

A Theory of Inalienability

Towards A Theory of Classical Liberal Jurisprudence

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Abstract

Classical liberalism tends to respond to the criticism of any voluntary market contract by promoting a wider choice of options and increased information and bargaining power so that no one would seem to be ‘forced’ or ‘tricked’ into an ‘unconscionable’ contract. Hence, at first glance, the strict logic of the classical liberal free market philosophy would seem to mitigate against ever *abolishing* any mutually voluntary contract between knowledgeable and consenting adults. Yet the modern liberal democratic societies have abolished (i.e., treated as invalid) at least three types of historical contracts: the voluntary slavery contract, the coverture marriage contract, and an undemocratic constitution to establish an autocratic government. Thus, the rights associated with those contracts are considered as inalienable. This paper analyzes these three contracts and shows that there is indeed a deeper classical liberal tradition of jurisprudence that rules out those contracts. The ‘problem’ is that the same principles imply the abolition of the employment contract—which is the foundation for the economic system that is often (but superficially) identified with classical liberalism itself.

Introduction

Would classical liberal jurisprudence ever imply the *abolition* of a mutually voluntary contract between consenting adults—as opposed to promoting other voluntary alternatives? We may lament that a person would be so desperate to make certain contracts (like selling a kidney) and desire to paternalistically outlaw such contracts. But that does resolve the original problem of the person having no better voluntary alternatives. On strictly classical liberal or libertarian grounds, the non-paternalistic response is to expand the range of choices and opportunities so that no one would be desperate enough to make such extreme contracts. So, again, the question is: are there (non-paternalistic) grounds in classical liberalism to *abolish* any mutually voluntary contract between consenting adults?

Examples of injustice

We might start by considering the simplest examples of an injustice in jurisprudence. There are two ‘canonical’ examples:

1. When a factually guilty person is not convicted of the crime—like Type I error in statistics when a factually true hypothesis is not accepted (i.e., is rejected);
2. When a factually innocent person is convicted of the crime—like Type II error in statistics when a false hypothesis is not rejected (i.e., accepted).

These two types of injustice can be illustrated by the following kind of table.

Table of injustices due to mismatch of factual and legal responsibility for a crime.		Factual Responsibility	
		Was factually responsible for the crime	Was not factually responsible for the crime
Legal Responsibility	Held legally responsible for the crime	True positive: Justly convicted.	Type II injustice: Unjustly convicted.
	Not held legally responsible for the crime	Type I injustice: Unjustly not convicted.	True negative: Justly not convicted.

Table 1: Type I and Type II Injustices

The basic underlying *juridical principle of imputation* that is violated in these injustices is:

Impute legal responsibility according to factual responsibility.

Can a contract involve a similar factual-legal mismatch to make it unjust?

Example 1: The coverture marriage contract

The classic description of the coverture contract was by William Blackstone in his *Commentaries*.

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 (1765), section on husband and wife]

By the coverture marriage contract, the independent legal personality of the wife was extinguished. The *feme covert* was a legal dependent under the guardianship of her lord and baron husband.

To understand the argument for the *abolition* of coverture (as opposed to promoting many other marriage alternatives), consider where modern, liberal, and democratic societies do have a legal relationship of dependency and guardianship. In each case, there is a factual requirement of incapacity, such as children of minority age, which needs to be certified in order to apply to adults:

- Insanity or mental disability in adults; or
- Senility (e.g., advanced dementia or Alzheimer's disease).

The coverture marriage contract established this sort of legal dependency and guardianship for adults where:

- there was no factual requirement of impairment or incapacity;
- where satisfying such a factual requirement was not required to ‘fulfill’ the contract;
- becoming factually incapacitated is not the sort of thing a person can voluntarily do to ‘fulfill’ a contract; and
- thus, the traditional Law substituted another notion of ‘fulfilling’ the contract, namely, obey your lord and baron husband.

In short, the coverture contract was a legalized fraud on an institutional scale, i.e., establishing legal incapacity where there is no corresponding factual incapacity.

