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Directed Duties and Inalienable Rights*

Hillel Steiner

This essay advances and defends two claims: (a) that rights cannot be inalienable and (b) that even if they could be, this would not be morally justifiable.

Many declarations of rights and constitutional documents proclaim certain rights—more precisely, certain claims and immunities—to be inalienable, in the strict sense of being absolutely and unconditionally unwaivable by those vested with them. These are rights to the relinquishment of which their bearers cannot give valid consent. For although those bearers can forfeit those rights by engaging in some act of serious wrongdoing, what they lack the authority to do is simply extinguish other persons' duties and disabilities to respect those rights.¹ Innocent bearers of inalienable rights are, necessarily, stuck with them.

Can rights really be inalienable? The belief that they can be obviously is, and has long been, so widely shared that evidential support for its existence is utterly superfluous. Of course, that belief does not entail a belief that there actually are inalienable rights. Much less does it entail a belief that all rights—moral or legal—are inalienable: no one, indeed, entertains that latter belief. And many who do believe that there can be inalienable rights would nonetheless deny that there actually are any.

A primary aim of this essay is to show that there aren't any because there can't be any. Or, more precisely, I aim to show that the conceptual or analytical cost of affirming the possibility of inalienable rights is exceptionally high, inasmuch as it entails the denial of what are commonly taken to be core properties of normative codes (legal or moral) including the Hohfeldian deontic logic of rights discourse. In the light of that find-

* I am greatly indebted to Ian Carter, Rowan Cruft, Tom Porter, Henry Richardson, Jonathan Quong, and two reviewers for their challenges and suggestions concerning several of the arguments advanced in this essay.

1. See Terrance McConnell, *Inalienable Rights* (Oxford: Oxford University Press, 2000), 3–23, for a discerning account of alienability, including its important difference from forfeitability.

ing, I will further consider the reasons that can be offered for believing that inalienable rights are morally desirable.

Before embarking on this argument, however, I think it is probably advisable to address one worry that might be taken to vitiate it from the start. Persons familiar with the long-running debate between proponents of, respectively, the Interest Theory and the Will Theory of rights may well suspect that this argument is simply a reasonably obvious reflection of a prior commitment to the latter's conception of rights and, hence, is correspondingly disputable or restricted in its validity.²

There are, to be sure, some cogent grounds for that suspicion. After all, the Will Theory famously contends that what rights do is protect rights-holders' choices, by vesting them with control over whether some element of another person's conduct is permissible or impermissible. More precisely, this contention is that being vested with the powers both to demand and enforce, and alternatively to waive, performance of a duty (or compliance with a Hohfeldian disability) is a necessary and sufficient condition of being a rights-holder: hence that theory's (notorious?) resistance to finding rights in those who are simply incapable of choice. Whereas the Interest Theory's opposing contention is that rights protect rights-holders' significant interests and that, consequently, a necessary and sufficient condition of being a rights-holder is that those interests would be adversely affected by the breach of a duty (or noncompliance with a disability).³ So, possession of the aforesaid powers is neither necessary nor sufficient to be a holder of Interest Theory rights, and those powers may well be vested in persons other than the holder of the right correlative to that duty (or disability).⁴ Since the alienability of a right consists in the waivability of its correlatively entailed duty (or disability), and since Will Theory rights-holders are, by definition, empowered to waive those correlates, their rights are, necessarily, not inalienable.

While all of this is true, the aforesaid suspicion is ultimately unjustified. For, as I hope to show, the impossibility theorem being advanced here—that rights cannot be inalienable—is entirely independent of the Will Theory and applies equally to rights conceived along the lines of the Interest Theory. To set the stage for that argument, we need first to review several fairly uncontested facts about rights and the conjunctive implications of those facts.

2. For a defense of the Will Theory, see Hillel Steiner, "Working Rights," in *A Debate over Rights: Philosophical Enquiries*, by Matthew Kramer, Nigel Simmonds, and Hillel Steiner (Oxford: Oxford University Press, 1998), hereafter *DOR*.

3. A person's noncompliance with a disability consists in his or her putative exercise of a power which he or she does not possess. Enforcement of a disability thus consists in the nullification of the normative effects of that exercise.

