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## **Whither Commodification?**

by

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*Afterword: Whither Commodification?*

Carol M. Rose<sup>§</sup>

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The word "commodification" is a kind of verbal giveaway, like "bourgeois," or "deconstruct" or "utility function." When you use a word of this sort, you convey a certain set of analytical categories or rather commitments—commitments that separate you from some other people who might well be interested in the same subjects, but who think about them in very different terms. I would be willing to bet, for example, that the word "commodification" never appears in the entire oeuvre of the neoclassical economist Milton Friedman. By the same token, the scholars who have a lot to say about commodification are not likely to have much truck with utility functions, though neoclassical economists do. Indeed, the very word "commodification" conveys serious doubts (not to say scorn) about market economics, especially the most imperialistic versions of law-and-economics, which purport to reduce all human

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institutions, motives, and actions to the comparisons of supply and demand.<sup>1</sup>

It is particularly interesting, then, to see that the language of commodification has started to penetrate the enemy camp. The word "commodification" makes an unexpected appearance in Richard Posner's contribution to this volume, where this quintessential guru of law-and-economics mentions the c-word several times, with a straight face albeit rather skeptically.<sup>2</sup> Less skeptical are James Salzman and J.B. Ruhl, two legal scholars who are comfortable with market-friendly economic thinking, but who nevertheless have published an article critiquing the "commodification" of environmental law."<sup>3</sup> A particularly startling surprise has emanated from the Nike Corporation, which, in case you didn't know it, is one of the world's largest producers of athletic shoes. When Nike decided to sever its connections with the mass-market retail shoe distributor, Foot Locker, a Nike spokesperson explained that one problem was that Foot Locker was "commodifying" sneakers.<sup>4</sup> Come again? How's that? What exactly is a sneaker if not a commodity?

These instances of linguistic cross-dressing hint that market-friendly economic theory may be drawing just a bit closer to commodification theory, however warily. In a way, this should not be a surprise. One of the commodification pieces designated

as classic in this volume is Calabresi and Melamed's 1972 article, "One View of the Cathedral," which generally took its cues from economic reasoning. But this economics-influenced duo argued quite explicitly that markets might not work for everything, and they focused in part on the question of inalienability - that is, legal constraints on the buying and selling of certain goods and services.<sup>5</sup> When Peggy Radin popularized the term "commodification" in 1987,<sup>6</sup> she too was addressing inalienability, even though she thought that economists' explanations were mighty thin.

Perhaps it is no wonder, then, that a number of the new essays in this book suggest that the reconsideration is mutual. Commodification theory itself seems to be taking a second look at markets and even issuing a few plaudits amidst the usual chorus of Bronx cheers. To be sure, Miranda Joseph sees commodification as part of a larger self-aggrandizing capitalist project, while Michael Sandel and Tanya Hernandez, taking a somewhat less wholesale approach, still think commodification has gone too far when it comes to buying and selling such matters as sex or military service. But Ann Lucas thinks there is something to be said for selling sex after all. Martha Ertman thinks it might be a nifty idea to sell reproductive materials. Deborah Stone has some nice words to say about the

commodification of caregiving, and Katherine Silbaugh thinks a dose of market talk could do some good in evaluating women's housework. Alexandra Chasin, while not very happy about the matter, can't help but notice that merchants and entrepreneurs have made the market sizzle for gay/bi/lesbian chic. Three cheers for commodification? No. But perhaps one or two.

What, then, has happened to commodification theory to result in this mixed message about markets? Consider the early use of the term. Radin's "commodification" was a rather awkward term, but it was probably a good deal easier to say than "commoditization," Arjun Appadurai's kindred appellation,<sup>7</sup> and besides that, the word's verbal thumbing-of-the-nose at markets clearly struck a nerve. After Radin's major article on "market inalienability," whole choruses of market-critical scholars started to use the language of commodification (and its kissing cousin "incommensurability")<sup>8</sup> to attack what they saw as the simple-minded nostrums of law-and-economics for torts, criminal law, family law, constitutional law, and pretty much every other legal subject.

Moreover, the commodification critique was never just a matter of scholarly theorizing. Lots of other people apparently share the basic intuition that one cannot reduce everything to market terms. We have all heard the adages: You can't buy love.

The best things in life are free. Money isn't everything. And so on. Business people (like that Nike spokesperson) know this too. There is something about cold cash that drives out the atmospherics. That is why, as one former realtor told me, realtors never say, "What kind of house would you like?" Instead they say, "What kind of a home (or as my informant said, a hooooome) would you like?"

But of course one does buy houses, or homes, just as one buys Nike shoes. Does that make houses (hooooomes) or shoes (Nikes) commodities? Yes. And no. Joan Williams and Viviana Zelizer apparently find the conundrum of commodity *vel non* so frustrating that they want to change the subject and to talk instead about what they call Differentiated Ties.<sup>9</sup>

Williams and Zelizer's attitude reflects some unfinished business in commodification theory. Things are both commodities and not commodities. Markets seem inappropriate for some things, but then again, maybe markets are pretty useful for exactly the same things. It is interesting that several of the essays in this volume return to some of Appadurai's ideas about "commoditization" (awkward language and all), and particularly to the idea that over time, things slip in and out of the status of commodity.<sup>10</sup> But when? And when not? This is the set of

questions that the new commodification theory seems to be addressing.

Since much commodification theory already seems to be headed in the direction of a reassessment of markets, in the remainder of this essay, I am going suggest some ways that commodification theory might borrow from the erstwhile opposing team. My plan is to take up some of the major themes of "classical" commodification theory—all of them contained in Radin's first big article on market inalienability—and then to explore how in each case, the new commodification theorists are already capturing, reworking and even liberating analogous but market-friendly approaches to the same themes, and how they might do even more of this work.

Rethinking the Double Bind: the perspective of the "Second Best"

One of the most striking discussions in Radin's major article *Market Inalienability* came toward the end, after she recounted a whole set of reasons why a society might not want to permit the commodification of sexuality, children, bodies and body parts. At the end of it all, she forthrightly addressed the daunting problems that poverty poses for an anticommodificationist position. Radin named the general problem "the double bind:" a poor person is in danger of holding a commodified view of her own body if she sells, say, a kidney, but because of her poverty

she is in trouble too if she is forbidden to sell it.<sup>11</sup> You cannot tell a poor person who wants to make some money by commodifying one of her body parts that she has to starve instead. Commodification may be bad, but starving is worse. To cope with these unpleasant realities, Radin argued for what she called "incomplete commodification" in goods like sexual services, i.e. permitting some sales but under tight restrictions.<sup>12</sup>

This double bind analysis has been a subject of numerous elaborations in the commodification literature, perhaps nowhere more than in the discussion of prostitution and the sale of body parts. But in general, Radin's double bind suggests a way of thinking that market friendly economists developed some time ago, even though the problems they discussed were normally not so emotionally charged as sales of sexuality and body parts. The concept is that of the "second best," and like most economic thinking, the second best is an attempt to compare things. In the law-and-economics literature, second-best analysis has often focused on the appropriate response to monopolies or to regulatory regimes. For example, a law-and-economics scholars might argue that the "first-best" solution to some situation would be no regulation at all (what a surprise!), but given some X set of regulations, the second best situation might a further



set of Y regulations that offset some of the problems created by X.<sup>13</sup>

Despite commodification theorists' aversion to many kinds of purportedly incommensurable comparisons, the general idea of the second best is one that has some resonance, in no small part because the concept lends itself to a reverse twist that in a sense gets a little revenge on the economists. The reverse twist is this: instead of *regulations* acting as a major context for second-best thinking, commodification theorists can identify *markets* as the context for second-best. That is, in a first-best world there would be no market for a particular good or service, and any transfers would be at most gifts; but the actual fact of markets forces the consideration of what might be second-best. On this analysis, it is markets themselves that create the second-best problem (take that, economists!).

