David Ellerman

Neo-Abolitionism

Abolishing Human Rentals in Favor of Workplace Democracy

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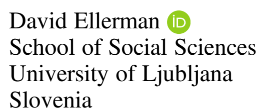
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To those who have gone before carrying their lanterns behind them of little use to themselves but lighting the way for those of us who follow (Dante, Purgatory, Canto XXII): Robert Oakeshott, Robert Dahl, William Greider, Philippe D. Grosjean, Walter Kendall, Warren Samuels, John Simmons, Jaroslav Vanek, and William Foote Whyte.

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About the Book

The most problematic institution in the economic system throughout most of the world is not the market or private property but the employer–employee relationship. In the technical terms of economics, the employer is *renting* the employees. The abolition of slavery ended involuntary slavery but also ended any voluntary contractual form of buying labor "by the lifetime." In its place, we have a system of voluntarily renting people by the hour, day, week, or any specified time period. A critique of voluntary forms of slavery and autocracy was developed in the Abolitionist and Democratic Movements. Based on the recovery and modern formulation of those old critiques, the neo-abolitionist critique of the human rental system is based on three theories that converge to the same conclusion: (1) the theory of inalienable rights that descends from the Reformation notion of inalienability of conscience, (2) the development of the modern natural rights or labor theory of property that people should appropriate the (positive and negative) fruits of their labor, and (3) democratic theory based on the distinction between non-democratic social contracts of alienation (*pactum subjectionis*) versus democratic contracts of delegation. The conclusion, common to the three arguments, is that the employer–employee relationship should be abolished in favor of the system of workplace democracy.

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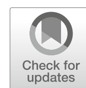
Chapter 1
Introduction



The abolition of slavery abolished not only the involuntary ownership of other people (workers) but also *voluntary* contractual forms of lifetime servitude. But that system of lifetime servitude was replaced by the current system of voluntary renting, hiring, employing, or leasing workers, i.e., the employment system. Hence the name "Neo-Abolitionism" for the idea of abolishing the employer–employee contract in favor of each firm being a workplace democracy. The three arguments against the human rental system are modern versions of old arguments that descend from the Reformation and Enlightenment in the Abolitionist and Democratic Movements. The first argument derives from noting that the old inalienable rights argument based on de facto inalienability of responsibility and decision-making that ruled out the long-term contract of lifetime servitude also applies against the shorter-term contract to rent oneself out. The second argument is the old labor or natural rights theory of private property (in the fruits of one's labor) that is violated when the employer legally appropriates the positive and negative fruits of the employees working in a firm. And the third argument applies to the firm the democratic arguments against the subjection contract that alienates the rights of self-governance in favor of a democratic contract of delegation.

1.1 Neo-Abolitionism

The most significant social reforms in the last two centuries have been the abolition of chattel slavery, the victory of political democracy as the norm for government, and the abolition of the coverture marriage contract along with the political enfranchisement of women. Much remains to be done on all three fronts, but our focus is on the second phase of the Abolitionist Movement. The legal possibility of owning other people (even voluntarily) has been abolished, but that has been replaced with the system of voluntarily hiring, employing, or renting other people—as opposed to workplace democracy, the system where people are always enfranchised as the legal

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members/citizens/owners in the company where they work. The goal of abolishing not only owning but also renting other people accounts for the name *Neo-Abolitionism.*[1]

We will see that the most fundamental arguments in the historical Abolitionist, Democratic, and Feminist Movements were against the legal treatment of persons as if they were only persons of limited capacity or even things. Then, once recovered, those arguments are seen to also apply against the current legal system of renting people, the employment, or employer–employee system.

The overall case against the employer–employee system can be based on any one of the three different rights-based theories:

1. Inalienable rights: The system of contracts (e.g., between firms and customers and suppliers) is key to any market economy so the inalienable rights analysis is central to determining which contracts may be allowed and which should be abolished by the legal system. The substantive theory of inalienable rights descends from the Reformation doctrine of the inalienability of conscience through the Abolitionist and Democratic Movements. The basic idea is simple. A person cannot, as a matter of fact, turn themselves in a non-person or a person of diminished capacity in order to fulfill a contract that *legally* alienated those aspects of personhood. Hence such a contract is a legalized fraud and should be recognized as invalid by the legal system.
2. Property rights: But each productive enterprise is the site for the appropriation of the liabilities ("who owes what") and the assets ("who owns what") created in its activities. The natural rights or labor theory of private property is the application of the standard juridical principle of imputation (assign legal responsibility in accordance with factual responsibility) to the question of property appropriation. That application implies that people appropriate the positive and negative fruits of their labor, which implies that the people working in each firm should be the legal members of the firm (i.e., workplace democracy). Marginal productivity (MP) theory asks the very different question of how much should each factor get, in effect, from the firm—whereas the labor theory of property addresses the prior question of who should be the firm (i.e., owe the liabilities and own the product) in the first place, e.g., Capital, Labor, or the State.
3. Democratic rights: And finally, each economic enterprise also involves a governance/management system so democratic principles also may be applied to determine the nature of that governance system. The key distinction is not the conventional one between consent and coercion; of course, governance should be based on the consent of the governed. But that consent could be to a non-democratic constitution (traditionally called a pact of subjection or *pactum subjectionis*). Hence the crucial distinction in the history of democratic theory was between a non-democratic constitution that *alienated* self-governing rights to

[1] In Ellerman (1990, 210), I used the expression "the new abolitionists" but in private conversation, James Livingston of the Rutgers University History Department suggested the better neologisms of "neo-abolitionists" and "neo-abolitionism."

a sovereign versus a democratic constitution the only *delegated* governance rights so those who govern as the representatives or delegates of those who are governed. And, of course, the employment contract is a contract of alienation, not delegation; the employer is not the representative or delegate of the employees.

Each approach makes a sufficient case for the abolition of the employment system. The arguments are rights-based (not utilitarian or consequentialist) and are in what would broadly be considered the classical liberal and, to some extent, the civic-republican traditions. Since so much of *conventional* classical liberalism is dedicated to defending the employment system, our strategy is to uncover the deeper *democratic* classical liberalism, which Noam Chomsky has called Enlightenment classical liberalism (Chomsky 2013, p. 686), that provides the core neo-abolitionist arguments in terms of (1) inalienable rights theory, (2) the labor or natural rights theory of property, and (3) democratic theory.

This narrative contains substantial intellectual history since the history of ideas on these issues has been much neglected and trivialized by conventional classical liberalism. That orthodox history is pictured as a pitched battle between political-economic systems based on coercion versus the classical liberal ideal of consent. But that is a complete distortion of the actual history of ideas about these issues. From Antiquity down to the present, certain forms of slavery and autocracy have been defended as being contractual in essence. Conventional classical liberalism has no theoretical critique of such arguments. It only questions the presupposition that the historical systems of slavery or autocracy were in fact contractual or consensual in any sense. And for the future, this orthodox liberalism only implies creating a wider *smorgasbord* of possible contracts rather than the abolition of any voluntary contract between consenting adults.

There is, however, a deeper tradition that might be called "democratic classical liberalism" or "Enlightenment classical liberalism" which provides a theoretical critique of even hypothetical voluntary systems of slavery ("lifetime servitude") or autocracy with some explicit or implicit contractual or consensual basis. In view of the intellectual hegemony of orthodox classical liberalism, those deeper arguments are scattered like the bones of some extinct dinosaurs that need to be dug up and reassembled to see the shape of the creature. That is our task of recovery.

The salient and controversial feature is that those old arguments, recovered from the historical Abolitionist and Democratic Movements, are seen to also apply against the current economic system based on the employer–employee contract—and hence the label "neo-abolitionism."

1.2 What Is “the System” Being Argued Against?

What Is “the System”?

What is the system or institution being criticized by neo-abolitionism and in the name of workplace democracy? The object of criticism is neither a market economy nor private property, i.e., is not “capitalism” in the sense of a private property market economy. The abolitionists in antebellum American did not attack markets or private property in general, although they did attack one type of market and one type of private property applied to persons.

The system being attacked herein is the *employment system*; the market contract being attacked is the *employer–employee contract* wherein one party (the employer) employs, “gives a job to,” hires, rents, or leases other persons (the employees).

Language Matters

But isn’t it incorrect to speak of “renting” a person? Don’t we usually talk about renting cars or apartments but only hiring persons? However, that usage does not survive a trip across the Atlantic. America’s “rental cars” are called “hire cars” in the UK, and the British lawbook on “Loan and Hire” (Baty 1918) is about the hiring of things, not persons.

Some people will point out: “hiring a person is not the same as renting a car.” The details are, of course, different. Thus, hiring a person is not the same as renting a car just as renting a car is not the same as renting an apartment. But abstractly considered, renting and hiring both refer to the purchase and sale of the *services* (person-hours, car-days, or apartment-months) of some entity, not to the purchase and sale of the entity itself. Other commentators find other differences. For instance, the usual rental contracts are for some time periods, e.g., renting a car for a day or an apartment for a month. But as one interlocutor put it: “The idea that the hiring of labor is a case of renting labor, while often stated, seems inconsistent with the at will character of employment contracts, especially on the side of the laborer.”

While the application of “renting” to persons is unusual, it is used deliberately here to foster a rethinking of what an Economics Nobel laureate, Ronald Coase (1910–2013), referred to as the “legal relationship normally called that of ‘master and servant’ or ‘employer and employee’” (Coase 1937, p. 403). Just as the employer–employee language is an updated euphemism for the older master–servant language, so hiring, “giving a job to,” or employing are all more socially acceptable euphemisms for the renting of persons.

Often this use of the human rental terminology is intentionally or unintentionally misinterpreted as being hyperbole. For instance, the statement might be “embraced” as follows: “Yes, employees are rented and, indeed, we all sell our souls in this system of wage slavery.” This misinterprets the rental assertion as an example of

hyperbole like “selling our souls” or “wage slavery.”[2] But by the standard economic notion of a rental contract, the rental assertion is only a statement of fact couched in jarring and non-euphemistic language so one might see an old reality from a new perspective.

The reference to the employment relationship as the renting of persons is not even a point of controversy; it is fully acknowledged in conventional economics itself. As Paul Samuelson (1915–2009), the first American Economics Nobel Prize winner, puts it in his economics textbook:

> Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself: he must *rent* himself at a wage. (Samuelson 1976, p. 52 [his italics])

Or in more detail:

> 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)

Other conventional economists make the same point in their textbooks.

> 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.) (Fischer et al. 1988, p. 323)

In the standard (stock/flow) distinction between an asset and the flow of the asset’s services, hiring or renting the asset itself is described as the *buying* of the services of the asset. When you rent a car for a day, you are buying a car-day of services. When you rent an apartment for a month, you are buying an apartment-month of services. When you rent a person for a day, you are buying a person-day of services.

Occasionally one will find the expression “renting services” which is an odd turn of phrase. One does not “rent a car-day”; one *buys* a car-day when one *rents* a car for a day. In the above quotation, the phrase “the firm rents the services of a worker” makes a similar confusion. The hourly wage is the rental rate for hiring or renting a worker for an hour—which is also the unit price of the “commodity that is traded in the labor market,” person-hours, the flow of services from the worker.

In the corporate finance literature, the fact that slavery is abolished means that a person as a “human capital asset” can only be rented, not bought, or sold.

> Suppose the cost of transaction in an asset is infinite or that by law or regulation the asset is not marketable. Perhaps the most important example of such an asset is human capital. You

[2] No matter how careful one is to avoid hyperbole like “wage slavery,” there will always be superficial readers or reviewers who interpret the argument as “hired labor is a form of slavery” and then go on to ridicule their own strawman.

> can rent your skills in return for wages, but you cannot sell yourself or buy anyone else. Slavery is forbidden. This has the effect of introducing a nondiversifiable asset into your portfolio—your human capital. (Copeland and Weston 1983, p. 202)

The human rental terminology also occurs in the "human resource" literature perhaps with a slight twist as in an award-winning book on "human capital."

> The first activity after planning is to acquire human capital for the organization. . . . Our focus in the acquisition quadrant is on the results of hiring or renting. The term *renting* is a catchall for contingent workers. . . . This form of human capital is, in effect, being rented or leased and then let go after the requirement is satisfied. The rental period can be anything from a few hours to fill in for someone who was delayed one morning to as long as a year or more to complete a project. The legal and ethical question of when a *rental* really becomes a *buy* is not at issue here." (Fitz-enz 2009, pp. 130–131 [author's italics])

This re-renting of people, like subletting a rented apartment, is also described in the Economics literature.

> Rent-a-Person (R-a-P) is a firm that hires people whom it then rents out to other firms that need temporary workers. (Begg et al. 2014, p. 117)

The renting-people characterization of the employer–employee relationship is perhaps the simplest example of the invisible boundaries of orthodox language and thought. That characterization is a surprise to most people. How is it that people can live their whole lives in a society based on the renting of people and yet when it is pointed out to them, they confess that they never thought of it that way? If a person lived their whole life in the antebellum South and then said they "never thought of the economy" as being based on owning people, then we would conclude that they were firmly in the grip of false consciousness. Yet today most people who never considered employment as the renting of people would not see themselves as being in the grip of social thought control. And that is just the simple matter of changing one word "hiring" to a synonym "renting."

Yes, the Human Rental Contract Is Voluntary

Our aim is to eventually show, from several viewpoints, that the contract to employ, hire, or rent human beings is inherently invalid and should be abolished—just as the *voluntary* contract to buy and sell human beings (including oneself) is already abolished. Hence the name "Neo-Abolitionism" for this set of arguments. But first, we must set aside certain rather superficial but popular arguments.

The argument is *not* that the employment contract is inherently coercive or involuntary. There is a popular intellectual parlor-game among left-wing critics of "the system" who just increase their standards of voluntariness until the contracts they wish to criticize seem to be involuntary. We are *not* playing that game. By any juridical standards, the employment relation is voluntary.

There are always extreme situations, but we are analyzing the *normal* well-regulated human rental system, not its extremities. Marxists say that most people are born without access to the means of production, so they are "forced" to sell their labor to survive. Those of us who were not born on a farm are similarly "forced" to buy our food in a grocery store or farmer's market. Indeed, a collectively bargained

labor contract is more voluntary in any practical sense than the take-it-or-leave-it contract of adhesion that the consumer faces in a grocery store or supermarket.

The Claim that "Wages Are Too Damn Low"

Marxists also claim that workers are exploited with low wages on the basis of the labor theory of value and exploitation. In addition to the other flaws in the labor theory of value (see Ellerman 1983, 2010a, 2018a), it would be only a critique of low wages, not a critique of the human rental system itself. Karl Marx (1818–1883) himself let this fact slip out in his discussion of overtime pay.

> It will be seen later that the labour expended during the so-called normal day is paid below its value, so that the overtime is simply a capitalist trick to extort more surplus labour. In any case, this would remain true of overtime even if the labour-power expended during the normal working day were paid for at its full value. (Marx 1977, p. 357 fn. [Chap. 10, sec. 3])

Thus, the supposed critique is of the labor not being "paid for at its full value," not of the employment system itself.[3] Marx brought a value-theoretic knife to a gun fight about contracts and property rights. An argument that "wages are too damn low" is a call for higher wages, not for abolishing the wage system.

"Economics" as Apologetics for Human Rentals

Throughout history, no social system has enjoyed such a sophisticated and "scientific" set of apologetics as today's human rental system. The main body of apologetics is conventional or orthodox Economics with orthodox political science playing a secondary and supporting role. To indicate its exalted role in the human rental system, conventional Economics will be spelled with a capital "E." Economics contains an unholy mixture of scientific, e.g., interpreting competitive market prices in constrained optimization problems (Ellerman 1984), and ideological components that need to be separated.

Often it is not just the answers, but the questions determined by the framing that are wrong. Our work is not just to provide different answers but a different framing—where the answers are then rather simple and obvious.

Whenever possible, Paul Samuelson (or other Economics Nobel Laureates) will be quoted to simply represent the standard position of Economics. But the most determined and philosophically sophisticated apologist for the human rental system is Frank Knight (1885–1972) who thus will be our principal antagonist. And Knight was, of course, equally frank about the nature of the employment relation since "in a free society the larger part of the productive capacity employed (as matters stand today in a typical Western nation) consists of the services of human beings themselves, who are not bought and sold but only, as it were, leased." (Knight 1936, p. 438).

[3]Of course, Marx was completely against the (private) employment system *personally*, but the discussion is about his *theories*, not his personal opinions.

1.3 What Is the System Being Argued for?

Work Need Not Be "Employment"

Most people today were born and raised in an economy based on the human rental system, so it seems perfectly natural. The human rental system is called the "free labor system" (in comparison with slavery) and is taken as part of "the End of History" (Fukuyama 1992). It is not seen for what it is, a historical halfway house between the system where other people could be owned by others (e.g., voluntarily) and a system where persons may be neither owned nor rented.

Indeed, the employment system is so taken for granted that it is routinely identified with work itself. A person without a job or work is said to be "unemployed." Countless books and articles discuss "work" when in fact they are discussing the employment system.[4] And a small proprietor or family farmer is said to be "self-employed" which is a euphemism comparable to referring to a freedman as a "self-owning slave."

The Alternative: Workplace Democracy

The alternative to the human rental system is not "socialism"; the alternative is a private property market economy where the people who work in each enterprise are the legal members or "owners" of the enterprise.[5] Each firm would be a *private* democratic organization where the people working in it are its citizens. This condition already holds in the small family businesses or family farms without hired hands, and in worker cooperatives or democratic Employee Stock Ownership Plans (ESOPs) (see Rosen et al. 2005; Erdal 2011; Blasi et al. 2013 for overall descriptions).[6] The best-known examples of workplace democracy on an industrial scale are in the Mondragon system of worker cooperatives in the Basque region of Spain (see Whyte and Whyte 1991; Oakeshott 1978, 2000; Lutz 1999). Our purpose here is not to go into how the legal structure of a democratic firm can be derived from first principles (see Ellerman 1990), but to focus on those first principles themselves (inalienable rights, rights to the fruits of one's labor, and democratic rights) that apply against the human rental system and in favor of workplace democracy.

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[4]See Mackin (2018) for a corrective analysis of superficial high-tech efforts to change "work".

[5]The word "owners" is in raised-eyebrow quotes because a workplace democracy or a democratic firm would not be a piece of property with owners, but a private democratic organization. As in a political democracy at the municipal or state level, one's citizenship rights are not property rights that may be bought or sold but are human or personal rights.

[6]There is also an academic literature about the "Illyrian firm" (Ward 1958) or "labor-managed firm" (Vanek 1970), but that model is inherently marred by the assumption that some members could be kicked out of membership if it would "sweeten the pot" for the remaining members and by a general lack of attention to the structure of personal and property rights (Ellerman 1990) that mars so much of the literature of Economics. Hence whenever an alternative to the private human rental firm or the public socialist enterprise is mentioned in the literature of Economics, it is that flawed model (e.g., the Illyrian firm or the Yugoslav model of socialist self-management) rather than straightforward private workplace democracy, e.g., the Mondragon cooperatives.

Neo-abolitionism rejects the usual framing of "capitalism versus socialism" both in what it supports and what it critiques. The supported alternative of workplace democracy (in a genuine private property market economy) highlights the absurdity of the "Great Debate" between the system of private employment (the so-called capitalism) and the system of public or "social" employment (governmental socialism or communism). That debate and the accompanying Cold War were like a modern-day version of the Peloponnesian War that pitted a society with the private ownership of slaves (Athens) against a society with the public ownership of the helot-slaves (Sparta). Each protagonist wants to affirm that the antagonist's system is the *only* alternative. Our society based on private human rentals needs to maintain a small supply of traditional socialists (preferably Marxists) in academia or elsewhere to serve a "useful fools" in public argumentation and to reinforce the binary choice of private or public human rentals. Today, the choice is not between people being privately rented in a private enterprise system or being publicly or "socially" rented under some form of socialism.[7] The real alternative is a society without humans owning or renting other humans, but that is unmentioned—and is almost unmentionable—in serious debate today.

When the topic of workplace democracy is raised, one of the first questions to arise is: "What about public employment?" The answer is quite simple. Each public job needs to be analyzed to see if it actually involves the exercise of the public power (e.g., the police or tax authorities). If so, then those jobholders can only be self-governing in the broader polity of citizens over whom they exercise the public powers *and* from whom those public powers were originally delegated. While some public jobs inherently involve the exercise of public powers, there are usually many other government jobs that involve no public powers and could well be organized in self-governing workplaces.[8]

What Arguments Are Not Being Made Here?

The arguments given here are rights-based (or what philosophers call "deontological"). The arguments are not consequentialist. Today we would say that the basic arguments for the abolition of slavery were *not* based on adverse consequences such as the poor treatment of the slaves, bad working conditions, or inadequate food, clothing, and shelter of the slaves. Such consequentialist arguments logically call for various reforms and regulations to eliminate those consequences, not for the abolition of the system. Similarly, our rights-based neo-abolitionist arguments against the

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[7]The word "socialism" is used here in the sense of real-existing socialism or communism that was indelibly stamped on the word by the twentieth century.

[8]A similar point may be made in a private democratic firm. In a workplace democracy, as in any democratic polity, the powers exercised by the management/government are delegated to the managers/governors directly or indirectly from the people over whom they may legitimately exercise those powers. The managers may not form a smaller self-governing unit while still exercising those broader powers. They may only be self-managing in the broader unit so that those over whom the managers exercise those powers are the same as those who originally delegated those powers to management.

human rental system are not based on low wages, poor benefits, or bad working conditions.[9]

The arguments given here are also not that employers are sometimes abusive or dominating.[10] It is also not that employees may feel dominated or alienated in their work. Employer abuses and working conditions of feeling dominated (a civic-republican phrase[11]) or alienated are all on the downside, and wages, salaries, and other benefits are on the upside of negotiations in an employment contract. Neo-classical Economics calmly responds that these complaints are part of the well-known disutility of work. They are surely aggravated by working as an employee subject to the will of the employer—but in return, the employee receives wages and benefits. If the employees do not consider the pay adequate to counterbalance the negative aspects, they can organize to bargain for more or look elsewhere for a job. Similar considerations apply if one is renting out a mule, truck, or apartment, where the owner felt the renter was abusing the rented entity in various ways. Such considerations about the *terms* of the rental contracts do not constitute a serious argument for outlawing the hiring system for mules, trucks, apartments, or persons. None of those considerations are arguments for abolishing the human rental system itself.[12]

Conventional classical liberalism or libertarianism often proposes a false individual choice between, say, being well-paid in a human rental firm or poorly paid in a democratic firm. Why should not the legal system allow a choice? The same false dichotomy was made in the slavery debates between the security and creature-comforts of being a slave (particularly a house-slave) in the South versus a "hireling" or "wage-slave" in the North not knowing if one will have a job or income tomorrow. Libertarians (e.g., Nozick 1974) are for allowing a free choice between selling oneself into a lifetime of servitude, renting oneself out of limited time periods, or making a living in some other way. Why not allow a *smorgasbord* of options? Yet all democratic countries have abolished not only involuntary slavery

[9]Individuals may find consequentialist arguments "convincing" for a neo-abolitionist conclusion, but there is always a logical gap. The gap is that institutions such as owning or renting other people are always capable of reform and regulation to lessen the adverse consequences. Indeed, there are also attempts to simulate the positive effects of abolishing the institution while remaining within it, e.g., the genre of management books on "how to get your employees to act like owners." There is also the worldwide industry to install stock-option or "virtual equity" programs to try to get the incentive effects of employee "ownership" but only as a *compensation* program without any share of voting or control. Arguments against an institution based on consequences or empirical effects can never logically 'seal the deal' since they cannot prove it is impossible to simulate those empirical effects under the old institution.

[10]For instance, Elizabeth Anderson (2017) emphasizes that aspect of the employment relation (see my review, Ellerman 2018b).

[11]See, for example, Pettit (1997).

[12]There is a large literature in applied economics based on the Kaldor–Hicks notion of "efficiency," e.g., the fields of Law-and-Economics or cost–benefit analysis. But that Kaldor–Hicks principle is vitiated by what Paul Samuelson called the "same-yardstick fallacy" (Ellerman 2014), so we will ignore such arguments for or against the human rental system.

but have also *abolished* any voluntary slavery or lifetime servitude contracts. Neo-abolitionism makes the case that the abolition of such contracts was not dependent on their tenure. The short-term human rental contract should also be abolished on the same grounds as the lifetime servitude contract (essentially treating persons as things within the scope and tenure of the contract). The argument is not whether one has the personal freedom to act like a slave or a dog for that matter; the argument is about what contracts should be recognized as legally valid and be enforced by the legal system.

There are, of course, a host of utilitarian or consequentialist arguments, going back particularly to democratic classical liberals such as John Stuart Mill (1806–1873), and, more recently, John Dewey (1859–1952), in favor of workplace democracy (Ellerman 2010b). These include arguments about both the greater efficiency of people working (jointly) for themselves as opposed to being "employees," as well as arguments about workplace democracy developing democratic capabilities and the all-around flourishing and self-actualization of people in a democratic setting. Similar arguments have been made in the past about the positive effects of being a citizen in a political democracy as opposed to being just a subject in an autocracy, but in this case, they apply to what most adults do all day long. For instance, Mill was quite clear about the probable future if humanity continues to improve.

