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Commentary

Reflections on Contract Law and Distributive Justice: A Reply to Kronman

By WILLIAM K. S. WANG*

In the first part of a recent article in the *Yale Law Journal*,¹ Professor Anthony Kronman provocatively argues that consistency forces libertarians down a slippery slope to welfare state liberalism.² Kronman contends: (1) libertarians allow rescission of coerced agreements, that is, contracts executed only because of threat of violence;³ (2) coercion is equivalent to unjustified "advantage-taking";⁴ (3) to ascertain which "advantage-taking" to prohibit in exchanges, libertarians must accept paretianism, a theory of distributive justice;⁵ (4) with regard to "advantage-taking" in contracts, the use of physical coercion, deceit, wealth, or talent are morally indistinguishable;⁶ and (5) because a libertarian uses paretianism, a principle of distributive justice, to judge the validity

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1. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472-97 (1980).

2. Overgeneralizing, libertarians contend that individuals have an absolute right to the fruits of their labor; welfare state liberals deny the absoluteness of this right and support some compulsive redistribution of wealth to the needy.

This reply does not discuss the second part of Kronman's article, which challenges the standard liberal preference for taxation as a method of redistribution.

3. Kronman, *supra* note 1, at 477-78.

4. *Id.* at 478-83.

Kronman uses the word "advantage-taking" in a nonpejorative fashion. *See infra* note 32 & accompanying text. To emphasize the neutral nature of the term "advantage-taking," this Commentary will always place quotation marks around the word "advantage-taking" and usually place them around the word "victim."

5. *Id.* at 483-88.

Paretianism has two versions. Under "individual paretianism" (IP), "advantage-taking" in a particular transaction is permitted only if the specific victim will benefit in the long run from allowing that form of "advantage-taking."

Under "group paretianism" (GP), a type of "advantage-taking" is allowed when doing so will increase the long-run welfare of most people who are taken advantage of in that particular way. *See infra* notes 15-16 & accompanying text.

6. Kronman, *supra* note 1, at 491-94.

of contracts, the libertarian must also accept contract rules designed to redistribute wealth more fairly.⁷

Were Kronman correct, his argument would constitute a definitive victory for liberalism over libertarianism. This Commentary identifies fatally weak links in Kronman's reasoning. With such high stakes riding on the validity of Kronman's argument, the sole goal of this paper is the demonstration of philosophical error; this reply does not analyze the relative merits of libertarianism and liberalism.

Kronman's Argument

Libertarians Must Endorse Paretianism to Ascertain the Legitimacy of "Advantage-taking"

In slightly more detail, Kronman's argument is as follows. The libertarian theory of contract law is premised upon the belief, first, that individuals have the right to make voluntary agreements for the exchange of their own property; and second, that if an agreement is coerced or involuntary, it is not enforceable.⁸ Involuntariness is equivalent to illegitimate "advantage-taking" by the other party. Illegitimate "advantage-taking" can take such forms as physical coercion, deliberate misrepresentation, and deliberate nondisclosure. Libertarians must develop a principle to distinguish between legitimate "advantage-taking" in a voluntary exchange and illegitimate "advantage-taking" which results in an involuntary contract.⁹

According to Kronman, libertarians would initially attempt to use the "liberty principle," which provides that "advantage-taking" by one party to an agreement should be allowed unless it infringes the rights or liberty of the other party. Kronman correctly notes that the liberty principle is useless unless one can determine what rights people have; an "advantage-taking" can just as easily be a right of the "advantage-taker" as an invasion of the rights of the "victim."¹⁰

Kronman suggests three principles that might be used to determine which forms of "advantage-taking" do not invade the rights of the "victim" and thus are permissible: natural superiority, utilitarianism, and "paretianism."¹¹ The first principle would allow naturally superior people to exploit naturally inferior individuals. This approach is incompatible with the libertarian belief in the moral equality of individuals.¹² The second principle, utilitarianism, would approve "advantage-taking" if the total amount of some good such as total happiness is

7. *Id.* at 495-97.

