UNIVERSITY OF REGINA ISSN 1709-7908
DEPARTMENT OF ECONOMICS

The Law and Economics of Artists' Inalienable Rights

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2001

DISCUSSION PAPER 95

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Forthcoming, *Journal of Cultural Economics*

1. Introduction

There are narrow and wide definitions of inalienability. The narrow definition is that inalienability entails the presence of restrictions on whether and how the ownership of a right may be transferred to someone else. The wider definition, following Susan Rose-Ackerman (1985, 1998), would include the narrow definition and add restrictions on who may own the entitlement and whether there are duties or restrictions on the owner in her relationship to the property.

This paper will focus on the narrow definition when considering the inalienable rights of artists, since most of the interesting questions involving artists are about the transfer of rights. On the question of inalienability and owners of art other than the artist, the wider definition of inalienability becomes useful, but those situations are not the subject of this essay (but see Moustakas (1989), Kearns (1998), or the recent book by Joseph Sax (1999) for interesting discussion of inalienability and the ownership of art). Furthermore, the paper is focussing on the inalienable rights of artists as artists. In most countries neither a sculptor nor an economics professor can sell one of his own kidneys, but that is not the subject of this essay.

In general property rights must be transferable to facilitate the movement of rights from lower-value to higher-value uses, and so ensure efficiency (Posner, 1992, p. 75).

The next section of the paper considers exceptions to the general rule, as well as some non-efficiency goals.

2. The Economics of Inalienability

Efficiency

In a famous essay, Calabresi and Melamed (1972) analyse the three ways that property rights are protected by law. Under a *property rule*, someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. Note that the state plays no role in determining values: that is up to the buyer and the seller. Under a *liability rule*, someone may use, or even destroy, the initial entitlement if he is willing to pay an objectively determined value for it. Generally the state will play some role in determining the value of the entitlement. Under an *inalienability rule*, transfers are not permitted between willing buyers and willing sellers.

Some goods have all three rules: a house is protected by a property rule where someone wants to buy it, by a liability rule under eminent domain, and by inalienability if the seller is judged mentally incompetent.

Calabresi and Melamed use a transaction cost approach to determine the circumstances where each type of rule would be most efficient. Property rules have the advantage of being willing bargains between parties at a mutually acceptable price; if there are no externalities contracts between individuals under a property rule will be Pareto improving. But where negotiating a price would be prohibitively costly, perhaps

due to the number of transactions, a liability rule might reduce transaction costs enough to justify not using a property rule.

An inalienability rule might be efficient in the Calabresi and Melamed framework when there are significant externalities:

> For instance, if Taney were allowed to sell his land to Chase, a polluter, he would injure his neighbour Marshall by lowering the value of Marshall's land. Conceivably, Marshall could pay Taney not to sell his land; but, because there are many injured Marshalls, freeloader and information costs make such transactions practically impossible. The state could protect the Marshalls and yet facilitate the sale of land by giving the Marshalls an entitlement to prevent Taney's sale to Chase but only protecting the entitlement by a liability rule. …But where there are so many injured Marshalls that the price required under the liability rule is likely to be high enough so that no one would be willing to pay it, then setting up the machinery for collective valuation will be wasteful. Barring the sale to polluters will be the most efficient result because it is clear that avoiding pollution is cheaper than paying its costs – including its costs to the Marshalls. (Calabresi and Melamed, 1972, p. 1111).

This analysis can be applied to common-pool problems, such as endangered species, or water rights. Reasonable use of a common-pool resource may be allowed, even when sales are prohibited. For example, aboriginal peoples may be allowed to hunt and fish for their own or for community use, so that they may enjoy their traditional ways of life, but sales of fish and game might be prohibited, as this would lead to over-exploitation of the resource. Another example is the common law of riparian rights, which allows reasonable use of flowing water for those who own riparian property, but only allows them to sell the rights to water if they also sell the land that goes with the right; this should allow for the enjoyment of the benefits the river can confer without leading to an inefficient depletion of the resource (Epstein, 1985, p. 981).

Sometimes information problems can generate cases where inalienability rules are efficient. For example, extensions of the externality argument could be to cases where there is a high correlation between particular kinds of owners and harmful behaviour, such that a blanket prohibition on sales may be the most efficient way to minimize social costs even if some individuals would not be dangerous owners. It is simply too costly to identify in advance who would, or would not, be responsible owners. Restricting sales of alcohol to minors, or even total prohibition in places where the likelihood of harm is very high (many Indian reserves in Canada choose, with good reason, to be "dry"), or gun control, are examples (see Epstein, 1985: pp. 974-8).