> The form of association, however, which if mankind ... continue to improve, must be expected in the end to predominate, is not that which can exist between a capitalist as chief, and workpeople without a voice in the management, but the association of the labourers themselves on terms of equality, collectively owning the capital with which they carry on their operations, and working under managers elected and removable by themselves. ...
>
> It is scarcely possible to rate too highly this material benefit, which yet is as nothing compared with the moral revolution in society that would accompany it: the healing of the standing feud between capital and labour; the transformation of human life, from a conflict of classes struggling for opposite interests, to a friendly rivalry in the pursuit of a good common to all; the elevation of the dignity of labour; a new sense of security and independence in the labouring class; and the conversion of each human being's daily occupation into a school of the social sympathies and the practical intelligence. (Mill 1970, Book IV, Chapter VII "On the Probable Futurity of the Labouring Classes")[13]

As foreshadowed by Mill, workplace democracy may well have many benefits for workers and for society as a whole but all our arguments here are that it is a matter of right, not utility or efficiency. We begin with the contractual arguments.

[13]It is notable that these views from the middle of the nineteenth century would still be considered radical and futuristic after two decades into the twenty-first century. What happened in between to "mankind ...[continuing] to improve"? The answer is Marx, Lenin, and the Russian Revolution which allowed Marxism and communist dictatorships to be considered as "*the* alternative" to the human rental system. As to any continuation of Marxism in the future, one can only apply Marx's quip to Marxism itself: the first time as tragedy, the second time as farce.

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Chapter 2
Contract: The Case Against the Human Rental Contract Based on Inalienability

The intellectual treatment of slavery or lifetime servitude is typically dumbed-down to the question of coercion versus consent. But from Antiquity, there have been intellectual defenses of contractual slavery that continue to this day. Hence the Abolitionist Movement had to dig deeper than just promote consent over coercion. The deeper tradition of rights that are inalienable even with consent (Spinoza's phrase) descends from the Reformation principle of the inalienability of conscience that was secularized in the Enlightenment. In this chapter, this intellectual history of contractual slavery and the abolitionist counterarguments based on inalienable rights are recovered in a modern form and applied against the short-term voluntary contract to rent oneself out in the employment relation. The basic idea is that the responsible actions of a person (the employee) cannot in fact be given up and transferred to another person (the employer) like one can the services of a car or apartment when those things are rented out—so the contract to rent a human being is inherently invalid. There seem to be many ways to mis-understand (or rhetorically trivialize) the notion of inalienable rights, so one subchapter is devoted to anticipating and clarifying those misunderstanding.

2.1 Contractual Defenses of Slavery

The History of Slavery Construed as a Contractual Institution

Often historical slavery is condemned on the basis of being involuntary. But that leaves open the possibility of a "civilized" form of voluntary lifetime servitude—whether one calls it "slavery" or calls it by some nicer euphemism. Indeed, the most sophisticated defenders of historical slavery tried to interpret it as a contractual institution. The Abolitionist Movement did not just argue for voluntariness but developed the theory of inalienable rights that would rule out even a voluntary form of servitude. But before recovering that theory in the next chapter, we must first consider the history of contractual arguments to allow slavery and the rather faux

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"theory of inalienable rights" in conventional classical liberalism or libertarianism that does not even rule out a civilized voluntary slavery or lifetime servitude contract.

Conventional classical liberalism classifies social institutions using the basic framing of consent versus coercion. Much of liberal intellectual history is written so that the prohibition against coercive institutions is sufficient to rule out past institutions such as slavery and political autocracy. There is little need for a theory of inalienability since consent is taken as sufficient; democracy is seen as government based on the consent of the governed and the abolition of slavery required labor to be based on consent and contract. In the words of Sir Henry Maine (1822–1888): "the movement of the progressive societies has hitherto been a movement from Status to Contract." (1972, p. 100).

But that is simply a convenient ignorance of intellectual history. Today most classical liberals or libertarians discuss "slavery" as if it were intrinsically involuntary so that "'Voluntary slavery' is impossible, much as a spherical cube or a living corpse is impossible." (Palmer 2009, p. 457) Thus there is no need to discuss the whole intellectual history that tried to justify slavery as being based on contracts or to learn about the abolitionist arguments against such voluntary contracts.

But in fact, from Antiquity onward, the sophisticated defense of slavery has always been based on implicit or explicit voluntary contracts. For Western jurisprudence, the story starts with Roman law as codified in the *Institutes* of Justinian:

> 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, sec. 4)

In addition to the third Roman legal means of outright contractual slavery, the other two means were also seen as having aspects of contract. A person born of a slave mother and raised using the master's food, clothing, and shelter was considered as being in a perpetual servitude contract to trade a lifetime of labor for these and future provisions. In the tradition of natural but alienable rights, Samuel Pufendorf (1632–1694) gave that contractual interpretation.

> Whereas, therefore, the Master afforded such Infant Nourishment, long before his Service could be of any Use to him; and whereas all the following Services of his Life could not much exceed the Value of his Maintenance, he is not to leave his Master's Service without his Consent. But 'tis manifest, That since these Bondmen came into a State of Servitude not by any Fault of their own, there can be no Pretence that they should be otherwise dealt withal, than as if they were in the Condition of perpetual hired Servants. (Pufendorf 2003 [1673], pp. 186–187)

Manumission was an early repayment or cancellation of that debt. And Thomas Hobbes (1588–1679), for example, clearly saw a "covenant" in the ancient "by captivity" practice of enslaving prisoners of war.

> And this dominion is then acquired to the victor when the vanquished, to avoid the present stroke of death, covenants either in express words or by other sufficient signs of the will that, so long as his life and the liberty of his body is allowed him, the victor shall have the use

> thereof at his pleasure. . . . It is not, therefore, the victory that gives the right of dominion over the vanquished but his own covenant. (Hobbes 1958 [1651], Bk. II, Chap. 20)

Thus, *all* of the three legal means of becoming a slave in Roman law (explicit contract, prisoner of war being sold into slavery, and being born of a slave mother) had explicit or implicit contractual interpretations.

Classical Liberalism's Faux Theory of "Inalienable Rights"

The *Two Treatises of Government* (1690) by John Locke (1632–1704) is one of the classics of conventional liberal thought. Locke would not condone a contract which gave the master the power of life or death over the slave.

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

This is the fount and source of what is sometimes taken as the "liberal doctrine of inalienable rights" (Tomasi 2012, p. 51). But after taking this edifying stand, Locke turns around in the next section and accepts a slavery contract that has some rights and obligations on both sides. Locke is only 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 accepted the contract and called it by the euphemism of "drudgery."

> For, if once *Compact* enter between them, and make an agreement for a limited Power on the one side, and Obedience on the other, the State of War and *Slavery* ceases, as long as the Compact endures. . . . I confess, we find among the *Jews*, as well as other Nations, that Men did sell themselves; but, 'tis plain, this was only to *Drudgery, not to Slavery*. For, it is evident, the Person sold was not under an Absolute, Arbitrary, Despotical Power. (Second Treatise, §24)

Locke is here setting an intellectual pattern, repeated many times later, of taking a high moral stand against an extreme form of contractual slavery, but then turning around and accepting a civilized form on contractual slavery (e.g., rights and obligations on both sides at least in the law books) usually with some more palatable euphemism such as drudgery, perpetual servitude, or perpetual hired servant.

Moreover, Locke agreed with Hobbes on the practice of enslaving the war captives or others who had committed a capital crime as a quid pro quo plea-bargained exchange of slavery instead of death and 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)

In Locke's constitution for the Carolinas, he seemed to have justified slavery by interpreting the slaves purchased by the slave traders on the African coast as the captives in internal wars who had accepted the plea-bargain of a lifetime of slavery

instead of death.[1] Thereafter, the title was transferred by commercial contracts—like lifetime versions of the indentured servitudes. If the slave later decides to renege on the plea-bargain contract and to take the other option, then "by resisting the Will of his Master, [he may] draw on himself the Death he desires."

Frank Knight pointed out that the foundations of classical liberalism, as he saw it, were laid well before Adam Smith:

> Interestingly enough, the political and legal theory had been stated in a series of classics, well in advance of the formulation of the economic theory by Smith. The leading names are, of course, Locke, Montesquieu, and Blackstone. (1947, p. 27, fn. 4)

We have already seen how Locke condoned a voluntary slavery contract with some rights on both sides. William Blackstone (1723–1780), in his codification of English common law, stuck to Locke's choreography. Blackstone rules out slavery where "an absolute and unlimited power is given to the master over the life and fortune of the slave." Such a slave would be free "the instant he lands in England." After such an edifying stand on high moral ground, Blackstone turns around and adds:

> Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. (Blackstone 1959, section on "Master and Servant")

Knight's other leading name in the foundations of classical liberal thought was Montesquieu (1689–1755). Montesquieu not only employed the same Lockean narrative in his treatment of inalienability; that treatment was updated by the dean of high liberalism, John Rawls (1921–2002). Montesquieu starts by ruling out the self-sale contract in an extreme form:

> To sell one's freedom is so repugnant to all reason as can scarcely be supposed in any man. If liberty may be rated with respect to the buyer, it is beyond all price to the seller. (Montesquieu 1912, Vol. I, Bk. XV, Chap. II).

Rawls paraphrases this argument from Montesquieu to argue that in the original position, the

> grounds upon which the parties are moved to guarantee these liberties, together with the constraints of the reasonable, explain why the basic liberties are, so to speak, beyond all price to persons so conceived. (Rawls 1996, p. 366)

After the "beyond all price" passage paraphrased by Rawls, Montesquieu goes on to note: "I mean slavery in a strict sense, as it formerly existed among the Romans, and exists at present in our colonies." (Montesquieu 1912, Vol. I, Bk. XV, Chap. II) Montesquieu then reverses course by noting that this would not exclude a civilized or "mild" form of the contract.

[1]See Laslett (1960), notes on §24, 325–326.

> This is the true and rational origin of that mild law of slavery which obtains in some countries; and mild it ought to be, as founded on the free choice a man makes of a master, for his own benefit; which forms a mutual convention between two parties. (Montesquieu 1912, Vol. I, Bk. XV, Chap. V)

And then Rawls goes on to follow the same choreography in his treatment of inalienability.

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

This is a question of theory, not personal views. Of course, no one thinks that John Rawls would *personally* endorse a voluntary slavery contract, but the question is about his theory of justice. This illustrates how little progress on the issue of inalienable rights has been made in modern conventional classical liberalism.[2] In Rawls' treatment of inalienability, he repeated the pattern and even some of the language ("beyond all price") of a "liberal doctrine of inalienable rights" descending from Locke, Blackstone, and Montesquieu that *did* explicitly endorse a civilized form of voluntary contractual slavery—perhaps described with euphemisms such as "drudgery" or "perpetual servitude."

Rawls' Harvard colleague, Robert Nozick (1938–2002), was notoriously explicit in accepting the (re)validation of the voluntary slavery contract.[3] He accepted that a free society should allow people to jointly alienate their political sovereignty to a "dominant protective association" (Nozick 1974, p. 15).

> 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)

Nozick illustrated one of the remarkable features of the current debates about the human rental system. Conventional classical liberals, not to mention libertarians, rush to try to defeat the neo-abolitionist arguments against human rentals. Yet they do not have a normative framework that is strong enough to in principle rule out a civilized contract for lifetime servitude, a non-democratic constitution, or even the old coverture marriage contract. And "in principle rule out" refers to some principled argument, not simply the subjective opinion "I am against those contracts." When they do not even have a principled critique strong enough to rule out those *already abolished* contracts, then "of course" they see no problem in the current contract to rent human beings. One should learn how to walk before trying to run. But it seems

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[2]The case for reclaiming *democratic* classical liberalism is made in Ellerman (2020).

[3]It is a re-validation since in the decade prior to the Civil War, there was explicit legislation in at least six states "to permit a free Negro to become a slave voluntarily" (Gray 1958, p. 527; quoted in Philmore 1982, p. 47). For instance, in Louisiana, legislation was passed in 1859 "which would enable free persons of color to voluntarily select masters and become slaves for life." (Sterkx 1972, p. 149) See also the section on "Voluntary Enslavement" in (Morris 1996, pp. 31–36).

perfectly acceptable for conventional classical liberals to just avoid the whole question of a principled critique of those already abolished contracts. It is unclear whether this is just professionally tolerated superficiality or whether they have the premonition that developing such a critique may logically lead them into a place they "cannot" go, i.e., into a critique of the human rental contract.

The contractual defense of slavery was also used in the old debate over slavery in antebellum America. Since conventional classical liberalism is based on the framing of "coercion versus consent," the pro-slavery position is almost invariably presented as being based on illiberal racist or paternalistic arguments that condoned involuntary slavery. Considerable "feel good" attention is lavished on illiberal paternalistic writers such as George Fitzhugh,[4] while consent-based contractarian defenders of slavery are passed over in silence. For example, Rev. Samuel Seabury (1801–1872) gave a sophisticated implicit-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. (Seabury 1969 [1861], p. 144)

Rev. Seabury then goes to answer the likely response.

> "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 [1861], p. 153)

But this and the whole history of contractual defenses of slavery seem to be erased from the scholarly memory in the *conventional* classical liberal intellectual history of the slavery debates. Eric McKitrick (1963) collects essays of 15 pro-slavery writers, Drew Gilpin Faust (1981) collects seven pro-slavery essays, and Paul Finkelman (2003) collects 17 pro-slavery writers, but *none* of them includes a single writer who argues to allow slavery on a contractual basis such as Seabury—not to mention Grotius, Pufendorf, Hobbes, Locke, Blackstone, Molina, Suarez, Montesquieu, and a host of others. It seems that a contractual defense may not be entertained in the usual classical liberal intellectual history of the slavery debates. That would undercut the simplistic "consent versus coercion" framing and require a more sophisticated theory of inalienable rights which might have who-knows-what consequences—so there is no need to go there.

We will outline the *genuine* theory of inalienable rights in the *democratic* as opposed to the *conventional* classical liberal tradition. The notion of inalienable rights was greatly popularized by the American Declaration of Independence, but the origin was much older.

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[4]See, for example, Genovese (1971), Wish (1962), or Fitzhugh (1960).

> The idea of legally establishing inalienable, inherent, and sacred rights of the individual is not of political but religious origin. What has been held to be a work of the Revolution was in reality a fruit of the Reformation and its struggles. (Jellinek 1901, p. 77)

That tradition descends from the Reformation doctrine of the inalienability of conscience through the Scottish and German Enlightenments and English Dissenters, and that was transferred "from a religious on to a juridical plane" (Lincoln 1971, p. 2) by the Abolitionist and Democratic Movements. As John Morley (1838–1923) put it rather grandly:

> To what quarter in the large historic firmament can we turn our eyes with such certainty of being stirred and elevated, of thinking better of human life and the worth of those who have been most deeply penetrated by its seriousness, as to the annals of the intrepid spirits whom the protestant doctrine of indefeasible personal responsibility brought to the front in Germany in the sixteenth century, and in England and Scotland in the seventeenth? (Morley 1908, p. 113)

This theory of inalienable rights needs to *explain* why the rights are inalienable, unlike the impoverishment of the rights discourse (Glendon 1991, 1998) where an "inalienable right" is just asserted as a way to try to short-circuit or cancel a rational discussion of an issue.

2.2 History of Inalienability Theory

Stoic Precedents for Inalienable Rights Theory

The intellectual history of abolitionism might begin with a watershed in the development of political and ethical thought, the break of the Stoic School away from the worldview of Aristotle. For Aristotle, slavery was based on "fact"; some people were "talking instruments"—marked for slavery "from the hour of their birth." The treatment of 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. Instead of the inequality between the citizens of the city-state and the barbarians outside, the Stoics saw a fundamental equality of all men in the City of the World. All men were equal because all participated in Reason.

A principal ingredient in the analysis of inalienability presented here is the substantive contradiction between a slave's legal status as a non-person and the slave's factual status as a person.

> In summary, then, slavery has always embodied a fundamental contradiction arising from the ultimately impossible attempt to define and treat men as objects. (Davis 1975, p. 82)

The basic point for contractual analysis is that the slave's factual status as a person is not changed by consent or contract. And this contradiction between legal and factual status applies, mutatis mutandis, to the rented person's legal status. An

appreciation of this contradiction can be found in various forms in the thought of the Stoics.

Chrysippus challenged Aristotle's notion that some people were slaves by nature. By virtue of their rational and social nature, Cicero saw all men as equal under the *jus naturale*. George Sabine (1880–1961) found in the Stoics an anticipation of the Kantian theme of treating all humans as persons, as ends-in-themselves, rather than as things.

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

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

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

In spite of the legal role of the slave as an instrument employed by another person, the mind of the slave is *sui juris*. A mind, thoughts, and decisions of the slave, therefore, remain free independently of their legal status of being a slave, The fact that a slave is expected to obey, and that this is written is some kind of law or contract, does not imply that a person, acquiring the legal status of a slave, also turns into an *actual* instrument of the master devoid of responsible agency.

The modern (democratic) classical liberal scholar, George H. Smith, has independently distilled from Western intellectual history the same theory of inalienability that is presented here. Smith also traces the key notion of conscience back to the Stoics.

> The idea of conscience has a long and fascinating history in Western thinking about ethics, religion, and politics. Among ancient Greek and Roman schools of thought, it was developed most fully by the Stoics, especially Epictetus, who spoke eloquently of an inner freedom that was immune to external coercion. Freedom, for the Stoic, meant independence of the inner self from everything external. (Smith 2013a, p. 173)

The Stoic notion of inner freedom re-emerged in the Reformation notion of the inalienability of conscience.

The Inalienability of Conscience in the Reformation

One of the golden threads running through the history of inalienable rights theory is the inalienability argument applied to the freedom of thought and judgment or, in the religious context, to the freedom of conscience. Here "conscience" means one's basic beliefs (not one's inner voice). No matter what one is told to believe by priest or Pope, it is always inexorably one's own decision. It is not a matter of should or should not; it is a matter of fact. An individual's powers of judgment cannot, in fact, be short-circuited and alienated so that their decisions and beliefs are determined by

an external authority. At best (or rather, at worst), a person can only make their own decisions by always accepting the judgments of some authority figure.

As previously noted, an early anticipation of this de facto inalienability argument can be found in the Stoic doctrine that while the body of the slave was in chains, the slave's mind or soul was *sui juris.*, e.g., Seneca's doctrine that only the body is enslaved and that the "inner part cannot be delivered into bondage" (quoted in Davis 1966, p. 77). This theme was emphasized by Martin Luther (1483–1546) and became a basic tenet of the Reformation. 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, p. 316)

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

> Furthermore, every man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; and as little as he can open or shut heaven or hell for me, so little can he drive me to faith or unbelief. Since, then, belief or unbelief is a matter of every one's conscience, and since this is no lessening of the secular power, the latter should be content and attend to its own affairs and permit men to believe one thing or another, as they are able and willing, and constrain no one by force. (Luther 1942, p. 316)

The inalienability of one's decisions about one's beliefs was summarized by Ernest Cassirer (1874–1945) as the actual "central principle of Protestantism" (Cassirer 1963b, p. 117): "No one can believe for another." George H. Smith also sees this inalienability of conscience as developing into the theory of inalienable rights.

> The expression "liberty of conscience" had become commonplace by the 17th century, and this sphere of inner liberty gradually developed into the notion of inalienable rights. A right that is inalienable is one that cannot be surrendered or transferred by any means, including consent, because it derives from man's nature as a rational and moral agent. (Smith 2008, p. 88)

For instance, the Non-conformist John Owen (1616–1683) argued in 1669 that "Liberty of conscience is of natural right... This liberty is necessary unto human nature, nor can it be divested of it;..." (Owen 2000, pp. 566–567).

Benedict de Spinoza

It seems that Benedict de Spinoza (1632–1677), an atheist and a Jew, was the first to translate the Protestant doctrine of the inalienability of conscience into the political notion of a right that could not be alienated "even with consent." In Spinoza's 1670 *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. (Spinoza 1951, p. 257)

George H. Smith also quotes another passage from Spinoza: "Inward worship of God and piety in itself are within the sphere of everyone's private rights, and cannot be alienated." (Spinoza 1951, p. 245) As Spinoza goes on to elaborate:

> I admit that the judgment can be biased in many ways, and to an almost incredible degree, so that while exempt from direct external control it may be so dependent on another man's words, that it may fitly be said to be ruled by him; but although this influence is carried to great lengths, it has never gone so far as to invalidate the statement, that each man's understanding is his own, and that brains are as diverse as palates. (Spinoza 1951, p. 257)

Some people are willing to take the opinion of an authority as sufficient evidence to make their decision—but that is still *their* decision.

Francis Hutcheson and the Scottish Enlightenment

Francis Hutcheson (1694–1746) preceded Adam Smith (1723–1790) in the chair of moral philosophy in Glasgow and was one of the leading moral philosophers of the Scottish Enlightenment. Hutcheson arrived (independently of Spinoza?[5]) at the same idea of inalienability in the form that was to later enter the political lexicon through the *American Declaration of Independence*. The inalienability argument is best stated 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. (Hutcheson 1755, p. 261)

Hutcheson contrasts de facto alienable goods where "the translation of them to others can be made effectually" with factually inalienable faculties where "the translation cannot be made with any effect." This was not just some expression of moral emotions that one "ought" to not alienate this or that basic right. Hutcheson actually set forth a *theory* which could have legs of its own far beyond Hutcheson's (not to mention Luther's) intent. He based the theory on what in fact could or could not be transferred or alienated from one person to another. Hutcheson goes on to show how the "right of private judgment" (i.e., one's conscience) is inalienable.

[5]Although Hutcheson introduced the language of "inalienable rights" and developed the ideas further than Spinoza, the pious Presbyterian never referenced the atheistic Jew as a source even though Spinoza's work was known in Scotland at the time.

> Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable. (Hutcheson 1755, pp. 261–262)

Hutcheson pinpoints the factual nontransferability of private decision-making power. Short of coercion, an individual's faculty of judgment cannot, in fact, be short-circuited or involuntarily controlled by a secular or religious authority.

> A like natural right every intelligent being has about his own opinions, speculative or practical, to judge according to the evidence that appears to him. This right appears from the very constitution of the rational mind which can assent or dissent solely according to the evidence presented, and naturally desires knowledge. The same considerations shew this right to be unalienable: it cannot be subjected to the will of another: tho' where there is a previous judgment formed concerning the superior wisdom of another, or his infallibility, the opinion of this other, to a weak mind, may become sufficient evidence. (1755, p. 295)

Hutcheson notes that accepting the judgment of an authority claiming "infallibility" is only another way for a "weak mind" to make a judgment—another echo of Spinoza.

Spinoza and Hutcheson together form the bridge between the religious inalienability of conscience and the political theory of inalienable rights.

> Although the appeal to inalienable rights first arose in the context of religious freedom, it was quickly extended to spheres other than religion, as we find in Jefferson's appeal to the inalienable rights of "Life, Liberty and the pursuit of Happiness." This was one of the most significant developments in the history of libertarian thought. (Smith 2017, pp. 118–119)

The conventional scholarly view has been that "Jefferson copied Locke" (Becker 1958, p. 79). But as we have seen, Locke had no serious theory of inalienability, and he, in fact, condoned a limited voluntary contract for slavery which he nicely called "Drudgery." Likewise, Blackstone saw no problem in a civilized voluntary slavery contract (i.e., with rights on both sides) which he nicely dubbed "perpetual service" even though the notion of "unalienable rights" was more common at that time. For instance, in his *Letters to Blackstone*, Philip Furneaux wrote not only for Blackstone but "to promote amongst my readers general just conceptions the right private judgment, and impartial liberty in matters conscience which of all human rights seems to me to be one of the most sacred and unalienable." (Furneaux 1771, p. iii, Preface to Second Ed.)

In his important study, *Inventing America*, Garry Wills reinvented Jeffersonian scholarship concerning the intellectual roots of the *Declaration of Independence*. Wills convincingly argues that the Lockean influence was more indirect and even to some extent resisted by Jefferson, while Hutcheson's influence was central and pervasive. Of direct interest here, "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important" (Wills 1979, p. 213). Despite some ambiguity, Hutcheson was "one of the prime sources of antislavery thought" (Davis 1975, p. 263).

Another contribution of the Scottish Enlightenment to antislavery thought is less well-known. The *Encyclopedia* (published alphabetically between 1751 and 1772) of Denis Diderot (1713–1784) was the summa of the French Enlightenment. The

article entitled *Esclavage* appeared in an early volume, and it restated the superficial, if not disingenuous, antislavery arguments of Montesquieu. However, in 1765 in the article *Traite des Negres*, signed by Chevalier de Jaucourt, there appeared what David Brion Davis has termed.

> one of the earliest and most lucid applications to slavery of the natural rights philosophy, [which] succeeds in stating a basic principle which was to guide the more radical abolitionists of the nineteenth century. (1966, p. 416)

De Jaucourt makes the far-reaching statement that: "Men and their liberty are not objects of commerce; they can be neither bought nor sold nor paid for at any price." He then continues:

> There is not, therefore, a single one of these unfortunate people regarded only as slaves who does not have the right to be declared free, since he has never lost his freedom, which he could not lose and which his prince, his father, and any person whatsoever in the world had not the power to dispose of. Consequently the sale that has been completed is invalid in itself. This Negro does not divest himself and can never divest himself of his natural right; he carries it everywhere with him, and he can demand everywhere that he be allowed to enjoy it. It is, therefore, patent inhumanity on the part of judges in free countries where he is transported, not to emancipate him immediately by declaring him free, since he is their fellow man, having a soul like them. (De Jaucourt cited in Gendzier 1967, p. 230)

After the publication of *The Problem of Slavery in Western Culture* (1966), Davis discovered "that de Jaucourt had merely copied someone else's words" (1971, p. 583). The author was a Scotsman, so Davis concludes; "It is clearly a mistake to attribute this radical antislavery position to the rationalism or secular humanitarianism of the French Enlightenment" (Ibid., p. 586).

