



ARTICLES

COMPENSATED SITING PROPOSALS AND ENVIRONMENTAL JUSTICE: SHOULD COMMUNITIES BE ALLOWED TO SELL THEIR HEALTH RIGHTS?

By

Paul Littlepage*

The population of Ruraltown, a fictional California community, is eighty percent Caucasian. The remaining residents are African-American and Latino/a. This population is concentrated in one small, low-income neighborhood, Number Nine.¹

BigChemEnviro (BCE), a major chemical company, recently decided to locate an organic solvent recycling plant in Ruraltown. Cheap land and easy access to major transportation routes made Number Nine an attractive site.²

Fearing local opposition to its plans, BCE began negotiations with the Ruraltown city council and a representative from Number Nine. The parties agreed that Ruraltown would receive an increase in the local tax base and new jobs in exchange for allowing BCE to locate its plant in Number Nine. Number Nine would receive a new community center and a single cash payment for the local community development program. BCE agreed to locate its plant in a fairly remote corner of Number Nine so as to minimize damage to property values. BCE also agreed to install mitigation/prevention measures

* Paul Littlepage is a 1997 graduate of King Hall. He holds a Master of Sciences in Microbiology from the University of California, Davis, and undergraduate degrees in both Microbiology and Physiology from Southern Illinois University.

¹ Such disparities are of course common in the United States. See, e.g., Norman Fainstein, *Black Ghettoization and Social Mobility*, in *THE BUBBLING CAULDRON: RACE, ETHNICITY, AND THE URBAN CRISIS* 123, 126-31 (Michael Smith & Joe Feagin eds., 1995); Dr. Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445 (1994).

² The siting directly targets the community even though BCE might not specifically wish to harm those who live there. Low income/minority neighborhoods usually fight undesirable sitings less often than higher income/non-minority communities. Low income/minority communities often have lower property values as well. Therefore, "when industry factors th[ese]...into its analysis of where to locate...it decides to target [minority] communities as prime locations." Eleanor Metzger, Comment, *Driving the Environmental Justice Movement Forward: The Need for a Paternalistic Approach*, 45 CASE W. RES. L. REV. 379, 384 (1994); see also Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L. Q. 619, 628-30 (1992) (giving additional reasons why minority communities are deliberately targeted by developers).

but admitted that levels of airborne pollution would rise regardless. This pollution would cause lung irritation, allergies and a slightly increased risk of cancer.

Was this a good deal for all concerned?

I. INTRODUCTION

The term "environment" in the concept of environmental justice can be broadly defined as pertaining to those issues that affect the health of individuals, both directly and indirectly. The term "justice" in the concept of environmental justice generally refers to that movement's focus on health issues within politically, socially, and economically disempowered communities—typically minority and low-income communities. The siting of locally undesirable land uses such as hazardous waste storage, radioactive waste dumps, toxic recycling plants, highways and incinerators³ often provide focal points of debate, analysis, and action for environmental justice scholars and activists in such communities.⁴ In particular cases, most people recognize that sitings of undesirable land uses may exacerbate social and racial disparities. However, it is important to recognize that these situations also present opportunities for reducing inequities between groups. Communities may, for example, ameliorate past disparities through clean-up of hazards, and prevent future problems by ensuring the equitable distribution or elimination of hazards.⁵

Recent proposals have identified compensation as a way to reduce inequities between different groups due to siting of undesirable land uses.⁶ However,

³ See generally Robert Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM 15 (Robert D. Bullard ed., 1993); Robert Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT'L LAW 319 (1993); Cole, *supra* note 2, at 628-30; Michel Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841 (1994); George Friedman-Jimenez, *Achieving Environmental Justice: The Role of Occupational Health*, 21 FORDHAM URB. L.J. 605 (1994).

⁴ See generally Cole, *supra* note 2, at 628-30; Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, KAN. J.L. & PUB. POL'Y, Summer 1991, at 69.

⁵ See, e.g., Howard Kunreuther et al., *Risk Perception and Trust: Challenges for Facility Siting*, 7 HEALTH SAFETY & ENV'T 109 (1996); David Morell, *Siting and the Politics of Equity*, in RESOLVING LOCAL CONFLICT 117, 125-27 (Robert W. Lake ed., 1987); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1046-49 (1993).

⁶ See generally MICHAEL O'HARE ET AL., FACILITY SITING AND PUBLIC OPPOSITION 67-87 (1983); Michael O'Hare, "Not on My Block You Don't": Facility Siting and the Strategic Importance of Compensation, 24 PUB. POL'Y 407 (1977); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195 (1997); Kunreuther, *supra* note 5; Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L. J. 329 (1995).

some environmental justice scholars criticize this approach, noting that some communities may agree to commodify resources such as health under socioeconomic constraints that preclude true autonomy and choice.⁷ In a 1994 article, Professor Vicki Been issued a wake-up call to the environmental justice movement.⁸ She argued that compensation schemes are here to stay, and that the environmental justice movement must prepare itself to tackle associated issues.⁹ This Article heeds Been's urging, and examines compensation schemes involving the commodification of health rights from an environmental justice perspective.¹⁰ Adopting Professor Margaret Radin's definition of personhood, this Ar-

⁷ Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 *FORDHAM URB. L.J.* 787 (1994).

⁸ *Id.* at 824.

⁹ *Id.* In her Article, Been asked four questions concerning compensated siting: first, do compensation schemes commodify things that should not be bought and sold?; second, since many sites are in poor communities, is acceptance of the siting really voluntary?; third, does compensated siting allow a community to sell the rights of future generations?; and fourth, is a compensation scheme truly voluntary if there is disparity in the amount of information available to each side? *Id.* at 824-26.

This Article focuses on Been's first question. It does not address information/bargaining power disparities that fall more clearly under the broader concept of unconscionability. Interestingly, in addition to the usual contract theories of unconscionability, passages from the Bible and especially the Koran also suggest a religious argument against unconscionable bargaining. See, e.g., *Deuteronomy* 24:6 (New American Standard): "No one shall take a handmill or an upper millstone in pledge, for he would be taking a life in pledge;" *Deuteronomy* 24:10-13 (New American Standard):

When you make your neighbor a loan of any sort, you shall not enter his house to take his pledge. You shall remain outside, and the man... shall bring the pledge out to you. And if he is a poor man, you shall not sleep with his pledge. When the sun goes down you shall surely return the pledge to him, that he may sleep in his cloak.

