

3-1-1995

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Recommended Citation

Neil Duxbury, *Law, Markets and Valuation*, 61 Brook. L. Rev. 657 (1995).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol61/iss3/1>

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BROOKLYN LAW REVIEW

Volume 61

1995

Number 3

ARTICLES

LAW, MARKETS AND VALUATION*

Neil Duxbury [†]

INTRODUCTION

I sometimes play a game with students which begins with my asking why we might ever wish to protect the tenure and rent levels of private sector residential tenants. When the law grants such protections, I argue, the supply of leasehold accommodation is likely to be reduced. After all, if the law is biased in favour of the tenant, who wants to be a landlord? Rather than accord tenants the rights to security of tenure and a "fair rent" (the principal protections embodied in the Rent Act 1977¹ and its predecessor statutes), it is far wiser to enact legislation along the lines of Part I of the Housing Act

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† LL.B., Ph.D., Reader in Law, University of Manchester, United Kingdom. This paper was written to form the basis of a workshop presented at Brooklyn Law School in April 1995. I am grateful for the criticisms of all those who participated in that event. For comments on earlier drafts, I am also grateful to Margot Brazier, Roger Brownsword, Hugh Collins, Marie Fox, Andrew Griffiths, John Harris, Tony Honoré, Richard Hyland, Joseph Jaconelli, Tim Jones, Nicola Lacey, Martin Loughlin, William Lucy, Neil MacCormick, Jean McHale, Henry Manne, John Murphy, Tim Murphy, Anthony Ogus, Richard Posner, Alain Pottage, Mike Redmayne, Colin Scott, Nigel Simmonds, Hillel Steiner and Cass Sunstein.

¹ Rent Act, 1977, s. 1 (Eng.).

1988²—legislation which not only makes less difficult the repossession of premises by landlords but which also allows rents to find their own market levels.³ While such “landlord-friendly” legislation may harm tenants in the short run, in the long term it can only work to their benefit, for it creates an incentive for people to become landlords, thereby generating market expansion and increased competition. If the market does grow larger and more competitive, I conclude, not only will the supply of accommodation be increased but standards will gradually improve and rents will come down. Legislation favouring landlords will prove equally favourable to tenants.

It almost goes without saying that few students are impressed by this argument. Attempting to bolster it with references to studies proclaiming the harmful effects of rent control in particular does little if anything to change their minds—they know full well that one may just as easily point to a body of literature extolling the virtues of rent regulation.⁴ The claim that the argument has a clear logic about it is also treated summarily. Even if they have not read Holmes, they sense that law is primarily a matter of experience rather than logic.⁵ Indeed, many of them, being tenants, speak from experience: on the basis of experience, they tell me that my argument—founded, as it is, on the premise that an expanded market is necessarily a more competitive market—is blind to the fact that possibilities for competition may be stifled by the existence of oligopoly or even monopoly; that I take no account of the gross disparity between supply of and demand for private sector rented accommodation; and that this disparity not only reflects the general difference in bargaining power between landlord and tenant but makes nonsense of the idea that deregulation will facilitate the evolution of a market in which the respective parties negotiate freely and on equal

² Housing Act, 1988, Part 1 (Eng.).

³ For an overview of this legislation, see Martin Davey, *The Housing Act 1988*, 52 MOD. L. REV. 661 (1989).

⁴ With regard to the likely effects of the Housing Act 1988 in particular, for example, compare Robert Albon & David C. Stafford, *Rent Control: Its Costly Repercussions*, 22 SOC. POL'Y & ADMIN. 10 (1988) with John Ivatts, *Rented Housing and Market Rents: A Social Policy Critique*, 22 SOC. POL'Y & ADMIN. 197 (1988).

⁵ See OLIVER W. HOLMES, JR., *THE COMMON LAW* 5 (Mark DeWolf Howe, ed., 1963).

terms.⁶ They also tell me that my argument takes no account of either freehold residential property or public sector accommodation—that I treat the private residential tenancy market as if it exists in isolation—and that I slip from talking about leasehold regulation generally to rent control in particular. To claim that leasehold deregulation will facilitate competition—which in turn will lead to lower prices and improved standards for tenants—is, I am told, to pay little attention to the realities of either the market or the landlord-tenant relationship. This sort of talk may seduce jurisprudence teachers, but people more accustomed to operating in the real world can see through such an argument in a matter of seconds.

At this stage in the discussion, I try to shift the justificatory burden onto the student. Even if we concede that there are problems with the argument in favour of deregulation, I suggest, that concession does not in itself justify the regulation of tenure and rents. Regulation brings its own problems. For example, under what circumstances might a landlord justifiably evict a tenant or raise a rent? What if the law is overzealous in its protection of the tenant? Are we not in fact harming tenants if we protect them to such a degree that potential landlords are disinclined to put their properties on the market? If one dismisses the proposal for deregulation, one might be expected to construct an argument which justifies some form of regulation: what is that argument?

⁶ The term "deregulation" is used here to denote not the removal of all regulation but the replacement of one particular set of regulatory provisions with another set which is considered to be somehow less stringent. When my students refer to the Housing Act 1988 as a deregulatory statute, they mean not that the statute removes all regulation of private sector leasehold accommodation, but that, as compared with the Rent Act 1977, it constitutes a "weaker"—less interventionist—form of legislation. When discussing markets, it seems inevitable that the term deregulation is used in this fashion—that is, to denote less as opposed to no regulation—for markets are only made possible by the existence of regulation, principally in the form of contract, tort and property law. American legal theorists seem particularly fond of stressing this point. See, e.g., ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 542-48 (1952); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 5-6 (1993). The assumption that deregulation necessarily reduces the level of state intervention is itself contentious, given that deregulatory initiatives invariably require that government remains involved in the monitoring and structuring of those activities which are no longer regulated. See Colin Scott, *Privatization, Control, and Accountability, in CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION* 231-34, 245 (Joseph McCahery et al. eds., 1993).

There are, of course, no simple answers to these questions. Having dismissed the case for deregulation, students suddenly find themselves struggling to formulate reasons for retaining legislation akin to the Rent Act 1977. While the discussion becomes inevitably very disorganised and vague, one argument seems frequently to surface: that it would be wrong not to regulate tenure and rent levels in a manner sympathetic to residential tenants because it is often the case that their tenancies are somehow a part of themselves. That is, a residential tenancy is not simply an abstract property right; rather, it is a home—a place upon which one depends, in which one invests and to which one usually becomes attached. The deregulatory perspective ignores this argument and instead ensures that the security desired by many private sector residential tenants is made dependent upon their capacity to compete in the residential leasehold market. The residential tenancy, rather than being conceived as a home, is treated as a mere commodity. Accordingly, the basic problem with Part I of the Housing Act 1988—with the replacement of security of tenure and fair rents with assured tenancies and market rents—is that it is founded on an inappropriate valuation of the residential lease as a property right.

While I am not at all convinced by this argument, I think it points to a problem which legal theorists in the United States have only recently begun to confront and which in this country has been all but overlooked. The problem concerns the limits of market reasoning. Some things are simply not for sale, either because they cannot be bought and sold or because there exist strong feelings that they should not be bought and sold. Love, friendship, human beings, votes, exemption from jury service, political influence (including, it seems, parliamentary questions⁷), marriage and procreation rights—these are but some examples of the sorts of things that are generally considered, for one reason or another, to lie outside of the market.⁸ The precise scope of the market is, of course, unclear,

⁷ This issue being especially prominent in the British press at the time of writing. See Nicholas Wood & Andrew Pierce, *Suspension for Two MPs in Cash Row*, THE TIMES, July 11, 1994, at 1; Robert Rhodes James, *A Question of Respect for the House*, THE TIMES, July 12, 1994 at 18.

⁸ For further examples and discussion, see AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* 77-83 (1988); STEVEN KELMAN, *WHAT PRICE*

and even things which fall within its domain may be distinguishable. This is the point that my students are stressing when they argue for fair rents and security of tenure: their claim is that while there obviously exists a market for residential leases, the belief that this type of lease confers upon the tenant a property right which is neither fungible nor commercial but peculiarly personal in nature suggests that it ought to be accorded special protection within the marketplace. Just as we may believe that some things are not or ought not to be alienable, we may also believe that certain things, although alienable, must be considered to embody more than merely their market value if we are to deter unconscionability within the market domain.

In various ways, legal systems reflect such beliefs—consider, for example, laws preventing the sale of certain things (such as human organs⁹) or establishing peculiar conditions which emphasise the special value placed on that which is being sold (for instance, the requirement that conveyances of legal estate be by deed¹⁰). That these sorts of beliefs are supported by law will sometimes be a source of dispute: that is, disagreements may arise over the issue of just what ought to be kept apart from, or accorded special protection within, the market domain. The basic purpose of this article is to highlight certain of these disputes with a view to determining why we might ever wish to accord special protections within the marketplace, and why it is that certain things might be considered inappropriate for market exchange. The question of just how far we should go to protect the tenure and rent levels of tenants is one such dispute; two others on which I focus are, first, the debate over whether we should permit markets in parental and surrogacy rights and, secondly, the question of whether it is ever appropriate to sell human tissues and organs for trans-

INCENTIVES? ECONOMISTS AND THE ENVIRONMENT 54-83 (1981); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 100-03 (1983); Cass Sunstein, *Disrupting Voluntary Transactions*, in NOMOS XXXI: MARKETS AND JUSTICE 279, 292-94 (John W. Chapman & J. Roland Pennock eds., 1989).

⁹ See HUMAN ORGAN TRANSPLANTS ACT, 1989, ch. 31 § 1(1) (Eng.).

¹⁰ See LAW OF PROPERTY ACT, 1925, 15 & 16 Geo. 5, ch. 20, § 52(1) (Eng.). Reflection of nonmarket value is only one of various reasons for the deed requirement here. Other reasons for the requirement include impossibility of delivery of that which is transacted and prevention of fraud and mistake.

plantation.

In the process of developing this discussion, I shall present two arguments. The first argument—what might be termed the argument from incommensurability—is that there exists an important distinction between the potential for applying market reasoning to particular legal and ethical disputes and the appropriateness of applying that type of reasoning to those disputes. We can nearly always devise market solutions to legal problems; however, such solutions will sometimes appear unsatisfactory because market reasoning will seem inapt for evaluating the particular problem under consideration. Economists—particularly Chicago neo-classical economists—have made immense strides in demonstrating the market dimensions of all sorts of human activity; and, without doubt, many of these initiatives have proved highly illuminating.¹¹ There are occasions, nevertheless, when such initiatives generate conclusions which might be considered inappropriate because market reasoning is able to provide only a limited or impoverished account of the particular issue at stake.¹²

However—and this is my second argument—while market reasoning may have its limits, I think that there has been a tendency, especially among academic lawyers, simply to as-

¹¹ There is a vast literature which might be cited here. The primary texts are undoubtedly GARY S. BECKER, *A TREATISE ON THE FAMILY* (enlarged ed. Harvard UP, 1991); GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOUR* (1976); and RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

¹² Obviously, this is a point which should become clearer as the discussion unfolds. For the moment, however, consider Posner's explanation of "kinky" sex in market terms:

Married men and men with steady girlfriends have all the "normal" sex they want, at home, more or less for free, and if these are companionate relationships, it is better sex than with prostitutes. Since prostitutes cannot underprice the wives or girlfriends, they have an incentive to differentiate their services—to offer something for which married men and men with steady girlfriends will pay because they do not have access to the identical service in the (free) home market.

