Inalienable rights and liberal-contractarian theories of justice —with applications to Rawls and Nussbaum

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Abstract

Liberal-contractarian philosophies of justice see the unjust systems of slavery and autocracy in the past as being based on coercion—whereas the social order in the modern democratic market societies is based on consent and contract. However, the 'best' case for slavery and autocracy in the past was based on consent-based contractarian arguments. Hence our first task is to recover those 'forgotten' apologia for slavery and autocracy. To counter those consent-based arguments, the historical anti-slavery and democratic movements developed a theory of inalienable rights. Our second task is to recover that theory and to consider several other applications of the theory. Finally the theories of justice expounded by John Rawls and by Martha Nussbaum are examined from this perspective.

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Introduction and Overview

Inalienable rights are not rights which require consent to be alienated; inalienable rights are rights which may not be alienated even with consent. Taking consent as being indicative of an implicit or explicit contract, if a contract to alienate a certain right was for some reason inherently invalid, then the right would be inalienable.

Hence the topic of inalienable rights is bound up with contractarian theories of justice, where we might take John Rawls and, to some extent, Martha Nussbaum as modern representatives, and with (classical) liberal theories of justice, where we might take Robert Nozick as a representative (at least on the libertarian end of the spectrum). Liberalism is usually formulated (e.g., in the context of free-market economics) without reference to a hypothetical social contract but the

emphasis is strongly on a social order based on consent and contracts as opposed to an order based on state coercion or status.[1]

> Fundamentally, there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of coercion—the technique of the army and of the modern totalitarian state. The other is voluntary co-operation of individuals—the technique of the market place. [Friedman 1962, 13]

My focus is on this common foundation of consent and contracts that is shared by contractarian and liberal theories of justice (in spite of many other differences), and the phrase "liberal-contractarian" denotes that common focus.

Since liberalism and contractarianism both put an emphasis on contracts, it should be a matter of some importance to liberal-contractarian philosophy to know if there are some contracts that ought to be considered inherently invalid and thus certain rights which are inalienable. While the phase "inalienable rights" is a staple in political rhetoric (e.g., stemming from the American Declaration of Independence) and in the human rights literature, there is surprisingly little *theory* about inalienable rights in the liberal or contractarian literature, e.g., in Rawls', Nussbaum's, or Nozick's work.

The paradigm free market example is a contract to sell oneself into slavery, the self-sale contract. The paradigm example to consider in the contractarian tradition is a social contract of subjection, a *pactum subjectionis* which transferred and alienated the right of self-government to a (Hobbesian) sovereign. Robert Nozick was one of the few modern philosophers to explicitly consider these examples and to treat them within his theory. Controversially, he pointed out that the libertarian philosophy would accept both these contracts as being valid or legally permitted. He argued that a free libertarian society should validate that sort of a contract with a "dominant protective association" [Nozick 1974, 15] playing the role of the Hobbesian sovereign. And the same reasoning would re-validate[2] the individual version of the alienation contract.

> 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, 331]

Regardless of whether or not this was Nozick's considered personal judgment in "reflective equilibrium," he did a service to philosophy by grinding out the logic of the liberal-contractarian vision unconstrained by any inalienable rights theory. Few, if any, other philosophers would personally agree that these contracts should be allowed, but there is a distinct lack of *theory* which yields that result.[3]

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[1] As Henry Maine put it, "the movement of the progressive societies has hitherto been a movement *from Status to Contract*." [1861, reprinted 1972, 100]

[2] It would be "*re*-validate" since in the decade before the Civil War, six states had explicit laws "to permit a free Negro to become a slave voluntarily." [Gray 1958, 527] For instance in Louisiana, legislation was passed in 1859 "which would enable free persons of color to voluntarily select masters and become slaves for life." [Sterkx 1972, 149]

[3] The author's pseudonymous spoof of Nozick [Philmore 1982; reprinted with explanation in Ellerman 1995] shows the flaws in the rather superficial arguments against the self-enslavement contract given by the few authors who

A third paradigm example of a dubious alienation contract is the old *coverture* marriage contract wherein the wife contractually alienated her independent legal personality to become a sort of subperson or dependent under the "cover" of the husband. Like the self-sale contract and political pact of subjection, the *coverture* marriage contract is now outlawed in modern democratic societies. But with a few exceptions [see Pateman 1988; 2002], there is little theory in the modern literature as to why such a contract (perhaps in a non-gendered form) should be considered inherently invalid.

The modern inattention to a theory of inalienability is naturally matched by a relative neglect of the consent-based contractarian arguments made historically for slavery and for autocratic governments not to mention the subjection of women. Of course, there were those who defended slavery or autocracy on racial or religious grounds ("Divine Right"), and liberal intellectual history tends to dote on such arguments as the alternative. But our focus is on the sophisticated or 'best' contractual arguments for the permissibility of slavery or autocracy even within the natural rights tradition. The point is that the natural rights were considered *alienable*. In response to those historical arguments in the alienable natural rights tradition, the democratic and anti-slavery movements developed a theory of inalienability which descends from the Reformation and Enlightenment (with some anticipation by the Stoics).

Hence our task is largely retrieval. First, the consent-based[4] contractarian arguments for autocracy and slavery need to be reviewed, and then the somewhat inchoate or scattered theory of inalienability that descends from the Reformation and Enlightenment needs to be reassembled in a more modern form.

When that theory is reassembled, then it becomes clear that the modern self-*rental* contract, i.e., the employment contract, would also be ruled out by the theory. This rather controversial result then provides a basis to re-evaluate modern liberal-contractarian philosophy such as the work of John Rawls [1971; 1996; 1999; 2000] and Martha Nussbaum [1999; 2000; 2006]—Nozick being more an eccentric special case. For instance, Rawls lived his whole life in an economy based on the renting of human beings, and yet in his writings about justice he never considered the possibility that there might be something inherently wrong with the contract to rent persons. Thus if the inalienability argument that rules out the self-sale contract, the political pact of subjection, and the *coverture* marriage contract also rules out the employer-employee contract, then this would point to a major problem in Rawls and indeed in modern liberal or contractarian philosophy. And finally we consider the extent to which Martha Nussbaum in her sympathetic critique of Rawls [2006] addresses these problems.

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explicitly consider it. The point of the spoof was to encourage the retrieval of the deeper inalienability theory developed historically to defeat apologies for slavery based on implicit or explicit contracts.

[4] The modern phase would be "liberal" but the consent-based arguments far precede the modern philosophy of free-market liberalism.

Brief History of Voluntary Slavery Contracts

For liberalism, the most basic consideration for justice is the question of consent versus coercion. Often slavery is seen as being coercive "by definition" so there is no need to consider a voluntary self-enslavement contract. But semantics aside, from ancient times there have been defenses of slavery on *contractual* grounds. The Old Testament of the Bible is a convenient starting point for the intellectual history of slavery contracts. The Old Testament law was that, after six years of service, any Hebrew slave was to be set free in the seventh year, the year of the Jubilee.

> But if he says to you, "I will not go out from you," because he loves you and your household, since he fares well with you, then you shall take an awl, and thrust it through his ear into the door, and he shall be your bondman for ever.[5]

In the *Institutes* of Justinian, Roman law provided three legal ways to become a slave.

> Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him.[6]

In addition to the third means of outright contractual slavery, the other two means were also seen as having aspects of contract. A person born of a slave mother and raised using the master's food, clothing, and shelter was considered as being in a perpetual servitude contract to trade a lifetime of labor for these and future provisions. In the alienable natural rights tradition, Samuel Pufendorf (1632-94) gave that contractual interpretation.

> Whereas, therefore, the Master afforded such Infant Nourishment, long before his Service could be of any Use to him; and whereas all the following Services of his Life could not much exceed the Value of his Maintenance, he is not to leave his Master's Service without his Consent. But 'tis manifest, That since these Bondmen came into a State of Servitude not by any Fault of their own, there can be no Pretence that they should be otherwise dealt withal, than as if they were in the Condition of perpetual hired Servants. [Pufendorf 2003 (1673), 186-7]

Manumission was an early repayment or cancellation of that debt. And Thomas Hobbes, for example, clearly saw a "covenant" in this ancient practice of enslaving prisoners of war.

> And this dominion is then acquired to the victor when the vanquished, to avoid the present stroke of death, covenants either in express words or by other sufficient signs of the will that, so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof at his pleasure. ... It is not, therefore, the victory that gives the right of dominion over the vanquished but his own covenant. [Hobbes 1958 (1651), Bk. II, chapter 20]

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[5] See Deut. 15:16-17; also Exodus 21:5-6.

[6] See *Institutes* Lib. I, Tit. III, 4.

Thus *all* of the three legal means of becoming a slave in Roman law had interpretations as implicit or explicit contracts.

Richard Tuck has traced another root of the alienability of liberty to a seemingly obscure medieval controversy about the meaning of apostolic poverty. Is a monk's right (*ius*) to use food, clothing, and shelter a property right (a *dominium*) even though a monk may not sell these commodities? The thinkers who foreshadowed the non-democratic liberal tradition argued that one's right or liberty to use commodities and, broadly, to act in the world, was indeed a property right (a *dominium*). This led to the conclusion that liberty could also be traded away.