See also *The Message of The Quran*, 4:29 at 108 (Muhammad Asad trans., 1984 ed.) (footnote omitted): "Do not devour one another's possessions wrongfully—not even by way of trade based on mutual agreement—and do not destroy one another."

The topic of intergenerational issues, which deals with the rights of presently uninvolved third parties and rights of presently nonexistent parties, is also better addressed elsewhere. See, e.g., James C. Wood, *Intergenerational Equity and Climate Change*, 8 *GEO. INT'L ENVTL L. REV.* 293 (1996); Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Declaration of Principles on Human Rights and the Environment*, 27 *COLUM. HUM. RTS. L. REV.* 487, 512-13 (1996).

¹⁰ To focus the discussion, this Article makes three critical assumptions. First, all parties are assumed to be fully informed of all known consequences/dangers and to have equal bargaining power. Second, this Article assumes commodification deals only with harm to human health and does not address the freedom of individuals to trade their property (e.g., to receive payments in return for a decrease in property value) or living conditions (e.g., to receive payments in return for a decrease in aesthetic value).

Third, this Article focuses on two types of exchanges in which people actively bargain away their health rights for a "remedy" or a "remedy plus an incentive." The first type of exchange occurs when incentive compensation is given in exchange for health rights. The second type of exchange occurs when remedial compensation is given in exchange for damages to health when the bargain was made before any harm occurred. An example of an incentive would be exchanging \$5000 for a 20% increase in the risk of cancer irrespective of any damage payment given. An example of remedial compensation made before any harm occurs would be a developer's promise to pay \$5000 or to provide insurance coverage for any cancer she

ticle analyzes the extent to which society should either restrain communities from selling their health rights, or, alternatively, adopt a fully nonpaternalistic approach and permit community self-determination without interference.¹¹ This Article first explores methods for classifying different types of commodification, and then discusses Radin's theories of market inalienability and personhood. This Article then applies Radin's concepts of incomplete commodification and evolutionary pluralism to the sale of health rights, and concludes that although it may be appropriate to commodify nonvital health rights, commodification of vital health rights deprives people of critical attributes of personhood and thus should not be allowed.

II. TYPES OF COMPENSATION

Types of compensation can be difficult to classify because the nature of compensation changes according to the individual community context. However, for analytical purposes, commentators generally divide compensation into discrete categories.¹² The two most prevalent classes of these categories include compensation defined by purpose and compensation defined by timing.¹³

causes. This promise would be given in exchange for the community's acceptance of the site. Readers should also note that this Article purposely excludes exchanges where remedies are not given for damages to health and where remedies are given post hoc for unforeseeable damages to health.

¹¹ See *infra* notes 36-95 and accompanying text (describing Radin's theory and applying it to sale of health rights in environmental justice context). This Article uses the term "health rights" to mean a person's right to be free of involuntary harms caused by others. This usage is similar to, but not identical with, some concepts of property rights. While property rights are a product of the state, see *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), health rights are innate, arising from the individual herself. In these terms it would not matter that BCE's harmful actions were "lawful" according to the state. Health rights spring from the individual, not the state; thus the state cannot "define" them away. See generally Richard Desgangne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263 (1995) (discussing interaction between individual or civil rights/health rights and environment); AARON SACHS, *ECO-JUSTICE: LINKING HUMAN RIGHTS AND THE ENVIRONMENT* (1995) (same); Symposium, *Earth Rights and Responsibilities: Human Rights and Environmental Protection*, 18 YALE J. INT'L LAW 215 (1993) (same); and Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338 (1996) (same).

¹² See generally Been, *supra* note 7; DAVID MORELL & CHRISTOPHER MAGORIAN, *SITING HAZARDOUS WASTE FACILITIES* 165 (1982); Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047 (1994); Mank, *supra* note 6; Paul R. Kleindorfer, *Compensation and Negotiation in the Siting of Hazardous-Waste Facilities*, 51 SCI. OF TOTAL ENV'T 197 (1986); Arthur M. Sullivan, *Siting Noxious Facilities: A Siting Lottery with Victim Compensation*, 31 J. URB. ECON. 360 (1992); S.A. Carnes et al., *Incentives and Nuclear Waste Siting*, in *RESOLVING LOCATIONAL CONFLICT* 353 (Robert W. Lake ed., 1987).

¹³ Been, *supra* note 7, at 792.

A. Compensation Defined by Purpose

1. Compensation as a Remedy

Within this category, compensation defined by purpose can be subclassified into several different types, including compensation as remedy, compensation as prevention, or compensation as incentive.¹⁴ As a remedy, compensation serves to restore the status quo, or to “make affected communities *as well off* after the siting event as they were before.”¹⁵ Compensation as a remedy is designed to account for unavoidable, intangible or uncertain impacts of siting.¹⁶ Such remedial compensation can take the form of monetary payments, in-kind replacement of resources/services (such as replacement of contaminated water supplies) or availability of contingency funds or insurance.¹⁷ For example, in the Ruraltown hypothetical, BCE might give money to the homeowners in Number Nine to compensate for any decrease in their property values.

As a remedy, compensation works best for problems that can be measured objectively, such as a drop in property values, or things that can be readily replaced in-kind, such as top soil. However, its application to nebulous or speculative injuries is problematic. How much compensation should a community receive for a tarnished image? What if Number Nine is perceived as a toxic sludge pit and no family or business wants to live there? In these circumstances, one must question whether any amount of money or kind of action could make the community the same as it was before.¹⁸

2. Compensation as a Preventative or Mitigation Measure

Compensation may also take the form of prevention,¹⁹ sometimes referred to as mitigation.²⁰ Here, the primary purpose is to prevent the facility from

¹⁴ *Id.*; Carnes et al., *supra* note 12, at 358-62 (describing categorizations of compensation).

