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TOWARD A LIBERTARIAN THEORY OF INALIENABILITY: A CRITIQUE OF ROTHBARD, BARNETT, SMITH, KINSELLA, GORDON, AND EPSTEIN

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The Declaration of Independence maintains that:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.

If what is meant by this is that people should have the right not to be murdered, their persons and legitimately owned property should not be invaded, and that they may pursue happiness in any way they wish as long as they do not thereby violate the equal rights of all others to do the same, this is perfectly compatible with libertarianism, the philosophy based on homesteading, personal and property rights, the non-aggression axiom, contract, and laissez faire capitalism.[1]

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[1]On fundamental libertarianism and rights, see Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973); Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998); Murray N. Rothbard, "Law, Property Rights, and Air Pollution," in *Economics and the Environment: A Reconciliation*, ed. Walter Block (Vancouver, B.C.: Fraser Institute, 1990); Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer, 1989); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston: Kluwer, 1993); Anthony de Jasay, *The State* (Oxford: Basil

Unfortunately, however, the doctrine of inalienability as construed by many is very different from this. So much so, I shall argue, that it is almost diametrically opposed to the libertarian notion of private property and free enterprise.

How can this be? At the outset, it pays to define terms. Various definitions of inalienability include non-relinquishability, non-salability, and non-transferability.[2] What does this mean with regard to the right to life or liberty? If this right is non-transferable, then I cannot confer it on you, that is, I cannot make a gift of myself to you; I cannot voluntarily agree to be your slave. If it is non-salable, then I cannot sell myself to you as a slave.

However, the following scenario will illustrate a problem. You are a rich man who has long desired to have me as a slave, to order about as you will, even to kill me for disobedience or on the basis of any other whim which may occur to you. My child has now fallen ill with a dread disease. Fortunately, there is a cure. Unfortunately, it will cost one million dollars, and I, a poor man, do not have such funds at my disposal. Fortunately, you are willing to pay me this amount if I sign myself over to you as a slave, which I am very willing to do since my child's life is vastly more important to me than my own liberty, or even my own life. Unfortunately, this would be illegal, at least if the doctrine of inalienability (non-transferability) is valid. If so, then you, the rich man, will not buy me into slavery, for I can run away at any time, and the forces of law and order will come to *my* rescue, not yours, if you try to stop me by force.

There is another way to put this matter. As a first approximation, commodification can be defined as the opposite of inalienability. (To do this is, in effect, to consider inalienability as non-salability).

Blackwell, 1985); Robert McGee, "If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?" *American Journal of Jurisprudence* 38 (1993), pp. 335–58; and Robert McGee, "A Theory of Secession for Emerging Democracies," *Asian Economic Review* 33, no. 2 (August 1991), pp. 245–65.

[2]Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review* 100, no. 8 (June 1987), pp. 1849–50; Randy Barnett offers a definition of alienable as "interpersonally transferrable." Randy E. Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy & Policy* 4, no. 1 (Autumn 1986), p. 184. On the next page, he writes: "To characterize a right as inalienable is to claim that the consent of the right-holder is insufficient to extinguish the right or to transfer it to another."

Thus, the debate concerns which rights, which aspects of the human condition, which relationships, can legally be sold, and which cannot. In order to be inclusive and exhaustive, we will construct a spectrum of commodification options.

At the extreme left would be those who oppose sales, markets, and prices for *anything*. In this viewpoint, held mainly by the dictators of such countries as North Korea and Cuba, and by professors of sociology, literature, and religion at American universities, *everything* would be inalienable.[3] Instead of greedy profit-driven enterprise, the economy would be organized around the socialist principles of central planning and "benevolence."

At the extreme right would be the libertarian philosophy I shall defend which maintains that *everything* should be legally alienable or commodifiable.[4]

The middle ground, occupied by virtually all scholars who have written on the subject, even those who consider themselves and are widely considered to be libertarians, is the thesis that while perhaps it should be legal to sell some (or most) goods or items, this does not apply in all cases. That is, there are some things which should be declared legally inalienable—whether by sale, gift, or relinquishment—or non-commodifiable.[5]

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[3]If I exaggerate, it is but slightly.

[4]The position on voluntary slavery which I support in this article is not well accepted by libertarians. See Walter Block, "Voluntary Slavery," *Libertarian Connection* 6, no. 1 (1970). To the best of my knowledge, Robert Nozick is the only other libertarian writer who has supported this position, in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 58.

[5]Some variant of this position is held by such libertarian stalwarts as Rothbard, *Ethics of Liberty*; George Smith, "Inalienable Rights?" *Liberty* 10, no. 6 (July 1997); Randy E. Barnett, "Pursuing Justice in a Free Society: Part One–Power vs. Liberty," *Criminal Justice Ethics* (Summer/Fall 1985); Barnett, "Contract Remedies and Inalienable Rights"; Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998); David Gordon, "Private Property's Philosopher," *Mises Review* 5, no. 1 (Spring 1999); Richard Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973); Richard Epstein, "Possession as the Root of Title," *Georgia Law Review* 13 (1979); Richard Epstein, "Past and Future: The Temporal Dimensions in the Law of Property," *Washington University Law Quarterly* 64 (1986); N. Stephan Kinsella, "Inalienability and Punishment: A Reply to George Smith," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–99); and Jörg Guido Hülsmann,

CLARIFYING THE ISSUE

Before mentioning specifics other than life and liberty, let us clear away the underbrush a bit. By their very nature, there are things which *cannot* be sold, given away, relinquished, or in any other way transferred. For example, what about selling a square circle? Due to the laws of logic, there is not and cannot be any such entity. Since it cannot exist, it cannot be sold, given away, or alienated in any way.

Next, consider true love or friendship. If the only way I can get you to spend time with me is to pay you for it, then whatever you are giving me (baby sitting, sexual services, companionship) *cannot* be friendship or love, since we define these things in a way that necessarily precludes them from being sold, as a matter of linguistics.[6] No one can claim that it should be legal to buy or sell true love, any more than he can claim it should be legally permissible to engage in comercial relationships concerning a square circle. Since it cannot be done in any case, passing a law prohibiting it is superfluous.

However, here are two more complicated ways of looking at the matter. First, you can't sell your true friendship for money, but you can fake it. However, having done this, you might well one day come to have true feelings of friendship for the person you were duping. Then, on that day, if you continue to accept payment, you now *are*, for the first time, selling true friendship or love, so this is not inalienable by nature.[7]

Second, you *can* sell true love and friendship. This applies at least in the case of some people. When babies are two years old, their taste in friends is vague and amorphous. Almost any other two year old will do. Suppose there are two applicants, but only one friendship slot

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"A General Theory of Error Cycles," *Quarterly Journal of Austrian Economics* 1, no. 4 (1998).

[6]Something of the same sort is at work regarding the claim that two people cannot occupy the same place at the same time. This is not so much a physical claim as it is a linguistic one. The point is whatever size is the territory, we tautologically define "place" and "time" in such a way as to make the original contention necessarily true. It is in this sense that one cannot sell true love.

[7]For this to be true, true love or friendship is based on feelings which may or may not occur. This is an empirical issue, not one of logic; we are not defining true love or friendship in such a way so as to logically preclude it, if you accept money for exhibiting these feelings.

(toddlers have to sleep a lot), and one of them offers toys in payment. The given child can prefer one and reject the other; if he does, he will be selling his true friendship. He is indiscriminate in that any of the potential playmates will do as well as any other. But one of them offers more than the second: a free toy. Many adults, too, are pretty indiscriminate in their affections (e.g., nymphomaniacs). These people most certainly *can* sell their true friendship, such as it is.[8]

What about the right to commit sneezes (or eye blinks)? It might be contended that because these are involuntary acts, they cannot be alienated. This is certainly true in the sense that no one has (much) control over whether he sneezes (or blinks his eyes). However, alienating can also be interpreted to mean only that you agree to pay a penalty if you violate your contract not to engage in such involuntary acts. "I'll sell you the right to control my sneezing (or eye blinks). Here's the deal. Every time I sneeze (or blink my eyes), I'll pay you $1." Or, "if I sneeze (or blink my eyes), you can kill me."

What about selling moral responsibility? The denial of this, too, is an attack, at least implicitly, on the doctrine of radical or total alienability. There are several ways to handle this criticism:

1. We need not be able to sell moral responsibility in order to justify voluntary slavery.

Voluntary slave contracts have only to do with property rights over humans, not metaphysical issues. If the agents of law witness a master forcibly confining a slave to the plantation and/or whipping him, may they legitimately stop him? This is the real question involving voluntary slavery; matters of guilt, responsibility, etc., are only secondary at best.

2. We *can* sell moral responsibility.[9]

Suppose a mob boss buys moral responsibility from a hit man; the hit man sells his moral responsibility to the boss. This means that if the hit man gets caught for a crime, the boss will shoulder his responsibility. Sure enough, the hit man commits a crime and is caught, so

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[8]I owe this example to Matthew Block.

[9]We are really discussing legal responsibility, not moral responsibility. The former, not the latter, is within the domain of libertarianism. I owe this point to Stephan Kinsella who, despite the fact that I herein criticize his own views, has taken great pains to improve earlier drafts of this paper. His disinterested search for the truth is an example for all of us, one which I will try mightily to emulate when I find myself on the other end of a similar exercise.

the boss offers to pay the penalty forfeited by the hit man. There is no logical contradiction in this (of course, most bosses will not agree to carry through on the deal, but that is another matter). If he has agreed to bear the hit man's responsibility, we can force the boss to do so.[10]

But suppose the victim objects. He wants the perpetrator (the hit man) to pay for his crime, not someone else (the mob boss). Does the victim have this right? No. He may only demand to be paid what he is objectively owed; he may not compel specific performance from the guilty party. Suppose that the crime was murder, and that the payment for this crime was the life of the murderer. We happen to have a machine which will transfer the life out of the live murderer, and into the body of the dead victim, such that after the transfer, there will be an alive victim, and a dead murderer. If a life is a life is a life, that is, all lives given up in this way are of equal value, then the victim has no right to object to this substitution. On the other hand, if the hit man is 25 years old, and the boss 75, and what may be transferred is only unexpired life expectancy (such that the hit man can give the victim, say, 55 more years, while the boss can only give 5 more), then the victim certainly has a legitimate complaint. In this case, the sale of moral responsibility could not be consummated, but not because of any intrinsic objection to it. It is just that the boss didn't have the wherewithal with which to make the purchase. That is, the ages of the boss and hit man are not intrinsic to the case, and may even be reversed, for illustrative purposes, in which case the sale could have succeeded.

The underlying point of the libertarian critique is that if I own something, I can sell it (and should be allowed by law to do so). If I can't sell it, then, and to that extent, I really don't own it. Take my own liberty as perhaps the paradigm case of the debate over inalienability. The claim is that if I really own my liberty, then I should be free to dispose of it as I please, even if, by so doing, I end up no longer owning it. Clearly, since I cannot own a square circle, I cannot sell it. If I can own my own ability to give true love, then I can sell it; if I logically cannot own this attribute, then, of course, I cannot give, barter, or sell it to anyone else.

