

## INALIENABILITY AND PUNISHMENT: A REPLY TO GEORGE SMITH

N. Stephan Kinsella\*

It can reasonably be argued that capital punishment is immoral or problematic because of the danger of executing an innocent person by mistake. George Smith, in a recent *Liberty* magazine article, in which he argues against capital punishment, does not take this approach.<sup>1</sup> Instead, Smith states that capital punishment is never permissible, even where “*reasonable doubt is impossible* and where the crimes have been especially heinous.”<sup>2</sup> In other words, even if we know beyond all doubt that someone has committed murder, it is impermissible to execute him (and also, presumably, to inflict less severe punishment).

Smith bases his argument on the concept of “inalienable rights,” rights that “cannot be transferred, surrendered, or forfeited.”<sup>3</sup> The argument runs roughly as follows. Libertarians must adopt one of two positions: (1) everyone has inalienable rights, in which case even a (known) murderer may not be executed; or (2) certain crimes may be punished with death, in which case the theory of inalienable rights must be abandoned. In Smith’s opinion, position (2) “would be catastrophic, for we cannot construct a libertarian theory of justice except on a foundation of inalienable rights.”<sup>4</sup>

Smith’s entire argument, then, rests on the notion that libertarianism and justice require inalienable rights. There are either

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\*N. Stephan Kinsella practices patent, computer, and Internet-related law with Duane, Morris & Heckscher LLP, in Houston, and teaches Computer Law at South Texas College of Law affiliated with Texas A&M University. He is co-editor of *Guide to Commercial Laws of the World* (Dobbs Ferry, N.Y.: Oceana Publications, 1998). Email: nskinsella@compuserve.com.

<sup>1</sup>George H. Smith, “A Killer’s Right to Life,” *Liberty* 10, no. 2 (November 1996): 46. Smith’s article was subsequently criticized in the May 1997 issue of *Liberty*. See John C. Goodman, “Do Inalienable Rights Outlaw Punishment?,” *Liberty* 10, no. 5 (May 1997): 47; Timothy Virkkala, “The Hollow Ring of Inalienability,” *Liberty* 10, no. 5 (May 1997): 49; and Smith’s response thereto, George H. Smith, “Inalienable Rights?,” *Liberty* 10, no. 6 (July 1997): 51.

Smith is, by any standard, a thoughtful and provocative libertarian theorist. See, for example, George H. Smith, *Atheism: The Case Against God* (Buffalo, N.Y.: Prometheus Books, 1979); George H. Smith, *Atheism, Ayn Rand, and Other Heresies* (Buffalo, N.Y.: Prometheus Books, 1991).

<sup>2</sup>Smith, “A Killer’s Right to Life,” p. 46 (emphasis added).

<sup>3</sup>Smith, “A Killer’s Right to Life,” p. 46.

<sup>4</sup>Smith, “A Killer’s Right to Life,” p. 48.

“inalienable” rights, or there are no rights at all. Yet Smith’s arguments for why libertarianism requires that rights be inalienable are unpersuasive.

### STANDING THREATS

One of Smith’s approaches is to provide an argument for capital punishment based on the notion of self-defense, and then to attack this argument as insufficient. Smith writes:

Some years ago during a summer conference, Randy Barnett and I sat down to see whether we could manufacture a defense of capital punishment. The best we could come up with was the notion of a “standing threat.” This is based on John Locke’s treatment of reparation and restraining, which “are the only reasons, why one Man may lawfully do harm to another, which is that we call punishment.”<sup>5</sup>

Thus, according to Locke, we may kill an aggressor in self-defense since he has placed the victim and aggressor in a “state of war.” Similarly, a case could be made that a convicted aggressor may be executed, on the grounds that he is a “standing threat” to others.

Rejecting this argument, Smith notes that, “To kill someone as a ‘standing threat’ in the name of self-defense may amount to little more than a surreptitious effort to smuggle capital punishment in through the back door of libertarian theory, having denied it entrance through the front.”<sup>6</sup> Smith is correct here: it is not for reasons of self-defense that a victim has a right to punish an aggressor. However, this does not mean punishment (retribution or retaliation) is impermissible, only that self-defense is not sufficient to justify punishment.

