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SYMPOSIUM REVIEW

VIRTUAL PROPERTY AND PERSONHOOD

M. Scott Boone[†]

Abstract

As virtual worlds have increased in popularity, they have generated a great deal of interest in the legal community. A number of legal commentators have discussed property in the context of virtual worlds. This article specifically discusses the application of Margaret Jane Radin's personhood theory to virtual world property. While application of Radin's personhood theory is far from perfect, it provides useful insight into broader questions of individuals as persons.

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I. INTRODUCTION

In recent years, virtual worlds have grown both in number and in population. The emergence of virtual worlds has spawned a great deal of interest and publicity, in both popular and specialized media. News articles about the millions of players participating in virtual worlds such as Second Life and World of Warcraft can be seen on a regular basis on both general and technology-related news sites.¹ Specialists in a variety of academic disciplines have turned their attention to virtual worlds. The legal academic community has been no exception to this. Within legal academic discussions, a substantial portion of the commentary has related to the issue of property rights in things that ‘exist’ only within virtual worlds. In this article, I seek to add to that discussion by examining the potential application of a particular normative theory – Margaret Jane Radin’s personhood theory – to virtual world property.

Part II provides a brief overview of virtual worlds and the early legal commentary addressing the property rights issue. Part III provides a description of Radin’s personhood theory of property. Part IV first asks whether virtual world property can be classified as personal under Radin’s theory and secondly, examines the potential effects of so classifying virtual world property. Finally, Part V concludes and tries to relate this inquiry to the bigger picture.

II. PROPERTY RIGHTS IN VIRTUAL WORLD OBJECTS

A. Terminology

As a preliminary matter, several comments about the terminology I will use may be helpful, particularly where this terminology may differ somewhat from that used elsewhere. I think it is more precise to use the term ‘virtual world property’ in discussions dealing solely with virtual worlds and to use ‘virtual property’ in discussions that are broader than just virtual worlds. In this

1. See, e.g., Press Release, Blizzard Entm’t, World of Warcraft® Reaches New Milestone: 10 Million Subscribers (Jan. 22, 2008), <http://www.blizzard.com/press/080122.shtml>; Steve Ranger, *Europeans Latch on to ‘Second Life,’* CNET NEWS, May 4, 2007, http://www.news.com/Europeans-latch-on-to-Second-Life/2100-1043_3-6181431.html?tag=news.3; David Kirkpatrick, *Second Life: It’s Not a Game*, FORTUNE, Feb. 5, 2007, http://money.cnn.com/magazines/fortune/fortune_archive/2007/02/05/8399120/; Marc Graser, *Habbo Hotel has Hollywood Hopes*, VARIETY, Sept. 7, 2007, <http://www.variety.com/article/VR1117971399.html?categoryid=1009&cs=1&nid=2567>.

classification, 'virtual world property' is a subclass of 'virtual property,' a broader class that may include additional types of virtual property besides virtual world property. In making this distinction, I am not trying to assert that virtual world property is distinguishable from other types of virtual property, but rather to define properly the limited scope I am addressing and thus avoid overreaching in my arguments without justification.

I also typically distinguish between 'object' and 'property' along the traditional property theory view that property is an intangible set of rights with respect to some thing. I use 'property' to refer to the set of rights and 'object' to refer to that thing to which the rights apply. Thus, I might say 'property rights in virtual world objects' instead of saying 'virtual world property' to make it clear I am referring to the rights aspect and not the object aspect. Making this distinction can be particularly useful in this area because we may have questions about both. Within typical situations involving personal property, we do not have much definitional difficulty understanding both what the thing or object is and what the rights are. Both are at issue in discussions of virtual property. What combination of code constitutes a 'virtual object' and what set of rights are included in the concept of 'virtual property' are both distinct, if interrelated, issues that need to be addressed.

Additionally, the virtual/virtual world distinction applies to objects as well. Thus, virtual world objects are a subclass of virtual objects. Again, I am not asserting that there are important differences between virtual world objects and other types of virtual objects, but rather defining a narrower scope of inquiry.

Herein, I will use the term 'virtual world property' instead of 'virtual world object' for two reasons. First, we are concerned here with the scope and extent of the relevant property rights rather than the functional characteristics of the coded virtual object. Second, I do not want the use of the word 'object' in 'virtual world object' to cause confusion with respect to the subject/object dichotomy discussed within the personhood theory. My use elsewhere² of the terms 'virtual object' and 'virtual world object' was not meant to imply that what was referred to was necessarily an object within the meaning of the subject/object dichotomy.

2. See M. Scott Boone, *Virtual Property, Ubiquitous Computing, and the Displacement of Property Rights*, 4 J. INFO. SOC'Y (forthcoming 2008).

B. *Virtual Worlds*

While there is no widely accepted definition of what a virtual world is, most definitions include some description of a simulated environment that is shared by multiple users, that is persistent, and that can be affected by the users. One of the leading experts on virtual worlds, Richard Bartle, described them in this way:

[They] are implemented by a computer (or a network of computers) that simulates an environment. Some – but not all – of the entities in this environment are under the direct control of individual people. Because several such people can affect the same environment simultaneously, the world is said to be *shared* or *multi-user*. The environment continues to exist and develop internally (at least to some degree) even when there are no people interacting with it; this means that it is persistent.³

The most popular virtual worlds today simulate three-dimensional graphical environments with which players can interact with and with each other. These interactions are mediated by the players' manipulation of their avatars. Avatars therefore act as the virtual representations of the players within the virtual world. If one were to take a snapshot of a typical scene within a virtual world, one might see a space, say a club or tavern, filled with a number of virtual people, or avatars. Each individual avatar is under the control of a different person in the real world sitting somewhere in front of a computer.⁴ Each person sees the same scene as other people, although each might be viewing the scene from a slightly different point of view. If one person, through their avatar, alters some part of the environment, the other players would observe that change. Thus, the space in virtual worlds is shared. Further, if one person logs out of the virtual world, the space remains for the other individuals and can still be altered by them. As the space continues to exist (at least virtually) after the person exits, it is persistent.

Virtual worlds can be divided into structured virtual worlds and unstructured virtual worlds.⁵ In structured worlds, players' avatars are often chosen from a small number of highly defined roles. Activities within structured worlds tend to be strongly oriented by the virtual

3. RICHARD A. BARTLE, *DESIGNING VIRTUAL WORLDS* 1 (2004).

4. This is the most common circumstance. In some instances, a single person might be controlling more than one avatar, and in other instances, a virtual representation that otherwise resembles an avatar may in fact be a bot being controlled by the computers controlling the virtual world.

5. This dichotomy could also be conceived of as a continuum.

world developers. While a player may have great freedom in the actions his avatar takes, the goals towards which those actions are aimed tend to be provided by the developer. Additionally, in a structured world, the virtual environments and the virtual objects within the world are defined and created by the developers. In contrast, unstructured virtual worlds provide much less definition. There are typically no roles assigned to avatars, and few goals provided by the virtual world developers. The roles in which avatars place themselves are left up to the players. Further, most of the content from virtual environments to virtual objects is created by the players and not the virtual world developers.

Virtual worlds can also be divided into game worlds and social worlds.⁶ In game worlds, players compete against the other players and against the environment to attain certain predefined goals. This is not meant to imply that social interaction does not take place within game worlds or that such interaction is not important. In fact, social interaction and social coordination are very important in most game worlds. While such interaction and coordination can in and of themselves be goals of the players, it is much more likely that the social interaction and coordination serve as a means to achieve the goals of the game. In social worlds, the goals of play are less defined, and the emphasis is on interaction with other players and with the environment.⁷

There is a large degree of overlap between these two classifications: structured and unstructured, game and social. Game worlds are almost exclusively highly structured virtual worlds. World of Warcraft⁸ provides an example of the current paradigm of a highly structured game world.⁹ Social worlds tend to be unstructured worlds, but the extent to which they are unstructured can vary quite a bit. Second Life¹⁰ is a paradigmatic example of an unstructured social world. The virtual world There¹¹ is a slightly less unstructured social

6. Again, this dichotomy could also be conceived of as a continuum.

7. Interaction with the environment occurs primarily in the form of creating content within the environment.

8. World of Warcraft, Community Site, <http://www.worldofwarcraft.com/index.xml> (last visited Mar. 26, 2008).

9. These games are often referred to as Massively Multiplayer Online Role-Playing Games, or MMORPG's. See Wikipedia, *Massively Multiplayer Online Role-Playing Game*, http://en.wikipedia.org/wiki/Massively_multiplayer_online_role-playing_game (as of Apr. 23, 2008, 21:47 GMT).

