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BOOK REVIEWS

CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN CHILDREN, BODY PARTS, AND OTHER THINGS

BY

MARGARET JANE RADIN

HARVARD UNIVERSITY PRESS, 1996

In a society that values freedom, individualism, and autonomy, many people perceive the right of ownership over one's own body to be absolute. Yet the nature of selfhood also leads many societies to prohibit markets in goods and services tied to the human body, such as sex, organs, children, and pornography. If we own ourselves and have the right to use our bodies in any way that does not injure others, why does society and legislation forbid such markets?

In *Contested Commodities*, Margaret Jane Radin, Professor of Law at Stanford University, addresses the issue of morally questionable markets, but in fact her topic is broader than that. Radin makes an inquiry into the nature of property itself and explores why most of us reserve some commodities as thoroughly inalienable. In this century, this question has frequently been discussed by legal theorists, notably those of the University of Chicago Law School. Radin, however, approaches the topic from a philosophical standpoint, surveying thinkers who have previously considered the nature of property from Aristotle to (now Justice) Richard Posner. While her ideas are complex, her writing is lucid and interesting, and she meticulously defines uncommon terms.

Radin begins her discussion by repeating the contention that all human interaction can be viewed as a series of market transactions. Even personal relationships involve "exchanges," and Radin posits that "Chicago-school" theorists, such as Richard Posner and Gary Becker, have used economic terms to explain personal, romantic, and sexual relationships normatively. If these terms help describe and explain behavior, then surely no danger exists in using one set of terms or another. She then discusses those thinkers of the Chicago-school, notably Posner and Becker, who believe that all resources with value should be "commodified" (made available in open markets), including children. While this worldview is seductive, Radin warns us that both applying these analyses and the hypothetical markets themselves do and would cause us to think of people as fungible, valuable only in monetary terms. She repeatedly employs and expands upon this reductionist caveat in many chapters.

Radin then discusses the distinctions between different types of market inalienability. She clarifies her focus by explaining that she is not writing about items that are illegal to own and use as well as sell, using heroin as an example of this type of commodity. Instead, Radin is interested in the inherently personal items that many of us do not think of in market terms. Radin notes that society and law often approve of the transfer of "contested commodities" as gifts, in transactions such as organ donation and adoption. Frequently, the products she discusses inalienable in a market context. Here, Radin considers the argument that commodities tied to the individual should be noncommodifiable due to information and transaction costs. Under this analysis, those that seek to sell themselves into slavery, for example, will always be worse off whether or not they believe themselves to have suffered a loss.

Radin continues to survey prior works on the nature of property and the current and preferred "domain" of the marketplace. The existence of markets alone may compel some to relinquish inherently personal items, and prompt using people as means to ends and not as inviolable, Kantian individuals. Many prior authors, Radin contends, have attempted to carve bright-line distinctions between the absolutely alienable and the noncommodifiable. Aristotelian thinkers, such as Martha Nussbaum, believe that such transactions would have the net effect of negating what makes us distinctly human and that participation in such markets is mutually exclusive with participation in society. Expanding on her introduction to reductionist arguments, Radin proposes that in a wholly commodified society, we would eventually place only dollar values on ourselves. Children, for example, knowing that they can be valued in terms of dollar worth, would perceive themselves and others as being part of a commercial hierarchy, inferior to those that would bring a higher price.

A brief yet significant chapter deals with the Radin's conception of "incomplete commodification." Radin suggests that all of the analyses on these issues that she has just summarized prove misguided. Even in existing markets, she argues, we do not think of goods and services as without value. We can "know the value of something and yet know that it is priceless," argues Radin. Using labor as an example, Radin suggests that not all of us seek to make as much money as possible. Radin explains that our work itself is fundamentally important to us, and even those in the most depersonalizing of jobs seek to make the experience worthwhile by interacting with co-workers or customers. Also, employment structures are "incompletely commodified" in most Western cultures, and restraints on trade such as wage and hour restrictions and safety regulations place limits on both employer and employee. Radin suggests that trade in "contested commodities" could be similarly restricted and that such goods could inhabit both the human and market spheres simultaneously, as many market goods already do.

After a brief review of her previous discussion, Radin discusses the complexities of instituting any kind of policy change and the paradox of either denying the poor from participating in the one market in which they undeniably hold material, or allowing such markets and potentially creating an economically-coerced underclass. Radin contends that such "double-binds" affect women in particular

and that male-dominated structures (which Radin believes include marriage and heterosexuality) cannot be altered without creating the danger of the "domino effect" of reductionism. Here, Radin strays somewhat from a strict economic or market discussion, but the diversion proves interesting and sets a firm groundwork for an entire chapter of feminist critique of specific markets affecting women in particular, namely heterosexual prostitution and baby selling. The only way to counteract the double-bind problem, Radin argues, is to consider the underlying causes of the double bind in each particular market. Prostitution could be safely legalized, for example, if safeguards such as "banning brokerage (pimping) and worker training (recruitment)" prevented the reductionist dilemma. Such a reform would allow poor women an opportunity to provide for themselves without submitting themselves to the dangers of a black market. A similar analysis, however, is not available for "baby-selling." Here, Radin finds the problem of reductionism unavoidable, and no hypothetical market structure could safeguard children from conceiving of themselves as commodities. In these discussions, Radin's analysis proves engaging, but her tone becomes quite conversational and her arguments based more on opinion than deduction. Her assumptions are large, and she seems to have embraced conceptions that she has previously argued against, such as the absolutism of market versus human conceptualizations.

