Translatio versus *Concessio* :

Retrieving the debate about contracts of alienation with an application to today's employment contract

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Liberalism: Consent vs. Coercion

- Liberalism: Basic question is consent versus coercion.
- Past systems of autocracy (pictured as) based on coercion; democracy based on consent.
- Past economic systems (pictured as) based on coercion (slavery and feudalism); capitalism based on consent.
- Progress of society from status (coercion) to contract (Sir Henry Maine).

Democratic capitalism based on consent

- “Fundamentally, there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of coercion—the technique of the army and of the modern totalitarian state. The other is voluntary co-operation of individuals—the technique of the market place.” (Milton Friedman)
- Economic system based on market place, and political system based on “consent of the governed.” The end of history!

Dark Side of Liberal Contractarian Thought

- But sophisticated (e.g., not “divine right”) defenses of autocracy from Roman and medieval times were based on an explicit or implicit contract of alienation, *pactum subjectionis*, from people to ruler.
- And sophisticated defenses of slavery (not to mention feudalism) from Roman law onward were based on explicit or implicit self-sale contracts.

Modern Liberal/Libertarian Thought

- Nozick: free society should allow people to alienate right of self-government to a "dominant protective association." "The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would." (*Anarchy, State and Utopia*, p. 331)
- Modern Economics: "Now it is time to state the conditions under which private property and free contract will lead to an optimal allocation of resources.... The institution of private property and free contract as we know it is modified to permit individuals to sell or mortgage their persons in return for present and/or future benefits." (Economist Carl Christ in Congressional testimony)

Modern Society

- But self-sale is now outlawed in favor of self-rental contract of alienation.
- "Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself; he must **rent** himself at a wage." (Paul Samuelson, *Economics*)
- Modern moral and legal philosophers (e.g., John Rawls, not to mention Nozick) have no inherent critique of the alienation contract to hire or rent persons—the employment contract that is the basis for our current economic system.
- They may fuss about the quality of the consent, coercive background conditions, exploitative wages, dangerous working conditions, etc.—but they have no inherent critique of renting other human beings. The voluntary renting of persons is not even raised as a moral problem to be discussed.

Basic Thesis

Consent		Coercion
Delegation (*concessio*)	Alienation (*translatio*)	

- Modern liberalism presents debate as being: Consent vs. Coercion (top row).
- But actual historical debates had autocracy and slavery defended on contractarian grounds with explicit or implicit alienation (*translatio*) contracts.
- Hence the democratic and anti-slavery movements developed theories of inalienable rights which were critiques of contracts of alienation (*translatio*) in favor of contracts of delegation (*concessio*).
- Thus the sophisticated historical debate was: *Concessio* vs. *Translatio* (2nd row).
- But the "problem" is that inalienable rights theory, once retrieved and understood in modern terms, also applies against the contract of alienation that is the basis of our current economic system, the self-rental or employment contract.

History of Voluntary Slavery Contracts

- Bible: If at Jubilee, slave says “I will not go out from you”, slavery becomes permanent.
- Roman Law: Institutes of Justinian:
  * Explicit self-sale contract;
  * Plea-bargain death sentence (e.g., prisoner of war) into lifetime of servitude; or
  * Born of slave mother so years of food, clothing, and shelter need to be worked off over lifetime.
- Natural law philosophers, e.g., Grotius, Pufendorf, Suarez, were all quite explicit on alienability of liberty.

John Locke: Father of Liberalism

- Locke only condemned slavery where master had right to kill slave. Civilized slavery contract was OK.

  "For, if once *Compact* enter between them, and make an agreement for a limited Power on the one side, and Obedience on the other, the State of War and *Slavery* ceases, as long as the Compact endures.... I confess, we find among the *Jews*, as well as other Nations, that Men did sell themselves; but, 'tis plain, this was only to *Drudgery, not to Slavery*. For, it is evident, the Person sold was not under an Absolute, Arbitrary, Despotical Power." (2nd Treatise, §24)

- Locke also accepted the plea-bargain argument, e.g., for prisoners of war.

