

Unveräußerliche Rechte¹

I. Was sind unveräußerliche Rechte?

1. *Waiving, transferring, and alienating a right*

To waive a right is to give up that right knowingly and voluntarily. Waiver involves the intentional or voluntary relinquishment of a right, or conduct that warrants the inference of relinquishment of that right. In order for waiver to be valid, the possessor must understand what he is doing and his choice must be voluntary. When valid waiver occurs, the duties correlative with the right are suspended because of the possessor's consent (or conduct on the part of the possessor that warrants the inference of consent). (9)

Waiving a right is one way of alienating it. Transferring a right to another is a second form of alienation. To say that something is alienable is to say that it is transferable to the ownership of another. A person's right to the property he possesses is paradigmatically alienable because it is transferable. [...] As with waiver, in order for transfer to be valid the possessor must have acted freely, with understanding, and with no fraud on the part of others. [...]

Waiver is *unilateral* and brings about one significant normative change, namely, that (selected) others are now authorized to do certain things because of the waiver. Transfer involves at least two parties; it is *bilateral* and brings about two normative changes. First, it authorizes another specific individual(s) to do things that were previously not warranted. And second, it imposes new obligations on the original possessor (though these obligations are selfimposed, in a sense). (10f.)

What is common to waiver and transfer is that the possessor's consent [...] authorizes others to infringe the possessor's right; the infringement is justified *because of consent*. When transfer occurs, not only are others authorized to infringe the possessor's right, but in addition the possessor has incurred an obligation (typically an obligation not to interfere) to the individual to whom the right has been transferred. An individual has alienated a right if she has waived it or transferred it to another. A right is *alienable* if that right may be waived or transferred to another. (11)

Veräußerliche Rechte: Rechte, die die RechteinhaberInnen freiwillig aufgeben (*waive*) oder an andere übertragen (*transfer*) dürfen.

Wenn ein Recht veräußerlich ist, genügt die Einwilligung der RechteinhaberInnen, um andere Personen von den dem Recht korrespondierenden Pflichten zu entbinden.

2. *Unveräußerliche Rechte*

Unveräußerliche Rechte: Rechte, die die RechteinhaberInnen nicht freiwillig aufgeben (*waive*) oder an andere übertragen (*transfer*) dürfen.

Wenn ein Recht unveräußerlich ist, genügt die Einwilligung der RechteinhaberInnen nicht, um andere Personen von den dem Recht korrespondierenden Pflichten zu entbinden.

Simply put, an inalienable right is one that is not subject to alienation. An inalienable right is one that may not be waived nor transferred by the possessor to another. If a right is inalienable, the possessor's consent does not normatively authorize others to infringe that right *and* the possessor's consent does not obligate the possessor with respect to the activity in question. [...] With regard to inalienable rights, the possessor's consent lacks normative efficacy. So understood, we can now see that an inalienable right is one that may neither be transferred

1 Das Handout basiert auf Terrance McConnell, *Inalienable Rights. The Limits of Consent in Medicine and the Law*, Oxford 2000, Kap. 1, 2 und 5. Die Seitenangaben in Klammern beziehen sich auf dieses Buch.

nor waived by its possessor. Here I take transfer and waiver to be different ways of alienating a right. For transfer and waiver both authorize others to infringe a right; but transfer, in addition, places obligations on the original possessor. So if a right is inalienable, then the possessor's consent lacks normative efficacy with respect to the obligation correlative with that right. (12)

[...] inalienable rights are best understood as follows: if X is an inalienable right, then others are not justified in infringing X simply because the possessor consented, and the possessor is not obligated to allow others to infringe X simply because he has given consent. On my account, both waiver and transfer are prohibited if a right is inalienable. (16)

[...], if a right is waivable or alienable, then the possessor's informed and voluntary consent alone is sufficient to suspend the correlative duty and to justify the person to whom the consent was given to infringe the right. If a right is inalienable, then the possessor's consent alone does not have the normative force to suspend the correlative duty. My approach assumes that rights are the basis of certain duties, understood as prohibitions or prescriptions, but that acting in ways other than what these prohibitions and prescriptions dictate is sometimes permissible. When such behavior is permissible, I call the act *a justified infringement*. And depending on the right in question and the nature of the circumstances, an infringement might be justified because the possessor forfeited his right, because the right was over-ridden by more important moral considerations, or because the possessor consented to the infringement. (20)

Unveräußerliche Rechte sind nicht notwendigerweise absolute Rechte:

Wenn ein Recht unveräußerlich ist, reicht die bloße Einwilligung der RechteinhaberInnen nicht aus, um sie zu verpflichten, das worauf sie ein Recht haben (bzw. hatten) aufzugeben und anderen zu erlauben, diese Rechte zu verletzen (*infringe*). Dies ist jedoch damit vereinbar, daß eine Person verpflichtet sein kann, dasjenige, worauf sie ein unveräußerliches Recht hat, aus anderen Gründen zu opfern.

[...] my account does not imply that an individual can never be obligated to sacrifice the object of an inalienable right. Instead, my account holds that a person can never incur such an obligation merely by giving consent. In this sense, the good protected by an inalienable right cannot be contracted away. But nothing I say precludes the possibility that one might be obligated to sacrifice such a good for a *different reason*. Suppose that the right to life is inalienable. If so, then on my account a possessor's consent alone cannot put her under an obligation to sacrifice her life. This, however, does not preclude the possibility that she is required to sacrifice her life for some other reason. We can imagine circumstances, for example, in which the lives of other innocent persons will be lost unless a person sacrifices her own life; for example, suppose that it is the lives of her own children that are at stake. Surely, in some such scenarios, we would say that the person's sacrificing her own life was required, not supererogatory. [...]

