

8-8-2017

# Rights, Alienation & Forfeiture

Jason Byas

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# RIGHTS, ALIENATION & FORFEITURE

by

JASON BYAS

Under the Direction of Andrew J. Cohen, PhD & Andrew I. Cohen, PhD

## ABSTRACT

If one has a right merely in virtue of being a person, she cannot lose that right as long as she remained a person – or so I argue. After sketching out what I mean by “natural rights,” “inalienable rights,” and “nonforfeitable rights,” I give some reasons to think any instance of the first would also have to be an instance of the latter two. I then respond to critiques of inalienability by A. John Simmons and Andrew Jason Cohen. After which, I apply the argument given for why natural rights would have to be inalienable as a reason to think they would also have to be nonforfeitable. Then I respond to the idea that the nonforfeitability of natural rights would conflict with self-defense by outlining an alternate account of self-defense. In closing, I consider some potential implications of the inalienability and nonforfeitability of natural rights, should such natural rights exist.

INDEX WORDS: Rights, Natural rights, Inalienable rights, Nonforfeitable rights, Rights forfeiture, A. John Simmons

RIGHTS, ALIENATION & FORFEITURE

by

JASON BYAS

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

2017

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2017

RIGHTS, ALIENATION & FORFEITURE

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August 2017

**DEDICATION**

To my parents, AJ Roeth, and the 16th floor computer lab of 25 Park Place.

## ACKNOWLEDGEMENTS

There are several people who deserve acknowledgement here, though I will limit myself to five groups. First, Andrew Cohen & Andrew Cohen. Both provided invaluable feedback, not only on the thesis itself, but on two previous papers that jointly served as its prototype. A.I. has been incredibly generous with his time, and greatly encouraging – not only with the thesis, but with my philosophical development in general at Georgia State and beyond. A.J. has been wonderfully stubborn in all the ways that one wants from a philosophical opponent and thesis director. Second, Christie Hartley and Andrew Altman, whose questions and comments and the defense posed worthwhile challenges. Third, Matt Jeffers and James Gillard, who served as sort of a “pre-committee” by taking over an hour of their time a few days before my defense to grill me on my thesis. Fourth, Billy Christmas and other organizers and attendees of the 2016 Brave New World conference at the Manchester Centre for Political Theory, who provided excellent early comments on a paper that would ultimately become this thesis. Fifth, various coffee shops across Atlanta and Decatur that provided the fuel and space necessary to complete much of my thesis.

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## 1 INTRODUCTION

Here I seek to defend the claim that all rights that are *natural* must also be both *inalienable* and *nonforfeitable*. In other words, I will be arguing that any right that you have automatically in virtue of being a person is also a right that you cannot *lose*, even through prior consent or wrongdoing. Importantly, I do not defend the contentious claim that there *are* any such natural rights.

In Chapter 2, I lay out what I have in mind by “natural rights,” “inalienable rights,” and “nonforfeitable rights.” A natural right, for my purposes, is an enforceable claim-right that all persons share in virtue of being persons. An inalienable right, for my purposes, is a right with which one cannot voluntarily part. Specifically, an inalienable right is *waivable*, but *not relinquishable*. A nonforfeitable right is a right with which one cannot be parted as a result of wrongdoing. These distinctions, and their significance, are briefly explored.

With that on the table, I move on in Chapter 3 to A. John Simmons’s two main charges against the claim that all natural rights must be inalienable rights. First, he finds the “paternalistic air” of inalienability’s “concern to protect persons from the consequences of their own voluntary choices” fundamentally at odds with any claim to “natural moral freedom” (1983: 186). In response, I lay out an argument for inalienability in Chapter 3 Section 1 that appeals not to protecting would-be-alienators from harming themselves, but instead to important conceptual features of natural rights. As I explain in 3.2, Simmons explicitly addresses an argument similar to the one I give in 3.1 (1983: 188). He argues that the success or failure of this argument hinges on whether personhood is a *sufficient condition* for having a natural right.

If, Simmons argues, natural rights are instead simply ones that we are “born to” (1983: 188) when we become persons, then arguments like the one given in 3.1 fail. Accordingly, I

spend 3.2 giving some reasons to think that if we are “born to” natural rights when we become persons, personhood must also be a sufficient condition for having those natural rights. Simmons also claims that the inalienability of all natural rights would make contracts impossible (1983: 182). I respond in Chapter 4, by noting that this claim is only true if we assume a particular model of contracts, for which Simmons does not argue. I therefore flesh out a different model, which can better accommodate inalienability. Chapters 5 & 6 reply to Andrew J. Cohen’s objections against inalienability, discussing his hypothetical of a “morally-lobotomized slave” and how inalienability relates to the *volenti* principle.

After discussing inalienability at length, I address nonforfeitability in Chapters 7 & 8. In the former, I make appeal to my argument in previous chapters that if there are natural rights, personhood must be a sufficient condition for having them. If that is true, then wrongdoers still have a sufficient condition for having those natural rights, and therefore still have those natural rights. In Chapter 8, I address the worry that if natural rights existed and were nonforfeitable, this would rule out the permissibility of defensive violence. I respond by first outlining and then very briefly defending an alternative approach to justifying defensive violence. Chapter 9 reiterates the arguments given, and what this paper has *not* sought to prove. In conclusion, I give some thoughts on what more is necessary to flesh out the practical consequences of inalienability and nonforfeitability, even if there do exist natural rights.

## 2 NATURAL, INALIENABLE & NONFORFEITABLE RIGHTS

### 2.1 Natural Rights: Enforceable Claim-Rights Which All Persons Have Automatically

In order to assess the claim that all natural rights must also be inalienable rights and nonforfeitable rights, we must first understand what is meant by “natural rights,” “inalienable rights,” and “nonforfeitable rights.” When I use the term “rights,” I will be exclusively (unless explicitly stated otherwise) referring to enforceable claim-rights. The term “claim-right,” then, refers specifically to rights through which a right-holder “is owed a duty by some other person(s)” (Wenar 2013: 207). Furthermore, these duties are enforceable, “either by coercing performance or by penalizing nonperformance” (Wenar 2013: 214). As an example, if I hold a claim-right over my jacket, you have an enforceable duty to refrain from using my jacket without my permission. Importantly, by “enforceable,” I specifically mean “enforceable through violence,” including through legal channels.<sup>1</sup> If I have a claim over someone that I may only enforce through non-violent social sanctions, this claim is not “enforceable” in the sense that I stipulate here.<sup>2</sup>

Also notice that any such “claim-right” is distinct from what we might call a mere “liberty-right.” The holder of a liberty-right merely has no duties with regards to that over which she holds a liberty-right (Rainbolt 2006: 2). In other words, if one has only a liberty-right to drive a particular car, she just has no duty to anyone to not drive the car (Rainbolt 2006: 6). It does not mean that anyone else has a duty to let her drive the car. By contrast, if one has a claim-

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<sup>1</sup> This is not to say that the positive law necessarily recognizes the enforceability of this right, only that the positive law morally ought to recognize the right’s enforceability.