8. *Id.* at 475-78.

9. *Id.* at 478-80.

10. *Id.* at 483-84.

11. *Id.* at 484-85.

12. *Id.*

increased. Utilitarianism violates the libertarian tenet that individuals have moral boundaries that must be respected even if total welfare or happiness is not maximized.¹³ In Kronman's view, only the third principle, paretianism, is consistent with the basic ethical beliefs of libertarians.

Therefore, if forced to choose among the foregoing three principles, the libertarian would endorse paretianism to determine what kinds of "advantage-taking" should be permitted. Paretianism, however, can take two different forms. Kronman first describes paretianism as a test applied to the individual "victim" of a transaction. "Advantage-taking" in an individual transaction would be allowed only if the specific individual who is disadvantaged will benefit in the long run from allowing that type of "advantage-taking."¹⁴ This Commentary will refer to this principle as Individual Paretianism (IP).

Because the highly individualized assessments called for by IP would be impossible for courts and legislatures, and because IP would lack the predictability of more formal, less individualistic rules, Kronman expressly rejects IP in favor of a second version of paretianism. This version allows a particular form of "advantage-taking" when doing so will increase the *long-run* welfare of *most* people who are taken advantage of in that particular way.¹⁵ For example, allowing land-buyers to take advantage of deliberately acquired geological information without disclosure to the sellers may encourage mineral exploration and thereby lower mineral and overall prices enough to make the land-sellers better off in the long run.¹⁶ This Commentary will refer to this as Group Paretianism (GP), because the principle applies to multiple, rather than individual, "victims."

GP measures the welfare of the "victims" against the baseline of legal prohibition of the "advantage-taking." This baseline is a situation of equality¹⁷ in which either the advantage must be shared with everyone¹⁸ or everyone is uniformly denied use of the advantage.¹⁹ In

13. *Id.* at 485-86.

14. *Id.* at 486.

15. *Id.* at 487.

16. *Id.* at 489-90. See *infra* text accompanying note 51.

17. Kronman, *supra* note 1, at 491-92.

18. Kronman uses the example of transactions based on nonpublic information. Under one possible rule, the information-possessor is given a property right in the information and can use it without disclosure to the party on the other side of the contract. The opposite rule would treat the information as a public asset that the possessor cannot exploit without prior disclosure to the other transacting party. Under GP, possessors are allowed to exploit nonpublic information only if those to whom the information is not disclosed will be even better off than they would have been had the information been regarded as a public asset. *Id.* at 492.

19. Kronman's illustration is the use of superior physical strength to coerce exchanges. The baseline of equality is achieved not by forcing the strong person to share the advantage

Kronman's view, the possessor of an advantage may only use it if those not possessing it are made better off by its use than "they would be if no one were given a greater right to the advantage than anyone else."²⁰

This paretian prohibition applies to all talents and assets, including strength, intelligence, wealth, and information. All belong to "a common pool or fund in which no one—not even the person who possesses the advantage—has any prior claim."²¹ If possession alone could justify "advantage-taking," all "advantage-taking" would be justified.²² Some "advantage-taking"—coercion, for example—is clearly unjustified. The distinction between justified and unjustified "advantage-taking" by the possessor of an advantage must be based on some principle; Professor Kronman argues that the only meaningful principle for a libertarian is paretianism.²³ Thus, Kronman concludes that libertarians must use paretianism to judge the validity of any contract in which one party takes advantage of talent or wealth. If the "advantage-taking" is nonparetian, the "victim" can rescind.

