

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

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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 is 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

that defects, typically, "come to light only after a period of occupancy."¹⁷ If the renewal tenant, therefore, knows full well of any deficiencies in his apartment, and is nevertheless willing to waive a warrantee of good quality (presumably, in order to obtain a lower rent than would otherwise be available), then, on Kronman's own account of economic efficiency, there can be no case for courts paternalistically setting these aside. That Kronman rejects such a course of action, even in these cases, indicates that this entire justification is wanting, even from the own perspective of his own syllogistic premises.

Our author however, has a card up his sleeve: "distributive justice."¹⁸ It would appear that a second line of defense for inalienability is the desire to transfer money from rich to poor:

"Many, including myself, have defended the view that private law norms may legitimately be used to redistribute wealth... the distributive justification for making certain contractual entitlements inalienable by prohibiting their waiver is simply an extension of this idea and is implicit in the familiar and widely accepted notion of an adhesive contract ... (which) ... is a striking imbalance in the bargaining power of the parties to a contract, so that one is able to dictate terms to the other... (W)e do but care how control over (a) painting is distributed (but w)e feel differently about the distribution of control over society's available housing stock, and inequalities of bargaining power in this context therefore seem a more appropriate target for judicial or legislative attack."¹⁹

Kronman goes too fast, here. There are some difficulties with his position. First, there is no such thing as "society's available housing stock." The buildings which now exist do not belong to "society." Rather, they are owned by individual investors, builders, landlords who earned the money necessary to erect or purchase them, and declined to spend these monies on their own personal consumption; but for them, there would not be these facilities. What Kronman is advocating, then,

¹⁷ Kronman, 1983, p. 769

¹⁸ Kronman, 1983, pp. 770-771

¹⁹ Kronman, 1983, p. 771, material in brackets supplied by present author.

amounts to no less than (legalized) theft.

Second, "bargaining power" has little to do with relative wealth, and much to do with relative prices. If this concept means anything at all²⁰, its operational definition must be that if A and B are bargaining over some aspect of a commercial relationship, that the final result will lie in the direction of the one with the greater "power." For example, if the landlord initially asks \$1000 per month for the rental of the dwelling, the tenant's first offer is \$700, and they end up "compromising" at \$995, then the former has more "bargaining power"; if the final price is \$705, then the latter. But this is a function of whether supply is greater than demand or demand greater than supply, and of the accuracy of the expectations of the two parties. Kronman, in contrast, seems to be using "bargaining power" as a synonym for wealth; e.g., the richer person always has the greater "bargaining power." If so, Ockham (of Razor fame) would characterize this as obfuscation. That is, we already have a perfectly good word to convey the concept of wealth: "wealth." It makes little sense to ask this term to play the quite different role assigned to it by Kronman.

Third, it is certainly true that "Many, including (him)self, have defended" robbery from the rich ostensibly in behalf of the poor²¹, and these goings on have indeed become "widely accepted." But this does not at all justify them. As it happens, the arguments in favor of such policies have been

²⁰ Which is dubious

²¹ Sowell (19xx) estimated that had all this money actually gone to the poor they would have had an average per capita annual income of \$70,000; and this in 19xx! No, much of this redistribution is actually within income classes, not between them.

thoroughly refuted. Nozick's²² main criticism of Rawls²³, for example, is that the latter's scheme was encapsulated in a time denominated end state: be the income and wealth distribution which took place behind Rawls' "veil of ignorance" ever so proper, it would have to unjustly outlaw a fair process which could undermine it. Suppose that the just end state distribution was an equal one. But if many people were willing to pay \$50 to see Wilt Chamberlain dunk a basketball, the distribution would be equal no more. We must therefore give up the idea of egalitarian (or any other) end state distribution, or be forced to ban "capitalist acts between consenting adults"²⁴ such as professional basketball²⁵.

Fourth, characterizing his policy as a "judicial or legislative attack" is absolutely true, both in the non pejorative sense he means it as well as in regard to its true nature: as the entering wedge of totalitarianism. The law is supposed to protect person and property, not "attack" them.

Strangely, Kronman almost concedes these points:

"It is therefore misleading to describe the nondisclaimable warranty of habitability as simply a device for correcting an imbalance in bargaining power. More accurately, it is an instrument of redistribution that seeks to shift control over housing from one group (landlords) to another (tenants) in a way that furthers the widely shared goal of insuring everyone shelter of at least a minimally

²² Nozick, Anarchy, State and Utopia, 1974

²³ Rawls, John, A Theory of Justice, Cambridge: Harvard University Press, 1971

²⁴ Nozick (1974).

²⁵ Capitalism, Kronman to the contrary notwithstanding, is a positive sum game. Wilt certainly gains from the deal. He regards his high salary as more than fully compensating him for the loss of leisure he must undergo to play basketball. But the general public also benefits. If they pay \$50 per ticket, it can only be because they regard the experience of witnessing his exploits more than this amount. If they valued the ticket at only \$40, say, they would hardly purchase it for \$50.

decent sort."²⁶

Let us take as a given this "widely shared goal" of minimum decent housing standards. Kronman feels that the best way to attain it is to legislatively "attack" landlords in favor of tenants. But this is mistaken. One way to see why is to put this matter into another context. Would anyone care to defend the analogous proposition that the best way to achieve cheap high quality automobiles, restaurant meals, computers, movies, novels, medical care, or, indeed, any other good or service in the GDP ranging from paper clips to super conducting super colliders, is by attacking their purveyors? In virtually any other context this would be widely seen as fallacious. Even childhood fairy tales speak of killing the golden goose. However, when it comes to housing, it would appear, all bets are off and reason flies right out the window²⁷.

Another way to see the error of trying to obtain low cost high quality rental housing by legal enactment is to propose the essence of the policy writ large; that is, take it to its ultimate conclusion. In this regard, the nondisclaimable warranty of habitability is but a small and relatively insignificant "attack" upon the owners of rental property. In order to see its effects more clearly, then, we eschew this policy, and consider another one, with more "teeth"; that is, rent control. Now here is a way to really deal with the "unfairness" of "unequal bargaining power." But the evidence on this policy as an aid to the poor is crystal clear: it boomerangs, and hurts the very tenants it is (presumably) intended to help²⁸.