  "Indeed having, by his fault, forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it, may (when he has him in his Power) delay to take it, and make use of him to his own Service, and he does him no injury by it. For, whenever he finds the hardship of his Slavery out-weigh the value of his Life, 'tis in his Power, by resisting the Will of his Master, to draw on himself the Death he desires." (2nd Treatise, §23)

- According to Peter Laslett, Locke seemed to justify slavery in the Carolinas by seeing slaves as captives in wars in Africa who chose servitude over death.

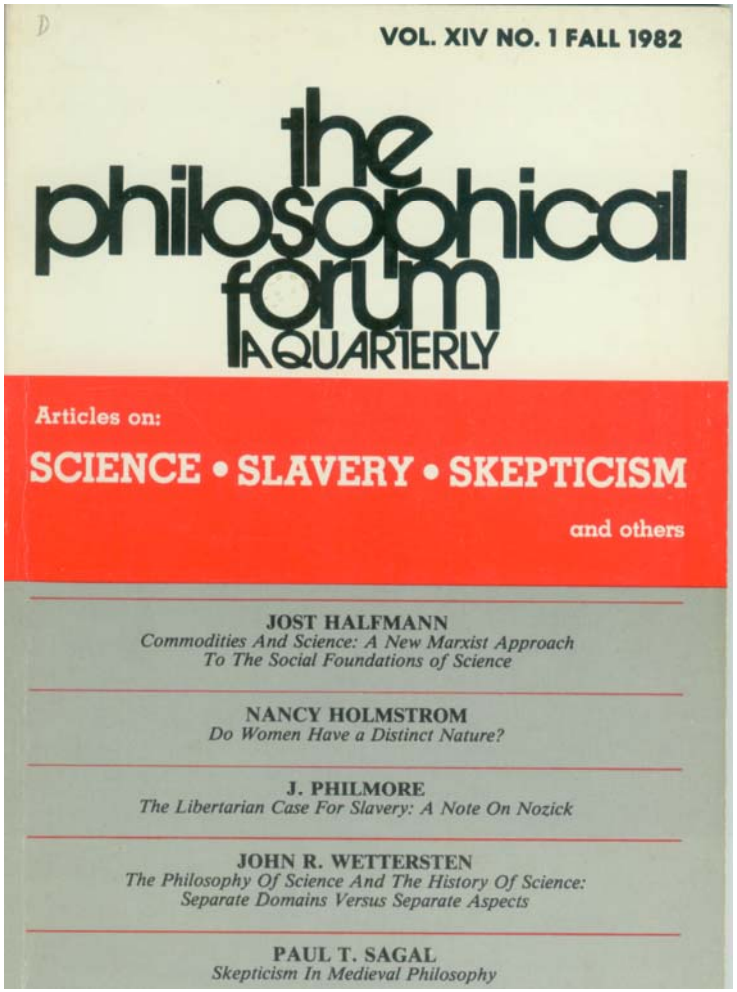
Rev. Samuel Seabury: Liberal Defender of Antebellum Slavery

- “From all which it appears that, wherever slavery exists as a settled condition or institution of society, the bond which unites master and servant is of a moral nature; founded in *right*, not in *might*; ... . Let the origin of the relation have been what it may, yet when once it can plead such prescription of time as to have received a fixed and determinate character, it must be assumed to be founded in the consent of the parties, and to be, to all intents and purposes, a compact or covenant, of the same kind with that which lies at the foundation of all human society.” (*American Slavery Justified by the Law of Nature,* 1861)
- “ "Contract!" methinks I hear them exclaim; "look at the poor fugitive from his master's service! He bound by contract! A good joke, truly." But ask these same men what binds them to society? Are they slaves to their rulers? O no! They are bound together by the COMPACT on which society is founded. Very good; but did you ever sign this compact? Did your fathers every sign it? "No; it is a tacit and implied contract. " ” (*American Slavery Justified by the Law of Nature,* 1861)