Libertarians Must Accept Contract Rules Designed to Redistribute Wealth More Fairly

Kronman next argues that if a libertarian uses a principle of distributive justice to judge the voluntariness of exchanges, consistency forces him to use a principle of distributive justice to develop contract rules that redistribute wealth.²⁴ To elaborate, society uses one set of laws to determine whether a contract is *invalid* because of illegitimate "advantage-taking" (coercion and deceit). To redistribute wealth, the society may adopt a second set of rules to govern the *content* of contracts, such as the law of usury, minimum wages, and nondisclaimable warranties. Both sets of contract laws are designed to limit "advantage-taking." According to Kronman, because a libertarian must employ a principle of distributive justice in drafting the first set of rules (rescindability based on illegitimate "advantage-taking"), the libertarian must accept laws in the second set that redistribute wealth more fairly. It would be arbitrary, argues Kronman, for a libertarian to limit

with others but by denying everyone the right to use strength in this particular way. GP allows a departure from this baseline only if the weak are made better off in the long run by being forced into contracts by the strong. *Id.*

20. *Id.* at 493.

21. *Id.*

22. *Id.* at 493-94.

23. *Id.* at 496-97. Kronman also argues that no difference exists between taking advantage of superior information or strength and taking advantage of wealth. Wealth is just another transactional advantage and, like all transactional advantages, may be utilized only if paretian principles permit. *Id.*

24. *Id.* at 495.

"advantage-taking" in one context and not the other.²⁵

In summary, beginning with the premise that a libertarian endorses voluntary exchanges and prohibits involuntary ones, Kronman arrives at the surprising and implausible conclusion that a libertarian must use paretian principles to restrain the use of talent and wealth in exchanges and must favor using contract rules to redistribute wealth from rich to poor.

Weak Links in Kronman's Argument

Kronman's Argument Is Negative

Kronman correctly argues that a libertarian would allow contract rescission by victims of certain kinds of "advantage-taking" such as coercion and deceit. Nondisclosure, mutual mistake of fact, and unilateral mistake of fact would pose more difficulty. The libertarian would have to adopt some principle to decide what kind of "advantage-taking" is unjustified. Kronman's argument that libertarians would choose paretianism is essentially negative. He describes just four possible approaches to judging "advantage-taking." Kronman rightly concludes that the first, the "liberty principle," begs the question. As to the remaining three, natural superiority, utilitarianism, and paretianism, Kronman says that "if a libertarian were *required* to choose among the three, the only one that he could choose without abandoning his most fundamental moral beliefs would be the third."²⁶

Kronman does not demonstrate why the libertarian would not choose one or more other principles to limit "advantage-taking." After discussing Kronman's paretianism, one commentator has suggested that an alternative approach would be a plurality of moral principles that might have a different relevance in different circumstances.²⁷

For example, a libertarian might divide all "advantage-taking" contracts into two sets: (1) those in which the "victims" were subject to no physical coercion and had the benefit of full disclosure of all relevant information, and (2) all other "advantage-taking" contracts. The libertarian might enforce *all* contracts in the first set, and use some system of moral principles to determine when to enforce contracts in the second set. For example, such a moral system might dictate that reckless fraud is grounds for rescission, but negligent fraud is not.

The most important reason that a libertarian would reject paretianism, however, is that he or she would be offended by its premises and inherent arbitrariness of application. The libertarian would reject

25. *Id.* at 495-97.

26. *Id.* at 485 (emphasis added).

27. Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 970 (1980).

paretianism's baseline of prohibition of all "advantage-taking." Further, the libertarian would regard *group* paretianism as morally arbitrary because it provides for a simple majority count of whether a group of "victims" is better off, and because defining the relevant group of "victims" is impossible.

Kronman's Baseline Prohibiting All "Advantage-taking" Is Unjustified

Kronman's paretianism differs from classic Pareto optimality, in which all changes that have been made make at least one person better off and no one worse off.²⁸ One can hardly object to such changes, but virtually all policy decisions harm someone.²⁹ The economist Kenneth Boulding once jokingly remarked that microeconomists are a bit simple-minded; only a fool would devote a discipline to trying to make people better off without making anyone worse off.³⁰

Classic Pareto optimality is of no assistance in evaluating "advantage-taking," because any prohibition that makes the "victim" better off must necessarily leave the "advantage-taker" worse off. For example, a rule prohibiting lying will make dishonest people worse off. Neither the adoption nor the rejection of a law against lying would be Pareto optimal.

