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## ARTICLE

*W. Selens*

### MARKET-INALIENABILITY

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

SINCE the declaration of "unalienable rights" of persons at the founding of our republic,<sup>1</sup> inalienability has had a central place in our legal and moral culture. Yet there is no one sharp meaning for the term "inalienable." Sometimes inalienable means nontransferable;<sup>2</sup>

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<sup>1</sup> The Declaration of Independence para. 2 (U.S. 1776).

<sup>2</sup> See, e.g., McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL. 25, 27 (1984) ("That which is inalienable . . . is not transferable to the ownership of another.").

sometimes only nonsalable.<sup>3</sup> Sometimes inalienable means nonrelinquishable by a rightholder;<sup>4</sup> sometimes it refers to rights that cannot be lost at all.<sup>5</sup> In this Article I explore nonsalability, a species of inalienability I call market-inalienability. Something that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market.

Controversy over what may be bought and sold — for example, blood or babies — pervades our news. Although some scholars have considered whether such things may be traded in markets, they have not focused on the phenomenon of market-inalienability. About fifteen years ago, for example, Richard Titmuss advocated in his book, *The Gift Relationship*,<sup>6</sup> that human blood should not be allocated through the market; others disagreed.<sup>7</sup> More recently, Elisabeth Landes and Richard Posner suggested the possibility of a thriving market in infants,<sup>8</sup> yet most people continue to believe that infants should not be allocated through the market.<sup>9</sup> What I believe is lacking, and wish to supply, is a general theory that can illuminate these debates. Two

<sup>3</sup> See, e.g., Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller."). For discussion of Calabresi and Melamed's view of inalienability, see pp. 1864-66 below.

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

<sup>5</sup> See, e.g., D. MEYERS, *INALIENABLE RIGHTS: A DEFENSE* 4 (1985) ("[A]n inalienable right is one that the right-holder cannot lose regardless of what he does or how others treat him and even if others are justified in declining to grant him what he demands in exercising his right."); Brown, *Inalienable Rights*, 64 PHIL. REV. 192, 192 (1955) ("[I]f there are any rights properly called 'inalienable,' assertions of these rights cannot, for any reason under any circumstances, be denied.").

<sup>6</sup> R. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

<sup>7</sup> See, e.g., Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343 (1972).

<sup>8</sup> See Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). Elsewhere Posner said:

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

R. POSNER, *ECONOMIC ANALYSIS OF LAW* 113 (2d ed. 1977). In the most recent edition of this book, the word "thriving" has been deleted from this passage, perhaps indicating that Posner has modified his views. See R. POSNER, *supra*, at 139 (3d ed. 1986). I shall return to Posner's views on baby-selling below. See *infra* note 51 and accompanying text. (Further references to *Economic Analysis of Law* will be to the third edition.)

<sup>9</sup> See, e.g., Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 348-57 (1984).

possibilities for filling this theoretical gap are traditional liberalism and modern economic analysis, but in this Article I shall find them both wanting.

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

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

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

To develop this theory, which will help us to decide what things ought not to be bought and sold, I must lay a rather complex groundwork. In Part I, I articulate the various meanings of inalienability and introduce the idea of commodification. In Part II, I explore an economic view that sees all things as exchangeable, first reflecting generally on the rhetoric and methodology of the market and then examining how inalienability is seen as a method of correcting market failures. In Part III, I consider a critique of the economic view that would reject markets entirely. I find this utopian vision to be flawed by a pervasive problem of transition, but suggest we take seriously its philosophical connection between rhetoric and human flourishing. In Part IV, I consider the traditional liberal divide between market and nonmarket realms and show that the philosophical commitments of the liberal view have tended to push it toward the economic view.

Finally, in Part V, I advocate a nonideal, pragmatic evaluation of market-inalienabilities based on a conception of personhood or human flourishing that differs from that of traditional liberalism or economics. In developing this analysis, I attempt to address the transition problem that plagues our pursuit of social ideals. To show how the analysis I recommend might illuminate specific issues of market-inalienability that deeply trouble us, I conclude by bringing it to bear on commodification of sexuality and reproductive capacity: prostitution, baby-selling, and surrogacy.