### BARNETT ON PUNISHMENT

Let me briefly note the following. Smith states: “For years [Barnett] has brilliantly elaborated on the pure theory of restitution as the only acceptable model of libertarian punishment, and he recognizes that the death penalty cannot be incorporated within this model.”<sup>7</sup>

Admittedly, Barnett does appear to believe that even guilty aggressors have a right against punishment. But he does not

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<sup>5</sup>Smith, “A Killer’s Right to Life,” p. 68.

<sup>6</sup>Smith, “A Killer’s Right to Life,” p. 69.

<sup>7</sup>Smith, “A Killer’s Right to Life,” p. 68.

claim to have justified such a right in his writings on restitution. In his published works on this issue, Barnett opposes a punishment-based system because he believes it may deter crime less than would a restitution-based system, and also because the unavoidable possibility of error can lead to “infliction of harm on the *innocent*”.<sup>8</sup> He does not, however, provide a strong argument that it violates an actual aggressor’s rights to punish him. Indeed, in his recent book *The Structure of Liberty*, Barnett states: “this analysis *cannot conclusively prove* that no combination of compensation or punishment can ever address effectively the compliance problem.”<sup>9</sup> And further: “I do not claim to have completely demonstrated this proposition [that justice requires restitution, not punishment] either in my earlier writings, or in this book.”<sup>10</sup>

Thus, although Barnett opposes punishment for a variety of reasons, those that are given to buttress his case in favor of restitution do not rest on viewing rights as inalienable and, in my view, Barnett has never demonstrated that rights are inalienable in the sense used by Smith.<sup>11</sup>

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<sup>8</sup>Smith, “A Killer’s Right to Life,” p. 228 (emphasis added). See also p. 197.

<sup>9</sup>Randy E. Barnett, *The Structure of Liberty: Justice and The Rule of Law* (Oxford: Clarendon Press, 1998), p. 237 (emphasis added).

<sup>10</sup>Barnett, *The Structure of Liberty*, p. 185 n. 36. See also pp. 228, 320, 321: “If men were gods, then perhaps imposing rewards and punishments on the basis of desert would be a workable theory.” Also: “It has been noted that one who wishes to extinguish or convey an inalienable right may do so by committing the appropriate wrongful act and thereby forfeiting it.” Randy E. Barnett, “Contract Remedies and Inalienable Rights,” *Social Philosophy and Policy* 4 (Autumn 1986): 186, citing Diana T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia University Press, 1985), p. 14.

<sup>11</sup>A second, less significant point, relates to Smith’s doubts about the propriety of killing or imprisoning someone for who has shown himself to be a “standing threat” to others. Smith notes: “Objective standards and procedures seem problematic in this case, to say the least. (Perhaps I am lacking in imagination; if so, I have little doubt that more imaginative libertarians will come to my aid with ingenious solutions.)” Smith, “A Killer’s Right to Life,” p. 69. Barnett seems to have done just this. Barnett argues that the principle of “extended self-defense” justifies imprisoning (sometimes for life) those who have made a sufficiently unambiguous communication of a threat to another. Barnett, *The Structure of Liberty*, pp. 186–91. On pp. 213–14, he points out that because of problems of enforcement abuse and rule of law considerations, however, Barnett would limit this remedy to those persons who have communicated a threat to others by their past *criminal* behavior (i.e., those who have been convicted, perhaps multiple times, of a crime), and only if the previous crimes were proved beyond a reasonable doubt. See also Randy E. Barnett, “Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction,” *Boston University Law Review* 76 (February/April 1996): 157. I believe this limitation on the principle of extended self-defense is unduly restrictive, but that is neither here nor there.

### DEFENSE, RESTITUTION, AND INALIENABILITY

Another problem with Smith's assertion that rights are inalienable is just that: it is merely an assertion. Simply labeling rights over and over again with the modifier "inalienable" does not make it so.<sup>12</sup> Libertarians do not typically view rights as "inalienable" in Smith's sense, or put much weight on this concept. In fact, viewing rights as alienable is perfectly consistent with—indeed, implied by—the libertarian non-aggression principle.<sup>13</sup> Under this principle, only the *initiation* of force is prohibited; defensive, restitutive, or retaliatory force is not. One *does* alienate or forfeit certain rights by committing acts of aggression. This is exactly why it is permissible to use force to defend against or punish aggression, or to obtain restitution. One has a natural, not inalienable, right to be free from aggression.