> We can see from the history of this movement how the attack on apostolic poverty had led to a radical natural rights theory. If one had property in anything which one used, in any way, even if only for personal consumption and with no possibility of trade, then any intervention by an agent in the outside world was the exercise of a property right. Even one's own liberty, which was undoubtedly used to do things in the material world, counted as property — with the implication that it could, if the legal circumstances were right, be traded like any other property. [Tuck 1979, 29]

For instance, the influential Spanish scholastic philosopher and jurist, Francisco Suarez, noted in 1612 this basic theme of the alienability of liberty:

> nature, although it has granted liberty and *dominium* over that liberty, has nevertheless not absolutely forbidden that it should be taken away. For ... the very reason that man is *dominus* of his own liberty, it is possible for him to sell or alienate the same. [Quoted in: Tuck 1979, 56]

Suarez developed the connection between voluntary slavery and the political *pactum subjectionis* which is a recurrent theme in the tradition of alienable natural rights to liberty.

> If voluntary slavery was possible for an individual, so it was for an entire people. ... A natural rights theory defense of slavery became in Suarez's hand a similar defense of absolutism: if natural men possess property rights over their liberty and the material world, then they may trade away that property for any return they themselves might think fit ... . [Tuck 1979, 56-7]

Hugo Grotius (1583-1645) was a pivotal figure in the development of natural rights political philosophy, but he also, in the alienable rights tradition, viewed man's natural right to liberty as a right which could be transferred with consent. Pufendorf followed Grotius, and in addition to giving a contractual interpretation to the slavery of a child born of a slave mother, Pufendorf noted that an explicit slavery contract was a lifetime version of the master-servant contract (employment contract in modern terms) where a servant could be hired for a certain time and would receive wages.

> But to such a Servant as *voluntarily offers himself to perpetual Servitude*, the Master is obliged to allow perpetual Maintenance, and all Necessaries for this

> Life; it being his Duty on the other hand to give his constant Labour in all Services whereto his Master shall command him, and whatsoever he shall gain thereby, he is to deliver to him. [Pufendorf 2003 (1673), 185]

Rousseau noted this contractarian argument: "Pufendorf says that we may divest ourselves of our liberty in favour of other men, just as we transfer our property from one to another by contracts and agreements." [1973, 105] Perhaps the passage Rousseau had in mind was:

> And as by private Contract, the Right of any thing which we possess, so by Submission the Right to dispose of our Strength and our Liberty of acting, may be convey'd to Another. Whence, if any Person should, for Instance, voluntarily and upon Covenant, deliver himself to me in Servitude, he thereby really confers on me the Power of a Master. [Pufendorf 1703, Book VII, Chap. III]

John Locke's *Two Treatises of Government* (1690) is a classic of liberal thought. Locke would not condone a contract which gave the master the power of life or death over the slave.

> For a Man, not having the Power of his own Life, *cannot*, by Compact or his own Consent, *enslave* himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. [Second Treatise, §23]

Locke is ruling out a voluntary version of the old Roman slavery where the master could take the life of the slave with impunity. But once the contract was put on a more civilized footing, Locke saw no problem and nicely renamed it "drudgery."

> 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. [Second Treatise, §24]

Moreover, Locke agreed with Hobbes on the practice of enslaving the captives in a "Just War" as a *quid pro quo* exchange based on the on-going consent of the captive.

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

Locke seemed to have justified slavery in the Carolinas by interpreting the raids into Africa as just wars and the slaves as the captives.[7]

William Blackstone's (1723-1780) codification of common law was quite important in the development of English and American jurisprudence. Like Locke, Blackstone rules out a slavery where "an absolute and unlimited power is given to the master over the life and fortune of the slave." Such a slave would be free "the instant he lands in England."

> 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 (1765), 72, section on "Master and Servant"]

An interesting case study in the selectiveness of liberal-contractarian intellectual history is the treatment of the American proslavery writers. The proslavery position is usually presented as being based on illiberal racist or paternalistic arguments. Considerable attention is lavished on illiberal paternalistic writers such as George Fitzhugh,[8] while consent-based contractarian defenders of slavery are passed over in silence. For example, Rev. Samuel Seabury [1969 (1861)] gave a sophisticated liberal-contractarian defense of ante-bellum slavery in the Grotius-Hobbes-Pufendorf tradition of alienable natural rights theory.[9]

> From all which it appears that, wherever slavery exists as a settled condition or institution of society, the bond which unites master and servant is of a moral nature; founded in *right*, not in *might*; ... . Let the origin of the relation have been what it may, yet when once it can plead such prescription of time as to have received a fixed and determinate character, it must be assumed to be founded in the consent of the parties, and to be, to all intents and purposes, a compact or covenant, of the same kind with that which lies at the foundation of all human society. [Seabury 1969 (1861), 144]

Seabury easily anticipated the retort to his classical tacit-contract argument.

> "Contract!" methinks I hear them exclaim; "look at the poor fugitive from his master's service! He bound by contract! A good joke, truly." But ask these same men what binds them to society? Are they slaves to their rulers? O no! They are bound together by the COMPACT on which society is founded. Very good; but did you ever sign this compact? Did your fathers every sign it? "No; it is a tacit and implied contract." [Seabury 1969, 153]

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[7] See Laslett 1960, notes on §24, 325-26.

[8] See, for example, Genovese 1971; Wish 1960; or Fitzhugh 1960.

[9] McKitrick (1963) collects together essays of fifteen pro-slavery writers but does not include any writers who argue on a contractual basis such as Seabury.

If modern contractarian liberals had recognized the past contractarian arguments for slavery (and autocracy), then they might be in the uncomfortable position of disagreeing with those proslavery thinkers not in principle but only in matters of fact. They might be reduced to special pleas that the implied "social contract" has "genuine" tacit consent, but that the implied slavery contract did not. It is no surprise that modern liberal-contractarian thinkers have just avoided this whole quandary by promulgating the simplistic consent-or-coercion version of the slavery debates. The pro-slavery contractual arguments go down the memory hole; it's just a question of consent or coercion. And liberal-contractarian thinkers have taken a stand foursquare in favor of consent.

Brief History of Voluntary Contracts of Subjection

It was previously noted that there were both individual and collective versions of the contract to alienate the rights of self-governance. The full-blown rump-and-stump version of the individual contract was the self-sale contract previously considered. The collective version was the pact of subjection, the *pactum subjectionis*, which alienated and transferred the people's rights of self-governance to a sovereign who then ruled in the sovereign's own name—not as a delegate, representative, or trustee of the people. By the contract of subjection, the people became subjects of the sovereign.

Here again, the intellectual history of the debate between autocracy and democracy has been over-simplified as a question of coercion or consent. Democracy is presented as "government based on consent of the governed" and non-democratic governments are presented as being based on coercion. But again there was a contractarian defense of non-democratic government from Antiquity down to Harvard's Professor Nozick.

We may start with Roman law. The sovereignty of the Roman emperor was usually seen as being founded on a contract of rulership enacted by the Roman people. The Roman jurist Ulpian gave the classic and oft-quoted statement of this view in the *Institutes* of Justinian:

> Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerning his *imperium*, have yielded up to him all their power and authority. [Lib. I, Tit. II, 6; Quoted in: Corwin 1955, 4; or in: Sabine 1958, 171]

The American constitutional scholar, Edward S. Corwin, noted the questions that arose in the Middle Ages about the nature of this pact.

> 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, fn.8]

It is precisely this question of *translatio* or *concessio*—alienation or delegation of the right of government in the contract—that is the key question, not consent versus coercion. Consent is on both sides of that alienation (*translatio*) versus delegation (*concessio*) question. The alienation

version of the contract became a sophisticated tacit contract defense of non-democratic government wherever the latter existed as a settled condition. And the delegation version of the contract became the foundation for democratic theory.

The German legal thinker, Otto Gierke, was quite clear about the alienation-vs.-delegation question.

> 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, 93-4]

The contractarian defense of non-democratic government was based on the *translatio* interpretation of the tacit social contract.

> In contrast to theories which would insist more or less emphatically on the usurpatory and illegitimate origin of Temporal Lordship, there was developed a doctrine which taught that the State had a rightful beginning in a Contract of Subjection to which the People was party. [Gierke 1958, 38-9]

In terms of the "coercion or contract" dichotomy, this tradition was grounded on contract.

> Indeed that the legal title to all Rulership lies in the voluntary and contractual submission of the Ruled could therefore be propounded as a philosophic axiom. [Gierke 1958, 39-40]

A state of government which had been settled for many years was *ex post facto* legitimated by the tacit consent of the people. Thomas Aquinas (1225-74) expressed the canonical medieval view.

> Aquinas had laid it down in his *Summary of Theology* that, although the consent of the people is essential in order to establish a legitimate political society, the act of instituting a ruler always involves the citizens in alienating—rather than merely delegating—their original sovereign authority. [Skinner 1978, Vol. 1, 62]

In about 1310, according to Gierke, "Engelbert of Volkersdorf is the first to declare in a general way that all *regna et principatus* originated in a *pactum subjectionis* which satisfied a natural want and instinct." [1958, 146]

After noting that an individual could sell himself into slavery under Hebrew and Roman law, Hugo Grotius extends the possibility to the political level.

> Now if an individual may do so, why may not a whole people, for the benefit of better government and more certain protection, completely transfer their sovereign rights to one or more persons, without reserving any portion to themselves? [Grotius 1901 (1625), 63; quoted in Rousseau 1973, 185]

He goes on to cite some explicit examples.

