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On commodifying intangibles

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Book Reviews

On Commodifying Intangibles†

James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*. Cambridge: Harvard University Press, 1996. Pp. xvi, 270. $35.00 (cloth), $15.95 (paper).

Margaret Jane Radin, *Contested Commodities*. Cambridge: Harvard University Press, 1996. Pp. xiv, 279. $35.00.

Wendy J. Gordon and Sam Postbrief*

I. Introduction: Intellectual Property and Controversial Markets

It was made clear long ago that property and value are different things. Value exists. It is a fact.[1] It can arise from law, and much of

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1. The distinction between "is" and "ought" is too ancient to have a birthday. A primary

law aims at *creating* more value in the world. But value can also arise in spite of law (consider, for example, the fortunes that bootleggers made during the Roaring Twenties), or in law's interstices.

When a particular value arises despite a lack of explicit legal protection, its possessors often ask courts or legislatures to give them a legal entitlement to preserve and further exploit that value. Typically the holders demand (1) a liberty to employ the valued thing; (2) a right to exclude others from using it;[2] and (3) a power to transfer the rights of exclusion and liberties of use to a market buyer. Taken together, these three entitlements—to use, to exclude, and to alienate—are recognizable as property.[3]

The law of intellectual property and unfair competition must continually decide which valuable things and behaviors should be subject to private control, and whether that control should take the form of "property." Such decisions are not necessary with regard only to newly developed technologies. Courts are called upon to make similar decisions about long-established media, including books. For example, copyright courts often must decide whether the "fair use" doctrine justifies or excuses a prima facie violation of a copyright owner's exclusive right—an open-ended inquiry that boils down to a determination that the contested use is or is not subject to the owner's property right. Sometimes "fair use" treatment is justified by a finding that no market is available to exploit the contested use, but sometimes copyright courts seem to distrust the market even when available. This raises the issue of when and why the market should be distrusted.

Similarly, a copyright court often must identify an author's "ideas," in which no copyright subsists, and distinguish them from the author's "expression," in which copyright can be owned.[4] But what is an *idea* and where is the dividing line between idea and expression? Presumably, to decide how the law should define "idea," we would

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illustration in the intellectual property area appears in the case of *International News Service v. Associated Press*, 248 U.S. 215 (1918), where a majority of the Supreme Court used its pre-*Erie* common law and equitable powers to create a "quasi-property" right in the news. Justice Holmes had strong doubts about the wisdom of the majority approach. In a separate and crucial opinion, he emphasized that "[p]roperty [is] a creation of law [and] does not arise from value, although exchangeable—a matter of fact." *Id.* at 246 (Holmes, J., concurring).

2. As Holmes wrote: "Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference . . . ." *Id.* at 248.

3. For a more formal examination of the Hohfeldian categories and their economic significance in the intellectual property context, see Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1354-94 (1989) [hereinafter Gordon, *Inquiry into the Merits of Copyright*].

4. *See* 17 U.S.C. § 102(b) (1994) (providing that "[i]n no case does copyright protection for an original work of authorship extend to any idea, . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work").

have to know (among other things) what purpose is served by denying property status to ideas. On that question, many hypotheses have been suggested. Some theories are undoubtedly correct—such as the suggestion, intimated in a different connection by John Dawson,[5] that fundamental building blocks like "ideas" may contribute so much to so many people that giving ownership in those fundamentals would cause impossible problems of tracing. But no existing account is comprehensive. For example, even for an idea whose genesis and effect *could* be traced, something in us, perhaps indebted to the First Amendment, rebels against the notion of one person being able to control how that idea is used.

A related question is whether *facts* should be owned. The Supreme Court recently ruled that copyright law could not protect raw data,[6] but the possibility remains that Congress[7] or the courts[8] might make data ownable by means other than traditional copyright. Is this a good idea? Although data is bought and sold, information is also the stuff of the First Amendment.

The courts have not been of much help recently in addressing these issues, or in addressing the underlying question about the proper scope of the market. Too often, judicial decisions have stretched existing doctrines to grant property rights without any clear reason. The result is often confusion. One circuit protects raw trade symbols;[9] another does not.[10] One circuit uses California law to protect a famous singer's rendition of a song from commercial imitation;[11] other circuits would undoubtedly hold such state protection preempted as inconsistent with federal copyright law.[12] Some courts eagerly protect data through the unfair-competition tort of misappropria-

5. *See infra* note 104 and accompanying text.

6. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

7. *See* Jane C. Ginsburg, *No "Sweat"?: Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338 (1992) (urging congressional action and defending its legitimacy).

8. *See* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992) [hereinafter Gordon, *On Owning Information*]. For a discussion of whether such state-based protection would be preempted, see *id.* at 155 n.22.

9. *See* Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir.) (permitting hockey teams to enjoin the sale of cloth National Hockey League team emblem replicas), *cert. denied*, 423 U.S. 868 (1975).

10. *See* International Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912 (9th Cir. 1980) (denying an injunction to a fraternal organization seeking to enjoin "unofficial" jewelers from making and selling jewelry embodying the club's emblem), *cert. denied*, 452 U.S. 941 (1981).

11. *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), *cert. denied sub nom.* Young & Rubican, Inc. v. Midler, 503 U.S. 951 (1992).

12. *See* 17 U.S.C. § 114(b) (1994) (providing that "[t]he exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording").

tion;[13] others interpret the tort narrowly;[14] while the authors of the *Restatement (Third) of Unfair Competition* recommend that a freestanding tort of misappropriation not be recognized at all.[15] But amidst the chaos, the trend seems to be pro-plaintiff and pro-private property. In a kind of misappropriation explosion, new intellectual property rights are continually granted, and the public domain continually cut back.

Many of the property right expansions are Congress's doing. Realpolitik may explain Congress's behavior—after all, possessing value often leads to possessing power as well.[16] But why is it that so many *courts* are also creating new and doubtfully justified rights on their own? Do the judges think that value is property and must be protected as such? Let us hope not, since that is ancient error.[17] What else, then, might explain the ever increasing spread of intellectual property rights? And is it a defensible principle that can guide exploration of the as-yet-unresolved issues?

A promising place to seek some answers to these and related questions is in two recent books: James Boyle's *Shamans, Software, and Spleens: Law and the Construction of the Information Society*,[18] and Margaret Jane Radin's *Contested Commodities*.[19] Boyle promises to tell us about intellectual property. Radin promises to enlighten us regarding what resources or values—such as body parts, sexual services, or babies—should enter the market. Between them, Boyle and Radin may tell us something about which kinds of intangibles, and which kinds of behaviors regarding intangibles, should be subject to the regime of private property, and which better belong outside the market.[20]

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13. *See* Board of Trade v. Dow Jones Co., 456 N.E.2d 84 (Ill. 1983).

14. *See* National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

15. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995) (suggesting that misappropriation only be recognized as a part of an otherwise established right, as is created by trade secret law, and that the "better approach" is that the states should refuse to "recognize a residual common law tort of misappropriation").

16. The problems with such translation of value from the monetary to the political sphere are part of the focus of Michael Walzer's *Spheres of Justice*. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) (arguing that to preserve equality, societal sources of value must be pluralist); *see also infra* notes 53-54 and accompanying text.

17. *See, e.g.*, Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814-17 (1935) (criticizing the elevation of value as a source of property rights). For a discussion linking the "value as property" notion to a primitive conception of corrective justice, and criticizing both, see Gordon, *On Owning Information*, *supra* note 8, at 166-95. Value as "property" can also be viewed through the lens of restitution. *See id. See generally* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992).

18. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

19. MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

20. The two books also represent two potentially complementary perspectives. Boyle is

Both books provide partial answers. Boyle suggests that some judges are drawn to granting new rights by a "myth of authorship."[21] This is more comprehensible than the notion "value is property" as an explanation for recent developments. Notions of "authorship" can be unpacked and critically analyzed in ways that a simple preference for status quo "value" might not.[22] As for Radin, she demands that our property institutions take explicit account of human flourishing. In so doing, she indirectly contributes to our understanding of why ideas are not owned, and of how to identify what should be the contours of "idea" or "fair use."[23]

Neither book, taken separately or together, fully tells us which intangibles are suitable for trading and in what context. For Radin, this is no failure. Not only is her focus not intellectual property, but her goal is a modest though important one: to make vivid the importance of noneconomic ways of viewing persons and legal institutions. Therefore it is natural that she would only partially enhance our understanding of a field (intellectual property) whose underpinnings are highly economic. Boyle's endeavor to provide a theory of the information society, however, is more significantly incomplete. Nevertheless, he teaches much: His entertaining book diagnoses problems with the current system in a way that can only help the profession deal with intellectual property's challenges.