To take the typical problem, sexual relations: in a first best world, one might think, sexual relations would form a seamless whole with love, which of course cannot be bought but is instead freely and passionately given. For the moment, I will sideline any critiques of this rather romantic and perhaps unadventurous notion, and simply suppose it to be true.<sup>14</sup> We live, nevertheless, in a second-best world with respect to this eternally interesting subject. As we all know, sexual services

are in fact bought and sold. Even women have started to buy them from men, apparently rather gleefully, as Tanya Hernandez' article on female sex tourists so vividly illustrates.<sup>15</sup>

Given the fact of a market for sex, how might commodification theory use the concept of the second-best? Here the question becomes, as it was for Radin, what is the second-best legal strategy where there actually are market exchanges in this kind of activity? Different theorists might answer differently, of course. Some (like Radin earlier and Hernandez more recently) clearly think that the proper legal strategy is to prohibit or severely hedge sales of sexual services, some for paternalistic reasons (psychological, physical and/or economic damage to the participants themselves), others for reasons relating to the effects on third parties (illness, nuisance, graft, spread of commodified attitudes, etc.).

Nevertheless, other commodification theorists might well think that the appropriate second-best strategy is a relatively free market. Let us concede for the sake of argument that first best is love. Second best, nevertheless, is getting paid. More specifically, second-best is not having to pay a pimp or a corrupt cop for the protection and contract enforcement that the law refuses to provide to sex workers. Who does well out of a prohibition model? Pimps and corrupt cops, that's who. The

prostitute might be better off if she were not a prostitute at all. But given that she is, and given that she doesn't have a whole lot of other choices, a freer market might let her keep the money and get out of the trade sooner if she so desires. Radin's discussion of sexual services flirted with second-best analysis, but Ann Lucas' and Martha Nussbaum's chapters in this volume now push the point much further, and with great aplomb.<sup>PPP</sup>

Consider the applications of second-best thinking in other areas where markets seem quite awful, but nevertheless exist as a fact. In the notorious article on baby-selling by Elizabeth Landes and Richard Posner, there is implicit a point that is often overlooked: there already is a market for babies. It just isn't a very efficient market or one that is conducted in cash, at least overtly. Instead, it is conducted in the currency of groveling to social workers, though as Pat Williams points out, the latter seem to want some money too.<sup>QQQ</sup> A more straightforward market for babies at least could get more money to the birth mothers, and less to the intermediaries in the so-called helping professions.<sup>16</sup> Organ transfers are another case in point. At the moment, there is an active though illegal market for organs from live donors, though it is generally kept pretty quiet. There are some health benefits to such markets by comparison to prohibition (fresher organs, timed sequences of operations), but

even putting those benefits to one side, a more straightforward market might get more of the money to the original owners of the organs, instead of forcing would-be purchasers to pay large sums to clandestine fixers, corrupt bureaucrats and career-nervous surgeons.<sup>18</sup> Or take a quite different subject, the location of locally unwanted land uses (so-called LULUs) like sewage treatment plants and sanitary waste fills. If LULU siting were based on a genuine reverse auction, in which the would-be facilities managers have to hike up their bids until some neighborhood agrees to act as a host site, these facilities might well wind up in low-income neighborhoods, as critics complain. But LULUs tend to wind up in low income neighborhoods anyway, through a political market (of influence and favors) in which the poor are at a great disadvantage, because they are not as organized or powerful as the middle-class neighborhoods. With an auction system, at least the poorer neighborhoods could receive some compensation.<sup>19</sup> In all these cases, first-best (arguably) would be perfect love, or perfect health, or a perfectly trash- and waste-free environment. But in a second-best world where there actually are implicit markets, all-out commodification might just start to look more attractive - more attractive, that is, than the fake processes that disguise the

market, drain off the money to intermediaries, and let the most disadvantaged parties hang out to dry.

Obviously, there are well-known problems with explicit markets in all these areas, particularly when the person doing the selling isn't selling his own or her own goods: parents can sell their kids into the sex trade, husbands might force wives to sell kidneys, neighborhoods could sell landfill space upwind of uncompensated neighboring communities. These forced transfers are not to be dismissed lightly, and indeed, market inalienability might be a superior choice where such problems are too difficult to monitor and solve. But thinking about commodification in a second-best framework allows one to compare bad situations while acknowledging that some other (unattainable) situation would be ideal. Looked at this way, commodification is not always the worst-best. Sometimes it is just second-best - in a world in which first-best isn't feasible, and other options are even worse than second-best.

Now, the second-best approach that I see just under the skin of commodification analysis presumes that the absence of markets would be first-best, at least for a given set of subjects. Says who? Sometimes markets looks pretty good, as Anne Lucas' article points out, even with subjects as intimate as sex. Big, impersonal, alienated free markets have some

attractions too. But when, and when not? Another kind of market-friendly theory suggests some directions in which commodification theorists might take this question. Rethinking the gift/market dichotomy: the perspective of social norm theory

One of the major contributions of Radin's classic analysis of commodification was her refinement of the concept of inalienability. As she pointed out, there is a pure form of inalienability in which the goods or services at issue are never allowed to be transferred at all—matters like the electoral franchise, and (at least in a post-bounty world) the obligation to military service. But a second and especially important form of inalienability permits transfer by gift, but not transfer by sale and purchase. Here some of her examples were sexual services and body parts. Goods like these, in the gift-but-not-sale category, are not necessarily inalienable strictly speaking. They are only inalienable in *markets*, or to put it in adjectival form, they are market-inalienable. It was this gift vs. sale distinction that led Radin to the concept of "commodification," that is, with some goods, the objection was not to transfers, but to *commodified* transfers.<sup>20</sup>

From a certain perspective, the distinction between gift and market transfers seems rather thin. In 1925, Marcel Mauss'

classic work on *The Gift* suggested that his fellow anthropologists were making too much of a purported difference, since gifts and market exchanges were really a lot alike. After all, both gift-giving and market dealings normally involve reciprocal exchanges, and in societies without cash-mediated markets, the complexities of gift-giving mimic the market, including concepts of debt and even interest.<sup>21</sup>