To get a better sense of the fraud, suppose, for the sake of argument, there was some voluntary act by which a person could turn themselves temporarily into a person of diminished capacity. Then one might lament that anyone would want or need to make such a contract (like selling a kidney), but at least that contract would not be a legalized fraud—since the factual performance would (we assume) fulfill the factual requirements in the eyes of the law for adult incapacity and dependency.

The same sort of Type I & II error table can be used to illustrate the mismatches between legal and factual capacity where the coverture contract involved the Type I error.

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 2: Type I & II mismatches of factual and legal dependency

The point is that the coverture marriage should be abolished by the standards of classical liberal jurisprudence (and has been in the liberal democracies) not because it was involuntary, but because it was fraudulent. In a fraud, the legal contract says A but the factual performance is not A but some B. The voluntary performance on the part of the *feme covert* is obedience (= B), not voluntarily turning oneself into an incapacitated adult (= A). But the legal contract then enforces of the consequences of A. That’s a fraud.

It is obvious that this analysis has nothing whatever to do with pragmatic, consequentialist, or utilitarian considerations such as the treatment of the wife by her husband, the size of the allowance given by husband to wife, abusive relationships, or the like.

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 sponsored

by the legal system in patriarchal society that allowed the reduction of married women to the status of legal dependents to parade in the form of a voluntary contract.

Example 2: The voluntary slavery contract

Similar arguments were made by abolitionists against the voluntary self-sale contract. A voluntary contract for a person to take on the legal status of a non-person or thing cannot be factually fulfilled by any voluntary act—just as the *feme covert* does not voluntarily convert herself into a factually incapacitated dependent. Hence the legal system substitutes the same factual performance in order to count as ‘fulfilling’ the contract: obey your master, e.g., in the Bible, Eph. 6:5, Titus 2:9, 1 Peter 2:18, Col. 3:22.

Thus, a voluntary slavery contract had the same sort of fraudulent mismatch; the contract made one a legal non-person but the factual performance that counted to ‘fulfill’ the contract was only voluntary obedience by a *de facto* person. Since the factual performance did not in fact fulfill a contract to alienate one’s personhood, the contract was again a legalized fraud. The early Scottish abolitionist and legal scholar, George Wallace, juxtaposed the factual and legal status of the slave to argue for the invalidity of any slavery contract.

Men and their liberty are not *in commercio*; they are not either saleable or purchaseable. For these reasons, every one of those unfortunate men, who are pretended to be slaves, has a right to be declared free, for he never lost his liberty; he could not lose it; his prince had no power to dispose of him. Of course, the sale was *ipso jure* void. This right he carries about with him, and is entitled every where to get it declared. As soon, therefore, as he comes into a country, in which the judges are not forgetful of their own humanity, it is their duty to remember that he is a man, and to declare him to be free. [Wallace 1760, pp. 95-96]

Any legal system that validated such a contract was still fully aware of the fraudulent mismatch, e.g., whenever the "non-person" committed a crime.

As one Antebellum Alabama judge explained: the slaves

are rational beings, they are capable of committing crimes; and in reference to acts which are crimes, are regarded as persons. Because they are slaves, they are ... incapable of performing civil acts, and, in reference to all such, they are things, not persons. [Catterall 1926, p. 2447]

The fraud was plain to all who would see it.

Forthright modern libertarians, such as Harvard’s late Robert Nozick, have not seen any reason to abolish a voluntary slavery contract between consenting adults.

The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would. [Nozick 1974, p. 331]

But we have seen that there are classical liberal grounds to abolish the voluntary slavery contract not because it was seen an involuntary but because it was fraudulent. Here again, this analysis of the voluntary slavery contract has nothing whatever to do with the consideration for the contract,

the slave's real income (food, clothing, and shelter), how harshly the slave is treated, or other such considerations.

