rich would end up with all the babies, or at least all the good babies. . . . Such a result might of course be in the children's best interest, but it is unlikely to materialize. Because people with high incomes tend to have high opportunity costs of time, the wealthy usually have smaller families than the poor. Permitting babies to be sold would not change this situation. Moreover, the total demand for children on the part of wealthy childless couples must be very small in relation to the supply of children, even high-quality children, that would be generated in a system where there were economic incentives to produce children for purchase by childless couples.

Id. at 142. Posner goes on to say that the poor may actually do better in a free baby market than under present adoption law, because "[p]eople who might flunk the agencies' criteria on economic grounds might, in a free market with low prices, be able to adopt children, just as poor people are able to buy color television sets." *Id.* at 143. Posner has recently said, however, that he "did not advocate a free market in babies." Posner, *Mischaracterized Views*, 69 JUDICATURE 321 (1986).

n52 See Calabresi & Melamed, *supra* note 3, at 1111-15.

n53 See, e.g., Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985); Rose-Ackerman, *supra* note 10; see also pp. 1867-70.

n54 See Calabresi & Melamed, *supra* note 3, at 1106-10. Although they do not elaborate the point, Calabresi and Melamed think that the same regime is justified from a libertarian point of view. Property rules best satisfy libertarian concerns, because they generally require the least state intervention, but liability rules might serve libertarian interests better in certain circumstances, for example where property rules are especially difficult to enforce. See *id.* at 1092 n.7. Such a convergence of efficiency and liberty is often noted by those who tend toward universal commodification. See *supra* note 48.

n55 See Calabresi & Melamed, *supra* note 3, at 1092 ("An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.").

n56 *Id.* at 1111.

n57 *Id.* at 1112.

n58 If the authors mean that "Marshall" is made unhappy by "Taney's" death, and that this is a reason to make kidneys inalienable, they fail to recognize our moral approval of kidney-giving. If they mean that "Marshall" is made unhappy only by death after kidney-selling, on the other hand, and that this is a reason to make kidneys inalienable, they are postulating a "moralism" that distinguishes between gifts and sales in a way that market rhetoric cannot. Because they define inalienability as nonsalability, their theoretical apparatus cannot distinguish market-inalienability from other kinds, and hence ignores the moral distinction between gift and sale.

n59 In addition to the two categories of external costs, the reasons Calabresi and Melamed adduce for the existence of inalienability in an otherwise free market system include two categories of paternalism, and "distributional goals." *See id.* at 1113-15. Their paternalistic reasons for inalienability are characterized (surprisingly) as efficiency reasons. In "self-paternalism," the individual furthers her own long-run welfare maximization by forbidding herself certain contrary transactions in the short-run; the classic illustration of this is Ulysses tying himself to the mast to avoid succumbing to the Sirens. *See id.* at 1113. In "true paternalism," "the most efficient pie is no longer that which costless bargains would achieve, because a person may be better off if he is prohibited from bargaining." *Id.* at 1114. The examples the authors have in mind are prohibitions of certain activities by minors. They state that true paternalism, unlike the situations involving "moralisms," involves "the notion that at least in some situations the Marshalls know better than Taney what will make Taney better off." *Id.* at 1113. It is hard to understand how, consistent with the moral subjectivism revealed in the discussion of "moralisms" as external costs, the authors can make sense of the notion that the person under a prohibition would be "better off" in some view other than her own. Thus, their paternalism-efficiency argument may collapse into their moralism-externality argument. By imposing paternalistic restraints, we are benefiting those people whose subjective moral beliefs include the "knowledge" that others would be better off if restrained, and who attach subjective value to seeing them better off. (Perhaps the argument can be saved from this collapse by supposing that in appropriate situations, such as restraining minors, we can confidently predict that the person herself will eventually come to realize she is better off.) *See infra* note 189.

In showing how "distributional goals" bear on inalienability, Calabresi and Melamed suggest that we should be on guard against the "danger . . . that what is justified on, for example, paternalism grounds is really a hidden way of accruing distributional benefits for a group whom we would not otherwise wish to benefit." *Id.* at 1115. Thus, "prohibiting the sale of babies makes poorer those who can cheaply produce babies and richer those who through some nonmarket device get free an 'unwanted' baby." *Id.* at 1114. Although this argument is directed toward distribution rather than efficiency, it speaks in the rhetoric of universal commodification: one is "poorer" if she cannot sell a baby she can "cheaply produce."

The commitment to market rhetoric in fact seems to have made it difficult for Calabresi and Melamed to talk about "other justice reasons" relevant to entitlements:

[W]e may as well admit that it is hard to know what content can be poured into ["other justice reasons"], at least given the very broad definitions of economic efficiency and distributional goals that we have used. . . . We defined distribution as covering *all* the reasons, other than efficiency, on the basis of which we might prefer to make Taney *wealthier* than Marshall. So defined, there obviously was no room for any other reasons.

Id. at 1102, 1104 (emphasis in original). Calabresi has since made it clear that he does not embrace universal market rhetoric:

We could speak about all that we do in law using only "justice" or "rights" language. We could instead speak of all that we do using only "scientific policy-making" language, as if everything involved costs and benefits. Or we could use both languages The question is, which language highlights the similarity among those things which we tend to trade off against each other readily . . . and separates out those things as to which we wish to make trade-offs only more rarely or perhaps not at all? In other words, we should use the language which allows us to put together those things which we want to talk about together. . . . To translate from one language to another is to betray. That is the translation, and the betrayal, of an Italian saying: "*Traduttore, traditore.*" What I am suggesting to you is that the use of economic language to describe part of law is terribly useful. And it is even useful, occasionally, to play as if one could use economic language across all of law, but only so long as one does not get confused about the fact that the real trade-offs in meaningful areas are not on a one to one basis. And that is why, most of the time, it is better to limit the use of economic language to those issues in law where simple trade-offs *are* likely.

Calabresi, *Thoughts on the Future of Economics in Legal Education*, 33 J. LEGAL EDUC. 359, 363-64 (1983) (emphasis in original). It seems fair to infer that Calabresi would now disapprove of market rhetoric to consider the legal or moral treatment of baby-selling, as in the passage quoted above, or to consider the treatment of rape, which I discuss at pp. 1879-81 below.

n60 Epstein, *supra* note 53, at 990. According to Epstein, "[r]ules restraining alienation are best accounted for, both positively and normatively, by the need to control problems of external harm and the common pool." *Id.* at 970. Epstein's common pool argument is about costs that arise when a resource must be shared. It is in fact a variant of the tragedy of the commons. See Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Like the argument for the tragedy of the commons, Epstein's argument assumes that, absent restraint, people will maximize individual short-run gain to the ultimate degradation of a resource. See Epstein, *supra* note 53, at 978.

n61 See Epstein, *supra* note 53, at 971.

n62 Epstein's argument about external harm is akin to Calabresi and Melamed's arguments about external costs and efficiency-based paternalism. See *supra* note 59. The external harms he mentions fall into three categories: aggression against third parties, overexploitation of the common pool, and exploitation of infants and insane persons. The primary examples of inalienability Epstein has in mind are prohibitions: guns, liquor, and drugs. He speaks of them as restrictions or bans on sales, but the logic of the argument extends to gifts and to possession and use as well. The distinctions between market-inalienabilities and other kinds are not noticeable when everything is thought of as part of the market.

In Epstein's view, restraints voluntarily imposed by individual bargaining are presumptively efficient. Restraints imposed by law are to be regarded much more warily, but his common pool argument can justify a few of them. See *supra* note 60. As examples of common pool types of restraints imposed by law rather than individual bargaining, Epstein mentions water rights and voting rights in corporate and political elections. See Epstein, *supra* note 53, at 979-82, 984-88; *infra* note 64. Under universal commodification, of course, these are not qualitatively different kinds of "goods." Epstein sees the English common law of riparian rights, which tied water rights to land rights and limited water rights to uses that did not disturb the natural flow, as steering between two extremes: inefficiencies caused by free alienability (the tragedy of the commons), see *supra* note 60, and inefficiencies caused by permanent entitlement of users who do not value highly the resource (which might be called inefficiencies of status). See Epstein, *supra* note 53, at 981. In effect he is proposing that a properly tailored status-inalienability, see *supra* note 20, is a cure (or a palliative) for the tragedy of the commons.

n63 See Epstein, *supra* note 53, at 988.

n64 To see the extent of Epstein's market rhetoric, consider his opinion that the most likely motive for buying votes "is to obtain control of the public machinery, in ways that allow a person to recover, at the very least, the money that was paid out to the individuals who sold their votes, with something left to compensate the buyer for the labor and entrepreneurial risk." *Id.* at 987-88. Someone whose rhetoric is less thoroughly market-oriented might surely conceive the motive for buying votes to be advancing one's unmonetized political, social, religious, or moral ideas.

n65 See *supra* note 46.

n66 See Epstein, *supra* note 53, at 971. In earlier work, Epstein stressed libertarian rights. See, e.g., Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979). Recently he claimed that libertarian rights and utilitarian reasoning lead to the same institutional rules. See, e.g., Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667 (1986); Epstein, Remarks in *Time, Property Rights, and the Common Law* (Round Table Discussion), 64 WASH. U.L.Q. 793, 793 (1986) ("[M]y long-term campaign . . . is to explain why libertarian rules are the first approximation of a decent set of rights in the utilitarian world."). Robert Ellickson and I demonstrate that it is not as easy as Epstein claims to be simultaneously a libertarian and a utilitarian. See Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, *supra* note 48, at 737; Radin, *Time, Possession and*

Alienation, 64 WASH. U.L.Q. 739, 743-45 (1986). Most recently, Epstein seems to affirm that his foundational normative principle is indeed efficiency and not libertarian natural rights. He says, for example, that the traditionally recognized natural rights evolved instrumentally to serve efficiency before people were able to theorize explicitly about efficiency. See Remarks of Richard Epstein, in *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 125-27 (1986).

n67 See Rose-Ackerman, *supra* note 10, at 931. Rose-Ackerman recognizes that the Calabresi-Melamed definition of inalienability, *see supra* note 55, refers only to nonsalability (in my terms, market-inalienability), and she recognizes that the reason for this narrowness is that their "treatment of inalienability is colored by [the] emphasis on quid pro quo transfers," Rose-Ackerman, *supra* note 10, at 932, that forms the basis of their treatment of property rules and liability rules. Rose-Ackerman posits a many-celled matrix of inalienabilities, representing all possible combinations of three variables: limits on who may hold an entitlement; limits on uses of it (uses that are permitted, required, or forbidden); and limits on transfers (what kinds of transfers are permitted or forbidden). Even though she distinguishes 96 varieties of inalienability, her matrix does not distinguish among the various types of losses, such as abandonment, forfeiture, and cancellation, *see supra* pp. 1852-53, that inalienability might prevent. She appears to concentrate on transfers just as Calabresi and Melamed concentrate on quid pro quo transfers. Indeed, she gives the name "pure inalienability" to nontransferability. See Rose-Ackerman, *supra* note 10, at 935. The main problem with her approach, however, is a normative flatness. Because some types of inalienability that occupy cells in the matrix occur infrequently or not at all in our legal and moral culture, and others are very salient, the matrix tends to obscure the fact that some types of inalienability carry broad normative implications, whereas some are less significant and some are mere logical permutations. In her taxonomy, for example, "modified inalienability," in which sales are forbidden and gifts are permitted -- market-inalienability -- is the exact counterpart of "modified property," in which sales are permitted and gifts are forbidden. See *id.* at 935, 942-51. In addition, sixteen cells are occupied by various kinds of complete use restrictions, in which "nothing is permitted," and in four of these cases "no one" may hold the entitlement. See *id.* at 933-34.

n68 Rose-Ackerman, *supra* note 10, at 932-33.

n69 See *id.* at 932.

n70 See *id.* at 938.

n71 " If policymakers wish to benefit a particular sort of person but cannot easily identify these people ex ante, they may be able to impose restrictions on the entitlement that are less onerous for the worthy group than for others who are nominally eligible." *Id.* at 940. For example, Rose-Ackerman suggests that the Homesteading Acts can be justified as a means of transferring land to formerly landless people willing to live on the land and farm it. See *id.*

n72 *Id.* at 942, 948-49.

