



REJOINDER TO KINSELLA ON OWNERSHIP AND THE VOLUNTARY SLAVE CONTRACT

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Abstract

Kinsella (2022) separates selling from ownership. He denies the claim that if you can't sell it, you don't (fully) own it. He rejects the notion that if you fully own it, you can sell it. He also rejects voluntary slavery and specific performance contracts. The present paper is an attempt to defend both claims. Does this debate between Kinsella and I have any practical consequences? Certainly not vis a vis the voluntary slave issue. That can only have theoretical implications for the establishment and refinement of libertarian theory. But the specific performance issue does have some. Suppose a doctor, during a surgical operation, decides to walk out of the operating room right in the midst of this procedure, leaving the patient to die. Can he or can he not be compelled, with the full force of the law, to get back on the job? Or may a guard forcibly prevent the quit right at the moment of danger? These are some of the issues explored in the present paper.

Keywords: Property; ownership; selling; libertarianism; deontology; voluntary slavery; specific performance contracts

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Stephan Kinsella is one of the most gifted and creative libertarian authors now active. I am honored to be his several times co author (Block, Kinsella, & Hoppe, 2000; Tinsley, Kinsella, & Block, 2004; Block, Kinsella, & Whitehead, 2006). I am deeply indebted to him for his superlative

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work on intellectual property (Kinsella, 2001, 2008, and 2012), and am a follower of his on that subject (Block, 2014, 2020; Mukherjee & Block, 2012.)

But he and I sharply depart from one another on the topic of selling and ownership, the voluntary slave contract and specific performance contracts (Kinsella, 2022)¹, the subjects of the present essay.

Kinsella accurately attributes the following position to me:

“If you own yourself—that is, you own your body—you should be able to sell it. So, a

¹ Unless otherwise specified, all mention of this author will refer, only, to this one publication of his. However,

Kinsella (2003) makes many of the same arguments as does this one.

voluntary slavery contract should be enforceable. And if the legal system does not permit voluntary slavery, then it means you really don't own yourself. So, the implicit assumption behind this argument is that one inherent aspect of ownership is the right or ability to sell. In other words, it is assumed that 'ownership' necessarily includes the ancillary 'right to sell.' It's taken for granted that "if you own something, you can sell it."

Why does Kinsella diverge from this perspective of mine? He starts to lay down his position as follows:

"... this argument is also used to argue for intellectual property. People say, 'well, if you can sell your idea, you must have owned it, so intellectual property is a legitimate concept.'"

Here, he attempts to demonstrate a logical inconsistency on my part. On the one hand, I do agree with him that intellectual property is a fallacious concept. On the other, he maintains that my linkage of selling and ownership enmeshes me in accepting the validity of intellectual property almost against my will, so to speak. If I am to be logical, he in effect avers, I must give up one or the other of these to incompatible positions.

I think his argument fails. Consider the mathematics teacher who is trying to drum into the heads of his students that $2+2=4$. Now, the idea of this equation of course, cannot be owned, since it is not scarce. However, the teacher's statement to this effect most certainly can be owned. Indeed, he is paid for selling this idea to the students, via his school. He does so with the words that come out of his mouth, and with what he writes on the blackboard with his hands, both body parts of which are indeed scarce, and can and are owned by him. Kinsella, here, is failing to distinguish

between the teacher's statement to the effect that $2+2=4$, which most certainly can be owned, indeed, is owned, on the one hand, and on the other hand, the disembodied notion that this equation is correct, which, along with Kinsella, I agree, cannot be owned.²

This scholar's next criticism of me is as follows: "So it's actually better to refer to property as the relationship between a person and a thing, although, over time, we sometimes are careless with language, and we will refer to the thing itself as property. Like we'll say, 'that car is my property.' But precise language would be, 'I have a property right in that thing, in that car,' or 'I own that car.'"

Kinsella and I are both native speakers of the English language, but we are very far apart from each other on this issue. In my view, "that car is my property" is a perfectly good equivalent, or synonym, for all of the other examples he uses. My claim is that he is here guilty of a stipulative definition, and as a result falsely rules out of court the phrase "that car is my property." This sentence would be accepted by 99 out of 100 speakers of English, and the one holdout would disagree out of pure obtuseness.