Instead of classic Pareto optimality, Kronman advances a one-sided paretianism. He would permit so-called "advantage-taking" if it works to the long-run benefit of those disadvantaged by it. Without explanation, he ignores the welfare of the potential "advantage-takers."³¹

In light of Kronman's definition of "advantage-taking," the one-sidedness of his paretianism is puzzling. To avoid criticism of his principle as question-begging, Kronman emphasizes that he uses the term "advantage-taking" in a nonpejorative fashion:

I mean the term ["advantage-taking"] to be understood in a broader sense . . . as including even those methods of gain the law allows and morality accepts (or perhaps even approves). In this broad

28. See R. POSNER, *THE ECONOMICS OF JUSTICE* 54-55, 88 (1981): "A change is said to be Pareto superior if it makes at least one person better off and no one worse off." *Id.* at 54; Coleman, *Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 226 (1980) ("An allocation of resources is Pareto superior to an alternative allocation if and only if no person is disadvantaged by it and the lot of at least one person is improved."); Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512-13 (1981); Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913, 914 (1980) *cf.* P. SAMUELSON, *ECONOMICS* 435 n.12, 591 & n.3 (11th ed. 1980); (defining an equilibrium as "Pareto optimal" if there is no possible movement from it that could make everyone better off).

29. See R. POSNER, *supra* note 28, at 89 ("[T]he Pareto-superiority criterion is inapplicable to most policy questions . . .").

30. Speech by Kenneth Boulding, Amherst College (1966).

31. This conclusion was independently arrived at by Baker, *supra* note 27, at 970.

sense, there is advantage-taking in every contractual exchange. Indeed, in mutually advantageous exchanges, there is advantage-taking by both parties.³²

Because Kronman defines "advantage-taking" neutrally, he cannot assume that libertarians would agree to an absolute prohibition of any "advantage-taking" transaction that does not leave the "victims" better off. Because a libertarian is concerned about the victims of some "advantage-taking" does not mean that he or she will show the same solicitude for the "victims" of all "advantage-taking."

The libertarian antipathy toward "involuntary" exchanges is based on the belief that individuals have the right to private property³³ and should not be deprived of it without "consent."³⁴ Kronman's paretianism, however, requires that all assets be considered part of a "common pool or fund in which no one—not even the person who possesses the advantage—has any prior claim."³⁵

Whether a property-owner is entitled to his or her property in the first place is a question separate from the "voluntariness" or legitimacy of exchanges. Indeed, discussions of "voluntariness" and even of contracts and exchanges presuppose the existence of private property. If before selling my blood to you, I falsely state that it is a rare type, you may be able to rescind. Clouds on my title to my own blood are irrelevant to the fraud issue. If I do not own my own blood, I cannot sell it at all, fraudulently or otherwise.

Admittedly, libertarians must use some system of moral principles to decide which "advantage-taking" exchanges to restrain.³⁶ Nevertheless, any resulting restriction on talents or resulting redistribution of wealth would be an incidental by-product of allowing the "victim" to extricate himself or herself from the contract. Kronman erroneously suggests that restrictions on robbery and deceit are equivalent to restraints on the talents of strength and intelligence.³⁷ If this were true, society would permit robbery by the weak and fraud by the stupid. A robber may be no stronger or cleverer than the victim but may use the element of surprise or the threat of a weapon. The robber is distinguished by his *willingness* to rob, not by his superior talent. Similarly, a deceitful seller may be distinguished by a willingness to lie rather than by superior intelligence. Furthermore, if a robber or defrauder hap-

32. Kronman, *supra* note 1, at 480. Kronman continues with this example: "Suppose I have a cow you want, and you have a horse I want, and we agree to exchange our animals. The fact that you want my cow gives me an advantage I can exploit by insisting you give me your horse in return." *Id.*

33. R. NOZICK, ANARCHY, STATE AND UTOPIA 150-53, 160-64, 174-82 (1974).

34. *Cf. id.* at 33-34 (1974) (prohibition of aggression by one person against another).