My thesis: No law should be enacted prohibiting or even limiting in any way people's rights to alienate those things they own. This is "full monte" alienability, or commodification.

[10]This is an insurance policy of sorts. I owe this point to Stephan Kinsella. However, if the boss runs away, then the hit man must pay the penalty due to the victim. In this case, he will have failed to sell his moral responsibility.

OBJECTIONS

Having made a first run at the problem, I now consider a series of objections to it, the better to flesh out the precise meaning of the thesis that voluntary slavery is compatible with libertarianism.

Suppose that the master says to his human property, "Now that you are my slave and must obey me, give me back that $1 million I just paid for you."[11] Yes, indeed, this sort of ploy would stop voluntary slavery dead in its tracks. Were the master be able to get away with it, this would place a chill on all such subsequent deals. However, there are several ways to respond. First, the slave could have already given the money to a third party, e.g., his child's doctor, in our canonical case. He could have done this at the very next instant after the slave contract was consummated, before the master could employ this gambit. Second, the contract could stipulate that the master cannot order the slave to refund the money. Here, there would not be "full" slavery in that the master would be prohibited from taking one (but only one) action vis-à-vis his new human property. Third, at most, this example proves it was foolish to sell yourself into slavery, not that it was wrong, illicit, or contrary to libertarianism. It would be like agreeing to work for $1 per year. Silly, perhaps, but no rights violation.[12]

MURRAY N. ROTHBARD

As with so much else in libertarian theory, Murray N. Rothbard took the lead in adumbrating a theory of inalienability as it pertains to slavery. Rothbard takes the position that:

> The distinction between a man's alienable labor service and his inalienable will may be further explained; a man can alienate his labor service, but he cannot *sell* the capitalized future value of that service. In short, he cannot, in nature, sell himself into slavery and have this sale enforced—for this would mean that his future will over his own person was being surrendered in advance. In short, a man can naturally expend his labor currently for someone else's benefit, but he cannot transfer himself, even if he wished, into

[11]Rothbard, in *Ethics of Liberty*, p. 135 n. 2, summarizing an argument by Jean-Jacques Rousseau, writes: "If a man sells himself into slavery, then the master, being an absolute master, would then have the right to commandeer the funds with which he had 'bought' the slave."

[12]I owe this example, and this solution, to David Gordon, another example of a colleague and friend helping me to improve a paper with which he disagrees.

> another man's permanent capital good. For he cannot rid himself of his own will, which may change in future years and repudiate the current arrangement. The concept of "voluntary slavery" is indeed a contradictory one, for so long as a laborer remains totally subservient to his master's will voluntarily, he is not yet a slave since his submission is voluntary; whereas, if he later changed his mind and the master enforced his slavery by violence, the slavery would not then be voluntary.[13]

I offer a few introductory remarks before giving reasons for disagreeing with this perspective. I view my criticisms of Rothbard not as overturning his entire system of liberty, which is based on private property, self-ownership, and the non-aggression axiom. To the contrary, I interpret these critical remarks as an attempt to *support* his overall system by supplying a corrective to a very minor part of it. If Rothbard is wrong in his interpretation of libertarian law in this one instance, as I hope to show, this does not put at risk the entire edifice. Rather, such a critique *strengthens* it, by showing that contract, predicated on private property reach to the furthest realms of human interaction, even to voluntary slave contracts.

Why, then, do I disagree with this author? There are several reasons. First of all, a man *can* "rid himself of his own will." He can do so by, for example, subjecting himself to a frontal lobotomy. Stephan Kinsella has suggested that in the future, there will doubtless be invented a "zombie" pill which turns people into animated automatons with no will of their own. On that day, it will indeed be possible for a man to "rid himself of his own will." But if this can be attained in the years to come, the reason it cannot now be done is merely a technical matter, not one pertaining to philosophy.[14] States Kinsella:

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[13]Rothbard, *Ethics of Liberty*, pp. 40–41.

[14]Williamson Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1 (Winter 1977), p. 7, points to "the natural fact that each human is the proprietor of his own will. To take rights like those of property and contractual freedom that are based on a foundation of the absolute self-ownership of the will and then to use those derived rights to destroy their own foundation is philosophically invalid." Rothbard, *Ethics of Liberty*, p. 135, cites this passage approvingly.

However, there are difficulties with this position. Property and contractual freedom, contrary to Evers, are not predicated on the absolute self-ownership of the will. Indeed, to put matters in this way is to assume as proven the very issue under contention. While it is extremely difficult to imagine a libertarian

> If the "impossibility" of literally alienating one's will means that it is impossible to be bound by contract to act as someone's slave, why is it not "impossible" to imprison an aggressor to enforce restitution? After all, even a convicted aggressor still has a will. Why is it not "impossible" to defend oneself with force? And yet it is *not* impossible for consent to be irrevocably granted, as we have seen; this condition exists for a justly imprisoned aggressor. Recipients of defensive, restitutive, or retaliatory force all retain a will, which is overwhelmed with some type of responsive force.[15]

Second, in any case, the "will" is irrelevant to our deliberations. We are debating not over the will, but over the body, that is, over the right to engage in the use of violence against a person's *body* who sells himself into slavery and then reneges on this contract.

Third, contrary to Rothbard, "for so long as a laborer remains totally subservient to his master's will voluntarily," he is *still* a slave, even though he does so voluntarily. Suppose I am kidnapped, forcibly taken from my home, placed in a dungeon, and coerced into shoveling coal. But then, my spirit broken, I do these tasks without demur, voluntarily, as it were. Nevertheless, I *remain* a kidnapee, despite these considerations.[16] Nor can I accept Rothbard's contention that if the slave "later changed his mind and the master enforced his slavery by violence, the slavery would not then be voluntary." On the contrary, it would *still* be voluntary, in that the slave signed a contract which allowed the master to whip him for disobedience, and received an amount of money agreeable to him for taking on this role.

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society peopled solely by automatons, it is equally arduous to picture it populated by the dead. While will and life are necessary precedents for the free society, they do not constitute the intellectual foundation for it. This is provided by Hoppe's argument from argument, in *Socialism and Capitalism*, p. 131. In any case, even if the will is as crucial as Evers believes it to be, this still does not speak to the *sale* or alienation of the will, only to its existence.

[15]Kinsella, "Inalienability and Punishment," p. 90. In *Ethics of Liberty*, p. 135, Rothbard articulates this point as follows: "Each man has control over his own will and person, and he is, if you wish, 'stuck' with that inherent and inalienable ownership." In my view, we are not "stuck" with anything of the sort. At the very least, there is always the possibility of suicide.

[16]Some slaves in the antebellum U.S. sang songs as they picked cotton, and were so browbeaten they didn't even consider escaping or rebelling. Yet, for all that, they were still slaves.

Rothbard continues his critique of the voluntary slave contract:

> Suppose that Smith makes the following agreement with the Jones Corporation: Smith, for the rest of his life, will obey all orders, under whatever conditions, that the Jones Corporation wishes to lay down. . . . The problem comes when, at some later date, Smith changes his mind and decides to leave. Shall he be held to his former voluntary promise? Our contention—and one that is fortunately upheld under present law—is that Smith's promise was not a valid (i.e., not an enforceable) contract. There is no transfer of title in Smith's agreement, because Smith's control over his own body and will are *inalienable*. Since that control *cannot* be alienated, the agreement was not a valid contract, and therefore should not be enforceable. Smith's agreement was a *mere* promise, which it might be held he is morally obligated to keep, but which should not be legally obligatory.[17]

Rothbard welcomes the fact that his "contention . . . is fortunately upheld under present law." The clear implication is that the law *could* have been other than it is, and the relevant judges, rather than being Rothbardians on this one issue, might have been Blockians. If so, then this is hardly a matter of philosophy. There is, then, no case for saying "that control *cannot* be alienated." Rather, the situation is that flesh and blood creatures made this decision, and that others *could* reverse matters. Consider the issue of the square circle in this regard. Here, it really *is* a matter of "cannot," rather than "would not." Square circles *cannot* be bought or sold since they *cannot* exist in the first place, and no subsequent set of judges or politicians can ever reverse this finding. Were a jurist to rule that a square circle contract was invalid, it is inconceivable that Rothbard would regard this decision as "fortunate." What would it even *mean* for a judge to determine that such a contract was valid? That one person had to turn over to another a square circle? The whole idea boggles the mind. Surely contracts for a square circle and for voluntary slavery occupy very different philosophical ground.

Further, the voluntary slave agreement is not a "mere" promise. Rather, it is a bona fide contract where consideration crosses hands; when it is abrogated, theft occurs. If you pay $1 million for the right to enslave me, and I spend it, work for a week at your plantation, change my mind, escape, and the forces of law and order refuse to turn me over to you, then I have in this manner stolen that amount of money

[17]Rothbard, *Ethics of Liberty*, pp. 135–36.

as surely as if I broke into your vault and absconded with it. It is difficult to see why this commercial arrangement does not meet the specifications of Rothbard's own "title transfer" theory of contracts.

One public policy issue upon which we disagree concerns the status of the voluntary enlistee in the army who later deserts. The soldier knows full well that the penalty for such an act, particularly in the face of the enemy during battle, is summary execution. He is paid a salary which reflects the onerousness of these conditions. Rothbard defends the deserter on the ground that "the enlistment was a mere promise, which cannot be enforceable, since every man has the right to change his mind at any time over the disposition of his body and will."[18]

His will, yes, at least we have seen Rothbard's argument on this account. But how did his body come to form part of the equation? If you cannot even alienate your body, how can legal suicide be rationalized? Taking one's own life is surely an aspect of libertarianism in that, almost by definition, it does not constitute an uninvited border crossing or aggression against someone else. Here, the law as presently constituted runs counter to Rothbard's analysis. Soldiers are penalized with their very lives for desertion. According to Rothbard's theory, such enforcement "*cannot*" occur, but it most certainly *does*.[19]

RANDY E. BARNETT

Barnett starts off his analysis by distinguishing that which is forfeitable from that which is inalienable.[20] He cites McConnell to the effect that "A person who has forfeited a right has lost the right because of some offence or wrongdoing."[21] In other words, you can forfeit your

[18]Rothbard, *Ethics of Liberty*, pp. 136–37.

[19]Kinsella, "Inalienability and Punishment," p. 91, n. 36, allows that a soldier who "enlist(s) in a volunteer army at a time of peril . . . may forcibly be restrained" to keep his end of the bargain. He makes this exception to his opposition to the enforceability of voluntary slave contracts on the ground that desertion "can be considered to be the cause of . . . physical harm" to the citizens of the country. In this, Kinsella follows Barnett, *Structure of Liberty*. But if, as Rothbard, Barnett, and Kinsella claim, it is a veritable law of nature that voluntary slave contracts are unenforceable, it is difficult to see how *any* exceptions whatsoever can be made. Rothbard here is more consistent with his erroneous view than are Kinsella and Barnett.