> For if the Campanians, formerly, when reduced by necessity surrendered themselves to the Roman people in the following terms: — "Senators of Rome, we consign to your dominion the people of Campania, and the city of Capua, our lands, our temples, and all things both divine and human," and if another people as Appian relates, offered to submit to the Romans, and were refused, what is there to prevent any nation from submitting in the same manner to one powerful sovereign? [Grotius 1901 (1625), 63-4]

Thomas Hobbes (1588-1679) made the best-known attempt to found non-democratic government on the consent of the governed. Without an overarching power to hold people in awe, life would be a constant war of all against all. To prevent this state of chaos and strife, men should join together and voluntarily alienate and transfer the right of self-government to a person or body of persons as the sovereign. This *pactum subjectionis* would be a

> covenant of every man with every man, in such manner as if every man should say to every man, *I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that you give up your right to him and authorize all his actions in like manner*. [Hobbes 1958 (1651), 142]

The consent-based contractarian tradition is brought fully up to date in Robert Nozick's contemporary libertarian defense of the contract to alienate one's right of self-determination to a "dominant protective association."

In view of this history of apologetics for autocracy based on consent, the distinction between coercion and government based on the "consent of the governed" was not the key to democratic theory. The real debate was within the sphere of consent and was between the alienation (*translatio*) and delegation (*concessio*) versions of the basic social or political constitution. Late medieval thinkers such as Marsilius of Padua (1275-1342) and Bartolus of Saxoferrato (1314-57) laid some of the foundations for democratic theory in the distinction between consent that establishes a relation of delegation and trusteeship versus consent to an alienation of authority.

> 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, 65]

As Marsilius put it:

> The aforesaid whole body of citizens or the weightier part thereof is the legislator regardless of whether it makes the law directly by itself or entrusts the making of it to some person or persons, who are not and cannot be the legislator in the absolute sense, but only in a relative sense and for a particular time and in accordance with the authority of the primary legislator. [Marsilius of Padua 1980 (1324), 45]

According to Bartolus, the citizens "constitute their own *princeps*" so any authority held by their rulers and magistrates "is only delegated to them (*concessum est*) by the sovereign body of the people" [Skinner 1978, Vol. 1, 62]

To secure that distinction for democratic theory, the task was to develop arguments that there was something inherently invalid in the alienation or *translatio* contracts, and thus that the rights which these contracts pretended to alienate were in fact inalienable.[10]

The Inalienable Rights Argument

We have seen that the debate about slavery and autocracy was not a simple consent-versus-coercion debate. From Antiquity down to the present, there were consent-based arguments for slavery and non-democratic government as being founded on certain explicit or implicit contracts. Hence in the counterarguments of the abolitionist and democratic movements, it was not enough to criticize divine rights or the coercion of people of another race who were considered of diminished capacity. The democratic and abolitionist movements needed to counter not the worst but the 'best' arguments for slavery and autocracy. They needed to counter the arguments that slavery and autocracy could be based on explicit or implicit contracts.

The key is that in consenting to such an alienation contract, a person is agreeing to, in effect, take on the legal role of a non-adult, indeed, a non-person or thing. Yet all the consent in the world would not in fact turn an adult into a minor or person of diminished capacity, not to mention, turn a person into a thing. The most the person could do was obey the master, sovereign, or employer—and the authorities would "count" that as fulfilling the contract. Then all the legal rights and obligations would be assigned according to the "contract" (as if the person in fact had diminished or no capacity). But the attributes that make one a person (e.g., *de facto* responsible action) cannot in fact be transferred to another person. Any rights the person had *qua* person would be unchanged. Since the person remained a *de facto* fully capacitated adult person with only the contractual role of a non-person or diminished person, the contract was impossible and invalid. A system of positive law that accepted such contracts would only be a fraud on an institutional scale. That in a nutshell is the inalienable rights theory based on the *de facto* nontransferability of the attributes a person has *qua* person.

Applying this argument requires prior analysis to tell when a contract puts a person in the legal role of a non-person. Having the role of a non-person is not necessarily explicit in the contract and it has nothing to do with the payment in the contract, the incompleteness of the contract,

[10] See Skinner 1978 for an extensive history of the alienation-versus-delegation debate.

working conditions, or the like. Persons and things can be distinguished on the basis of decision-making and responsibility. For instance, a genuine thing such as a tool or machine can be alienated or transferred from person A to B. Person A, the owner of the tool, can indeed give up making decisions about the use of the tool and person B can take over making those decisions. Person A does not have the responsibility for the consequences of the employment of the tool by person B. Person B makes the decisions about using the tool and has the *de facto* responsibility for the results of that use. Thus a contract to sell or rent a tool such as a shovel from A to B can actually be fulfilled. The decision-making and responsibility for employing the tool can *in fact* be transferred from A to B.

But now replace the tool by person A himself or herself. Suppose that the contract was for person A to sell or rent himself or herself to person B—as if a person was a transferable or alienable instrument that could be "employed" by another person. The *pactum subjectionis* is a collective version of such a contract but it is easier to understand the individualistic version. The contract could be perfectly voluntary. For whatever reason and compensation, person A is willing to take on the legal role of a talking instrument (to use Aristotle's phrase). But the person A cannot in fact transfer decision-making or responsibility over his or her own actions to B. The point is not that a person should not or ought not do it; the point is that a person *cannot* in fact make such a voluntary transfer. At most, person A can agree to cooperate with B by doing what B says. But that is no alienation or transference of decision-making or responsibility. Person A is still inexorably involved in ratifying B's decisions and person A inextricably shares the *de facto* responsibility for the results of A's and B's joint activity—as everyone recognizes in the case of a hired criminal regardless of the completeness of the instructions.

Yet a legal system could "validate" such a contract and could "count" obedience to the master or sovereign as "fulfilling" the contract and then rights are structured as if it were actually fulfilled, i.e., as if the person were actually of diminished or no capacity. But such an institutionalized fraud always has one revealing moment where even the most slavishly conforming observers can see the legal fiction behind the system. That is when the legalized "thing" would commit a crime. Then the "thing" would be suddenly metamorphosed—in the eyes of the law—back into being a person to be held legally responsible for the crime. For instance, an antebellum Alabama court asserted that slaves

> are rational beings, they are capable of committing crimes; and in reference to acts which are crimes, are regarded as persons. Because they are slaves, they are … incapable of performing civil acts, and, in reference to all such, they are things, not persons. [Catterall 1926, 247]

Since there was no legal theory that slaves physically became things in their "civil acts," the fiction involved in treating the slaves as "things" was clear. And this is a question of the facts about human nature, facts that are unchanged by consent or contract. If the slave had acquired that legal role in a voluntary contract, it would not change the fact that the slave remained a *de facto* person with the law only "counting" the contractual slave's non-criminous obedience as "fulfilling" the contract to play the legal role of a non-responsible entity, a non-person or thing.

The key insight is the difference in the factual transferability of a thing's services and our own actions—the person-thing mismatch. I can voluntarily transfer the services of my shovel to another person so that the other person can employ the shovel and be solely *de facto* responsible for the results. I cannot voluntarily transfer my own actions in like manner. Thus the contract to rent out my shovel is a normal contract that I fulfill by transferring the employment of the shovel to its employer.

The "problem" with any *theory* (as opposed to catalogue of personal views) is that it may have "legs of its own" and go further that the original applications. The inalienability argument is a case in point since it applies as well to the self-rental contract—that is, today's employment contract—as to the self-sale contract or pact of subjection. I can certainly voluntarily agree to a contract to be "employed" by an "employer" on a long or short term basis, but I cannot in fact "transfer" my own actions for the long or short term. The factual inalienability of responsible human action and decision-making is independent of the duration of the contract. That factual inalienability is also independent of the compensation paid in the contract—which is why this inalienability analysis has nothing to do with exploitation theories of either the Marxian or neoclassical (i.e., paying less than the value of marginal productivity) varieties.

Where the legal system "validates" such contracts, it must fictitiously "count" one's inextricably co-responsible co-operation with the "employer" as fulfilling the employment contract—unless, of course, the employer and employee commit a crime together. The servant in work then becomes the partner in crime.

> 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]

When the "venture" being "jointly carried out" by the employer and employee is not criminous, then the facts about human responsibility do not change. But then the fiction takes over. The joint venture or partnership is transformed into the employer's sole venture. The employee is legally transformed from being a co-responsible partner to being only an input supplier sharing no legal responsibility for either the input liabilities or the produced outputs of the employer's business.

Brief History of the Inalienability Rights Argument

The foundation of the inalienable rights argument was the crucial difference between persons and things in an alienation contract. Where has this insight—that a person cannot fit the legal role of a non-person (even voluntarily)—erupted in the history of thought? The Ancients did not see this matter clearly. For Aristotle, slavery was based on "fact"; some adults were seen as being inherently of diminished capacity if not as "talking instruments" marked for slavery "from the hour of their birth." [*Politics*, 1254a] Treating them as slaves was no more inappropriate for Aristotle than treating a donkey as an animal—to each according to its nature.

The Stoics held the radically different view that no one was a slave by their nature; slavery was an *external* condition juxtaposed to the internal freedom of the soul. Chrysippus challenged

Aristotle's notion that some people were slaves by nature. By virtue of their rational and social nature, Cicero saw all men as equal under the *jus naturale.* Sabine found in the Stoics an anticipation of the Kantian theme to treat all humans as persons rather than as things.