Both defensive and restitutive force, like punitive (retributive or retaliatory) force, imply some alienation of rights. This is just why defensive or restitutive force is considered to be permissible: because the aggressor has alienated his right to be free

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<sup>12</sup>Smith says Jeremy Bentham held the theory of "inalienable rights" to be "nonsense upon stilts," and thus wonders if anyone who rejects inalienable rights must follow Bentham to his anti-libertarian conclusions. Smith, "Inalienable Rights?," p. 51. Yet Bentham said that *rights* were nonsense, and that *natural rights* were nonsense upon stilts. He did not use the modifier "inalienable" that Smith subtly puts in his mouth (though he does use the adjective "imprescriptible"). Jeremy Bentham, "Anarchical Fallacies," in *Human Rights*, A.I. Melden, ed. (Belmont, Calif.: Wadsworth Publishing, 1970), p. 28. Bentham opposed natural rights on the grounds that they were anterior to government, and thus his criticism is applicable to both alienable and inalienable natural rights. Thus, one can oppose Bentham's rights-skepticism by being in favor of *alienable* natural rights, which means that rejecting inalienability does not mean following Bentham down a non-libertarian path, as long as one does advocate *natural rights*.

<sup>13</sup>Many, probably most, libertarians maintain that rights are strictly "alienable," i.e. *some* actions are sufficient to alienate rights (although they usually also maintain that rights are "inalienable" *sometimes*, e.g. promising to be another's slave, as opposed to the commission of an act of aggression, does not serve to alienate rights; see section "Inalienability," and note 28, below. In fact, any libertarian who advocates the right to punish (or, really, even the right to self-defense) at least implicitly endorses that rights can be alienated. See, e.g., Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), p. 81, where he says "the criminal . . . loses his right *to the extent* that he has deprived another man of his" (emphasis in original); Barnett, "Contract Remedies and Inalienable Rights," p. 186 (quoted in note 10 above); Roger Pilon, "Criminal Remedies: Restitution, Retribution, or Both?," *Ethics* 88, no. 4 (July 1978): 348-57, 353 ("The criminal act has created rights in the victim; in the criminal it has both alienated rights and created obligations correlative to the newly created rights of the victim."); John Locke, *Second Treatise on Civil Government* (Buffalo, N.Y.: Prometheus Books, [1690] 1986) § 172 (power over one man's life "is the effect only of forfeiture which the aggressor makes of his own life when he puts himself into the state of war with another"); also other sources quoted in N. Stephan Kinsella, "A Libertarian Theory of Punishment and Rights," *Loyola Los Angeles Law Review* 30 (1997): 607-45, 620-22, n. 37.

of such force. If one is opposed to punishment on inalienability grounds, how can one then endorse defensive or restitutive force? As John Goodman correctly notes, Smith's argument against the death penalty is an argument against punishment as such, even against defensive or restitutive force.<sup>14</sup> Thus, to be consistent, Smith has to either object to *any* use of force against an aggressor, including even self-defense; or admit that rights are not truly inalienable.<sup>15</sup>

So which is it? Is Smith inconsistent, or does he consistently object to all force? Smith has apparently flip-flopped on this issue. At first, he seems to acknowledge that rights are not really inalienable: "I agree with Locke that reparation (restitution) and restraint (self-defense) are the only justified uses of violence in a free society."<sup>16</sup> Yet later, Smith appears to change his mind:

Goodman argues 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.<sup>17</sup>

Smith's view of the 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. (Such a position might be referred to as "stupid," or, perhaps, "Darwinian," pacifism.) If, however, he admits that defensive and restitutive force are per-

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<sup>14</sup>Goodman, "Do Inalienable Rights Outlaw Punishment?," p. 47.

<sup>15</sup>The following thought-experiment, from the ever-fertile libertarian mind of Walter Block (as relayed to me by Joe Salerno), illustrates why a proponent of restitution must, in principle, be willing to support capital punishment as well. Block asks, what if it were possible to actually provide true restitution to a murder victim—to restore his life—by connecting a "life-sucking" machine to the murderer, and transferring his life essence to the dead victim? This would bring the dead victim back at the cost of the killer's life. Surely, a restitutionist would have to be in favor of this, as it is simply a type of force used to enforce restitution, and the purpose of restitution is to "restore" the victim. But what is the difference, in principle, between killing the aggressor to "restore" the victim, and killing the aggressor as punishment? In both cases, the aggressor is intentionally killed, against his will, in response to his earlier aggression. It would seem that in this case, the restitutionist, like the retributionist, supports executing murderers, and thus cannot claim that a murderer has, in principle, an inalienable right to life.