History of Contracts of Subjection

- Roman law: Institutes of Justinian: "Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerning his *imperium*, have yielded up to him all their power and authority."
- Medieval law: "Aquinas had laid it down in his *Summary of Theology* that, although the consent of the people is essential in order to establish a legitimate political society, the act of instituting a ruler always involves the citizens in alienating—rather than merely delegating—their original sovereign authority." (Quentin Skinner)
- Thomas Hobbes: *Pactum subjectionis* is a "covenant of every man with every man, in such manner as if every man should say to every man, *I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that you give up your right to him and authorize all his actions in like manner*." (*Leviathan*, 1651)
- Harvard's Robert Nozick: A free society would authorize alienation of one's right of self-determination to a "dominant protective association."

"J. Philmore": Libertarian Case for Slavery



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THE LIBERTARIAN CASE FOR SLAVERY

J. PHILMORE

Our property in man is a right and title to human labor. And where is it that this right and title does not exist on the part of those who have money to buy it? The only difference in any two cases is the tenure.[1]

INTRODUCTION

A prominent economist has quipped that free market libertarianism is derived from liberalism by taking the limit as common sense goes to zero. There is an element of truth in this because what liberals take as "common sense" often turns out to be only a shared prejudice. The Harvard philosopher, Robert Nozick, has carried out this limiting process of taking liberalism to its only logical conclusion: libertarianism.[2] Nozick's uncompromising statement of the libertarian credo represents something of a watershed in modern social and moral philosophy because of its explicit acceptance of voluntary contractual slavery.

> The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would.[3]

It seems to be a basic shared prejudice of liberalism that slavery is inherently involuntary, so the issue of genuinely voluntary slavery has received little scrutiny. The perfectly valid liberal argument that involuntary slavery is inherently unjust is thus taken to include voluntary slavery (in which case, the argument, by definition, does not apply). This has resulted in an abridgement of the freedom of contract in modern liberal society.

> Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself: he must *rent* himself at a wage.[4]

Carole Pateman's "The Sexual Contract"

- "Philmore, for example, argues for a '*civilized* form of contractual slavery'.... Philmore makes no bones about the fundamental role of the employment contract in contractarian argument. He asserts that 'any thorough and decisive critique of voluntary slavery... would carry over to the employment contract.... Such a critique would thus be a *reductio ad absurdum*'." [Pateman 1988, 71]
- "The contractarians have performed a service by defending the 'civilized' slave contract, so revealing the extreme fragility of the criterion of temporal limitation of the employment contract as a distinguishing mark of a free worker....The contractarian argument is unassailable all the time it is accepted that abilities can 'acquire' an external relation to an individual, and can be treated as if they were property. To treat abilities in this manner is also implicitly to accept that the 'exchange' between employer and worker is like any other exchange of material property." [147]
- "The answer to the question of how property in the person can be contracted out is that no such procedure is possible. Labour power, capacities and services, cannot be separated from the person of the worker like pieces of property. The worker's capacities are developed over time and they form an integral part of his self and self-identity; capacities are internally not externally related to the person." [150]

History of Inalienable Rights Theory I

- Stoics: Body can be enslaved but soul is “sui juris”—the “inner part cannot be delivered into bondage”.
- Martin Luther: Inner part that cannot enslaved becomes “liberty of conscience”:

  “Besides, the blind, wretched folk do not see how utterly hopeless and impossible a thing they are attempting. For no matter how much they fret and fume, they cannot do more than make people obey them by word or deed; the heart they cannot constrain, though they wear themselves out trying. For the proverb is true, "Thoughts are free." Why then would they constrain people to believe from the heart, when they see that it is impossible?” (*Concerning Secular Authority*, 1523)
- Francis Hutcheson: Translated “liberty of conscience” into notion of inalienable rights. “Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable.” (*System of Moral Philosophy*, 1755)

History of Inalienable Rights Theory II

- Thomas Jefferson: “Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important.” (Garry Wills, *Inventing America*, 1979).
- “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”
- “Like the mind's quest for religious truth from which it was derived, self-determination was not a claim to ownership which might be both acquired and surrendered, but an inextricable aspect of the activity of being human.” (Staughton Lynd, *Intellectual Origins of American Radicalism*, 1969).