My critic next avers as follows: "... the essence of a property right is the right to exclude others, not the right to use." No, it is both. Certainly, the right to exclude. But, also, the right to use, so long as this use doesn't violate the rights of others. For example, I own my fist.³ I may legally swing it around all I want, but certainly not if it impacts your nose. Not even if it comes close enough⁴ to your proboscis to constitute a threat to you. Ditto for this gun I own. It is my property. I may use it to shoot it in any direction I please, except, of course, if in any way violates anyone else's rights.

² Kinsella uses the phrase "intellectual property" no fewer than 17 times in his relatively short essay. This is more than passing curious, given that I fully agree with him on this subject, indeed, am an appreciate student of his on this issue.

³ Is the human body private property? Kinsella states: "So for the body, the link is a self-ownership link. You own your body, and the reason is because of your direct control over it." There is a lively debate in libertarian circles as to the genesis of this ownership, given that

none of us consists of anything other than parts of our parents' bodies, and resources they have given to us. See on this: Alstott, 2004; Block, 2016, forthcoming; Cohen, 1992; Curchin, 2007; Fried, 2004, 2005; Hicks, 2015; Jeske, 1996; Kinsella, 2006; Okin, 1991; Shnayderman, 2012; Torsell and Block, 2019; Woollard, 2016; Young, 2015.

⁴ How close may it venture in that direction? For an attempt to wrestle with that question, see Block and Barnett (2008).

Norman Malcolm said this of his teacher and mentor, Ludwig Wittgenstein, "On one walk he 'gave' to me each tree that we passed, with the reservation that I was not to cut it down or do anything to it or prevent the previous owners from doing anything to it: with those reservations it was henceforth mine."⁵ Precisely. This joke of Wittgenstein's is very apropos. He succinctly dramatizes what are the requirements of ownership: the opposite of everything he mentions to Malcolm. Kinsella stands refuted by Wittgenstein.

Kinsella's next foray is into the thicket of why we own ourselves. He states as follows: "the basis here of self-ownership, or body-ownership, is not homesteading, but it's the direct control over your body." And again, since this is a crucial part of his thesis: "So for the body, the link is a self-ownership link. You own your body, and the reason is because of your direct control over it."

I shall have much to say not so much in criticism of this claim, but of the use to which he puts it. However, initially, here is a push-back: suppose there is a super-duper mesmerizer, who can take over control of your body. Then, you no longer have "direct control" over your body. But from a deontological point of view, you are still the rightful owner of yourself. The uninvited hypnotist is a trespasser, a criminal. Moreover, we have very little direct control over ourselves when we are unconscious, or asleep. But our rights to not recede then, even by one single iota.

According to our author, "We could say that when a child 'wakes up' at the right moment when he becomes sapient enough to be said to have rights, he homesteads himself. But it's really a loose analogy. It just means that's the point in time in which he's a person with rights. It's not like his body was unowned, and he just homesteaded it."

However, I don't think you have to "wake up" in order to have rights. Sleeping people, comatose people, unconscious people, young babies all have (equal) rights. I go so far (Block, 2021) as to claim the same sort of rights for fetuses in the

womb, and they have certainly not yet "woken up" in any sense whatsoever.

Nor can I see my way clear to going along with Kinsella when he opines: "...like Crusoe on an island, he can never 'own' anything because there's no society to have norms with respect to. He controls, and he uses things. He possesses these things as means, he exercises 'actual authority' over these things—but he doesn't own them."

But ownership means the right to use, sell, lend, and exclude others from so doing with a given piece of property. Crusoe, the first one on the island, certainly is the owner of his hut, his rowboat, the land he homesteaded, etc. He built these items. He homesteaded the material out of which he manufactured them. He "mixed his labor"⁶ with at least some of the territory of the island. When Friday comes along, it would be a crime for him to take over any of these of Crusoe's belongings without the latter's permission.

This claim of Kinsella's, too, is problematic: "In society, you can also do the same thing. You can just possess something and not intend to own it—you pick up a stick and throw it away."