The first point of clarification, then, is this. If a right is inalienable, then the possessor's consent alone cannot put her under an obligation to sacrifice the object of that right or to allow others to infringe the right. But this does not rule out the possibility that the possessor may be required to sacrifice the good for some other reason. (42)

II. Argumente gegen unveräußerliche Rechte

1. Das begriffliche Argument

Das begriffliche Argument gegen unveräußerliche Rechte beruht auf einer bestimmten Vorstellung über das Wesen von Rechten, insbesondere auf einer bestimmten Vorstellung darüber, worin der Sinn oder die Funktion von Rechten besteht. Es gibt hierzu im wesentlichen zwei konkurrierende Vorstellungen: die Interessentheorie und die Willenstheorie der Rechte. Das begriffliche Argument beruht auf der Willenstheorie.

Die Interessentheorie der Rechte:

The interest conception holds that rights are devices for promoting individual welfare. Rights imply duties on others, and according to the interest conception the rights-possessor is the beneficiary of a set of duties. The interest conception implies that an individual can have rights only if it has interests, interests that can either be advanced or thwarted. A right-holder must have a good of its own and the duties correlative with rights protect that good. (28)

Die Willenstheorie (choice conception) der Rechte:

[...] the choice conception maintains that rights are devices for protecting individual autonomy. Rights delineate an area over which an individual has control, and the duties that rights imply prohibit others from usurping this control. On this view, the rights-possessor is pictured "as the active manager of a network of normative relations." Within the designated domain, the rights-possessor is authorized to make choices and rights function to protect individual choices. The choice conception implies that an individual can have rights only if he is capable of making choices with which others might interfere. This presumably means that only autonomous individuals are rights-possessors. It seems clear that the interest account distributes rights more widely than does the choice account. (28)

Das begriffliche Argument gegen unveräußerliche Rechte:

- (i) Zum Begriff des Rechts gehört,
 - (a) daß Rechte Vorteile für die RechteinhaberInnen sind,
 - (b) daß diese Vorteile in der Kontrolle bestehen, die Rechte ihren InhaberInnen in den Beziehungen gegenüber anderen Personen gewähren (= Willenstheorie der Rechte).
- (ii) Aufgrund von (i b) gehört es zum Begriff des Rechts, daß InhaberInnen von Rechten ihre Rechte aufgeben oder übertragen können.
- (iii) Unveräußerliche Rechte sind Rechte, die man nicht aufgeben oder übertragen kann.
- (iv) Also kann es keine unveräußerlichen Rechte geben.

The first and most serious argument against inalienable rights is *conceptual*. According to this argument, it is a part of the very concept of a right that its possessor may waive or transfer it to another. Just as it is a conceptual truth that rights imply obligations, so too it is a conceptual truth that the consent of the possessor suspends that obligation; genuine consent is a permission-generating act. (25)

Rights are normatively advantageous to their possessors. But if some rights were inalienable, they could be burdensome to their possessors. Therefore, no rights are inalienable. (25)

If some rights were inalienable, individuals would lack the control necessary for understanding why rights are advantageous to their possessors. (26)

Defenders of the conceptual argument against inalienable rights hold that what is normatively advantageous about rights is the control that is accorded to the possessor of the right in his relations with others. And this control includes alienability. (28)

*Erwiderung auf das begriffliche Argument:*²

1. Man kann Prämisse (i b) bestreiten und stattdessen die Interessentheorie der Rechte vertreten:

[...] one obvious option for defenders of inalienable rights to adopt is to argue for the interest conception of rights. While it may not follow immediately from adopting this option that some rights are inalienable, doing so at least blocks the conceptual argument against inalienable rights. And one suspects that a positive argument for the inalienability of some rights would be easy to construct, given the interest account. (28)

2. Es trifft nicht zu, daß Rechte immer nur Vorteile und keine Lasten für die RechteinhaberInnen mit sich bringen:

Granting the choice conception of rights, then, what can be said in response to the conceptual argument against inalienable rights? Recall that in part the argument is fueled by the idea that rights cannot be burdensome baggage for their possessors. As acknowledged at the outset of this book, rights are normatively advantageous for those who have them. But what does it mean to say that rights cannot be burdensome to their possessors? Most will grant that rights cannot *always* be burdensome to their possessors; for then it is hard to see how they would be advantageous. But does the defender of the conceptual argument hold that rights can *never* be burdensome to their possessors? Such a claim is implausible. Parents have rights to make certain decisions regarding their children, rights that have associated with them responsibilities. Most of the time these rights are not burdensome; indeed, they bring joys and rewards to parents. Surely, however, these rights are sometimes burdensome. I speculate that the same is true of many other rights. (29)

3. Wenn die Veräußerung bestimmter Rechte die Rechte anderer gefährdet, ist es erlaubt, die Veräußerung dieser Rechte zu verbieten: Wenn die Erlaubnis, daß P_2 das Recht von P_1 verletzen darf, nur weil P_1 der Verletzung zugestimmt hat, die Rechte anderer Personen (die nicht zugestimmt haben) gefährdet, dann ist es berechtigt, die Verletzung des Rechts von P_1 nicht zu erlauben.