RICHARD A. POSNER, *SEX AND REASON* 132 (1992). This passage illustrates, I think, how a particular form of market-reasoning price theory, in this instance, may have considerable explanatory power and yet also be considered to imply an inappropriate valuation: in this case, the inappropriate valuation stems from the representation of women—qua prostitutes, wives and girlfriends—as a sex market for men. Of course, price theory is not alone in representing women in this fashion; marxist theory, for example, lends itself to much the same representation. On this point, see LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* 170-91 (Catherine Porter trans., 1985).

sume rather than to test those limits. The claim—prevalent in a good deal of recent American jurisprudential literature—that market reasoning offers only simplistic solutions to ethical and legal dilemmas can be easily, and indeed often is, exaggerated. Focusing on arguments from incommensurability, I shall try to demonstrate that assumptions about the inappropriateness of market-based valuations often turn out to be ill-founded.

This Article is concerned, accordingly, with the relationship between regulation and valuation. When the law stipulates that particular goods or activities ought to be kept outside of, or accorded special protection within, the domain of the market, it provides, in effect, that monetary valuations cannot do justice to the goods or activities in question. But why might monetary valuations ever be considered inappropriate? In the first part of this Article, I shall try to demonstrate that one answer to this question may be derived from a particular theoretical perspective on property rights—a perspective which emphasises the relationship between the right to private property and personal self-development. While many a criticism might be levelled at this perspective, I shall argue it nevertheless provides a useful starting point for trying to understand why certain things may be considered unsuited to the market domain.

I. PROPERTY AND PERSONHOOD

It is not uncommon to hear victims of burglary remark that while the theft of objects such as one's television and compact-disc player is an awful inconvenience, what really hurts is the taking of those things which have an irreplaceable sentimental or personal value. Since the early 1980s, Margaret Jane Radin has been using this elementary insight—that we place different values on different types of property—as the foundation for a theory concerning the regulation of private property rights.¹³ Radin's theory is premised on a broad dis-

¹³ See MARGARET J. RADIN, *REINTERPRETING PROPERTY* (1993) [hereinafter "RE-INTERPRETING PROPERTY"]. This book is comprised mainly of previously published essays, the earliest of which appeared in 1982. Radin has referred to her perspective as representing only "a partial theory." See Margaret J. Radin, *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 67 (1986). There are, so far as I can see, two distinct senses in which Radin's

inction between personal and fungible property. In developing her theory, the subject on which she has focused principally is rent control. While I consider Radin's arguments about rent control to be highly disputable, I believe that her theory offers some intriguing insights concerning the appropriate use of market reasoning in relation to particular ethical and legal dilemmas.

Radin rejects the utilitarian and natural-rights theories of property and instead develops a "personhood" theory which, she claims, is broadly attributable to Hegel.¹⁴ Although the

theory might be described as partial. First, the theory is partial in that Radin limits her discussion to property rights, even though the perspective which she adopts may be considered to be but an instance of a more general theory of rights. For attempts to broaden the implications of Radin's perspective—particularly in relation to American constitutional issues—see Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 342-46 (1992) (arguing that personal freedoms ought to be recognised as personal property rights); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing that commercial speech, unlike other forms of speech, tends to be economic rather than personal in nature and therefore does not deserve the same degree of constitutional protection); ; Stephen Cherensky, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CAL. L. REV. 595 (1993) (arguing that present methods of resolving disputes between corporations and their inventor-employees are ineffective and applying Radin's approach to the problem). Radin's theory might also be considered partial in the sense that it is but part of a more general effort by certain American legal theorists to demonstrate the shortcomings of the neo-classical economic approach to property rights. For other studies within this tradition, studies which contain conclusions similar to those reached by Radin (but which eschew personhood theory), see Charles Fried, *Difficulties in the Economic Analysis of Rights*, in *MARKETS AND MORALS* 175 (Gerald Dworkin et al. eds., 1977); Frank I. Michelman, *Discretionary Interests-Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan*, 55 ALB. L. REV. 619 (1995); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW* 3 (J. Roland Pennock & John W. Chapman eds., 1982); Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659. In her recent writings, Radin herself has attempted to demonstrate how her arguments concerning the regulation of private property rights can be seen to tie in with certain aspects of feminist and pragmatist theory. See, e.g., Margaret J. Radin, *Evaluating Government Reasons for Changing Property Regimes*, 55 ALB. L. REV. 597 (1992); Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1033-35 (1991); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 SO. CAL. L. REV. 1699 (1990).

¹⁴ Radin clearly dissociates herself from the utilitarian and natural rights traditions (see RADIN, *REINTERPRETING PROPERTY*, *supra* note 13, at 105-19), but on the subject of Hegel she is less unequivocal. She notes that her "view that persons

concept of personhood figures in classical philosophy and theology,¹⁵ in the United States in particular it has come to figure in modern debates over subjects as diverse as abortion, corporate responsibility and gay and lesbian rights.¹⁶ Given its range of application, it is hardly surprising that the concept should conceal a multiplicity of meanings.¹⁷ Radin herself does not attempt to define personhood. Rather, she simply asserts that personhood is embodied in property rights: "[t]he premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment."¹⁸ Passing over the question of how individuals initially acquire rights in natural resources, Radin contends that we express our personalities through our acquisition, use and disposal of private property, and that often our personalities and our property become intertwined. This is not merely to claim that cars, clothes, pets and the like often speak volumes about their owners. Radin's point, rather, is that we sometimes become bound up with property to such a degree that its loss would cause us pain which could not be relieved by replacement of the object with other goods of equal market value. Property with which we are bound up to this degree is, in Radin's terms, personal property, and is to be contrasted with fungible property, which has a purely economic or instrumen-

can become bound up with external objects can be related to Hegel, who argued in his *Philosophy of Right* that placing the will into an object takes the person from the abstract to the actual," but also that she does "not mean to take Hegel as a theoretical foundation for [her] view, but only as a suggestive text." RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 7-8.

¹⁵ See Mary T. Clark, *An Inquiry into Personhood*, 46 REV. METAPHYSICS 3 (1992).

¹⁶ On abortion, see Rosemarie Tong, *The Personhood Debate in Abortion: Toward a Reconciliation*, THE WORLD & I, May 1992, at 494. On corporate responsibility, see Michael J. Phillips, *Corporate Moral Personhood*, 2 BUSINESS ETHICS Q. 435 (1992). On gay and lesbian rights, see José Gómez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 L. & INEQUALITY 121 (1983).

¹⁷ Compare, e.g., Lawrence A. Locke, *Personhood and Moral Responsibility*, 9 L. & PHIL. 39 (1990) with Marya Schechtman, *Personhood and Personal Identity*, 87 J. PHIL. 71 (1990), which in turn might be compared with THOMAS NAGEL, *THE VIEW FROM NOWHERE* 28-66 (1986). Cf. also, more generally, Daphna Oyserman, *The Lens of Personhood: Viewing the Self and Others in a Multicultural Society*, 65 J. OF PERSONALITY & SOC. PSYCHOL. 993 (1993) (on personhood as a culturally contingent concept).

¹⁸ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 35.

tal value.

Radin concedes that no bright-line distinction exists between personal and fungible property; rather, there exists "a continuum from fungible to personal. Many relationships between persons and things will fall somewhere in the middle of this continuum."¹⁹ Given that personal property supposedly has a stronger moral value, and therefore deserves greater legal protection, than fungible property, determining where a particular property right falls on this continuum is likely to be crucial. How are we to arrive at such determinations? The manner in which individuals become bound up with, and identify and develop their characters through objects is, Radin states, inevitably subjective. It may be possible, nevertheless, to formulate "objective criteria differentiating good from bad identification with objects in order to identify a realm of personal property deserving [legal] recognition."²⁰ Fulfilling this possibility requires "a theory of the good or well-developed person, or a concept of human flourishing . . . to tell when objects are appropriately treated as personal."²¹ But Radin offers no such theory. Throughout her writings, she refers frequently to "fully developed" persons and an "appropriate conception" of human flourishing. But such terms are not explained. The theory of personhood which Radin deems so important to her theory of property never materialises.

Rather than present a theory of personhood, Radin tries to explain the concept by stating what it is not. Property rights ought not to be regarded as personal, she claims, where the nature of the relationship between person and thing is inimical to the development of "healthy self-constitution." Elaborating on this claim, she observes that "[w]e can tell the difference between personal property and fetishism the same way we can tell the difference between a healthy person and a sick person, or between a sane person and an insane person." Leaving aside the remarkable assumption that physical and mental illnesses are invariably visible, there is the question of whom "we" might be. Radin deliberately uses the word "we" to suggest "that a consensus exists" which constitutes "a sufficient source

¹⁹ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 53.

²⁰ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 38.

²¹ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 198.

of objective moral criteria" concerning what ought to be legally protected as personal property. "[A] 'thing' that someone claims to be bound up with . . . should not be treated as personal," she states, "when there is an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution."²² This proposition is circular: healthy self-constitution, for Radin, is that condition which "we" identify as healthy self-constitution. It is not clear, furthermore, how "we"—however defined—might represent a source of objective moral consensus.²³ As Radin herself recognises, communities rarely if ever speak with a single ethical and political voice.²⁴

That the relationship between property rights and personhood is characterised by a distinct lack of consensus becomes particularly clear when one considers certain of the claims which Radin herself makes. The peculiar proprietary tastes of the "private fetishist," she asserts, ought to be regarded as merely fungible rather than personal, because a fetish is an indication that one has become bound up with an object in a manner which people generally would consider unhealthy.²⁵ That an individual has an unhealthy obsession with a particular category of objects, however, does not necessarily mean that he or she should be denied personal property rights in such objects. If my shoe fetish causes me to collect footwear in abundance, my property rights in what I collect ought surely—assuming my obsession causes no harm to others—to be treated in law as personal property rights. Still more questionable is Radin's assumption that, generally speaking, rights in personal property have a greater value and therefore deserve

²² RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 43.

²³ See generally Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1993); see also Frank I. Michelman, *Private Personal but Not Split: Radin Versus Rorty*, 63 SO. CAL. L. REV. 1783, 1791 (1990).

²⁴ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 240 n.96; see also Margaret J. Radin, *Lacking a Transformative Social Theory: A Response*, 45 STAN. L. REV. 409, 415 n.25, 422-23 (1993), where she purports to reject the consensus assumptions to be found in her earlier essays. Such assumptions are still implicit, however, even in her most recent writings. See, e.g. Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1885 (1987) (claiming that "market rhetoric does violence to our conception of human flourishing") (hereinafter "*Market Inalienability*").

²⁵ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 43-44.

greater legal protection than rights in fungible property. Despite her occasional references to a continuum, she seems generally content to make a crude distinction between fungible and personal, and to proclaim the former to be inferior to the latter. "Object loss," she proclaims, "is more important than wealth loss because object loss is specially related to personhood in a way that wealth loss is not."²⁶ I cannot see that this will always be the case. To lose a pair of socks, for example, might leave one less personally affected than if one were to lose the cash equivalent of those socks. Without either a theory of personhood or a set of objective criteria on which to base her argument, Radin's proposition that the personal is more important than the fungible stands or falls on the degree to which it commands intuitive appeal.

Radin attempts to demonstrate the intuitive appeal of her argument by applying it to the subject of rent control. During the 1960s and 1970s, there occurred in the United States what various commentators have termed a "revolution" in residential landlord and tenant law. Courts and legislatures began increasingly to regulate the landlord-tenant relationship, and in particular to accord new protections to tenants.²⁷ It is also notable that, around this time, there occurred a significant reduction in the supply of low-rental private-sector accommodation. While it is difficult to determine the reasons for this reduction,²⁸ various commentators suggest that the contrac-

²⁶ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 65.

²⁷ See generally Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982).