n73 See *id.* at 941.

n74 Rose-Ackerman's conclusion that "it is generally possible to conceive of an alternative policy that would be superior [to inalienability] if transaction costs were lower," *id.* at 969, seems to indicate that efficiency -- even if it is efficiency in achieving aims that are "distributive" -- is her main concern. To this conclusion there is a "major exception" involving the "ideal of citizenship, where insulation from market forces may be desirable in principle." *Id.*

n75 *Id.* at 931.

n76 *See supra* note 74.

n77 Rose-Ackerman describes four conceptions of the duties of citizens, each associated with a different form of inalienability. *See* Rose-Ackerman, *supra* note 10, at 961-68. Under the "strong" conception, represented by inalienable duties, "the state requires certain actions of some or all citizens and forbids the transfer of these duties to others." *Id.* at 966. Under the "weakest" conception, represented by alienable property rights, "citizenship services" are obtained under a market regime. Votes can be sold or given away, and jurors and soldiers are paid volunteers. *See id.* at 962. Under inalienable rights, citizenship rights (like voting) are nontransferable, but there is no duty to exercise them. *See id.* at 966. Under alienable duties, "people are assigned duties by the state" but can pay or persuade others to perform them. *Id.* at 967. Rose-Ackerman hints that she would consider distribution as well as efficiency in selecting one of these conceptions of citizenship, noting that it would be unacceptable to have the rich end up with most of the votes. *See id.* at 963. She hints at an ethical case for the inalienable duty conception of citizenship, but she puts it in market rhetoric: this conception of the military draft, or jury service, treats these duties as responsibilities of citizenship, but "it is clearly more costly for society as a whole since some people with high opportunity wages in the private sector . . . will be called." *Id.* at 967. In general, Rose-Ackerman's matrix demonstrates the liberal positivist conception of the state as creating or granting whatever rights and duties citizens have. Under all "conceptions" of citizenship the state and its citizens are radically separate. In my view, her adherence to market rhetoric, her failure to provide a normative structure for determining when distribution trumps efficiency, and her individualist positivism combine to weaken her third normative rationale for inalienability, in which she finds market processes sometimes incompatible with democratic functioning. Nonetheless, she raises a question that is important to pursue. I believe further investigation of it must explore the notion of community-inalienability. *See supra* note 21.

n78 This question is taken up in Section B of Part III below.

n79 This is the link between rhetoric and the world that I suggest (in Section B of this Part) can be taken seriously even outside the context of the worldview of complete noncommodification. The suggestion that market transactions (for example, in sexual services or children) might engender a domino effect in rhetoric that leaves everyone unable to conceive of possible nonmarket alternatives is one way this normative view of rhetoric will figure in my evolutionary pluralist view. *See infra* pp. 1912-14.

n80 For discussion of Marx's early and later treatment of alienation and its relationship to commodification, see S. AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 96-123 (1968), and A. GOULDNER, *THE TWO MARXISMS* 177-220 (1980).

n81 Marx, *Economic and Philosophic Manuscripts of 1844*, in *THE MARX-ENGELS READER* 70 (R. Tucker 2d ed. 1984) [hereinafter *THE MARX-ENGELS READER*].

n82 *Id.* at 71 (emphasis in original).

n83 This Marxist view should be contrasted with the traditional view that the market brings about better human beings. Albert O. Hirschman reviews the strand of traditional thought holding that the growth of the market was a civilizing and humanizing force in society -- the "*doux-commerce*" thesis prevalent in the eighteenth century -- and contrasts it with other traditional views. See Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LITERATURE 1463, 1483 (1982). In the current trend toward recognizing the importance of long-term relational contracts, Hirschman detects the possibility that "[t]he stage could thus be best set for a partial rehabilitation of the '*doux-commerce*' thesis," *id.* at 1474, whereas anticommodifiers or critical pluralists would see instead an evolutionary trend toward decommodification, cf. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565.

n84 Marx, *The German Ideology: Part I*, in THE MARX-ENGELS READER, *supra* note 81, at 193. The revolution is necessary "not only because the *ruling* class cannot be overthrown in any other way, but also because the class *overthrowing* it can only in a revolution succeed in ridding itself of all the muck of ages and become fitted to found society anew." *Id.* (emphasis in original).

n85 See 1 K. MARX, CAPITAL, 71-83 (F. Engels ed. 1894, S. Moore & E. Aveling trans. 1984); cf. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy of the Law"*, 11 LAW & SOC'Y REV. 571, 573-75 (1977) (expounding Marx's theory of the fetishism of commodities).

Thoroughgoing reification, with its ramifications for the disempowerment of human beings, is the classical meaning of commodity fetishism. See *infra* pp. 1873-74. There are other meanings as well. One refers to the surface phenomenon of rampant consumerism or crass devotion to material possessions. To be a commodity fetishist in this newer and less technical sense is simply to have one's identity too tied to possessions, to be too dependent upon thing-ownership for pleasure and a sense of self-worth. This meaning does not correspond to commodity fetishism in the classical Marxist sense because it does not refer specifically to the nature of the things possessed as capitalist market trade artifacts. Nevertheless, it is a form of fetishism (projection onto objects), and it is certainly compatible with some Marxist views of the world. Another meaning is what Fred Hirsch calls "the new commodity fetishism," the idea that "an excessive proportion of individual activity is channeled through the market so that the commercialized sector of our lives is unduly large." F. HIRSCH, SOCIAL LIMITS TO GROWTH 84 (1976). This "new commodity fetishism" sticks to the technical meaning of "commodity" and is thus different from the common-sense view I have just described, which is more truly "fetishist." It is also apparently pluralist, not Marxist.

n86 What we now call market value, Marx thought of as "exchange value," which he contrasted with "use value" (the worth of something to consumers) and "value" (the amount of labor socially necessary to produce something). See 1 K. MARX, *supra* note 85, at 84-93. For explication and criticism of Marx's theories of value, see, for example, Cohen, *Labor, Leisure, and a Distinctive Contradiction of Advanced Capitalism*, in MARKETS AND MORALS, cited in note 29 above, at 107, and J. ELSTER, MAKING SENSE OF MARX 119-65 (1985).

n87 1 K. MARX, *supra* note 85, at 79; cf. Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (arguing that "market oriented liberty" -- as opposed to individual liberty defined as self-determination and self-realization -- is not conducive to the autonomy of either producers or consumers).

n88 G. LUKACS, *Reification and the Consciousness of the Proletariat*, in HISTORY AND CLASS-CONSCIOUSNESS 83 (R. Livingstone

trans. 1971). Lukacs thought it might justifiably be claimed that Marx's "chapter dealing with the fetish character of the commodity contains within itself the whole of historical materialism," *id.* at 170, and that we can "gain an understanding of the whole of bourgeois society from its commodity structure," *id.* at 198.

n89 *See id.* at 88-92. "Rationalization" is Max Weber's term for the development of the economic system toward achieving ever greater profit at less cost. *See, e.g.,* A. KRONMAN, MAX WEBER 130-37 (discussing the formal rationality of economic action).

n90 G. LUKACS, *supra* note 88, at 91.

n91 Lukacs argued:

The transformation of the commodity relation into a thing of "ghostly objectivity" cannot therefore content itself with the reduction of all objects for the gratification of human needs to commodities. It stamps its imprint upon the whole consciousness of man; his qualities and abilities are no longer an organic part of his personality, they are things which he can "own" or "dispose of" like the various objects of the external world. And there is no natural form in which human relations can be cast, no way in which man can bring his physical and psychic "qualities" into play without their being subjected increasingly to this reifying process.

Id. at 100.

n92 In reified bourgeois thought, "facts" are the highest form of fetishism:

[I]n the "facts" we find the crystallisation of the essence of capitalist development into an ossified, impenetrable thing alienated from man. And the form assumed by this ossification and this alienation converts it into a foundation of reality and of philosophy that is perfectly self-evident and immune from every doubt. . . . Thus only when the theoretical primacy of the "facts" has been broken, only when *every phenomenon is recognised to be a process*, will it be understood that . . . the facts are nothing but the parts, the *aspects* of the total process that have been broken off, artificially isolated and ossified.

Id. at 184 (emphasis in original).

n93 *Id.* at 116.

n94 *See id.* at 114-17.

n95 " Only by conceiving of thought as a form of reality, as a factor in the total process can philosophy overcome its own rigidity dialectically and take on the quality of Becoming." *Id.* at 203 (footnote omitted). Lukacs warned against conceiving of the link between thought and reality in a way that reintroduces foundationalism:

It is true that reality is the criterion for the correctness of thought. But reality is not, it becomes -- and to become the participation of thought is needed. . . .

Thus thought and existence are not identical in the sense that they "correspond" to each other, or "reflect" each other, that they "run parallel" to each other or "coincide" with each other (all expressions that conceal a rigid duality). Their identity is that they are aspects of one and the same real historical and dialectical process.

Id. at 204.

n96 *See supra* p. 1863.

n97 If the means-ends distinction is denied, the transition never ends. Transition, or the seeking of ideals that we formulate and yet see as beyond us, is then the central feature of political life. *See, e.g.,* R. UNGER, KNOWLEDGE AND POLITICS (1975); Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982); Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

n98 The problem of transition from an evolutionary point of view will be considered in Part IV when I turn to an examination of pluralism.

n99 *See* Abel, *A Critique of American Tort Law*, 8 BRITISH J. L. & SOC'Y 199, 207-09 (1981); Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982); Abel, *Torts*, in THE POLITICS OF LAW 185 (D. Kairys ed. 1982).

n100 *See* Abel, *A Critique of American Tort Law*, *supra* note 99, at 201-02.

n101 *Id.* at 207. For a case that commodifies more explicitly than most, see *Sherrod v. Berry*, 629 F. Supp. 159, 163 (N.D. Ill. 1985), in which an economist was allowed to testify that the hedonic value of a human life is "somewhere in the dimension of three times up to 30 times [the person's] economic productive income." *Cf.* L. HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 62-66 (discussing the *Pinto* case, in which Ford Motor Company used cost-benefit analysis to weigh the costs of injury and death against the costs of an \$ 11 safety device that would have prevented the *Pintos'* gas tanks from exploding).

n102 Abel, *A Critique of American Tort Law*, *supra* note 99, at 208 (footnote omitted).

n103 *See id.* at 207.

n104 This slogan seems to have been popularized by Samuel Hayakawa. *See* S. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 24-25 (4th ed. 1978). It, along with a companion "extensionalist" slogan, "A map is not the territory," apparently stem from the work of Alfred Korzybski. *See, e.g.,* A. KORZYBSKI, SCIENCE AND SANITY 750 (4th ed. 1958).

n105 A similar point is made by Brian Barry in his discussion of what he perceives to be a shift from consequentialist to nonconsequentialist theories of ethics. "In principle, it is possible to imagine that you could reach the same concrete judgments starting from either point, but in practice it tends to make a big difference which cases you take as clear and central and which as difficult and exceptional." Barry, Book Review, 88 YALE L.J. 629, 630 (1979). Although Barry does not give illustrations, an example might be the justification of punishment. For utilitarian deterrence theorists, deciding whether to punish strict liability or *malum prohibitum* offenses does not cause problems, but deciding whether to punish innocent people or undeterrable offenses requires fancy footwork. For deontological retributivist theorists, the situation is reversed.

n106 See, e.g., Baker, *supra* note 44; Kennedy, *supra* note 44.

n107 For example, a typical economic analysis can be found in Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604 (1984).

n108 See *supra* note 50 and accompanying text.

n109 R. POSNER, *supra* note 8, at 202. In the passage in which this sentence appears, Posner examines the argument that rape should not be punished criminally if there is "no market substitute for rape" because the rapist "derives extra pleasure from the coercive character of his act." (Presumably, the "market substitutes" would be marriage, dating, and prostitution.) Posner finds the argument "weak" -- and is thus able to conclude that rape should be punished criminally -- for three reasons: protecting the marriage market and property rights in women's persons; avoiding "wasteful expenditures" on protecting women and on overcoming the protections; and "the fact that the rapist cannot find a consensual substitute does not mean that he values the rape more than the victim disvalues it." *Id.*

n110 See Calabresi & Melamed, *supra* note 3, at 1124-27 (applying their framework to criminal sanctions).

n111 See *id.* at 1125-27.

n112 *Id.* at 1126.

n113 Although Calabresi and Melamed have a strong tendency to talk in monetized efficiency terms, there is a hint of pluralism in this passage, which must be quoted at some length in order to convey the rhetorical flavor:

The question remains, however, why *not* convert all property rules into liability rules? The answer is, of course, obvious. Liability

rules represent only an approximation of the value of the object to its original owner and willingness to pay such an approximate value is no indication that it is worth more to the thief than to the owner. . . . If this is so with property, it is all the more so with bodily integrity, and we would not presume collectively and objectively to value the cost of a rape to a victim against the benefit to the rapist even if economic efficiency is our sole motive. Indeed when we approach bodily integrity we are getting close to areas where we do not let the entitlement be sold at all and where economic efficiency enters in, if at all, in a more complex way. . . .

