

On the Renting of Persons

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Abstract

Liberal thought (in the sense of classical liberalism) is based on the juxtaposition of consent to coercion. Autocracy and slavery were supposedly based on coercion whereas today's political democracy and economic "employment system" are based on consent to voluntary contracts. This paper retrieves an almost forgotten dark side of contractarian thought that based autocracy and slavery on explicit or implicit voluntary contracts. To answer these "best case" arguments for slavery and autocracy, the democratic and antislavery movements forged arguments not simply in favor of consent but arguments that voluntary contracts to legally alienate aspects of personhood were invalid "even with consent"—which made the underlying rights inherently inalienable. Once understood, those arguments have the perhaps "unintended consequence" of ruling out today's self-rental contract, the employer-employee contract.

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INTRODUCTION

The Dark Side of Liberal Contractarian Thought

Modern liberal thought juxtaposes today's political and economic order based on voluntary contracts to the coercive systems of autocracy and slavery in the past. But there is a skeleton in the closet, a dark side to contractarian thought. From Antiquity down to the present day, there has been a contractarian tradition which argued that economic as well as political forms of subjection could be based on explicit or implicit voluntary contracts. This dark side of contractarian thought fully agreed with today's liberal emphasis on (explicit or implicit) consent and with the condemnation of coercion.

If the historical democratic and abolitionist movements were to do more than just have "higher standards" about the reality or quality of the consent to such contracts, then they needed to find an *inherent* flaw in those contracts to alienate one's self-governing rights to political or economic

masters. If such alienation contracts were inherently flawed, then the rights that those contracts would pretend to alienate would be *inalienable rights*.

Our entry point is the workplace governance debate which is hopelessly miscast as a debate about "ownership" rather than about the employment relationship. After recovering the contractual underpinnings of the corresponding historical debates about governance, we delve into the dark side of contractarian thought to retrieve the arguments for slavery based on explicit or implicit contracts, e.g., a voluntary slavery contract. Then we turn to the counterargument, the *theory* of inalienable rights that descends largely from the Reformation and the Enlightenment. The "problem" with a *theory* of inalienable rights is that—unlike isolated historical condemnations of certain institutions—a theory might have "unintended consequences" such as a critique of the alienation contract at the basis of today's economy, the employment contract to rent persons.

Ownership and Governance

At one time, the king was seen as the owner of a country, the prince as the owner of a principality, and the feudal lord was the owner of his dominion. This "ownership" was not just a bare property interest in real estate; it included the governance of the people living on the land. The landlord was the Lord of the land. The governance of people living on land was taken as an attribute of the ownership of that land: "ownership blends with lordship, rulership, sovereignty in the vague medieval *dominium*,...."¹ As Otto Gierke put it, "Rulership and Ownership were blent".²

To understand the workplace governance debates of today it may be useful to revisit this mentality of the kings, princes, and lords who "owned" their dominions. A commonality with today is the mentality that the governance over the people actually working their property was all part of the owners' dominion. The inhabitants of the king's, prince's, or lord's dominion had no standing in that governance. The rulers and their agents did not rule as delegates, representatives, or otherwise in the name of those inhabitants. The "very idea" seemed somewhat outlandish.

Today, the same mentality is very much with us in the notion of corporate ownership. The only people who are under the authority of the owners and their agents are the ones who work their property, the employees of the corporation. Just as the Canadians or citizens of another country might be affected by the actions of the U.S. government but are not under the authority of that government, so many are affected by the activities of a corporation but only the employees are under its authority. But the "very idea" that the employees qua workers (i.e., as those who are governed or managed) would have any standing in that governance seems an outlandish perversion of the very idea of "ownership."

If political governance was previously thought to be based on land ownership and now isn't, then what about the connection between corporate ownership and workplace governance? What is the legal basis for the rights of government or management not over the land, buildings, or

¹ Maitland, Frederic, *Frederic William Maitland: Historian*, R.L. Schuyler, ed., (Berkeley: University of California Press, 1960), 174.

² Otto von Gierke, *Political Theories of the Middle Age* (Boston: Beacon Press, 1958), 88.

machinery of the corporation but over all the people who work in a corporation? Both the right and left give remarkably confused answers to that simple question.