So, is there any difference between gift exchange and market exchange? Well, yes and no. Among commodification theorists, Viviana Zelizer has been most notable in pointing out that yes, there are similarities between nonmarket and market exchanges, but no, as a social matter they are still not the same. She has famously described, for example, the lengths to which people will go to disguise a gift of money as something else. With careful folding, a five-spot can be made to look like a belt decoration.<sup>22</sup>

Zelizer's work points in the direction of what legal scholars now term "law and social norms," an area of legal scholarship that is generally friendly to law-and-economics thinking, but that criticizes its psychological and social bases. Robert Ellickson, whose 1991 book *Order Without Law* propelled social norms into the legal limelight, is like Zelizer in pointing out that gifts involve reciprocity and that gift-

givers even keep mental accounts of who owes what to whom, but that there nevertheless are occasions on which gifts are appropriate but cash is not. Bringing the bottle of wine to the dinner party will be just fine, and may even be expected, but paying its price in cash would offend the host.<sup>23</sup>

One of the critical differences between gift exchange and commodified exchange is the *size* of the relevant community in which exchange takes place, or at least its potential size. Dollars are just as green, no matter who plunks them down. If you have the cash, you can be anyone in the world but you can still buy the hairdryer or the bar of soap; and if not, not.<sup>RRR</sup> Gift exchange, on the other hand, operates within more limited ambits. Its context, it seems, entails embeddedness in a culture—even a culture of two—where social norms govern. That is why gifts need not be exactly equal or symmetrical. The parties know each other, and they keep similar mental accountings in which the giver of the lesser gift still has a debt, to be made up next time or to be advanced in the "currency" of admiration and respect. And if one of the immediate parties should lapse in her reciprocal obligations, she will be reminded by the surrounding and observing community, which uses advice, gossip, and ostracism to enforce the prevailing social norms.<sup>24</sup>



All the complicated understandings of gift exchange make sense in a community web of densely intertwined and mutually observed interactions. But cash markets, it seems, can dispense with these social interactions. They depend not on well-understood relationships or community social norms, but rather on impersonal law. Hence communitarians see market transactions as hard, distant, unfeeling, and cold by comparison to gift exchanges, where everyone has to be a member of the relevant community, and as it were, in the know.

How aggravating, then, to find that a community's culture may show up in a big, impersonal cash market. How distressing, for example, to see the spiritual designs of Aboriginal groups adorning pimply mainstream adolescents' tee-shirts.<sup>25</sup> How annoying to find the earrings and fashions of proud gays and lesbians being sported by straights who never paid their dues.<sup>26</sup> How irksome to see the cultural icons of Kwanzaa, the glories of Kenta cloth, bedecking a blue-haired, middle-aged white woman from the suburbs.<sup>27</sup> (Alas, I confess that I am that blue-haired middle-aged white woman.). Cash markets, it would seem, drive out the intimate meanings and cultural synergies of gift exchange, and instead dilute social norms in a cold bath of literal and figurative alienation.

The gifts-vs.-markets issue needs some addenda, however. Here is a first addendum, concerning a *wealth/meaning tradeoff*. In gift exchange, the community of exchange is likely to be rather limited, contained within the ambit of the controlling social norms. In markets, on the other hand, there are all kinds of potential bidders out there for your stuff, and if there are more bidders, the chances are better that your stuff will bring in a bigger return. But here's the tradeoff: sales in a larger cash market can dissipate the cultural meanings that infuse your stuff in the smaller gift-exchange community. Those tie-dyed tee-shirts of the 1960s were way cool as long as only hippies wore them, but they got pretty tepid when the over-30 set started to appropriate the designs. Gay bars can lose their cachet for the regulars when too many eager straights show up.<sup>ss</sup> Kenta cloth - not to speak of hip-hop gestures - start to look creepy and alien and even like something of a power grab in the hands of suburban white folk, as bell hooks argues.<sup>28</sup>

The tradeoff, in short, is money versus meaning. What is more, there is a collective action problem at the heart of the meaning/money tradeoff. Meaning is a collective good, whereas money is likely to go to individuals. When individuals sell a few culture-laden items to outsiders, their individual sales may cumulatively spell the end of the community's collective good of

iconic meaning. This is the reason why communities might want to have some say about individual's sales of cultural goods.<sup>29</sup>

On the other hand, money is nothing to sneeze at, even for the collectivity, and the paternalistic concern of outsiders may be just that – paternalism, and unwanted too. You think that it ruins the tribal group's authenticity when tourists buy tickets to see the rain dances? You bemoan the ways that the dances themselves have changed, just to please the tourists' insatiable demand for what they obtusely think is authentic?<sup>30</sup> Tough. Mind your own business. Meaning and money might trade off against each other, but who is to say that meaning should always trump money? Besides, as Sarah Harding points out with respect to Native American artifacts, money may become a part of meaning, where commodification is a part of a thing's history.<sup>TTT</sup>

Here's a second addendum to the gifts-markets dichotomy. This addendum concerns *asymmetries in access to market exchange*, asymmetries that have been much noted among commodification theorists, particularly with respect to family structure. Typically the wife specializes in matters of gift exchange while the husband sells his services in the market, and both develop their skills accordingly. No wonder that at divorce, he has a wider range of options. He can offer his human capital in the wider employment market, whereas her human capital is, as the

economists would say, firm-specific, which is another way of saying that the only major bidder for her services is the husband she is divorcing, hardly an ideal situation for her. No wonder either that feminist critics—and market economists too—often call for a market-based assessment of the household work that she has done.<sup>uuu</sup> Anticommodificationists resist such efforts, for the usual reasons: marketizing Mom's housework and child care would drain meaning out of loving relationships. But some others think a dollop of commodification would be a good thing, particularly as a way of evening the score as between Mom and Dad.<sup>31</sup> In any event, these asymmetries once again highlight the point that the locus of gift exchange is a relatively limited community—here a family—whereas the locus of the market exchange is potentially world-wide. If one (Mom) deals with the limited community of gift exchange, and the other (Dad) deals in the global marketplace, he's bound to have more economic options when they stop getting along.

The third addendum to the gift-market dichotomy follows directly, and it concerns a *certain comparative advantage of commodification*. There are times when commodification does not seem like a second best, to revert to the economists' terminology. Commodification can be first best. To be sure, if markets are disallowed and only gift exchanges are allowed,

those gift exchanges will be thick with community meaning. Ugh, says Martha Ertman, get your thick meaning out of my hair.<sup>32</sup> As her article suggests, when exchanges are subject to social norms and community surveillance, the participants may be subject to stifling intrusion, particularly in matters so delicate and so socially fraught as reproduction. Neighbors, government officials, and self-appointed moralists think they have a right to intrude in nonmarket exchanges. But not in markets. As Michael Sandel points out, for better or worse, markets are non-judgmental.<sup>33</sup> You can buy this sperm or that egg for indifferent, cold cash. No wonder some prefer markets: by comparison to the cloying heat and friction of social norms, the cool, smooth market is liberating, empowering, insouciant. Viva commodification!