4. See Matthew Kramer's "Rights without Trimmings," in Kramer, Simmonds, and Steiner, *DOR*, 60–101, for an excellent exposition and defense of the Interest Theory.

The first of them is that the duties and disabilities correlatively entailed by rights are directed ones. Conduct conforming to those correlates is not simply obligatory: it forms the content of an obligation that is owed to specific persons by specific other persons. The Will Theory and the Interest Theory offer opposing accounts of how that direction is determined—how the specific persons to whom that conduct is owed are to be identified—but they are at one in conceiving the obligatoriness of that conduct as directed. The specificity of this directedness is entirely consistent with the possibility that the persons to whom a particular kind of conduct—say, forbearance from assault—is owed may be indefinitely numerous, and it is similarly consistent with the possibility that the persons owing it may also be indefinitely numerous. What that specificity implies is that such owing consists in a separate bilateral relation between each person who owes that dutiful conduct and the person to whom it is owed: each such relation is a relation between two specific persons. My duty not to commit assault is a kind of directed duty, two distinct instances of which are my duty not to assault you and my duty not to assault your brother.⁵

A second fact is that moral rights are grounded in—are the elementary particles of—principles of justice. Whatever we believe the demands of justice to be, whatever theory of justice seems to us most persuasive, we standardly identify the moral duties and disabilities thereby entailed as correlating to moral rights and the violations of those rights as injustices. Failures to fulfill other kinds of moral duty—instances of meanness, cowardice, dishonesty—may, contingently, also amount to injustices, but they need not do so.

A third fact is that principles of justice, or the moral rights grounded in them, constitute the primary standard by which legal systems are morally assessed. Theories of justice are inherently theories about what the basic content of legal rules should be. The most common form of moral complaint against a legal rule is that it fails to advance or protect persons' moral rights—it fails to be just—whereas its failure to satisfy other moral requirements, for example, benevolence, is not usually seen as being equally damning. While we do not expect legal systems to enforce generosity, we do expect them to uphold our moral rights.

5. If those two nonassault duties are legal duties, the specific persons to whom they are owed are not necessarily you and your brother. Whether it is you and your brother depends upon (a) whether those duties are ones of civil law or criminal law and, if the latter, (b) whether they are duties correlative to Interest Theory or Will Theory rights. The legal doctrine, that consent is no defense against criminal law charges, implies that the beneficiaries of criminal law duties—the persons whose interests are protected by criminal law duties—lack the power to waive performance of (i.e., to extinguish) those duties. Hence, those duties do not entail Will Theory rights in them; cf. Steiner, "Working Rights," 248–55.

Highly relevant to that third fact is the fact, fourth, that a legal system is understood to be that set of rules that enforceably dominate any other rules prevalent in a group of persons. That my moral code, or the rules of my club, require that I do *X* standardly constitutes no defense against the charge that I violated the legal prohibition against doing *X*. Nor, therefore, does it normally exempt me from whatever legal penalty is forcibly imposed for that violation.

Fifth, what significantly and fairly readily follows from these facts might be called the *Moral Primacy Thesis*. As the primary standard for the moral evaluation of those dominantly enforceable sets of rules, the demands of principles of justice, or the moral rights grounded in them, enjoy moral primacy over the demands of other moral principles. Whether that primacy is understood in terms of lexical priority, or side constraints, or trumps, or reasons with peremptory force, in circumstances where duties correlative to just rights are not jointly performable with duties generated by other moral principles, it is performance of the former that morality requires.⁶

That morality assigns such primacy to moral rights appears, for instance, to be a necessary condition for making sense of the common notion of “having a right to do wrong.”⁷ Of course, and following Hohfeld, no one can ever be strictly said to have a right to do anything: at most, persons have liberties or powers to act, and having a liberty or a power to do something does not entail a constraint (duty or disability) in anyone else.⁸ But we can have rights—claims—that others not interfere with our acting in certain ways, and those persons would thereby hold correlative duties of noninterference. Among the ways of acting that are protected by such claims may be ones which, in certain circumstances, are wrong on grounds other than justice. Thus, one of morality’s other principles may well be charity—a norm which encumbers me with duties to transfer some of my resources to those more in need of them than I am. Assuming

6. For lexical priority, see John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), 42ff.; for side constraints, see Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), 28–33; for trumps, see Ronald Dworkin, “Is There a Right to Pornography?” *Oxford Journal of Legal Studies* 1 (1981): 177–212; and for reasons with peremptory force, see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 192.