10. Second Life, <http://secondlife.com/> (last visited Mar. 26, 2008).

11. There, <http://www.there.com> (last visited Apr. 12, 2008).

world, while Habbo Hotel¹² and Club Penguin¹³ are social worlds that are decidedly more structured than either There or Second Life. The added structure in these worlds derives primarily from the lack of ability to create content and to a much lesser extent from the presence of preset goals.

In these worlds, players can acquire a variety of virtual world objects. These objects can range from clothing or armor for their avatar, to tools for use by their avatar, to virtual real estate. In structured game worlds, and to a lesser extent in unstructured social worlds, these objects are rivalrous. That is, only one player-avatar can make use of a given virtual world object at a particular time, and if one player transfers the virtual world object to another player, then the first player does not retain a copy. Making virtual world objects rivalrous increases the sense of a shared world. Maintaining the rarity of rivalrous objects also allows the virtual world operators to provide players with goals for game-play – namely the acquisition of such objects. Additionally, particularly within structured game worlds, avatars themselves can, through game-play, gain increased abilities to act within and to affect the virtual world. Both the acquisition (and retention) of virtual world objects and the increased abilities of an avatar add to the sense of the virtual world's persistence. These aspects also provide the players with goals for game-play.¹⁴

C. Approaches to Property Rights in Virtual World Objects

As a result of the fact that virtual world objects are persistent and most often rivalrous, markets for these virtual world objects have blossomed and grown both as direct trade between players and as a cottage industry. In addition to the in-world trade that is often encouraged by the virtual world operators, trade of virtual world objects also occurs outside of virtual worlds and involves the exchange of real world currency. This latter type of trade is most commonly referred to as real money transfer. Exchange of virtual world objects for real money is so extensive that economists have demonstrated that both the gross GNP and the per capita GNP of some virtual worlds rival that of real world countries.¹⁵

12. Habbo US, <http://www.habbo.com/> (last visited Apr. 12, 2008).

13. Club Penguin, <http://www.clubpenguin.com/> (last visited Apr. 12, 2008).

14. For a more extensive description of virtual worlds, see generally F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1 (2004) and Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1 (2007).

15. See Edward Castronova, *Virtual Worlds: A First-Hand Account of Markets and Society on the Cyberian Frontier* (Ctr. for Econ. Studies & Inst. for Econ. Research, Working

Because of the value associated with virtual world objects and because many virtual world operators dislike the practice of real money transfers, disputes have arisen over this industry. In turn, these disputes have given rise to the question of whether property rights exist with respect to virtual world objects.¹⁶

The first examination of virtual world property in the legal academic arena came in a 2004 article by Professors F. Gregory Lastowka and Dan Hunter entitled *The Laws of the Virtual Worlds*.¹⁷ Professors Lastowka and Hunter made the case that virtual world property was not different from other recognized types of property in a descriptive sense¹⁸ and that virtual world property could be justified by several of the major normative theories typically used to justify property rights.¹⁹ Within the analysis of the descriptive nature of property, they argued first that the intangibility of virtual world objects was not materially different from other intangible property interests.²⁰ Second, they argued that the possible temporal limitations placed upon virtual world property rights by the potentially ephemeral nature of virtual world objects did not make virtual world property descriptively different from other types of recognized property that also had temporal limitations.²¹ In their normative analysis, they argued that virtual world property could potentially be justified by three prevalent normative theories: the utilitarian theory of Bentham,²² the labor theory of Locke,²³ and the personhood theory of Radin.²⁴

Paper No. 618, 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294828; Mark Ward, *Virtual Gaming Worlds Overtake Namibia*, BBC NEWS, Aug. 19, 2004, <http://news.bbc.co.uk/2/hi/technology/3570224.stm>.

16. The question of whether property rights exist with respect to virtual world objects in turn gives rise to another question – to whom such rights are initially allocated. This latter question has been the subject of much less explicit discussion than the first question.

17. Lastowka & Hunter, *supra* note 14, at 29-51.

18. *Id.* at 37-43.

19. *Id.* at 43-50.

20. *Id.* at 40-42.

21. *Id.* at 42-43.

22. *Id.* at 44-46.

23. *Id.* at 46-48.

24. *Id.* at 48-50. Lastowka and Hunter referred to this theory under its alternate name, 'personality theory'. I use the name 'personhood theory' here to be consistent with the rest of this article. Additionally, Lastowka and Hunter attribute this theory, at least to some degree, to Hegel. However, whether Hegel even had a theory of property is highly contested. I have attributed the theory to Radin here both because it provides the reader with a proper view of how the rest of this article relates to Lastowka and Hunter's work and because I believe Radin's work was the primary source, along with Jeremy Waldron's work, for their discussion of this theory.

Subsequently, in an article entitled *Virtual Property*, Professor Joshua Fairfield has taken up the utilitarian justification of property rights in virtual world objects and expanded upon it with a law and economics justification.²⁵ First, he points out that property rights are generally granted in newly emerging resources in order to provide incentive for their proper development and use.²⁶ Then, he argues that, largely due to the interdependent nature of virtual environments, improper allocation of property rights in virtual environments can lead to an undesirable anticommons.²⁷ In an anticommons, overlapping property rights prevent anyone from making beneficial use of the property thus reducing overall value.²⁸ Property rights should therefore be allocated in a manner that cuts across potential conflicts and allows the use of the object to which the property rights attach.²⁹ Because virtual world objects define such a useable object, they are the proper unit in virtual environments to which property rights should be attached.³⁰

Just as Professor Fairfield's article took up the utilitarian argument in more detail, this article seeks to take up another of the normative justifications raised by Lastowka and Hunter – the personhood theory of Radin.

III. PROPERTY AND PERSONHOOD: RADIN'S THEORY

In 1982, Professor Margaret Jane Radin published an essay entitled *Property and Personhood* in which she initially introduced her personhood theory of property.³¹ Later, the theory also came to be referred to as the personality theory of property. At its core, the theory seeks to elaborate "the notion that ownership is bound up with self-constitution or personhood."³² The theory posits that we can describe

25. Joshua A. T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005). Professor Fairfield actually discusses virtual property beyond virtual world property.

26. *Id.* at 1065.

27. *Id.* at 1076.

28. *Id.* at 1069.

29. *See id.* at 1077-78. *See also id.* at 1070 (describing the distinction between vertical and horizontal property rights originally made by Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 670 (1998)).

30. *Id.* at 1077-78.

31. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) [hereinafter Radin, *Personhood*].

32. MARGARET JANE RADIN, REINTERPRETING PROPERTY I (1993) [hereinafter RADIN, REINTERPRETING PROPERTY].

two types of property or property relationships:³³ personal³⁴ and fungible.³⁵ 'Personal' property is that which has become bound up with the individual, the loss of which would cause a level of loss greater than the monetary value of the property.³⁶ Classic examples used by Radin are the home,³⁷ wedding rings,³⁸ and body parts.³⁹ Fungible property is property that is perfectly replaceable,⁴⁰ of which the classic example is money.⁴¹ Despite describing this classification as a dichotomy between personal and fungible property, Radin acknowledges that property exists on a continuum between personal and fungible.⁴²

My terms fungible and personal do not mark out a rigid binary dichotomy but rather mark the end points of a continuum. Nevertheless, the terms are useful. We understand certain categories as corresponding to the continuum's end points, or as close to it – we understand some categories of property items as being completely interchangeable with others of their kind without loss of value to the person (fungible), and some categories as being bound up with the person so as to be of unique and nonmonetizable value to the person (personal).⁴³

33. Radin initially used the term property, Radin, *Personhood*, *supra* note 31, at 957, but later thought that property relationships would have been a preferable term. RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 2. The later term, property relationships, is less ambiguous in that it more accurately describes what is of interest – the rights between individuals – as opposed to the thing or object to which the rights apply.

34. As Radin later acknowledges, the choice of the term 'personal' may not have been the best choice because 'personal property' is already widely used to refer to something else – personality. She suggests that the term 'constitutive' would have been a better choice. RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 2. However, because the academic literature surrounding this theory largely uses her original terminology, I will use it herein.

35. *Id.* at 2.

36. See Margaret Jane Radin, *The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 426 (1995) [hereinafter Radin, *O'Fallon Lecture*] ("I use the term personal property to refer to categories of property that we understand to be bound up with the self in a way that we understand as morally justifiable.").