> Even if he were a slave he would not be, as Aristotle had said, a living tool, but more nearly as Chrysippus had said, a wage-earner for life. Or, as Kant rephrased the old ideal eighteen centuries later, a man must be treated as an end and not as a means. The astonishing fact is that Chrysippus and Cicero are closer to Kant than they are to Aristotle. [Sabine 1958, p. 165]

Seneca further developed the idea of external bondage and internal freedom of the soul.

> It is a mistake to imagine that slavery pervades a man's whole being; the better part of him is exempt from it: the body indeed is subjected and in the power of a master, but the mind is independent, and indeed is so free and wild, that it cannot be restrained even by this prison of the body, wherein it is confined. [Seneca, *De beneficiis,* III, 20; quoted in Cassirer 1963, 103]

In spite of the legal role of the slave as an instrument employed by another person, the mind of the slave is *sui juris.*

The Stoic doctrine that the "inner part cannot be delivered into bondage" [Davis 1966, 77] re-emerged in the Reformation doctrine of liberty of conscience. Liberal thought tends to interpret the doctrine of liberty of conscience in terms of tolerance [see Rawls 1996]. But there is another aspect of the doctrine that leads to the theory of inalienable rights, and this aspect gets short shrift in liberal intellectual history.

Secular authorities who try to compel belief can only secure external conformity.

> Besides, the blind, wretched folk do not see how utterly hopeless and impossible a thing they are attempting. For no matter how much they fret and fume, they cannot do more than make people obey them by word or deed; the heart they cannot constrain, though they wear themselves out trying. For the proverb is true, "Thoughts are free." Why then would they constrain people to believe from the heart, when they see that it is impossible? [Luther 1942 (1523), 316]

Martin Luther was explicit about the *de facto* element; it was "impossible" to "constrain people to believe from the heart."

> 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. Since, then, belief or unbelief is a matter of every one's conscience, and since this is no lessening of the secular power, the latter should be content and attend to its own

> affairs and permit men to believe one thing or another, as they are able and willing, and constrain no one by force. [Luther 1942 (1523), 316]

Leaving aside some intermediate figures, we might jump over to Francis Hutcheson, the predecessor of Adam Smith in the chair in moral philosophy in Glasgow and one of the leading moral philosophers of the Scottish Enlightenment. Although intimated in earlier works, the inalienability argument is best developed in Hutcheson's influential *A System of Moral Philosophy* (1755).

> Our rights are either *alienable*, or *unalienable.* The former are known by these two characters jointly, that the translation of them to others can be made effectually, and that some interest of society, or individuals consistently with it, may frequently require such translations. Thus our right to our goods and labours is naturally alienable. But where either the translation cannot be made with any effect, or where no good in human life requires it, the right is unalienable, and cannot be justly claimed by any other but the person originally possessing it. [Hutcheson 1755, 261]

Hutcheson appeals to the inalienability argument in addition to utility. He contrasts *de facto* alienable goods where "the translation of them to others can be made effectually" (like the aforementioned shovel) with factually inalienable faculties where "the translation cannot be made with any effect." This was not just some outpouring of moral emotions that one should not alienate this or that basic right. Hutcheson actually set forth a *theory* which could have legs of its own far beyond Hutcheson's (not to mention Luther's) intent. He based the theory on what in fact could or could not be transferred or alienated from one person to another.

Hutcheson goes on to show how the "right of private judgment" or liberty of conscience is inalienable.

> Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable. [Hutcheson 1755, 261-2]

Hutcheson pinpoints the factual nontransferability of private decision-making power. In the case of the criminous employee, we saw how the employee ultimately makes the decisions himself (through ratification and voluntary obedience) in spite of what is commanded by the employer. Short of coercion, an individual's faculty of judgment cannot in fact be short circuited by a secular or religious authority.

> A like natural right every intelligent being has about his own opinions, speculative or practical, to judge according to the evidence that appears to him. This right appears from the very constitution of the rational mind which can assent or dissent solely according to the evidence presented, and naturally desires knowledge. The same considerations shew this right to be unalienable: it cannot be subjected to the will of another: tho' where there is a previous judgment

> formed concerning the superior wisdom of another, or his infallibility, the opinion of this other, to a weak mind, may become sufficient evidence. [Hutcheson 1755, 295]

Democratic theory carried over this theory from the inalienability of conscience to a critique of the Hobbesian *pactum subjectionis*, the contract to alienate and transfer the right of self-determination as if it were a property that could be transferred from a people to a sovereign. 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, 45] The crucial link was to go from the inalienable liberty of conscience to a theory of inalienable rights.

> 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, 56-7]

Or as Ernst Cassirer put it:

> There is, at least, *one* right that cannot be ceded or abandoned: the right to personality…They charged the great logician [Hobbes] with a contradiction in terms. If a man could give up his personality he would cease being a moral being. … There is no *pactum subjectionis,* no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity. [Cassirer 1963, 175]

In the Scottish Enlightenment, the jurist, George Wallace (or Wallis) applied the inalienability argument to slavery. Wallace asserted that: "Men and their liberty are not *in commercio*; they are not either saleable or purchaseable." He then continues:

> 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, 95-96]

Wallace's statement illustrates the interplay between *de facto* and *de jure* elements, an interplay that is central to understanding the inalienability argument. When he declares that the slave has "never lost his liberty; he could not lose it," that refers to the slave's *de facto* retention of his free will and decision-making capacity (as recognized, for example, in the example of the criminous slave). Yet the law can declare a slave purchase contract as valid, and take a slave's obedience as fulfilling the contract to be a chattel. Since the slaves remain a *de facto* human agents in the *de*

jure role of a thing, they are only "pretended to be slaves" by the legal authorities (at least until the slaves commit crimes).

In the American Declaration of Independence, "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important." [Wills 1979, 213] But the *theory* behind the notion of inalienable rights was lost in the transition from the Scottish Enlightenment to the slave-holding society of ante-bellum America. The phraseology of "inalienable rights" is a staple in the American political culture, e.g., as 4th of July rhetoric, but the original theory of inalienability has been largely ignored or forgotten.

I have focused on the path from the Reformation through the Scottish Enlightenment. There is also a path directly through German philosophy that might be mentioned. Immanuel Kant acknowledged that "every man has inalienable rights which he cannot give up even if he would..." [1974, 72].

> Nor can a man living in the legal framework of a community be stripped of this quality by anything save his own crime. He can never lose it, neither by contract nor by acts of war (*occupatio bellica*), for no legal act, neither his own nor another's, can terminate his proprietary rights in himself. [1974, 61]

But why? The explanation might be based on Kant's notion of proprietary right derived from intentional possession by one's will.

> [O]wning is a matter of a human will taking possession; it therefore already excludes slavery as a possible form of property: persons cannot be owned... . [W]hat defeats the appropriation of a person is that he is necessarily occupied by his own will. [Ryan 1982, 57]

This theme is more explicit in Hegel's treatment of property and inalienability.

Hegel gave the most explicit treatment that—like Hutcheson—juxtaposed the alienability of things (like shovels where "the translation of them to others can be made effectually") with the inalienability of the aspects of our personhood (decision-making and responsibility).

> The reason I can alienate my property is that it is mine only in so far as I put my will into it. Hence I may abandon (*derelinquere*) as a *res nullius* anything that I have or yield it to the will of another and so into his possession, provided always that the thing in question is a thing external by nature. [Hegel 1967 (1821), §65]

But alienation clearly cannot be applied to one's own personality.

> Therefore those goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible. [Hegel 1967, §66]

An individual cannot in fact vacate and transfer that responsible agency which makes one a person.

> The right to what is in essence inalienable is imprescriptible, since the act whereby I take possession of my personality, of my substantive essence, and make myself a responsible being, capable of possessing rights and with a moral and religious life, takes away from these characteristics of mine just that externality which alone made them capable of passing into the possession of someone else. When I have thus annulled their externality, I cannot lose them through lapse of time or from any other reason drawn from my prior consent or willingness to alienate them. [Hegel 1967 (1821). Remark to §66]

This argument had legs of its own and reached beyond Hegel's intent. The argument so clearly applied also to the master-servant contract that Hegel tried to invoke some metaphysical mumbo-jumbo–"the use of my powers differs from my powers and therefore from myself, only in so far as it is quantitatively restricted" [Hegel 1967, §67] to make the distinction "between a slave and a modern domestic servant or day-labourer" [Hegel 1967, Addenda to §67, 241], i.e., to morally differentiate the self-sale and self-rental contracts. But Hegel's waffling is not sustained by his own theory since a person cannot vacate their will or transfer possession of their personality for eight hours a day any more than for a lifetime.

The inalienability argument and the legal pretense involved in a voluntary slavery contract has been echoed by the modern Kantian philosopher, George Schrader. Other people by their existence make a demand on us to acknowledge and treat them as persons rather than as things.

> This is a demand, incidentally, which no man can forfeit by his own volition. No man can, for example, by selling himself as a slave make himself not to be a person. [Schrader 1960, 64]

As Wallace noted, there is an element of pretense in the relationship since the slaves remain *de facto* persons.

> A man remains a man no matter what his condition in the world. He may not demand in any verbal way that he be treated as a man; in fact, he may even recommend that his humanity be disregarded. But the fact that he continues to exist as a man entails that his claim upon us as a human subject has not been removed. … [N]o man can actually make himself or another to be merely a slave; he can only make him play the role of a slave. It is not difficult to exhibit the deception and bad faith involved in such a relationship. [Schrader 1960, 64]

Unfortunately, this modern rendition of the inalienability argument is more the exception than the rule.[11]

[11] See Ellerman 1992 for more intellectual history of the inalienability argument.