Example 3: *Pactum subjectionis*

The third example of a contract to alienate some aspect of people's personhood is the collective governance contract of a non-democratic constitution or *pactum subjectionis* by which people would voluntarily give up their legal status as citizens to become subjects of some sovereign.

[A]s Rousseau shrewdly observed, Pufendorf had argued that a man might alienate his liberty just as he transferred his property by contract; and Grotius had said that since individuals could alienate their liberty by becoming slaves, a whole people could do the same, and become the subjects of a king. [Davis 1966, p. 413]

Since those were, by assumption, voluntary social contracts, democratic theory had to do beyond the simplistic idea of democracy as "government with the consent of the governed" and differentiate those voluntary pacts of subjection from democratic constitutions.

As the legal scholar, Otto von Gierke, put it:

This dispute also reaches far back into the Middle Ages. It first took a strictly juristic form in the dispute ... as to the legal nature of the ancient '*translatio imperii*' from the Roman people to the *Princeps*. One school explained this as a definitive and irrevocable alienation of power, the other as a mere concession of its use and exercise. ... On the one hand from the people's abdication the most absolute sovereignty of the prince might be deduced, On the other hand the assumption of a mere '*concessio imperii*' led to the doctrine of popular sovereignty. [Gierke 1966, pp. 93-4]

Or as the American constitutional scholar, Edward S. Corwin, said:

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, p. 4]

Or as summarized by the civic republican intellectual historian, Quentin Skinner:

The theory of popular sovereignty developed by Marsiglio [Marsilius] and Bartolus was destined to play a major role in shaping the most radical version of early modern constitutionalism. Already they are prepared to argue that sovereignty lies with the people, that they only delegate and never alienate it, and thus that no legitimate ruler can ever enjoy a higher status than that of an official appointed by, and capable of being dismissed by, his own subjects. [Skinner 1978, Vol. 1, p. 65]

Contrary to Sir Henry Maine, from the viewpoint of democratic theory, “the movement of the progressive societies” has not been a movement “from Status to Contract” [Maine 1972, p. 100] but the movement from Alienation Contracts to Delegation Contracts.

The doctrine that a person cannot in fact alienate their decision-making powers and responsible agency to factually fulfill an alienation contract has its roots in the Reformation doctrine of the inalienability of conscience. Here "conscience" means one's basic beliefs. No matter what one is told to believe by priest or Pope, it is always inexorably one's own decision.

As Martin Luther put it:

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, p. 316)

The inalienability of one's decisions about one's beliefs was summarized by Ernest Cassirer as the actual “central principle of Protestantism” [Cassirer 1963a, p. 117]: “No one can believe for another.”

This principle was then transformed in the Radical Enlightenment (Spinoza) and the Scottish Enlightenment (Francis Hutcheson) into the doctrine of inalienability based on one's personhood. Few have seen these connections as clearly as Staughton Lynd in his *Intellectual Origins of American Radicalism*. When commenting on Hutcheson's theory, Lynd noted that when “rights were termed ‘unalienable’ in this sense, it did not mean that they could not be transferred without consent, but that their nature made them untransferrable.” [Lynd 1969, p. 45] The crucial link was to go from the *de facto* inalienable liberty of conscience to a *theory* of inalienable rights based on the same idea.

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, pp. 56-7]

And then “Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important” [Wills 1979, p. 213]. Hutcheson provided the alternative language to describe a right where the contract to alienate the right was inherently invalid—the language of inalienable rights.

Although the appeal to inalienable rights first arose in the context of religious freedom, it was quickly extended to spheres other than religion, as we find in Jefferson's appeal to the inalienable rights of “Life, Liberty and the pursuit of Happiness.” This was one of the most significant developments in the history of libertarian thought. [Smith 2017, pp. 118-9]

As noted by George H. Smith, this notion of rights inalienable due to invalid contracts to alienate aspects of personhood, was indeed an important development in the history of classical liberal (or libertarian) thought since it accounted for the abolition of certain voluntary contracts. Ernst Cassirer provides a good summary of this argument that rules out the non-democratic *pactum subjectionis* not because it was involuntary but because it fraudulently assumed the alienation of the decision-making powers that are inalienably part of people's personhood.

