

Alienability, Inalienability, Paternalism and the Law: Reply to Kronman

by Professor Walter Block
Economics and Finance Department
University of Central Arkansas
Conway AR 72035
wblock@mail.uca.edu
tel: 501 450 5355
fax: 501 450 5302

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Introduction

To say that a possession or human attribute is inalienable is deny that it ought or can be given up, sold, disposed of in any way¹. Typical candidates for this treatment include blood, kidneys, sperm and other human organs, children, and liberty; e.g., it is illegal for you to sell yourself into

¹ Barnett, Randy E. (1986) "Contract Remedies and Inalienable Rights" Social Philosophy & Policy Vol. 4, Issue 1, Autumn, pp. 179-202; Barnett, Randy E. (1986) "Contract Remedies and Inalienable Rights" Social Philosophy & Policy Vol. 4, Issue 1, Autumn, pp. 179-202; Brown, Stuart M. Jr., "Inalienable Rights," The Philosophical Review, 64, 1955, pp. 192-211; Calabresi, Guido and Melamed, Douglas "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," Harvard Law Review, Volume 85, April 1972, No. 6); Epstein, Richard, "Why Restrain Alienation," Columbia Law Review, vol. 85 (1985) 970; Feinberg, Joel, "Voluntary Euthanasia and the Inalienable Right to Life," Philosophy and Public Affairs 7 (1978), 117; Hart, Oliver "A Theory of Debt Based on the Inalienability of Human Capital," Quarterly Journal of Economics, Nov 94, Vol. 109 Issue 4, p. 841; Kinsella, N. Stephan, "Inalienability and Punishment: A Reply to George Smith," Journal of Libertarian Studies, Vol. 14, No. 1, Winter, 1998-1999, pp. 79-93; Kuflik, Arthur, "The Inalienability of Autonomy," Philosophy and Public Affairs, Vol. 13, No. 4, 1984, Fall, pp. 271-298; Kuflik, Arthur, "The Utilitarian Logic of Inalienable Rights," Ethics, 97, Oct. 1986, pp. 75-87; McConnell, Terrance, "The Nature and Basis of Inalienable Rights," Law and Philosophy, Vol. 3, 1984; McConnell, Terrance "The Inalienable Right of Conscience: A Madisonian Argument," Social Theory & Practice, Fall 1996, Vol. 22, Issue 3; Meyers, Diana T., "The Rationale for Inalienable Rights in Moral Systems" Social Theory and Practice, Vol.7, No. 2 (summer 1981), 127-143; Radin, Margaret Jane, "Time, Possession and Alienation," 64 Washington University Law Quarterly, 739 (1986); Radin, Margaret Jane, "Market-Inalienability" Harvard Law Review, Volume 100, No.8, June, 1987, pp. 1849-1937; Richards, B. A., "Inalienable Rights: Recent Criticism and Old Doctrine," Philosophy and Phenomenological Research 29 (1969): 391-404; Rose-Ackerman, Susan (1985) "Inalienability and the Theory of Property Rights," Columbia Law Review, Vol.85:931; Tribe, Laurence H. (1985) "Commentary; The abortion funding conundrum: Inalienable rights, affirmative duties, and the dilemma of dependence," Harvard Law Review: Vol. 99: 330; Van DeVeer, Donald, "Are Human Rights Alienable?," Philosophical Studies 37 (1980): 165-176; Wellman, Carl. "The Inalienable Right to Life and the Durable power of an Attorney" Law & Philosophy, May 95, Vol. 14 Issue 2.

slavery².

Is the doctrine of inalienability paternalistic?

Kronman offers the following definition of this latter term:

"In general, any legal rule that prohibits an action on the ground that it would be contrary to the actor's own welfare is paternalistic. The prohibition against suicide, the requirement that motorcyclists wear helmets, are all examples of legal paternalism."³

Does the law contain inalienable elements? His answer to this question is a definitive yes:

"One central purpose ... is to protect the promisor himself by limiting his power to do what the law judges to be against his own interests; this is paternalism, and there is more of it in our law of contracts than one might suspect."^{4,5}

However, instead of rejecting paternalism on the ground that it is an affront to human dignity, an egregious attack on liberty, Kronman actually supports this aspect of the law. What are his arguments in favor of paternalism, and of the status quo as regards alienability? There are several,

² For the a defence of total alienability, e.g., a critique of the doctrine of inalienability, see Nozick, Robert, Anarchy, State and Utopia, New York: Basic Books, 1974 (p. 331, ft. 48); Block, Walter, "Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Epstein and Kinsella," Journal of Libertarian Studies, forthcoming A; Block Walter, "Voluntary Slavery," Libertarian Connection, 1968; Block, Walter, "Market-Inalienability Once Again: Reply to Radin," forthcoming B; Block, Walter, "Kuflik on Inalienability: A Rejoinder," forthcoming C.

³ Kronman, "Paternalism and the Law of Contracts," 92 Yale Law Journal (1983) pp. 763-764.

⁴ Kronman, "Paternalism" (1983, p. 764)

⁵ This serves as a critique of Barnett's (1986) claim that inalienability of autonomy is not paternalistic. For another criticism of Barnett (1986) along similar lines see Block 1968, Block (forthcoming A).

but the main benefit is as "an efficiency-enhancing adjunct to the fraud remedy."⁶

I. Economic Efficiency and Distributive Justice

Take, for example, his advocacy of the non disclaimable warranty of habitability. First, Kronman regards the warranty of habitability "as a device for allocating the risk that an undetected condition will render the premises uninhabitable."⁷ Next, he notes the possibility that the landlord might lie to the tenant about the quality of the premises. If so, this will lead the tenant to engage in a process of information gathering, which our author⁸ does not regard as "socially productive search"⁹.