The author of the radical antislavery doctrine used by de Jaucourt was an obscure Scottish jurist, George Wallace (1727–1805). Wallace asserted that: "Men and their liberty are not *in commercio*; they are not either saleable or purchaseable." He then continues:

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

Wallace's statement illustrates the interplay between de facto and de jure elements, an interplay that is central to understanding the de facto 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 discussed below). 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 de facto human agents in the de jure role of a thing, they are only "pretended to be slaves" by the legal authorities.

Some Testimony from Early Ministers

One of the earliest voices about the inalienability of conscience in America was Roger Williams (1603–1683). As the modern editor of Williams' writings on religious liberty put it:

> Since conscience was not a volitional experience (that is, not subject to control of the will), force normally would not work to change it. Williams believed it absurd to suggest that persons could "will or entrust such a power to the civil magistrate to compel their souls and consciences" to conform to convention or a government mandate, for conscientious conviction is by definition an inalienable experience over which no third party can assume control. (Davis 2008, p. 25)

George H. Smith has uncovered a remarkable sermon by the "New Light" minister, Elisha Williams that clearly develops the notion of the inalienability of conscience.

> No action is a religious action without understanding and choice in the agent. Whence it follows, the rights of conscience are sacred and equal in all, and strictly speaking unalienable. This *right of judging every one for himself in matters of religion* result from the nature of man, and is so inseparably connected therewith, that a man can no more part with it than he can with his power of thinking: and it is equally reasonable for him to attempt to strip himself of the power of reasoning, as to attempt the vesting of another with this right. And whoever invades this right of another, be he pope or Caesar, may with equal reason assume the other's power of thinking, and so level him with the brutal creation. A man may alienate some branches of his property and give up his right in them to others; but he cannot transfer the right of conscience, unless he could destroy his rational and moral powers.... (Williams 1998 [1744], p. 66; see Smith 2013a, p. 177)

Another "liberal preacher," John Brazer, made similar points in 1828.

> Our apprehensions of truth, our belief of any article of faith, our assent to testimony, our views of any proposition, are necessarily personal acts. ... And as no man can think for another, or perceive for another, so no man can believe for another, or, what is the same thing in fact, make his belief the standard of another man's belief. ... These are the inalienable rights of conscience, of which no man can divest himself, without committing an outrage upon the nature which God has given him; these are rights with which no man or set of men can interfere, whether to secure a unity of belief, or for any other purpose, without incurring deep guilt. (Brazer 1828, pp. 63–64)

Brazer clearly expresses what Cassirer took to be the central principle of Protestantism that "No one can believe for another."

Richard Price

In this survey of inalienable rights theory, we are searching for the factual element of the de facto inalienability argument—not just for assertions of "inalienable rights." Staughton Lynd in his excellent study *Intellectual Origins of American Radicalism* has highlighted precisely this feature in Hutcheson's thought and in the work of the Dissenters such as Richard Price.

> 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.
>
> This was a proposition peculiarly congenial to Dissenting radicalism. For it freedom of conscience was inseparable from moral agency. (Lynd 1969, p. 45)

Richard Price (1723–1791), a dissenting Presbyterian minister from Wales, was a well-rounded thinker with contributions in moral philosophy, political theory, economics, and mathematics in addition to more religious endeavors. With the outbreak of the American Revolution, Price courageously published a work, *Observations on the Nature of Civil Liberty,* which sided with the Americans' claim

> that Great Britain is attempting to rob them of that liberty to which every member of society and all civil communities have a natural and unalienable title. (1776, Part I; reprinted in Peach 1979, p. 67)

This and later works by Price earned him the respect and admiration of the American revolutionaries. Tom Paine in *The Rights of Man* launched his famous attack on Burke's *Reflections on the Revolution in France* by noting that "a great part of [Burke's] work is taken up with abusing Dr. Price (one of the best-hearted men that lives) . . ." (reprinted in Dishman 1971, p. 167).

Price build his political theory on

> that principle of spontaneity or self-determination which constitutes us agents or which gives us a command over our actions, rendering them properly ours, and not effects of the operation of any foreign cause. (1776, Part I, sec. I; reprinted in Peach 1979, pp. 67–68)

Price divides liberty into its physical, moral, religious, and civil components but "there is one general idea that runs through them all, I mean the idea of self-direction, or self-government" (in Peach 1979, p. 68). Any contract pretending to transfer the right of a people's self-determination to another state would be non-binding.

> Neither can any state acquire such an authority over other states in virtue of any *compacts* or *cessions.* This is a case in which compacts are not binding. Civil liberty is, in this respect, on the same footing with religious liberty. As no people can lawfully surrender their religious liberty by giving up their right of judging for themselves in religion, or by allowing any human beings to prescribe to them what faith they shall embrace, or what mode of worship they shall practise, so neither can any civil societies lawfully surrender their civil liberty by giving up to any extraneous jurisdiction their power of legislating for themselves and disposing their property. (Ibid., pp. 78–79)

Price's tract naturally raised a furor of opposition so, in 1777, he wrote *Additional Observations on the Nature and Value of Civil Liberty* to clarify his positions and answer his critics. Again, the different types of liberty were squarely grounded on

> the general idea of self-government. The liberty of men as agents is that power of self-determination which all agents, as such, possess. Their liberty as moral agents is their power of self-government in their moral conduct. Their liberty as religious agents is their power of self-government in religion. And their liberty as members of communities associated for the purposes of civil government is their power of self-government in all their civil concerns. (reprinted in Peach 1979, p. 136)

Lynd points out that Price contributed directly and indirectly to the American debates over slavery in the late eighteenth and nineteenth centuries. Some thinkers, then and now, see people as having a natural property right in their own person and actions, all of which are alienable. But Price saw a quite different natural right to liberty.

> But the second kind of right, what Price called "that power of self-determination which all agents, as such, possess," was inalienable as long man remained man. 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)

Here again, we see the golden thread running from the inalienability of conscience ("the mind's quest for religious truth") to the inalienable right of self-determination.

Inalienability in Kant and Hegel

Immanuel Kant (1724–1804) acknowledged that "every man has inalienable rights which he cannot give up even if he would. . ." (1974, p. 72).

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

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

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

In his treatment of Kant's doctrine of autonomy, Karl Popper (1902–1994) emphasizes the inalienability of responsibility even for following commands (when not physically coerced).

> Kant's Copernican Revolution in the field of ethics is contained in his doctrine of autonomy the doctrine that we cannot accept the command of an authority, however exalted, as the ultimate basis of ethics. For whenever we are faced with a command by an authority, it is our responsibility to judge whether this command is moral or immoral. The authority may have power to enforce its commands, and we may be powerless to resist. But if we have the physical power of choice, then the ultimate responsibility remains with us. It is our decision whether to obey a command, whether to accept authority. (Popper 1965, pp. 181–182)

This theme was even more central to the treatment of inalienability by Georg Wilhelm Friedrich Hegel (1770–1831). Hegel gave, to our knowledge, one of the clearest statements of the de facto inalienability argument in the history of Western philosophy.

The embodying of one's will in things through purposive human activity or labor is the basis of appropriation.

> A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'. (Hegel 1967, §44)

Property is actualized will.

> But I as free will am an object to myself in what I possess and thereby also for the first time am an actual will. and this is the aspect which constitutes the category of *property,* the true and right factor in possession. (Ibid., §45)

If property originates as the embodiment of will (i.e., the fruits of labor), then certain things are not eligible for appropriation since they already embody another human will, e.g., the actions of another person.

> Since property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite. ... The fact that a thing of which I can take possession is a *res nullius* is ... a self-explanatory negative condition of occupancy .... (Ibid., §51)

In becoming a person, an individual in effect takes possession of themselves and thus becomes ineligible for appropriation by others.

> It is only through the development of his own body and mind, essentially through his self-consciousness's apprehension of itself as free, that he takes possession of himself and becomes his own property and no one else's. (Ibid., §57)

Although Hegel waivered in applying the argument to all people, it provided the fundamental argument against slavery.

> The alleged justification of slavery ... depend[s] on regarding man as a natural entity pure and simple, as an existent not in conformity with its concept .... The argument for the absolute injustice of slavery, on the other hand, adheres to the concept of man as mind, as something inherently free. (Ibid., Remark to §57)

This anti-slavery argument provides more than just a critique of involuntary slavery; it is a critique of any contract to voluntarily alienate aspects of one's personhood. To voluntarily alienate something, we must be able to withdraw our will from it—to in fact vacate it and turn it over to the use of another person.

> 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. (Ibid., §65)

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

> 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. (Ibid., §66)

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

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

There is another reason why we might close this intellectual history of the theory of inalienability with Hegel. He lived in the time of the industrial revolution when the master–servant relationship was moving out of the household to become the dominant form of work in the factory system.[6] The main focus of Hegel's and many of the other treatments of inalienability was the critique of the whole notion of contractual slavery. Yet the theory had stronger and untoward implications.

Classical economists, as well as slavery apologists, made the point that, from the economic viewpoint, the difference between the slavery relationship (which apologists saw as contractual) and the employment relationship was the tenure of the relationship.

> Our property in man is a right and title to human labor. And where is it that this right and title does not exist on the part of those who have money to buy it? *The only difference in any two cases is the tenure.* (Bryan 1858, p. 10 [italics in original]; quoted in Philmore 1982, p. 43)

Or in the words of the classical economist, James Mill (1773–1836):

> The labourer, who receives wages sells his labour for a day, a week, a month, or a year, as the case may be. The manufacturer, who pays these wages, buys the labour, for the day, the year, or whatever period it may be. He is equally therefore the owner of the labour, with the manufacturer who operates with slaves. The only difference is, in the mode of purchasing. The owner of the slave purchases, at once, the whole of the labour, which the man can ever perform: he, who pays wages, purchases only so much of a man's labour as he can perform in a day, or any other stipulated time. (Mill 1844. Chap. I, section II, pp. 21–22)

The "problem" was that Hegel's treatment of inalienability had nothing to do with the time period, the tenure of the contract. The "right to what is in essence inalienable" held as well for 8 h a day as for 7 years or a working lifetime. But Hegel had no desire to become a radical or pariah in his own society and he had to pass the Prussian censors. Hence, he introduced a little metaphysical doubletalk in order to "walk back" his inalienability theory that went beyond his intentions.

> Single products of my particular physical and mental skill and of my power to act I can alienate to someone else and I can give him the use of my abilities for a restricted period, because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being. . . .
>
> The relation here between myself and the exercise of my abilities is the same as that between the substance of a thing and its use. . . . It is only when use is restricted that a distinction between use and substance arises. So here, the use of my powers differs from my powers and therefore from myself, only in so far as it is quantitatively restricted. Force is the totality of its manifestations, substance of its accidents, the universal of its particulars. (Hegel 1967, §67)

In case the purpose of Hegel's remarks was not clear, there was an explanation culled from Hegel's lectures: "The distinction here explained is that between a slave and a modern domestic servant or day-labourer." (Hegel 1967, p. 241). Of course, in terms of Hegel's own treatment of inalienability, his walk-back or "moon-walk" is

[6] See Anderson (2017) for more on this transformation.

nonsense. Can the hired killer alienate "the use of my abilities for a restricted period" and thus escape de facto responsibility for his actions?

Even though Marx was quite familiar with Hegel's *Philosophy of Right*, Marx ignored (or did not understand) Hegel's treatment of inalienability. Instead, Marx quoted only Hegel's moon-walk (Chap. VI, fn. 3, in Vol. 1 of *Capital*) as if it was accurate. This interpretation is corroborated by Marx's treatment of the labor contract in the sphere of exchange. If responsible agency could not be de facto voluntarily transferred, then the labor contract would be an impossible contract and an institutionalized fraud. Yet Marx insists that the sphere of exchange "is in fact a very Eden of the innate rights of man" (Marx 1977 (1867), Chap. 6) so that he must descend into the "hidden abode of production" in order for his labor theory of value to reveal exploitation. That was the path taken by the mature Marx—regardless of one's interpretations of the juvenile Marx—and that is the Marx who missed the (de facto) inalienability critique of the voluntary contract for the renting of persons—so clearly spelled out by Hegel.

Inalienability (or the Lack Thereof) in Modern Economic Theory

The case against slavery was often stated in hyperbolic terms as involving the ownership of persons or "souls." But "souls don't chop cotton"; labor does. The more clear-eyed defenses of antebellum slavery pointed out that it was a way to secure a continuing supply of labor. Indeed, the positive-good theories of slavery contrasted the "security" of the slave with the insecurity of the hireling or employee.

> Slavery is the duty and obligation of the slave to labor for the mutual benefit of both master and slave, under a warrant to the slave of protection, and a comfortable subsistence, under all circumstances. The person of the slave is not property, no matter what the fictions of the law may say; but the right to his labor is property, and may be transferred like any other property, . . . Nor is the labor of the slave solely for the benefit of the master, but for the benefit of all concerned; for himself, to repay the advances made for his support in childhood, for present subsistence, and for guardianship and protection, and to accumulate a fund for sickness, disability, and old age. The master, as the head of the system, has a right to the obedience and labor of the slave, but the slave has also his mutual rights in the master; the right of protection, the right of counsel and guidance, the right of subsistence, the right of care and attention in sickness and old age. . . . Such is American slavery, or as Mr. Henry Hughes happily terms it, 'Warranteeism'. (Elliott 1860, p. vii)

Since such a system was thus interpreted as being based on an implicit lifetime labor contract with rights and obligations on both sides (at least in theory), conventional Economics has always had difficulty in arriving at a knock-down argument to justify the abolition (instead of reform) of such a contractual system. Indeed, what serious arguments could justify *abolishing* a long-term or lifetime labor contract while fully supporting as the epitome of legitimacy the shorter-term human rental contracts—when "*The only difference in any two cases is the tenure*"? The argument based on the de facto inalienability of responsible human action and decision-making is not available to conventional economists, political scientists, or legal theorists since the arguments are independent of the tenure of the contract—and the neo-abolitionist conclusions that naturally follow are clearly beyond the pale of orthodox thought.

Hence our principal antagonist, Frank Knight, had to find another reason for the abolition of slavery than any rights-based argument such as the de facto inalienability of personhood.

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

In the human rental system, workers are more effective and cheaper, and that, for Knight, is why slavery was abolished. Indeed, far from using inalienable rights arguments, Knight repeatedly criticized the notion of "inalienable rights" as being "logically not a part of the property system" and even as one of the "defects of our civilization."

> If laborers were not guaranteed the "inalienable right" of freedom, that is, if they could make enforceable time contracts for work and thus capitalize their labor power they would in an economic sense be more secure—in the sense in which the slave has security. (Knight 1956, p. 93, fn. 6)
>
> The peculiar weakness of the position of one who owns earning power only in the form of personal capacities is, somewhat paradoxically, a consequence of the guarantee of personal freedom, general in modern nations, but logically not a part of the property system; in fact, it is a limitation on the ownership of one's own person. Because of such "inalienable rights" a man cannot "capitalize" his earning power because a contract to deliver labour in the future will not be enforced. (Knight 1947, p. 26, fn. 3)
>
> It is one of the defects of our civilization that mechanism has not been involved to enable human ability to hypothecate its productive power in procuring resources to make it effective under its own direction and responsibility. (Knight 1965, p. 350, fn. 1)

The crown jewel of neoclassical Economics is the "fundamental theorem of welfare economics" which states that a competitive[7] equilibrium in a private property market economy (with the human rental contract) is allocatively efficient ("Pareto optimal" in technical terms). Far from ruling out long-term or lifetime contracts, this notion of competitive equilibrium requires full future markets in all commodities such as human labor. If futures contracts were truncated after, say, 15 years in the future, then there might currently exist willing buyers and sellers of a commodity for 16 years in the future, so any system with such truncated markets could not be efficient. The efficiency of allowing buyers and sellers of the commodity dated 16 years from now would be lost. Hence the fundamental theorem of current Economics requires *unrestricted* futures markets in all commodities such as human labor, i.e., it requires that a person be able to capitalize or hypothecate their future labor in a present contract—as desired by Knight to remove that current "defect" in our civilization.

[7] The notion of "competitive" in economic theory means essentially that no participant has any market power. The assumption is that there are always other market participants that will buy or sell the same commodity at the same price so no one can increase the selling price or decrease the offering price.

The apologetic function of Economics would be ill-served if any of the textbooks pointed out that the efficient allocation of resources (such as the commodity of human labor) requires the legalization of lifetime labor contracts (i.e., a civilized form of voluntary slavery contracts). Hence the textbooks are silent on James Mill's point that: "The only difference is, in the mode of purchasing." But one prominent economist had the courage (or recklessness) to point it out 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, pp. 337–378)

The absence of this simple admission in any Economics textbook is testimony to a level of thought control in the Economics profession that would be the envy of any communist or fascist dictatorship.

Moreover, this puts the normative content of conventional Economics into some perspective. Safe, sound, and serious economists will rush to attack or dismiss the neo-abolitionist argument to rule out the human rental contract when they do not even have a normative theory strong enough to rule out a civilized voluntary slavery (or lifetime servitude) contract. Will they have the moral courage to promote their efficiency-based "convictions" such as the revalidation of the contract "to sell or mortgage their persons" (like the young Nozick) and thus remove such "defects of our civilization" (Knight), or will they continue to "duck and dive" on the real issues raised by neo-abolitionism?

2.3 Modern Theory of Inalienable Rights

The Conventional "Moral Limits of Markets"

There are quite conventional legal limits on market contracts for commodities that are outlawed for various public policy reasons, such as the sale of hard drugs, blood diamonds, rare bird feathers, or even one's kidneys—all of which are genuinely alienable. Such contracts are analyzed well within the boundaries of conventional but progressive and morally sensitive thought inside the human rental system, e.g., Walzer (1983), Rose-Ackerman (1985), Radin (1987), Anderson (1990), Satz (2004, 2010), or Sandel (2012).

Our concern is with a basic type of contract that attempts to legally alienate certain de facto inalienable aspects of personhood—which renders the contracts inherently invalid and institutionally fraudulent since the person remains a full-fledged person within the scope of the contract. Moreover, some of these contracts would not be considered *market* contracts such as the coverture marriage contract or the *pactum subjectionis*—so the focus on the "moral limits of markets" is too limiting.

"Inalienable" Means Inalienable Even with Consent

Many conventional classical liberals, particularly those of libertarian bent, emphasize the natural right to self-ownership, e.g., Knight's "ownership of one's own person" (1947, p. 26, fn. 3). This bizarre treatment of one's self as a piece of property is usually a prelude to then considering the alienation of those "property rights."[8] This is often accompanied by a definition of "inalienable" as meaning not alienable without consent.

> If rights were viewed as property, then inalienability might mean only that a man must consent to what is done with them. (Lynd 1969, p. 45)

Thus professing "inalienable natural rights" could actually be laying the groundwork for slavery and autocracy.

> And as Rousseau shrewdly observed, Pufendorf had argued that a man might alienate his liberty just as he transferred his property by contract; and Grotius had said that since individuals could alienate their liberty by becoming slaves, a whole people could do the same, and become the subjects of a king. Here, then, was the fatal flaw in the traditional theories of natural rights. (Davis 1966, p. 413)

In our own time, Robert Nozick's opening proclamation

> Individuals have rights, and there are things no person or group may do to them (without violating their rights) (Nozick 1974, p. ix)

is often taken as a declaration of inalienable rights. But the significance is just the opposite as Nozick goes on to condone both voluntary slavery (331) and voluntarily alienating the right of self-determination to a non-democratic "dominant protective association" (e.g., p. 15). Clearly, Nozick had no notion of rights that are inalienable "even with consent" in Spinoza's phrase. Nozick is reported to have had second thoughts in his later life *precisely* on the question of inalienability, but he never developed a *theory* of inalienability that would overturn his earlier position.[9]

A right which requires consent to be alienated is not an "inalienable right"; it is a right as opposed to a privilege. Any legal capacity which could be taken away without the consent of the bearer would hardly qualify as a "right" at all; it would only be a privilege granted and removable by others.

How Libertarians Typically Misunderstand "Inalienability"

The theory of inalienability is about what contracts the *legal system* ought to accept as valid or invalid. The underlying and rather noncontroversial classical liberal norm

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[8]See also (Pateman 2002) for an analysis of the "self-ownership" concept.

[9]According to David Boaz (2011), Tom Palmer recalls that David Schmidtz said at a Cato Institute forum in 2002 that:

"Nozick told him that his alleged "apostasy" was mainly about rejecting the idea that to have a right is necessarily to have the right to alienate it, a thesis that he had reconsidered, on the basis of which reconsideration he concluded that some rights had to be inalienable. That represents, not a movement away from libertarianism, but a shift toward the mainstream of libertarian thought."

In his own book on libertarian theory, Palmer traces the "mainstream of libertarian thought" (2009, p. 457) about inalienable rights back to Locke's (faux) treatment.

is that the legal system should not accept as being legally valid and enforceable any contract that is essentially a legalized fraud, e.g., that pretends to alienate some aspect of personhood that cannot, in fact, be voluntarily alienated.

Inalienability theory does not place any limits on the *individual actions* such as "capitalist acts between consenting adults" (Nozick's phrase) or wanting to act slavishly towards others or have others act slavishly towards them. A libertarian can take a piece of paper and write out a "contract" to be his neighbor's "dog" so long as he is taken for a morning walk and gets a nice piece of meat for dinner. No law enforcement officer will show up to coerce the libertarian to stop sleeping in the dog-house, to take off the dog collar, and to stop drinking out of the toilet. The libertarian's "yelps for liberty" is not in that sense constrained by the theory of inalienable rights. But they should not expect the legal system to validate and enforce any such "contracts" to be a slave, a dog, or the like. For instance, if the neighbor decided to deliberately "put down his dog," the legal system would rightly find him factually and then legally responsible for murder, not just animal abuse.

Robert Nozick was not the only libertarian who thought that the legal system should legalize and enforce any contract to alienate personhood. More recently, three oddly self-labeled "left" libertarians have logically developed the idea that one's self is owned like a piece of (alienable) property and have carried the idea to its logical conclusion of condoning a voluntary slavery contract.

> But left-libertarians affirm, in contrast with most other liberal egalitarians, the extensive alienability of rights of self-ownership, encompassing, for example, the right to sell oneself into onerous servitude or even permanent slavery. (Vallentyne et al. 2005, p. 212)

They continue to emphasize the point in a footnote.

> Of course, many will view the right to sell oneself into slavery as highly implausible. We believe, however, that the affirmation of this right of transfer is more in keeping with our status as autonomous, rational choosers than its denial. To *whom* would a duty not to sell oneself into slavery be owed? (Ibid., p. 212, fn. 21)[10]

The answer to their rhetorical question is that there is no duty to not act like a slave or not like a dog if anyone should so desire. The theory of inalienability is about what contracts the legal system should or should not validate, not about slavish, dog-like, or "capitalist acts between consenting adults." They, of course, never consider the fact that voluntarily becoming a de facto non-person or thing to fulfill such a contract is not factually possible for "autonomous, rational choosers."

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[10]They go on to give their references where they individually argue for voluntary slavery contracts: Vallentyne 2000; Steiner 1994, pp. 232–33; and Otsuka 2003, pp. 126–27. The three authors should be congratulated on following out the logical consequences of their *theory* (about ownership of the self as a piece of property) instead of the more conventional libertarian or classical liberal posture of ignoring the question or just adopting a conventional opinion without any supporting theory. The notion of "theory" is often used so loosely in the literature on political science, jurisprudence, and philosophy that any personal opinion of a writer (e.g., Rawls) is usually construed as following from whatever "theory" they might espouse.

A slightly different way to make the same point is that the inalienability critique of human rentals is about the *institution*, not about individual acts. Upon first hearing the neo-abolitionist critique, one common response is to defend some individual act, not the institution (i.e., the employment contract)—such as: "After Uncle Ralph died, Aunt Louise *hired* the neighbor's boy to mow the lawn with Ralph's lawnmower. Are you saying she is a bad person?" No, the theory of inalienability does not say that Aunt Louise is a bad person; it says that any legal institution validating and enforcing a contract to legally alienate aspects of personhood that are de facto inalienable is a bad institution.[11]

The Case of the Criminous Slave

The theory of inalienability presented here will be illustrated with several intuitive and paradigmatic examples of inalienability. When analyzing the employment system, analogies with slavery can provide such powerful "intuition pumps." The reason is that we have not been socialized into accepting slavery (unlike human rentals) as part of the furniture of the social universe, so we should be able to see it dispassionately and objectively.

A legal system of chattel slavery is but one example of a legal system of a system that legally treated persons as non-persons or things. The ethical condemnation of the system should be based not on utilitarian considerations about how poorly the slaves were treated (which could always be improved, reformed, and better regulated within the system) but on that fundamental contradiction or mismatch between the slave's legal role as a thing and the underlying fact of the slave's personhood.

Did the antebellum legal system really believe that slaves were in fact not persons, or was it an official pretense or fiction? The pretense of the slave's thinghood was the basis for the economic system of slavery. But that pretense served no purpose when slaves stepped outside the appointed role and committed crimes.

> The slave, who is but 'a chattel' on all other occasions, with not one solitary attribute of personality accorded to him, becomes 'a person' whenever he is to be punished! (Goodell 1969, p. 309 [his underscore emphasis])

Thus, the fraudulent nature of the legal system was openly realized when the slaves committed criminal wrongs. This is illustrated in Fig. 2.1 using the metaphor that "one cannot fit a square peg in a round hole."