¹⁵ MORELL & MAGORIAN, *supra* note 12, at 166.

¹⁶ *Id.*

¹⁷ *Id.* at 172; *see also* Arthur M. Sullivan, *Victim Compensation Revisited*, 41 J. PUB. ECON. 211 (1990) (giving other examples of remedial compensation); Carnes et al., *supra* note 12, at 358-62 (giving other examples of remedial compensation).

¹⁸ MORELL & MAGORIAN, *supra* note 12, at 166-67.

¹⁹ Been, *supra* note 7, at 792.

²⁰ *See, e.g.*, MORELL & MAGORIAN, *supra* note 12, at 165; Been, *supra* note 7, at 792; Carnes et al., *supra* note 12, at 358-62 (giving other examples of compensation as mitigation).

damaging the community, or to reduce the magnitude of harm where possible.²¹ For example, companies like BCE can anticipate and avoid foreseeable problems such as water contamination and noise pollution by redesigning their facilities and/or processes.²² However, companies and communities cannot so easily address injuries caused by less tangible or less foreseeable occurrences, such as stigma to the community or increased risk of accidents. Design changes can address such problems to some extent, but cannot eliminate them.²³ In this instance, where less foreseeable injuries cannot be completely prevented, such nonmitigated damage may be dealt with by compensation as remedy.

3. *Compensation as Incentive*

In addition to remedy and mitigation, compensation also takes the form of incentive. Compensation as incentive “reward[s] the community for accepting the facility by providing funds or benefits in excess of those required to remedy any harms caused by the facility.”²⁴ Incentives are positive inducements to encourage communities to accept an undesirable land use,²⁵ and make siting of such a use easier to accommodate by meeting other community needs. Companies, for example, might offer to build community recreation facilities, clean up other existing waste sites, provide cash payments, or even increase snowplowing of city streets.²⁶

As previously noted, classifying compensation according to purpose serves a limited analytical function, because the concepts of remedy, mitigation or incentive are not clearly distinct from one another. In some circumstances, a promise to build a park or community center may be analyzed as a remedy for a decrease in community image; in other situations, such promise might be more appropriately viewed as an incentive to accept a siting. Likewise, better lining for a waste

²¹ Been, *supra* note 7, at 792.

²² MORELL & MAGORIAN, *supra* note 12, at 165.

²³ *Id.*

²⁴ Been, *supra* note 7, at 792.

²⁵ MORELL & MAGORIAN, *supra* note 12, at 173 (quoting Lawrence Bacow, *Mitigation, Compensation, Incentives and Pre-emption*, prepared for the National Governors Association [10 Nov. 1980], at 5).

²⁶ See generally *id.* at 173; Gerrard, *supra* note 12; Kleindorfer, *supra* note 12, at 198 (giving examples, but describing compensation slightly differently than as used in this section); Carnes et al., *supra* note 12, at 358-62 (giving other examples of compensation as incentive).

dump may be seen as a preventative action, but such action takes on overtones of incentive when the promise is used as a bargaining chip in site negotiations.²⁷

B. Compensation Defined by Timing

Compensation also may be classified based on when it is given, and is thus termed *ex-ante*, *on-going*, or *ex-post*.²⁸ In these cases, the purpose of the compensation is the same but the method differs depending on when it is provided.

Ex-ante compensation is given before a site is built or before any harm is done to the community.²⁹ It can take the form of monetary payments/contingency funds (a remedy); building health facilities for a community (an incentive); or a promise to change a site design to decrease noise pollution (a prevention or mitigation).³⁰

On-going compensation consists of the facility's continuing payment or service to the community.³¹ Examples include continued action to decrease noise pollution (a prevention); continued response and correction of harm or danger (a remedy); or continued benefits such as money payments or jobs (an incentive).³²

Ex-post compensation occurs after harm is caused by a facility.³³ It might take the form of payment to accident victims or payment to homeowners for property value decreases (both remedies)³⁴ or the promise of it may be used as a bargaining chip during siting negotiations (an incentive). By definition, *ex-post* compensation cannot serve as a preventative measure.

²⁷ See MORELL & MAGORIAN, *supra* note 12, at 173; Carnes et al., *supra* note 12, at 362 (describing how the categories of compensation are blurred).

²⁸ See, e.g., Been, *supra* note 7, at 792-93; Kleindorfer, *supra* note 12, at 198.

²⁹ Kleindorfer, *supra* note 12, at 198.

³⁰ MORELL & MAGORIAN, *supra* note 12, at 166-70; see also Mank, *supra* note 6, at 360-61 (giving other examples of *ex-ante* compensation).

³¹ Been, *supra* note 7, at 793-94.

³² *Id.* at 793; see also Mank, *supra* note 6, at 360-61 (giving other examples of *ongoing* compensation).

³³ Been, *supra* note 7, at 792-93.

³⁴ E.g., Mank, *supra* note 6, at 361-62 (giving other examples of *ex-post* compensation).

III. MARKET-INALIENABLE RIGHTS³⁵

A. Overview of Radin's Theory of Market-Inalienability

Margaret Radin's theory of market-inalienability supports an argument against commodifying health rights.³⁶ Radin defines items that are market-inalienable as those which should not be sold or traded in the market.³⁷ According to Radin, an item that is market inalienable is not necessarily inseparable from a person. Instead, Radin's theory posits that market trading should not be used as the social mechanism for separating that item from the person.³⁸ In other words, Radin allows that people may give certain resources away, but they cannot sell them.

Radin's theory of market-inalienability is designed to promote the concept of "human flourishing."³⁹ Thus she maintains that the resources that qualify as non-alienable are those that are important to personhood.⁴⁰ Under her theory, in an ideal world, markets would not necessarily be abolished, but all things important to personhood would be protected by market-inalienability.

B. Radin's Concept of Personhood

Radin's concept of personhood is essential to her theory of market-inalienability.⁴¹ She states that society views things external to the person as freely alienable and things internal to the person as inalienable. Radin's view, however, is beyond the traditional internal/inalienable – external/alienable model; she believes that people do not exist wholly separate from their environment. She proclaims that some external things may be just as market-inalienable as internal things.⁴² According to Radin, the key to alienability is the effect of a sale on personhood.