## I. MARKET-INALIENABILITY AND NONCOMMODIFICATION

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

### A. Traditional Meanings

Theorists have seldom recognized that we have no one sharp meaning of inalienability.<sup>10</sup> Nevertheless, the traditional meanings of inalienability share a common core: the notion of alienation as a separation of something — an entitlement, right, or attribute<sup>11</sup> — from its holder. Inalienability negates the possibility of separation. Meanings proliferate because the separation that constitutes alienation can be either voluntary or involuntary, and can result in the entitlement, right, or attribute ending up in the hands of another holder, or in its simply being lost or extinguished.<sup>12</sup> Any particular entitlement,

<sup>10</sup> Most of the definitions quoted in notes 2–5 above ignore their rivals. Among recent commentators, Susan Rose-Ackerman is exceptional in recognizing many meanings. See Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); *infra* note 67 (discussing Rose-Ackerman's approach to the meanings of inalienability).

<sup>11</sup> The traditional conception of alienation as separation of objects from persons is related to the traditional subject/object dichotomy, which I discuss in Section B of Part III below. In what follows, I shall often refer generally to whatever is inalienable as a "thing." This is a necessary shorthand, although it does present the danger of an unwanted connotation of objectness, especially in light of the subject/object dichotomy.

<sup>12</sup> As these two variables suggest, each of four broad categories of separability might be negated by a corresponding form of inalienability: involuntary extinguishment (cancellation, forfeiture of civil rights); voluntary extinguishment (waiver, abandonment); involuntary transfer (condemnation, adverse possession); and voluntary transfer (gift, sale). The negation of involuntary transfer is less likely than the other categories to be conceived of as inalienability; for example, we do not consider the prevention of theft an inalienability. There are other variables that are sometimes significant for understanding inalienabilities. The most important of them are: the sovereign's role in the interaction (whether the sovereign is the instrument of involuntary loss or the recipient of involuntary transfer); the nature of the holder of an inalienable right, entitlement, or attribute (whether the holder is a person or group, and whether the person has an official capacity or the group has special normative significance); and the availability of

right, or attribute may be subject to one or more forms of inalienability.

In one important set of meanings, inalienability is ascribed to an entitlement, right, or attribute that cannot be lost or extinguished. If involuntary loss is its focus, inalienable may mean nonforfeitable<sup>13</sup> or noncancelable; if voluntary loss is its focus, inalienable may mean nonwaivable<sup>14</sup> or nonrelinquishable.

In another important set of meanings, inalienability is ascribed to an entitlement, right, or attribute that cannot be voluntarily transferred from one holder to another.<sup>15</sup> Inalienability in these uses may mean nongiveable, nonsalable, or completely nontransferable. If something is nontransferable, the holder cannot designate a successor holder.<sup>16</sup> Nongiveability and nonsalability are subsets of nontransferability. If something is inalienable by gift, it might be transferred by sale;<sup>17</sup> if it is inalienable by sale, it might be transferred by gift.<sup>18</sup> This nonsalability is what I refer to as market-inalienability. In precluding sales but not gifts, market-inalienability places some things outside the marketplace but not outside the realm of social intercourse.

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compensation. These and other variables can be thought either to create a larger matrix or to delineate subcategories in the four broad categories. Market-inalienability is a normatively important subcategory of inalienabilities that negate voluntary transfer, a category delineated by the distinction between monetary exchanges and other voluntary transfers. In the text, I do not seek to elaborate on the matrix of inalienabilities, but rather to set the scene for an exploration of market-inalienability. The taxonomy of inalienabilities I propose here should be compared with that of Susan Rose-Ackerman, cited in note 10 above, at 933–35. See *infra* note 67.

<sup>13</sup> Nonforfeitability is ambiguous. It may refer to an entitlement, right, or attribute that cannot be involuntarily negated, such as certain civil rights; or it may refer to things that cannot be involuntarily transferred to the sovereign without compensation. In the text I use the former meaning.