The "talking instrument" (Aristotle's phrase) in work becomes the person in crime.

There are two contradictions here which should not be confused:

1. the formal legal-legal inconsistency within a legal system that treats the same individual legally as a thing in normal work and legally as a person when

[11] Another standard libertarian "defense" of the human rental contract does not even connect to the issue. "What could possibly be wrong with a contract that says 'You do this, I do that, and here is how we split the proceeds?" Nothing is wrong since that is such a general description of a partnership contract that it has none of the peculiarities of the human rental contract which is not a partnership contract (except in a metaphorical sense).

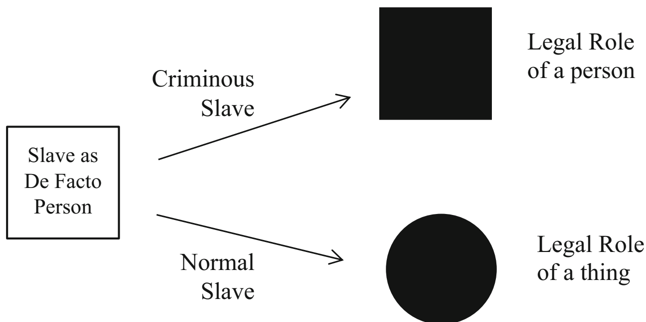

Fig. 2.1 Two legal roles of the slave

Table 2.1 Type I and II error table from statistics

Table of Type I and Type II Errors		Hypothesis	
		Factually True	Factually False
Decision About Hypothesis	Accept (not rejected)	True positive	False positive (Type II error)
	Reject	False negative (Type I error)	True negative

committing a crime (in the diagram, the formal inconsistency is trying to fit the same peg in *both* a round hole or a square hole depending on the normal or criminous case) and

2. the substantive legal-factual contradiction in a legal system that accepts a de facto person as fulfilling the de jure role of a thing (in the diagram, the substantive contradiction of trying to fit the square peg in the round hole in the normal case).

The merely formal inconsistency (1) could be resolved by always legally treating a slave as a thing, e.g., by treating a criminous slave like an errant beast of burden that caused an injury.

The substantive problem is that the self-same slave is legally treated quite differently depending on whether their actions are criminous or not. The contrast between the two legal roles (of criminous and non-criminous slaves) is highlighted to point out the system's self-incriminating testimony about the factual-status/legal-role mismatch for the non-criminous slave. In a court of law, testimony against one's own interests will tend to have the most credibility. In the case of the criminous slave, the legal system of slavery revealed the bankruptcy of its own juridical foundations; it acknowledged that the slave was, in fact, a responsible person in spite of the slave's usual legal role as a thing.

Here as elsewhere in the analysis of inalienability, this contrast between a person's factual and legal status can be well-illustrated in tabular form by adapting the Type I and II error table such as Table 2.1 from statistics.

Table 2.2 Type I & II mismatches of factual and legal status as a person

Table of legal injustice due to mismatch in factual/legal status		Factual Status	
		Factually a person	Factually a Non-person
Legal Status	Legally a person	True positive	Type II injustice: De facto non-person treated legally as a person
	Legally a non-person	Type I injustice: De facto person made legally a non-person	True negative

These tables will compare a factual situation, like the truth or falsity of a hypothesis, with some human-determined decision such as acceptance or rejection of the hypothesis. The aim is to get the human determination to agree with the factual situation. In the statistical example, there are two ways the determination can go wrong: Type I error when the human judgment is negative (i.e., the hypothesis is rejected) but the hypothesis is factually true (so it is a false negative) and Type II error where the hypothesis is accepted (or not rejected) when it is factually false (so it is a false positive).

The Type I and II error tables in statistics are based on the correspondence theory of truth; truth and falsity depend on the correspondence between the hypothesis and reality. The theory of justice used here could similarly be called the *correspondence theory of justice* since it is based on the correspondence of a legal judgment and certain facts about human intentionality and personhood, e.g., the juridical imputation principle: assign legal responsibility according to factual responsibility. In our adaptation of Type I and II error tables, the factual truth or falsity of the hypothesis is replaced in Table 2.2 by the factual status of a person (e.g., having factual capacity or not), and the human determined judgment about the hypothesis is replaced by the legal system's determination of the legal status of the person (e.g., having legal capacity or not).

This understanding of the legalized fraud in the (substantive) inconsistency of treating de facto person as a legal piece of property is still problematic today at least to some political philosophers. One "prereview" in a prominent journal of political philosophy (that warranted the editor's rejection of the paper) pointed out how the legalized fraud argument gets "off on the wrong foot."

> But it seems to get off on the wrong foot by implicitly and unwarrantedly assuming that there has to be more to the ownership of a slave than the ownership of a live human body. There's nothing obviously self-contradictory in the idea of my owning a kidney from another person's body, so it's difficult to find any such flaw in the idea of my owning the whole bundle of that person's body-parts. My owning that live human body in no way entails a denial that he/she is "factually a person".

It seems that no matter how often one repeats that it is the legal-factual inconsistency that is the basis for the legalized fraud argument and illustrates the point with the error tables (with factual status in the columns and legal status in the rows), some will always just think the charge is some legal-to-legal inconsistency within the law. As another anonymous referee/commentator put it:

> If some rights are alienable by contract, then a person can alienate those rights in a contract without the contract engaging in any of the 'fraudulent' inconsistencies that the author identifies. For this tradition of classical liberalism, rights are really authorities to decide—e.g. how to use one's time, body, and material resources—and these authorities can be traded by contract. So, a contract whereby I trade a car for money exchanges the authority to decide what happens to the car to the buyer. The same can be true for my time and body. And to the extent that it is, there is no contradiction in contracts that alienate authority to decide what happens to me to others. This is why Grotius has no problem in justifying voluntary slavery, for such a contract is just the complete alienation of all authority (for some defined temporal duration, which may be for life).

Thus, one can just ignore the factual difference between turning over a car to be used by another in a car rental contract, and de facto inalienability of one's decision-making and responsibility in the human rental contract. Yes, there is "no contradiction in contracts"; the contradiction and the fraud are *between* the legal nature of the contract and factual nature of personhood.

The Application to Coverture Marriage Contracts

The most recent example of a legally abolished voluntary contract is the coverture marriage contract that in effect extinguished the independent legal personality of the wife. The husband or "Lord and Baron" has a guardian relationship over the *feme covert*. Normally, to establish a legal guardian relationship of one adult over another adult as a dependent, there must be some *factual* condition on the part of the dependent such as some mental disability, insanity, or senility that needs to be legally certified. Yet the coverture marriage contract established the husband as the guardian over the *feme covert* who had no independent legal personality and thus could not make contracts or own property except in the name of the husband.

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. (Blackstone 1959 the section on "Husband and Wife")

Here as elsewhere in the analysis of inalienability, the point revolves around the contrast between a person's legal status and a person's factual status. In an adult woman factually of normal capacity, that capacity is factually inalienable in the sense that the woman cannot by voluntary action actually alienate that capacity and factually become a person of diminished capacity, a dependent, factually suitable for a guardianship relation. Yet the coverture contract gave her precisely that *legal* status of being a dependent, i.e., the "legal existence of the woman is suspended during the marriage."

Table 2.3 Legal errors due to mismatch of factual and legal dependency

Table of legal errors due to mismatch in dependency status		Factual Dependency Status	
		Factually Independent	Factually Dependent
Legal Dependency Status	Legally Independent	True positive	Type II errors: Dependent person not legally dependent
	Legally Dependent	Type I error: Independent person made legally dependent	True negative

As summarized in Table 2.3 (these error tables were first used in Ellerman 2018), the point of the critique of the coverture marriage contract is the mismatch (or lack of correspondence) between the legal and the factual situation (not facts about the natural work but the facts about the responsibility, decision-making, intentionality, and personhood of persons).

Since the woman is just as much a de facto capacitated adult person as before voluntarily agreeing to the contract (the Type I error), the coverture contract was essentially an institutional fraud sponsored by the legal system in patriarchal society that allowed the reduction of married women to the status of legal dependents to parade in the form of a voluntary contract.[12]

In a fraud, the legal contract says A but the factual performance "fulfilling" the contract is not A but some B. The voluntary performance on the part of the *feme covert* is obedience (= B), not voluntarily turning oneself into a factually incapacitated adult (= A). But the legal contract then enforces of the consequences of A. That is an institutionalized fiction, i.e., a legalized fraud.[13]

This inalienability argument against the coverture contract should be distinguished from at least three other types of arguments.

[12]A reputable journal on legal theory rejected a paper containing this argument on the basis of an anonymous referee suggested resolution of the legal-factual mismatch problem as if it were a legal-legal problem of wording within the law. "My first concern is the claim that coverture and the like are 'legalized forms of fraud'—that a coverture contract represents some capable as if they were incapable. I don't see this. Why can't it just be that the law defines two different reasons to establish a guardianship relation (1) incapacity; (2) being a woman? If it can be, then it doesn't follow from the fact that coverture treats competent women the same way the law treats incompetents that the law is taking women to be incompetents."

[13]It should be obvious that when discussing an *institutionalized* fraud, we are not imputing "fraudulent intent" as in individual frauds nor is there any imputation of "fraudulent intent" on the part of the lawmakers who establish these legal institutions. When John Bates Clark broached the possibility that a human rental firm could be an "institutional robbery" (Clark 1899, p. 9), he was not talking about individual cases of wage theft.

- It is obvious that the inalienability critique of the coverture contract has nothing whatever to do with pragmatic or consequentialist considerations such as the size of the allowance given by the husband to the wife, abusive relationships, or the like.
- Also, we are *not* playing the usual left-wing forward-looking parlor game of escalating one's notion of "voluntariness" until the contract we want (by our pre-analytical judgments) to rule out is seen as being "involuntary." The inalienable rights critique applies even if the feme covert's obedience was perfectly voluntary.
- Moreover, we are not playing the conventional classical liberal backward-looking parlor game of retroactively redefining "coercion" so that any outlawed contract is seen as having been coercive. Then classical liberals can argue "All coverture marriages were 'really' coercive, and that is why the institution was abolished" without delving into the uncharted waters of inalienability that might have unintended consequences.

The Theory of Inalienability

Here is the core of the theory of inalienability. A person of normal capacity cannot in fact by consent transform themselves into a thing or a person of diminished capacity, so any contract to that legal effect is merely a legalized fraud or Type I mismatch, and is thus juridically invalid. A right is *inalienable* (even with consent) if the contract to alienate the right is inherently invalid.

In an ordinary fraudulent contract, the contract is for the seller to deliver A and the buyer pays for A, but B is in fact delivered. Consider a contract for a person to be rented out as a part-time robot for a specified time. This is a contract for selling the robot-services to the robot's controller (the employer) for that time, and that is what the controller pays for. But, in fact, a person cannot turn themselves into a part-time robot so the contract is impossible to fulfill and should thus be legally recognized as invalid.

Suppose, however, that the legal authorities instead say it is a "valid" contract if the person just *obeys* the commands of the controller. That would still be a legalized fraud. But it is a fraud with a payoff for the employer buying the as-if robot services. What is, in fact, a joint human activity carried out by responsible persons (working employer and employees) is then legally treated as the sole activity of the "employer" who is "employing" the services of the as-if part-time robots. As we will see in further detail in Part II on property rights, the employer bears 100% of the legal expenses and gets 100% of the legal revenues from the joint human activity, and the employees qua employees legally have 0% of the positive and negative results of their joint human activity[14]; they are legally treated simply as one of the

[14]The employer is typically a corporation whose legal members are the shareholders. The shareholders do not individually own the corporation's assets such as tables and chairs or the newly produced "widgets." The statement that employees own 0% of the widgets they produce does not refer to their individual rights. It means that the employees qua employees are not part of the corporate body that owns the newly produced widgets.

expenses, the labor expense, incurred by the employer. That 0% of the joint results going to the employees is the precise meaning of saying that the normal employees have the legal role of part-time robots, i.e., the legal role of a rented thing within the scope of the employment contract. It has nothing whatever to do with psychological feelings of "being treated as a thing" or "being alienated or dominated" although such feeling may naturally follow from being a rented person.

In general, any contract to take on the full-time or part-time legal role of a thing or non-person is inherently invalid because a person cannot in fact voluntarily give up and alienate their factual status as a person. I can, in fact, give up and transfer my use of this pen (or computer) to another person, but I cannot do the same with my own human actions—not for a lifetime and not for 8 h a day.

To return to our square-peg/round-hole analogy, the square peg can consent to fit into the round hole and the legal system can accept the contract, but neither the consent nor the legal validation factually enables the square peg to become round. It remains square, and the legalities remain fraudulent.

Yet a legal system can "validate" a contract treating human activity as an alienable commodity, and the system can also pretend that *obedient* co-operating workers "fulfill" the contract—until the revealing moment of unlawful activity. That is, the legal system can pretend that the square peg fits into the round hole (until it commits a crime). This argument is called the de facto *inalienability argument* since it is based on the *factual* inalienability of essential human characteristics of personhood such as decision-making and responsibility for the results of one's deliberate actions.

The argument is not that certain rights should be considered "inalienable" because they are "really important" or necessary for the human condition or the like. It is furthermore obvious that this de facto inalienability critique of the employment contract has nothing whatever to do with pragmatic or consequentialist considerations such as the size of the wage, the working conditions, employees being alienated from their work, employers dominating employees, the freedom of pee breaks (Linder and Nygaard 1998), or the other staples of standard left-wing criticism.

The employees cannot by any voluntary act turn themselves into de facto non-responsible instruments (like capital goods or land), just as the married woman cannot voluntarily alienate her adult capacity to become a de facto dependent—as is illustrated in Table 2.3.

The Type I and II error table can be used to illustrate in Table 2.4 the basic idea where the focus is on factual and legal responsibility for some results X. For instance, when X is a crime, then it is commonly recognized as an injustice when there is a mismatch or lack of correspondence. For instance, when a factually guilty person is judged legally not guilty, that is a miscarriage of justice—analogous to a Type I error (false negative) of rejecting a true hypothesis. Or when a factually innocent person is found to be legally guilty, that is also a miscarriage of justice—like the Type II error (false positive) of accepting a false hypothesis.

In the case at hand of the human rental firm, both errors occur—although we will generally focus on the victims of the factual-legal mismatch rather than on the beneficiaries. The factually responsible party or association, the people working within a firm, has 0% of the legal responsibility for X, the total results, positive and

Table 2.4 Lack of correspondence between factual and legal responsibility

	Table of injustices due to mismatch of factual and legal responsibility	Factual Responsibility	
		Factually responsible for X	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

negative, of the productive activity (Type I injustice). The party or association that does get 100% of the legal responsibility, such as the corporate shareholders in the employing corporation, does not, qua shareholders, have the factual responsibility (Type II injustice).[15] This is not some new revelation. As stated over a century ago by a sociologist unindoctrinated in the dogmas of Economics:

> [The employer and employee] 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 1916, p. 66).

At some level of consciousness, Economists know this to be true, but actually saying so too loudly would disrupt the distributive shares picture of the employer and employees (or master and slaves for that matter) being as-if partners in an enterprise, each getting a certain share of the product.

2.4 How to (Mis)Understand Inalienability Theory

De Facto Responsibility Versus Role Responsibilities

The notion of de facto responsibility and the juridical principle of imputation play an important role in the neo-abolitionist case. But "responsibility" is a notoriously slippery notion with many possible meanings. The legal philosopher, H. L. A. Hart (1907–1992), illustrates the point with what he calls "stylistically horrible" prose.

> As captain of the ship, X was responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible for the loss of the ship with all

[15]Philosophers will seemingly forever debate the nuances of responsibility and related notions of agency and desert (e.g., Feinberg 1970; Olsaretti 2003; Fischer 2006; Fleurbaey 2008), but the contrast between 0% and 100% leaves little room for nuance if philosophers could only be persuaded to consider the actual legal structure of the human rental firm rather than the metaphorical distributive shares "partnership model."

> aboard. It was rumoured that he was insane, but the doctors considered that he was responsible for his actions. Throughout the voyage he behaved quite irresponsibly, and various incidents in his career showed that he was not a responsible person. He always maintained that the exceptional winter storms were responsible for the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible for his negligent conduct, and in separate civil proceedings he was held legally responsible for the loss of life and property. He is still alive and he is morally responsible for the deaths of many women and children. (Hart 1968, p. 211)

In particular, Hart discusses "role-responsibility" (Ibid., p. 212) which we must differentiate from the notion of de facto responsibility. The question of de facto responsibility is backward-looking or retrospective. The question is "Who did it?"– not what are one's responsibilities in an institutional or organizational role.

In an institution or organization, a person has a role, a job, or some set of specified tasks the individual is supposed to perform. That is the person's role-responsibilities. The individual would be deserving of certain merits or demerits depending on whether the person fulfilled or fell short of fulfilling their "responsibilities."

These institutionally defined role responsibilities should not be confused with the notion of de facto responsibility as used in the juridical principle of imputation and which would ordinarily not occur in the plural. A group of people acting jointly is de facto responsible for the differences they deliberately make—in comparison with what would have occurred had they not acted. For the assignment of de facto responsibility for what they did, it does not matter if the joint action was part of the group's "responsibilities" or assigned tasks in some institutional or organizational setting.

The Case of the Tortious Servant

When an employee or servant commits a tort out of negligence, the employer or master can be held liable. The controversy in the field of agency law surrounding this "vicarious liability" of the employer affords us another illuminating example of the peculiarities of the employer–employee relationship.

Justice Oliver Wendell Holmes Jr. outlined the usual norm of imputing or assigning legal responsibility to the de facto responsible party—a norm which emerges as the labor theory of property when applied to property appropriation.

> I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility,—unless, that is to say, he has induced the immediate wrong-doer to do acts of which the wrong, or, at least, wrong, was the natural consequence under the circumstances known to the defendant. (1921, p. 101)

But in the doctrine of *respondeat superior*, the master may be held liable for the negligence of a servant even if the wrongful act was not commanded by the master and the master exercised due to caution in hiring and instructing the servant. The servant's act is manifestly not the master's act, so the master is not de facto responsible for the act. The assignment of legal responsibility to the master does not follow the usual canon of legal responsibility so it is called "vicarious liability" or "strict liability." The controversy over vicarious liability is not as live today as in the past due to workers' compensation insurance. But there are several points of

interest both in what is said and in what is not said by the jurists commenting on vicarious liability.

We begin by reviewing the legal responsibility of the employer and the employee in normal lawful work. Employees bear no legal responsibility for the positive and negative results of their actions within the scope of their employment. The employer bears all the legal responsibility, i.e., the employer legally *owes* for the negative results (the expenses) and legally *owns* the positive results (the revenues). Employees are employed or rented as if they were instruments which serve as "perfect conductors" transmitting the responsibility back to the employer. When the employer is a corporation, the natural persons who legally fill the employer's role are the members or owners of the company, the shareholders.[16] Absentee shareholders, particularly in a corporation with publicly traded shares, have only a notional connection with the productive process in the corporation. Yet the shareholders are the final residual claimants in the corporation; they have the ultimate legal responsibility for the positive and negative results of the lawful actions of the hired hands and heads of the people (managers and workers) working in the firm.[17]

What happens when an employee commits a negligent tort? As one would expect from the case of the criminous slave, the tortious servant emerges from the cocoon of non-responsibility metamorphosed into a responsible human agent.

> That is to say, although it is contrary to theory to allow a servant to be sued for conduct in his capacity as such, he cannot rid himself of his responsibility as a freeman, and may be sued as a free wrong-doer. This, of course, is the law today. (Holmes 1921, p. 79)

When the employee has morphed into a "free wrong-doer," then they may be sued for a tort or civil wrong. "Being an employee" is not a defense or shield against legal responsibility for wrongful actions.

[16]Within Economics or the Law, ideology requires the straight-faced pretense that the "members" of a corporation are the shareholders and that the employees are the external suppliers of an input, labor services. But in a less ideologically charged context, the truth may slip out. For instance, in the banal context of a managerial accounting textbook one can read: "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). Buildings can be owned, but the human rental system embodies the obscene notion that organizations of people also have "owners" and that these organizations can be bought and sold. Pundits found it ridiculous when President Trump suggested buying Greenland. They asked rhetorically, "How can a country or even a city in a country be bought and sold?" But they consider buying and selling the human organizations called "companies" as perfectly normal. Then they say, like Trump said of Greenland, "It is just a purchase and sale of real estate and other property." And in either case, the people currently using that property are free to stay or go as they please.

[17]While the legal system says the shareholders are the legal members of the company, the truth about who is responsible for the business results sometimes slips out in the management literature. "Nevertheless, people are the only element with the inherent power to generate value. All other variables—cash and its cousin credit, materials, plant and equipment, and energy—offer nothing but inert potentials. By their nature, they add nothing, and they cannot add anything until some human being, be it the lowest-level laborer, the most ingenious professional, or the loftiest executive, leverages that potential by putting it into play." (Fitz-enz 2009, p. xix).

The law also allows the victim to sue the employer or master although the plaintiff cannot collect damages twice. If the employer is found legally liable, then it is only a liability in a "strict" legal sense since the master was presumed not to be de facto responsible. Justice Holmes attacked strict liability—"I therefore assume that common sense is opposed to the fundamental theory of agency" (1921, p. 102)—because it violated the usual juridical principle of assigning legal liability in accordance with de facto liability, a liability established strongly by intentional action or weakly by negligent behavior. Others supported vicarious liability because the employer has a "deeper pocket" and because liability for employee negligence should be part of the costs of modern business enterprise (e.g., "The Basis of Vicarious Liability" in Laski 1921).

There has been such a focus on the employer's liability that one is apt to forget the employee's liability.

> We have noticed that students sometimes slip into the fallacious assumption that because the employer is liable, the employee is not. This idea is wholly false. The law of agency, which makes employers liable, does not repeal the law of torts, which makes negligent individuals liable. (Conrad, et al. 1972, p. 168)

The employee, after all, is the de facto responsible person—which is why the employer's legal liability is called "strict" or "vicarious."

Perhaps the most astonishing aspect of the vicarious liability debate is the complete failure to apply the "ordinary canons of legal responsibility" to the normal employment relation. Jurists are perturbed when legal liability is assigned to the employers who have no de facto responsibility. But there is not a word about the fact that the employees are jointly de facto responsible, together with a working employer, for the results of normal lawful work, and yet the employees have zero legal responsibility for the normal positive or negative results of those actions. The employer has all the legal responsibility for the positive and negative results of the employees' actions within the scope of lawful employment. No one in the debate notices that the employment relation seems to "repeal" the "ordinary canons of legal responsibility."

No deep analysis of the sociology of knowledge is required to fathom this blind spot in legal analysis. The basic institutions in a society define the horizons of thought. The application of the ordinary canon of legal responsibility would reveal an inherent flaw in the employment relation—a result clearly beyond the pale of safe, sane, and serious jurisprudential analysis in an economic civilization based on that relationship.

The Case of the Criminous Employee

The unique property of labor, namely responsible agency, is not factually transferable. The case of the criminous employee is another intuition pump which illustrates that key idea in the theory of inalienability. Suppose that an entrepreneur hired an employee for general services (no intimations of criminal intent). The entrepreneur similarly hired a van, and the owner of the van was not otherwise involved in the entrepreneur's activities. Eventually, the entrepreneur decided to use the factor services he had purchased (man-hours and van-hours) to rob a bank. After being

caught, the entrepreneur and the employee were charged with the crime. In court, the worker argued that he was just as innocent as the van owner. Both had sold the services of factors they owned to the entrepreneur. "Labor Service is a Commodity" (Alchian and Allen 1969, p. 469), as one can learn from Economics texts. The use the entrepreneur makes of these commodities is "his own business."

The judge would, no doubt, be unmoved by these arguments. The judge would point out it was plausible that the van owner was not responsible. He had given up and transferred the use of his van to the entrepreneur, so unless the van owner was otherwise personally involved, his absentee ownership of the factor would not give him any responsibility for the results of the enterprise. Absentee ownership of a factor is not a source of responsibility.

The judge would point out, however, that the worker could not help but be personally involved in the robbery (unless he, per impossible, was totally unaware of what he was doing, or rather as an economist might say, of what was being done with his man-hours). Man-hours are a peculiar commodity in comparison with van-hours. As Alfred Marshall so quaintly put this "Second peculiarity. The seller of labour must deliver it himself." (1890, p. 566)[18] This means an employee cannot "give up and transfer" the use of his own person, as the van owner can the van. In factual terms, the worker remains a fully responsible agent knowingly co-operating with the entrepreneur—regardless of the legal contract. The employee and the employer share the de facto responsibility for the results of their joint activity, and the law will impute legal responsibility accordingly. But when a crime is committed, the employee in work is legally promoted to a partner.

> 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)

But it cannot be argued that employees suddenly become robots or some sort of non-responsible instruments to be "employed" by the employer when the venture "they jointly carried out" was non-criminous. The employees (and working employer) in an enterprise are still jointly factually 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 fruits of their joint labor.

While factual responsibility is the same for criminous or non-criminous actions, the law treats the two cases asymmetrically, e.g., holds a trial only in the criminous case. The overall goal of the legal system is not just to punish criminal behavior but to prevent it where possible. Hence the legal system expands its notion of legal

[18]In his *Principles of Economics* (1890), Alfred Marshall noted some peculiarities of labor: (1) workers may not be bought and sold; only rented or hired, (2) the seller must deliver the service himself, (3) labor is perishable, (4) labor owners are often at a bargaining disadvantage, and (5) specialized labor requires long preparation time. Yet none of these "peculiarities" explains why the burglar and not the burglary tools are charged in court—in spite of Wieser's clear explanation decades earlier (see below). Marshall could not find the R-word.

culpability to include accessories before the fact, e.g., to include the van owner if he had known it would be used in a criminal act. No such extension of any degree of strict legal responsibility is extended to ordinary market transactions where no illegalities are involved.