<sup>2</sup> None of this is meant to deny that there are reasonable senses of the word “right” other than the one I have stipulated here, nor that there are other reasonable senses of the word “enforceable.” Rather, I am pointing out a particular set of moral claims that we call “rights,” which are “enforceable” in a particular way. Someone saying, for instance, that both parties in a standard monogamous marriage have a “right” to their spouse’s fidelity, which they may “enforce” through social sanctions or divorce, is not saying something wrong on the account I have given. They are just talking about something else.

right to a car, this means that she has claims against others' attempted uses of the car, and may enforce those claims. Notice also that the holder of a claim-right who has elected against enforcing that right at a given time – and thereby granting a liberty-right to another party – still has the right in question. This is because the right-holder still retains the option of terminating the other party's liberty-right at any time. In what follows, I exclusively use the word “right” to refer to claim-rights enforceable through violence, unless explicitly stated otherwise.

In the sense I intend here, affixing “natural” to the beginning of “right” simply means that the right in question exists independent of any positive law or custom, and is instead a claim-right held by all persons *automatically*. This use follows A. John Simmons's when he says that “[natural] rights are extrainstitutional, and it is commonly supposed that all persons equally are ‘born to’ these rights, regardless of where or when they are born” (Simmons 1983: 177). This does not necessarily imply any connection to controversial natural law ethics.<sup>3</sup> Rather, to say that there are “natural rights” of this sort just means that there are certain duties that persons owe to all other persons that are obtained as soon as one obtains personhood. Following Simmons, anyone who believes that persons have extrainstitutional duties to refrain from murdering other persons and extrainstitutional claims to not be murdered by other persons, is someone who believes in natural rights. Such rights are distinct from paradigmatically non-natural rights, like rights to particular pieces of property. Since I did not gain the right to the car parked in front of my house simply by reaching personhood, my rights over the car are not natural rights.<sup>4</sup>

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<sup>3</sup> However, some may happen to base their defense of natural rights on such a natural law ethic. All that I am saying here is that they *need not* do so in order to argue for natural rights.

<sup>4</sup> However, one might plausibly suggest that the right to acquire property is a natural right, even though the right to particular pieces of property is not.

As stated at the outset, *I will not be arguing for natural rights*. Instead, I will be analyzing what would or would not be entailed by a right being “natural” in the way I have described here. While my points are intended to apply to any “natural right,” I will use the right of self-direction – the right to non-interference in one’s non-interfering activities – as a paradigmatic natural right. I choose self-direction because the paradigmatic case of alienating one’s natural rights is to sell oneself into slavery, transferring this right of self-direction to another person. If self-direction is a natural right in the way I have described, then the fact of our personhood is at least initially entails obligations of respect<sup>5</sup> in others, mandating that they treat us in ways consistent with our consent. Importantly, this relationship is *automatic*, not earned, because the basic facts that establish our personhood further establish the moral facts requiring that other persons engage with us only in ways consistent with our consent.<sup>6</sup>

Understood this way, while one might say that we own ourselves, *we do not own our rights*, strictly speaking. This is because our rights are a set of *moral facts*. The moral relationship we refer to as our right to self-direction is simply a set of moral facts about the world that obtain because of certain other facts. I no more “own” this set of facts than I “own” the fact that I am wearing a black shirt, that I was born well after the Second World War, that I am 5’10”, that I speak English, or that I was born in the Western Hemisphere. Ownership applies to objects<sup>7</sup> over which the owner has the moral jurisdiction to determine use, and to refer to those facts just mentioned as things that I “own” is a category mistake. They are just statements that

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<sup>5</sup> All that is meant here by “obligations of respect” are “obligations that we owe to others in virtue of their personhood.”

<sup>6</sup> How exactly one sees this movement from the fact of our personhood to the obligations we are owed in virtue of that personhood will obviously differ substantially from theorist to theorist. I take no position on those thorny specifics here. Instead, I only observe that something of this kind is what must be meant by the idea of a natural right.

<sup>7</sup> Seeing as it is irrelevant to our present discussion, those who believe people can own ideas may feel free to include “ideas” among the things described as “objects” in this sentence.

are true about me. Similarly, the moral fact that you must respect the moral significance of my consent and non-consent in all interactions between us is a fact about us, not something that I own.

## 2.2 Inalienable Rights: Waivable, But Not Relinquishable

In saying that we have “inalienable rights,” one claims that there are some rights that may not be relinquished “even by the consent of the right-holder” (Barnett 2014: 77). Here I follow Joel Feinberg in drawing a distinction between *waiving* and *relinquishing* a right (Feinberg 1977: 246-251). To relinquish a right is to renounce the right and no longer hold it – to make it so that if you later change your mind, that change in mind no longer holds moral force,<sup>8</sup> at least with regards to the rights in question. The person who has transferred her right to another person entirely has *relinquished* it, and no longer holds the associated claim.

By contrast, to *waive* a right is simply to consent, for a given moment, to another person’s use of an object over which you hold a right, even if that use would normally be a rights violation. If you waive your right, you still maintain the power to withdraw your consent to a given use of the object in question, and that withdrawal still holds moral force. In other words, you have maintained your *claim-right*, though you have granted another person a *liberty-right*.

Since you maintain the claim-right, you maintain the power to remove the other person’s liberty-right. Simmons notes that cases where we waive but do not relinquish our rights are cases where “we merely decline to exercise [our rights] in some particular case,” and “[those rights]

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<sup>8</sup> By “hold moral force,” I mean that this affects what actions are morally permissible or impermissible. I might loudly voice my disapproval with the color that you choose to paint your house. However, this loud resistance holds no moral force. If we were talking about my house, though, my loud resistance to the loud colors you are using to paint it *would* have moral force – it would make what you were doing impermissible. If I then try to forcibly stop you from painting my house that color, I do not act wrongfully (or at least not with regards to rights).

are not lost” (Simmons 1983: 180). I join Simmons (1983: 180) in seeing only cases of *relinquishment* as cases of alienation.

This distinction between relinquishment (alienation) and waiving will be easier to understand with examples. When I sell you my car, I have relinquished my right to the car. When I let you borrow my car, I have waived my right to the car. While the difference here may seem like one of duration, there is nothing about relinquishment that requires *permanence* (Simmons 1983: 180). For instance, when I rent out my car to you with a contract that requires me to wait until a certain date and time before demanding its return, I have temporarily relinquished my right to the car. I have *lost* my claim-right to the car until your rental expires – and have therefore alienated it for that time. We can contrast this from a case where I have merely informally let you borrow it, with the understanding that I can demand it back at any time. In that instance, I have merely *waived* my right to the car, and it is important to see why. In both the case of sale and the case of contractual renting, “control over the exercise of the right changes hands” (Simmons 1983: 180), and I may not demand the car back as a matter of right. In the case of informal borrowing, no normative control over the exercise of the right has changed hands, and I may demand the car back at any time as a matter of right.

On the understanding of inalienability that I claim here is required by natural rights, one is not able to *relinquish* her right to self-direction, but she may *waive* it. Therefore, I identify alienation with relinquishment, and unless stated otherwise, use the terms interchangeably. Those who have merely waived their rights, have not (on my account) alienated those rights. This understanding of alienation is shared by Simmons, who also reserves “alienate” for a genuine loss of rights (relinquishment) (1983: 180). Worth noting, though, is that this clashes directly with certain other common understandings of alienation and inalienability, which take



inalienable rights to also be non-waivable (McConnell 1984). The defense of inalienability I give below, then, cannot be used as a defense for this stronger form of inalienability, and problems with this stronger form of inalienability will not always be problems for my account.

