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S. Holland

University of Puget Sound, sholland@pugetsound.edu

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Suzanne Holland

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Contested Commodities at Both Ends of Life: Buying and Selling Gametes, Embryos, and Body Tissues

ABSTRACT. This essay examines the increasing commodification of the body with respect to tissues, gametes, and embryos. Such commodification contributes to a diminishing sense of human personhood on an individual level, even as it erodes commitments to human flourishing at the societal level. After the case for social harm resulting from the increasing commodification of the body is made, the question becomes whether that harm is best remedied by following any of three approaches by which government traditionally seeks to promote the flourishing of its citizens. The author concludes that it is not, and that what is needed is a pragmatic and somewhat casuistic approach to the regulation of contested commodities—that which legal scholar Margaret Jane Radin calls “incomplete commodification.”

IN HER SENIOR YEAR at a New England liberal arts college, Sharon Stamford noticed an ad in the campus newspaper for egg donors; price: \$5000.¹ Sharon knew she could use \$5000 so she made a phone call and later signed up with the fertility clinic that placed the ad. While Sharon likes the idea of helping infertile women, she is savvy enough to know that she possesses a valuable commodity that allows her to earn income while going to school. A healthy 20-year-old woman, Sharon never considered whether the fertility treatments she would undergo would be harmful to her long-term health, or to her fertility. She knew that guidelines suggest egg donors limit themselves to three retrieval cycles, but she calculated that three of these would net her \$15,000, or perhaps more, and that she might be able to leave college debt-free.

When Tom and Marlene Davis decided to donate the excess embryos from their IVF procedures, their intent was to help the cause of scientific

research. Neither thought of their donation as contributing to a market in embryos; they had no idea such a thing really existed. They had of course paid the medical expenses of the college student whose eggs were harvested on their behalf though they did not think of this transaction as “buying and selling.” As donors they would undoubtedly be surprised to learn that as early as 1994, the fertility business was estimated to be a \$2 billion dollar a year industry (*Pediatrics* 1994).

In Los Angeles, as Mary Smith’s daughter, Jennifer, lay dying of a brain hemorrhage, Mary was contacted by one of the estimated 154 tissue banks in the U.S. (Heisel 2001). Deciding that her daughter’s death would be a way to help others in a time of tragedy, Mary and her husband, Frank, donated their daughter’s skin tissue to the nonprofit tissue bank that contacted them. They were never told that the tissue they thought they had donated to burn victims would later be sold for profit to one of several businesses that turn tissues into products for a lucrative and growing cosmetic enhancement industry. Estimates are that the body tissue trade currently generates \$500 million per year. In fact, tissue gifts such as the one made by the Smiths actually “. . . fuel a fast-growing industry predicted to hit \$1 billion within three years” (Katches, Heisel, and Campbell 2000).

On hearing of such cases, people often feel “cheated,” duped, conflicted, and even angry. As one woman said, “I thought I was donating to a nonprofit. I didn’t know I was lining someone’s pocket. . . . It makes me angry. It makes me appalled. If it’s not illegal, it ought to be. It’s certainly immoral” (Katches, Heisel, and Campbell 2000). Although it is illegal to trade in organs and tissues, it is not illegal to charge “reasonable fees” for handling and processing.²

Like many, I am troubled by what I take to be signs of the increasing reach of the commodified market into more areas of our lives than I think we ought to tolerate. For example, I experience feelings of dis-ease when I read that non-organ body parts—especially body tissue, gametes, and embryos—are the foundations of billion-dollar private-sector industries. I am further discomforted to learn that neither the assisted reproduction industry nor the body tissue industry is regulated and that the United States stands alone among the nations of the world in this regard (Mead 1999, p. 59; Kahn 1999, p. 586).

In this essay I examine the increasing commodification of the body in these areas.³ Such commodification, I believe, contributes to a diminishing sense of human personhood on an individual level, even as it erodes commitments to human flourishing at the societal level. I maintain that

tissues, gametes, and embryos have an intimate connection to personhood and, as such, their commercial uses ought to be subject to government regulation. Government has a responsibility, in the Aristotelian sense, to create conditions for the flourishing of its citizens; shirking from market regulation in these cases abrogates this responsibility and hinders, rather than fosters, an aim of human flourishing.

Though much could be said about the extent of the state's responsibility to encourage human flourishing, I limit my examination to the realm of the market with respect to certain developments in biotechnology. In the United States, the federal government tends to interpret this responsibility in some combination of three ways: (1) the movement to legally prohibit all trade in certain "commodities;" (2) the movement to prohibit the use of federal dollars for objectionable types of research that might otherwise receive federal funds; (3) a laissez-faire approach to the private sector and to the unfettered operations of the free market.

Although it is both possible and permissible (to an extent) to trade body parts in a literal market, is it appropriate to conceive of the body as commodifiable—i.e., as property somehow alienable from the self? How we conceptualize things (rhetorical commodification) matters because rhetoric influences what happens to those things in a literal market. It is my contention that this rhetorical commodification combined with, for example, literal sales in body tissues and gametes constitutes a kind of social harm, as I will show. I ask whether that harm is best remedied by following any of the three approaches by which government traditionally seeks to promote the flourishing of its citizens. I conclude that it is not, and that what is needed is a pragmatic and somewhat casuistic approach to the regulation of contested commodities, something legal scholar Margaret Jane Radin (1996, pp. 102–14) calls "incomplete commodification." Such an approach best honors our commitments to personhood, commitments that are difficult to maintain under a fully commodified and unregulated market.

