The Case Against the Employment System
Based on the Norms of Ordinary Jurisprudence

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Abstract

Historically, the sophisticated arguments for slavery and autocratic government were consent-based in terms of implicit or explicit contracts. And the legalized oppression of married women was based on the coverture marriage contract. Hence the critiques developed in the abolitionist, democratic, and feminist movements were not simply arguments for consent as opposed to coercion, but arguments against certain voluntary contracts, e.g., in the form of inalienable rights

arguments. But today, under the intellectual hegemony of classical liberalism, the historical arguments tend to be simplified to "consent versus coercion." The older arguments against certain contracts, even if perfectly voluntary, have been largely overlooked, ignored, or lost—perhaps for an obvious reason. When these older arguments are recovered and restated in terms of the underlying norms of ordinary jurisprudence, then the arguments clearly apply against the human rental or employment contract that is the basis for our present economic system.

Introduction

There is a clear and definitive case against the current employment system and in favor of workplace democracy based on first principles that descend to modern times through the Reformation and Enlightenment in the abolitionist, democratic, and feminist movements. By the 20th century, the arguments had been dispersed and largely lost—like the bones of some ancient beast scattered in a desert—partly due to misconceptions, mental blocks, and misinterpretations embodied in Marxism, classical liberalism, and conventional economic theory. Hence we must begin by clearing away certain misconceptions.

The basic misconception of liberalism

The modern liberal consciousness was formed in the 19th century with the abolition of slavery and the triumph of political democracy as the normative ideal in the West. Both changes were interpreted as moving from a coercive system to a system based on consent. Thus "consent" became the root-norm of liberalism (always in the European sense of classical liberalism), a principle further exemplified with the post-socialist resurgence of market societies.

But this "liberal norm of consent" is both a conceptual oversimplification of the issues as well as a historical falsification of the debates. There were always sophisticated arguments for slavery and for non-democratic forms of government *based on consent*. The advances in anti-slavery arguments and democratic arguments based on the inalienable rights arguments of the Reformation and Enlightenment were made against those liberal defenses of slavery and autocracy based on consent.

These inalienable rights arguments have been largely lost to modern liberalism (not to mention, neoclassical economics) with its dumbed-down dichotomy of "coercion versus consent." Of course, there were always illiberal defenses of slavery and autocracy (e.g., racist arguments or divine-right theories), and those are precisely the ones propped up as strawmen and then batted down by liberal philosophers and intellectual historians as they portray the triumphal march "from Status to Contract." (Maine 1972, 100)

Slavery

Far from the official legitimation for slavery being coercion, the contractual arguments for slavery go back even to Antiquity. In Justinian's codification of Roman law, each of the three legal means of becoming a slave had an incidence of contract. One means was an explicit contract to sell one's labor services all at once, the self-sale contract. Another means was the practice of allowing prisoners of war to plea bargain a lifetime of slave labor instead of being

executed. Finally, those who were born slaves received food, clothing, and shelter from their masters and they could (by manumission) pay off this liability inherited from their mothers' contractual condition, or they could continue the arrangement for another generation.

Frank Knight pointed out that the foundations of classical liberalism were laid well before Adam Smith: "Interestingly enough, the political and legal theory had been stated in a series of classics, well in advance of the formulation of the economic theory by Smith. The leading names are, of course, Locke, Montesquieu, and Blackstone." (Knight 1947, 27 fn. 4) All three of these classical liberal writers accepted a voluntary slavery contract as long as there was some semblance of rights on both sides, e.g., so that a master may not arbitrarily kill his slave. Here are the three pertinent quotes.

> 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. (Locke 1960, Second Treatise, §24)

> This is the true and rational origin of that mild law of slavery which obtains in some countries; and mild it ought to be, as founded on the free choice a man makes of a master, for his own benefit; which forms a mutual convention between two parties. (Montesquieu 1912, Vol. I, Bk. XV, Chap. V)

> Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. (Blackstone 1959, section on "Master and Servant")

In the American debates over slavery, people like Reverend Samuel Seabury (1969) gave (implicit) contractarian defenses of slavery–while George Fitzhugh and a host of others gave illiberal and racist arguments. The reader is invited to see which strawmen are propped up and batted down in the standard histories of the slavery debates. For instance, modern liberal scholars of pro-slavery thought can't seem to find Seabury or any of the earlier contractarian defenses. Eric McKitrick (1963) collects essays of *fifteen* pro-slavery writers; Harvard University's current President, Drew Gilpin Faust (1981), collects essays from *seven* pro-slavery writers; and Paul Finkelman (2003) collects *seventeen* excerpts from pro-slavery writings. But *none* of them include a single writer who argues to allow slavery on a contractual basis such as Seabury—not to mention Grotius, Pufendorf, Locke, Blackstone, Montesquieu, and a host of Scholastics such as Jean Gerson, Luis de Molina, and Francisco Suarez.[1]

As was pointed out by some pro-slavery writers, the essential economic difference between the slave and the employee or 'hireling' is the amount of labor purchased at once.

