PROPERTY

Cases, Concepts, Critiques

Edited by

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> In 1954, when the government decided to encourage electric utilities to venture into nuclear power, the companies at first were enthusiastic; but after studying the consequences of a possible major nuclear accident, they and such equipment manufacturers as General Electric and Westinghouse backed off. They feared damage claims that could bankrupt them. Insurers refused then and refuse now to provide full coverage. And so the utilities told Congress they would build nuclear plants only if they first were to be immunized from full liability. Congress responded with the Price-Anderson Act of 1957. Because of this law—a law that legalized financial unaccountability—nuclear power technology exists and is growing today. . . . In 1965, when it recommended that the Price-Anderson Act be renewed, the Congressional Joint Committee on Atomic Energy "reported that one of the Act's objectives had been achieved—the deterrent to industrial participation in the atomic energy program had been removed by eliminating the threat of large liability claims." . . . In December 1975 . . . Congress voted to extend the law for ten more years.[9]

In the face of such policies we have attempted to demonstrate that the logic of property leads one from the notion of private property (the right to exclude) with a kind of inevitability to the notion of common property (the right not to be excluded)—unless one proposes gerrymandering the concept of private property. At least this is true with respect to certain kinds of things which have traditionally been seen to fall within the range of what can rightfully become (and remain) private property. A more elaborate specification of what kinds of things these might be is a topic that goes much beyond the scope of this paper. And, of course, there remains the task of filling out our incomplete notion of common property, i.e., formulating the principles for procedures for fair-taking and fair-using.

Property and Production

An Introduction to the Labor Theory of Property

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INTRODUCTION

The purpose of this paper is to outline the modern development of the labor theory of property, and to briefly present a major application of the

[9] Morton Mintz and Jerry S. Cohen, *Power, Inc.* (New York: The Viking Press, 1976), pp. 513f. Other such liability exclusionary examples could be cited.

theory, the property theoretic critique of capitalist production. Most of the themes we will touch on can be illustrated using a certain pedogogical example: *the hired criminal example.*

An entrepreneur hires both labor and capital. For labor, he hires some workers for the performance of general services at a fixed wage and, for capital, he hires a van at a fixed rental. The van owner only rents out the van and is not personally or otherwise involved with the entrepreneur. The entrepreneur then employs his capital and labor to commit a crime, say, to rob a bank. After the crime, the bank robbers, i.e., the employer and his employees, are apprehended. But in court the employees tell the judge that they are just as innocent as the van owner. They say only the entrepreneur is responsible. They bring in economists and lawyers to testify, as experts, that "labor is a commodity" just like the services of the van, and that the workers and the van owner have symmetrical roles as sellers of certain commodities. It is the buyer who chooses the particular use of the commodities. The sellers of the services are to receive a fixed remuneration while the buyer assumes the risk of the enterprise. The suppliers of the hired inputs, the van owner and the workers, bear no responsibility for the results of the entrepreneur's enterprise. It's his business, after all.

The judge would, no doubt, be unmoved by this *hired labor defense.* He would point out that the hired worker's role is not really symmetrical with that of the van owner. The van owner could turn over the use of the van to the entrepreneur and not have any personal involvement in the van's use. If that were ascertained to be the case, the van owner would be innocent. However, a worker *cannot* turn over the use of his self to the entrepreneur and not have any personal involvement in the employment of his labor. Unless a worker is for some reason incapacitated and doesn't know what he is doing, a worker is inexorably involved and inescapably de facto responsible for the results of his intentional actions. Labor services are thus *not* a transferable commodity like the services of a van. Hence the judge would reject the hired labor defense.

If it were legally ascertained, say, by a jury trial, that the entrepreneur and his employees were in fact the people responsible for robbing the bank, then they *all* would be held legally responsible for the crime. The employees in work become the partners in crime. It isn't just the entrepreneur's business—after all.

In this hired criminal example, there need not be any criminal intent in the original contract. The criminal deed might have occurred within an on-going and otherwise normal employment relation. A common first reaction to this example is to assert that the employees are legally liable *because* an employment contract which involves the commission of a crime is null and void. But that puts the cart before the horse. The employees are legally liable for the crime, not because of the legal status of their contract, but because they committed the crime. Indeed, it must first be legally ascertained that the employer and the employees committed a crime in order to know that the commission of a crime was in fact involved in the employment relation. Their guilt is the reason for the nullification of the contract, not vice versa.