Hegel's Inalienability Critique of Slavery Contract

"The reason I can alienate my property is that it is mine only in so far as I put my will into it. Hence I may abandon (*derelinquere*) as a *res nullius* anything that I have or yield it to the will of another and so into his possession, provided always that the thing in question is a thing external by nature. ... Therefore those goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible." (*Philosophy of Right*, §65-66)

Delegation vs. Alienation

- Started with late Medieval and Renaissance distinction between contracts of alienation (*translatio*) and delegation (*concessio*).
- "During the Middle Ages the question was much debated whether the *lex regia* effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty at the end of this period, like Marsiglio of Padua in his *Defensor Pacis*, took the latter view." (Edward Corwin, 1955)
- "The theory of popular sovereignty developed by Marsiglio [Marsilius] and Bartolus was destined to play a major role in shaping the most radical version of early modern constitutionalism. Already they are prepared to argue that sovereignty lies with the people, that they only delegate and never alienate it, and thus that no legitimate ruler can ever enjoy a higher status than that of an official appointed by, and capable of being dismissed by, his own subjects." (Q. Skinner, 1978)

Inalienability Critique of *Pactum Subjectionis*

- "There is, at least, *one* right that cannot be ceded or abandoned: the right to personality…They charged the great logician [Hobbes] with a contradiction in terms. If a man could give up his personality he would cease being a moral being. … There is no *pactum subjectionis*, no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity." (Ernest Cassirer, *Myth of the State*, 1963)

General Form of Inalienability Theory

- Alienation contract is one that puts person in legal position of a non-person or a person of diminished capacity.
- But genuine consent of adult person with full capacity to an alienation contract cannot create a *de facto* non-person or *de facto* diminished capacity.
- Hence the Law accepts a surrogate performance as 'fulfilling' the contract: "Obey the master."
- But then the **legal** rights of the person are legally reduced to those of a non-person or diminished person as long as the contract is 'fulfilled' by obeying the master.
- Thus alienation contract is legalized fraud on institutional scale.
- Since the contract to be a non-person or diminished person cannot actually be fulfilled, it is an impossible and inherently invalid contract.
- Hence the rights that such a contract would pretend to alienate are inherently inalienable—just like the characteristics of being a person that such a contract tries to alienate.

Criminality: Understanding Inalienability

- Moment of Truth: Legal system admits the legal fiction behind alienative relation when legal 'non-person' commits a crime.
- Antebellum judge ruled that slaves "are rational beings, they are capable of committing crimes; and in reference to acts which are crimes, are regarded as persons. Because they are slaves, they are … incapable of performing civil acts, and, in reference to all such, they are things, not persons."
- Same for modern alienation relation where persons are rented:

  "All who participate in a crime with a guilty intent are liable to punishment. A master and servant who so participate in a crime are liable criminally, not because they are master and servant, but because they jointly carried out a criminal venture and are both criminous." (*Law of Master and Servant*, 1967)

Application to Employment Contract

- Employer-employee or employment contract can be viewed as the rental version of the self-sale contract and as the workplace version of the *pactum subjectionis*.
- As rental contract, it is legal alienation of responsible human actions. Surrogate performance is “obey the employer” and resulting legal rights are same as for a rented instrument: no legal ownership of produced products and no legal liability for used-up inputs—only get the rental payments (wages or salaries) for the labor.
- Moment of truth is the criminous employee: The servant in work becomes the partner in crime—with full legal co-responsibility along with employer for the results of actions they perform together (“fruits of their labor”).

The Workplace *Pactum Subjectionis*

- As a workplace constitution, the collectively bargained employment contract is a contract of alienation, not delegation. The employer is not the delegate, representative, or trustee for the employees.
- "The analogy between state and corporation has been congenial to American lawmakers, legislative and judicial. The shareholders were the electorate, the directors the legislature, enacting general policies and committing them to the officers for execution. …

  Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation whose consent must be sought." (Abram Chayes, 1966)
- And contract with those who are governed, i.e., those who are under the authority of management, is the employment contract, a contract of alienation.