²⁸ In the context of the United States, it is important to take into account not only that very little public-sector housing exists but also that the size of the market in low-rental private-sector accommodation is likely to depend on the degree to which housing code programmes are enforced. See generally Neil K. Komesar, *The Revolution in Landlord-Tenant Law: A Comparative Institutional View*, 69 CORNELL L. REV. 612 (1984); Richard F. Muth, *Redistribution of Income through Regulation in Housing*, 32 EMORY L.J. 691 (1983); On housing code programmes and the problem of their enforcement, see Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973); Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973); and, on the impact of the revolution in landlord and tenant law on housing code enforcement, Samuel B. Abbott, *Housing Policy, Housing Codes and Tenant Reme-*

tion of the low-rental market was attributable primarily to increased implementation and use of rent control legislation.²⁹ The counter-productivity of rent control is a familiar theme in neo-classical economic literature: when supply is outstripped by demand, so the argument goes, the imposition of rent ceilings can only exacerbate the housing shortage which initially led to the charging of high rents.³⁰ Radin rejects this argument against rent control. In doing so, however, she makes no attempt to undermine the logic implicit in the neo-classical position. Rather, she endeavours to demonstrate that neo-classical analysis generates an inappropriate valuation of residential tenancy rights.

How is she to demonstrate this point? The demonstration requires, first of all, that we abandon logic in favour of intuition. "The intuitive general rule," Radin claims, "is that preservation of one's home is a stronger claim than preservation of one's business;" indeed, it is for this reason that "[m]ost of us . . . feel that a tenant's interest in continuing to live in an apartment that she has made home for some time seems somehow a stronger or more exigent claim than a commercial landlord's interest in maintaining the same scope of freedom of choice regarding lease terms and in maintaining a high profit margin."³¹ To formulate this intuition in terms of personhood: the tenant's home is a justifiable form of personal property, "while a landlord's interest is often fungible."³²

Like others, I doubt the soundness of this intuition.³³ Of

dies: *An Integration*, 56 B.U. L. REV. 1 (1976).

²⁹ See, in particular, Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984); see also Charles J. Goetz, *Wherefore the Landlord-Tenant Law "Revolution"?—Some Comments*, 69 CORNELL L. REV. 592 (1984); Werner Z. Hirsch, *From "Food for Thought" to "Empirical Evidence" about Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604 (1984).

³⁰ For the classic exposition of this argument, see MILTON FRIEDMAN & GEORGE STIGLER, *ROOFS OR CEILINGS? THE CURRENT HOUSING PROBLEM* (1946).

³¹ RADIN, *REINTERPRETING PROPERTY*, *supra* note 13, at 79.

³² RADIN, *REINTERPRETING PROPERTY*, *supra* note 13, at 84. The use of the word "often" here is an indication that landlords themselves may have a personal as well as a fungible interest in property—for example, where they live in the same building as their tenants. Radin also appreciates that some landlords value the well-being of their tenants over the level of rent which they may be able to extract from them. She nevertheless recognises that it would be difficult if not impossible to implement rent control legislation which "create[s] subcategories of protected landlords." RADIN, *REINTERPRETING PROPERTY*, *supra* note 13, at 95.

³³ For the doubts of others, see Timothy J. Brennan, *Rights, Market Failure*,

the various objections which might be raised, I should emphasise five. First, if a protective regulatory strategy is to be adopted, it might be argued that there is more sense in implementing regulations which preserve interests in businesses over and above homes, for there is a greater likelihood that homes will be lost if businesses are not kept afloat. A broader formulation of this point is that our acquisition and cultivation of personal property depends upon the existence of a framework which facilitates the acquisition and exchange of fungible property (money in particular). Second, there is the problem of determining where particular rights lie on the personal-fungible continuum: consider, for example, the case of the tenant who sublets—how are we to characterise the sub-lessor's reversionary interest? As personal? Fungible? Both? Third, Radin's argument seems still more suspect when extended to other regulatory problems. If applied to mortgages rather than rents, for example, her argument leads to the conclusion that, since their interest in the property will invariably be fungible, mortgagees ought to be prevented (even in the event of rising interest rates) from increasing monthly payments, because to permit such an action is likely to be injurious to the personhood of the mortgagor.³⁴ Fourth, given her failure to develop a theory of personhood and her apparent inability to formulate objective criteria for determining precisely what ought to be protected as personal property, Radin's argument amounts to little more than a call for arbitrary discrimination through regulation. If

and *Rent Control: A Comment on Radin*, 17 PHIL. & PUB AFF. 66 (1988); Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 950-54 (1991); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 770-74 (1988); Dan Greenberg, *Radin on Personhood and Rent Control*, 73 THE MONIST 642 (1990).

³⁴ See Brennan, *supra*, note 33 at 70-71. Consider also, in this context, Radin's endeavour to connect personhood with the protection of privacy. Just as one's home is necessarily bound up with oneself, she claims, so also is one's car. While this latter statement is perhaps unsurprising, coming, as it does, from a former professor at UCLA, it is nevertheless used to support a rather questionable conclusion: viz, that since cars are personal, "it is as much an intrusion to invade a car as it is an intrusion to invade a home." RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 62. The equation of cars and homes in this fashion rather suggests that Radin has lost her sense of direction somewhere along the personal-fungible continuum. This much becomes clear, I think, if one considers the implications of her argument with regard to leasehold rights: if cars are personal just as are homes, then, by analogy, drivers of cars which are leased ought to be protected in much the same way as Radin would like to see residential tenants protected.

one does not share Radin's intuition, her argument is really nothing other than a stark declaration that certain rights—and therefore the holders of those rights also—are especially valuable and therefore require special protection.³⁵ Fifth, and finally, Radin assumes that there is a distinct correlation between the value placed on a property right and the extent to which it ought to be protected: the higher the value of a particular right, the more paternalistic we ought to be in regulating it. Yet, if the pricing of specific property rights is regulated in such a way as to disincline those who hold such rights from selling them, those rights and those who wish to buy them are, in a sense, being devalued. If, in general, a high value is placed on private sector residential tenancies, in other words, the most appropriate means of expressing that valuation is to implement a (de)regulatory strategy which ensures their greater availability.

Radin attempts to make her position on rent control seem intuitively more acceptable by suggesting that respect for personhood is likely, in certain instances, "to have communitarian roots."³⁶ "[P]ersonhood is fostered by living within an established community of other persons," she claims, and tenants often flourish as individuals because they live not only "in a geographical 'community'" but "also [in] a spiritual 'community.'"³⁷ The preservation of this general community is likely to depend on the enactment of rent control laws. "[W]e are," she asserts, "committed to a right against raising the price [of housing] to a point that disrupts communities and causes homelessness."³⁸ Since "we should err on the side of

³⁵ See Epstein, *supra* note 33, at 771-73.

³⁶ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 86.

³⁷ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 87-88; and *cf. also* Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 818-19 (1989).

³⁸ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 176. Radin has received judicial and academic support on this point. See *Silverman v. Barry*, 845 F.2d 1072, 1081 (D.C. Cir. 1988); David L. Rosendorf, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701 (1990-91) (suggesting that Radin's personhood thesis might be used to advance the cause of the homeless); though compare Lucie E. White, *Representing "The Real Deal"*, 45 U. MIAMI L. REV. 271 (1990-91) (suggesting that the notion that people cherish the home as a form of personal property is somewhat undermined by the fact that American citizens have become generally inured to homelessness).

community preservation because it is an important value," we ought generally to favour rent control—otherwise, communities of tenants "may gradually die off as its departing members[]" decontrolled apartments are filled with (presumably richer) nonmembers.³⁹ Various assumptions are made here—that *laissez-faire* policies necessarily raise prices, that the removal of rent control disrupts communities of tenants, that community dispersal is always undesirable, and that the notion of a community (even a "spiritual" community) of tenants needs no explanation.⁴⁰

Even if we were to accept all of these assumptions as justifications for rent regulation, we would still be left with the question of precisely what degree of regulation might be desirable; for if it is true that community preservation depends upon rent control, and that communities ought always to be preserved, it is unclear under what circumstances a landlord might ever be permitted to raise rents. In attempting to offer an "all-things-considered analysis" of residential rent regulation,⁴¹ Radin considers just about everything—apart from the position of the landlord. "A requirement that every landlord be able to obtain a reasonable rate of return" on his or her premises, she suggests,

is unjustified. If one is an inefficient supplier, or if one bought one's capital plant speculatively in a rising market, and then regulation is imposed upon one's business, there doesn't seem to be any intrinsic right to remain in that business. Insofar as it is fair to consider the landlord a business . . . it does not follow that the landlord is entitled to remain a landlord under all circumstances. Our intuitions

³⁹ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 88-91.

⁴⁰ On this last point, Radin states that

[w]ithout a more well-developed theory of community, it is not possible to outline the indicia of community. But it seems there are particular intuitions we can feel fairly confident about, even without a fully developed theory. Sometimes, for example, tenants are primarily members of one ethnic group who interact in ways that form a cohesive and defined group. On the other hand, perhaps a very high turnover rate might convince us we are not dealing with a real community.

RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 88-89.

This merely raises the problem of what is meant by the term "real community." Students, for example, might sometimes be identified as tenants who live in communities and yet exhibit high turnover rates. Does this mean that student communities are unlikely to be "real" communities?

⁴¹ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 94.

should tolerate some efficiency losses (exit of marginal landlords to other businesses) in light of strong personhood claims by tenants, as long as the landlord's interest is fungible.⁴²

Radin is, of course, correct to state that landlords do not have a right to remain in their particular business. But what she apparently fails to appreciate is that if rents were regulated in the manner she advocates—so that landlords could not justifiably expect a reasonable rate of return on their properties and so that rents could be kept low at the landlord's expense—few, if any, people would want to enter into that business. In basing her argument for residential rent control on intuitive concerns about the personhood of the tenant, Radin pays scant attention to the economic interest of the landlord. Respect and protection for the former, however, demands much the same for the latter.

The fundamental problem with Radin's analysis of rent control, to my mind, rests in the fact that she is suggesting that we take a property right—the leasehold estate—which has market value, and try to think about how we might devise a regulatory framework which emphasises its "nonmarket personal significance."⁴³ While we may acknowledge the personal dimension of the residential tenancy, the fact of the matter is that such tenancies are clearly also commodities for market exchange, and therefore a regulatory framework which prioritises the personal over the fungible aspect of the landlord-tenant relationship is likely to be considered unsatisfactory. Radin's personhood perspective becomes distinctly more interesting and challenging, however, once it is developed in relation to property rights which are not commonly considered to be commodities—rights, that is, which many would regard as exclusively personal.⁴⁴ To allow such rights to be made the subject of market exchange, Radin claims, may be injurious to personhood.⁴⁵ On what basis, however, might a particular property right be deemed inappropriate for commodification? Radin's answer is that such rights ought to be kept outside the

⁴² RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 94-95.

⁴³ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 140.

⁴⁴ In much of her more recent work, Radin has tended to take the personhood perspective along this path. See, e.g., Margaret J. Radin, *Justice and the Market Domain*, in NOMOS XXXI: MARKETS AND JUSTICE, *supra* note 8, at 165-97.

⁴⁵ See RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 196-202.

market domain when they are very clearly and importantly bound up with one's personhood.⁴⁶ But we have seen that this answer is only acceptable if one agrees with Radin's own intuitions concerning where particular property rights lie on the personal-fungible continuum. In order to delve further into the relationship between regulation and valuation, therefore, it is necessary to jettison the vocabulary of personhood and adopt a different tack.

II. INCOMMENSURABILITY

Efforts to justify the transfer of private property rights in accordance with the principle of utility invariably meet with the objection that this principle, however conceived, cannot accommodate the diverse ethical concerns which may be relevant to such justifications. The problem with embracing utilitarian theory, in other words, is that it is monistic: that is, it closes us off not only from the fact that there exists a diversity of human goods but also from the fact that we do not evaluate these goods along a single metric.⁴⁷ In the conclusion to this Article, I shall suggest that market-oriented theories, despite providing monistic valuations of diverse goods, may prove important and illuminating as a general source of regulatory jurisprudence and that legal theorists ought to reflect very carefully before dismissing them. For the moment, however, I wish only to highlight the limitations of monism.

