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ASKING THE NEAREST HIPPIE

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It is an honor to be asked to contribute to this Symposium in honor of Margaret Jane Radin. It is particularly exciting to be able to engage with her scholarship during the summer of 2015 (the time this essay was written) when so many compelling legal issues are coming to a head: same sex marriage and the recognition of dignity as a constitutional value, pragmatic treatment of controversial regulation such as the Affordable Care Act, the death penalty under scrutiny as two justices unequivocally reaffirm its unconstitutionality, voting rights protections roll back, police brutality against African-American citizens as a daily occurrence, and affirmative action policies pushed out by color blind ideals. The times feel tumultuous, especially when continued military force, terroristic violence, and nuclear proliferation are thrown into the mix. Justice Scalia's anachronistic reference to hippies¹ in his *Obergefell* dissent² brings to mind the summer of 1967 (the Summer of Love), which set the stage for the clamorous election of 1968.³ Is the present summer similarly portentous?

1. He opined: "Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015). But, what exactly makes someone a hippie? Although the origins of the word are murky, there is an association between the word hippie and the contemporary term, hipster. Both trace their roots to the word "hip," meaning "to be aware" or "to know" with the modern spin of "sophisticated" or "fashionable." See Jessie Sheidlower, *Crying Wolof*, available at http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/2004/12/crying_wolof.html. Even though the word hippie is related to hipster, a hippie is very much different from the contemporary hipster, whose ironic posturing and affectation distinguishes him from the genuine seriousness and commitment that we associate with the long haired doyen of the Sixties (at least as they exist in Justice Scalia's imagination). Hippies seem to be a radicalized version of the Beats, whose Christian commitments (Beat comes from Beatitudes) shaped a cultural radicalism and attitude of being cool but caring. The Yippies, activists who ignited the protests of 1968, were a politicized version of the hippies. See e.g., Brian Burrough, *Days of Rage: America's Radical Underground, the FBI, and the Forgotten Age of Revolutionary Violence* 26-7 (2015).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015).

3. For an account of the year 1968 as a turning point in culture and politics, see Jeremi Suri, *The Global Revolutions of 1968* (2007).

Whatever the future holds, the vibrant present resonates with the big idea that I associate with Professor Radin's scholarship, the centrality of personhood to law.⁴ The concept of personhood, grounded in continental philosophy, challenges the separation of subject and object. Following are two very brief, and perhaps overly simplistic, characterizations of the concept of personhood which will suffice for the purposes of this Article. The human mind informs objects, giving them meaning and resonance. Consequently, not everything can be reduced to 'things' for the purpose of scientific, market, or state control. These two notions inform recent judicial opinions. For example, Justice Kennedy's eloquent invocation of dignity in the *Obergefell* opinion is an acknowledgement of the concept of personhood in Constitutional law.⁵ In addition, Justice Sotomayor's dissent in *Glossip* describing the pain a death penalty recipient feels when midazolam is administered acknowledges personhood.⁶ Professor Radin has thought deeply and thoroughly about personhood in the law, and her writings both directly and indirectly have contributed to how courts articulate the value of personhood in the most controversial of decisions.

Through a compelling articulation of personhood, Professor Radin's scholarship challenged two established ideas dominating law and politics in the 1980's when she began her legal career. The first was a mechanical application of economics to law, sometimes labeled "law and economics," that reduced all human interactions to matters of pecuniary transactions.⁷ Subscribers to this idea see everything as a commodity, whether human labor, social interactions, or legal rights. By recognizing personhood and the difficulty, if not the impossibility, of separating subject from object, Professor Radin launched a powerful alternative to the dominance of economics in legal thinking. Although behavioral psychology does not inform her work directly, her recognition of the cultural and psychological place of the person is arguably a precursor (or perhaps an intellectual nudge) to behavioral economics as a critique of so-called "rational choice" law and economics.

At the same time, Professor Radin did not reject economics as a useful tool for understanding interactions that are commodifiable without sacrificing personhood.⁸ Markets for ordinary goods and services ("normal" mar-

4. See Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982)

5. "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." See *Obergefell*, supra note 2 at 2602.