In the hired criminal example, it should be particularly noted that the worker is not de facto responsible for the crime *because* an employment contract which involves a crime is null and void. Quite the opposite. The employee is de facto responsible because the employee, together with the employer, committed the crime (not because of the legal status of the contract). It was his de facto responsibility for the crime which invalidated the contract, not the contractual invalidity which made him de facto responsible. The commission of a crime using a rented van does not automatically invalidate the van rental contract if the van owner was not personally involved. The legality or illegality of a contract cannot somehow create de facto responsibility that would not otherwise exist.

Defenders of the Received Truth about the human rental system will have much difficulty understanding this argument. They might take the legal superstructure *as the reality*, and thus they would lose sight of the underlying factual situation. If it is legal, then they think it *must* be factual. It is as if one identifies factual guilt or innocence with what is decided in a court of law (i.e., with legal guilt or innocence). Such a "legalistic" viewpoint ignores the factual question of whether the defendant was de facto responsible for the accused act. It is a miscarriage of justice when there is a mismatch between legal and factual responsibility, i.e., when an innocent person is found legally guilty or when a guilty person is found legally innocent.

A similar neglect of the underlying factual reality is involved in the standard argument that "responsibility" is determined by the employment contract (when only legal responsibility is so determined). For instance, a counter-argument might go as follows.

> Employees voluntarily give up their responsibility for the products of their labor in the employment contract. There is no inconsistency involved in holding the "criminous employee" responsible because he is not really an employee. A contract involving the commission of a crime is null and void, so he stepped outside of the employment contract when he committed the crime.

That argument stays at the legal level of responsibility and does not touch the question of the underlying factual responsibility which one cannot just "give up." The point is that de facto responsibility is not transferable; the non-criminous employee in a normal firm is just as de facto responsible as the criminal.

Consent does not improve the fit of the square peg in the round hole as illustrated in Fig. 2.2. The point is that the square peg does not fit into the round hole *regardless* of whether it is legally agreed to be a round peg or not.

It is again helpful not to confuse

1. the formal inconsistency in a legal system that treated the same individual legally as a thing (e.g., in normal work) and legally as a person when committing a crime and

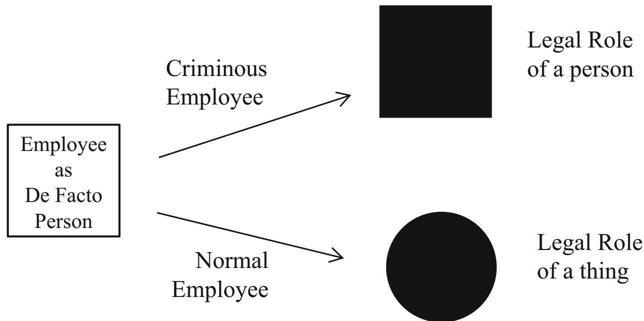

Fig. 2.2 Two legal roles of the employee

2. the substantive contradiction in a legal system that accepts a de facto person as fulfilling the de jure role of a thing (e.g., the employee in normal work).

By rendering the criminous employment contract null and void, the law escapes the formal inconsistency of having an individual simultaneously in the legal role of a responsible person and in the legal role of an employed instrument. That keeps the bookkeeping straight at the legalistic level.

When a person, say, dies not by natural causes but as a result of human action, then it is part of the job of the legal system to find the de facto responsible party and to impute the legal responsibility to them. An example is the imputation of legal responsibility to the criminous employee. That is a correct assignment since the worker was de facto responsible together with the working employer for the results of their joint activity.

Libertarians sometimes ask: "What does it mean to say the legal system treats the employment contract as valid or invalid?" When the employment contract is considered legally valid, then the legal system does *not* seek out the de facto responsible parties in a non-criminous enterprise. When the "venture" being "jointly carried out" is non-criminal, the employee does not suddenly become an instrument like the van. The worker is still jointly de facto responsible together with the others working in the enterprise, but then the employer gets all the legal responsibility for the positive and negative results of the enterprise.

The problem is the substantive contradiction in the normal employment relation wherein a de facto responsible person has the legal role of a "non-responsible" instrumentality being "employed" by the employer. As in the case of a contractual slave or a contractual *feme covert*, the Law that considers those contracts as valid commits a "sin of omission" by not looking beyond or behind those contracts to recognize the de facto responsible agency of those persons. But when those contracts or today's human rental contract involve a crime, then the Law looks beyond or behind those contracts and then the Law correctly tries to do its job of recognizing the de facto responsible persons.

Libertarians who place great stock in the voluntariness of the labor contract should heed rather than just avoid these examples of inalienability. The criminous

employee would most certainly voluntarily "give up" and alienate his responsibility for the fruits of his labor, i.e., his responsibility for robbing the bank or committing a murder. He would love, for once, to be legally treated as just an instrument employed by the employer. But the Law says "No." The Law would not validate such a contract, and yet, with no hint of personal involvement, there is no reason to invalidate the van owner's contract. Why the difference? Does the Law arbitrarily decide to validate some contracts and to invalidate others? No, the difference is quite clear. The van owner can, in fact, give up the use of his van and not be otherwise involved; the worker cannot do the same with his person. It is that factual inalienability that is the basis of the de facto theory of inalienable rights.

Employees Versus Independent Contractors

Normative principles such as the ordinary canon of legal imputation and the principle of democratic self-determination converge to attack the institution of renting human beings, viz. the employer–employee relationship. The alternative to employment is workplace democracy, the system where people of always jointly working for themselves, paying their own costs, self-governing their own work, and owning whatever they produce.

The smallest examples of democratic businesses are independent business-people operating without the benefit of hired labor. If those independent operators (ICs) produce and/or sell a tangible appropriable product, there is no possibility of considering them as employees of their customers. When one buys a pumpkin from a farmer, there is no possibility of taking the farmer as one's employee.

When the product, however, is not a separate, tangible, and appropriable commodity but only a certain effect, then the possibility does arise of confusing the independent contractor with the employee. The two legal roles are fundamentally different in theory even though some gray-area cases can arise in practice. It is a favorite tactic of the defenders of the human rental system to try to define gray-area cases and consider the whole analysis as "refuted" unless some bright-line criterion can be supplied to settle all possible future court cases. Hence, it will be useful to review the distinction, which is particularly important in agency law since the customer (the party contracting with the IC) is not vicariously liable for the negligent torts of an independent contractor.

The legal role of the independent contractor does *not* violate democratic principles or the labor theory of property. The independent contractor self-governs their work. Indeed, the "control test" is one of the most important legal tests used to distinguish employees from independent contractors. Economics Nobel Laureate Ronald Coase quotes from a legal reference book in his classic article on the nature of the (employment) firm.

> The master must have the right to control the servant's work, either personally or by another servant or agent. It is this right of control or interference, of being entitled to tell the servant when to work (within the hours of service) and when not to work, and what work to do and how to do it (within the terms of such service) which is the dominant characteristic in this relation and marks off the servant from an independent contractor, or from one employed merely to give to his employer the fruits of his labour. In the latter case, the contractor or performer is not under the employer's control in doing the work or effecting the service; he

has to shape and manage his work so as to give the result he has contracted to effect. (Batt 1967, p. 8; an earlier edition quoted in Coase 1937, p. 403)

The master or, in newspeak, the employer has the legal right of management over the servant or employee, but the customer of an independent contractor has no such right of discretionary managerial control. The individual independent contractor is self-managing in the delivery of the effect or service so that legal role does not violate the principle of democratic self-determination.

The independent contractor does not alienate or transfer the discretionary managerial control over their actions. An independent contractor is not rented by the customer; only a certain service or effect is sold. This is particularly confusing because the word "hired" is sometimes applied to independent contractors as well as to employees. When someone "hires" a lawyer in independent practice, that lawyer is an independent contractor. If a corporation hires a lawyer onto its legal staff, that lawyer is an employee of the corporation.

The other test is simply the notion of independence. The independence role of independent contractors means that they legally appropriate the positive and negative fruits of their labor. They appropriate and sell the positive fruits, typically an intangible service or effect (e.g., repairing a faucet or painting a house). They also directly bear their costs (appropriate the negative fruits of their labor) even though the costs are passed on to the customers as part of the price of the product. For instance, an independent house painter might present the homeowner with a bill itemizing so many hours of labor and so many gallons of paint. But the homeowner has not purchased the painter's labor as an employer; the painter has simply itemized the labor and paint to "justify" the price of the entire paint job.

Some past victories of the Labor Movement take the form of rights attached to the employee's legal role. Hence there will always be the attempt of human rental firms to get as many workers as possible reclassified as independent contractors. Thus, taxi companies like Uber or Lyft pretend that they are just selling a calling service to independent drivers who use their own capital goods (cars). But in addition to the detailed requirements on the drivers and cars, one only has to "follow the money" (i.e., customers pay the taxi company, not the drivers) to see the true nature of the relationship. In the early factory system, some employees working as mechanics would bring their own tools to the job, so their "wage" could be construed as paying for both the services of the employees and their tools. In a similar manner, the payments made from the Uber-like taxi companies to the drivers should be realistically seen as an employee wage combined with a payment for the services of the cars.

The Identity Fiction

The case of the tortious servant also gives us the occasion to examine some of the legal fictions surrounding the employer–employee relationship. We saw in the case of slavery how jurists could be quite explicit in describing the slave as having the legal role of a thing (for lawful activities). Such candor is the exception. There are subtler ways to legally treat a person as a non-person.

One legal strategy to deny an individual's legal personality is to "identify" the individual with another person. The baron–feme 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; always a "feme covert" instead of the anomalous "feme sole." The identity fiction for the baron–feme 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 coverture wife could own property and make contracts, but only in the name of her husband.

For the employment relation, the identity fiction states that "the master and servant are considered as one person." The identity fiction expresses an older mode of legal thought about the employment relation; it is not needed to understand or explain the employment relation in modern terms. But it does catch the sense of the employee's instrumentality. Within the scope of lawful employment, an employee does not have the legal role of a responsible person. The employer has all the legal responsibility for the results of the acts of the employees so "the acts of the servants are the acts of the master."

A variation on the identity fiction is given by the phrase: *Qui facit per alium facit* per se (that which is done through another is done oneself). This also captures the instrumental role of the employee. The employer "acts through" the employees.

For the sake of legal clarity, it is unfortunate that the identity fiction is also applied to situations where no fiction is needed. The master–servant relation is usually defined to be a subset of the principal-agent relation (hence the name "agency law") so that a blue-collar production worker is technically an "agent." But an independent contractor, such as a lawyer in private practice, can also be an agent. When a lawyer acts as a properly authorized agent to negotiate a contract, the principal is also said to "act through" the agent.

A principal, however, "acts through" an independent lawyer in quite a different sense than an employer acts through, say, a production worker. The lawyer conveys information and can perform symbolic legal acts (e.g., signing a contract) for the principal. The direct physical act of an independent contractor would, however, never count as the direct physical act of the principal. As Justice Holmes observed, "the precise point of the fiction is that the direct act of one is treated as if it were the direct act of another" (1921, pp. 111–112). Therefore, the identification fiction is not required to account for the relationship between a principal and an independent contractor as an agent—even though sloppy habits of legal thought might apply identification language to that case.

The case of the tortious servant has given us the opportunity to make a number of points. It allowed us to introduce the distinction between employees and independent contractors. It also showed how the identity fiction was used in the legal conceptualization of relationships which depersonalized certain individuals by identifying them with another individual. Historical examples include the master–slave, baron–feme, and employer–employee relationships.

The overall theme here is inalienability. The employee contracts into a legal role where some other party has all the legal responsibility for the results of the employee's lawful actions. The ordinary canon of assigning legal responsibility in

accordance with de facto responsibility is violated. But when the employee commits an unlawful act such as a tort or civil wrong, the law sees no point to insulating the employee from that responsibility. The employee is said to have stepped outside the employee's role. Then the usual legal canon applies, and the employee may be sued for the tort. In de facto terms, the employee is, if anything, more responsible for the fruits of the perfectly deliberate and intentional actions of lawful work than for an unintentional but negligent tort. That capacity for de facto responsibility is in fact inalienable. The Law pretends it has been alienated. The Law pretends the act of the servant is the act of the master so long as the pretense is not abused by unlawful actions.

Part-Time Robots: Making Part-Time Humans Safe for Part-Time Renting
The example of a person who functioned as a part-time robot is another intuition pump to illustrate the de facto inalienability argument. Since the argument is based on the facts about human nature, we might assume that science fiction technology can modify human nature enough to defeat the argument.[19]

Suppose that it was possible to electronically implant a small computer in a person's brain so that by flipping a switch the individual was "taken over" and "employed" by the computer under the control of an external user or employer. In William Gibson's science fiction example of such a part-time sexual robot, he telling described it as: "Renting the goods, is all" (Gibson 2000, p. 143) When in the robot mode, the individual would have no ability to deliberately terminate or even influence their "actions" (or rather behaviors). When the computer was externally switched off, the individual would regain conscious control and be able to act in the usual deliberate and responsible manner. One could vary the example by imagining some drugs that would temporarily turn a person into a part-time zombie, but we will stick to the high-tech imagery of a computer-driven part-time robot.

The part-time robotization would change human nature to make it safe for the employment system. The person as a part-time robot would not be de facto responsible for the positive or negative fruits of its services. The person as a part-time robot would not have decision-making direct control over its services. Those labor-services would be de facto transferable like the services of a van—so the legal validation of the employment contract for the transfer of those robot services would not be an institutionalized fraud. The moral case against such a human rental system would be based on requiring such actual dehumanization as a condition for employment.

The example of the part-time robot is illuminating from another viewpoint. Since the employment contract *fits* the part-time robot without involving any fraud that

[19]Both George H. Smith (1997, p. 54) and the author (1973, p. 18) independently arrived at the science fiction example of a human with a computer chip implanted in their brain and controlled by another as a genuine example of one person being "employed" by another. And Smith (1997, p. 54) and the author (1973, p. 3) also both used the example of a non-robotic rented person committing a crime at the behest of their employer—where the Law fully recognizes the factual inalienability of moral agency in the case of a hired criminal.

means the employment contract applied to ordinary persons treats them *as if* they were such part-time robots within the scope of their employment.[20] That is, the employment contract imputes zero legal responsibility to the employees for the positive or negative fruits of their labor as if they were part-time robots employed by an employer. In short, renting people legally treats them *as if* they were things within the scope of the rental contract.

You Can Lead a Horse to Water, But Cannot Make Him Drink

The professional consequences of publicly supporting the neo-abolitionist argument in a society based on human rentals are akin to supporting abolitionism in the Antebellum South, e.g., whatever is the modern equivalent of being "tarred and feathered and ridden out of town on a rail." Therefore, it is quite possible to fully understand the argument and still refrain from drawing the obvious conclusions.

The curious case of a libertarian legal scholar Randy Barnett illustrates the point. His work on contractual remedies and inalienable rights (1986) provides an excellent modern example of understanding the de facto inalienability argument but refraining from drawing the obvious but "unacceptable" conclusions.

When a contract is breached, traditional legal theory prefers enforcing the payment of monetary damages to trying to enforce the belated specific performance of the contract. Except in very limited circumstances, the courts will not enforce the specific performance of a breached contract. Barnett argues that the restrictions against enforcing specific performance should apply specifically to labor contracts, but that other breached contracts might well be specifically enforced by the courts. The interesting point is that Barnett uses the de facto inalienability argument to exclude the specific performance of labor contracts because labor is de facto non-transferable!

Barnett clearly sees that human actions are not de facto transferable. We can only agree to co-operate with others; we cannot transfer or alienate the de facto control over our voluntary actions.

> If rights are enforceable claims to control resources in the world and contracts are enforceable transfers of these rights, it is reasonable to conclude that a right to control a resource cannot be transferred where the control of the resource itself cannot in fact be transferred. Suppose that A consented to transfer partial or complete control of his body to B. Absent some physiological change in A (caused, perhaps, by voluntarily and knowingly ingesting some special drug or undergoing psychosurgery) there is no way for such a commitment to be carried out. (Ibid., p. 188)

Barnett also correctly contrasts this de facto inalienability of intentional human actions with the de facto transferability of bona fide commodities.

> What is *my* house or car could equally well be *your* house or car. But bodies are different from other kinds of things. What is *my* body cannot in any literal sense be made *your* body.

[20]In the fantasy world of business ideology in the human rental system, the proverbial "entrepreneur" is treated as an *übermensch* of such creativity, drive, and agency that mere employees are in effect considered *untermensch* as if they were part-time robots "employed" by the employer-entrepreneur.

> Because there is no obstacle to transferring control of a house or car (of the sort that is unavoidably presented when one attempts to transfer control over one's body), there is no obstacle to transferring the right to control a house or car. But if control cannot be transferred, then it is hard to see how a right to control can be transferred. (Ibid., p. 189)

Barnett correctly concludes that "the services of the employees cannot be the subject of a valid contract because such services consist of the employees' exercise of their inalienable rights" (Ibid., p. 199). But Barnett inexplicably fails to apply this insight to the normal employment contract. Instead, he apparently interprets this to mean only that if the contract is "breached" (not obeyed), then the employee should only be liable for money damages. The courts should not try to enforce specific performance since labor is non-transferable.

We previously observed how Hegel's use of the de facto inalienability contract against the voluntary slavery contract carried Hegel further than he wanted. Hegel resorted to some transparent doubletalk to avoid applying the critique to the employment contract. Barnett is in a similar quandary. The conclusion to Barnett's argument seems to be much stronger than he is willing to draw. If labor is really de facto non-transferable as he has so forcefully argued, then the conclusion is that the contract to legally transfer labor is *invalid* from the outset—not just that the contract should not be specifically enforced when it is "breached" by the failure to obey.

The contract to legally transfer labor never is fulfilled by the de facto transfer of labor. An employee can at most co-operate together with a working employer, i.e., *obey* the employer. This de facto responsible co-operation and obedience—which earns the criminous employee a trip to jail—is interpreted as "fulfilling" the contract to legally transfer labor (when no crime is involved).

Barnett has in fact splendidly restated the de facto inalienability analysis which shows the inherently fraudulent and invalid nature of the institution of renting or hiring human beings. The whole machinery of a contract to legally transfer the right to temporarily control the use of a rented entity cannot, in fact, be applied when the entity is a responsible person. To legally validate such a labor contract and to interpret responsible cooperation as "fulfilling" the contract to transfer labor is only to perpetrate a fraud on an institutional scale. Yet this obvious conclusion of the argument is simply "unacceptable" and "unavailable" to a conventional, or, in this case, a libertarian law professor.

Intellectuals and professionals live within a network of essentially like-minded people who share certain assumptions. When one visibly breaks with any of those presumptions, then something has gone wrong. To persist in doing so, as opposed to a temporary lapse, will lead to one becoming a pariah and outcast from one's professional circle. Hence the fact that people are unwilling to draw rather obvious conclusions that are outside the pale. There is an old saying: "You can lead a horse to water, but you cannot make him drink." In fact, Barnett should be congratulated on stating that facts about the inalienability of labor, even though other rather obvious considerations prevented him drawing the logical conclusions.

A person living their whole life in a human rental system is probably going to consider that system as self-evidently valid. While there may be the pretense of judging the system by some purported moral argument, the reasoning is actually the

reverse. Moral arguments are judged according to whether or not they are compatible with the "obviously just" system of human rentals, rather than the other way around. One writer made that common attitude quite explicit when commenting on the author's work.

> [Ellerman] notes that, if the impossibility of a person transferring his ability to make independent judgements makes contractual slavery impossible, it also makes employment contracts impossible. Perhaps surprisingly, he swallows that absurd conclusion instead of re-evaluating the argument that led to it. (Frederick 2016, p. 62)

If an argument implies that human rentals are invalid, then that is considered as a *reductio ad absurdum.*

"If It's Legal, Then It Must Be Factual"

No one likes to think that their own society is based on a lie, a legalized fraud. The Good Citizen in the antebellum American South saw that the legal system treated Blacks as being subhuman or of diminished capacity. Hence the Good Citizens believed there must be a factual basis for those laws; otherwise, their own society would be based on a lie. So, if the law considers Blacks to be of diminished capacity, then it must be true. Otherwise, if they publicly asserted that the law was not based on the facts, then they would face the consequences.

This automatic adjustment of the perceived facts to agree with the legal status was also obvious in the legal system. As one antebellum Alabama judge said (apparently without irony) that the slaves:

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

In the antebellum legal system as well as in today's human rental system, the selfsame de facto responsible person who is legally owned or rented by others is treated differently for criminous or non-criminous actions. Clearly the legalized fraud of pretending that ordinary employees have alienated or waived their (factual or legal?) responsibility should not be allowed to shield them from criminal legal responsibility. As an anonymous referee for a legal theory journal put it in rejecting the argument:

> Why can't the law define two senses of responsibility, one for criminal complicity and one for claims on the product of employment relations? Indeed, it seems clear that there is good reason to distinguish these things. There could be good reason to allow people to waive 'positive' responsibility—making capitalist employment possible, not least. It's harder to see how there could be good reasons to allow someone to 'waive' criminal complicity. Be that as it may, the point again is: why can't the law avoid contradiction, by multiplying meanings?

As we see from the previous quote, that "multiplying meanings" is what the antebellum judge did. And there is, of course, not a word about any changes in de facto responsibility when the Law considers employees as agreeing to "waive 'positive' responsibility." Thus, the charge of a legalized fraud remains regards of the "multiplying meanings" and legal fictions of the Law then and now.

It was much the same in societies where marriage was based on the coverture or guardianship marriage contract. The contract treated married women like minors or adults of diminished capacity who could not make contracts or own property in their own name. Hence many normal men took that legal status as also the factual status; otherwise, the whole marriage institution would be based on a legalized fraud. Indeed, a contemporary person argued that way in private correspondence.

> In your paper, you argued that coverture marriage contract is legalized fraud, because it establishes legal incapacity where there's no factual incapacity. I don't find it to be a fraud. You seem not to distinguish between a natural person and a legal person. The coverture marriage contract only says that the wife will be an incapacitated legal person (i.e., with limited political rights), but it says nothing about the wife as a natural person. The corresponding factual incapacity might be that women are by nature generally less intellectually capable of meaningfully exercising political rights, as Aristotle would argue.

Today slavery, both involuntary and contractual, has been abolished, and the coverture-guardianship marriage contract has been abolished in the Western democracies. But we still see the "if it's legal, it must be factual" attitude at work in the human rental system. The rented people ("employees") in a conventional firm are (qua employees) not a part of the legal entity (typically a corporation who is the employer) which bears the legal responsibility for the liabilities incurred in the work and holds the legal responsibility (i.e., ownership) of whatever is produced. Hence the employees have no *legal* responsibility for the negative or positive fruits of their labor in this human rental system that supposedly exemplifies "the" private property system. Hence the Good Citizen, as well as the conventional economist or legal thinker, will take that as also being the factual situation. Thus, the employees, within the scope of the employment contract, are viewed as having no *factual* responsibility for the positive or negative results of the human actions. They are "employed" by the "employer."

In the case of the current human rental system, the most sophisticated and Dedicated Defender was Frank Knight, so he *had* to treat the labor services themselves (within the scope of the employment contract) as the mechanical services of a rented thing.

> For "labor" we should now say "productive resources." (Knight 1956, p. 8)
>
> In a deeper analysis, the error in the whole classical position…roots in the special character and role assigned to labor. More generally still, it consists in confusing conceptual analysis with ethical evaluation. From the former standpoint, labor and capital instruments, including land, are all alike, simply productive resources. (Knight 1956, p. 87, fn. 70)
>
> It is characteristic of the enterprise organization that labor is directed by its employer, not its owner, in a way analogous to material equipment. Certainly there is in this respect no sharp difference between a free laborer and a horse, not to mention a slave, who would, of course, be property. (Knight 1965, p. 126)

If the legal system treats the services of the rented worker like the services of rented material equipment or a horse, then the Dedicated Defender avoids cognitive dissonance by taking the corresponding view of the facts.

The modern but conventional classical liberal opposes treating people as instruments in the political sphere.

> Kant's injunction to regard another "never simply as a means, but always at the same time as an end," because perfectly anti-instrumental, was also perfectly liberal. All the classical liberals agreed that citizens should not be treated as mere instruments or materials in the hand of their rulers. (Holmes 1993, p. 245)

But from "trained incapacity" or simply a fear of becoming an intellectual pariah, such classical liberals cannot "see" or analyze what happens when human beings are rented.

The traditional views of Blacks or women are now eliminated or at least repressed due to the Civil Rights and Feminist Movements, but the corresponding views about workers are rather commonplace, at least in the upper classes. One form of those classist views is that employees are like children who are affixed on immediate gratification and cannot understand their own longer-term interests. The Chicago economist and jurist, Richard Posner, shamelessly expresses this view in a criticism of worker ownership.[21]

> A worker will trade off any long-term benefits to the corporation from a corporate action that would increase the value of his shares against whatever short-term benefits, in the form of a higher salary or greater fringe benefits or a lighter workload, an alternative course of action would confer on him; and usually the tradeoff will favor increased compensation for work over increased stock value. (Posner 2007)

Thus, the Dedicated Defender would have us believe that the corporate managers and board members, who are actually obsessed with the short-termism of quarterly earnings reports (e.g., Jacobs 1993; Rappaport 2011; von Weizsäcker and Wijkman 2018; Willey 2019; etc.), have their eyes on "long-term benefits"—while workers, who see employment in the corporation as their future, would not be concerned with the long term. The facts are typically just the opposite as was noted by one observer of the co-determination worker board seats in German companies.

