WHITHER SELF-MANAGEMENT? FINDING NEW PATHS TO WORKPLACE DEMOCRACY ☆

David Ellerman

ABSTRACT

Today, there is the real possibility that self-management and workplace democracy will follow socialism into the dustbin of history. But the connection of self-management to socialism was misconceived from the beginning. Workplace democracy has its own roots in the historical struggle against slavery and against autocracy. The paper reviews the history of the theory of inalienable rights that applies not only against the self-sale contract and the political contract of subjection but also against of the self-rental or employment contract, today's contract of subjection for the workplace. The paper concludes with the current debate about corporate governance.

☆ Keynote Address for 12th Annual Conference International Association for the Economics of Participation July 8, 2004, Halifax, Canada.

Participation in the Age of Globalization and Information
Advances in the Economic Analysis of Participatory and Labor-Managed Firms, Volume 9, 321–355

ISSN: 0885-3339/doi:10.1016/S0885-3339(05)09011-3

1. INTRODUCTION: SOCIALISM AND SELF-MANAGEMENT

Historically, the idea of workers' self-management has been entwined or entangled with the idea of "socialism." Concretely, the connection arose out of the attempt by post-war Yugoslavia to find a third way, a system of self-management distinct from both the state-socialism of the Russian model and the capitalist model in the West. Indeed, this form of work organization had its roots in that bold Yugoslav effort. Many in those days accepted the connection between socialism and the general idea of worker's self-management or workplace democracy. They thought of democracy in the workplace as a variant of socialism, as a "self-managed socialism" in Branko Horvat's phrase.

But today much has changed. The monstrous construction of Soviet communism has finally collapsed. And, like it or not, all the variants of "socialism" have been drowned in the resulting tidal wave. I would argue that the connection between workplace democracy and socialism was misconceived all along, and that we should welcome rather than regret the sweeping of all the "socialisms" into the dustbin of history. Perhaps there are a few who bonded with the word "socialism" in the pink of youth and now they want to redefine it yet again. But this is not the late 19th century when the definition of "socialism" was still up for grabs. Whether we like it or not, the 20th century has indelibly stamped the word "socialism" with the meaning of government ownership, and it is sentimental nonsense to pretend otherwise. "Socialists" who seek a new world might start by seeking a new word.

Today, we face a different challenge – the challenge to find new paths to the underlying principles of workplace democracy so that those principles are not washed away in the deluge along with all the socialisms. Today, there is a real danger that those who favored workers' self-management will retreat back from democratic first principles to the practice of "democratic participation" in firms still organized on the basis of the employer–employee relationship.

How can we begin again to make the case for genuine democracy in the workplace?

2. EFFICIENCY ARGUMENTS

One set of arguments, particularly amenable to economists, is about the relative efficiency of more "democratic" or participative firms in contrast to conventional firms. According to the often-implicit premises of these

arguments, there are no rights violations involved in the conventional employment firms so the choice between the types of firms is just that – a matter of choice. People may choose to set up one type of firm or the other. Proponents of the more democratic firms point out various possibilities for greater efficiency – be it allocative efficiency or X-efficiency.

I have never given much credence to efficiency arguments for workplace democracy for two reasons.

First, as will become clear, I think the transformation of the workplace is a question of rights, not expediency. Antebellum slavery may well have been an inefficient way to organize work but to analyze slavery as an "efficiency problem" would leave much to be desired.

Second, efficiency arguments are not directly about the rights structure of the employment firm so they are always vulnerable to simulation counter-arguments. If more bottom-up decision-making proves to be more efficient in a democratic firm, then an "enlightened" employment firm could always try to simulate it by delegating more decision-making to the shop or office floor in a participative scheme. Thus an efficiency argument can never imply that the rights structure should itself be changed.[1] Nevertheless, this is as close as many economists – who see only through an efficiency lens – can come to an argument for a "democratic" or at least "participative" firm.

3. HOW CAN THERE BE A RIGHTS VIOLATION IN A TRULY VOLUNTARY EMPLOYMENT RELATION?

All would agree that there was an inherent rights violation in slavery. But many will argue that any comparison of the employment contract to slavery is ill-taken. The phrase "wage slavery" is an oxymoron. Consent is a necessary condition for any acceptable relation. Slavery was an involuntary relationship and thus efficiency questions about slavery were always trumped by the rights violation due to the coercive nature of the relationship.

They might agree that, leaving aside consent, one can compare the master–slave relation and the employer–employee relation along a scale measuring the amount and duration of the labor bought and sold. Under slavery, the master acquired all of the slave's services – just as when one buys a machine, one acquires all of the machine's services (plus the "scrap" at the end of its lifetime). In the employment relation, the employer only acquires the employee's labor for a certain length of time – just as when one rents a machine, one acquires the machine's service only for a certain duration.

While the master–slave and employment relationships might be compared along a duration scale, the two relationships are fundamentally different in terms of voluntariness. The basic liberal defense of the employment relation is not along the duration scale. The defense is that the employment relationship is voluntary.

The emergence of modern liberal society was a movement from the involuntary status of being a slave or serf to a society based on contract – including the employment contract. The bedrock question within the liberal framework is the question of consent or coercion. Since slavery lies on the side of coercion and the employment relation on the side of consent, any comparison between the two is ill-taken – according to this standard view.

4. THE DARK SIDE OF LIBERALISM: CONTRACTARIAN ARGUMENTS FOR SLAVERY AND AUTOCRACY

4.1. Modern Liberal Philosophers

We return to the basic question: "How can there be an inherent rights violation in a fully voluntary contract?" This question has an answer, an answer that was hammered out in the anti-slavery and democratic movements. The intellectual roots of the answer can be traced back to the Stoics but the golden thread of the argument descends to modern times from the Reformation and the Enlightenment.

But that answer has however been lost to the mainstream of modern liberalism.[2] This might be illustrated by considering the two most prominent liberal moral philosophers of our day, John Rawls and Robert Nozick both late of Harvard University.

The employment contract is the voluntary contract to rent or hire oneself out to an employer for a certain purpose and time period. Ordinarily, the word "hire" is preferred but I use the synonym "rent" to extract us from the old mental ruts. The words are 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, p. 569).