Addressing the conceptual argument more directly, we may begin with a simple point that even defenders of the choice conception of rights do not think that individuals have unbridled freedom with respect to rights. Since others too have rights, those rights may restrain what the rights-possessor may do or how she may exercise her rights. If exercising a right in a certain way infringes the rights of others, there is at least a reason to believe that exercising the right in that way is wrong. And even defenders of the choice conception will concede that certain agreements between consenting parties are inappropriate and should not be enforced. Again, the uncontroversial case here is when two parties contract to violate the rights of a third individual. If I pay you a sum of money because you agreed to kill Frederick, such an agreement is inappropriate and unenforceable; and this is so, of course, because carrying out the agreement will violate the rights of Frederick. This points the way to an *in principle* argument for the inalienability of some rights that even defenders of the choice conception can accept. **If P_2 's infringing the right of P_1 simply because P_1 consents causes harm or infringes the rights of some innocent**

2 Zur Verteidigung unveräußerlicher Rechte genügt es, zu zeigen, daß sie in der Willenstheorie der Rechte verteidigt werden können. Wenn sie dort verteidigt werden können, können sie auch in der Interessentheorie verteidigt werden:

[...] if inalienable rights can be defended on the choice conception of rights, they can be defended on the interest conception too. This follows if we grant the modest assumption that autonomy is a part of individual welfare for those individuals who are capable of choice. Granting this, we may say: "Because autonomy can be treated as a particular component of individual welfare, anything which counts as a right under the choice conception will also count as such under the interest conception." And given this, any right that can be defended as inalienable under the choice conception can also be defended as inalienable under the interest account. (29)

third party or seriously puts those rights at risk, then there are at least prima facie grounds for prohibiting such a relationship. It is important to emphasize that this “in principle” argument for inalienable rights requires the defender to show that the rights or well-being of a third party are jeopardized *simply because* one individual, P₂, is permitted to infringe the right of P₁ whenever P₁ genuinely consents. The burden of showing this may not be easy. One would guess that advocates of the choice conception of rights would work from the presumption that rights are alienable; the burden of proof is on those who hold that some rights are inalienable. And the in principle argument envisioned here is one for a certain social policy. Put in the abstract, the argument for inalienability that even proponents of the choice conception can accept is this: If allowing P₂ to infringe right R of P₁ simply because P₁ consented will endanger the rights of nonconsenting persons, then it is justifiable not to allow such a relationship. In any given case, it may be difficult to make this argument; and the burden is on the proponent of inalienable rights. But this at least shows that the notion of an inalienable right is not ruled out conceptually if we adopt the choice account of rights. (29f.)

2. Das antipaternalistische Argument

The [anti-]paternalistic argument against inalienable rights might be summarized as follows:

- (i) If right R is inalienable, the rights-possessor’s consent is not sufficient to authorize another in infringing R.
- (ii) If a rights-possessor’s consent is not sufficient to justify another in infringing his rights, then a competent individual’s options are being restricted for that person’s own good.
- (iii) If a competent individual’s options are restricted for his own good, then those who are engaged in restricting his options are engaged in paternalism.
- (iv) But treating competent individuals paternalistically is unacceptable.
- (v) So, no right is inalienable.
- (vi) If no right is inalienable, then all rights are alienable.
- (vii) So, all rights are alienable.³ (26f.)

Erwiderung auf dieses Argument:

1. Man kann Prämisse (iv) ablehnen und einen harten Paternalismus (vgl. FN 3) vertreten.
2. Man kann Prämisse (ii) bestreiten, die besagt: Wenn die Zustimmung der RechteinhaberInnen nicht genügt, um die Veräußerung ihrer Rechte zu erlauben, wird die Kontrolle der RechteinhaberInnen über ihre Rechte zu deren eigenem Wohl eingeschränkt. Mit anderen Worten, der einzige Grund für das Verbot der Veräußerung von Rechten ist der harte Paternalismus. Dies läßt sich bestreiten, indem man zeigt, daß die Verletzung der Rechte unbeteiligter Dritter der Grund für das Verbot der Veräußerung von Rechten ist.

The weak link in the antipaternalistic argument against inalienable rights is premise (ii). According to this premise, if a rights possessor’s consent is not sufficient to justify another in infringing his rights, then a competent individual’s options are being restricted for his own good. This, in effect, says that the *only* ground for not permitting infringement on the basis of consent alone is hard paternalism. But this is doubtful. Indeed, the response to the conceptual argument just sketched shows this. If the basis for denying that consent alone justifies infringement is to protect the rights of nonconsenting third parties, then the normative foundation for inalienable

3 “It is now commonplace to distinguish between two kinds of paternalism – soft paternalism and hard paternalism. Roughly, soft paternalism is restricting a person’s freedom for his own good only when that person’s behavior is substantially nonvoluntary (due, for example, to mental defect, lack of maturity, compulsion, or ignorance). Paternalism toward an incompetent is typically soft paternalism. Hard paternalism is restricting a person’s freedom for his own good, even when his behavior is substantially voluntary. Paternalism toward a competent individual is typically hard paternalism. This argument against inalienable rights is based on rejecting hard paternalism. Premise (iv) should be understood as opposing hard paternalism, but not necessarily soft paternalism.” (27)

rights is not paternalistic. Again, the burden of proof is on the defender of inalienable rights. But if he can show that nonconsenting third parties are threatened, his position need not rest on paternalism.