By rejecting the hired labor defense, the judge has, in fact, "dynamited" the legal foundations of capitalist production. In asserting that people are to be held legally responsible for the results of their intentional actions, the judge is applying the old labor theory of property ("People should get the fruits of their labor") in the courtroom. Unless the judge wanted to hold that the workers suddenly became machines like the van when the enterprise was not criminal, the judge would have to arrive at the same conclusion that *all* the people who worked together in the enterprise should have the legal responsibility for the results of their actions. Since, as the legal and economic experts might point out, the employer-entrepreneur has all the legal responsibility in a normal capitalist enterprise, the judge would have to conclude that this is unjust.

The judge's insight into the factual non-transferability of labor was really an insight into the old natural law doctrine of inalienable rights—in this case, the right to the results of one's actions ("fruits of one's labor"). A person cannot in fact transfer the use of his actions or "labor services" to another person the way that a van's services can be transferred—even when the enterprise is not criminal. The factual non-transferability of labor is the same if the activity is lawful or not. But the Law treats the two cases in diametrically opposite ways. When the enterprise is lawful, the employment contract is accepted as legally valid so the labor services are legally transferred and the workers, like the van owner, have no legal responsibility for the results of the enterprise. But unless the judge wanted to hold that lawfulness suddenly made labor services factually transferable like van services, the judge would have to conclude that the employment contract legally alienates that which is inalienable and thus that the contract is invalid on natural law grounds.

The hired criminal example is a parable that illustrates the labor theory of property and the critique of capitalist production based upon that theory. We will now develop these themes in more detail.

THE DISTRIBUTIVE SHARES METAPHOR

Conventional economic theory analyzes production in terms of the distributive shares paradigm—which pictures certain shares in the value of the product of production as being distributed to the suppliers of the various inputs. In particular, the capital owners, herein called "Capital," and the workers, herein called "Labor," are viewed as having basically symmetrical roles in that each gets a certain share of the pie. The traditional debate focuses on the determination of the share size.

As a description of property rights, the distributive shares picture is quite false. The simple fact is that one party, such as the employer in a capitalist firm, *owns all* the product, i.e., all the produced outputs. For example, Ford Motor Co. doesn't just own Capital's "share" of the Fords produced; it owns all of them. Capitalist economists are, of course, aware of this "legalistic" fact, but they feel called upon to metaphorically reinterpret the product as being "shared" or "distributed" in order to account

for the income received by the input suppliers. How could one party, such as Capital, get all the product when there are several scarce inputs?

THE CONCEPT OF THE WHOLE PRODUCT

The simple facts (sans metaphor) will again suffice. Property can take either a positive or negative form as assets or liabilities, i.e., as property rights or property obligations. When economists speak of the "product," they refer only to the positive product—the assets produced in the production process (the outputs). But there is also a negative product. In order to produce the output assets, it is necessary to incur the liabilities for using up the inputs. And one can "own" or hold liabilities just as one can own assets. The fact which accounts for the other input suppliers' income without the shared pie metaphor is the fact that the one party who owns all the positive product also owns all the negative product, i.e., also holds all the liabilities for the used up inputs. For example, the Ford Motor Co. owns not only all the Fords produced but also holds all the liabilities for the inputs such as steel, rubber, glass, and labor used up in the production process. The other input suppliers, instead of being co-claimants of the product, are only creditors of that one party who owns all the positive and negative product.

We have seen that in order to accurately describe the property relations of production, it is necessary to expand the customary concept of "product" to include the negative product (input liabilities) in addition to the usual positive product (output assets). We will call this bundle of property rights and obligations, the *whole product.* In short, "whole product" = "positive product" + "negative product" = "output assets" + "input liabilities." In any productive enterprise, one legal party owns the whole product of production. Moreover, since the outputs were not created before and the inputs were not used up before, the whole product owner is the *initial* or *first* holder of that bundle of property rights and obligations. The legal phraseology for the initial acquisition of property, as opposed to the second-hand acquisition by transfer from a prior owner, is the *appropriation* of property. Hence we have the following basic structural characteristic of production property relations: *one party appropriates the whole product of a productive enterprise.*

WHO IS TO BE THE FIRM?