The moral philosopher John Rawls (1971) lived his whole life in an economic system based on the renting of human beings. Yet in a lifetime of contemplation and writing on justice , Rawls never hinted that there might be an inherent problem in an economy based on the voluntary renting of human beings. Yes, here and there, a particular relationship might be abused. But in spite of some lip service to the Kantian principle of treating people as ends-in-themselves and never simply as means, Rawls saw no problem per se in the relationship of voluntarily renting other human beings.

Leaving aside the historically coercive nature of slavery, what about a truly voluntary 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 (1976) 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 (p. 52 (emphasis in the original)).

Robert Nozick, not contented to stop at John Rawls' acceptance of the self-rental contract, argued on strict liberal and indeed libertarian grounds that even the self-sale or voluntary-slavery contract should be accepted. This contract comes in both a collective and individual form. The collective form was historically known as the pact of subjection or *pactum subjectionis*, wherein a people alienated and transferred their right to govern themselves to a monarch or some other form of a Hobbesian sovereign. Professor Nozick (1974) argued that a free libertarian society should validate that sort of a contract with a "dominant protective association" playing the role of the Hobbesian sovereign (p. 15). And the same reasoning applied to 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, p. 331).

Accordingly, Nozick completely abandoned the notion of inalienable rights from the anti-slavery and democratic movements. But he kept the notion of a "right" that could not be taken away without one's consent. But that is only a right as opposed to a privilege. Nozick had no notion of an "inalienable right" that may not be taken away even with one's consent. Even if a system of positive law accepted a voluntary contract to alienate such a right, the anti-slavery and democratic movements argued, as we will

see, that such contracts were inherently invalid – and thus that the rights should be recognized as being inalienable.

Nozick was not alone in this suggested revision of post-bellum jurisprudence to accept the self-sale contract. Nozick has neoclassical economics as a silent partner in this quest for liberal justice. Allocative efficiency requires full futures markets in all commodities including human labor. Any attempt to truncate self-rental contracts at, say, T years could violate market efficiency since there might be mutually voluntary contracts to buy and sell labor $T + 1$ years in the future. Hence, market efficiency requires full future markets in labor – essentially the self-sale contract. Neoclassical textbooks loathe to admit this implication. But the Johns Hopkins University economist Carl Christ made the point quite explicit 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, p. 334).

Thus John Rawls finds no justice problem in the self-rental contract and Robert Nozick explicitly and neoclassical economics implicitly accept the self-sale contract. While the 4th of July rhetoric of "inalienable rights" lingers on, the liberal mainstream has essentially lost the inalienable rights theory that descends from the Reformation and Enlightenment – the theory that explains how rights can be violated in a fully voluntary contract.

4.2. The Older History of Self-Sale Contracts

Modern liberalism can ignore the idea of rights-violating voluntary contracts since liberalism promulgates a dumbed-down version of the historic debate about slavery as a simplistic morality play of consent versus coercion. The defenders of slavery are pictured as condoning coercion – at least of people with a sufficiently different ethnicity or race. Modern liberalism presents itself as having achieved the superior moral insight that coercion is always wrong – regardless of race or ethnicity.

But that is a gross falsification of the actual historical debates. In fact, from ancient times, there have been sophisticated defenses of slavery on contractarian grounds. Roman law, as codified in the *Institutes* of Justinian, provided three legal means of becoming 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 (*Institutes* Lib. I, Tit. III, 4).

In addition to 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 having agreed to a tacit contract to trade a lifetime of labor for these and future provisions. 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 (*Leviathan*, II, Chapter 20).

The point is not the factual absurdity of interpreting this as a covenant; the point is the attempt by Hobbes and many others to ground slavery on the liberal basis of explicit or tacit consent. The dumbed-down consent-or-coercion liberalism of our day would disagree only on the factual question of what constitutes "consent."

Roman Law thus contemplated three legal means of becoming a slave, and all were based on an implicit or explicit contract. But that is only Roman law; what about the father of modern liberalism, John Locke (1960)? In Locke's influential *Two Treatises of Government* (1690), he 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, it would be a rather severe form of the master-servant or employment relationship.

> 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).

Having thus established that slavery could be based on contract, the liberal defenders of slavery had no need to condone kidnapping. But wherever slavery existed as a settled condition, then – like society itself – the institution could be seen as being based on a tacit contract. For example, Rev. Samuel Seabury gave a sophisticated liberal contractarian defense of antebellum slavery.

> 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 (1969 (1861), p. 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, p. 153).

This puts modern contractarian liberals in the uncomfortable position of disagreeing with Seabury only on factual grounds. They are reduced to arguing on empirical grounds that the implied contract for society has "genuine tacit consent," but that the implied slavery contract does not. It is no surprise that modern liberalism has just avoided this quandary by dumbing down the intellectual history of the slavery debates. The sophisticated liberal contractual arguments go down the memory hole; it is just a question of consent or coercion.

4.3. The Older History of 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 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, modern liberalism has dumbed down the intellectual history of the debate between autocracy and democracy to a simplistic question of coercion or consent. Democracy is presented as "government by the consent of the governed" and non-democratic governments are presented as being based on coercion. But again there was a liberal contractarian defense of non-democratic government from antiquity down to Nozick.

We may again start with Roman law in our thumbnail sketch of the contractarian defense of autocracy. 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 (Lib. I, Tit. II, 6):

> 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 (quoted in Corwin, 1955, p. 4; or in Sabine, 1958, p. 171).

The American constitutional scholar, Edward S. Corwin, noted the questions which would arise 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...took the latter view (Corwin, 1955, p. 4).

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. The liberal framing of the question as "consent or coercion" misses the real issue. Consent is on both sides of that question: it is a matter of a contract of alienation or a contract of delegation. The alienation version of the contract became a sophisticated tacit contract defense of non-democratic government wherever it existed as a settled condition. And the delegation version of the contract became the foundation for democratic theory.

The German legal thinker, Otto Gierke (1966), was quite clear about the alienation-versus-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 (pp. 93–94).

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, pp. 38–39).

In terms of the liberal "coercion or contract" dichotomy, this tradition was grounded foursquare 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, pp. 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. In about 1310, according to Gierke (1958),

> 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 (p. 146).