<sup>14</sup> Waiver is ambiguous. It may refer either to permanent or temporary abrogation of an entitlement, right, or attribute. In the latter meaning, perhaps we should not speak of waiver as "loss." In the text I use the former meaning.

<sup>15</sup> Preclusion of involuntary transfer is not usually conceived of as inalienability. See *supra* note 12.

<sup>16</sup> Something that is inalienable in this sense need not be inalienable in the broader senses detailed above. See *supra* note 12. Something that is nontransferable might still be forfeited, canceled, relinquished, waived, or perhaps involuntarily transferred to the government or its designates.

<sup>17</sup> In addition to transfer by gift and sale, barter also represents a theoretically possible means of transfer. I do not consider barter, however, because it is not a widespread method of exchange in our culture.

<sup>18</sup> There are also subsets of gift transfer: transfer *inter vivos*, and bequest or devise. Although gift transmission at death is not a focus of this Article, market-inalienability may sometimes leave open both kinds of gift transfer; for example, one may will one's body or organs. In other cases, bequest might be irrelevant, as with sexual services. See *infra* pp. 1921–25. Bequest might be prohibited in cases in which it imparts unwanted connotations of property, for example, in the case of relinquishment of children for adoption: a testator can create a guardianship for a child but may not will the child itself to the guardian. See *infra* pp. 1925–28.

tated — though not entailed — by his definition of the person. The subject/object problem pulls pluralism toward universal commodification because there is no obvious stopping place short of that.<sup>185</sup>

### C. Negative Liberty

Two theories about freedom are central to the ideological framework in which we view inalienability: the notion that freedom means negative liberty,<sup>186</sup> and the notion that (negative) liberty is identical with, or necessarily connected to, free alienability of everything in markets. The conception of freedom as negative liberty gives rise to the view that all inalienabilities are paternalistic limitations on freedom. The idea that liberty consists in alienability of everything in markets clashes with substantive requirements of personhood, making it difficult, for example, to argue against human commodification. In general, the commitment to negative liberty, like the commitment to the Kantian structure of persons versus objects, has caused confusion in liberal pluralism and has exerted a pull toward universal commodification.

Inalienabilities are often said to be paternalistic.<sup>187</sup> Paternalism usually means to substitute the judgment of a third party or the government for that of a person on the ground that to do so is in that

<sup>185</sup> Of course, the subject/object problem could pull in the opposite direction as well. If the bright line ceases to be intuitively obvious, yet one is not yet ready to give up the subject/object dichotomy entirely, one could retreat to a position placing (almost) everything in the subject realm as well as to a position placing (almost) everything in the object realm. Surrounding circumstances have so far rendered universal commodification the more popular philosophical refuge from the incomplete breakdown of the subject/object dichotomy.

<sup>186</sup> "Negative liberty" means roughly the freedom of the individual to be let alone to do whatever she chooses as long as others are not harmed. See I. BERLIN, *Two Concepts of Liberty* in *FOUR ESSAYS ON LIBERTY* 122 (1969) ("Political liberty in this sense is simply the area within which a man can act unobstructed by others."); see also Skinner, *The Idea of Negative Liberty: Philosophical and Historical Perspectives*, in *PHILOSOPHY IN HISTORY* 193, 197 (R. Rorty, J. Schneewind & Q. Skinner eds. 1984) (defining negative liberty as "the mere nonobstruction of individual agents in the pursuit of their chosen ends"). The positive/negative distinction, which Isaiah Berlin says is traditional, was used by Kant, who referred to the kind of arbitrary freedom of the will that we perceive in the phenomenal realm as negative. Positive freedom, in the noumenal realm, was for Kant identical to action necessitated by universal reason in conformity with moral law. See I. KANT, *supra* note 155, at 36. For a criticism of the concept of negative liberty, see Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 175 (A. Ryan ed. 1979). For a useful taxonomy of various positive and negative conceptions of freedom, as well as a sophisticated defense of a modified negative view, see R. FLATHMAN, *THE PHILOSOPHY AND POLITICS OF FREEDOM* (1987).