In a capitalist firm, the whole product is appropriated by the employer, typically the party herein called Capital consisting of the owners of the capital used in the production process. In a *socialist* firm, it is "Society" in its organized form, the government, which appropriates the whole product. In the type of firm which is called *self-managed, labor-managed, laborist,* or a *workers' cooperative,* it is the party herein called Labor consisting of all those who work in the enterprise who would appropriate the whole

product. Hence the basic question which differentiates the systems of capitalist production, socialist production, or self-managed production is the question: "Who is to appropriate the whole product of production?" If we use the word "firm" as an abbreviation for "whole product appropriator," then the question could be paraphrased: "*Who is to be the firm?*" Capital, Society, or Labor?

Capitalist economists make no attempt to justify Capital's appropriation of the whole product. Instead, they evade the matter by using the distributive shares metaphor to misrepresent Capital and Labor as each getting a "share of the product." Since the size of the "pie shares" in the functional distribution of income is largely a function of prices, capitalist economists base their "story" on a theory of prices. However, the principal point about the neoclassical theory of prices is not that it is true or false, but that it is irrelevant to the debate over capitalist production. Capitalism is not a particular type of price system. Capitalism is a particular type of property system; the system which allows Capital, by means of the employment contract, to appropriate the whole product of a production process. The best of price theories would only determine the market value of the assets and liabilities in the whole product, but would not determine who is to acquire that bundle of property rights and obligations in the first place.

THE LABOR THEORY OF PROPERTY

The *labor theory of property* asserts that people have the natural right to the positive and negative fruits of their labor, i.e., that people have the natural right to own the positive fruits of their labor and the natural obligation to bear the negative fruits of their labor. In any given productive enterprise, the production of the outputs and the using up or consumption of the inputs are, respectively, the positive and negative fruits of the joint labor of the people working in the enterprise. Hence, the labor theory of property implies that the working community of the enterprise (i.e., Labor in the inclusive sense) has the natural right to the outputs and the natural liability for the inputs, i.e., that Labor should appropriate the whole product. Thus if labor is the just and legitimate basis for private property appropriation, then capitalist production—far from being allegedly "founded on private property"—stands in direct contradiction with the institution of private property. It is the system of production called *workers' self-management, labor-management, laborism,* or *workers' cooperation* which is implied by the basic property principle of appropriating the fruits of one's labor.

The theoretical attack on capitalist production has usually been in the name of a rather ill-defined group of theories collectively known as "the labor theory of value." But that broad heading includes two quite different "labor theories": (1) the marxist labor theory of value, and (2) the labor theory of property. We have already indicated the failure of *any* theory of value or prices, the neoclassical or the marxist theory, to come

to grips with the basic structure of production property relations. It is only the property theoretic version of the "labor theory of value," the labor theory of property, which addresses the basic structural and non-value-theoretic question which separates self-managed production from capitalist production in its private or public enterprise forms, "Who is to be the firm?"

Within political economy, the labor theory of property was initially developed by the classical laborists such as Thomas Hodgskin and William Thompson in England and P.-J. Proudhon in France.[1] These early efforts have been largely obscured by Marx's mistaken attempt to develop the "labor theory" as a value theory—as if capitalism was a set of value relations instead of property relations. However, the full development of the labor theory of property was also impaired by two important deficiencies in the classical treatment: (1) the neglect of the negative part of the whole product, and (2) the failure to interpret the labor theory in terms of the juridical norm of legal imputation in accordance with de facto responsibility.

With regard to the neglect of liabilities, the labor theory has often been expressed in the rhetorical claim of "Labor's right to the whole product" where the expression "whole product" was taken as referring to only the positive product. But the claim hardly makes sense without the inclusion of the negative product. Suppose that, in a self-managed economy, firm A produces capital goods such as drill presses which are then used by firm B to produce consumer goods. How can the firm A workers appropriate the positive fruits of their labor unless the firm B workers appropriate the negative fruits of their labor (i.e., bear the liabilities for using up the machine services)? Unless the firm A workers are willing to give away their positive product for free (and live on air), the firm B workers must bear the negative fruits of their labor and satisfy those liabilities by purchasing or leasing the capital goods.