Skipping over many minor figures, 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 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 (Original 1651), p. 142).

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

5. THE COUNTERARGUMENT: INALIENABLE RIGHTS

We have seen that the debate from antiquity up to the present about slavery and autocracy was not a simple consent-versus-coercion debate. Instead, there were consent-based arguments for slavery and non-democratic government as being based on certain explicit or implicit contracts.

What were the counterarguments against such contracts in the abolitionist and democratic movements? The most basic counterarguments were not about efficiency and were not quibbles about the reality or quality of the consent to explicit or implicit contracts. Instead, arguments developed that there was something inherently invalid in such alienation or *translatio* contracts, and thus that the rights which these contracts pretended to alienate were in fact inalienable.

There is a simple logical structure to the inalienable rights arguments against the alienation contracts, such as the self-sale contract or the pact of subjection. In consenting to such a contract a person was agreeing to, in effect, take on the legal role of a non-person or thing. Yet all the consent in the world would not in fact turn the person into a thing. The person would play an agreed upon role such as obeying the master, and the authorities would "count" that as "fulfilling" the contract to have the role of a non-person. Then the rights and obligations are assigned as per the contract as it were actually fulfilled. Since the person remained a de facto person with only the contractual role of a thing, the contract was impossible and invalid. A system of positive law that accepted such contracts was only a fraud on an institutional scale.

But how are persons and non-persons differentiated? Persons and things can be distinguished on the basis of decision-making and responsibility. For instance, a thing such as a tool can be alienated or transferred from person A to B. Person A can indeed give up making decisions about the use of the tool and person B can take over making those decisions. Similarly, 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 from A to B can 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 or tool. 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. 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.

Yet a legal system could "validate" such a contract and could "count" obedience to the master or sovereign as "fulfilling" the contract. But such an institutionalized fraud always has one revealing moment where even the most slavishly conforming observers can see the fiction behind the system. That is when the legalized thing would commit a crime. Then the "thing" would be suddenly metamorphosed 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, p. 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 slave's non-criminous obedience as "fulfilling" the contract to play the legal role of a non-responsible entity, a non-person, or a 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. I can certainly voluntarily agree to a contract to be "employed" in like manner by an "employer" on a long- or short-term basis, but I cannot in fact "transfer" my own actions. Where the legal system "validates" such contracts, it must fictitiously "count" my 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 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, p. 612).

When the "venture" being "jointly carried out" by the employer and employee is not criminous, then the facts about human responsibility are unchanged. 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 negative or positive results of the employer's business.

5.1. Some Intellectual History of the Person–Thing Mismatch

Where has this key insight – that a person cannot fit the legal role of a thing – erupted in the history of thought? The Ancients did not see this matter clearly. For Aristotle, slavery was based on "fact"; some people were "talking instruments" – marked for slavery "from the hour of their birth." Treating them as slaves was no more inappropriate for Aristotle than treating a donkey as an animal.

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.

After the Dark Ages, the Stoic doctrine that only the body is enslaved and that the "inner part cannot be delivered into bondage" (Seneca quoted in Davis, 1966, p. 77) re-emerged in the Reformation doctrine of liberty of conscience. 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), p. 316).

Martin Luther (1942 (1523)) 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 (p. 316).

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

> 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 (1755, p. 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."

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 (pp. 261–262).

Hutcheson pinpoints the factual non-transferability 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 show 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 (1755, p. 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.

> Like the mind's quest for religious truth from which it was derived, self-determination was not a claim to ownership which might be both acquired and surrendered, but an inextricable aspect of the activity of being human (Lynd, 1969, pp. 56–57).

Or as Ernst Cassirer (1963) puts 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 (p. 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 purchasable." 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, pp. 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).

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, p. 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, p. 64).

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, p. 213). But the theory behind the rhetoric of "inalienable rights" was lost in the transition from the Scottish Enlightenment to the slave-holding society of antebellum America.

5.2. Application to the Employment Contract

Today, the inalienability theory has to be recovered from its roots in the critique of the liberal contractarian defense of slavery and autocracy. By dumbing down the question to "consent or coercion," modern liberalism has lost sight of both the liberal arguments for slavery and autocracy as well as the counterarguments in the form of inalienable rights theory. Once recovered, it is seen that the inalienability arguments apply as well to the individual self-rental contract and the collective *pactum subjectionis* of the workplace, the individual and collective versions of the employment contract. The mismatch of a person in a non-responsible "thing" role and the non-transferability of decision-making and responsibility apply as well for 8 hours a day as for a lifetime of labor.

The abolition of the employment relation is a radical conclusion that will be strongly resisted on every front. After the abolition of slavery and the acceptance of political democracy, liberal societies prided themselves on having finally gotten human rights right. Hence, there is strong intellectual resistance to giving any sustained thought to the idea that there might be an inherent rights violation in a liberal economic system based on the voluntary renting of human beings. There is certainly resistance to recovering the hidden history of liberal contractarian arguments for slavery and autocracy – and even to recovering the inalienable rights contra-arguments against those contracts. Today's employment contract is only the rental version of the self-sale contract and is only the workplace version of the social contract of subjection.

Very little sustained thought is necessary to understand the arguments. Take, for example, the approach to the employment contract as the workplace *pactum subjectionis*. The key to the intellectual history was to understand the distinction between two opposite types of social contract. On the one side was the social contract wherein a people would alienate and transfer their rights of self-determination to a sovereign. The sovereign was not a delegate, representative, or trustee for the people. The sovereign ruled in the sovereign's own name; the people were subjects. One the other side was the idea of a social contract as a democratic constitution erected to secure the inalienable rights rather than to alienate them. Those who wield political authority over the citizens do so as their delegates, representatives, or trustees; they govern in the name of the people.

Now once one understands this fundamental distinction between the alienation and the delegation social contracts, what additional information is needed to make the application to the employment contract? Does anyone think that the employer is the delegate, representative, or trustee of the employees? Does anyone think that the employer manages in the name of the employees?[3] Since the answers are so blindingly obvious, the usual response is apparently just to not think about it. Just don't go there. Then one can fall back on the consent or coercion framework. Democracy is government by the consent of the governed, and the employees give their consent to the employment contract so where is the problem?