The most common answer harks back to the theory that "rulership" is part of ownership. The shareholders are the owners of the corporation and their governance rights are even seen as part of the ownership of capital assets. This view of the "rights of capital" seems to be one point of agreement between Marx and the defenders of the current system.

It is not because he is a leader of industry that a man is a capitalist; on the contrary, he is a leader of industry because he is a capitalist. The leadership of industry is an attribute of capital, just as in feudal times the functions of general and judge were attributes of landed property.³

The view that "Rulership and Ownership are blent" is also uncritically promulgated by most economists, e.g., the "rights of authority at the firm level are defined by the ownership of assets, tangible (machines or money) or intangible (goodwill or reputation)."⁴

If by the "rights of authority" at the firm level, one only means the rights to exclude a trespasser then that indeed is based on property rights. But if the "rights of authority" are taken to include the discretionary rights of management over the people working in the firm, then that requires the employment contract. The "governance" that is supposed to be exercised by the shareholders and their agents is not the giving of commands to land, buildings, or machines; it is indirectly and directly giving orders to the people who are working with those properties.

The legal authority over the workers is not based on the ownership of capital assets but the ownership of the employees' labor which was purchased in the employment contract. Of course, the ownership of assets gave those owners the bargaining power to almost always enforce "capital hiring labor" rather than the reverse, but the technical point about the structure of governing rights is that the management rights over workers are based on the employment contract wherein the owners of capital hire or rent workers, not on the rights of capital ownership *per se*. Thus changing workplace governance is not just about changing the bundle of rights involved in asset ownership. It is about the employment contract, the renting of persons.

CONTRACTARIAN ARGUMENTS FOR SLAVERY

Contractual Slavery in Modern Liberalism

How can there be an inherent rights violation in a fully voluntary contract? Perhaps the argument is that some contracts are not "fully voluntary" in some sociological or historical sense (Marx)—or that some voluntary contracts should be overridden on paternalistic grounds? No, those are not the arguments being recovered here. There is a critique of the voluntary contracts of alienation⁵ that was hammered out in the anti-slavery and democratic movements.

³ Karl Marx, *Capital: A Critique of Political Economy. Volume I* (New York: International Publishers, 1967 [orig. 1867]), 332.

⁴ Bengt Holmstrom and Jean Tirole, "The Theory of the Firm," in R. Schmalensee and R. Willig, eds., *Handbook of Industrial Organization* (Amsterdam: North-Holland, 1989), 123.

⁵ To be more precise, they are contracts for a person of full capacity to voluntarily take on or accept the legal role of a person of diminished capacity or of a non-person within the scope of the contract.

But that analysis has been lost to the mainstream of modern liberalism⁶ that focuses on the question of consent versus coercion. Today, the contract at the basis of the economic system is the employment contract, 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 help us think out of the old mental ruts. 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.⁷

Or as another economics textbook puts it:

The commodity that is traded in the labor market is labor services, or hours of labor. The corresponding price is the wage per hour. We can think of the wage per hour as the price at which the firm rents the services of a worker, or the rental rate for labor. We do not have asset prices in the labor market because workers cannot be bought or sold in modern societies; they can only be rented. (In a society with slavery, the asset price would be the price of a slave.)⁸

Involuntary slavery has been abolished, but 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 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.⁹

Robert Nozick, the late prominent moral philosopher from Harvard University, argued on strict libertarian grounds that the self-sale or voluntary slavery contract should be (re)validated.¹⁰ This

⁶ I use "liberalism" in the European sense as "classical liberalism," not in the American sense juxtaposed to conservatism. The fundamental tenet of liberalism is a society based on voluntary contract, not coercion (including "status" as a type of coercion).

⁷ Paul A. Samuelson, *Economics* (New York: McGraw-Hill, 1976), 569.

⁸ Fischer, Stanley, R. Dornbusch and R. Schmalensee, *Economics*. (New York: McGraw-Hill, 1988), 323.

⁹ *Ibid.*, 52 (*italics in the original*).

¹⁰ It is "*re-validated*" since in the decade before the Civil War, six states had explicit laws "to permit a free Negro to become a slave voluntarily." Lewis Cecil Gray, *History of Agriculture in the Southern United States to 1860* (Gloucester: Peter Smith, 1958), 527.