> In contradistinction to U.S. corporate boards that prioritize short-term boosts to share value, codetermination boards establish investment policies that nurture long-term firm prosperity and bolster local and national communities. (Tyler 2019)

Finally, the case of the criminous servant was previously considered where "A master and servant who so participate in a crime are liable criminally, not because

[21] One finds much cruder expressions of the same view in private conversation. During my years in the World Bank in the mid-1990s, I supported the proposed privatization policy whereby the people in the post-socialist countries should meet the market and private property system by getting some ownership in their place of living and their place of work—instead of it going to the oligarchs and other government cronies. On a flight from Tallinn Estonia to Moscow, a high-ranking official in the World Bank's privatization program leaned across the aisle (after a few drinks in the Tallinn exit lounge) to tell me why the Bank would never support worker ownership privatization. She said that once workers got control of a factory, they would start cutting out the electrical wiring and unbolting the machinery to get some quick money in the market for scrap metal. As factory after factory would subsequently shut down, the blame for the damage to the economy would fall on whoever advocated worker ownership privatization, and that was not going to be the World Bank. When I asked what it would sound like if she attributed similar idiocy to Blacks or women, the conversation ended.

they are master and servant, but because they jointly carried out a criminal venture and are both criminous." (Batt 1967, p. 612) This example was used as an intuition pump to make the point that the employees do not suddenly turn into mechanical non-responsible instruments when the venture "they jointly carried out" was non-criminous.

But those who routinely think "if it's legal, it must be factual" will give a different analysis of the case of the hired criminal. They will think that the salient point is that an employment contract that involves a crime is not valid, so the alleged "master and servant" were then just two people in a de facto partnership and *that* is why the servant is responsible. The problem here is that the word "responsible" is used as if there were no distinction between legal and factual responsibility—because "if it's legal, then it must be factual." If one thus uses the concept of responsibility without paying attention to the legal-factual distinction, then it is obvious that the criminous servant is (legally) responsible while the non-criminous employee is not (legally) responsible so there is no problem—if one ignores the *same factual* responsibility in the two cases.

Labor-Seller = Person; Labor-Performer = Thing

In any rental transaction, there is (1) the owner of the entity rented out and there is (2) the entity rented out, the car, apartment, or person. The problem does not arise in the first role of the sovereign owner acting in the marketplace—but in the second role of the person as the entity rented out. The problem in both cases arises from applying an alienation contract (in the sale or rental version) to persons instead of only to things. This should not be hard to understand—unless one is living in a society where owning or renting other persons is the norm, e.g., the antebellum South or today's society, respectively.

Hence libertarians and many classical liberal and neoclassical economists need a simple way to avoid the problem; simply ignore the second role of the person qua rented entity performing the services (within the scope of the contract) and focus exclusively on the first role of the sovereign self-owning person continuously making and remaking the employment contract. All agency, responsibility, and decision-making are imputed to the person qua labor-seller—who, as Alfred Marshall pointed out, delivers the entity rented out. The rented worker supposedly never decides to produce a widget, rob a bank, or commit murder; the seller of labor only decides to sell widget-making labor, bank-robbing labor, or murdering services.

In this imaginative reconceptualization ploy, it is only the employer who *does* anything like producing widgets, robbing banks, or committing murder; the employees are always on the other side of the labor market being only responsible for deciding to sell the appropriate services.[22] When the owner of a tractor sells the

[22]It gets even more of a fantasy when one considers that the typical employer is a corporation and the legal members of a corporation are its shareholders which, in the case of a publicly traded company, are scattered far and wide. It is as if the shareholders form a school of fish that acts as a hand to manipulate the management as a puppet, and, in turn, the management manipulates the employees as second-order puppets.

plowing-services of the tractor to a farmer, then the tractor-owner does not plow the field. The farmer employs the rented tractor to plow the field. In the conventional view, it is the same when people rent themselves out. The labor-suppliers only sell certain services to the employer and that is all they do; it is the employer who employs the employee to do the work. Somehow, the employee in that second role as the rented entity within the scope of the contract is seen as devoid of normal factual responsibility; in that role, the people are only rented instruments or things like the tractor employed by the employer to do the work.

This should at least be a salve to the hired killer who, under this reconceptualization, does not commit murder but only has the role like an accessory before the fact knowingly renting an entity capable of being used or "employed" to commit a murder, e.g., a gun, to the criminal. In fact, the neo-Austrian economist, Israel Kirzner, likens the employment contract to a hypothetical example where the gun-owner rents out the gun *and accompanies* the gun (as in Marshall's "second peculiarity" of labor) so that as the gun-user decides upon each use (e.g., using the gun to commit a crime), then the gun-owner decides on the spot whether or not to sell that sort of gun-services.

The point of the imagined example is that the self-owning person also accompanies the entity rented out (the person qua employee) and similarly continuously makes the decision whether or not to sell that sort of service.[23] And in both cases, that is the extent of the gun or person owner's responsible involvement. Then the employer "employs" the gun or the person in the *same* manner. As Kirzner puts it about that second labor-performing role, "the laborer's rented *time*, [is] exactly similar to the gun" (2002, p. 9). Kirzner does not tell us how the person-qua-employee "flips some switch" to suddenly become a thing like a gun being employed by the employer. Nor does he need to since the human rental system legally treats the rented person like a rented thing—so, to the Dedicated Defender, that *must* also be the factual situation.

There are countless ways that economists can misframe the question and then devote their time and energies on matters essentially irrelevant to the human rental system. But Knight and Kirzner are two Dedicated Defenders who have bravely eschewed all the conventional distractions and drilled down to the basic question of the status of human actions versus the services of things within the scope of the human rental contract, i.e., in the execution (not the continuous negotiation) of the employment contract. And they can do no more than just assert, without a shred of argument, that the responsible human actions of the employees are just like rented services of things (e.g., Knight's "material equipment," Kirzner's "gun," or Bohm-Bawerk's "corporal goods") being employed by the employer:

> It is characteristic of the enterprise organization that labor is directed by its employer, not its owner, in a way analogous to material equipment. (Knight 1965, p. 126)
>
> [T]he laborer's rented *time*, [is] exactly similar to the gun. (Kirzner 2002, p. 9)

[23]This can be seen an elaboration of the Alchian-Demsetz view (1972) of the labor contract as being continuously renegotiated.

> Regardless of their form, all corporeal goods undergo utilization by virtue of the activation for the delivery of useful renditions of service of the forces of nature residing in them. This is no less true if the corporeal goods are persons or living creatures than it is if they are things. (Böhm-Bawerk 1962, pp. 67–68)

These statements *must* be true; otherwise, the whole system would be based on a fraud.

The theory of de facto inalienability given here starts with facts, not with moral pleas. Any significant theory should be able to state the circumstances or facts that would prove it wrong—unlike moral pleas for "inalienable rights" to an education, housing, clean water, healthcare, and so forth. Knight and Kirzner do not give any shred of argument or citation of facts to show that ordinary human labor carried out with the human rental contract is like the employer's use of material equipment or a rented gun. But let us suppose, for the sake of argument, that defenders of the human rental contract could find some way that people could voluntarily transform themselves into de facto non-responsible instruments to be employed by the employer. This would firstly be of great interest to hired criminals the world over. By such a transformation, hired killers would not be murderers but at most accessories before the fact like the person renting out the gun to someone knowingly intent on a murder. Secondly, the dedicated defenders would have to show that this transformation was what was "really" taking place in the fulfillment of the human rental contract on the part of the employees. If that could be shown, then the argument given herein would be defeated. But failing such a demonstration, the defenders must simply ignore the basic point about the de facto inalienability of human responsibility and decision-making, and instead raise myriads of red-herring arguments to pretend that they are really addressing the argument. Or they can just ignore the whole set of arguments and instead focus on defeating schoolboy-Marxist talking points.

The philosopher Elizabeth Anderson has recently focused on this ploy that attempts to say that when an employment contract is made, then the execution of "the laborer's rented *time*" is separable from the worker as a responsible agent like the services of a rented gun or any other *thing*.

> This makes it seem as if the workplace is a continuation of arm's-length market transactions, as if the labor contract were no different from a purchase from Smith's butcher, baker, or brewer. ...But the butcher, baker, and brewer remain independent from their customers after selling their goods. In the employment contract, by contrast, the workers cannot separate themselves from the labor they have sold; in purchasing command over labor, employers purchase command over people. (Anderson 2017, p. 57)

Are people perhaps seen as moral minotaurs, half-human and half-beast, so that the human half enjoys inalienable rights while the beastly half can be rented out in the employment contract? Or perhaps people are amphibious creatures alternating between a "public world" that enjoys inalienable rights and a "private world" where such rights fall into eclipse? Anderson uses a striking metaphor to describe this cultivated blindness to the fact of persons being rented out in the human rental contract.

> The result is a kind of political hemiagnosia: like those patients who cannot perceive one-half of their bodies, a large class of libertarian-leaning thinkers and politicians, with considerable public following, cannot perceive half of the economy: they cannot perceive the half that takes place *beyond* the market, *after* the employment contract is accepted. (Ibid., pp. 57–58)

In focusing on that second role of the entity rented out, Anderson is essentially using the inalienable rights argument outlined above that was hammered out in the Abolitionist, Democratic, and Feminist Movements and that provides a principled neo-abolitionist critique of the institution of renting human beings.

The Consumption Employment Contract

There is another type of employment contract that barely exists but might be mentioned. Namely, apply the concept of employment to consumption activities instead of production. Normally, consumption is done in a self-managed way with the consumer buying the inputs (the consumption goods) and bearing those costs, and then owning the resultant used goods or waste products. But consumption could be organized under an employment relation. Instead of paying for the "inputs," the consumer would pay an "employer" to "employ" them to consume the goods. The employer would bear the costs of the "inputs" and own the resultant used or waste products. The de facto inalienability critique would apply to such a consumptive employment contract as to the "normal" productive employment contract. The critique did not depend on the direction of the payment between employer and employee.

Leveraging Things and Leveraging Humans

Some of the implications of the employment relation can be appreciated by considering the notion of capital "leverage." If the owner of $5000 can hire or borrow $10,000 and put it all to work in an enterprise, the original $5000 is called "equity capital" while the borrowed $10,000 is "debt capital" or "loan capital." The borrowing amplifies or magnifies the effects of the equity capital. With only $5000 invested, $15,000 is put to work. The equity holder gets the profits and losses from three times the equity capital. This amplification due to using hired capital is called "financial leverage" (or "gearing" in England). It should be noted that losses are also amplified by leverage.

Who's in, and who's out? Loan capital, like equity capital, is being used in an enterprise, but the suppliers of the loan capital are outsiders to the enterprise. They are creditors of the enterprise, while the suppliers of equity capital are the "insiders" (from the legal or de jure viewpoint). The same considerations can be applied to any resources including "human resources" (to use a popular and telling expression from modern business jargon).

Since human beings may also be hired or rented, we may also think of human rentals as *human leverage*.[24] The net results of many peoples' efforts can legally

[24]Chapter 1 in the award-winning book on human capital (Fitz-enz 2009) is entitled "Human Leverage."

count as the results of one person's effort if the one hires the many. The employment relation allows one or a small number of people to "leverage" their enterprise by hiring tens, hundreds, or thousands of other people.

Why should the employment relation be treated differently from the hiring, renting, or borrowing of things? The answer lies in the de facto inalienability of responsible human actions, unlike the services of things (not to mention money) which can be in fact alienated from their owner to be employed by other persons who are then factually responsible for the results of that usage.

The results of human leverage show up in the income distribution. Some researchers found the income distribution of the highest 1% of the population distinctly shooting off with a different trend than the other 99%.

> No one would dispute the fact that the wealthy differ from the lower 99% in the manner that they accumulate income. While most people are paid by the hour, or the number of widgets they produce, the wealthy frequently accumulate their extra wealth by some amplification process; that process varying from case to case. Perhaps one of the most common lower-level modes of amplification is for an individual to organize an operation with others working for him so that his income is amplified through the efforts of others (a modest-sized business, for example). (Montroll 1987, pp. 16–17)

Using income data for 1935–36, the average amplification factor was estimated at 16.8.

> This number is not surprising since one of the most common modes of significant income amplification is to organize a modest-sized business with the order of 15–20 employees. (Montroll 1987, p. 18)

In fact, the business is carried out by all the people working there, but in law, it is the enterprise of only the employer. The employees have a legal role like that of an instrument, indeed that of a human lever, working as a means to leverage or amplify the ends of the employer. The employees are not part of the ends of the enterprise. The employer does not act as the representative of the whole group of people working in the firm. The employer acts only in his own name, and the employees are "employed" to that end.

The possibility of human leverage also supplies the simplest and most direct explanation for the prevalence of employment firms in a free enterprise economy which allows the employment relation and where there is a sufficient supply of labor willing to accept the employee's role. The choice of firm structure is exercised by the entrepreneur or entrepreneurial group who organizes the firm. Since (by hypothesis) the firm is expected to be profitable, it is in the self-interest of the organizers to leverage the other people involved in the firm by employing or renting them.

"Inalienable" Means Cannot Alienate, Not Shouldn't Alienate

Although the human rental contract legally treats the worker qua employee (not the sovereign labor-seller in the marketplace role) as rented "material equipment" (Knight) or "corporal bodies" (Böhm-Bawerk), there is no factual performance of the worker to actually fulfill that rented-equipment role. Aside from the science fiction part-time robot story, persons cannot factually alienate their responsible

agency, so an alternative factual performance is accepted by the legal system as "fulfilling" the contract, namely *obeying* the employer or the employer's agents.

The point is not that one ought not to alienate one's responsible agency, but that one *cannot* voluntarily do so. Exactly the same sort of analysis applies to the perpetual servitude (or civilized voluntary slavery) contract. As previously noted, George H. Smith independently arrived at the same theory of inalienability, and he makes this point forcefully against the libertarians who defend a voluntary slavery or perpetual servitude contract. It is not a matter of *should not*; it is a matter of *cannot*. When considering a voluntary slavery contract that Murphy might make, George H. Smith is quite clear.

> This supposed contract, according to the theory of inalienable rights, is no contract at all, because nothing has been transferred. The slavery contract makes no more sense than if Murphy had agreed to give me an absolute property right in his subjective beliefs and values. Regardless of whether he "consented" or not, a right cannot be alienated unless the object of that right is capable, in principle, of being transferred from one person to another. And, as I argued in my essay, moral agency cannot be transferred, abandoned, or forfeited. Moral agency is inalienable, and so must be the right to exercise that agency. (Smith 1997, pp. 53–54)
>
> Thus "inalienable" in this sense refers to rights that *cannot* be transferred to another, not to rights that merely *should not* be transferred to another. If the subject of a right—such as the ability to reason and judge–cannot be alienated, then neither can the right associated with that subject. (Smith 2013b, pp. 27–28)

Thus, any contract to put a person in the legal position of having alienated such a right would be impossible to actually fulfill and would thus be inherently invalid. As Smith put it in the case of the slavery contract: "This slavery contract is invalid not because it is morally reprehensible, but because it is physically impossible. The 'terms' of the contract correspond to nothing in the real world." (1997, p. 54) The legal systems that supported such personal alienation contracts always accepted some alternative performance as "fulfilling" the contract. And that alternative performance always had the same form: obey the master (e.g., in the Bible, Eph. 6:5, Titus 2:9, 1 Peter 2:18, Col. 3:22) or obey the employer.

Abraham Lincoln is a representative of the deeper *democratic* classical liberalism that contrasts with the conventional classical liberalism which takes the employer's yelps for the right to rent other people as the sine qua non of human liberty.

> We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. (Lincoln 1989, p. 589 [Speech at Sanitary Fair, Baltimore 1864])

Lincoln was contrasting his democratic classical liberalism with the "yelps for liberty" (Johnson 1777, p. 259) emanating from slaveholders.

When the person's voluntary obedience has thus "fulfilled" the contract, then the legal authorities enforced the *legal* consequences *as if* the person had voluntarily become of diminished or no capacity. Thus, such a legally implemented personal

alienation contract amounts to a fraud on an institutional scale and should be abolished in any system of free *and non-fraudulent* contracts.

Some Recent Inalienability Critiques of the Employment Contract

This critique of treating labor as an alienable commodity is not new. One striking example early in the twentieth century was Ernst Wigforss (1881–1977), one of the founders of Swedish social democracy, who made the same point as to why the notion of a purchase and sale contract does not apply to the human actions.

> There has not been any dearth of attempts to squeeze the labor contract entirely into the shape of an ordinary purchase-and-sale agreement. The worker sells his or her labor power and the employer pays an agreed price. . . .But, above all, from a labor perspective the invalidity of the particular contract structure lies in its blindness to the fact that the labor power that the worker sells cannot like other commodities be separated from the living worker. This means that control over labor power must include control over the worker himself or herself. Here we perhaps meet the core of the whole modern labor question, and the way the problem is treated, and the perspectives from which it is judged, are what decide the character of the solutions. (Wigforss 1923, p. 28)

The apparent Nozickian, J. Philmore, issued what might be called *Philmore's Challenge* to all the classical liberals and libertarians who consider the liberty to rent other persons as the sine qua non of human liberty.

> Contractual slavery and constitutional non-democratic government are, respectively, the individual and social extensions of the employer-employee contract. Any thorough and decisive critique of voluntary slavery or constitutional non-democratic government would carry over to the employment contract—which is the voluntary contractual basis for the free market free enterprise system. (Philmore 1982, p. 55)

Carole Pateman took up Philmore's Challenge in her feminist classic *The Sexual Contract* (1988) which envisioned patriarchal society as a type of coverture marriage contract writ large as a social contract. The same inalienability critique that applies against the coverture marriage contract also applies against the employment contract.

> 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. (Pateman 1988, p. 147)
>
> 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. (Ibid., p. 150)

The voluntary self-sale, coverture, and self-rental contracts are all in the same moral boat since they all legally alienate that which is factually inalienable.

No One Can "Employ" Another

Aside from physical coercion, there are not two different ways to do X, one way as a factually responsible agent and the other way as just being "employed" like material equipment. There is only that first way.

- In a democratic firm, the shop-floor or office-floor member is voluntarily agreeing to follow decisions to do X made by persons higher up in the (democratic) hierarchy to whom decision-making authority has been directly or indirectly delegated.

- In the human rental firm, the employee is *also* voluntarily agreeing to follow decisions to do X made by persons higher up in the (non-democratic) hierarchy (without any pretension of the higher-ups being delegates)—since that is all a person can voluntarily do.

There is no different voluntary performance in the human rental firm where moral agency is actually transferred so that the person can be actually “employed” by the “employer” (as the Law fully recognizes in the hired criminal example).

Of course, the reasons to do X at the behest of another person will be quite different in the two cases, just as the reasons for a person to adopt religious belief Y were quite different if the person comes to the decision on their own or because the priest or Pope said so. The point of the inalienability of workplace or religious decisions is that in either case, it is ultimately the person’s own responsible decision. As Karl Popper put it: “It is our decision whether to obey a command, whether to accept authority.” (Popper 1965, p. 182).

The religious authority cannot make the believer’s decisions for them; that is the sense of the inalienability of conscience in the phrase “no one can believe for another.” Similarly, in the workplace, the “employer” cannot make the worker’s decision to do X in some way that the employer is the only factually responsible agent involved, and, in that sense, no one can (de facto) “employ” another. The employees and any working employer are inextricably co-responsible in a factual sense for the results of their joint human activity in the workplace—which the legal system avoids recognizing by virtue of the inherently fraudulent contract for the renting of human beings.

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Chapter 3
Property: The Case Against the Human Rental System Based on Private Property Rights

One of Marx's biggest blunder was to characterize the private property market economy based on human rentals as "capitalism" and as being based on "private ownership of the means of production." The mischaracterization of the system was enthusiastically received by the supporters of the human rental system so they could pose as the defenders of private property. In fact, the system is based on violating what has always been the only legitimate basis for property appropriation, namely getting the fruits of your labor. By renting the people working in an employment firm, the employer legally appropriates 100% of both the liabilities and assets created by those people employed in the firm. Far from appropriating the positive and negative fruits of their joint labor, the employees are only one of the rented inputs and the employer pays off those wage/salary liabilities and the other input-liabilities to claim 100% of the produced outputs. This chapter explores the misperceptions about property rights in the current system (the "fundamental myth") and associated economic theories and delves into the intellectual history of the labor theory of property—which is the juridical principle of imputation (assign legal responsibility according to de facto responsibility) applied to questions of property.

3.1 The Misnomer of "Capitalism" and the Fundamental Myth

The "Ownership of the Means of Production"

Both sides in the Great Debate between "capitalism" and socialism/communism seemed to agree about the definition of "capitalism" ("market economy with private ownership of the means of production"). The one point of near-universal agreement was that the central property right in capitalism was "the private ownership of the means of production" (not the ownership of items of personal property). Marx did not give specifics about his vision of socialism or communism. But when one spends

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one's adult life condemning X (e.g., *private* ownership of the means of production), then it is clear that one's image of a better society will not have X. In the Marxist tradition, "private" is a swear-word. Hence the Marxist vision of socialism or communism *had* to have social, public, or state ownership of the means of production along with substantial non-market allocation. And this was the case in every Marxist country.

We also owe the capital-based phraseology of "capitalist" and "capitalism" largely to Marx. To understand his idea, one must go back to the medieval notion of dominion based on the ownership of land. What today we might call the "landlord" was then the Lord of the land exercising both political/juridical control over the people living on the land and the rights to the fruits of their labor. The legal historian, Frederic Maitland (1850–1906), noted that "ownership blends with lordship, rulership, sovereignty in the vague medieval *dominium*. . . ." (Maitland 1960, p. 174). Or as the German legal scholar, Otto von Gierke (1841–1921), put it simply: "Rulership and Ownership were blent." (Gierke 1958, p. 88).

Marx carried over to the ownership of capital this medieval notion of the ownership or dominion over land.

> 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. (Marx 1977, Chap. 13, pp. 450–451)

Marx's blunder has been a staple of socialist thought ever since as was pointed out by Bo Rothstein.

> It is astonishing that a hundred years of socialist thought have not confronted the basic capitalist idea—that owners of capital have the right of command in the relations of production. The idea behind nationalization, wage earner funds, and the like is in fact fundamentally the same idea as that on which capitalism is based, namely, that ownership of capital should give owners the right to command in the production process (be they democratically elected politicians, state bureaucrats/planners, workers' representatives, or union officials). Indeed, this is a nice example of what Antonio Gramsci called bourgeois ideological hegemony. (Rothstein 1992, p. 118)

The defenders of "capitalism" enthusiastically accepted this view that the management rights ("leadership of industry") and the rights to the product are all "an attribute of capital," of the "ownership of the means of production," or of the ownership of "productive property" (in John Tomasi's phrase). Hence any change in the management or product rights would be a violation of their supposed "property rights."

In a recent book with Tyler Cowen's dust-jacket tribute of "one of the very best philosophical treatments of libertarian thought, ever," John Tomasi outlines the "*thick* conception of economic liberty" held by the classical liberalism of Adam Smith and his descendants: "Wide individual freedom of economic contract and powerful rights to the private ownership of productive property are prominent features of the thick conception of economic liberty." (Tomasi 2012, p. xxvi). But there at least two problems in this. The "freedom of economic contract" includes the legal right to make the juridically invalid human rental contract. And the "powerful

rights to the private ownership of productive property" involve a misconception of property rights that I will call the "fundamental myth."

The Fundamental Myth

The *fundamental myth* is that management and product rights are legally attached to capital. It is asserted by thinkers, left, right, and center as in the following quote from an English Liberal:

> The owner of capital resources, or the agent who acts on behalf of the owner or a number of associated owners, controls and determines, *in virtue of such ownership*, the process of production and *the action of the workers* who are engaged in the process. In its unqualified form, capitalistic organization is a form of autocracy or absolutism. (Barker 1967, pp. 105–106, emphasis added)

John Maynard Keynes (1883–1946) also saw the rights to the net returns from using a capital asset in a going concern as being attached to the capital asset—as if the asset could not be rented out.

> When a man buys an investment or capital-asset, he purchases the right to the series of prospective returns, which he expects to obtain from selling its output, after deducting the running expenses of obtaining that output, during the life of the asset. (Keynes 1953, p. 135)

But this is factually incorrect; there are no such rights of capital in the so-called capitalist system. In spite of the constant ideological assertion of the "rights of capital," it takes nothing more than an understanding of the renting out of capital to see the fallacy. In medieval times, there was little or no market in land so the identification of land ownership with "dominion" over the people living or working on the land was more plausible.

Economists who spend their professional lives studying markets should be able to think through the consequences of capital being rentable—just like people. Suppose capital assets are rented out to another legal party who buys, hires, or already owns the other inputs and who undertakes a productive process. Then that legal party by virtue of being the hiring party (not the owner of the capital assets) exercises the discretionary management rights within the limits of the input contracts (i.e., the management rights) over that process and has ownership of whatever product is produced. Banks and other financial firms are in the business of loaning out financial capital; real estate companies, equipment rental companies, and computer hardware companies are also in the business of hiring, renting, or leasing out physical capital assets.