> With us this property does not consist in human "flesh" . . . Our property in man is a right and a title to human labor. And where is it that this right and title does not exist on the part of those who have the money to buy it? *The only difference in any two cases is the tenure. . . . Our slave - property lies only incidentally in the person of the slave but essentially in his labor*. Who buys a slave except he has work for him? His person is held as the only sure means of obtaining his labor. The proprietorship of his person extends only so far as the derivation of a fair amount of labor. The value of the slave is determined by the sort and amount of labor he is capable of and it

[1] On the Scholastics, see Richard Tuck (1979).

> is according to these that he is bought and sold; and it is undeniable that these are the same conditions which determined the hireling's wages. (Bryan 1858, 10 italics in original)

Or as James Mill, the utilitarian liberal and father of John Stuart Mill, pointed out:

> The labourer, who receives wages sells his labour for a day, a week, a month, or a year, as the case may be. The manufacturer, who pays these wages, buys the labour, for the day, the year, or whatever period it may be. He is equally therefore the owner of the labour, with the manufacturer who operates with slaves. The only difference is, in the mode of purchasing. The owner of the slave purchases, at once, the whole of the labour, which the man can ever perform: he, who pays wages, purchases only so much of a man's labour as he can perform in a day, or any other stipulated time. (Mill 1826, Chap. I, section II)

If a contractual relationship to buy "the whole of the labour, which the man can ever perform" violated moral norms in spite of being voluntary, then the current economic system based on the voluntary contract simply for the shorter-term purchase of labor "for the day, the year, or whatever period it may be" might be put in moral jeopardy. Hence 'responsible' intellectual historians, liberal scholars, and social scientists simply cannot go there.

Today, the reigning social model finds its 'scientific' expression in the neoclassical model of competitive capitalism which not only allows, but *requires* for efficiency, complete future markets in all goods and services including labor. Although self-sale contracts were outlawed when slavery was abolished, the shining exemplar of liberal thought (the neoclassical economic model) requires that such lifetime labor contracts be re-allowed in order to get the basic efficiency results. As one neoclassical economist stated in no less a forum than Congressional Testimony:

> 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. (Christ 1975, 334)

To place emphasis of the libertarian logic of freedom, the late Harvard philosopher, Robert Nozick, has argued that a free system would allow an individual "to sell himself into slavery." As if to emphasize the modern learned ignorance of Enlightenment inalienable rights doctrine, Nozick even reinterprets an "inalienable" right as a right that one may not give up w*ithout consent*–which just identifies "inalienable rights" with "rights" as opposed to privileges. Nozick thus has no notion whatever of "inalienable right" in the original sense of a right that one may not give up "even with consent" (Spinoza 1951, 257) (e.g., due to the inherent invalidity of the contract to alienate any rights one has qua person—see below).

Non-democratic government

The contractual arguments for allowing non-democratic government also go back to Antiquity and continue down to Nozick and beyond. Any rulership that existed as a settled condition was interpreted as based on an implicit contract or covenant with the people—settled by the prescription of time. In the *Institutes* of Justinian, we find that the Roman people have by the *lex regia* enacted the *imperium* of the ruler. The German legal scholar, Otto von Gierke (1958), finds that by the late Middle Ages, it was propounded as a philosophical axiom that rulership was based on a voluntary contractual alienation of rights from the ruled to the ruler, the contract of subjection or *pactum subjectionis*. Or as medieval scholar Brian Tierney pointed out: "The

idea that licit rulership was conferred by consent of the community to be ruled was fairly commonplace at the beginning of the fourteenth century." (1997, 182)

Surely the best-known version of this doctrine was Thomas Hobbes' theory of contractual autocracy. To avoid the war of all against all that would make life "nasty, brutish, and short," each along with the other would alienate the right of self-determination to the Sovereign. This liberal tradition of non-democratic government based on the "consent of the governed" continues on down to the free-market principles whose libertarian vision of a free system would allow the *pactum subjectionis* where individuals contract away their governance rights to a "dominant protective association." (Nozick 1974, 15)

This completes the summary of the basic misconception of liberalism, that the abolition of slavery and the triumph of political democracy represented a decision for consent over coercion. The older non-trivial debate, almost completely lost or ignored in modern liberalism, was *not* about the root-norm of consent versus coercion, but between two opposite forms of consensual arrangements. It was between a Hobbesian contract to *alienate* the rights of self-determination and a democratic constitution to secure those rights which are only *delegated* to the governors/managers.

> 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. (Corwin 1955, 4)

The non-trivial argument for democracy was not usual liberal stand in favor of consent instead of coercion, but the inalienable rights argument against the voluntary alienation contract and in favor of the voluntary delegation contract.