[20]Barnett, "Contract Remedies and Inalienable Rights," p. 186.

[21]Terrance McConnell, "The Nature and Basis of Inalienable Rights," *Law and Philosophy* 3 (1984), p. 28.

right to freedom, say, by committing a crime and being incarcerated for this offense, but you cannot alienate this right by selling or giving it away.

But if a right is truly inalienable, it should also be non-forfeitable. Conversely, if a right is forfeitable, then, and to that extent, it *cannot* be inalienable. Barnett's position amounts to the assertion that someone can take away someone else's right to freedom (as in the case of jail for criminals), but that the person himself cannot on his own give up this right. If it is all right for someone else to *take* your freedom, why is it wrong for you to *give up* your freedom voluntarily? The implication of Barnett's position is that suicide should be prohibited by law, for here you are giving up your own life. But this implication is surely incompatible with the libertarian legal code.[22]

George Smith considers an objection to Barnett's rather startling claim that since the right to life is inalienable, it is non-forfeitable, so the death penalty cannot be justified: "Perhaps [the killer] initially possessed inalienable rights [like everyone else] but somehow forfeited these rights after committing his foul deed." But Smith replies in a devastating manner:

> This argument evidently proceeds from a peculiar definition of inalienable rights. Forfeiture, after all, is a mode of alienation. Let me be clear about this: by "inalienable," I mean "inalienable."[23]

One cannot but help side with Smith *vis-à-vis* Barnett on this issue. After all, if something is literally inalienable, it *cannot* be alienated.

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[22]To legalize suicide but not voluntary slavery is a logical contradiction. Some argue that in voluntary slavery, you give a "blank check" to your master, but since that would allow the master to use you for rights-violative purposes, it is illegitimate to engage in such a voluntary action. However, let us consider the case of suicide. When you kill yourself, or even when you die of natural causes, you have no guarantee as to what will be done with your body, and it may be used to violate the rights of an innocent party. Therefore, if voluntary slavery should be illegal because of the "blank check" argument, then so should suicide, and even death itself, on the same grounds. Since the latter is a nonsense—ought implies can, no one can stave off death under present technology, and it is a bit much to accuse of rights violations all of those who have died solely because of the fact that they died—and libertarians certainly favor the right to kill oneself, then they are logically compelled to accept the argument for the legalization of voluntary slavery.

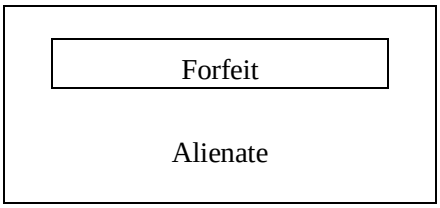
[23]George Smith, "A Killer's Right to Life," *Liberty* 10, no. 2 (November 1996), p. 48.

But if it cannot be alienated, then it cannot be separated from its owner for *any reason*. It is puzzling that Barnett can claim that a right is at once both inalienable and forfeitable.

As a matter of ordinary language, it is easy to make the distinction between alienability and forfeiture, but do the advocates of this distinction have a (logical) *right* to make it? I think not, for forfeiture is *part* of alienation. If a right is forfeited, it is *necessarily* alienated; it is no longer with the person, it is apart, or alienated, from him. On the other hand, if a right is alienated, it need not also be forfeited. For example, if the right is sold or given away, it is alienated but not forfeited. Thus, the position that a right ought to be capable of being forfeited but not alienated amounts to a logical contradiction.

The denial of this eminently sensible position means that no one can ever be punished for anything. Moreover, to disavow it even casts aspersions on the right of self-defense, for if someone is attacking you and you defend yourself, you cannot be acting rightly unless your attacker has forfeited (by his attack upon you) his right of bodily integrity. If he still retains that right (and he does, since he has not yet been found guilty of anything by a duly constituted court), then it would be improper on your part to invade his physical person, even in self-defense. This is an untenable position, since you, too, have the right to bodily integrity, and the only way to retain it is to ward off invaders through self-defense. But if people can forfeit rights (have them taken away by other people), then surely they can give away these rights of their own volition.

Consider Venn Diagram 1:



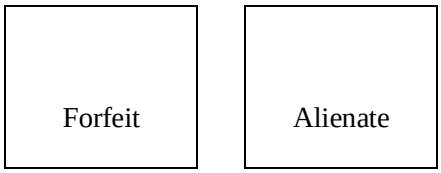
Venn Diagram 1

As we see, forfeiture is a subset of alienation. Here, alienate means *either* that you rid yourself of a right, or that someone else does this for you. In either case, the right is lost to the person.

However, it could be argued that the two concepts are entirely separate.[24] In Venn Diagram 2, they would be depicted as an apple and

[24]How plausible is this interpretation of language? In my own view, it is reasonable, in that the ordinary common usage of the words alienate and forfeit

an orange, placed side by side with no overlap between them, let alone one of them encompassing the other, as in Diagram 1.



Venn Diagram 2

Let us consider this second possibility. Were it true, we could no longer draw the implication that if alienation is justified, then so is forfeiture. Nor could we claim, contrary to Barnett, that forfeiture cannot be justified in the absence of alienation. The two, now, in effect, are unrelated.

Barnett argues that forfeiture, but not alienation, is justified. I take the position that both are compatible with libertarianism. Given Venn Diagram 1, I am correct. Given Diagram 2, I judge it a tie between us. Whether Barnett is correct depends not upon the relation between forfeiture and alienation but upon which arguments can be utilized to justify alienation or non-alienation. It is to this task that we now turn.

Having laid the groundwork with this distinction, Barnett offers "four reasons for inalienability," or four justifications for his own position on the matter.

Barnett's First Reason[25]

Barnett's first reason is that:

> The nature of individual rights might rule out the alienation of certain of these rights. . . . To illustrate this, suppose A consents to an arrangement under which he will always unquestionably follow the commands of B. If such a consensual arrangement were legally and morally binding, then A would violate B's rights by refusing to do what B commands; A would be wrong to so refuse. Suppose, now, that B orders A to violate the rights of C.[26]

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are not precise enough to point clearly in one direction or the other. I consider both interpretations, so as to not end up merely with a verbal disagreement.

[25]All Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 186–88.

[26]Barnett cites Arthur Kuflik, "The Inalienability of Autonomy," *Philosophy and Public Affairs* 13, no. 4 (Fall 1984), p. 286, in support of his argument:

One implication Barnett draws from these considerations is that:

> A no longer has the right to act on his own assessment of the rightfulness of a given command. In other words, A no longer has the moral means to respect the rights of C. If the transfer from A to B is valid, then A cannot be liable for the violation of C's rights. If liability exists, it must be limited to B.

This does not appear to be an insuperable problem for my side of this debate. If A is no longer a moral agent, then *of course* B must be responsible. He is the only one in this little scenario who *could* be responsible for A's unwarranted attack on C.

Further, I can use the same "logic" employed by Barnett against forfeiture. Suppose a jailor, to whom A's rights have been forfeited (not alienated), orders the selfsame A to violate the rights of the selfsame C of Barnett's illustration. Under these conditions, there is the same[27] "contradiction" in forfeiture that Barnett sees in alienation. For the sake of logical consistency, Barnett can either maintain his rejection of alienation and thereby also reject forfeiture, or maintain his defense of forfeiture and thereby embrace alienation.

There is a second implication which Barnett draws from his story about owner B ordering slave A to violate innocent third party C's rights: "There is now a conflict of rights. A would be acting wrongfully if he respected C's rights (thereby violating B's rights) and would also be acting wrongfully if he failed to respect C's rights."

There are problems here. First of all, any contradiction in rights due to inalienability applies as well to forfeiture, for prison wardens

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If the slave contract "is valid, then the autonomy-abdicating agent has no right to object, let alone to refuse" to violate the rights of innocent person C.

[27]Well, not exactly the same, but similar in all relevant regards. The only difference is that in the alienation case, A agreed to be bound by the commands of slave owner B, while in the forfeiture case, he is forced into obeying warden B. But in *both* cases, there is this seeming "contradiction" between doing what is right with regard to C (respecting his rights) and obeying the commands of B, whether in his capacity as slave owner or jailor. Yes, Barnett can argue that it is a contract violation for A to refuse to be bound by slave owner B's commands regarding C, but I can and do argue that so is it a (rights, in this case) violation for A to refuse to do as he is ordered to do by jailor B. Were Barnett to take the position that the commands of the jailor regarding innocent man C are illicit, the same stance is open to me with regard to the slave owner.

as well as slave owners can order those under their control to do illicit acts.

Second, this objection does not get around the possibility that we can have a voluntary slave sale where the contract stipulates that the slave owner *can't* order the slave to violate rights. Barnett's charge of conflict between rights holds true only if the original agreement stipulated what it had no right to stipulate, what I need not advocate that it stipulate, namely, that the slave gives up his moral autonomy. On the contrary, I need only advocate the legality of a limited slave contract in which the slave gives up no more and no less than his right to object to being kidnapped, and agrees to be ordered to do all non-rights-violative acts asked of him by his new owner.

In the third place, and most basically, there is no rights conflict because B simply had no right to order A to violate C's rights. Therefore, it is no violation of B's rights to refuse to obey this illicit order.

In making his charge, Barnett correctly relies on the doctrine of "compossibility," which means that there can be no conflict in valid rights. He offers two possible reconciliations of the conflict which ensues when slave owner B orders slave A to assault innocent man C:

> First, we could conclude that because the original arrangement is binding, either C really had no enforcement right against A in the first place, or C lost his right upon the making of the contract between A and B. Second, we could conclude that the original agreement between A and B cannot be binding—that is, some of A's rights are inalienable—because such a rights transfer would conflict with the valid rights of C. Any rights theory that supported the rights claim of C (as most rights theories would) would have to deny the validity of the contract between A and B.

I don't much like his second alternative. To accept this would be to agree to his stance on voluntary slavery (that it is impossible), and to renounce my own (that it is possible, and even beneficial). What of his first? While I do believe that the initial contract *can* be binding, I do not agree with Barnett that it can be binding in the sense he implies. Namely, that the slave is duty-bound to obey whatever orders issue forth from the master. The problem I find with his two alternatives is that he ignores a third: that the contract is binding, but only in the *limited* sense that the slave is duty-bound to comply with all *proper* wishes of the master.

But Barnett is having none of this. He states:

> A need not violate C's rights because neither A nor B have the right to violate the rights of another. This is true, but to recast the example in this way is to omit the issue unavoidably raised by the hypothetical agreement: Is A's right to control his own person and respect C's rights—a right that A indisputably starts with—a right that can be transferred?