The other approach to the employer–employee contract is as the contract to hire or rent oneself out – just as one might rent out an instrument or tool. The counterargument was that people cannot in fact transfer the employment of themselves to an employer as they can the employment of a tool. The employer cannot be solely de facto responsible for the results as if the employees were only non-responsible tools. This is again blindingly obvious

and fully recognized by the law when the employer and employee commit a crime. Does anyone really think that employees morph into non-responsible instruments when their actions are not criminous? How can one avoid the conclusion that the employees and working employers are jointly de facto responsible for the results of their enterprise? Again, it is better not to think about it.

There are many "stories" in conventional economics and legal theory to help one avoid thinking about these issues. As Luther himself emphasized, the mind cannot be forced to go where it does not want to go. Without going through all the "ducking and diving," perhaps the basic story goes something like this.

> In the employment contract, the employees know well what is expected of them; in return for their compensation, they are to obey the employer within the scope of the employment contract (which, incidentally, would not include crimes). Similarly, the employer knows that he or she, in return for paying the compensation, is acquiring the right to decide what the employees are to do within the scope of the contract. Everyone knows what everyone else is expected to do. There is no language in the contract about temporarily playing the role of a "thing" or anything like that. It is a perfectly straightforward voluntary contract. When the two parties both fulfill their part (paying compensation and following directions), then the contract is fulfilled and that is the end of the matter.

This is the simple "obey and get paid" story that one should tell oneself to avoid thinking too hard about the actual structure of rights in the employment firm and to avoid thinking about the R-word (responsibility). Before taking note of the rights structure, it is useful to see that the same kind of story can be told about a voluntary master–slave relationship based on selling labor by the lifetime.

> In the slavery contract, the slaves know well what is expected of them; in return for their consideration (e.g., purchase price and perhaps ongoing food, clothing, and shelter), they are to obey the master within the scope of the slavery contract (which, incidentally, would not include crimes). Similarly, the master knows that he or she, in return for providing the consideration, is acquiring the right to decide what the slaves are to do within the scope of the contract. Everyone knows what everyone else is expected to do. There need be no language in the contract about playing the role of a "thing" or anything like that. It is a perfectly straightforward voluntary contract. When the two parties both fulfill their part (paying consideration and following directions), then the contract is fulfilled and that is the end of the matter.

When the antebellum law talked about slaves having the legal role of "things," that was an unnecessary extravagance. A slavery contract would need no such language; it is a straightforward quid pro quo, the consideration is given in return for obedience – till death do they part.

5.3. Structure of Rights in the Employment Firm

To see that the employees (or the slaves) have the legal role of non-responsible entities, one has to apply some analysis to take the mind where the mind does not want to go. 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 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 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 is important to compare the employees' role with that of the other factor suppliers who supply to the company actual things or the services of things such as land, machinery, intermediate goods, or loan capital. Those factor suppliers also are not legal members of the company, so they bear none of the legal liability for the costs (their supplied inputs being one of the costs) and have no legal claim on the outputs. Here is where the difference in the factual transferability of persons and things comes into the analysis. The suppliers of things can alienate and transfer their inputs to the employer, so

Table 1. Responsibility for the (Positive and Negative) Results of a Company.

	Has de facto Responsibility	Has no de facto Responsibility
Has legal responsibility	Working members of company	Absentee "members" (shareholders) of company
Has no legal responsibility	Employees of company	Suppliers of things to company

those factor suppliers have no de facto responsibility for the employer's use of the factors.

In the following 2×2 table (Table 1), of the four combinations of having or not having legal responsibility and having or not having de facto responsibility, there is only one remaining category to mention, those who have legal responsibility without de facto responsibility for the results of the enterprise. They are the absentee shareholders (persons or institutions) who do not work or otherwise have an active personal role in the enterprise. Yet they like the working shareholders who are also the legal "members" of the company and are thus residual claimants through their corporate embodiment (not as separate persons).

All of this analysis of the rights and responsibilities complicates the picture far beyond the simplistic "obey and get paid" story about the employment contract. The employment contract does not have to "say" that the employee takes on a non-responsible role. As long as the legal system accepts the employees' obedience as fulfilling the contract in return for the wages, then the employer (e.g., the employing corporation) bears all the liabilities for the inputs and thus has the legal claim on the produced outputs. Thus without any such language in the contract, the employees are excluded from any legal responsibility or residual claimancy role (e.g., corporate membership) in spite of their de facto responsibility. Thus persons take on the legal role of non-responsible entities or things in what is conventionally seen as "a perfectly straightforward voluntary contract."

The negative conclusion is that the employment contract should be recognized as being jurisprudentially invalid. Human decision-making and responsibility is in fact not transferable so the contract for the sale of human actions (labor) is inherently invalid.

On the positive side, there is the basic juridical principle of responsibility that legal responsibility should be imputed in accordance with de facto responsibility (insofar as possible since accidents may not have a de facto responsible party). In short, the responsibility principle implies that there

should be no off-diagonal elements in the above table. The people who work in a firm should be the legal members of the firm, and the people who only supply things to the firm should not be members of the firm. All firms should be democratic self-managed firms.

5.4. Other Rights-Violating Voluntary Contracts

Sometimes it is easier to understand an argument if one sees parallel applications – in this case, to other types of contracts which would involve inherent rights violations. One of the contracts has been historically realized and the others are hypothetical. A 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 femme 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), p. 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 (as in the vestigial 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.[4]

The coverture marriage contract is now outlawed in favor of the partnership version of the marriage contract but one could imagine a modernized sex-neutral *dependency contract*. One adult with full capacity would voluntarily agree to become a non-adult "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 sponsor. The dependent could only make contracts and hold property under the name of the sponsor. The relevant identity

fiction would be: "the sponsor and dependent are one person in law – and that one person is the sponsor." 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 sponsor would count as "fulfilling" this contract to be a "non-adult."

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 sponsor as "fulfilling" the contract, and then the legal rights would be assigned accordingly as if the "dependent" was actually a non-adult.