> There is, at least, *one* right that cannot be ceded or abandoned: the right to personality. Arguing upon this principle the most influential writers on politics in the seventeenth century rejected the conclusions drawn by Hobbes. They charged the great logician with a contradiction in terms. … 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. (Cassirer 1963a, 175)

It means, as the examples of modern economics and philosophical libertarianism illustrate, that the non-trivial inalienable rights arguments against such alienation contracts have been 'forgotten.' And for good reason. As Philmore put it:

> Contractual slavery and constitutional non-democratic government are, respectively, the individual and social extensions of the employer-employee contract. Any thorough and decisive critique of voluntary slavery or constitutional non-democratic government would carry over to the employment contract—which is the voluntary contractual basis for the free market free enterprise system. (1982, 55)

Thus the "problem" is that when the old inalienable rights arguments are understood in clear and modern terms, then it is quickly seen that those normative arguments cut far deeper than only ruling out *buying* other people and *political* autocracy–to also rule out the renting of persons and the workplace *pactum subjectionis* of the employment contract.

A linguistic glass-wall

Let us pause to consider an amusing invisible barrier in conventional language. Suppose a person lived in the middle of a slave society (e.g., the ante-bellum American South). Surely when asked if they knew of a society based on owning other human beings, they would recognize their own society as an example. Now consider present-day society and consider the following experiment the author has conducted with economics students.

First the students are told about the system of chattel slavery where workers are bought and sold as movable property. But just as a house or a car can be bought and sold, so one can also rent a house or car. Now instead of buying workers as in a slavery system, suppose we consider a system of renting workers. The students are asked if anyone knows an economic system based on the renting of workers. A Black student might point out that during slack times, plantation slaves were rented out to work as stevedores, as hands in factories (for example, turpentine or sugar mills), or as common laborers. The Professor agrees but asks again for an example of a whole economic system based on renting people. After another pause, some students offer, "Well, what about feudalism?" The Professor responds that feudalism might be seen as based on the voluntary homage contract (Engerman 1973), but that permanently attached the serf to the manor and was not a temporary rental contract. After more embarrassed silence, finally a student, by the process of elimination, offers: "Well, isn't that sort of like what we have now?"

Yes, except that we use the word "hiring" or some other euphemism ("employing" or "giving a job") instead of "renting" when people are rented in the employment relation. As the late dean of neoclassical economics, Paul Samuelson, 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." (1976, 52 (his italics)) Or as other neoclassicals put it:

> The commodity that is traded in the labor market is labor services, or hours of labor. The corresponding price is the wage per hour. We can think of the wage per hour as the price at which the firm rents the services of a worker, or the rental rate for labor. We do not have asset prices in the labor market because workers cannot be bought or sold in modern societies; they can only be rented. (In a society with slavery, the asset price would be the price of a slave.) (Fischer et al. 1988, 323)

Hiring and renting are used interchangeably when referring to cars (e.g., "hire-car" in the UK instead of "rental-car" in the US), but not for people. Learning this unwritten rule is part of being socialized into a society based on renting human beings.

The r-word that cannot be spoken in economics

The 'science of economics' has even stronger unwritten rules as to what words and concepts can be used. Certain facts, known to all, are quite unmentionable in this 'science.' For instance, we all know that only people can be blamed or held responsible for anything. We all might occasionally indulge animistic metaphors about "things" being blamed for some outcome, but we are well aware of the metaphor. We know, for example, that when a crime is committed, the responsibility for the crime must be imputed back through the tools or instruments to the human users. When we do not blame the knife or gun for a crime, we do not think for a moment that the instrument was therefore of no "help" to the perpetrator in the commission of the crime (and thus some crimes and many accidents might be prevented if such tools were scarcer). Of course, such

instruments have some efficacy in crimes; otherwise they would not be used. But we have no trouble differentiating that efficacy from responsibility for the crime. No trouble, that is, unless one is a professional economist who must, in the interests of science, "overlook" what everyone knows.

This simple and definitive differentiation of human actions from the services of things on the basis of the r-word "responsibility" has been lost to economics for the whole 20th century. In economics, human actions and the services of things are seen alike as having a causal efficacy called "productivity" and they are represented symmetrically as input services in "production functions." Economists flip-flop between two symmetrical pictures of the production process. When feeling scientific, economists adopt an engineering mentality and a passive voice; the inputs are technologically transformed into the outputs (but not by anyone). When economists wax poetical, then all the inputs (such as land, labor, and capital) cooperate together to produce the product. "Together, the man and shovel can dig my cellar" and "land and labor together produce the corn harvest" (Samuelson 1976, 536-7). At all costs, the asymmetrical picture is avoided where persons use up materials and the services of the instrument to produce the outputs—thereby producing the "whole product" (see below) with its negative and positive components.