The Coverture Marriage Contract and Other Personal Alienation Contracts

One "benefit" of this analysis is that one might correlate with or even imagine other types of alienation contracts which may or may not have been historically realized. Another historical example of this sort of institutionalized fiction was the older and now legally invalid *coverture marriage contract* that "identified" the legal personality of the wife with that 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 (1765), 83, section on "Husband and Wife"]

The *baron-femme* relationship established by the *coverture* marriage contract exemplified the identity fiction in past domestic law. A female was to pass from the cover of her father to the cover of her husband (with the present-day vestiges of the bride taking the husband's family name instead of the father's, and the wedding ceremony where the bride's father "gives away" the bride to the groom)—always a "*femme covert*" instead of the anomalous "*femme sole*." The identity fiction for the *baron-femme* relation was that "the husband and wife are one person in law" with the implicit or explicit rider, "and that one person is the husband." A wife could own property and make contracts, but only in the name of her husband. Again, obedience counted as "fulfilling" the contract to have the wife's legal personality subsumed under and identified with that of the husband.[12]

The *coverture* marriage contract was generally outlawed in the latter part of the 19th century in favor of a partnership version of the marriage contract but one could imagine a modernized gender-neutral *dependency contract*. One adult with full capacity would voluntarily agree to become a "dependent" of another adult, the "guardian" or "sponsor," in return for whatever consideration. The independent and adult legal personality of the "dependent" would be "suspended" in favor of the guardian. The dependent could only make contracts and hold property under the name of the guardian. The relevant identity fiction would be: "the guardian and dependent are one person in law—and that one person is the guardian." The language of the contract could be adjusted so as not to offend modern sensitivities as long as it was understood what the contract means. Obedience by the adult dependent to the guardian would count as "fulfilling" this contract and the legal rights would be allocated accordingly (e.g., all property belonging to the guardian).

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[12] In Carole Pateman's analysis of this sort of a "sexual contract" in a more general setting, she independently pointed out the connection to the employment contract and the *de facto* inalienability of labor. "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. …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, 147-150]

This hypothetical modernized sex-neutral version of the *coverture* contract would be invalid for the same reasons as the original *coverture* contract, the self-sale contract, or the employment contract. The adult "dependent" remains a *de facto* adult, the law would accept obedience to the guardian as "fulfilling" the contract, and then the legal rights would assigned accordingly as if the "dependent" was actually a non-adult.[13]

Another imagined example of an invalid alienation contract would be the *consumptive employment contract*. Typically a consumer buys consumption goods, self-manages his or her own consumption activity, and takes the liability for the consumed good as well as appropriates any waste product. The "employment" concept could be applied to consumption by having the consumer instead of paying for the consumer good, to pay an "employer" to "employ" the consumer in the consumption of the good. Then the employer would legally take on the legal liability for the used-up input to the consumption process, would manage the process, and would appropriate any waste product that might be sold, say, to a recycling center. Instead of the employer paying the productive-employee to transfer value-adding labor, the consumptive-employee is paying the employer to accept the transfer of the value-subtracting consumption activity (like a negative form of labor). While some contracts between the elderly and nursing homes might seem to be of this type, this type of consumption employment contract seems little used. In any case, the critique of the production employment contract would apply as well to the consumption version. Responsible human action, net value-adding or net value-subtracting, is not *de facto* transferable.

In spite of the abundance of legal precedent in the historical alienation contracts such as the self-sale contract, the *pactum subjectionis*, and the *coverture* marriage contract, today's employment contract, and even some hypothetical alienation contracts (the "dependency contract" and the consumptive employment contract), legal theory has yet to focus on the general notion of an alienation contract applied to persons.[14] All these contracts have the same scheme. An adult person with full capacity voluntarily agrees for whatever reason and in return for whatever consideration to accepting a lesser legal role. But they do not in fact alienate their capacity as a person in order to fulfill that diminished legal role. Instead the law accepts their (non-criminous) obedience to the master as "fulfilling" the contract. Then the rights and obligations follow the legal role (e.g., the slave of a master, the subject of a sovereign, the *femme covert* of her baron, the employee of the employer, and so forth)—*as if* the person were not in fact a person of full

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[13] Many modern feminist thinkers understand well the fiction and fraud involved in the old *coverture* contract where the husband had all the external legal rights and obligations for the "one person in law." However, with the exception of Carole Pateman and perhaps a few others, there seems to be little recognition of the same type of fiction and fraud involved in the employment contract where the employer takes all the legal ownership of the produced products and carries all the legal liabilities for the *de facto* jointly responsible activities of the people working in the enterprise.

[14] One reason is that progress by abolishing the slavery contract, the *pactum subjectionis*, and the *coverture* marriage contract tends to be accompanied by the historical revisionism of mapping the issue back into the consent-coercion dichotomy. Once those contracts are moved to the other side of the legal ledger, it becomes a political incorrectness of the blaming-the-victim variety to think that there could ever have been voluntary slaves, voluntary subjects in an autocracy, or voluntary wives in a *coverture* contract. It was all really coercion, and *that's* why those "contracts" were abolished. Hence there is no need for any theory of inalienable rights (which might have unwelcome legs of its own) and no reason to compare those coercive "contracts" of the past with today's voluntary employment contract. And Marxism obligingly reinforces that misframing of the issue by taking the view that—like the revisionist version of the abolished contracts—the labor contract is not "really" voluntary.

capacity. The whole scheme amounts to a fiction and fraud on an institutional scale that nonetheless parades upon the historical stage as a contractual institution based on consent.

Renting People: Litmus Test for Liberal-Contractarian Theories of Justice

Suppose a philosopher lived his or her whole life in a society with the economy based on some people owning other people, and where the ownership was based on a contractual relationship. Suppose the philosopher wrote extensively about justice but never raised the possibility that there might be something inherently unjust and wrong in a contractual relationship wherein some people owned others. Regardless of what marvelous subtleties there might be in the philosopher's theory of justice,[15] one might consider it lacking in a rather fundamental way. It would fail a rather simple litmus test. The failure to even raise the question about the ownership of other people would condemn the theory of justice as a sophisticated apologia-by-omission for the *status quo*.

My contention is that we are now in this situation but with "renting other people" substituted for "owning other people" as the litmus test.

Perhaps we need to take a closer look at this contemporary application of the inalienability argument to the renting of people. Ordinarily the word "hire" is preferred but I use the synonym "rent" to help us think out of the old mental ruts. In spite of the social indoctrination to apply "renting" to things and "hiring" to persons, the words are otherwise equivalent. Americans say "rent a car" and the British say "hire a car" but they mean the same thing. As Paul Samuelson puts it:

> One can even say that wages are the rentals paid for the use of a man's personal services for a day or a week or a year. This may seem a strange use of terms, but on second thought, one recognizes that every agreement to hire labor is really for some limited period of time. By outright purchase, you might avoid ever renting any kind of land. But in our society, labor is one of the few productive factors that cannot legally be bought outright. Labor can only be rented, and the wage rate is really a rental. [Samuelson 1976, 569]

Leaving aside the coercive nature of historical slavery, what about a civilized self-sale contract to sell one's labor by the lifetime instead of by the hour, week, or month? History has already ruled out such a voluntary slavery contract along with the institution of involuntary slavery. Again, as Paul Samuelson puts 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, 52 (emphasis in original)]

The next question is the relationship between renting and owning. A durable productive asset can be analyzed as a stream of productive services supplied over a period of time perhaps plus some

[15] For instance, how children might divide a cake in a *fair* or *just* manner by having the child cutting the cake operate under a veil of ignorance as to which slice she would get.

salvage value at the end of its productive lifetime. When an asset is rented, then the services of the asset are bought and sold. Renting a man for an hour is buying one man-hour of services. The primary difference between self-rental and self-sale contracts is the difference between selling one's labor in smaller packets or selling it all at once.[16] The abolitionist arguments against selling persons or "souls" were easily defeated by the proslavery writers who emphasized that they were only interested in owning labor, not in owning souls or persons. As a pro-slavery writer put it:

> Slavery is the duty and obligation of the slave to labor for the mutual benefit of both master and slave, under a warrant to the slave of protection, and a comfortable subsistence, under all circumstances. The person of the slave is not property, no matter what the fictions of the law may say; but the right to his labor is property, and may be transferred like any other property, or as the right to the services of a minor or apprentice may be transferred.... Such is American slavery, or as Mr. Henry Hughes happily terms it, 'Warranteeism'. [Elliott, 1860, vii]

Or again, "Our property in man is a right and title to human labor. And where is it that this right and title does not exist on the part of those who have money to buy it? The only difference in any two cases is the tenure." [Bryan 1858, 10] As was previously noted, Blackstone saw a lifetime servitude contract as "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." And Pufendorf saw slaves as "perpetual hired Servants." Or as James Mill put it,

> 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, Chapter I, section II]

When boiled down to the basic economics, the difference between a civilized slavery system based on implicit or explicit contracts (which is how historical slavery found its sophisticated defense) and the current economic system based on renting people (which is so taken for granted that liberal-contractarian philosophers of justice do not even take notice of it) is in the different durations of the labor contracts.