It is worth noting that the connection between inalienable rights and paternalism might be much stronger if one were to adopt the interest conception of rights. Or, to put the point somewhat differently, if one holds the interest conception of rights, defending inalienable rights seems easier. For if the purpose of rights is to protect the welfare of rights-possessors, then it is not hard to imagine that this goal might better be achieved by denying alienability to at least some rights. But here the interest conception of rights is not employed. (30)

3. Das Argument aus der Unmöglichkeit von Pflichten gegen sich selbst

This argument claims that those who endorse inalienable rights must affirm that there are duties to oneself but, the critics claim, the notion of duties to oneself is implausible. The reason that inalienable rights imply duties to oneself, the critic claims, is this. If a right is inalienable, then certain relations between even consenting individuals are prohibited; and if these relations are prohibited, then individuals have a duty not to engage in them. This argument against inalienable rights might be summarized as follows:

- (i) If right R is inalienable, then the rights-possessor's consent is not sufficient to authorize another in infringing R.
- (ii) If the rights-possessor's consent is not sufficient to authorize another in infringing R, then consenting individuals are prohibited from engaging in a relationship in which one infringes R simply because the other consents.
- (iii) If consenting individuals are prohibited from engaging in a relationship in which one infringes R simply because the other consents, then the prohibition imposed on the would-be consenter is a duty that he has to himself.
- (iv) But individuals cannot have duties to themselves.
- (v) So, no right is inalienable.
- (vi) If no right is inalienable, then all rights are alienable.
- (vii) So, all rights are alienable. (27)

Erwiderung auf dieses Argument:

1. Man kann Prämisse (iv) ablehnen und bestreiten, daß Personen keine Pflichten gegen sich selbst haben können.

2. Man kann Prämisse (iii), derzufolge das Verbot der Veräußerung von Rechten den RechteinhaberInnen Pflichten gegenüber sich selbst auferlegt, aus folgenden Gründen bestreiten:

(a) Das Verbot der Veräußerung von Rechten muß nicht den RechteinhaberInnen (negative) Pflichten gegen sich selbst auferlegen, sondern kann vielmehr anderen Personen (negative) Pflichten auferlegen.

(b) Selbst wenn das Verbot der Veräußerung von Rechten den RechteinhaberInnen (negative) Pflichten auferlegt, müssen dies keine Pflichten gegen sich selbst sein, sondern können auch Pflichten gegenüber anderen sein. Wenn die Veräußerung die Rechte unbeteiligter Dritter gefährdet, ist die negative Pflicht, ein Recht nicht zu veräußern, eine Pflicht gegenüber Dritten.

The initial response to this argument that I shall pursue here is to question premise (iii). According to this premise, if consenting individuals are prohibited from engaging in a relationship in which one infringes a right simply because the other consents, then the prohibition imposed on the would-be consenter (the rights-possessor) is a duty (in the form of a prohibition) that he has to himself. But this can be questioned on either of two grounds. First, though inalienable rights do give rise to certain prohibitions, these prohibitions *need not* be on the rights-possessor. If right R is inalienable, the possessor's consent alone does not justify another in infringing R. **It may be that the only prohibition generated by the inalienability of a right is on others: they are prohibited from**

infringing a person's right if they have no other reason than that he consented. But even if prohibitions associated with inalienable rights are also imposed on rights-possessors, there is a second basis for questioning premise (iii); for the prohibition on the would-be consentor need not be understood as a duty that he has to himself. Again, the response to the conceptual argument above can point the way here. If in selected cases permitting infringement on the basis of consent alone will put nonconsenting parties at risk, then the duty may be owed to the state, or to nonconsenting third parties. As before, the burden is on the defender of inalienable rights; but it need not be an impossible burden. Premise (iii) is certainly not true merely on conceptual grounds. (31)

4. Das Argument aus dem Grundsatz „*Volenti non fit injuria*“

Aus dem Grundsatz „*Volenti non fit injuria*“ („Dem Einwilligenden geschieht kein Unrecht“) folgt, daß es keine unveräußerlichen Rechte geben kann:

- (i) Angenommen, P_1 willigt in die Verletzung ihres Rechts ein und P_2 verletzt daraufhin P_1 s Recht.
- (ii) Wenn R unveräußerlich ist, müßten wir schließen, daß P_2 R unberechtigterweise verletzt hat.
- (iii) Aufgrund des *Volenti*-Grundsatzes können wir aber nicht schließen, daß P_2 R unberechtigterweise verletzt hat.
- (iv) Also kann es keine unveräußerlichen Rechte geben.

Suppose that right R is inalienable. If so, then P_1 's consent alone does not justify P_2 in infringing R. But now suppose that P_2 does infringe P_1 's right to R with P_1 's consent. If the right to R is inalienable, then it seems that we must conclude that P_2 has violated P_1 's right to R. But such a charge seems unwarranted. (32)

Erwiderung auf dieses Argument: (32)

Wenn die Unveräußerlichkeit bestimmter Rechte nicht damit begründet wird, daß die Rechte der in die Veräußerung einwilligenden Personen verletzt werden, sondern damit, daß durch die Veräußerung unbeteiligte Dritte geschädigt werden, ist die Unveräußerlichkeit von Rechten mit dem *Volenti*-Grundsatz vereinbar: Man verbietet die Veräußerung bestimmter Rechte nicht deshalb, weil mit der Veräußerung dem Einwilligenden Unrecht geschähe, sondern weil damit unbeteiligte Dritte geschädigt würden.

I want to argue that one can affirm the “volenti” doctrine – that is, one can agree that to one who has consented, no wrong is done – without being committed to the claim that all rights are alienable. The claim that some rights are inalienable is not incompatible with the “volenti” doctrine.