The paradigmatic application of the kind of inalienability that Simmons and I are talking about is as an injunction against slavery contracts. If I agree to become your slave and that agreement is normatively binding in an enforceable way, I have fully alienated my right to self-direction. If I agree to become your indentured servant until a certain date and under certain terms (perhaps you may beat but not kill me), I have partially and temporarily alienated my right to self-direction. If I agree to become your so-called “slave,” but it is understood that I may back out of the arrangement at any time, I have not alienated, but merely *waived* my right to self-direction, albeit in a dramatic way. Accordingly, if the kind of inalienability I defend is correct, I may agree to do everything you say, accept physical punishments for failures to do so, and even allow you to kill me for my insolence. However, it must *also* be the case that if at any time, I decide to withdraw my consent from this arrangement, my consent (or rather, lack thereof) still holds moral force, and must be respected. To repeat: the issue here is *not* one of permanence. If natural rights are inalienable, then I can waive them, but I cannot *relinquish* my natural rights even for a period of seconds. The central concern is that at all times, the consent to which we morally appeal must be ongoing and current.<sup>9</sup>

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<sup>9</sup> We might wonder, then, about a case where I waive my right to life by letting you kill me. I have consented throughout, but once what’s done is done, I can no longer withdraw that consent, because I am now dead. Fully exploring this question is beyond the scope of this thesis, but one possible account might draw on *volenti* to deny that such killing is a rights violation.

### 2.3 Nonforfeitable Rights: Rights Retained After Wrongdoing

To say that a right is nonforfeitable is different than saying it is inalienable. Whereas “alienation” refers to voluntarily giving up one’s right, “forfeiture” refers to an “involuntary loss [of one’s right] through wrongdoing (Simmons 1983: 178). For instance, if I voluntarily gift you fifty dollars, I have alienated my right to that fifty dollars, whereas if I incur a compensatory debt of that same amount, I have forfeited my right to that fifty dollars. Put another way, both the person who has bought your bike and the person who has stolen and destroyed your bike might owe you fifty dollars. Each loses a right to her fifty dollars as a result of her actions. Your customer has *alienated* her right to the fifty dollars, whereas your thief has *forfeited* her right to the fifty dollars.

If I can forfeit at least some of my natural rights, one such case might be that after committing a crime, I forfeit my right to self-direction (at least in part), leaving me liable to receive forms of legal punishment that would have otherwise violated my natural rights. Just as alienation does not require permanence, forfeiture does not either. Consider an inmate justly incarcerated in a legitimate system of criminal punishment. While such an inmate will have forfeited her right to self-direction (in that she may not leave the prison) for the duration of her sentence, that right is restored to her at the end of her sentence. Similarly, many theorists who use rights forfeiture to explain defensive violence will argue that an attacker regains her rights upon no longer posing a threat.

Given this understanding of rights forfeiture, a nonforfeitable right would one that cannot be lost as a result of any wrongdoing. For instance, if all natural rights are nonforfeitable and the right to self-direction is a natural right, even a murderer retains her right to self-direction. In order to imprison this murderer, one of two things would have to be true: either the right to self-

direction may be overridden (even if it is not lost), or the murderer must have never had a right against the imprisonment in the first place. This is because if the right of self-direction is nonforfeitable, one could not have previously held it and then lost it as a result of wrongdoing.

### 3 WHY NATURAL RIGHTS MUST BE INALIENABLE RIGHTS

#### 3.1 A Non-Paternalist Defense of Inalienability

Simmons's first charge against the inalienability of all natural rights is a common one. This is that there seems to be something inherently paternalistic to the idea of inalienability (Simmons 1983: 186). It is not particularly difficult to see why. Rights are often thought to be things that are good for people to have, and when those rights are inalienable, this inalienability prevents people from harming themselves. Clearly, part of the reason that many people react against the paradigmatic case of alienation – contractual slavery – is out of a paternalistic impulse that one should not be able to harm herself in that way. However, there are plenty of other clearly non-paternalistic prohibitions that also have the effect of preventing one from harming herself. Prohibitions against murder have the effect of preventing all sorts of harms to oneself, but the prohibition against murder is obviously not paternalistic. This is because a prohibition – whether against committing murder or against selling oneself into slavery – can only be called “paternalistic” if the reason for that prohibition is to prevent self-inflicted harm. Responding to this charge, then, requires fleshing out an argument for inalienability that makes no appeal to preventing harm to the person who willfully attempts to alienate her natural rights. Here I will attempt to lay out such a case.

As I previously stated, if there are any natural rights, they are best understood not as things that we own, but instead as certain sorts of moral facts about us. Obviously, some facts about us can be changed, and some cannot. I cannot change the hemisphere in which I was born, nor the year I was born. I can change the fact that I am wearing a black shirt, that I am 5'10", or that I speak English. Even for those that I can change, though, more is necessary than simply deciding or stating that these things are no longer true about me. To stop being 5'10", I have to

grow taller, cut off my legs, or do something else that changes the distance from the top of my head to the ground when I'm standing up straight. To stop speaking English, I have to make myself forget the language. This is true even in the easy cases – for to stop wearing a black shirt, I have to take off the shirt or change its color. For our purposes, what is relevant is that in order for these facts about me to no longer hold, I have to make the things that constitute them no longer the case. For as long as it is the case that I know the words of the English language, can process them, and can properly formulate my thoughts in that language, it is the case that I speak English. Similarly, if the argument of this paper is correct (and if the claim-right to self-direction is a real natural right), then as long as it is the case that I am a person, I retain my claim-right to self-direction. At first glance, this seems to follow straightforwardly from the idea of a right that I have in virtue of being a person. Since I retain this right, the consent appealed to in interactions with me must be ongoing, for actions that go against my current dissent are still going against my rights.

### 3.2 Simmons's Reply

Of course, the bare fact that rights come about automatically does not, on its own, mean that they cannot be alienated. Simmons stresses this in replying to a rationale for inalienability similar to my own. According to Simmons, whether or not the argument that if a right is “one which every person possesses simply in virtue of being human, a person would have to cease to be human in order to alienate ... [that] right” works depends entirely upon what “simply in virtue of being human”<sup>10</sup> means (Simmons 1983: 188). Simmons agrees that *if* this means being a person is a *sufficient condition* for being a holder of the given right, *then* “the conclusion

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<sup>10</sup> Careful readers may notice that while Simmons uses the word “human” here, I opt instead for “person.” I do not take anything significant to hang on this difference. Nothing that Simmons says, for example, implies that he would see natural rights as inapplicable to some hypothetical species with the same level of intelligence and moral agency as humans.

obviously follows” (1983: 188). Yet if “this claim is taken to mean that every person is ‘born to’ (or with) certain rights” by being born as a person, “the conclusion is a non-sequitur” (1983: 188). Simmons charges arguments like mine, which see ongoing personhood as entailing ongoing natural rights, with conflating “the conditions for the loss of a right with the conditions for its initial possession” (1983: 188).

To better understand Simmons’s point here, we can compare it with a different set of facts that obtains automatically as a result of certain conditions. If I walk into a room with motion-activated lights, they come on automatically. Yet this does not mean that I cannot do something to turn off those lights. My walking in the room caused the lights to turn on, but my being in the room is not a *sufficient* condition for the lights being on. It merely played a *contributing* role, where it, in combination with other conditions, led to the light automatically turning on. Moreover, to assume that the lights will be on perpetually after I have entered the room would be to conflate the conditions for the lights *turning* on with the conditions for the lights *staying* on. One might then think that personhood’s automatic generation of natural rights is something like being the room automatically turning on the lights. Simply being a person can be sufficient for gaining a right without being enough to maintain it despite previous attempts at alienation.