³⁵ The terms market-alienable and commodifiable are used interchangeably in this Article. The opposites of these terms, market-inalienable and noncommodifiable, are also used interchangeably.

³⁶ Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

³⁷ *Id.* at 1850.

³⁸ *Id.* at 1854.

³⁹ *Id.* at 1851.

⁴⁰ *Id.* at 1903.

⁴¹ See, e.g., Radin, *supra* note 36; Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986) [hereinafter Radin, *Rent*]; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁴² *Id.*

Radin's definition of personhood is composed of three related concepts: freedom, identity and contextuality. Freedom involves the power to autonomously choose and the ability to exercise free will.⁴³ Identity concentrates on the "integrity and continuity...required for individuation" over time, and contextuality focuses on "self-constitution" as it relates to the surrounding environment of things and other people."⁴⁴ In sum, personhood consists of freedom of choice and the continuation of a central core personality, viewed through adaptability or evolution to one's surroundings. Freedom and identity are viewed through the lens of contextuality. A person must have changing and continuing relationships with the social and natural worlds. These relationships influence the freedom and identity aspects of personhood, and therefore the person herself.⁴⁵

C. Radin's Rejection of Universal Commodification

Based on her concept of personhood, Radin determines that universal commodification of all resources is unjustifiable.⁴⁶ Viewing the identity aspect of personhood through contextuality, Radin maintains that "one's politics, work, religion, family, love,...character, and personal attributes [are] integral to the self."⁴⁷ Further, she asserts that to view these attributes as totally commodifiable and detachable from individuals "do[es] violence to our deepest understanding of what it is to be human."⁴⁸ In other words, a human is no longer a person if all attributes and values are completely fungible and sold off. Individuals need these qualities to define and create personhood.⁴⁹

D. Health Rights are a Non-Commodifiable Resource

Health rights appear to fall within Radin's definition of critical resources that should not be considered commodifiable. Radin's theory suggests both objective and subjective analyses are appropriate in defining personhood, and that

⁴³ *Id.* at 1905.

⁴⁴ *Id.*

⁴⁵ "Environment" here means one's surroundings or context, not necessarily "environment" in the contemporary conservationist sense.

⁴⁶ Radin, *supra* note 36, at 1906.

⁴⁷ *Id.* at 1906.

⁴⁸ *Id.*

⁴⁹ *Id.*

not all things that “someone...subjectively identifi[es with] should be treated legally or morally as personal.”⁵⁰ Radin’s complete view of personhood thus includes some normative aspects.⁵¹ While resources affecting personhood are nebulously defined, under Radin’s theory they certainly encompass resources that affect the ability to breath clean air, drink clean water, and eat clean food. Health rights seem innately within concepts which affect personhood. Radin views sexuality/sex as justifiably affecting personhood, and it seems natural to view health rights as equally important.

E. Paternalism and Radin’s “Double-Bind”

Radin rejects universal commodification due to its effect on personhood. However, Radin also notes that if society designates a resource as market-inalienable, then it takes away an individual’s ability to decide for herself whether to sell that item.⁵² In this sense, society’s categorization of a resource as inalienable is paternalistic. If people are to be totally autonomous, then it seems that the people in Number Nine should be able to decrease their personhood by selling their health rights. As Radin notes, “if we think respect for persons warrants prohibiting a mother from selling something personal to obtain food for her starving children, we do not respect her personhood more by forcing her to let them starve instead.”⁵³

Allowing a poor minority community like Number Nine to accept health problems in exchange for good paying jobs could eventually allow the community to break out of poverty. In the future, then, the community would not be forced to make such draconian choices. Radin terms this “damned if you do—damned if you don’t” situation as the double bind.⁵⁴ Admittedly, allowing commodification may harm personhood by re-enforcing class divisions and racial oppression. The commodification could also alienate individuals from themselves and from society. Social disapproval connected with commodification might also exacerbate oppression of a person or group.⁵⁵ These are all possibilities, but

⁵⁰ *Id.* at 1908.

⁵¹ *Id.*; see Radin, *Rent*, *supra* note 41.

⁵² Radin, *supra* note 36, at 1904.

⁵³ *Id.* at 1911.

⁵⁴ *Id.*

⁵⁵ *Id.*

the commodification must be viewed based on its effect on personhood in a particular context. Sometimes the community's or individual's current problems outweigh the possible risks of commodification.

Radin allows that market-inalienability must be judged in the current context of unequal power between individuals, communities, private associations, and government. Because of such inequality, she suggests that sometimes it may be more appropriate to allow some commodification rather than none at all.⁵⁶ For example, in an ideal world a poor person in Number Nine would be prohibited from selling his health rights because doing so would decrease his personhood. However, in our less-than-ideal "real" world that poor person must earn money to survive, so prohibiting him from selling his health rights—and thus condemning him to squalor, sickness, or death—may not be justifiable.

F. Justifications for Paternalism

Radin offers three possible justifications for market-inalienability despite its paternalistic overtones: the prophylactic argument, the assimilation to prohibition argument, and the domino theory.⁵⁷ The first theory suggests that in contemporary society, the risk of paternalistic action will decrease personhood is overshadowed by the likelihood that the sale of a resource that integrally affects personhood was coerced by economic or other duress.⁵⁸ The second assimilation theory is morally based, and suggests that commodification may create or expose "wealth and class-based contingencies for obtaining things that are critical to life itself [such as] health care [which would] undermine a commitment to the sanctity of life."⁵⁹ In addition, the market rhetoric used in commodification "creates and fosters an inferior conception of human flourishing."⁶⁰ Thus, the very words used in describing a thing as commodifiable can decrease aspects of personhood. According to Radin's third theory, the domino effect assumes that the commodified version of at least some things is morally inferior. The commodified and noncommodified versions of the object cannot exist at the same time since the inferior version will eventually sully the superior version.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1909.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1912.