THE INCREASING COMMODIFICATION OF THE BODY IN THE BIOTECH ERA

Biotechnology is a substantial industry at the beginning of this third millennium, and "the business of human bodies is a growing part of the \$17 billion biotechnology industry comprising more than thirteen hundred biotechnology firms" (Andrews and Nelkin 2001, p. 2). That the human body has been increasingly subject to commercialization in recent years can be correlated with a rise in private sector funding for biotech-

nological research. In fact, the National Bioethics Advisory Commission (NBAC 1999, p. 34) itself noted that private sector funding finally outpaced government funding for research in this arena for the first time in history. The reasons for this are complex, and I will not dwell on them here as my concern is primarily with the implications of the reach of the market into the territory of the human body. I think it is no overstatement to say that we are witnessing nothing less than a new kind of gold rush, and the territory is the body (see, e.g., Triber 1998).

Body Tissues

In a four-part series that won a journalism Pulitzer Prize for 2000, reporters from the Orange County Register uncovered a vast for-profit market in human body tissues. That there is such a market is not in itself surprising, but what stands out from this investigation is the way in which body tissue companies obtain the tissues that are made into commodifiable products to supply industries such as the cosmetic surgery business. In most cases, nonprofit tissue banks obtain body tissues from cadavers donated by relatives who wish to make an altruistic contribution of their loved one's tissues, as in Mary and Frank Smith's case. In nearly all instances, the reporters found that donors were never informed that the donated parts would later be sold "downstream" for profit. Downstream commodification allows multiple recipients to profit financially from the original donation—in this case the tissue bank, the company that turns tissues into products, the seller of those products, and the hospital or physician who bills the patient. As reporters Mark Katches, William Heisel, and Ronald Campbell (2000) discovered:

Families are led to believe they are giving the gift of life. They are not told that skin goes to enlarge penises or smooth out wrinkles, or that executives of tissue banks—nonprofit groups that obtain body parts—routinely earn six-figure salaries. The products are rarely life-saving as advertised.

The "gift of life" is big business in America. For a nonprofit tissue bank, one typical donation can yield between \$14,000 and \$34,000 in downstream sales, sometimes far more than that. "Skins, tendons, heart valves, veins, and corneas are listed at about \$110,000. Add bone from the same body, and one cadaver can be worth about \$220,000" (Katches, Heisel, and Campbell 2000). Four of the largest nonprofit tissue banks told the Orange County Register that together they expected to produce sales totaling \$261 million in 2000. The average salary of the top execu-

tives of the largest nonprofit tissue banks was \$135,000, although one was as high as \$533,000 (Katches, Heisel, and Campbell 2000).

It is not uncommon for nonprofit tissue banks to link with a corporate entity. The publicly traded Osteotech, the world's largest producer of bone products, "invented" the world's largest tissue bank, the Musculoskeletal Transplant Foundation, in order to assure a ready supply of cadavers. A particularly egregious example of such a partnership is one in which the University of Florida's Tissue Bank started a corporate firm, Regeneration Technologies Inc. The two entities share a director, office space, and phone lines. The nonprofit director and corporate vice president, Nancy Holland, expressed the opinion commonly shared by tissue bank directors and industry executives that these relationships should not be revealed to the donors. "Holland said telling potential donors about profits and ties to companies would complicate the consent process" (Katches, Heisel, and Campbell 2000).

In fact, the consent process involves only partial disclosure. What Holland's comment points to is that the success of downstream commodification might be hindered if donors were to be fully informed. They are informed that the tissue they donate to the nonprofit tissue bank will be used to help burn victims, for example. But cosmetic enhancement uses—one of the downstream markets—are rarely mentioned. Consent forms do not specify such uses of donated body materials, "nor do they mention their alliances with the private companies making plastic-surgery products. 'We don't want to give them the impression that their loved one's skin is going into (an actress's) lips,' Collagenesis's DeVore said, adding that 'he'd be in another business' without his tissue-bank partners" (Heisel, Katches, and Kowalczyk 2000).

Fully informed consent of potential donors and their families is axiomatic to the ethics of informed consent, and tissue donors should not be exceptions. Donor families have a right to know the full extent of the "research" to be conducted on the tissues and body parts they donate to tissue banks. Likewise, they have a right to know about the possibility of downstream commodification of the donated material, as well as disclosure of the commercial interests of nonprofit tissue banks "partnering" with corporate entities. Anything short of this is not fully informed consent and risks exploitation of vulnerable persons, as the following example illustrates:

When Susan Sutton committed suicide, her parents gave permission for her heart, liver, corneas, bones, and skin to be used for transplantation. But the parents could barely afford her funeral. Later they were incensed to learn

that profits had been made at each stage. The hospital and medical teams made thousands of dollars in profits through payments from the body-part recipients' insurers. The agency coordinating the transplant made \$22,000 or more. In such cases, the recipients' payment to hospitals covers not only the transplant services but also the organ itself—generally \$16,000 for a kidney or heart and \$21,000 for a liver. Sutton's parents got nothing. Since they could not afford the cost of a gravestone, they buried Susan in an unmarked grave. (Andrews and Nelkin 2001, pp. 40–41)

It seems obvious that such a situation ought never to occur in the first place; it is more likely to be avoided altogether if the market in tissues were regulated instead of sequestered, a distinction I shall explore subsequently.