<sup>16</sup>Smith, "A Killer's Right to Life," p. 69.

<sup>17</sup>Smith, "Inalienable Rights?," p. 55 (emphasis added). Note that Smith here confusingly refers to "fines and imprisonment"—presumably forms of restitution—as "punishment," even though a supposed advantage of restitution is that it is *not* punitive.

missible, he has admitted rights are not inalienable, and thus, he cannot oppose punishment on grounds of inalienability.

### THE RIGHT OF PROPORTIONAL PUNISHMENT

As I have argued at greater length elsewhere,<sup>18</sup> an individual has a right to use force against an aggressor in response to aggression. This right to use force can be utilized for a variety of purposes: for self-defense during or before the act of aggression, for revenge, to obtain restitution, to prevent the aggressor from committing further crimes, or to deter others from committing crimes. What the victim wants to use the right *for* is his business. But the reason *why* a victim has a right to retaliate or defend against an aggressor is that the aggressor cannot sensibly withhold his consent to retaliatory, defensive, or restitutive force (these may be considered different types of *responsive* force, that is, *non-initiated* force, force which is *in response to* initiated force). To use related legal terminology, the aggressor is “estopped,” or precluded, from denying the victim’s right to use (proportional) responsive force, since such a denial would contradict the aggressor’s view that the use of force *is* permissible (the view demonstrated by the act of aggression).<sup>19</sup>

Thus, eye-for-an-eye type proportional punishments are legitimate in response to aggression. A murderer, therefore, is estopped from objecting to his own capital punishment. He can no longer claim a right to be free from such treatment. Since he previously had such a right, the right that he previously had must have evaporated. We may say, then, that his right to not have force used against him has been alienated (or forfeited, waived, abandoned, relinquished, surrendered, or lost; the terminology is not important).<sup>20</sup>

<sup>18</sup>See Kinsella, “A Libertarian Theory of Punishment and Rights”; also N. Stephan Kinsella, “New Rationalist Directions in Libertarian Rights Theory,” *Journal of Libertarian Studies* 12, no. 2 (Fall 1996): 313–26; N. Stephan Kinsella, “Punishment and Proportionality: The Estoppel Approach,” *Journal of Libertarian Studies* 12, no. 1 (Spring 1996): 51–73. This argument draws on and is related to Hans-Hermann Hoppe’s “argumentation ethics” defense of libertarian rights. See, e.g., Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer Academic Publishers, 1989), p. 131.

<sup>19</sup>For a discussion of proportionality, see Kinsella, “A Libertarian Theory of Punishment and Rights,” p. 631.

<sup>20</sup>Another error lies in the very title of Smith’s article: “A Killer’s Right to Life.” Under libertarianism, one has a right against the *initiation* of force—against aggression. But punishment is not *initiatory* force; it is force *in response* to initiated force. Part of Smith’s confusion here lies in thinking that libertarianism upholds some actual right to *life*. There is no right to life. There is a right against aggression. That is

### THE UTILITY OF PUNISHMENT

There are further errors in Smith's article. Consider, for example, Smith's view that restitution is superior to punishment as a basis for criminal justice. Smith argues that punishing an aggressor "does not restore or equalize rights; it simply wipes out another set of rights," and that allowing retaliation only provides, at most, "a sense of emotional balance" to the victim. Several responses to this argument can be made. First, Smith here begs the question of whether rights are inalienable by assuming that the aggressor *has* a set of rights to be violated. If the aggressor's rights were alienated, (proportionally) punishing him does not wipe out his rights, as he had none left to wipe out.

Second, just because punishment does not restore rights, it is not clear why restitution is automatically superior, since restitution does not restore rights either. It is true that the consequences and fact of an act of aggression can never be undone. The indignity will always have been suffered. Any response by a victim, including restitution and retribution, will always be an imperfect remedy. Indeed, this is one reason why aggression is impermissible: because the harm done thereby is literally undoable, incalculable, and not subject to an adequate remedy.<sup>21</sup> A victim will always remain, to some extent, a victim.