Another information-based argument occurs in cases where sellers have superior information to buyers about the quality of a good. When buyers cannot easily identify quality in advance of purchase, and prices come to reflect expected quality in the market,

high-quality sellers will not find it worthwhile to participate, and the situation will be reduced to a market for "lemons" (Akerlof, 1970). So, for example, prohibiting sales of blood, and relying strictly on gifts, may preserve the philanthropic tastes of high-quality donors, without contaminating the supply with blood from only-in-it-for-the-money low-quality donors (Arrow, 1972).

An example of the transaction cost approach to entitlements applied to cultural economics is in the area of intellectual property. Compulsory license in intellectual property is a liability rule: a radio station need not negotiate for permission to broadcast a song, but *is* obliged to pay the composer and publisher (and, if there are neighbouring rights, the performer and producer) a fee that is set by the government. Price setting on a song-by-song broadcast-by-broadcast basis would be very expensive in terms of transaction costs. On the other hand, the production of a play is governed by a property rule; the potential producer must negotiate with the playwright. In this case the transaction costs are lower; a particular play, even a very successful one, will be performed far fewer times than a popular song will be played on radio. Also, the playwright has a more complex decision to make than a musician; whereas musicians want as much airplay as possible, a playwright may sometimes deny rights to a small theatre company if a larger company in the same region might later have an interest in the play. Playwrights might also gain from being able to price-discriminate between theatre companies.

Note that there is not universal acceptance of the notion that compulsory license is the optimal rule to govern broadcasts of recordings. Robert Merges (1994; 1996) notes that in the early part of the twentieth century recordings were covered by a voluntary

arrangement between copyright collectives and broadcasters; Merges calls this arrangement a "voluntary liability rule" (1994: p. 2670). However, pressures were put on legislators to regulate prices in broadcasts, with the monopoly powers of the copyright collectives cited as the justification. Canada, in 1936, was the first country to replace negotiation on broadcast fees with statutory rates, and other countries soon followed. Merges claims that statutory compulsory license discourages players in the market from developing technologies that could reduce the costs of a property rights system, and so the industry may be locked into a "suboptimal liability rule" (1994: p. 2671).

The issue of statutory rates and compulsory license in copyright may seem far removed from the question of inalienability. But it raises an important issue. From a static perspective, there may be some cases where transaction costs considerations point to circumstances where an inalienability rule would be efficient. But caution should be exercised that such a rule is not hindering the development of effective ways of lowering the transaction costs associated with a property rule. As Steven Cheung so effectively demonstrated with his "Fable of the Bees" (1973), effective markets can arise in cases where economic theorists have simply assumed they could not.

Distribution

Do situations arise where restrictions on alienability can make the distribution of wealth less unequal? Clearly, making rules about the alienability of entitlements will have some distributional consequences, but generally they will be either secondary to efficiency concerns, or, if the inalienability rule is about distribution, it will be on paternalistic grounds, such as restricting the ability to sell in-kind welfare benefits.

Some light can be shone on the question of inalienability for distribution's sake by considering contracts that are held to be unconscionable for reasons of "unequal bargaining power." Traditionally, the common law of contract has held that a bargain can be struck down as unconscionable "in certain cases in which one party is in a position to exploit a particular weakness of the other" (Treitel, 1995, p. 381). Examples are misrepresentation, breach of fiduciary duty, duress and undue influence, and contracts with a minor or an incompetent. An economist would argue that this aspect of the law of contract is fully justifiable, since the purpose of contract is to facilitate mutually beneficial exchange, and unconscionable contracts will generally be to the detriment of one of the parties. However, unconscionability should be invoked only when the *process* by which the deal was struck was flawed; unconscionability should not be invoked where the process was fair – responsible adults not under duress or being lied to having come to an agreement – but where *ex post* one of the parties claims the *substance* of the contract is unfair (see Epstein (1975) for a general discussion). That the efficiency of an economy is enhanced by responsible adults being able to commit themselves to the terms of a contract - with some exceptions noted in the previous section - is understood. But the declaration of unconscionability of a contract on the basis of unfair terms is also harmful from a distributional point of view.