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 argued that a free libertarian society should validate that sort of a contract with a "dominant protective association"¹¹ playing the role of the Hobbesian sovereign. 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.¹²

Accordingly Nozick completely abandoned the notion of inalienable rights developed in the anti-slavery and democratic movements. But he kept the phrase by redefining it as 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 alienated "even with consent" (to use Spinoza's phrase).

Nozick was not alone in this suggested revision of post-bellum jurisprudence to again accept the self-sale contract. Nozick's libertarian "yelps for liberty"¹³ to rent or buy persons have neoclassical economics as a silent partner. 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 today be willing buyers and sellers of labor T+1 years in the future. Hence market efficiency requires full future markets in labor—essentially the self-sale contract.¹⁴ One might try to find a neoclassical textbook that admits 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.¹⁵

Thus Robert Nozick explicitly and neoclassical economics more implicitly accepts the self-sale contract.

¹¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 15.

¹² *Ibid.*, 331.

¹³ Paraphrasing Dr. Johnson's question: "how is it that we hear the loudest yelps for liberty among the drivers of negroes?" Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress*. In *The Works of Samuel Johnson, Vol. 14*, (Troy NY: Pafraets & Co., 1913).

¹⁴ "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." James Mill, *Elements of Political Economy* (London, 1826), Chapter I, section II.

¹⁵ Carl F. Christ, "The Competitive Market and Optimal Allocative Efficiency." in J. Elliott and J. Cownie. eds., *Competing Philosophies in American Political Economics* (Pacific Palisades, CA: Goodyear, 1975), 334.

Retrieving the History of Voluntary Self-Sale Contracts

Modern liberalism can ignore the idea of rights-violating voluntary contracts since it promulgates an over-simplified version of the historic debate about slavery as a 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 prides itself on 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 defenses of slavery on *contractarian* grounds. 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.¹⁶

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 the past and future provisions.¹⁷ Manumission was an early repayment 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.¹⁸

The point is not the factual question of interpreting this as a covenant; the point is the attempt by Hobbes and many others to ground slavery on the basis of explicit or implicit consent.

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.

¹⁶ See *Institutes* Lib. I, Tit. III, 4.

¹⁷ "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, Samuel 2003 (1673). *The Whole Duty of Man, According to the Law of Nature*. Andrew Tooke (trans.), Indianapolis: Liberty Fund, 186-7]

¹⁸ Thomas Hobbes, *Leviathan*, (1651), Bk. II, chapter 20.

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.¹⁹

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.²⁰

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.²¹

Locke seemed to have justified slavery in the Carolinas by interpreting the slaves from Africa as captives in wars (e.g., inside Africa) who had made that covenant.²²

An interesting case study in liberal intellectual history is the treatment of the American proslavery writers. The proslavery position is almost always presented as being based on illiberal racist or feudal paternalistic arguments. Considerable attention is lavished on illiberal writers such as George Fitzhugh,²³ while liberal contractarian defenders of slavery are passed over in silence. For example, Rev. Samuel Seabury gave a sophisticated liberal defense of ante-bellum slavery in the Grotius-Hobbes-Pufendorf tradition of alienable natural rights theory.

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

¹⁹ John Locke, *Two Treatises of Government*. (New York: New American Library, 1960 [Orig. 1690]), §23.

²⁰ *Ibid.*, §24.

²¹ *Ibid.*, §23.

²² See Peter Laslett, "Introduction with Notes." in P. Laslett, *John Locke: Two Treatises of Government* (New York: New American Library, 1960), notes on §24, 325-326.

²³ See: Eugene Genovese, *The World the Slaveholders Made*. (New York: Vintage Books, 1971), Harvey Wish, ed., *Ante-bellum*. (New York: Capricorn Books, 1960), or George Fitzhugh, *Cannibals All! or, Slaves Without Masters*, C. Vann Woodward, ed., (Cambridge: Harvard University Press, 1960).