The problem here is that we are now arguing at cross purposes. I agree with Barnett that if the only voluntary slave contract logically possible is the one *he* mentions, then voluntary slavery is a chimera, and there is at least one inalienability—the one he specifies. However, I maintain that a Barnett-type voluntary slave contract is *not* the only one possible. In addition to his, there is also a voluntary slave contract which limits the master to licit orders. If we allow him illicit ones, then, yes, difficulties ensue,[28] as Barnett has so eloquently shown.

Could Barnett argue, then, that I am conceding that there exists at least one thing that A cannot be allowed to sell, namely, the "right to control his own person"? No, because to be *allowed* to do something implies that you are *able* to do so. As Barnett himself states, "ought implies can." So it is *not* true that I am conceding that A not be *allowed* to give up his will. My claim is that this would be akin to a contradiction in terms, an attempt, as it were, to sell the proverbial square circle. A *cannot* do any such thing, because to do so is, in effect, to "commit" a logical contradiction.

According to Barnett:

> Notwithstanding any agreement he may have made to B, A is still under a duty to respect C's rights. A cannot, therefore, alienate such complete control of his future actions to anyone.

Yes, I agree, A cannot do that. But he *need* not do this, and *still* he can sign a voluntary slave contract. The only requirement (at least as far as this particular objection is concerned) is that the agreement stipulate that the master can never order the slave to violate the rights of third

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[28]Suppose that owner B orders slave A to create a square circle. Again, we have a contradiction, for the slave, in Barnett's conception, is morally and legally bound to obey his owner's orders but, in this case, he cannot. This is not an argument about voluntary slavery, at least after we see how it deteriorates. Rather, it is but an implication of the old computer adage "garbage in, garbage out." If you construct an argument with a contradiction in the premises, and argue validly, as Barnett has done, you will end up with a contradiction in the conclusion.

parties such as C. If the master does this, it is then *he* who is in violation of the contract. This, of course, is not a critique of Barnett per se, since he quite properly maintains that "any agreement to obey the *lawful* (or rights respecting) orders of another would survive the analysis thus far presented."

My point, however, is that the master *cannot* legitimately give any other kind of order to his slave because he couldn't possibly have purchased the "right" to violate the rights of a third party from the person soon to be his slave. Future slave A initially had no right to invade C, so when A sold himself to B, A couldn't have the "right" to aggress against C. Thus, when B gives his command in this regard, it is per se an improper one, equivalent to an "order" to create the square circle.

Perhaps John Locke can be of help in this context:

> For nobody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power . . . to take away the life or property of another . . . and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power.[29]

Locke is totally correct in asserting the basic premise that "nobody can transfer to another more power than he has in himself." How could anyone do this? If I don't have the right to this here car, then I cannot legitimately transfer it to you. Person A, who is selling his autonomy, has no initial right to kill innocent person C. Therefore, when A sells himself to B as a voluntary slave, it would *not* be legitimate for B to order A to kill C. Based on Locke's insight, A didn't have the right to kill C in the first place. How, then, could he have passed on this right to B? The answer is that A could not do any such thing.

Therefore, Barnett's claim that voluntary slavery implies a logical contradiction (A cannot kill C under orders from B, since C has a right to his own life; A must kill C under orders from B, since B ordered him to do it, and A owes B allegiance as the slave of B, due to the contract he signed) is false. We must reject the second part of this supposed contradiction. Namely, it is not true that A must kill C under orders from B merely because B ordered him to do it and because A

[29]John Locke, *Second Treatise*, in *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), sec. 135.

owes B allegiance as B's slave due to the contract they signed. Why not? Because, as Locke so ably informs us, A had no right to kill C before the slave contract, so he could not pass on this right through sale to B in that contract.

To recapitulate my reaction to Barnett's case where B orders A to violate C's rights:

1. A doesn't have to do it. He still owns his will. If A does commit aggression against C, A should be punished for it.[30]

2. Slave A who is told by his master B to assault innocent man C is in exactly the same position as he would be if instead of his master B giving him this command, it were strange gunman B_2 doing so. Since there is no contradiction in that case, there is none in this.[31] In both instances, an illicit order is given and the recipient is placed in an awkward position. To save his life, he must violate the libertarian legal code.[32]

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[30]If this was done under duress, then A can turn around and sue B for forcing him, A, to violate C's rights. But A is responsible for his act in the first instance. If B flees the scene and cannot be captured, then A owes a debt to C and must pay it himself.

[31]Do we go too fast? No. The gunman's victim owes him nothing; the slave owes the slave master certain duties of obedience, but not the duty to obey *illicit* orders.

[32]Suppose an ordinary non-slave situation. If A refuses to assault C, and is murdered by B, then the legal analysis is clear: B killed A unjustifiably. But suppose that A, fearing for his own life, assaults C, and then is captured. Then, the legal analysis is more complex. C has a case against A, his attacker. On the libertarian theory of punishment, C may collect damages from A. However, A has a case against B, and may, if B, too, can be caught, collect from B and turn this consideration over to C. However, if B cannot be brought to justice, then A must make good his attack on C, even though, in a sense, he was "blameless" or acted under duress. We know this since, at least under libertarian law, C may take violent measures to defend himself against A, even though A was not attacking him on A's own volition. This being the case, A is also responsible, after the fact, for damage imposed on C.

Further, B not only aggressed against C but also against A, so A can collect an additional amount from B for his own rights violation—assuming B has enough to first compensate C and then has something left over with which to compensate A. As well, C could sue B directly. I owe this point to Stephan Kinsella.

But the main point, the one of relevance to our text discussion, is that the *same* analysis applies to A whether he has assaulted C because he is B's

3. A would *not* be acting wrongfully if he respected C's rights and refused to abide by B's orders. A would not be violating B's rights since B *has* no right to order A to assault C in the first place.[33]

4. The slave cannot sell that which he didn't own in the first place (the right to initiate violence against C).

Barnett's Second Reason[34]

Balked in his criticism of voluntary slavery (at least the version herein presented), Barnett moves on to the second of his four arguments. Here, in effect, he reiterates Rothbard's explanation that the "will" cannot be alienated.[35] This is unobjectionable when it comes to a "willful . . . act."

However, Barnett continues:

> Suppose, now, that the agreement between A and B were recast to read that A transfers to B "the right to use force against A to compel A to conform his conduct to B's commands."

As long as it were understood that B's commands were rights respecting, this is precisely the version of voluntary slave contracts that I claim should be permissible in law. However, Barnett objects on the ground that "a right to control a resource cannot in fact be transferred where the control of the resource itself cannot in fact be transferred."

In order to buttress his case, Barnett continues:

> The crucial question . . . is not whether A's consent to the use of force by B justifies B's actions, but whether A's prior consent can limit his right to withhold consent in the future.
>
> Suppose that, after promising to perform services and granting to B the "right" to use force to compel performance,

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slave, or because A is held at gunpoint by B_2. Voluntary slavery, then, presents no particular ethical problem. Barnett notwithstanding, there is no logical contradiction implied by such an institution.

[33]This holds unless C owes B the right to beat him up. That is, suppose C had previously battered B, and the court had determined that B now had the right to administer a beating to C. Under these conditions, it would be perfectly acceptable for B to order his slave, A, to batter C in his behalf.

[34]All Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 188–90.

[35]See Rothbard, *Ethics of Liberty*.

> A thinks better of it and revokes his consent. When B (or a court) attempts to enforce B's command, may A rightfully resist? The argument that B may rightfully use force against A entails that A no longer has a right to resist B because this right has somehow been transferred to B (or lost). Yet A's agreement notwithstanding, A retains his ability to resist B. Just as A cannot alienate his right to the future control of his person because his ability to control his person cannot literally be transferred, A cannot have transferred or lost his right to resist when he retains his ability to resist. Therefore, if A may rightfully resist B, then B may not have the right to use force against A, since such a right would also impose on A a contradictory duty to refrain from resisting.

There are several replies which must be made to this thesis. First, the agreement between A and B is a matter of contract, not promise. And contract, after all, is no small matter for libertarians, particularly in the absence of any conflict with the underlying private property rights regime.[36]

Second, A might still have the ability to resist B, but it may be greatly attenuated, e.g., by handcuffs or leg shackles, or by public opinion and the force of law, which still supports contractual rights and obligations.

Third, and more important, abilities and rights belong in different universes of discourse. We might go so far as to say, contrary to Barnett, that the one does not at all imply the other. For example, whether awake or asleep, I retain the identical *rights* not to be molested by you. However, in the former state, I surely have far more *ability* to resist you than in the latter. Therefore, if there were a one-to-one connection between rights and abilities of the sort posited by Barnett, my rights would radically change from daylight to nightfall.

Fourth, the reason that A could not alienate his will in our previous example had nothing to do with the fact that he could not eradicate his ability to control himself. As even Barnett admits, this conceivably could be done with "mind altering drugs, brainwashing techniques, or psychosurgery." On the contrary, A could not alienate his will because this would be part and parcel of a logical contradiction.

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[36]On this see Hans-Hermann Hoppe, with Guido Hülsmann and Walter Block, "Against Fiduciary Media," *Quarterly Journal of Austrian Economics* 1, no. 1 (1998), pp. 19–50.

Fifth, the Barnett quote comes perilously close to asserting that "might makes right." But just because a person *can* resist does not at all give him the *right* to resist; just because he can*not* does not mean he has *no right* to do so.[37]

Barnett's Third Reason[38]

This brings us to Barnett's third reason for his anti-alienation thesis: "duties owed to oneself." While such an argument might, in a non-libertarian context, be deserving of the sort of long, sober, and serious analysis we have given his first two reasons, for the present audience, this must be given relatively short shrift. For a libertarian *qua* libertarian, there simply are no duties that one owes to oneself. The only duties owed by a libertarian, to anyone, are to refrain from initiating violence against non-aggressors, but these are duties owed to *other* people, not to oneself. Barnett, then, in espousing his "third reason," clearly leaves behind the realm of libertarianism. But he is not safe even there, for we shall pursue him wherever he goes.

What are the specifics? He writes:

> Suppose that it could be shown that one has a moral duty to live a good life or to pursue happiness. . . . [This would prevent] an agreement to transfer rights to all present and future acquired external possessions . . , [as well as] attempts to transfer a right to control *parts* of his body . . . such as his blood or heart.

Why? Presumably because this "would be an inferior moral choice" and would not be conducive to living a good life or pursuing happiness.

But libertarianism takes no view whatsoever on what is moral, what is a "good" life, and what contributes to such a state of affairs. It is concerned solely with the justified use of force.[39] And yet, Barnett's views on this matter are still subject to libertarian criticism.

First, harken back to our canonical example. Why is it immoral for a man to attempt to save the life of his sick child by selling himself

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[37]See Kinsella, "Inalienability and Punishment," p. 11, quoted below.