Gametes and Embryos

Before leaving the subject of the increasing commodification of the body, it will be useful briefly to examine the market issues surrounding embryos and gametes, particularly oocytes. Although the National Organ Transportation Act of 1984 (P.L. 98–507 (19 October)) clearly circumscribes the limits of organ and fetal tissues trade, the limits are not clearly set regarding trade in embryos or gametes. In its report on human embryonic stem cell research, the National Bioethics Advisory Commission (NBAC 1999, p. 36) expressed concerns about the possible exploitation of embryo and egg donors, correctly foreseeing a potential market in downstream commodification of embryos. NBAC urged private sector compliance with the guidelines it set forth for public funding of embryonic stem cell research—that donors be fully informed about the kind of research that might be done on their discarded embryos. There are no teeth, however, in the NBAC recommendations; the guidelines apply only to public sector funding, and in the private sector “no laws require IVF clinics to inform couples what type of research will be done on their embryos” (Andrews and Nelkin 2001, p. 35).

Discarded embryos are highly attractive to researchers in both the public and private sectors, although at present it appears that such research may only proceed in the private sector. Geron Corporation of California is a leader in research on embryonic stem cell lines derived from such excess embryos. Embryonic stem cells are highly coveted by researchers because they hold the key to the treasures of regenerative medicine—replenishing tissues and organs indefinitely so that the body can repair itself, a kind of “immortality.” One does not have to use any imagination to grasp the lucrative potential of these stem cells. Without federal oversight of the

private sector, it seems at least as likely that the fate that has befallen body tissues will befall “donated” embryos from IVF clinics. Downstream commodification may be all but assured, tempting clinicians perhaps to pressure couples for such donations, or encouraging women to undergo hyperstimulation in order to harvest enough eggs to create excess embryos. As Nelkin and Andrews (2001, p. 35) write:

When IVF patients are asked to donate excess embryos for research, they are not told specifically what that research will entail. They generally assume that their embryos will be used by their own doctor to help other couples who suffer from infertility. They might be disturbed to learn that their embryos have been used to develop a commercial cell line.

In John Moore’s case, a commercial cell line was developed from his blood, rather than from an IVF donation, but Moore may be the most well-known example of someone having been “disturbed” by downstream commodification of a cell line. It has been reported that the Swiss pharmaceutical giant, Sandoz, paid \$15 million for the rights to the cell line developed from Moore’s blood, called the Mo-cell line. Although Moore sued for property rights to his own tissue, the California Supreme Court ultimately found that he had no such rights and that he was not entitled to share in the profits of the commercial applications from his cell line. One can, however, order his cell line, and that of thousands of others, through an on-line catalogue, the American Type Culture Collection (Andrews and Nelkin 2001, pp. 30–31).

Another issue concerns the marketing of gametes. Egg and sperm donation is big business because of course there would be no fertility industry to speak of without them. Any Internet search will call up hundreds of links to gamete donation—opportunities for people to donate, sites for marketing one’s gametes, for obtaining the gametes themselves, for obtaining egg and sperm donor information—including catalogues of narratives and descriptions of the donors and their eugenic appeal.

Although sperm donation receives little fanfare and sperm donors comparatively little payment, it is still a healthy business for both donors and brokers. Costs of sperm to users are set entirely by market demand. Average sperm donor payments are somewhere in the neighborhood of \$50 to \$70 per donation, with donors being able to deposit up to three samples per week in some cases (Xytex 2001). The American Society of Reproductive Medicine (ASRM 2001) recommends limiting sperm donation to no more than 25 pregnancies per donor in a population of 800,000. It is

estimated that of the 6.7 million women with infertility problems in 1995, 42 percent used infertility services, including 13 percent who had had artificial insemination and another 2 to 3 percent who used other ARTs of some kind (Stephen 1995). Even with a limit of 25 pregnancies per donor, simple math shows the huge profit potential of sperm donation.

Oocytes are in even greater demand than are sperm, as any Internet search on assisted reproduction reveals. Demand for eggs has now exceeded available supply, which can be partially explained by a combination of three factors: more women are putting off childbearing until their thirties; one in ten women suffers some form of infertility after age 35; and more couples desire to have genetically related children (Marcus 1999). Since market forces prevail in the fertility industry, payments to egg “donors” have risen accordingly, leading to, among other things, websites where egg donors can auction their eggs to the highest bidder.