²⁶ Kronman, 1983, p. 772

²⁷ States Aaron (1967): to be supplied

²⁸ On this see Baird, Charles, Rent Control: The Perennial Folly, Washington D.C.: The Cato Institute, 1980; Block, Walter, "A Reply to the Critics," Rent Control: Myths & Realities, Walter Block and Edgar O. Olsen, eds., Vancouver: The Fraser Institute, 1981, pp. 283-319; Block,

So well entrenched is this finding within the economics profession²⁹, that even those with impeccable leftist credentials have seen the fallacy of advocating this form of attack on the landlord

Walter, "Rent Controls--Who Benefits and Who Is Hurt," Housing in Canada: A Continuing Challenge, Paul Cosgrove and Raymond V. Hession, eds., Don Mills, Ontario: The Canadian Real Estate Association, 1982, pp. 197-209; Block, Walter, "Rent Control: A Tale of Two Canadian Cities," Mid Atlantic Journal of Business, Vol. 25, No. 7, 1989, pp. 85-88; Block, Walter, "On Rent Control," David Henderson, ed., The Fortune Encyclopedia of Economics, New York: Warner Books, 1993, pp. 421-425; Block, Walter, "Rent Control: A Case Study of British Columbia," Mid Atlantic Journal of Business, Vol. 30, No. 3, December 1994, pp. 299-304; Cragg, J.G., "Rent Control Report" commissioned by British Columbia Rentalsman, mimeo, 1974; Friedman, Milton, and Stigler, George, "Roofs or Ceilings? The Current Housing Problem," in Block, Walter, and Edgar Olsen, eds., Rent Control: Myths and Realities, Vancouver, The Fraser Institute, 1981; Grant, R. W., Rent Control and the War Against the Poor, Manhattan Beach: Quandary House, 1989; Horton, Joseph, Shorter, Ethan, and Block, Walter, "Rent control: an economic abomination," International Journal of Value Based Management, Vol. 11, No. 3, pp. 253-263, 1998; Johnson, M. Bruce, ed., Resolving the Housing Crisis: Government Policy, Decontrol, and the Public Interest, San Francisco: The Pacific Institute, 1982; Lindbeck, Assar, The Political Economy of the New Left, (New York: Harper and Row, 1972); McDonough Gene and Block, Walter, "The Evils of Rent Control," Consent #27, 1997, pp. 10-11; Mungovan, Patrick, "The Ravages of Rent Control," The Chalcedon Report No. 359, June 1995, pp. 31-32; Myrdal, Gunnar, "Opening Address to the Council of International Building Research in Copenhagen," 1965; cited in Dagens Nyheter (Swedish Newspaper), 25 August 1965, p. 12; cited in Rydenfelt, Sven, "The Rise, Fall and Revival of Swedish Rent Control," in Rent Control: Myths and Realities, Walter Block and Edgar Olsen, eds., Vancouver: The Fraser Institute, 1981, p. 224; Salins, Peter D., The Ecology of Housing Destruction: Economic Effects of Public Intervention in the Housing Market, New York: New York University Press, 1980; Sohr, Kevin, and Block, Walter, "Rent Control," Freeman, Vol. 47, No. 11, pp. 681-682, 1997; Tammara, Christine, Corley, Carole, and Block, Walter, "Rent Control: An Economic Evil," Commentaries on Law and Economics, 1999, forthcoming; Tucker, William, The Excluded Americans: Homelessness and Housing Policies, Washington D.C., Regnery Gateway, 1990.

²⁹ For surveys, Frey, Bruno S., Werner W. Pommerehne, Friedrich Schneider and Guy Gilbert (1984) "Consensus and Dissension Among Economists: An Empirical Inquiry," American Economic Review, December, 74:5:986-94; Walker, Michael, and Block, Walter, "Entropy in the Canadian Economics Profession: Sampling Consensus on the Major Issues," Canadian Public Policy, Vol. XIV. No. 2, June 1988, pp. 137-150.

as a means of helping the tenant. For example, states Lindbeck "In many cases, rent control appears to be the most efficient technique presently known to destroy a city -- except for bombing."³⁰ And according to Myrdal "Rent control has in certain western countries constituted, maybe, the worst example of poor planning by governments lacking courage and vision."³¹

But why trust the market to supply the poor with so important a commodity as home and hearth? Surely, no good can come of an institution whose main actors are motivated by so low a human motive as greed. Therefore, let us turn this important task over to the public sector³², on the ground that the bureaucrats at least do not fall under the sway of the evil profit motive. This will not do, either, since, if anything, public housing has been more of an unmitigated disaster than even rent control. The main problem is that income limits (spaces are for the poor, after all) mean that the cream keeps getting skimmed off the top: the neighborhood leaders, around whom the people in the

³⁰ Lindbeck, Assar, The Political Economy of the New Left, (New York: Harper and Row, 1972); cited in Rydenfelt, Sven, "The Rise, Fall and Revival of Swedish Rent Control," in Rent Control: Myths and Realities, Walter Block and Edgar Olsen, eds., Vancouver: The Fraser Institute, 1981, p. 213.

³¹ Myrdal, Gunnar, "Opening Address to the Council of International Building Research in Copenhagen," 1965; cited in Dagens Nyheter (Swedish Newspaper), 25 August 1965, p. 12; cited in Rydenfelt, Sven, "The Rise, Fall and Revival of Swedish Rent Control," in Rent Control: Myths and Realities, Walter Block and Edgar Olsen, eds., Vancouver: The Fraser Institute, 1981, p. 224.

³² For a critique of the idea that when selfish men go into the public sector they sprout angel's wings and undergo a complete transformation of motives, see Buchanan, James M., and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy, Ann Arbor: University of Michigan, 1971; Buchanan, James M., and Brennan, Geoffrey, The Power to Tax: Analytical Foundations of a Fiscal Constitution, Cambridge: Cambridge University Press, 1980

projects might coalesce, are instead forced to vacate, since they are the ones most likely to receive wage raises, which make them ineligible for continued occupancy. This leaves a plethora of female headed households, and few adult males to serve as role models and to deal with gangs of teen aged males. Then, too, there is almost a visceral hatred for all things commercial on the part of the planners. This means that shopping is inconvenient, and as a result there are few crime quelling "eyes on the street"³³.