### **3.3 Why Personhood Must Be a Sufficient Condition for Having a Natural Right**

To see whether or not we are able to alienate our right to self-direction, we should consider what would have to happen to make the automatically-obtaining yet changeable fact just mentioned no longer the case. For the motion-sensing light, I could hold still for a while, press a button, cut the power, or just break the lightbulb. The action I took at time  $T_{+1}$  – walking in the room – changed something about the state of affairs that previously held at  $T_0$  in such a way that

brought about a new state of affairs at  $T_{+2}$ , which made it such that the lightbulb is on. At  $T_{+3}$ , I took an action that changed the state of affairs in such a way that the lightbulb is off at  $T_{+4}$ . Whatever action it is that I took, it made it the case that the electric current is no longer running to the bulb. The light is no longer on, *because* the electric current is no longer running to the bulb. This reveals that the electric current running to the bulb was an *additional necessary condition*, so just merely being in the room cannot be a sufficient condition for the light being on.

As Simmons himself notes (1983: 188), if one's personhood is a sufficient condition for having natural rights, then those rights must be inalienable. Therefore, we should try to see if there is some other necessary condition (beyond mere personhood) for having natural rights that has been overlooked. Whatever this additional necessary condition would be, we can see that it would have to be something that universally *does* hold as soon as we become persons, and universally *does not* hold after attempting to alienate a natural right. For if it is a necessary condition for our *natural* rights, then it would have to be in place when we are "born to" them. If it is enough to make attempted alienations of natural rights successful, then relaxing that condition must be *enough* to successfully alienate a natural right. Perhaps there is another thing, beyond just our status as persons, which must hold for natural rights to hold, and which is present before the slavery contract, but is no longer present after the slavery contract. The only thing that does seem to change is that before the signing of a slavery contract, you have never endorsed the future disregarding of your will (over oneself), whereas after the signing of the slavery contract, you have. This is, after all, the essence of what a slavery contract is: an endorsement of non-consensual activity against one's person in the future.

When we aren't talking about slavery contracts, it does not seem that mere endorsement of future non-consensual activity can change our moral relationships in such a way that justifies

those non-consensual interactions when the time comes. Imagine that a person (call him Paul) loudly supports the execution of all Catholics at Time  $T_0$ , and a bill is passed at  $T_{+1}$  authorizing the execution of Catholics. Paul himself becomes a Catholic at  $T_{+2}$ , and is discovered as Catholic by the police at  $T_{+3}$ . It does not seem that Paul's previous support for such a policy renders his execution at  $T_{+4}$  non-rights-violating. To kill Paul for being Catholic is still, despite his endorsement at  $T_0$ , a rights violation at  $T_{+4}$  (assuming he does not consent at  $T_{+4}$ ).

The defender of contractual slavery – again, the paradigmatic instance of alienating one's natural rights – will want to say that the cases are dissimilar. In the case just given, Paul's past endorsement of the law is an endorsement of rights violations (both against himself and others). Yet, the defender of contractual slavery might say, signing on to contractual slavery need not be an endorsement of rights violations in this way. For while the law would involve killing victims who had never endorsed being killed, the contractual slavery would only involve the slavery of a person who had previously accepted it. Moreover, while Paul clearly does not consent at the time of his execution, a contractual slave might do so even when being beaten. If we compare the two cases further, though, it will become clear that these are not genuinely relevant dissimilarities.

Consider a slavery contract in which I agree to become your slave, and I also decide to sell some of my friends to you as well. Obviously, even if natural rights were alienable, this would not be a *fully* successful contract – I still could not alienate the rights of *others* on their behalves.<sup>11</sup> As far as alienating *my own* rights goes, though, the contract seems like it would be successful (if natural rights were alienable). Furthermore, if I am to have alienated my natural rights, it must be the case that it is now no longer a rights violation to beat me *against my will*. If my emphatic non-consent is still enough to make such a beating a rights violation in the future,

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<sup>11</sup> However, in a moral world where all rights were alienable, I might be able to sell them into slavery if they had previously granted me the power to do so.



*then I have not alienated my natural rights.* This is because, as stated earlier, I join Simmons and Feinberg in seeing alienation as a matter of *relinquishing* one's rights, not merely *waiving* them.<sup>12</sup>

To make clearer why the two cases are similar, notice that if I am able to sell myself into actual slavery, it must be the case that my mere endorsement of such non-consensual activity against me in the future<sup>13</sup> is *enough* to make that activity no longer a rights violation. Therefore, if the rights being alienated are natural, it must be the case that *the lack of such a future-oriented previous endorsement* is a necessary condition for having those rights. Otherwise, relaxing this condition – by endorsing future non-consensual activity – would not be enough to alienate the rights in question.<sup>14</sup> In order for the transfer of natural rights that is supposedly involved in contractual slavery to be possible, then, it must be the case that merely endorsing one's non-consensual activity in the future is enough to make that non-consensual activity no longer a rights violation. Otherwise, one's personhood is in fact a sufficient condition for maintaining one's natural rights, which would make all natural rights inalienable. This is because the person who is still a person but has previously attempted to alienate her rights still meets all of the necessary conditions for having those natural rights.

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<sup>12</sup> For instance, the previous consent of those who agree to boxing matches does make the violence against them no longer rights-violating. This is because they have *waived* those rights. Yet if they were to emphatically withdraw that consent, and try to leave the match, forcing them to keep fighting after that point would be rights-violating. This is because they have not *relinquished* those rights. Of course, if all rights were alienable, there could be boxing matches where those attempting to forfeit a match can be forced to continue fighting. My point here is only that the common sense view that the hits in a boxing match don't violate the rights of the boxers is perfectly consistent with the understanding of inalienability discussed here.

<sup>13</sup> Here "non-consensual activity against me in the future" should be understood to include "future action against my then-occurring dissent," though not necessarily "future action against my then-occurring dissent that I have also never prospectively endorsed."

<sup>14</sup> One might reasonably wonder whether or not a lack of something can even be a condition in the first place. If lacks of things can't be conditions, making my case for the inalienability of all natural rights is even easier. This is because the one thing that would have to be a necessary condition for having natural rights in order to make natural rights alienable could not even be a condition in the first place. For the sake of argument, I leave this aside and assume that lacks of things can in fact be necessary conditions.