THE JURIDICAL PRINCIPLE OF IMPUTATION

The failure of the classical labor theorists to interpret the labor theory in terms of responsibility has been the single greatest impediment to the understanding and development of the theory. For example, the classical treatment of the labor theory notoriously failed to give a relevant and definitive differentiation of labor from the services of capital and land, e.g., the many attempts to show that "Only labor is productive" or that "Only labor creates value." Yet the differentiation is immediate on the responsibility interpretation since the non-human factors of production (capital and land) lack the capacity for responsibility. All the factors are

[1] Anton Menger, *The Right to the Whole Produce of Labour: The Origin and Development of the Theory of Labour's Claim to the Whole Product of Industry*, Macmillan and Co., London, 1899 (reprinted by Augustus Kelly).

productive in the sense of being causally efficacious, but *only labor is responsible.*

Anyone who can understand why guns and other instruments—no matter how efficacious—are not hauled into courts and charged with crimes can also understand that of all the factors of production, only labor is responsible. It is indeed a simple fact. Yet the capitalist and marxist debate on "the labor theory" has been so incredibly ingrown and dogmatic on both sides that the reader is invited to survey the entire past capitalist and marxist literature for any appreciation of the relevance of that simple fact.

We are concerned with *responsibility* in the ex post sense of the question "Who did it?"—not with "responsibilities" in the ex ante sense of one's duties or tasks in an organizational role. A person or group of people are said to be *de facto* or *factually responsible* for a certain result if it was the purposeful result of their intentional (joint) actions. The assignment of *de jure* or *legal responsibility* is called *imputation.* The fundamental *juridical principle of imputation* is that de jure or legal responsibility is to be imputed in accordance with de facto or factual responsibility. For example, the legal responsibility for a civil or criminal wrong should be assigned to the person or persons who intentionally committed the act, i.e., to the de facto responsible party (if any). Since, in the economic context, intentional human actions are called "labor," we have the following equivalence.

> *The Juridical Principle of Imputation:* People should have the legal responsibility for the positive and negative results of their intentional actions.
>
> *The Labor Theory of Property:* People should legally appropriate the positive and negative fruits of their labor.

This equivalence was perhaps not evident in the classical treatment of the labor theory of property because that treatment ignored the negative product, and yet it is the negative side of the imputation principle that is applied explicitly in civil and criminal trials.

In view of this equivalence, the labor theory of property emerges from the underground caverns of radical political economy into the center of the "Temple of Jurisprudence." The labor theory of property is not just some arcane doctrine ritualistically mentioned, usually in connection with Locke, in books on philosophy, law, or the history of thought; it is the standard principle of imputation applied, day in and day out, in the courts of law. Indeed, the idea of assigning legal responsibility in accordance with de facto responsibility is so basic and obvious that it usually isn't even formulated as a "principle." Instead, it is the exceptions to the rule that are labelled or flagged. That is, whenever on other grounds of public policy a party is held legally responsible for something that was not the result of their actions—as when a master is held legally liable for the tort of his servant—then the exception to the rule is explicitly labelled as "vicarious liability" or "strict liability" (see any lawbook on Agency).

MARGINAL PRODUCTIVITY THEORY

The equivalence between the labor theory of property and the juridical imputation principle pushes the roots of the labor theory back in history, far beyond Locke, to the time when Humanity emerged from the world-view of primitive animism. Animism attributed the capacity for responsibility not just to persons but also to non-human entities and forces. Accordingly, in order to escape the grasp of the imputation principle that imputes responsibility only to persons, capitalist economists have had to resurrect a metaphorical form of primitive animism. This "sophisticated animism" reaches its highpoint in the metaphorical interpretation of marginal productivity theory which views productivity in the sense of causal efficacy *as if* it were responsibility. Since the labor theory can be expressed in two equivalent ways, as the principle of property appropriation and as the juridical imputation principle, one might expect the corresponding two metaphorical versions of marginal productivity theory. The property version was developed by John Bates Clark[2] who viewed the inputs as generating property claims on shares of the product, and the imputation version was developed by Friedrich von Wieser[3] who viewed shares in the product as being imputed to the various inputs.

Wieser's contribution is remarkable because he is one of the few capitalist economists to have recognized (in print) the simple fact that only labor is responsible.

> The judge, . . . who, in his narrowly-defined task, is only concerned with the *legal imputation,* confines himself to the discovery of the legally responsible factor,—that person, in fact, who is threatened with the legal punishment. On him will rightly be laid the whole burden of the consequences, although he could never by himself alone—without instruments and all the other conditions—have committed the crime. The imputation takes for granted physical causality. . . .
>
> . . . If it is the moral imputation that is in question, then certainly no one but the labourer could be named. Land and capital have no merit that they bring forth fruit; they are dead tools in the hand of man; and the man is responsible for the use he makes of them.[4]

Since capitalist production was in obvious conflict with the juridical imputation principle, Wieser was presented with a dilemma. He chose to remain faithful to the professional mission of capitalist economists and thus he rejected the juridical imputation principle instead of capitalist production. The principle was "only" concerned with legal responsibility and judicial imputation. Capitalist apologetics clearly requires a different notion of imputation, an "economic imputation" in accordance with "economic responsibility."