7. Compare Jeremy Waldron, “A Right to Do Wrong,” *Ethics* 92 (1981): 21–39.

8. Much ink has been needlessly spilled in disputes over whether all rights entail the presence of correlative constraints. To some great extent, the issue is purely terminological. The view that some rights don’t entail constraints trades on the indiscriminating use of the term “rights” noted by Hohfeld. Clearly, neither “no claims” nor liabilities are in themselves constraints on the conduct of those who have them: they do not imply, of any act, that it is impermissible. Hence, no clear analytical purpose is served by treating their correlatives—liberties and powers—as rights. Since only duties and disabilities are constraints, clarity and precision tell in favor of counting only their correlatives (claims, immunities) as rights.

that I am justly entitled to those resources—that I hold moral rights that others not interfere with my disposition of them—the Moral Primacy Thesis does not entail that I do no wrong in refusing to act charitably and insist on withholding those resources from needier persons. All that is entailed by assigning primacy to moral rights is that others would be committing a worse wrong by forcing me to make that transfer. In other words, morality's assigning such primacy entails that the following three alternatives are listed in descending order of desirability: (a) my choosing to transfer my resources to the needy, (b) my withholding those resources, (c) my attempting to withhold those resources but being forced by others to transfer them. It is alternative (b) that represents having (i.e., exercising) a right to do wrong. The fact that my withholding is an exercise of my moral rights is insufficient morally to justify that act. All that it would suffice to justify are whatever actions might be necessary to prevent or remedy my being forced to transfer.⁹

There is another, and related, familiar feature of our moral thinking that suggests primacy status for moral rights. In everyday moral discussions, we standardly don't invoke rights to resolve our disagreements except as a last resort. Thus, as members of a newspaper's editorial staff, we might disagree with one another about whom the paper should support in a current electoral contest. Typically, the way we would argue about the relative merits of each of the candidates is by ascertaining facts, clarifying conceptual ambiguities, and appealing to one or another of the more fundamental moral principles that might severally be associated with each alternative. In other words, we would do our best to reach a consensus on which option is the morally optimal one. It is only when we find ourselves unable to reach that consensus that I might fall back on asserting "Look, I'm the managing editor here—I'm the one with the moral right to decide whom the paper supports."¹⁰ For me to offer that argument at the outset of our discussion would be not only churlish but also beside the point, since what that discussion is about is how best I can exercise my right: that it is my right is not in dispute. In other words, the resolving role of moral rights in moral disputes is not to dissolve disagreement but rather to determine who—in the face of indissoluble disagreement—ought to decide what is to be done. And it seems clear that moral rights can play this adjudicating role only if their status is one of having priority over whatever other moral norms may be in mutual contention in such disputes.

9. Compare Hillel Steiner, "Duty-Free Zones," *Aristotelian Society Proceedings* 96 (1996): 231–44.

10. More strictly: "I'm the one with the liberty to decide whom the paper supports, and I'm vested with claim-rights that you not interfere with the implementation of that decision."

I have dwelled at some length on this moral primacy of moral rights—of justice—because it is seriously at odds with some aspects of many discussions of moral rights, and those differences will later be seen to have important implications for the justifiability of inalienable rights. Thus, for instance, Terrance McConnell writes:

Let us say that a right is *infringed* when the correlative duty is not discharged. . . . Infringements may be either justified or unjustified. If an infringement of a right is morally unjustified (and so wrong, or impermissible) . . . then let us say that the right has been *violated*. If an infringement of a right is morally justified, then the right has not been violated. So understood, all violations are infringements, but not all infringements are violations. And all violations are wrong, but not all infringements are wrong.¹¹

It is true that some justification can be offered for some failures to discharge a correlative duty, in the sense that a moral reason can be given for such conduct. Thus, in the penultimate example above, there obviously can be a justification for forcing me to transfer some of my resources to persons needier than myself. But the fact that a moral reason can be given for it is insufficient to render that forcing act morally permissible. For it to be sufficient, some moral principle—say, charity or need alleviation—would have to enjoy moral priority over the principles of justice, since it is they that entitle me to those resources and thereby generate others' correlative duties of noninterference with my disposition of those resources.¹² Such priority is evidently inconsistent with the moral primacy of moral rights. Accordingly, that primacy entails, contra McConnell, that there are no infringements that are not also violations and, therefore, that are not also wrong.