⁶⁰ *Id.*

Finally the morally inferior commodified version will completely contaminate the morally superior noncommodified version.⁶¹

G. *The Failure of the Empowerment Movement*

Radin's three theories offer nonpaternalistic justifications for some market-inalienabilities. In addition, other scholars suggest that paternalism may be justified because alternative, nonpaternalistic approaches have proven insufficient. For example, the major nonpaternalistic approach to solving environmental problems in minority/low income communities focuses on group empowerment.⁶² In theory this approach, which focuses on grassroots change, is compatible with Radin's theory of personhood. Self-empowerment and group-empowerment would tend to increase personhood through enhancement of freedom of choice and strengthening of identity.

However, at least one commentator has shown that group empowerment has not prevented environmental justice problems and argues that paternalistic⁶³ solutions are necessary.⁶⁴ Many factors prevent individuals from effectively combating pollution and environmental degradation in their communities. These factors include lack of education, language barriers, exclusion from both traditional political processes and mainstream environmental organizations, and the large amount of time spent fighting for basic life necessities.⁶⁵ In the presence of these factors, scholars argue, nonpaternalistic action cannot succeed. Without

⁶¹ *Id.* at 1913. Radin notes that her second and third theories are mirror images of one another: The [assimilation to] prohibition theory stresses the wrongness of commodification—its alienation and degradation of the person—and the domino theory stresses the rightness of noncommodification in creating the social context for the proper expression and fostering of personhood. *Id.*

⁶² Under the theory of group empowerment, members of an affected community decide how the collective community will react to an issue, such as the issue of whether to encourage or protest the siting of a dump. The key to this theory is that the decision is made by the immediate stakeholders rather than by private, external groups or the government.

⁶³ Metzger defines an action as paternalistic "where an individual or entity acts in order to benefit a particular group, without verifying the specific nature of that group's wishes." Metzger, *supra* note 2, at 391.

⁶⁴ Metzger, *supra* note 2. *But see* Cole, *supra* note 2 (calling for nonpaternalistic approach to environmental justice issues).

⁶⁵ *See, e.g.,* Metzger, *supra* note 2; Austin & Schill, *supra* note 4, at 69, 71, 72 n. 4; Neil A. Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 *PAGE ENVTL. L. REV.* 683; Cole, *supra* note 2; *see also* John H. Rodgers, *Collaborating Across Many Divides: Environmental Justice Groups and the Mainstream Nationals* (1995) (unpublished thesis, University of California (Santa Barbara)) (examining relationship between environmental justice groups and mainstream environmental groups).

paternalistic action, many minority communities may never reach the level of self-empowerment necessary to solve environmental problems.⁶⁶ The decrease in personhood due to social marginalization is greater than that from temporary paternalism. Thus, the use of short-term paternalistic approaches⁶⁷ may be justified, despite the associated dangers.⁶⁸

H. Incomplete Commodification as a Solution to the "Double-Bind"

Therefore, unless we find the solutions to poverty, racism, and other underlying societal ills, we force ourselves to choose the lesser of the two evils, and to select a liveable solution from a palette of unacceptable choices.⁶⁹ Here, Radin's argument can be very helpful; specifically, Radin's core theory of evolutionary pluralism offers tools for addressing the negative aspects of commodification as well as the double bind problem. Radin offers "incomplete commodification" as a tool for addressing the negative aspects of commodification as well as the double bind problem; i.e., to allow some aspects of a resource to be traded on the market, but not all. Radin suggests that the degree of commodification will vary in any given context.⁷⁰ According to Radin, using incomplete commodification instead of complete noncommodification decreases the threat posed by application of lofty ideals.⁷¹ Radin illustrates her theory and analysis of evolutionary pluralism with the example of prostitution.⁷²

Radin first assumes that personhood ideally includes equal nonmonetized sharing of sexual interaction,⁷³ and that prostitution adversely affects one's personhood through the commodification of self and the entailing estrangement from oneself and society. Prohibition of prostitution is therefore justified in an

⁶⁶ Metzger also notes that even if nonpaternalistic actions (such as education) are fruitful, paternalistic actions may be quicker. "While the problem is left untreated, members of these communities are suffering from exposure to unacceptable levels of water...contamination...[etc.]" (internal cites omitted). Metzger, *supra* note 2, at 395. Of course, paternalistic actions would not be acceptable if they caused more long-term harm than the short-term suffering they prevented.

⁶⁷ Metzger, *supra* note 2.

⁶⁸ Metzger points out several problems inherent in paternalistic approaches, including inhibition of social progress by keeping individuals from focusing on their own lives, and harming individuals' sense of responsibility and motivation. Metzger, *supra* note 2, at 393-94. The factors listed by Metzger can also be interpreted as decreasing personhood. Cf. Radin, *supra* note 36.

⁶⁹ Radin, *supra* note 36, at 1917.

⁷⁰ *Id.* at 1918.

⁷¹ *Id.*

⁷² *Id.* at 1921.

⁷³ *Id.*

ideal world. In our nonideal world, however, prohibition of prostitution may not be justifiable for two reasons. First, sex may already be commodified, and second, the prohibition of prostitution may cause more harm than it prevents. Some women need money from prostitution to better their lot in life and to break cycles of poverty.⁷⁴

The theory of evolutionary pluralism can help us determine whether and to what extent to allow prostitution. Noncommodification is supported by the slippery slope or domino theory argument. Fully and openly commodified sex would contaminate all sex and, at its most extreme, would result in the full panoply of advertising and market forces aimed at selling sex. There would be sex recruiters, stock markets, catalogs and so forth. People's discourse about sex would ultimately be affected, and new terms and attitudes would arise preventing the ideal of equal sharing of nonmonetized sexual interaction. The commodified version of sex would displace and overwhelm the noncommodified version.

The obvious rebuttal is that sex is already commodified to a certain extent. For example, various community newspapers carry numerous advertisements for sex;⁷⁵ sexual advertisements sell everything from beer to breakfast cereal;⁷⁶ and the state of Nevada allows some legalized prostitution.⁷⁷ None of this commercialization has led to dreaded extremes, but that does not mean that the domino effect could not happen or is not happening.