[2]John Bates Clark, *The Distribution of Wealth,* Macmillan and Co., 1899.

[3]Friedrich von Wieser, *Natural Value,* tr. C. A. Malloch, G. E. Stechert and Co., 1930 (orig. published in 1889).

[4]*Ibid.,* pp. 76–79.

> In the division of the return from production, we have to deal similarly . . . with an imputation,—save that it is from the economic, not the judicial point of view.[5]

By defining "economic responsibility" as marginal productivity, Wieser could at last draw his desired but rather tortured conclusion that competitive capitalism economically imputes the returns from production in accordance with economic responsibility.

Insofar as property rights are concerned, each input supplier's share of the product is only a metaphor in the first place since the employer appropriates the whole product. The Clark-Wieser theory that the size of each input's metaphorical share of the product is justified by the input's metaphorical responsibility ("To each what he creates") is the pinnacle of capitalist apologetics. But it is the actual property relations of capitalist production, i.e., the employer's appropriation of the whole product, that need to be justified or condemned, and the relevant notion of responsibility is the non-metaphorical variety used every day as the basis for juridical imputation.

THE PATHETIC FALLACY

There is also an older and more widespread animistic interpretation of production which views the inputs as "agents of production cooperating together to produce the product." This attribution of agency to natural objects and forces is a common literary and artistic metaphor that Ruskin called the *pathetic fallacy*. Examples include: "The wind was responsible for the banging shutters" or "The waves pounded furiously on the shore." Examples in the "literature" of economics are: "Together, the man and shovel can dig my cellar" or "[L]and and labor *together* produce the corn harvest."[6] In spite of the literary allure of the pathetic fallacy, it is still a fallacy. It confounds the distinction, well-grounded in jurisprudence (but virtually unheard of in economics), between the *responsible actions* of persons and the *behavior* of things. A shovel does not act together or cooperate together with a person to dig a cellar, because a shovel does not act at all. A person uses a shovel to dig a cellar. Machines do not cooperate with workers; machines are operated by workers. In general, things do not act together with persons; things are acted upon and used by persons.

Instead of labor and the non-human inputs "cooperating together to produce the product," the people who work in the production process use up the non-human inputs in the process of producing the outputs. If we describe "using up the inputs" as "producing the negative product," then the factual non-animistic description of production is that Labor produces the negative and the positive products, i.e., that Labor produces the whole product.

[5] *Ibid.*, p. 76.

[6] Paul A. Samuelson, *Economics*, 10th ed., McGraw-Hill, New York, 1976, pp. 536–537.

THE EMPLOYEE AS A HUMAN TOOL

The equivalence between the labor theory of property and the juridical imputation principle allows us to use jurisprudential concepts and distinctions in the analysis of production—such as the distinction between the responsible actions of persons (labor) and the behavior of things (services of the non-human inputs). In particular, we can analyze the old charge that the employees are treated as things or objects in capitalist production. Things lack the capacity for responsibility so they can bear no legal responsibility for the results of their services. Instead, that responsibility is imputed back through the thing to the human user. That is exactly the legal position of the employees in a capitalist firm. The employees have none of the legal responsibility for the produced outputs (i.e., no legal ownership claim on the outputs) and none of the legal responsibility for the used up inputs (i.e., no legal claims against them for the used up inputs). Instead, that legal responsibility for the positive and negative results of the employees' actions is imputed back through them to the person or persons who "use" or "employ" them, the employer. Hence, the employees in a capitalist firm have, within the scope of their employment, precisely the legal role of tools or instruments.

This point could also be understood by considering a science fiction fantasy wherein employees were *actually* turned into human tools within the scope of their employment. Suppose that electrodes could somehow be inserted into each employee's brain so that a computer could drive them independently of their volition and involuntarily cause them to carry out the commanded tasks. During the off hours, the workers would be "unplugged" so they could lead their normal lives as consumers, citizens, and labor sellers. In such a system, labor would genuinely be devoid of responsible agency. Labor would truly be a commodity, like the services provided by a machine or animal, which can be bought and used by an employer without the original owner of the services incurring any responsibility for the results of the services.