And one final addendum to the gift-market dichotomy revolves about the *social norms of markets*: who says markets are so alienated from norms and trust? No doubt a turn from gift exchange to market exchange can entail the loss of community meanings, along with the disruption of relationships based on understanding, local knowledge and trust. But social norm scholarship suggests that markets themselves are rather more complicated than we might have thought, and that they may be norm-based and norm-generative rather than norm-destructive. The

economic historian Avner Greif has traced the ways in which medieval merchants leveraged home-town, small-group relationships to give themselves the mutual assurances they needed to trade on an international scale.<sup>34</sup> Contract theorists - and Teemu Ruskola in this volume - point out that many or even most commercial relationships last over long time periods, during which the participants come to know and to trust one another.<sup>35</sup> Lisa Bernstein's work is packed with examples of the ways in which merchants in varied commodities—diamonds, cotton, hay—overlay their market dealings with consultations, behavioral norms, chatter and chiding.<sup>36</sup> Even e-Bay, presumably the most impersonal and universal of markets, has devised indices through which the participants can report on one another, publicizing which buyers and sellers are prompt, honest and competent, and which are slowpokes and slackers.<sup>vv</sup> In many if not all these contexts, market participation fosters new communities of interest among former strangers, even though these new communities of interest may disrupt the older communities of birth, status, and locality. But what's the matter with that?

In an interesting way, the key to what we might call market-communitarianism is the economists' bugbear, transactions costs. One cost of transactions, for example, is imperfect information. In some markets, information is not much of a

problem. As sociologists have pointed out, where product information is obvious on the face of the product, and where the relevant transactions can occur simultaneously, little social structure may be expected to unfold among the participants. But where market participants must take risks, as when they buy goods of untested quality or sell goods before payment is delivered, they need institutional structures to assure them. In these situations of imperfect information, trading relationships are much more likely to effloresce into dense social networks and long-term relationships, even among persons who were initially complete strangers.<sup>37</sup>

Not that market-communitarianism is all sweetness and light, however. Amy Chua's important work on market-dominant minorities all over the world underscores the importance of social organization for trade.<sup>38</sup> It is precisely the social organization of some social groups that permits them to dominate the trading activities of the countries in which they reside - the Ibo in Nigeria, the overseas Chinese in Indonesia, the Indians in east Africa. But Chua also describes the pathologies that may emerge. The members of market-dominant social groups trust one another, but they don't trust the rest of the society, so that unlike e-Bay, the market-dominant minority group is closed. In turn the outsider-majorities may hate and distrust

market-dominant insider-minorities, and they may well blame them for local social ills, sometimes with disastrous results.

In a sense, one could see Chua's market-dominant minorities as the modern-day inheritors of Avner Greif's medieval merchants. They are groups that rest on the dense-packed norms of gift-exchange among themselves, and that have leveraged those small-scale social talents into commodity-based skills in a wider trading market. But whatever the status of medieval and modern market-dominant minorities, the scholarship of social norms has simply blasted out of the water the notion that markets are cold, distant, and a-social. Quite the contrary, none but the simplest of markets can function without social organization, trust, and norms. No wonder, then, that in the theories of social norms, we can see a certain convergence between market thinking and commodification theory.

Rethinking Fungibility: The Perspective of the *In Rem* Theory of Property

One of Radin's concerns about market rhetoric is its implicit rejection of the uniqueness of things. Market rhetoric assumes that everything can be traded for everything else, and that through the medium of money, all is fungible. According to Radin, this attitude represents an impoverished view of human activity.



Radin's analysis of market rhetoric and fungibility has recently received some unexpected support from a couple of market-friendly property scholars, Thomas Merrill and Henry Smith. Merrill and Smith are among a group of authors who have gotten interested in the differences between property and contract, and they have written a series of articles that attempt to refine those differences, which they think have been blurred in law and economics scholarship.<sup>39</sup> Interestingly enough, their analysis also enlightens readers about the relationship between markets and fungibility.

In distinguishing property from contract, Merrill and Smith argue that as a general matter, contracts involve only a small number of persons who can actually work out the terms of the deal, and for that reason contracts can be quite complicated. In any event, the contract will be all over when the immediate participants finish with it. Property, on the other hand, can easily survive its current owners. A given piece of property may be bought and sold over and over, and the more durable the goods, the more times those goods will show up in the market. What this means, according to the new theory, is that property's legal consequences attach to the thing (*in rem*) as opposed to the persons involved (*in rem*), as in contract law. And most importantly, the legal categories of property have to be kept

simple, so that new generations of owners have a pretty good idea about what they are getting, and so that current buyers and sellers don't go crazy trying to search out a lot of weird relationships that might affect the purchase.

What does all this say for commodification theory? The point to notice is that the *in rem* theory is really about property that circulates in big markets, that is, commodifiable property. This property has to be simple because simplicity reduces information costs. The theory assumes a big universe of buyers and sellers over time, who cannot possibly all know one another or know anything about the history and context in which the purchased thing once appeared. Thus the *in rem* theory tells us why market-alienability and fungibility go together: idiosyncrasies are not allowed because big markets bring strangers to the goods, and strangers cannot be asked to figure out the idiosyncratic twitches of prior owners.<sup>40</sup>

But of course not all resources lend themselves to simplification or fungibility. Take environmental resources: most are notoriously complicated. That is one reason why it has been so hard to figure out workable "tradable rights" schemes for most of them. For example, wildlife habitat in one location and topography is very difficult to compare to wildlife habitat elsewhere, since different plants and animals thrive in

different topographies and weather patterns.<sup>41</sup> Generally, only the simplest and most fungible of environmental goods (or bads) have proven tractable to trading schemes. Similarly, for works of art, there is certainly a thriving art market, but the art works themselves are far from fungible. No one cares if you buy a bottle of orange juice and carelessly drop it on the floor, but lots of people would care if you did the same with a Rodin sculpture. You can always get another bottle of orange juice, but a Rodin sculpture is a lot harder to replace. Speaking of Rodin, the artist himself or herself may have a special investment in the artwork, and might be particularly concerned if you painted the sculpture chartreuse.