Although the ASRM recommends that payment to oocyte donors be capped at \$5,000, there are no laws regulating payments to these donors, and brokers are free to set whatever payment structure they wish. Moreover, there are no legal limits on the number of times a woman may donate her eggs though here, too, the ASRM recommends no more than three retrieval procedures “because the long-term health effects are unknown” (Marcus 1999). Egg donation is a complicated and often painful process for the donor, and its dangers involve, ironically, the risk of infertility to the college-age donor later in her own childbearing years. Rebecca Mead’s *New Yorker* (1999, p. 60) article illustrates this reality:

... as Cindy Schiller found out, the process can be painful, and it can be dangerous as well: hyperstimulation can, in very rare instances, lead to stroke ... but it is too early in the history of egg donation to know what the long-term side effects might be. Ovarian scarring may compromise a donor’s own fertility, and one medical study, which has since been disputed, has suggested that there might be an association between fertility drugs and ovarian cancer.

Despite all of these risk factors, Schiller, the law student Mead followed, told Mead that she had twice donated as an undergraduate and “was now eager to do it again, even though the last time she had ‘hyperstimulated’...” (Mead 1999, p. 56).

Why does Schiller want to go through this process again? She told Mead (1999, p. 56) that she views donation as “a worthy thing to do for which she can be paid in sums that seem handsome to a heavily indebted student.” And how do young women find out about opportunities for

making money as egg donors? They are of course Internet savvy and can find any one of several sites soliciting their services; college newspaper advertising also plays a large part in the marketing strategy of egg brokers trying to attract donors. Both of these avenues form the nexus by which we can learn about the rhetoric of gamete commodification.

THE RHETORIC OF COMMODIFICATION

Rhetoric shapes our world-view about what it means to be human; this is its power. That is why market rhetoric can seem “intuitively out of place” (Radin 1996, p. 87) with respect to what is personal. To speak of what is personal as a fungible object (sex, for instance) seems to do violence to our sense of personhood. By personhood I mean that sense of something inviolable about the human self such that conceptualizing aspects of one’s person as alienable property commensurable with other properties on the market erodes the very notion of what it is to have a self. As Radin (1996, p. 93) correctly observes, “The critique of market rhetoric tells us that the way we conceive of things matters to who we are.” Perhaps that is the reason why the rhetoric surrounding eggs and embryos has been carefully circumscribed. A look at websites for fertility clinics and gamete brokers supports this contention.

The Egg Donor Program of Los Angeles has a website typical of most. It features an image of a stork holding a bundle and, below, a beautiful, blonde woman with a beautiful, blonde little boy, both smiling and happy. It reassures prospective parents that “the program is known for having donors who are extremely bright and attractive, as well as kind hearted” (<http://www.eggdonation.com/home/html>). A competitor site, Egg Donation, Inc., welcomes you to their site with pictures of baby blocks and tells prospective clients, “Our egg donors are specifically solicited, psychologically counseled, medically evaluated, provided with legal counsel, and matched with intended parents” (<http://www.eggdonor.com>). In keeping with the rhetoric of fulfillment and altruism, the company tells egg donors, “We understand that financial considerations are not a major motivating factor when a woman decides to help in this very special way.” The donor may, however, receive between \$3000 and \$10,000 for “compensation.” A look at the egg donor application form gives some insight into which types of women might receive the lower payment, and which, the higher. The form asks specific questions about hair color, religion, eye color, education, height, and work experience, for example, from which one might infer that eugenics plays some role in determining the payments to donors.

In large part because of the rhetoric used to describe the transactions with respect to embryos and eggs, we are not accustomed to speaking of them in market terms, although their presence in the market economy is pervasive, as I have indicated. Given that no laws prohibit payments for oocytes, what is the importance of using the language of donation? As we know, women who get paid whatever the market will bear for their oocytes are always referred to as “donors,” and couples who sign consent forms for the disposal of excess embryos remaining after fertility treatments are asked whether they wish to “donate” their embryos to research, or to another couple’s fertility process. Is “donation” a euphemism designed to mask the pervasiveness of the literal market transactions that occur surrounding something we connect to a deep sense of personhood?

In view of the fact that a great deal of money changes hands, both personally and corporately, in egg and embryo donation, surely a more forthright rhetorical description would refer to such transactions for what they are: buying and selling. After all, downstream commodification of embryos is not uncommon, and there is no required capitation on what egg donors receive for their eggs. The eggs of some women are worth more than those of other women, subject to both eugenic considerations and market values.

In the campus newspaper of my northwest liberal arts college, ads tell women that they will get \$4000 for donating their eggs; at Ivy League universities the market value for white, blonde, athletic intellectuals is upward of \$40,000. Some women who advertise their eggs on the Internet ask as much as \$150,000. A sidebar in *Minnesota Medicine* (1998) picked up on the commodified rhetoric of egg donation at Princeton University:

Lea Tate, of Potomac, Maryland, advertised in the Prince for about two weeks; her ad attracted readers with the words, “Need extra income now?” . . . Another ad, placed by a couple, seeks an egg donor who is “athletic, blonde, small to medium build.” And an ad from an alumna starts with “Help our dream come true.”

A Princeton bioethics student noted that one of her roommates intended to donate her eggs in order to obtain the advertised fee. “College campuses are good places to advertise, she observes, because students are young and healthy and often need the money” (*Minnesota Medicine* 1998).