37. Radin, *Personhood*, *supra* note 31, at 959.

38. *Id.*

39. *Id.* at 966. See also Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1856 (1987) [hereinafter Radin, *Market-Inalienability*].

40. Radin, *O'Fallon Lecture*, *supra* note 36, at 426-27 ("I use the term fungible property to refer to categories of property that we do not understand to be justifiably bound up with the self, but rather understand to be separate from the self in the sense that they are not implicated in self-constitution.").

41. Radin, *Personhood*, *supra* note 31, at 960.

42. Radin, *O'Fallon Lecture*, *supra* note 36, at 427.

43. *Id.*

However, most of her analysis and application of the personhood theory assumes that the property in question is either personal or fungible.⁴⁴

Whether property is personal or fungible is not determined by some characteristic of the thing, but rather by whether the thing and the rights in it have become bound up with the individual. If we apply the terminology of the classic subject/object dichotomy, then we would say that property becomes personal when it becomes more subject and less object, which is other to or outside of the self/subject.⁴⁵

In human life as we know it, self-constitution can include connectedness with things in the world; with a home, for example. Not everything we might be thus connected with in the world can be property, but some such things can be property. When an item of property is involved with self-constitution in this way, it is no longer wholly "outside" the self, in the world separate from the person; but neither is it "wholly" inside the self, indistinguishable from the attributes of the person. Thus certain categories of property can bridge the gap, or blur the boundary, between the self and the world, between what is inside and what is outside, between what is subject and what is object.⁴⁶

On the other hand, many examples of property are not bound up with the self and do not contribute to an individual's proper self-constitution. Property that remains object is fungible.

Lots of things that people own have little to do with self-constitution, however. People hold money not for its special relationship to who they are but for what it can buy in the way of other things. Many things that people own, such as items of property held only for investment, are just like money in this respect. Property items of this kind are understood as outside the self, and they do not serve to blur the boundaries of the self or subject.⁴⁷

44. See generally RADIN, REINTERPRETING PROPERTY, *supra* note 32.

45. Radin identifies this blurring of the traditional subject/object dichotomy as a feature of her pragmatist approach. RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 9:

Just as the blurring of the traditional distinction between empirical and normative (fact and value) is a pragmatist project, so too is the blurring of the traditional distinction between subject and object. My attempt to develop a view of property and persons that blurs the subject/object distinction is therefore another pragmatist aspect of my project.

46. Radin, *O'Fallon Lecture*, *supra* note 36, at 426.

47. *Id.*

Whether property is personal or fungible depends not on what type of thing it is, but rather on what an individual's relationship to the property is. Thus, the same type of thing can be personal for one individual and fungible for another. For example, a wedding ring may be simple fungible property to the artisan who produced it⁴⁸ and the jeweler who sells it, because the artisan and jeweler hold the ring only as property that can be exchanged for value. However, the very same ring may become personal property when it becomes bound up with a spouse's personhood, when it reaches a certain level of importance relative to the spouse's self-constitution.⁴⁹ Similarly, a house or apartment can be fungible property when held by a builder or landlord, but may become personal property for one who dwells in the house or apartment.⁵⁰

Radin draws philosophical inspiration from both Hegel and Kant.⁵¹ In her initial work, Radin focused primarily on Hegel and his view that a person has no concrete existence until that person exercises his will on the outside world.⁵² She saw a parallel between her personhood theory of morally-justifiable self-constituting property and Hegel's idea that "[b]ecause the person . . . is merely an abstract

48. Under various natural right theories about the relationship between personhood and external objects, however, a ring thus crafted could be connected to its creator.

49. Radin, *Personhood*, *supra* note 31, at 959 ("For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of replacement will not restore the status quo – perhaps no amount of money can do so.").

50. *Id.* at 960 ("Other examples are the wedding ring in the hands of the jeweler, the automobile in the hands of the dealer, the land in the hands of the developer, or the apartment in the hands of the commercial landlord."); *id.* at 992:

There is more to the rationale based on sanctity of the home; it contains a strand of property for personhood. It is not just that liberty needs some sanctuary and the home is a logical one to choose because of social consensus. There is also the feeling that it would be an insult for the state to invade one's home because it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference.

51. RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 7:

My view that persons can be become bound up with external objects can be related to Hegel, who argued in his *Philosophy of Right* that placing the will into an object takes the person from abstract to actual. It can also be related to Kant, who argued in his *Rechtslehre* that property was necessary to give full scope to the free will of persons: they must have control over objects in order fully to constitute themselves as persons.

See also Radin, *Personhood*, *supra* note 31, at 971-79; Radin, *Market-Inalienability*, *supra* note 39, at 1891-98.

52. Radin, *Personhood*, *supra* note 31, at 972-73.

unit of free will or autonomy, it has no concrete existence until that will acts on the external world. . . . [T]he person becomes a real self only by engaging in a property relationship with something external."⁵³ Although Kant's view of a person as reducible to an autonomous agent of free will and his view of the strict boundary between subject and object⁵⁴ appear at odds with Radin's theory, Radin did find some level of coherence between her theory and Kant's conclusion that "property must become a juridical (i.e., socially mediated) relationship precisely because it is crucial to the full scope of the will of persons."⁵⁵ In later writings, Radin makes clear that she was not intending to use Hegel (or Kant) as a theoretical base for her theory; rather she was pointing out "certain resonances" between their work and her theory.⁵⁶

The argument that some property is bound up with the self to the point that it has become self-constitutive, that it has come to blur the line between subject and object, is only part of Radin's analysis.⁵⁷ In addition to recognizing that connections can exist between a person and property, Radin's theory also introduced a normative aspect that asked whether such a connection between an individual and a particular property should be recognized as personal—that is given greater protection.⁵⁸ Not all subjectively important connections to property, therefore, are protected as personal under Radin's theory. In addition to good object-relations, Radin also acknowledged that individuals could also form bad object-relations, which she also referred to as fetishistic connections.⁵⁹ So, under the theory's normative aspect, not all strong connections between a person and property should be recognized under and protected by her personhood theory.

53. *Id.*

54. See Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1351-57 (1996).

55. RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 8.

56. *Id.* at 7 ("I do no more than point out certain resonances between these texts and the cultural/legal understanding I am trying to illuminate."); *id.* at 8 ("I did not mean to take Hegel as a theoretical foundation for my view, but only as a suggestive text.").

57. *Id.* at 4-5.

58. *Id.*

59. Radin, *Personhood*, *supra* note 31, at 968-70 (Radin appears to borrow the term 'fetishism' from Marxist theories.). See also Radin, *Market-Inalienability*, *supra* note 39, at 1871-74. Just as Radin drew inspiration from the philosophical work of Hegel and Kant when describing the self-constitution of the person through property, Radin appears to draw some amount of inspiration from Marx and later Marxist theorists for her distinction between person-property relations (those that should be recognized as personal and those that should not.). *Id.*

To determine when property had become important enough to an individual's personhood and when that connection constituted good object-relations which should be protected under the theory, Radin initially said that we should look to an "objective moral consensus" of what property relations contributed to "healthy self-constitution."⁶⁰ During the years between the initial publication of the *Property and Personhood* article, which introduced her theory, and the publication of her book *Reinterpreting Property*, the linguistic formulation of this test evolved.⁶¹ Because the term 'objective' seemed to contradict the term 'consensus' and because the term 'objective' carried a great deal of philosophical baggage that did not coincide with the pragmatic meaning she intended, the term was not used in any formulations after the initial article.⁶² Additionally, the term 'consensus' was dropped because it gave too many readers the impression that what constituted personal property could change as simple majority viewpoints changed.⁶³ Similarly, the term 'healthy' evolved into 'human

60. Radin, *Personhood*, *supra* note 31, at 969:

Because I seek a source of objective judgments about property for personhood, but do not wish to rely on natural law or simple moral realism, consensus must be a sufficient source of objective moral criteria—and I believe it can be, sometimes, without destroying the meaning of objectivity. In the context of property for personhood, then, a thing that someone claims to be bound up with nevertheless should not be treated as personal vis-à-vis other people's claimed rights and interests when there is an objective moral consensus that to be bound up with that category of thing is inconsistent with personhood or healthy self-constitution.

61. See RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 4 ("I would put it differently now, after some years of wrestling with pragmatist ideas.").