Now turn back to the execution case. If it is the case (as is necessary for alienation of natural rights to be possible) that the mere endorsement of non-consensual activity in the future is enough to alienate one's rights, then Paul has alienated his rights, and his execution is not rights-violating. Perhaps one might say that this endorsement would also have to be public, and somehow officially notarized. If that is the case, we can shift the example such that Paul had pushed an official petition supporting the execution of all Catholics. One might also say that this is not actually an endorsement of his rights being violated in the future, since Paul obviously does not realize that he will eventually be a Catholic in the future. However, it is the clear meaning of Paul's advocacy of the anti-Catholic law that if anyone – himself included – is to become a Catholic in the future, then this new Catholic should be executed. If you were to ask Paul at the time he held this position, he would no doubt unflinchingly agree. If endorsing future non-consensual activity were enough to make that non-consensual activity non-rights-violating, then this would mean that Paul had alienated his rights to self-direction (with regards to religion), and his future execution would not be rights-violating. Of course, Paul's advocacy would not be enough to alienate the rights of all other once and future Catholics. Those executions would still be rights-violating, despite Paul's advocacy (assuming that they did not also consent either at the moment or in the past). Yet *his* execution would *not* be rights-violating. Unless one is prepared to say that this execution would not be rights-violating, then the mere endorsement of non-consensual activity in the future is not enough to alienate one's rights. Thus, those who take Paul's execution as still rights-violating must reject the claim that "never having endorsed future non-consensual activity against oneself" is a necessary condition for having natural rights. If that is the case, then one's personhood *is in fact* a sufficient condition for maintaining natural rights,

if it is at least (as Simmons suggests) a sufficient condition for initially obtaining them. If that is the case, then all natural rights must necessarily be inalienable.<sup>15</sup>

In a last ditch effort, those who reject the view that natural rights must be inalienable rights (while believing in natural rights) may bite the bullet. They might say, sure, a law of executing Catholics is usually rights-violating, and it is probably even still morally impermissible to execute this particular ex-anti-Catholic Catholic (for other reasons) – but executing him is not *rights-violating*. Note just how radical of a bullet this would be to bite. People very often change their views on public policy, and will not infrequently end up having their rights seemingly violated in ways that they previously supported. The consistent bullet-biter, wanting to maintain the point against inalienability here, would have to say that these people did not really have their rights violated. Such a view may be internally consistent, but it also takes much of the teeth out of the natural rights framework. Since the dispute here is one primarily of interest to natural rights theorists, I take this as a point in my view's favor.

The view that the execution is wrong, *but not a rights violation*, further seems implausible when we consider what it would mean for it to not be a rights violation. If it is not a rights violation, then this is a case where interference from others would not be justified. For if the execution is non-rights-violating activity, interfering with it would be a violation of the *executioner's* right to self-direction. Yet killing someone against their will for their religious

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<sup>15</sup> One might think that the preceding considerations have only shown that one particular natural right is inalienable – not that all rights that are natural must also be inalienable. This is mistaken. If what I have said so far is correct, those maintaining that any given natural right is alienable would have to provide a necessary condition for natural rights beyond personhood. This condition would have to universally hold for all persons as soon as they become persons – otherwise the right would not obtain automatically upon personhood. This condition would also have to be relaxed in attempting alienation – otherwise the attempted alienator would still meet all necessary conditions for having the right, even after attempting the alienation. Here I have provided an example of such a condition being relaxed, and why the relaxing of that condition would not seem to be enough to properly alienate the right.

beliefs seems like a clear case where third-party interference is justified. The same response here also applies to those who may be prepared to bite the bullet due to particular accounts of political authority. My point here, of course, assumes that it can never fall within a state's legitimate authority to kill Catholics simply for being Catholic. This seems safe, given that most people would take the fact that a given account of political authority *does* authorize the state to execute Catholics simply for being Catholic as a *reason to reject* that account of political authority.

#### 4 PROMISES & CONTRACTS

Simmons's second objection to the inalienability of all natural rights is that this would seem to eliminate the important institution of promise-keeping. More specifically, he states, "the claim that all natural rights are inalienable ... is not at all plausible. If ... the right to freely formulate and pursue a life plan ... is a natural and human right ... then the inalienability of all natural ... rights would entail that promising (by which the rights we have to freedom of action are taken to be voluntarily redistributed) is impossible" (Simmons 1983: 182).

Since the natural rights under discussion are specifically those that are *coercively enforceable* claim-rights, promise-keeping does not *on its own* involve any kind of alienation whatsoever. If I promise to wait for you at a subway station, I have taken on a new moral obligation – namely, not to board a train before you reach me. Not only that, but you also have a new moral claim on me: that I fulfill my promise and wait for you at the station. However, no enforceable claim-rights have been redistributed. The mere fact that it is now *morally wrong* for me to board the train does not mean that you now have an *enforceable* claim-right to my not doing so. It does not seem likely that you either could have someone else physically prevent me from getting on the train, or force me to provide compensation at some point afterward.<sup>16</sup> Simmons's point, then, cannot be that the inalienability of natural rights rules out promises-as-such, but rather that it appears to rule out *contracts*, since they are usually seen as *enforceable promises*.

The right of self-direction entails that it is up to me whether I will mow your lawn or not mow your lawn. If I sign a contract with you to mow your lawn, though, it seems at first glance

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<sup>16</sup> Clearly, you may – depending on the circumstances – reasonably give me some sort of social sanction for my failure to fulfill my promise. This does not, though, involve an "enforceable" claim-right in the way I stipulated previously in 2.1.

as if I have necessarily *lost* my right to not mow your lawn. Despite the fact that I previously had an enforceable right to not mow your lawn, you now (it appears) have an enforceable right to have your lawn mowed by me. Yet contracts are only a problem for the inalienability of natural rights if contracts involve a transfer of natural rights, and contracts only involve such a transfer *if* they must necessarily understood as enforceable promises of personal services (Barnett 2004: 77-82).

It is important, then, that different paradigms for understanding contract exist, some of which are fully inalienability-compatible. For example, one might see contracts for personal services as a conditional transfer of titles to external property (such as money), rather than an enforceable promise to provide those personal services. On this view, the person who signs a contract for personal services is consenting to certain titles to external property (such as money) transferring to the other person in the event that she fails to fulfill her end of the contract (Barnett 1986: 197). What is being agreed to, then, are the conditions for transferring certain non-natural rights (property titles), not natural rights.

Defenders of this account contend that it is independently justified by being uniquely able to account (in a non-ad-hoc way) for the dominant view that the specific-performance of personal services cannot legitimately be enforced (Barnett 1986: 198). If a contract is just an enforceable promise, then prohibiting specific-performance seems ad hoc. If we instead see contracts as laying out conditions for future transfers of property, the inalienability of the rights that would have to be transferred to enforce specific-performance serves as a plausible explanation for the ban.

Therefore, Simmons's claim that the inalienability of one's right to self-direction would rule out contracts is mistaken. If self-direction were a natural right, this would only rule out

enforceable claim-rights to the fulfillment of promises of personal services – an account Simmons assumes without argument. It would not rule out agreeing to conditions under which titles to certain pieces of property would transfer to another person. In that case, the rights being transferred – rights to particular pieces of property – are not natural rights. Since contracts do not require the alienation of any natural rights, contracts are not a reason to reject the inalienability of all natural rights.

## 5 COHEN'S "MORALLY-LOBOTOMIZED SLAVE" CASE

A different way one might reject the claim that an attempted slavery contract cannot rid someone of their natural rights is to show that the fact of one's personhood (which I take to be unaltered by the slavery contract) can *in fact* be altered. For instance, I could consensually arrange to have my moral agency removed, eliminating my personhood and thereby eliminating the moral fact my right of self-direction (which applies only to persons). Andrew J. Cohen poses this possibility (Cohen 2007: 467), referring to the person who has undergone this transformation as a "morally-lobotomized slave." Since the morally-lobotomized slave is no longer a moral agent, this being no longer qualifies for rights, and may then become the property of another person.

This claim seems true as far as it goes. Of course, following what I said in the previous chapter, right up until the moment that the transformation actually takes place, the person whose body might eventually become property has the right to change her mind and back out of the arrangement. But assuming that she does not, and that we have good reason to believe that her consent was genuine, it seems that we have no good non-paternalist or non-consequentialist reason to disallow this sort of arrangement.