The first year student might push on, however, and ask why we treat the thief or rapist differently from the injurer in an auto accident or the polluter in a nuisance case. Why do we allow liability rules there? In a sense, we have already answered the question. The only level at which, before the accident, the driver can negotiate for the value of what he might take from his potential victim is one at which transactions are too costly. The thief or rapist, on the other hand, could have negotiated without undue expense (at least if the good was one which we allowed to be sold at all) because we assume he knew what he was going to do and to whom he would do it.

Id. at 1125-27 (emphasis in original). Recall that Calabresi and Melamed also hint at pluralism in their mention of "other justice reasons" for setting entitlements, but they find it difficult to flesh out this idea, in my view because of their commitment to market rhetoric in that article. It should be noted that Calabresi has modified his views and probably no longer conceives of rape in market rhetoric. *See supra* note 59.

n114 Calabresi and Melamed's discussion of crimes against property and bodily integrity conceives of them as exactly parallel but for the concession quoted in note 113 above. Note also that a tendency toward universal commodification results from their use of market rhetoric: all scarce and desired resources are "goods." Calabresi and Melamed argue that "an entitlement to a good or to its converse is essentially inevitable. . . . We either have the right to our own property or body or the right to share others' property or body. We may buy or sell ourselves into the opposite position, but we must start somewhere." Calabresi & Melamed, *supra* note 3, at 1100-01 (footnotes omitted). And all these goods seem to have associated monetized costs and benefits: "Any entitlement given away free implies a converse which must be paid for. For all those who like children, there are those who are disturbed by children; for all those who detest armies, there are those who want what armies accomplish." *Id.* at 1099 n.23.

n115 In Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982), I suggest that property may be divided into fungible and personal categories for purposes of moral evaluation. Property is personal in a philosophical sense when it has become identified with a person, with her self-constitution and self-development in the context of her environment. Personal property cannot be taken away and replaced with money or other things without harm to the person -- to her identity and existence. In a sense, personal property becomes a personal attribute. On the other hand, property is fungible when there is no such personal attachment. *See id.* at 959-61, 978-79, 986-88.

n116 Thus, fungible objects are commodified: trading them is like trading money. Personal things are not commodified (or have been decommodified by assimilation into the person); the effect of detaching them from the person is nonmonetizable.

n117 The distinction between fungible and personal property is intended to distinguish between, on the one hand, things that are really "objects" in the sense of being "outside" the person, indifferent to personal constitution and continuity, and on the other hand, things that have become at least partly "inside" the person, involved with one's continuing personhood. The traditional subject/object dichotomy makes the notion of personal property hard to grasp, *see infra* pp. 1892-98, and, in the present context, poses a danger. To analogize bodily integrity to personal property may simply reintroduce the suggestion inherent in market rhetoric that I am trying to argue against: the suggestion that bodily integrity is somehow an owned object separate from personhood, rather than an inseparable attribute of personhood.

n118 This should not be understood to argue that someone who is raped is changed into a completely different person. To assert either that she is altogether the "same" afterwards or that she is completely "different" afterwards would trivialize her experience: we must have a way of conceptualizing our understanding both that she is different afterwards, so that we recognize that she has been changed by the experience, and simultaneously that she is the same afterwards, or else there would be no "she" that we can recognize to have had the experience and been changed by it. Just as personal attributes should not be seen as separate from an abstract self, neither should our experiences be seen as

separate from ourselves.

n119 The intuitive view outlined here can be deepened by an understanding of the unsatisfactory view of personhood underlying universal commodification, and by an understanding of the role of the subject/object dichotomy in the ideological heritage of liberal pluralism. After considering these matters, *see infra* pp. 1884-85, 1892-98, I return to the problem of what is wrong with conceiving of bodily integrity in market rhetoric at pp. 1907-09 below.

n120 Antifoundationalism denies that rationality or truth consists of linear deductions from an unquestioned foundational reality or truth. Coherence theories stress holistic interdependence of an entire body of beliefs and commitments; they judge truth or rightness by fit, not by correspondence with an external foundational standard. For example, Rawls's "reflective equilibrium" is a moral methodology based on coherence, *see* J. RAWLS, *A THEORY OF JUSTICE* 48-51 (1971); and Quine's "field of force" is a metaphor for the coherence view of metaphysics, *see* W.V.O. QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20, 42 (2d ed. 1980). As Quine recognized, the coherence view tends toward pragmatism. *See id.* at 42-46. In my view, the need to reevaluate reality and truth in light of the rejection of foundationalism stems from the revolution wrought by Wittgenstein and Kuhn. *See* L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1958); T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). In a famous example, Kuhn suggests that "the scientist who looks at a swinging stone can have no experience that is in principle more elementary than seeing a pendulum. The alternative is not some hypothetical 'fixed' vision, but vision through another paradigm, one which makes the swinging stone something else." *Id.* at 128.

Hermeneutics, the sociology of knowledge, and perhaps post-structuralism are other thought traditions that converge with coherence theory on the issue of the theory- or discourse-dependence of reality. *See* P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966); J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); H. GADAMER, *TRUTH AND METHOD* (2d ed. 1982); *HERMENEUTICS AND PRAXIS* (R. Hollinger ed. 1985); C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (1982); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); Heller, *Structuralism and Critique*, 36 *STAN. L. REV.* 127 (1984); Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1152 (1985). These thought traditions diverge on the issue of whether discourses can be judged as better or worse, which is one reason I pursue only the antifoundationalist pragmatist view.

n121 The sweeping philosophical implications of rejecting traditional dichotomies between language and reality, and fact and value, may be difficult to imagine. They would infuse and transform our everyday discourse. The vocabulary of our conversation still presupposes certain categories and foundational principles that we are in the process of philosophically rejecting. *See, e.g.*, R. RORTY, *Pragmatism, Relativism, and Irrationalism*, in *CONSEQUENCES OF PRAGMATISM* 160 (1982).

n122 *See* H. PUTNAM, *REASON, TRUTH AND HISTORY* 139-41 (1981). What is at issue both for Putnam and for me is not any kind of directional causal chain, but rather only the coherence of values, facts, and discourse. *See, e.g., id.* at 132-35, 201-03, 215. In other words, the argument is that the world is holistic and that these matters are all interdependent. Changes anywhere will lead to changes everywhere. Universal commodification presupposes, as well as leads to, an inferior conception of human flourishing. Putnam is interested in dissolving the fact/value dichotomy, whereas I am interested in establishing that rhetoric is implicated in our facts-and-values. I believe Putnam makes this point, using the term "conceptual schemes" rather than discourse or rhetoric, although he does not stress it. Hence, I believe my position to be substantially similar to his, although different in emphasis.

n123 *See id.* at 139-40. This term, referring to the aggregate level of satisfaction or pleasure, derives from the use of a hedonic calculus (like Bentham's) to judge the good.

n124 *Id.* at 140. Extreme utilitarians ("super-Benthamites") would in fact be led to argue for punishment of innocent people on consequentialist grounds. *Cf.* Smart, *Extreme and Restricted Utilitarianism*, 6 PHIL. Q. 344 (1956). But because we are *not* super-Benthamites, the idea of punishment of the innocent has instead been an embarrassment for utilitarianism, a problem it must solve. *See* Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

n125 H. PUTNAM, *supra* note 122, at 141.

n126 *See id.* at 140.

n127 *Id.* at 141 (first emphasis added, second emphasis in original).

n128 *Id.* at 141. As Putnam reminds us, giving normative weight in this way to conceptions of human flourishing, *eudaemonia*, is a form of neo-Aristotelianism. *See id.* at 148. Other theorists who are pursuing normative conceptions of human nature or flourishing are Alasdair MacIntyre, *see* A. MacINTYRE, *AFTER VIRTUE* (2d ed. 1984), and Roberto Unger, *see* R. UNGER, *PASSION* (1984).

n129 Posner, *supra* note 50, at 1199.

n130 *See* R. POSNER, *supra* note 8, at 202 (quoted in note 109 above).

n131 In order to decide what conception of human flourishing is properly ours, all we can do is reflect on what we now know about human life and choose the best from among the conceptions available to us. *See infra* note 208. Thus, we should not accept a conception of human flourishing that excludes our understanding of politics as (also) community self-determination, excludes our understanding of reproductive capacity as essentially human and personal, and excludes our understanding that the pain of witnessing criminal acts and unjust institutions is not like the price of shoes or snowplows.

n132 *See* M. Radin, *The Rhetoric of Alienation* (unpublished manuscript on file at the Harvard Law School Library).

n133 This conception of the person as an abstract, fungible unit makes us all interchangeable ghosts. It seems -- as we shall see in Part IV -- that something like this ghostly abstract conception of personhood has been popular in liberal political and moral theory for a long time. *Cf. supra* note 91. Nevertheless, I think we are not (and need not be) committed to this conception in the wholehearted way required by universal market rhetoric.

n134 Universal commodification is allied with a narrow view of negative freedom. *See infra* p. 1905. For further discussion of negative freedom, see Section C of Part IV below.

n135 *See supra* pp. 1872-73.

n136 *See infra* pp. 1904-06.

n137 I am 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. Unless we are convinced that pursuing the good is always the province of the government, it is certainly open to us to decide provisionally that certain discourses embody inferior conceptions of human flourishing without endorsing censorship of them. Moreover, even if pursuing the good is a collective duty, tolerance may be a good to be pursued. *Cf.* H. PUTNAM, *supra* note 122, at 49 (arguing that "respect for persons . . . requires that we accord them the right to choose a moral standpoint for themselves").

n138 Hence, a thoughtful pluralist who wishes to remain a liberal will encounter a deep tension. For example, Thomas Scanlon argues:

[I]f what the partisans of pornography are entitled to (and what the restrictors are trying to deny them) is a fair opportunity to influence the sexual mores of the society, then it seems that they, like participants in political speech in the narrow sense, are entitled to at least a certain degree of access even to unwilling audiences.

Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 545-46 (1979). This conclusion might be avoided to some extent, Scanlon argues, if we could determine whether

exposure . . . leads to changes in one's tastes and preferences through a process that is, like subliminal advertising, both outside of one's rational control and quite independent of the relevant grounds for preference, or whether, on the contrary, the exposure to such influences is in fact part of the best way to discover what one really has reason to prefer.

Id. at 547. Scanlon concludes, somewhat obscurely, that there may be grounds for protecting unwilling audiences against exposure to pornography involving violence, torture, or domination, but not against exposure to "mildly unconventional sexual attitudes or practices." *Id.* at 549. The reason given is that for the latter, "it is more plausible to say that discovering how one feels about such matters when accustomed to them is the best way of discovering what attitude towards them one has reason to hold." *Id.*

The argument that even if one likes violence, torture, and domination after being accustomed to them, this is not a *reason* for accepting them, *see id.* at 548, seems to me to be merely a disguised argument for rejecting an inferior conception of human flourishing, and the discourse (pornography) in which it is couched. There is nothing in the argument as explicitly given that would otherwise tell us when growing to like something is a reason to value it and allow it to change one's human world, and when not. Disguising the argument suppresses the dissonance caused by accepting a link between discourse and personhood while trying to remain a liberal.