Inalienability or incomplete inalienability is one way to manage these real-life complicated properties that do not fit easily into the legally simple, marketable categories that the *in rem* theory proposes. A very common form of incomplete alienability results from regulation. An example is the Endangered Species Act's prohibition on "taking" endangered animals, which means killing or otherwise disrupting them.<sup>www</sup> A property owner can sell her acreage, but generally, neither she nor the new owner can wriggle out of this "take" prohibition by paying something; effectively the public has a permanent and inalienable wildlife easement over the property. Artists' so-

called moral rights in works of art are another instance of incomplete alienability. These moral rights give artists the authority to prevent alterations of their works of art, even post-sale; the artists' cannot alienate this entitlement, presumably because too many would simply bargain away their rights, leaving the artworks to the not-always-tender mercies of the purchasers. The United States to date has been rather reluctant to enact many moral rights into its intellectual property law, but European countries are much more favorably inclined.<sup>yy</sup>

There are also non-regulatory ways to restrict alienability. Restrictive covenants on real estate are a form of partial restraint on alienation, allocating rights to neighbors over one another's use of property. Restrictive covenants also illustrate another interesting phenomenon, namely that property may be made practically inalienable by the *proliferation* of property rights themselves. Michael Heller has written at length about the "anticommons," a situation in which there are so many and such diverse legal interests in a particular resource that no one can reassemble the whole, a situation that becomes pathological when it means that the property can never be used.<sup>42</sup>

Nevertheless, the complex/inalienable end of the property spectrum is not always pathological, even for economic thinkers.

In fact, complexity can be a way to enforce inalienability, just as inalienability can be a way to manage complexity. True enough, according to the *in rem* theory, property that is marketed has to be relatively simple. But not everyone wants their property to be marketable, and for such people, complication can be a part of a conscious plan to foil the market. I know someone whose family has long had some land in the Rocky Mountains. In an effort to keep the property in the family, the current generation of family owners are dividing up the property among so many members of the newer generations that (they hope) the property can never be sold to an outsider. Somewhat similarly, Stuart Banner's work on property relations in settlement-era New Zealand describes the complicated layerings of use rights among Maori landholdings, where one family had the fruit of a tree, another the fowling rights, and a third the rights to the bark.<sup>43</sup> The twofold effect of this proliferation of overlapping rights was that (a) outsiders couldn't understand them and (b) as a consequence they were discouraged from buying the properties. Matters changed later on, when the English settlers managed to force some simplification onto Maori land claims and then proceeded to buy them apace.

Note that complexifications of this sort tend to act not just as limits on the alienability of property, but also as limits on *change*. The sculpture subject to moral rights is not likely to get daubed chartreuse. The endangered species habitat will remain as it is. The Rocky Mountain property will not only stay in the family, but it will stay roughly in its current configuration, since the larger the number of family members, the less likely it is that they will agree on any drastic changes. The Maori properties continued in their multiple uses as long as they remained complicated—and changed dramatically once they became legally simple.

This pattern suggests a basic conservatism running through the language of "market-inalienability," "anticommodification," and "incommensurabilities," and it suggests a reason why law-and-economics scholars are impatient with this kind of talk. Despite the nickname of the dismal science, market-oriented economists tend to like things that are dynamic, optimistic, breezy. They don't like to be reminded that matters are more complicated, and they don't like to delay change by accounting for all the little wrinkles. The *in rem* theory of property demonstrates what commodification theorists already knew about market alienability and market rhetoric, namely that market rhetoric is simple and oblivious to nuances, made for bulls in

china shops. It has to be, or big markets won't work. But the *in rem* theory also illustrates why market economists get irked with commodification theory. Inalienability, complexity and stasis are all part of the same anticommodification package. Which is to say, anticommodificationists seem like a bunch of fuss-budgets and Nervous Nellies.

Clearly some of the new commodification theorists in this volume suggest a similar view. Inalienable rights may protect important matters, but markets open up possibilities. How much easier it would be for gays and lesbians to have babies if they could just buy reproductive materials, and not mess around with snoopy bureaucrats!<sup>44</sup> Who can fail to sympathize, just a little bit, with the young ladies whose gender-bending experiments include the purchase of sexual services from men!<sup>45</sup> Who does not find it just a bit refreshing that the seller of Kwanzaa clothing is completely indifferent to black and white, and instead only cares about green?<sup>46</sup> In short, markets serve up ways to get rid of old stuff and acquire new stuff-and that means figuratively as well as literally. The new commodification theory has more than a whiff of recognition of the market's enormous potential for experiment and novelty. Sometimes, liberation comes in the form of a money price.

Rethinking market rhetoric: the perspective of "doux commerce"

One of Radin's major contributions to commodification theory was her attentiveness to the *rhetoric* of the market. As she pointed out, marketizing some human activities inappropriately makes us talk about them differently, and talking about them differently can make us *think* about them differently, sometimes to the detriment of others, sometimes to the detriment of ourselves. Your children may be frightened and confused if they hear you talk about the market for babies. Juries may be inured to the pain, terror, and humiliation of muggings or rapes when they hear these crimes described as "market bypass."<sup>47</sup> When you buy what are euphemistically called sexual services, you may fool yourself into thinking that sex can be separated easily from the personal and emotional content that normally gives sex its *gravitas*. Radin's complaint, in short, was that the application of market rhetoric to non-commodifiable matters coarsens our understanding of these matters, leading us into mistakes, loosening our moral grasp, and undermining our ties to others. And so it seems that, just as commodified properties necessarily take on a simplified and flattened *in rem* legal character that is good against an undifferentiated world at large, so does market rhetoric itself take on an *in rem* quality, simplifying and flattening all



nuance, idiosyncrasy, and sentiment, not only for the speaker of this rhetoric but for hearers as well.

Both before and after Radin's work, others have echoed these complaints about the rhetoric of markets in contexts that the writers deemed inappropriate. From a conservative perspective, this is the problem with the language of contractual marriage. Contract obligations in this intimate setting, it is said, could make the married partners talk and think of their individual entitlements, undermining the moral foundation of sharing that should permeate their relationship.<sup>48</sup> Market ideas for environmental protection suffer a similar criticism. Talk of pollution entitlements, it is said, hollows out the moral obligation to do the right thing, because this talk encourages the idea that those with the cash can buy the right to inflict damage on others.<sup>49</sup> And in perhaps the most famous study of all, Richard Titmuss argued that the sale of blood undermines the altruistic voluntary blood donations that are likely to be of higher quality.<sup>50</sup> In all these areas, market speakers, seemingly like Shylock, shockingly mix the "spheres" in which money reigns with those in which money means nothing.<sup>51</sup>

But clearly marketization and commodification are more subtle than this. Deborah Stone, writing in this volume about paid caregivers, gives us the most succinct and charming

statement: "Love creeps in." Ann Lucas suggests that love or at least affection even creeps into prostitution, where clients and sex workers come to think well of one another. Richard Posner argues that just about everyone admires and respects our professional military service personnel, and that we are not concerned that the soldiers are volunteers for pay.

In all these examples it appears that commodification of a good or service has not markedly diminished people's abilities to think beyond the cold cash to the nuance of the relationship or service. To be sure, most would probably acknowledge that the cash is an impediment to be overcome. Surely the call girl (or call boy) suffers a moment of anxiety or embarrassment while a favorite client fumbles for his wallet. On the other hand, had it not been for the cash, the call girl and client would never have met at all. Neither would the care-needy and the care worker. Neither would the Kwanzaa bookseller and the interested customer.