<sup>187</sup> Calabresi and Melamed's discussion of inalienability rules illustrates a typical use of the notion of paternalism. See *supra* note 59. Another illustration is Anthony Kronman's treatment of restrictions on alienation as a form of paternalism. See Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763 (1983).

person's best interests.<sup>188</sup> For advocates of negative liberty, to substitute someone else's choice for my own is a naked infringement of my liberty.<sup>189</sup> Freedom means doing (or not doing) whatever I as an individual prefer at the moment, as long as I am not harming other people.<sup>190</sup> To think of inalienability as paternalism assumes that freedom is negative liberty — that people would choose to alienate certain things if they could, but are restrained from doing so by moral or legal rules saying, in effect, that they are mistaken about what is good for them.

To say that inalienabilities involve a loss of freedom also assumes that alienation itself is an act of freedom, or is freedom-enhancing.<sup>191</sup> Someone who holds this view and conceives of alienation as sale through free contract is deeply committed to commodification as expressive of — perhaps necessary for — human freedom. Insofar as theories of negative freedom are allied to universal commodification, so are traditional discussions of inalienability in terms of paternalism. If we reject the notion that freedom means negative liberty, and the notion that liberty and alienation in markets are identical or necessarily connected, then inalienability will cease to seem inherently paternalistic. If we adopt a positive view of liberty that includes proper self-development as necessary for freedom, then inalienabilities needed to foster that development will be seen as freedom-enhancing rather than as impositions of unwanted restraints on our desires to transact in markets.

<sup>188</sup> As Duncan Kennedy points out, paternalism involves false consciousness. See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563, 626-29, 631-49 (1982). The paternalist asserts that the actor has made a mistake about what is best for her and that a third party or the government is in a state of true consciousness and can therefore override her choice. Although Kennedy seeks to rescue it for his own purposes, the term "paternalism" has largely been used as a pejorative by advocates of negative liberty.

<sup>189</sup> Paternalism is particularly anathema to libertarians who are also moral subjectivists. They hold that a person's subjective preferences define her interests and, therefore, that it is nonsensical to claim that anyone else knows better than she does what is good for her. For these libertarians, among whose number are many practitioners of law and economics, the notion of false consciousness is simply incoherent.

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

<sup>190</sup> This is a rough restatement of the characteristic idea of negative liberty. See *supra* note 186.

<sup>191</sup> Both Mill and Hegel, at least in certain contexts, thought that alienation of objects is an act partly constitutive of individual freedom. See *supra* p. 1889, 1892. But cf. *infra* note 204.

Joel Feinberg's discussion of the inalienable right to life<sup>192</sup> illustrates the traditional link between inalienability and paternalism, as well as the tension caused by the clash between negative liberty and substantive requirements of personhood. Feinberg distinguishes three conceptions of the inalienable right to life, which he calls "the paternalist," "the founding fathers," and "the extreme antipaternalist."<sup>193</sup> In the view he calls paternalist, to say that the right to life is inalienable means that it is a nonrelinquishable mandatory right, one that ought to be exercised, like the right to education.<sup>194</sup> In contrast, the view that Feinberg attributes to the founding fathers holds that the inalienable right to life is a nonrelinquishable discretionary right.<sup>195</sup> It is discretionary because the individual may choose whether to exercise it.<sup>196</sup> For example, the right to own property is a discretionary right because I may choose to own nothing; it is a nonrelinquishable discretionary right because I cannot morally or legally renounce the right to own property even if I choose not to own any.<sup>197</sup> Feinberg concludes that the nonrelinquishable right to life is discretionary, not mandatory:

[W]e have a right, within the boundaries of our own autonomy, to live or die, as we choose . . . . [T]he basic right underlying each is the right to be one's own master, to dispose of one's own lot as one chooses, subject of course to the limits imposed by the like rights of others. . . . In exercising my own choice in these matters, I am not renouncing, abjuring, forswearing, resigning, or relinquishing my right to life; quite the contrary, I am *acting* on that right by exercising it one way or the other.<sup>198</sup>

This passage suggests that the right to life is discretionary because it is parasitic on negative liberty. But Feinberg does not say whether the underlying right to be one's own master is mandatory or discretionary. The omission points to an apparent contradiction in the argument, a contradiction that stems from a commitment to negative liberty.<sup>199</sup> If the discretionary right to life is nonrelinquishable, as

<sup>192</sup> See Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93 (1978).