The remarkable fact is that if all capitalist firms switched overnight to the employment of this dehumanized labor, the legal institutions of capitalism would hardly notice the difference. That is, the employees already have legal roles *as if* they were such part-time human tools so no changes in their legal roles would be required. Since the employees would then be genuinely devoid of responsibility for the results of their behavior, the legal structure that imputes all the legal responsibility for the used up inputs and the produced outputs to the employer would then be appropriate. As the employees would be "unplugged" during non-working hours, they could as usual combine in unions to collectively bargain about their wages and the conditions of their employment (but no union meetings on company time). Labor law would still guard the rights of labor sellers and curb the abuses of labor by the employers. Pundits could still celebrate each person's natural right to the original ownership of his labor services and his natural liberty to sell his own labor services by the voluntary employment contract to the highest bidder on the labor market.

In short, this new system would be essentially the same as normal capitalism, except that it would not violate the humanity of people during their work hours—since that humanity would have been suspended. By turning working people into part-time instruments, labor would be rendered morally safe for capitalist production. Since normal capitalism gives employees a legal role as if they already were such dehumanized instruments, it is easy to understand how capitalist production can be dehumanizing—how workers might feel alienated from their product as if it were not the fruits of their labor and how they might think of their work as so many hours taken out of their lives.

The employee in a (normal) capitalist firm and the slave both have the legal position of a human tool—but with two major differences. The slave was owned on a "full-time" basis, whereas the employee is only hired or rented. And the slave generally acquired the legal role of a chattel involuntarily. The voluntary contract to sell oneself—as opposed to renting oneself out—has now been legally invalidated.

> 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.[7] [Samuelson's emphasis]

It should hardly be surprising that people take on the legal role of an instrument when they *rent* themselves out by entering the employment contract.

The employee is legally treated as a human tool only so long as the activities are lawful. When the employer and employees break the law, then the legal authorities step in and hold the employees co-responsible together with the employer for the results of their activities. The "talking instrument" in work becomes the responsible person in crime. The slaves, of course, enjoyed the same miraculous metamorphosis whenever they committed crimes. As one abolitionist observed in 1853:

> The slave, who is but "*a chattel*" on all *other* occasions, with not one solitary attribute of personality accorded to him, becomes "*a person*" whenever he is to be *punished*![8]

Legal philosophers and jurisprudents write volumes upon volumes which dissect human actions to establish degrees of de facto responsibility under conditions of impaired mental competence, mistaken information, duress, and so forth in order that the appropriate degree of legal responsibility may be assigned. Yet one would scan the entire legal and philosophical literature in vain to find the simple observation that the actions of the employees in a normal capitalist firm are fully deliberate, intentional, voluntary, and responsible—but that the employees are assigned zero legal responsibility for the positive and negative results of these actions. It is the staggering power of social indoctrination which structures people's perception of social reality so that certain aspects are seen very clearly while other aspects are quite invisible. Thus it is that lawyers and philosophers can spend a lifetime splitting hairs to properly apply the imputation principle to border-line cases and yet never even notice a direct one hundred per cent violation of the principle right under their noses.

[7] *Ibid.*, p. 52.

[8] William Goodell, *The American Slave Code in Theory and Practice*, New American Library, New York, 1969, p. 309 (orig. published in 1853).

CAPITALIST PRODUCTION AS A LEGALIZED FORM OF THEFT

The standard defense of capitalist production (i.e., wage labor) is that it cannot be inherently unjust because it, unlike chattel slavery, is based on a voluntary contract, the employer-employee or hired labor contract. Some critics (e.g., marxists) disagree with the factual proposition that the contract is voluntary—as if to agree with the underlying normative premise that wage labor would be permissible if it were really voluntary. But this customary debate about the voluntariness of the contract is quite sterile and irrelevant.

The point is that the employment contract is invalid either way. If wage labor "really" is involuntary and coercive, then it is, of course, wrong on those grounds. If wage labor is reasonably voluntary, as we assume it to be, then it is unjust as it directly violates the fundamental juridical principle of imputation. The labor services performed by the employees, directly or indirectly under the direction of the employer, are normal, voluntary, deliberate, and intentional human actions, i.e., they easily satisfy all the usual juridical criteria for responsible actions. Taking orders does not erase a person's de facto responsibility, as we saw in the hired criminal example. All the people who work in an enterprise, the employees and any working employers, have the joint *de facto* responsibility for the total results of their activities, i.e., for using up the inputs in the process of producing the outputs. But the employer takes all the *legal* responsibility for the used up inputs and the produced outputs (assuming that the activities were lawful). The employer legally appropriates the whole product *as if* the employees had *in fact* been mere instruments of production. Since one party, the employer, legally appropriates the property, the whole product, which another party, all who work in the enterprise, is de facto responsible for creating, wage labor is a legalized form of misappropriation or, in plain terms, theft.