Perhaps labor contracts up to T years are exemplars of free market contracts while labor contracts for T+1 or more years are to be outlawed as exemplars of injustice. Robert Nozick is not the only one to note that the liberal-contractarian philosophy cannot in principle make such an arbitrary distinction. The pride and joy of neoclassical economics is the "fundamental theorem of welfare economics" which says that an equilibrium in a competitive market system is allocatively efficient. This theorem requires full future markets in all commodities such as the commodity of labor services. If there was a time limitation on labor contracts such as T years, then there might be willing buyers and sellers in labor services dated T+1 or more years in the

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[16] From the economic viewpoint, humans tend to have negative "salvage value" after the end of their productive years. Thus in a hypothetical system of contractual slavery, the employers of slaves would prefer to buy all of a person's productive labor and only that with no obligation of care after the productive years. Indeed, the proslavery writers emphasized the "insurance" aspect of caring for workers in old age and contrasted it with the employers of "free labor" who would "throw the hirelings out on the street" when they were no longer able to work.

future so those mutually beneficial transactions could not be consummated. Hence an equilibrium in such a truncated market would not be allocatively efficient. Thus the conditions for the "fundamental theorem" of neoclassical economics to hold are that lifetime labor contracts be allowed. Economists are understandably loathe to recognize this elementary line of reasoning as may be checked by perusing the elementary or advanced texts. But just as Paul Samuelson had the admirable bravado to point out that the employment contract was a rental contract, so an economist, Carl Christ, had the courage to point out the assumptions of the fundamental theorem 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]

Thus Nozick was hardly alone; he was accompanied (for the most part, silently) by the whole profession of neoclassical economics in pointing out that a "free system" would "permit individuals to sell or mortgage their persons in return for present and/or future benefits."

Today any contract resembling a self-sale contract (or an upfront paid) lifetime labor contract would not be recognized as valid or enforceable by the legal authorities. But the self-rental or employer-employee contract is the basis of the current economic system and is accepted by liberal-contractarian philosophers of justice as a matter of course without comment.[17]

The theory of inalienability that descends from the Reformation and Enlightenment is a theory, not just personal views expressed as a "philosophy." As a theory, it may have implications beyond the immediate concerns of its discoverers. We have already noted that the inalienability theory is a case in point in that it applies equally well to the employment contract as to the self-sale contract, the social contract of subjection, and the *coverture* marriage contract.

The application of the inalienability theory to the employment contract does not require any deep technical knowledge of economics or the law that might be unavailable to liberal-contractarian philosophers of justice. For instance, in the critique of the social contract of subjection by early democratic theory, the key distinction was between a contract to alienate (*translatio*) the right of self-government to a sovereign and a contract of delegation, trusteeship (*concessio*), or representation. Did the governor rule in his own name or only as the representative of the governed?

It takes no esoteric knowledge for a philosopher to understand that the employer-employee contract is a contract of alienation, not delegation. The employer is not the representative, trustee, or delegate of the employees. The employer manages in his or her own name and interests, not in the name or interests of those managed.

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[17] Of course, philosophers and any social commentators in general may complain about abusive employers, exploitative wages, or dangerous working conditions. But as with slavery, the focus of philosophical analysis is properly on the system itself, not just on abuses of the system by various masters or employers.

> The manager in industry is not like the Minister in politics: he is not chosen by or responsible to the workers in the industry, but chosen by and responsible to partners and directors or some other autocratic authority. Instead of the manager being the Minister or servant and the men the ultimate masters, the men are the servants and the manager and the external power behind him the master. Thus, while our governmental organisation is democratic in theory, and by the extension of education is continually becoming more so in practice, our industrial organisation is built upon a different basis. [Zimmern 1918, 263]

Hence if the inalienability critique of the traditional contracts of political subjection was known and understood by today's philosophers, then it would be an easy next step to see that it applied to the basis of our present day economy.

Another aspect of the theory is the inalienability of human decision-making and responsibility that Hutcheson derived from Luther in the doctrine of the liberty of conscience. But the point about human nature is not restricted to religious decisions. Deciding to obey a master's command to do X is only another way to decide to do X, and the servant or employee inextricably shares in the *de facto* human responsibility with the master or employer for the results. Philosophers and lay people understand this quite well in the case of the hired criminal; yet no one seriously argues that employees morph into actual instruments (rather than co-responsible persons) when their actions are legal. Thus if the inalienability theory that descends from the Reformation was known and understood by today's philosophers, then it would again be an easy next step to see that it applied to the basis of our present day economy.

A thing or instrument cannot incur responsibility; the responsibility for the results of using an instrument is imputed back through the thing to the responsible user. It may be helpful to analyze the rights and liabilities of the employee's role to see if it is the legal role of an instrument.

In a proprietorship, the proprietor has the legal responsibility (both positive and negative) for the results of the proprietor's *de facto* responsible actions. That is, the proprietor is liable for the costs of the used up inputs and the proprietor may claim and sell the output that is produced. Thus the proprietor does not have a non-responsible role. Similarly for the partners in a partnership.

In an owner-operated corporation, the corporation is a legal person separate from the owner or owners as individuals. Thus when the working owner or owners carry out the work of the company, it is technically the company as a separate legal person that has the legal liability for the used-up inputs and the legal claim on the produced outputs. But the owners are the legal members of that company, so through their corporate embodiment they have the legal responsibility for the positive and negative results of their *de facto* responsible actions. In economics, this is sometimes called the role of the "residual claimant" (liable for the input costs and getting the output revenues whose net is the residual). Thus the owner-operators of a company also do not have the legal role of a non-responsible entity or thing.

We have seen that the employees are inextricably *de facto* co-responsible along with the working employers for the results (positive and negative) of their enterprise. But the employees as

employees are *not* legal members of the company. Yet it is the company that has the legal liability for the used up inputs (the employees' labor simply counting as one of those inputs) and the legal claim on the produced outputs. Since the employees are not legal members of that corporate body, they have *no* share of the legal responsibility for either the positive or negative fruits of their *de facto* responsible actions. Thus it is that the employees take on a legally non-responsible role of an instrument in the employment contract in spite of there being no language to that effect in the labor contract and in spite of their continuing *de facto* responsibility. It has nothing to do with employers being nasty or nice to workers, how hard employees are worked, the size of the rental (wage) payments, the incompleteness of the contract, the safety of the working conditions, or the like.

While the employees have zero legal responsibility for the positive and negative results of their actions, the workers as the original owners and sellers of the labor services, of course, have a claim against the employer for the rental payments. Indeed, that is true of any rental contract regardless of whether one rents out a donkey, a shovel, or one's self.

John Rawls' Theory of Justice

John Rawls' theory of justice [1971; 1996] was generally recognized as giving the most sophisticated modern development of a liberal-contractarian theory of justice. Yet the theory is formulated at such an abstract level that it is difficult to draw any definite implications for questions that occupied previous philosophers of justice such as the voluntary self-enslavement contract, a political constitution of subjection, or the *coverture* marriage contract. One may safely assume that Rawls, unlike his colleague Nozick, was personally against re-validating any of these historical forms of contracts. But did Rawls have any *theory* that would rule out those contracts?

It was previously noted how the doctrine of the liberty of conscience was connected to the notion of inalienability with Frances Hutcheson being one of the pivotal figures to explicitly make the connection as he introduced the notion of inalienable rights ("The same considerations shew this right to be unalienable"). The liberty of conscience is a central theme in Rawls' *Political Liberalism*[18] but the connection to inalienability—which we might call *Hutcheson's bridge*— is unfortunately missed. In a brief aside about the inalienability of all the basic liberties [1996, 365-7], Rawls makes an old and almost standard argument about inalienability. He argues against an extreme case of alienating *all* the basic liberties. But once the alienation becomes qualified and restricted then it is accepted.

We have already seen this pattern of argument in Locke and Blackstone who with great moral flourish condemned a contract to enter into an extreme form of slavery (like the Roman slavery where the master could take the slave's life). But once the contract becomes civilized and limited, then it is accepted and appropriately renamed ("drudgery" in the case of Locke and "perpetual service" in the case of Blackstone). Montesquieu also used this pattern of argument: "To sell one's freedom is so repugnant to all reason as can scarcely be supposed in any man. If liberty

[18] "Thus, the historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth and seventeenth centuries. Something like the modern understanding of liberty of conscience and freedom of thought began then." [Rawls 1996, xxvi; see also Lecture VIII]

may be rated with respect to the buyer, it is beyond all price to the seller. [Montesquieu 1912, 284; Vol. I, Bk. XV, Chap. II] Rawls paraphrases this argument from Montesquieu and goes on to argue that in the original position, the "grounds upon which the parties are moved to guarantee these liberties, together with the constraints of the reasonable, explain why the basic liberties are, so to speak, beyond all price to persons so conceived." [1996, 366]

Now in the passage paraphrased by Rawls, Montesquieu adds the footnote: "I mean slavery in a strict sense, as it formerly existed among the Romans, and exists at present in our colonies." [Montesquieu 1912, 284, fn. 1; Vol. I, Bk. XV, Chap. II] As with Locke and Blackstone, Montesquieu goes on to note that this would not exclude a civilized or "mild" form of the contract.