Monistic theories of value are founded on the notion that the good may be treated as fundamentally unitary. "In adopting a theory of value," one opponent of such theories claims, "we adopt a way of understanding and appreciating what is worthwhile in life and of exploring new possibilities for living. Monism drastically impoverishes these possibilities" in that "[i]t suppresses the parallel evolution of evaluative distinctions and sensibilities that make us capable of caring about a rich variety of things in different ways."⁴⁸ Monism, then, is unable

⁴⁶ RADIN, REINTERPRETING PROPERTY, *supra* note 13, at 200.

⁴⁷ See Charles Taylor, *The Diversity of Goods*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 330-47 (1985); see also generally ROBERT E. GOODIN, GREEN POLITICAL THEORY 98-108 (1992); HILLEL STEINER, AN ESSAY ON RIGHTS 166-77 (1994).

⁴⁸ ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 118 (1993).

sufficiently to account either for the fact that human beings place different values on different things or for the fact that our diverse valuations require diverse modes of valuation.⁴⁹

It ought to be stressed that failure to recognise the inevitability of diverse valuations is not the issue here. Recognition of this inevitability runs throughout a good deal of social, scientific and philosophical—even utilitarian—literature.⁵⁰ The issue, rather, is one of demonstrating the essential impoverishment of any theory which attempts to gloss over conflicts and distinctions among diverse valuations by subsuming them under a single metric. It is often the case that no one measure can be used properly to value different goods⁵¹ for the reason that it is simply inappropriate to treat those goods as comparable in terms of their value. In such instances, we might say that such goods are incommensurable.⁵²

Monetary valuations illustrate the problem of incommensurability in an especially stark fashion.⁵³ When friends come round for a meal, they often bring wine, flowers or some other

⁴⁹ See generally ANDERSON, *supra* note 48, at 44-64, 117-40; MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* 165-277 (1990). For a neo-Aristotelian development of this theme, see MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE* (1990). For an attempt to relate Nussbaum's Aristotelian perspective to modern jurisprudential debate concerning value-incommensurability, see Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 (1990).

⁵⁰ Consider the distinction which Kant makes between price and dignity, and also Durkheim's discussion of the sacred and the profane as incommensurable domains. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 96-97 (translated by H.J. Paton as *THE MORAL LAW*, H.J. Paton ed., 1967); EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 38-40 (Joseph Ward Swain trans., 1976). As for utilitarianism, see John Stuart Mill, *Utilitarianism* in JOHN STUART MILL, *UTILITARIANISM* 258-59, 289-90 (M. Warnock ed., 1962) (arguing that the principle of utility does not preclude recognition of diverse valuations); see also JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 75-92 (1986).

⁵¹ This may even be the case where the things being valued are subjected to the same kind of valuation—for example, valuations of children by their parents, or valuations of two or more similarly afflicted people with a view to determining who or which ought to be allocated life-saving scarce resources. On these themes, see GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978); WILLIAM STYRON, *SOPHIE'S CHOICE* (1979); see also Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 799 (1994).

⁵² See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 322 (1986).

⁵³ For the classic formulation of the argument that money deadens the diversity of human values, see KARL MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844* 124 (Lawrence & Wishart, 1959); see also KARL POLANYI, *THE GREAT TRANSFORMATION* 41 (Farrar & Rinehart, Inc., 1944).

token. While we generally accept such gifts, we would be offended if they were instead to offer us the cash equivalent of a bottle of wine or bunch of flowers. Normally, our friends would be similarly aghast if, having accepted an invitation to visit them for a meal, we were to cancel at the last minute and offer monetary compensation for the inconvenience caused. In such circumstances, cash valuations—irrespective of how high or low such valuations may be—are inconsistent with the manner in which we value friends, and thus we treat the two goods as incommensurable.⁵⁴

If one adopts a broader criterion of valuation—utility, say, instead of money—the problem of incommensurability still persists. Imagine that one has to decide between attending an important business meeting and attending the funeral of a close friend. If I fail to attend the former, I am likely to miss out on the opportunity to meet certain potentially very lucrative business contacts. If I fail to attend the latter, I am likely to upset many of my friends. If I consider the problem in terms of utility-maximisation, it might become clear to me that the cost of upsetting my friends outweighs the benefit which may come from making important business contacts, or vice-versa. The important point is not that considerations of utility may lead me to a choice, but that resort to such considerations in making a choice might be considered inappropriate. To use utility as the basis for determining whether or not to attend the funeral of a friend again seems inconsistent with the manner in which we value friendship.

At this point, one may raise an objection. Is it not the case that we often do value incommensurable goods in terms of a single metric such as money or utility, but that we do so implicitly? While I do not give my friends cash instead of wine, flowers or birthday presents, for example, I do value their

⁵⁴ The point is expressed more precisely by Joseph Raz, *Value Incommensurability: Some Preliminaries*, 86 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 117, 130 (1986) ("If Judy refuses to judge whether she values her friendship with John more or less than she values \$1,000,000, she nevertheless does regard it as worth either more or less or precisely the same as \$1,000,000, but she also values not thinking about this question. Hence her refusal to compare."). For further efforts at illustration, see Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992); Richard Warner, *Excluding Reasons: Impossible Comparisons and the Law*, 15 OXF. J. LEG. STUDS. 431 (1995).

friendship in monetary terms when I decide just how much I should spend on them. If we make such cash valuations behind the scenes, as it were, what is wrong with making them explicit? To my mind, the fatalistic argument—that we may as well make explicit that which we do implicitly—is unconvincing. In implicitly valuing incommensurable goods in terms of a single metric, Sunstein observes, an individual “may be showing a commitment to a certain set of judgments about how relationships and prospects should be valued, and if the trade-offs were made explicitly, that commitment would be undermined or even violated.”⁵⁵ Whether valuations are made implicitly or explicitly, in short, is likely to have symbolic significance; explicit valuations may seem inappropriate in a way that implicit valuations do not.⁵⁶

Incommensurability can clearly be articulated in terms of Radin’s personhood thesis. For Radin, the problem of incommensurability arises when that which is distinctly personal is treated as fungible. The problem arises more generally when the valuation of particular things (not necessarily property rights⁵⁷) as commodities is normally considered inappropriate. When incommensurability is formulated in terms of whether or not it is appropriate to value a particular thing as a commodity, it has been argued, it becomes a useful concept

⁵⁵ Sunstein, *supra* note 51, at 817.

⁵⁶ See Raz, *supra* note 52, at 348-49:

Many people . . . will leave their spouses for a month to do a job they do not like in order to earn some money. And yet they will not agree to leave the spouse for the same month for an offer of money, even a significantly larger sum of money. They will feel indignant that someone supposes that they are willing to trade the company of their spouse for money from a stranger.

See also generally ROBERT NOZICK, *THE NATURE OF RATIONALITY* 26-35 (1993); Scott Altman, *(Com)modifying Experience*, 65 SO. CAL. L. REV. 293 (1991). It is also worth noting in this context that sometimes, although we permit monetary valuations of particular activities, we are disinclined to permit the advertising of those valuations. In the United Kingdom, for example, barristers, veterinary surgeons, stockbrokers and accountants, among others, have resisted the advertising of prices for the activities in which they engage on the basis that such advertising might threaten the integrity and ethical responsibilities of their professions. See ANTHONY OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 128 (1994).

⁵⁷ See, e.g., Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1566 (1983) (arguing that the treatment of aspiration, diversity, mutuality and civic virtue as commodifiable values violates liberal principles).

for criticising the initiatives of those theorists—primarily neo-classical lawyer-economists—who contend that just about anything might profitably be made the subject of market valuation.⁵⁸ Just how useful the concept of incommensurability might be in this context, however, depends on whether it embodies anything more than diverse individual feelings about what ought not to be bought and sold.

To pose the problem bluntly: how might we ever determine that it is inappropriate to value something as a commodity? To my mind, the argument that the peculiarly personal nature of certain things may determine that they ought not to be traded, or that they ought to be the subject of protective regulation (such as rent control), is unconvincing for the simple reason that there are plenty of things with a distinctly personal dimension—such as our favourite literature, music, restaurants, holiday locations and the like—which are very obviously and very naturally commodified. So personhood cannot determine what constitutes inappropriate commodification.

Perhaps a more convincing criterion of appropriateness can be extracted from our examples above concerning equations of cash with friendship. When we explicitly place a cash value on friendship, we degrade what it means to be friends with somebody—hence, we deem the valuation to be inappropriate. Accordingly, we might formulate the proposition that a market valuation is inapt when it degrades or demeans that which is being valued.⁵⁹ I would argue that this proposition is only convincing, however, when we are dealing with extreme cases in which a market valuation is resorted to without the consent of those subjected to it and where applying such a valuation does more harm than good (for example, by causing a great deal of offence). It is possible to envisage instances where market valuations, even though they might be considered in some way to demean that which is being valued, are deemed somehow beneficial, and therefore consented to, by those subjected to the valuation. In such circumstances, is there really any validity in the claim that market valuations

⁵⁸ For an attempt to use the concept for this purpose, see generally Sunstein, *supra* note 51.

⁵⁹ On the capacity of market valuations to degrade that which is being valued, see ALLEN BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* 101-03 (1985).

are inappropriate because they are demeaning?

I shall address this question by considering arguments for and against markets in parental rights and human organs. While I do not quite reach the Nozickian conclusion that individuals should be allowed to bind themselves under whatever contractual terms they wish,⁶⁰ I argue that critics of market reasoning have tended to exaggerate the dangers of commodification. Before I begin to address these issues, however, there is another question which needs at least briefly to be considered: assuming, for a moment, that some market valuations are inappropriate because they degrade that which is being valued, what is to be done? Consideration of this question requires that we turn our attention to something which, for the most part, has featured only implicitly in this Article: law. It is through the apparatus of the law, after all, that determinations are made as to what may be traded within the market domain, and under what conditions.

III. REGULATION AND VALUATION

Within common-law systems, rules very frequently relate but obliquely to the values which they serve.⁶¹ One consequence of this is that the likelihood of particular rules being applied to determine precise valuations of things is extremely low. When someone loses an arm in an accident, or when a river is polluted, the legal system—incapable, as it is, of accommodating diverse modes of valuation—tends to use money as its metric. Of course, the fact that compensation payments may not represent precise valuations of that which has been lost or harmed does not mean that they are degrading.⁶² The imposition of a compensation order, for instance, will often be regarded not merely as an effort to put a price on a nonpecuniary loss or harm, but as a requirement with a symbolic dimension—a requirement, that is, which is premised on the belief that the

⁶⁰ Cf. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 331 (1974). See also *infra* note 95 and accompanying text.

⁶¹ See N.E. Simmonds, *Bluntness and Bricolage*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS* 1, 18 (H. Gross & R. Harrison eds., 1992).

⁶² See Margaret J. Radin, *Compensation and Commensurability*, 43 *DUKE L.J.* 56 (1993); Margaret J. Radin, *On the Domain of Market Rhetoric*, 15 *HARV. J.L. & PUB. POL'Y* 711, 726 (1992).

tortfeasor ought to renounce something of value for his or her wrongdoing, even if that thing of value is incommensurable with the loss or harm which has been sustained. In the face of incommensurability, in other words, the legal system will often be used to place a pecuniary value on that which, strictly speaking, resists such valuations.⁶³ In such circumstances, monetary valuations are resorted to *faute de mieux*.

This is not to suggest that legal systems generate only monistic valuations, or that the only reliable mode of computation for the lawyer is money. Indeed, this clearly is not the case. When courts declare damages for breach of contract inadequate and instead award a remedy of specific performance, for example, they may do so because the plaintiff's entitlement is considered to be incommensurable with cash valuation.⁶⁴ Given, however, that the repertoire of evaluative tools available within legal systems is limited—to the extent, indeed, that the best tool available is usually money—it is important to raise the question of how legal systems might actually regulate what are generally considered to be inappropriate valuations of goods. Since individuals value different things in different ways, and since legal systems cannot take precise account of the diversity of human valuations, is it not right to conclude that people must be permitted to value things in whatever ways they like?⁶⁵ In short, is there not too great a risk of er-

⁶³ See Sunstein, *supra* note 51, at 820.