[38]Unless otherwise cited, all Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 191–92.

[39]See, e.g., Walter Block, "Libertarianism vs. Libertinism," *Journal of Libertarian Studies* 11, no. 1 (1994), pp. 117–28.

into slavery? As Barnett states, he will thereby lose "all present and future acquired external possessions," but by agreeing to engage in this sale of himself, he has *demonstrated* that he values his child's life more than any and all "external possessions" he may acquire in the future.[40] Given this, were he *not* to engage in a voluntary slave contract, or sell his blood, kidney, or heart for a price higher than he values these items, *then* he would be acting immorally, even in Barnett's terminology, and not pursuing what for him is happiness.[41]

But there is also a second problem. Barnett's moralizing directly contradicts libertarianism. Assume, now, that he is completely correct: voluntary slave sales are anti-happiness, and immoral to boot. They are akin, perhaps, to what Barnett would have to consider other victimless crimes, such as pornography, prostitution, gambling, drugs, alcohol, cigarettes, etc. The problem is that prohibiting slave sales, or any of these other acts that I stipulate to be immoral, is a violation of the libertarian non-aggression axiom. Say what you will about any of these activities, none of them involves the initiation of violence against any non-aggressor or his property.[42]

Next, Barnett cites the right to change one's mind as an escape clause for heart sales or voluntary slave contracts:

> While a person may be able to transfer control over a heart to another (and arguably may not be prevented from doing so), her never ending duty to herself prevents her from

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

[41]These things are rather subjective; what makes one person happy makes another miserable. Why should Barnett's view of the good life be allowed to determine the morality of others? See on this, e.g., James M. Buchanan and G.F. Thirlby, *L.S.E. Essays on Cost* (New York: New York University Press, 1981); Ludwig von Mises, *Human Action* (Chicago: Regnery, 1966); and Murray N. Rothbard, "The Hermeneutical Invasion of Philosophy and Economics," *Review of Austrian Economics* 3 (1989), pp. 45–59.

Even Barnett seems to concede this when he allows that a gift of a heart from one person "might be in conflict with the duty that person owes to herself (of course, it also might not)." But if Barnett himself cannot definitively make such a determination, how can he so positively assert this? After all, this is the very core of his third reason.

[42]See Walter Block, *Defending the Undefendable* (New York: Laissez-Faire Books, 1991).

> transferring a right to her heart to another such that she must convey control of the heart even if she changes her mind.

This position is not without its difficulties. First, what are these duties that one owes oneself? These are, as we have seen, not only unspecified, but even the author of this claim questions them. Second, why do people have rights to change their minds about contracts duly agreed to only in the case of voluntary slavery and heart transplants? Or does Barnett favor undoing *all* contracts, if one of the parties changes her mind? Or, if not all contracts, perhaps only those dealing with door-to-door salesmen or encyclopedia hucksters? What if the contract specifies, before hand, that it is for *real*, e.g., one which, upon signing, *cannot* be set aside by a unilateral alteration of the feelings of one of the signatories?[43] Suppose, further, that the heart seller has already spent the money paid for the heart, and has no other worthwhile collateral. Would she still be allowed to change her mind about forking over the heart? It would appear that she would, for, if not, she wouldn't be able to "live a good life or to pursue happiness," at least according to some interpretations of these goals. Given these considerations, Barnett, it would appear, would have to favor outright theft. This is "moral"?

Another difficulty is Barnett's claim that "an airline pilot may be forcibly restrained by passengers from parachuting out in mid flight."[44] How can this be? Does not the pilot have duties to himself, just as does the heart donor? If the pilot's duties to himself do not allow him to quit in mid-air, why are matters any different in the case of the heart donor? Both have signed contracts, or otherwise obligated themselves to carry through with their agreed-upon tasks.[45]

To add insult to injury, Barnett asserts: "Surely the account just provided is not paternalist." One may be excused for thinking: Surely it is.[46] He defends against this charge on the ground that "such a universal argument for inalienable rights denies everyone the same option and therefore does not put advocates into any type of parental stance towards others." Suppose I were to command that no one eat potato chips since they are bad for health. Surely this demand on my

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[43]Isn't that supposed to be what a contract is all about in the first place?

[44]Barnett, *Structure of Liberty*, pp. 81–82.

[45]This point was brought into focus for me by Stephan Kinsella.

[46]Well, perhaps, instead, it is maternalist, given his mode of expression.

part is paternalistic. I give this order for everyone's own good, including my own. *No one* can eat potato chips. There can be no doubt that this, too, is *universal*. Just because an order is non-hypocritical (e.g., it applies to the person making the order as well as to others) does not save it from being paternalistic.

States Radin:

> Two theories about freedom are central to the ideological framework in which we view inalienability: the notion that freedom means negative liberty, and the notion that (negative) liberty is identical with, or necessarily connected to, free alienability of everything in markets. The conception of freedom as negative liberty gives rise to the view that all inalienabilities are paternalistic limitations of freedom.[47]

Nor need we accept at face value the claim that Barnett's prescription is truly universal. On the contrary, it applies only to those who wish to sell their hearts or their liberty. Barnett attempts to liken his mandate with the libertarian axiom of non-aggression: "Any compossible system of rights restricts somebody's options—one may not act so as to violate the rights of another." But this will not do. The non-aggression axiom applies to all, without exception, not merely those who wish to engage in voluntary slave contracts.

The refutation to Barnett's views on paternalism is supplied by Nozick:

> A person may choose to do to himself, I shall suppose, the things that would impinge across his boundaries when done without his consent by another. . . . Also, he may give another permission to do these things to him (including things impossible for him to do to himself). Voluntary consent opens the border for crossings. Locke, of course, would hold that there are things that others may not do to you by your permission, namely, those things you have no right to do to yourself. Locke would hold that your giving your permission cannot make it morally permissible for another to kill you, because you have no right to commit suicide. My non-paternalistic position holds that someone may choose (or permit another) to do to himself

[47]Radin, "Market-Inalienability"; and Margaret Jane Radin, "Time, Possession, and Alienation," *Washington University Law Quarterly* 64 (1986). On negative liberty, Radin cites Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), For a refutation of his vision of negative liberty, see Rothbard, *Ethics of Liberty*, pp. 215–18.

> *anything*, unless he has acquired an obligation to some third party not to do or allow it.[48]

Barnett's Fourth Reason[49]

Say what you will about Barnett's first three reasons, they were at least principled. The same, unfortunately, cannot be said for his last one. Here, Barnett's opposition to legalizing slave contracts is not because he claims they are rights violative, nor internally contradictory, but solely as a practical matter: to make law enforcement easier and/or cheaper. His argument

> stems from a general skepticism that agreement to transfer rights amounting to the control of one's destiny would ever (or very often) be obtained in the absence of incompetence, fraud, duress, mistake, or some other recognized contract defense. . . . For example, the high cost of erroneously deciding that a slavery contract was truly voluntary could be said to militate against *ever* permitting the enforcement of such an agreement.[50]

One problem is that Barnett is talking about saving money, and I am concerned with justice. At a deeper level, on this basis, we could ban seduction and consensual sex since it is sometimes difficult to distinguish them from rape. As Walter Williams writes:

> The test for moral relations among people is to ask whether the act was peaceable and voluntary or violent and involuntary. Put another way, was there seduction, or was there rape? Seduction (voluntary exchange) occurs when we offer our fellow man the following proposition: I will make you feel good if you make me feel good. An example of this occurs when I visit my grocer. In effect I offer, 'If you make me feel good by giving me that loaf of bread, I will make you feel good by giving you a dollar.' Whenever there is

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[48]Nozick, *Anarchy, State, and Utopia*, p. 58. For a defense of paternalism, see John Kleinig, *Paternalism* (Totowa, N.J.: Rowman and Allanheld, 1984).

[49]Unless otherwise cited, all Barnett quotations in this section are drawn from Barnett, "Contract Remedies and Inalienable Rights," pp. 193–95.

[50]As sources for this prophylactic argument, Barnett cites Anthony Kronman, "Paternalism and the Law of Contracts," *Yale Law Journal* 92 (1983), p. 768; Terrance McConnell, "The Inalienable Right of Conscience: A Madisonian Argument," *Social Theory & Practice* 22, no. 3 (Fall 1996); and McConnell, "The Nature and Basis of Inalienable Rights," pp. 53–54. Also see Radin, "Market-Inalienability"; and Radin, "Time, Possession, and Alienation," p. 1910.

> seduction, we have a positive-sum game; i.e., both parties are better off in their own estimation.
>
> Rape (involuntary exchange), on the other hand, happens when we offer our fellow man the following proposition: "If you do not make me feel good, I am going to make you feel bad." An example of this would be where I walked into my grocer's store with a gun and offered, "If you do not make me feel good by giving me that loaf of bread, I am going to make you feel bad by shooting you." Whenever there is rape, we have a zero-sum game, i.e., in order for one person to be better off, it necessarily requires that another be made worse off. [51]

Likewise, on this basis, we could support preventive detention for all black teenage males, including totally innocent ones, on the ground that they can only be differentiated from the guilty ones at a "high cost." On this basis, we might even ban all marriages, since, with a divorce rate of some 50 percent, it is very hard to determine at the outset which of them will succeed.

Barnett concludes from all this that "resources external to one's person are (generally) alienable, and the right to possess, use, and control one's person is inalienable."[52] This, of course, runs directly counter to the truism that if you can't sell it (or give it away), then you really don't own it. Barnett affirms that you *do* rightfully control your own person, *and* that you should be prohibited from selling it, or, more strictly speaking, that any attempted sale of your own person should not be recognized by the law. My response: If you can't sell or give it away, then, and to that extent, you don't really own it completely, since full ownership brings in its wake the right to dispose of it however you wish to do so.

GEORGE SMITH

George Smith argues that if life and liberty are truly inalienable, not only are they not for sale, they cannot be forfeited either. As we have seen, forfeit is but an aspect of alienability. Therefore, he concludes, the death penalty is unjustified. Smith writes:

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[51]Walter E. Williams, "The Legitimate Role of Government in a Free Society," in *The Frank M. Engle Lectures, 1978–1997*, ed. Roger C. Bird (Bryn Mawr, Penn.: American College, 1998), p. 640.

[52]This is approvingly cited in Radin, "Market-Inalienability," p. 1896.