6. See *Glossip v. Gross*, 135 S. Ct. 2726, 2793 (2015). For Professor Radin's views on the death penalty, see Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 *U. Pa. L. Rev.* 989 (1978)

7. See Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Children, Body Parts, and Other Things* (1996); Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849 (1987)

8. See Margaret Jane Radin, *A Deweyan Perspective on the Economic Theory of Democracy*, 11 *Const. Comment.* 539 (1994)

kets) are appropriate for economic analysis. But norms of personhood, as articulated in democratic politics, require political institutions to rival and oversee markets. These seemingly inconsistent views coalesce in Professor Radin's form of pragmatism, which guides legal decision making through the forest of conflicting values. Her pragmatism challenges pure utilitarianism as the guide for law and policy. While utilitarianism attempts to aggregate all of the interests reflected in society into a single metric, pragmatism is grounded in the context of institutions, history, and social norms.

For those familiar with Professor Radin's work, her notion of personhood as a critique of economics and as a basis for pragmatism is given voice in her extensive writing on property theory and more recently on contract law reform. This tribute only briefly addresses these lines of scholarship. My main purpose is to identify general themes in Professor Radin's critique of economics and her formulation of pragmatism, first through a consideration of personhood and identity politics, and second through an analysis of personhood and ideology. The tribute concludes by considering the future and identifying two types of personhood theory, labeled libertarian personhood and civic personhood, that might emerge from current debates. The nagging question that the conclusion of this Article attempts to answer is: which of these two is a compelling prediction of where personhood is headed?

To the uninitiated, the idea of personhood might conjure up images of personal identity rooted in gender, race, ethnicity, religion, and other markers. But Professor Radin uses the term personhood to refer to characteristics more general, such as the human mind or personality or spirit (in the secular sense). Personhood, as I understand it, is not universal or fixed. Autonomy may seem to be a synonym, but more apt would be to understand personhood as that set of attributes which make the exercise of autonomy possible.

While personhood is distinct from personal identity, the concept is neither color- nor gender-blind. Personhood includes personal identity but does not hold these attributes of identity to be fixed or unchanging. The attraction of personhood as a concept, at least to me, is that it is anti-essentialist while recognizing the contingency and social relevance of identity markers.⁹

One may wonder how malleable personal identity can or should be. As an example, consider the following exchange from the *Doonesbury* comic published in the late 1980's. Mike Doonesbury meets an old college housemate Didi Robins through his wife JJ. The following dialogue ensues:

Mike: Didi, of course I remember you. Bernie's girlfriend.

9. See Shubha Ghosh, *Identity, Invention, and the Culture of Personalized Medicine Patenting* 13-15 (2012)(discussing Radin's notion of personhood as shaping views of personalized medicine).

Didi: Ex-girlfriend. We finally broke up last year. He couldn't handle my scene.

Mike: Scene?

JJ: Didi founded a very respected performance art newsletter for radical lesbians.

Mike: Oh. . .so you're. . .

Didi: No. I am conservative and straight. But I saw a need.¹⁰

Market fundamentalists would welcome Didi with glee; she found a market niche and filled it. However, one need not delve too deeply into identity politics to recognize the problem of authenticity in Didi's commitments. Who does the magazine speak for? Does Didi represent any one or even anything? She seems to be a pure opportunist.

Within the terms of personhood, Didi would also appear suspect. She seems to be treating radical thought and sexual preference as commodities to be packaged and marketed like breakfast cereal. The need she seeks to fill seems to be purely a material one based on consumption of commodities. Furthermore, while Didi superficially provides voice, her magazine may actually be silencing voices by co-opting a niche from other speakers.

What is missing in the conversation between Mike and Didi is a recognition of how identity can be expressed outside of the market context. While markets may dampen the dialogue, democratic participation can amplify it. Politics offers an alternative avenue for personhood that markets deny and eviscerate. What institutions can accommodate markets while giving strength to politics? The answer lies in a particular view of pragmatism.

Conceived and released in the late 1980's and 1990's, Professor Radin's work was incubated during a transitional period of the end of the Cold War and the global ideological battles between capitalism and communism (both words I probably should capitalize, but won't at the risk of deifying each). Nearly thirty years of hindsight suggests that the Cold War dissolved into a series of hot wars, relentless terrorist attacks, and global battles between a social order based on market, legal, and, at times, Christian fundamentalism and one based on patriarchy and hierarchies, sometimes secular, sometimes clerical, under the flag of questionable glosses on Islam.

But as the Wall and walls fell between the East and the West, possibilities abounded before settled patterns congealed. Professor Radin's pragmatism was one of these possibilities, not followed completely in political circles, but influential in legal ones. In 2009, we hear Judge Posner calling himself a pragmatist, even a Keynesian.¹¹ While those scholars more rigid than Judge Posner move more slowly, if at all, exchanges among legal aca-

10. G.B. Trudeau, *Doonesbury Deluxe: Second Glances* Askance 151 (1987).

11. Richard Posner, *How I Became a Keynesian*, *The New Republic* (September 23, 2009), available at <http://www.newrepublic.com/article/how-i-became-keynesian>.

demics do not seem as rancorous as they were in the 1980's and 1990's. A take no prisoners attitude, one learns, only imprisons the zealous.