35. Kronman, *supra* note 1, at 493.

36. *See supra* text accompanying note 27.

37. *See* Kronman, *supra* note 1, at 492, 494.

pens to be exceptionally strong or intelligent, society consistently could permit him or her to use his or her talents in morally acceptable activities, but not in morally unacceptable ones.

Kronman correctly notes that restrictions on illegitimate "advantage-taking" in contracts decrease the "advantage-taker's" wealth.³⁸ The purpose of the restraint, however, is *not* wealth redistribution. Allowing one party to rescind a contract deprives the other party of the benefit of the bargain. This result is more accurately described as a *restoration* of the pre-exchange wealth distribution than as a *redistribution*. Whether the "advantage-taker" is rich or poor, he is deprived of the fruits of his morally offensive conduct. Whether the "victim" is affluent or impoverished, the property he gave up "involuntarily" is returned.

Kronman's unjustified bias against "advantage-taking" is especially apparent in his initially advanced one-sided *individual* paretianism, IP; in each contract, the "victim" may rescind, unless allowing the "advantage-taking" works to the long-term benefit of that particular "victim."³⁹ IP is either unjustified or trivial. If the "advantage-taking" is not objectionable, the victim should not be allowed to rescind at all. If IP is applied only to objectionable "advantage-taking," the principle is reduced to the trivial proposition that a victim of objectionable "advantage-taking" may rescind, unless consistently allowing this type of "advantage-taking" works to the *long-term* benefit of that particular victim. IP hardly furnishes assistance in answering the crucial question of what "advantage-taking" is objectionable. A hypothetical will make this clear.

Suppose I buy a newly built skyscraper in San Francisco. Earthquake insurance is not available. A major earthquake destroys the building one week later. Assume the following alternative facts:

1. The U.S. Geological Survey had publicly predicted a major earthquake in the next decade. I knew of this prediction but dismissed it. No one knew the quake was imminent.
2. My seller had received nonpublic information from a University of California geology professor that a quake was imminent. I had no such information.
3. The U.S. Geological Survey knew that a quake was imminent but did not disclose the information to avoid panic. My seller had bribed a government official to obtain this information.
4. When I expressed concern about earthquakes, the seller gave me a U.S. Geological Survey Report that indicated the probability of a major earthquake in San Francisco. The actual report said that the

38. *Id.* at 496.

39. *See supra* note 14 & accompanying text.

probability was one in fifty, but the seller fraudulently altered the report to read one in fifty thousand.

In all four cases, the exchange is adverse to me. I would have been better off had I not purchased. I also would be better off if I could rescind. Because Kronman uses the term "advantage-taking" in a nonpejorative sense, all four cases are characterized by various types of "advantage-taking" by the seller. If nothing else, the seller is taking "advantage" of my desire for a skyscraper.⁴⁰ In all four cases, I would be better off in the long run with a rule allowing buyers in my position to rescind. Uninsurable natural disasters are sufficiently rare that it is unlikely that I would eventually *sell* real estate to someone who wished to rescind because of an earthquake or other uninsurable natural disaster. Therefore, Kronman's IP would allow me to rescind in all four cases.

Common sense indicates I should not be allowed to rescind in the first fact situation above. Whether IP should be applied to fact situations two, three, and four depends on whether the conduct of the seller is considered sufficiently offensive to allow the buyer to rescind. In other words, Kronman's one-sided IP should be applied only where the "advantage-taking" is highly offensive. In that situation, the victim should be allowed to rescind unless he or she would be better off in the long run with a rule denying rescission. IP does *not* determine whether the conduct in the fact situations two, three, and four is sufficiently offensive. This hypothetical illustrates why a libertarian would reject IP as useless in judging whether a certain form of "advantage-taking" is objectionable.