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 contracts such as the self-sale contract, the *pactum subjectionis*, and the coverture marriage contract, today's employment contract, and even some hypothetical contracts (the "dependency contract" and the consumptive employment contract), legal theory has yet to focus on this general notion of a voluntary contract for a fully capacitated person to take on a lesser legal role. 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 lesser 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 at all or were not a person of full 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.

5.5. New Paths and New Perspectives

"Self-management" is associated with "socialism" and "socialism" is associated historically in liberal society with the denial of democracy. Yet we have seen almost the opposite. Liberalism exhibits a learned ignorance of the long history of liberal contractarian defenses of slavery and non-democratic governments as being based on consent. And liberalism also has "lost" the inalienability theory hammered out in the anti-slavery and democratic movements. Instead, the basic question is posed in liberalism as consent versus coercion.

> 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, p. 13).

Since democracy is pictured as being "government based on the consent of the governed" and since the employment firm is also based on consent, there are no basic rights violations in modern liberal society.

Contrary to the blinkered vision of liberal apologetics, we have seen that the subtle issues lie all within the domain of consent (little subtlety is required to be against coercion). The "consent of the governed" to a Hobbesian *pactum subjectionis* is not democracy, and the employment contract is the mini-Hobbesian contract for the workplace. Thus once the question is posed as consent-to-alienation versus consent-to-delegation, then the daunted affinity of "liberal-capitalism" with democracy disappears in its acceptance of the employment firm. A true affinity to democracy would entail not only the abolition of the *pactum subjectionis* in the political sphere in favor of democratic constitutions but the abolition of the employment contract in favor of all firms and other organizations being organized as workplace democracies.

A similar reversal occurs concerning property rights. "Self-management" is associated with "socialism" and "socialism" is historically associated with the denial of private property rights. Yet we have seen almost the opposite. A basic principle in jurisprudence is the responsibility principle

that whenever possible legal responsibility should be assigned or imputed according to the de facto responsible party. For instance, in a trial the idea is to make an official decision on the factual question of whether or not the defendant is the de facto responsible party. If so, then legal responsibility is imputed accordingly. But the principle is general. The more positive application of the responsibility principle is the old idea often associated with John Locke that people should appropriate the fruits of their labor. This labor theory of property is both positive and negative since new products are only produced by using up other things as inputs. Hence the question of assigning legal responsibility is two sided, to assign the ownership of the product and the liability for the used-up inputs to the people who, by their de facto responsible actions, produced the outputs by using up the inputs.

Hence a private property system based on the basic principle of justice (imputing to people what they are responsible for) would have the legal members of each firm exactly the people who work in the firm. Thus, a system based on justice in private property would entail workplace democracy. In contrast, the current system based on the employment contract ends up not assigning the assets and liabilities created in production to those who created them but rather assigns them to a largely absentee class of shareholders who did not create them.

It is also time to move beyond the simplistic liberal morality play of consent-or-coercion and to see the whole history of subjection linked to the consent-based apologetics of the intellectual clerks of the past and present. And it is time to understand the deeper intellectual history of the anti-slavery and democratic movements based on the enduring idea that persons do not fit into the legal role of things – even with consent. This theory, overlooked by modern liberalism, is part of our own history. It bequeaths to our day the call for the abolition of the whole institution of renting human beings.

It is time for new paths. New paths indeed. It is precisely the principles of democracy and justice in property that call for the abolition of the employment contract in favor of a private property market economy of democratic firms.

6. CONCLUDING REMARKS: GETTING FROM HERE TO THERE

6.1. The Approach through Employee Ownership

I will now turn to the more practical questions of getting from here to there, from our current economic system very much based on the unchallenged

employment relation to a system of economic democracy where all firms are democratic firms.

One strategy is through employee ownership, the firm by firm creation of more-or-less democratic firms by start-ups or buy-outs using legal forms such as worker cooperatives or joint-stock corporations with employee stock ownership plans (ESOPs).

This strategy is important for the simple reason that it fosters local experimentation. In spite of all the public rhetoric about political democracy, our society is actually rather anti-democratic in what people do all day long, their work. The very idea of the firm as a small democratic polity seems to be so new and strange that much experimentation is needed to find out how it might work.

The downside of the employee-ownership approach is that it "buys into" the fundamental myth that the enterprise is a piece of property with owners. This is a basic misunderstanding of a private property market economy. Land, buildings, machinery, and financial capital all have owners. There are two quite different ways in which the owners of capital can use it. The owners can try to hire in a complementary set of inputs including the "labor input" and then undertake a certain productive opportunity. Or the owners of capital can hire the capital out to others who may undertake production. Who ends up undertaking production is determined by how those contracts are made – by who ends up hiring what or whom. Thus, the undertaking of production – being the firm – is a contractual position, not a pre-existing property right that was part of the ownership of capital.

This is rather confusing since the legal parties that make the contracts to undertake production are typically corporations, and corporations do have owners. Hence we hear the loose expressions about the "ownership of the firm" or "ownership of the enterprise." But there is no "ownership" of a pattern of contracts. Absent the contracts to hire in other factors or even to hire out the corporate assets, the corporation is only an input owner. It is the contracts that determine if a corporation becomes an enterprise undertaking production or a supplier of inputs to other parties who are undertaking productive opportunities. At one point the Studebaker corporation leased one of its factories to Chrysler Corporation. Studebaker "owned the means of production" (the factory) but Chrysler was the firm or enterprise undertaking production using those capital assets.

The idea that the ownership of capital includes the "ownership of the firm" using that capital as the fundamental myth of our present economic system. Understanding this myth is the *pons asinorum*[5] in understanding property rights. That is why the name "capitalism" is a misnomer for the

employment system. "Capital" does not include the "ownership of the enterprise." The question of who *is* the firm (not who "owns" the firm) is determined by the contracts. And the characteristic feature of our present system is the voluntary contract for the renting of the people working in an enterprise, the employment contract. Hence, I have used the phrase "employment system" although older names such as "wage system" or "wage labor system" are also better than the misnomer "capitalism."

Part of the road to workplace democracy is crossing the *pons asinorum* to see what is actually owned and what is not owned in our current system. Democracy is not at war with private property but with the employment contract to rent human beings. The approach to workplace democracy through employee ownership does not really cross that bridge; it tends to "buy into" the idea of the employees as the new "owners of the firm." A democratic firm is not a corporation where its class of owners or shareholders is (temporarily) co-extensive with its employees.