Confusions about corporations may cloud this issue. When an individual owns a machine, then it is easily understandable that the machine could be rented out. But suppose the individual forms a corporation and puts in the machine and other capital as initial capital. Then many think that the individual's ownership of the corporation somehow makes a fundamental difference in the logic of rentability. However, the machine may still be rented out in which case the owner of the corporation (and indirect owner of the machine) does not have the management or product rights in whatever other going-concern operation uses that machine. Incorporation is not incarnation; it does not miraculously transubstantiate the ownership of a capital

asset into the ownership of the net results produced using the capital asset in a going concern.

The capital owner has negative or indirect control rights over the use of the capital as in: “No, you may not use this machine, building, or land.” This right is sufficient to make those who nevertheless use the machine, building, or land into trespassers—but it does not automatically make them into employees.

> Central to ownership is the right to exclude others from contact with an item. Ownership thus gives the owner of an item the right to control the uses to which others put it in the sense that he may veto any use of it proposed by someone else. But it does not give him any right to tell anyone to put that property to the use that he wants. It is not a right to command labor. (McMahon 1994, p. 16)

The positive discretionary control or management rights over the workers using the capital asset comes from the employer–employee contract, not the ownership of the capital the employees are using. This is a conceptual point about the structure of property rights in the current system and is not about the bargaining power (typically in the hands of capital owners) or transaction costs involved in renting capital out of a corporation or renting people into a corporation.

The Case of the Conner Avenue Plant

One common simplistic misunderstanding of the fundamental myth is that it holds that “the owner of the firm doesn’t own the product produced by the firm.” If by “firm” one means a corporation, then there is currently the ownership of a corporation, but it is the pattern of contracts (who hires what or whom) that determines who owns the product produced using some of the corporation’s assets (which could be leased out).

In addition to the fundamental myth being involved in a common misunderstanding of the “ownership of a corporation,” it is also expressed in the usual notion of “owning a factory.” But the simple logic of the rentability of capital does not stop at the ownership of a whole factory. In the early 1950s, the Studebaker-Packard Corporation had the Packard bodies produced in the Detroit Conner Avenue plant of the Briggs Manufacturing Company. When the founder died, all 12 of the U.S. Briggs plants were sold to the Chrysler Corporation in 1953. “The Conner Ave. plant that had been building all of Packard’s bodies was leased to Packard to avoid any conflict of interest.” (Theobald 2004).

Who “owned the firm?” This historical example illustrates the vacuity of the usual idea that “being the firm” or firmhood is determined by some “ownership of the firm.” Where was the “ownership of the firm” that included the ownership of the auto bodies coming off the assembly line or the management rights over the production process? The shareholders in Studebaker-Packard owned that company and similarly for the shareholders in Chrysler, but that did not answer the question of “who is the firm” in that going-concern operation of producing auto bodies. That was determined by pattern of the new market contracts—by who hires, rents, or leases what or whom. Studebaker-Packard leased the factory from Chrysler. Then the Studebaker-Packard Corporation would hold the management rights and product rights for the operation of the factory owned by the Chrysler Corporation.

In spite of the logical argument and factual examples, most economists and legal theorists seem unwilling to draw out the implications of capital being rentable (just like people). "How can Chrysler Corporation not hold the management rights or rights to the products of its own factory?" Of course, conventional classical liberals *can* understand that capital can be rented out, but they find no convenience in drawing out the consequences. They prefer to lazily assume the fundamental myth which serves as the *pons asinorum* of property theory. For them, it is a bridge too far.

Another conceptual dodge might be mentioned. When it is pointed out that operating a capital asset as a productive going concern is a contractual role, not an extra owned property right, a typical response is: "Yes, but it is that role which we call the 'ownership' role." After thus redefining "ownership" to include the going-concern contractual role (which is not owned in the usual unredefined notion of "ownership"), the semantics shifts back to conclude that "the product rights are part of the 'ownership' of the capital asset" or "the 'ownership' of the corporation owning the asset." Such shifting-semantics fallacies allow the fundamental myth to persist.

Even "Capitalism" Is a Misnomer

In the Middle Ages, there was no developed market for renting out land, so those governance and product rights were rolled into the medieval notion of ownership as dominion. But capital assets, including land for that matter, are *routinely* rented out in our so-called capitalist system.

The Marxist notion of the "ownership of the means of production" is a quasi-religious dogma. Many defenders of the "capitalist" system seem equally dogmatic in failing to think through the consequences of capital being rentable in a private property market economy.

Since the management and product rights are not attached to capital in the first place, the whole "Great Debate" between "capitalism" and socialism or communism (as to whether there should be private or public ownership of the means of production) was ill-formed from the beginning. It is wrong in the same sense that two centuries ago it would be wrong to frame the basic social question about whether slave plantations should be privately owned, government owned, or socially owned.

Even the most prominent liberal philosopher could not get beyond the framing in terms of the ownership of the means of production or of productive assets (as opposed to personal assets):

- "under socialism the means of production are owned by society..."
- "The first principle of justice includes a right to private personal property, but this is different from the right of private property in productive assets..."
- "welfare-state capitalism permits a small class to have a near monopoly of the means of production..."
- "Property-owning democracy avoids this...by ensuring the widespread ownership of productive assets..." (Rawls 2001, pp. 138–139)

There is, however, one economist who stands out as the most philosophically and economically sophisticated defender of the so-called capitalist system—and he did

not call it by that name. He was able to trace out the consequences of capital being rentable and understood that the product/management rights were thus not part of capital ownership. He is our chosen antagonist, Frank H. Knight, one of the founders of the Chicago School of Economics (see Emmett 2010). Knight was perfectly clear on "capitalism" being a misnomer and on Marx's role in propagating that myth about capital ownership.

> Karl Marx, who in so many respects is more classical than the classicals themselves, had abundant historical justification for calling, i.e., miscalling—the modern economic order "capitalism." Ricardo and his followers certainly thought of the system as centering around the employment and control of labor by the capitalist. In theory, this is of course diametrically wrong. The entrepreneur employs and directs both labor and capital (the latter including land), and laborer and capitalist play the same passive role, over against the active one of the entrepreneur. It is true that entrepreneurship is not completely separable from the function of the capitalist, but neither is it completely separable from that of labor. The superficial observer is typically confused by the ambiguity of the concept of ownership. (Knight 1956, p. 68, fn. 40)

If an economic, political, or legal theorist is such a "superficial observer" as to not think through the consequences of capital being rentable, then there is little hope to get beyond erroneous tropes and schoolboy libertarian talking-points—or post-modernist sloganeering ("It's all about power").

The current system is not characterized by capital being unrentable, but by *both* persons and capital goods being legally rentable. Given the power enjoyed by capital owners (including entrepreneurs with ample access to capital) and the transaction costs involved in currently reversing the contract between capital and labor, it is almost a truism that people will be rented by the owners of capital, not capital being rented by people.

It is a shame that so many economists and conventional classical liberals think that since "everyone," i.e., themselves as well as "The Opposition" (Marxists), agrees on the "rights of capital" that it is beyond questioning. Frank Knight, due to his vision of the pure entrepreneurial role, had to draw out the consequences of capital being rentable for the "superficial observer" who cannot get beyond easily refuted banalities about the "rights of capital."

Residual Claimancy

Since the management and product rights are not an "attribute of capital," how does a legal party acquire those rights over a production process? In a private property market economy, it is determined by *the contractual fact pattern of who hires what or whom*. The direction of the hiring contracts may differ between the conventional parties; capital may hire labor, labor may hire capital, or some third party such as an entrepreneur or the government may hire both capital and labor.

The key legal position is that the legal party must acquire by hiring or prior ownership all the inputs (e.g., the *services* of land, labor, and capital, the raw materials, and intermediate goods) that are used up in the productive process. Those hiring or buying contracts give that party the unified management rights over the productive process, and by bearing the liabilities or costs of the used-up inputs, that party has the legally defensible claim on whatever is the produced

output. This mechanism for assigning the assets (and liabilities) created in production is the invisible-hand mechanism at the foundation of this *or any* private property system (see analysis in Ellerman 1992, 2014). From Adam Smith onward, conventional Economics endlessly analyzes the invisible-hand mechanism of the price system. But Economics does not even take notice of the similar invisible-hand mechanism for the property system. Why not? Because the invisible-hand mechanism in the property system handles the question of appropriation in production, and Economics does not recognize any such appropriation since all those rights are supposedly part of the pre-existing "rights of capital."

Having those management and product rights is what would usually be called "being the firm." Thus, we have seen that the process of determining "who is to be the firm" is determined by direction and fact pattern of the market contracts, not by some prior "ownership of the firm." In other words, "being the firm" is a contractual role, not a piece of property to be owned. Even Knight did not think the matter through entirely. In the previous quote, he continues: "The owner of an enterprise may not own any of the property employed in it. . ." (Knight 1956, p. 68, fn. 40). But if the identity of the party who is the firm or enterprise (i.e., in the going-concern sense of having the management and product rights) is determined by the pattern of contracts in a market economy, then such a contractual role is not "owned." There is no "owner of an enterprise" in the going-concern sense of a contractually determined enterprise.[1] The people who are the legal members of the firm are not legally determined by the ownership of capital or the "means of production" but by the pattern of market contracts, by who hires what or whom.

> This contract theory of the power over the corporation fundamentally changes the parameters for establishing economic democracy. Not realizing the importance of this logic has probably been the second most important mistake by the socialist and Marxist left over the last hundred years. (Rothstein 2020, p. 10)[2]

That legal role of bearing all the input costs and then claiming and selling the outputs is often referred to in value terms as being the "residual claimant." The residual (or profit) is the difference between the market value of the produced outputs and the input costs. Hence our previous point might be phrased as saying that "residual claimancy is a contractual role," not a piece of property to be owned. These points seem to be understood by economists who treat a going-concern enterprise as a "nexus of contracts" or "a nexus of treaties" (Aoki et al. 1989).

> Each factor in a firm is owned by somebody. The firm is just the set of contracts covering the way inputs are joined to create outputs and the way the receipts from the outputs are shared

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[1]This distinction between the corporation and the contractually defined firm-as-a-going-concern was made by the author over 40 years ago (Ellerman 1975). A French legal scholar, Jean-Philippe Robé, has independently made essentially the same distinction between the corporation and "the firm—the organization built via contracts transferring control over resources to the corporations used to legally structure the firm" (Robé 2011, 4).

[2]The most important mistake, according to Rothstein, was the belief that the industrial working class would forge the new form of production.

> among inputs. In this 'nexus of contracts' perspective, ownership of the firm is an irrelevant concept. (Fama 1996, p. 304)
>
> This is the set of contracts theory of the firm. The firm is viewed as nothing more than a set of contracts. (Ross and Westerfield 1988, p. 14)

There is no "ownership" of a nexus of contracts or set of contracts; one's contractual partners may well decide to make different contracts or even find other partners in the future without violating any so-called ownership of the firm.

To think clearly about these matters, it is always advisable to look at the underlying questions of property and contract. The residual might be numerically zero but that does no zero out all the management and product rights that are part of residual claimancy. Economists sometimes consider the special case where the residual (or pure profit) is zero in a perfectly competitive market and then declare that: "in a perfectly competitive market it really doesn't matter who hires whom..." (Samuelson 1966, p. 351) or "under constant returns to scale and statical conditions of certainty, it is immaterial which factor hires which" (Samuelson 1972, p. 27) as if the discretionary management rights, input-liabilities, and product rights had all vanished. If professional economists, as the intellectual clerics in the church of human rentals, really believe their own 'scientific truths,' then they might try to enlighten the employers that "it really doesn't matter who hires whom."

Corporate Finance Theory: Last Bastion of the Fundamental Myth

To the small extent that conventional economists understand in some contexts that residual claimancy is a contractual role (or a nexus of contracts), even that is soon forgotten when they turn to the ideologically important theory of capital and corporate finance theory which are still firmly in the grip of the fundamental myth. Corporate finance theory and the older capital theory are both based on definitions that capitalize the *future* value of the profits that would result from future residual claimancy into the *current* value of the capital asset (typically a corporation). In the words of two Economics Nobel Prize winners:

> [I]n valuing any specific machine, we discount at the market rate of interest the stream of cash receipts generated by the machine, plus any scrap or terminal value of the machine, and minus the stream of cash outlays for direct labor, materials, repairs, and capital additions. The same approach, of course, can also be applied to the firm as a whole, which may be thought of in this context as simply a large, composite machine. (Miller and Modigliani 1961, p. 415)

But this assumes that the machine owner is the residual claimant now and in the future. The market contracts that amount to future residual claimancy have hardly been made now for the entire future time periods. When such contracts are just "assumed," the machine owner or the corporation has no ownership right over their future suppliers or customers to force them to make the "assumed" contracts. Hence there is no *present* property right to those *future* profits and thus that capitalized value cannot be added to the "value of the corporation" (or other capital assets) as if it were currently owned by the capital owners.

Samuelson signals this attaching of the residual net profits to capital by claiming that "capital goods have a 'net' productivity" (1976, p. 661), the "net productivity of

capital" (which Samuelson notes is not a marginal concept), while all the other factors have only a marginal productivity. Moreover, this institutional consequence of the capital owners typically being the hiring party and thus residual claimant is presented as a "technological fact" (Samuelson 1976, p. 600).

The present value of the assumed future profits depends on the contractual behavior of suppliers and customers (all "unowned" by the corporation being "valued") and thus it is called "*goodwill*." The remarkable inattention and thus naivete in conventional Economics about property rights (or the lack thereof) is well-illustrated by two other Economics Nobel laureates when they blithely assert that the "rights of authority at the firm level are defined by the ownership of assets, tangible (machines or money) or intangible (goodwill or reputation)" (Holmstrom and Tirole 1989, p. 123). This combines the fundamental myth about management rights ("rights of authority") and about the rights to future products and profits ("goodwill") all being part of presently owned capital. Even accountants (somewhat lower on the professional totem pole than Economists) realize that there is something dubious about claiming goodwill as a presently owned property right, and thus the standard accounting principles do not allow goodwill to be listed as an asset on the corporate balance sheet.[3]

Thus, economists can understand the point about not owning the contractual behavior of other parties now or in the future when it is in some non-threatening context, but capital theory and corporate finance theory are ideologically central to the concept of "capitalism" based on the fundamental myth, so the myth still reigns supreme in those domains (see Ellerman 1992).[4]

The Question of Property Appropriation

In ordinary economic activity, property rights are constantly being created and terminated. They are being created in the production process, which results in a new product or a service sold on the market. Property rights are being terminated in consumption of these products and services, but also in the production activity when

[3]But even the accounting profession seems unsure what to do with "purchased goodwill" when a corporate asset is purchased at a price above its economic replacement value. But as in the old joke about a country bumpkin coming to New York and being "sold the Brooklyn Bridge," such a transaction does not create a property right which the seller did not have in the first place. Hence there is no logical basis for the usual practice of suddenly treating "purchased" goodwill (or the "purchased" Brooklyn Bridge) as an asset (or contra-equity) account to be depreciated in the future. Some accountants have correctly noted that "purchased goodwill" should be booked as a debit to equity—which would be replaced by the future profits if and when they are earned. "The amount assigned to purchased goodwill represents a disbursement of existing resources, or of proceeds of stock issued to effect the business combination, in anticipation of future earnings. The expenditure should be accounted for as a reduction of stockholders' equity." (Catlett and Olson 1968, p. 106).

[4]It might be added that the Cambridge Capital Controversy (Harcourt 1972) between some orthodox economists of Cambridge MA and some heterodox economists of Cambridge UK had mainly to do with the problems with using short-cut aggregate concepts of capital. These problems were resolved by the full-blown heterogeneous capital goods model of the Cambridge MA School (Samuelson and Solow 1956). Of course, neither Cambridge considered the fundamental-myth-based flaws considered here.

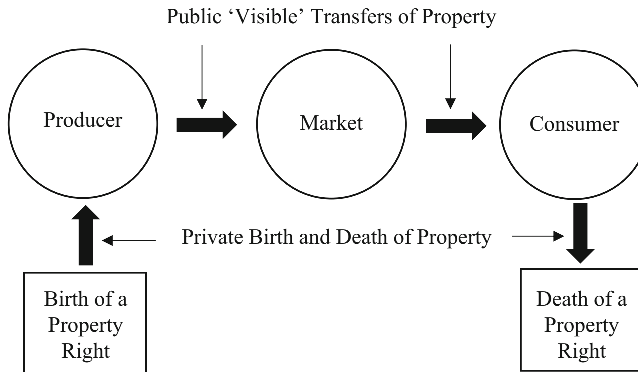

Fig. 3.1 The life cycle of a property right

productive resources like electricity, materials and half-finished products are used to create the final product or service.[5] In between the creation and termination of property rights, they are transferred or exchanged on the market. Thus, property has a life cycle which might be pictured as follows in Fig. 3.1 (note, however, that the "consumer" might be another firm "consuming" an intermediate good in the production of a final product).

The question of who becomes the legal owner of the newly created property is the question of the *appropriation* of an asset, i.e., establishing the initial property right to the asset. Moreover, the question of appropriation has an algebraic symmetry concerned with the death or termination of a property right. The termination of rights was an original meaning of "expropriation."

> This word [expropriation] primarily denotes a voluntary surrender of rights or claims; the act of divesting oneself of that which was previously claimed as one's own, or renouncing it. In this sense, it is the opposite of "appropriation". A meaning has been attached to the term, imported from foreign jurisprudence, which makes it synonymous with the exercise of the power of eminent domain. . . . (Black 1968, p. 692, entry under Expropriation)

Since "expropriation" now has this acquired eminent-domain meaning, the expropriation (termination) of rights to some assets such as an apple or the services of a car will be treated as the "appropriation of the liabilities for using up an asset such as an apple or the services of a car." This simply follows the practice in elementary arithmetic where the subtracting of a positive number, e.g., $-(+X)$, is the same as the addition of a negative number, e.g., $+(-X)$. Thus "subtracting a right to an asset" will be thought of as "adding the liability for the asset." Hence, we will speak only of "appropriation," but it is a *two-sided* question about the appropriation of assets on the plus side and the appropriation of liabilities on the minus side. It must be pointed out that this negative side of appropriation is one of the hardest concepts to

[5]Our focus is on commodities, rivalrous and excludable private goods, that are produced and consumed as a part of deliberate human activity—even though in the distant past there may have been endowments of unproduced goods.

understand; commentators constantly ignore it and then find fallacies in the arguments they misrepresent, e.g., "How can one party appropriate the entire output when there are costs to be covered?"

It is a remarkable fact—which itself calls for an explanation—that the conventional literature on the Economics of property rights does not even raise or *formulate* (never mind, answer) the question of appropriation about the mechanism for the initiation and termination of property rights in these normal activities. For example, the question is ignored in the so-called Economics of property rights (e.g., Furubotn and Pejovich 1974), in the so-called property rights approach to the firm (e.g., Hart and Moore 1990), in the Putterman and Kroszner anthology (1996) of papers on the "economic" nature of the firm, in the property rights literature of the new institutional Economics (e.g., Furubotn and Richter 1998), and in the law and economics literature (e.g., Cooter and Ulen 2004; Miceli 1999). Such a systematic neglect of the question of appropriation in normal production, like "the dog that didn't bark," calls for an explanation.

One reason for the neglect is that discussions of property creation tend to be restricted to a rather mythical state of nature (e.g., Locke) or original position. There is a huge philosophical literature on "original appropriation" as if it somehow settled all later questions of property. In fact, the history of property titles only determines to whom the liabilities are owned, not who should appropriate those liabilities in the first place.

The "economics of property rights" similarly looks at the "appropriation" of unclaimed or commonly owned natural goods (e.g., Cooter and Ulen 2004) but ignores the everyday matters of production and consumption of commodities where property rights are routinely created and terminated. For instance, Harold Demsetz (1967) considers how private property in land with fur-bearing animals was established as a result of the growth of the fur trade. John Umbeck (1981) considers how rights to gold deposits were created during the 1848 California gold rush on land recently ceded from Mexico. Yoram Barzel (1989) considers how the common property rights to minerals under the North Sea were privatized but ignores the assignment of initial rights in normal production (e.g., in his Chap. 5, "The formation of rights").

On the liability side, the law and economics literature (Calabresi 1970) looks extensively at the assignment of liabilities in the legal trials that may follow the *accidental* destruction of property in torts or crimes. But there is no attention to the mechanism for assigning the liabilities for the production inputs and consumption goods that are quite deliberately used up or consumed in normal activities where legal trials are clearly not the mechanism for liability assignment.

In the case of the product of production, there is a reason—albeit a mistaken one—for not formulating the question of appropriation. The fundamental myth dismisses the theoretical need for this discussion because it attaches the product rights to some pre-existing ownership of a capital asset or, simply, "the firm." Hence, the question of appropriation cannot even be properly formulated. And as noted, it is simple to see the fallacy; one only has to consider the result of renting the capital employed in production. The party who hired in the capital and paid for all the other

used-up inputs would have the legally defensible first claim on the produced output, not the owner of the capital asset to whom the rent was being paid as one of the input costs.

The simplest and crudest version of this fundamental myth is the assumption that the bundle of rights that constitute ownership of a capital asset includes the ownership of whatever product might be produced using that asset. Three modern statements of this version of the myth are:

- "a right of ownership-over-the-asset's-products, or *jus fruendi*" (Montias 1976, p. 116),
- the "right of usufruct [which] entitles the holder to the 'fruits' or 'produce' derived from an asset" (Furubotn and Richter 1998, p. 79), or simply
- "the right to the products of the asset" (Putterman 1996, p. 361).

The idea of an "asset's product," the "'produce' derived from an asset," or "the products of the asset" has a quaint and rather naïve nineteenth-century flavor. If each asset or input had an identifiable product, there would be no need for the development of marginal productivity (MP) theory in the late nineteenth century. As Paul Samuelson politely put it:

> One foolish principle, first suggested, said, "Give every input what it produces." In practice this broke down because nobody could decide what each input really produced. Social output is always the joint result of all inputs, just as the area of a rectangle depends on both altitude and base. (Samuelson 1948, p. 526)

It is particularly noteworthy that Furubotn and Richter (1998), as principal representatives of the so-called new institutional economics, could still be in thrall to the "foolish" idea of "the 'fruits' or 'produce' derived from an asset."

Yet another version of the fundamental myth is to take the "capital asset" as being a production opportunity as described in technical economics by a production function or a production set. Entrepreneurs are "bidding for ownership of the firms" and become the "owners of the productive opportunity" (Hirshleifer 1970, pp. 124–125). A proprietor may sell "the rights to the transformation function" or "his rights to the venture" (Fama and Jensen 1996, p. 341) to another proprietor. The entrepreneur is the "owner of a production function" (Haavelmo 1960, p. 210).

But the technological relationship between inputs and outputs (i.e., the "production function") in a productive opportunity is either public knowledge or is one of the private inputs that need to be acquired (e.g., in a technology licensing agreement) in order to undertake the productive opportunity. In a private property market economy, any party with the necessary inputs (including the technological knowledge, e.g., blueprints and engineering know-how) to undertake a productive opportunity does not need to additionally buy some hypothetical "ownership of the productive opportunity." That is only another form of the fundamental myth which serves to justify ignoring the actual mechanism for the appropriation of the assets and liabilities created in normal productive (and consumptive) activities.

The "Invisible Judge" Mechanism of Property Appropriation

Since Adam Smith, economic theory has worked to elucidate the invisible-hand market mechanism embodied in the price system. But the rights to commodities are not only bought and sold in the marketplace; those property rights had to be *initiated* at some point and will eventually be *terminated* in the life cycle of a property right.

The market *also* embodies an invisible-hand mechanism that governs the initiation and termination of property rights—but this mechanism seems to have been truly invisible in Economics due to the many forms of the fundamental myth.

When the legal system intervenes into the market, that can be seen as a visible-hand mechanism of appropriation. A typical example is a civil or criminal trial to assign the legal liability for property that has been destroyed. These trials illustrate the underlying juridical norm of the *responsibility imputation principle*: assign the de jure or legal responsibility to the person or persons who were actually de facto responsible for destroying the property.

The *invisible*-hand or market mechanism for the legal imputation of initial and terminal rights comes into play when there is no explicit trial. Then the visible hand of the legal authorities does not intervene. Then the legal authorities, in effect, render the laissez-faire judgment of "let it be." Using the Smithian metaphor, we might conceptualize "non-action" on the part of the legal authorities as the laissez-faire ruling of an *Invisible Judge* who always rules "let it be."

The two types of contracts where the role of the Invisible Judge is particularly important are the first and last transfer contracts in the life cycle of a commodity. When a purchased commodity is subsequently consumed, used up, or destroyed and the Invisible Judge lets it be, then the liability was, in effect, assigned or imputed to that last buyer. And when a newly produced commodity is first sold and the Invisible Judge lets it be, then the first property right was, in effect, assigned or imputed to the first seller. Thus, we have the

Market, Laissez-Faire, or Invisible Judge mechanism of appropriation:

> The property rights to newly produced commodities are assigned by the Invisible Judge to the first seller and the property liabilities for used-up commodities are assigned by the Invisible Judge to the last buyer. And, in a productive opportunity, the legal party who was the last buyer of the used-up inputs (and thus absorbed or paid off all the liabilities for the used-up inputs) will have the legally defensible claim on the produced outputs in order to be the first seller.

The laissez-faire mechanism applies to all cases when property is created or used up (when a court and visible judge does not intervene). When assets are consumed or otherwise used up and the Invisible Judge lets it be, then the liability for the used-up or consumed property is imputed to the last buyer (where those costs naturally lie if no intervention is made).