Capitalist production is *not* a theft in the simple sense of a transfer of already owned property without the owner's consent. It is a theft in the sense of a wrongful appropriation of new property which is taken *ab initio* by a party other than the party de facto responsible for creating the property. When legal responsibility is imputed to a party other than the responsible party, that is a miscarriage of justice, a violation of the juridi-

cal imputation principle. The employment relation is an institutionalized form of that type of misimputation, where it is a bundle of both property rights and obligations that is misimputed.

Justice is at war with wage labor. The employer-employee relation inherently violates the basic norm of imputation. But how could this happen? Do the legal authorities deny the employees' de facto responsibility? Do the legal authorities claim that the employers (e.g., the corporate shareholders) are solely de facto responsible for the whole product? In short, what is the *modus operandi* of capitalist appropriation?

THE LAISSEZ FAIRE MECHANISM OF IMPUTATION

It would clearly be unfeasible for the legal authorities to render an explicit legal imputation, by having a judgment, ruling, or trial, in order to assign legal responsibility every time that some commodities were consumed or produced. Instead, the legal system must rely on the following:

> *Laissez Faire Mechanism of Imputation:* Unless some law has been broken, let the costs of an activity lie where they have fallen, and then let the party who bore the costs claim any appropriable positive results of the activity.

Thus if a party voluntarily appropriates the negative product, then that party has the legally defensible claim on the positive product. By depending on this jurisprudential invisible hand mechanism to govern lawful activities, the legal system can restrict explicit legal imputations to illegalities. The rationale for the laissez faire mechanism of imputation is that if any costs should fall into the wrong hands, then that presumably would involve an illegality (e.g., a crime, tort, or breach of contract) which, in turn, would prompt legal intervention by the "visible hand" of the law to explicitly impute the legal responsibility in accordance with de facto responsibility.

In a capitalist firm, the employer's appropriation of the whole product is a laissez faire appropriation. Within the confines of the laissez faire mechanism (i.e., when no law is broken), a party only needs to bear the costs of production (appropriate the negative product) in order to have the legally defensible claim on the positive product or outputs. Since no *explicit* legal imputation is involved in the employer's appropriation of the whole product, the legal authorities do not explicitly affirm or deny the de facto responsibility of the employees or the employer. The question of responsibility does not overtly arise at all—since it is an invisible hand mechanism. Moreover, the entire question of the appropriation of the whole product of production seems "invisible" to philosophers, lawyers, and economists.[9] Discussions of property appropriation generally ignore production and concentrate on the appropriation of unowned natural objects or land.

[9]See for example *The Economics of Property Rights*, ed. Eirik Furubotn and Svetozar Pejovich, Ballinger, Cambridge, MA, 1974.

Economists sometimes worry about the "original endowment" of input ownership, but they do not even formulate the question of appropriating the input-liabilities and output-assets created in production.

THE EMPLOYER-EMPLOYEE CONTRACT AS AN INVALID CONTRACT

The key to the implicit denial of the employees' responsibility is the employer-employee contract. The owner of an instrument or machine, such as a car or van, can use the instrument personally and be responsible for the results *or* the owner can turn the instrument over to be used independently by another person who would then be responsible for the results. If a person could similarly alienate and transfer the "use" of his or her own person, then the employment contract would be a bona fide contract—like the contract to hire out a genuine instrument. *If* the employees could alienate and transfer their labor services to the employer so that the employer could somehow use these services without the employees being inextricably co-responsible, *then* the employer would be solely de facto responsible for the whole product and *then* the employer's laissez faire appropriation of the whole product would be jurisprudentially correct. But such a contractual performance on the part of the employees is not factually possible. All the employees can do is to voluntarily cooperate, as responsible human agents, with their working employer, but then the employees are inextricably de facto co-responsible for the results of the joint activity.

The inescapable joint responsibility of all the people who participate in an activity is a matter of fact. Judicial decrees, legislative enactments, and philosophical pronouncements will not change those facts. For lawful activities, the Law neither affirms nor denies those facts since the laissez faire mechanism reigns. When employees or, in legal jargon, servants commit civil or criminal wrongs at the direction of the employer, then the Law sets aside the invisible hand mechanism of imputation and renders an explicit legal imputation based on the facts insofar as they are ascertained.