62. See *id.*

I would no longer use the word 'objectivity' so unselfconsciously. (Indeed, 'objectivity' does not appear in this unproblematic way in any essay after the first.) It is not that the word is without meaning for the pragmatist. There are indeed things that we experience as existing apart from us and outside our control. But the word has too much baggage in the history of modern Western thought. The baggage is essentialism, the kind of traditional philosophical realism that the pragmatist denies.

63. See *id.* at 4-5.

I would no longer use the word 'consensus' to describe the kind of strong entrenchment of concepts like personhood in our culture and discourse. ("Consensus" does not appear in the essays written after "Property and Personhood.") I was groping for a vocabulary in which to express the pragmatic understanding of objectivity: shared understandings that are, for now, too entrenched to be revisable by individuals, and are experienced by individuals as coming from outside themselves. "Objective moral consensus" was a particularly unfortunate phrase in which to try to express this entrenchment because the foundationalist baggage attached to "objectivity" implied for most readers a kind of transcendent reality divorced from the activities of human beings.

flourishing' because the former invited too much confusion as to whether one was to consider 'healthy' for its descriptive implications or its normative implications.⁶⁴

Instead, Radin said that, in making determinations about whether particular self-constitutive property relations are good or bad, whether they contribute to human flourishing or not, we should take an approach inspired by philosophical pragmatism and look for moral views with a "strong entrenchment."⁶⁵

Not everything with which someone may subjectively identify herself should be treated legally or morally as personal. Otherwise the category of personal things might collapse into "consumer surplus": anything to which someone attached high subjective value would be personal. The question whether something is personal has a normative aspect: whether identifying oneself with something—constituting oneself in connection with that thing—is justifiable. What makes identifying oneself with something justifiable, in turn, is an appropriate connection to our conception of human flourishing.⁶⁶

Importantly, Radin's theory is at first implicitly and later consciously both pragmatic and nonideal.⁶⁷ She appears to reject conceptualism, the idea that there exists a particular concept of

Thus, "objectivity" seemed to contradict what was implied by "consensus," which has its own baggage having to do with groups of individuals entering into a social contract. To most readers, "consensus" seemed to imply a naïve kind of conventionalism. It seemed to suggest that normative understandings are determined by taking a survey of people's views, or asking people to vote.

64. *Id.* at 5 ("I would no longer make 'health' ('healthy self-constitution') the criterion by which we distinguish good from bad property attachments . . . I now think it will advance the argument much better to speak directly about human flourishing, rather than health.").

65. *Id.* at 4. See also Radin, *O'Fallon Lecture*, *supra* note 36, at 427 ("These categories of understanding are not transcendent but rather relate to cultural commitments.").

66. Radin, *Market-Inalienability*, *supra* note 39, at 1908.

67. Radin, *O'Fallon Lecture*, *supra* note 36, at 425:

I now think my characterization of the main aspects of personhood . . . owed too much to past ideal theories about personhood. As a pragmatist, I believe nonideal theory is also necessary. To be a bit more precise, I believe our visions about the nature of human beings and the nature of the good life for human beings cannot be too far divorced from the circumstances that give rise to those visions, from what gives them their bite, their urgency. These circumstances include an understanding that our life at present falls short of the good life for human beings, as well as what we understand to be the specifics of its deficiencies.

See also Radin, *Market-Inalienability*, *supra* note 39, at 1915 ("In spite of our ideals, justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us.").

property that is the right one or the only one, and formalism, the idea that a particular property concept can be applied formally, that is to say logically and mechanically.⁶⁸ Instead, "'pragmatism' suggests, if nothing else, a focus on context and practice, as well as a drawing back from grand theory."⁶⁹ As Radin herself has written, "[p]ragmatism is essentially particularist, essentially context-bound and holistic; each decision is an all-things-considered intuitive weighing. Pragmatism is indeed 'essentially' ad hoc."⁷⁰ Therefore, Radin does not offer any comprehensive theory on what contributes to human flourishing.⁷¹ As a result of taking a pragmatic approach that borders on a positivist approach,⁷² Radin only describes particular examples of property that when self-constitutive can further human flourishing.⁷³

Once property is found to be personal as opposed to merely fungible, the rights associated with that personal property are potentially altered. The personhood theory can be described as affecting property rights in two ways.⁷⁴ First, personal property is given preferential treatment, that is to say personal property is favored over fungible.⁷⁵ Thus, if an object has become incorporated into the subject, in other words if it has become 'personal' property, then it should be protected to the detriment of a fungible property interest held by another; the interest in personal property should be favored over fungible property.⁷⁶ The functioning of rent control statutes

68. RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 100.

69. Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 348 (1993).

70. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680 (1988).

71. See Schnably, *supra* note 69, at 357; Margaret Jane Radin, *Justice and the Market Domain*, in MARKETS AND JUSTICE 165, 188 (John W. Chapman & J. Roland Pennock, eds., 1989) ("I have no handy algorithm for making this decision."). See also Radin, *Market-Inalienability*, *supra* note 39, at 1908 ("There is no algorithm or abstract formula to tell us which items are (justifiably) personal.").

72. RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 9 ("[T]he blurring of the traditional distinction between empirical and normative (fact and value) is a pragmatist project").

73. See Schnably, *supra* note 69, at 357.

74. See *id.* at 357-58.

75. *Id.*

76. *Id.*

[O]ne method is to favor personal over fungible property interests. For example, the state may, in effect, give tenants permanent tenure on good behavior by restricting the right of landlords to evict the tenants. Or the state may require a shopping center owner to permit protestors to demonstrate on the premises. In each case, the individuals with the personal interest (the tenants and the

would be an example of this effect of the personhood theory of property.⁷⁷ A tenant's property right, which is personal, is protected to the detriment of the landlord's property interest, which is considered fungible. Second, the alienability of personal property may be restricted.⁷⁸ Property that is or that has become 'personal' property may be market inalienable; in other words, that property should be maintained in a non-commodified state.⁷⁹ Something that is market inalienable can be given away, but not sold.⁸⁰ Radin applied her theory in this way to sexual services, adoption markets, and surrogacy services.⁸¹

IV. VIRTUAL PERSONHOOD: APPLYING RADIN'S THEORY TO VIRTUAL WORLD PROPERTY

Having introduced the phenomena of virtual world property and examined Radin's personhood theory of property, this Part will seek to test the application of the latter to the former. This analysis will be divided into two inquiries. The first inquiry will examine whether virtual world property can be classified as personal within Radin's meaning of that term.⁸² The second inquiry will examine what implications would follow from a determination that some virtual world property qualifies as personal.⁸³

A. Can Virtual World Property Be Personal?

The first question to address in applying Radin's personhood theory to virtual world property is whether virtual world property can be classified as personal within Radin's personal-fungible continuum. The extent of the question being asked is better understood in light of

protestors) prevail over the individuals with the fungible property interest (landlords and mall owners). Favoring a personal interest could also mean giving it greater protection from state interference.

77. See generally Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986) [hereinafter Radin, *Rent Control*].

78. See Schnably, *supra* note 69, at 357-58.

79. *Id.* at 358 ("A second technique for protecting a personal interest is to decommodify it or make it market-inalienable, meaning that it can be given away but not sold. Our ideal of human flourishing indicates that some attributes or property should not exist in a commodified form at all").

80. *Id.* See also Radin, *Market-Inalienability*, *supra* note 39, at 1853 ("This nonsalability is what I refer to as market-inalienability. In precluding sales but not gifts, market-inalienability places some things outside the marketplace but not outside the realm of social intercourse.").

81. See Radin, *Market-Inalienability*, *supra* note 39, at 1921-36.

82. See discussion *infra* Part IV. A.

83. See discussion *infra* Part IV. B.

a few important qualifications. First, just as it was useful for Radin to simplify her analysis by treating the continuum as a dichotomy,⁸⁴ it will be useful here as well. In other words, we will be asking whether virtual world property exists far enough along that continuum on the personal end to be treated as fully personal rather than trying to identify exactly where on the continuum virtual world property might be. Second, just as Radin's theory does not attempt to classify all property of a specific type as personal but instead attempts to establish that some property of a specific type held in the right manner can be classified as personal,⁸⁵ so too will we seek to ask whether some virtual world property can be considered personal rather than fungible. In other words, Radin did not argue that all wedding rings are always held as personal property; she argued that some wedding rings, when held in a self-constitutive manner conducive to human flourishing, were personal.⁸⁶ Similarly, we are not asking whether all virtual world objects are personal, but rather whether some can be considered personal. Finally, the question does not seek to prove generally the existence of property rights in all virtual world objects. Radin's theory presumed the existence of property rights in fungible property and did not seek to provide any independent justification for those rights.⁸⁷ Her theory only sought to identify and describe a special class of property – personal property.⁸⁸ Similarly, we do not seek to provide an independent justification for property rights in all virtual world objects; instead, we seek only to ask whether some subclass of virtual world property should be treated as personal property within Radin's meaning of that term.