Despite his advocacy of "attacking" landlords, Kronman recognizes the possibility that all such market interferences, including inalienable or nondisclaimable habitability warrants, can result in higher rents. He thus turns to deal with the objection that landlords "can easily pass along -- in the form of an increased rent charge -- whatever additional insurance or compliance costs they incur as a result of their expanded warranty liability."³⁴

He has two responses. First

"But there may be nothing wrong with forcing tenants, including poor tenants, to spend their money on better housing (or more exactly, on insurance against the risk of inadequate housing). We recognize the legitimacy of compulsory insurance in other areas; social security is one example...."³⁵

Say what you will about him, at least concede that this author is a consistent paternalist. Presumably, professors at Yale know better what is in our own best interests than we do ourselves. If a tenant wishes Geo level quality accommodation, he will be forced into a Camry style unit nonetheless. If a worker wishes to spend his money now, on wine, women and song if need be,

³³ See Jacobs, Jane (1989), The Death and Life of Great American Cities, New York: Vintage

³⁴ Kronman, 1983, p. 773

³⁵ Kronman, 1983, p. 773

instead of saving for his old age, there stands Kronman, ready to stop him from so foolish a course of action, at the point of a gun. He takes this position despite the fact that blacks, who are over represented as members of the poorer classes, and also have lower life expectancies than average, as a result receive fewer payments after retirement, are thereby cheated by social security. He is still willing to force people into coercive social security even though its yield performance has been for many years much inferior to that of the stock market, where people keep their savings on a voluntary basis³⁶.

Kronman's second response is to deny that landlord's can pass on a high proportion of these costs: "Under certain empirically possible conditions, landlords will be able to pass along only a small portion of these costs and will have to absorb the rest."³⁷ His source for this heroic assumption is Ackerman³⁸, a notorious advocate of rent control.

Let us assume, if only for the sake of argument, that what Kronman-Ackerman claim to be empirically possible is actually true. Even then, a small part of these additional costs are visited on the poor. While some poverty stricken tenants will perhaps regard the additional insurance forced down their throats as worth more to them than their additional rents, others will not. Kronman has still not escaped, even on his own assumption, the unwelcome result that his policy will impoverish (some of) the poor. And what about those costs that the landlords "will have to absorb"? Kronman seems to suppose that they will lay supine and accept their fate. But in actual point of fact, at least

³⁶ For a critique of social security, see (to be supplied)

³⁷ Kronman, 1983, p. 773

³⁸ Ackerman, "Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy," 80 Yale Law Journal, 1093 (1971).

some investors in residential rental units will seek greener fields. Their departure, however, will raise rents once again. Again, we return to the killing of the golden goose, with no thought that this will reduce the rate of eggs forthcoming. Even if we regard landlords merely only as a means to be exploited to the benefit of tenants, we should still not treat them in this way; not if we have the best interest of renters at heart. But landlords are also people, with rights; Kronman's thesis is hardly tenable.

II. Personal Integrity

In this section Kronman deals with

"... the varied group of restrictions intended to prevent an individual from contracting away too large a part of his personal liberty. The most obvious and elementary restriction of this sort is the prohibition against contracts of peonage or self enslavement... A person who would give away too much of his own liberty must be protected from himself, no matter how rational his decision or compelling the circumstances."³⁹

But why must he? If it is truly his own liberty, should it not be his decision as to whether or not to give up "too much" of it? We are all free to drink "too much" to eat "too much" and to play "too much." Why should we all not be free to exercise this element of liberty too? And who is to say whether a given amount is "too much"? The person himself, or Kronman, in his behalf?

To be fair to our author, he does not set up straw men; he offers strong arguments to his opponents. He posits that inalienability cannot be accounted for "in purely economic terms."⁴⁰ For example, the debtors who agree "to contract away their statutory right to a discharge in bankruptcy" are acting in an economically efficient manner, given that this "can effectively communicate information ... about the debtor's credit worthiness." Ditto, Kronman stipulates, for "the rule barring

³⁹ Kronman, 1983, p. 775

⁴⁰ Kronman, 1983, p. 776

antenuptial agreements"⁴¹ which does not allow for the possibility of divorce. This "facilitates the communication of information regarding the promisor's sincerity and future intentions."⁴² Nor does he shrink from even the most extreme of examples:

"If Spartacus agrees to become the slave of Claudius in return for a guarantee of food, shelter and education for his children, there is no a priori basis for thinking the exchange inefficient. The welfare of both parties may be increased by an arrangement that gives one irrevocable control over the labor of the other."⁴³

Further, Kronman considers the prophylactic reasons for administrative ease of guarding against "deception and duress."⁴⁴ But then, unlike other opponents of full alienability⁴⁵, very much to his credit, he **rejects** them:

"There is, however, something unsatisfying about this argument: Even if we had an inexpensive mechanism that enabled us to discriminate, with complete confidence, between coerced contracts of enslavement and uncoerced ones, many, including myself, would still favor the prohibition of all such agreements. This suggests that our intuitive opposition to self enslavement rests upon considerations the argument just sketched does not capture or adequately express."⁴⁶

On what grounds, then, does he favor laws prohibiting the alienation of such things as bankruptcy protection, the divorce option, and freedom itself?

Kronman offers the following answer:

"The prohibition against such contracts is best explained, in my view, by the special threat they pose to the promisor's integrity or self respect. The nature of this threat is revealed with

⁴¹ Kronman, 1983, p. 776

⁴² Kronman, 1983, p. 776.

⁴³ Kronman, 1983, p. 777

⁴⁴ Kronman, 1983, p. 777

⁴⁵ See footnote zzzx, supra

⁴⁶ Kronman, 1983, p. 777

particular clarity when the promisor's own values have changed dramatically since he entered the contract."⁴⁷

This, unhappily, is a bit of a let down, after such a powerful buildup. For we may ask, why doesn't Kronman apply the same insight to "integrity or self respect" as he focussed on "deception and duress"? That is, why, given that the individual is the owner of his "integrity or self respect" should he be prevented by law from selling these characteristics? Moreover, it is not at all as clear as Kronman thinks that selling oneself into bondage, of whatever form, will necessarily reduce "integrity or self respect." It is highly likely that the very opposite is true.

First consider bankruptcy. Kronman himself has admitted that "In certain circumstances, it may be rational for a debtor to waive his right to a discharge in return for a reduction in the cost of credit. An agreement of this sort can effectively communicate information both about the debtor's credit worthiness and the likelihood he will need to invoke the bankruptcy laws. In some cases, it may also be more efficient for the debtor to self insure against the risk of insolvency than for him to purchase insurance from his creditor (by retaining the right to avoid the debt in bankruptcy.)"⁴⁸

But it doesn't seem at all likely that a person who avails himself of this option will lose any "integrity or self respect." If anything, the very opposite would appear to be the case. After all, the debtor is going out on a limb, willing to bear the heightened risk of his possible failure.