In order to explain this, recall the difference between infringements and violations. If P_2 infringes P_1 's right to R, that infringement may be justified or unjustified. An infringement of a right may be justified for any one of at least three reasons: P_1 may have forfeited her right to R; P_1 's right to R may have been overridden by a more important consideration; or R may be alienable and P_1 may have validly alienated or waived her right to R. Suppose, however, that P_2 's infringement of P_1 's right to R is unjustified. In that case, it is natural to think that P_2 has violated P_1 's right to R. But this need not be the case. All violations of a right are unjustified infringements; but it is not the case that all unjustified infringements are violations. As was explained in chapter I, in order for P_2 to violate P_1 's right to R, it must be the case that P_2 's infringement of P_1 's right is unjustified and P_1 is the victim. But this leaves open the possibility that P_2 's infringement of P_1 's right to R is unjustified but not a violation of R because P_1 is not properly regarded as the victim.

If P_2 's infringement of P_1 's right to R is unjustified, then the act is wrong. But if P_1 is not the victim, who is? There are two possibilities here. One possibility is that there is no victim at all; P_2 's action is wrong, but there is no one to whom a wrong is done. If P_2 's act were criminal, then it would be a victimless crime. The other possibility is that someone other than P_1 is the victim. The most obvious candidate here would be some

nonconsenting third party. In suggesting how defenders of inalienable rights might respond to arguments against such rights, I pointed out that if nonconsenting parties were adversely affected because P_2 is permitted to infringe P_1 's right to R merely because of P_1 's consent, then this provides a legitimate nonpaternalistic basis for disallowing such a permission. If P_2 proceeds anyway, then presumably society at large is the victim.⁴ (32)

III. Argumente für unveräußerliche Rechte

1. *Unveräußerliche Rechte als wirksamstes Mittel zur Erreichung eines wünschenswerten gesellschaftlichen Ziels*

The general idea here is that there may be certain goals that benefit all of society, and those goals are only achievable, or at least most efficiently achievable, if certain rights are inalienable. We may begin by noting that even the alienability of property rights may be limited. And though limiting alienability is not the same as pure inalienability, the rationale for the former is apt to provide a clue for an adequate argument for the latter. Susan Rose-Ackerman provides some examples, where alienability of property rights is limited because of legitimate social goals. She suggests that prohibiting the sale of selected game is an appropriate way to facilitate the conservation of the species. Of course, a society might attempt to achieve this same goal by proscribing possession and ownership of the species; in some cases, this prohibition may more efficiently achieve the end of conservation. But one can imagine circumstances in which conservation of the species is more likely to be achieved if possession is permitted but sale is forbidden. If this possibility were to obtain, then society would have a utilitarian reason to limit alienation.

Calabresi and Melamed, working with this same idea, suggest that one individual, Taney, may be prohibited from selling his land to another, Chase, a known polluter, because this would harm Taney's neighbor, Marshall, by lowering the value of his property. This may seem a bit far-fetched since the same goal could be achieved by making polluting illegal or very costly to polluters. But if for some reason this would not work, then restricting alienation would serve a good social end. (34)

2. *Unveräußerliche Rechte als beste kollektive Handlungsstrategie zum Schutz des Wohlergehens einer bestimmten Gruppe von Personen*

Für bestimmte Rechte gilt: Wenn sie veräußerlich wären, könnten Situationen eintreten, in denen Personen (z. B. ungelernete Arbeiter) praktisch dazu gezwungen wären, ihre Rechte zu veräußern. Um dies zu verhindern wird die Veräußerung verboten.

The idea in general is this. If right R were waivable, though at some cost to the possessor, and some individuals would benefit from or be willing to waive R, then circumstances would likely develop so that nearly all people (or all people in certain socioeconomic classes) would have little choice but to waive R. Consider this example. Current occupational safety laws do not allow an employee to waive his right to work in a safe environment. Even if an employee signs such a waiver, it has no effect; it does not relieve the employer of his legal obligation to provide a safe working environment, nor does it make the employer immune from civil suit. Suppose, however, that employees could waive their right to a safe working environment; suppose that such a valid waiver were legally efficacious and did relieve the employer of his obligations in this area. The impact on at least unskilled workers is not hard to imagine. For any workers whose bargaining power was limited, prospective employees could demand that a waiver be signed as a condition of employment. Economic needs and lack of

4 McConnell unterscheidet hier also zwischen zwei Arten von *unjustified infringements of rights*:

1. P_2 's infringement of P_1 's right is unjustified *and* P_1 is the victim (= violation of P_1 's rights).
2. Unjustified infringement of P_1 's rights but P_1 is not properly regarded as the victim:
(a) Es gibt keine Opfer, (b) unbeteiligte Dritte sind die Opfer.

other options might quickly give (at least) unskilled workers little choice but to sign the waiver. So merely making waiver an option in this kind of case places an entire class of individuals in a bad position. Only if waiver is not an option for any of them will they be able to retain the protections guaranteed by the right to work in a safe environment.

The argument just given will work in cases where one group of people are at a serious disadvantage in bargaining with a second group and when what is at issue is something persons in the first group cannot plausibly choose to forgo. [...]

Yet another application of this argument can be found in the emerging field of genetic testing. Already through various techniques many genetically based maladies can be detected prior to the advent of any symptoms. And with the relentless progress of the human genome project, it is not far-fetched to suppose that nearly all genetically based maladies will be discoverable well in advance of their onset – presumably as soon as genetic material can be extracted. Such information could be extremely useful to companies that sell life insurance or medical insurance. For by refusing to sell life insurance policies to persons whose deaths are apt to come while they are young and by refusing to sell medical insurance to persons who will be afflicted with an illness that is very expensive to treat, such companies can increase their profits considerably. As a result, some citizens would be unable to purchase health insurance or life insurance. An obvious way to handle this problem is to make it illegal for insurance companies to require genetic testing of prospective buyers. But if that is all that is done, these companies are apt to develop an obvious counterstrategy. If it is merely *permissible* for individuals to be tested and to give the results to others, insurance companies will provide an incentive for many to do just that. They will offer “reduced rates” for those who have a “clean” genetic test. A two-tiered cost structure will develop rapidly, and eventually those who are unwilling to undergo genetic tests or unwilling to give the results to the company will either be priced out of the market or forced to pay exorbitant rates. This practice is unfair and can be prevented only by restricting the options of consenting parties. (35f.)