> Inalienable rights are inextricably linked to our reason and volition, which together constitute our moral agency. Since we literally cannot alienate our moral agency—no one else can think for us, or will for us, even if we want them to—this means that we cannot alienate the right to exercise moral agency. We have no choice in the matter.[53]

But the *coup d'etat* to this line of reasoning has been given by Kinsella. This is so important an insight that I repeat it:

> If the "impossibility" of literally alienating one's will means that it is impossible to be bound by contract to act as someone's slave, why is it not "impossible" to imprison an aggressor to enforce restitution? After all, even a convicted aggressor still has a will. Why is it not "impossible" to defend oneself with force? And yet it is *not* impossible for consent to be irrevocably granted, as we have seen; this condition exists for a justly imprisoned aggressor. Recipients of defensive, restitutive, or retaliatory force all retain a will, which is overwhelmed with some type of responsive force.[54]

Undaunted, however, Smith continues:

> One of the consequences . . . of the philosophy of inalienable rights . . . I believe, is the total repudiation of capital punishment as inconsistent with the inalienable right of self sovereignty. . . . Every person—including a wanton, brutal killer—has certain inalienable rights in common with the rest of humankind, rights that cannot be transferred, abandoned, or forfeited. . . . The death penalty is a clear violation of that inalienable right known as self sovereignty.[55]

However much we may admire Smith's courage and sheer effrontery in attempting to overturn established principles, this simply will not do. If the murderer cannot forfeit his right to life since it is inalienable, then not only are we proscribed from imposing the death penalty upon him, we are not even warranted in using *self-defense* against him while he is in the act of killing us since, for us to do so would necessarily violate his inalienable right to life. How could we respect this right of his while killing him, even in self-defense? We

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[53]Smith, "A Killer's Right to Life," p. 46.

[54]Kinsella, "Inalienability and Punishment," p. 90.

[55]Smith, "A Killer's Right to Life," p. 47.

could not, for this would be to forfeit the murderer's right to life, and, if there is anything that Smith has been clear about, it is that, for him, "'inalienable' mean[s] 'inalienable'."[56]

If there were any question about this, Smith goes on to maintain the purity of his vision:

> If we say that inalienable rights should be respected, but only under certain conditions, then . . . this . . . requires that we demote inalienable rights to a subordinate position.[57]

He might as well have deduced that incarceration, too, is improper, because it takes away part of a person's life, and all of his liberty. But Kinsella's dismissal of this notion is definitive: "If one is opposed to punishment on inalienability grounds, how can one then endorse defensive or restitutive force?"[58]

In Smith's 1996 article, "A Killer's Right to Life," he did not go that far, for that would have constituted a *reductio* of his own system. However, his 1997 article, "Inalienable Rights?" does just that:

> My case against capital punishment, if consistently applied, would militate against all forms of punishment, *such as fines and imprisonment.* I freely concede that this is a major problem for the libertarian theory of restitution. . . . Can we imprison someone and compel him to work off his debt? . . . These and other questions have not been adequately examined, much less answered, by libertarians, and I remain uncertain about how to deal with them.[59]

In response, Kinsella wrote, "Smith's view of inalienability of rights has clearly led him down a dead end. If he is consistent, he must condemn all uses of force, even defensive and restitutive."[60]

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[56]Nor can we imprison him, for this would be, in effect, kidnapping or enslaving him, certainly something incompatible with his inalienable right to freedom. Smith doesn't seem to realize this, as he buys into the notion of "a legitimate act of self defense." He states, "Murphy had declared a 'state of war' against me and others, so all of us had the right to use defensive violence against him." But what about Murphy's inalienable right to life? What about there being "no exceptions" to this rule, for any reason? See Smith, "A Killer's Right to Life," p. 68.

[57]Smith, "A Killer's Right to Life," p. 48.

[58]Kinsella, "Inalienability and Punishment," p. 83.

[59]Smith, "Inalienable Rights?" p. 55.

[60]Kinsella, "Inalienability and Punishment," p. 83.

But there are difficulties with his position even short of that termination point. For not only does the murderer have a right to life and liberty (if they are truly inalienable), but the victim, too, has a property right in life. Thus, at least according to libertarian punishment theory, which is based on restitution, the murderer owes the victim a life.[61] There is, thus, a contradiction in the inalienability of life theory. The murderer must give up his life to the dead victim, but, according to inalienability theory, we cannot forcibly take the murderer's life in order to accomplish that task. Yet, the victim is also a human being; his life ought to be equally inalienable, at least according to this theory.[62]

If there are serious problems with Smith's analysis, he at least serves as a *reductio ad absurdum* against the inalienabilist position of Rothbard, Kinsella, and Barnett, for these latter authors certainly believe in self-defense and punishment, to say nothing of the death penalty itself. Yet, it is difficult to see how they can square this with their advocacy of inalienability. For, as we have seen from Smith, "inalienability is inalienability." There are *no* exceptions to this, such as for punishment or self-defense (whether or not Smith appreciates this point himself). Again, any such exceptions would require that the killer's freedom be *alienated* from him, in direct opposition to the perspectives of not only Smith, but Rothbard, Kinsella, and Barnett as well.

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[61]On this, and on libertarian punishment theory in general, see, e.g., N. Stephan Kinsella, "Punishment and Proportionality: The Estoppel Approach," *Journal of Libertarian Studies* 12, no. 1 (Spring 1996); N. Stephan Kinsella, "A Libertarian Theory of Punishment and Rights," *Loyola of Los Angeles Law Review* 30 (1997); Randy E. Barnett and John Hagel, eds., *Assessing the Criminal* (Cambridge Mass.: Ballinger, 1977); Roger Pilon, "Criminal Remedies: Restitution, Retribution, or Both?" *Ethics* 88, no. 4 (July 1978); and Randy E. Barnett, "Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction," *Boston University Law Review* 76 (February/April 1996).

[62]Smith, "A Killer's Right to Life," curiously, gives more respect to the rights of murderers than to the rights of victims. Assume we have a machine—in 10,000 years, we probably will—which can transfer the life from a live murderer back to his dead victim. Since Smith's position on inalienability prohibits the death penalty for the murderer, the murderer may not be forced to give up his life in behalf of the dead victim. There is only one life available for the two of them, murderer and victim, and Smith's position would not allow this life to be taken from the murderer and given to the victim. I owe this point to Stephan Kinsella.

N. STEPHAN KINSELLA

Kinsella, as we have seen, constitutes a definitive rejection of Smith. As a critique of voluntary slavery, however, it is less successful. Kinsella starts off, reasonably enough, with libertarian premises:

> The key here is to focus on force and consent. . . . [T]o enslave someone, the slave owner must be *entitled* to use force against the slave if the slave disobeys or tries to run away. . . . It is the legitimacy of using force that matters, and this depends on consent.[63]

I agree wholeheartedly with Kinsella that the crux of the voluntary slave controversy, at least for the libertarian, revolves around a key question: When the slave disobeys and/or tries to run away, and the would-be owner uses violence in order to quell this disobedience, is the slave master guilty of a violation of the libertarian proscription against the initiation of force? If he is guilty, then there can be no such thing as a voluntary slave contract; if not, there can be.

What is Kinsella's proof that the owner is indeed guilty of a violation of the libertarian non-aggression axiom in such a case? He states:

> If A promises (or contracts, or agrees; the terminology is not important) to be B's slave, this is no doubt an attempt to consent *now* to force inflicted in the future. If A later changes his mind and tries to run away, may B at that point use force against A?
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> . . . . I would say no, however, simply because there is no reason why A *cannot* withdraw his consent. Unlike the case of aggression, where the aggressor's prior aggression estops him from objecting to the use of retaliatory force, *A has not committed aggression* against B. Thus, it is not inconsistent for A to later object to the use of force. All A did previously was utter words to B such as "I agree to be your slave." But this does not aggress against B at all, any more than does uttering the insult, "You are ugly." . . . In a nutshell, a would-be slave-owner must be entitled to use force against the would-be slave in order for the slavery agreement to be enforceable and for rights to be alienated in this manner; but the would-be slave has simply not initiated force against the would-be slave owner.[64]

There are several flaws here. But before discussing them, I must acknowledge a valid point. It is not a matter of great importance if we

[63]Kinsella, "Inalienability and Punishment," p. 90, emphasis in original.

[64]Kinsella, "Inalienability and Punishment," pp. 90–91, emphasis in original.

are talking about contracts, where consideration is given, or about gifts or agreements, where it is not.[65] A violation of the former clearly can amount to theft, which is strictly proscribed by libertarianism; but a violation of the latter is also stealing.

If there is a voluntary slave *contract*, then consideration has been exchanged. For example, B paid A, say, $1 million which A no longer has (since he spent it on his child's medical operation, given the example with which we began this paper). One week later, A becomes tired of slavery and decides to leave. If he does, though, he is departing with an entity, A himself, for which B paid this rather considerable sum of money.[66] Under these circumstances, I fail to see how it can be maintained that "*A has not committed aggression* against B." A most certainly *has* committed aggression against B once A runs away, by stealing B's valuable slave, namely, A himself. If horse rustling is a crime, and it is and should be, then so is slave stealing.

But if voluntary slavery consists of no more than an agreement or gift on the part of A to B, and A later reneges, B is still justified in using force against A to compel him to keep his promise. Absent this position, any gift-giver or donor would always be in a position to come to the gift-receiver or donee and demand the return of his largesse.

Now for the disagreements with Kinsella. I cannot see my way clear to agreeing that it doesn't matter if the slavery stems from a contract, agreement, or promise. In my view, only the latter cannot support the use of force on the part of the slave master to keep his property under his continued dominion. Kinsella writes: "Rights are inalienable in the limited (and more conventional) sense that one cannot irrevocably grant consent to aggression in the future by way of a mere promise."[67] Again, I agree. Where I depart from Kinsella is that I maintain that promises on the one hand, and agreements and

[65]In a previous draft of this paper, I took the opposite position, but Stephan Kinsella subsequently argued me out of it. I thank him for setting me straight on this issue. On this issue, see N. Stephan Kinsella, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003).

[66]A contract supported by consideration is sufficient to transfer title, but it is not necessary. Title can also be legitimately transferred in a unilateral or gratuitous transfer without any consideration passing hands. I owe this point to Stephan Kinsella.

[67]Kinsella, "Inalienability and Punishment," p. 91.

contracts on the other, are very different entities. By contrast, he takes the position that "the terminology is not important."

As for promises, I support Rothbard, who states:

> Suppose that A promises to marry B; B proceeds to make wedding plans, incurring costs of preparing for the wedding. At the last minute, A changes his or her mind, thereby violating this alleged "contract." What should be the role of a legal enforcing agency in the libertarian society? Logically, the strict believer in the "promise" theory of contracts would have to reason as follows: A voluntarily promised B that he or she would marry the other, this set up the expectation of marriage in the other's mind; *therefore* this contract must be enforced. A must be *forced* to marry B. As far as we know, no one has pushed the promise theory this far. . . . [T]here can be no property in someone's promises or expectations; these are only subjective states of mind, which do not involve transfer of title, and therefore do not involve implicit theft.[68]

In the contract case (albeit not where there was only a promise), runaway slave A took B's $1 million in what became bad faith when he ran away; in effect, A stole this money. (In actual point of fact, what was stolen, literally, was the body of the slave, by himself.)[69] Surely a man has a right to use force against a thief who steals $1 million from him; why not then in this case? If so, then freedom is alienable. In the agreement case, the runaway slave did not steal any specific amount of money; rather, he absconded with a valuable asset of the slave owner, himself.