Long years of rigorous economic training are necessary in order to "forget" such an obvious difference between persons and things. The payoff from this rigorous indoctrination can be seen by investigating any economics textbook. Before the 20th century, some political economists like Thomas Hodgskin (1973 (1832)) and other classical laborists had some sort of "labor theory" that tried to treat labor as having some "mysterious" attribute fundamentally different from the services of things. Then around the turn of the 20th century, the theory of marginal productivity emerged to solve the "problem of imputation." Every Principles text, from Alfred Marshall's and Paul Samuelson's to their vast contemporary progeny, discusses (and dismisses) the "labor theory" (of value) and presents marginal productivity theory as the 'solution' to the imputation problem.

The reader is invited to try to find a single economics text in the entire 20th century which even mentions the simple fact that only human actions (labor services) are imputable–that responsibility must be imputed back through whatever the instruments and tools to the human users. Failing that, one may appreciate the power of indoctrination in the would-be science of economics.

This distinction is perfectly standard in jurisprudence. As Immanuel Kant put it:

> A *person* is the subject whose actions are susceptible to imputation. … A *thing* is something that is not susceptible to imputation. (1965, 24-5)

The modern jurist, Hans Kelsen, describes the associated norm of imputation.

> Since the connection between delict and sanction is established by a prescription or a permission—a "norm"—the science of law describes its object by propositions in which the delict is connected with the sanction by the copula "ought". I have suggested designating this connection "imputation." This term is the English translation of the German *Zurechnung*. The statement that an individual is *zurechnungfähig* ("responsible") means that a sanction can be inflicted upon him if he commits a delict. The statement that an individual is

> *unzurechnungsfähig* ("irresponsible")—because, for instance, he is a child or insane—means that a sanction cannot be inflicted upon him if he commits a delict. ... The idea of imputation (*Zurechnung*) as the specific connection of the delict with the sanction is implied in the juristic judgment that an individual is, or is not, legally responsible (*zurechnungsfähig*) for his behavior. (Kelsen 1985, 364)

One has to go back to the juridically-trained 19th century Austrian economist, Friedrich von Wieser, to find any non-metaphorical mention the r-word (or the z-word "Zurechnung" in German) in the economics literature.

> 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. (1930 (1889), 76-9)

There is a common pose that orthodox economists are scientifically judging the existing human rental system according to some normative principles such as Pareto optimality. They are analogous to the political economists, jurisprudents, and philosophers in the antebellum American South who pretended to be judging their peculiar institution according to some moral norms and who unsurprisingly never supported any knock-down inalienable rights arguments against the institution. The social role of 'economics' in our society based on human rentals suggests the opposite direction of causality. Norms and normative principles are judged according to whether or not they align with the social role of orthodox economics in giving a "scientific account" of the existing or perhaps an idealized human rental system.

For instance, Wieser actually summarizes the essentials of the labor theory of property (juridical imputation norm applied to property appropriation) critique of the employment system–"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." But that gives Wieser no second thoughts about the system of renting human beings; it only proves that the usual moral (factual) or legal norms of imputation *obviously* do not apply! It would apparently be an economic *reductio ad absurdum* to apply the usual moral/legal norm of imputation to production since it conflicts with the "yelps for liberty" (Johnson 1777, 259) to rent human beings in the free market free enterprise system! Thus the social role of "Economics" in the human rental system demands a new notion of "economic imputation" in accordance with another new notion of "economic responsibility".

> 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." (Wieser 1930, 76)
>
> THE ECONOMICALLY RESPONSIBLE FACTORS (Wieser 1930, header on p. 77)

By defining "economic responsibility" in terms of the animistic version of marginal productivity, Wieser and later orthodox economists can finally draw the conclusion demanded by their professional vocation: to show that the competitive human rental system "economically" imputes the product in accordance with "economic" responsibility.

Thus we arrive at an apogee of neoclassical microeconomics: trying to justify a metaphorical imputation of "distributive shares" in the product rights with a metaphorical notion of "responsibility." In contrast, the modern treatment of the labor theory of property (i.e., based on the juridical imputation norm) deals with the imputation of the "return from production" precisely from the moral, legal, and "juridical point of view."

The fundamental myth of capitalist property rights

The last ideological misconception that we need to consider is about the structure of property rights in production. The labor theory of property is about the appropriation of produced property as assets (as well as the liabilities for newly used up property). The standard view pretends that no appropriation takes place in capitalist production since the right to the product is supposedly already part of the "private ownership of the means of production." Any appropriation, where the labor theory might be applied, could only be situated in some original state of nature when the first means of production were being appropriated, and in any case all that is lost in the mists of the past.