The second argument is a response to a collective action problem that will put unequal parties in certain situations in more nearly equal bargaining positions. (37)

The second argument applies when ascribing inalienability to certain rights is the best collective action strategy that a group of persons can adopt to protect their own welfare. (38)

3. Unveräußerliche Rechte als Schutz der Interessen unbeteiligter Dritter

Wenn die Erlaubnis, bestimmte Rechte zu veräußern, unbeteiligte Dritte schädigen würde, ist es geboten, die Veräußerung dieser Rechte zu verbieten.

The third argument applies when allowing alienation to justify others in infringing a person’s right will put innocent third parties at risk. (38)

A third argument – available not only to utilitarians, but to others too – appeals directly to the interests of innocent third parties. In the abstract, the argument says that if P_1 ’s consent alone permits P_2 to infringe P_1 ’s right to R, then other individuals’ right to R will be threatened because of this. This sort of argument will be most plausible when it is difficult to determine after the fact whether the original rights-possessor did in fact consent to the infringement, and if so, whether the consent was genuine – that is, freely given and adequately informed.

The right to life, understood minimally as the right not to be killed, provides an example. If this right is inalienable, then the possessor’s consent is not sufficient to justify killing. As is sometimes said, the consent of the victim is no defense for the act of killing. [...] If consent alone did justify killing, abuse would seem all too easy. Murderers would try to make it appear that their victims consented, and if successful they would be off the legal hook. And among the many obstacles to determining whether the person who was killed did genuinely consent is the fact that this person’s testimony is not available to us. It may not follow from this that voluntary euthanasia ought to be forbidden; [...] But we can see why some may want to hold that consent alone should not be allowed as a defense for killing. (37)

What this third argument says is this: If allowing waiver or transfer to permit persons to whom consent has been given to infringe an individual's right puts other rights-possessors at risk (because, for example, it will make it difficult to prevent abuses), then society has legitimate (nonpaternalistic) grounds for not recognizing the legitimacy of such alienation. But for this argument to be convincing, it must show more than the mere possibility that abuse will occur. Defenders of inalienability who employ this argument must show that more harm will result from allowing alienation (that is, allowing consent to justify infringement) than if alienation were not allowed. For it may be that harm to nonconsenting persons will result no matter which of the two policies is adopted. And in that case, the utilitarian will presumably urge the adoption of the policy with which less harm, on balance, is associated. One can see this by looking at a different case. Self-defense is allowed as a justification for killing. Yet clearly the self-defense justification can be abused; persons can commit cold-blooded murder and make it appear to be a case of self-defense. To disallow self-defense as a justification for killing, however, would be unwarranted; for it is quite likely that even more innocent persons would be harmed if this were our social policy. So advocates of this third type of argument have a burden that is greater merely than showing that abuse is possible if alienation is legally allowed. (38)

4. *Kantische Argumente*

Vgl. McConnell, S. 39–41.

IV. Das unveräußerliche Recht auf Leben

1. *Das Recht auf Leben*

Es gibt mindestens zwei Interpretationen des Rechts auf Leben:

Negative Interpretation: Das Recht auf Leben impliziert nur eine negative Pflicht, nämlich die Pflicht, nicht zu töten.⁵

Positive Interpretation: Das Recht auf Leben impliziert neben der negativen Pflicht auch positive Pflichten, nämlich die Pflichten, andere nicht sterben zu lassen und sie zu retten.

Die positive Interpretation muß die Frage beantworten, welche Opfer das Recht auf Leben von potentiellen Rettern verlangen darf:

But how much sacrifice, short of putting one's own life at serious risk, can another's right to life require of one? Suppose that Chang has a fatal form of leukemia and his only chance for survival is to be given a bone marrow transplant. Though unrelated, it happens that Florio is the only person known to be a suitable donor for Chang. Florio can donate bone marrow to Chang without putting his own life at risk. Is Florio morally obligated to make such a donation? And if so, is that obligation based on Chang's right to life? It sounds odd to say that Florio *violates* Chang's right to life if he refuses to donate his bone marrow, though that would be the implication if we say that there is such a duty and that it is based on the right to life.

This case about Florio and Chang is not far-fetched. At least one such case has made its way to the *legal* system in the United States. This is a case involving cousins, Robert McFall and David Shimp. In June 1978, McFall was diagnosed as having aplastic anemia, a usually fatal disease in which the patient's bone marrow fails to produce enough red and white blood cells and platelets. McFall's only hope of survival was to receive a bone marrow transplant. His six siblings were examined, but none was compatible to serve as a donor. Then McFall's first cousin, David Shimp, underwent preliminary tests, and he was determined to be a perfect match for tissue

5 Das läßt offen, wie stark dieses Recht ist, d. h., ob es verwirkt werden kann (und daher das Tötungsverbot nicht mehr gilt) oder ob es von anderen moralischen Gesichtspunkten überwogen werden kann, so daß es erlaubt oder geboten ist zu töten.

compatibility. At that point, however, Shimp refused to undergo further tests and withdrew as a potential donor. Reasons for his refusal were not entirely clear, though apparently the requests of his wife and mother and a longtime family feud were factors affecting the decision. Many people tried to persuade Shimp to change his mind, but he would not. McFall then filed suit to compel Shimp to serve as a bone marrow donor for him. Pennsylvania (Allegheny County) Judge John Flaherty ruled against McFall. Judge Flaherty said that although Shimp's refusal to donate was morally indefensible, nevertheless, there is *no legal duty* to take action to save another's life and certainly no duty to serve as a bone marrow donor for another. Robert McFall died on August 10, 1978.