⁶⁴ See Sunstein, *supra* note 51, at 843-44. Of course, recognition of value-incommensurability is only one of the reasons that courts may decide to award specific performance. On other possible reasons for the use of this remedy, see Anthony Ogus, *Remedies*, in *CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS* 243, 254-62 (Donald Harris & Denis Tallon eds., 1989).

⁶⁵ For a particularly eloquent formulation of this conclusion, see FRIEDRICH AUGUST VON HAYEK, *THE ROAD TO SERFDOM* 59 (1944):

[T]he whole philosophy of individualism . . . starts from the indisputable fact that the limits of our powers of imagination make it impossible to include in our scale of values more than a sector of the needs of the whole society, and that, since, strictly speaking, scales of value can exist only in individual minds, nothing but partial scales of value exist—scales which are inevitably different and often inconsistent with each other. From this the individualist concludes that the individuals should be allowed, within defined limits; to follow their own values and preferences rather than somebody else's; that within these spheres the individual's system of ends should be supreme and not subject to any dictation by others.

Hayek of course recognizes that, while people may value things in whatever ways

ror if we try to use the legal system to determine that certain valuations of things are inappropriate?

That the law will determine certain valuations to be inappropriate is inevitable. For example, legal systems place prohibitions on particular acts—such as theft, rape and murder—which reflect the actor's improper valuation of the life and well-being of others. Peculiar regulatory dilemmas arise, however, when we consider actions which—although they may be regarded in some way to represent an improper valuation of others—are consented to by those who are (or who own that which is) subjected to the valuation. In such instances, the law may be used to regulate the disposition and use of that which is being valued—for instance, by prescribing preconditions for its valid transfer, or even by declaring it to be inalienable.⁶⁵

Where the law does place restrictions on alienability, it will not necessarily do so because unrestrained alienation would encourage inappropriate valuations. Restrictions on alienability may be imposed for paternalistic reasons (for example, because certain individuals are considered unable to determine whether particular exchanges will be in their best interests⁶⁷), or in order to correct market failures (for example, by bringing about what the market itself would achieve in the absence of transaction costs or collective-action problems⁶⁸), or in order to achieve or support distributive goals (for example, where there exists a fear that the absence of restriction will exacerbate inequalities of wealth⁶⁹). Where

they like, this does not mean that they may *do* whatever they like. Certain human actions which might generally be considered to represent improper valuations of others—such as theft, rape and murder—are understandably outlawed, I would argue, not primarily because of the values which they entail but because they usually harm, and are normally not accompanied by the consent of, those to whom they are directed.

⁶⁵ On inalienable rights, see Diana T. Mayers, *The Rationale for Inalienable Rights in Moral Systems*, 7 SOC. THEORY & PRAC. 127 (1981); Terrence McConnell, *The Nature and Basis of Inalienable Rights*, 3 L. & PHILOS. 25 (1984).

⁶⁷ See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 55-67 (1970); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786-97 (1983).

⁶⁸ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 978-88 (1985).

⁶⁹ See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 960-61 (1985); Kathleen M. Sullivan, *Unconstitutional*

avoidance of inappropriate valuation is the reason—or one of the reasons—for a restriction on alienability, the relevant mode of valuation will almost invariably be market-based and the restriction will nearly always determine that the object of valuation is not commensurable with other objects and therefore ought not to be traded on markets at all. We have already seen, however, that claims of incommensurability are likely to be contestable. Accordingly, while there may often exist more than one reason for imposing a restriction on alienability, where one of the reasons for the imposition is the apparent inappropriateness of market valuation, it is important to consider precisely why such valuation is deemed inappropriate. Given that restraints on alienation tend to be justified for a variety of reasons, it seems almost inevitable that legal systems will never permit people to value just about anything however they like—even if we disregard those instances where valuation is not accompanied by consent. But insofar as such restraints are justified on the basis of incommensurability, we ought to consider to what degree, if at all, market valuations really are inappropriate.

IV. JUDGING MARKETS

Apart from restraining alienation, legal rules may protect rights in other ways. In their classic article on this subject, Guido Calabresi and Douglas Melamed contend that rights, besides being protected by inalienability rules, may be protected by liability and property rules. A right is protected by a liability rule if it can be taken upon payment of compensation, while it is protected by a property rule if it can be taken only through voluntary exchange. For Calabresi and Melamed, incommensurability provides the key to understanding the differences between these two types of rules. A rule establishing that thieves should be punished by charging them the market value of that which they steal would be inappropriate not simply because thieves often evade capture, but because market compensation alone is likely to be an inadequate penalty for the theft. According to Calabresi and Melamed, “[l]iability 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."⁷⁰ Property rules are thus not collapsible into liability rules.

Recognition of incommensurability may also lead us to the conclusion that certain rights ought to be protected by neither liability nor property rules but by inalienability rules. "[W]e would not presume collectively and objectively to value the cost of a rape to the victim against the benefit to the rapist even if economic efficiency is our sole motive" for "when we approach bodily integrity we are getting close to areas where we do not let the entitlement be sold at all"⁷¹ In order to deter the inappropriate commodification of particular rights, Calabresi and Melamed conclude, we supplement them with "an undefinable kicker which represents society's need to keep all property rules from being changed at will into liability rules."⁷²

This "kicker"—an example of which would be the imposition of a criminal sanction to ensure that a particular right cannot be taken according to one's willingness to pay for it—is indefinable because it is based on the notion of inappropriate valuation, and there exists in this context no single criterion of appropriateness. Although Calabresi and Melamed relate the issue of indefinability specifically to the distinction between liability and property rules, it is just as important for the purpose of considering rules concerning inalienability. Indeed, their analysis puts us in a position to formulate more precisely a question which we have raised but have yet to address: namely, if appropriateness resists definition, can there ever be any justification for preventing, or regulating the terms of, transactions which, although considered by many people to embody inappropriate valuations, are consented to by the relevant parties? Of course, the simple answer to this question is that regulation in such instances may be introduced for reasons other than incommensurability—in order to avert market failure, prevent exploitation, encourage wealth-redistribution or whatever. But insofar as incommensurability does serve as a reason for regulating exchanges accompanied by consent, can

⁷⁰ Calabresi & Melamed, *supra* note 68, at 1125.

⁷¹ Calabresi & Melamed, *supra* note 68, at 1125.

⁷² Calabresi & Melamed, *supra* note 68, at 1126.

it ever prove acceptable? Let us consider this question by focusing on two debates.

A. *Parental Rights and Reproductive Capacities*

In the late 1970s, Elisabeth Landes and Richard Posner wrote a now famous article in which they proposed that certain American adoption agencies should, on an experimental basis, be permitted to use surplus income generated by their adoption fees to pay women contemplating abortion to have the baby instead and put it up for adoption. Landes and Posner argued that such an experiment, if implemented, might maximise wealth at various levels. In cases of unwanted pregnancy, women will be provided with an extra option—that is, with an incentive neither to abort nor to raise the baby in burdensome circumstances. Since the existence of such an incentive should ensure an increase in the number of children available for adoption the range of choice available to prospective adoptive parents' will also be increased. The experiment would represent, in short, a "tentative and reversible step[] towards a free baby market."⁷³

Although Landes and Posner were arguing only for partial and experimental deregulation of the adoptions system, their suggestion met with a good deal of opposition. Swift's proposal for the commodification of unwanted children was classic satire.⁷⁴ Landes and Posner, in contrast, were using neo-classical economic methodology to support an apparently serious argument in favour of baby-selling. If such sales were permitted, critics objected, the market system would exploit the poor and the vulnerable, babies would probably be bought and sold for immoral purposes, pricing would be affected by factors such as skin colour and disability and the wealthy would undoubtedly buy the "best" babies.⁷⁵ The term "baby-selling," Posner has

⁷³ Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 347 (1978).

⁷⁴ Jonathan Swift, *A Modest Proposal for Preventing the Children of Poor People from Being a Burthen to their Parents or the Country, and for Making them Beneficial to the Public*, in JONATHAN SWIFT: A CRITICAL EDITION OF THE MAJOR WORKS 429-99 (A. Ross & D. Woolley, eds. 1984).

⁷⁵ For these and other objections, see NANCY C. BAKER, *BABYSELLING: THE SCANDAL OF BLACK-MARKET ADOPTION* 43 (1978) (arguing that the most likely

subsequently observed, is misleading, since in the partially deregulated adoptions market the subject of sale would not be babies—the Landes and Posner proposal does not accommodate slavery—but parental rights over babies.⁷⁶ Posner has argued, furthermore, that many of the objections to the proposal are simply borne of misinterpretation and exaggeration. The proposal does not entail doing away with laws prohibiting child abuse, nor is it a recommendation that all laws forbidding the sale of parental rights be abolished. More importantly, those who highlight the possible objections to the proposal tend to pay little attention either to the fact that adoptions markets—albeit stringently regulated—already exist, or to the fact that deregulation of those markets may reduce the disparity between the demand for and supply of babies for adoption.⁷⁷

There is one objection, however, with which Posner apparently feels unable to engage. It is impossible to argue with people, he is reported to have said, if they take the view that it is simply inappropriate to treat parental rights as commodities.⁷⁸ For two reasons, this admission might be considered

victims of adoptions markets are poor women, especially girls in their early teens); Jane M. Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987); Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99 (1987); William J. Pierce, *Baby Auction*, WALL ST. J., Aug. 22, 1986, at 16 (suggesting that baby-selling may serve the interests of child pornographers). For more measured critiques of the Landes and Posner proposal, see Ronald A. Cass, *Coping With Life, Law, and Markets: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73 (1987); J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 347-55 (1984).

⁷⁶ POSNER, *supra* note 11, at 410. It is implicit in Posner's emphasis on parental rights as the subject of market transactions that one understands parental rights not simply as proprietary rights held by parents over children, but as rights which serve also to determine that which belongs to the child rather than to the parent. On the distinction between parental rights as property rights and parental rights as paternalistic rights, see Jonathan Montgomery, *Children as Property?*, 51 MOD. L. REV. 323-342 (1988); and, more generally, on the gray area dividing the rights of the parent and the rights of the child, see also J.M. Eekelaar, *What are Parental Rights?*, 89 LAW. Q. REV. 210 (1973); J.C. Hall, *The Waning of Parental Rights*, 31 CAMBRIDGE L.J. 248 (1972).

⁷⁷ See Richard A. Posner, *Mischaracterized Views*, 69 JUDICATURE 321 (1986); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59-72 (1987); see also, on adoptions markets, George William Myers, Jr., *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy Over Gray-Market Adoptions?*, 18 DUQ. L. REV. 629 (1980); Margaret V. Turano, Note, *Black-Market Adoptions*, 22 CATH. LAW. 48 (1976).

⁷⁸ "[There are] people for whom the idea of a price tag on babies has a horrible symbolic resonance. I can't really quarrel with them if that's how they feel."

particularly important. First of all, it illustrates a point to which I shall return: that even those who are especially vigorous in promoting the application of market valuations tend to concede that such an approach has definite limitations. Secondly, and still more importantly, it suggests that even if we can demonstrate the likelihood of a particular deregulatory strategy generating overall efficiency gains, that strategy may still be considered undesirable. The reason for this, I think, is that regulation often serves a largely symbolic function. Efforts to prohibit certain "harmful" activities (such as euthanasia or the use of cannabis) are often less than successful—and there may exist considerable feeling that those efforts at prohibition are difficult if not impossible to justify, given the range of activities which are permitted and yet which seem just as (if not more) harmful than those which are outlawed—yet it seems that prohibition of those activities is retained largely because many people are uncomfortable with the image of a society in which they are not prohibited. In consequence, the retention of inefficient regulation will sometimes be preferred over deregulation.