This Book Review will summarize Boyle's and Radin's key arguments. Each book makes a significant contribution, and it is hoped the summary will make those contributions more accessible to readers. The Review will then turn to intellectual property, and to the question of markets in cyberspace. "Cyberspace" is, of course, what we know more casually as "the Web" or "the Net,"[24] that intangible electronic domain from which the American public may soon be able to download everything from music and movies to software and secrets.[25] Because the Net's computer links have the potential to reduce transaction costs considerably, cyberspace poses a particular challenge to those intellectual property doctrines, such as "fair use"

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preoccupied with issues of *reward*. His book's primary point is that "authors" are rewarded too much, and "sources" are rewarded too little. Radin is preoccupied with issues of *need*.

21. *See infra* notes 35-39 and accompanying text.

22. *See* Gordon, *On Owning Information*, *supra* note 8, at 178-80.

23. *See infra* notes 85-108 and accompanying text.

24. For a discussion of the technical and historical distinctions between "Net" and "Web," see Maureen O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. (forthcoming Feb. 1998).

25. Cyberspace would be an appropriate topic for both Boyle and Radin. As for Boyle, the Net's stock in trade is his subject matter, namely, information. As for Radin, the Net is currently making a transition from an informal and open domain governed by "Netiquette" to something else—perhaps a set of mini-domains governed by property rules. To examine aspects of this transition there are few tools as useful as Radin's examination of the limits of market control.

in copyright law, that have been aimed in part at circumventing transaction cost barriers.[26] With Boyle and Radin we can deepen our understanding of the many forces other than transaction costs that shape (or should shape) intellectual property boundaries.

II. BOYLE

As the "death of authorship" gradually took over grove after grove of literary academe, a related cottage industry set itself up in the field of copyright.[27] In some ways this was surprising. After all, First Amendment and copyright lawyers hardly needed Foucault[28] to tell them that the legal conception of "authorship" worked to constrain meaning. Generations of scholars in the United States have tried to liberate new authors from obeisance to old ones.[29] That American

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26. *See, e.g.*, Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter Gordon, *Fair Use as Market Failure*] (examining reasons for fair use including and going beyond the transaction cost barriers that can prevent market formation).

27. *See, e.g.*, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994); JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW (1991); OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW (Brad Sherman & Alain Strowel eds., 1994); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS (1994); Rosemary J. Coombe, *Challenging Paternity: Histories of Copyright*, 6 YALE J.L. & HUMAN. 397 (1994) (book review). For instructive criticism of the poststructuralist turn in copyright scholarship, see DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT (1992).

28. Foucault argued, inter alia, that "authorship" is a cultural construct that makes it possible for some central source to constrain variations in meaning. *See* Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 158-59 (Josué V. Harari ed., 1979). He writes: "[T]he author is not an indefinite source of significations which fill a work . . . . [H]e is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction." *Id.* at 159. To the extent that copyright law gives "authors" rights to control hostile uses of their works, Foucault does no more than state the truth. However, in the United States—unlike, apparently, in France (Foucault's home)—authors usually are not allowed to constrain meaning. In fact, one of the primary purposes of the "fair use" defense in the U.S. is to disable authors from employing copyright law in the service of private censorship. *See, e.g.*, Wendy J. Gordon, *On the Economics of Copyright, Restitution, and "Fair Use": Systemic Versus Case-by-Case Responses to Market Failure*, 8 J.L. & INFO. SCI. 7 (1997) (examining private censorship as a form of market failure) [hereinafter Gordon, *On the Economics of Copyright*]; Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1041-46 (1990) [hereinafter Gordon, *Toward a Jurisprudence of Benefits*] (reviewing PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE (1989), and discussing private censorship, fair use, and market failure).

29. *See* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1591-95, 1601-06 (1993) [hereinafter Gordon, *Property Right in Self-Expression*]; Wendy J. Gordon, *Reality as Artifact: From* Feist *to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992) [hereinafter Gordon, *Reality as Artifact*]; Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 28, at 1032-49 (discussing "private censorship");

courts have only sometimes shared this goal should not obscure the fact that sometimes they embrace it. For example, under either copyright law or the ill-named doctrine of "moral rights," many nations forbid the parodic use of established copyrighted texts, but U.S. courts are hospitable to parody.[30]

Thus, the voice of the authorial iconoclast, calling into question the meaning of established canons, has long provided the primary energy that empowers both First Amendment and related intellectual property scholarship.[31] Fighting against authorial constraint is a time-honored American tradition, if only sporadically recognized by the courts. As a result, it is doubtful that many members of the copyright bar took the "death of the author" literature seriously.[32]

Then James Boyle's *Shamans, Software, and Spleens* came along. It *persuades* that the authorial myth has, in fact, sometimes usurped the iconoclast myth in shaping our law. In so doing, Boyle's book shakes up some of the copyright bar's self-congratulation regarding its free speech successes.[33]

Boyle's book, however, also fails to do much that it promises. It claims to deliver an account of the information society, but does not. It claims to bring the economics of information crashing down around its proponents' ears, but fails.[34] Nevertheless the book does indeed do its central task well: It warns us that a piece of rhetoric and romance may be taking our nation to a place where historically generated illusions are fogging the prospects needed for new growth.

This, Boyle's strongest and central argument, essentially passes through three stages. First, he shows us that information is a category to which the current law has no stable response, and he diagnoses the

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David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989); Pamela Samuelson, *Reviving* Zacchini*: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983); Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

30. *Compare, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (parodist can be an appropriate beneficiary of the "fair use" defense), *with* Cie Generale des Etablissements Michelin-Michelin & Cie v. C.A.W.-Canada, 71 C.P.R.3d 348, 381 (Can. Fed. Ct. 1996) ("[P]arody does not exist as a facet of 'criticism,' an exception to infringement in Canadian copyright law.").

31. *See, e.g.*, STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990) (explaining the importance that First Amendment law places on the iconoclast).

32. *See* Michael Spence, Book Review, 46 REV. ENG. STUD. 610 (1995) (reviewing THE CONSTRUCTION OF AUTHORSHIP, *supra* note 27).

33. *See, e.g.*, BOYLE, *supra* note 18, at 244 n.2 (criticizing, inter alia, Gordon, *Inquiry into the Merits of Copyright*, *supra* note 3).

34. For an illustration of the continuing value of the economics of information, see MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 106-18 (1993).

instabilities. Second, he shows us how a myth of authorship—that is, granting private property to whomever can best be styled an "author" and denying private property to those who cannot claim the authorial mantle—works to provide answers that the unstable law cannot otherwise provide. Third, he argues that the results generated by the "authorship myth" are often counterproductive, giving prior generations of authors—and corporations—power that inhibits the free speech of new authors.[35]

Oddly, it is not Boyle's culminating argument that possesses the most value. We already know that present authors are indebted to prior authors, and (at least since Landes and Posner[36] made it explicit) we all know that increasing the rewards to one generation of authors can increase the costs of creation for the next generation. No one would deny the need to use one's predecessors. One need not cite Harold Bloom for the proposition that poets create by building on, and repudiating, works of prior poets.[37] So Boyle is joining a chorus when he tells us that each generation builds on the accomplishments of the prior generation, and that broad intellectual property rights can stifle new growth. Yet there is importance in Boyle's treatment of *how* the authorial image may have obscured this well-known set of truths.[38]

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35. Boyle also works through a set of puzzles to show us both the law's inability to deal consistently with information and that the myth of authorship plays a strong but inappropriate role in each. The puzzles are from copyright law, blackmail law, the law of body parts (the famous "spleen case" from California), and insider trading. Given the nature of this Review, it seemed best to omit discussion of these so-called puzzles, except for one—the spleen case that Radin helps to illuminate. *See infra* notes 70-75 and accompanying text.

36. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); *see also* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 338-52 (1988) (discussing copyright law). Of course, the point has been made, albeit more impressionistically, many times before. One of the most effective presentations of the debt each generation of authors owes its predecessor appears throughout Benjamin Kaplan's *An Unhurried View of Copyright*. *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).

37. For Bloom's elaboration of this proposition, see HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (1973). The phrase "a dwarf standing on the shoulders of a giant may see farther than a giant himself" is such a truism that one sociologist wrote a book exploring the ironic difficulties one has in trying to trace authorship of the phrase itself. *See* ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT 4 (1965).

38. Among other things, the romantic vision of authorship sees creators as *not needing* to borrow from predecessors, an illusion that conceals a central reason for limiting the scope of intellectual property rights.

In commenting on the historical shift whereby inspiration ceases to come from muses "outside" the poet but rather finds its originating locus "inside" the poet, Françoise Meltzer writes:

> [T]he terms "inside" and "outside" have a complex history with respect to inspiration. In the West, inspiration comes mainly from the "outside" (visits from gods, demons, prophetic dreams, and of course, genies) until the organicist myths that spawned early romanticism. The organicists . . . argue that genius is like a seed, impounding its own substance; all the material is already there, inside, and needs only the proper watering to unfold. This move from the outside to the inside is mirrored at the linguistic level: in the latter part of the

Boyle argues that the seductive force of the authorship myth lies in its apparent power to resolve the "public"/"private" opposition that, he argues, usually governs the law of information. Thus, Boyle claims that when information is seen as "public," our legal system values equality in access, and lawmakers envision efficiency as flowing from free use unencumbered by the restraints of private property. Symmetrically, Boyle claims that when information is seen as "private," our legal system values protecting an author's or subject's boundaries, and lawmakers envision economic gains as flowing primarily from the incentives to create that property rights generate. In Boyle's view, the law at present contains no principled way to choose between the "public" and "private" paradigms, and the authorial image purportedly provides a mode of bringing resolution to difficult cases.[39]

Even a copyright scholar convinced that U.S. courts put social welfare concerns before authorial personality interests[40] can be gradually persuaded by Boyle that some courts really do attempt to identify and reward "authors." Admittedly, there are other explanations, if Boyle's examples are taken individually.[41] But, cumulatively, he persuades.

A pivotal moment comes in his discussion of *Feist Publications v. Rural Telephone*.[42] When the Supreme Court in *Feist* denied copyright to a white-pages telephone directory, much of the copyright bar agreed with the result—copyright should not be used to monopolize bare facts, but should be restricted to protecting the original and creative *arrangement* of facts. But many were deeply puzzled by the primary rationale the Court used to justify that result: the claim that facts are found rather than authored.[43] Few of us are naive enough to imagine that "facts" are unfiltered by the observer's

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> eighteenth century, in German, French, and English, for example, one begins to *be* a genius rather than to *have* genius. . . . [T]he romantic legacy . . . modifies the topography of originality . . . .

FRANÇOISE MELTZER, HOT PROPERTY: THE STAKES AND CLAIMS OF LITERARY ORIGINALITY 12 (1994).

39. The power to resolve dilemmas does not make a good decisionmaker. Consider the common penny: flipping it can answer any "yes" or "no" question, but is hardly a reliable guide.

40. On the primacy of economic and related social welfare concerns, see Gordon, *Fair Use as Market Failure*, *supra* note 26, at 1602-27; Gordon, *Property Right in Self-Expression*, *supra* note 29, at 1607-09 (proposing a connection between natural rights theory and the economic approach to copyright law).

41. For example, Radin implicitly gives an alternative explanation of the spleen case. *See infra* notes 73-75 and accompanying text.

42. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

43. *See id.* at 347 (citing, inter alia, MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[E] (1990)); *see also id.* at 361 ("[T]he raw data does not satisfy the originality requirement. . . . [T]hey existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory.").

judgment, purposes, and presuppositions.[44] Further, most of the facts in a phone book—names, addresses, and phone numbers—*are* created rather than found. Our names are chosen by our parents, our street addresses are manufactured by housing developers or city bureaucrats, and our phone numbers are generated by the phone company.

Probably most of the fans of the *Feist* opinion simply liked the way its result furthered First Amendment goals. As for the opinion's logic, we simply shrugged and attributed the Court's naiveté to its having thoughtlessly relied on the inadequate treatment given the subject by the Nimmer copyright treatise.[45] However, when Boyle goes through his discussion limning the authorial features discovered by courts, the reader is finally convinced: The Court in *Feist* did not simply rely lazily on Nimmer. It went looking for a personalized author, and denied copyright when it could not find one. Perhaps the authorial conceit does matter, and perhaps it is indeed the force of the authorial conceit that often blocks consideration of alternative policies.[46]

III. RADIN

Radin concentrates on a different force that blocks consideration of alternative policies, namely the law-and-economics paradigm. She fears that when policymakers face a social problem, they will ask "why not the market?" This may distract them from asking the important and open question, "what should we do?"

Defenders of the economic perspective typically argue that beginning an inquiry inside the market paradigm at least provides a structured set of questions to ask, thereby guiding our further questioning.[47] Potential forms of market failure are many but not infinite. Forms of market failure include, for example, externalities, information imperfections, wealth or income effects, strategic behavior, and (perhaps) nonmonetizability. One can use each form of market failure to structure the inquiry "why not honor the market?"[48] instead of being forced to roam at large. In fact, one of

44. For a more detailed discussion, see Gordon, *Reality as Artifact*, *supra* note 29, at 93.

45. NIMMER & NIMMER, *supra* note 43. For an alternative rationale and extension of the *Feist* holding, see Gordon, *Reality as Artifact*, *supra* note 29.

46. For example, without the authorial conceit, perhaps the Court would have addressed the free speech issues more comprehensively.

47. For an excellent discussion comparing Radin's views with the market failure approach, see TREBILCOCK, *supra* note 34, at 23-57.

48. *See, e.g.*, Gordon, *Fair Use as Market Failure*, *supra* note 26, at 1605-15, 1627-35 (using market failure to structure a fair use analysis); Gordon, *On the Economics of Copyright*, *supra* note 28 (using the market failure characteristic of endowment effect to justify judicial refusal to enforce private censorship); Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 28, at 1041-49 (discussing private censorship as market failure).

the most common criticisms of Radin is the imprecision of the answers she gives to specific questions[49] and the free-flowing nature of her inquiry.

Radin willingly concedes that most practitioners of law and economics understand that there are limits to the market's usefulness. She also recognizes that sophisticated practitioners like Michael Trebilcock can and do use economic tools to explore the same kinds of problems with which she is concerned. Radin, however, wishes to suggest inadequacies in the economists' touchstone for analyzing those limits, namely, the market failure paradigm. It can be argued that using this paradigm is not as good as starting from a premise that is more agnostic: in part because the market-failure paradigm prejudges where the burden of proof should be located, in part because it pushes the analysis toward a mimic-the-market kind of result, but primarily because it constrains the likely answers.

Even for one who prefers the discipline imposed by the challenge of the market-failure model, Radin's objections are powerful. Her book reminds us that the price for that model's apparent neatness might be to miss those wholes that are greater than the sum of their parts. For example, if a person needs a kidney, the question "why can't I buy it?" might distract us from asking, "how should the legal system restructure health care so that preventive medicine makes kidney transplants less necessary?"[50] An economist is better equipped than a moralist to address the latter, more open-ended question, but Radin argues that the market failure paradigm may make it difficult for the economist properly to formulate the question in the first instance. Similarly, Radin argues that "why not the market?" is a question that implicitly favors the status quo, locking us into the "double bind" that so much commodification presents.[51] However horrible the sale might be in the eye of the observer,[52]

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49. *See* Gillian Hadfield, Book Review, 48 U. TORONTO L.J. (forthcoming Winter 1998) (reviewing RADIN, supra note 19).

50. Thanks to Ann Seidman for helping Wendy Gordon see why these questions may indeed lead to different results. This is something Sam Postbrief knew already. For example, consider this remark from his notes on Boyle: "[E]fficiency and perfect information are the holy relics of economic theorists, which fix and inflame the devotion to the creed."