In an analogous way, manumission (buying a slave's freedom) is a confused strategy to abolish slavery since it confirms the underlying ownership of the slave. In the employee ownership case, there is even confusion about just what "ownership" is being purchased. Since the other parties to a corporation's contracts are free to contract with other partners in the future, one cannot "buy" for the future the contractual position that the corporation had in the past. When one buys a corporation, one is actually buying only a set of capital assets organized in a corporate body. One hopes that the "goodwill" of the contractual partners will continue beyond their current contracts but that is not "purchased" along with the corporate shares.

Setting aside all the myths and confusions, the heart of a democratic worker "buy-out" is a reversal in the contract between capital and labor where current labor has also become a supplier of some of the capital. In a company reorganized on a democratic basis, a person becomes a member solely on the basis of working in the company, not on the basis of supplying capital. Nevertheless, worker-members may supply capital as part of the original deal or as a membership fee, and they will acquire more capital as part of their labor-based earnings is retained in the firm rather than paid out. This member-supplied capital is recorded in a set of internal capital accounts that bear interest like any other borrowed capital and that is paid out over a period of time. Since the worker's membership rights (voting and net revenue rights) are based solely on their human participation in the firm (i.e., their de facto responsible activity in the firm), those rights are independent of the capital in their capital account.

These questions have come up in a poignant way in my own past work on employee buy-outs in the Industrial Cooperative Association and elsewhere. It is safe to say that most or all employees come into a buy-out with full belief in the fundamental myth. They are "buying the firm" so they will then be the "owners of the firm" regardless of whether or not they work in the firm in the future. At what point does the democratic consultant try to persuade the workers to structure the new company so that they are not the new "owners" who may rent future workers. When they think they are "buying the firm," is it some type of "bait and switch" to then suggest a new company structure where both present and future workers will be members based on their labor and that their membership rights will be independent of the capital in their accounts?

These are some of the practical problems in trying to use "employee ownership" – with its attendant intellectual baggage – as a path to workplace democracy. In spite of having spent many years taking this path, I now think that, for both practical and theoretical reasons, other paths should be explored.

But before leaving the "employee-ownership" path, I might remark about a related path of "capital strategies" through various union-controlled or public-sector pension funds. Instead of letting management usurp the control rights "rightfully" belonging to the absentee owners of shares, these institutional investors are trying to use those rights to get corporations to do various worthwhile things. This is even being touted as a new form of "public accountability" in something like "pension fund socialism." In terms of the analogy with slavery, this "capital strategy" is even worse than the manumission strategy of fighting slavery by buying slaves and freeing them. In this case, the idea is, in effect, for good and well-intended people to buy slaves and then to "do good" for them as slaves.

If the capital strategy approach was to have any emancipatory potential then the "labor-oriented" institutional investors should use their influence on a company to transform the company into a democratic firm so that, among other things, it would not be "owned" by the absentee suppliers of capital. Since that is rather unlikely to happen, I must be very skeptical that much good will come from the well-meaning absentee suppliers of capital – regardless of the "labor-oriented" label.

Since the idea is to convert a firm into a democratic polity whose "citizens" or members are the people being managed in the firm, it is by no means clear that an ownership-based or capital-based strategy is best. Suppose that instead of a residency-based democratic government in a municipality that the city was ruled by the landowners using land-based voting

rights. One strategy to change the system would be for all the current residents who were landless and thus could not vote to use one means or another to buy the necessary land and thus get the vote. Then the idea is that they would use their land-based votes to change the system so that all current and future residents could vote regardless of land ownership. It is possible but unlikely for this to work due to means being used contradicting the originally sought-after end.

The other strategy where the means contradict the end is a path to workplace democracy through collective bargaining by labor unions. In the late 19th century, there were reform unions who aimed to replace the "wage system" with the "cooperative commonwealth" (see Grob, 1969; Lasch, 1991). But throughout most of the 20th century, the labor movement has withdrawn that challenge and has tried only to get "more, more, and more" within the employment contract. In return, the role of unions in collectively bargaining the employment contract has been enshrined in labor legislation. Thus, trade unions have become part and parcel of the employment system. Any strategy that would expect the unions to work to abolish the employment system must be viewed with some skepticism.

6.2. Other Paths to Workplace Democracy

What are the other paths to workplace democracy where the means may not contradict the end?

One approach is German-style co-determination. Corporate law is changed so that employees in a company acquire what is typically a minority representation on the supervisory board of a company. Since this representation is independent of share ownership, this approach has the virtue of directly approaching the democratic structure of labor-based voting rights – at least for part of the board representatives. Full membership rights would also include net income rights, and then with the partial retention of net income, the workers would need some structure of internal capital accounts to keep track of their share of retained income. And finally the process could be completed by converting the absentee shares into some form of non-voting preferred shares or variable income bonds. This path to workplace democracy might have some potential in continental Europe.

The post-war history in Japan has created another path. With the family ownership of the old *zaibatsu* groups discredited by the war, the American occupying reformers tried to set an Anglo-American system of stock market capitalism. But instead, the older corporate groups reconstituted themselves

with sizable cross-holdings of shares. Share cross-ownership within these new *keiretsu* groups was the method used to neutralize the control of absentee shareholders while keeping the legal structure of the Anglo-American joint stock company. The cross-owners within the group would delegate the control rights (for non-distressed operation) to each company's management and all the shares were treated as fixed income preferred stock. Thus the membership rights in such firms were in some sense "internalized" to the firm. There was more a transformation in the internal corporate culture than in the legal structure. The managers recognized that they were trustees managing in the name of the company which in human terms meant the people who made up the company. But there was no actual legal structure to enact that accountability. With these caveats, it could be seen as a type of "employee sovereignty."

> The fundamental principle underlying the Japanese model of mixed economy is anthropocentricism, or what Keisuke Itami refers to as "peoplism." Peoplism is given concrete expression in the form of employee sovereignty with the corporation, and an emphasis on the independent, land-owning farmer within agriculture. This principle is clearly different from the ideological foundations of Western capitalism, and it would be incorrect to assume that the Japanese system belongs to the same regime just because it uses market mechanisms extensively and exists side by side with a democratic political system (Sakakibara, 1993, p. 4).