Overwhelmingly, corporate entities (and professional societies) use the language of altruism. In reality, altruism very well may be a secondary motivation of the targeted market group, college egg donors, who are

likely to be captivated by financial inducements. Moreover, higher pay from greater competition among clinics can encourage such women to ignore the risks inherent in the egg retrieval process, and this is potentially harmful to personhood. Of course egg donors should be compensated for their medical costs and related expenses; beyond this, however, one must seriously question why we would continue to use the term “donation.”

Radin is helpful here. “To conceive of something personal as fungible also assumes that persons cannot freely give of themselves to others,” she writes. “At best they can bestow commodities. . . . A better view of personhood should conceive of gifts not as disguised sales, but rather as expressions of the interrelationships between the self and others” (Radin 1996, p. 93). That is precisely the problem with the current rhetoric of “donation.” With embryos, the giver usually conceives of them as a gift of interrelationship—as indeed with body tissue donors—and usually is not aware of the downstream commodification that distorts the intent of the gift. With eggs, the giver is called a donor and, although she may conceive of her participation as a gift, it is also highly likely that she is attracted by the variable payment possibilities. In this sense, the gift is really a disguised sale, to use Radin’s term. In both cases, commitments to personhood are distorted.

COMMODIFICATION AS A SOCIAL HARM

Despite the fact that there is a deep libertarian streak running through the U.S., one wonders how many of us actually feel committed to a libertarian ethos when it comes to the commodification of that which speaks to us of our own humanity. People make difficult choices about how to dispose of the human body, for example, because the body is intimately connected to our sense of who we are. Perhaps that is why people get angry and feel betrayed when they find out that the body tissue of someone precious to them has been sold to a company to make a cell line or to use in collagen treatments for cosmetic enhancement. Critics might argue that such emotion is related to having been “duped” in a kind of bait-and-switch situation. But would this sense of outrage dissipate if the transaction were above-board so that “donors” were appropriately paid as sellers with no illusion of having made an altruistic gift? I suspect not.

Instead, I am persuaded that how we think of things, the conceptual framework that we use, in large measure shapes what we do with those things. “Our conceptualizations of what matters for what is,” Radin writes. “Because words and the world are linked, the result at which a

normative discourse arrives is not detachable from that discourse without altering the meaning of the result” (Radin 1996, p. 88). If we think of the body as a fungible entity, we are more likely to be comfortable with a market that exchanges it for other fungible entities—e.g., body tissues traded off for collagen treatments. If, on the other hand, we think of the body as inalienable, we will not want to subject it to the vicissitudes of the market. This is the importance of grasping that the market is both literal and metaphorical or symbolic, as Radin argues throughout her book.

For many of us, our sense of the dignity of humanity is fundamentally disturbed by the suggestion that that which bears the marks of personhood can somehow be equated with property. We do not wish to have certain aspects of that which we associate with our personhood sold off on the market for whatever the market will bear. Pondering the question of whether there ought to be a market in babies, Radin (1995, p. 1) suggests that “if it were okay to think of children as property, then it probably would be okay to buy and sell them; and if it’s not okay to buy and sell them, then maybe it’s not okay to think of them as property.” Substituting the word children in this sentence with “embryos” or “eggs” or “body tissues” has a similar rhetorical effect on the reader. “If it were okay to think of [eggs/embryos/body tissues] as property, then it probably would be okay to buy and sell them; and if it’s not okay to buy and sell them, then maybe it’s not okay to think of them as property.” Perhaps this explains why the fertility industry is so careful to use the language of donation—because it’s not okay to think of the body as alienable property.

But is the solution to remove such commodities from the literal market entirely, to block their exchange,⁴ as Michael Walzer (1983, pp. 88–102) might suggest? Radin (1996, p. 30) explains the problem with a liberal theory such as “blocked exchanges:”

. . . the traditional [liberal] view wrongly implies the existence of a large domain of pure free-market transactions to which special kinds of personal interactions form a special exception. It also wrongly suggests that a laissez-faire market regime is *prima facie* just. The traditional liberal view prevents us from appreciating the nonmarket aspects of many of our market relations; it prevents us from seeing fragments of a nonmarket social order embedded or latent in the market society.

Thus it is the case that even liberal theorists, such as Michael Walzer, miss the mark because theories of conceptual compartmentalization keep

us from seeing the embeddedness or contextuality of our human transactions. Even were we to block the exchange of eggs, embryos, and body tissues from the literal market, we would not necessarily eliminate the effects of the rhetorical market.

Now it is true that we do not all hold the same understanding about what certain things represent. To sharpen the point, Radin uses the term “contested commodities,” signifying multiple and contested meanings. One may, for example, hold internally plural understandings of the same thing. Accordingly, Radin (1996, p. 103) posits two levels of contestation, internal and external. Something may have internally contested meanings (I feel that an heirloom ring of mine is priceless, yet I have it appraised), and another may have externally contested meanings (some people think that adoption should be commodified and others do not). In short, there are both market and nonmarket understandings of many things, and these understandings often exist simultaneously.

This is certainly true of the body. Internally, we might feel ourselves committed to the notion that the human body is priceless, even as we can wonder what price we might be able to get for the donation of our sperm or eggs. Externally (in public discussion), some of us think that people ought to be paid whatever the market will bear for their eggs, while others are committed to the notion that oocytes are an integral part of bodily integrity and should be kept out of the market entirely.

