

# The Coverture Marriage and the Employment Contracts: The Tale of Two Invalid Contracts

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# Fundamental Liberal Philosophy: I

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

*[Buchanan, James M. 1999. The Logical Foundations of Constitutional Liberty]*

# Fundamental Liberal Philosophy: II

- The touchstone of a liberal social order is consent, not coercion, and progress is the movement “from Status to Contract.” [Maine, Henry. 1861, *Ancient Law*]
- Yet, all modern, liberal, democratic societies *OUTLAW* and *ABOLISH* certain voluntary contracts:
  - the voluntary self-sale or slavery contract;
  - the voluntary individual or collective contract of subjection [*pactum subjectionis*]; and
  - the voluntary coverture marriage contract.

# Coverture Marriage Contract: I

- The classic common law description from William Blackstone (1723–1780):

*By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. [Blackstone, William 1765, Commentaries on the Law of England, section on husband and wife]*

# Coverture Marriage Contract: II

- By the coverture marriage contract, the independent legal personality of the wife was extinguished.
- The feme covert was a legal dependent under the guardianship of her lord and baron husband.
- No doubt, most modern women would find such a contract obnoxious and absurd—and would prefer a marriage contract that was an equal domestic partnership.
- But the question for liberal society is: Why **abolish** the coverture contract?
- Why not just allow a variety of marriage contracts so that couples could make a free and voluntary choice?

# The Case for Abolition of Coverture: I

- The case for abolition of the coverture contract, not just for allowing other types of marriages, can be distilled from the history of the abolitionist and feminist movements.
- To understand the abolitionist argument, consider where modern, liberal, and democratic societies do have a legal relationship of dependency and guardianship.
- In each case, there is a *factual* requirement of incapacity which needs to be certified in order to apply to adults:
  - Children of minority age;
  - Insanity or mental disability in adults; or
  - Senility (e.g., advanced dementia or Alzheimer's disease).

# The Case for Abolition of Coverture: II

- For adults, when that factual requirement is legally certified, then that adult is a legal dependent under the guardianship of their legal guardian, and cannot independently make contracts, buy/sell property, etc.
- The coverture marriage contract established this sort of legal dependency and guardianship where:
  - there was *no factual requirement* of impairment or incapacity;
  - where satisfying such a factual requirement was not required to “fulfull” the contract;
  - becoming factually incapacitated is not the sort of thing a person can voluntarily do to “fulfill” a contract; and
  - thus the Law substituted another notion of “fulfilling” the contract; *obey* your lord and baron husband.

# The Case for Abolition of Coverture: III

- Thus the coverture marriage contract was established by patriarchal society to “legally” establish the condition of dependency and guardianship under the guise of a voluntary contract, when the factual requirement for such a legal condition of incapacity was knowingly absent.
- In short, the coverture contract was a *legalized fraud* on an institutional scale—i.e., establishing legal incapacity where there is no corresponding factual incapacity.
- And that is why the contract is juridically invalid and is abolished in the modern, liberal, democratic societies.
- The situation can be presented in a table like Type I and Type II errors in statistics.



# The Case for Abolition of Coverture: IV

Table of legal errors due to mismatch of factual and legal capacity		Factual Capacity Status	
		Factual Adult Capacity	Factual Adult Incapacity
Legal Capacity Status	Legally Adult with Capacity	True positive	Type II error: Incapacitated person still with legal capacity.
	Legally Adult without Capacity	Type I error: Person with adult capacity legally incapacitated.	True negative

Table 1: Legal versus Factual Capacity & Incapacity

# Today's Human Rental Contract: I

- Easy to see how the abolitionist argument also applied against the voluntary contract to sell oneself, but what about the contract to only rent oneself out voluntarily?

*Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself: he must **rent** himself at a wage. [Samuelson, Paul A. 1976. Economics. (his emphasis)]*

- *Claim:* The abolitionist/feminist argument applies, *mutatis mutandis*, to the employer-employee contract to rent oneself out voluntarily.

# Today's Human Rental Contract: II

- Instead of a person's capacity (e.g., to make rational decisions, etc.), we consider a person's factual responsibility for the results of their deliberate actions.
- In a legal trial, the whole idea is to again match the legal and factual status of being responsible for some crime or tort.
- The standard juridical principle of imputation is to impute or assign the legal responsibility in accordance with factual responsibility, i.e., to find a factually guilty person legally guilty, and to find a factually innocent person legally innocent.

# Today's Human Rental Contract: III

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

Table 2 of legal versus factual responsibility.

- Injustice = legal/factual mismatch.
- Type I injustice is the mismatch where a factually guilty person is found legally innocent;
- Type II injustice is the mismatch where a factually innocent person is found legally guilty.