If the new commodification theorists have noticed this pattern, in which commerce creates new relationships among former strangers, they are not alone. Eighteenth century economic thinkers noted that commerce brings people together who otherwise would not encounter one another at all, and they argued that far from coarsening speech and thought, commerce

makes manners gentle, patient, and other-regarding.<sup>53</sup> A business person wants to sell you something, not start a fight with you. To make the sale, he or she needs to find you and pay attention to what you want, in order to meld your interests with his or hers. Notice that "she" and "hers" are very much a part of the discourse of commerce. Travelers to Holland, the most commercial country of early modern Europe, noticed the great freedom of Dutch women, who could participate in commerce in a way unthinkable in the military pursuits of the aristocracy.<sup>54</sup> Subsequent historians have somewhat controversially linked the burgeoning late eighteenth century global trade to the rise of philanthropy, including the antislavery movement.<sup>55</sup> The reason is that commerce introduced traders to others all across the globe, and got them interested in the well-being of people very unlike themselves.

All this gooey sentimentality about gentle commerce may seem a bit hard to take in the light of the anti-globalization movement of the last several years, in which capitalist expansion is presented in its most hard-hearted and exploitative light.<sup>56</sup> The economic historian Albert Hirschman, whose work over the last generation has reminded everyone about the *doux commerce* theories of the eighteenth century economic theorists, also observes that commerce invites far less favorable

descriptions.<sup>57</sup> These appear notably in the work of Karl Marx, but among others as well, as for example in Alexandra Chasin's warnings that the great slut commerce may lure gays and lesbians away from wider social concerns.<sup>222</sup> But on the whole, commodification theory may be mirroring the mood swings that Hirschman has described with respect to theories of commerce, with anti-commodificationist concerns in the ascendancy in the early years, followed by a more open interest in markets among the newer commodification theorists. Again as Stone puts it, we can scarcely fail to see that love creeps in.

And yet, to return to the theme of rhetoric, might we be better off if market-created love could avoid using the language of cash? Might we actually benefit more if we could enjoy markets in intimate, complex or unique goods, while pretending we were doing something else and talking about commodities some other way? Well, perhaps so. Perhaps we would be happier with a veil drawn across the rhetoric of commerce. And no doubt the first people to notice this are the people who are trying to sell you something, the Nike executives worried about Foot Locker's commodification of Air Jordans, or the real estate broker's offer to find you a suitable hooooome.

Hence I would like to suggest that while there is probably something to be said for disguising commodification with some

other rhetoric, these disguises can be overdone. Funeral directors are notorious for their dislike of talking to you about the cost of the coffin. Tour operators and dance instructors would rather not tote up the final bill, as if the fun were not for sale.<sup>59</sup> But it is. Moreover, the law reflects that fact, and forces "anticommodificationist" fun merchants to fess up to the tab.

More radically, there can be times when commodification rhetoric has its uses even where things are not for sale. In environmental law, much ink has been spilled over the technique of "contingent valuation," the effort to find shadow prices that assess the value of non-market goods like scenery and wildlife.<sup>AAAA</sup> There are few explicit values for these good things, so economists have tried to come up with other valuation methods. They ask people, How much do you spend to visit a national park where you might see or hear a wolf? How much would you spend to know that the experience was available to you? How much just to know the wolf was there? These so-called contingent valuations have drawn fire from both right and left - from the right because they seem so loaded with uncertainty and hypothetical thinking, from the left because they seem so, well, so inappropriate to the wonders of nature, great and small.<sup>60</sup>

My view is that these critiques are taking market rhetoric far too literally. In a sense, contingent valuation is metaphoric, the best we can do when we have no explicit way to assign values. In a commercial society, the absence of money value for something makes its value look like zero. But everyone knows that this is wrong. There is a value to eighty-mile visibility, clear water, and live fish in the clear water. It is precisely the jarring quality of contingent valuation-the let's-pretend market language, the mixing of "spheres"-that makes the point. Much the same may be said of the claims for reparations that Keith Hylton's contribution describes, that is, for race-based injuries in the sometimes-distant past. As Hylton points out, the strongest legal claims are for identifiable personal and property losses, fitting as they do most easily into the conventional categories of compensatory justice. But in some ways, the more outré claims for slavery reparation are more interesting rhetorically. Frail and unwieldy though they may be as a legal matter, these demands for money compensation make up a jarringly pointed call for justice too, albeit of a type not easily addressed by the tort system.<sup>BBBB</sup> As in the language of the so-called market for ideas or the market value of spousal services, the very terms of cold cash and commodification wake us up to the fact that a great deal is at stake.<sup>61</sup>

In a sense, using commodification rhetoric in this way is quite like the extension of rights language to unexpected subjects and objects, such as animal rights, children's rights, and "standing" for trees. This linguistic extension too has drawn fire from both right and left, in part on the ground that rights-talk corrupts our thinking. But rights-talk, like market-talk, draws on our rather limited metaphoric resources to make clear that something important is at stake.<sup>62</sup> It is the very mixing of spheres that gives these analogies their power, and of course their danger.

#### Conclusion

Whither, then, commodification, or rather commodification theory? One can never be certain that the future will be like the past, of course. But observing the trends in commodification theory over the last several years, it seems clear that some commodification theorists are at least somewhat more comfortable with markets, and more intrigued with the market's possibilities for novelty, liberty, and self-fashioning-not to speak of money. To be sure, no one who talks a great deal about "commodification" is likely to be wholly uncritical of markets. The language is still a signal, and the signal still says, You can't buy happiness. But then again, let's check eBay one more time . . . .

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<sup>1</sup>Commodification anxiety may be a species of a more general distrust of inappropriate mixing of "spheres"; see Kenji Yoshino, *The Lawyer of Belmont*, 9 J. L. & HUMANITIES 183, 184-88 (1997) (discussing MICHAEL WALZER, *SPHERES OF JUSTICE* (1983)). **Error! Main Document Only.** See also Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 Harv. L. Rev. 689, 696 (2003) (discussing Walzer's "spheres").

<sup>2</sup>Richard A. Posner, *Community and Conscription*, New Republic, May 5, 2003, this volume.

<sup>3</sup>James Salzman & J. R. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000).

<sup>4</sup> MAUREEN TKACIK, *IN A CLASH OF SNEAKER TITANS, NIKE GETS LEG UP ON FOOT LOCKER*, Wall St. J., May 13, 2003, at A1, col. 4, A10, col. 4.

<sup>5</sup>Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), this volume. See also Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

<sup>6</sup>Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *M-I*]; for her more recent reflections on the subject, see MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS* (1996), also in this volume.



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<sup>7</sup>Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 3, 15 (1986), also in this volume. Appadurai credits the term to another author in the same volume: Igor Kopytoff, *The Cultural Biography of Things: Commoditization as Process*, *id.* at 64.

<sup>8</sup> See, e.g., Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998).

<sup>9</sup>Joan Williams & Viviana Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, this volume. Katherine Silbaugh's article take a similar position with respect to household labor: *Commodification and Women's Household Labor*, 9 Yale J. L. & Feminism 81 (1997), this volume.