This does not, however, dictate that the victim should be artificially restricted in choosing among various imperfect remedies. Admittedly, both inflicting punishment on an aggressor (retribution) and extracting monetary damages from him (restitution) are imperfect remedies. But why not let the victim decide which one, or which combination of these, he prefers?<sup>22</sup> After

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why libertarians advocate the non-aggression axiom or principle, not the "life axiom." An innocent person can use his right against aggression to protect his life, if he so chooses, or he may commit suicide or waste his life in other ways. Thus, an innocent person may be said to have a right to life, if it is kept in mind that the so-called "right to life" is merely derivative of—a consequence of—the primary right against aggression, just as the right to free speech is derivative of the right to own private property and the right against aggression. (On the link between the rights of freedom of speech and private property, see Rothbard, *Ethics of Liberty*, chap. 15.) An aggressor, on the other hand, no longer has a right against the imposition of force, and thus his life is in peril. The aggressor, therefore, no longer has a "right to his life," such that it was.

<sup>21</sup>Barnett, an advocate of restitution and opponent of punishment, recognizes this, and for this reason emphasizes the importance of crime *prevention*. See Barnett, *Structure of Liberty*, pp. 159, 184–90, esp. 189.

<sup>22</sup>On giving victims the option of what type of punishment to apply or whether to seek restitution or some blend of punishment and restitution, see Kinsella, "A Libertarian Theory of Punishment and Rights," pp. 633–36; Pilon, "Criminal Remedies," p. 356; Barnett, *Structure of Liberty*, p. 183 n.32; Joseph Ellin, "Restitutionism Defended," *Journal of Value Inquiry* (forthcoming, Winter 1998–99).

all, the victim did not ask to be made a victim. He did not ask to be put in the position of having only two imperfect possible remedies available to him. If a victim prefers to torture his torturer, who is Smith to say that the victim's preference is not rational? Unlike Smith, I am not so unwilling to allow victims to attempt to attain "a sense of emotional balance," if that is all that is possible to them. (Like Barnett, however, I am concerned about the unavoidable possibility of mistakenly punishing the innocent, and thus admit the appeal of a restitution-based system in order to avoid punishing innocents, but not for reasons of inalienability.)

The right to inflict (proportional) punishment on one's aggressor can be useful in other ways as well. Most significantly, perhaps, it may be utilized to reach a more objective determination of the proper amount of restitution. For example, the victim may trade all or part of his right to retaliate for a payment ("ransom") or other service by the aggressor, i.e., the aggressor buys his way out of punishment.<sup>23</sup> A serious aggression leads to the right to inflict more severe punishment on the aggressor, which would thus tend to be traded for a higher average amount of ransom or restitution than for comparatively minor crimes. Further, a victim especially offended or traumatized by aggression (and thus subjectively "damaged" more severely) will tend to bargain for a higher ransom. Also, richer aggressors will tend to be willing to pay more ransom to avoid the punishment the victim has a right to inflict.<sup>24</sup> Thus, allowing punishment to be traded for damages solves the so-called millionaire problem faced under a pure restitution system, where a rich man may commit crimes with impunity, since he can simply pay easily-affordable restitution after committing the crime.

For these reasons, allowing the option of punishment can help arrive at a more objective measure of restitution damages.<sup>25</sup>

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<sup>23</sup>For previous suggestions of the possibility of criminals buying their way out of punishment, see Rothbard, *Ethics of Liberty*, pp. 86, 89; Pilon, "Criminal Remedies," p. 356.

<sup>24</sup>See Kinsella, "A Libertarian Theory of Punishment and Rights," pp. 644-45. See also Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87, no. 4 (July 1977): 297, reprinted in *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, Randy E. Barnett and John Hagel III, eds. (Cambridge, Mass.: Ballinger, 1977); Roger Pilon, "Criminal Remedies," p. 351. For a "law-and-economics" discussion of this issue, see David D. Friedman, "Reflections on Optimal Punishment, or: Should the Rich Pay Higher Fines?," *Research in Law and Economics* 3 (1981): 185-205.