Consider two examples. "Add-on clauses" are an aspect of credit agreements between consumers and stores where the consumer, purchasing on credit, agrees that previous purchases from the store will be held as collateral against later purchases. In the U.S. case of *Williams v. Walker-Thomas Furniture* (350 F. 2d 445 (D.C. Cir. 1965), discussed by Epstein (1975) pp. 306-8), Williams successfully argued that Walker-

Thomas' add-on clause, that held $1800 of previous furniture purchases as collateral for a $515 stereo purchase, was illegal. In a sense this generates an inalienability rule: consumers are restricted from using some goods that they own as collateral. The outcome for these consumers is that their ability to obtain credit is impaired. A rule that we can imagine was intended to assist the poor by protecting them from "unfair" contracts has simply served to restrict their options.

A second example is from the world of cultural economics. In the U.K. case of *Macauley v. Schroeder Publishing Co. Ltd.* ([1974] 1 All E.R. 171, discussed in depth by Trebilcock (1976)), an unknown popular-songwriter entered a contract with a music-publishing firm. The songwriter assigned copyrights to the publisher for all of his output over the term of the contract in exchange for royalties. The term was five years, automatically renewable for a further five years if the songwriter's royalties during the first term exceeded £5,000. The publisher could terminate the contract at any time on one month's notice; the songwriter had no right to terminate. The songwriter received £50 against future royalties on signing the contract (Trebilcock, 1976, p. 361). The House of Lords held for the songwriter/plaintiff that the contract was unenforceable on the grounds that inequality of bargaining power had led to an unconscionable agreement. If judgments like this became the rule, the law would be imposing an inalienability restriction on the human capital of songwriters: the terms under which they could rent their songwriting potential on a long-term basis would be limited. The expected outcome is that publishers would be less willing to deal with unknowns, and so would offer them less favourable terms.

Speaking in more general terms, where there is a concern about "unequal bargaining power", an effort to redress it through alienability restriction on the poorer participant in the contract can well make matters worse for them. Williams and Macauley won their cases, but the long-term implications are less happy for their peers. As Trebilcock (1993, p. 252) writes: "I am deeply sceptical of assigning a major role to contract regulation in the service of distributive justice goals."

Commodification

Margaret Jane Radin (1996) defines "market-inalienability" as a restriction where goods can perhaps be transferred by gift but cannot be transferred by sale. There are situations that place "some things outside the marketplace but not outside the realm of social intercourse" (p. 18), and "by making something nonsalable we proclaim that it should not be conceived of or treated as a commodity" (p. 20). Radin criticizes Calabresi and Melamed (1972) and Epstein (1985) for discussing inalienability purely in the realm of restricted sales (and so not distinguishing between gifts and sales), and in commodifying everything, so that all that remains are efficiency considerations on trades in commodities. In other words, Radin thinks the law and economics literature assumes many of the interesting questions away.

Radin's book is subtitled "The Trouble with Trade in Sex, Children, Body Parts, and Other Things", and art doesn't enter the category of "other things" in her volume. But it is worth noting that Radin does express an awareness of the "double bind": restrictions on alienability of some goods can serve to keep poor people poor, and so care

must be taken with alienability restrictions that there are not adverse distributional consequences.

Citizenship

It is virtually universal that eligible voters cannot sell their votes in political elections. Epstein (1985, pp. 987-8) gives efficiency reasons: the only buyers of votes would be those who expect some payoff after the election that will justify their expenses. Prohibiting vote selling is a way of lessening the various abuses that occur when individuals gain power over the public purse. Rose-Ackerman (1998, pp. 270-1) also raises an efficiency rationale for inalienability of votes: poor voters can improve their lot by voting as a group for certain political actions, but this requires coordinated voting behaviour. Vote-selling would introduce a free-rider problem – each poor voter will sell their vote knowing that at the margin their vote has negligible influence on the electoral outcome – and the coordination effort fails.

Civic republicanism is enjoying a revival of interest, and would contribute a very different view of the voting process, and reasons for the inalienability of votes (and the inalienability of civic duties such as jury duty or the military draft). Republicanism has at its core the idea that the economist's way of thinking about democratic government – what republicans would call a *pluralist* view of government – is wrong. Pluralist theories of government are those that view individuals as entirely self-serving, in the public as well as the private sphere: "the primary interests of individuals appear as pre-political, and politics, accordingly, as a secondary instrumental medium for protecting or advancing those 'exogenous' interests" (Michelman, 1988, p. 1503). Republicans would

claim it is a view that denies our ability to "step back" from self-interest during public debate. Rational maximizers might agree to a constitution, whether one that gives all authority to a Leviathan that will give them relief from a life that is nasty, brutish, and short, or a liberal constitution selected by risk-averse individuals from behind a Rawlsian veil-of-ignorance. But under such constitutions it is hard to see whether there is any place for a *citizen*.