When dealing with pro-commodification arguments, Radin characterizes the current sexual climate as incompletely commodified, having both market and non-market aspects. Also, complete market-inalienability could be harmful to poor women because of the double bind, but complete commodification could lead down the slippery slope and destroy society's ideal of sexuality. Radin frames

⁷⁴ Even women with little education can sometimes earn more as prostitutes than the average starting attorney. Jessica N. Drexler, Comment, *Governments' Role in Turning Tricks: The World's Oldest Profession in The Netherlands and The United States*, 15 DICK. J. INT'L L. 201, 210, 210 n. 94 (1996).

⁷⁵ See, e.g., SAC. NEWS & REV., June 5, 1997, at 47-59 (displaying numerous advertisements for "escorts" and other adult services).

⁷⁶ See, e.g., Samantha Conti, *Italian Ads: Caught in the Act*, Womenswear Daily, Dec. 27, 1996, at 29 (discussing the use of sex in Italian ads to sell clothing, laundry hampers and shoes); Sharon Waxman, *One Company's Surprising Spin; Firm's Ads Sell Sexuality Along With Wheelchairs*, Wash. Post, Nov. 29, 1996, at C1 (examining the use of sex to sell wheelchairs); Harry Berkowitz, *Sex Sells in Latest TV Commercials*, Newsday, May 10, 1996, at A55 (describing how even conservative companies such as Mercedes-Benz use sex to sell products).

⁷⁷ Drexler, *supra* note 74, at 224-25.

the question as “how to structure an incomplete commodification that takes account of our nonideal world, yet does not foreclose progress to a better world of equal power (and less susceptibility to the domino effect of market rhetoric).”⁷⁸ Radin suggests the decriminalization of prostitution to help alleviate the double bind on poor women while lessening prostitution’s dangers/degradations on personhood. To reduce the domino effect, organized capitalist markets in sexual services should be prohibited, and advertising and pimping should not be allowed.⁷⁹ Radin’s solution is, in effect, a balancing test that weighs the double bind (harms of noncommodification) against injuries to personhood (harms of commodification). To allow commodification, the harms of noncommodification must outweigh any injuries to personhood.

I. Application of Incomplete Commodification to Compensation Schemes

How does the above analysis apply to the commodification of health in compensation schemes? Risks to health affect Radin’s concept of personhood since one’s health is closely linked with personal identity and contextuality. Also, an individual’s interaction with her environment is very much dependent on her health.⁸⁰ In an ideal world, therefore, harm to one’s health or an increase in the risk of harm should be noncommodifiable. However, because the world is less than ideal, a pragmatic application of Radin’s theory of incomplete commodification to the issue of selling health rights appears appropriate.

J. Commodification of Health Risks

Just as in the example of prostitution, the commodification of health or health risks could lead down a slippery slope into the commodification of all health rights. If society allows the people of Number Nine to sell their health rights, then society will increasingly treat health as an fungible and commodifiable good. On the other hand, health care, health and health risks are already partially commodified in our society, yet wholesale commodification has not re-

⁷⁸ Radin, *supra* note 36, at 1924.

⁷⁹ *Id.* at 1924-25.

⁸⁰ See, e.g., Nancy J. Osgood and Susan A. Eisenhandler, *Gender and Assisted and Acquiescent Suicide: A Suicidologist’s Perspective*, 9 ISSUES L. & MED. 361, 372 (1994).

sulted. Also, society allows persons to accept high-risk jobs⁸¹ and high quality health care is often available only to those who can afford it.⁸²

K. Society Already Restrains Commodification of Health Rights

It is also true that society already restrains the partial commodification of health and health risks. Government regulations, for example, determine the risk level of many jobs. Government programs such as Medicaid and Medicare try to provide equal access to health care for all persons. Arguably these governmental interventions help counteract total commodification of the person or total commodification of all health rights (thereby decreasing the impact of the domino effect argument). It can also be argued that these governmental interventions merely hide the slide down the slippery slope and therefore do not diminish the impact of the domino argument.

L. Rights of Others

Compensation schemes' effects on the rights of others is another factor weighing against commodification. For instance, only one member of the Number Nine community participated in the decision-making process. It is true that it would be very difficult to have individual agreements with each person affected by a siting, but the involvement of other people's personhood is difficult to police in compensation schemes. This raises the question of whether and to what degree voluntariness exists in the market, which is the gist of Radin's prophylactic argument. While it is impracticable to require bargaining with each individual, the possible danger of affecting third persons necessitates consideration in the evolutionary pluralism balance.

⁸¹ While high risk jobs do not necessarily pay exorbitant salaries, the pay is sometimes less important than just having a job. The desire for such jobs is illustrated by *UAW v. Johnson Controls, Inc.*, a case in which female employees clearly expressed a desire to work despite the fact that the job site was possibly contaminated with lead. See 499 U.S. 187 (1991); see also Susan Karlin, *For Some, Danger is All in a Day's Work*, L.A. TIMES, Sept. 16, 1991, §2D (Business), at 30 (giving brief overview of reasons for accepting high risk employment).

⁸² See, e.g., Troyen A. Brennan, *An Ethical Perspective on Health Care Insurance Reform*, 19 AM. J.L. & MED. 37, 37 (1993).

*M. Commodification Can Increase Economic and Social Class Divisions,
and Thus Promote Poverty and Racism*

Another argument against commodification arises from Radin's assimilation to prohibition theory. Commodification of health and health risks in compensation schemes could create and expose wealth/race based contingencies for obtaining things important to life. Allowing sale of health rights would only increase the already high hurdles that low income and minority people face in securing things such as proper health care. Allowing people to sell their health rights would also cruelly emphasize the majority's ease of access to society's benefits.⁸³ The market rhetoric of sale of human health rights could create an "inferior concept of human flourishing." The ideas, terms and actions used in commodification could lead to a decrease in personhood for the sellers and other similarly situated people. If society totally commodifies health rights, then people in effect will be sold for their organs. Some people's health will be sold for the convenience of the rest of society.