<sup>25</sup>On the issue of determination of the proper amount of damages, see Bruce L. Benson, "Restitution in Theory and Practice," *Journal of Libertarian Studies* 12, no. 1 (Spring 1996): 79-83; Rothbard, *Ethics of Liberty*, pp. 88-89. For a law-and-econom-

And even if punishment is banned and is not an actual option—because of the possibility of mistakenly punishing innocents, say—an award of restitution can be *based* on the model of punishment. E.g., a jury could be instructed to award the victim an amount of money it believes he *could* bargain for, given all the circumstances, *if* he could threaten to punish the aggressor. This can lead to more just and objective restitution awards than would result if the jury is simply told to award the amount of damages it “feels” is “fair.”<sup>26</sup>

The right to retaliate could also be used to justify “enslaving” the aggressor and put him to work for a time to generate income for the victim (restitutionists like Barnett support this use of force against the aggressor, but do not consider it to be punitive, but rather necessary to enforce restitution).<sup>27</sup> Or suppose an aggressor is very poor, and otherwise unable to pay monetary damages to the victim. In this case, the threat of inflicting severe punishment on the aggressor may induce the aggressor’s relatives or friends to pay off the victim to spare the aggressor from being punished. The victim would thereby be compensated even though the aggressor is penniless, whereas the victim would be totally uncompensated if no threat of punishment were available to move the aggressor’s relatives to chip in. (In a restitution-based system, a poor aggressor who is imprisoned in a work-facility designed to generate income payable to the victim may also find friends and relatives to pay off part of his debt to have him released earlier. However, as the aggressor in this case faces only a limited and usually temporary form of “slavery” and not more severe punishment, the motivation for others to bail him out would probably be reduced.)

### INALIENABILITY

The theory of inalienability has been plagued by confusion, vagueness, and inconsistency. The concept is typically applied to

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ics discussion of this issue, see David D. Friedman, “What Is ‘Fair Compensation’ for Death or Injury?,” *International Review of Law and Economics* 2 (1982): 81–93.

<sup>26</sup>I believe this latter approach is consistent with and supplements Barnett’s theory of a restitution-based justice system, since Barnett nowhere specifies any objective standards or criteria by which a judge or jury is to determine the amount of restitution a victim is to receive for a non-economic crime like murder, rape, and the like. He specifies only that the aggressor must “compensate” the victim for the “harm caused,” to “restore” the victim. Barnett, *Structure of Liberty*, 159, 185. Of course, how much compensation is needed to compensate for a rape is a difficult question, and, of course, no amount of restitution can ever “restore” a murdered victim.

<sup>27</sup>Barnett, *Structure of Liberty*, pp. 174–84.

the issue of whether a *non-aggressor* can alienate his rights by a mere contract or promise, i.e. by a peaceful action. For example, may one sell oneself into slavery, or enter into a binding, enforceable contract to perform services? Libertarians come down on both sides of this question, but tend to say that rights are “inalienable,” i.e., one may not sell oneself into slavery.<sup>28</sup> Most libertarians hold this view of inalienability, which I will refer to as the standard or “limited” view of inalienability, since adherents of this view usually also maintain that acts of aggression *do* alienate rights.<sup>29</sup> In this view, only violent actions serve to alienate rights. Smith has used the label “inalienability” in an idiosyncratic way to mean that even *aggressive* actions do not alienate rights.

What, then, is the proper, libertarian view of inalienability and rights? Consent is the crucial element to focus on here. If a person consents to an action that would otherwise violate his rights, there is no rights violation. Boxers in a ring, or duelers dueling, do not have their rights violated when struck by fist or bullet. This is because they consented to these exchanges of force.<sup>30</sup> *To alienate one's right means that one is unable to withhold consent to some action that would otherwise infringe the right if there were no consent.* Thus, a right is alienated by somehow rendering it impossible to object to the action that the alienated right would otherwise prohibit. One does something now, that prevents one from withholding consent in the future, thereby effectively alienating the relevant right. To alienate a right, then, is to *irrevocably* grant the relevant consent to another.

Is it possible to irrevocably grant consent? Smith, an advocate of what may be called the “strong” view of inalienability, would say it is not possible under any circumstances (except, perhaps, for defensive or restitutive force). Proponents of the limit-

<sup>28</sup>See, e.g., Barnett, *Structure of Liberty*, pp. 77–82; Barnett, “Contract Remedies and Inalienable Rights,” pp. 186–95; Rothbard, *Ethics of Liberty*, pp. 40–41, 134–36; Tibor R. Machan, *Human Rights and Human Liberties* (Chicago: Nelson Hall, 1975): pp. 116–17; Smith, “A Killer’s Right to Life,” p. 49; Smith, “Inalienable Rights?,” p. 54.

<sup>29</sup>See note 13 above.