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. If a man could give up his personality he would cease being a moral being. He would become a lifeless thing—and how could such a thing obligate itself—how could it make a promise or enter into a social contract? This fundamental right, the right to personality, includes in a sense all the others. ... 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 1963b, p. 175]

Moreover, the classical liberal economist/philosopher, James M. Buchanan, arrived at the same conclusion that a classical liberal social order would only allow a constitution of delegation. First, Buchanan makes the standard point about the necessity of consent.

The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. [Buchanan 1999, p. 288]

Then he moves to a deeper level in classical liberalism and requires that in addition to be a “sovereign” in the marketplace, people may *at most* enter into delegative contracts where they are the principals.

The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as *principals*. The premise denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals. [Ibid.]

Thus Buchanan is in the long line of democratic classical liberal theorists who exclude the constitutions of alienation (*pactum subjectionis*) in favor of democratic constitutions where the governors have the role of agents and representatives of the people as principals. Here again, this analysis and criticism of the non-democratic governance contracts of alienation has nothing whatever to do with whether the sovereign is a “good king,” the material conditions of the subjects, or the like.

Employment contract as the human rental contract

Before considering the employer-employee contract as the fourth example, it might be helpful to establish the conceptual nature of the contract. The employer-employee relationship is usually described by various euphemisms such as hiring, employing, giving a job to, and so forth. But from the economic viewpoint, it is the *renting* of a person essentially similar to renting a car (called 'hire-cars' in the UK) or an apartment.

The 'Standard Reply' is "But they are not the same! Giving a job to someone not the same as renting a car or an apartment." Of course, the details are not the same—like renting a car is not "the same" as renting an apartment. The point is that renting a person, car, or apartment is buying the flows of services of an entity instead of buying the entity itself—and in that more abstract sense, renting a person, a car, or an apartment are the same.¹

While this 'renting' terminology is nonstandard when applied to persons, it is in fact not even controversial. As the foremost neoclassical economist and first American Economics Nobel winner, Paul Samuelson (1915-2009), 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 1976, p. 52 (his italics)]

Other prominent economists agree:

Strictly speaking, the hourly wage is the rental payment that firms pay to hire an hour of labour. There is no asset price for the durable physical asset called a 'worker' because modern societies do not allow slavery, the institution by which firms actually own workers. [Begg, Fischer, & Dornbusch 1997, p. 201]

The human rental system we have today differs from involuntary slavery in two fundamental respects:

- The system is based on a voluntary contract, the employer-employee contract; and
- The contract is only to sell a limited amount of one's labor, not the whole of one's labor.

Example 4: The human rental contract

Things, as opposed to persons, cannot be responsible for anything. Only persons can be responsible for anything, be it a crime or not. This distinction is perfectly standard in jurisprudence (liberal or otherwise). 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. [Kant 1965, pp. 24-5]

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

¹ There is a related linguistic dodge that might be mentioned, namely the talk of "renting services." But the rented entity has to be returned to the owner after the time period of the contract, and services of a car (car-days), apartment (apartment-months), or person (person hours) are used up and cannot be returned. When an entity is rented, then the flow of services of the entity are purchased or bought, not "rented."

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 *zurechnungsfähig* (“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, p. 364]

The juridically trained Austrian economist, Friedrich von Wieser, noted this difference between persons and things in 1889:

The judge ... who... 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 1930, p. 76]

Wieser restates the point in economic terms:

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. [Wieser 1930, p. 79]

So, what are the facts about responsibility in a firm? The facts are that all the people who work in an enterprise, employees and working employers, are jointly *de facto* responsible for both:

- the negative results, i.e., using up the inputs, and
- the positive results, i.e., producing the outputs of the firm.