But the "story" is false from the beginning. The rights to the product are not part of the "ownership of the means of production" (private or otherwise); that is the *fundamental myth* sponsored by Marxist as well as orthodox economists. Appropriation does take place in normal production, not just in some original state of nature. Indeed, there is a market mechanism of appropriation (Ellerman 1993) quite unnoticed by conventional economics which buys the myth that the product is already part of the "ownership of the means of production."

Consider a technically-defined production opportunity wherein people use some materials and a widget-maker machine to produce widgets. The "fundamental myth" is that the right to the product is part and parcel of the ownership of the capital good, the widget-maker machine. In this simple form, the myth is easy to defeat. Have labor hire capital or have some third party hire both. Then the hiring party would own the product, not the owner of the machine.

But that insight is much more "difficult" to grasp if we put the capital asset inside a corporate shell. Incorporate a company and have the owner of the widget-maker machine contribute it to the company in return for the only shares. Then they are the owner of the company and would "supposedly" be the owner of whatever is produced using the capital assets of the company (that is, the widget-maker machine). Isn't that what corporate ownership means? But that is again false for the same reasons. The machine can be rented out by the company (as, at one point, the Studebaker Company leased out one of its factories). When the machine is rented out, then the company would not be the owner of the product produced using the company's capital assets (the machine). The company would only be an input-supplier to the other "firm" or "enterprise" using the machine. Yet the original owner of the machine is still the owner of the company. This is a point about the structure of property rights, not marketplace power relations. The ownership of the product produced with a company's capital asset is not part and parcel of the ownership of the company. That is the fundamental myth about capitalist property rights.

It is the direction of the hiring contracts (who hires what or whom—where market power clearly plays a role) that determines who bears the input-liabilities and who thus appropriates the output-assets–not the "ownership of the means of production." One party buys or already owns all the

inputs to be used up in production and then, having absorbed those input-liabilities, that party can lay sole legal claim on the new produced assets.

The idea that the product was part of the "ownership of the means of production" was crystallized by Marx and thus he named the system "capitalism." It is a misnomer.

> Karl Marx, who in so many respects is more classical than the classicals themselves, had abundant historical justification for calling, i.e., miscalling—the modern economic order "capitalism." Ricardo and his followers certainly thought of the system as centering around the employment and control of labor by the capitalist. In theory, this is of course diametrically wrong. The entrepreneur employs and directs both labor and capital (the latter including land), and laborer and capitalist play the same passive role, over against the active one of the entrepreneur. It is true that entrepreneurship is not completely separable from the function of the capitalist, but neither is it completely separable from that of labor. The superficial observer is typically confused by the ambiguity of the concept of ownership. The owner of an enterprise may not own any of the property employed in it; and further reflection will show that the same item of property may in different senses be owned entirely, or in widely overlapping degrees, by a considerable number of proprietors. (Knight 1956, 68, fn. 40)

The product rights are not part of capital. Both Marxists and the defenders of "capitalism" agreed on the myth that the owner of capital was the "owner of the firm"; they disagreed on whether that "owner" should be public or private—so that the Cold War was much like a modern version of the Peloponnesian War between the Athenians who had privately-owned slaves and the Spartans who had publicly-owned slaves.

The case against the human rental system

The labor theory of property

We are now in a position to briefly state the case against the human rental firm and for the democratic firm based on the norms of ordinary jurisprudence. I will state the case based on the "labor theory of property"–which is just the ordinary juridical norm of assigning legal responsibility in accordance with *de facto* or factual responsibility. Our purpose is *not* to make a moral argument in favor of that ordinary juridical norm of imputation, but to descriptively show that the human rental system violates the norm—*regardless* of what one thinks about the norm.

Regardless of the productivity of the instruments and materials of production, only the human beings involved in the firm can be *de facto* responsible for producing the product. But textbook-trained economists immediately throw up their hands and point out that you can't impute the entire output to Labor ("Labor" = "managers and workers"); the product must be divided to account for the income to the other scarce inputs!

> Labor leaders used to say, "Without any labor there is no product. Hence labor deserves all the product." Apologists for capital would reply, "Take away all capital goods, and labor scratches a bare pittance from the earth; practically all the product belongs to capital."
>
> Analyze the flaws in these arguments. If you were to accept the arguments, show that they would allocate 200 or 300 percent of output to two or three factors, whereas only 100 percent can be allocated. (Samuelson and Nordhaus 2010, 246)

But they have misconceptualized the imputation problem concerning the actual non-metaphorical r-word.[2] There is also a negative product. Labor does not produce the product *ex nihilo*; Labor produces the product by using up the input materials and the services of the capital instruments. And thus Labor is also *de facto* responsible for that negative product (and the satisfaction of those input-liabilities accounts for the other factor incomes). The analogous argument by the "Apologists for capital" does not apply since things (e.g., capital and land) are not imputable in the usual non-metaphorical juridical sense. If the capital-supplier or land-supplier were also *personally* involved in the production process, that is part of "labor" and is independent of the marginal productivity of their supplied capital or land. As Samuelson put it when making a similar point:

> It is the productivity of the acre of land that is being paid for, and not the personal merits of the landowner. (Samuelson 1976, 562)

The positive and negative product, the (undivided) produced assets and input-liabilities, make what we might call the *whole product*.[3] It is not described by a number but by an ordered list of positive and negative numbers, a "vector."