Answering the question turns out to be highly problematic. Radin acknowledges that there is no easy algorithm for determining what property should be considered personal.⁸⁹ The theory appears to ask first whether property has become so bound up with the self so as to blur the boundary between subject and object⁹⁰ and then second

84. See Radin, *Personhood*, *supra* note 31, at 987.

85. *Id.*

86. *Id.* at 959-60.

87. See *id.* at 986.

88. Radin's theory does not appear to be dependent upon the existence of a system of fungible property rights except to the extent that it fashions rules that operate within an existing system of broadly applicable fungible property rights. As we might expect from a pragmatic approach, her theory merely observes a system of fungible property rights and then seeks to work in reference to it. See generally RADIN, *REINTERPRETING PROPERTY*, *supra* note 32.

89. See, *supra* note 71 and accompanying text.

90. See Radin, *Personhood*, *supra* note 31, at 959.

whether such a connection is morally justifiable, that is whether such a connection supports human flourishing.⁹¹

As a starting point in determining whether virtual world property can become bound up with the self, we might initially examine the subjective value of virtual world property. That individuals place a high subjective value on virtual world property is not too difficult of an argument to make. Millions of people invest large amounts of both time and money in obtaining and using virtual world property.⁹² Some studies suggest that regular players spend on average more than twenty hours a week in virtual worlds.⁹³ Much of that time is spent acquiring or improving virtual world objects; all of it is spent using virtual world objects.⁹⁴ Some players spend hundreds or even thousands of dollars to obtain highly desired virtual world objects.⁹⁵ Further, in addition to placing high subjective value on virtual world objects, individuals also appear to strongly identify with some virtual world objects, particularly avatars.⁹⁶ While it is clear that most players do not identify with their avatars in a way we would recognize as meeting Radin's requirement-that the connection blur the line between subject and object, it is quite likely that some players' connections to their avatars do.⁹⁷

However, holding high subjective value in and having strong connection to some property are not sufficient to classify property as personal.⁹⁸ If it were sufficient, then the capitalist compleat would hold his financial empire as personal property merely because he valued it highly and he identified himself through it.⁹⁹ In addition to showing a self-constitutive connection to virtual world property, we would also need to show that such a connection supported human

91. *Id.* at 961.

92. See JULIAN DIBBELL, *PLAY MONEY: OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT* 12-14 (2006).

93. See, e.g., The Daedalus Project: The Psychology of MMORPG, <http://www.nickyee.com/daedalus/> (last visited Apr. 12, 2008).

94. See DIBBELL, *supra* note 92.

95. *Id.*

96. See Lastowka & Hunter, *supra* note 14, at 63-68.

97. Remember that we are not seeking to demonstrate that all virtual world property is personal, only to demonstrate that some virtual world property can be personal. The percentage of a particular type of virtual world property that is personal may impact what rules are adopted. For example, if the percentage is sufficiently small, then we might not choose to protect the type as a whole through market inalienability. But that concern is beyond the question we are asking here.

98. Radin, *Market-Inalienability*, *supra* note 39, at 1908.

99. See Radin, *Market-Inalienability*, *supra* note 39, at 1908.

flourishing in order to be justifiably classified as personal property.¹⁰⁰ To define human flourishing and what supports it, we would look to strongly entrenched moral views.¹⁰¹ This is where an attempt to demonstrate that virtual world property can be classified as personal becomes particularly problematic. While we might begin to consider the extent to which potentially personal virtual world property enhances to the somewhat fuzzy concept of human flourishing, the mixture of positivist and normative approaches in Radin's pragmatism leaves us with little guidance in novel situations such as virtual worlds.

In initially examining whether a view that personal connection to virtual world property is conducive to human flourishing is strongly entrenched in our moral system, we might start by looking at the common or popular view of virtual worlds and of the individuals who invest large amounts of time within them. Much of the coverage of virtual worlds in the press and in popular media is of a sensationalized nature. While the successful business side of virtual worlds gets some news coverage, particularly in technology oriented news outlets, negative stories about virtual worlds seem to get more widespread news coverage; mainstream news outlets cover virtual worlds when one player murders another player in real life because that player stole a virtual world object from the murdering player,¹⁰² or when an individual dies in real life because he was playing in a virtual world for several straight days.¹⁰³ In popular media such as television shows, we see more of the same. Shows such as *Law & Order: SVU*,¹⁰⁴ *CSI: New York*,¹⁰⁵ *NCIS*,¹⁰⁶ and *NUNMB3RS*¹⁰⁷ have all aired episodes in which some individual who is portrayed as having become overly involved in a virtual world either kills himself or someone else

100. *Id.*

101. See RADIN, REINTERPRETING PROPERTY, *supra* note 32, at 4-5.

102. See, e.g., 'Game Theft' led to fatal attack, BBC NEWS, Mar. 31, 2005, <http://news.bbc.co.uk/2/hi/technology/4397159.stm>.

103. See, e.g., Choe Sang-Hun, *Hooked on the virtual world: A reality in South Korea*, INT'L HERALD TRIB., June 12, 2006, <http://www.iht.com/articles/2006/06/11/business/addside12.php>; Stanley A. Miller II, *Death of a Game Addict*, J. SENTINEL, Mar. 31, 2002, <http://www.jsonline.com/story/index.aspx?id=31536>; Carmen Ivanov, *Two Fanatic World of Warcraft Gamers Have Died Because Of WoW - Are there more to come?*, SOFTPEDIA, Nov. 8, 2005, <http://news.softpedia.com/news/Two-Fanatic-World-of-Warcraft-Gamers-Have-Died-Because-Of-WoW-11821.shtml>.

104. *Law & Order: Special Victims Unit: Game* (NBC television broadcast Feb. 8, 2005).

105. *CSI: New York: Down the Rabbit Hole* (CBS television broadcast Oct. 24, 2007).

106. *NCIS: The Immortals* (CBS television broadcast Oct. 14, 2003).

107. *NUMB3RS: Primacy* (CBS television broadcast Nov. 9, 2007).

because of the over involvement with the virtual world. The treatment of virtual worlds in mainstream news and popular media is very reminiscent of the hysteria with which fantasy role-playing games such as *Dungeons & Dragons* were treated in the late 1970's and early 1980's.¹⁰⁸ It also has a flavor of the concern with virtual reality in the early 1990's – that users of virtual reality would ignore the real world in favor of spending all of their time in virtual reality to the detriment of both themselves and the real world. Notably, most of these examples of treatment in news coverage and popular media do at least implicitly stress a high level of connection between the individual and the virtual world object, most commonly an avatar. They portray a high degree of blurring between an individual's self and avatar, between the real world and the virtual world. However, that connection and that blurring are portrayed as highly negative.

While I have little doubt that few people would want the mainstream news and popular media industry to be the final arbiters of our society's moral views, that industry is adept at reading its targeted audience. Therefore their negative portrayal of virtual worlds nonetheless has value as an indicator even if we would not accept it as proof. Further, even though it may be weak as evidence of our moral views, it is evidence that contradicts what we would need to classify virtual world property as personal, and thus, however weak, it moves us farther from demonstrating that virtual world property can be considered personal. What we would need and what we do not observe is evidence of the protection of virtual world property because of some strongly entrenched feeling that it should be given greater protection. That is not to say that virtual worlds and virtual world property is not beneficial to human flourishing or that they will not someday become recognized as so, but rather that they are not so recognized now.

Recall that Radin's personhood theory is, particularly in this step, a combination of positivist and normative approaches.¹⁰⁹ It is not a theory that attempts to derive an entire system of property rights from a starting principle; it does not attempt to explain all aspects of property. The theory is pragmatic in nature and is a mixture of

108. See, e.g., *MAZES AND MONSTERS* (McDermott Productions 1982) (a Tom Hanks movie about a college student who comes to confuse a fantasy role-playing game with reality); Wikipedia, *Mazes and Monsters*, http://en.wikipedia.org/wiki/Mazes_and_monsters (as of Mar. 15, 2008, 15:56 GMT).