These arguments take on added weight because the communities involved are low income and minority areas. Commodification would not only create and highlight wealth/class based contingencies for obtaining life necessities, but also would emphasize the past history of slavery and forced minority labor in the United States.⁸⁴ If we allow the commodification of health rights, we allow some more powerful group essentially to sell members of less powerful groups. These strong overtones of slavery could cause an even greater decrease in personhood.

N. Advantages of Allowing Commodification of Health Rights

On the other hand, the presence of the double bind for poor and minority communities argues for allowing commodification of health rights. Allowing Number Nine to choose an organic solvent recycling plant and accept compen-

⁸³ *Id.*

⁸⁴ See, e.g., Howard Winant, *Dictatorship, Democracy, and Difference: The Historical Construction of Racial Identity*, in *THE BUBBLING CAULDRON, RACE, ETHNICITY, AND THE URBAN CRISIS* 31 (Michael Smith and Joe Feagin eds., 1995).

sation in exchange could help propel that community out of poverty.⁸⁵ The money given to Number Nine could, for example, provide adequate prenatal care, more police, or a crime prevention program, thereby raising the quality of life and emotional well being of the community. Compensation could break the cycle of poverty and despair that grips many communities like Number Nine.

As with the example of prostitution, a solution of incomplete commodification would best address the real world problems involved with compensation schemes. Prohibiting some commodifications while allowing others would have the double benefit of not foreclosing the movement of poor and minority communities to a better life but would also decrease the danger outlined by Radin in her theories against commodification.

O. How Would Society Structure Incomplete Commodification of Health Rights in Compensation Schemes?

If incomplete commodification of health rights is allowed in compensation schemes, the next major question is how best to structure such a system. The solution should decrease or eliminate domino effects, prophylactic problems, and assimilation to prohibition concerns, decrease personhood as little as possible and ameliorate the double bind. One approach is to divide commodification of health rights into categories and only allow commodification of certain health rights.

1. Vital Versus Nonvital Health Rights

The first categorization is between vital and nonvital health rights. One commentator, Grady, has taken Radin's basic premise of partial market-inalienability and applied it to the sale of human organs.⁸⁶ In both situations—sale of organs and sale of health rights in compensation schemes—people are selling their health, either directly or through increased risk. Both the sale of organs and of health rights in compensation schemes could lead to total commodification

⁸⁵ See, e.g., Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933 (1992) (detailing the benefits from a landfill for a Native American reservation and pointing out that paternalism is itself a form of environmental racism); Radin, *supra* note 36, at 1916.

⁸⁶ Mark F. Grady, *Politicization of Commodities: The Case of Cadaveric Organs*, 20 J. CORP. L. 51 (1995).

of the self and decreased personhood through estrangement from oneself and others.

Grady distinguishes between vital and nonvital organs (e.g., bone marrow and the heart).⁸⁷ Vital organs are those without which people cannot live; nonvital organs are either replaceable (bone marrow) or multiple ones where one can be removed without serious harm to the individual (e.g., a kidney or liver lobe).⁸⁸ Sale of vital organs greatly decreases personhood, whereas the sale of nonvital organs does not. For example, the sale of a heart taken from a living individual is a far greater offense to personhood than the sale of bone marrow. In the first situation the individual dies, and in the second she lives. Other commentators have used similar structures. Munzer, in discussing Kant's views on organ sales, states that "the emphasis lies on the *integration*—the 'togetherness'... of the various parts of the body that make up the entire organism[; t]o sell anything that is integral to that organism impairs humanity and dignity."⁸⁹

In the context of compensation schemes, health rights can also be divided into vital and nonvital categories. The sale of nonvital organs is analogous to the sale of minor or nonvital health rights (e.g., allergies or lung irritation caused by airborne pollutants). The sale of vital organs is analogous to the sale of major or vital health rights (e.g., contraction of cancer).

2. Sale of Health Rights Versus Sale of Risk to Health Rights

The second categorization of health rights is between the sale of health rights and the sale of risks to health rights. Often the exchange in compensation schemes is more accurately characterized as the sale of increased risks to health rights rather than the actual sale of health rights.⁹⁰ After all, few siting developers would blatantly engage in the buying and selling of cancer. In an incomplete commodification scheme, the risk of harm to a health right actually occurring is counterbalanced by the magnitude of the health right in question. A large de-

⁸⁷ Grady uses the term "less vital" instead of "nonvital." However, "nonvital" more strongly emphasizes the lessened effect on personhood involved in such transactions.

⁸⁸ Grady, *supra* note 86, at 56 (using different examples, but same concepts).

⁸⁹ Stephen R. Munzer, *Kant and Property Rights in Body Parts*, CAN. J. L. & JURIS., July 1993, at 319.

⁹⁰ For example, in the compensation plan for Number Nine, exchanging lung irritations for the siting is the sale of a health right. The lung irritation is definitely going to occur. Conversely, there is no guarantee that anyone will ever contract cancer. The citizens of Number Nine are selling a risk to their health rights. In exchange for, say, a 1% risk of cancer they will allow the siting.

crease in personhood due to the sale of a vital health right (e.g., the sale of contracting cancer) would be less of a blow to personhood if the risk were extremely slight.⁹¹ As the risk increases, the probability of contracting cancer approaches certainty. The more certain the risk, the greater the decrease in personhood, and vice versa.

Not only does the harm to personhood vary depending on the risk, but the amount of harm to personhood due to "x" percent risk is not the same in all situations. The line between zero risk and certainty is not equal for all commodifications. For example, "x" percent risk of possibly treatable cancer is less of an insult to personhood than "x" percent risk of certainly incurable cancer. Contracting incurable cancer is a huge blow to personhood, even at lower risk rates.

A system of partial commodification must avoid both the double bind on the one hand and the domino effect, prophylactic issues, and assimilation to prohibition concerns on the other. The system should also decrease harms to personhood caused by commodification. This Article proposes that society allow minority/low income communities to commodify nonvital health rights and low risks to vital health rights as long as the benefits to individuals and the community outweigh any resulting decrease in personhood. Again, this requires an application of Radin's balancing test. As an illustration, this Article will briefly reexamine Radin's three arguments against commodification in the context of a sale of nonvital health rights or of low risk to vital health rights.