51. For Radin's discussion of "double bind," see RADIN, *supra* note 19, at 123-30. *See also infra* note 73.

52. Economists sometimes try to capture observers' reactions through "moralism"—that is, the cost to observers (disutility) of seeing something horrible. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972). However, though it may be important to measure the discomfort that horrible choices cause to observers, that is hardly the most important issue. Such horrors do not become less important to a deontological or fairness analysis when hidden. This is well illustrated in Calabresi and Melamed's separate discussion of "other justice reasons," *see* Calabresi & Melamed, *supra*, at 1102-05, and in Frank Michelman's discussion of how the cognate concept, "demoralization cost," would be treated differently under an economic or a

prohibiting the sale (and losing the money it could generate) may leave the subordinated or poverty-stricken seller feeling further exploited.

In addition to criticizing the market failure approach, Radin also finds inadequacies in liberal efforts to take account of nonmarket values. The liberal approach she criticizes most vigorously is compartmentalization: that is, the division of social life into separate spheres—some governed by money, some by beauty, some by talent, and some by political strength. Her main target in this regard is Michael Walzer. Walzer insists that justice requires not permitting the criteria that rule in one sphere (such as the market) to rule in other spheres (such as politics).[53] Radin makes a strong case that a model of "separate spheres" is inadequate, as most occasions involve *mixtures* of commodified and noncommodified values.

While this is an apt point, it does not impair the key value of Walzer's work. Walzer's central point is the same as Radin's own: "to show that many of us do have implicit unrecognized commitments to incommensurability," and to assert that these commitments deserve respect.[54]

As mentioned, Radin is sometimes criticized for failing to make definite pronouncements.[55] It is true that at the close of her book, the reader still does not know whether babies and kidneys should or should not be commodified.[56] But this is not necessarily a problem. Radin accomplishes her purpose, which is to open up inquiry and to add the issue of commodification discourse to the reader's personal agenda. As for the lack of definite recommendations, are specific proposals really necessary? Only hubris would lead law professors to imagine that judges or legislatures would adopt their academic prescriptions in toto.[57]

Radin's concerns extend beyond the blinders that economics can put around the eyes of policymakers. She fears that the spread of the market into new domains—through the sale of blood, organs for

fairness-based normative system, *see* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-15 (1967).

53. *See* WALZER, *supra* note 16.

54. RADIN, *supra* note 19, at 9.

55. *See* TREBILCOCK, *supra* note 34, at 26-29; Hadfield, *supra* note 49.

56. Regarding body parts, Radin is not certain whether or not "people should be able to sell their kidneys or corneas." *See* RADIN, *supra* note 19, at 161. As for baby-selling, her objections to allowing markets in babies are qualified and contingent. *See id.* at 137-40.

57. In addition, Radin may have some sympathy for the deconstructionist enterprise and its focus (at least in the hands of some practitioners) on resisting certainties and keeping discourse open. For an accessible popular account of this aspect of deconstruction, see Nick Smith, Comment, *Incommensurability and Alterity in Contemporary Jurisprudence*, 45 BUFF. L. REV. 503 (1997).

transfer, babies, and surrogacy—will lead to a degraded self-conception for the populace in general, as persons might come to view themselves as little more than "bundles of commodities."[58] Radin reiterates throughout her book that lawmakers tempted to extend the market into these new domains need to take into account how such market extensions might degrade people's self-perceptions. In particular, she wants policymakers to ask whether extending commodification into a particular sphere might lead to "universal commodification,"[59] as a result of which Americans might come to view themselves and all of their capacities as fungible packages of goods for sale. She urges that lawmakers avoid laws that might encourage such a shift in human values.

Hence, Radin suggests deliberately using law to affect nonlegal norms. This is a popular topic[60] and hardly an uncontroversial one. For example, Richard Posner was recently quoted as saying that the effort to use law to affect values is both "paternalistic" and "potentially totalitarian."[61] How would Radin reply to charges such as these?

First, of course, Radin would reply that her work is meant to be antiauthoritarian and empowering. But an observer would have to concede that Radin is hardly clear in explaining precisely how a society would choose the appropriate values to pursue.[62]

A second argument is explicit in Radin's book. She contends that the impact of law on norms is inevitable and already occurring.[63] She might even add, "so far it's *your* normative paradigm that's winning,

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58. She refers to this danger as a potential "domino effect." RADIN, *supra* note 19, at 95.

59. Radin has been variously interpreted in regard to whether a domino effect will occur, resulting in "universal commodification." She sees universal commodification as far from inevitable. Instead, Radin asks that each time policymakers consider extending the market to a new domain, they make an empirical decision as to whether the proposed extension is likely to further the reach of commodification rhetoric.

60. The feedback loop between law and norms has become popular enough to make it into the *New Yorker*. *See, e.g.*, Jeffrey Rosen, *The Social Police: Following the Law Because You'd Be Too Embarrassed Not To*, NEW YORKER, Oct. 20 & 27, 1997, at 170; *see also* Symposium, *Law, Economics, and Norms*, 144 U. PA. L. REV. 1643 (1996).

61. As quoted in the *New Yorker*, Judge Posner said:

> Government has a role in encouraging people to be law-abiding, but when it gets down to trying to get people to like each other, to change people's values and make them more tolerant—this whole notion of shaping people's preferences through government—I don't like it particularly. I think it's both paternalistic and likely to be ineffective, but to the extent that it is effective, it's likely to be totalitarian.

Rosen, *supra* note 60, at 176.

62. Theorists of incommensurability such as Radin are usually linked to "abhorrence for authoritarianism." Smith, *supra* note 57, at 509. The notion is that by insisting on particularity and context, and by resisting utilitarianism and other monistic value systems, the incommensurability theorist works to make room for diversity. *See id.* at 510. Yet despite her caveats, Radin often seems to assume that there can be one unified view of "human flourishing"—that is, her prose contains hints of a quasi-essentialist perspective.

63. Radin argues that law cannot avoid having an impact on discourse. She argues that either alternative—that is, regulation with an eye to discouraging the discourse of commodification, or nonregulation—"underwrites a conceptual structure." RADIN, *supra* note 19, at 176.

Judge Posner." It is hard to argue with Radin on that point. Law and economics is being taught every day to law students, who presumably go out into the world to convey its perspective to their clients. More significantly, the dominant cry all over the world is for privatization and markets. So what Radin urges might prove little more than a corrective to an already over-dominant ideology.[64]

The book also contains a third possible response to Posner. Radin would likely argue that the totalitarian impulse can be constrained by the usual boundaries of free speech doctrine, namely, the distinction between speech and behavior.[65] Here, however, Radin needs more detail and more exploration of the very contexts the importance of which she so often emphasizes elsewhere in the book.

Nevertheless, there is great appeal in Radin's idealistic call to focus on the human being as something more than a buying and selling organism. Radin's failure to provide a full account of "human flourishing,"[66] or to account for the epistemological and political problems inherent in governmental pursuit of such a goal, is hardly fatal. Any scholar can do little more than place individual paving stones on the mud, hoping that others will explore and extend the path she has identified. Radin makes a persuasive case that the markets that provided us a way out of feudalism had their dangers as well as their advantages. Those whom she persuades can take up the task of analyzing the comparative merits of different methods of discouraging commodification rhetoric.

Radin's work is not only prescriptive. Her descriptive efforts, analyzing how people come to view themselves and their possessions, are also valuable. Here she functions as part of a community of scholars seeking to identify a conception of humanity "thicker" than the economists' traditional conception,[67] and from which today's economists are learning. Consider the economic assumption that individuals' preferences are capable of ranking all resources and behaviors on a commensurable and transitive scale.[68] Preferences are

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64. For the most part, however, the judges and legislatures that effectuate the dominant market ideology do so unconsciously. It is important not to understate how different are the dangers that arise when lawmakers explicitly and deliberately attempt to shape values through law.

65. Radin tries to meet the First Amendment issue head-on by, for example, distinguishing between laws that would prohibit reading books that advocate baby-selling, and laws that would prohibit baby-selling itself. *See* RADIN, *supra* note 19, at 176-83.

66. The account she does present is borrowed in part from Martha Nussbaum. *See* RADIN, *supra* note 19, at 66-68. One of its key aspects seems to be the interplay between change and stability. The market, historically, opened up the option of change for individuals. Radin recognizes the value of being free from feudal status categories, but is concerned that the importance of stable context be preserved.

67. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993) (exploring incommensurability and related topics).

68. *See, e.g.*, A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A*

"transitive" if, for example, someone who prefers A to B and B to C will also prefer A to C.

Radin adds to our understanding of how *context* matters to people's preference structures. Given the importance of context, resource A, B, or C will not necessarily have a stable meaning or value, even for one person. The value of a resource may vary with factors such as whether the person owns the resource or needs to purchase it, or even how the question about valuation is posed. Economists often brag that their assumptions need not be accurate so long as the predictions that economics yields are accurate. Yet some investigators of human-choice behavior have produced results for which a contextual approach like Radin's is more predictive than standard economic assumptions about preferences.[69]

Buyer's Guide to Posner's Economic Analysis of Law, 87 HARV. L. REV. 1655, 1667, 1679-81 (1974) (describing assumptions underlying the economic paradigm). For criticism of this notion, and its implications for commensurability, see Gillian Hadfield, *Reconceptualizing Rational Choice in Contract Law*, 146 U. PA. L. REV. (forthcoming May 1998).

69. Consider, for example, the importance of whether the price a person is willing to accept to give up a resource is the same as the amount he would have been willing to pay to purchase the same resource. Even in a world without transaction costs, a unique efficient outcome (sometimes called the strong version of the Coase Theorem, *see* Herbert Hovencamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783, 786 (1990)) is achievable only if there is no significant difference between these two measures. Coase's own analysis in the original *The Problem of Social Cost*, R.H. COASE, *The Problem of Social Cost*, *in* THE FIRM, THE MARKET, AND THE LAW 95 (1988) [hereinafter COASE, *Problem of Social Cost*], assumes that the price a person would demand in exchange for selling a resource she owns is the same as the price that same person would pay to buy the resource if the law did not give her an entitlement to it.

Of course, in real life these two prices often differ. The issue is how often such variance appears, and how significant it is. For example, Coase's later position no longer depends on an exact identity between buy and sell prices, but still relies on there being little variance between them. *See* R.H. COASE, *Notes on the Problem of Social Cost*, *in* THE FIRM, THE MARKET, AND THE LAW, *supra*, at 157, 170-74. A valuable review of the experimental evidence, and some related normative discussion, can be found in Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993).

One can view Radin as arguing simply that people become attached to their possessions, and that is Hoffman and Spitzer's narrow characterization of her view. *See id.* at 90. But one could read Radin's lesson more broadly, as indicating that possessions vary in value with the context in which their value is assessed. If so, then in every experiment Hoffman and Spitzer cite, the approach of Radin and her compatriots supports the experimental evidence.

To show this, focus on one aspect of "context": People usually do not like to sell personal possessions. Among other things, such sale often connotes a "pawn shop" level of need that most of us are uncomfortable demonstrating. *Cf.* Keith N. Hylton, *The Law and Ethics of Organ Sales*, 4 ANN. REV. L. & ETHICS/JAHRBUCH FÜR RECHT UND ETHIK 115, 134 (1996) ("[F]ew of the rich would sell their blood for fear of the reputational damage that might result if it were known that they were selling blood, a sure sign of financial distress."). If so, we should not be surprised that experimental subjects demanded more money to sell coffee mugs they were given than the subjects were willing to pay in order to purchase such mugs. *See* Hoffman & Spitzer, *supra*, at 76-78 (discussing mug experiments). Conversely, the willingness-to-accept and willingness-to-pay prices tend to converge precisely where such contextual "pawn shop" connotations do not arise—as in the experiments involving the purchase and sale of securities, *see id.* at 78-84 (since unlike one's mugs and other dishes, securities are *meant* for sale), or, in a clearly artificial setting such as the one in which subjects are given the choice of spitting out or holding in their mouths a bitter-tasting solution. *See id.* at 69-76.

IV. BOYLE MEETS RADIN: ON HOW TO TREAT OUR SOURCES

Boyle stresses that authorship is overvalued by our intellectual property system. He emphasizes that our law undervalues *sources*, such as the rain forest, shamanist knowledge of medicine, or community cultural images. In his view, these are undervalued because they are treated as a "commons" that anyone may use and are deprived of property status. For Boyle, this is a great evil. Radin, however, provides a hint as to why, perhaps, we might not want to deem all sources objects of private property.

To clarify this subtle potential conflict between Radin's view and Boyle's, it will be useful to examine Boyle's analysis of *Moore v. Regents of the University of California*,[70] the famous "spleen case." In *Moore*, a panel of California judges held that a patient was not entitled to own the commercially valuable cell line that doctors had grown, without his consent, from his excised spleen.[71] In his analysis of the case, Boyle argues that the judges employed a language of authorship out of all proportion to the facts. In the judges' view, he suggests, the scientists added all of the value, and the spleen contributed nothing different from what any random spleen could have provided. But, Boyle argues, had the patient's spleen not possessed unusual properties, its cells would have hardly been as valuable for research as their unique properties made them. Boyle contends that the authorship model led the judges simultaneously to overvalue the doctors' contribution and to undervalue the contribution of the spleen source itself. It also may have led the court to ignore or underplay alternative policies.

One may question Boyle's interpretation of the opinion. But if one looked at the fact pattern of *Moore* de novo, the most likely inquiry for use in the *Moore* case would have been to ask what bad or good effects flow from giving humans alienable property in their organs or cells.[72] The most obvious good effect would be a potential increase in the supply of body parts and resultant advances in medical care. Radin provides some assistance in determining the bad effects. For Radin, the most obvious dangers of giving alienable property rights in spleens and other body parts would be twofold: first, damage to personhood, as people began to think of their bodies as separable

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70. Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).

71. Ultimately, the patient was held to have stated a good cause of action arising out of a lack of informed consent, but he was not entitled to a property interest in the cell line. *See id.* at 497.

72. The court did not completely ignore this inquiry. *See id.* at 493-97.

from themselves;[73] and second, increased oppression and subordination for those persons led to sell body parts.[74]

Radin might well conclude that the good effects of granting property rights in spleens (increased incentives to provide cultivated cell lines for research) could be achieved in part by giving alienable property rights to researchers who do the cell cultivation. She might likewise conclude that the bad effects (injuries to personhood and subordination) could be largely avoided by denying patients legal power to sell their spleens. Patients would then not be tempted to sell parts of themselves, or to think of themselves in monetary terms.

This bifurcated answer—property for the doctors, not for the patient—is essentially the result the court reached in *Moore*.[75] Thus, even if we grant to Boyle that the judges' decision was influenced by a sentimental adherence to authorship imagery, Radin's analysis may provide an alternative explanation for the result the court reached.

The convergence between the *Moore* holding and a potential Radin analysis suggests, in turn, that Radin may offer some clues about why our law is reluctant to permit property rights in the cultural commons from which intellectual properties are built. Her dominant inquiry is how legal characterizations can affect self-conception. Bringing her question to bear on the ownership of cultural commons does yield fruit. For if our common culture—our "sources"—were fully owned, our conceptions of ourselves might change in deleterious ways. We might even begin to cooperate less with social norms.

Why do people show consideration for others? The answer is not only the Pavlovian conditioning of childhood. Why do people obey the law? The answer is not only the power of legal penalty. An important alternative source of each (presumptively desirable) behavior is our feeling of debt. At least for the middle class, we feel

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73. *See* RADIN, *supra* note 19, at 125. Radin notes that "[t]he debate over whether people should be able to sell their kidneys or corneas raises the issue whether organs are or are not an aspect or attribute of personhood." *Id.* at 161. Radin, however, does not know how to resolve this question, in part because organ-commodifiers might be exercising autonomy in choosing to sell. *See id.* This is related to what Radin calls the double bind: that both permitting and forbidding sales have cruel effects. Until income redistribution or other policies make it possible to survive without selling things so tied to personhood, there may be an argument in favor of permitting such sales. *See id.* at 123-30.

74. *See id.* at 159. It might be argued that even if the plaintiff Mr. Moore had prevailed in his ownership claim, the case would have provided precedent only for people to own parts of their bodies that are *both* inessential to continued life *and* that had to be removed for reasons unrelated to the possibility of commercial sale. But one does not have to accept the "domino theory," *see id.* at 95-103, 145, to doubt that the effect of a pro-property decision could have been so narrowly cabined.