Another difficulty with Kinsella's case for inalienability is that he makes exceptions to it. He supports Barnett's claim that "an airline pilot may be forcibly restrained by passengers from parachuting out in mid-flight." He also would allow force to be used against the person "agreeing to donate an organ which causes the recipient to rely on this, or enlisting in a volunteer army at a time of peril."[70]

But if there are exceptions to inalienability, then this doctrine cannot be true as a matter of principle. What happened to the supposed inalienability of the will of the pilot, donor, and soldier? Why

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[68]Rothbard, *Ethics of Liberty*, p. 134.

[69]I owe this point to Stephan Kinsella.

[70]Kinsella, "Inalienability and Punishment," p. 91, n. 37, citing Barnett, *Structure of Liberty*, pp. 81–82.

are their "rights" being denied? What happened to Kinsella's argument, in effect, that the airline pilot, the organ donor, and the voluntary enlistee "have not committed aggression against" their respective B: the passengers, the organ donee, and the citizenry? As we have seen, if these agreements were a matter of contract, then there *was* aggression, and the wages of the pilot and soldier, and, in effect, the fee of the donor were stolen.

Of course, this leaves open the question of whether the contract should be upheld, e.g., specific performance required, or if the contract violator should merely be forced to return the money he was paid, perhaps with a additional amount as a penalty. In my view, in a fully free market system, there would be two kinds of contracts: those that specify specific performance, and those that allow financial penalties and monetary recompense. In the absence of any such distinction, I would enforce specific performance with the understanding that the contractually obligated person could buy his way out of the contract at a mutually agreeable price. For example, an opera singer with laryngitis would be dragged onto the stage, kicking and screaming (well, whispering) if need be. One such publicized incident of that sort and people would no longer be so willing to sign contracts without escape clauses.

Even I would not go so far as Kinsella on these exceptions. To me, it matters not one whit whether the donee "relies" on the donor's promise, or the citizens on the soldier's. The key element is contractual, not promissory. If the pilot, donor, and soldier were paid, then their failures to honor their contractual obligations amount to no less than theft, and certainly justify the use of force, at least under libertarianism. Contracts are a serious business, and should be treated as such.[71]

Going out on a limb for inalienability, Kinsella feels duty bound, reasonably enough, to preclude such a fate from contracts involving non-human resources. If *all* things were inalienable, if nothing were capable of being sold or given away, we would not have much of a free market place. His line of defense against any such conclusion is that there is a world of difference between our rights to ourselves (our own persons) and our rights over physical property such as land, clothing, etc. For him, the former supercede the latter. Kinsella writes:

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[71]On the other hand, contracts are based on property rights, and cannot violate them. For more on this, see Hoppe, et al., "Against Fiduciary Media."

> The right to alienate external resources is not limited, however, because of crucial differences between rights pertaining to one's person and rights of ownership in homesteaded goods. The right to homestead external resources is derivative of and distinct from the basic right against non-aggression. External scarce resources are appropriated and acquired, and held by intention (it is this that distinguishes ownership from possession), and thus can be abandoned or alienated by a sufficient expression of intention, i.e., a contract. For this reason, under the libertarian title-transfer theory of contract, one can alienate particular property titles, i.e., titles to external (homesteadable) scarce resources owned by an individual. In this sense, there is a distinction between title to property, which is alienable by mere contract, and rights related to one's body, which are not alienable by promise or contract.[72]

I am unpersuaded by this line of reasoning. I know of no sharp distinction between property internal or external to the person in libertarian theory. On the contrary, I maintain, it is all of a piece. Liberty is a seamless web, applying, equally, to human and non-human property. External property, of course, can be abandoned, but so can the internal version, by suicide or zombicide.

In order to see this, let us consider what is perhaps the most rigorous defense of basic liberties ever penned: Hoppe's argument from argument.[73] In the view of this philosopher, the only way to establish truth in political philosophy is through argumentation; if a theory cannot survive this process, it cannot be counted as true. What, then, are the preconditions for argumentation to take place? Given present technical accomplishments, one must have a throat, a tongue, lungs, vocal chords, indeed a body. Score a point for Kinsella. But one *also* needs at least a place to stand on, if not also food, protection from the elements, etc. Hoppe's point is that if any specific argument denies any of these underpinnings which are themselves required for argument to occur in the first place, it is to that extent flawed. This would rule out *any* attack on freedom of the person *or* on property rights, since *both* are necessary for this process to take place.

So Kinsella cannot sustain his claim that personal rights are somehow more important than rights to physical property. *Each* is a necessary condition for the free society. Either of them avails nothing

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[72]Kinsella, "Inalienability and Punishment," p. 92.

[73]Hoppe, *A Theory of Socialism and Capitalism*, p. 131.

without the other. Each is necessary; only together are they sufficient for this end.

In concluding this section, let us return to our canonical example of the poor father who wants to save his child from a death threatening illness which will cost $1 million, and the rich man who wants this father as his property, and will pay this amount of money. If the law on this matter were as Kinsella advocates, this business arrangement could not be consummated. The rich would-be slave owner is officially put on notice that if and whenever the slave-father decides to run away, any force used to prevent him from doing so would be illegal. Without being able to resort to compulsion, though, he would have no way to ensure continued ownership over the human slave he has purchased, so he won't pay the $1 million in the first place, and the sick child dies. The reason for this state of affairs is that self-ownership can be alienated not by contract but only through forfeit, by committing a crime. If someone wants to become a slave, the only way he can do it is to commit murder and be found guilty; then, at least under libertarian law, he will become the slave of the heir of the victim. If he wants to be paid for becoming a slave (e.g., in order to save his child), he is simply out of luck.

DAVID GORDON

Gordon approvingly comments on Rothbard's argument that contractual rights are very important, but are inferior to private property rights. Gordon interprets this as opposition to voluntary slave contracts:

> You cannot, then, sell yourself into slavery. You can voluntarily submit to the will of another; but, should you change your mind, no legal force can compel you to obey another's bidding. Why not? Contract, to reiterate, does not stand as an absolute: only what fits together with self ownership can be enforced. You can only give away your property, not yourself.[74]

Gordon buttresses this interpretation by again citing Rothbard, this time to the effect that neither promise nor expectation can serve as the springboard for contract; instead, it "must involve a transfer of titles between the parties at the time the contract is made."[75] As

[74]Gordon, "Private Property's Philosopher," p. 2, citing Rothbard, *Ethics of Liberty*, p. 133.

[75]Gordon, "Private Property's Philosophy," p. 3.

Rothbard correctly points out, only here—not in the case of contract as promise nor contract as fulfilled expectation—is a contract violation akin to theft. When a promise is broken or an expectation unfulfilled, there is no necessary illicit transfer of property, e.g., theft. However, if there is a title transfer, but one party to the contract does not fulfill his end of the bargain, then he has in effect stolen property from the other.[76]

Notice that there are three separate strains of intertwined thought underlying this argument. First, Gordon bases his rejection of voluntary slave contracts on them being per se incompatible with self-ownership. Second, he takes the position that selling oneself into slavery is putting the cart before the horse, to favor the least important of two basic libertarian building blocks (contract) and to deprecate the more important of them (property), given that they are in conflict. Third, to this end, he points to the failure of contract as promise or failed expectation, and the validity of contract as title transfer. Say what you will about these arguments, it cannot be denied that they are entirely separable. Thus, in defending voluntary slave contracts, we must counter each of Gordon's very different arguments, one at a time.

Let us begin with self-ownership (in so doing, we will ignore the issues of whether contract is incompatible with property rights, and what justifies contracts). Gordon maintains that to give or sell yourself (not merely your physical property) to someone else would be a per se violation of self-ownership. I claim, very much to the contrary, that to *forbid* this *and* to fail to legally enforce such contracts would violate the rights of self-ownership of the person. If you really own something, whether an unimportant piece of your property (such as a car or house) or an important part of your property (such as your own person), then you should be able to sell or give it away. The extent to which you cannot do with yourself what you will is the extent to which you do not really own yourself.

We consider the charge that the voluntary slave case implies an abnegation of property rights in favor of contracts (in this discussion, we avoid the issue of whether this doctrine is false per se, and again the justification of contracts themselves). I have no disagreement with Gordon insofar as his main contention is concerned. Property rights

[76]It is precisely this analysis which is the antidote to Kinsella's failure to distinguish between contract and promise.

are, indeed, logically prior to contract. Be the latter ever-so-important for libertarian theory, they must of necessity rest on the bedrock of property rights, for in engaging in commercial arrangements, one can legitimately only do so with one's own property. To do so with that properly belonging to someone else is hardly compatible with the freedom philosophy.[77]

But why is it thought that the voluntary slave contract transfers property which is not owned, or illegitimately owned? The slave is transferring the right to control *himself*; and who, if not this person himself, has the right to do so? Surely, there can be no one else with this right. There is no third party C in a position to protest that the sale of A to B is a violation of C's rights.[78]

Now for the argument from contract (and again, we ignore the issues of self-ownership and of giving undue precedence to contract over property rights), once again I find myself in full agreement with both Gordon and Rothbard. They are both entirely correct in asserting the title transfer theory of contract, vis-à-vis those positions which explain contract in terms of promise or expectations fulfillment. But where is the evidence that voluntary slave contracts rely on promise or expectation? While, conceivably, *some* voluntary slave contracts may indeed be of this variety, this is hardly necessary. It is easy to

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[77]As it happens, Hoppe, et al., "Against Fiduciary Media," make this identical point with regard to fractional-reserve banking. The main point of that essay is that even on the assumption that the contract between the fractional-reserve banker and his customer is fully informed and voluntary, it is still invalid under libertarian law because the agreement between these two concerns property which belongs to neither of them.

Regarding the relationship between fractional-reserve banking and voluntary slavery, Hülsmann mistakenly draws the very opposite conclusion. In his view, the agreed-upon impropriety of the former is fully congruent with, and even implies, the impropriety of the latter. He states: "Someone claiming that the interdiction of fractional-reserve banking would infringe upon man's freedom of contract would have to hold the defense of slavery to be a like infringement." See Hülsmann, "A General Theory of Error Cycles," n. 41.

From my perspective, by contrast, I only cite the illicitness of fractional-reserve banking as evidence that I agree with Gordon that property rights undergird contractual rights, and the latter cannot be valid when they are incompatible with the former.

[78]By contrast, in the fractional-reserve banking case, there are innumerable third parties in exactly this position.

conceive of other voluntary slave contracts which rely not at all on promise or expectations fulfillment, but rather on title transfer. In our canonical case, A sells himself to B in return for $1 million. If this is not a title transfer, then nothing is. Were A allowed to abrogate this contract (assume he has already spent the money for his child's operation), it seems difficult to deny that he would thereby be (in effect) stealing the money he was paid for his services as a slave. On what grounds is it claimed that this has anything whatever to do with promise or expectations? It seems clear that this is a veritable paradigm case of a title-transfer contract in action.