A more recent case raised similar issues, though it involved minors. Jean-Pierre Bosze was a boy dying of leukemia. His only hope was a bone marrow transplant. But his immediate family members were not suitable to be donors. The boy's father asked the mother of three-year-old twins, Allison and James Curran, whom he had fathered during an affair, to have them tested to determine if one of them might be compatible to serve as a bone marrow donor to their half-brother, Jean-Pierre. The mother refused to permit the testing. The father sued, but predictably the court ruled in favor of the mother. In this case, the court would have overridden the mother's judgment only if she had been acting contrary to the best interests of her children.

Cases like these present some difficulties for defenders of the positive interpretation of the right to life. It appears that this account implies a duty (moral or legal) the existence of which most people would deny. In reply, it seems that defenders of the positive account must argue for one of two claims: either there is after all a (moral) duty to serve as a donor in cases like this, or contrary to appearances the positive interpretation does not entail such duties. (80f.)

2. Das unveräußerliche Recht auf Leben

Wenn das Recht auf Leben veräußerlich ist, genügt die Einwilligung einer Person um ihre Tötung zu rechtfertigen. Wenn das Recht auf Leben unveräußerlich ist, genügt die Einwilligung dazu nicht. Die Einwilligung kann andere nicht von der negativen Pflicht, nicht zu töten, entbinden.

If the right to life is alienable, then the consent of the possessor justifies killing that person. **If the right to life is inalienable, then freely given, fully informed consent does not suspend the duty not to kill; the possessor's consent does not justify killing.** (82)

Problem der positiven Interpretation des Rechts auf Leben mit der Unveräußerlichkeit

Für die positive Interpretation des Rechts auf Leben ergibt sich folgendes Problem:

Gemäß der positiven Interpretation impliziert das Recht auf Leben die Pflicht, andere zu retten. Personen haben jedoch das (legale und moralische) Recht, lebenserhaltende medizinische Maßnahmen zu verweigern. Dieses Recht impliziert die negative Pflicht, solche Maßnahmen zu unterlassen, wenn die Personen es wünschen. Allein die Zustimmung der Personen ändert also die korrespondierende Pflicht anderer. Daraus ergeben sich zwei Möglichkeiten:

1. Man schließt, daß das Recht auf Leben nicht unveräußerlich ist.
2. Man hält an dem unveräußerlichen Recht auf Leben fest, jedoch nur in der negativen Interpretation.

It is well established that competent individuals have the legal and moral right to refuse medical treatment, including life-saving interventions. This is an extension of the right to self-determination, and the consensus is that this is both a moral and a legal right. This right imposes obligations on others: any medical intervention must be withheld or withdrawn if the individual for whom the intervention is intended is competent and so requests. Given this, notice the implication. If the right to life is understood as positive, it implies duties on others to save lives and not to allow persons to die. But if a competent person declines life-saving treatment, that treatment must be withheld or withdrawn. So if the right to life implies a duty to save, then such a duty is suspended with the

possessor's consent. Indeed, not only are others *permitted* to withhold or withdraw life-saving medical treatment at the patient's request, but they are also *required* (legally and morally) to do so. So, if the right to life is positive, the possessor's consent does alter the correlative obligations of others (assuming that defenders of the positive account are not willing to deny that competent persons have a right to refuse life-saving treatment).

Given the right to refuse medical treatment, this still leaves at least two options. One option is to say that this shows that the right to life is alienable. We must be careful, though. For it is possible that only some of the obligations correlative with the right to life are suspended because of the possessor's consent. Another option is to adopt the negative interpretation of the right to life. (81)

Argumente für die Unveräußerlichkeit des Rechts auf Leben

1. Paternalistisches Argument

One obvious rationale to support the inalienability of the right to life is strongly paternalistic, one designed to protect people from their own foolishness. If consent justified killing, too many people in moments of weakness would request of another to kill them. To protect people from making such tragic choices, we do not allow the killer off the hook merely because the victim consented. This rationale provides people with a strong incentive not to comply with a person's request to kill him, thereby protecting that person from his own weakness and irrationality. And presumably this rationale could be used to justify both moral and legal inalienability. (82f.)

2. Die Unveräußerlichkeit des Rechts auf Leben schützt das Leben unbeteiligter Dritter

If you kill me, as I requested, it seems that the conduct in question involves only consenting parties. And to proscribe behavior involving only consenting parties is often to engage in paternalism. But our behavior can affect others; or to put the point more accurately, the fact that society permits us to have such a relationship can affect others. [...] **If society allows the possessor's consent always to count as a legal justification for killing that person, this may well increase the chances that harm to nonconsenting persons will occur.** (83)

To explain the dangers, consider first these somewhat speculative points. **Allowing a person to kill another simply because the latter consents may create a moral climate in which the lives of all persons will be less secure.** People may become hardened and less outraged when someone's life is taken. Such a society may eventually take less seriously a genuine violation of a person's right to life. A legal system cannot, without great difficulty, both claim to place a high value on human life and allow some to kill human beings simply because those individuals have consented.