75. The doctors were granted property rights in the spleen cells, and the patient was denied them. The patient retained a right to *exclude*, but it was a personal right that did not translate into a right to share in the commercial proceeds. It was a personal right against breach of fiduciary duty and lack of informed consent, rather than a right measurable by the profit the invader might reap. *See Moore*, 793 P.2d at 483-86.

that we are part of a common society that has given us much, and that we owe something in exchange.[76] Fellow-feeling might not long survive conversion of our culture into a cash-and-carry commodity.

Some feminist theorists might scoff at this kind of analysis. It is the kind of idealization that leads society to say "work in the home is so precious that we don't want to put a price on it"—so that no mother gets paid in dollars, and too many mothers fail to be paid at all.[77] But preciousness and pricelessness possess a double edge.

If we refuse to grant property rights, we may preserve valuable aspects of "personhood," but people who value things in commercial terms may come to undervalue the things to which the law denies full alienable property status. Since so much of societal valuation is commercially based, refusing to allow something to be bought and sold may lead to its being undervalued,[78] just as much as its being bought and sold may lead to its being wrongly valued. As with the other double binds, the best solution may not be to grant property rights, despite the short-run attractions of doing so. (Boyle's suggestion is that the sources be propertized.) The best recourse yet may be to restructure our notions of value, to reexamine our notion of the commons, and to refresh our societal sense of reciprocity and mutual debt.

V. BOYLE MEETS RADIN AGAIN: WHEN PARTS OF ONE'S SELF ARRIVE PRE-ALIENATED

Let us return to the issue broached in this Book Review's Introduction: namely, the proper scope of intellectual property law. Property law typically has two main normative concerns: "what things should be ownable?" and "what rights should constitute ownership?" The two questions are overlapping subsets of the same issue—"how should

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76. *See generally* LAWRENCE BECKER, RECIPROCITY (1986) (presenting a philosophical exploration of the importance of reciprocity in human relations).

77. *See* Katherine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997). Many of us recall a situation comedy from the 1950s in which the female character, a wife and mother, is forced to cancel a doctor's appointment (perhaps because of an emergency at home) but is nevertheless billed for the time. "The doctor's time is valuable," she is told. Later, the doctor has a medical emergency and keeps the mother in his waiting room for hours, and finally cannot meet with her. The mother sends the doctor (male) a bill for her lost time. The doctor does not pay, and the mother sues. The final scene is in the courtroom. What does the judge say? "The time spent in motherhood is indeed valuable, even more valuable perhaps than the doctor's time. But precisely because it is so valuable, no price can be put on it. Case dismissed." The mother has to pay the doctor, and he does not have to pay her.

78. *See* TREBILCOCK, *supra* note 34, at 50-51 (exploring the debate over payment for surrogacy, and raising the possibility that denial of monetary compensation reinforces society's undervaluation of such contributions); *see also* Silbaugh, *supra* note 77, at 84-109 (defending the use of economic discourse in the context of law and household labor).

the law of property affect the relations among persons?"—and provide a useful entrée into the larger issue.

What things are ownable in our system? Typically we own cars, clothes, jewelry, money, books, stock in trade, tools of one's trade, securities, and real estate.[79] In *Contested Commodities*, Radin is interested in the things not usually ownable, but that may be on the verge of becoming either ownable or exploitable commercially: human organs, babies, fetal tissue, the use of women as surrogate mothers or sexual partners. She is concerned with things unusual for property law. Boyle, too, is interested in atypical subject matters. For him, however, the atypical subject matter of interest is information.[80] Oddly, Boyle largely ignores Radin's point and Radin largely ignores Boyle's subject matter. So let us make the intersection for them. When does *information* (Boyle's topic) become *personal* (Radin's topic)?

Information becomes personal to its recipient as soon as its substance matters to the receiving mind—which happens as soon as information is something more than stock in trade.[81] Yet to its creator, information might continue to be personal even after it is sold. So information can be personal not only for the person who sends it out, but also for the recipient who integrates it; for the audience as well as for the author. It can be simultaneously personal for all of us.[82]

What about the nature of the *rights* that should attach to information when it is a personal resource? What most concerns Radin is the power to alienate—*separating* the thing from the self, and doing so for a purely instrumental reason: for example, receiving money, so that the person loses something human and gets something cold in exchange.[83] Boyle does not say so, but this is one way of characterizing his concerns as well: He worries that intellectual property rules have the potential to separate audience members from segments

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79. Radin is famous for making distinctions *among* these: Some things have "personal" meanings, such as the meaning wedding rings have for a bride and groom versus the meaning they have for a jeweler. She suggests that perhaps the law should make room for these other meanings. Radin thus has had a crucial role in opening up formal categories.

80. This Book Review follows Boyle in using the term "information" broadly, to embrace any intangible product of intellectual or artistic labor. In such a lexicon, both data and digitized visual images are "information."

81. The recipient for whom information is merely stock in trade might be called a "pure free rider" or "stowaway." Such a person largely lacks ethical claim to free use. *See* Gordon, *Property Right in Self-Expression*, *supra* note 29, at 1576-78.

82. An economist might refer to the "inexhaustible" or "public goods" nature of information since it can be so widely shared.

83. Of course, the defender of alienation might reply that the seller can use the cold cash to buy something warm, such as food for a child. This dilemma is part of Radin's concern with double binds.

of themselves,[84] and artists from the material they encounter in their lives and culture.

At first, Radin does not seem to have much to say about inherently nonexclusive intangibles like ideas, images, and other intellectual products. That is because she is concerned with alienation, and one can never divest one's mind of something that is learned, short of submitting to a brainwash. Yet, one *can* alienate the power to express *in the world* what is in the mind. And expressing the mind in the world is part of what it means to be human.

So, taking Boyle and Radin together, we emerge with this concern: Copyright law *pre-alienates*. It lets things come *into* the mind that are *already owned* by someone else.

In a culture where works are ubiquitous, we may not have a meaningful opportunity to refuse entrance to others' images, music, and ideas.[85] It may not even be normatively appropriate to insist that one refuse when one can; basic access to culture may be a good to which everyone should be entitled. Once the information (the image, the poem, the music) is in the mind, the person will start to use it, relate to it, embroider it, and weave it into her life experience. Copyright might prohibit the person from expressing those elaborations. Such enforced passivity in regard to one's own conceptions could amount to a kind of separation from one's own mind.[86]

It is precisely those things that we are likely to integrate into our minds—to embroider and weave into our plans—that are most likely to be called "ideas." The importance of keeping us free to use these is one reason why "ideas" are not ownable under copyright. They are commonly (rather than privately) owned.

Is this common ownership inalienable? Classically, when a right or resource was designated as "inalienable," the designation usually denoted that one could not permanently divest one's self of that right

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84. Boyle is also concerned with increasing ownership rights of sources, which (like any increase in ownership rights) has potential for restraining audience spontaneity and self-development. This pro-property part of Boyle's book is well-intentioned but not well-thought-through. Giving enforceable property rights to indigenous communities for their "common knowledge" may well be defensible in distributive justice terms, as against certain strangers, but the issue is complex.

85. Compare the importance of "opportunity to decline" in restitution law. *See* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 265-93 (1985) (discussing a principle of free acceptance). *But see* A.S. Burrows, *Free Acceptance and the Law of Restitution*, 104 LAW Q. REV. 576 (1988) (arguing against the use of a free acceptance principle). For an exploration of free acceptance and opportunity to reject in the context of fair use and other intellectual property doctrines, see Gordon, *On Owning Information*, *supra* note 8, at 211-29; and Gordon, *Property Right in Self-Expression*, *supra* note 29, at 1578-81.

86. *Cf.* J.S.G. Boggs, *Who Owns This?*, 68 CHI.-KENT L. REV. 889, 890 (1993) ("When I hear the words intellectual property, they make me think of the things inside me . . . ."); Litman, *supra* note 29, at 1016 ("Some aspects of works of authorship are easily absorbed, and once we have absorbed them, we are likely to make them our own and lose sight of their origins.").

or resource and transfer it to another.[87] Thus, the right to free speech is said to be "inalienable" in that one might temporarily decline to employ one's right of free speech, but one cannot permanently give it away.[88] The legal prohibition on all slavery, even that which is voluntarily entered, is another example of inalienability.