Civic republicanism is a system of government that recognizes individuals as something more than rational maximizers. Hanna Pitkin (1981, p. 347) writes:

> we come to politics with our private interest firmly in hand, seeking by any means necessary to get as much as we can out of the system. …Drawn into public life by personal need, fear, ambition or interest, we are there forced to acknowledge the power of others and appeal to their standards, even as we try to get them to acknowledge our power and standards. …In the process, we learn to think … about our stake in the existence of standards, of justice, of our community, even of our opponents and enemies in the community; so that afterwards we are changed. Economic man becomes a citizen.

"At the heart of strong democracy is talk" (Barber, 1984, p. 173). The essence of civic republicanism is the conversation between citizens, the interaction that turns us into

participants in the governing process. The concern in this essay is inalienability restrictions on artists. The civic republican ideal will come into play when inalienability restrictions on artists enhance or infringe upon the ability of citizens to freely deliberate, and participate in the political sphere.

3. Artists' Inalienable Rights

In this section three examples of inalienability restrictions on artists are discussed. For each case it will be seen that inalienability is difficult to justify.

Droit de Suite

Droit de suite is an entitlement that artists maintain in works of art after initial sale that provides them with a royalty on subsequent resales (see Perloff (1998) for a brief accounting of the various royalty structures in countries and states that maintain such a rule, and Hansmann and Santilli (2000) for an economic analysis). Economists have been divided on the question of whether *droit de suite* benefits artists, who are certainly the *intended* beneficiaries. The rule essentially makes artists investors in their own works. It is reasonable to believe that artists are inferior owners of risk, with their being poor and with non-diversified portfolios, relative to dealers and collectors. Since *droit de suite* would likely decrease the initial price of art works, in exchange for the resale royalty, one might conclude that artists are made worse off by *droit de suite* (Mantell (1995) comes to this conclusion). On the other hand, *droit de suite* gives the artist a second instrument in coming to an agreement with a dealer, and since the artist has two "targets" in her dealer's behaviour – initial price, and promotional effort by the

dealer – the extra instrument may lead to a better contract for the artist (see Karp and Perloff, 1993). John Solow (1998) points out another aspect of the question: if later work by an artist tends to increase the value of earlier work, *droit de suite* may provide a useful incentive system for the artist that can be translated into higher initial sales prices. In effect the unknown artist can say to a potential buyer, "this work will rise in value because I have incentives to produce future work that will cause its rise in value." Finally, Hansmann and Santilli (2000) point out that if we are to have *droit de suite* at all, it must be through legislation, since royalty rights through contract would be extremely difficult to enforce.

Perloff (1998) reports that in most jurisdictions that have it, *droit de suite* is inalienable and unwaivable; in California the right cannot be waived except by a written contract that provides for a *higher* resale royalty. Why should *droit de suite* be an inalienable right? Hansmann and Santilli (2000) remind us that the "signaling" function of *droit de suite* - an artist's demonstration of her faith in rising values of her work – is undermined if the artist has but no choice than to accept resale royalties. On the other hand, they go on to note that unwaivability gives the artist a commitment in her *oeuvre* as a whole, which may be helpful in securing the interest of buyers of one particular work.

A possible argument for unwaivability is that young, unknown artists are working with dealers who possess monopsony power. These artists are in a market where selling prices would be inefficiently low. Introduction of an unwaivable *droit de suite* gives the artist an increase in his earnings, since with the monopsonist already paying artists a reservation price that must be paid in *current* dollars, since artists have limited opportunities to borrow against future expected earnings, initial prices cannot drop any

further. But the problem with this argument is that there is very little evidence that monopsony power among dealers exists.

A second possibility is that *if droit de suite* is in fact an efficient way for artists, dealers, and collectors to contract, given the incentive issues described above, then transaction costs might be lowered through a kind of standard form contract. But Perloff (1998) warns that the transaction costs involved in administering a *droit de suite* regime are substantial, especially when such a minority of artists can expect to gain significant amounts by it.

Furthermore, when one considers the potential efficiency gains from a *droit de suite*, they will generally imply different arrangements for different artists. Transaction costs aside, a mandated royalty rate cannot have the efficiency properties generated by the optimal royalty rate from Karp and Perloff's (1993) model.

So whether or not the case can be made that *droit de suite* can lead to efficiency gains, a government mandated scheme that is inalienable and unwaivable is difficult to justify.