IP is especially inappropriate in *mutually advantageous* exchanges involving full disclosure of all material facts and no physical coercion. Kronman gives as two examples of "advantage-taking" "a monopoly of some scarce resource—the only water hole or the best cow or the strongest shoulders in town. . .," and the "incapacity of the promisor himself—[including] . . . impecuniousness."⁴¹ These two examples differ fundamentally from Kronman's other examples of "advantage-taking": hypnotism, physical coercion, fraud, nondisclosure, and unilateral mistake.⁴² The victim of monopoly or poverty would not be worse off had he never met the alleged "advantage-taker." The exchange is mutually advantageous. Conceivably, the "victim" could claim that if the universe were different, he would not engage in this transaction. If the universe were different, however, the "victim"

40. See *supra* note 32 & accompanying text.

41. Kronman, *supra* note 1, at 479.

42. *Id.* at 477-79.

would be a different person, with different abilities and personality.⁴³ In this universe, the "victim" is still better off transacting with the "advantage-taker" than not transacting at all. A libertarian would not prohibit such exchanges or allow their rescission. Indeed, prohibition would make the "victim" worse off by depriving him or her of the opportunity to enter a mutually beneficial exchange. Allowing rescission would be futile because the exchanges almost never would be rescinded. If one person has a monopoly of a scarce resource, those who need the resource would rather pay high prices than do without the resource.

In order to justify differences in wealth, the noted libertarian philosopher, Robert Nozick, hypothesizes that Wilt Chamberlain's contract provides that each person attending his basketball games must pay an extra twenty-five cents into a box whose contents will be paid directly to Wilt Chamberlain. At the end of a season he winds up with \$250,000.⁴⁴

Under Kronman's paretianism, Chamberlain's talent would be thrown into a common pool to which he had no prior right. In each exchange, he would be prohibited from using his talent, *unless* permitting use of the talent inured to the long-run benefit of the "victim," one of his fans. Presumably, all the fans would be desolate if Chamberlain could not take "advantage" of them. Therefore, IP would validate all the ticket sales.

Nozick's approach to the hypothetical is completely different, however. He would not dream of classifying the ticket purchases as "involuntary." Indeed, he views the transactions as paradigms of just exchanges, which require no defense.⁴⁵

In summary, paretianism's baseline of absolute prohibition of all "advantage-taking" is much too broad-sweeping for libertarians. In choosing a principle to judge "advantage-taking," libertarians would reject IP and choose some other principle or system of principles. By rejecting IP, the libertarians would escape Kronman's slippery slope at an early stage.

The Arbitrariness of *Group* Paretianism

Assuming *arguendo* that a libertarian accepted IP as the proper principle for judging "advantage-taking," however, the libertarian would still reject Kronman's one-sided *group* paretianism (GP), which permits a type of "advantage-taking" if, in the long run, the welfare of

43. See generally Levin, *Reverse Discrimination, Shackled Runners, and Personal Identity*, 37 PHIL. STUD. 139 (1980).

44. R. NOZICK, *supra* note 33, at 161-62.

45. See *id.*

most of its victims is increased.⁴⁶ As mentioned earlier, convenience and predictability prompted Kronman to substitute GP for IP.⁴⁷ For several reasons, the libertarian would find GP hopelessly arbitrary.

The Arbitrariness of a Simple Majority Census of Better-Off "Victims"

Kronman describes certain differences between GP and utilitarianism.⁴⁸ However, both principles violate the libertarian tenet that individuals have moral boundaries that must be respected even if the total welfare of some group is not maximized.⁴⁹ If a libertarian feels that an individual's rights have been violated by a certain form of "advantage-taking," and that permitting this "advantage-taking" will not benefit the individual "victim," the libertarian will hardly classify the transaction as "voluntary" or acceptable solely because *others* in the class of "victims" will be benefited in the long term by allowing that type of "advantage-taking."