<sup>30</sup>As Richard Epstein explains, “The case for the recognition of consent as a defense in case of the deliberate infliction of harm can also be made in simple and direct terms. The self-infliction of harm generates no cause of action, no matter why inflicted. There is no reason, then, why a person who may inflict harm upon himself should not, *prima facie*, be allowed to have someone else do it for him.” Richard Epstein, “Intentional Harms,” *Journal of Legal Studies* 4 (1975): 411. See also Kinsella, “A Libertarian Theory of Punishment and Rights,” pp. 610–11. For an unorthodox libertarian view that duelers do not actually “consent” since it is only engaged in due to the “threat of disgrace,” see T. Patrick Burke, *No Harm: Ethical Principles for a Free Market* (New York: Paragon House, 1994): pp. 192, 268 n. 15.

ed view of inalienability, by contrast, hold that it is possible to do this by aggressing, but not by merely making an agreement or promise. (Those rare libertarians, like Walter Block, who believe rights may be alienated even by a non-violent action like agreement, hold what may be viewed as a “weak” view of inalienability.)

Let us examine the three ways that consent possibly could be irrevocably granted: by physical means, by aggression, and by voluntary agreement. The physical, or physiological, means refers to a person voluntarily undergoing some process that literally places him under the power of another (e.g., drugs, surgery).<sup>31</sup> This is akin to committing an act of suicide or “zombicide,” and is not of particular interest, since after the zombicide is complete, the zombie presumably does not even try to run away or withhold consent from his master.

Committing an act of aggression is a clear-cut means for alienating (some of) one’s rights. As explained above,<sup>32</sup> an aggressor is estopped from withholding consent to the victim’s proposed use of (proportional) retaliatory force, since such a denial would contradict the aggressor’s view that the use of force is permissible. An act of aggression is a way of irrevocably granting consent to punishment. This is exactly why an act of aggression serves to alienate rights: because the act of aggression conclusively demonstrates the aggressor’s view that aggression is proper, thus precluding him from consistently objecting to the victim’s use of (proportional) retaliatory force. The strong view of inalienability (Smith’s view) is, for this reason, untenable.<sup>33</sup> So which view is correct, the limited view or the weak view?

This depends on the answer to the following question: Can one irrevocably grant consent by voluntary agreement, such as a promise or contract to be another’s slave? Barnett recognizes the importance of consent here:

The crucial question . . . is whether Ann’s current consensual choices can limit her right to revoke her consent in the future. Having consented to let Ben touch her or to enter the [boxing] ring with him, may she be forced to carry through with her commitment after she has changed her mind?<sup>34</sup> This is a difficult and complicated ques-

<sup>31</sup>See, e.g., discussions of this in Smith, “Inalienable Rights?,” p. 54, and Barnett, *Structure of Liberty*, 78 n. 39.

<sup>32</sup>See note 18 above, and accompanying text.

<sup>33</sup>See notes 10 and 13 above.

<sup>34</sup>Barnett, *Structure of Liberty*, p. 81.

tion. Some argue that a contract is a contract, and may be enforced. This view is based on the theory that one is a self-owner, entitled to full control of all of one's property, including one's body, and that this control comprises the ability to sell one's body.

Most libertarians, however, seem to hold the limited view of inalienability, whereby aggression does alienate rights, but promising to be someone's slave does not. Advocates of this view typically argue that such contracts are not enforceable because there is some sort of logical impossibility involved in voluntarily alienating all of one's rights in this manner.<sup>35</sup> For example, some argue that it is literally impossible to transfer one's actual will to another, and thus a promise to do so is null and void; title thereto cannot be transferred. It is like contracting to sell the sun to someone. Such a contract, having an impossible object, would be null and void from the outset.

My view is that the impossibility reasoning typically given to argue that consent cannot be irrevocably granted is fallacious, and has helped to muddle the issue of inalienability. For example, 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.

The key here is to focus on force and consent, for to keep someone as a slave, it is not necessary that the will be physically alienated. Rather, in order to enslave someone, the slave-owner must be *entitled* to use force against the slave if the slave disobeys or tries to run away. The impossibility of actually alienating one's faculty of volition is irrelevant. It is the legitimacy of using force that matters, and this depends on consent.

Putting the issue this way, however, provides a different argument why consent cannot irrevocably be granted by mere agreement or promise—why the prospective slave may change his mind in the future and withdraw his consent. If *A* promises (or contracts, or agrees; the terminology is not important) to be *B*'s

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<sup>35</sup>See note 28 above.