# Factual responsibility within employment: I

- When an employee commits a crime, even under orders from the employer, the employee is still factually co-responsible and would be held legally co-responsible.

*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, Francis. 1967. The Law of Master and Servant. 5th ed.]*

- But the employees do not suddenly turn into non-responsible “living instruments” when the venture “they jointly carried out” is not a criminal venture.

# Factual responsibility within employment: II

- *Basic Fact*: the employees (and working employer) in an enterprise are jointly factually co-responsible for using up the inputs (i.e., creating the input-liabilities) and producing the products (i.e., the output assets) that make up the negative and positive results, the “whole product,” of a productive enterprise.
- Thus, by the same juridical norm of imputation, they should jointly have the legal liabilities for using up the inputs and the legal ownership of the produced outputs.
- Yet, the employees, qua employees, have 0% of the input-liabilities charged against them and 0% of the produced outputs owned by them which is exactly *the legal role of a rented non-responsible instrument*.

# Factual responsibility within employment: III

- The employer appropriates 100% of the input-liabilities (including labor cost liability) and 100% of the produced assets—precisely as if everyone else working in the venture jointly carried out was a non-responsible “living instrument.”
- As one early 20<sup>th</sup> century sociologist put it:

# Factual responsibility within employment: IV

*There is much theoretic discussion to the "right of labor to the whole product" and much querying as to how much of the product belongs to the laborer. These questions never bother the manufacturer or his employee. They both know that, in actual fact, all of the product belongs to the capitalist, and none to the laborer. The latter has sold his labor, and has a right to the stipulated payment therefor. His claims stop there. He has no more ground for assuming a part ownership in the product than has the man who sold the raw materials, or the land on which the factory stands.*

*[Fairchild, Henry Pratt 1916, Outline of Applied Sociology]*



# Factual responsibility within employment: V

- Thus in the normal (i.e., non-criminous) human rental system, we get another mismatch between the factual and legal responsibility of the workforce in an enterprise.

Table of injustices due to mismatch of factual and legal responsibility		Factual Responsibility	
		Was factually responsible for whole product	Was not factually responsible for whole product
Legal Responsibility	Held legally responsible for whole product	True positive	Type II injustice: Factually non-resp. party gets legal responsibility
	Not held legally responsible for whole product	Type I injustice: Factually resp. party is legally non-responsible.	True negative

Table 3: Factual versus legal responsibility for the whole product

# Factual responsibility within employment: VI

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

*Here is the most urgent challenge to political invention ever offered to the jurist and the statesman. The human association which in fact produces and distributes wealth, the association of workmen, managers, technicians and directors, is not an association recognised by the law. The association which the law does recognise—the association of shareholders, creditors and directors—is incapable of production and is not expected by the law to perform these functions. We have to give law to the real association, and to withdraw meaningless privilege from the imaginary one. [Percy, Lord Eustace 1944, 16<sup>th</sup> Riddell Memorial Lectures)]*

# Factual responsibility within employment:

## VII

- *Type I injustice*: factually but not legally responsible party = “the association of workmen, managers, technicians and directors”;
- *Type II injustice*: not factually but legally responsible party = “the association of shareholders, creditors and directors”.

# Abolitionist parallels: I

Table of injustices due to mismatch of factual and legal status		Factual Status	
		Factual Capacity / Responsibility	Factual Incapacity / Non-responsibility
Legal Status	Legally with Capacity / Responsibility	True positive	Type II Injustice
	Legally without Capacity / Responsibility	Type I Injustice: Feme Covert / Rented people (employees)	True negative

Table 4: Abolitionist parallels for coverture and employment contracts

# Abolitionist parallels: II

- As with voluntary coverture contract, so with voluntary employment contract:
  - where there is no factual requirement of the employees being non-responsible;
  - where satisfying such a factual requirement was not required to “fulfull” the contract;
  - becoming factually non-responsible is not the sort of thing a person can voluntarily do to “fulfill” a contract; and
  - thus the Law substituted another notion of “fulfilling” the contract; *obey* your employer.

# Abolitionist parallels: III

- Thus the human rental contract established by today's society "legally" establishes the condition of being a non-responsible instrument under the guise of a voluntary contract, when the factual requirement for such a legal condition of non-responsibility was knowingly absent (e.g., the hired criminal case).
- In short, the human rental contract is a *legalized fraud* on an institutional scale—i.e., establishing legal non-responsibility where there is no corresponding factual non-responsibility.
- And that is why the human rental contract should be recognized as being juridically invalid and should be abolished in the modern, liberal, democratic societies.

# Abolitionist parallels: IV

- Just as the alternative to the coverture contract was a domestic partnership contract, so the alternative to the human rental contract is the organization of an economic enterprise as an industrial partnership where all who work in the enterprise are partners or members of the enterprise—a workplace democracy.