That said, I do not think that this poses a problem for the inalienability of natural rights. By accepting Cohen's "morally-lobotomized slave" case, I am not accepting a case where someone remains a person while successfully alienating her natural rights. The morally-lobotomized slave not only ceases to be the same person, but in fact *ceases to be a person* after the operation. This is therefore less a case of one person selling herself into slavery, and more a case of one person committing suicide (or at least suicide of personality), and willing the rights to what was once her body to another person afterwards. The new owner of this flesh-and-blood



machine may choose to think of it as a “slave,” and she may choose to refer to it by the same name as the person who once occupied that body. Yet this does not mean that it is in fact the same person, once free and now slave.

To further emphasize why this is not a case of someone relinquishing her right of self-direction, consider the following cases. A person dies a natural death, and it was in her will that her corpse be donated for scientific use. A person chops off her hand and sells it on the black market. A person is eaten alive by a lion, and this lion is later captured and sold to another person. In all three of these cases, a person’s body has been partly or wholly sold to another person, yet it would be absurd to refer to any of these scenarios as a slavery contract. The reason is because the flesh sold is now inanimate matter, and is no longer a rights-bearing person.<sup>17</sup> There is no in-principle difference between these cases and the morally lobotomized slave case. If I agree for my body to become a morally-lobotomized slave and contract that out, I am not agreeing to myself become a slave. I would only be agreeing to become a slave if my body was *still me*<sup>18</sup> when it came under the ownership of another person. To call something that is not even a person a “slave” seems an inappropriate use of the concept.

Even beyond these considerations, this is clearly not the paradigmatic case of inalienability-violating slave contracts. We are not typically thinking of the morally-lobotomized slave when we say that inalienability prevents slavery contracts. Rather, we are typically thinking of the case where a person agrees to have her lack of consent ignored in the future, has not gone through any kind of transformation into a different sort of being, and will now no longer have her attempts to exit the situation respected as a matter of right. This is more along

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<sup>17</sup> I am not intending this to be a particularly metaphysically loaded phrasing, because it is far beyond the scope of this paper to say anything on the metaphysics of mind and body. The reader should feel free to take this phrase as metaphorically as necessary to fit their own metaphysical commitments.

<sup>18</sup> The disclaimer in footnote 13 also applies here.

the lines of what Cohen calls a “no-rights slave” (Cohen 2007: 488), who maintains her personhood but alienates the rights that accompany that personhood. Cohen endorses the permissibility of contracts where people become no-rights slaves, seeing no principled reason for not doing so that is both non-paternalist and non-consequentialist. If my previous argument for why natural rights must be inalienable rights succeeds, and there are such natural rights, then there are solidly non-paternalist and non-consequentialist reasons for embracing inalienability and rejecting the permissibility of contracts attempting to make one a “no-rights slave.”

## 6 INALIENABILITY & *VOLENTI*

Despite what I have said, the enforceability of slavery contracts (and thus the alienability of all rights, even natural ones) might seem to follow straightforwardly from the *volenti* principle, which holds that when someone consents to certain risks, she has no claim against the harm that follows. This is at least Andrew J. Cohen's view when he claims that slavery contracts must "be upheld if we are to take the volenti principle (*volenti non fit injuria*) seriously — and we should, lest we make it unacceptable for athletes to hurt each other when they consent to play sports together" (Cohen 2007: 489). Cohen elaborates somewhat in a footnote on the same page, saying that the person contracting into slavery would have to be made "fully aware that she would receive no protection from the state and, indeed, that the state would have to help ... [her slaveholder] against anyone trying to help [her]" (Cohen 2007: footnote 19). If the person who has contracted into slavery has been made aware of the risks and (initially) voluntarily accepted them, then the volenti principle, Cohen argues, means she can no longer have claims against those risks.

The volenti principle, however, is fully compatible with the inalienability of natural rights, and does not require upholding the slavery contract. For our paradigm applications of volenti, properly understood, do not *relinquish* rights, but merely *wave* them. When one voluntarily accepts the potential for risks, she is saying that the risks that come her way are coming with her consent. I have not removed the moral relevance of my consent to being punched when I enter a boxing ring, I have consented to being punched. If I cease to consent, I must be allowed to leave the ring, but I consented to those hits I have already received. Volenti does not mean that football players who try to leave the game may be physically forced back onto the field, only that they cannot sue for the damages they have received during the course of

an ordinary game. Similarly, I might somehow signal that I intend to enter into a state of pseudo-slavery, where I voluntarily accept the risks of being physically beaten for disobeying my pseudo-slaveholder. This might also involve denying other people the right to intervene in this beating. However, the moment that I withdraw my consent from the arrangement, concerned third parties once again have the right to intervene, and I may collect compensation for any damages that happen. All that accepting *volenti must* mean is that I may not collect compensation for the harms I received during the period of my consent. Of course, if natural rights were actually alienable, *volenti* could be interpreted in such a way as to also include the enforceability of slavery contracts. For if natural rights were alienable, one might see the loss of rights as just a foreseeable consequence of the risk one has taken in signing a slavery contract. My point here is merely that there is nothing about *volenti as such* that implies slavery contracts must be enforceable, and therefore *volenti* cannot be used *as an argument for* the alienability of natural rights.

To make this point a little clearer: consider how the *volenti* principle might apply in a world where it was morally possible<sup>19</sup> to sell one's child into complete slavery. In this world, a parent whose child was about to be killed by the child's slaveholder could not interfere with this killing – nor could she have anyone else interfere. For the child's death was a foreseeable consequence of the agreement the parent made, whereby total ownership of the child passed into

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<sup>19</sup> By talking about an exchange as “morally possible,” I mean something different than the mere literal possibility that one person could give another person money for a given good or service, with the other person successfully providing that service. What I'm referring to is also distinct from moral permissibility of such a transaction. I mean specifically the fact that the moral title of ownership could successfully pass into the purchaser's hands as a result of the transaction. For example: it is literally possible for me to sell you my neighbor's car – I could easily steal her car, and then exchange it with you for money. It is still, however, morally impossible for me to sell you my neighbor's car, because you would not now have moral title to the car, only effective possession. It may be morally impermissible to sell you a gun if I know that you plan to commit mass-murder. Yet is morally possible for me to successfully put the moral title of ownership to that gun in your hands, despite its moral impermissibility. So the world I am imagining above is one where one could grant an actual moral title of ownership to her children.

the hands of the slaveholder. That said, it would be clearly mistaken to say that this means the volenti principle should allow us to sell our children into slavery. There are pre-existing moral reasons that it is not morally possible to sell one's child into slavery. There is nothing about the volenti principle as-such that requires the moral possibility of selling one's child into slavery, so the moral impossibility of selling one's child into slavery shapes the way that the volenti principle applies – not the other way around. The fact that a world where selling one's child (or anyone else) into slavery were morally possible would be one where volenti would mean you'd lost your right to intervene is irrelevant, because this is not that world. Similarly, if my argument for the inalienability of natural rights is correct, and if we also have natural rights, then those pre-existing moral facts shape the way that the volenti principle applies – not the other way around.

Another related question could be why the inalienability of natural rights even allows for rights to be waived in the first place. The answer here is that the right to use ourselves as we so choose includes the right to combine our uses with the use another person might make of us. By consenting to another person's use of us, we combine our use with theirs, meaning that when we waive our rights we are merely saying that this the way we choose to *use* those rights. If the way I choose to use my body is to box with you, I can waive my rights to not be punched, since that punching will be fully consistent with my consent in that moment.