Now consider divorceless marriage. Kronman has stated: "By waiving the right to bring a divorce action, an anxious suitor can convincingly convey the depth of his or her commitment."⁴⁹ This doesn't sound like a person lacking in "integrity or self respect." Indeed, the very opposite again seems more correct. For anyone can get married if divorce is easy. It takes a bride and groom with

⁴⁷ Kronman, 1983, p. 780

⁴⁸ Kronman, 1983, p. 776

⁴⁹ Kronman, 1983, p. 776

great "integrity or self respect" to launch into the high wire of marriage with no such safety net lying below.

A similar analysis applies to selling oneself into bondage, to save family members from starvation, or to pay for a medical operation for a sick child. Rather than thereby losing "integrity or self respect" as Kronman claims, a more reasonable assessment would consider a parent who refuses to do this as lacking in those characteristics.

Kronman sees a great threat to "integrity or self respect" when "the promisor's own values have changed dramatically since he entered the contract."⁵⁰ In order to clarify this, Kronman distinguishes between disappointment, when "an assumption proves to have been mistaken," and regret, "when a person wishes that he had not made a particular contract because his goals have changed."⁵¹ Kronman is particularly concerned that the signatory to one of these permanent contracts might "regard his earlier decisions as a foreign element whose continuing influence appears senseless from the standpoint of his present goals."⁵² He goes so far as to claim that "Self betrayal of this sort weakens a person's confidence in his ability..."⁵³

Of course it is exceedingly likely that a man who gives up his liberty for the lives of his family may come to rethink his position when in the throes of being whipped by his master; or that a couple who have married for life, but now hate each other, regret their permanent marital ties; or that a debtor who didn't repay what he owes, and signed away the protection afforded him by

⁵⁰ Kronman, 1983, p. 780

⁵¹ Kronman, 1983, pp. 780-781.

⁵² Kronman, 1983, p. 782

⁵³ Kronman, 1983, p. 782.

bankruptcy law, rues the day he agreed to do this, while languishing in debtors prison. The appropriate answer to this is "So what." Or "Too bad." Or, "Tough cheese." Or "You should have thought about this down side before you signed that agreement." Or "See a good shrink."⁵⁴ But whatever the response, the distinction between regret and disappointment will hardly save Kronman's thesis.

Let us borrow a leaf from Kronman:

"There is, however, something unsatisfying about this argument' from regret: Even if there was no such problem about changing our minds, many, including (Kronman), would still favor the prohibition of all such (voluntary slavery, no bankruptcy protection, marriage until 'death do us part') agreements. This suggests that our intuitive opposition to self enslavement rests upon considerations the argument just sketched does not capture or adequately express."⁵⁵

I fully agree with this emended version of Kronman's words. What, then, is the real reason that he and so many others object to selling oneself into slavery? I suspect they have a profound and deeply felt fear, revulsion and suspicion of the free enterprise system, and don't much like markets, commerce, trade, economic freedom. Since alienation is integral to these institutions, it is rejected out of hand, even if the arguments in support are spurious.

Suppose a person does not change his mind about any of this; e.g., his voluntary slave contract, bankruptcy contract or marriage for life. Thus, by definition, he cannot suffer from "disappointment and regret." Would Kronman then be in favor of voluntary slave contracts? He has not directly expressed himself on this issue, but reading in between the lines, the answer is likely to

⁵⁴ Edelstein, Michael R., and Steele, David Ramsey, Three Minute Therapy, Lakewood CO: Glenbridge, 1997; Ellis, Albert, and Harper, Robert A., A Guide to Rational Living, North Hollywood, CA: Wilshire, 1961

⁵⁵ Kronman, 1983, p. 777, my paraphrase

be a definitive and outraged "No!" There is thus an alternative hypothesis to explain Kronman's advocacy of legalizing inalienability: a hatred and distrust of commerce per se.

Consider Kronman's views on debt in this regard:

"The right to a discharge is usually justified in terms of the debtor's need for a fresh start, unhampered by earlier debts. One reason for giving the debtor a fresh start is to counteract the self hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets."⁵⁶

Yes, the debtor may "have a need for a fresh start," but doesn't this also apply to the creditor? He, too has a need for his own money to be returned to him. And if bankruptcy law is really an attempt to "counteract self hatred" for the debtor, won't he hate himself even more if in addition to his "past mistakes" the law now allows him to steal from the creditor? Kronman draws from these considerations that no one should be able to alienate the duty to pay off debts in full; I learn a very different lesson: bankruptcy law is legalized stealing, and ought to be repealed. To add insult to injury, Kronman defends his position on "moral"⁵⁷ grounds⁵⁸.

⁵⁶ Kronman, 1983, p. 785

⁵⁷ Kronman, 1983, p. 786

⁵⁸ As for the view that present bankruptcy laws amount to a theft from the unpaid creditor, Rothbard, Murray N., The Ethics of Liberty, Humanities Press, Atlantic Highlands, N.J., (1982[1998] p. 144) states: "The debtor who refuses to pay his debt has stolen the property of the creditor. If the debtor is able to pay but conceals his assets, then his clear act of theft is compounded by fraud. But even if the defaulting debtor is not able to pay, he has still stolen the property of the creditor by not making his agreed upon delivery of the creditor's property. The function of the legal system should then be to enforce payment upon the debtor..." And according to Noel, F. Regis, "A History of the Bankruptcy Clause of the Constitution of the United States of America" Washington, D.C.: doctoral dissertation, Catholic University of America (1920) pp. 187, 191 {cited in Rothbard 1998[1982], p. 144, ft. 14}: If the laws of bankruptcies were based on the legal rights of individuals, there would be no warrant for the discharge of debtors from the payment of their debts as long as they lived, or their estates would continue to exist.... The creditor has rights which must not be violated even if adversity be the

Kronman attempts to pull at our heartstrings with the following example:

"Suppose ... that an employee working for a pharmaceutical concern discovers that his company is selling drugs used to produce a lethal chemical weapon, a fact he did not know when he entered the contract. If the employee believes that continuing to work for the company is inconsistent with certain deeply-held moral convictions, the violation of which would be a serious blow to his self-respect, he should be permitted to quit and pay his employer damages for whatever loss the company suffers."⁵⁹

Let it be said once and for all, loud and clear: contracts are at the very basis of a civilized order.⁶⁰ If they are allowed, by law, to be abrogated every time someone changes his mind, or learns new information, or has an identity crisis, or feels a threat "to his integrity and self respect," the wheels of commerce will tend that much more quickly to grind to a halt. Even more important than this mere utilitarian consideration there is a matter of deontology: injustice will be perpetrated. What about the pharmaceutical company left holding the bag? Does it have no rights?