Ronald Dore (1987) has contrasted the company as community model in Japan with the Anglo-American concept as of the company as a piece of property. Koji Matsumoto has emphasized these labor-oriented aspects of the Japanese firm along with comparisons to Yugoslav self-managed firms.

> Although there is some danger of oversimplification in making such a statement, the most direct description of this situation is that Japanese corporations 'are controlled by, and exist for, their employees'. Japanese corporations are thus united bodies of corporate employees (Matsumoto, 1991, p. 27).

It is not a coincidence that we have seen these two partial paths toward workplace democracy develop in the two countries where the old system was discredited by defeat in the World War II. Perhaps other paths will develop out of the discrediting of the old system in the post-socialist revolutions of 1989–1990. But it is too soon to tell since the first response has usually been a swing of the pendulum to the other extreme.

It is a truism that each country has its unique history. As long as one gets away from the idea that there is One Best Way or blueprint for all private property market economies, then many local experiments will take place. For example, Korea industrialized with the family owned choebals playing a major role. There was no defeat in war to discredit the family owners but

there was some discrediting with the East Asian crisis. In any case, diminishing returns is being felt with the generational turnover. Korea is also a relatively small country that would eventually have its major companies under foreign ownership and control unless something is done. They might find their own version of the Japanese path to replace foreign control with insider control and more cooperative labor relations as the family ownership diminishes.

6.3. The Path through the Corporate Governance Debate

Where does this leave the Anglo-American economies? I have emphasized that the labor contract is fundamentally different from the other input supply contracts. Human labor is not de facto transferable. Even though the employees have the legal role as the outside suppliers of an input, in fact they are the firm as an organization of people. This leads to a remarkable schizophrenia. There are two firms. There is the firm in the eyes of the law whose members are the shareholders scattered far and wide and who typically trade into the stock simply as an investment without any intent or capacity to play a human role in the firm. This is the firm that has a "meeting" once a year. In contrast to this de jure firm, there is the de facto firm consisting of the people who work in the firm – who have a meeting every working day to actually produce the product and conduct the business of the firm.

Table 1 can be rephrased using these notions of the legal (de jure) company and the de facto company.

Ordinary consciousness often reflects the de facto company. The employees are often thought of as the members of the organization. Consider the following from a perfectly standard managerial accounting textbook.

> An organization can be defined as a group of people united together for some common purpose. A bank providing financial services is an organization, as is a university providing educational services, and the General Electric Company producing appliances and other products. An organization consists of *people*, not physical assets. Thus, a bank building is not an organization; rather, the organization consists of the people who work in the bank and who are bound together for the common purpose of providing financial services to a community (Garrison, 1979, p. 2).

Garrison is talking entirely about the de facto company, not the company as it exists in law. This same redefinition of the firm now has roots in ordinary consciousness. Look at the books on the business shelves in your local bookstore. Find a book that uses some expression like "members" of the company. Chances are that the author, like Garrison above, is referring to the employees (including managers) of the firm, not the far-flung shareholders (who are the legal "members").

As public stock markets have spread shares far and wide, the idea that the stockholders are in any real sense the "owners" or "members" of a publicly traded company has become a sheer fantasy. There are two groups invested in keeping the fantasy alive. There are economists, lawyers, and assorted ideologues who will gladly adapt themselves to whatever is the ruling orthodoxy and vigorously defend it – until it changes. And there are the managers who have mightily profited from the eclipse of the shareholders. They have every interest in keeping the fantasy of "shareholders' capitalism" alive as the cover story for the reality of managerial capitalism.

John Maynard Keynes (1936) saw that the public stock markets had caused the "euthanasia of the rentier, of the functionless investor" (p. 376) while Adolf Berle and Gardiner Means described the result as the "separation of ownership and control" (Berle & Means, 1932, p. 89). But this delegitimization of the old "property" rationale for membership in the company has so far lead to more de facto managerialism than to a relegitimization of membership based on internal democracy.

Here is the entry point for another path to workplace democracy. The separation of ownership and control along with the unaccountability of managers and the resulting abuses has created the "corporate governance problem." Who is to be the new legitimate members of the company? While a few cherish the hope for the resurrection of the "responsible private owner" in massive institutional investors run by portfolio-managing bureaucrats, others search the horizon for various "stakeholders" who together with the regulatory agencies and law courts might create a "new accountability." But they are searching for legitimacy in all the wrong places.

There already is a class of members who make up the firm, the de facto firm consisting of the people who work in it. And since the staff of a company are the de facto firm, they are the ones who could actually monitor the management of their company and address the corporate governance problem directly.

> The only cohesive, workable, and effective constituency within view is the corporation's work force (Flynn, 1973, p. 106).

And there already is a legitimacy norm for questions of governance and democracy. The notion of "shareholders' democracy" is not only impractical but is incoherent since the shareholders are not themselves under the authority of the managers.

> The analogy between state and corporation has been congenial to American lawmakers, legislative and judicial. The shareholders were the electorate, the directors the legislature, enacting general policies and committing them to the officers for execution....
>
> Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation whose consent must be sought (Chayes, 1966, pp. 39–40).

Many parties have their interests affected by a company and better judicial and regulatory means are needed to protect those legitimate outside interests. But those (de facto and de jure) outside parties are not governed or under the authority of company management. Only the de facto firm, the people working in a company are under the authority of the management within the scope of the employment contract. Hence the path to democracy in the workplace is to redefine the de jure firm so that it matched the de facto firm (which would eliminate the off-diagonal elements in Table 2 above). This was well put by the English conservative Lord Eustice Percy 60 years ago.

> Here is the most urgent challenge to political invention ever offered to the jurist and the statesman. The human association which in fact produces and distributes wealth, the association of workmen, managers, technicians and directors, is not an association recognised by the law. The association which the law does recognise – the association of shareholders, creditors and directors – is incapable of production and is not expected by the law to perform these functions. We have to give law to the real association and withdraw meaningless privilege from the imaginary one (Percy, 1944, p. 38; quoted in Goyder, 1961, p. 57).