That deregulation is sometimes resisted largely for symbolic reasons—that many people may dislike the vision of a society in which, for example, parental rights are treated as commodities—does not lead to the conclusion that incommensurability-based objections to market reasoning ought always to be respected. Indeed, Posner's observation that it is impossible to argue with those who consider it totally inappropriate to commodify parental rights represents not a concession but recognition of the fact that such people leave no room for debate. My own view is that the commodification of parental rights is very much a matter for debate. To allow the purchase and sale of parental rights is likely to generate a variety of costs and benefits, and it is simply arbitrary to conclude that the potentially degrading effects of inappropriate valuation necessarily weigh heavier than all other considerations.

Consider this argument in relation to surrogacy arrange-

Comment attributed to Richard Posner in Theodore Roth, *Law and Economics*, U. CHI. MAG. Aug. 1991, at 31. For examples of the anti-commodification objection, see Prichard, *supra* note 75, at 352; Frankel & Miller, *supra* note 75, at 101-03; Margaret J. Radin, *Reflections on Objectification*, 65 SO. CAL. L. REV. 341, 349-51 (1991).

ments.⁷⁹ The incommensurability-based objection to commercial surrogacy is quite simple: to allow people (usually a couple) to pay a woman to undertake the labour of pregnancy in order to bear a child which they can raise as their own is to permit an inappropriate valuation of both children and women's reproductive capacities.⁸⁰ The commercial surrogate mother, in selling her reproductive capabilities, commodifies and thereby degrades both herself and the child or children she produces. Commodification is considered degrading in this context because market norms take priority over parental norms. Whereas Landes and Posner proposed the sale of parental rights over unwanted babies, commercial surrogacy is more calculated in that the natural mother deliberately conceives a child for material advantage.⁸¹ Furthermore, surrogacy concerns rights over the unborn. This fact may encourage an even more inappropriate valuation of children than one might find in a partially deregulated adoption market, for if commercial surrogacy is permitted, there arises the issue of how to define the subject-matter of the contract. Adopting parents are acquiring more than just a child; they are acquiring a child with specific attributes. Yet, under commercial surrogacy arrangements, the scope for determining whether the child will possess the attributes desired by the adopting parents is more limited than under conventional adoption arrangements.⁸² To express the point in market language, commercial surrogacy arrangements are contracts for the supply of goods, the quality

⁷⁹ Surrogacy is a misleading term in that the surrogate mother is typically the genetic and gestational mother rather than a surrogate. Moreover, the development of in vitro fertilisation has tangled the notion of surrogacy even further in that the commissioning parents under an IVF "surrogacy" arrangement might also be the genetic parents. See Gillian Douglas & N.V. Lowe, *Becoming a Parent in English Law*, 108 LAW Q. REV. 414, 415 (1992). It is also worth noting here that, in the discussion which follows, I am concerned only with commercial (as opposed to unpaid) surrogacy arrangements.

⁸⁰ See generally Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990).

⁸¹ See Herbert T. Krimmel, *The Case Against Surrogate Parenting*, 13 HASTINGS CENTER REP. 35, 35-37 (1983).

⁸² Under "a market in reproductive services," it has been argued, "[a]ll personal attributes of ourselves as well as our children (sex, eye color, predicted IQ and athletic ability, and so forth) would be given a dollar value by the market, whether or not we wanted to regard ourselves and our progeny in these terms." A.M. Capron & Margaret J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 J. OF L., MED. & HEALTH CARE 34, 36 (1988).

of which cannot be determined in advance. If those goods turn out to be of a quality inferior to that anticipated and desired by the buyers, they may not wish to take possession of and assume responsibility for them; and since the sellers produced these "inferior" goods specifically for the buyers, they too are unlikely to want to keep them.

To my mind, this incommensurability-based objection to commercial surrogacy is unconvincing. In essence, the objection is alarmist, based, as it is, on an improbably bleak vision of unemotional natural and adoptive parents treating children as chattels. "To demonstrate the unacceptability of commercial reproduction and transactions in children," Capron and Radin assert, "one need only imagine the market carried to its natural conclusion," that is, as "an open, structured process of offering children of all ages to the highest qualified bidders."⁸³ In another context, Radin uses much the same strategy to criticise markets in sexual services:

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 catalogue, or through a large brokerage firm that has an '800' number, or at a trade show, or in a local showroom. . . . A change would occur in everyone's discourse about sex, and in particular about women's sexuality.⁸⁴

Such examples, I would argue, demonstrate nothing at all, for the simple reason that they caricature market activity and represent arguments which no one promotes. It is also quite ironic that the incommensurability perspective, while it

⁸³ Capron & Radin, *supra* note 82, at 36.

⁸⁴ Radin, *Market Inalienability*, *supra* note 24, at 1922. Radin paints what I consider to be a similarly alarmist picture when she assesses the risks involved in establishing markets in parental rights. See Margaret J. Radin, *What, if Anything, Is Wrong with Baby Selling?*, 26 PAC. L. J. 135, 144-45 (1995):

If a baby is the object of a market exchange, there may be an effect on that child's self conception when he or she grows up. You know your parents paid money for you, maybe enough to have bought a BMW, but not enough to have bought a house. . . . This equates your whole self to a dollar value. . . . Furthermore, kids talk to each other. . . . John, down the street, his parents bought him for as much as a BMW, so my son could say, Am I worth a BMW? How much would you pay for me? It's possible, in other words, that this way of thinking about children could spread.

emphasises the dignity and value of persons, in fact depends on a peculiarly one-dimensional—one might even say demeaning—image of surrogate mothers and adoptive parents. The assumption that neither party to a commercial surrogacy arrangement would want to keep a child which is considered to be in some way “defective” is especially problematic. The more usual problem with surrogacy arrangements is that natural mothers tend to suffer distress and intense regret when the time comes to surrender the baby.⁸⁵ Certainly the unwanted-child scenario may arise—and when it does arise, it will be very difficult to determine what to do.⁸⁶ But it is a scenario which is just as likely to arise in relation to non-commercial surrogacy arrangements. Representatives of the incommensurability perspective are nevertheless content, by and large, to permit unpaid surrogacy.⁸⁷ Insofar as the unwanted child scenario represents a real problem, it is a problem which relates to surrogacy in general rather than specifically to its commercialisation.

Also questionable is the claim that commercial surrogacy degrades women. The assumption on which this claim is based is that a woman's reproductive labour is integral to herself and therefore ought not to be commodified.⁸⁸ But this is a nonsequitur. There are plenty of things which are integral to ourselves—our abilities and talents as teachers, athletes, musicians, artists and so on—which we readily commodify without suffering degradation. It is far from obvious that a woman's

⁸⁵ See *In re Baby M*, 537 A.2d 1227 (N.J. 1988); Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. OF L. & MEDICINE 243 (1984) (arguing that courts ought to treat surrogacy contracts as revocable pre-birth agreements which allow the natural mother to keep the child if she experiences regret); Philip J. Parker, *Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry*, 5 INT'L J. L. & PSYCHIATRY 341 (1982).

⁸⁶ See MARTHA A. FIELD, *SURROGATE MOTHERHOOD* 103-06 (1988). According to Field, in those instances where, for whatever reason, neither party to the surrogacy arrangement wants the child once it is born, “there is a strong policy argument that the couple who promised to adopt should not be permitted to withdraw from the contract if the mother attempts to turn the child over to them.” *Id.* at 105. Of course, insisting on the enforceability of the contract is all very well, except that such insistence cannot detract from the fact that the child remains unwanted.

⁸⁷ See, e.g. Capron & Radin, *supra* note 82, at 34.

⁸⁸ See CAROLE PATEMAN, *THE SEXUAL CONTRACT* 209-18 (1988); see also MARY WARNOCK, *A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY* 45 (1985) (“[I]t is inconsistent with human dignity that a woman should use her uterus for financial profit”).

choice to market her reproductive capabilities should be considered any differently.⁸⁹ Not only might the legitimization of commercial surrogacy improve general social welfare by providing greater opportunities for parenthood for those unable to conceive children,⁹⁰ but it may empower women in particular by providing many of them with a source of potential wealth which is not available to men.⁹¹ To express this line of argument at a more general level, commodification, even when considered to be a peculiar or inappropriate form of valuation, may nevertheless enhance freedom and welfare.⁹² From this it follows that the restriction or prohibition of commodification may reduce opportunities for the advancement of freedom and welfare.⁹³ It is my view that any such restriction or prohibition is necessarily rendered suspect by the presence of genuine

⁸⁹ See Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132, 153-54 (1992); Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFF. 107, 114-15 (1992); see generally JOHN HARRIS, *THE VALUE OF LIFE: AN INTRODUCTION TO MEDICAL ETHICS* 136-56 (1985).

⁹⁰ See Avi Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J. L. & SOC. PROBS 1, 15-17 (1986); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. OF CONTEMP. HEALTH L. & POL'Y 21, 27 (1989); Karen M. Sly, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee*, 18 GONZ. L. REV. 539, 549-51 (1983).

⁹¹ This is the thesis to be found in CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989). The possibility is also conceded in Radin, *Market Alienability*, *supra* note 24, at 1915-17. Compare Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL'Y 139 at 147-48 (1990) ("One strains to see female liberation in a practice that pays so little, capitalizes on the traditionally female virtues of self-sacrifice and caretaking, and enables men to have biologically related children without the burden of marriage."). Various commentators on earlier drafts of this article urged me at this point to draw an analogy between women's reproductive capabilities and sperm: why, in short, does there exist a general reluctance to commodify the former but not the latter? I am not convinced that the analogy is at all illuminating. The principal reason that sperm is more readily commodified, I should have thought, is that, as compared with the capacity to reproduce, it is more readily commodifiable. Pateman captures the point in part (though not, I feel, entirely) when she states that, "[u]nlike labour power, sexual parts, the uterus, or any other property that is contracted out for use by another, sperm can be separated from the body." PATEMAN, *supra* note 88, at 217.

⁹² See generally MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 23-57 (1993); see also Sunstein, *supra* note 51, at 805 ("[I]t is . . . plausible to see incommensurability as constitutive of some valuable forms of freedom").

⁹³ See Radin, *Market-Inalienability*, *supra* note 24, at 1921-22; see also generally Eric Mack, *Dominoes and the Fear of Commodification* in NOMOS XXXI: ETHICS, ECONOMICS AND THE LAW 198-225 (John W. Chapman & J. Roland Pennock eds., 1989).

consent.⁹⁴ That is, if there exist people who are willingly prepared to agree to what are generally considered to be inappropriate valuations—who are willing to trade, say, their parental rights or their reproductive capabilities in order to benefit themselves and others—then the restriction or prohibition of the relevant activity is difficult to justify.⁹⁵

⁹⁴ There are two points which ought to be raised in relation to this statement. The first is that it demands that one address the issue of what constitutes "genuine" consent. Many legal theorists emphasise that, where the parties to an exchange enjoy disproportionate levels of bargaining power, consent will sometimes conceal coercion. For the classic articulation of this point, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923). My own feeling is that this argument ought to be treated with a certain amount of caution. Although economic choices may be restricted by economic capacity, this does not mean that such choices are not genuinely consented to. Limited bargaining power may force people out of (or, more likely, preclude them from entering) certain markets and thereby confine them to others, but that hardly means that those people do not consent to the transactions which they make within those markets in which they are able to participate. Could I afford it, I would drive a Mercedes. That does not mean, however, that I did not genuinely consent to the transaction when I bought my Volkswagen. My limited bargaining power compels me to participate in one market, or at one market level, rather than another; but this compulsion does not denote an absence of genuine consent.