No one in his right mind would agree to a specific performance contract (let alone voluntary slavery) except under the most grave and unusual of circumstances. If, however, a morally sensitive individual such as depicted by Kronman were foolish enough to sign a specific performance contract with a pharmaceutical firm without doing the requisite research, and later learned it was engaged in what he regarded as unsavory acts, that is just simply too bad for him. A contract is a contract. Let

cause of the bankrupt's condition. His claims are part of his property."

⁵⁹ Kronman, 1983, pp. 783-784

⁶⁰ There is only one thing more basic: private property rights. On this relation between contract and property, see Hoppe, Hans Hermann, Hulsmann, Guido, and Block, Walter, "Against Fiduciary Media," Quarterly Journal of Austrian Economics, Vol. 1, No. 1, pp. 19-50, 1998

word of this sort of thing get out to the newspapers, and henceforth all others will be put clearly on notice not to sign such contracts without due deliberation and consideration. Once allow sensitivity to be a defense against contract breaking, and contracts will no longer be worth the paper they are printed upon.

III. Judgment and Moral Imagination

Another example of Kronman's anticapitalist mentality⁶¹ is his support for cooling off periods.

"A temporary suspension of the promisor's contractual powers reduces the likelihood of an overly hasty decision and thus helps counteract what I have described as a defect in his reasoning process; its purpose is to prevent the promisor from binding himself too quickly or while his judgment is impaired."⁶²

This is, of course, an exercise in paternalism. It is therefore contrary to the democratic ethic which pervades political discourse. If people are so "hasty" in purchasing encyclopedias from a door to door salesman, how can they be trusted with the solemn power of the ballot box? Suppose I go door to door and sell a set encyclopedias to Bill Gates, who later decides to renege on the deal. This law would allow a world class businessman to get out of a measly \$1,000 contract on the ground that he may need to "counteract ... a defect in his reasoning process."

Instead of a "cooling off" period for voluntary commercial acts in the private sector, how about one for the political sphere? Surely there have been "overly hasty decisions" made by politicians and bureaucrats. Why doesn't Kronman advocate a time period during which legislators

⁶¹ See Mises, Ludwig von, The Anti-Capitalist Mentality, South Holland, IL: Libertarian Press, 1972

⁶² Kronman, 1983, p. 786

can reconsider their penchant for socialist legislation such as anti trust, minimum wage, rent control, public housing, affirmative action, tariffs, central banking, zoning, nationalization, welfare, public education, socialized medicine, business regulation and all the rest? Why not call for a "cooling off period" before citizens exercise their ballot box "rights"? It cannot be denied that all too hasty decisions have been made in this domain⁶³.

Kronman seeks to buttress his argument by resorting to contracts signed by children⁶⁴. Here, of course, he is on far firmer ground. Children, after all, are not adults. There can be no reason in principle not to extend to them special dispensations of this sort. But his mention of this case in the present context is rather problematic, since his goal is not so much to bring to call into question contracts for the under aged, but rather to bring into disrepute the entire institution of contract, for supposedly responsible adults. For example, Kronman defends the cooling off periods for marriage and divorce which are presently entrenched in the law, and people involved in these institutions are certainly not children⁶⁵.

But he does address himself to the essential question:

"Why should the general presumption that a person is the best judge of his own interests be suspended in the case of children (as well as drunks, married persons contemplating divorce and purchasers of goods sold door to door)?"⁶⁶

⁶³ For a critique of democracy in favor of monarchy, e.g., a "cooling off period" of infinity for voting, see Hoppe, Hans-Hermann, "Time Preference, Government, and the Process of Decivilization -- From Monarchy to Democracy," 5 Journal Des Economistes Et Des Etudes Humaines, 319, 1994.

⁶⁴ Kronman, 1983, p. 787

⁶⁵ Kronman, 1983, p. 788

⁶⁶ Kronman, 1983, p. 789

His answer is in terms of "good judgement": if people have it, well and good; if not, then the paternalistic state should spring to their rescue. An important element of this ability, he tells us

"involves a critical reflection on one's interests and desires and hence presupposes some distance from them; indeed, we associate judgment with sobriety and dispassion ... only a person who shows skill in his choice of ends can be said to possess judgment."⁶⁷

A minor problem with all of this is that Kronman overlooks the essentially subjective⁶⁸ nature of good judgement. A man's decision to become a race car driver or a test pilot is seen as the epitome of bad judgment by accountants and clerks. And this is cordially reciprocated, in the inverse direction. So, who is right, those with a great toleration for physical danger, or those who lack it? The very question serves as evidence of the essential subjectivity of choices of this sort.

Another difficulty is that the bureaucrats who are to take on the paternalist role are themselves guilty, upon occasion, as are we all, of bad judgement. How can we rely on them to extricate us from our foibles if they suffer from the same ailment responsible for our plight in the first place?⁶⁹

A major problem is uncovered when we take Kronman exactly at his word. It is an undeniable fact that blacks are over represented amongst those found guilty of crimes, and also of a higher than proportionate number of illegitimate births⁷⁰. Suppose we take this to be evidence of

⁶⁷ Kronman, 1983, pp. 789-790

⁶⁸ See on this footnote ZX, supra

⁶⁹ Instead of "Who guards the guardians?" we can have "Who paternalizes the paternalists?"

⁷⁰ See Levin, Michael, Why Race Matters, Westport, CT: Praeger, 1977; Murray, Charles, Losing Ground: American Social Policy from 1950 to 1980, New York: Basic Books, 1984

"bad judgement."⁷¹ But our author favors "cooling off periods" and other accouterments of paternalism for "children ... as well as drunks" on the basis, in effect, that they cannot be trusted to exhibit "good judgement." We arrive, then, at the profoundly racist deduction that non whites ought to be singled out, and particularly subjected to paternalism by the all loving state apparatus, because they manifest "bad judgement" and this, for him, triggers paternalism. Of course, Kronman says no such thing, explicitly. But the premises leading up to this conclusion are all either true, or offered by him. Needless to say, any premise that reaches such a result cannot be a valid one.