Against this, it could be and has been argued that competing moral considerations can sometimes, for example in emergencies, override or defeat duties correlative to moral rights. But such arguments for the defeasibility of (some) rights commonly deploy examples which essentially rely upon an underspecification of the putatively overridden rights. A case in point may be Joel Feinberg's well-known wilderness example.

Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperilled. Fortunately, you stumble onto an

11. McConnell, *Inalienable Rights*, 5.

12. For the sake of argument, the principles of justice I'm assuming in this example are not themselves ones enjoining need alleviation. If they were ones enjoining need alleviation, then it would be entirely unclear in what sense I can be said to have a just right to those forcibly transferred resources in the first place and, hence, unclear why that forcing action counts as an infringement, much less a violation, of such a right.

unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm. Surely you are justified in doing all these things, and yet you have infringed the clear rights of another person.¹³

Of course, a necessary though insufficient condition for this argument to work is that the cabin owner's property rights are themselves moral, and not merely legal, ones: no one doubts that there can be ample moral justification for infringing merely legal rights. Even so, however, it is far from clear that this is a case of those moral property rights being overridden or defeated. For its being such a case evidently presupposes that that property's ownership is entirely unencumbered by the sorts of specifiable correlative moral duties and disabilities that would render the stranded backpacker's actions morally permissible and not a rights infringement.¹⁴ And that presupposition itself unavoidably relies upon the particular conception of ownership implied by a particular conception of the principles of distributive justice that may or may not be correct.

If it is not correct, if the cabin's ownership is indeed encumbered by the aforesaid duties and disabilities, then the backpacker has committed no rights infringement. If, on the other hand, that conception is correct, and the backpacker's actions have indeed infringed the owner's rights, upon what grounds could it be argued that this infringement is not a violation? That there is some justification for the backpacker's actions is, as was previously noted, insufficient to imply their permissibility: many (most?) actions that violate rights are done for reasons which invoke some moral principle or value. Nor does the fact that the perpetrators of rights-violating actions are standardly required to compensate their victims imply in any way that those actions are, after all, permissible. Indeed, the classic legal maxim, *Ubi jus ibi remedium* (no right without a remedy), itself implies that, in the absence of any such remedial requirement, no right is involved. Whereas the view that rights can permissibly be overridden offers no grounds for such a remedial requirement and leaves it an entirely open question as to whether there should be one. So our conclu-

13. Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980), 230.

14. McConnell (*Inalienable Rights*, 20–21) acknowledges the explanatory capacity of this "further specification approach" to sustain a denial that there is any infringement here, but prefers his "justified infringement approach" because he is "not at all convinced that all of the necessary specifications could ever be executed; the possibilities seem too numerous." However, since exactly the same set of data would be needed by his preferred approach, to ascertain whether some infringements are justified, this does not seem to be a sufficient reason for that preference.

sion here must be that, regardless of whether the cabin owner's rights do or do not correlatively entail duties prohibiting the backpacker's actions, the wilderness example poses no challenge to the Moral Primacy Thesis. The bearing of this thesis on inalienability will emerge presently.

To alienate a right is to waive performance of its correlatively entailed duty.¹⁵ A waiver extinguishes that duty and thereby entails that non-performance of the duty-act is permissible. No one who is not vested with the power to do so can waive a duty. Anyone who is not so vested is encumbered with a disability in regard to the waiving of that duty: disabilities signify the lack of corresponding powers. If Blue is vested with a right—in this case, a claim—that Red not assault her, and if Blue's consent to Red's assaulting her is insufficient to waive his relative duty not to assault her, then Blue lacks the power to alienate that right and is encumbered with a disability, D_1 , to do so. Her right against Red looks to be inalienable.¹⁶

But it is not, for disabilities entail correlative immunities. So, if Blue is encumbered with D_1 , then someone else, say Green, is vested with the correlative immunity, I_1 , against Blue's waiving Red's duty not to assault Blue. Now, the question we have to ask is this: Is Green's immunity, I_1 , waivable and, if so, by whom? If it is waivable and, moreover, waivable by Green, then Green is in a position to extinguish D_1 : that is, to release Blue from her disability to waive Red's duty not to assault her. And if Blue can be thus empowered to waive that duty, then, trivially, that duty is a waivable one, that is, its correlative right is alienable.