While I am prepared to try to defend the possibility of genuine consent, what I would not deny is the fact that consent does not necessarily facilitate gains in welfare. Factors such as lack of information or peculiarity of preferences may lead a person to consent to transactions which leave him or her worse rather than better off. The presence of consent, in other words, ought not to be automatically equated with improvements in autonomy and well-being. On this particular point, see Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

The second point which ought to be raised regarding consent—and here, rather than try to defend my argument, I can only concede one of its essential limitations—is that consent is sometimes irrelevant to incommensurability-based objections to commodification. There are some things which do not have the capacity to consent to the process of commodification and yet which may be degraded by that very process. There may exist strong feelings, for example, that the creation of markets in pollution rights encourages environmental degradation by making polluting activities permissible at a price. See *infra* note 116 and accompanying text. One can hardly defend such activities by developing an argument based on consent, for the environment does not have the capacity to consent. Much the same point may be made in relation to the degradation of animals. On the environmental theme, see Nathalie Boucquey, *Hot Spots in the Bubble: Ecological Liability in Markets for Pollution Rights*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION 49-74 (G. Teubner et al. eds., 1994).

⁹⁵ An activity such as commercial surrogacy might, of course, be objected to on grounds other than incommensurability—for example, because it is considered exploitative, or because it fails to take into account the interests of the child. See

B. *Human Tissues and Organs*

Even if it were possible to demonstrate in a particular context that commodification is an inappropriate mode of valuation, it does not necessarily follow that commodification ought thereby to be restricted or prohibited. Just as the perceived wrongfulness of a particular activity may not preclude the possibility of our having a right to engage in that activity,⁹⁶ identification of incommensurability is unlikely in itself to constitute a good reason for regulating market exchanges.⁹⁷

This is not to conclude that incommensurability-based objections to market exchanges will always be unsound. I have emphasised that the presence of consent to such exchanges is an important factor in overriding considerations of incommensurability. It might also be possible to envisage extreme instances in which commodification may be considered an inappropriate mode of valuation despite the presence of consent.⁹⁸ By and large, however, arguments for restricting or

generally Satz, *supra* note 89. While my concern here is specifically with incommensurability as a basis for precluding or regulating particular market exchanges, it ought at least to be mentioned that objections such as these are hardly unproblematic. For a critique of the exploitation argument, see Alan Wertheimer, *Two Questions about Surrogacy and Exploitation*, 21 PHIL. & PUB. AFF. 211-239 (1992); and for critiques of the idea that it is possible to ascertain the best interests of the child, see JON ELSTER, SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 134-50 (1989); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).

⁹⁶ See Jeremy Waldron, *A Right to Do Wrong*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991 63 (1993).

⁹⁷ See Sunstein, *supra* note 51, at 851 ("[O]pposition to commensurability, and insistence on diverse kinds of valuation, do not by themselves amount to opposition to market exchange"); Wertheimer, *supra* note 95, at 218 ("The permissibility of market transactions does not require that the goods exchanged be commensurable on a single metric"); see also generally Robert P. George, *Does the "Incommensurability Thesis" Imperil Common Sense Moral Judgments?*, 37 AM. J. JURISPRUDENCE 185 (1992).

⁹⁸ In what circumstances might the commodification of an activity be considered inappropriate despite the presence of consent? In an earlier draft of this Article, I suggested the example of the circus freak who willingly exhibits his disfigurement for a price. In spite of the presence of consent, I claimed, commodification in this context seems inappropriate. Various people took me to task on this point. Why, I was asked, is the circus freak example any more extreme than the proposal to commercialise surrogacy or to permit the sale of human tissues and organs? Does not the example appeal to precisely the sort of

prohibiting particular market exchanges are unlikely to prove persuasive when based solely on the identification of incommensurability.

The debate over whether we should allow markets in human tissues and organs demonstrates, I think, that the persuasiveness of arguments from incommensurability depends in general on whether or not they are accompanied by other reasons for regulating market exchange. Without attempting to examine either the types of markets which might be established for the exchange of human tissues and organs or the fact that certain tissues and organs may be more marketable than others, we might begin with the generalisation that there exists considerable support for the commercialisation of human body materials. It has recently been estimated that between forty and fifty percent of British people consider the sale of human organs permissible in principle.⁹⁹ Furthermore, covert market activity in this area is not uncommon,¹⁰⁰ and arguments in favour of legitimating market exchanges dominate the relevant academic literature.¹⁰¹

intuitivism which I object to when assessing Radin's personhood thesis? The answer that I gave to this objection is that the commodification of parental rights and human organs is intended to generate significant benefits beyond the gain in wealth which falls to the seller: part of the purpose of allowing these sales, after all, would be to improve and possibly even to save lives. In contrast, the benefit to be gained from commodifying the exhibition of disfigurement—the entertainment or thrill that someone might derive from seeing the circus freak—seems fairly inconsequential. On reflection, I am not convinced by this argument, not least because it implies that a line might be drawn between sufficiently beneficial and insufficiently beneficial commodifications. Inevitably, the matter of where such a line might be drawn boils down to intuition, and on certain issues—prostitution, for example—it is possible to envisage widespread disagreement concerning whether or not commodification of the relevant activity generates significant benefits. While I am far from sure of my ground on this issue, my increasing inclination is to say that the presence of consent—assuming that consent is a relevant factor—should be taken to justify the commodification of any activity.

⁹⁹ See Astid Guttmann & Ronald D. Guttmann, *Attitudes of Health Care Professionals and the Public Towards the Sale of Kidneys for Transplantation*, 19 J. MED. ETHICS 148 (1993).

¹⁰⁰ See RUSSELL SCOTT, *THE BODY AS PROPERTY* 179-97 (1981); Alexander Dorozynski, *European Kidney Market*, 299 BRITISH MED. J. 1182-85 (1989).

¹⁰¹ See, for but a sample of this literature, John Bignall, *Kidneys: Buy or Die*, 42 LANCET 45 (1993); Marvin Brams, *Transplantable Human Organs: Should Their Sale Be Authorized by State Statutes?*, 3 AM. J. L. & MEDICINE 183 (1977); Nancy L. Buc & Joan Z. Bernstein, *Buying and Selling Human Organs is Worth a Harder Look*, 1 HEALTH-SCAN 3 (1984); David E. Chapman, *Retailing Human Organs under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393 (1983); Lloyd R.

The principal argument in support of the market system is simple: reliance on altruism condemns the sick. That is, a donation-based system¹⁰² cannot generate a supply of human tissues and organs which matches demand¹⁰³ and consequent-

Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1990); Richard A. Epstein, *Organ Transplants: Is Relying on Altruism Costing Lives?*, 4 AM. ENTERPRISE 50 (1993); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y AND L. 57 (1989); Keith N. Hylton, *The Law and Economics of Organ Procurement*, 12 L. & POL'Y 197 (1990); Clifton Perry, *Human Organs and the Open Market*, 91 ETHICS 63 (1980); Jeffrey M. Prottas, *Obtaining Replacements: The Organizational Framework of Organ Procurement*, 8 J. HEALTH POL. POL'Y & L. 235-50 (1983); Richard Schwindt & Aidan R. Vining, *Proposal for a Future Delivery Market for Transplant Organs*, 11 J. HEALTH POL. POL'Y & L. 483 (1986); Susan Hankin Denise, Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015 (1985); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182 (1974). It is worth at least noting that the best part of this literature advocates not the sale and transplant of organs from living persons, but only the establishment of markets for inter vivos and cadaveric organs. While the implication running throughout most of this literature is that the commercialisation of inter vivos and cadaveric organs would alleviate scarcity to such a degree that it would not be necessary to permit the sale of organs from living persons, certain representatives of the market perspective recognise also that, were markets in human organs from living persons to be permitted, the consequences of exploitation and lack of information in particular could prove catastrophic.

¹⁰² It seems to me that a basic problem with the pro-market argument is that it is usually contrasted with an "opt-in" system of donation—that is, a system whereby the individual opts to make his or her organs available for transplant on death. It is, of course, possible that the supply of organs might be increased by adopting a system based on presumed consent, whereby individuals are presumed to have made their organs available on death unless they have explicitly opted out from such an arrangement. While an opt-out system raises difficult moral issues in its own right, it may nevertheless be regarded as a means of reducing scarcity without resorting to the market. For arguments along these lines, see IAN KENNEDY, *TREAT ME RIGHT: ESSAYS IN MEDICAL LAW AND ETHICS* 237 (1988); William N. Gerson, *Refining the Law of Organ Donation: Lessons from the French Law of Presumed Consent*, 19 N. Y. J. INT'L L. & POL. 1013 (1987). For objections to such a scheme, see Robert A. Sells, *Let's Not Opt Out: Kidney Donation and Transplantation*, 5 J. MED. ETHICS 165 (1979).

¹⁰³ It is interesting, in this regard, to compare early literature on the regulation of organ transplantation with modern studies on the same theme. Earlier writers were optimistic that voluntary donations would meet demand. Nowadays, it is commonly acknowledged that there exists no room for such optimism. Compare Paul P. Lee, *The Organ Supply Dilemma: Acute Responses to a Chronic Shortage*, 20 COLUM. J.L. & SOC. PROBS. 363 (1986); Alfred M. Sadler & Blair L. Sadler, *Transplantation and the Law: The Need for Organized Sensitivity*, 57 GEO. L.J. 5 (1968); Note, *Legal Problems in Donations of Human Tissues to Medical Science*, 21 VAND. L. REV. 352 (1968); with Richard Michael Boyce, *Organ Transplantation Crisis: Should the Deficit Be Eliminated Through Inter Vivos Sales?*, 17 AKRON L. REV. 283 (1983);

ly, under any such system, those in need are more likely to suffer. A market system would not only alleviate scarcity, but would ensure significant gains for vendors and recipients alike. Such a system, moreover, might be defended on philosophical as well as economic grounds: that is, if one accepts (this, of course, is a big "if") the Nozickian argument that we possess alienable property rights in ourselves, it follows that we ought, in principle, to be able to trade those rights if we so wish.¹⁰⁴

Compared with the argument in favour of market exchange, the argument from incommensurability¹⁰⁵—that it degrades the intrinsic value of humanity to permit the sale of human tissues and organs¹⁰⁶—seems remarkably weak. Not

¹⁰⁴ For such an argument, see Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28 (1986); Samuel C. Wheeler III, *Natural Property Rights as Body Rights*, 14 NOÛS 171 (1980); see also generally STEPHEN R. MUNZER, A THEORY OF PROPERTY 37-58 (1990); John Christman, *Can Ownership be Justified by Natural Rights?*, 15 PHIL. & PUB. AFF. 156, 168 (1986). It might also be noted in this context that Anglo-American law has traditionally exhibited a general disinclination to recognise property rights in the human body. See Raymond D. Cotton & Andrew Sandler, *The Regulation of Organ Procurement and Transplantation in the United States*, 7 J. LEGAL MED. 55, 57-75 (1986); Bernard M. Dickens, *The Control of Living Body Materials*, 27 U. TORONTO L.J. 142 (1977); Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBS. 193 (1983); Richard J. Sideman & Eric D. Rosenfeld, *Legal Aspects of Tissue Donations from Cadavers*, 21 SYRACUSE L. REV. 825, 826-37 (1970).

¹⁰⁵ For efforts to advance this argument, see Ruth F. Chadwick, *The Market for Bodily Parts: Kant and Duties to Oneself*, 6 J. APPLIED PHIL. 129 (1989); McCall Smith, *Property, Dignity, and the Human Body*, 2 HUME PAPERS ON PUB. POLY 29 (1994). Steven R. Munzer adopts a somewhat more equivocal position in *Kant and Property Rights in Body Parts*, 6 CANADIAN J. L. & JURISPRUDENCE 319 (1993); Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, in PROPERTY RIGHTS, 259 (1994). Michelle Bourianoff Brayand developed the personhood-based analysis in *Personalizing Property: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990). One argument which, surprisingly, appears not to have been put forward by proponents of incommensurability is that certain of the legal consequences of establishing a market in human tissues and organs might be considered bizarre, if not grotesque. In the United States, for example, it has been suggested that if market valuations of the human body were legally permissible, decedents would be required to include such valuations in their gross estate for purposes of taxation. See Note, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842, 862 (1973).