I have a different interpretation of this scenario. In my view, you owned this stick for a brief time, and then you abandoned it. If someone grabbed that stick from out of your hands before you threw it away, he would have been a thief; he would have stolen *your* stick. True, you had intended to throw it away, even were in the very act of so doing, but this makes no-never-mind; that stick is yours, whether you like it or not, at least for the time being. If in the process of throwing away that stick you accidentally hit some innocent person with it in the snout, you would have been guilty of attacking that person with *your* stick."

At this point, we arrive at the nub of Kinsella's thesis:

"... what about selling yourself, your 'self,' i.e., your body...? Keep in mind: external things can be sold because they were previously unowned and acquired by an actor-owner who

⁵ Malcolm (1958, pp. 31-32).

⁶ Bylund, 2005, 2012; Grotius, 1625; Hoppe, 1993, 2011; Kinsella, 2003, 2006, 2009A, 2009B; Locke, 1948

(pp. 17-19), 1955 (chapter 5); Paul, 1987; Pufendorf, 1673; Rothbard, 1973, 32; Rozeff, 2005; Watner, 1982

is already a self-owner, and they can abandon it. But your body rights don't arise by homesteading or by your intent to own yourself. They arise because of the best link based upon your direct control."

My response is that how your ownership over your own body "arises"⁷ is of little importance in this context. It is sufficient that now, you, no one else, are the clear owner of your own person.

Nothing daunted, Kinsella continues:

"So, if I try to make a contract, 'I promise to sell' or 'I promise to be your slave forever,' those words do not change the fact that I still have the best link to my body. And because my words are not an act of aggression—which is the only way to come to own someone else's body—if they commit an act of aggression—then promising to be someone's slave is simply not enforceable because it doesn't transfer any title to anything. You still own your body. You can always change your mind, in other words."

This is troublesome. You can change your mind about that shirt or car you just purchased. But suppose it was bought under a no "backsies" understanding. The sale was final, and no returns will be allowed. Let us posit you have a dog who is heart and soul with you. K9 dogs are said to have this sort of connection with their masters. According to Kinsella, not only would it be illegal to sell this dog, particularly to a neighbor who could still see him, influence him, but, also, well-nigh logically impossible for this to occur. Just as we all "have the best link to my body", you, too, have the best link to this dog. You snap your fingers, and the dog does your bidding, not that of the neighbor, to whom you have sold the dog. The point is, "the best link to, in terms of control," is clearly way outside the bounds of libertarian homesteading and property rights theory. Merely because someone has "the best link" to something, does not mean he is necessarily the legitimate owner of it, Kinsella to the contrary notwithstanding.

But he is on a roll. This author attempts a knock-out blow:

"It is true that man, being what he is, cannot absolutely guarantee lifelong service to another under a voluntary arrangement. Thus, Jackson, at present, might agree to labor under Crusoe's direction for life, in return for food, clothing, etc., but he cannot guarantee that he will not change his mind at some point in the future and decide to leave. In this sense, a man's own person and will is 'inalienable,' i.e., cannot be given up to someone else for any future period."

Alright, I agree, no one can alienate his will. Will schmill! We are not talking will. Rather, we are discussing the legal status of a master who kills his voluntary slave. Is he a murderer, or is he not? This has nothing whatsoever with will, or links, or control, or any other irrelevant issue raised by our author. Of course, Kinsella's insight is correct: no one can alienate their will. We are sort of stuck with our wills. But what is the relevance of this correct claim? There is no relevance. Rather we are discussing an entirely different subject: the legal status, not the psychological status, of the person who signs a contract, for consideration, to renounce his otherwise existing rights not to be killed.