In contrast, a significant strand of feminist thought 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. *See* Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987); MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985). As this view does not try to retain the indicia of liberalism -- in particular that one must be neutral on what constitutes the good life -- it can be much more explicit about the reason for rejecting this kind of discourse: it reflects an inferior conception of human flourishing and one that is degrading to women. And this view sees no room for tolerance, *cf. supra* note 137, because it holds that a dominant inferior conception of human flourishing is simply preventing women from developing their own self-conception.

n139 That there should be a realm of inalienable "political" rights and a realm of alienable "property" rights seems fundamental to those who hold a traditional world view that divides up the social world into politics and markets. In the realm of politics there are familiar inalienable individual rights like life, liberty, and the pursuit of happiness; there are also autonomy, liberty, and equal respect for persons. In the realm of the market there are alienable property rights and free trade. Karl Polanyi thought this pluralist view to be necessary to the emergence of the full laissez-faire market society: "A self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere. Such a dichotomy is, in effect, merely the restatement, from the point of view of society as a whole, of the existence of a self-regulating market." K. POLANYI, *THE GREAT TRANSFORMATION* 71 (1944).

n140 Kennedy and Michelman refer to the market regime as the "PPFC" regime. See Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 750 (1980).

n141 The common law of restraints on alienation seems to reflect both the conceptualist and the separatist traditions. To strike down restraining conditions because they are said, without more, to be "repugnant to a fee," is merely to say that free alienability is implicit in the concept of the fee simple absolute. See, e.g., *Northwest Real Estate Co. v. Serio*, 156 Md. 229, 234, 114 A. 245, 246 (1929) (holding as repugnant to the fee simple title a clause preventing the property from being sold or rented prior to a designated date without the consent of the grantor). When restraining conditions have been weighed to determine their "reasonableness," alienability is potentially a social variable separate from private ownership. See, e.g., *Wellenkamp v. Bank of Am.*, 21 Cal. 3d 943, 582 P.2d 970, 143 Cal. Rptr. 379, (1978) (holding that a due-on-sale clause in a deed of trust constituted an unreasonable restraint on alienation).

n142 See *infra* pp. 1891-98.

n143 See *infra* pp. 1889-91. One might think of positivist functionalism as a third strategy: property and contract have whatever characteristics we choose to give them in order to accomplish our goals. In this strategy, entitlement and free alienation are justified by more direct reference to the requirements of the free market. It stems from the work of Jeremy Bentham, see J. BENTHAM, *THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE* pt. I, chs. 6-12 (R. Hildreth trans. 1840), and has many intellectual descendants, particularly among economists. Positivist functionalism need not be thought of as a third strategy, however, because it, too, is either conceptualist or separatist. When it is conceptualist, private entitlement and free alienation are understood in what property *means* as well as in what property must be to facilitate the maximization of wealth, welfare, or utility through free exchange. See *infra* note 144. When it is separatist, private entitlement and free alienation are separately justified by their desired consequences. In this Part, I have not thought it necessary to elaborate how the theory of Bentham and his successors tends toward or facilitates universal commodification.

n144 Those who tend toward universal commodification often take this conceptual view. See, e.g., R. EPSTEIN, *supra* note 48; Epstein, *supra* note 53; cf. Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239 (1987) (arguing that Epstein's conceptualism has troublesome consequences for the justification of antidiscrimination rights). But conceptualism is not necessarily linked with the views of those who espouse commodification. Marx's "bourgeois property" is a similar conceptual notion meaning ownership plus free alienability, that is, commodification. See, e.g., K. MARX, *THE COMMUNIST MANIFESTO* (P. Sweezy trans. 1964); Marx, *The German Ideology*, in *THE MARX-ENGELS READER*, *supra* note 81, at 186-93. Marx presumably would not have accepted any view that ownership might be justified if separated from market alienability, since he asserted that bourgeois property could not coexist with other kinds. See 3 K. MARX, *supra* note 85, at 505-19. To consider nonmarket "property" or inalienable "property" seems to be a contradiction both for Mill and for Marx.

n145 J. S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* bk. II, ch. ii, at 218 (W. Ashley ed. 1909).

n146 *Id.* at 220.

n147 *Id.* at 221.

n148 *Id.* bk. III, ch. i, at 208.

N149 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. The sociologist Orlando Patterson argues that there is no intrinsic difference between "property" in the work of slaves, on the one hand, and in the work of employees or of divorced spouses with legally enforced support obligations, on the other. *See* O. PATTERSON, *SLAVERY AND SOCIAL DEATH* 21-27 (1982). Patterson's main point is that slavery is not tied to the notion of property in human beings; it exists under many kinds of social structures that do not include property. For those who wished to affirm the liberal market society and its pervasive property relations, while rejecting slavery, however, distinguishing between market property in human beings' labor and slave property in human beings' labor was crucial. For Hegel's difficulties with the problem of selling oneself into slavery, see p. 1894 below; for Mill's, see pp. 1902-03 below.

n150 The essential principle of property being to assure to all persons what they have produced by their labour and accumulated by their abstinence, this principle cannot apply to what is not the produce of labour, the raw material of the earth. . . . Whenever, in any country, the proprietor . . . ceases to be the improver, political economy has nothing to say in defense of landed property, as there established.

J. S. MILL, *supra* note 145, at 229-30, 231.

n151 For example, from the passage quoted in note 150 above, we might infer that land should not be owned by nonimprovers. The tension between the property rights Mill actually thought could be justified and what he said was required for something even to be property is also evident in Mill's views on bequest. He considered bequest "one of the attributes of property," *see* J. S. MILL, *supra* note 145, at 226-29, but was opposed to unlimited bequest. This seems to contradict both the unlimited right to dispose (for the testator) and the unlimited right to receive (for the devisee or legatee) that Mill asserted are inherent in the concept of property. *See* D. Thompson, *Inheritance and Property Rights* (unpublished manuscript on file at Harvard Law School Library).

n152 Mill thought that land ownership yielded only "qualified" property because its importance and scarcity resulted in a duty of stewardship owed to society by its owners. *See* J. S. MILL, *supra* note 145, at 229-35. He also thought that landed property was less justifiable than property in things created by one's own faculties, *see supra* note 150, and hence gave rise to weaker or fewer rights. He might well have rejected the idea that the bad consequences of allowing land to be exclusively controlled by its owners should be characterized as external costs; he might well have rejected the idea that his qualifications were only exceptions in aid of market results.

n153 In the traditional liberal pluralist picture, the market domain is dominant, large, and is the rule; the nonmarket domain is subordinate, small, and is the exception. Inalienabilities are anomalies in social life, requiring special explanation and justification. This picture concedes much to the market and to commodification. In my view, a more satisfactory pluralism will relinquish conceptualism about property, and then it need not concede that there is any *prima facie* laissez-faire market realm on one side of a metaphorical wall. See Radin, *supra* note 42.

n154 A different kind of separatist strategy, which did not equate transfer of property with contract, was practiced by Hume in the first half of the eighteenth century. Hume's separate chapters on transfer of property and on the obligation of promises reflect his view that the exchanges of services and actions that are the subject of contract are part of the commerce of mankind although not commodities. See D. HUME, A TREATISE OF HUMAN NATURE bk. III, pt. II, § ii, at 484 (*Of the Origin of Justice and Property*), § iii, at 501 (*Of the Rules, which Determine Property*), § iv, at 514 (*Of the Transference of Property by Consent*), § v, at 516 (*Of the Obligation of Promises*) (L. Selby-Bigge 2d ed. 1978) (1740).

For Hume, private property is a convention for the stability of possessions. See *id.* § ii, at 484. But this convention -- to respect others' possessions if they will respect your own -- still leaves the "grand inconvenience" that possessions held by the recognized rules of acquisition are not likely to be in the hands of the most fitting person. See *id.* § iv, at 514. Because to "allow every man to seize by violence what he judges to be fit for him, wou'd [sic] destroy society," justice requires "some medium betwixt a rigid stability, and this changeable and uncertain adjustment." *Id.* This "medium" is the "translation of property by consent," and its necessity is "determined by a plain utility and interest." *Id.* at 514-15. Hume did not bring up any examples of circumstances in which "plain utility and interest" require that something be nontransferable, though reliance on utility and interest does leave this move open. Modern economic analysts are his successors: transaction costs explain or justify some inalienabilities in the world of presumptively alienable property. See *supra* pp. 1863-70.

n155 See I. KANT, *General Introduction to the Metaphysic of Morals*, in THE PHILOSOPHY OF LAW 9, 31-32 (W. Hastie trans. 1887) (1797) ("A PERSON is a Subject who is capable of having actions *imputed* to him. Moral Personality is, therefore, nothing but the Freedom of a rational Being under Moral Laws"); G. HEGEL, PHILOSOPHY OF RIGHT § 41 (T. Knox trans. 1952) ("Personality is the first, still wholly abstract, delineation of the absolute and infinite will."); *id.* § 35 ("The universality of [the] consciously free will is abstract universality, the self-conscious but otherwise contentless and simple relation of itself to itself in its individuality, and from this point of view the subject is a person.").

n156 See I. KANT, *The Science of Right*, in THE PHILOSOPHY OF LAW, *supra* note 155, at 61, 61-67; G. HEGEL, *supra* note 155, §§ 41-71.

n157 See *infra* p. 1893.

n158 G. HEGEL, *supra* note 155, § 65.

n159 What Hegel had in mind here are "personality as such," "universal freedom of will," "ethical life" (community morality), and "religion." *Id.* at § 66. (The term "ethical life" is a translation of Hegel's *Sittlichkeit*, the meaning of which might be better conveyed by "community morality.") These "goods, or rather substantive characteristics," constituting personality itself and the essence of self-consciousness are inalienable. *Id.* Under alienation of the personality itself, Hegel included slavery, serfdom, disqualification from holding property, encumbrances on property, "and so forth." *Id.* § 66R. Superstition, and ceding to someone else full power to direct one's actions or to prescribe duties of conscience or religious truth, "etc.," counted as forbidden alienation of intelligence and rationality, of

morality and religion. *See id.*

n160 Kant and Hegel had similar views on propertization. *See* I. KANT, *supra* note 156, at 62 ("It is possible to have any external object of my Will as Mine. In other words, a Maxim to this effect -- were it to become law -- that any object on which the Will can be exerted must remain objectively in itself *without an owner* . . . is contrary to the Principle of Right." (emphasis in original)); G. HEGEL, *supra* note 155, § 44.

n161 Kant's position was similar to Hegel's. Kant had put the same subject/object problem in starker form:

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 a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.

I. KANT, LECTURES ON ETHICS 165 (L. Infield trans., J. Macmurray rev. ed. 1930). Kant's argument here was in the form of a contradiction, a form of argument that Hegel also used. *See infra* p. 1896. From this contradiction, which seems to rule out voluntary enslavement although Kant did not mention it here, Kant purported to deduce not only that sexual services cannot be marketed, but also that a person is not entitled to sell one of her teeth. *See* I. KANT, *supra*. If nothing else, this deduction can serve as a warning that the internal/external or subject/object distinction does not generate noncontroversial particular consequences.

n162 *See* G. HEGEL, *supra* note 155, § 42 ("What is immediately different from free mind is that which, both for mind and in itself, is the external pure and simple, a thing, something not free, not personal, without rights.")

n163 For Hegel, it is only an "initial" gulf because as *Geist* (mind or spirit) becomes actualized, the wills of persons will become actualized in objects, and objects will be enlivened by the wills of persons. *See* G. HEGEL, *supra* note 155, § 44. For Kant, it is a permanent gulf; although persons (subjects) must control all things (objects) as property in order to be free, their character as subjects and objects is not thereby metamorphosed. *See* I. KANT, *supra* note 156, at 62 (quoted in note 160 above).

n164 G. HEGEL, *supra* note 155, § 67 (emphasis added).

n165 Hegel's argument for intellectual property exhibits a similar difficulty. Hegel thought that the method or medium of expression could externalize mental products and hence render them propertizable. *See id.* § 69. But this is not the same as saying they are a thing external by nature. In general, the concept of intellectual property is difficult to assimilate to the German model of justification of property. In fact, there had seemed to be no place at all for intangible property in Kant's theory of *possessio noumenon*. For Kant, there were only three propertizable external objects of the will: external corporeal things, another's free will in performance of a particular act, and certain status relationships. *See* I. KANT, *supra* note 156, at 64. Hegel followed Kant in relying on the external/internal (or subject/object) distinction, although he disavowed Kant's propertization of the status of wives and children. *See* G. HEGEL, *supra* note 155, §§ 75R, 161A, 175.

n166 *See supra* note 163. For Hegel, the essence of property is just that it is necessary to embody the will and actualize personality:

As *immediate* individuality, a person in making decisions is related to a world of nature directly confronting him, and thus the personality of the will stands over against this world as something subjective. For personality, however, as inherently infinite and universal, the restriction of being only subjective is a contradiction and a nullity. Personality is that which struggles to lift itself above this restriction and to give itself reality, or in other words to claim that external world as its own.