We do have laws that say it is not okay to buy and sell body tissues, though such practices go on anyway, as I have shown. We have no federal laws, however, to say that it is not okay to buy and sell eggs and embryos. Perhaps this suggests that we do think of such body parts as property.⁵ Yet if it is true that we conceptualize these aspects of the body as property, why are so many of us disturbed when confronted with its commercialization? How then do we resolve the tension between what we think and speak—the rhetorical market—and the commercialization of such properties in the literal *laissez-faire* market? Radin (1996, p. 30) offers a more nuanced and pragmatic solution, which she calls “incomplete commodification,” a solution that better allows us to honor our deeply held commitments to personhood and to human flourishing because it takes account of “the non-market aspects of many of our market relations.”

A theory of incomplete commodification asks us to imagine a metaphorical market continuum ranging from complete or universal commodification, on one end, to universal noncommodification on the other. On one end of the continuum, full commodification, in which ev-

everything is bought and sold, exists as a potential harm when linked with fungibility of “bodily property.” But at the other end of the continuum, complete *non*commodification—a Marxist state of affairs—is also potentially harmful because it has the effect of simply giving power over to the market.⁶ In response to the potential harm to personhood caused by complete commodification, incomplete commodification offers regulation of the market as a way of fostering vitally important aspects of our flourishing, such as contextuality, identity, and freedom. Housing and work are two areas we do regulate in accord with human flourishing; they both signify more than something to be bought, sold, and paid for. We regulate our work lives, Radin (1996, p. 110) holds, in recognition of the relationship of work to these three aspects of personhood. Similarly, we regulate housing and think it to be appropriate “. . . because, although we value the efficiency of the market, at the same time housing must be incompletely commodified in recognition of its connection with personhood. . . . People engaged in market interactions often do not understand themselves as just acquiring things; they are relating to each other as well” (Radin 1996, p. 112).

As I have written elsewhere, “. . . incomplete commodification affords us a more accurate reflection of the realities of our human transactions: we value both market efficiency and the fullness of our personhood” (Holland 2001, p. 17). In other words, incomplete commodification provides a way of regulating the market and evaluating what reach the market ought to have for a particular entity, in this case non-organ body parts. Furthermore, it allows us to arrive at a mean between the two extremes of complete commodification and complete noncommodification, something that might have contented Aristotle. Of course, applying a theory of incomplete commodification is more difficult than outlining the theory. And it is this application to which I turn in the final section of this essay.

TOWARD A REGULATED MARKET IN BODY PARTS

Although we have seen that it is not expressly illegal to trade in non-organ body parts, the rhetoric surrounding such contested commodities indicates that most people believe such practices to be immoral, or at the very least unsavory. But unsavoriness does not constitute objectifiable harm, as Ruth Macklin (1996) has argued. Thus, one must ask whether such commodification results in actual harm, and, if so, to whom? The answers to these questions are to be found at the macro level.

I have been arguing that the harm of commodification is socio-cultural. Although it may or may not be the case that buying and selling embryos, gametes and body tissues results in harm to these entities—a position anti-abortion supporters take in objecting to human embryonic stem cell research—this is not the level of my enquiry. Harm to embryos has been taken up at length by many others.⁷ I take the long view of the situation and have attempted to make a case for the social harms of body part commodification, a harm that may be largely symbolic since it is admittedly difficult to quantify what constitutes diminishment of personhood at the individual and societal levels. Yet with Radin I hold that symbolic harm is no less real, as the rhetoric of commodification and our discomfort with it reveals. Anticipating her critics on this point, Radin (1996, pp. 92–93) writes:

The question remains whether use of market rhetoric commits the speaker to the conception of human flourishing implied by it. “After all,” the neo-classical economist might say, “What’s wrong with using reductionist models if they succeed in explaining behavior? Mere use of the models doesn’t commit me to believing that they accurately reflect human values.” I do not believe a speaker can be completely divorced in this way from the implications of her rhetoric. Rhetoric does have an influence on the world, and on the speaker herself, although in what way it does so is complex. And when a proffered “explanation” of human activity implies a conception of human flourishing that is foreign to the actors themselves we should question the extent to which it can be considered explanatory.

We must ask whether market efficiency is a sufficient explanation for a human activity such as “donating” tissue or gametes. What kind of notion of human flourishing is implied here? Is a reductionist model sufficiently explanatory?

I have argued that what disturbs donors and those who learn of the practice of buying and selling body parts has to do with the commodification of that which is human. That there appear to be no boundaries around what is bought and sold troubles people on the one hand; yet, on the other hand, they feel powerless to effect changes about what troubles them. When citizens feel enervated by forces they perceive to be beyond their control, government has a role to play. That role is to foster the conditions for human flourishing. Among other things, human flourishing entails attending to “resources, distributional principles, institutional principles, institutional structures, and the facts of personality development that make a good human life possible” (Radin 1996, p. 63).⁸

When we do think of such lofty aims as the proper role of government with respect to the flourishing of its citizens, we have been accustomed in this country to exempting the market arena from such concerns and, often, from the purview of government's duty. We can no longer afford to entertain this policy as it undermines some of our deepest ethical commitments. Do we want our notion of human flourishing to include the buying and selling of body parts at great cost to some and with huge profits for a few? When that which is intimately connected with our sense of inalienability of the human person is routinely commodified with no enforceable oversight, we can experience the effects of what Radin (1996, pp. 95–101) calls the “domino theory.”