More important, however, and less speculatively too, **the problems of proof that will arise if the possessor's consent justifies killing are potentially great.** Almost any murderer can claim that his victim consented; and it will be difficult to prove otherwise. (83f.)

Unveräußerliche Rechte und Pflichten gegen sich selbst

If the right to life is inalienable, then P_2 is not justified in killing P_1 simply because P_1 gave free and informed consent. But suppose that P_1 does give P_2 permission to kill him and P_2 does so. Who is guilty of wrongdoing in this case? P_2 ? P_1 ? Both? It at least initially seems that if P_1 is guilty of wrongdoing (because of the inalienability of the right to life), then inalienable rights do imply duties to the self. But such an inference is too quick and unwarranted. For the more important issue in this case concerns to whom the duties are owed. It is possible that both P_1 and P_2 are guilty of wrongdoing (legal or moral, depending on the context) if P_2 kills P_1 with P_1 's freely given, fully informed consent, yet the duties violated by each are not owed to P_1 . As was suggested earlier, the duty may be owed to the community at large. And the most plausible nonpaternalistic basis for designating selected legal rights as inalienable is to appeal to the interests of innocent third parties. If such a position can be adequately defended, then in the interaction between P_1 and P_2 the duties associated with P_1 's inalienable right to life – whether those duties are borne only by P_2 or by both P_1 and P_2 are not owed to P_1 . Such a defense would show that inalienable rights need not imply duties to oneself. (87)

Selbstmord und das unveräußerliche Recht auf Leben

Aus der Unveräußerlichkeit des Rechts auf Leben folgt nicht das Verbot des Selbstmords:

If the right to life is inalienable, does it follow that suicide is always wrong? [...] On the account of inalienability that I have offered in this book, this question need not be answered in the affirmative; the inalienability of the right to life need not preclude the permissibility of suicide. If a right is inalienable, it prohibits a certain relationship between the possessor of that right and others. Such a right may not be waived or transferred to another; the possessor's consent is not sufficient to suspend the duty (duties) correlative with the inalienable right. Thus, what is proscribed by inalienable rights are certain relationships or agreements between two or more consenting parties. So understood, there is some reason to think that the inalienability of the right to life will have implications for the permissibility of voluntary euthanasia, since that practice involves a relationship between consenting parties. But whether the possessor of the right to life may kill himself is a separate issue not determined by the fact that the right to life has the status of being inalienable. (86)

Sterbehilfe und das unveräußerliche Recht auf Leben

Die Unveräußerlichkeit des Rechts auf Leben bedeutet nur, daß die Einwilligung *allein* nicht ausreicht, um die Tötung der einwilligenden Person zu rechtfertigen. Dies ist jedoch damit vereinbar, daß die Einwilligung *zusammen* mit anderen Gründen die Tötung der einwilligenden Person rechtfertigen kann. Die Unveräußerlichkeit des Rechts auf Leben ist daher vereinbar mit freiwilliger aktiver Sterbehilfe: Wenn es neben der Einwilligung noch andere Gründe für die Tötung gibt, kann Sterbehilfe trotz der Unveräußerlichkeit des Rechts auf Leben erlaubt sein. Solche anderen Gründe für Sterbehilfe sind, daß sie folgende Werte respektiert und fördert: Autonomie, Verhinderung von Leiden und Sterben in Würde.

The right to life is legally inalienable because if we allow consent alone to justify killing, this will put at serious risk the rights of nonconsenting parties. But, [...], this does not preclude the possibility that consent in conjunction with other relevant conditions may justify killing. Society should allow killing in such selective cases, however, only if doing so promotes positive values *and* the risks to nonconsenting parties are reduced significantly. Can this sort of case be made for permitting voluntary active euthanasia?

Legally allowing voluntary active euthanasia can promote several important and widely shared values. One such value is autonomy – respecting the freedom and choices of agents. If euthanasia is truly voluntary, then it is carrying out the choice of the person whose death is hastened. At the very least, autonomy imposes negative requirements on agents; they must refrain from interfering with the freedom and choices of others (in the absence of a moral justification for doing so). Not only is truly voluntary euthanasia not contrary to the person's choices, it actually promotes such choices. A second value promoted by allowing voluntary euthanasia is the prevention of suffering. As noted above, it seems that it is part of the concept of euthanasia that the act has as its aim the prevention of suffering for the person whose death is hastened. Persons afflicted with illnesses that are terminal, incurable, and painful, or illnesses that are incurable and debilitating, are the obvious candidates for euthanasia; for they may be individuals whose suffering can be prevented only by hastening death. A third value that voluntary active euthanasia can promote is death with dignity. Some persons fear the way that they will die, independent of whether physical pain is involved. They fear helplessness, total dependency on others, slowly wasting away, and the sort of memory that others will have of their final days. When their death is imminent, they want to die on their own terms. [...]

These are values worth pursuing, I shall assume. But can these values be promoted without seriously putting at risk the rights of nonconsenting persons? If euthanasia is to be legally permitted while avoiding the risks noted above, certain safeguards must be employed. These will be the additional relevant conditions which, when combined with consent, justify euthanasia. To be relevant, these conditions must be such that their satisfaction will make it unlikely that nonconsenting parties will be harmed. I shall suggest five such conditions. [...] The

conditions are the following: (i) the individual requesting that his death be hastened must have an illness that is terminal, incurable, and painful, or incurable and debilitating; (ii) the act of euthanasia must be performed by a physician; (iii) no fee is involved; (iv) the individual's diagnosis and prognosis must be confirmed by a second physician who is financially and professionally independent of the first; and (v) the individual must undergo a psychological examination to establish that his consent was freely given. (89f.)