<sup>193</sup> See *id.* at 120-23.

<sup>194</sup> See *id.* at 120-21.

<sup>195</sup> Feinberg understands "inalienable" to mean prohibition of voluntary relinquishment. See *id.* at 112 ("An *inalienable right* is one that a person cannot give away or dispense with through his own deliberate choice." (emphasis in original)). In order to avoid unnecessary confusion, the discussion in the text substitutes "nonrelinquishable" for Feinberg's use of "inalienable."

<sup>196</sup> See *id.* at 121.

<sup>197</sup> See *id.* at 115-16.

<sup>198</sup> *Id.* at 121.

<sup>199</sup> Whether Feinberg is committed to negative liberty is unstated in the article under consideration, although that seems fairly inferable from his declaration of "doubts about the theory of inalienable rights in any case," *id.* at 94, and his characterization of mandatory rights as

Feinberg claims is the founding fathers' view, then we can infer that the "basic right" to *have* discretion — liberty — must be mandatory: one cannot choose not to be one's own master, not to dispose of one's lot as one chooses. But to attribute this mandatory conception of liberty to the founding fathers would apparently be to attribute to them a form of positive liberty, a view that people can be required to be free.<sup>200</sup> Hence, Feinberg attributes to the founding fathers a discretionary, not mandatory, view of the right to liberty. But if the right to liberty is indeed discretionary, then it seems I could choose *not* to be my own master, *not* to dispose of my lot as I choose, just as I could choose not to own property. And if I could choose that, I could choose not to have any of the other parasitic nonrelinquishable rights, like the right to life. The right to life would then be relinquishable.

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

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

Might one hold fast to negative liberty and — contrary to the argument I have just given — still claim we are not free not to be free? This difficulty is the root of the tension between pluralism and negative liberty, and of the consequent pressure to give up pluralism.

"smug paternalism," *id.* at 122, and "offensively demeaning," *id.* at 106. A commitment to negative liberty is clear in J. FEINBERG, *HARM TO SELF* 62-66 (1986), in which Feinberg distinguishes among autonomy, liberty, and freedom, and defines both liberty and freedom in terms of absence of constraint.

<sup>200</sup> Contrary to the adherents of negative liberty, perhaps it is indeed plausible to attribute some form of positive liberty to the founding fathers. See Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25-31, 47-55, 74 (1986).

Mill's well-known attempt to argue against freedom to sell oneself into slavery directly poses this difficulty:

[B]y selling himself for a slave, [a person] abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself . . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.<sup>201</sup>

The argument is obscure. It is hard to see why Mill thought it obvious that the principle of negative freedom could not require the "freedom not to be free;" only positive freedom clearly holds that a person *must* be free.<sup>202</sup> In general, what in Mill's view is the connection between free alienation and freedom? (Why is alienation of freedom "not freedom"?) Most commentators have viewed Mill's argument against selling off one's freedom as a lapse into paternalism.<sup>203</sup>

Neither in his conception of freedom nor in his conception of alienability does Mill appear to explain why human beings are non-commodifiable. One could understand him to imply that there is an unstated divide between the realm of the market (free trade) and the realm of politics (liberty).<sup>204</sup> People must be free in order for a free political order to exist; they cannot be free without such a political order; hence, in the nonmarket realm they cannot, without contradic-

<sup>201</sup> J.S. MILL, *On Liberty*, in *THREE ESSAYS* 126 (1975).

<sup>202</sup> See *supra* note 186.

<sup>203</sup> See, e.g., J. FEINBERG, *supra* note 199, at 75-79.