Both Kinsella and I have sons who we love very much. Suppose, god forbid, they both contracted a serious disease which, if left untreated, would kill them. Happily, there is a full cure. Unhappily, it costs \$50 million and neither of us dads have anything like that amount of money at our disposal. Happily, there is a billionaire, no, make that a trillionaire, who is willing to purchase both of us as slaves for this amount of money, but only if it would be legal for him to kill us without being accused of committing a crime. We both love our sons more than our own freedom and might well be more than willing to sign any such contract. However, under Kinsella's theory, both sons would have to die. Under the theory I am espousing, in very sharp contrast, both sons would live, and both fathers would go off to the rich man's plantation, there to do his bidding as slaves, at the risk of our lives. We benefit, since we rate our son's lives higher than our own freedom. The rich slave master, too, gains, as in all cases of

⁷ See fn. 3, supra.

voluntary commercial arrangements, at least ex ante, since he regards our servitude to him more highly than the piddling \$100 million, he has to pay for the pair of us.⁸

My learned friend's thesis is that the voluntary slavery contract is illicit since the will of the slave cannot be alienated. To be sure, that is absolutely correct. But he sale has nothing to do with the will. I stipulate it cannot be alienated. What is being sold, in sharp contrast, is not the will; rather, it is the right to object to being beaten, or killed, by the slave master. Note, I say "killed" but not murdered since under the aegis of voluntary slavery, the master has the right to end the life of the slave if he wishes to do so, at his own discretion.

Kinsella emphasizes the fact that "... your direct control or your will is the reason you own your body."

Alright, we are now at the point where we all own our bodies. Control over them may not legally be taken away from us.⁹ But it is entirely irrelevant how this came to be in the first place. It is now a fact. Kinsella should get used to this state of affairs. What is now of interest, in sharp contrast, is whether we may sell ourselves or not. One of the aspects of ownership is the right to sell. If we cannot sell ourselves into bondage, then, to that extent, we are not really full owners of ourselves.

Kinsella concludes: "...in (libertarian) law, 'sell' refers to transferring title to an owned thing. So you don't literally sell your labor. You just perform your labor. You perform some action."

This seems to be made out of the whole cloth. It is as if Kinsella wants to alter accepted language. Yes, we perform labor. But we also sell it. We do indeed own our own labor. If someone takes it away from us, for example, by kidnapping us, they have, among other more serious things, also

stolen our labor. What is going on here? What is going on is that Kinsella is attempting to undermine specific performance contracts. A hires B to sing at his wedding. At the last minute, B has a better offer and refuses to appear at A's wedding as a performer. According to Kinsella, there are only two things that A can rely upon to ensure that B shows up. One, A will tell all and sundry that B is unreliable¹⁰. Two, A can get B to post a bond such that if he does not show up at the wedding, he forfeits a certain amount of money. What A cannot do is physically compel B to sing at his wedding: frog march him to the stage, and threaten to shoot him if he does not exercise his tonsils. Namely, Kinsella opposes specific performance contracts. But why should such contracts be forbidden by law, if both parties agree to engage in them? For Kinsella, it is because these contracts reek of voluntary slavery, and he at all intellectual costs opposes that institution.

Let us use a more powerful scenario to demonstrate an alternative view. Bob is a high tightrope walker. He walks on a thin wire, 200 feet above the ground. If he falls, he dies. He hires Dave to hold a net under him, such that if Bob falls off the wire, Dave will be situated so as to be able to save his life. So, the performance begins. Half way through it, Dave starts to walk off the job. May Bob, or one of his agents, compel Dave to fulfill a specific performance contract? That is, may Bob use (defensive) violence against Dave if he refuses to carry through? It all depends upon the specifics of the contractual arrangements between them. If it specifies that Dave will forfeit his bond, and that will be the only legal response of Bob, then so be it. But if the contract specifies specific performance, then Dave may properly be compelled to carry through on his assignment. Voluntary agreement is the key here, not control over one's body or will.

⁸ One objection to the foregoing is that the master could order his slaves to return the money he just paid for them. The response is that the contract could specify this could not occur.

⁹ I abstract from issues such as the death penalty for murderers, where we do indeed take the murderer's life away from him.

¹⁰ In the libertarian legal code, there are no slander or libel laws, so A need not fear telling the truth about B, even if it harms the reputation of the latter. See on this: Block 1976, ch. 7, 2008; Pillard and Block, 2020; Rothbard, 1998, ch. 16; Westley, 2008

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