The imputation principle (assign the legal responsibility to the *de facto* responsible party) implies that Labor should have the legal responsibility for the positive and negative fruits of their labor. In the 19th century, Thomas Hodgskin and other classical laborists (called "Ricardian Socialists", although they were neither) asserted "Labour's Right to the Whole Product" (Menger 1970 (1899)). Labor should be legally liable for the used-up inputs and should legally own the produced outputs; Labor should be the firm. The net value of whole product is the "residual" so the responsibility argument concludes that Labor ought to be the residual claimant. (Ellerman 2016; 2017)

The analogous case for abolishing the coverture marriage contract

Historical examples of voluntary contracts that have been abolished due to the abolitionist, democratic, and feminist movements are, respectively, the voluntary slavery contract, the non-democratic political constitution (*pactum subjectionis*), and the coverture marriage contract. Since the coverture contract is the most recent example, it may be useful to review the inalienable rights argument against that free and voluntary contract. Note that we are *not* playing the usual Left-wing parlour game of escalating one's notion of "voluntariness" until the contract we want to rule out is seen as being "involuntary." The inalienable rights critique applies even if it is perfectly voluntary.

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[2] Marginal productivity theory is actually concerned with the demand for inputs by the firm—which partly determines the size of the liabilities ("distributive share") owed to each factor. But the theory of property addresses the conceptually prior pre-distributive question of who is to get the whole product, i.e., who is to be the "firm," in the first place (Ellerman 2016; 2017).

[3] In the neoclassical literature, this standard vector is called the "input-output vector" as in: Quirk and Saposnik, (1968, 27); or production vector. For instance, if $y = f(x_1,\ldots,x_n)$ is the production function for a productive opportunity, then $(y,-x_1,\ldots,-x_n)$ is the whole product, input-output vector, or production vector.

Normally, to establish a legal guardian relationship of one adult as guardian over another adult as dependent, there must be some *factual* condition on the part of the dependent such as some mental disability, insanity, or senility that needs to be legally certified.

Yet the coverture marriage contract established the husband as the "Lord and Baron" or, in less flowery language, guardian over the *feme covert* who had no independent legal personality and thus could not make contracts or own property except in the name of the husband.

> 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 1959, section on "Husband and Wife")

In an adult woman of normal capacity, that factual capacity is factually inalienable in the sense that the woman cannot by voluntary action actually alienate that capacity and factually become a person of diminished capacity, a dependent, factually suitable for a guardianship relation. Yet the coverture contract gave her precisely that *legal* position.

As summarized in Table 1, the point is the mismatch between the factual and the legal situation (analogous to Type I and II errors in statistics).

Table of legal errors due to mismatch of factual and legal dependency status		Factual Dependency Status	
		Factually independent	Factually dependent
Legal Dependency Status	Legally independent.	True positive	Type II error: Dependent person not legally dependent.
	Legally dependent	Type I error: Independent person made legally dependent.	True negative

Table 1: Legal errors due to mismatch of factual and legal dependency

Since the woman is just as much a de facto capacitated adult as before voluntarily agreeing to the contract (the Type I error), the coverture contract was essentially an institutional fraud[4] sponsored by the legal system in patriarchical society that allowed the reduction of married women to the status of legal dependents to parade in the form of a voluntary contract.

The critique of the human rental or employment contract is entirely analogous using the usual notions of factual and legal responsibility as applied to the appropriation of the liabilities and assets created in production.

[4] It is a "fraud" in the normal sense where the legal contract is for A but it is a different B that is factually 'delivered'.

The case for abolishing the human rental contract

The inalienable rights argument against not only buying but renting people can be illustrated with a simple story. Suppose that an entrepreneur hired an employee for general services (no intimations of criminal intent). The entrepreneur similarly hired a van, and the owner of the van was not otherwise involved in the entrepreneur's activities. Eventually the entrepreneur decided to use the factor services he had purchased (man-hours and van-hours) to rob a bank. After being caught, the entrepreneur and the employee were charged with the crime. In court, the worker argued that he was just as innocent as the van owner. Both had sold the services of factors they owned to the entrepreneur. "Labor Service is a Commodity" (Alchian and Allen 1969, 469 (section title)) as the scientific texts proclaim. The use the entrepreneur makes of these commodities is "his own business."