The “domino theory” assumes that for some things it is preferable to find a noncommodified way of expressing our interactions and rhetoric because we fear that a market world-view will dominate something that it ought not subsume. Baby selling is one example used by Radin. The problem, as with all slippery slope arguments, is that what we fear will not necessarily come to pass. Yet it is nevertheless true that many of us would prefer a noncommodified way of thinking and transacting aspects of human personhood.

Radin's theory of incomplete commodification strikes me as the most practical way of navigating the murky waters of these highly contested commodities. We must begin by enquiring about the proper role for government with respect to such issues. Unlike Britain, the U.S. has opted for a decentralized system of general guidelines and voluntary compliance. There is no corresponding central regulatory agency such as Great Britain's Health Fertilization and Embryology Authority (HFEA); instead, we are left to “rely on professional values, commitments, and integrity in order to steer or modify the use of ART” (Robertson 1997, p. 163). In general, this is also the case with respect to non-organ body parts; the system we have in place is itself contributing to an erosion of human flourishing.

With respect to human flourishing and the free market, the federal government tends to limit its role to one or some combination of three areas: (1) it may opt to legally prohibit all trade in certain commodities, such as organ sales; (2) it may opt to prohibit the use of federal dollars for objectionable types of research that might otherwise receive federal funds; (3) it may adopt a laissez-faire approach to the private sector's unfettered interactions with the free market.

Regarding the first approach, for example, the National Organ Transplantation Act of 1984 (P.L. 98–507 (19 October)) was established to

ensure that organs could neither be bought nor sold in the United States. An example of the second approach is the current debate about the permissibility of federal funding for research on stem cells derived from human embryos. President Bush's ruling on the use of federal dollars to create new stem cell lines overturns the NIH guidelines of August 2000, which permitted scientists to use public monies to derive stem cells from discarded frozen embryos. Such restrictions on the use of public funds for stem cell research constitutes an example of the third approach combined with the second, in which government takes measures to prohibit the use of federal funds for "morally objectionable" research even as it tacitly opens the private sector door to commodification of the very thing it seeks to prohibit in the public sector.

The extent to which government pursues such a conflicted policy regarding the increasing commodification of the body is the extent to which—perhaps unwittingly—it undermines its own intentions with respect to the common good and human flourishing. The Bush administration already has signaled its intention to respect both a pro-life position, and a pro-free market position. In the realm of the contested commodities we have been exploring, such commitments will have a hard time co-existing; as such, they are inherently untenable. I suggest a better policy would be for federal government to take an active role in limiting the reach of the market with respect to such body parts. What I am advocating, based on Radin's theory of incomplete commodification, is different from a policy of limiting government funding for that which it deems morally objectionable. Limiting government funding (option number two above) is a solution that will eventually become part of the problem of a laissez-faire market in body parts.

When government decides to limit its funding—refusing to allow taxpayer dollars is the rhetoric it prefers to use—it generally does so because it wants to register moral or ethical objections to what proactive funding would otherwise signify. I do not favor government being in the business of moral arbiter, and I think I am representative of many Americans in saying this. I do, however, favor government using its regulatory power to curb the private sector's interest in unregulated commodification of those contested commodities that are connected to our tenacious commitments to personhood.

I have been arguing that gametes, embryos, and non-organ body tissues are three such contested commodities. Specifically, I think we might continue to allow the commercialization of the ARTs industry, but place

regulations on the buying and selling of embryos, including regulations on advertising. As NBAC suggests with respect to human embryonic stem cells, embryos ought only to be donated and donors ought to be treated to fully informed consent before making decisions about the disposal of excess embryos. I agree with NBAC, but would expand their recommendations to enforceable regulations of the private sector's behavior. We also should prohibit the downstream commodification of embryos in keeping with the original intent of donors that their embryos be used to help other couples or to aid in the research process.

Government cannot claim to foster conditions for human flourishing, which includes the protection of vulnerable members of society, with a policy that curtails federal funding for research on donated embryos, while turning a blind eye to the *laissez-faire* market's uses of and profits obtained from donated embryos. A donated embryo—or body tissue—must remain a donated body part, and brokers must not be allowed to profit from what was intended as a gift. Permitting such unregulated behavior, I suggest, contributes mightily to undermining personhood on multiple levels—among them one's sense of bodily integrity and one's sense of trust in health care providers.

Conversely, regulating the market in the way I have suggested might shore up the erosion of trust and personhood and go some way toward eliminating cynicism and feelings of political inertia. If government really does want to sanction free trade in embryos and gametes, it at least should do so forthrightly. In that case, the rhetoric of donation should be supplanted by the rhetoric of commodification. Former “donors” should be paid and perhaps subject to tax on earned income in this arena. Of course, one cannot control rhetoric legislatively, nor should we attempt to do so. I am merely pointing out an inconsistency that gets overlooked and urging an awareness of the kind of rhetoric that shapes these new technologies, and our relation to them and to ourselves.