But the legal system tells a different story. The employees (qua employees) jointly:

- owe zero percent, 0%, of the liabilities for the used-up inputs; and
- own zero percent, 0%, of the produced outputs of the enterprise.

This is precisely the legal position of rented things, i.e., “dead tools in the hand” of the employer. Thus, the human rental contract, operates as if that human responsibility can be alienated and transferred to the employer who thus should have 100% of the legal responsibility for the positive and negative product, the assets and liabilities created in production. In modern economics, the list or ‘vector’ of those assets and liabilities created in a productive opportunity is called the “production vector” or “input-output vector” but for historical reasons, we will call it the *whole product* since it lists the ‘whole’ results of production, both positive and negative.

But an employee cannot voluntarily alienate their responsible agency to fulfill the human rental contract—just as the *feme covert* or voluntary slave could voluntarily take on the factual status to fulfill their contracts. Hence the legal system substitutes another factual performance to count as ‘fulfilling’ the human rental contract, namely obey your employer. All people can do voluntarily is to, say, obey another's orders to do this or that, which means they are inextricably factually co-responsible for the results.

Again, the fraud is out in the open for all who would see it—in the criminal case. A standard British law-book on the employer-employee relation notes:

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, p. 612]

The obvious question is what happens *in fact* when the employer and employees “jointly carried out a [non-]criminal venture”? Do the employees suddenly turn into machines being “employed” by the all-responsible employer? No, the factually inalienable co-responsibility of the employees is the same as before. It is the response of the Law that changes. No crime has been committed so no need to hold a trial to assign the legal responsibility in accordance with the factual responsibility. The employer assumes and pays off the input liabilities and then has 100% claim on the produced outputs, and the employees thus have 0% of the negative and positive fruits of their labor—in violation of the property theoretic version of the juridical principle of imputation, the labor or natural rights theory of property [Schlatter 1951].

Since there is no actual transfer of responsible human agency from the labor-seller to the labor-buyer, the whole contract to buy-and-sell labor, i.e., to rent persons, is a legalized fraud on an institutional scale, and thus should be abolished along with the self-sale contract and coverture marriage contract on classical liberal grounds. Here again, this analysis and critique of the employment contract has nothing whatever to do with the wage rates, the working conditions, the employees’ feelings of being dominated or alienated, or the like.

Ernst Wigforss, one of the founders of Swedish social democracy, made this point in arguing for the invalidity of the human rental contract in 1923.

There has not been any shortage of attempts to squeeze the labor contract entirely into the shape of an ordinary purchase-and-sale agreement. The worker sells his or her labor power and the employer pays an agreed price. ...But, above all, from a labor perspective the invalidity of the particular contract structure lies in its blindness to the fact that the labor power that the worker sells cannot like other commodities be separated from the living worker. ... Here we perhaps meet the core of the whole modern labor question,... . [Wigforss 1923, p. 28]

The modern political theorist, Carole Pateman, makes the same point in her 1988 book about the coverture contract writ large as “The Sexual Contract”:

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.
[Pateman 1988, p. 150]

A thing, like a tool, a beast of burden, a truck, or an apartment can be factually transferred to the use or *employment* of another person to factually fulfill a rental contract. Responsible human action, i.e., labor, cannot be separated or factually transferred from the “employed” person—unlike the services of any thing that is rented out, e.g., a tool, a mule, a truck, or an apartment.

Frank Knight as an ‘exceptional’ classical liberal thinker

Most ‘responsible’ social scientists and legal scholars ‘tippy-toe’ around the mismatch between labor services as factually responsible human actions and their legal role as merely causal productive services like those of capital or land. But Frank Knight was a noteworthy exception; he was by far the most deep-thinking and outspoken of the defenders of the human rental system. He knew that he had to collapse any relevant distinction between factually responsible human labor and the causally efficacious or productive services of things so that: “For ‘labor’ we should now say ‘productive resources’.” [Knight 1956, p. 8]