<sup>10</sup>Sarah Harding, *Culture, Commodification, and Native American Cultural Patrimony*, this volume; Ann Lucas, *The Currency of Sex: Prostitution, Law and Commodification*, this volume. SEE ALSO THATCHER FREUND, *Objects of Desire: The Lives of Antiques and Those Who Pursue Them* (1993) (tracing an antique's history).

<sup>11</sup> Radin, *M-I*, *supra* note —, at 1915-18.

<sup>12</sup>Radin, *M-I*, at 1915-18; but see Lucas, this volume (criticizing Radin's version of "incomplete commodification."

<sup>13</sup> See, e.g., George Mundstock, *The Trouble with FASB*, 28 N.C. J. INT'L L. & COMM. REG. 813 (2003) (explaining economic theory of the second best, citing as "classic exposition" Richard G. Lipsey &

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Kelvin J. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956)).

<sup>14</sup> See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 206-207 (2001) (noting that female sexuality need not always be "warm, fuzzy, soft-focused" but sometimes edgy, dangerous and willing to confront shame and "objectification").

<sup>15</sup> Tanya Kateri Hernandez, "Sex in the [Foreign] City"-*Commodification and the Female Sex Tourist*, this volume.

<sup>PPP</sup> See Martha Nussbaum, *Taking Money for Bodily Services*, in *Sex and Social Justice* (1999), this volume; Ann Lucas, this volume. Radin herself now refers to these kinds of problems as those of "nonideal theory"; see Margaret J. Radin & Madhavi Sunder, *Foreword*, this volume.

<sup>QQQ</sup> Patricia J. Williams, *In Search of Pharaoh's Daughter*, in *The Rooster's Egg: The Persistence of Prejudice* (1995), this volume.

<sup>16</sup> Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 326, 336-39, 347 (1977), also in this volume.

<sup>18</sup> Michael Finkel, *Complications*, N.Y. TIMES, May 27, 2001, sec. 6 (Magazine) at 26, col. 1 (describing extensive international trade in kidney replacement); see also Lloyd R. Cohen, *Increasing the Supply of Transplant Organs* (1995), this volume (supporting markets in organs); cf. Emanuel D. Thorne, *When Private Parts Are Made Public Goods: The Economics of Market Inalienability*, 15 YALE J. REG. 149 (1997) ("exhortation" for inalienable organs might have advantages over market)

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<sup>19</sup>See, e.g., MICHAEL B. GERRARD, *WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING* 86-90, 178-80 (1994).

<sup>20</sup>Radin, *M-I*, *supra* note —, at 1853-55; **Error! Main Document Only.**

<sup>21</sup>MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 1, 3, 40 (1967) (English translation of *Essai sur le don, forme archaïque de l'échange*, 1925); see also Appadurai, *supra* note —, at 10-12 (chiding fellow anthropologists for romanticizing gift over market); for some other potshots at the gift/market distinction, see also the mercilessly slashed version of my 1992 article, *Giving, Trading etc.* this volume.

<sup>22</sup>VIVIANA ZELIZER, *THE SOCIAL MEANING OF MONEY* 105 (1994).

<sup>23</sup>ROBERT C. ELLICKSON, *ORDER WITHOUT LAW : HOW NEIGHBORS SETTLE DISPUTES* 78, 225-29 (1991) (describing numerous neighborly in-kind exchanges and strategies to even up implicit obligations).

<sup>RRR</sup> **Error! Main Document Only.** This is not to say, of course, that prejudice does not affect markets, as for example in the efforts of homeowners to prevent sales of housing to minority racial groups. See Carol M. Rose, *Shelley v. Kraemer*, in *Property Stories* (2004).

<sup>24</sup>For a fascinating account of complex reciprocal labor exchange in a remote Peruvian agrarian area, see PAUL B. TRAWICK, *THE STRUGGLE FOR WATER IN PERU: COMEDY AND TRAGEDY IN THE ANDEAN COMMONS* 98-108 (2003).

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For gossip in norm-enforcement, see ELLICKSON, *supra* note —, at 232-36.

<sup>25</sup>For similar situations, see Madhavi Sunder, *Property in Personhood*, this volume.

<sup>26</sup> See Dereka Rushbrook, *Cities and Queer Space: Staking a Claim to Global Cosmopolitanism*, this volume.

<sup>27</sup> Regina Austin, *The Commodification of Black Culture and Kwanzaa*, this volume.

<sup>SSS</sup> See Rushbrook, this volume.

<sup>28</sup> See Austin, this volume; and hooks, *Black Looks: Race and Representation* (1992), this volume.

<sup>29</sup>See Sunder, this volume (concerning group efforts to control culture). Williams and Zelizer, this volume, argue that it is critical to locate the property right appropriately; hence if meaning is a collective good, the collectivity might be the appropriate decision-maker about sales. Collective "ownership," however, poses major alienability problems; see discussion of inalienability and stasis, *infra*.

<sup>30</sup>For a fascinating account Turkmen carpet weavers' modifications to satisfy purchaser demand for "authentic" design (thereby undermining the whole idea of authenticity), see Brian Spooner, *Weavers and Dealers: The Authenticity of an Oriental Carpet*, in *THE SOCIAL LIFE OF THINGS*, *supra* note xx, at 195, 214-35.

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<sup>TTT</sup> Harding, this volume.

<sup>UUU</sup> To cite some of the authors appearing elsewhere in this volume, see Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 125-27 (2000) (giving feminist case for recompense); Martha M. Ertman, Commercializing Marriage: A Proposal for Valuing Women's Work through Premarital Security Agreements, 77 Tex. L. Rev. 17 (1998) (same); Richard A. Posner, *Economic Analysis of Law* 151-54 (6<sup>th</sup> ed. 2003) (giving market economists' analysis).

<sup>31</sup> See Silbaugh, this volume. For a cross-section of the various views on this subject, see *Symposium on Divorce and Feminist Legal Theory*, 82 GEO. L. J. 2119 (1994).

<sup>32</sup> Martha M. Ertman, What's Wrong with a Parenthood Market? A New & Improved Theory of Commodification, 82 N.C. L. Rev. 1 (2003), this volume.

<sup>33</sup> Michael J. Sandel, *The Moral Limits of Markets* (1998) this volume.

<sup>34</sup> Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence from the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989).

<sup>35</sup> Teema Ruskola, *Family, Inc.: What's the Difference Between a "Family" and a "Corporation"?* this volume; **Error! Main Document Only.**; for early theoretical discussions of the real-world importance of longterm or "relational" contracts, see Ian MacNeil, *The Many Futures of Contract*, 46 S. Cal. L. Rev. 691 (1977); and Stewart Macaulay, *Elegant Models, Empirical*

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Pictures, and the Complexities of Contract 11 L. & Soc'y Rev.  
507 (1977)

<sup>36</sup>Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1725 (1996) (discussing practices of the Nat'l Grain & Feed Assn.); *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

<sup>vvv</sup> **Error! Main Document Only.** EBay encourages both buyers and sellers to report on their experiences with one another, whether positive or negative, through a "Feedback Forum" that results in a "profile" for each user. The profile is then available to subsequent buyers or sellers. For a complete description, see <http://pages.ebay.com/help/feedback/feedback.html>. EBay describes this system as one that helps to "create a trustworthy community for everyone" (at <http://pages.ebay.com/help/sell/basics.html>, item 7).