> 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, 287; I, Bk. XV, Chap. V]

And Rawls goes on to note:

> This explanation of why the basic liberties are inalienable does not exclude the possibility that even in a well-ordered society some citizens may want to circumscribe or alienate one or more of their basic liberties. [Rawls 1996, 366]
> Unless these possibilities affect the agreement of the parties in the original position (and I hold that they do not), they are irrelevant to the inalienability of the basic liberties. [367, fn. 82]

Moreover, the extreme case argument for inalienability had little relevance in the historical debates.[19] The proslavery writers were quick to point out the laws protecting slaves on the *ante-bellum* law books, Hobbes excluded the alienation of the right to life from his *pactum subjectionis* (since the whole idea was to better protect life by stopping the war of all against all), and the *coverture* marriage contract involved considerable "protections" for the *femme covert*.

Like most modern liberal-contractarian philosophers of justice, Rawls fails the litmus test of ruling out the renting of people. But there is also a "historical litmus test": does the theory rule out a civilized non-discriminatory version of the old personal alienation contracts, e.g., the self-sale contract, the political pact of subjection, and the coverture contract?

We have already seen that there is something of a continuum between the self-rental contract and a civilized form of the self-sale or lifetime labor contract. Rawls' theory of justice accepted the self-rental contract completely as a matter of course (which is not to say that Rawls was blind to specific abuses of the employer-employee relationship) so it is hard to see how the theory could suddenly generate a bright line constraint to rule out the longer version of the master-servant

[19] Other superficial arguments against slavery contracts or political pacts of subjection were treated in Philmore 1982, reprinted in Ellerman 1995.

contract.[20] In *ante-bellum* American law, the self-sale contract was formulated in racial terms which would violate Rawls' veil of ignorance. But a limited race-neutral contract, e.g., the self-sale contract envisioned in Nozick's "free system," would not violate that fairness condition.[21]

Similar remarks apply to the traditional *coverture* marriage contract since the contract would violate the fairness condition built into the veil of ignorance. "The same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women." [Rawls 1996, xxxi] But a modernized gender-neutral dependency or guardianship contract would be allowed by Rawls' theory *just as* the modernized master-servant contract is allowed.

Similar remarks could even be applied to the political pact of subjection, the contract for the alienation of self-governance rights. Some traditional views of the hierarchy embodied in an autocracy saw most people "born with saddles on their back" with "a favored few booted and spurred, ready to ride them" [Jefferson 1904-5, 225] and such views might have the contractarian gloss of an implicit contract of subjection vouchsafed by the prescription of time. But such hierarchical classifications would violate Rawls' veil of ignorance. However, a classless modernized governance alienation contract, such as Nozick's contract with a "dominant protective association," would be allowed by Rawls' theory since the theory also allows the workplace governance alienation contract, i.e., the employment contract.

The contractarian approach is quite important in the history of philosophy since it provided the 'best' apologies for personal, political, and sexual subjection (as represented by the three implicit or explicit contracts).[22] Since those three contracts are already outlawed in the modern democracies, it would seem to be a reasonable litmus test for any theory of justice set forth today that it provide a plausible counter-theory to refute those 'best' contractarian arguments. Such a theory of inalienable rights was indeed hammered out in the democratic and abolitionist movements but that theory did not survive in Rawls' work in spite of the direct connection with the liberty of conscience. Indeed, proponents of the inalienability theory in modern ethical philosophy are about as scarce as abolitionists in the ante-bellum South since it is easily seen that the theory would rule out the employment contract for the renting of persons that is the basis for the present form of a private property market economy.

The alternative form of a private property market economy after the abolition of the employment relation would have all firms reconstituted as democratic organizations with the people working in the firm as its legal members [see Ellerman 1990]. Since Rawls did not explicitly consider the inalienability analysis of the employment contract, the contract which also functions as the workplace *pactum subjectionis*, the "*Theory* leaves aside for the most part the question of the claims of democracy in the firm and the workplace… ." [Rawls 1996, xxx]

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[20] The "employee" terminology became general usage only in the twentieth century. The older name of the employer-employee relation was the master-servant relation, a usage that still survives as a technical legal term, for instance in Batt 1967, and in many law books on agency.

[21] Here the topic is Rawls' *theory*, not his personal views which would, of course, be against such a contract.

[22] Rawls was well aware of that tradition from the history given in Philmore 1982 (personal communication).

Martha Nussbaum's Frontiers of Justice

The author has elsewhere [Ellerman 2005] developed a general theory of the helping relationship with the principal application being assistance to social, economic, and institutional development in the developing countries. The theory has a large overlap with what I take to be the essentials of the Sen-Nussbaum capabilities approach to development [Sen 1999; Nussbaum 2000; Alkire 2002]. Perhaps the common basis is the notion of autonomy expressed in the Kantian principle of treating persons as ends in themselves and never simply as means. e.g., the "*principle of each person as end* [Nussbaum 2000, 56].

> The norm, here as elsewhere, should be the idea of being treated as an end rather than a means, a person rather than an object. [Nussbaum 1999, 11]

This expresses "the Kantian notion of the inviolability and the dignity of the person." [Nussbaum 2000, 73] This principle is also common ground with John Rawls.

> John Rawls evidently draws primarily on Kant's moral philosophy, with its core idea that human beings should always be treated as ends, never merely as means. This idea of human inviolability is an intuitive starting point for Rawls's entire theoretical enterprise... .[Nussbaum 2006, 50]

Much development assistance (and the helper-doer relationship in general) ranges between a hard social-engineering approach and a soft paternalistic approach, neither of which promotes the autonomy based on the development of the doer's own capabilities. In terms of the old Chinese proverb, giving people fish is not the development of their capabilities to fish themselves. Applied to the questions of development assistance, the capabilities approach fosters "Autonomy-compatible poverty reduction" [Alkire 2002, 150].

Nussbaum's book, *Frontiers of Justice* [2006], represents an ambitious expansion in the scope and content of her treatment of the capabilities approach as a theory of justice. *Frontiers* is organized as an extensive intellectual conversation with John Rawls. She sees three "unsolved problems" in Rawls' theory, the treatment of the mentally impaired, relations between nations, and relations with the (non-human) animals. In each case, the capabilities approach is developed to address these three problem areas.

The approach of this paper is to consider liberal-contractarian theories of justice (which broadly includes both Rawls and Nussbaum) from the viewpoint of the inalienability theory developed historically to rule out voluntary slavery contracts and political constitutions of subjection. Our remaining task is to consider if Nussbaum's additions and subtractions from Rawls' theory helps to address the deficiencies highlighted by inalienability theory.

The common Kantian element is a promising starting point. Persons are differentiated from animals (i.e., non-human animals) and things by reason which broads includes self-consciousness, the use of language, and freedom of the will. Reason or, in this case, practical reason gives persons the capability to make free decisions to perform actions and to have the *de facto* responsibility for the results of those actions. The inalienability theory is based on the factual inalienability of one's own human actions in contrast with the factual alienability of the services of an animal (such as donkey) or a thing (such as a shovel). The services of an animal or a thing can in fact be transferred from one person to another so that the second person can

employ them and be solely *de facto* responsible for the results. Thus alienation contracts to sell or hire out animals or things are *bona fide* alienation contracts which can be fulfilled by the corresponding interpersonal transfers. Only the actions of a person cannot be transferred from one person to another so that the second person (the "employer") can employ them and be solely *de facto* responsible for the results. The "employee" is inextricably *de facto* co-responsible for the results—as our moral intuitions (as opposed to social indoctrination) show so clearly in the case of the hired criminal.

Since Rawls accepts this Kantian differentiation, the inalienability theory is available to Rawls (particularly considering Hutcheson's bridge between liberty of conscience and inalienability). But the differentiation of humans from animals and things according to (what we broadly term) reason is precisely one of the points where Nussbaum diverges from Kant and Rawls: "The Kantian split between personhood and animality is deeply problematic." [Nussbaum 2006, 132]

> [B]y retaining a concept of the person based on Kant's, and by defining the basis of political equality in terms of the possession of moral capacity, [Rawls] runs into some of the same difficulties with mental disability that Kant's theory plainly encounters. [133]
>
> Clearly, the Kantian conception of the person suffices, in Rawls's view, to rule nonhuman animals out as members of the community who work out and are bound by principles of justice. [332]

In contrast, Nussbaum's development of the capabilities approach would see all creatures as having a certain nature as specified by their capabilities, and would see justice requiring all creatures being able to flourish according to their capabilities, at least to a certain minimum degree. Unlike Kant's and Rawls' approach, Nussbaum attaches moral significance to the capabilities that any (sentient) creature might have; the capabilities associated with human reason are not the only ones for which justice requires respect and dignity.

> Instead, we should adopt a disjunctive approach: if a creature has *either* the capacity for pleasure and pain *or* the capacity for movement from place to place, *or* the capacity for emotion and affiliation *or* the capacity for reasoning, and so forth (we might add play, tool use, and others), then that creature has moral standing. [362]

This issue here is not so much any particular differences in how Rawls or Kant would like to see animals treated. The point is that they would see the proper treatment of animals as a matter of "compassion and humanity" but this is only an indirect or derivative matter since only humans have, in their eyes, direct moral standing. In contrast, Nussbaum moralizes the capabilities of sentient animals so that they have *direct* moral standing, i.e., so that "animals are entitled to world policies that grant them political rights and the legal standing of dignified beings." [399]

In spite of the good intentions, this attempt to breach of the moral barrier between human species and the (lower) animals is rather dangerous. The attempt to establish a moral continuum between

humans and the animals so that animals would be treated more like humans also opens up the possibly of morally accommodating the treatment of humans more like animals and things.

