Justice in the Workplace

David Ellerman

You are called in for jury duty. You protest to the judge that you are not a lawyer; how can you be expected to make a legal decision? But the judge points out that the jury is not there to interpret the law but to make a decision about the facts. Is the defendant in fact responsible for committing the crime as charged—or not? Guilty or not guilty?

Given the jury's decision, the legal system then assigns the legal responsibility accordingly. That means assigning or "imputing" the legal responsibility for the crime to the defendant if the jury decides the defendant is in fact responsible, and not otherwise.

That is the basic principle of justice: assign the legal responsibility to the person or persons who are in fact responsible for the deeds in question.

With that principle of justice, there are two ways for an injustice to be committed:

- assigning legal responsibility to a defendant who was not in fact responsible for the crime, i.e., convicting an innocent person, or
- don't assign legal responsibility to a defendant who was in fact responsible, i.e., not convicting a guilty person.

There is something else to notice about the basic norm of justice. Criminals have their "tools of the trade" which can be quite important in the commission of a crime. But tools cannot be in fact responsible for committing a crime, only persons. Guns can't be responsible for killing people, but people find it much easier to kill someone, deliberately or accidentally, if guns are available. Thus regardless of the tools, instruments, or other things being used in committing a crime, only the persons committing the crime are in fact responsible for it. It is like the responsibility flows through the tools and instruments as a conduit back to their human users. And the users are also in fact responsible for using those instruments. A legally-trained Austrian economist made this point well over a century ago:

   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. [Wieser, Friedrich von. 1930 (1889). Natural Value. Trans. C. A. Malloch. New York: G.E. Stechert and Company, 76]

This basic principle of justice—impute legal responsibility according to factual responsibility—is used by the courts of law, but there is nothing to restrict the principle just to crimes or misdeeds. When people deliberately produce something positive, shouldn't they also get the legal "credit" or "ownership" of that result? And since nothing can be produced out of nothing, a person creating something positive will always involve using up some resources, and the person should also be legally responsible or liable for using up those resources. The justice principle can thus be seen as applying to both positive and negative results of all responsible human actions.
But there is a "problem"; our economic system does not follow the justice principle! The previous system, where some people (the masters) could own other people involuntarily (the slaves), was abolished in favor of the current system that allows some people (the employers) to voluntarily rent other people (the employees). But voluntariness was not the key issue since voluntarily owning other people was also abolished. As the first American Nobel Prize winner in economics put it:

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. [Samuelson, Paul A. 1976. *Economics*. New York: McGraw-Hill, 52 (his italics)]

This may seem to be a jarring use of the word "rent" but it is accurate. Americans refer to "rental cars" and the British refer to "hire cars" but both are talking about the same thing where the renter is not buying the car but only buying some of its services (so many "car-days"). Renting something means buying its services. In the employment relation, the employer is not buying the employee but only buying some of the employee's services (so many "person-hours").

But the justice principle is at war with system of renting people. In a factory operating under the employment relation, the people working in the factory jointly produce whatever is the product, say, widgets, and they jointly use up various sorts of intermediate goods and the services of land and machinery in order to produce the widgets. But the people working in the factory do not jointly have legal ownership of the widgets they produce and they do not jointly have the legal liability for all the resources they use up to produce the widgets. Instead it is the employer (legally, the company, but in terms of natural persons, the owners or shareholders in the company) who owns the outputs and pays off the liabilities for the used up resources. The rented people, the employees, are only the providers of another resource or "input" called "labor services" and the employer pays off the liability for "using up" that "input" by paying the wages.

Hence the employment system seems to involve a mismatch between legal responsibility (all to the employer) and the factual responsibility (all who work in the enterprise, employees and working employers). The renting of persons sure seems to violate the justice principle of assigning legal responsibility in accordance to factual responsibility.

But, it will be said, the whole relationship is voluntary; the employees voluntarily give up their responsibility for the results of their "labor services." What can that possibly mean?

Consider the case of an employee who commits a crime at the instruction of the employer. Certainly then the employee really does want to voluntarily give up and transfer away any factual responsibility for the results of his "labor services." But there is no such escape. The legal system then recognizes that the use or "employment" of one's own actions cannot be voluntarily transferred to another person. One could transfer the use of one's car or shovel to another person, but not the "employment" of one's self. As a British law book on the employer-employee relation puts it (using the old-speak of "master and servant"):

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. [Batt, Francis. 1967. *The Law of Master and Servant*. 5th ed. London: Pitman, 612]
Employer and employee both factually and thus legally responsible for criminous venture

But what factually changes when the "venture" being "jointly carried out" is not criminous? Do the employees suddenly turn into non-responsible robots "employed" by their "employer"? Presumably employees are just as much factually responsible for their deliberate actions (similarly following the instructions of managers or working employers) when they produce widgets as when they commit crimes.

It is the response of the legal system that changes, not the employees. When no crime is committed, the legal system sees no reason to intervene to explicitly apply the justice principle. The system then accepts just "obeying the employer" as "fulfilling" the employment contract so there seems to be no breach of the contract—even though obeying the employer didn't get the criminous employee off the hook. But with no breach or crimes involved, the legal system does not intervene to apply the justice principle. The employer ends up paying off all the liabilities for the used-up resources, including the wage payments for the employees' labor services, and thus owning all the widgets produced. All seems fair and square. But even a working employer, not to mention an absentee employer, is not in fact solely responsible for using up those resources or for producing that product—so this adds up to a violation of the justice principle.

This violation is built into the whole system of renting persons—even voluntarily. Should that be surprising? We are accustomed to condemn slavery for being involuntary, but would owning other people be okay if it were voluntary? Perhaps the basic problem with owning other people was not whether it was involuntary or voluntary, but that it treated persons as things. And that is still a problem with the renting of other people; it treats the rented persons like non-responsible things whose use or "employment" can be voluntarily transferred from one person to another like a car or shovel.

How can the problem be fixed? Today the renting of people seems as "natural" as owning people did before the 19th century. In either case, most people in such a society take it for granted. But what if the abolitionists' achievement of abolishing the owning of other people was followed up with the "neo-abolitionist" goal of abolishing the renting of other people? It would mean that all the people working together in some enterprise would be the "owners" or members of that enterprise. They would jointly own what they jointly produce (like the widgets) and they would jointly pay off the liabilities for all the resources (like the services of land and capital) that they use up. In short, they would jointly own both the positive and negative "fruits of their labor."

The conservative British thinker, Lord Eustace Percy, put the matter very well back in 1944.

3
Here is the most urgent challenge to political invention ever offered to the jurist and the statesman. The human association which in fact produces and distributes wealth, the association of workmen, managers, technicians and directors, is not an association recognised by the law. The association which the law does recognise—the association of shareholders, creditors and directors—is incapable of production and is not expected by the law to perform these functions. We have to give law to the real association, and to withdraw meaningless privilege from the imaginary one. [Percy, Eustace. 1944. The Unknown State: 16th Riddell Memorial Lectures. London: Oxford University Press, 38]

The closest we have today to that sort of company would be worker cooperatives (like the Mondragon cooperatives in the Basque country in Spain) or the "employee-owned" companies like the 7,000 or so Employee Stock Ownership Plans (ESOPs) across the United States (at least where 100% of the stock is in the ESOP).