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.²⁴

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."²⁵

If modern 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 only in matters of fact. They might be reduced to arguing on empirical grounds that the implied contract for society has "genuine" tacit consent, but that the implied slavery contract did not. It is no surprise that modern liberalism has just avoided this quandary by promulgating the simplistic consent-or-coercion version of the slavery debates. The sophisticated contractual arguments to permit slavery go down the memory hole.²⁶ It's just a question of consent or coercion, and, thank goodness, liberalism has taken a courageous moral stand in favor of consent.

There is a largely parallel story²⁷ to be told about the defense of non-democratic government based on explicit or implicit voluntary collective contracts of subjection. The idea was that where non-democratic government persisted, then it was vouchsafed by the prescription of time in the consent of the governed. But the focus here is on the individual contracts to sell or rent oneself to a master or employer.

THE COUNTERARGUMENT: INALIENABLE RIGHTS THEORY

The Essentials of the Inalienable Rights Argument

We have seen that the debate about slavery was not a simple consent-versus-coercion debate. From Antiquity down to the present, there were consent-based arguments for slavery as being founded on certain explicit or implicit contracts. The abolitionist movement needed to counter not the worst but the "best" arguments for slavery. They needed to counter the arguments that slavery could be based on explicit or implicit voluntary contracts.

²⁴ Samuel Seabury, *American Slavery Justified by the Law of Nature* (Miami: Mnemosyne Publishing Company, 1969 [Orig. 1861]), 144.

²⁵ *Ibid.*, 153.

²⁶ Eric McKittrick (ed.), *Slavery Defended: the views of the Old South*. (Englewood Cliffs NJ: Prentice-Hall, 1963) collects essays of fifteen pro-slavery writers but does not include a single writer who argues to allow slavery on a contractual basis such as Seabury—not to mention Grotius, Pufendorf, Locke, Blackstone and a host of others.

²⁷ See Ellerman, David, Inalienable Rights: A Litmus Test for Liberal Theories of Justice. *Law and Philosophy*. 29 (5 September 2010): 571-599.

The task was to develop arguments that there was something inherently invalid in the alienation contracts, and thus that the rights which these contracts pretended to alienate were in fact inalienable. 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 since the person remained a *de facto* fully capacitated adult person with only the contractual role of a non-person, the contract was impossible and invalid. A system of positive law that accepted such contracts was only a legalized fraud on an institutional scale.

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, 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 like a shovel 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 or alienated 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 like a shovel. 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 or that the person is not paid enough; 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—even if B's instructions are quite complete. 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 servile apologists 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.²⁸

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 valid contract that I fulfill by transferring the employment of the shovel to its employer.

The inalienability argument 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 (extracting more labor time than is embodied in the wages) or neoclassical (paying wages 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 morphs into 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

²⁸ Helen T. Catterall, *Judicial Cases Concerning Slavery and the Negro* (Washington, D.C.: Carnegie Institute, 1926), 247.

they are master and servant, but because they jointly carried out a criminal venture and are both criminous.²⁹

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 input liabilities or the produced outputs of the employer's business. And then the intellectual hirelings whose profession is to "account for" our economic civilization based on the renting of persons can point out that the system is founded on a voluntary contract—unlike those coercive systems of the past.

Some Intellectual History of the Person-Thing Mismatch

Where has this key insight—that a person cannot voluntarily fit the legal role of a non-person (e.g., the *de facto* inalienability of responsible agency)—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." Treating them as slaves was no more inappropriate for Aristotle than treating a donkey as a non-person.

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 being essentially lost during the Middle Ages, the Stoic doctrine that the "inner part cannot be delivered into bondage"³⁰ 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?³¹

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

²⁹ Francis Batt, *The Law of Master and Servant* (London: Pitman, 1967), 612.

³⁰ Seneca quoted in: David Brion Davis, *The Problem of Slavery in Western Culture* (Ithaca: Cornell University Press, 1966), 77.

³¹ Martin Luther, "Concerning Secular Authority" in F. W. Coker, ed., *Readings in Political Philosophy* (New York: Macmillan, 1942), 316.