109. See RADIN, *REINTERPRETING PROPERTY*, *supra* note 32, at 9 (describing pragmatism as a combination of empirical and normative approaches). See also Radin, *Personhood*, *supra* note 31, at 958.

positivist and normative approaches. The theory is therefore more useful, at least more easily applicable, the more it relies on its positivist aspect. That is to say, the more the underlying normative result in a particular circumstance is agreed upon, the better it works, the more acceptable its application. Radin derives her theory from observations of what appears to her to be certain types of property that are fairly consistently given greater protection, such as the home for example.¹¹⁰ This is the positivist aspect of her theory and her pragmatic approach. In novel contexts, such as that presented by virtual worlds, the positivist aspect of her theory is not able to bolster the normative inquiry; observation of virtual worlds is unlikely to reveal any strongly entrenched moral views relating to specifics of virtual world property.

Additionally, the criticism that existing and new rules have a recursive effect on any consensus or strong entrenchment on what constitutes personhood may become more relevant. Radin's early description of the normative step of determining if the connection to property should be recognized as personal relied on reference to an objective moral consensus.¹¹¹ This drew criticism related to potential feedback effects. First, any consensus of what constituted good property relations could change over time, and second, granting higher protection to a type of property could in turn affect that consensus.¹¹² Thus, the criticism went, the recognition of property as personal under Radin's theory could influence the consensus about what should be protected, creating an opposite causal relationship from what Radin intended.¹¹³ Even though Radin has sought to move away from a standard as mutable as one based on consensus,¹¹⁴ her newer formulation of the normative measure, a strong moral entrenchment¹¹⁵, is likely to be susceptible to the same criticism, even if to a lesser degree. Susceptibility to this criticism is even more acute with respect to novel contexts, such as virtual worlds. While recognition of property as personal may have only a small recursive effect on a strong moral entrenchment that pre-exists that recognition, the effect may be much greater in novel contexts, such as virtual worlds, in which strong entrenchments do not yet exist.

110. See *supra* note 37 and accompanying text.

111. See *supra* note 60 and accompanying text.

112. See generally Schnably, *supra* note 69, at 362-75.

113. *Id.*

114. See *supra* notes 62-64 and accompanying text.

115. See *supra* notes 65-66 and accompanying text.

Furthermore, we would be less concerned with being led astray by any effects from feedback in established contexts than we would be in novel contexts. With established rules and contexts, the home for example, Radin's mixed positivist and normative approach still seems likely to yield a beneficial result in the view of a pragmatist even if there is some feedback between recognizing property as personal and the strong moral entrenchment about that property deserving protection as personal property. We feel more confident that the strongly entrenched moral conviction has value and less worried about any negative effects arising out of potential feedback from personhood-based rules back onto the entrenchment because we have long standing experience with established rules and contexts. But can we say the same for situations in which the rules and contexts are new? In these novel situations, we do not have established normative ground to build upon. There is likely no moral view yet strongly entrenched in these novel situations. Without better normative guidance, guidance that is less dependant upon a positivist approach, we seem less likely to reach an initial beneficial result, or at least less likely able to even judge the desirability of the result. The positivist approach does not work to identify our "normative" basis. We can extrapolate from other situations and contexts, but the more novel the situation, the less certain we can be. The threat of feedback becomes more urgent; the rule can largely generate the strong entrenchment rather than the other way around.

B. Potential Implications of Finding Virtual World Property Personal

As discussed above, a finding that property is personal under Radin's personhood theory can affect property rights in two ways. First, personal property can be given preferential treatment relative to fungible property, and second, personal property may have restricted alienability.¹¹⁶ Thus, if virtual world property is found to be personal as defined by Radin's personhood theory,¹¹⁷ the rights associated with virtual world property might be affected in both of these ways. Therefore, virtual world property rights might be favored over

116. See *supra* notes 74-81 and accompanying text.

117. Even though the previous section concluded that it was difficult to demonstrate that virtual world property could be considered personal, see discussion *supra* Part IV.A, this section assumes that virtual world property is personal for the purpose of examining the implications of such a conclusion.

competing fungible property rights, and the alienability of virtual world property might be restricted.

1. Disputes Between Players and Virtual World Operators

Favoring players' personal property rights in virtual world objects over the fungible property rights of virtual world operators might be one effect of determining that virtual world property is personal.¹¹⁸ Radin's personhood theory could thereby provide support for a player in a dispute with an operator of a virtual world. One of the results of granting greater protection to personal property rights under Radin's theory is that where one individual's rights in personal property conflict with another individual's rights in fungible property, the former rights are favored. This remains true for situations in which two individuals have rights in the same property. If one individual's property interest is personal, while the other's is fungible, the former should prevail under the personhood theory, or at the very least, the former should be favored. Therefore, if the player's property interest is personal and the virtual world operator's property interest is fungible, Radin's personhood theory would favor the player's interest over the virtual world operator's interest.

This effect is highly analogous to the application of the personhood theory to justification of rent control statutes.¹¹⁹ In the rent control context, both the tenant and the landlord hold an interest in the relevant property, the residential rental unit. Yet, rent control statutes protect the property rights of tenants to the detriment of the property rights of landlords. Radin's theory of property for personhood provides support for these statutes.¹²⁰ Since the residential rental unit is the tenant's home, it will often be considered personal under Radin's theory.¹²¹ In contrast, the interest of the landlord will almost always be considered fungible; it is in other words merely an

118. This assumes the most likely scenario that the players' interests are personal and the virtual world operators' interests are fungible. That is of course not the only possible scenario. Virtual world operators could theoretically be so deeply connected to their world that their rights could be considered personal if a strong moral entrenchment supported that such a connection furthered human flourishing. However, it seems more likely, relatively speaking, that players' interests would be considered personal while virtual world operators' interests would be considered fungible.

119. The putative effect of making a determination that virtual world property is personal is analogous; this discussion is not intended to argue that virtual world property is analogous to rental units as homes with respect to whether virtual world property can be considered personal.

120. See Radin, *Rent Control*, *supra* note 76, at 350-52.

121. *Id.* at 350.

investment that is fully replaceable by equal monetary value.¹²² Therefore, the tenant's property right should be favored over the landlord's property right because the former is personal and the latter is fungible.¹²³ The player's property rights in virtual world objects are analogous to the tenant's property rights while the virtual world operator's property rights are analogous to the landlord's property rights. Because the two sets of rights are interdependent, protecting one can be detrimental to the other. The application of the personhood theory would conceivably do just that. As personal property rights, the player's property rights would be favored over the virtual world operator's fungible property rights just as a tenant's personal property rights in the tenancy would be favored over the landlord's underlying fungible property rights.

In exercising control of virtual worlds, virtual world operators can in the exercise of their own rights impinge upon the property rights of players in virtual world objects. One example would be nerfing. The practice of nerfing refers to the virtual world operators' reduction of a virtual world object's capabilities after it has been distributed. When a virtual world operator uses their control over the virtual world to reduce the in-world capabilities of a particular type of object, the player's property rights in that object are arguably impacted. Another example would be the practice of resetting virtual worlds to a previous point in time. Essentially, virtual world operators can reset the virtual world to an earlier point in time. This is generally done either in an attempt to correct some systemic problem or as a response to a technical problem. When reset, everything in the virtual world basically jumps back to where and how it was at an earlier point. This can potentially impact a player's property rights by removing from the player virtual world objects and avatar-based abilities obtained prior to the reset and subsequent to the point in time to which the world is reset. A more dramatic example would be the simple banning of a player. If the virtual world operators ban a player from the virtual world by terminating the player's account access, then the player is effectively stripped of all virtual property right the player might have had. One final example would be virtual world operators shutting down a virtual world entirely. Virtual world operators can simply stop operating the world; the virtual world ceases to be. When that happens, players would lose all access to any virtual property.

122. *Id.*

123. *Id.*

Each of these is an example of the fungible property rights of the virtual world operators trumping the potentially personal property rights of players. However, Radin's personhood theory seeks the opposite result. Thus, in each case, the theory's application might result in a legal rule preventing the relevant action by the virtual world operators. The question then becomes when the personhood theory will intervene and mandate a legal rule that produces a different result, a result favoring the personal property right of the player.