Coverture Marriage Contract

- "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture." (Blackstone, 1765)
- In fact, wife did not become an individual without separate attributes of being a person—only legally. 'Fulfilling' contract was obeying the husband. Legal consequence was no contracts/ownership except through the "one person in law" of her husband.
- However, when the wife committed a crime, ...
- Same inalienability critique applies to the coverture contract which is indeed not recognized as being legally invalid.

Consumptive Employment Contract

- A new alienation contract not found empirically.
- Self-managed consumption: consumer buys inputs, consumes goods, and owns waste products or byproducts.
- Reorganize consumption under an employment relation:
  * Consumer pays employer to be employed to consume goods.
  * Employer buys inputs to be consumed and owns outputs (waste products or byproducts).
  * Opposite of productive employment contract.
- Contract is invalid for same reason as productive version.

Rethinking Corporations

- Common view is that corporate owners right to manage workers is based on the ownership of the corporation—just as in medieval times, owner of land was lord over those living on the land.
- But corporate ownership is only indirect ownership of corporate assets and thus right to make workers trespassers—not the right to manage them.
- Management rights come solely from the employment contract, not directly from asset ownership.
- This if employment contract is invalid, then conventional corporations are only asset-holding shells whose only economic return can come from renting out assets to the producers in labor-managed firms.
- “Capitalist” production not based on “private ownership of means of production” but on the employment contract—and thus “capitalism” is a misnomer.

Debate about Employment ("Capitalist") System

- First misformulation is that system was based on private property (private ownership of capital).
  * Marx accepted misformulation and then argued for system based on "public ownership of means of production."
- Second misformulation was "consent vs. coercion" of liberal philosophy.

Consent		Coercion
Delegation (*concessio*)	Alienation (*translatio*)	

  * Again Marx accepted the misformulation but argued that labor contract was "really" coercion.

Sphere of Analysis of the System

- In sphere of exchange, Marx did not challenge capitalist *quid pro quo* ("a very Eden of the innate rights of man") but sought to find "exploitation" in sphere of production.
  * Thus Marx missed entirely the inalienability critique of the labor contract which was even available in his time in Hegel.
- In sphere of production, Marx accepted capitalist framing of analysis as a value theory and developed his own "labor theory of value"—now abandoned even by Marxists.
  * Thus Marx missed the reframing of analysis as a theory of property appropriation, the labor theory of property (beyond scope of this talk), which was also available in his time (e.g., Proudhon and Hodgskin).

Marx as Perfect Foil for "Capitalism"

- On every major question, Marx accepted the capitalist misformulation of the question.
- "Capitalism": A system based on property or on contract? Marx not only accepted but sponsored the idea of the system as based on "private ownership of the means of production."
- Liberalism: Marx accepted the "consent vs. coercion" formulation but argued that the system was "really" coercive.
- Sphere of analysis: Marx did not challenge capitalist claim of *quid pro quo* in labor contract, but hoped to prove "exploitation" in the sphere of production.
- Value theory: Marx accepted analysis of production using value theory and developed his own (rather hopeless) "labor theory of value" rather than the labor theory of property appropriation.

Conclusions

- Liberalism's basic question of "consent vs. coercion".
- Retrieval of contractual defenses of slavery and autocracy.
- Real debate was between contracts of alienation (*translatio*) and contracts of delegation (*concessio*).
- Retrieval of inalienability theory of anti-slavery and democratic thinkers.
- Marx being wrong on all major questions—and thus was perfect foil for those defending the employment system.
- Inalienability analysis implies abolition of employment (self-rental) contracts along with the already abolished self-sale contracts, political constitutions of subjection, and coverture marriage contracts.

The End

"*Translatio vs. Concessio*"

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Along with the book "*Property and Contract in Economics: The Case for Economic Democracy*"