But this only begins the reductio. There is also the fact that all of us inferior creatures, ruled by our passion and not our reason, exhibiting all sorts of bad judgment in our everyday affairs, make thousands of choices in a year, millions in a lifetime. If we need a "cooling off" period due to bad judgement, this pervades our entire lives. The implication of Kronman's analysis is that we should have a "cooling off" period not just for a few choices, but for all of them. But this of course would bring life to a veritable standstill⁷².

This line of reasoning, moreover, has all the earmarks of being contrived out of the whole cloth; it sounds almost as if Kronman is making this up as he goes along. For example, he informs

⁷¹ This is the weakest part of my argument, given the innate subjectivity of such a determination. But it is difficult to understand what Kronman means by bad judgement if he does not accept these two facts as a paradigm case.

⁷² Kronman (1983, p. 795) specifically denies this: "... even the requirement of a cooling off period has antidemocratic implications, which explains why we demand a special justification for these restrictions and would never think of imposing a cooling off period in every contractual relationship." But Kronman cannot have it both ways. If democratic considerations are so important, there should be no cooling off period. If there is a case for such a time out in order to *reflect more carefully, then these extenuations cannot be all that formidable. Kronman never offers "special justifications" on a case by case basis. Rather, he relies on over arching grounds such as "lack of judgement."* Out of this one may indeed derive a yes or no position, but not a variable one.

us there is a sharp difference between "shrewdness" and "good judgement"⁷³; that "skill in deliberation" counts, while "intuitive insight" does not. Kronman even avers that good "judgement ... is a form of imagination" and may "aptly be compared to the construction of a work of art."⁷⁴ This sounds more like poetry than legal theory. Pretty poetry, perhaps, for those who like this sort of thing, but we must remember that our author is using these words to defend coercive paternalistic interference with the lives and liberties of innocent adults.

Kronman states:

"If judgment is a condition of freedom, restrictions of this sort arguably increase the parties' freedom by forcibly encouraging the development of imaginative capacities; at the very least, they promote the welfare of the parties without significantly diminishing their freedom."⁷⁵

Yes, and freedom is slavery, and slavery, freedom; war is peace, and peace, war. How can you increase freedom by "forcibly encouraging" anything?⁷⁶ Kronman says freedom can be increased by forcibly encouraging "imaginative capacities." I say, with equal justification, that you can increase freedom by forcing people to eat more ice cream. Or less.

There are many ways to increase "imaginative capacities." There are acting lessons, science fiction writing, story telling, psychoanalysis, fairy tales, folklore, the list goes on and on. It is not immediately apparent why this should have anything to do with freedom, let alone increase it. There

⁷³ Kronman, 1983, p. 790

⁷⁴ Kronman, 1983, p. 791

⁷⁵ Kronman, 1983, p. 794

⁷⁶ Other than the libertarian non aggression axiom. That is, I can "force" you, at the point of a gun, not to commit murder or rape, by threatening you that if you do, I will retaliate violently, without violating your rights. But this is because you have no right to murder or rape in the first place. This does not apply to the present analysis, since marriage, even on terms disapproved of by Kronman, is hardly an invasion of person or property.

are some very imaginative people, for example, who have bitterly opposed freedom. Lillian Hellman, for example, was a gifted writer of fiction, and yet a Stalinist. It is one thing to urge people to attend acting school. Just conceivably, despite counter examples of this sort, it might indeed increase our "imaginative capacities." It is an empirical issue. But to do this on a compulsory basis, that is, to force people to take acting lessons in order to increase freedom, is a contradiction in terms. For the very act of making them compulsory is itself a denial of freedom.

Further, if good judgement is important enough to justify the use of coercion, one would think that the law should accept its absence as a mitigation of contracts. Yet, Kronman informs us, "... we quite properly refuse to recognize lack of judgement as a general defense against the claim that one has failed to meet his contractual obligations."⁷⁷

Kronman maintains that "Our society is committed to the principle that, as long as they do not violate the rights of others, individuals may pursue their own conceptions of the good."⁷⁸ This is as accurate a description of the libertarian philosophy as has ever been penned. But it comes as a jarring note in an essay devoted to undermining this principle, by advocating numerous interferences with freedom on a paternalist basis. For example, no sooner does he express this highly libertarian sentiment but that he argues:

"Mandatory cooling off periods, which only postpone the moment of contractual commitment, do not conflict as sharply with the principle of liberal neutrality⁷⁹ as do those restrictions that flatly bar the enforcement of certain agreements because of their substance or content... More importantly, the imposition of a mandatory cooling-off period implies a moral

⁷⁷ Kronman, 1983, p. 794

⁷⁸ Kronman, 1983, pp. 794-795

⁷⁹ I have been calling this libertarianism.

deficiency in those to whom it applies."⁸⁰

Kronman is indeed correct in asserting that a cooling off period is not as great an infringement on liberty as is an outright prohibition of a commercial interaction. However, an enforced postponement is still a limitation on freedom. Rape is not as bad as murder, but it is still rights violative. One would hardly advocate rape on the ground that it is the lesser of two evils; but this appears to be the point being made by our author. Moreover, not only does Kronman advocate forced delay, he also recommends outright prohibition of certain contracts, e.g., the nondisclaimable warranty of habitability⁸¹. Thus, even this defense of the lesser of two evils is not really available to him.

It might well be that there is some sort of moral deficiency in people who have poor judgement. But this is a victimless "crime," like stupidity, and ought not to attract the negative attention of the police. This initiative cannot easily be reconciled with Kronman's libertarian insistence that "individuals may pursue their own conceptions of the good." Or is this to apply only to those people who, in Kronman's view, have good judgement?

Kronman offers as a further justification for waiting periods "that a person who decides to marry or divorce without delay is likely to be moved by a powerful passion that can cloud his judgment and cause him to act in a way he will later regret."⁸² Yes, I can just hear my mother saying things like that to me. Kronman as an wise uncle, dispensing advice to his nephews is perfectly acceptable in the libertarian vision. But our author is not merely offering well intended advice.

⁸⁰ Kronman, 1983, p. 795

⁸¹ Kronman, 1983, p. 772

⁸² Kronman, 1983, p. 796

There is an iron fist in the velvet glove he proffers: the threat of governmental compulsion, e.g., fines and jail sentences, if his wise counsel is rejected. My mother had this power until I was an adult, but not afterward. Kronman, in contrast, wants to treat all citizens in this manner, for their entire lives.