Radin's topic is fascinating, her style compelling, her arguments insightful, and her conclusions worthy of consideration. Yet, she tends to repeat her central argument, that thinking about ourselves can depersonalize us, without adding any real depth to her analysis. Perhaps this is unavoidable in a book written for a lay audience. Her analysis in later chapters tends to weigh far too heavily on large generalizations. Her own ideology, while not destroying the validity of her arguments, colors and shapes her analysis rather than any form of hard data. She meticulously presents the ideas of others neutrally, and her work proves especially valuable as an overview of the history of the conception of property. She also gives balanced critiques of most of the viewpoints she relates, managing both to present both sides of each debate as well as to inform the reader of her own opinions. By consistently presenting other authors' ideas before her own insights, Radin divorces her own judgment from her presentation of concepts, allowing the reader to agree or disagree with an unbiased presentation of the material.

The concepts Radin wrestles with are not merely abstractions and hypotheticals. While the widespread legalization of prostitution and slavery seems unlikely, lawmakers continually grapple with categorizing other human-derived and human-linked products and services, such as surrogate motherhood, frozen embryos, and pornography. *Contested Commodities* is useful to anyone who seeks a clearer understanding of property, particularly those with an interest in family law and adoption, health law and reproduction, or the burgeoning field of law and economics.

Daniel I. Steinberg

SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES

BY

CHARLES M. HAAR

PRINCETON UNIVERSITY PRESS, 1996

For more than five decades, many urban dwellers have chosen to migrate from central cities to seek the bucolic experience of a home in the outlying suburbs. In *Suburbs Under Siege*, Harvard Law Professor and noted urbanist Charles M. Haar asserts that this suburban migration trend has excluded racial and ethnic minorities. Haar contends that this schism between urban and suburban dwellers polarizes American society, which creates an economic and social division based on race.

Haar attributes this division to local zoning regulations that exclude the development of low to moderate income housing which is predominately occupied by racial minorities. As a result, racial minorities are trapped in the central cities and subject to a markedly different life experience than their suburban counterparts. Left uncorrected, he infers that this schism will undermine the legitimacy of our present social structure. Haar's thesis is that an aggressive judiciary should correct this social and moral majoritarian injustice. In his opinion, it is the obligation of the judicial system to act as a safety net for counter-majoritarian justice when the legislative and executive branches of government fail to prevent and undo majoritarian oppression and injustice. In *Suburbs Under Siege* Haar attempts to assist the reader in comprehending how the legal system has responded to this situation. He offers recipe ingredients for an activist judiciary seeking to institute social and moral justice in an atmosphere of majoritarian resistance as another purpose of his book.

In his opening salvo directed at the suburbs, Haar defines the all too common problem faced by racial minorities when they search for suburban housing; they are excluded from residency. He selected an actual case to "translate general concepts into concrete actions." In this regard, Haar chose the well documented approach to this issue undertaken by the New Jersey Supreme Court; commonly referred to as the Mount Laurel Doctrine. The Mount Laurel Doctrine represents a successful example that sustained an argument to end the shifting of the negative externalities normally associated with the poor moving away from the bucolic suburbs to the already socially depressed central cities.

Ethel Lawrence is to New Jersey affordable housing as Rosa Parks is to racial desegregation. In 1974, Ms. Lawrence, aided by legal services attorneys, filed a lawsuit because she could not find an affordable home in her hometown of Mount Laurel, New Jersey. This seemingly simple action ignited a more than two decade long conflagration amongst the three branches of New Jersey's state government. The debate concerned the limits of the local police power to zone

property, an individual's constitutional right to affordable housing, and the proper role of the state government's executive, legislative, and judicial branches.

Haar provides only a cursory review of the demographics upon which he bases his migration barrier argument. Clearly, the demographics prove that central cities have been subjected to an out-migration of its population. The demographics also show that the central cities' remainder population disproportionately comprises racial minorities who are also poor. Haar fails to demonstrate that these demographic results are due to exclusionary zoning practices. Nor does he provide any discussion regarding whether these exclusionary zoning practices were *de jure* or *de facto* actions. As a result, Haar does not discuss the legal consequences running from each status; a situation leading to a *Washington v. Davis* problem. However, in fairness, it must be noted that this was not a concern of his because, as the reader later learns, the New Jersey Supreme Court did not concern itself with this legal issue.