The prophylactic argument against commodification, which states that the sale of health rights arouses suspicions of coercion, is still a concern with this proposed method. Yet, while society must worry that particular sales were involuntary, the harm to personhood is not as large as it is for the sale of all vital health rights. Sale of nonvital health rights and sale of low risks to vital health rights cause a smaller decrease in personhood. The injury to coerced individuals who are mistaken for voluntary sellers is less, so the need to constrain the voluntary sale of these types of health rights is not as strong.

The assimilation to prohibition argument states that commodified versions of some things should not exist since they would expose wealth/race-based requirements for obtaining things critical to life. Moreover, the very discourse of commodifying these things decreases aspects of personhood. Both of these prob-

⁹¹ Cf., e.g., Colin F. Camerer & Howard Kunreuther, *Decision Processes for Low Probability Events: Policy Implications*, 8 J. POL'Y. ANALYSIS MGMT. 555 (1989) (surveying effects of low probability/high consequence events on policy).

lems are especially serious because the areas involved are low income and/or minority communities. Carefully limiting what health rights may be commodified lessens concerns raised by the assimilation to prohibition theory. With this proposal, there is a limit beyond which compensation cannot go. The wealth/race-based contingencies still exist for obtaining things critical to life. However, because personhood is not decreased as much, the contingencies are less emphasized. Damage from market rhetoric is lessened because commodification will not be able to penetrate into all areas of health rights. There is a limit to what kind of sale is allowed. Discussing the sale of nonvital health rights and the sale of low risks to vital health rights will therefore have a correspondingly smaller impact on personhood.

The proposed structure's greatest benefit is that it limits the domino effect. Certain health rights are being sold, which may decrease personhood to some degree, but there is less of a danger that these sales will lead to the total commodification of all health rights. Some health rights will always be noncommodifiable—vital health rights and high risks to vital health rights. Admittedly, no bright line exists between vital and nonvital health rights, but this proposal acknowledges that a bundle of rights exists which will not be commodified. Total commodification of health rights is explicitly disallowed.

As stated earlier, the overtones of slavery which arise in compensation schemes can be especially damaging to personhood in minority communities. There is a legitimate concern of the commodification of people as well as a concern of the commodification of health rights. Again, the proposed system explicitly limits commodification. Disallowing the commodification of all health rights also disallows the commodification of people. The problem is still present, but to a lesser degree.

Because it allows communities or their representatives to take steps to correct marginalization and poverty, the proposed commodification scheme also decreases the double bind. The double bind suggests that without influxes of money and benefits into lower income and minority communities those communities will remain in a cycle of marginalization and poverty.⁹² Communities' ability to take these self-help steps can be seen as increasing personhood. The major question, then, is whether the benefits from compensation schemes will outweigh the decreases in personhood caused by commodification of health

⁹² See, e.g., Radin, *supra* note 36; Metzger, *supra* note 2.

rights. Each situation will differ, but compensation for the sale of nonvital health rights and low risks to vital health rights should be allowed when the benefits outweigh the harms.

IV. CONCLUSION

The proposed compensation scheme justifiably could be used for Number Nine because some of the health rights in question are vital and some are nonvital. Some of the risks to health rights are rather definite and others are very low. For the vast majority of people, the increases in lung irritation and allergies, both nonvital health rights, would not be serious injuries to personhood. Lung irritation and allergies are neither life threatening nor debilitating. Under the proposed model, Number Nine should be allowed to exchange these health rights for the money and increased jobs as long as the benefits outweigh the damages to personhood.

The risk of cancer, however, involves a vital health right. Therefore it is important whether the magnitude of the risk is low or high.⁹³ Because the risk is low, it should be permissible to allow Number Nine to sell its health rights; the benefits will outweigh the decreases in personhood. However, if the risk of cancer increased, then the benefits to Number Nine also would have to increase in order to justify the compensation scheme. At some point, the decrease in personhood would outweigh the benefits from the compensation. Also, at some point commodification would become unjustifiable since the risk of cancer becomes a certainty and therefore equivalent to a vital health right.⁹⁴ Part of the justifiability of a compensation scheme depends on how "good a deal" the com-

⁹³ Because the level of risk is so important, information becomes an issue. Not only is access to information important, but current scientific limits to information are important also. Which group should bear the burden of scientific uncertainty? If an aspect of a siting is not known to cause health problems only because no research has been done on the question, then is there really no risk? It seems fair that the party who has the most information and the greatest access to information should bear the burden of proof. In other words, since the developer and the government have more access to information, they should bear the burden of proving the level of risk (or lack thereof) to the greatest extent possible given current scientific understanding. See generally S.M. Macgill & D.J. Snowball, *What Use Risk Assessment?*, in *RESOLVING LOCATIONAL CONFLICT* 232 (Robert W. Lake ed., 1987).

⁹⁴ Thus, there are two points at which a compensation scheme involving vital health rights may become unjustified. The first is when the costs outweigh the benefits. This could occur even when the costs are very small (i.e. when the risk is very slight). The second is when the risk to a vital health right becomes so large that, in effect, it is a certainty. At that point what is really being sold is no longer a risk to a vital health right, but the vital health right itself. This would be prohibited.

munity gets, but the benefits must always outweigh the costs.⁹⁵ For Number Nine the benefits do seem to outweigh the costs. The community is receiving many benefits that could greatly improve its quality of life in exchange for some lung irritation, allergies, and a very low risk of cancer.

⁹⁵ This is a rough test and the actual implementation of such is beyond the scope of this Article. However, the decision itself would perhaps best be left to judicial analysis in suspect cases. If the balancing were left to agency oversight then the problem of agency capture arises. However, leaving this balancing to the courts would take up valuable judicial time. Whatever method is implemented will have to ensure equal access to all parties. Again, though, the question of implementation is better left to a later analysis.