With respect to gamete donors, an incompletely commodified approach could recognize that donors are contributing to something that can be seen as a social and personal good (remedying infertility), even as they deserve a degree of compensation that constitutes neither a financial burden (too little) nor a health risk (too much). I see no reason not to follow the suggestion of ASRM and cap egg donor compensation at \$5000. (By European market standards, such a fee is extremely generous.) Allowing some compensation, but capping it at \$5000, would reduce the competition for eggs and perhaps curb the lure of advertising that is targeted to

college students in need of “easy money.” Similarly, I suggest limiting the number of times a woman may donate her eggs to no more than two cycles until such time as researchers have better data on the long-term health risks to such women. It will be objected that there is already a shortage of eggs and that my proposal will increase the shortage. I am not an economist, but I have never been persuaded by supply side economic arguments. It seems to me preferable to limit demand, even for eggs. Moreover, I do not agree with those who think that procreation is an unbounded right, and I recognize that under a market system there will be those who feel it is their right to obtain, legally, whatever they can pay for. I would simply like to limit what is paid. Perhaps, too, capping the compensation for egg donation ultimately will lead couples away from the frenzy to produce a genetically related child, and move society again in the direction of adoption.⁹

Finally, with respect to egg donation, I would think that if government insisted on pursuing a policy of permitting unbridled market activity, but limiting public funding, part of its responsibility for human flourishing would be to advocate for the have-nots. This might mean a federal policy of refusing federal research dollars for programs that engage in oocyte or embryo research on the basis of eugenic concerns. It might also mean establishing federally-financed loans or grants for those individuals who cannot afford the services of market-based fertility clinics and gamete brokers. As I said, I do not agree that procreation is an unbounded right, but as long as we pursue policies to the contrary, it should be the responsibility of government to make sure that all of its citizens have the capacity to flourish in this way.

I suggest one last way of incompletely commodifying the market in body tissues, eggs, and embryos, and it will be an unpopular suggestion. As long as we are not foreclosing literal market interactions for the products of body tissue, embryos, and gametes, we might satisfy some of our commitments to personhood by (1) shutting down those nonprofit tissue banks that accept fees for the downstream commercialization of tissue gifts, and (2) making it illegal for nonprofit entities to have any fiduciary relationship with for-profit corporations trading in body products. For body tissue companies, we should require that a percentage of their profits be “taxed” and put into a trust to allow more just access to the goods these companies make from the human body. For example, perhaps one of the uses of such a fund would be for hospital burn trauma units to obtain funds, thereby making it possible for them to compete with the

cosmetic surgery centers that currently command the lion's share of skin tissue and tissue products.

It could be argued that it would be preferable to regulate the amount of tissue for-profit corporations can have access to and that tissues should be triaged to hospitals first. That might be preferable in a completely noncommodified world, but that is not the one we live in. My proposal, I think, goes some way toward arriving at a balance of market commitments, while still recognizing the nonmarket aspects of our interactions embedded within the market—the attraction of Radin's theory.

The task I have set for government and for policymakers is not an easy one, for the market is voracious, and the profits to be made in the territory of the human body are tremendous. It will require the courage of convictions about how important human flourishing is for society, and how vital it is not to be cavalier about what personhood means. Margaret Jane Radin (1996, p. 92) notes the difficulty of following this path even as she writes with conviction:

In order to decide what conception of human flourishing is properly ours, all we can do is reflect on what we now know about human life and choose the best from among the conceptions available to us. Whatever turns out to be best, it will not be the life of universal commodification.

If the human body at the beginning of the third millennium is the new Yukon territory, those of us who want to encourage the entrepreneurial spirit of the gold rush, but at the same time fundamentally maintain the dignity of the human person, would do well to take Radin's theory to heart. Policymakers should experiment with its application, for to maintain the status quo of laissez-faire markets with certain things entirely sequestered from those markets is likely to result in more stripping of a territory that speaks to us of what is fundamentally human.

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NOTES

1. All names are fictionalized, although the cases are constructed from actual situations.

2. The National Organ Transplantation Act of 1984 (P.L. 98–507 (19 October)) made it illegal to profit from the sale of tissue, though there are no known cases of companies or tissue banks having been prosecuted. As the Orange County Register reported, “Companies and tissue banks step around the law by charging marked-up fees to handle and process the body parts. They avoid billing for the tissue itself. The law allows for reasonable fees to cover processing costs without defining reasonable” (Katches, Heisel, and Campbell 2000, p. 2).
3. I limit my remarks to non-organ body parts since organ commodification is the subject of Thomas Shannon’s essay in this issue.
4. Things that are exempted from the literal market are called “blocked exchanges.”
5. The courts have recognized tissues and cell lines not as personal property, but as the commercial property of the corporate entities that own the rights to their development. See, for example, the legal precedent set in the Moore case, in Andrews and Nelkin (2001, pp. 27–31).
6. For an extended discussion of Radin’s theory of incomplete commodification and its application to human cloning, see Holland (2001).
7. For a recent example, see several of the essays in Holland, Lebacqz, and Zoloth (2001).
8. See also Martha C. Nussbaum’s (2000) elaboration of the conditions necessary for human flourishing in any society.
9. For a fine discussion of this issue and its racial implications, see Roberts (1995).

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