Radin's pragmatism is grounded in the realities of ordinary, conventional social interactions. While seemingly abstract and theoretical, personhood as a concept is about real people, not abstract ideals. For this reason, pragmatism is different from humanism, whether of the Greek or Renaissance or secular variety. Pragmatism, as grounded in reality, comes across in Professor Radin's recognition of personal attachment to property that limits fungibility of things for cash. Radin's recent work on contractual boilerplate also stems from her pragmatic view of personhood. Her book, *Boilerplate*¹², is filled with examples of contracts gone wild, ordinary consumers caught unaware by obtuse verbiage and take it or leave it offers.

Some may question my claim about groundedness. Critics will assert that the theory of personhood is not attuned to business realities and the needs of companies to protect against liability and to structure transactions that are bullet-proof. But the business of American jurisprudence is not business. Nor is it personhood. What Radin recognizes is that people, whether consumers, owners and users of intellectual property, or longstanding homeowners and community members, are not pure instruments, present only to open up wallets and bank accounts to needy business people. Instead, a democratic market society consists of people whose needs guide where markets and states take them. Personhood gives voice to what would otherwise be silenced by the unrelenting interests of corporate leviathans.

Where Professor Radin's deviation from pragmatism is revealed is her commitment to democratic deliberation. This commitment informs her views on property and contract and has its roots in her theories of personhood as a counter to market fundamentalism. But is democratic deliberation realistic? Political decision making is a matter of conflicting interests, negotiation, strategic behavior, and opportunism. One's substantive ideals may be sacrificed at the altar of proceduralism and deal-making. Laws can control undue influence of money and the outright purchase of legislation and judicial decisions. But even with these controls, democracy is often not a paragon of deliberate decision making where dialogue and participation guide outcomes. The political process often is about silencing oppositional interests and voices to reach a particular compromise. This characterization is certainly true of economic regulation and legal controls on property and contracting. One has to wonder whether personhood, with its implications for pragmatism, may be dwarfed by self-interest, concentrated and organized to ignore the people law is meant to serve.

Here is where the pragmatic challenge to the ideologies of the Cold War gives way to different forms of ideologies. What ongoing debates over government intervention—whether into health care, education, or the environ-

12. Margaret Jane Radin, *Boilerplate* (2013).

ment—reveal is that the ideological battles between capitalism and communism predate the end of World War II and harken back to intellectual battles in the Nineteenth Century over freedom and equality. Furthermore, ideology and intellectual nuances may be a veil for naked economic interest. Advocates for capitalism are clearly in it for the money, but espousers of communism often support the perks of party membership within a tightly controlled authoritarian structure. Often, because of these economic realities, ideologies are justified in pragmatic terms, making one wonder whether there are any principles to the promised flexibility of pragmatism.

William James famously wrote of “cash value” as the benchmark for pragmatism.¹³ The turn of phrase is awkward for a pragmatist who eschews market fundamentalism. To be fair, James did not literally mean cash as the metric of value, but the phrase offends the ear for those seeking principles while avoiding rigid ideologies. What a phrase like “cash value” begs is the value of imagination as discussed by Wallace Stevens in his essay “Imagination as Value.”¹⁴ Cash, money more generally, after all is a product of the imagination embodied in a specific form for the ease of exchange. What pragmatism, of whatever style, means is that the human subject operates within the world. Imagination, transforming reality, demonstrates the real payoff of pragmatism rather than any appeals to cash.

Wallace Stevens captures the value of imagination in his depiction of the role of the poet in society:

the chief problem of any artist, as of any man, are the problems of the normal and that he needs, in order to solve them, everything that the imagination has to offer.¹⁵

Law does not reduce to poetry, or poetry to law. But the lawyer, like the poet, needs to rely on the imagination to address the “normal problems” of the world. Even seemingly rule-bound Justice Scalia appeals to the imagination by conjuring up the hippie, waiting to be approached and asked about the shape of legal rights. Imagination is the buffer against the reduction of law to the pure battle of self-interest, guided by the invisible hand (itself an imaginative metaphor) in economics or politics. In recognizing personhood, we give life to individual imaginations and the collective imagination of how values are expressed in law.