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.³²

Perhaps it was the atheist Jew, Benedict de Spinoza, who first translated the Protestant doctrine of the liberty of conscience into the political notion of a right that could not be ceded "even with consent." In Spinoza's *Theologico-Political Treatise*, he spelled out the essentials of the inalienable rights argument:

However, we have shown already (Chapter XVII) that no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment, or be compelled so to do. For this reason government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty and a usurpation of the rights of subjects, to seek to prescribe what shall be accepted as true, or rejected as false, or what opinions should actuate men in their worship of God. All these questions fall within a man's natural right, which he cannot abdicate even with consent.³³

But it was 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, who arrived (independently?) at the same idea in the form that was to later enter the political lexicon through the American Declaration of Independence. Although intimated in earlier works, the inalienability argument is best 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.³⁴

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.

³² Ibid., 316.

³³ Benedict de Spinoza, *Theologico-Political Treatise*. Elwes (trans.), (New York: Dover, 1951 [1670]). 257.

³⁴ Francis Hutcheson, *A System of Moral Philosophy* (London, 1755), 261.

Hutcheson goes on to show how the "right of private judgment" or (Luther's) "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.³⁵

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."³⁶ The crucial link was to go from the *de facto* inalienable liberty of conscience to a *theory* of inalienable rights based on the same idea.

Like the mind's quest for religious truth from which it was derived, self-determination was not a claim to ownership which might be both acquired and surrendered, but an inextricable aspect of the activity of being human.³⁷

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."³⁸ 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 our political culture, e.g., our 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. Hegel gave the most explicit treatment that—like Hutcheson—juxtaposed the alienability of things (like a shovel) 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.³⁹

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

³⁵ Ibid., 261-62.

³⁶ Staughton Lynd, *Intellectual Origins of American Radicalism* (New York: Vintage Books, 1969), 45.

³⁷ Ibid., 56-57.

³⁸ Garry Wills, *Inventing America* (New York: Vintage Books, 1979), 213.

³⁹ Georg W. F. Hegel, *Hegel's Philosophy of Right*, T.M. Knox, trans., (New York: Oxford University Press, 1967 [1821]), §65.

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.⁴⁰

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.⁴¹

This theory of inalienability 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 to differentiate the self-sale and self-rental contract.⁴²

Hegel's precedent was also important in showing yet another opportunity missed by Marx. Marx was not only wrong in accepting that rulership was blended with ownership, in accepting the liberal framing of the question as consent-versus-coercion (while differing only on the factual question of the labor contract being coercive or not), and in accepting that the system should be analyzed by a (labor) theory of value rather than a (labor) theory of property. Marx even missed the inalienability critique of the labor contract clearly spelled out before him by Hegel, and thus Marx mistakenly characterized the "sphere of exchange" as "a very Eden of the innate rights of man."⁴³

Application to the Employment Contract

Today the inalienability theory has to be retrieved from its roots in the critique of the contractarian arguments for slavery and autocracy. 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 eight hours a day as for a lifetime of labor.

⁴⁰ Ibid., §66.

⁴¹ Ibid., Remark to §66.

⁴² Ibid., §67.

⁴³ Marx, Karl 1967 (1867). *Capital: A Critique of Political Economy. Volume I*. Samuel Moore and Edward Aveling, New York: International Publishers, p. 176. For more intellectual history of inalienability theory, see: David Ellerman, *Property & Contract in Economics: The Case for Economic Democracy* (Cambridge MA: Blackwell, 1992). This book is out of print but the rights have reverted to the author so the full text can be downloaded at: www.ellerman.org. For more on Marxism as the quintessential foil for capitalist apologetics, see: David Ellerman, Marxism as a Capitalist Tool. *Journal of Socio-Economics*. 39 (6 December 2010): 696-700.

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 pride themselves on (supposedly) getting 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 persons.

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 of the pact of subjection was to understand the distinction between two opposite types of social contract.⁴⁴ 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. On 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 any contemporary political scientist or economist, no matter how intellectually conformist, think that the employer is the delegate, representative, or trustee of the employees? Who thinks that the employer manages in the name of the employees?

Since the answers are so blindingly obvious, the usual response is to not think about it. "Responsible" thinkers, almost by definition, don't go there. There are not only glass ceilings but glass walls that define the accepted corridors of thought. Responsible thinkers are equipped with uncanny radar so they can roar down the glass corridors of orthodox thought without ever getting close to the walls—all the while seeing themselves as brash free thinkers—even as social scientists—exploring the vast unknown. This radar-like instinct, inbred by the ambient society, constantly and almost unconsciously warns them away from the glass walls—away from irresponsible speculations (except perhaps in the pink of youth before ambient society has done its work) and down the corridors of safe, sound, and serious social science.