The judge would, no doubt, be unmoved by these arguments. The judge would point out it was plausible that the van owner was not responsible. He had given up and transferred the use of his van to the entrepreneur, so unless the van owner was otherwise *personally* involved, his absentee ownership of the factor would not give him any responsibility for the results of the enterprise. But man-hours are a peculiar commodity in comparison with van-hours. The worker cannot "give up and transfer" the use of his own person, as the van owner can the van. Employment contract or not, the worker remained a fully responsible agent knowingly co-operating with the entrepreneur. The employee and the employer share the *de facto* responsibility for the results of their joint activity, and the law will impute legal responsibility accordingly.

> 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 1967, 612)

Unless one wants to argue that employees suddenly become robots or some sort of non-responsible instruments to be 'employed' by the employer-entrepreneur when the venture "they jointly carried out" was non-criminous, then the employees (and working employer) in an enterprise are jointly factually responsible for using up the inputs (i.e., creating the input-liabilities) and producing the products (i.e., the output assets) that make up the negative and positive components in the "Whole Product" representing the whole results in a productive opportunity.

Thus, by the usual juridical norm of imputation, they should *jointly* have the legal liabilities for using up the inputs and the legal ownership of the produced outputs. Yet, the employees, qua employees, have 0% of the input-liabilities charged against them and 0% of the produced outputs owned by them which is exactly the legal role of a rented non-responsible instrument. At least one early-20th century sociologist was insufficiently 'socialized' so that he could still state the actual facts about ownership.

> Under the factory system, the factory, raw materials, and finished product belong to the capitalist. The laborer at no time owns any part of what is passing through his hands or under his eye. Never can he say, "This product, when finished, will be mine, and my rewards will depend on how successfully I can dispose of it." There is much theoretic discussion to the "right of labor to the whole product" and much querying as to how much of the product belongs to the laborer. These questions never bother the manufacturer or his employee. They both know that, in actual fact, all of the product belongs to the capitalist, and none to the laborer. The latter has sold his labor, and has a right to the stipulated payment therefor. His claims stop there. He has no more ground for

> assuming a part ownership in the product than has the man who sold the raw materials, or the land on which the factory stands. (Fairchild 1916, 65-66).

The employer holds 100% of the input-liabilities and owns 100% of the produced outputs. Yet the employees are as inextricably and inalienably co-responsible (in factual terms) as in the case of the criminous venture.

The employees cannot by any voluntary act turn themselves into de facto non-responsible instruments (like capital goods or land), just as the married woman cannot voluntarily alienate her adult capacity to become a de facto dependent (see Table 2).

In her seminal book making the case against the coverture marriage contract writ large as "The Sexual Contract," Carole Pateman also saw that essentially the same argument applied against the human rental contract.

> 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. (Pateman 1988, 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 or services, cannot be separated from the person of the worker like pieces of property. (Ibid., 150)

The whole contract to rent human beings is another institutional fraud legally sponsored by a society based on renting (instead of owning) other humans so that the positive and negative fruits of the rented people can be appropriated by the employer. That is the basis for the neo-abolitionist claim that the employer-employee contract for the renting of human beings is inherently invalid. (Ellerman 2015)

Notice that this argument is entirely independent of the size of the wage or quality of working conditions, and has no connection to any theory of price or value including any so-called "labor theory of value." (Ellerman 2010) The parallel argument from democratic theory arrives at the same conclusion about the employment contract except that it is then viewed as the *private* Hobbesian *pactum subjectionis* of the workplace.

The inalienable rights theory that descends from the Reformation

Generalizing from these two cases, one can see the general form of the inalienability argument against personal alienation contracts. Any contract that puts a normally capacitated person in the legal position of a person of diminished capacity or non-capacity cannot actually be voluntarily fulfilled to factually justify that legal role. Note that the argument is not that a person "should not" or "ought not" make such a contract; the argument is that a person *cannot* factually fulfill such a contract. The person remains a factual person.

Hence the legal authorities always have to have an alternative factual performance that will legally count as 'fulfilling' the contract, and that factual performance always has the same form: obey your master, obey your ruler, obey your husband, or obey your employer. The resulting legal contract is only an institutionalized fraud parading as an ordinary contract. It is fraudulent in the normal sense that the contract is legally for A (i.e., legally becoming a person of

diminished capacity or a non-person) but it is a quite different B that is factually 'delivered.' It is voluntary *obedience* that is factually 'delivered'—as opposed to voluntarily turning oneself into a person of diminished capacity or a non-person to factually justify the legal role. Since the latter factual performance to justify the legal role is not factually possible (i.e., one's factual status as a person is factually inalienable), that is why the contract should be *abolished*—as opposed to just allowing alternative contracts (e.g., alternative marriage contracts) to offer a wider choice.