¹⁰⁶

The idea of commodification of human flesh repels us, quite properly I would say, because we sense that the human body especially belongs in that category of things that defy or resist commensuration-like love or friendship or life itself. To claim that these things are "priceless" . . . is to claim that the bulk of their meaning and their human worth do not lend themselves to quantitative measures; for this reason, we hold them

only is the notion of degradation contestable—why, for example, might it be considered degrading to sell one's kidney but not one's thoughts?—but so too is the notion of humanity.¹⁰⁷ I find it difficult to see how the market system might above all else be considered to degrade the intrinsic value of humanity if one of the main reasons for moving to such a system is to alleviate human suffering by ensuring an increased supply of organs for transplantation.¹⁰⁸ One might, of course, formulate other objections to the market system—that the system may be open to abuse; that it may displace need in favour of ability and willingness to pay; that it may exploit the poor;¹⁰⁹ that it may

to be incommensurable . . . [I]f we come to think of ourselves like pork bellies, pork bellies we will become.

LEON R. KASS, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 PUB. INTEREST 65, 81-83 (1992). This claim seems alarmist and muddled in equal measures. In discussing the "commodification of human flesh," Kass at one point suggests that the sale of human organs is morally no different from cannibalism: "the human body is treated as mere meat." *Id.* at 71. Whereas the cannibal will usually have other sources of nourishment, however, the sale of human organs is intended, among other things, to increase the supply of a scarce resource, to benefit people who most likely have no other means of benefit.

¹⁰⁷ For an exploration of this point in relation to the supply of human organs, see John Harris, *The Survival Lottery*, 50 PHIL. 81 (1975).

¹⁰⁸ For an attempt both to defend and to explore the broader implications of this line of argument, see JOHN HARRIS, *WONDERWOMAN AND SUPERMAN: THE ETHICS OF HUMAN BIOTECHNOLOGY* 118-39 (1992). It should be noted, furthermore, that there rests implicit in the incommensurability-based objection to the market system the assumption that organ donation as opposed to sale clearly does not degrade humanity. This assumption seems simplistic, especially when one considers psychological research exploring possible links between organ donation and feelings of self-degradation. See, e.g., Sidney E. Cleveland, *Personality Characteristics, Body Image and Social Attitudes of Organ Transplant Donors Versus Nondonors*, 37 PSYCHOSOMATIC MED. 313 (1975) (suggesting that, as compared with non-donors, organ donors are more willing to accept their mortality but are also likely to display more hostility, depression and guilt). Consider also, in this context, Hansmann, *supra* note 101, at 70:

Although it is sometimes suggested that putting a price on human organs would in some way be offensive to our values . . . it is important to keep in mind that any such moral difficulties with a futures market for organs must be compared with the morality of routinely inflicting distress on families by forcing them to make an emotionally difficult decision in the minutes and hours immediately following the death of a family member and subjecting them to substantial psychological and social pressure to make that decision in favour of donation.

¹⁰⁹

Inevitably, our view on donation for recompense must be coloured by our experience of a national health service. Within that framework, it is difficult to see the sale of organs as other than a way for the rich to

discourage altruistic acts; or that it may generate a supply of infected materials without providing satisfactory mechanisms for monitoring quality¹¹⁰—but to resort to such objections is to argue for restrictions or prohibitions on market exchange on some basis other than incommensurability. In short, in those instances where money might be considered to represent an inappropriate mode of valuing a particular good or activity, arguments from incommensurability alone are unlikely to justify the regulation of markets.

CONCLUSION: FEAR OF MARKETS

It is easy to see how this Article might be interpreted as an attempt to glorify markets. But that has not been my objective. I do not deny that there are some things which either cannot or should not be commodified, nor do I deny that there sometimes exist powerful symbolic or policy reasons for resisting commodification. I do believe, however, that market reasoning is often misunderstood and even caricatured, that its dangers are frequently exaggerated and that its capacity to explain and prescribe is underestimated. In a world dominated

obtain priority essential care, the inequity being compounded by the corollary that the poor, who would form the pool of such donors, would be positively disadvantaged in the role of supplier.

JOHN K. MASON & R.A. MCCALL SMITH, *LAW AND MEDICAL ETHICS* 299 (4th ed., 1994). For a critique of the proposition that a market in human tissues and organs is likely to prove exploitative, see Charles Errin & John Harris, *A Monopconistic Market: or How to Buy and Sell Human Organs, Tissues and Cells Ethically in*, *THE SOCIAL CONSEQUENCES OF LIFE AND DEATH UNDER HIGH TECHNOLOGY MEDICINE* 134 (I. Robinson ed., 1995).

¹¹⁰ The latter two objections—that markets may both discourage altruism and generate an increased supply of infected product—are presented most often in relation to the supply of blood. See RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 70-75, 142-57, 209-46 (1970); Raymond Plant, *Gifts, Exchanges and the Political Economy of Health Care*, 4 *J. MED. ETHICS* 5 (1978); and Peter Singer, *Freedoms and Utilities in the Distribution of Health Care*, in *MARKETS AND MORALS*, *supra* note 13, at 149-173, 164 ("The fact that many people who would otherwise give blood will not do so if it can be bought should not be ignored or brushed aside. To say that this decision is the individual's free choice, and that freedom is maximized as long as a person can give if he chooses to do so, is to take a naive view of the nature of choice."). On the market as an incentive to conceal damaging information, see Kenneth J. Arrow, *Gifts and Exchanges*, 1 *PHIL. & PUB. AFF.* 343, 354-55 (1972); and, more generally, George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market*, 84 *Q. J. ECON.* 488 (1970).

by market valuation, Cass Sunstein has recently warned, "[a] great deal would be lost . . . a life with genuine commensurability would be flat and dehumanised."¹¹¹ One can only wonder to whom this warning might be directed. Surely nobody—not even the most staunch Chicago neo-classicist—would deny the necessity of incommensurability. An altogether different issue is that of what, if anything, ought to be done about incommensurability. To put the point more specifically, once incommensurability has been identified, how, if at all, ought it to be accommodated within the legal framework? According to Sunstein, "those who favour legal approaches based on unitary kinds of valuation and commensurability should understand that their approach is best defended as a means of overcoming certain institutional obstacles, and not as reflecting a fully adequate understanding of the relevant problems."¹¹² Since proponents of monism tend to be very clear about the objectives behind and the limitations of the theories to which they subscribe, one can only wonder, again, to whom such a remark might be directed. Consider, for example, the monistic theory of value which Sunstein most likely has in mind, Richard Posner's theory of wealth-maximisation. "There is," Posner has conceded,

nothing in the ethic of wealth maximization which says that society has a duty to help the needy. It has a duty not to hurt them, to leave them alone; but it has no duty, and in a strict ethic of wealth maximization no right, to force the productive people to support the unproductive . . . In this regard, wealth maximization is . . . out of phase with the powerful currents of contemporary moral feeling . . . an incomplete guide to social decision-making.¹¹³

For Posner, wealth maximisation, despite its limitations, is the best ethic available for the purpose of guiding public policy generally, and the only ethic which the courts in particular can do much to promote.¹¹⁴ The contentiousness of this claim is

¹¹¹ Sunstein, *supra* note 51, at 854.

¹¹² Sunstein, *supra* note 51, at 855. Consider also, in this context, Anthony Kronman's argument that the accommodation of incommensurability is necessary to the pursuit of practical wisdom. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 53-108, 237-38, 338-42 (1993).

¹¹³ Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J. L. ETHICS & PUB. POL'Y 85, 101 (1985).

¹¹⁴ Richard A. Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT'L REV. L. & ECON. 131, 133 (1984).

hardly relevant here. The point to be stressed, rather, is that Posner, like other market theorists,¹¹⁵ hardly needs to be urged to recognise the limitations of monism. Sunstein's claim that proponents of market reasoning ought to understand the implications of valuing diverse goods along a unitary metric seems redundant.

That Sunstein should express such concern over the resort to market reasoning seems, in a sense, ironic. For, in his writings on environmental law, he demonstrates perhaps better than anyone else how initial fears over the inappropriateness of market valuations can sometimes prove ill-founded. In the United States, he has observed, the idea that it may be feasible and desirable to use the pricing system as a basis for environmental protection has traditionally met with considerable resistance.¹¹⁶ The essence of the objection is that it is inappropriate to place a cash value on environmental degradation, since doing so essentially destigmatises particular polluting activities by making them permissible at a price.¹¹⁷ But nowadays, Sunstein observes, it is commonly accepted that environmental-protection policies are more likely to prove successful when they are supported by market-based incentives to reduce pollution rather than by traditional "command-and-control" regulation.¹¹⁸ In the context of environmental policy-development, the language of the market is no longer consid-

¹¹⁵ See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 270-76 (1962) (discussing vote-selling).

¹¹⁶ See Sunstein, *supra* note 51, at 814.

¹¹⁷ See KELMAN, *supra* note 8, at 27-53; and cf. further Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEG. STUDS. 217, 247-53 (1993).

¹¹⁸ See Cass Sunstein, *Administrative Substance*, DUKE L.J. 607, 634-40 (1991). For literature supporting Sunstein's point, see Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 188-98 (1988); though compare Robert Howes, *Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State*, 31 ALBERTA L. REV. 455 (1993); B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 ECON. INQUIRY 551 (1985). For British literature on the question of whether or not the pricing system provides a better basis for environmental protection than conventional regulation, see LORD ZUCKERMAN & W. BECKERMAN, *MINORITY REPORT OF THE ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION* (Cmd. 4894, London: HMSO, 1972), ¶¶ 2-22; and compare Paul Burrows, *Pricing Versus Regulation for Environmental Protection*, in *ECONOMIC POLICIES AND SOCIAL GOALS: ASPECTS OF PUBLIC CHOICE* 273-83 (A.J. Culyer, ed., 1974).

ered to be incongruous.

A similar point might be made in relation to the evolution of life insurance. In the United States during the early part of the nineteenth century, the commodification of death was considered sacrilegious. The sanctity of human life would be undermined, it was believed, if life itself were made the subject of commercial speculation.¹¹⁹ By the end of the century, however, attitudes had begun to change. With increasing industrialisation and the flourishing of the market economy, economic valuations of death—and hence the life insurance industry itself—became gradually more acceptable. Indeed, with the promotion of life insurance as a form of altruism—as a means, that is, of providing for one's dependents after death—such valuations became ever more desirable.¹²⁰ As with the case of environmental protection, fear of the market had turned out to be misplaced.

Such examples do not support the conclusion that just about anything legitimately might be the subject of economic valuation. But what they do support, I think, is the conclusion that resistance to market reasoning is often ill-conceived. Certainly, such reasoning has limitations—indeed, given that the legal, ethical and political issues with which academic lawyers grapple are so complex and diverse, it is inevitable that economic analysis will often have to be supplemented or even displaced by other evaluative tools. But this in itself is no reason to be dismissive or fearful of market reasoning. While commodification may sometimes seem an inappropriate form of valuation, it is important that we consider in each instance whether the benefits of engaging in this form of valuation might outweigh the apparent costs. The fact that the market seems perpetually to expand—that we now routinely commodify things (such as child care and support for the elderly) which once would have been considered unsuited to the market domain—suggests that these costs often turn out to be bearable if not immaterial. Creeping commodification, quite simply, is not necessarily insidious commodification. The potential of market

¹¹⁹ See Viviana A. Zelizer, *Human Values and the Market: The Case of Life Insurance and Death in 19th-Century America*, 84 AM. J. SOC. 591, 597-602 (1978).

¹²⁰ See VIVIANA A. ROTMAN ZELIZER, *MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES* 150-53 (1979).

reasoning needs to be explored, not resisted.¹²¹ This Article is, if nothing else, a plea for more exploration.

¹²¹ On this point, see further TREBILCOCK, *supra* note 92, at 241-68.