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*?

This is the crucial question. If the answer is yes, this means that *A* has no right to object, and has effectively alienated his rights. 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." Words per se do not aggress, which is one reason there is a (derivative) right to free speech. 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. The would-be slave-owner is thus *not* entitled to use force against the slave; hence no rights were alienated.<sup>36</sup>

Thus, I conclude that a slavery agreement is not enforceable. Rights are not completely inalienable, as Smith contends, for aggression can alienate rights. We must reject the strong view of inalienability. However, 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 or agreement. This is not because of any impossibility in alienating one's will, but because a promisor has not committed aggression. One retains the right to change one's mind, absent special circumstances.<sup>37</sup> The limited view of inalienability seems to be the most sensible.

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<sup>36</sup>Proponents of the weak view of inalienability, like Walter Block, on the other hand, would argue that the sale of one's body confers ownership of it to another person, and that subsequent violence against the sold body by the new owner is no more aggression than is self-mutilation. I remain to be convinced by this line of argument, primarily because there seems to be a relevant difference between the rights related to one's body and rights in homesteaded resources, due to the different justifications for and nature of these rights.

<sup>37</sup>E.g., an airplane pilot may be forcibly restrained by passengers from parachuting out in mid-flight. See Barnett, *Structure of Liberty*, pp. 81–82. The reason the parachuting is arguably aggression is that this action can be considered to be the cause of the physical harm that will befall the passengers, much like one who shoots a gun or drops a bomb is an aggressor. Arguments could be constructed for other special cases, such as agreeing to donate an organ which causes the recipient to rely on this, or enlisting in a volunteer army at a time of peril.

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 (speech act) but are alienable by act of aggression.<sup>38</sup>

To summarize, then, one may object to certain acts of aggression; or one may grant consent to allow the otherwise-prohibited action to take place. The right against aggression may be alienated, but only by *irrevocably granting* consent, which may be done only by committing an act of aggression. A non-violent action such as a promise or agreement to do something with one's body, on the

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<sup>38</sup>See also Barnett, *Structure of Liberty*, p. 82. There has been great confusion in the area of contract theory, which has perhaps contributed to the confusion in inalienability reasoning. For example, the "impossibility" reasoning seems to be based on the groundless assumption that contracts are based on the concept of "binding promises," or on an improper analogy between homesteadable scarce resources, which can be acquired or abandoned, and rights against aggression, which relate to one's body. However, contracts need have nothing to do with promises, and there is a difference between rights to acquired external resources and rights to one's body. For more on the libertarian theory of contracts, see Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (1986): 269; Rothbard, "Property Rights and the Theory of Contracts," in *Ethics of Liberty*, pp. 133-48; Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1 (Winter 1977): 3-13. Thus, the framework for rights, punishment, and consent put forward herein also has implications for other aspects of libertarian theory, which cannot be addressed in detail here. For example, the view of the unenforceability of slavery contracts also applies to contracts for personal services, and, indeed, to all promises in general, and thus to the theory of contracts. The theory of detrimental reliance is also relevant here. In my view, promises *per se* are not enforceable, and contracts are not best viewed as enforceable promises but as exchanges or alienations of titles to acquired tangible property external to one's body. Some promises may be enforceable, due to detrimental reliance, but only in cases where the reliance not circular, and thus plays a causal role in harming another, and such enforceable promises are something different from contract itself. This view of contracts, inalienability, and rights presented herein also has implications for the distinction between the alienability of homesteadable property versus the (limited) inalienability of rights related to one's body. Elaboration of these ideas will have to await a subsequent article.

other hand, does not alienate rights, because the consent may be withdrawn at any time in the future, with certain exceptions. This is because a promise now to consent in the future to violence does not commit aggression against the promisee.

### CONCLUSION

If Smith is right that even a murderer has a right to not be killed, then it is wrongful aggression to kill the aggressor, just as it is wrongful aggression for a murderer to kill the victim. Then it is no longer the initiation of force that is impermissible; it is force in general, even retaliatory, defensive, or restitutive force. Without a right to respond to aggression, the non-aggression principle goes out the window, as does the distinction between aggressor and victim. Smith's defense of the strong version of inalienable rights thus undermines what is surely the heart of libertarianism, the non-aggression principle.