G. HEGEL, *supra* note 155, § 39 (emphasis in original). For a construal of Hegel's theory of property, see Radin, cited in note 115 above, at 971-78.

n167 *See* G. HEGEL, *supra* note 155, § 66R.

n168 Hegel argued that encumbrances on property (probably meaning what we would call restraints upon alienation, like conditions or entails) are themselves a disallowed alienation of substantive personality rights. *See supra* note 159. But note that Hegel thought that a landed aristocracy with entailed estates was most qualified to govern the properly developed state. *See* G. HEGEL, *supra* note 155, §§ 305-307; *cf. id.* § 180R ("In the higher sphere of the state, a right of primogeniture arises together with estates rigidly entailed; it arises, however, not arbitrarily but as the inevitable outcome of the Idea of the state."). In reconceiving pluralism I take the approach not taken by Hegel and argue that close connection to personhood can sometimes justify market-inalienability. *See infra* Part V.

n169 G. HEGEL, *supra* note 155, § 73. Something exists according to its concept (*Begriff*) when it is fully actualized in accord with mind or spirit (*Geist*).

n170 *Id.* § 74.

n171 *Id.* § 71R.

n172 If Hegel's property theory is a picture of the person's relationship with external objects, his contract theory is a picture of the person's relationship with other persons. Since it is a picture of two wills relating to each other in will-containing objects, no wonder Marx saw this kind of contract theory as fetishism. *See* 1 K. MARX, *supra* note 85, at 84-85.

Although Hegel argued that market exchange of property is required for proper self-development, he did not advocate universal commodification. Not only did he argue that certain things (namely, those belonging to substantive personality) were in principle not conceivable as property, but he also argued that family relationships and political relationships (the state) were not in principle conceivable as contract. *See* G. HEGEL, *supra* note 155, § 75R. In the progress of the ethical Idea from abstract to actual, the family and the state are higher spheres than the sphere of abstract right in which private property and free contract belong. *See id.* §§ 75R, 158-169, 261. The sphere of private right is the sphere of civil society (that is, the free market); the fully developed state is not merely an association of individual traders, but also (or rather) an organic entity, the embodiment of community morality, "the actuality of the ethical Idea" and "the actuality of concrete freedom." *See id.* §§ 183R, 257, 260. In these higher spheres, alienability and contract would be transcended by the advancing actualization of *Geist*. But it is open to dispute whether transcendence would mean that property and contract disappear, or that they continue to exist but with new significance. The latter is more likely the correct dialectical interpretation.

n173 G. HEGEL, *supra* note 155, § 66R.

n174 *See id.*

n175 *Id.*

n176 Nevertheless, the distinction and its consequences still seem obvious to some. For a recent discussion of inalienability that relies on an intuitive subject/object distinction, see Barnett, cited in note 4 above, at 195, in which the author states that "rights to possess, use, and control resources external to one's person are (generally) alienable, and . . . the right to possess, use, and control one's person is inalienable."

n177 *See* T. KUHN, *supra* note 120, at 6 (arguing that the adoption of scientific theories has both reflected and transformed "the world within which scientific work was done"); R. RORTY, *supra* note 120.

n178 *See* G. LUKACS, *supra* note 88.

n179 Traditional pluralism posits a bright line or wall between the market and nonmarket realms that is like the bright line dividing persons and things. *See supra* note 153.

n180 *See, e.g.,* Kuflik, *The Inalienability of Autonomy*, 130 PHIL. & PUB. AFF. 271, 296-98 (1984).

n181 *See supra* p. 1885.

n182 In a separatist strategy based upon the internal/external distinction, alienability is connected to situation in the external object realm. *See supra* pp. 1892-93.

n183 *See supra* pp. 1880-81.

n184 *See supra* note 161.

n185 Of course, the subject/object problem could pull in the opposite direction as well. If the bright line ceases to be intuitively obvious, yet one is not yet ready to give up the subject/object dichotomy entirely, one could retreat to a position placing (almost) everything in the subject realm as well as to a position placing (almost) everything in the object realm. Surrounding circumstances have so far rendered universal commodification the more popular philosophical refuge from the incomplete breakdown of the subject/object dichotomy.

n186 "Negative liberty" means roughly the freedom of the individual to be let alone to do whatever she chooses as long as others are not harmed. *See* I. BERLIN, *Two Concepts of Liberty* in *FOUR ESSAYS ON LIBERTY* 122 (1969) ("Political liberty in this sense is simply the area within which a man can act unobstructed by others."); *see also* Skinner, *The Idea of Negative Liberty: Philosophical and Historical Perspectives*, in *PHILOSOPHY IN HISTORY* 193, 197 (R. Rorty, J. Schneewind & Q. Skinner eds. 1984) (defining negative liberty as "the mere nonobstruction of individual agents in the pursuit of their chosen ends"). The positive/negative distinction, which Isaiah Berlin says is traditional, was used by Kant, who referred to the kind of arbitrary freedom of the will that we perceive in the phenomenal realm as negative. Positive freedom, in the noumenal realm, was for Kant identical to action necessitated by universal reason in conformity with moral law. *See* I. KANT, *supra* note 155, at 36. For a criticism of the concept of negative liberty, *see* Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 175 (A. Ryan ed. 1979). For a useful taxonomy of various positive and negative conceptions of freedom, as well as a sophisticated defense of a modified negative view, *see* R. FLATHMAN, *THE PHILOSOPHY AND POLITICS OF FREEDOM* (1987).

n187 Calabresi and Melamed's discussion of inalienability rules illustrates a typical use of the notion of paternalism. *See supra* note 59. Another illustration is Anthony Kronman's treatment of restrictions on alienation as a form of paternalism. *See* Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763 (1983).

n188 As Duncan Kennedy points out, paternalism involves false consciousness. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563, 626-29, 631-49 (1982). The paternalist asserts that the actor has made a mistake about what is best for her and that a third party or the government is in a state of true consciousness and can therefore override her choice. Although Kennedy seeks to rescue it for his own purposes, the term "paternalism" has largely been used as a pejorative by advocates of negative liberty.

n189 Paternalism is particularly anathema to libertarians who are also moral subjectivists. They hold that a person's subjective preferences define her interests and, therefore, that it is nonsensical to claim that anyone else knows better than she does what is good for her. For these libertarians, among whose number are many practitioners of law and economics, the notion of false consciousness is simply incoherent.

Donald Regan argues that paternalism might be justified in some cases by converting the notion of freedom into a teleological principle (maximizing freedom), and that this is still a notion of negative freedom. *See* Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113-17 (R. Sartorius ed. 1983). Regan also proposes a form of justification based upon avoiding harm to someone's later self. This form of justification implicitly relies upon a notion of fostering personhood or self-development that may be inconsistent with negative liberty. An "Argument from Personal Integrity" close to Regan's is embraced in J. KLEINIG, *PATERNALISM* 67-73 (1984), and a similar argument is made by Kronman, cited in note 187 above, at 786-97.

n190 This is a rough restatement of the characteristic idea of negative liberty. *See supra* note 186.

n191 Both Mill and Hegel, at least in certain contexts, thought that alienation of objects is an act partly constitutive of individual freedom. *See supra* p. 1889, 1892. *But cf. infra* note 204.

n192 *See* Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93 (1978).

n193 *See id.* at 120-23.

n194 *See id.* at 120-21.

n195 Feinberg understands "inalienable" to mean prohibition of voluntary relinquishment. *See id.* at 112 ("An *inalienable right* is one that a person cannot give away or dispense with through his own deliberate choice." (emphasis in original)). In order to avoid unnecessary confusion, the discussion in the text substitutes "nonrelinquishable" for Feinberg's use of "inalienable."

n196 *See id.* at 121.

n197 *See id.* at 115-16.

n198 *Id.* at 121.

n199 Whether Feinberg is committed to negative liberty is unstated in the article under consideration, although that seems fairly inferable from his declaration of "doubts about the theory of inalienable rights in any case," *id.* at 94, and his characterization of mandatory rights as "smug paternalism," *id.* at 122, and "offensively demeaning," *id.* at 106. A commitment to negative liberty is clear in J. FEINBERG, HARM TO SELF 62-66 (1986), in which Feinberg distinguishes among autonomy, liberty, and freedom, and defines both liberty and freedom in terms of absence of constraint.

n200 Contrary to the adherents of negative liberty, perhaps it is indeed plausible to attribute some form of positive liberty to the founding fathers. *See* Michelman, *The Supreme Court, 1985 Term -- Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25-31, 47-55, 74 (1986).

n201 J. S. MILL, *On Liberty*, in *THREE ESSAYS* 126 (1975).

n202 *See supra* note 186.

n203 *See, e.g.*, J. FEINBERG, *supra* note 199, at 75-79.

n204 Because Mill insisted so strongly on the inherent alienability of property, *see supra* p. 1889, it is interesting that he elsewhere declared that "the principle of individual liberty is not involved in the doctrine of Free Trade." J. S. MILL, *On Liberty*, *supra* note 201, at 117. Hence, for Mill (unlike modern proponents of negative liberty), individual liberty is not involved in most government regulation of trade in commodities. Most trade restrictions, including restrictions on production, are wrong for Mill not because they violate the producers' liberty but because "they do not really produce the results which it is desired to produce by them." *Id.* They are wrong for utilitarian, not libertarian, reasons. On the other hand, prohibitions, "where the object of the interference is to make it impossible or difficult to obtain a particular commodity," do violate individual liberty, but that of the buyer, not the seller. *Id.* A modern version of this argument is to be found in Baker, *Counting Preferences in Collective Choice Situations*, 25 *UCLA L. REV.* 381 (1978), in which the author defends a distinction between regulation and prohibition that parallels Mill's, and in Baker, cited in note 87 above.

This argument seems to make the existence of a liberty interest depend on the motive with which the restraints are enacted. It also seems to imply that freedom is implicated in acquisition of goods, but not in disposition of them. Recall that in Mill's property discussion, both the right to dispose and the right to acquire were stressed as inherent in the idea of property. *See supra* p. 1889. If freedom is implicated in acquisition rather than disposition of goods, the idea that alienability and negative freedom are identical or necessarily linked is undermined. If freedom is primarily implicated in acquisition, then perhaps we should ask, as Mill did not, whether the would-be slave-owner's freedom instead of (or as well as) the would-be slave's is being violated by prohibiting slavery.

n205 Robert Nozick takes the extreme view: a "free system" will allow an individual "to sell himself into slavery." R. NOZICK, *supra* note 48, at 331.

n206 *See* Demsetz, *supra* note 60, at 348-49; *supra* pp. 1865-66. For the reasons discussed in Section B of Part II above, this is deeply unsatisfactory from the point of view of personhood.

n207 Because my purpose here is to sketch a rough, common understanding rather than to be philosophically precise, I do not attempt to elaborate a complete view of freedom, nor to characterize a distinction between freedom and autonomy, nor to define free will.

n208 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 present views of them seem maddeningly wrong-headed.