<sup>37</sup>See Peter Kollock, *The Emergence of Exchange Structures: An Experimental Study of Uncertainty, Commitment and Trust*, 100 AM. J. Soc. 313 (1994) (describing psychology experiment in behavior that established trading relationships).

<sup>38</sup>Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM L. REV. 223 (1996).

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<sup>39</sup>Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?* 111 YALE L. J. 357 (2001); *The Property-Contract Interface*, 101 COLUM. L. REV. 773 (2001) ; same, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle* 110 YALE L. J. 1 (2000); see also Henry Hansmann & Reinier Kraakman, *Property, Contract and Verification: The Numerus Clausus Principle and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2001), Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, in *THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 209, 213-15 (1999).

<sup>40</sup> Austin, this volume, also notes that commodification involves a flattening of cultural character.

<sup>41</sup>Salzman & Ruhl, *supra* note -.

<sup>www</sup> . **Error! Main Document Only.**Endangered Species Act, 16 U.S.C. sec. 1531-44, sec. 1538 (forbidding any person to "take" endangered species; "take" defined in sec. 1532 (19) as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," or attempt any of these acts).

<sup>xxx</sup> Please insert cite. **Error! Main Document Only.**For the concept of moral rights in intellectual property, and its varying legal treatments, see, e.g. Thomas F. Cotter, *Pragmatism, Economics, and the Droit Morale*, 76 N.C. L. Rev. 1 (1997).

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<sup>YYY</sup> **Error! Main Document Only.** For the concept and legal treatment of moral rights in intellectual property, see, e.g. Thomas F. Cotter, Pragmatism, Economics, and the Droit Morale, 76 N.C. L. Rev. 1 (1997).

**Error! Main Document Only.** [NOTE NUMBER MISSING, SHOULD BE 42?] Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621 (1998); Michael A. Heller and Rebecca S. Eisenberg, Can Patents Deter Innovation? The Anticommons in Biomedical Research, 280 Science 1243 (1998).

<sup>43</sup> **Error! Main Document Only.** Stuart Banner, Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand, 24 Law & Soc. Inquiry 807, 811 (1999).

<sup>44</sup> Ertman, *supra* note xx, this volume.

<sup>45</sup> Hernandez *supra* note xx, this volume; cf. Lucas, *supra* note xx, this volume.

<sup>46</sup> Austin, *supra* note xx, this volume.

<sup>47</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1199 (1985)

<sup>48</sup> See, e.g. Milton Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L. J. 2119 (1994) (taking baleful view of compensation efforts). But see Carol M.



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Rose, *Rhetoric and Romance*, 82 GEO. L. J. 2409 (1994)

(criticizing Regan's Spouses and Strangers); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL L. REV. 204 (1982) (favoring contracting); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880* 103 YALE L. J. 1073 (1994) (sympathetic presentation of early compensation efforts)

<sup>49</sup>Michael J. Sandel, *Editorial, It's Immoral to Buy the Right to Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

<sup>50</sup>RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 225 (1971), this volume.

<sup>51</sup>On closer analysis, Shylock is the one character who knows the difference. See Yoshino, *supra* note 1, for a brilliant analysis of THE MERCHANT OF VENICE's pervasive confounding of money with love.

<sup>53</sup>**Error! Main Document Only.** Albert O. Hirschman, *The Passions and the Interests* 54-63 (1977).

<sup>54</sup> **Error! Main Document Only.** See, e.g., Peter C. Sutton, *Dutch Treat*, NY. REV. BOOKS, Feb. 17, 1994, at 31, 32 (reviewing James A. Welu, et al., *Judith Leyster: A Dutch Master and Her World* (1993)).

<sup>55</sup>Thomas Haskell, *Capitalism and the Origins of Humanitarian Sensibility (Part 2)*, 90 AM. HIST. REV. 547, 549-59 (1985). For

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the controversy about the relationship of capitalism to abolitionism; see generally CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION (Thomas Bender, ed. 1992).

<sup>56</sup>But see Linda Y. C. Lim, *Women's Work in Export Factories: The Politics of a Cause*, in *Persistent Inequalities: Women and World Development* 101, 116-18 (Irene Tinker, ed., 1990) (comparing women's multinational factory employment favorably to patriarchal dominance, criticizing feminist opposition to this work).

<sup>57</sup> **Error! Main Document Only.**Hirschman, *supra* note xxx [passions & interests], at 54-63; see also Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble*, 20 J. Econ. Lit. 1463 (1982).

<sup>57</sup> please complete cite **Error! Main Document Only.**Hirschman, *supra* note ---- [passions & interests]; see also Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble*, 20 J. Econ. Lit. 1463 (1982).

<sup>zzz</sup> Alexendra Chasin, *Selling Out: The Gay and Lesbian Movement Goes to Market* (2000), this volume.

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<sup>59</sup> See, e.g., *Vokes v. Arthur Murray, Inc.* 212 Sol 2d 906 (Ct.App. Fla. 1968) (permitting suit to cancel expensive dance lesson and trip contracts, on grounds of sales pattern of excessive flattery).

AAAA For the pros and cons, see the Symposium on Contingent Valuation, 8 J. Econ. Perspectives 3 (1994).

<sup>60</sup>**Error! Main Document Only.**Id.; see also Donald J. Boudreaux, Roger E. Meiners, Roger E., & Todd J. Zywicki, Talk is Cheap: The Existence Value Fallacy, 29 *Env't'l. L.* 765 (1999) (conservative criticism of contingent valuation as too uncertain); John M. Heyde, Comment, Is Contingent Valuation Worth the Trouble? 62 *U. Chi L. Rev.* 331 (1995) (criticizing contingent valuation from left as inappropriate for natural wonders).

BBBB Keith N. Hylton, A Framework for Reparation Claims, 23 *B.C. Third World L. J.* 31 (2004), this volume.

<sup>61</sup>**Error! Main Document Only.**See Carol M. Rose, Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value By Any Other Name is Preference 87 *Mich L. Rev.* 1631,

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1642-46 (1989) (reviewing Mark Sagoff, *The Economy of the Earth* (1988)) (arguing that critics of contingent valuation overlook its shock value).

<sup>62</sup>**Error! Main Document Only.** See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991) (conservative critique of "rights talk" for focusing too much on individual claims, ignoring corresponding duties, need for balance and political conversation); Mark Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1382-84 (1984) (leftist critique of the "reification" of rights); cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1364-66 (1988) (criticizing critiques of rights, arguing the great importance of rights rhetoric for "dispossessed people").