Radin's analytic entry was to exploit an ambiguity in this traditional broad meaning of "inalienable."[89] In *Contested Commodities*, she continues to explore the distinction between those rights and resources of which one cannot divest one's self at all, and those rights and resources that can be given away, or even traded for other goods in kind, but the *sale* of which the law prohibits. She coined the term "market-inalienability" to identify the latter type of limited prohibition.

Yet there is a functional link between the traditional kind of "inalienable right" found in the Declaration of Independence, and Radin's market-inalienability. This linkage occurs with regard to inexhaustible resources.

Clifford Holderness has distinguished between two ways a resource can be owned.[90] The resource can be owned by a "closed class" (such as an individual or a defined small group) or an "open class" (such as the public). He points out that resources can be exchanged most easily when they are owned by a closed class. He urges this as a virtue for private, closed-class ownership.[91]

When an inexhaustible resource is owned by an "open class," there may be no way for it to be transferred effectively and permanently. For example, if we all own a piece of information, buying silence from one person only opens us to the threat of disclosure from another.[92] So, if we all have a right of free speech, no one party could ever afford to shut us up. For even if one bribed us all to silence, the next newly born child could—upon learning to speak—extract from the buyer all his remaining surplus, leaving the buyer penniless when the next-after-next child comes on the scene. Thus, entitlements owned by an open class like the public may be inalienable in a *practical* sense.[93]

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87. *See, e.g.*, Calabresi & Melamed, *supra* note 52, at 1113.

88. And, by implication, the government cannot argue that the populace agreed to give up the right as a "price" for order. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

89. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

90. *See* Clifford Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321 (1985).

91. *See id.* at 322-23, 328-29.

92. This is one of the grounds advanced to justify the criminalization of blackmail.

93. The Coase theorem posits that in a world without transaction costs, resources will always be transferred to their highest-valued use. But if the class of owners is continually opening to

How, then, would law treat intellectual property if it strives to meet Radin's goals of honoring the personal? Since certain information is potentially personal to both creator and audience, and "ideas" seem to be this kind of information, the law might refuse to give either the author or the audience a right to exclude. That is, the law might advocate sharing between them,[94] and that is at least in part what our law of copyright does.[95] And once the ownership of ideas was shared by the public, it would be inalienable in the broad sense of the word. Ultimately, the ideas could not be effectually controlled by purchase.[96] Not even the government would have enough money to buy the ideas from us. Nor could anyone—not even an affecting ideologue or a sweet-talking Department of Mind Control—effectively obtain the ideas from us by gift, so long as the ideas remained part of the commonly owned public domain.

What of "fair use," the copyright doctrine that allows copying, parodying, and altering copyrighted works without their authors' permissions? The doctrine historically has sheltered free speech, as well as making possible transactions that could not be effectuated through the market.[97] At least one court has responded to a decrease

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new members, and if those members cannot be bound by the sales decisions of the preexisting class, then transfers can never be complete. A publicly owned right to information would thus be immune from the Coase theorem: No final transfer to a highest-valued use would be possible. It therefore is to be hoped that the law in assigning the entitlement to the public has correctly given the right *ab initio* to the highest-valued use.

94. There could, coexistent with a duty to share, be a duty to pay. In fact, such "liability rule" solutions are often recommended as compromises to dilemmas in property law. Copyright law has long embraced explicit "compulsory licenses," and the role of such liability rule solutions will likely increase in the future. Thus, the Supreme Court, in *Campbell v. Acuff-Rose*, 510 U.S. 569, 578 n.10 (1995), hinted that a member of the public who wished to do a parody might be permitted to do so, subject to a duty to pay for the "stock in trade" aspect of the copying.

95. *See* 17 U.S.C. § 102(b) (1994). It should be noted, however, that some states have indicated a willingness to give property-like rights to ideas on the purported rationale that federal copyrights only reach subject matter affirmatively protected by the federal statute. *See* Mayer v. Josiah Wedgwood & Sons, Ltd., 601 F. Supp. 1523, 1532 n.16 (S.D.N.Y. 1985) (dictum).

96. This is also a practical implementation of Walzer's goal: Granting a resource to an open class may effectively eliminate the power of money to centralize ownership of that resource. If the resource is one that should be governed by nonmonetary standards, one way of ensuring that result is to grant the resource to an open class.

97. Today it is virtually impossible for a copyright owner to extract fees from everyone who makes a private copy of her copyrighted work. How would the copyright owner even know if you are copying her movies on your living-room VCR, never mind when or how often you are doing it? Nor does today's copyright owner know when you are photocopying articles to put in your private library. Even if the copyright owner did know, or even if the copyist volunteered the information, the costs of contracting, negotiating, and transmitting funds between copyright owner and user might well swamp whatever benefits the copying might yield. As a result, copying might stop. Fair use allows the copying to occur and does so without depriving a copyright owner of revenues she could otherwise obtain. This is the argument advanced in Gordon, *Fair Use as Market Failure*, *supra* note 26. *See, e.g.*, Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1356-57 (Ct. Cl. 1973) (exhibiting concern that if photocopying licensing were required, this would discourage the practice of scientifically valuable photocopying), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

in transaction costs (brought about by the availability of apparently practical photocopy licensing) by decreasing the scope of fair use.[98]

Cyberspace holds out the promise of nearly costless transactions. It may be possible, not too long from now, for a Net-surfer to press a button whenever she sees something she likes,[99] and thereby direct a computer somewhere to give her a virtually instantaneous copy—and, with the same speed and ease, deduct the price of a copy from her bank account.

The privacy and distributional justice issues are obvious. But even if the computers could be trusted somehow not to tell Big Brother what we are all watching, and even if governmental libraries were to subsidize poor persons' uses of the Net, the computerization of culture implicates other issues. In particular, such computerization promises to increase drastically the number of times a market transaction between copyright owner and user will be practical.

From an economic perspective, one of the primary reasons for *not* propertizing everything has been the presence of significant transaction costs.[100] Considering the harms we continually inflict on each other, and the benefits we continually confer on each other, scholars have often offered *reciprocity* as a key to understanding the shape of law. They typically suggest that the law should and does limit the right to sue to occasions when something significantly large, and significantly unlikely to be reciprocated, is at stake. If the law did not have such limits, we would go broke trying to keep track of who owes what to whom.

This kind of analysis has played a strong role in both the public and private law of tangible property,[101] torts,[102] intellectual property,[103] and restitution. John Dawson's discussion of restitution is typical:

> Uncompensated gains are pervasive and universal; our well-being and survival depend on them. . . . Even with a bank of monster

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98. *See* American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995); *see also* INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 82 (1995) (predicting that "[i]t may be that technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine").

99. Admittedly, there is a transaction cost to the Net surfer in finding the material she wants; that raises separate issues and opportunities. The focus here is the decrease in the transaction costs after a desired product has been located.

100. From the perspective of maximizing economic value, the shape and allocation of property rights depend crucially on transaction costs. *See* COASE, *Problem of Social Cost*, *supra* note 69, at 95.

101. *See* Michelman, *supra* note 52, at 1179-83, 1255.

102. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 548 (1972).

103. *See, e.g.*, Gordon, *On Owning Information*, *supra* note 8, at 222-23, 249-51.

> computers one could hardly estimate the consequences of discovering electric light. The radius of the fallout and the number of beneficiaries on whom it descends must be sharply reduced before one could even consider tracing the fallout back to its source.[104]

Thus, with the impracticality of transacting comes a common sense limitation on the requirement that we transact.[105] If, however, transaction costs decrease markedly—on the Web or elsewhere in our future—will any reasons remain for limiting property rights? Should fair use vanish completely?

One reason for preserving fair use has been hinted at before: The more we pay for, the less the sense of debt we may have toward our culture as a whole. We currently impose no charges for the bulk of the effects we levy on each other, primarily because of transaction costs, but with a beneficial side effect as well. Many of us feel some sense of connectedness to the community that both demands unpredictable sacrifice and gives unearned joys. Radin's focus on community and stability helps remind us that a sense of connectedness is something that should be preserved.