Indeed, on a pragmatic understanding there is no one best (in the sense of ultimate and final) view of personhood, at least that we can currently understand; there are only views that we can come to recognize as better than those we have previously held. Thus, I can only seek to have us recognize a better view of personhood, not to formulate the best one. Some pragmatists think that even in the long run there is no "really" best view, whereas others think that there is in principle a "real" limiting concept, a "best" view that evolution progresses toward. Richard Rorty is an example of the more skeptical kind of pragmatist, *see* R. RORTY, *supra* note 120, and Hilary Putnam is an example of the more realist kind, *see* H. PUTNAM, *supra* note 122. John Stick has recently placed the skeptical strain in the tradition of John Dewey and the realist strain in the tradition of Charles S. Peirce. *See* Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 341 n.27 (1986). In this Article, I remain uncommitted to either of these two strains. I do not assert either that there is potentially or in the long run one best concept of human flourishing, or that there is not. Although this is not the place to try to develop a complete metaethics, the problem has always struck me as one that defines the limits of our imagination by posing two possibilities, neither of which we can comfortably affirm. Questions about time and space are analogous: it seems mind-boggling either to affirm that time has been going on forever, or that there was once a first moment; it seems equally mind-boggling either to affirm that space goes on and on, or that it ends somewhere.

n209 *See supra* pp. 1902-03.

n210 *Cf. supra* note 161.

n211 The Kantian person as a fungible unit of free will also is not a person as we know one. *See supra* note 155 and accompanying text. The person of Rawls's original position is also a Kantian unit devoid of most characteristics that situate us and make us human persons. *See* J. RAWLS, *supra* note 120. Rawls, of course, understands that real persons are different from the abstraction, but maintains that the Kantian abstraction is nevertheless appropriate for structuring liberal political and legal institutions. *See* Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 533-35 (1980); Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 232-34 (1985); *cf. supra* p. 1897. Rejecting liberal theories of political equality and the rule of law involves rejecting Kantian abstract personhood. *See, e.g.,* M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); *cf. Baker, Sandel on Rawls*, 134 U. PA. L. REV. 895 (1985).

n212 Roberto Unger may be right in saying that continual transcendence of contexts is one mark of personhood. *See* R. UNGER, *supra* note 128. For a critique of Unger's notion of human nature as self-transformability, *see* R. Garet, *The Critique of Human Nature* (unpublished manuscript on file at Harvard Law School Library). To Unger's vision we must add that, paradoxically, a continuing commitment to contexts is also a mark of personhood. To be a person one must stay the same, but one must also change and develop. One cannot change everything all the time and be a person, nor can one change nothing ever and be a person. But we can recognize that persons must change without thinking of them as subjects completely separate from the "outside" world. Understanding that persons change themselves is not the same thing as thinking that the person is the subjective ghost that remains after everything that makes her what she is -- although only for the present -- is detached and thought of as an object separate from her.

n213 *See supra* pp. 1880-81.

n214 *See* M. Radin, *supra* note 132.

n215 The universal commodifier would conceive of a gift as an exchange by assuming that giving you something that I value yields me monetizable value in return, or by assuming that I am doing it so that you will treat me with favor, and this favorable treatment yields monetizable value to me.

n216 See L. HYDE, *supra* note 101, at 56. "It is the cardinal difference between gift and commodity exchange that a gift establishes a feeling-bond between two people, while the sale of a commodity leaves no necessary connection." Gifts are similarly characterized by John Noonan as "given in a context created by personal relations to convey a personal feeling." J. NOONAN, BRIBES 695 (1984) (distinguishing among gifts, tips, contributions, and bribes).

n217 See, e.g., F. HIRSCH, SOCIAL LIMITS TO GROWTH app. at 95-101 (1976).

n218 Those who subjectively identify with things not properly personal might be said to be alienated; improper object-relations keep them from being integrated persons according to the conception of human flourishing we accept. See *supra* pp. 1871-72, 1907.

n219 The distinction between "property for use" and "property for power" appears in Hobhouse, *The Historical Evolution of Property, in Fact and in Idea*, in PROPERTY: ITS DUTIES AND RIGHTS 3, 9-11, 23 (2d ed. 1922).

n220 The normative element in identifying personal things is discussed in a little more detail in Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986), and in Radin, cited in note 115 above.

n221 See *supra* pp. 1892-94.

n222 Of course, in suggesting that we relinquish the subject/object dichotomy, I do not mean that we should try to relinquish the common-sense understanding that there is a world of things separate from ourselves, that somehow we should to try to feel ourselves fused with our chairs or our pencils. I do mean that we need not explain our feelings of separateness from things in the world by positing the Kantian foundational apparatus of subjectivity and objectivity.

n223 A prophylactic ban on sales would thus be a risk-of-error rule based on respect for persons. See Radin, *Risk-of-Error Rules and Non-Ideal Justification*, in JUSTIFICATION: NOMOS XXVIII 33 (J. Pennock & J. Chapman eds. 1986). The rules allowing all accused persons to go unpunished absent proof of guilt beyond a reasonable doubt or invalidating of all contracts involving minors as parties are examples of risk-of-error rules.

n224 In assuming that self-commodification might be acceptable but for uncertainties of knowledge and adjudication, this argument in principle admits commodification of the person. Cf. J. FEINBERG, *supra* note 199, at 80-81 (asserting that a blanket rule against self-enslavement might be justified by the risk of mistaken judgments of voluntariness); R. POSNER, *supra* note 8, at 238-44 (arguing that the unenforceability of a voluntary self-enslavement contract is economically explainable by the high likelihood of making a disastrous mistake).

n225 Cf. M. WALZER, *supra* note 42, at 102 (discussing a ban on "desperate exchanges" in the labor market).

n226 If such a redistribution were to come about, poverty would no longer be presumed a coercive factor, and the prophylactic justification would be less compelling. When someone is coerced at gunpoint, the remedy is to force the gun-wielder to give back whatever was obtained under duress and to try to prevent such threats from occurring in the first place. If someone is "coerced" by poverty into selling something she would not otherwise sell, unwinding the transaction is more problematic. The buyer is not the sole cause of the seller's duress, and thus it seems unfair to take back the "goods" and let the seller keep the money. If unwinding the transaction includes restitution of the price paid, then the duress is not removed. To prevent such threats from occurring in the first place entails preventing poverty. A rule saying that those who give up anything at gunpoint will be punished would not be appropriate; thus, it seems that a rule saying that those who give up things under the "coercion" of poverty will be punished is not appropriate either. This argument can be understood as one reason why we should not necessarily consider economic need as negating free choice.

The puzzle about whether poverty can constitute coercion is a philosophical red herring that conceals a deeper problem. Insofar as preventing sales seems harmful or disempowering to poor people who otherwise would sell personal things, it is so even if we think of the choice to sell as coerced. Because allowing sales, even if we think of them as freely chosen, also seems harmful or disempowering, we are caught in a double bind, a painful dilemma of transition. See *supra* pp. 1875-77; *infra* pp. 1915-17.

n227 Although the prophylactic argument is troubling when applied to "coercion" by poverty, it retains some force with respect to coercion in general. People can be coerced by many nonmonetary factors of power others may have over them. The issue would be whether any nonmonetary factors of power that we wish to characterize as negating free choice could plausibly be presumed to result in people's attempting to sell things. The concept of coercion -- in particular the issue of what factors of power we should characterize as negating free choice -- is a philosophical dispute I cannot review more deeply here. See, e.g., R. FLATHMAN, *supra* note 186, at 180-220; Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440 (S. Morgenbesser, P. Suppes & M. White eds. 1969).

The prophylactic argument may properly recommend that trades of personal things -- like the sale of family heirlooms or a homestead -- be at least more closely scrutinized for voluntariness than trades of fungible things. Invalidating "contracts" produced under duress is no more than free-market hygiene. Although we do not scrutinize all contracts for duress, case-by-case analysis of trades of things that are usually personal could be mandated by the conviction that respect for personhood requires individualized attention.

n228 See M. Shapiro, Regulation as Language: Communicating Values by Reducing the Contingencies of Choice 14-15, 25-28, 53-57 (unpublished manuscript on file at Harvard Law School Library).

n229 See *supra* pp. 1898-903, 1905.

n230 This point is made by writers as disparate as Georg Lukacs, cited in note 88 above, and Peter Singer, cited in note 29 above.

n231 To this the universal noncommodifier would no doubt respond that commodified nuts and bolts are produced by commodified labor, and that prohibiting commodified labor morally matters as much as prohibiting commodified love, friendship, and sexuality. She might further respond that commodification of their labor forces workers to experience only the commodified versions of love, friendship, and sexuality.

n232 In fact, utopian noncommodifiers, who think that commodification is inherently wrong, also tend to think that commodified and noncommodified forms of human interactions cannot coexist. In his view that "bourgeois property" cannot coexist with other kinds of property, Marx may be understood to have meant that market and nonmarket forms cannot coexist. *See supra* note 144; *see also* G. LUKACS, *supra* note 88.

n233 *See* R. TITMUSS, *supra* note 6. Peter Singer uses the form of argument I call the domino theory in his defense of Titmuss against the liberal view that both gifts and sales should be permitted. *See generally* Singer, *supra* note 29.

n234 *See* R. TITMUSS, *supra* note 6, at 237-46; Singer, *supra* note 29.

n235 In my view, the argument against commodification of blood on the ground that it would foreclose a necessary opportunity for altruism does not succeed, because the argument is too general to single out blood or any small group of particular things. *See* Radin, *supra* note 42.

n236 The assumption is a concession to universal commodification if it means that thinking in money terms comes naturally to people *sub specie aeternitatis*. But noncommodifiers might assume that thinking in money terms comes naturally to people who live in a commodified social order. This assumption expresses the link between rhetoric and the world, discussed in Section B of Part III above. My argument is that it should be evaluated more particularly, not that it should be ignored.

n237 *See infra* pp. 1918-21.

n238 Thus, the problem of justice under nonideal circumstances is connected to the transition dilemma for social progress that I discussed earlier. *See supra* pp. 1875-77. Although I shall not try to do so in this Article, we are now in a better position to evaluate a narrower transition problem: whether changes, though necessary for progress, require compensation of individuals who consider themselves harmed by them. *Cf.* Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (arguing that compensation is generally not required). For example, are holders of fungible property wronged (and thereby perhaps entitled to compensation) when it is partially decommodified? If the question is analyzed in moral terms other than those of the market, it makes a difference what kind of thing we are talking about. If the attribute, right, or thing is fungible to those who consider themselves losers, its loss is appropriately considered monetary; if it is not fungible to those who benefit from the change, our best theory of personhood might tell us that it ought not to be commodified. In this case decommodification corrects a wrong to personhood at the expense only of fungible interests held wrongfully.

Thus, when some things emerge as more important than ordinary fungible property to people and to society as a whole, the diminution of their fungible value to would-be sellers might be seen as an acceptable responsibility of citizenship. It appears at least that to pay compensation -- for example, to those who lost money when slaves were emancipated or when child labor was prohibited -- would deny that the thing had been decommmodified, treating it as fungible even while declaring that it is not.

n239 Although in the text I pursue its application to poor women, it should be evident that the double bind is broader in scope. For example, it also complicates the problem of whether people should be allowed to sell their organs. *See supra* note 23.

n240 *See supra* p. 1907.

n241 If marketing one's body is an available option, then those who fail to commodify themselves to feed their families might be thought blameworthy as well. *See M. Shapiro, supra* note 228, at 55.

n242 *See supra* pp. 1910-11.

n243 *See id.*

n244 In the struggle for social justice for women, the double bind is pervasive. Is marriage to be considered a contract in which certain distributions of goods are agreed to between autonomous bargaining agents? Upon divorce, such a conception of marriage makes it difficult for oppressed women who have not bargained effectively to obtain much. Or is marriage to be considered a noncontractual sharing status in which the partners' contributions are not to be monetized? Upon divorce, such a conception makes it difficult for oppressed women who have contributed unmonetized services to their husbands' advantage to obtain much. Unmonetized sharing is hypocritical under present social circumstances, say feminist theorists, yet in a better world many feminists would prefer unmonetized sharing to commodification. The idea of contractual autonomy is more attractive than being submerged in a status that gives all power to men, yet the autonomy is often illusory, and the reinforcement of individualist bargaining models of social interaction is contrary to feminist ideals for a better world. *See sources cited infra* notes 259-60.

n245 To think of the problem as simply drawing a boundary line between a completely nonmarket realm and a laissez-faire market realm is under present circumstances to understand (with liberal pluralism) the market as the presumptive norm. *See supra* note 153.

n246 The conventional term for incomplete commodification (partial market-inalienability) is, of course, restraint upon alienation.

n247 These aspects correspond to the two ways in which universal commodification views the human world as completely commodified. In

the participant aspect -- the meaning of interactions to the individuals involved in them -- all human interactions are viewed as trades resulting in monetizable gains and losses. In the social aspect -- the community response to this meaning -- all things are presumptively to be traded in a free market.

n248 Thus, to think of our labor power only as a commodity separate from ourselves, is, as Marx thought, to do violence to our ideal of personhood. In supposing that for some of us work is incompletely commodified, I am supposing -- perhaps contrary to Marxists -- that unalienated work exists to some extent. *See supra* pp. 1871-72. I am not supposing that no alienated labor exists, nor am I supposing that unalienated work is not correlated with class. For further discussion of incomplete commodification of work, see Radin, cited in note 42 above.

n249 Karl Polanyi noted the partial decommodification of labor:

To argue that social legislation, factory laws, unemployment insurance, and, above all, trade unions have not interfered with the mobility of labor and the flexibility of wages, as is sometimes done, is to imply that those institutions have entirely failed in their purpose, which was exactly that of interfering with the laws of supply and demand in respect to human labor, and removing it from the orbit of the market.