Moral Rights

Moral rights are those rights that the creator of a work of art retains even after ownership of the work and/or the copyright in the work have been transferred to someone else. Moral rights include the rights of: *paternity* – the right to be identified as the creator of a work; *integrity* – the right of protection against alteration or mutilation of a work; *disclosure* – the right to publish or not to publish a work; and *withdrawal* – the right to remove a work from circulation. The last two rights are contingent upon the creator

paying either the person to whom the work was promised or the owner of the work fair compensation. The Berne Convention for the Protection of Literary and Artistic Works includes the rights of paternity and integrity, but not the rights of disclosure and withdrawal. Furthermore, the Berne Convention is silent on the question of whether the rights can be waived or alienated.

The way in which moral rights can be waived varies from country to country, but the statutes are often vague, and so inter-country comparisons must be done cautiously. For example, Section 14.1(4) of Canada's *Copyright Act* says:

> Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary.

At least, that's what the English version of the *Act* says; the French version replaces the word "indication" with "*stipulation*", which seems to be something different (see Tamaro, 1998, pp. 289-90 for discussion). What's especially confusing is that France is the country that famously has very stringent restrictions on the alienation of moral rights, but in Canada it is in the French version of the copyright statutes that authors are presumed to have allowed third parties to invoke a waiver unless there is a stipulation to the contrary.

In the United Kingdom moral rights can be waived, but the waiver must be written and signed by the person giving up the right, and may be conditional or

unconditional and may be expressed subject to revocation. The United States' Visual Artists Rights Act of 1990 allows waivers of moral rights by express written consent of the artist to a specific person for a specific use, but does not allow blanket waivers. In France any offer by an author to waive the right of paternity remains unilaterally revocable by the author (see Netanel, 1994, pp. 52-53). In terms of the right of integrity, there is probably less difference across countries than might be supposed by the rhetoric. The general idea in most countries is that integrity rights are not waivable beforehand or unduly widely, but changes to works can be authorized in particular instances if they are clearly specified (see Cornish, 1995, pp. 9-10). Commercial exploitation of works demands at least some scope for variation.

Why have statutory moral rights at all? Couldn't artists simply incorporate them into any contracts they form? A standard tenet of the economic analysis of law is that transaction costs are minimized, and so the efficiency of the system enhanced, if the law 'mimics the market': "efficiency is promoted by assigning the legal rights to the party who would buy it … if it were assigned initially to the other party" (Posner, 1992, p. 52). Hansmann and Santilli (1997), in their extensive discussion of the law and economics of moral rights, note that granting moral rights and allowing them to be waivable but not transferable is a system that does much to minimize transaction costs, if in fact they are more highly valued by artists than potential owners of the works, and that uses that would violate the right of integrity of the artist are generally inefficient. They also point out that the ability to waive but not transfer moral rights gives artists a way of controlling uses of the work through subsequent owners, a servitude that would be difficult to construct through common law contracts. Hansmann and Santilli write that a ban on all degrees of

waivability is likely going to prevent some efficient uses of the work, but that it might be efficient to ban waivers if the ban was only applied to uses that are clearly inefficient. In the Netherlands, for example, the paternity right can be waived, and the integrity right may be waived only if the changes to the work would not be prejudicial to the name or reputation of the creator.

Dutch law holds that after the assignment of copyright "the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such" cannot be waived, but the artist can waive the right to oppose other alteration of the work, and indeed never has the right in the first place to prevent alterations "such that opposition would be unreasonable" (Netherlands *Copyright Act 1912*, Article 25). In Canada, on the other hand, moral rights be waived in whole or in part, although to be valid the waiver "must be expressed in clear and unequivocal terms and based on enlightened consent" (Tamaro, 1998, p. 288, who notes that this is generally true of any transfer of rights, and that "blanket waivers of all moral rights in a work would be subject to close scrutiny" by the courts). Is the Dutch prohibition of waiver efficient?

To answer that question, we need to know what the prohibition of waiver really means. Consider the Canadian case where Michael Snow was commissioned to create a sculpture for a large Toronto shopping center. "Flight Stop" contains sixty geese, hung under the artist's supervision from the ceiling of the galleria. The geese quickly became a symbol of the center. One Christmas the owners of the shopping center decided to put Christmas ribbons on the geese. Snow objected, and obtained an injunction against the ribbons on moral rights grounds. However, it should be noted that the shopping center