Conversely, let's suppose that Green's immunity, I_1 , is not waivable—that Green is encumbered with a disability, D_2 , to waive I_1 . Then someone else, say Black, is vested with I_2 , which is the immunity correlatively entailed by Green's D_2 . Again, we need to know whether Black's immunity, I_2 , is waivable and, if so, by whom. If it is waivable and, moreover, waivable by Black, then Black is in a position to extinguish D_2 : that is, to release Green from her disability and thereby empower her to release Blue from the disability, D_1 , to waive Red's duty not to assault her. And if Green can be thus empowered to waive Blue's D_1 , then Blue can be empowered to waive Red's duty not to assault her. And if Blue can be thus empowered to waive that duty, then, again, that duty is a waivable one, that is, its correlative right is alienable.

What if Black's immunity, I_2 , is not waivable? That is, what if Black is, in turn, encumbered with a disability, D_3 , to waive I_2 ? Then someone else, say Purple, is vested with I_3 , which is the immunity correlatively entailed by

15. Or, if that right is an immunity, its alienation consists in waiving compliance with the correlatively entailed disability.

16. Hence, and as indicated near the outset, the present argument is not reliant upon the Will Theory of rights. For if Blue's right that Red not assault her were a Will Theory right, Blue would not be encumbered with that disability and would thus be empowered to waive Red's nonassault duty.

Black's D_3 . Obviously, we could continue indefinitely adding such epicycles to this line of reasoning by imagining that Purple's immunity too is unwaivable by him and identifying yet another person, Indigo, who in turn holds the immunity, I_4 , correlative to Purple's thereby entailed D_4 disability.

Let's not do that. For the sufficiently unmistakable point here is that wherever this otherwise infinite regress stops, it can be stopped only by an immunity which is waivable by the person vested with it.¹⁷ And the exercise of that waiver renders serially possible a succession of waivers—a *waiver chain*—that terminates in Blue's being empowered to waive Red's nonassault duty.¹⁸ And the waivability of that duty entails, once again, that Blue's right against Red's assaulting her is not inalienable.¹⁹

So endorsers of the belief that there can be inalienable rights are confronted with a serious dilemma. They must either reject the Hohfeldian logic of correlative relations embedded in rights discourse or embrace infinite regressiveness—nonclosure—in the sets of rules constitut-

17. That is, it can be stopped only by the presence of a Will Theory, that is, alienable, right (in this case, an immunity vested in, say, Indigo).

18. Might this line of reasoning be thwarted by simply rejecting Hohfeldian correlativity and supposing that Blue's disability (to waive Red's duty) is not a directed disability—that is, is not one correlatively entailing an immunity in anyone? This would imply that, were Blue not to comply with that disability (see n. 3 above)—were she to waive Red's duty—she would not thereby be violating anyone's right nor, therefore, committing any injustice. Hence, the problem with that supposition is that, although there's nothing incoherent about Blue's also being encumbered with an undirected disability, that noncorrelative disability would have to be one grounded in some moral value or principle other than justice—say, prudence or self-respect—since it is justice that is the value in which correlative constraints (duties, disabilities) are grounded, and values other than justice are—on the Moral Primacy Thesis—subordinate to it, with their demands being, thereby, subject to its restrictions on legitimate enforceability. So Blue could indeed be encumbered with two disabilities—one directed, the other undirected—such that, were the former to be waived, it would still be morally wrong (though no longer unjust) for her to grant Red the liberty to assault her: she would be committing a wrong act but not one which wrongs anyone.