> 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.[10]

When the "venture" being "jointly carried out" is non-criminal, the employees do not suddenly become instruments (in fact). "All who participate in" the productive activity of a normal capitalist enterprise are similarly de facto responsible for the positive and negative results of the

[10]Francis Batt, *The Law of Master and Servant*, 5th ed. by G. Webber, Pitman, London, 1967, p. 612.

activity, i.e., for the whole product. The employer's legal appropriation of that whole product thus violates the basic norm of imputative justice. The Law does not "announce" the violation by solemnly decreeing that, as long as the employees' actions are lawful, the employees will be legally considered only as hired instruments being employed by the employer. Instead, the Law achieves the same results by accepting the employment contract as valid and by accepting the same inextricably co-responsible cooperation on the part of the employees as fulfilling the employment contract. No explicit decree, judgment, or imputation is necessary since the laissez faire mechanism has "taken over" again. The employer has borne all the costs of production, including the "labor costs," so the employer has the legally defensible claim on all the outputs. Thus the employer laissez faire appropriates the whole product of all the people working in the enterprise. That is the *modus operandi* of capitalist appropriation.

We have seen that in order to vouchsafe capitalist appropriation, the legal system must legalize a fraud in the sense of accepting a person as "fulfilling" a contract that implicitly puts the person in the legal role of a non-person or thing. A contract to sell oneself, as opposed to renting oneself out, would place a person in the legal role of a thing on a full-time basis. The contract to sell oneself is invalid on higher law or natural law grounds, and that invalidity is now recognized in positive law. The contract to hire or rent oneself out is similarly invalid on higher law grounds, but positive law still accepts it as "valid" and construes the employees' responsible cooperation as "fulfilling" the contract.

INALIENABLE RIGHTS

An *inalienable* right is a right that may not be alienated even with consent of the holder of the right. A right is inalienable if the voluntary contract to alienate the right is invalid. For example, any right held solely by virtue of being a person (as opposed to a thing) is inalienable on natural law grounds since one's status as a person is unchanged by any contract. A legal system can, of course, "validate" such a contract as a matter of positive law and thus treat an inalienable right as being legally alienable. For instance, in the period immediately preceding the Civil War, general legislation was passed in six slave states "to permit a free Negro to become a slave voluntarily."[11]

Most anyone can understand the concept of inalienability in the context of the hired criminal example. How absurd for the criminous employees to think that by signing a contract, they could "sell" their own actions and somehow transfer the responsibility for the results of their actions to someone else. But when the employees' actions are lawful, the absurdity becomes the legal reality as the employment contract is "validated" and all the legal responsibility for the results of the employees' actions is taken over by the employer. But since the de facto responsibility for the positive and negative results of one's intentional actions is non-transferable, whether the actions are lawful or not, the rights to the positive fruits of one's labor and the obligations to bear the negative fruits of one's labor are inalienable. Just as the positive law at one time "validated" the contract wherein a person could sell himself as a slave to a master, so today the positive law treats an inalienable right as being legally alienable by "validating" the contract to rent or hire oneself out as an employee or servant to an employer or master.

[11]Lewis Cecil Gray, *History of Agriculture in the Southern United States in 1860*, Vol. I, Peter Smith, Gloucester, MA, 1958, p. 527.

FINAL REMARKS

The standard defense of capitalist production is that it is based on a voluntary contract, the employment contract. But we have seen that the voluntary contract to hire oneself out, like the contract to sell oneself, is inherently invalid. The fraudulent mismatch, between the employees' legal role as hired instruments and their responsible performance, induces the malfunction in the laissez faire imputation mechanism. The contract sets up and allows the employer's misappropriation of the whole product. As usual, a fraud allows a theft to parade in the disguise of a voluntary contract.

Buddhist Economics

E. F. SCHUMACHER

"Right Livelihood" is one of the requirements of the Buddha's Noble Eightfold Path. It is clear, therefore, that there must be such a thing as Buddhist economics.

Buddhist countries have often stated that they wish to remain faithful to their heritage. So Burma: "The New Burma sees no conflict between religious values and economic progress. Spiritual health and material well-being are not enemies: they are natural allies."[1] Or: "We can blend successfully the religious and spiritual values of our heritage with

[1]*The New Burma* (Economic and Social Board, Government of the Union of Burma, 1954)