Under GP, if allowing a particular form of "advantage-taking" benefits, in the long term, 51% of the disadvantaged class, the remaining 49% may be sacrificed, no matter how little the 51% gain, no matter how much the 49% lose, and no matter how much members of society outside the class of transactors are harmed by allowing the "advantage-taking." Conversely, under GP, if allowing a particular form of "advantage-taking" benefits in the long term only 49% of the disadvantaged class, the remaining 51% must be relieved of the disadvantage, no matter how much the 49% ultimately lose, no matter how little the 51% ultimately gain, and no matter how much members of society outside the class of transactors are harmed by disallowing the "advantage-taking."

This approach would please neither the utilitarian nor the libertarian. The utilitarian would object because society's total welfare is not maximized. The libertarian would be bothered because certain individuals would have their rights infringed so that others would benefit.

This analysis of GP disregards the fundamental flaw of both GP and IP mentioned earlier,⁵⁰ because Kronman's concept of "advantage-taking" includes both objectionable and nonobjectionable conduct, no reason exists to favor the disadvantaged "victims" over the "advantage-takers." It is difficult to understand why *anyone*, much less a libertarian, would embrace GP's solicitude toward the class of "disadvantaged" people and GP's simple majority poll of the preferences of that class.

46. See *supra* note 15 & accompanying text.

47. *Id.*

48. Kronman, *supra* note 1, at 487-88.

49. See *supra* note 13 & accompanying text.

50. See *supra* text accompanying notes 31-32.

Impossibility of Defining the Relevant Group of Victims

GP is morally arbitrary for another reason. The number of people who are "victims" of a certain type of "advantage-taking" depends on how that type of "advantage-taking" is defined. Suppose that one hundred people would sometimes be the "victims" of a certain type of "advantage-taking." If that type of "advantage-taking" were defined more broadly, however, perhaps two hundred people would be "victims." If the form of "advantage-taking" were defined more narrowly, perhaps only fifty individuals would be "victims." These changes in the number of "victims" might influence the result of the GP welfare poll. For example, a majority of the two hundred "victims" might be worse off if the "advantage-taking" were permitted, but a majority of the fifty "victims" might be better off.

The problem of defining specific types of "advantage-taking" plagues one of Kronman's own examples of the application of paritarianism. B, a trained geologist, buys a piece of property without disclosing to the seller, A, that there is a rich mineral deposit on the land.⁵¹ Kronman suggests that allowing buyers to take advantage of deliberately acquired geological information may encourage mineral exploration and thereby lower mineral and *overall* prices enough to make sellers like A better off in the long run. If so, buyers like B should not be required to disclose. However, Kronman does not explain why the class of "victims" should not be broader or narrower than "land-sellers whose buyers do not disclose mineral deposits."

Suppose that the sellers of land with oil, natural gas, and bauxite are better off in the long run; but sellers of land with iron ore, uranium, gold, and silver are worse off in the long run. Separate contract rules could be developed for each type of mineral. Sellers could also be classified by region or state. Suppose that Oregon residents who unknowingly sell natural gas-rich land are worse off in the long run because natural gas is not an important source of power in that state. If the buyer knows there is natural gas on an Oregon resident's property, should the buyer be obligated to disclose this fact to the seller? Even if one rule is to be adopted for all "minerals," "mineral" must be defined. Is hot underground water, usable for thermal power, a mineral?

The relevant class could also be broadened to include:

1. land-sellers whose buyers do not disclose material information;
2. sellers *and buyers* of land when the other party does not disclose material information;
3. sellers (of anything) whose buyers do not disclose material information;

51. Kronman, *supra* note 1, at 489-90.

4. sellers *and buyers* (of anything) when the other party does not disclose material information;
5. sellers and buyers (of anything) when the other party engages in material nondisclosure *or affirmative misrepresentation*.

GP has no standard for determining whether a class of "victims" has been properly defined. Therefore, the principle is impossible to apply in practice.