However, according to the old aphorism, "one man's meat is another man's poison." There is an element of subjectivity¹⁰ in human affairs not incorporated into this analysis. Kronman is

⁶ Kronman, 1983, p. 766.

⁷ Kronman, 1983, p. 767

⁸ Kronman, 1983, p. 767

⁹ For an argument in favor of government intervention into the economy on grounds of "socially inefficient" or "unproductive exchange," see zxzx. For a critique, see zxzx.

¹⁰ Buchanan, 1969; Buchanan and Thirlby, 1981; Mises, 1966; Rothbard 1962, 1973, 1977, 1989; Buchanan, James M., Cost and Choice: An Inquiry into Economic Theory, Chicago: Markham, 1969; Buchanan, James M. and G.F. Thirlby, L.S.E. Essays on Cost, New York: New York University Press, 1981; Mises, Ludwig von, Human action, Chicago: Regnery, 1949, 1963, 1966; Rothbard, Murray N., Man, Economy and State, Los Angeles, Nash, 1962; Rothbard, Murray N., "Value Implications of Economic Theory," American Economist, Vol. 17, Spring 1973; Rothbard, Murray N., "Toward a Reconstruction of Utility and Welfare Economics," San Francisco: Center for Libertarian Studies, Occasional Paper #3, 1977; Rothbard, Murray N., "The Hermeneutical Invasion of Philosophy and Economics," Review of Austrian Economics, Vol. 3, 1989, pp. 45-59; DiLorenzo, Thomas J., "The Subjectivist Roots of James Buchanan's Economics," Review of Austrian Economics, Vol. 4, 1990, pp. 180-198; Barnett II, William, "Subjective Cost Revisited," Review of Austrian Economics, Vol. 3, 1989, pp. 137-138; Block, Walter, "On Yeager's 'Why Subjectivism?'," Review of Austrian Economics, Vol. 2, 1988, pp.

relying on economically invalid interpersonal comparisons of utility. In the residential housing market, presumably, it is more efficient for the landlord to provide a warrantee of habitability since he likely knows more about the premises than the tenant. But the tenant will tend to waive this benefit if he is a risk preferrer. The lower rent he obtains for waiving the warrantee compensates him for bearing this risk.

Kronman relies on a prophylactic argument¹¹, which uses legally innocent acts as a proxy for fraud¹², on the assumption that there is a correlation between the former and the latter. On this ground, one might as well engage in preventive detention of all teenage black males, since there is a positive correlation between them and crime¹³, at least more so than other sub groups of the population. The point is, it is unjust to incarcerate innocent youngsters on the ground that their age, sex, race cohort is over represented in criminal statistics, just as it is to prohibit waivers of habitability, even if it could be shown that a high proportion of fraud takes place in such cases. If Kronman is so concerned with fraud, why does he not advocate increasing the penalties for this crime, and/or allocating more police to its eradication? Instead, he wishes to outlaw a totally innocent type of contract on the grounds that it is positively correlated with fraud.

199-208; Block, Walter, "On Robert Nozick's 'On Austrian Methodology'," Inquiry, Vol. 23, No. 4, Fall 1980, pp. 397-444;

¹¹ The talmudic doctrine of ona'ah is also prophylactic. For a critical analysis, see Block, Walter, "Ona'ah (forthcoming D). Another advocate of phophylacticism in law is Barnett (1986). For a rejoinder, see Block (forthcoming A).

¹² in this case, the disclaimable warranty of habitability, agreed to by both landlord and tenant

¹³ Levin, Michael, Why Race Matters, Westport, CT: Praeger, 1977

Kronman notes, reasonably enough, that "... claims of fraud are often difficult to prove."¹⁴ But if a tenant is so worried about this, he can purchase an insurance policy against fraud (one which, in return for high premiums) allows a low threshold of proof. It is also often arduous to incarcerate black teen aged male criminals. The police capture only a fraction of perpetrators. They must be wary of charges of racism. Witnesses can be intimidated. There are even allegations of black jury nullification. Does that mean that we should put criminals from this age sex race cohort in jail without proof of crime? This seems to be the implication of Kronman's analysis, although, undoubtedly, he would reject this result. But his own conclusion is commits a similar logical fallacy and is equally invalid.

Also consistent with Kronman's view¹⁵, although he does not explicitly call for this, is a full disclosure requirement for landlords. But what about caveat emptor? This has been the legal tradition for centuries. Moreover, this author fails to distinguish actual lying, which is indeed fraud, with failure to disclose drawbacks to the property.

It would appear that Kronman is at least ambivalent about his own prophylactic justification for paternalistic non disclaimability of real estate warranties. He states:

"The efficiency justification for nondisclaimable warranties is less compelling in the use of renewal leases, since here tenants will have easier access to information concerning latent defects. Few would argue, however, that an exception to the nondisclaimability rule should be carved out to cover renewal leases. This suggests that nondisclaimable warranties have some other (e.g., distributive) justification as well."¹⁶

Not necessarily. There is an altogether different explanation. Kronman himself mentions

¹⁴ Kronman, 1983, p. 768.

¹⁵ Kronman, 1983, p. 767

¹⁶ Kronman, 1983, p. 769, n. 27