Some people, of course, are moved by "powerful passion" in virtually all aspects of their lives. They are just basically passionate. Should we therefore install cooling off periods for them for all items? Kronman is having none of this reductio:

"To be sure, similarly distorting passions may be at work even in the most mundane commercial transactions, but there is no way of distinguishing these cases from those in which the parties' judgement is unclouded without an intensive and probably futile inquiry into their feelings and motives."⁸³

But this will not do. If it is so important that our fellow citizens never divorce, marry, or buy an encyclopedia without benefit of a waiting period, then this justifies either attempting to distinguish cases where this is needed from where it is not, or, imposing a cooling off period for all transactions, with no exceptions. Who knows? Perhaps someone will one day become emotional about buying a newspaper, and will have to be restrained from so impulsive an act. Alternatively, if it is "futile" for the state to inquire into the "feelings and motives" of other people, then it should not impose any waiting period for anything, for we never know for sure whether they are indeed suffering from "powerful passions" even in the paradigm cases of marriage, divorce and encyclopedia sales.

But such agnosticism is not for the likes of Kronman. He would insist that we do have knowledge about the inner lives of the citizenry, which justifies intervention in decisions with emotional aspects, but not for others. What, then, of applying this policy to matters of home and

⁸³ Kronman, 1983, p. 796

hearth; for jewelry, old toys, garage sales, pets, other things with sentimental value? Surely, even on Kronman's reading of the situation, there ought to be a greatly expanded role for cooling off periods in these domains. But then, as we have seen, this leads directly to very unwelcome speculations about different ethnic groups suffering under the thrall of "powerful passions" at very different rates⁸⁴. If this is the justification for waiting periods, it is hard to see how this implication can be resisted, upon pain of contradiction.

Kronman attempts to obviate the challenge that it is important that commercial arrangements be consummated quickly, for "If every contract were subject to a mandatory cooling-off period, the whole system of market exchange on which our modern economy rests would be impaired."⁸⁵ His answer: "(B)ut the requirement that a couple wait before they marry or divorce has less serious consequences."⁸⁶ This hardly explains "why a cooling-off period is also required in various consumer transactions"⁸⁷ Kronman concedes, but makes no attempt to reconcile this lacunae with his theory. (As we have seen, an urge toward dirigisme accounts for both types of activity very easily.)

As for the "less serious consequences" of marriage and divorce than many consumer transactions, this claim is subject to counter examples. Suppose, for example, that a girl is pregnant,

⁸⁴ See on this Levin, Michael, Why Race Matters, Westport, CT: Praeger, 1977; Rushton, J. Philippe, Race, Evolution and Behavior: A life history perspective, New Brunswick, N.J.: Transaction, 1997

⁸⁵ Kronman, 1983, p. 796

⁸⁶ Kronman, 1983, p. 796

⁸⁷ Kronman, 1983, p. 797

and her parents will commit suicide if she is not married immediately. Then, speed becomes a matter of life and death. Or suppose that unless a couple is immediately divorced, the parent of one of them will cut him out of the will. This may or may not be a matter of such great immediacy as that, but it is not clear how Kronman's assessment of "less serious consequences" than the ordinary market transaction can be sustained in such a case.

References

Aaron, Henry

Ackerman, "Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy," 80 Yale Law Journal, 1093 (1971).

Baird, Charles, Rent Control: The Perennial Folly, Washington D.C.: The Cato Institute, 1980

Barnett, Randy E. (1986) "Contract Remedies and Inalienable Rights" Social Philosophy & Policy Vol. 4, Issue 1, Autumn, pp. 179-202

Barnett II, William, "Subjective Cost Revisited," Review of Austrian Economics, Vol. 3, 1989, pp. 137-138

Block, Walter, "Market-Inalienability Once Again: Reply to Radin," forthcoming B

Block, Walter, "Rent Control: A Case Study of British Columbia," Mid Atlantic Journal of Business, Vol. 30, No. 3, December 1994, pp. 299-304

Block, Walter, "On Rent Control," David Henderson, ed., The Fortune Encyclopedia of Economics, New York: Warner Books, 1993, pp. 421-425.

Block, Walter, "Kuflik on Inalienability: A Rejoinder," forthcoming C

Block, Walter, "A Reply to the Critics," Rent Control: Myths & Realities, Walter Block and Edgar O. Olsen, eds., Vancouver: The Fraser Institute, 1981, pp. 283-319

Block Walter, "Voluntary Slavery," Libertarian Connection, 1968

Block, Walter, "Rent Controls--Who Benefits and Who Is Hurt," Housing in Canada: A Continuing Challenge, Paul Cosgrove and Raymond V. Hession, eds., Don Mills, Ontario: The Canadian Real Estate Association, 1982, pp. 197-209.

- Block, Walter, "On Yeager's 'Why Subjectivism?'," Review of Austrian Economics, Vol. 2, 1988, pp. 199-208
- Block, Walter, "Rent Control: A Tale of Two Canadian Cities," Mid Atlantic Journal of Business, Vol. 25, No. 7, 1989, pp. 85-88.
- 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, "On Robert Nozick's 'On Austrian Methodology'," Inquiry, Vol. 23, No. 4, Fall 1980, pp. 397-444; Spanish translation, Libertas, No. 26, 1997, pp. 71-131
- Brown, Stuart M. Jr., "Inalienable Rights," The Philosophical Review, 64, 1955, pp. 192-211
- Buchanan, James M. and G.F. Thirlby, L.S.E. Essays on Cost, New York: New York University Press, 1981.
- Buchanan, James M., and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy, Ann Arbor: University of Michigan, 1971.
- Buchanan, James M., and Brennan, Geoffrey, The Power to Tax: Analytical Foundations of a Fiscal Constitution, Cambridge: Cambridge University Press, 1980
- Buchanan, James M., Cost and Choice: An Inquiry into Economic Theory, Chicago: Markham, 1969
- Buchanan, 1969; Buchanan and Thirlby, 1981; Mises, 1966; Rothbard 1962, 1973, 1977, 1989
- 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)
- Cragg, J.G., "Rent Control Report" commissioned by British Columbia Rentalsman, mimeo, 1974.
- DiLorenzo, Thomas J., "The Subjectivist Roots of James Buchanan's Economics," Review of Austrian Economics, Vol. 4, 1990, pp. 180-198
- Edelstein, Michael R., and Steele, David Ramsey, Three Minute Therapy, Lakewood CO: Glenbridge, 1997
- Ellis, Albert, and Harper, Robert A., A Guide to Rational Living, North Hollywood, CA: Wilshire, 1961
- 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

Frey, Bruno S., Werner W. Pommerehne, Friedrich Schneider and Guy Gilbert (1984) "Consensus and Dissension Among Economists: An Empirical Inquiry," American Economic Review, December, 74:5:986-94.