had used the geese in promotion material prior to that incident, with their appearance on shopping bags, advertisements, and so on. Snow's objection was based on the grounds that he is a serious artist, and that the ribbons would have made him appear to be a creator of kitsch. Now, Snow was certainly *allowed* to permit the ribbons on his geese. Under Canadian law, he could have waived the right to prevent it, even though in the minds of many, especially in the 'art world,' his reputation as a serious artist would have suffered. The Dutch law gives the impression that Snow would not have been allowed to permit the Christmas ribbons, even if he had wanted to. If indeed that is what "unwaivable" means, it seems to generate an inefficient result, in that we should assume that if Snow and the shopping center want to come to an agreement about Christmas ribbons on the geese it is unlikely that third party effects would dominate the preferences of the first and second parties. But perhaps that sort of unwaivability is not what occurs in practice. Instead, what it means to say that an artist cannot waive the right to oppose changes prejudicial to the reputation of the artist, is that the artist will always retain the right to rescind an earlier waiver if the artist himself believes that some proposed change would be detrimental to his reputation. That would mean that the damage to the artist's reputation must be in the eyes of the artist himself, or his estate, but not to some third parties. It also is simply a way of enforcing full and informed consent on the part of the artist who waives his moral rights; a blanket waiver will always be subject to a reconsideration if the change might be harmful to the artist.

The lesson here is that the differences between continental and common law regarding moral rights should not be exaggerated, and that restrictions on waivers are mostly a way of ensuring the informed consent of artists. In other words, the restrictions

on waivers are really about the *process* of forming contracts, and not so much about the *substance* of the waiver; there is less inalienability through the waiver restrictions than it first appears.

There have been arguments that allowing the waiver of moral rights will in fact make artists worse off. Gerald Dworkin (1994, p. 28) writes:

> The existence of an uncontrolled power to "agree" [his quotation marks] to waive moral rights calls into question the effectiveness of the entire code of moral rights. Presumably, unless a contract can be attacked on the grounds of undue influence or restraint of trade, standard waiver clauses will strip many authors of all moral rights.

David Vaver (1987, p. 774) agrees, claiming that "making moral rights freely assignable and waivable will in practice eliminate them entirely." The essence of Dworkin's and Vaver's argument seems to be that standard form contracts will arise, and that these will be to the detriment of artists due to their lack of bargaining power. Perhaps anticipating the economist's response, Vaver writes about "this naïve support of freedom of contract." But as was noted in the previous section, restrictions on alienability to achieve distributional aims, in this case in favour of artists and against those who would use their works, will often backfire.

Constitutional Rights

Under the U.S. doctrine of unconstitutional conditions, government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government is not obligated to establish the benefit program in the first place. In other words, in a particular sense constitutional rights are inalienable; see Kathleen Sullivan (1989) for an extensive discussion.

An ordinary example would be that the government could not offer to increase an individual's welfare benefits in exchange for her ceasing to publicly criticize government policies. It has been claimed, although with a substantial debate around the issue, that certain restrictions on the public funding of art violate the doctrine of unconstitutional conditions.

In 1990, the Act governing the U.S. National Endowment for the Arts (NEA) was amended requiring the Chairperson to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into account general standards of decency and respect for the diverse beliefs and values of the American public" (20 U.S.C. § 954(d)(1)). There are two questions here: is the 'decency and respect' provision an unconstitutional condition; and, if it is, why should constitutional rights in this circumstance be inalienable?

On the first question of whether the NEA amendments represent unconstitutional conditions, Steven Shiffrin (1999, p. 19) argues the following:

> Now suppose the government denies an artistic subsidy to a piece of blasphemous art or to a person who has produced blasphemous art. …That denial may or may not be

> unconstitutional. If the denial is based on the belief that the work in question or the work to be produced is unlikely to meet artistic standards, it is not open to constitutional question. On the other hand, if the work or the probable work is deemed to be *otherwise deserving* of artistic support, a subsidy cannot constitutionally be denied on the ground that the work is offensive. Under the First Amendment [the article of the U.S. Constitution protecting freedom of speech], dissenters have no right to be subsidized, but dissenters cannot be denied subsidies just because they are dissenters. [the emphasis is Shiffrin's]

In *National Endowment for the Arts* v. *Karen Finley* (118 S.Ct. 2168 (1998)), the NEA successfully obtained a Supreme Court reversal of lower courts' judgments that performance artist Finley's rights had been violated when her grant application was denied, even though the peer-review panel of artists had recommended funding. Sullivan (1991, p. 85) argues that the Supreme Court decision is wrong, and that the 'decency and respect' provision is unconstitutional:

> It is simply a fallacy to say, as content-restrictions advocates so often do, "It's the taxpayers' money and we may do as we like with it!" In a free society, the

> government may no more purchase orthodoxy by power of the purse than compel it by the power of the sword.