In a deeper analysis, the error in the whole classical position...roots in the special character and role assigned to labor. More generally still, it consists in confusing conceptual analysis with ethical evaluation. From the former standpoint, labor and capital instruments, including land, are all alike, simply productive resources. [Knight 1956, p. 87, fn. 70]

To conclude this brief discussion of the productive services, we may merely notice the invalidity of ... commonly assumed grounds of distinction between labor and property services. ... It is characteristic of the enterprise organization that labor is directed by its employer, not its owner, in a way analogous to material equipment. Certainly there is in this respect no sharp difference between a free laborer and a horse, not to mention a slave, who would, of course, be property. [Knight 1965, p. 126]

And if all the employees in an enterprise are just supplying services like the productive services of things, then the only human actions responsible for the positive and negative results of the enterprise are the actions of the employers.

Under the enterprise system, a special social class, the business men, direct economic activity; they are in the strict sense the producers, while the great mass of the population merely furnish them with productive services, placing their persons and their property at the disposal of this class; the entrepreneurs also guarantee to those who furnish productive services a fixed remuneration. [Knight 1965, p. 271]

We have seen how the inherent invalidity of a personhood alienation contract, like a voluntary slavery contract, can also be expressed as the inalienability of the rights such contracts would legally alienate. As if to anticipate our argument, Frank Knight continually criticized the notion of “inalienable rights” as not allowing workers to hypothecate or mortgage their future labor in order to obtain present resources, e.g., to start their own business.

The peculiar weakness of the position of one who owns earning power only in the form of personal capacities is, somewhat paradoxically, a consequence of the guarantee of personal freedom, general in modern nations, but logically not a part of the property system; in fact, it is a limitation on the ownership of one's own person. Because of such "inalienable rights" a man cannot "capitalize" his earning power because a contract to deliver labour in the future will not be enforced. [Knight 1947, p. 26, fn. 3]

Since the “inalienable rights” restrictions on selling or collateralizing future labor are “logically not a part of the property system” in the human rental economy, those restrictions must be set aside for the idealized competitive model of the human rental system to achieve allocative efficiency; otherwise there might willing buyers and sellers of future labor who would be forbidden to make a mutually beneficial transaction. As another conventional economist put it in 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, p. 334]

And to consistently round-out his argument, Knight must give an alternative rationale for the abolition of a voluntary slavery contract than “inalienable rights” or the inherent invalidity of such a contract on classical liberal grounds.

The abolition of slavery or property in human beings rests on the fact that slaves do not work as effectively as free men, and it turns out to be cheaper to pay men for their services and leave their private lives under their own control than it is to maintain them and force them to labor. [Knight, 1965, p. 320]

Classical liberal jurisprudence and the abolition of certain voluntary contracts

We now have seen four examples of inherently fraudulent contracts that legally alienated certain factually inalienable aspects of one's personhood and thus should all be abolished on classical liberal grounds:

- the voluntary slavery or self-sale contract;
- the coverture marriage contract;
- the *pactum subjectionis*; and
- the human rental or self-rental contract.

Hence, we can abstract the common features:

- All the contracts put a normal capacitated adult into the legal role of a person of diminished or no capacity (within the scope of the contract);
- All the contracts are not factually fulfilled by the person voluntarily becoming a person of diminished or no capacity;

- All the historical contracts hence substituted another voluntary performance that would count as ‘fulfilling’ the contract;
 - obey your master,
 - obey your husband,
 - obey your ruler, and
 - obey your employer.

All the contracts were the institutional basis for a legalized fraud; legally treating a normal capacitated person as a person of diminished or no capacity within the scope of the contract. The critique is not of the persons who, for whatever reason, accepted such contracts and ‘fulfilled’ them by their voluntary obedience.

The critique is of any *legal system* that accepts such personhood- or personal-alienation contracts as legally valid. A bedrock principle of classical liberal jurisprudence is that contracts must be voluntary *and non-fraudulent*. The usual left-wing criticism is just to escalate one's notion of “voluntariness” until the contracts one wants to criticize are seen as “involuntary.”