RICHARD EPSTEIN

From my perspective, Epstein starts off well enough for an article which argues for restraining alienation:

> As a first approximation, it appears that any restraint upon the power of an owner to alienate his own property should be regarded as impermissible. . . . To the person who thinks of rights as being acquired by first possession, the right of alienation seems to be an inescapable element of the original bundle of property rights. If alienation is not acquired by the person who has obtained ownership by taking possession of the property, then who else can claim it, and by what possible warrant?[79]

He continues on a similar wavelength:

> To insure that exchanges can go forward, rights of alienation must be vested somewhere, or resources will remain fixed in the hands of those who do not want them. There seems no better place in which to locate exclusive rights of alienation than with the parties already entitled to possession and use.[80]

But even here there are signs of weakness. For one thing, this perspective is altogether too pragmatic and utilitarian, as opposed to rights based. Institutions that prevent the free flow of resources to those who most value them will certainly reduce overall wealth.[81]

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[79]Richard Epstein, "Why Restrain Alienation," *Columbia Law Review* 85 (1985), p. 971.

[80]Epstein, "Why Restrain Alienation," p. 972.

[81]But this is a rather superficial and Coasean reason for preferring that they do, and is hardly the point here.

For another, this statement allows for the possibility that the law *could* vest property in A's hands, and the right to alienate it in B's hands, and that it does not do so entirely as a matter of convenience. But matters are a bit more limited than that. One may go so far as to say that it is a necessary part and parcel of ownership that one can give away, sell, or otherwise alienate the property. Indeed, if one is forbidden to alienate it, then, and to that extent, one does not really own it at all. If a man is permitted by law to occupy some land, but not sell it, then he is merely a legal squatter, not the owner.[82]

It is, perhaps, possible for some—however, not for libertarians of the sort that Epstein claims to be—to suppose that all private landowners are, or can ever be, is squatters. Property rights to land, in this vision, could properly only belong to the crown, or to the state in more democratic eras.[83] But what of the individual person? It is more difficult to claim that people are really owned by the crown, in that they cannot sell themselves, and are mere squatters of themselves, so to speak. So we arrive again at the original issue, only this time for people, not land and other property: It is *not* the case that original ownership of the person *could* vest in himself *or* in someone else. It must necessarily be entrenched only in himself. This being the case, the right of alienation, then, *must* inhere in the individual.

So far, to be fair to Epstein, there are only hints that he rejects the total alienability that I have been defending. It is only when he discusses torts vs. injunctions for possibly dangerous activities that his views become pellucid. He states:

> This uncertain inquiry into remedial choices works itself back into the question of alienability. Suppose, for example, it is concluded that no effective remedy is available against the party in possession of the [dangerous] thing because he is insolvent or difficult to locate or both. Tort actions for damages or injunctions quickly become impossible or at least too costly. At this point, the protection of third parties need no longer be confined to remedies directed against the party in possession. Protection of third parties could demand that dangerous instrumentalities never get into the hands of those persons whose conduct cannot

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[82]Of course, he can be a renter, or the holder of a usufruct, but this is a matter of contract, not law. I owe this point to Stephan Kinsella.

[83]For a critique of the Henry George school of economics, see Murray N. Rothbard, *Money, Method, and the Austrian School*, vol. 1 of *The Logic of Action* (Cheltenham, U.K.: Edward Elgar, 1997), pp. 284–85.

> effectively be policed or monitored. Legal restrictions on alienation thus allow an indirect attack upon improper use of dangerous things.[84]

This is similar to Barnett's fourth reason for opposing alienation: It is sometimes cost effective to violate rights. However, just because a man "is insolvent or difficult to locate or both" does not mean his rights may be disregarded.

The first illustration of this principle offered by Epstein is gun control.[85] Distinguishing between machine guns, rifles, and pistols, he favors the present ban on the sale and use of the former. He is ambivalent about the latter two, since he thinks it an empirical issue, and it is not clear to him whether the benefits outweigh the costs.[86]

But gun control—of *any* type, variety, or kind, up to and including machine guns—is not justified on his own libertarian grounds. Epstein's words are surely worth repeating: "The core function of the law is to protect all persons and their property against the force and fraud of another."[87] But mere gun sale or ownership surely cannot count as "force against another." As even Epstein acknowledges, guns can be used for many other purposes, including target shooting, contemplation, antiquarianism, etc., but, preeminently, for self-defense.

In contrast, atom bombs are necessarily offensive. They cannot be targeted to include only the guilty. This implies, however, not only that thermonuclear devices should have their alienation restricted, but, even more basically, they should be entirely prohibited. No one should be able to sell an atom bomb, but no one should be able to own one either.[88]

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[84]Epstein, "Why Restrain Alienation," pp. 973–74.

[85]Epstein, "Why Restrain Alienation," p. 974. Epstein's analysis is similar to Guido Calabresi and Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85, no. 6 (April 1972). They place restrictions on the alienation of pollution, but do not advocate banning it entirely.

[86]Perhaps Epstein will change his mind if he reads John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Chicago: University of Chicago Press, 1998). Lott had the same view, then went and did the research, only to discover that the costs of gun control are huge and the benefits are small.

[87]Epstein, "Why Restrain Alienation," p. 970.

[88]For an analysis of H-bombs in the off-world context, where they need not be offensive weapons, and therefore should not be banned (nor restrictions

Epstein's second example is liquor, because "the behavior that alcohol induces in drinkers may inflict serious harm upon third persons."[89] This constitutes a reductio against his own position. Given what Epstein says about the "the core function of the law," and given that imbibing alcoholic beverages is not a per se violation of liberty, banning their sale clearly involves Epstein in a contradiction. Practically *anything* may "inflict serious harm upon third persons": soap, skates (you can slip on them and hit someone else), nails, knives, glass (they can cut third parties), salt, pepper, aspirin (too much can poison you; under socialized medicine, you will become a burden on others), and so forth. Were he consistent, Epstein would have to urge a ban on the sale or possession of all of these household items. The question Epstein must face concerns how to reconcile this with his own libertarian sentiments. His treatment of this topic suggests that he is calling for a reinstitution of alcohol prohibition.[90]

Epstein's third example concerns narcotics and drugs:

> There is always a danger, especially with narcotics, that persons under the influence will inflict harms on third parties, as when a gunman under the influence of heroin goes on a rampage.[91]

Yet, if there are any harms having to do with such substances, it has to do with their prohibition, not they, themselves. The outlawry increases prices dramatically from what they would be on a free market. This creates crime in several ways: Addicts have to commit crimes to pay for their habits; people using these drugs are criminalized by law; gangs shoot each other, and also innocent by-standers; and the police are suborned and co-opted thanks to the gigantic profits which flow from the prohibition in the first place. While this is neither the time nor the place to go into a full-scale critique of narcotics laws, suffice it to say that if Epstein were really concerned about "third party harms," he would take a tack opposite to that which he took.[92]

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placed on their alienation), see Walter Block and Matthew Block, "Toward a Universal Libertarian Theory of Gun (Weapon) Control: A Geographical Analysis," *Ethics, Place, and Environment* 3, no. 3 (2000).

[89]Epstein, "Why Restrain Alienation," p. 976.

[90]Surely this is a misreading on my part?

[91]Epstein, "Why Restrain Alienation," p. 977.

[92]Epstein's concern with "third parties" seems to have evaporated in regard to bystanders injured or killed under such circumstances. For a critique of

Fourth, Epstein advocates a ban on the sale of "a book that describes how to build an atomic bomb."[93] This is similar to the drug that makes you go out and murder. The drug itself should be legal since its purchase and even ingestion are not per se acts of violence. People who buy it, though, should be carefully followed by the police.

But what about books written by Marx or his many followers? Based on Epstein's theory of causation, these volumes have killed far more people than those which tell us how to make an atom bomb. Books and articles by scholars masquerading as libertarians, or by feminists, multiculturalists, and their ilk have undoubtedly been far less harmful than Marxist ones, but they, too, have caused harm. Should they also be banned? Epstein might agree, but this would clearly be improper under the libertarian legal code.[94]

CONCLUSION

What, precisely, did the slave owner in Alabama in 1835 get from his slave? Moral agency? Will? Heartfelt and cheerful obedience? None of the above. The master only received the privilege that when and if he used violence against the slave, he would not be penalized by law for assault, battery, and kidnaping, as he would have been had he carried out these acts against a free person. *That is all* that voluntary slavery would give the owner; not moral agency or will or anything else discussed by the critics of voluntary slavery.[95]

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narcotics laws, see, e.g., Meaghan Cussen and Walter Block, "Drug Legalization: A Public Policy Analysis," *American Journal of Economics and Sociology* 59, no. 3 (July 2000).

[93]Epstein, "Why Restrain Alienation," p. 978.

[94]Epstein, "Why Restrain Alienation," pp. 978–84, also opposes alienation for "common pool problems," but he does so as part of contractual agreements, that is, if people agree to do so. On p. 982, he states: "both sides often agree that the rights that they have created under contract shall not be assignable without the consent of the other." Since I favor the right of owners to do exactly as they wish with their own private property (as long as it is not used to invade the rights of others), his thesis in this section of his paper does not contradict my own. However, for a critique of the common pool analysis employed by Epstein, see Walter Block, review of *Property and Freedom*, by Richard Pipes, *Quarterly Journal of Austrian Economics* 5, no. 1 (Spring 2002).

[95]A short summary of the problems with the claim that life and liberty are inalienable is that it entails the prohibition of:

Let me close by reiterating the point that in criticizing the views on voluntary slavery of Rothbard and his associates, I am not attempting to, nor do I succeed in, denigrating Rothbard's basic libertarian philosophy. Rather, I see myself as making a tiny adjustment to this system, one which strengthens libertarianism by making it more internally consistent.

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1. suicide, euthanasia, and religious martyrdom;

2. any punishment at all, let alone the death penalty; see Smith, "Inalienable Rights";

3. placing one's life at risk, as do stunt men or race car drivers; see Barnett, "Contract Remedies and Inalienable Rights," p. 190;

4. defensive violence against attackers; see Kinsella, "Inalienability and Punishment";

5. boxers and masochists; see Barnett, "Contract Remedies and Inalienable Rights," p. 190; and Arthur Kuflik, "The Utilitarian Logic of Inalienable Rights," *Ethics* 97 (October 1986), n. 5;

6. marriage until death do us part; that is, marriage with no possibility of divorce; previously, this was the rule in many countries, and in Ireland until very recently; and

7. medical operations; see Kuflik, "The Utilitarian Logic of Inalienable Rights," n. 5.

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