If inalienability allows us to withdraw our consent at any time, and means that volenti only applies to actions taken during the time a right has been waived, there is one more question on this front. What should we do in cases where consent has been withdrawn, but the action has already passed the point of no return? To explain: suppose that we're in a boxing match. You start to swing your fist at me, and I yell "stop!" just as you're in mid-swing. Your momentum is such that the punch just cannot be stopped. Or, for a more dramatic example: I have consented to

be guillotined, and you let the blade fall. Just as it is about to decapitate me, you hear me scream “No, don’t!” *This* is where the volenti principle comes into play. Assuming your consent can be reasonably judged to have been genuine and informed, your ongoing consent means you accept the risks of letting it go on past the point of no return.

## 7 WHY NATURAL RIGHTS MUST ALSO BE NONFORFEITABLE RIGHTS

Even most theorists who hold that natural rights must be inalienable would dispute the conclusion that they must also be *nonforfeitable* rights. For instance, Randy Barnett makes a point to emphasize that in arguing for inalienable rights, he has not argued for nonforfeitable rights (Barnett 2014: 77).<sup>20</sup> Critics of inalienability, however, have often argued that if personhood is a sufficient condition for having natural rights, this would not only entail the inalienability of those rights, but also their nonforfeitability (Frederick 2016: 57-58; Simmons 1983: 188). Those critics are right.

Given what I have already said about why natural rights must be inalienable, the reason those rights must also be nonforfeitable is fairly straightforward. After committing wrongdoing, an offender maintains her personhood. In Chapter 3 of this thesis, I argued that if there are natural rights, personhood must be a *sufficient* condition for having them. If this claim is true, this means offenders still have a sufficient condition for having those natural rights, even after their wrongdoing. Since wrongdoing does not alter that sufficient condition for having natural rights, they cannot lose natural rights through wrongdoing. After all, if a person meets a sufficient condition for having something, then they necessarily have it. Such is the nature of sufficient conditions. Thus, all natural rights must not only be inalienable rights, but also nonforfeitable rights.

There are two primary reasons that one might want to avoid the conclusion that all natural rights must also be nonforfeitable rights. The first of these, of course, is that this might seem to render most forms of legal punishment unjust (Frederick 2016: 57-58; Simmons 1983:

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<sup>20</sup> Barnett does not go on to *argue* against nonforfeitability, but instead asserts his disagreement and emphasizes that he intends his argument to only work for inalienability (Barnett 2014: 77).

188). I will largely leave this worry to the side, except to note that could one respond either by biting the bullet<sup>21</sup> or by saying that criminals have not had their rights *forfeited*, but instead *overridden* (Husak 2008: 97-98). The second worry with the view that all natural rights are nonforfeitable, however, is much larger. This is that the nonforfeitability of all natural rights would seem to rule out defensive violence.

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<sup>21</sup> See Boonin 2008 and Chartier 2013: 263-320 for some reasons why this might not be as deadly of a bullet as it seems.



## 8 FORFEITURE & DEFENSIVE VIOLENCE

### 8.1 Wellman on Forfeiture & Defensive Violence

In the course of arguing for a rights forfeiture theory of punishment, Christopher Heath Wellman admits that he can produce “no satisfactory argument for the claim that wrongdoers forfeit their rights” (Wellman 2012: 376), but takes it that “very few will actually deny this particular premise” (Wellman 2012: 376-377).<sup>22</sup> This is because Wellman holds that in order to make sense of self-defense, it must be possible to forfeit rights. After all, our intuitive notion of self-defense is that “your right to swing your fist ends where my face begins,” and that might sound like it has a notion of rights forfeiture built-in. In a case where (e.g.) “Criminal punches Victim in the face and runs off with Victim’s briefcase,” it seems “merely commonsensical” that there are now things “that would have been [previously] ... impermissible” for Victim to do to Criminal that would now be permissible (Wellman 2012: 377). Without further information, it seems that if there is something suddenly permissible (that was previously impermissible) for Victim to do to Criminal, then the most intuitive explanation of this is that the right previously possessed by Criminal has been temporarily forfeited. As Wellman notes, most disputes about rights forfeiture in questions of self-defense are about under what conditions a person does or does not forfeit her rights, not about whether or not rights forfeiture is the right framework (Wellman 2012: 374).

However, consider the following point raised in passing by Judith Jarvis Thomson. In her article “Self-Defense,” she relies on a rights forfeiture theory of self-defense, but notes a complication when talking about “innocent aggressors” (Thomson 1991: 300). “Innocent

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<sup>22</sup> Strictly speaking, I of course also do not deny here that people can forfeit their rights. I only deny that people can forfeit their *natural rights*. However, since the rights Wellman has in mind are plausibly natural rights (rights against violence to one’s person), the discussion here is still applicable.

aggressors” are those who are on a path to violate your rights, but are not morally responsible for this (Thomson 1991: 300). It sounds odd, she admits, to say that they have “forfeited” their rights, given that some may want to say that “forfeiting a right by definition requires fault” (Thomson 1991: 301). In response to this concern, Thomson replies, “What is in question is not whether the innocent aggressor *forfeits* his right but whether he *lacks* it. And once we agree that he is about to violate your right – and that you can prevent this only by killing him – it seems right to conclude that he no longer has a right that you not kill him” (Thomson 1991: 301, emphasis added). In other words, it is not rights forfeiture *per se* that the permissibility of defensive violence rests upon, but rather the fact that the offender does not have a right against that violence.<sup>23</sup> If there is some account that can explain why the offender does not have a right against the defensive violence when it is being done to them *without* appeal to rights forfeiture, this will significantly lessen the implausibility of the claim that all natural rights must be nonforfeitable rights.

## 8.2 Eric Mack’s “Elbow Room” Approach

Eric Mack presents one account of self-defense that does not rely upon rights forfeiture. This “approach begins with the rationale for ascribing to individuals a basic right of self-defense and proceeds with an investigation of the range of defensive conduct that such a right needs to sanction” (Mack 2016: 20). Given that this approach begins from an understanding that “the sanctioned defensive conduct must be permissible,” it stipulates that “the rights that persons have ... *cannot include* rights against that sanctioned defensive conduct” (Mack 2016: 20, emphasis

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<sup>23</sup> Another alternative, of course, is to suggest that defensive violence is permissible because the right remains but is *overridden*. If this is the proper understanding of defensive violence, it would also serve my purpose in showing that defensive violence doesn’t require the forfeiture of natural rights to work. However, in the interest of space, I have limited my discussion to outlining Mack’s elbow room approach.

added). Therefore, in a case of do-or-die self-defense, a victim is justified in killing her attacker because that attacker *never had a right against that defensive violence in the first place*. Rather than starting out “with a blanket right against being killed and then forfeit[ing] or los[ing]... that right when” one attempts to murder another person (Mack 2016: 21), Mack’s approach comes with “moral elbow room” already carved in to the content of the right (Mack 2016: 20).