In terms of intellectual history, this inalienability argument descends from the Reformation doctrine of inalienability of conscience (where "conscience" means one's basic religious beliefs, not one's "inner moral voice"). The key insight is that even if one accepts whatever the priest or Pope tells one to believe, that is still inexorably or inalienably one's own decision to accept those beliefs.

> Furthermore, every man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; and as little as he can open or shut heaven or hell for me, so little can he drive me to faith or unbelief. (Luther 1942 (1523), 316)

This inalienability of conscience is sometimes expressed in the slogan "No one can believe for another"—which Ernst Cassirer takes as the "central principle of Protestantism" (1963b, 117)—in the sense that the priest or Pope cannot factually determine another person's beliefs; that is inalienably one's own decision.

It should be noted that this is a very strong notion of inalienability that is part of being a person. The point is not that one *should not* give up that decision-making power by being dominated by a priest or Pope, but that as long as one remains a person, one *cannot* alienate such decision-making power. Your decision to believe what you are told is still inalienably *your* decision. One can at most agree to make one's decision by delegating it to the better judgment of an agent-delegate with superior knowledge, experience, or the like.

It was this Reformation doctrine of the liberty and inalienability of conscience that was transferred "from a religious on to a juridical plane" (Lincoln 1971, 2) during the Enlightenment, e.g., in the work of Baruch Spinoza and Francis Hutcheson, to the theory of inalienable rights at the basis of the abolitionist and democratic movements. Staughton Lynd is particularly clear in tracing this theory of inalienable rights and distinguishing it from the rather trivial version which interpreted "inalienable" as meaning "not alienable without consent."

> Then it turned out to make considerable difference whether one said slavery was wrong because every man has a natural right to the possession of his own body, or because every man has a natural right freely to determine his own destiny. The first kind of right was alienable: thus Locke neatly derived slavery from capture in war, whereby a man forfeited his labor to the conqueror who might lawfully have killed him; and thus Dred Scott was judged permanently to have given up his freedom. But the second kind of right, what [Richard] Price called "that power of self-determination which all agents, as such, possess," was inalienable as long as man remained man. 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. (Lynd 1969, 56-57)

Returning to the case at hand, the human rental contract, unlike the coverture marriage contract, is still legally valid. Perhaps 100 or even 50 years from now, today's good-hearted orthodox economists, lawyers, political scientists, and liberal intellectuals will be looked back upon and asked *in absentia*: "Just which part of renting human beings didn't you understand?"

The fact that a whole economic civilization is founded on a bogus "contract" (the contract to rent human beings) to transfer what is untransferrable is "unbelievable" to most people—which is why so much false consciousness needs to be socially constructed to sustain the system. While the earlier systems of legalized violations of human rights had their platoons of intellectual cleric-hirelings (Milton 1957 (1659)) or mercenaries, no previous system had anything approaching the sophistication of orthodox economics, political science, legal theory, and the other social sciences.

The standard norm of justice and injustice

Under the norm where two conditions ought to match, like being a legal and factual dependent or being legally and factually responsible for something, then there are two ways to have a mismatch—like the type I and type II errors in statistics. It is a norm violation or 'injustice' when there is a mismatch. For instance, when a factually guilty person is judged legally not guilty, that is norm-ally taken as a miscarriage of justice—analogous to a Type I error of rejecting a true hypothesis. Or when a factually not guilty person is found to be legally guilty, that is also a miscarriage of justice—like the Type II error of accepting a false hypothesis.

Table of injustices due to mismatch of factual and legal responsibility		Factual Responsibility	
		Was factually responsible for X	Was not factually responsible for X
Legal Responsibility	Held legally responsible for X	True positive	Type II injustice: Innocent party legally guilty
	Not held legally responsible for X	Type I injustice: Guilty party legally innocent.	True negative

Table 2: Mismatches between factual and legal responsibility

In the case at hand, both errors occur. The factually responsible party or association, the people working within a firm, do not get the legal responsibility for the whole product (the Type I injustice with X = whole product), and the party or association that does get the legal responsibility, such as the corporate shareholders in the employing corporation, do not have the factual responsibility (the Type II injustice with X = whole product).

In a remarkable case of courage and clarity, the British Conservative minister and writer, Lord Eustace Percy, precisely pointed this out in 1944.

> 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 1944, 38)

In our terms, 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" is the party factually but not legally responsible for the whole product (i.e., those who lose by the Type I error), while the "association of shareholders, creditors and directors" is legally but not factually responsible for the whole product (i.e., those who gain by the Type II error).

Conclusion

This paper has endeavored to explain in clear modern terms the inalienable rights arguments that descend from the Reformation and Enlightenment to our times in the abolitionist, democratic, and feminist movements. The arguments are based on quite standard norms in ordinary jurisprudence. Our point was not to argue for or against the underlying norms but to show that when reassembled, the arguments clearly also apply against the voluntary human rental contract that is basis for our current economic system.

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