The personhood theory of property does not completely protect personal property under all circumstances. When the theory mandates such protection is not enunciated particularly clearly. This is another area in which the theory's positivist aspect makes its application to novel circumstances problematic. The analogy to the theory's application to the justification for rent control statutes may be helpful. Through rent control statutes, landlords are prevented from raising rent beyond a proscribed amount for a tenant, who is presumed to have a personal property interest in their rented home. Landlords are also blocked from simply evicting the tenant in order to charge a subsequent tenant greater rent. Landlords are, however, permitted to evict the tenant based on the bad conduct of the tenant. The limitation on the landlord appears then to relate to the reasons for the landlord's exercise of their fungible property rights and landlord's concomitant interference with the tenant's personal property rights. If the landlord's actions are for pure economic gain, then the interference with the tenant's personal right may not be permitted. The landlord can neither raise the tenant's rent nor evict the tenant in order to lease to a subsequent tenant at a higher rental rate just because the rental market might bear it. The landlord is not allowed to exercise her fungible property rights to extract greater rents because it would impact the tenant's personal property rights. Instead, under the explanation of rent control statutes provided by Radin's personhood theory of property, the landlord's rights yield to the tenant's rights. One possible explanation for when the landlord's fungible rights should yield to the tenant's personal rights is that the fungible rights should yield when the fungible right is being exercised only for economic gain. Thus, a landlord cannot act against a tenant's personal property rights just for economic gain but can act against that personal right because of the bad behavior of the tenant.

If we apply this interpretation to our virtual world examples, then we see that applying the personhood theory to virtual world property may not affect the outcome in many of the examples. Neither

nerfing nor resetting are generally done simply to extract more value from players. Instead, they are typically done to correct either some problem with the design of the virtual world or some problem of a technical nature within the world. If a player is denied access to the virtual world and his virtual world property because he has behaved badly and has therefore been banned, then the virtual world operator is not acting to extract more value from that player. So, even if players had property rights in virtual world objects and those rights were considered personal under Radin's theory, the theory would not mandate a legal rule in these instances to produce a different result.

In other examples, however, the theory might mandate a different result. If a player is denied access to the virtual world simply because the player is unable to pay the increased fees demanded by the virtual world operators for access, then favoring personal property rights over fungible property rights might produce a rule preventing the virtual world operators from raising fees in such a manner.¹²⁴ Similarly, if virtual world operators shut down a virtual world only to manipulate the market in favor of a new virtual world they are producing and to extract thereby additional value, then the personhood theory might block such a move by virtual world operators.

Once we identify the possible effects of applying the personhood theory to virtual world property, we see that the possible criticisms of such an application are also analogous to the criticisms levied against rent control. Rent control statutes have been criticized as actually exacerbating the problem they were nominally supposed to address: rental housing shortages.¹²⁵ Price-theory analysis states that limiting the amount of rent a landlord can charge to an amount lower than what the market will bear will decrease the incentive for landlords both to use current buildings for residential rental purposes and to construct new residential apartment buildings.¹²⁶ As a result, price-theory suggests, rent control statutes will actually increase the shortage of rental housing.¹²⁷ Criticisms brought against virtual property generally, criticisms that would likely be even more heavily levied against the effects of the personhood theory described above, parallel the criticisms leveled against rent control by price-theory. The

124. Such fee inflation is purely hypothetical. Fee inflation analogous to the level of rent inflation that leads to rent control has not been observed.

125. See Radin, *Rent Control*, supra note 77, at 350-52.

126. *Id.* at 350.

127. *Id.*

criticism of recognizing virtual property rights is that recognizing such rights places restrictions on what virtual world operators can do and thereby gives rise to potential liability on the part of virtual world operators.¹²⁸ This reduces incentives to create and operate virtual worlds, which in turn reduces opportunities for players to participate in greater numbers and varieties of virtual worlds.¹²⁹ Thus, if virtual property rights reduced access to virtual worlds and if virtual property rights supported human flourishing, a conclusion necessary to recognition of virtual world property as personal, then the application of the personhood theory to virtual world property could be self-defeating by actually reducing the opportunities for human flourishing.

2. The Alienability of Virtual World Property

The second way in which recognizing virtual property rights as personal under Radin's personhood theory might affect virtual property relates to the right of alienability. Under Radin's theory, highly personal property¹³⁰ may have partially or completely restricted alienability.¹³¹ Specifically, it may be market inalienable; in other words, it may be given away but not sold.¹³² It is maintained in a non-commoditized state.¹³³ Thus, if virtual world property is found to be personal, then the personhood theory may mandate that virtual world property be maintained in a completely or partially non-commoditized state.¹³⁴

Interestingly, making virtual world property market inalienable is a result that stands in direct opposition to the result initially sought by players claiming property rights in virtual world objects. Those players sought the legal ability to sell virtual world property. Thus, the real money transfer controversy that originally raised the issue of property rights in virtual world objects asked if players have the right to alienate virtual world objects in a market. Most of the virtual world

128. Richard Bartle, *Pitfalls of Virtual Property*, THEMIS GROUP, 2004, at 9, <http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf>.

129. *Id.*

130. Some things may be so highly personal that referring to them as property at all may be harmful to personhood. Thus, Radin later adopted the use of terms such as 'attributes' to describe the highly personal. See Radin, *Market-Inalienability*, *supra* note 39, at 1885.

131. See generally Radin, *Market Inalienability*, *supra* note 39.

132. *Id.* at 1850.

133. *Id.* at 1855.

134. For the sake of simplicity, I will not hereafter distinguish between partial non-commodification and complete non-commodification.

property debate has therefore focused, perhaps without reflection, on the commodification of virtual world objects and on the allocation of that commodity. Even if it is unfair to say that the debate has focused on these issues, the debate has certainly taken place very much in the shadow of these issues.

Radin's personhood theory, however, deals primarily with making property non-commoditized, that is to say market inalienable. While Radin's theory provides support for allocation of some rights to players,¹³⁵ it does not provide support for rights of alienation that would create an entitlement to real money transfer. Commodification and market alienability, necessary prerequisites to rights of alienation that enable real money transfer, are antithetical to personal property under the personhood theory. Commodification is an aspect of fungible property not personal property. The application of the personhood theory would not, therefore, provide support for players seeking the right to sell virtual world property.

While Radin's personhood theory certainly seems to presume the existence of fungible property rights, it leaves the justification for fungible rights to other theories.¹³⁶ Radin's theory is not one that seeks to determine and justify the entire scope of property rights with respect to all possible objects of property right. Rather, her theory seeks to explain and justify the enhanced set of rights given to objects with certain characteristics, namely objects that have become important to healthy self-constitution and human flourishing.¹³⁷ The fact that Radin's theory would not provide a justification for the existence of alienability rights in virtual world property does not necessitate a conclusion that such rights do not exist and should not be recognized.

Instead of providing support for rights to alienate virtual world property, the personhood theory could have the opposite effect and might make virtual world property market inalienable. If virtual world property is recognized as personal, then legal rules preventing its sale might be developed. Permitting the sale of virtual world property that has become personal property would be considered harmful under Radin's theory for two primary reasons. The first reason is related to the possibility of market coercion.¹³⁸ Separation of personal property from the individual through coercion harms the person because

135. See discussion *supra* Part IV. B. 1.

136. See generally RADIN, REINTERPRETING PROPERTY, *supra* note 32.

137. *Id.*

138. See Radin, *Market-Inalienability*, *supra* note 40, at 1879-87, 1910-12.

personal property has become part of the self in a manner that enhances human flourishing.¹³⁹ Coerced sale is therefore detrimental to the individual's ability to flourish as a person. In order to prevent the possibility of sales of virtual world property due to market coercion, sale is prohibited. The second reason is related to the negative effects of market rhetoric.¹⁴⁰ The sale by some converts virtual world property from subject to object and through the rhetoric of alienation devalues virtual world property for all.¹⁴¹ Conceiving and speaking of virtual world property as a fungible commodity would harm individuals because thinking of personal property as something that can be separated from the person without harm acts to separate it from the individual. As Radin said, "Rhetoric is not just shaped by, but shapes, reality."¹⁴²

An examination of both reasons in an attempt to determine if virtual world property is so personal as to necessitate non-commodification reveals that while neither reason provides much support for non-commodification, the second reason may provide somewhat stronger support than the first, even if only relatively. The first reason, protection against market-coerced sale, provides little support for making virtual world property market inalienable. Unlike the contexts in which Radin applied this reasoning, the virtual world context lacks any compelling stories of market coercion. There are no stories analogous to the stories of women forced to act as surrogates by extreme poverty or of individuals forced to sell a kidney to provide food for themselves and their families. The closest the virtual world context comes to providing such stories are the early stories of click-sweat shops. The positive difference between the market value of virtual world property in countries such as the United States and the hourly pay rate in less developed countries led many commentators to postulate the existence of click-sweat shops in which workers would be paid very low wages to play virtual world games. The virtual world property thus obtained would then be sold for a profit. While the existence of such 'gold farming' businesses, as they are now called, is confirmed, they are not generally thought of equivalent to sweat shops. Regardless of whether they are click-sweat shops, the story does not provide evidence of the relevant effect of market coercion, because such players-as-workers are obtaining virtual world

139. See generally *id.*

140. See *id.*

141. See *id.* at 1880-81, 1912.

142. *Id.* at 1870.

property only for the purpose of later sale. Thus the players-as-workers are not being forced to part with personal property, only fungible property. This lack of compelling stories makes the need for a ban on sale of virtual world property much more difficult to envision, let alone justify.