Other Obstacles to the Application of GP

Other practical problems confront GP. Clairvoyance is required to apply GP to Kronman's proposed rule permitting land-buyers to conceal deliberately acquired geological information. He hypothesizes that such a rule would make land-sellers better off in the long run because of the resulting decline in the price of a given mineral, or of minerals in general. To test this hypothesis, future victims must somehow be identified and their annual land-sale losses predicted. Then, the effect of lower mineral prices on their welfare must be projected year by year. After these two determinations, welfare gains and losses for different years must be aggregated using an appropriate discount rate.⁵²

Furthermore, Kronman's nondisclosure rule might have a divergent effect on classes of land-selling victims from different years. Every year, the victims differ. Like any consumer, each victim purchases his or her own distinctive "market basket" of goods and services. (This distinctive "basket" also varies from year to year.) Therefore, the price of any given mineral, or of minerals in general, has a different impact on each annual group of land-selling victims. Were Kronman's nondisclosure rule adopted, a majority of one year's class of victims might be better off in the long run, but a majority of next year's victims might be worse off.

Another problem is how to count the number of persons who are better off and worse off. If a partnership, corporation, trust, or pension fund is a victim, do all the partners, shareholders, and beneficiaries each count as one victim?

Finally, who would engage in the fact-finding necessary to determine whether victims are better or worse off in the long run? As Kronman himself suggests, courts are ill equipped to make such findings.⁵³ A legislature would be besieged by lobbyists of trade associa-

52. For a discussion on discounting future returns to present value, see V. BRUDNEY & M. CHIRELSTEIN, *CASES AND MATERIALS ON CORPORATE FINANCE* 35-44, 59-81 (2d ed. 1979); W. KLEIN, *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 203-20 (1981).

53. *Cf.* Kronman, *supra* note 1, at 487: "Unlike a court, a legislature must evaluate the effects of proposed rules on classes of persons rather than on particular, identifiable individuals."

tions arguing for certain findings and classifications. This hardly seems a system that a libertarian would embrace.

In summary, GP is impossible to apply in practice. Even if the relevant class of victims somehow could be defined, clairvoyance would be necessary to identify future victims and the effect of a rule on their long-term welfare. Furthermore, a rule may have divergent effects on the groups of victims from different years. Because of these and other serious practical obstacles, even if a libertarian could disregard the moral arbitrariness of GP, he or she would still be unable to apply the principle.

Conclusion

Starting with the correct premise that libertarians would prohibit certain forms of "advantage-taking"—coercion and deceit, for example—Kronman attempts to force libertarians down the slippery slope to wealth redistribution. Essential to Kronman's argument is libertarian endorsement of paretianism, a principle of distributive justice that places all advantageous assets into a common pool to which no one, not even the possessor, has any prior claim. Paretianism has a baseline prohibiting all "advantage-taking," even that which is morally approved. If you like my voice and pay to hear my singing, by Kronman's definition, I am taking "advantage" of your taste for my talent. Paretianism's common pool principle sweeps too broadly for the libertarian. The libertarian antipathy toward robbery is based on solicitude for, not rejection of, private property. Just because libertarians would prohibit some "advantage-taking" does not mean that they would accept a principle initially prohibiting all "advantage-taking." Instead of using paretianism to identify illegitimate "advantage-taking," libertarians would use a set of moral principles sensitive enough to make such differentiations as that between intentional and reckless deceit or between affirmative misrepresentation and nondisclosure. Paretianism's Draconian approach is of little use in making these fine distinctions.

Kronman advances two versions of paretianism: Individual and Group. He substitutes the latter for the former because of convenience and predictability. GP's simple majority census of better-off "victims" violates the libertarian tenet that individuals have moral boundaries that must be respected although others are deprived of a benefit. In addition, GP cannot be applied because defining the relevant class of "victims" is impossible.

In short, a libertarian would reject paretianism as a restraint on "advantage-taking" exchanges. Therefore, consistency would not force him or her to use paretianism, or another principle of distributive jus-

tice, to limit "advantage-taking" in other contexts. At an early stage, the libertarian would escape Kronman's slippery slope to welfare state liberalism.