19. Compare Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), 71–72, and “Working Rights,” 253–54. More precisely, Blue's right is a conditionally alienable one, that condition being the waiving by Green of her immunity against Blue waiving Red's nonassault duty. Conditional alienability, it hardly needs saying, does not amount to inalienability: it does not entail absolute and unconditional unwaivability. We might be tempted to suppose that inalienability can be ascribed to some Interest Theory rights, namely, whatever rights may be vested in beings incapable of choice, such as fetuses, infants, members of other animal (and plant?) species, etc. But that is simply because those rights are ones which their holders—being not merely unempowered but also unempowerable—not only cannot waive: they also cannot demand or enforce them either. Their unempowerability means that their lack of powers is due to (empirical) *inability*—incompetence or lack of agency—rather than being due to (normative) *disabilities*. And there is no reason why the empowerable persons entrusted with the powers pertaining to those unempowerables' rights cannot waive them. So those rights, too, cannot be described as absolutely and unconditionally unwaivable.

ing that domain. Neither of these options is a terribly attractive move. Perhaps little needs to be said with regard to the indispensability of that logic: its essential and generally acknowledged role, as an analytical tool for clarifying the language of rights by exposing the precise normative meaning of statements framed in that language, is too familiar to warrant rehearsal here.²⁰

What about nonclosure? Here, it seems evident that an infinitely regressive waiver chain, in thus precluding closure or what is sometimes referred to as a “stable resolution,” cannot be a property of anything describable as a normative (much less legal) system: there is necessarily insufficient time and/or persons to sustain it. Indeed, there is something particularly odd about this form of infinite regress. For its structure closely resembles that of a game whose rules include a stipulation that, at the end of any round, there is someone who is empowered to demand and secure a further round. Indeed, it may be doubted that this is a game at all. A set of normative rules embracing nonclosure can be logically incapable of delivering a definitive answer to the question of whether Red owes Blue a duty of nonassault: this, because there is no way of determining the veracity of each serial immunity-holder’s claim to have been empowered to waive his or her successor’s correlative disability (and to have exercised that power). For even if each of Green, Black, Purple, Indigo and . . . N makes such claims, it remains a necessarily open question as to whether N ’s claim is true: that is, it is true only if $N + 1$ makes a similar claim and that claim is true; but $N + 1$ ’s claim is true only if $N + 2$ makes a similar claim and that claim is true; but $N + 2$ ’s claim is true only if . . . and so forth. The oddity of this infinite regression essentially derives from the fact that it entails a contradiction. Thus, (1) it is necessarily true—true by definition—that each disability entails one and only one corresponding immunity; (2) therefore it is necessarily true that the number of disabilities is equal to the number of immunities; (3) but in the case of Blue’s allegedly inalienable right, the number of immunities is one less than the number of disabilities, because (a) Blue is a disability-holder, but not an immunity-holder, and (b) all immunity-holders are (allegedly) also disability-holders.

If, then, all rights are alienable, can there be any reason—any reason other than rhetorical overreach—for deeming some of them to be *inalienable*? What exactly do purveyors of inalienable rights hope thereby to accomplish?

20. Which is not to suggest that Hohfeld’s conceptual schema has encountered no objections. Although it would take us too far afield to review these here, a pretty comprehensive survey—as well as a convincing set of refutations—of them is provided in Kramer, “Rights without Trimmings,” 35–49, 101–11; see also Nigel Simmonds, “Rights at the Cutting Edge,” in Kramer, Simmonds, and Steiner, *DOR*, 146–75.

Most critics of the idea that rights can be inalienable do so on the grounds that such inalienability is paternalistic. Depending on the details of how this criticism is framed, it can be understood as either a moral one or a conceptual one. In either case, the starting point of all such criticism is the correct claim that the essential function of making a right inalienable is to extend the scope of the protection it provides to its holders, from protection against injury only by others, to also include protection of them against injury by those rights-holders themselves.²¹ This is then deemed unacceptable by some critics on the moral grounds that it curtails the freedom to which those rights-holders are entitled: within the limits of the duties owed to them, they alone should be allowed to determine whether breaches of those duties would be injurious to them and, hence, whether and to what degree they may be permissibly injured. Other critics reject inalienability on the quasi-conceptual grounds that it falsely, or even self-contradictorily, presupposes that such rights-holders lack the qualities necessary for moral agency.