While the second reason may provide more support for non-commodification of virtual world property when compared to the first, its application in the virtual world context does not compare well to the examples related to this reason provided by Radin. Almost as soon as some players wanted to sell virtual world property, there were players who fervently opposed the buying and selling of virtual world property. Although there are many possible explanations for players' objections to the sale of virtual world property, one possibility is that these players found that the sale of virtual world property by others somehow lessened what they had. This could be an example of the type of harm that Radin describes as being caused by market rhetoric.¹⁴³ However, that the sale of virtual world property by others caused these players to feel less connected in a beneficial way to their virtual world property is only one of many possible explanations for their objections. Additionally, the sale of virtual world property does not intuitively equate to the examples used by Radin to describe the negative effects of market rhetoric. The primary example used by Radin of a context in which market rhetoric is harmful is that of bodily integrity, in particular rape.¹⁴⁴ On an intuitive level, the potential harm caused by market rhetoric used in the context of virtual world property does not equate to the harm caused by using market rhetoric to describe rape.

Virtual world property might in the future become so integral and important to individuals and their personhood as to justify non-commodification under Radin's theory; however, there appears to be little to support non-commodification presently. The objections of many players to the buying and selling of virtual world property might possibly relate to the negative effects of market rhetoric when applied to personal property, but it is far from the only explanation for those objections. It is therefore difficult to demonstrate that virtual world property is so personal as to justify using Radin's personhood theory to place virtual world property in a non-commodified state.

143. See Radin, *Market-Inalienability*, *supra* note 39, at 1880.

144. *Id.* at 1879-81.

V. CONCLUSION – THE BIGGER PICTURE

The attempted application of Radin's personhood theory to virtual world property provides a far from perfect fit. First, Radin's pragmatic approach produces a standard for identifying personal property that is largely positivist in nature.¹⁴⁵ This in turn creates difficulty when we attempt to apply the theory to novel areas such as virtual worlds. Their novelty makes it difficult to identify any strongly entrenched moral views regarding virtual world property and its relation to an individual's ability to flourish. Second, the application of her theory to virtual world property, assuming that such property is personal, seems to produce few helpful rules, although this may be because of the difficulty of envisioning virtual world property as comparable on the personal-fungible continuum as the persuasive examples given by Radin herself. Thus, the difficulty may not be so much in envisioning what rules would be mandated by a finding that virtual world property is personal, but rather the difficulty in accepting those rules as desirable on an intuitive level arises because virtual world property does not appear to us to be as personal as many of the examples used by Radin.

The inquiry, however, should not be abandoned. Our relatively narrow inquiry into the potential application of Radin's personhood theory of property to virtual world property may provide insight into broader questions, broader both in theoretical and contextual senses. Radin's theory is just one example of many possible theories about supporting individuals as persons, and virtual worlds are just one example of many contexts in which computer-mediated technology is presenting challenges to individuals as persons.

On the theory side, there may well be areas of further inquiry within and around Radin's theory that will be fruitful. For example, one such area in which we might continue to look relates to the interaction between Radin's theory and autonomy. While a theory such as Radin's that is based so heavily on ideas of self-constitution might at first glance be expected to be in harmony with notions of autonomy, it largely is not.¹⁴⁶ Most notably, Radin's emphasis on

145. See *supra* notes 67-73 and accompanying text.

146. See Radin, *O'Fallon Lecture*, *supra* note 36, at 431-32.

In my work on property and personhood so far, I have focused on one aspect of the dialectic of contextuality: the need for context stability. I have largely ignored the other aspect of the dialectic of contextuality, the need for context flexibility. I thus have run the risk of being understood as promoting a too-thick theory of personhood. You can say I have stressed connectedness, at the expense of the possibility of disconnection.

market inalienability is very much at odds with traditional notions of autonomy.¹⁴⁷ But, it is in that middle ground between Radin's market inalienability and traditional liberal notions of autonomy where many relations between individuals, including perhaps relations defined by virtual world property, seem to reside.¹⁴⁸ Further exploration of this middle ground in which the protection of personhood and the protection of autonomy need to be reconciled may therefore be useful in defining how virtual world property should be treated. Conversely, further examination of virtual world property may be useful in finding a way to reconcile Radin's personhood theories and traditional theories of autonomy.

On the context side, maintaining this discussion is important because the potential application of Radin's theory of personhood to virtual world property is a part of a larger discussion about the role of individuals in a society increasingly mediated by technology. More

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Like feminists who feel it is worthwhile to run the risk of undue stress on personal contextuality at the expense of personal autonomy, I felt it was worthwhile to run the risk of being misunderstood as promoting a too-thick theory of personhood, in order to provide an antidote to a too-thin theory of personhood that is dominant in traditional liberalism. Traditional liberal theory leans too far toward alienability, commensurability and commodification.

.....
Maybe the antidote is no longer needed, or no longer worth the risk (if ever it was). I hope that future work on property and personhood will be less one-sided. It should try to achieve a better understanding of the nature of the paradoxical coexistence of the two aspects of contextuality in self-constitution, both in theory and in practice.

147. Radin departs from the traditional view of autonomy for two reasons. First, she appears to view the market as inherently coercive. *See supra* notes 139-140 and accompanying text. Thus, making property that is highly 'personal' market inalienable, which protects the individual from the loss of that property and the concomitant loss to their personhood that would result from losing the property that has become so closely bound up with their personhood. *Id.* While some might not need protection from the market's coercive effects and while some might hold the same type of property as fungible property, Radin argues that in some situations the loss of autonomy these individuals may suffer in making some types of property market inalienable is outweighed by the value to personhood gained by others who would be subjected by loss to market coercion. *Id.*

Second, Radin argues that allowing for commodification of a certain type of property would lead to a use of rhetoric of alienation that would be harmful to personhood object-relations even in the absence of any market coercion. *See supra* notes 141-142 and accompanying text. The sale by some converts the property from subject to object, and through the rhetoric of alienation devalues the type of property for all. *Id.* This is linked to, or explains, the objections of many players to the sale of avatars and virtual world objects.

148. In terms of Radin's personhood theory, this middle ground might be understood as being at neither end of the personal-fungible continuum. Thus, property in this area might not be personal enough to receive the highest level of protection - market inalienability, but might be personal enough to receive some degree of greater protection.

and more of the activities of individuals are moving online into computer-mediated space. At the same time, more and more of the physical world is becoming computer-mediated.

Virtual worlds can be thought of as the ultimate embodiment of a computer-mediated world. As virtual worlds exist completely within a system of computers, every aspect within those worlds is computer-mediated. Examining the individual as an avatar in what could be fairly characterized as the most highly computer-mediated environment currently existing may provide insight into how a future of increasing computer mediation will impact individuals. Increasing computer mediation of human activity provides increasing possibilities of interference with an individual's ability to act and thus with an individual's ability to self-constitute themselves.¹⁴⁹ Thus continuing to examine how Radin's theory of personhood might apply in the virtual world context may provide insight into how the technology of increasing computer-mediation may affect individuals in broader contexts. While Radin's theory is only one possible theory addressing the needs of individuals as persons and while the theory only addresses a subset of human relations – property – it does provide an in-road into issues likely to be of increasing importance in an increasingly computer mediated world.

149. Here, we see a further reason why reconciling theories of personhood and autonomy may be important. Traditional notions of autonomy and liberty provide little protection in novel computer-mediated contexts. Because traditional liberal theories of autonomy focus on protecting the individual from interference by the state, they provide little help in dealing with computer-mediated interactions in which it is private actors, not the state, that are interfering with the individual.

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