K. POLANYI, *supra* note 139, at 177.

n250 In examining the connection between personhood and one's work or home, the discussion in the text links incomplete commodification of labor and housing to fostering freedom, identity, and especially contextuality. Perhaps labor regulation could also be seen as designed to check a domino effect: complete commodification of people's labor may (as Marx thought) lead to commodification of workers. *See supra* pp. 1871-73.

There are other, more market-oriented ways of looking at regulation. From the point of view of universal commodification, these regulations would be unjustified unless they promote efficiency, and they have not been readily seen as efficiency-enhancing. *See, e.g.*, R. POSNER, *supra* note 8, §§ 11.6-11.7, at 308-15 (discussing inefficiencies resulting from regulation of the employment relationship); *id.* § 16.6, at 445-48 (discussing inefficiencies resulting from housing code enforcement); Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Hirsch, *supra* note 107. *But cf.* Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (using an economic model to argue that antidiscrimination legislation might enhance economic efficiency). These regulations may also be seen as examples of wealth redistribution under liberal welfare rights, but this understanding also tends toward commodification: it assimilates work and personal property to fungible wealth of the holders, merely asserting that the holders are entitled to a minimum amount of such wealth even if that requires redistribution. For a discussion of welfare rights and personhood in the context of housing, see Radin, *Residential Rent Control*, cited in note 220 above.

n251 Insofar as we do see regulation as the social aspect of incomplete commodification, moral reasoning and not market failure will be the focus of debates over its proper extent. We would justify regulation of interactions involving buying and selling these things by referring to their closeness to personhood, not to inefficiencies caused by transaction costs. If we think that because of their desperate poverty and the pricing policies of landlords and employers, tenants and workers would not wish to have the regulations, that is, would choose complete commodification, then that places us in the double bind. *See supra* pp. 1915-17. The regulations are not thereby rendered unjustified, however, if they are now our best available alternative.

n252 Thus, the category of personal property may be seen as related to incomplete commodification. *See supra* notes 115-17. For those things that we accept as being appropriately identified with the person, a range of protections exists to shield them from market forces and wrongful treatment as fungible. The ability to establish oneself in relationship with things is promoted by the social aspect of incomplete

commodification; once the relationship is established, the thing is personal.

n253 Other regulation of labor and rental housing can also be seen as partial decommodification based on personhood. For example, there is some tendency toward recognizing job-tenure rights, *see, e.g., Individual Rights in the Workplace: The Employment-At-Will Issue*, 16 U. MICH. J.L. REF. 199 (1983); Hermann & Sor, *Property Rights in One's Job: The Case for Limiting Employment-At-Will*, 24 ARIZ. L. REV. 763 (1982), and a parallel tendency toward recognizing tenants' tenure rights, *see, e.g., RESTATEMENT (SECOND) OF PROPERTY* § 14.8 (1977) (prohibiting retaliatory evictions in residential housing); Uniform Residential Landlord and Tenant Act § 5.101 (1972) (same); N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1976) (limiting the termination of residential tenancies to enumerated grounds of "good cause"); Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 833-35 (1983) (noting that eviction control accompanies rent control). Partial decommodification of labor is proceeding further with the advent of comparable worth (a form of just price regulation), *see, e.g., COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES* (H. Remick ed. 1984); Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986), and partial decommodification of rental housing is proceeding further with rent control (also a form of just price regulation). *See* Baar, *supra*, at 725-26 & n.1 (estimating that approximately 10% of all privately owned residential units in the United States are subject to some form of rent control); Radin, *Residential Rent Control*, *supra* note 220.

n254 These are some of the central cases of contested commodification. For other cases to which market-inalienability might be extended, *see* notes 27-33, 235 above. There are occasionally market-inalienabilities attached to things that seem "external," in the sense of not being closely related to personhood as now conceived. Many of these invite us to consider human personhood in a broad ecological context. Examples are legislation banning hunting and trade in artifacts of endangered species. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 64-68 (1979) (upholding a market inalienability in the Eagle Protection Act, 16 U.S.C. § 668(a) (1982), against challenge as a taking); *cf.* Rose-Ackerman, *supra* note 10, at 943 (discussing these inalienabilities from an economic efficiency perspective).

n255 I am confining the present discussion to traditional male-female prostitution because I am considering a set of would-be commodities that women would control. A different nonideal moral analysis will no doubt be required for other forms.

n256 Legalized prostitution has existed in many places, and there has always been a large black market of which everyone is well aware. That those who purchase prostitutes' services are often not prosecuted seems to indicate that commodification of sexuality, at least by the purchasers, is tolerated. For various views on commodification and prostitution, *see, for example, Jaggar, Prostitution*, in *THE PHILOSOPHY OF SEX* (A. Soble ed. 1980); Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979); and sources cited in note 31 above.

n257 *See supra* pp. 1915-17.

n258 This is the lesson of the effect of rhetoric on our world. *See supra* pp. 1881-85.

n259 *See, e.g., C. MacKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Gottlieb, *The Political Economy of Sexuality*, 16 REV. RADICAL POL. ECON. 143 (1984); Hantzis, *Is Gender Justice a Completed Agenda?* (Book Review), 100 HARV. L. REV. 690 (1987); MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J.

WOMEN CULTURE & SOC. 635 (1983); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC. 515 (1982).

n260 See, e.g., A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983); P. ROOS, GENDER AND WORK 119-54 (1985); Rubin, *The Traffic in Women*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (R. Reiter ed. 1975). Insistence on continued noncommodification of homemaker services of a wife is also problematic. The context of current sexual politics makes both commodification and noncommodification seem generally disempowering to women. Assimilation to the market paradigm seems defeating for personhood, relationships, and political identity, but given economic and cultural realities, so does continued insistence on a realm of nonmarket interpersonal sharing.

The additional argument that the commodity form of a thing might drive out the noncommodified version of the "same" thing does not seem at present a great threat to nonmarketized homemaker services. A domestic services market (though not one that is in full bloom) does coexist with a parallel class of unpaid providers. It does not appear that, as a result, we have implicitly come to think of homemaker services in market rhetoric. And if we had -- here is the double bind again -- many women would be better off at divorce, when money is all that is left at stake. Cf. L. WEITZMAN, THE DIVORCE REVOLUTION 323-401 (1985) (describing the disastrous economic consequences to women and children of the present system of divorce).

n261 In another double bind situation, the sale of human organs, California has imposed an analogous incomplete commodification, providing that patients may sell their organs but criminalizing brokering. See CAL. PENAL CODE § 367f(e) (West 1986). In structuring an incomplete commodification for sexual activity, another important issue is whether contracts to sell sexual services should be enforced. The usual reason given for precluding specific performance of personal service agreements is that to force someone to perform smacks of slavery. If sexual service contracts were to be specifically performed, persons would be forced to yield their bodily integrity and freedom; this is commodification of the person. Suppose, then, that we decide to preclude specific performance but allow a damage remedy. Enforceable contracts might make the "goods" command higher prices. This is on the procommodification side of the double bind. The other side is that having to pay damages for deciding not to engage in sex with someone seems very harmful to the ideal of sexuality as integral to personhood, and it seems that determining the amount of damages due is tantamount to complete commodification. Granting a damage remedy requires an official entity to place a fungible value on the "goods"; commodification is thus officially imposed. Thus, we should make such contracts unenforceable, denying the most important factor of commodification -- enforceable free contract. We could either provide for restitution if the woman reneges or let losses lie. If we let losses lie, we preclude any increased domino effect that official governmental (court) pronouncements about commodified sexuality might cause. But letting losses lie would also allow men to take and not pay when women are ignorant or powerless enough to fail to collect in advance.

Similar two-edged results are reached by the doctrine of nonenforcement of illegal contracts, under which contracts to render sexual services are currently unenforceable because of the illegality of prostitution. See, e.g., CORBIN ON CONTRACTS § 1476 (1962) (stating that a contract in furtherance of immorality is void). Under this doctrine there can be a no-win situation for women in situations of nonmarital cohabitation, if the relationship is either construed as too close to countenance commodification, thus becoming an illegal contract for sexual services, or too distant to infer it, thus becoming one in which no contract in fact was made. See Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1101-02 (1985). This seems to be an instance of the double bind: women who lack power are oppressed both by the noncommodification interpretation and by the commodification interpretation.

n262 There may be cases in which it is clearer than it is with regard to sexuality that market-inalienability is presently unjustified. A possible example is "amateur" athletics, in particular the services of collegiate football players. See *supra* note 32. At present, the issue seems to be not whether the accoutrements of capitalism can be kept out of athletics, but instead whether the suppliers of services are to be allowed a share of the take. This situation is analogous to prostitution in that some of the suppliers may be members of oppressed classes, but disanalogous in that commodifying these services is not at present connected with any particular moral opprobrium. Moreover, although the noncommodified form of athletic endeavor may be part of an interaction that is important for certain kinds of participatory bonding, that interaction is not at present as central to personhood as sexual interaction.

n263 See generally N. BAKER, BABYSELLING: THE SCANDAL OF BLACK-MARKET ADOPTIONS (1978).

n264 See N. BAKER, *supra* note 263, at 43 (suggesting that most natural mothers who give up babies for adoption on the black market are 13- to 14-year-old girls).

n265 Hence, as Posner says, there would be "good" babies (and presumably "bad" babies). See Posner, *supra* note 8, at 142 (quoted in note 51 above). As a result, boy babies might be "worth" more than girl babies; white babies might be "worth" more than nonwhite babies.

n266 Perhaps we should separately evaluate the risk in the cases of selling "unwanted" babies and selling babies commissioned for adoption or otherwise "produced" for sale. The risk of complete commodification may be greater if we officially sanction bringing babies into the world for purposes of sale than if we sanction accepting money once they are already born. It seems such a distinction would be quite difficult to enforce, however, because nothing prevents the would-be seller from declaring any child to be "unwanted." Thus, permitting the sale of any babies is perhaps tantamount to permitting the production of them for sale.

n267 As Lewis Hyde recounts:

In 1980 a New Jersey couple tried to exchange their baby for a secondhand Corvette worth \$ 8,800. The used-car dealer (who had been tempted into the deal after the loss of his own family in a fire) later told the newspapers why he changed his mind: "My first impression was to swap the car for the kid. I knew moments later that it would be wrong -- not so much wrong for me or the expense of it, but what would this baby do when he's not a baby anymore? How could this boy cope with life knowing he was traded for a car?"