<sup>204</sup> Because Mill insisted so strongly on the inherent alienability of property, see *supra* p. 1889, it is interesting that he elsewhere declared that "the principle of individual liberty is not involved in the doctrine of Free Trade." J.S. MILL, *On Liberty*, *supra* note 201, at 117. Hence, for Mill (unlike modern proponents of negative liberty), individual liberty is not involved in most government regulation of trade in commodities. Most trade restrictions, including restrictions on production, are wrong for Mill not because they violate the producers' liberty but because "they do not really produce the results which it is desired to produce by them." *Id.* They are wrong for utilitarian, not libertarian, reasons. On the other hand, prohibitions, "where the object of the interference is to make it impossible or difficult to obtain a particular commodity," do violate individual liberty, but that of the buyer, not the seller. *Id.* A modern version of this argument is to be found in Baker, *Counting Preferences in Collective Choice Situations*, 25 *UCLA L. REV.* 381 (1978), in which the author defends a distinction between regulation and prohibition that parallels Mill's, and in Baker, cited in note 87 above.

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

tion, be free not to be free. This reconstruction makes Mill a pluralist, as indeed he apparently wished to be; but the reading is not very true to Mill in the way it relinquishes negative liberty.

Again, one way to avoid Mill's problem is to espouse universal commodification. The universal commodifier can hold on to negative liberty and avoid Mill's problem — espousing negative liberty while eschewing voluntary enslavement — because under universal commodification freedom itself is seen as monetizable and alienable. Those who tend toward universal commodification may indeed endorse voluntary enslavement.<sup>205</sup> Those who declare human beings noncommodifiable must do so on the ground of postulated market failure (for example, transaction costs).<sup>206</sup>

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

## V. TOWARD AN EVOLUTIONARY PLURALISM

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

### A. Noncommodification and the Ideal of Human Flourishing

1. *Rethinking Personhood: Freedom, Identity, Contextuality.* — Because of the ideological heritage of the subject/object dichotomy,

<sup>205</sup> Robert Nozick takes the extreme view: a "free system" will allow an individual "to sell himself into slavery." R. NOZICK, *supra* note 48, at 331.

<sup>206</sup> See Demsetz, *supra* note 60, at 348-49; *supra* pp. 1865-66. For the reasons discussed in Section B of Part II above, this is deeply unsatisfactory from the point of view of personhood.

which prohibits commissioned adoptions.<sup>296</sup> If, on balance, incomplete commodification rather than market-inalienability comes to seem right for now, it will appear so for these reasons: because we judge the double bind to suggest that we should not completely foreclose women's choice of paid surrogacy, even though we foreclose commissioned adoptions; because we judge that people's (including women's) strong commitment to maintaining men's genetic lineage will ward off commodification and the domino effect, distinguishing paid surrogacy adequately from commissioned adoptions; and because we judge that that commitment cannot be overridden without harm to central aspects of people's self-conception. If we choose market-inalienability, it will be because we judge the double bind to suggest that poor women will be further disempowered if paid surrogacy becomes a middle-class option, and because we judge that people's commitment to men's genetic lineage is an artifact of gender ideology that can neither save us from commodification nor result in less harm to personhood than its reinforcement would now create. In my view, a form of market-inalienability similar to our regime for ordinary adoption will probably be the better nonideal solution.

## VI. CONCLUSION

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

I have created a contrasting archetype, universal noncommodification, to characterize the utopian vision — expressed by Marxists and other social critics of the market order — of a social world free of market relationships and market conceptions. Although this archetype, too, is an oversimplification, I believe it enables us to focus on

<sup>296</sup> If paid surrogacy is permitted, it can become a substitute for commissioned adoption. Cf. *supra* note 273.

the transition problem that always lies between us and our utopias. If decommmodification of things important to personhood is provisionally the ideal of justice we should strive for, trying to bring it to pass now may sometimes be unjust. In attempting to make the hard choices in which both commodification and decommmodification seem harmful — the transition problem of the double bind — we must evaluate each contested commodification in its temporal and social context, and we must learn to see in the commodification issue the same interconnection between rhetoric and reality that we have come to accept between physical reality and our paradigms of thought.

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

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