The Supreme Court gave two arguments to support its decision, quite contradictory. The majority opinion of the court was that since the 'decency and respect' provision is only advisory, and a part of the decision-making process, the provision does not constitute a government abridgment of freedom of speech. The concurring opinion of Justice Scalia is that the 'decency and respect' provision *is* a criterion that discriminates on the basis of content and viewpoint, but that this is perfectly acceptable. It is no more vague than the criterion of 'artistic excellence,' but more importantly "it is the very business of government to favor and disfavor points of view.

That government funding of art is necessarily viewpoint-biased is argued by Marci Hamilton (1996, p. 111), who goes on to the conclusion that this is a good reason for government to stay out of the arts funding business altogether :

> republican democracy is best served by keeping government from meddling with art. Those who advocate governmental regulation and censorship of art for the greater good routinely fail to take into account the importance of the subversive, defamiliarizing value of art to the ongoing project of liberty. …the Constitution requires that government steer clear of meddling in the art world unless it can prove a compelling interest…

Her rationale is that the peer review panels of the NEA are necessarily biased, even without extra provisions on 'decency and respect':

> Peer review panels are composed of those artists who have already succeeded: the status quo of the art world. The "new" is automatically discounted in this environment and originality is sacrificed. The arts bureaucracy invites lobbying and safe governmental investment instead of cutting-edge artistic development (p. 115).

The doctrine of unconstitutional conditions, if it is valid at all, centers on the *inalienability* of certain rights. However, Sullivan (1989) points out that the traditional grounds for inalienability – efficiency, distribution, the desire to place some limits on commodification – do not provide very good rationales for making constitutional rights inalienable. The crux of the matter, she says, is not that one should not be allowed to alienate a right, but to *whom* one is transferring the right:

> The unconstitutional conditions cases ask not whether a constitutional right is inalienable in general, but rather whether it may be relinquished to *government.* It is one thing to choose atheism or sign a secrecy agreement in

> response to a private inducement; it is another matter for government to induce either result (pp. 1488-9).

Sullivan argues that the doctrine of unconstitutional conditions is necessary to prevent the erosion of the social contract that defines the rights of individuals and the limits on the state. While one individual may be willing to waive a constitutional right in exchange for payment from the government, such a transaction will have effects that reach beyond that one individual. This is a case where civic republican notions of government become important; there is more at stake than a collection of individual transactions between citizens and government.

Can this argument be applied to public funding of art? The difficulty is that it will be impossible to separate the government program itself from some kind of content discrimination. Frederick Schauer (1998), writing about the "decreasingly useful doctrine of unconstitutional conditions," (p. 102) claims:

> If Karen Finley's eligibility for an NEA grant had been contingent upon agreeing to speak, or not to speak, outside of the context of the very art for which she sought support, we would have seen a classic unconstitutional condition. If, for example, she had been told not only that she could not get funding for her own form of performance art, but also that she could not get funding for anything, unless she refrained from performing in chocolate anywhere, the

> unconstitutional conditions doctrine would compel invalidation. But that was not the case here. Instead she was told that her eligibility for *this* grant was contingent upon some characteristic of *this* art, and thus her freedom to produce whatever kind of art she wished – including bad art – was curtailed only by her desire to obtain the grant, and only to the extent of her grant-seeking conduct (pp. 103-4).

Sullivan's argument for why constitutional rights should be inalienable, at least when they would be waived in exchange for payment from the government, certainly has some merit. However, it is difficult to make the case that conditions on the public funding of art are an example of an unconstitutional condition.

4. Conclusion

In this essay we have considered three cases where arguments have been made in favour of alienability restrictions on artists, presumably for their own good. However, in the case of *droit de suite* it was seen that making the right inalienable was most likely inefficient and not to the benefit of most artists. In the case of moral rights, we found that restrictions on the waivability of moral rights were more about ensuring a fair process of contracting rather than inhibiting mutually beneficial transactions. Finally, we found that there might be a compelling argument for the doctrine of unconstitutional conditions on grounds of concerns for the relationship between the state and the individual, but that this

was not an applicable doctrine to the questions that have arisen over the public funding of controversial art.

References

Akerlof, George A. (1970) "The Market for 'Lemons': Quality, Uncertainty and the Market Mechanism" *Quarterly Journal of Economics 84*: 488-500.

Arrow, Kenneth (1972) "Gifts and Exchanges" *Philosophy and Public Affairs 1*: 343-62.