To illustrate the difference between the rights forfeiture approach and Mack’s “elbow room” approach, consider again the adage that “your right to swing your fist ends where my face begins.” The rights forfeiture approach would take this to say that you have a blanket right to swing your fist, which is suddenly forfeited when you attempt to swing your fist into my face. Meanwhile, the “elbow room” approach would instead interpret the “ending” of the “right to swing your fist” not as a temporary termination of the right, but as going beyond that right’s scope. In other words, something like, “the moral coverage of your right to swing your fist only extends as far as it can without conflicting with another person’s rights.” Since this is a plausible-enough alternative to a rights forfeiture theory of defensive violence, the mere fact of defensive violence’s moral permissibility is not enough to establish that our natural rights can be forfeited.

Moreover, we have independent reason to prefer Mack’s elbow room approach to the forfeiture approach. Remember that in cases where an offender stops posing a threat to others, the rights forfeiture theorist would say that her previously-forfeited rights are suddenly restored. For if the aggressor has forfeited her right, that means she no longer has the right. If her suddenly no longer being on a path to violate your rights means that attacking her would once again be a rights violation, that means she has regained the right. If the primary concept is forfeiture, rather

than a right to defensive violence, one might wonder exactly how the aggressor has come to once more have that right's protection (Mack 2016: 22).

Imagine a situation where an offender – call him Conan – starts running at me with a sword, intent to slice off my head.<sup>24</sup> If I know that the only thing I can do to prevent Conan from completely chopping off my head is to shoot him squarely in the face, it seems like I am within my rights to do so.<sup>25</sup> Rights forfeiture theorists of defensive violence would agree – Conan, they would say, has forfeited his right. Yet if Conan suddenly tripped, somehow knocking himself unconscious, I would very clearly no longer be within my rights to shoot Conan in the face. The reason here also seems clear: there is no plausible way in which shooting Conan in the face is still a defensive action. Yet if the fact that the action is no longer defensive is what is tracking whether or not I can shoot Conan in the face, “rights forfeiture” seems like a mistaken way to describe a *side-effect* of what is really going on. For the thing playing a decisive role here seems to be that the action of shooting Conan in the face is no longer covered under *my* right of self-defense (since the action is no longer defensive), not that Conan has lost some right of his and then suddenly gotten it back (Mack 2016:22). The fact that Conan did not have the moral coverage of a right against being shot in the face at that moment follows from my right to use defensive violence, not the other way around. Since Mack's elbow room theory better accounts for the impermissibility of attacking previous aggressors who are no longer threats, we have a reason to prefer it to rights forfeiture views. Since rights forfeiture is not only unnecessary but

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<sup>24</sup> Here I assume without argument that we can, at least sometimes, make justified inferences about the intent and likelihood of success for a person's actions. I also assume that in the given case, such intent and likelihood of success are both readily apparent.

<sup>25</sup> Notice that I have intentionally chosen a case where the alternative of non-action means my certain death. Proportionality factors heavily into the scope of our rights, and I would not have the right to shoot Conan if he were merely on a path to push me.

even misleading for explaining the permissibility of defensive violence, the permissibility of defensive violence cannot be appealed to as a reason for why natural rights must be forfeitable.

## 9 CONCLUSION

If what I have said here is correct, then contra Simmons, the view that all natural rights must be inalienable is at least plausible. Inalienability is not a paternalistic notion, because it is a product of the very *nature* of natural rights – not an ad hoc way of preventing self-harm. As Simmons himself notes, if one’s personhood is a sufficient condition for natural rights, then the inalienability of those natural rights “obviously follows” (Simmons 1983: 188). Since these rights must be rights that we are all “born to” as soon as we become persons (Simmons 1983: 177), then in order for our personhood to not be a sufficient condition for having those rights, there must be some other necessary condition for having them. This condition, if natural rights are to be alienable, must universally hold at the time we are “born to” our natural rights, and universally cease to hold when we attempt to alienate them. There appears to be only one such condition that meets these qualifications. This is that one has never previously endorsed non-consensual activity against herself in the future with regards to the object of the natural right in question. Yet this does not appear to be a necessary condition for having natural rights. For this would mean that a person’s rights could never be violated in a way that she had previously formally endorsed. This seems false, when we consider cases like the one given about the ex-anti-Catholic Catholic. Therefore, the lack of a previous endorsement to future non-consensual activity against one with regards to the subject of one’s natural right does not seem to be a necessary condition for holding this natural right. Without any other necessary conditions for holding a natural right to be found, personhood can be taken to be a sufficient condition.

Simmons’s worry that the inalienability of all natural rights is at odds with contracts is also mistaken. This is because the inalienability of all natural rights is only inconsistent with a particular understanding of contracts that Simmons simply *assumes*, not with the idea of

contracts-as-such. An alternative account, which view contracts as conditional transfers of property, is perfectly consistent with inalienability. Therefore, if everything else I have said is true, this is a reason to prefer this alternative understanding of contracts, not a reason to limit the inalienability of natural rights. This alternative account also has the independent advantage of making sense of bans on specific performance for personal services in a non-ad-hoc way.

Andrew J. Cohen's hypothetical of a "morally-lobotomized slave" is not a problem for the claim that all natural rights are inalienable. Such an entity would no longer be a person, and therefore whatever we say about its moral status has no bearing on whether persons can lose their natural rights without losing their personhood. Against Cohen's further claim that inalienability conflicts with the *volenti* principle I argued that this gets the order of application mistaken. There is nothing about *volenti* as-such that rules out inalienability, there are only certain ways that *volenti* would apply if natural rights were alienable. If natural rights are inalienable, this affects the way the *volenti* principle applies, the *volenti* principle does not affect whether or not natural rights are alienable.

Simmons and others are right to suggest that the argument I have given for the inalienability of all natural rights would also mean the nonforfeitability of those rights. If personhood is a *sufficient* condition for having natural rights (as I argued previously), then even persons who commit wrongdoing retain those rights, because they still have a sufficient condition for having them.

I considered as an objection to the nonforfeitability of all natural rights that this would render defensive violence unjust. In reply, I outlined an alternative explanation for defensive violence, Eric Mack's "elbow room" approach. On such a view, aggressors lack rights against defensive violence not because they have forfeited it, but because they never had it in the first

place. Not only is this alternative explanation possible, we have independent reason to prefer it. This is that it better explains why those who are no longer aggressing or able to aggress may no longer be attacked. Since there is not only an alternative, but a preferable alternative, to rights forfeiture explanations of defensive violence, defensive violence cannot be appealed to as a reason to reject the nonforfeitability of natural rights.

There are, of course, several other objections to the inalienability and nonforfeitability of all natural rights that this paper has not even begun to touch. Furthermore, I have not at any point pretended to establish that there actually are any such natural rights. Nor have I tried to determine which rights would be natural – aside from referring to some intuitively paradigmatic cases. Simmons argues that it is “not at all plausible” (1983: 182) that all natural rights are inalienable, all I have done is argue that it *is* at least plausible. Where this leaves us in practical terms depends on several other untouched questions, even if it turned out that there were such natural rights. Most significantly, we would need to know whether or not those rights could be overridden, and if so, under what circumstances. If certain natural rights may be overridden, legal punishment that infringes upon natural rights may still be permissible. If those natural rights may not be overridden in the necessary way, this greatly limits the sorts of legal punishment that may be morally permissible. Similarly, if natural rights are overridable, perhaps contracts that require specific performance of certain services (such as certain military contracts) may be permitted despite infringing upon retained rights, due to the overriding importance of those services. If those natural rights cannot be overridden in the necessary way, then this seems to rule out such contracts. I leave these and many other expansive questions to the side, instead treating this as laying some necessary groundwork.



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