L. HYDE, *supra* note 101, at 96 n. * (1979).

n268 It is sometimes said that baby-selling violates the thirteenth amendment. See, e.g., Holder, *Surrogate Motherhood: Babies for Fun and Profit*, 12 LAW, MED. & HEALTH CARE 115 (1984). For a summary of various arguments leveled against baby-selling, see Prichard, cited in note 9 above.

n269 But perhaps we should prophylactically decline to trust any parents who wished to give a child away for "frivolous" reasons adequately to raise a child if forced to keep her.

n270 Relinquishing a child may be seen as admirable altruism. Some people who give up children for adoption do so with pain, but with the belief that the child will have a better life with someone else who needs and wants her, and that they are contributing immeasurably to the adoptive parents' lives as well as to the child's. Baby-selling might undermine this belief, because if wealth determined who gets a child, we would know that the adoptive parents valued the child as much as a Volvo but not a Mercedes; if an explicit sum of money entered into the decision to give the child up, then we would not as readily place the altruistic interpretation on our own motives. If babies could be seen as incompletely commodified, however, the altruism might coexist with sales. See *supra* pp. 1913-14, 1926.

n271 Surrogacy is often popularly viewed as baby-selling, and the thirteenth amendment is invoked. *See, e.g.*, Holder, *supra* note 268, at 117. The slavery analogy is inadequate for the reasons detailed above.

Surrogacy has engendered a number of different viewpoints. *See, e.g.*, Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REF. 865, 870 (1985) (arguing that "any legal efforts to prohibit this [baby-making] market from operating would be unwise"); Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 52-53 (1986) (arguing that surrogate motherhood is "fundamentally different from baby-selling" and could provide "a new solution for infertility"); Krimmel, *supra* note 28, at 35 (maintaining that it is ethically impermissible to bring a child into the world for purposes other than the desire to act as her parents); Mellow, *An Incomplete Picture: The Debate About Surrogate Motherhood*, 8 HARV. WOMEN'S L.J. 23 (1985) (pointing out shortcomings of viewing surrogacy either from the perspective of the liberal ideology of free contract or from the conservative perspective of preserving the traditional family); Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 (1985) (presenting, with extensive commentary, a statute legalizing surrogacy and regulating the interaction by requiring the participation of doctors, psychologists, and lawyers, limiting compensation of the surrogate to \$ 25,000, prohibiting reduction in compensation if the child is stillborn or impaired, and making specific performance available to both parties); Note, *Reproductive Technology and the Procreative Rights of the Unmarried*, 98 HARV. L. REV. 669, 684-85 (1985) (arguing that the Supreme Court has implicitly recognized a right to procreate and that individuals should not be "arbitrarily deprived of the ability to exercise [that right] through the use of reproductive technology"); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1954-55 (1986) (defending the inalienability of abortion rights for surrogate mothers and the alienability of their rights to rear the children once born); *see also* Magisterium of the Catholic Church, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day* 25 (Feb. 22, 1987) (stating that surrogacy, like artificial insemination by a donor, is "contrary to the unity of marriage and to the dignity of the procreation of the human person").

n272 A full treatment of the issues of surrogacy must also consider embryo transfer, in which the baby is not genetically related to the surrogate, and single men or gay couples who desire to become fathers.

n273 Surrogacy appears even more like a commissioned adoption if what is important to the adopting couple is not primarily the genetic link between father and baby, but rather the opportunity to exercise control over the mother's background and genetic make-up and to monitor her pregnancy. *See, e.g.*, *The Pain of Infertility: One Couple's Choices*, L.A. Times, Mar. 22, 1987, § 6, at 12, col. 1. One adopting father remarked: "We felt, in the case of surrogates, we would be involved from the beginning: conception, monitoring the fetus . . ." The couple said they "would have adopted had the surrogate option not been available." *Id.*

n274 *See, e.g.*, Hollinger, *supra* note 271, at 893 ("The payments are not to purchase a child, but to compensate for personal services."); *see also* Note, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee*, 18 GONZAGA L. REV. 539, 549 (1983) (arguing that a surrogate mother is not selling her baby, but rather is "provid[ing] a home in her womb for the child of another").

n275 If we were assuming that babies cannot be property, we would more readily envision an ordinary adoption for a price not as baby-selling, but rather as sale of gestational services, or fetal growth support services, followed by the gift of an unmonetized child.

n276 *See, e.g.*, *To Serve "the Best Interest of the Child"*, N.Y. Times, Apr. 1, 1987, § B, at 2, col. 2 ("At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his."). Indeed, the very label we now give the birth mother reflects the father's ownership: she is a "surrogate" for "his" wife in her role of bearing "his" child.

n277 Biblical "surrogate" interactions may be seen in this way. *See Genesis* 16 (Abraham, Sarah, and Hagar); *Genesis* 30 (Jacob, Rachel,

and Bilhah). Perhaps some would see artificial insemination as analogously oppressive to men, but the situations are asymmetrical because of the present gender structure. *See infra* note 285.

n278 *See, e.g., Surrogate Motherhood: A Practice That's Still Undergoing Birth Pangs*, L.A. Times, Mar. 22, 1987, § 6, at 12, col. 2 (citing research finding that "[t]he average surrogate mother is white, attended two years of college, married young and has all the children she and her husband want"). Perhaps allowing surrogacy but not permitting adoption for a price would worsen the double bind for poor women, who are less likely to be chosen as surrogates by the couples who seek this arrangement. To underscore the irony of the double bind, consider the testimony of an adopting mother who fears that surrogacy "can exploit the lower classes and the women of the Third World," and thus finds it "unconscionable" to choose as surrogates women who are poverty-stricken and need the money. *Id.* § 6, at 12, col. 1.

n279 Even if surrogate mothering is subjectively experienced as altruism, the surrogate's self-conception as nurturer, caretaker, and service-giver might be viewed as a kind of gender role-oppression. *See, e.g.,* A. DALLY, *INVENTING MOTHERHOOD: THE CONSEQUENCES OF AN IDEAL* (1982); A. RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* (1976); Hantzis, *supra* note 259, at 696.

n280 This is true whether the surrogate gives or sells the baby or her services (however we wish to characterize the thing transferred). If an adoption is commissioned, the baby would not have been born but for the would-be parents' demand, but probably even if these transactions were permitted there would still be a substantial number of unwanted children also available for adoption.

n281 *See supra* note 273.

n282 People who are sensitive to what men lose by not having the bonds with children traditionally thought characteristic of motherhood might argue that if we hope for "new" men that are more bound up with their children, we should foster progress toward this ideal by assuming a deep and personal bond between men and their genetic offspring. Hence, we might think we should respect and encourage men's desires for surrogacy.

n283 There has been very little study, however, of the emotional aftermath of adoption. *See* C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 404-24 (3d ed. 1985). As we can recognize from the widespread incidence of child abuse and neglect, not all genetic parents are bonded to their children in any ideal sense.

n284 True, there is usually a deep bond between a baby and the woman who carries it, but it seems to me that this bond too is created by shared life, the physical and emotional interdependence of mother and child, more than by the identity of the genetic material. It will be difficult to study this question unless childbearing by embryo transfer, in which a woman can carry a fetus that is not genetically related to her, becomes widespread.

n285 *See* Smith, *Parenting and Property*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 199 (J. Trebilcock ed. 1983). Artificial

insemination -- and for that matter traditional procreation -- poses a similar issue of genetic property. It is just as inappropriate to conceive of parent-child bonding in terms of women's genetic "property" as in terms of men's. But in the context of the present gender structure, the desire to carry on the woman's genetic line is less likely to make men fungible. Moreover, the interests of women and men are asymmetrical because the carrying of the child in the woman's body (whether or not it is hers genetically) is a stronger factor in interrelationships with a child than an abstract genetic relationship.

n286 According to those who arrange surrogacy transactions, some women who have acted as surrogates do report altruistic motivations. See N. KEANE & D. BREO, *THE SURROGATE MOTHER* (1981); cf. L.A. Times, *supra* note 273, § 6, at 12, col. 2 (reporting the statement of a psychotherapist for a Beverly Hills surrogacy center that the majority of surrogates say that "they enjoy being pregnant, are attracted by the money . . . , and feel deep sympathy for women who are unable to have children"). *But cf.* note 279.

n287 One such example occurs when a woman bears a child for her childless sister.

n288 To prevent women from benefiting financially from reproductive services, some states have passed criminal statutes prohibiting women who relinquish children for adoption from receiving expenses. Others require a full accounting of fees received. See Katz, *supra* note 271, at 8-10, nn. 34-37.

n289 See *supra* pp. 1925-26.

n290 The same worry applies, of course, to baby-selling in jurisdictions in which paying the mother's expenses is allowed. See *supra* note 288.

n291 In light of the apparent strength of people's desires for fathers' genetic offspring, the ban on profit would also be difficult to enforce. As with adoption, we would see a black market develop in surrogacy.

n292 The issue of whether surrogacy agreements should be specifically performed -- whether the mother who changes her mind should nonetheless be forced to hand over the baby -- has received the most popular attention recently. See, e.g., *Father of Baby M Granted Custody; Contract Upheld*, N.Y. Times, Apr. 1, 1987, § A, at 1, col. 5. We should not think, however, that we are faced with merely a binary choice: either banning paid surrogacy arrangements or granting specific performance of them. To conceive of surrogacy as a special situation requiring specific performance seems to place undue weight on the supposed genetic interests of would-be fathers in their unique "property," and to undervalue both the personal development of unwanted children they might otherwise adopt (and become bonded to) and the personal identity of women torn between economic need and deep attachment to a baby. *But cf.* Hollinger, *supra* note 271, at 909-19. Hollinger's sensitivity to the effect of surrogacy and other new reproductive strategies on the adoption of children who are not white or middle-class, and hence are less "desirable," and her understanding that the strength of the interest in parenthood need not be as closely tied to genetic parenthood as we have tended to view it, seem at odds with her conclusion that surrogacy contracts should be specifically performed. See *id.* at 909-12.

n293 Of course, we should decide upon a reasonable time limit during which she must make up her mind, for it would be injurious to the child if her life were in limbo for very long. This could be done analogously with statutory waiting periods for adoption to become final after birth. *See, e.g., Surrogate Parenting Assocs. v. Kentucky ex rel Armstrong*, 707 S.W.2d 209, 213 (Ky. 1986) (holding that the five-day waiting period in Kentucky's termination of parental rights statute and consent to adoption statute "take[s] precedence over the parties' contractual commitments, meaning that the surrogate mother is free to change her mind"). We might wish to make the birth mother's decision to keep the child not an absolute right but only a very strong presumption, such as would be used in a custody dispute over a newborn baby in a divorce. In my view, however, adoption is the better analogy: except in very special cases, both surrogates and others who are considering relinquishing children for adoption should be able to decide after birth to keep the child. *See, e.g., id.* (stating that if a surrogate decides to keep her child, "[s]he would be in the same position vis-a-vis the child and the biological father as any other mother with a child born out of wedlock" and that the "parental rights and obligations between the biological father and mother, and the obligations they owe the child," would be those imposed by the statutes applicable to this situation).

n294 Because a pregnancy and a child's life are involved in the surrogacy interaction, rather than just one sexual encounter as with prostitution, "official" recognition of the interaction, with its contribution to commodification, will have to be tolerated, regardless of whether we choose market-inalienability or incomplete commodification. Decisions will have to be made about restitution in case of breach, about payment of the surrogate's expenses, and above all, about care for the child if all parties fail to take responsibility. Even if we choose incomplete commodification, contract remedies should be avoided. Specific performance should be avoided because of the analogy to personal service agreements, and also because we should not conceive of children as unique goods, *see supra* note 292; damage remedies should be avoided because of the obvious "official" commodification involved in setting a dollar value on the loss. It is not my purpose here, however, to try to draft an appropriate statute or guidelines for courts.

n295 The special dangers of commodification in the surrogacy situation should serve to distinguish it from the way we treat children generally. Perhaps a regulatory scheme should require bonding, insurance policies, or annuities for the child in case of death of the adoptive parents or reneging by them. *See Note, Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, *supra* note 271, at 1304. *But cf.* Hollinger, *supra* note 271, at 911 n.174 (arguing that financial requirements for surrogate parents are unwarranted because the state does not require that "children generated by coital means be similarly protected"). Perhaps a better scheme (because less oriented to market solutions) could require that alternative adoptive parents at least be sought in advance.

n296 If paid surrogacy is permitted, it can become a substitute for commissioned adoption. *Cf. supra* note 273.