Responsible thinkers can fall back on the consent or coercion framework, a framing accepted even by their standard Marxist foils. Democracy is government by the consent of the governed, and the employees give their consent to the employment contract so where is the problem? Yesterday, there indeed were inherent human rights violations by institutions based on coercion but today we happily live in a liberal society where all the institutions are founded on consent. Yes, even today there probably are cases where workers are overworked, underpaid, and even perhaps coerced by their employers, and these abuses need to be corrected. But such

⁴⁴ This distinction between alienation and delegation is the constant theme in a civic republican history of political theory: Quentin Skinner, *The foundations of modern political thought. Vol. I and II.* (Cambridge: Cambridge University Press, 1978), but is ignored or unknown in a comparable intellectual history from a liberal perspective: Jonathan Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy.* (Princeton: Princeton University Press, 2010).

acknowledged abuses do not amount to any inherent rights violation in the voluntary contract for the renting of persons. Such is the Happy Consciousness of today's responsible liberal thinkers.

The inalienability counterargument was that people cannot in fact transfer the employment of themselves to an employer as they can the employment of a tool like a shovel. Responsible agency is *de facto* inalienable. 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. Of course, a contract to commit a crime is invalid but the legality of a criminous contract is not the issue. 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? Since the answer is as obvious as it is unacceptable, serious social scientists don't think about it at all.

The Coverture Marriage Contract

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 *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*.⁴⁵

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 (the origin of today's vestiges where the bride's father "gives away" the bride to the groom and the bride takes the groom's family name)—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.⁴⁶

⁴⁵ Blackstone, *Ehrlich's Blackstone*, 83, section on "Husband and Wife".

⁴⁶ 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." Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 147-150.

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.

CONCLUDING REMARKS

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, legal theory has yet to focus on the general notion of an alienation contract.⁴⁷

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—*as if* the person were not in fact 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 valid contractual institution.

Liberalism exhibits a comfortable learned ignorance of the long history of 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 that descend from the Reformation and Enlightenment. Instead, the basic question is posed in liberalism as the juxtaposition of coercion versus consent. Since democracy is pictured as being "government based on the consent of the governed" and since the employment firm is also based on consent, both are seen as part of the liberal progress from societies based on coercion to societies based on consent.

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 daunting affinity of "liberal-capitalism" with democracy is demolished. The historical bedfellows of the employment contract are the other personal alienation contracts such as the *pactum subjectionis* and the self-sale contract. A true affinity to democracy would entail the abolition of the employment contract in favor of all firms being organized as workplace democracies.

⁴⁷ 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 framing. 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 marriage. One just escalates one's standards of voluntariness so it is all *really* social coercion, and *that's* why those contracts were abolished. Hence there is no need for any *theory* of inalienability (which might have unintended consequences) and no reason to compare those coercive contracts of the past with today's voluntary employment contract. And Marxism obligingly reinforces that framing of the issue by disagreeing only about the voluntariness of the labor contract by invoking still higher standards of consent.

A similar reversal occurs concerning property rights. 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. 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.⁴⁸ 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 also entail workplace democracy.

Far from the present employment system being based on democracy and private property, it is precisely the principles of democracy and justice in private property that call for the abolition of the renting of persons in the employment contract—in favor of workplace democracy.

⁴⁸ The question of whether or not the labor theory of property was Locke's theory is considered in Ellerman, *Property & Contract in Economics*, *Ibid.*, where we also analyze other radical writers such as Pierre-Joseph Proudhon and Thomas Hodgskin who focused on the labor theory of property. In contrast, Marx developed only the disastrous labor theory of value, not the labor theory of property, as Marxists correctly point out: "None of this, by the way, implies that Marx intended the labor theory of value as a theory of property rights, a la Locke or even Proudhon" [Shaikh, Anwar, *Marx's Theory of Value and the "Transformation Problem"*. In *The Subtle Anatomy of Capitalism*. Jesse Schwartz ed., (Santa Monica: Goodyear, 1977, 106-139), 121].