Barber, Benjamin R. (1984) *Strong Democracy: Participatory Politics for a New Age*, University of California Press, Berkeley.

Calabrisi, Guido and Melamed, A. Douglas (1972) "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" *Harvard Law Review 85*: 1089-1128.

Cheung, Steven N.S. (1973) "The Fable of the Bees: An Economic Investigation" *Journal of Law and Economics 16*: 11-33.

Cornish, W.R. (1995) "Authors in Law" *Modern Law Review 58*: 1-16.

Dworkin, Gerald (1994) "Moral Rights and the Common Law Countries" *Australian Intellectual Property Journal 5*: 5-36.

Epstein, Richard A. (1975) "Unconscionability: A Critical Reappraisal" *Journal of Law and Economics 18*: 293-315.

Epstein, Richard A. (1985) "Why Restrain Alienation?" *Columbia Law Review 85*: 970-990.

Hamilton, Marci A. (1996) "Art Speech" *Vanderbilt Law Review 49*: 73-122.

Hansmann, Henry and Santilli, Marina (1997) "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" *Journal of Legal Studies 26*: 95-143.

Hansmann, Henry and Santilli, Marina (2000) "Resale Royalties for Works of Art: A Comparative and Legal Analysis". Paper presented at the Association for Cultural Economics International, Biennial Conference, Minneapolis.

Karp, Larry S. and Perloff, Jeffrey M. (1993) "Legal Requirements that Artists Receive Resale Royalties" *International Review of Law and Economics 13*: 163-177.

Kearns, Paul (1998) *The Legal Concept of Art*, Hart, Oxford.

Mantell, Edmund H. (1995) "If Art is Resold, Should the Artist Profit?" *The American Economist 39 (1)*: 23-31.

Merges, Robert P. (1994) "Of Property Rules, Coase, and Intellectual Property" *Columbia Law Review 94*: 2655-73.

Merges, Robert P. (1996) "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations" *California Law Review 84*: 1293-1393.

Michelman, F. (1988) "Law's Republic" *Yale Law Journal 97*: 1493-1537.

Moustakas, John (1989) "Group Rights in Cultural Property: Justifying Strict Inalienability" *Cornell Law Review 74*: 1179-1227.

Netanel, Neil (1994) "Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law" *Cardozo Arts and Entertainment Law Journal 12*: 1-78.

Perloff, Jeffrey (1998) "Droit de Suite" in P. Newman, ed., *The New Palgrave Dictionary of Economics and the Law*, Macmillan, London.

Pitkin, H. F. (1981) "Justice: On Relating Private and Public" *Political Theory 9*: 327-352.

Posner, Richard A. (1992) *Economic Analysis of Law*, 4th edition, Little, Brown & Co., Boston.

Radin, Margaret Jane (1996) *Contested Commodities*, Harvard University Press, Cambridge MA.

Rose-Ackerman, Susan (1985) "Inalienability and the Theory of Property Rights" *Columbia Law Review 85*: 931-969.

Rose-Ackerman, Susan (1998) "Inalienability" in P. Newman, ed., *The New Palgrave Dictionary of Economics and the Law,* Macmillan, London.

Sax, Joseph L. (1999) *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, University of Michigan Press, Ann Arbor MI.

Schauer, Frederick (1998) "Principles, Institutions, and the First Amendment" *Harvard Law Review 112*: 84-120.

Shiffrin, Steven H. (1999) *Dissent, Injustice, and the Meanings of America*, Princeton University Press, Princeton NJ.

Solow, John L. (1998) "An Economic Analysis of the *Droit de Suite*" *Journal of Cultural Economics 22*: 209-226.

Sullivan, Kathleen M. (1989) "Unconstitutional Conditions" *Harvard Law Review 102*: 1413-1506.

Sullivan, Kathleen M. (1991) "Artistic Freedom, Public Funding, and the Constitution" in S. Benedict, ed., *Public Money and the Muse*, Norton, New York.

Tamaro, Normand (1998) *The 1998 Annotated Copyright Act*, Carswell, Toronto.

Trebilcock, Michael J. (1976) "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" *University of Toronto Law Journal 26*: 359-385.

Trebilcock, Michael J. (1993) *The Limits of Freedom of Contract*, Harvard University Press, Cambridge MA.

Treitel, G.H. (1995) *The Law of Contract*, 9th edition, Sweet and Maxwell, London.

Vaver, David (1987) “Authors’ Moral Rights – Reform Proposals in Canada: Charter or Barter of Rights for Creators?” *Osgoode Hall Law Journal 25*: 749-86.