Although the corporate governance problem has been with us throughout the 20th century, the path to workplace democracy through the corporate governance question seems even more appropriate today. It is a process of gradually reconstituting the corporation. All the work toward greater participation of workers in the affairs of their company points in this direction. In some respects, the psychological transformation is already there; the people who make up the de facto company are seen as the real members of the company. What remains is finding ways to effect the legal transformation, the withdrawing of privilege from the imaginary company of shareholders and the legal recognition of the actual members of the company.

Table 2. Who's in and Who's out of the Two Companies.

	Inside de facto Company	Outside de facto Company
Inside legal company	Shareholders working in company	Absentee "members" (shareholders) of company
Outside legal company	Employees of company	Suppliers of things to company

NOTES

1. The simulation argument also works the other way. When some economists claim that "hierarchy" is necessary for efficiency and thus a democratic firm is inefficient, they miss the possibility of simulating the hierarchical "efficiency" within a democratic firm. Moreover, as will be seen below, the question between an employment or democratic firm is not hierarchy or not but whether the managerial authority ("hierarchy") is based on a contract of alienation or delegation.
2. I use "liberalism" in the European sense as "classical liberalism," not in the American sense juxtaposed to conservativism. The fundamental tenet of liberalism is a society based on voluntary contract, not coercion (including "status" as a type of coercion). At the enterprise level, the characteristic feature of liberalism is the acceptance of the employment firm based on the employer–employee contract. I use the phrase "employment firm" rather than the misleading phrase "capitalist firm" since the characteristic feature of the conventional firm is the employment contract, not the private ownership of the means of production. More on this anon.
3. "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, p. 263).
4. Carole Pateman (1970), already well-known for her early work on self-management and participatory democracy , has analyzed this sort of a "sexual contract" in a more general setting where 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, pp. 147–150).
5. The "ass' bridge" was the early theorem in Euclidean geometry curriculum such that if a student could not get across that bridge, then his talents were elsewhere.

REFERENCES

Batt, F. (1967). *The law of master and servant* (5th ed.). London: Pitman.

Berle, A., & Means, G. (1932). *The modern corporation and private property*. New York: MacMillan.

Blackstone, W. (1959 (1765)). Ehrlich's blackstone. In: J. W. Ehrlich (Ed.). New York: Capricorn Books (Original 1765).

Cassirer, E. (1963). *The myth of the state*. New Haven: Yale University Press.
Catterall, H. T. (Ed.) (1926). *Judicial cases concerning slavery and the Negro*. Washington, DC: Carnegie Institute.
Chayes, A. (1966). The modern corporation and the rule of law. In: E. S. Mason (Ed.), *The corporation in modern society*. New York: Atheneum.
Christ, C. F. (1975). The competitive market and optimal allocative efficiency. In: J. Elliott & J. Cownie (Eds), *Competing philosophies in American political economics* (pp. 332–338). Pacific Palisades, CA: Goodyear.
Corwin, E. S. (1955). *The 'Higher Law' background of American constitutional law*. Ithaca: Cornell University Press.
Davis, D. B. (1966). *The problem of slavery in Western culture*. Ithaca: Cornell University Press.
Dore, R. (1987). *Taking Japan seriously*. Stanford, CA: Stanford University Press.
Flynn, J. J. (1973). Corporate democracy: Nice work if you can get it. In: R. Nader & M. J. Green (Eds), *Corporate power in America* (pp. 94–110). New York: Grossman Publishers.
Friedman, M. (1962). *Capitalism and freedom*. Chicago: University of Chicago Press.
Garrison, R. (1979). *Managerial accounting*. Dallas: Business Publications Inc.
Gierke, O. v. (1958). *Political theories of the Middle Age*. Boston: Beacon Press.
Gierke, O. v. (1966). *The development of political theory*. New York: Howard Fertig.
Goyder, G. (1961). *The responsible company*. Oxford: Basil Blackwell.
Grob, G. (1969). *Workers and utopia*. Chicago: Quadrangle.
Hobbes, T. (1958 (Original 1651)). *Leviathan*. Indianapolis: Bobbs-Merrill.
Hutcheson, F. (1755). *A system of moral philosophy*. London: Foulis.
Keynes, J. M. (1936). *The general theory of employment, interest, and money*. New York: Harcourt, Brace & World.
Lasch, C. (1991). *The true and only heaven*. New York: Norton.
Locke, J. (1960). *Two treatises of government*. New York: New American Library (Original 1690).
Luther, M. (1942 (1523)). Concerning secular authority. In: F.W. Coker (Ed.), *Readings in political philosophy* (pp. 306–329). New York: Macmillan (Original 1523).
Lynd, S. (1969). *Intellectual origins of american radicalism*. New York: Vintage Books.
Matsumoto, K. (1991). *The rise of the Japanese corporate system: The inside view of a MITI official*. London: Kegan Paul International.
Nozick, R. (1974). *Anarchy, state, and utopia*. New York: Basic Books.
Pateman, C. (1970). *Participation and democratic theory*. Cambridge: Cambridge University Press.
Pateman, C. (1988). *The sexual contract*. Stanford: Stanford University Press.
Percy, E. (1944). *The unknown state: 16th Riddell memorial lectures*. London: Oxford University Press.
Rawls, J. (1971). *A theory of justice*. Cambridge: Harvard University Press.
Sabine, G. H. (1958). *A history of political theory*. New York: Henry Holt and Company.
Sakakibara, E. (1993). *Beyond capitalism: The Japanese model of market economics*. Lanham, MD: University Press of America.
Samuelson, P. A. (1976). *Economics* (10th ed.). New York: McGraw-Hill.
Schrader, G. A. (1960). Responsibility and existence. In: C. J. Friedrich (Ed.), *Responsibility* (pp. 43–70). New York: Liberal Arts Press.

Seabury, S. (1969). *American slavery justified by the law of nature*. Miami: Mnemosyne Publishing Company (Orig. 1861) Reprinted.
Wallace, G. (1760). A system of the principles of the law of Scotland (Vol. I). Edinburgh.
Wills, G. (1979). *Inventing America*. New York: Vintage Books.
Zimmern, A. E. (1918). *Nationality & government*. London: Chatto & Windus.