Neither of these lines of criticism strikes me as sufficiently persuasive. The moral objection evidently relies upon some particular conception of distributive justice that may or may not be correct. And the conceptual one presupposes the Will Theory of rights:²² a theory which is one that I endorse but also one that others do not. What is wanted here, I think, is an argument against the justifiability of inalienability that does not exhibit either of these forms of dependence.

One type of justification sometimes offered for making certain rights inalienable is that, in some circumstances, this may be the most-effective means of realizing certain social goals. It is argued that those goals can only, or most efficiently, be attained if the actions required by certain duties are performed and, hence, if the holders of rights correlative to those duties are constrained from waiving them.²³ But the obvious problem with this mode of justification is that it is precluded by the Moral Primacy Thesis. For by thereby instrumentalizing persons' rights and construing them as means to the realization of those goals, this mode of

21. By disempowering rights-holders from waiving others' duties not to injure the former in the various ways specified in those duties. There is the further question of whether such inalienability also entails that rights-holders owe duties to themselves. In that regard, I'm inclined to agree with Kant and others that, while there can indeed be duties to oneself, they are not correlative ones. Hohfeldian correlativity requires that correlative relations obtain between two different persons: I cannot have rights against myself; I cannot be both plaintiff and defendant in a legal suit nor, presumably, in its moral counterpart.

22. Except insofar as the bearers of those inalienable rights are unempowerable because incapable of choice; see n. 19 above.

23. Compare McConnell, *Inalienable Rights*, 34–35, for several examples proffered by legal scholars.

justification subordinates justice to whatever moral values or principles are associated with those goals: in other circumstances, attainment of those goals may not require performance of those duty-acts which might, accordingly, be acceptably waivable or even forbidden. Inalienability that is entirely contingent upon the relative causal efficacy of certain duty-acts does not look like being best described as pertaining to rights that are absolutely and unconditionally unwaivable.

A related but more complex justification for making certain rights inalienable is that, in some circumstances, this can serve as a solution to a collective action problem—more complex because the goods delivered by such solutions are presumed to be the very ones to which those rights entitle their holders. That is, in this case, inalienability is said to be justified, not by its instrumental relation to some extraneous other moral value or principle but, rather, as a means necessary to protect each person's just right to those goods themselves, against the danger of others' free riding. Russell Hardin offers the following case:

Consider Mill's example of the problem of reducing the workday from ten to nine hours: "Assuming then that it really would be in the interest of each to work only nine hours if he could be assured that all others would do the same, there might be no means of their attaining this object but by converting their supposed mutual agreement into an engagement under penalty, by consenting to have it enforced by law." Because factory workers as a class face a difficult collective action problem, in which the logic is for all to favour the nine-hour day as a general rule but to work ten hours in their particular cases, they will wind up working ten hours for a day's pay if they are not prevented from doing so. Hence, what they need is not the simple right to a nine-hour day but the inalienable right to a nine-hour day. Indeed, the force of the logic of collective action may make the simple right of little value. We might simply extend the freedom of contract to allow the members of such a class to contract among themselves to hold together in seeking their interest against another party. But that freedom would not help a very large group. Hence Mill's workers would require that their right be effectively inalienable.²⁴

A problem with this sort of example is that it is underdescribed. We are not told how or why a worker's right to a nine-hour workday would be endangered by those who would waive that right, if empowered to do so, and work for ten hours. Presumably the missing information is that, since the latter would be putting in one hour more for the same day's pay—and

24. Russell Hardin, "The Utilitarian Logic of Liberalism," *Ethics* 97 (1986): 47–74, 58–59.

would therefore be being paid at a lower rate—they would, in a competitive job market, be jeopardizing the future employment (or wage rate, or opportunities for promotion, etc.) of those who work only nine hours: that is, of those who refuse to waive their right to a nine-hour workday. For if considerations such as these were not at stake, it would be difficult to explain why anyone would work for more than nine hours.