Professor Haar launches right into the legal analysis of the limits of local police power to zone prior to Mount Laurel I. Although New Jersey was a Dillon's Rule state, communities had been given *carte blanche* authority by the state judiciary to act under their police power. Thus, many court observers were unprepared for the New Jersey Supreme Court's departure from its past precedents in Mount Laurel I. On March 24, 1975 a unanimous Court required "every municipality, through its regulation of land use, to presumptively make realistically possible an appropriate variety and choice of housing." The Court added an affirmative command that every municipality had to provide low and moderate income housing "at least to the extent of the municipalities fair share of the present and prospective need therefore." In one decision, the Court turned New Jersey municipal law on its head. To avoid a U.S. Supreme Court review of the state court's ruling, the majority held that this right was grounded in the New Jersey Constitution. Haar opines that the Court took this legal tactic to insulate the decision from federal review and likely reversal.

Haar offers a quick and dirty review of contemporary fundamental rights and equal protection constitutional analysis. He concludes that under either branch of constitutional analysis, the U.S. Supreme Court would likely apply the highly deferential rational basis test. Haar concludes it is more likely that the state court's decision would be reversed under this level of constitutional scrutiny. The state court receives kudos from him for their approach to insulate their judicial activism from external tampering. This legal tactic represents ingredient number one in Haar's recipe of judicial activism.

The decision in Mount Laurel I eventually produced three other cases, which re-affirmed the state court's holding in Mount Laurel I and refined the remedy method. Colloquially, these cases are collectively referred to as the Mount Laurel Doctrine. Haar then painstakingly discusses the evolution of the Mount Laurel Doctrine and offers it as a model of a justified activist judiciary that can counteract oppressive majoritarian injustice.

For example, the state court early on confronts the problem of judicial competence to administer a complex court ordered remedy facing strong popular oppo-

sition. Much of the state court's problems are reminiscent of the busing orders following school desegregation holdings. Haar analyzes the state court's enactment attempts of its holding to not only remove exclusionary zoning barriers but also to require each community to erect its proportional fair share of affordable housing for its housing market region. These attempts evolve at first from direct judicial involvement to the integration of special court magistrates and consensus-building techniques. One method to implement the holding involved a so-called "builders remedy." In short, the state court pre-empted local zoning and building permitting authority and offered the private sector a direct incentive to build and avoid costly local barriers to affordable housing. This legal tactic represents ingredient number two in Haar's recipe of judicial activism. That is, make sure the remedy can be achieved and provide the means to effect the remedy.

Once elected officials came to realize that the state court's remedy would be imposed with or without their involvement, they courageously stepped forward to offer their expertise and opinion on the matter. Haar notes that the state legislature's offered solution to achieve the state court's holding was less ambitious and effective than the judicial approach. Nevertheless, the state court deferred to the state legislature's initiative. However, while the state court acquiesced to the legislature, they did not abdicate their role as a safety net. The state court made it abundantly clear that they intended to be the proverbial 800 pound gorilla observing the legislature's progress. This legal tactic represents ingredient number three in Haar's recipe of judicial activism. That is, know when to step aside to avoid separation of powers dispute, but remain a player in the ongoing encounter.

Haar writes in a manner that conveys his personal conviction that the current exclusionary zoning inclination proves constitutionally infirm and morally unjust. He uses the Mount Laurel Doctrine as a medium to communicate his primary thesis: that the American judicial system has an obligation to intercede and prevent moral injustice when neither the legislature nor executive branches of government forthcomingly prevent and undo majoritarian injustice. Some may mistake Haar's argument as supporting an activist judiciary, this is not his position. By necessity, however, the judiciary must become activist in order to perform the task Haar advocates. The role of his active judiciary is limited by an unstated principle. This inference is readily apparent through Haar's indicated respect for separation of powers doctrine.

Suburbs Under Siege is an easy and interesting book to read. It can be enjoyed by the lawyer, planner, sociologist, citizen activist, or anyone with a desire to better understand the judicial weapons and weaknesses concerning the issue of exclusionary zoning barrier removal. *Suburbs Under Siege* should also be read by all elected and appointed zoning and planning officials to learn about the effects their decisions have on real people.

Haar offers the Mount Laurel Doctrine as a model of judicial reform that can be transferred to other jurisdictions to end the morally unjust effect of exclusionary zoning practices prevalent in most suburban communities. His book also of-

fers a contemplative argument that racial discrimination has not yet ended, but merely attempted to cloak itself in the garments of legitimate government actions.

Professor Haar has offered the judicial system a recipe to provide racial minorities with an escape route from the central cities to the much-sought-after bucolic suburbs. Time will tell whether other states use the recipe or discard it.

Peter D. Ruggiero