Friedman, Milton, and Stigler, George, "Roofs or Ceilings? The Current Housing Problem," in Block, Walter, and Edgar Olsen, eds., Rent Control: Myths and Realities, Vancouver, The Fraser Institute, 1981

Grant, R. W., Rent Control and the War Against the Poor, Manhattan Beach: Quandary House, 1989

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

Hoppe, Hans-Hermann, "Time Preference, Government, and the Process of Decivilization -- From Monarchy to Democracy," 5 Journal Des Economistes Et Des Etudes Humaines, 319, 1994.

Hoppe, Hans Hermann, Hulsman, Guido, and Block, Walter, "Against Fiduciary Media," Quarterly Journal of Austrian Economics, Vol. 1, No. 1, pp. 19-50, 1998

Horton, Joseph, Shorter, Ethan, and Block, Walter, "Rent control: an economic abomination," International Journal of Value Based Management, Vol. 11, No. 3, pp. 253-263, 1998

Jacobs, Jane (1989), The Death and Life of Great American Cities, New York: Vintage

Johnson, M. Bruce, ed., Resolving the Housing Crisis: Government Policy, Decontrol, and the Public Interest, San Francisco: The Pacific Institute, 1982

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

Kronman, "Paternalism and the Law of Contracts," 92 Yale Law Journal (1983)

Kuflik, Arthur, "The Utilitarian Logic of Inalienable Rights," Ethics, 97, Oct. 1986, pp. 75-87

Kuflik, Arthur, "The Inalienability of Autonomy," Philosophy and Public Affairs, Vol. 13, No. 4, 1984, Fall, pp. 271-298

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

Lindbeck, Assar, The Political Economy of the New Left, (New York: Harper and Row, 1972)

McConnell, Terrance "The Inalienable Right of Conscience: A Madisonian Argument," Social Theory & Practice, Fall 1996, Vol. 22, Issue 3

McConnell, Terrance, "The Nature and Basis of Inalienable Rights," Law and Philosophy, Vol. 3, 1984

McDonough Gene and Block, Walter, "The Evils of Rent Control," Consent #27, 1997, pp. 10-11

Meyers, Diana T., "The Rationale for Inalienable Rights in Moral Systems" Social Theory and Practice, Vol.7, No. 2 (summer 1981), 127-143

Mises, Ludwig von, Human action, Chicago: Regnery, 1949, 1963, 1966.

Mises, Ludwig von, The Anti-Capitalist Mentality, South Holland, IL: Libertarian Press, 1972

Mungovan, Patrick, "The Ravages of Rent Control," The Chalcedon Report No. 359, June 1995, pp. 31-32

Murray, Charles, Losing Ground: American Social Policy from 1950 to 1980, New York: Basic Books, 1984

Myrdal, Gunnar, "Opening Address to the Council of International Building Research in Copenhagen," 1965; cited in Dagens Nyheter (Swedish Newspaper), 25 August 1965, p. 12; cited in Rydenfelt, Sven, "The Rise, Fall and Revival of Swedish Rent Control," in Rent Control: Myths and Realities, Walter Block and Edgar Olsen, eds., Vancouver: The Fraser Institute, 1981, p. 224.

Noel, F. Regis, "A History of the Bankruptcy Clause of the Constitution of the United States of America" Washington, D.C.: doctoral dissertation, Catholic University of America, 1920).

Nozick, Robert, Anarchy, State and Utopia, New York: Basic Books, 1974 (p. 331, ft. 48)

Radin, Margaret Jane, "Market-Inalienability" Harvard Law Review, Volume 100, No.8, June, 1987, pp. 1849-1937

Radin, Margaret Jane, "Time, Possession and Alienation," 64 Washington University Law Quarterly, 739 (1986)

Rawls, John, A Theory of Justice, Cambridge: Harvard University Press, 1971

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

Rothbard, Murray N., "Value Implications of Economic Theory," American Economist, Vol. 17, Spring 1973

Rothbard, Murray N., Man, Economy and State, Los Angeles, Nash, 1962.

Rothbard, Murray N., The Ethics of Liberty, Humanities Press, Atlantic Highlands, N.J., 1982 (1998).

Rothbard, Murray N., "The Hermeneutical Invasion of Philosophy and Economics," Review of Austrian Economics, Vol. 3, 1989, pp. 45-59

Rothbard, Murray N., "Toward a Reconstruction of Utility and Welfare Economics," San Francisco: Center for Libertarian Studies, Occasional Paper #3, 1977

Rushton, J. Philippe, Race, Evolution and Behavior: A life history perspective, New Brunswick, N.J.: Transaction, 1997

Salins, Peter D., The Ecology of Housing Destruction: Economic Effects of Public Intervention in the Housing Market, New York: New York University Press, 1980.

Sohr, Kevin, and Block, Walter, "Rent Control," Freeman, Vol. 47, No. 11, pp. 681-682, 1997

Sowell

Tammara, Christine, Corley, Carole, and Block, Walter, "Rent Control: An Economic Evil," Commentaries on Law and Economics, 1999, forthcoming

Tribe, Laurence H. (1985) "Commentary; The abortion funding conundrum: Inalienable rights, affirmative duties, and the dilemma of dependence," Harvard Law Review: Vol. 99: 330

Tucker, William, The Excluded Americans: Homelessness and Housing Policies, Washington D.C., Regnery Gateway, 1990.

Van DeVeer, Donald, "Are Human Rights Alienable?," Philosophical Studies 37 (1980): 165-176

Walker, Michael, and Block, Walter, "Entropy in the Canadian Economics Profession: Sampling Consensus on the Major Issues," Canadian Public Policy, Vol. XIV. No. 2, June 1988, pp. 137-150.

Wellman, Carl. "The Inalienable Right to Life and the Durable power of an Attorney" Law & Philosophy, May 95, Vol. 14 Issue 2