So the justification for inalienability in such cases actually works like this: all members in this class of rights-holders have a moral right to a nine-hour workday, but unless they are all disabled from waiving that right, each of them will have an incentive to waive it, in order to gain (or avoid losing) a competitive advantage for future employment, promotion, and so forth; the result of each waiving that right will be that they all wind up working a ten-hour day, that is, lowering their wage rate, without enhancing anyone's prospects of future employment or promotion; this class of rights-holders is too large for each member of it feasibly to bear the transaction costs of forming a set of mutual disablement contracts with all the other members; hence, the only way to secure that inclusive disablement is to make the right to a nine-hour workday noncontractually inalienable.

A moment's reflection on this line of justification reveals, however, that—like its counterpart in the preceding case of social goals—it is one that instrumentalizes that nine-hour right in the service of other ends and is therefore precluded by the Moral Primacy Thesis. For if we ask why persons should not be allowed to work a ten-hour day if they so choose, the answer implicit in this justification is not that their doing so would result in others losing their nine-hour rights: they would not. Rather, it is that their doing so would put downward competitive pressure on those others' future wage rates and/or prospects of future employment or promotion. Under different circumstances—in the labor market and/or in the feasibility of an inclusive set of mutual disablement contracts—this justification for the inalienability of that nine-hour workday right would not apply, and that right would be acceptably waivable or perhaps even denied altogether. So again, an inalienability that is entirely contingent—in this case, upon circumstances in the labor market or affecting transaction costs—does not look like being best described as pertaining to rights that are absolutely and unconditionally unwaivable.

Preclusion by the Moral Primacy Thesis equally applies to various inalienability justifications that have, as their object, protection of the vulnerable against pressures that can be exerted by the powerful. Persons' moral rights against enslavement, and against being disabled from obtaining a divorce, are often said to be justifiably inalienable because that inalienability removes what would otherwise be an opportunity for the powerful to exploit the vulnerable by inducing them to waive rights that

protect them against having various forms of misery inflicted on them.²⁵ But, worthy as such protection may be, providing it by means of disabling the holders of those rights is problematic. And the nature of this problem is exposed when we try to identify the party vested with the immunities correlative to those disabilities. For it seems clear that this rights-holder cannot be other than society or the community taken as a whole. That is, this line of justification is simply a more specific application of the first one we examined, inasmuch as it renders those persons' moral rights subservient to social goals: in this case, the goal of what Arthur Kuflik calls "a socially more desirable balance of bargaining power."²⁶ If what is wanted is an increase in the bargaining power of the vulnerable—and if this is itself another requirement of justice—there would seem to be morally better ways of achieving that end (e.g., by wealth redistribution) than by restricting those persons' capacity to exercise their just rights.

A final form of justification for inalienability consists in the deployment of various kinds of Kantian consideration. Kuflik offers a representative statement:

Respect for personhood must include respect for the person in oneself; certain rights are so fundamental to, or indeed, constitutive of, the moral dignity of the person, that even the individual himself is without title to give them up or trade them away, *no matter how good* the expected consequences of striking such a bargain.²⁷

Sometimes it is "agency" or "self-respect" that occupies the position held by "moral dignity" in this argument. And there are correspondingly divergent views as to precisely which moral rights play that constitutive role, with a right to autonomy or a right against humiliation being among those that have been proffered.

Again, however, and regardless of the identity of those fundamental rights, we need to ask the Hohfeldian question of who holds the immunity correlative to the disability which this inalienability is. We know that it cannot be the rights-holder him- or herself, since correlativity is a relation obtaining between two different persons: one cannot have rights against oneself. So, as in the previous case, we are thereby driven to infer that such justifications are ones that flow out of social values or principles other than justice and, hence, ones that collide with the Moral Primacy Thesis.

25. Compare Arthur Kuflik, "The Utilitarian Logic of Inalienable Rights," *Ethics* 97 (1986): 75–87, 84–87.

26. *Ibid.*, 86.

27. *Ibid.*, 75.

To conclude: rights signify the presence of a relation between two different parties. But what is often overlooked is that inalienable rights signify the presence of two relations among three different parties. And that fact implies, as we have seen, that all rights are alienable. Moreover, and even if there could be inalienable rights, the kinds of reason that could be offered on behalf of that inalienability would not amount to a morally valid justification. So proclaiming certain rights to be inalienable does indeed seem to be a certifiable instance of rhetorical overreach.