13. “Pragmatism . . . asks its usual question. ‘Grant an idea or belief to be true,’ it says, ‘what concrete difference will its being true make in any one’s actual life? . . . What, in short, is the truth’s cash-value in experiential terms?’” William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (Longmans 1907), excerpted in John J. McDermott, ed, *The Writings of William James* 430 (Chicago 1977).

14. Wallace Stevens, “Imagination as Value” in *The Necessary Angel: Essays on Reality and the Imagination* (1955).

15. *Id.* at 156.

But if one fears that self-interest, whether in cash or some other form, will inhibit imagination, forcing out personhood, then one has to confront the question: what are the possible futures of personhood and do any offer hope? Or should we simply let the realities of markets and the *realpolitik* that undergirds democracy hold sway? Two possible futures are worth considering: libertarian personhood and civic personhood.

Libertarian personhood posits liberty as the core of being a person. Several developments support an individualistic view of personhood. As markets have expanded through shifts in government regulation and expansions in technology, individual autonomy continues to play a greater role in economic decision-making. We live in the “Age of the Selfie” in more ways than one as self-reliance, independence, and free expression become dominant norms. Furthermore, expansion in rights, particularly the right to marry as set forth in the *Obergefell* decision, point to freedom based conceptions of the person. Whether this move is a conservative or a liberal one is a question of the scope of liberty, which depends on political decisions of the legislature and courts as well as on changing social norms. What libertarian personhood implies is the shifting scope of individual liberty as shaping the relationship between markets and politics.

But is liberty a coherent norm? Justice Scalia in his *Obergefell* dissent colorfully mocks the notion of freedom to marry by asking the reader to “ask the nearest hippie.” What the nearest hippie would presumably tell us is that marriage is a restrictive institution and an inhibitor of freedom. But Justice Scalia sidesteps the point that the nearest hippie would question all institutions as inhibiting of individual liberty. Social conventions are to be questioned, brought down in some instances, and even replaced. For Justice Scalia, “hippie” is a disparaging label, one that he seems to be throwing at those who accept Justice Kennedy’s opinion. But the skepticism of the nearest hippie is the sum and substance of legal thinking, always questioning, ever doubtful, forever waiting for institutions that embrace the human person.

Skepticism is not everlasting. At some point, radical doubt needs to be quelled. At that point, civic personhood comes into its own. For civic personhood, personal autonomy is not about individual liberty but about duties that are owed to others. It is communal in the specific sense of embedding freedom in a network of relationships. Legal duties and obligations define these obligations, what more emotionally may be called a sense of belonging. Civic personhood has a dark side, just as the word family can be twisted into a cult-like state. The concept of civic personhood does not imply the extinction of the self into some greater communal identity. Instead, the concept understands the person as existing beyond the individual self.

The nearest hippie, if asked, might answer that institutions, even marriage, can expand the orbit of the person, can provide fulfillment and make an individual person whole. The Supreme Court recognizes this type of hip-

pie, different from his ever-skeptical brother that Justice Scalia invokes. In *United States Department of Agriculture v. Moreno*,¹⁶ the Court found unconstitutional provisions in the Food Stamp Act that would extend only to the traditional nuclear family. These provisions denied benefits to those living in nontraditional families. In its ruling, the Court admonished the legislature for discriminating against hippies and their communal lifestyle. In 1973 the Court seemed to recognize that communal arrangements can take many forms, and in 2015 that variety was expanded to include same sex marriage.¹⁷

Professor Radin's ideas on personhood are compelling against narrowly utilitarian economic analyses of law. But one may question where they lead. Recognizing politics as a counter to markets is a forceful implication. But deliberative democracy is arguably as fanciful a notion as the freely equilibrating marketplace. Pragmatism points to bridging the divide between law and reality. But reality may be marred by the competition of interest groups engaging in realpolitik. The concept of personhood was one of many possible paths opened after the end of the Cold War. While it has had its influence, open questions remain about how future institutions will be structured through law.

Will personhood head in the direction of libertarianism or civic virtue? The developments we witnessed in the summer of 2015 show promise for a pragmatic compromise between the two as the Court protects individual liberty in the name of equality and dignity. As compared to the summer of 1968, hippiedom of sorts ascendant, matters seem less violent now but no more coherent. The answer may not lie with the nearest hippie, but in our introspection and our deliberations with others. For both, Professor Radin's work can continue to provide a comforting beacon.

16. 93 S. Ct. 2831 (1973).

17. Justice Kennedy cited the *Moreno* decision in *Lawrence v. Texas*, his 2003 opinion striking down anti-sodomy laws for interfering with a liberty interest in intimate associations under the Fourteenth Amendment. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003)