But the analysis here is that the personhood alienation contract may well be voluntary (i.e., in the obedience ‘fulfillment’ sense) but such contracts are inherently fraudulent.

Does this juridical theory of inalienability have an explanatory or clarifying power? The theory implies the:

- abolition of the voluntary slavery contract;
- abolition of the *pactum subjectionis* as a basic for political government; and
- abolition of the coverture marriage contract.

In the last two centuries, the most important social changes in the liberal societies (i.e., the western industrialized countries) have been:

- the abolition of slavery, involuntary and voluntary (19th century);
- the acceptance of democracy as the only legitimate of form of government (19th century); and
- the abolition of the coverture marriage contract and other advances in the Women’s Movement (e.g., married women’s property acts in the 19th and early 20th centuries).

It is easy to nod in agreement when a theory implies the abolition of institutions that have already been abolished. When any theory implies the abolition of an existing and long-established institution in a society, then the people born and raised in that society will consider the institution as natural and, of course, legitimate, and thus such a theory will be considered essentially a *reductio ad absurdum*.

The democratic alternative

The alternative to the human rental system is:

- genuine system of private property (getting the fruits of your labor);
- genuine system of non-fraudulent market contracts;
- every one is a member of the democratic enterprise where they work;
- people are jointly working for and governing themselves in the workplace; and

- jointly appropriating the positive and negative fruits of their labor.

With remarkable courage and clarity, the Tory thinker, Lord Eustace Percy, put the fundamental task as follows:

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, p. 38]

Note that Percy's two associations correspond precisely to the:

1. Type I association that factually "produces and distributes wealth" but is not even "recognised by the law" and
2. Type II association which "the law does recognise" is factually "incapable of production and is not expected by the law to perform these functions."

Table of injustices due to mismatch of factual and legal responsibility for <i>whole product</i> = (output assets, input liabilities)		Factual Responsibility	
		Was factually responsible for whole product	Was not factually responsible for whole product
Legal Responsibility	Held legally responsible for whole product	True positive	Type II injustice: Factually non-resp. party gets legal responsibility
	Not held legally responsible for whole product	Type I injustice: Factually resp. party is legally non-responsible.	True negative

Table 3: Type I & II mismatches between legal and factual responsibility for the whole product of an enterprise.

Concluding remarks

The ‘*problem*’ in classical liberal philosophy, economics, and jurisprudence is well illustrated by the case of James M. Buchanan. Consider, for example, the previous quote by the Nobel-prize-winning economist where he “denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals.” [Buchanan 1999, p. 288] Well, no one but no one thinks that the employees are the principals and the employer is the agent, delegate, or representative of the employees in the employer-employee relation. Unlike Frank Knight, who understood what he ‘had’ to do (e.g., identify responsible human action with the causally efficacious or productive services of things), Buchanan and most other classical liberal scholars seem blithely unaware of the problem. Buchanan did not even notice in the economics system where he lived his whole life and in which he received the Economics Nobel Prize, that the employees are not the principals in the most common “social-organizational

arrangements”; nor did he ever cast any doubt on the human rental relationship. It is just beyond the orbit of serious consideration.

The philosophy of classical liberalism historically developed, in part, as a defense of the system of private property and market contracts of which the employment contract has always been an integral part—even though that contract:

- violates the non-fraudulent condition by putting the factually co-responsible employees into the legal position of non-responsible instruments;
- violates the normative basis for private property appropriation since the employees legally appropriate 0% of the positive and negative fruits of their labor; and
- violates the restriction to delegative contracts since the employment contract is a collective contract to alienate the employees’ self-governing rights to the employer within the scope of the employment.

Hence, it is a considerable ‘problem’ for classical liberalism if its own deeper principles, which implied the abolition of the voluntary slavery contract, the coverture marriage contract, and the social contract of a non-democratic constitution, also imply the abolition of the employment contract.

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