I have tried to focus on the inalienability arguments that are necessary to counter the 'best' contractarian arguments for personal, sexual, and political subjection. What were the less sophisticated 'worst' arguments for subjection? One standard type of argument was to see natural differences between people—men and women, whites and blacks, and so forth—as being morally relevant, and then to see a properly ordered society as one where each would flourish according to their nature. Aristotle saw the nature of some people as being marked from the hour of their birth for servitude so there was no injustice in treating them according to their nature. Women have by nature the capability to have children so a properly ordered society would (on this view) have them flourish according to their capability. Racist proslavery writers saw Africans as suited by nature for closely supervised physical labor so that justice demanded that they have that role in society.

The liberal counter-argument against these 'worst' arguments for various forms of subjection was not to deny natural differences between humans, e.g., differences in child-bearing capabilities, skin color, or physical strength—but to deny that those natural differences had moral relevance.

> At the heart of this tradition [liberalism] is a twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is the power of moral choice within them, a power that consists in the ability to plan a life in accordance with one's own evaluation of ends. [Nussbaum 1999, 57]

The morally relevant capability was the capability for (practical) reason, a potentiality shared by all normal humans, male or female, black or white, physically strong or weak. The capabilities approach has a list of capabilities but "very great importance…attaches to practical reason, as a good that both suffuses all the other functions, making them human rather than animal, and figures, itself, as a central function on the list." [Nussbaum 1999, 44]

But in *Frontiers*, Nussbaum undermines Kant's and Rawls' moral differentiation of humans from animals by seeing the dignity of reason as only the "dignity of a certain sort of animal" [2006, 132] and by attributing moral relevance and standing to the natural capabilities of animals such as the capabilities for locomotion, play, and experiencing pain or pleasure. But then we are back in the business of attributing moral relevance to all sorts of natural capabilities (not just to reason). If we can attribute moral relevance to the capabilities of lions, tigers, and gazelles for locomotion, then haven't we opened the flood gates to also attributing moral relevance to female humans' natural capability to have babies—which in turn leads to the conception of society where "justice" requires that women have a "special role" according to their "special capabilities" (*Kinder, Küche, Kirche*)?

While these considerations may suffice to raise a danger flag, the deeper point in the Kantian differentiation is that there is something specific to the capabilities of reason that give it moral standing and that the other capabilities such as locomotion simply do not have. Hence the

attribution of moral standing to the various capabilities of sentient creatures misses the basic point of the Kantian characterization.

What is it about the capabilities of reason (broadly including self-consciousness, language, and freedom/autonomy of the will) that uniquely generate moral standing? The very idea of a norm presupposes some Archimedean point not completely a part of the natural world so that the norm can be imposed on the world. A creature with the capabilities of reason provides that point. The exercise of self-conscious thought, with a structure expressed by the creative use of language,[23] allows such a rational creature to autonomously construct imagined alternatives in the mind, to evaluate those alternatives, and to arrive at a free choice. "One essential feature of reason's absolute spontaneity is its capacity to set ends for itself." [Rawls 2000, 284] Then "our decisions as informed by pure practical reason initiate a new series of appearances, a new beginning in the order of nature." [Rawls 2000, 288] If humans were completely part of the natural world, then they would have no such Archimedean point provided by the exercise of pure practical reason from which to initiate "a new beginning in the order of nature."

Kant expressed these ideas using his own philosophical or metaphysical jargon; humans have a noumenal self which can act freely and interact with the natural world as a deterministic phenomenal realm. This is not just a characterization of humans as having some natural capability such as the bipedal gait (without feathers).

Kant's basic ethical theory arises out of this characterization of humans as rational creatures. That is, in a world with creatures having this "transcendental" capability to generate their own ends, ethics arises as the need for each such creature to recognize and treat other such creatures as generating their own ends in themselves and to never treat them only as a part of the natural world, i.e., never simply as a means to one's own ends. Thus Kant's categorical imperative (particularly in the second and third formulations [see Rawls 2000]) arises out of the Kantian characterization of humans as rational creatures. Lacking reason (self-consciousness, language, freedom of the will,…), the lower animals do not have this "transcendental" or "noumenal" standpoint from which to generate ends in themselves and to initiate new causal sequences; they are a part and parcel of the natural world.

Hence from the viewpoint of Kant and Rawls, it is a serious error to present the capabilities of reason as simply another capability 'on all fours' with the capabilities of the lower animals such as the capabilities of locomotion or experiencing pleasure or pain. As just indicated, there was a *theory* by which Kant and Rawls attributed direct moral standing uniquely to the capabilities of reason, and not to the various capabilities of the lower animals. And, we might add, the same considerations show these human capabilities to be "unalienable."

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[23] The ordinary use of language has the "distinctive properties of novelty, freedom from control of external stimuli and inner states, coherence and appropriateness to situations, and its capacity to evoke appropriate thoughts in the listener." [Chomsky 1988, 138] The language faculty "appears to be unique in essentials to the human species and common to members of the species." [35] Chomsky notes that slavery is now understood as "an infringement on essential human rights" and that we may "look forward to the day" when "the need to rent oneself to survive may be seen in a similar light, as we come to have better understanding of the moral values rooted in our inner nature." [153]

Conclusions

Our overall purpose was the examination of liberal-contractarian philosophies of justice—with John Rawls and Martha Nussbaum as modern examples—from the viewpoint of the theory of inalienability that descends from the Reformation and Enlightenment (with some anticipation by the Stoics). Liberalism formulates the basic issue as consent-versus-coercion so from that viewpoint, slavery and autocracy are dismissed as being, by definition, based on coercion. Hence one of our tasks was the recovery of the hidden or forgotten tradition of contractual arguments for personal, political, and sexual subjection as represented respectively by the self-sale contract, the political constitution of subjection, and the *coverture* marriage contract. Then the task was to recover and express in more modern terms, the theory of inalienable rights developed historically in the democratic and anti-slavery movements against those 'best' contractual arguments for autocracy and slavery.

Perhaps the biggest surprise in the recovery of inalienable rights theory is that it clearly applies to the contract for the renting of persons, today's employment contract. A person cannot in fact voluntarily become a non-responsible instrument to be employed by another person for eight hours any more than for a lifetime. Since the employment contract is the basis for our present economic system, it should perhaps not be a surprise that the inalienability theory is neglected by modern economists, legal theorists, and philosophers. As each of the three historical contracts of subjection (personal, political, and sexual) were outlawed as a result of the efforts of the anti-slavery, democratic, and feminist movements, liberal-contractarian philosophy recasts each of the historical debates into a discourse of coercion versus consent. The past institutions of subjection are then seen as being coercive by definition and are ruled out on those grounds. Hence there is no need to countenance any potentially troublesome theory about certain voluntary contracts being inherently invalid and certain rights being inherently inalienable even with consent.

John Rawls lived his whole life in an economic system where employees are "not counted as sources of claims" on the products they produce and are "not counted as capable of having …obligations" [1996, 33] to meet the costs they incur in production, and where other persons, the employers, "control and own the product of their labor" [1996, 122].[24] Yet in his considerable writings about justice, Rawls never raised the question of there being any inherent justice problem in this whole system of renting human beings.

Since Martha Nussbaum's *Frontiers of Justice* was written as a commentary on Rawls, one might initially examine it to see if it addresses the glaring omission in Rawls' work. Nussbaum, like Rawls, has lived her life in an economic system where normally capacitated adults take on a legal role where their governor or manager is not their representative, trustee, or agent (i.e., the employment contract is an alienation or *translatio* governance contract so the employees have no vote in the workplace) and where those normally capacitated adults have no direct or indirect legal ownership of the products they produce or legal liability for the costs they incur (i.e., the employees have the legal role of rented instruments).

[24] The given quotes are from Rawls' description of slavery but the specific aspects quoted also apply to the system where workers are rented, hired, or employed rather than owned by an employer or master, the system in which Rawls lived his whole life. For instance, the master owns the product of the servant's labor regardless of the duration of the hiring contract.

Yet here again, we see the whole system of treating normally capacitated adults treated as rented instruments passed over in silence; it is not even raised as a problem on the frontiers of justice. Instead the "frontiers of justice for our future" [415] deal with borderline questions such as how a theory of justice should deal with humans with serious mental disabilities and with the nonhuman animals. The inalienability theory based on the nontransferability of responsibility was at least available to Rawls based on the Kantian element in his thought. But Nussbaum goes in a different direction away from that element in Kant and Rawls by postulating a continuum of morally relevant capabilities from normally capacitated human adults to the sentient animals so that justice would require each to flourish to some minimal degree according to their capabilities. We argued that far from refuting the 'best' arguments for subjection, this philosophical move was reminiscent of some of the old 'worst' arguments for subjection—which is the opposite of Nussbaum's intent.

Finally we argued that a proper understanding of the Kantian characterization of a moral person based on the capabilities of reason would explain why Kant and Rawls considered normally capacitated human adults as the creatures with direct moral standing in a theory of justice. Furthermore, this understanding supports the narrower capabilities approach developed in Sen's and Nussbaum's earlier work [1999, 2000] which emphasized the human autonomy expressed in the "core idea … of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a 'flock' or 'herd' animal." [Nussbaum 2000, 72]

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