Radin's approach does not mean that the market-failure model is of no use.[106] For example, that model tells us that the market may be inappropriate when the copyright transaction transfers to nonparticipants significant benefits or costs ("externalities").[107] Further, assets such as reputation may have strong wealth or endowment effects: It can be unwise to rely on the market to determine the highest-valued use in cases where reputation is at issue, namely cases involving parody and criticism. In addition, sensitivity to market failure suggests that values that are not easily monetized should, perhaps, be handled outside the market.[108]

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104. John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1412 (1974). Note that the electric light *would* be patentable, but that the tracing problems are minimized by having patents last for no more than 20 years.

105. For the classic statement of the way that the law responds to transaction costs by lessening or abrogating the usual requirement for consensual transactions, see Calabresi & Melamed, *supra* note 52, at 1106-10. Though the literature on the *Cathedral* article is voluminous, a helpful place to begin is Symposium, *Property Rules, Liability Rules, and Inalienability—A Twenty-Five Year Retrospective: Remaking the Simple Rules of the Cathedral*, 106 YALE L.J. 201 (1997).

106. Also, outside of both market failure concerns and Radin's analysis, transactional fairness may sometimes dictate "fair use," as when a copyright owner's assertion of copyright control would, because of effects that the owner's behavior has already set in motion, cause a net harm that can be ameliorated by permitting copying. *See* Gordon, *Property Right in Self-Expression*, *supra* note 29, at 1601-06. *Hustler Magazine, Inc. v. Falwell*, 796 F.2d 1148 (9th Cir. 1986), exemplifies this transactional kind of fair use: Jerry Falwell was permitted to make photocopies of a copyrighted work that ridiculed him, in order to raise money to fight the ridicule.

107. *See* Gordon, *Fair Use as Market Failure*, *supra* note 26, at 1630-32.

108. *See id.* (discussing nonmonetizability); *see also* Robert Merges, *The End of Friction?:*

Radin's focus on the human element in property law also has implications for liability rules.[109] The biggest conundrum likely to face the next decade of intellectual property scholars is the increasing role of liability rules.[110] Particularly in copyright law, the use of such solutions is tempting. The primary goal of copyright is to provide incentives for creation, while a primary danger of copyright is restraint on free speech. It might be imagined that liability rules are an ideal way to resolve these tensions: Order copyists to pay (thus bolstering the incentives of intellectual property owners) while simultaneously depriving intellectual property owners of veto rights (thus assuring that private censorship will be avoided). Even the Supreme Court is playing with liability rule solutions in the copyright arena.[111]

However tempting liability rules may seem, they have human costs[112] that go well beyond the traditional administrative-cost and

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Property Rights and Contract in the "Newtonian" World of On-Line Commerce, 12 BERKELEY TECH. L.J. 115, 134 (1997) ("Fair use [in the future] will revolve less around market failure, and more around the idea of favoring certain classes of users with a statutory privilege. In economic terms, the new foundation will represent a shift from emphasizing transaction costs to emphasizing redistribution, pure and simple.").

109. Liability rules include both compulsory licenses set by statute and money-only remedies granted by courts. Even aside from liability rule issues, it is hoped that Radin will turn her attention increasingly to intellectual property. Many of its issues—such as the assignability or descendibility of the right of publicity, or the nature and putative inalienability of moral rights—touch on her concerns.

110. *See* Calabresi & Melamed, *supra* note 52.

111. Thus, for example, the fair use doctrine has traditionally sheltered many critical and parodic uses of copyrighted work. Copying involved in making a critical review or a parody is seen as socially valuable, and the criticism or parody is unlikely to be achievable (or objective) if the person criticized or parodied is given a veto right over it. If granted fair use treatment under this traditional approach, the critic or parodist can copy for free. But in *Campbell v. Acuff-Rose*, 510 U.S. 569, 578 n.10 (1995), the Supreme Court recently hinted that in future parody cases, even if the parodist can utilize the fair use doctrine to escape an injunction, perhaps the parodist will be forced to pay some kind of fee to the owner of the disparaged work. The Court hinted at a similar approach in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), where it explained why a circus performer's suit for monetary relief only, against a news agency that broadcast his act without permission, did not violate the First Amendment. *See id.* at 578 ("Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.").

Liability rule treatment has long been a conceptual alternative to the fair use doctrine's traditional free ride. *See, e.g.*, Gordon, *Fair Use as Market Failure*, *supra* note 26, at 1622-24 (alternatives to fair use). But scholars have only begun to explore the implications of wholesale judicial willingness to substitute monetary recovery for injunctions.

Intellectual property statutes often embody compulsory licenses. Justice Brandeis thought that liability rule solutions should be a *legislative* province. *See* International News Serv. v. Associated Press, 248 U.S. 215, 266-68 (1918) (Brandeis, J., dissenting) (rejecting the majority's grant of a common law right in the news).

112. Jane Ginsburg seems to recognize as much when she suggests that works of "low authorship" such as fact directories and computer databases should be "limited by a form of collective licensing," while the creators of works involving personal authorial investment such as novels and paintings should retain their traditional veto right. Ginsburg, *supra* note 7, at 339-41. However, the audience's human needs to copy or distort are likely to be larger with respect to high authorship works.

measurement concerns voiced by Calabresi and Melamed.[113] For example, it might change the nature of the artistic professions and the nature and quality of the works produced if artists lost their right to control copying, and retained only a right to be paid.[114]

Radin historically has been concerned with how our legal institutions affect human flourishing. Her primary topic is whether people who have rights to exclude should also be able to sell them for money. She argues, as discussed above, that coupling a right to exclude with alienability can be damaging to human self-conceptions. If that is so, then a fortiori our self-conceptions would be subject to potentially even greater dangers if we lost our rights to exclude. If a power to sell became the *only* interest that particular people could possess in their work, then their attitudes toward themselves and their work might change markedly.

VI. CONCLUSION

In the debate over the relation between law and norms, virtually everyone agrees that the law should be concerned with inculcating one attitude: a norm of respect for law.[115] Copyright laws can erode that respect, either if inconsistent with usual norms such as privacy,[116] or if copyright imposes duties to pay that are so extensive that they erode the general sense of obligation we owe to our culture as a whole.

Admittedly, paying for culture is not paying for everything. The value of civil order is itself immense. But the more that people pay for, the more likely they are to overlook their remaining debt.

Boyle and Radin enter the field of battle under the same colors. Both target law and economics. Both joust against overarching theory in general. Each argues in favor of pragmatism and against formalism, and each trumpets the importance of paying attention to detail and context. Both focus on the feedback loop between law and social norms.[117]

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113. *See* Calabresi & Melamed, *supra* note 52, at 1093-105.

114. Among other things, commercialization can discourage certain valuable kinds of artistic endeavors, and instead encourage a less valuable kind of artistic effort. Rewards do not invariably elicit desirable behavior. *See* ALFIE KOHN, PUNISHED BY REWARDS: THE TROUBLE WITH GOLD STARS, INCENTIVE PLANS, A'S, PRAISE, AND OTHER BRIBES (1993).

115. *See* Rosen, *supra* note 60, at 176.

116. *Cf.* Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 242-46 (1991) (arguing that the actual norms of artistic creation can coexist with copyright law only because artists are systematically ignorant about that law's actual provisions).

117. Boyle argues that norms from authorial discourse have hurt intellectual property law, and Radin argues that market-oriented laws have the potential to degrade our discourse about human nature.

Most importantly, both books exhibit solicitude for the ordinary human's effort to make meaning out of her world. Thus, for Boyle the primary demon is not really "romantic authorship," but rather the danger that intellectual property law will come to deprive iconoclasts of the material needed to make new meanings. Similarly, for Radin the primary demon is not that babies or body parts will be sold; it is that the market will so come to dominate our view of the world that we will be deprived of the material needed to create alternative self-definitions.

Admittedly, the two books differ in their topics: Boyle's book primarily targets an intellectual property owner's power to exclude, while Radin targets the power to alienate that is sometimes attached to personal entitlements. But at bottom, both books are animated by an optimistic belief that qualitative human progress is achievable if we as a society can end our overreliance on market and property solutions. In the process, Boyle helps identify and debunk a myth that has harmfully distorted our law of information, and Radin deepens our understanding of how our personal abilities to flourish may depend in part on the shape that law gives to property.