It is production, not consumption, where the important applications are made. One legal party purchases (or already owns from past purchases or activities) all the inputs to be used up in a productive opportunity. Those inputs are used up in production, and one legal party has already paid off those liabilities or will soon do so (e.g., "end of the week" wage payments). Then that party has the legally defensible claim on *all* the produced outputs, i.e., that party legally appropriates both

the negative and positive parts of the product, unless the legal authorities intervene to reassign both those liabilities and assets to some other party. Hence in normal production, when no such intervention takes place, then that one legal party in effect legally appropriates a bundle of legal rights and liabilities, the input-liabilities, and the output-assets. This laissez faire mechanism of appropriation is a *description* of how the market works; it is not a normative principle itself. The fundamental theorem of the property system states the conditions under which the descriptive market mechanism of appropriation operates correctly according to the normative juridical principle of imputation that governs the creation and destruction of property.

The recognition of the market mechanism of appropriation shows that the market has an underappreciated role in the property system, not just in the price system. It is not just for rearranging existing property rights in a more efficient way. In view of the widespread belief in some form of the fundamental myth, many supporters and critics of the current private property system have misplaced their focus. The pattern of appropriation is defined not by the ownership of property but by the pattern of contracts (which are, of course, influenced by the market power of monopolistic ownership). When the legal system validates or invalidates certain contracts, the property system is also transformed.

An appreciation of the market mechanism of appropriation helps to understand the implications of the legal system considering the human rental contact as valid. When employer and employees cooperate in a criminous enterprise, the Law sets aside the contract and looks at the underlying facts about de facto responsibility in order to assign legal responsibility accordingly. In a normal enterprise, the underlying facts do not change about the de facto responsibility of the people working in the enterprise. But the response of the Law changes. With no crime being committed and the human rental contract being considered valid, then the market mechanism takes over and the legal responsibility is, in effect, imputed by the Invisible Judge according to the contracts.

The Whole Product of Production

What is the "product of production" that is to be legally appropriated by some legal party? We have seen that the question of appropriation has both a positive and negative side since both assets and liabilities are created in production. Hence the right notion of "product" should include both that new assets *and* liabilities created in a productive opportunity. In spite of the widespread informal allegiance to the fundamental myth, the notion of product used in modern former literature is precisely a list or "vector" of the assets and liabilities created in production. The new output-assets are created as the positive elements in the list and the liabilities created by the using up of the inputs are listed as the negative elements.[6]

[6]For instance, as one technical monograph puts it: "Again we adopt the usual convention that a positive y_{ik} means that the *k*th producer has the *i*th commodity as output of his firm, while a negative y_{ik} means that the kth producer has the *i*th commodity as input to his firm." (Quirk and Rubin 1968, p. 8). In the words of microeconomics text: "A *production plan* is simply a list of net outputs of

For clarity in exposition, an ultra-simple but representative example will be used here:

- The output-assets +Q (e.g., so many widgets),
- the liabilities –K for the non-human inputs including the *services* of capital, land, and natural resources and other non-human inputs (e.g., the raw materials and components needed to produce widgets), and
- the liabilities –L for the human *actions* of the people working in the productive enterprise.

In plain language, by performing the actions L, the people working in the firm use up the various non-human inputs K in the production of the product Q. But in the human rental system, the actions L of the people working in the firm are represented as an "input" that "gets used-up." Thus, the list (Q, –K, −L) in our representative example is what is usually called the "input–output vector" (Quirk and Rubin 1968, p. 27), "production plan" (Varian 1992, p. 2), or just production vector. For reasons of historical recognition (Menger 1899), we will also call this list of output-assets and input-liabilities the *whole product*—which can be parsed into the sum of the *positive product* of output-assets and the negative product of input-liabilities. In the example, this is:

$$(Q, -K, -L) = (Q, 0, 0) + (0, -K, -L)$$

$$\text{Whole product} = \text{Positive product} + \text{Negative product}.$$

The question of appropriation can thus be formulated as: "Who is to appropriate the whole product in a productive opportunity?" The question splits into:

- a descriptive part: "Who *does* appropriate the whole product?" and
- a normative part: "Who *ought* to appropriate the whole product?"

The Descriptive Question of Appropriation

The descriptive question is answered in any private property market economy (where the human rental economy is a special case) by the market mechanism of appropriation previously described. In normal production, one legal party will purchase or already own all the inputs that are to be used up in the productive activity. When those inputs are consumed and the party is not reimbursed for them, then that party "swallows" or "absorbs" the liabilities, i.e., appropriates the negative product. And whichever party has already appropriated the negative part of the whole product will have the legally defensible claim on the positive part of the whole product. That is how the contractual fact pattern (who hires what or whom) determines the legal appropriation of the whole product—which is described in value terms as "residual claimancy."

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various goods. We can represent a production plan by a vector y. . ., where y_j is negative if the *j*th good serves as a net input and positive if the *j*th good serves as a net output." (Varian 1992, p. 2).

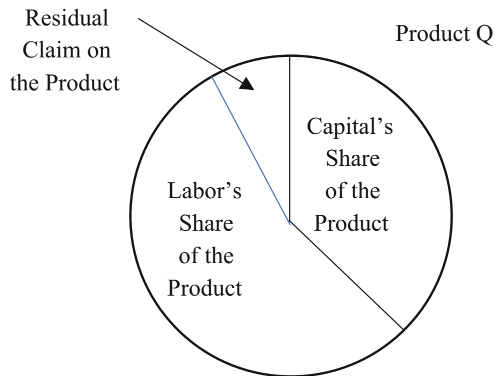

Fig. 3.2 Distributive shares metaphor

For reasons that will later become clear, the results of production are usually described as in Fig. 3.2 in metaphorical terms as the "distribution" of the product (i.e., the positive product or output-assets such as Q widgets) among the input-suppliers.[7]

But in terms of actual property rights, that is only the distributive shares *metaphor* since 100% of the input-liabilities and 100% of the output-assets are appropriated by one legal party—who would thus be called the "firm" (in the going-concern sense). One cannot subtract the liability for so many hours of using a widget-grinding machine from the output-assets of so many widgets since they are different commodities like "apples and oranges." Thus, there is no "residual" at the level of property assets and liabilities. The phrase "residual claimant" can be misleading since that one party pays 100% of the expenses for the input-liabilities and gets 100% of the revenues from the output-assets, and the "residual" is the difference in monetary value.

The distributive shares metaphor is only a picturesque way of seeing the product or its value as being split, as-if in a partnership, between the input-suppliers. In the same manner, one could see the value of the product of a slave plantation as being split between the masters and slaves, the as-if partners in the enterprise. The masters get a certain part of the plantation's income as do the slaves (in the form of food, clothing, and shelter). The distributive shares picture focuses on the relative size of the shares so that morally sensitive and progressive commentators in antebellum times could promote an increased share of the plantation's income going to the slaves.

As the field of Political Economy, e.g., John Stuart Mill (1970 [1848]), changed into the field of Economics, e.g., Alfred Marshall (1890), the topic of "Property" was defined out of the field—so that conventional economists could just avoid any discussion of property by pleading "It's just not Economics." After all, as the fields of the social sciences have been determined in the modern university, the Economics Department is in the school of arts and sciences, while the study of law is in a separate law school. How can Economists be expected to know anything about some

[7]That analysis is of the functional distribution, not the personal distribution, of income among factor suppliers.

legal principle such as the juridical imputation principle in the world of Economics? An Economics Nobel laureate could say to me in private correspondence, "Needless to say, the 'legal' aspects of all this are beyond me"—as if he could not figure out that one legal party pays off 100% of the input-liabilities and owns 100% of the produced outputs (i.e., legally appropriates the whole product) and could only conceptualize the problem in his words as "ways of imputing output to inputs," i.e., the distributive shares metaphor. Prior to the marginalist revolution and the ascendency of the distributive shares metaphor as dogma, a political economist could still state the simple legal facts.

> 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. Being equally, however, the owner of the labour, so purchased, as the owner of the slave is of that of the slave, the produce, which is the result of this labour, combined with his capital, is all equally his own. In the state of society, in which we at present exist, it is in these circumstances that almost all production is effected: the capitalist is the owner of both instruments of production [DE: i.e., having paid off all the input-liabilities]: and the whole of the produce is his. (Mill 1844, Chapter I, section II)

These legal facts about property rights do not deny that in terms of value, the slaves get a share of the value of the product as their real income (food, clothing, and shelter) and similarly for rented workers.[8]

Another common reaction to pointing out these legal facts to the clerics of Economics is that the facts are only the superficial legalisms, while the distributive shares metaphor reveals deeper economic realities—i.e., how much of the product goes to the employees in the human rental firm or how much of the product goes to the slaves in a slave plantation. When facts are dismissed as "superficial" and metaphors are considered as "deep," then at least one does not have to wonder if it is science or ideology that rides high in the saddle for conventional Economics. The philosopher Richard Rorty has argued against the traditional notion of an "underlying reality" in favor of seeing "truth" along with Nietzsche as "a mobile army of metaphors" (Rorty 1989, p. 17). Much of neoclassical economics already is "a mobile army of metaphors" so, by those standards, it must be very near to the "truth."

The Normative Question of Appropriation

In a jury trial, presided over by a visible judge, the job of the jury is not to make law but to make the official decision about the facts, i.e., whether or not the defendant is factually guilty as charged. Once that question of factual or de facto responsibility is officially settled by the jury's decision, then the legal or de jure responsibility is assigned or imputed accordingly. The underlying principle was explicit from antiquity, e.g., in the Latin expression: "*Iustitia, quae suum cuique distribuit*" or "Justice

[8]There have even been rather pathetic debates within Economics (Fogel and Engerman 1974; David et al. 1976) about whether or not the slaves in effect received the value of their marginal productivity.

Table 3.1 Type I and Type II injustices

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

renders to everyone his due" (Cicero, *De Natura Deorum*, III, p. 15) down to modern times.[9] We will state it simply as:

Juridical principle of imputation: Assign legal responsibility according to factual responsibility.

Among jurisprudents, the imputation principle has been most extensively analyzed by Hans Kelsen (1881–1973) who considered it as basic as, but distinctive from, the cause and effect law of nature.

> Imputation, implied in the concept of responsibility, is the connection between a certain behavior, namely a delict, with a sanction. Therefore it is possible to say: the sanction is imputed to the delict, but the sanction is not "effected by" (is not "caused by") the delict. It is obvious that the science of law does not aim at a causal explanation of the legal phenomena delict and sanction. In the rules of law by which the science of law describes these phenomena, it is not the principle of causality which is employed, but another principle that we designated as imputation. (Kelsen 1967, p. 81)

Table 3.1 illustrates the two opposite ways the imputation principle can be violated:

- Type I violation when a factually guilty person is found legally innocent (or, in Kelsen's terms, the delict is present, but the sanction is not legally applied), and
- Type II violation when a factually innocent person is found legally guilty (i.e., there is no delict, but the sanction is legally applied).

Both violations of the principle are considered as miscarriages of justice.

When there is no violation of the law to occasion a legal trial, then the same principle still applies. Moreover, the principle applies to both positive and negative outcomes. Our concern here is not the application of the juridical principle to torts or crimes but to the appropriation of property, i.e., to newly created assets and liabilities.

[9]One legal scholar formulated it as follows: "[This] is itself a principle about natural responsibility, and so, as a guide for adjudication, unites adjudication and private morality and permits the claim that a decision in a hard case, assigning responsibility to some party, simply recognizes that party's moral responsibility." (Dworkin 1985, p. 288).

In this property application, the juridical principle is only a modern formulation of the old *natural rights* or *labor theory of property*, the principle that people should appropriate the positive and negative fruits of their labor.[10] Some legal scholars have also seen the labor theory of property as the property-theoretic version of the juridical principle of imputation.

> [T]he libertarian entitlement thesis, to the effect that persons are entitled to retain the fruits of their labor, and the libertarian thesis about outcome-responsibility, to the effect that persons are responsible for the harms that they cause, are two sides of the same coin. ... The basis of this unity is the idea that people "own" the effects, both good and bad, that causally flow from their actions. (Perry 1997, p. 352)

Actually, the connection between the Lockean "fruits of one's labor" narrative and the imputation principle was made over a century ago in orthodox apologetics. John Bates Clark (1899) constructed a metaphorical distributive shares interpretation of marginal productivity (MP) theory using Lockean language that became part of orthodoxy, e.g., "The basic postulate on which the argument rests is the ethical proposition than an individual deserves what is produced by the resources he owns." (Friedman 1962, p. 196). Friedrich von Wieser (1930 [1889]) constructed a metaphorical interpretation of MP theory using the language of imputation and the responsibility principle. Since both schemes build metaphorical interpretations of the same MP theory (where all resources are treated as "responsible" for the product that was "produced by the resources"), the entitlement-responsibility connection was there all along in orthodox apologetics.

Perhaps the biggest moral idiocy of Marxism is its attack on the idea of private property. Far from implying the abolition of private property, the labor theory of property might paraphrase Gandhi[11] to say:

> It *would* be a very good idea to have a *real* private property market economy based on the principle of people legally appropriating the positive and negative fruits of their labor—instead of the property-as-theft system we have now based on the fraudulent and inherently invalid contract for the renting of human beings.

The Facts about Production

The same facts previously emphasized in the context of analyzing the human rental or employment contract can now be analyzed from the point of view of property appropriation. The most basic fact is that only persons (and not things) can be factually responsible for anything. In any given economic enterprise, the people working in the enterprise (white collar and blue collar, labor as well as management) are factually and jointly responsible for the assets and liabilities created in the activity of the productive enterprise. In our representative example, by performing

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[10]See, for instance, Schlatter (1951) for the history of this theory of property which is usually traced back at least to John Locke, but is the essentially the property-theoretic application of the ancient principle that "Justice is to give everyone their due."

[11]The perhaps apocryphal quote attributed to Gandhi is that when asked "What do you think of Western civilization?", he replied "I think it *would* be a very good idea."

Table 3.2 Imputation principle violation under the employment system

Labor de facto responsible for	(Q, −K, 0)	= labor's product
Labor legally appropriates	(0, 0, L)	= labor commodity
Labor responsible for but does not appropriate	(Q, −K, 0) − (0, 0, L) = (Q, −K, −L)	= whole product.

the labor L, the people working in the enterprise use up the services of the things represented as K and produce the outputs represented as Q. Thus, the product of the labor L is the list or vector (Q, − K, 0) which might be called *Labor's product*. Thus, by the imputation principle interpreted as a principle of property appropriation, the legal party consisting of all the people working in the enterprise should legally appropriate Labor's product. Of course, it is the firm as a legal entity that legally appropriates +Q and legally bears the liabilities – K, so the imputation principle implies that the people working in the firm should be the legal members (also known incorrectly as "owners") of the firm.

However, in the human rental system, the people are only recognized as producing the labor L seen as a commodity, i.e., (0, 0, L) as a list or vector, which is then sold by the employees to the employer (e.g., the employing corporation) in the employment contract. Hence the people working in the enterprise ought to appropriate Labor's product (Q, − K, 0) but only appropriate (0, 0, L) so they are factually responsible for but do not legally appropriate the difference—as illustrated in Table 3.2.

This property-theoretic misimputation correlates with the fraudulent nature of the human rental contract. That contract legally pretends that factual responsibility can be transferred from the employees to the employer so that the employer would both legally and rightfully appropriate the whole product. But the inalienability of factual responsibility means that the people working in the enterprise are, regardless of their legal status, still jointly de facto responsible by their actions L for producing Q by using up K, i.e., for producing Labor's product (Q, –K, 0). Thus, the contractual inalienability of factual responsibility leads to the property-theoretic misappropriation of the whole product by the legal party serving as the employer. That is how the analysis of contracts given in Part I dovetails with the analysis of property here in Part II (the theoretical result that connects the market contracts to the productive appropriation is given later as the "fundamental theorem of property theory").

It should be noted that the whole argument is independent of the legitimacy or illegitimacy of the prior ownership of the non-labor inputs K. That ownership only determines to whom the liability –K is owed. The legitimacy of the ownership of K would depend on the prior history of how that ownership was acquired.

It should also be noted that the argument given here is not the one often attributed to "labor leaders."

> Labor leaders used to say, "Without any labor there is no product. Hence labor deserves all the product." Apologists for capital would reply, "Take away all capital goods, and labor scratches a bare pittance from the earth; practically all the product belongs to capital."

> Analyze the flaws in these arguments. If you were to accept the arguments, show that they would allocate 200 or 300 percent of output to two or three factors, whereas only 100 percent can be allocated. How does the neoclassical marginal-productivity theory resolve this dispute? (Samuelson and Nordhaus 2010, p. 246)

The distributive shares picture has conquered Economics "as completely as the Holy Inquisition conquered Spain" (Keynes 1953, p. 32). Economists are now professionally committed to working within the distributive shares metaphor about how to "allocate. . .[the] output to two or three factors." Insofar as economists might wish to consider the legal facts instead of metaphors, then the fact is that one party always appropriates 100% of the outputs produced, *and* that one party *also* legally bears 100% of the liabilities for the used-up inputs (i.e., the energy, raw materials, intermediate goods, and the services of land, labor, and capital). The liabilities for the used-up inputs and the produced assets constitute the "production vector" or what we have called the "whole product."

The real question passed over in Economics is not the proper metaphorical distributive shares in the produced outputs. The real and prior question is who is to appropriate the whole product in the first place, i.e., who is to be the firm (Capital, Labor, the State, or whoever)? And the normative answer given by the usual juridical principle of imputation is that those assets and liabilities should be legally assigned to the human beings who transformed those inputs into those outputs.

While economists seem professionally incapable of thinking outside the distributive shares box, it is possible for some other social scientists to understand the actual 100% ownership of the product by the employer (as well as bearing 100% of the production costs or liabilities).

> 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 1916, pp. 65–66).

Not being bound by the professional learned ignorance of Economics, a sociologist is able to state what holds "in actual fact" over a century ago—while my Economics Nobel Laureate correspondent can only display the learned ignorance: "Needless to say, the 'legal' aspects of all this are beyond me." Other economists who are "unprofessional" (in the sense of not be bound to the conventional dogmas) and who have actually run a business are quite able to understand the labor theory of property and its implications for the firm.

> Let me state most emphatically that what I call the Labor Theory of Right leads to employee ownership, not to profit sharing. Profit is, as we have repeatedly noted, a residual. It is systematically unpredictable. It is, nevertheless, affected by decisions regarding everything from product development to marketing. The interests of laborers and owners in such decisions are rarely identical; sometimes they are diametrically opposed. In profit sharing, conflicts are resolved in favor of owners. When laborers and owners are the same people, decisions can turn on the interests of the enterprise rather than on class advantage. Decisions

may still turn out to be right or wrong, but they will be so for everyone. There will be neither scapegoats nor windfall profiteers. (Brockway 1995, p. 303)

Indeed, the response of orthodox Economists to these arguments is something like this.

Please, we're economists; we can't talk about property rights and contracts or some so-called "juridical principle of imputation." We are not law professors. That's not even part of Economics. To an Economist, what you probably mean to say is that workers produce more value than they are paid—and we largely agree with you since markets are far short of the competitive ideal, their marginal productivity, as is correctly pointed out by progressive economists such as Stiglitz, Piketty, Galbraith, Krugman, and Atkinson as well as by leading progressive philosophers such as Rawls. But in the ideal competitive case, workers are paid the value of their marginal product so workers then "reap what they sow." Therefore, we should make markets more competitive so workers will really be paid the full value of their marginal product, and then your concerns about justice—which we, of course, share—will be satisfied.

Thus, we turn to the theory that supposedly shows that workers "reap what they sow" in the ideal competitive model.

3.2 Marginal Productivity Theory

Marginal Productivity Theory as Apologetics for Human Rentals

The principal attempt by conventional Economics to justify the human rental system is the theory of marginal productivity theory. The problem is not with MP theory as a theory of the demand for *genuine* commodities used as inputs, but with its ideological-normative use to attempt to justify the human rental relation where responsible human actions are treated simply as casually efficacious "inputs" to production.

Interestingly, the normative version of MP theory tries to use the *same* normative imputation principle—but with a few "changes." In that regard, the MP theoretic attempt to legitimize human rentals and the critique of human rentals *both* appeal (broadly speaking) to the *same* normative imputation principle.

One of the earliest and most explicit treatments of MP theory as a property-theoretic application of the imputation principle was made by John Bates Clark (1837–1938).

When a workman leaves the mill, carrying his pay in his pocket, the civil law guarantees to him what he thus takes away; but before he leaves the mill he is the rightful owner of a part of the wealth that the day's industry has brought forth. Does the economic law which, in some way that he does not understand, determines what his pay shall be, make it to correspond with the amount of his portion of the day's product, or does it force him to leave some of his rightful share behind him? A plan of living that should force men to leave in their employer's hands anything that by right of creation is theirs, would be an institutional robbery—a legally

> established violation of the principle on which property is supposed to rest. (Clark 1899, pp. 8–9).[12]

Our chosen antagonist, Frank Knight, chastises Clark for being so explicitly normative.

> To begin with, let us insist on the complete separation of the theory of distribution proper from certain sweeping moral and social dogmas, which have been deduced from it. Professor J. B. Clark, the leading American exponent of the theory, is partly responsible for this confusion, through a few unguarded paragraphs in "The Distribution of Wealth." (Knight 1956, p. 109, fn. 1)

But then Knight turns around to make the same ethical argument about justice in his own more guarded words.

> The primary ethical claim on behalf of free enterprise as a mechanism of economic organization is that it leads to this result, i.e., that under this system the "individual" gets the consequences of his own activities, takes out of the social enterprise what he puts into it. (Knight 1947, p. 48)
>
> The analysis [of market competition] shows how, under the conditions necessary for its existence, this organization achieves *efficiency* in the utilization of resources and *justice* in the distribution of the total product, efficiency being defined by the ends chosen by individuals and justice by the principle of equality in relations of reciprocity, giving each the product contributed to the total by its own performance ("what a man soweth that shall he also reap"). (Knight 1956, p. 292)

And with varying degrees of explicitness, the same point about what holds in competitive equilibrium is repeated in the textbooks.

> The basic postulate on which the argument rests is the ethical proposition that an individual deserves what is produced by the resources he owns (Friedman 1976, p. 199)

In the sense of "imitation is the sincerest form of flattery," Economics has already paid homage to the juridical imputation principle by appealing to it in the only way it could—in a metaphorical way.

> Under "perfect competition" it is theoretically true that the income share paid to the individual who furnishes any unit of productive service is equal in market value to the share of the social product causally imputable to that unit of productive service as its contribution to the total. (Knight 1947, pp. 6–7)

This is how Economics tries to co-opt a bastardized version of the juridical principle of imputation. Thus, in a sense, the debate between human rentals and workplace democracy is not really about the normative principle but about which argument correctly applies the principle to the actual facts and which only weaves a metaphorical story about "the economically responsible factors" (Wieser 1930, header on p. 77) as opposed to non-metaphorical legally or morally responsible agents.

Like the weaver's warp and woof, one metaphor requires another for the "whole cloth" to hold together. The imputation interpretation of marginal productivity

[12]It should be noted that John Bates Clark uses the notion of an "institutional robbery—a legally established violation" so he was not talking about ordinary theft or even wage theft in the sense of not paying for all of an employee's time worked.

theory (pioneered by Friedrich von Wieser and John Bates Clark) uses one metaphor to justify another metaphor. Instead of the actual legal facts that each owner of a rented factor owns 0% of the product (and owes 0% of the liabilities), each such owner is "pictured" as getting a share of the product in terms of the rental payments. And, under appropriate competitive conditions, the two metaphors match; each factor "gets what it produces." By using one metaphor to prop up another, human rental apologetics can "slip the surly bonds" of reality and soar freely in the metaphorical void.

Mistake #1: Treating Human Actions and the Services of Things As Alike
The actual juridical principle of imputation applies to the responsible actions of persons, not to the non-responsible but causally effective services of things. People are responsible agents, and things can only be causally effective. The shovel contributes to the amount of dirt dug up, but it not responsible for the digging. The juridical principle of imputation can only be applied to responsible persons, but not to causally efficacious things.

> A *person* is the subject whose actions are susceptible to imputation. . . . A *thing* is something that is not susceptible to imputation. (Kant 1965 (1797, pp. 24–25))

There are two ways to treat human actions and the services of things alike: promote the services of things as being like responsible actions (e.g., as in the pathetic fallacy) or demote human actions to being like the causally effective services of things. The first metaphorical ploy is often used in the informal and picturesque literature: "Together, the man and shovel can dig my cellar" and "land and labor together produce the corn harvest" (Samuelson 1976, pp. 536–537). Non-metaphorical statements would be that "a man uses a shovel to dig my cellar" or that "farmers use land (and other inputs) to raise the corn harvest." MP theory supposedly solves the problem of imputing shares of the product to the "cooperating" inputs as if they were all responsible agents.

> Now the riddle of the Sphinx—how to allocate among two (or more) cooperating factors the total product they *jointly* produce—can be solved by use of the marginal-product concept. (Samuelson 1976, p. 541)

But the more standard treatment in conventional Economics is to demote the responsible human actions of employees to being just another causally efficacious service "employed" or "activated" by the all-responsible employer or entrepreneur.

Frank Knight is perhaps the most explicit in this regard.

> It is characteristic of the enterprise organization that labor is directed by its employer, not its owner, in a way analogous to material equipment. Certainly there is in this respect no sharp difference between a free laborer and a horse, not to mention a slave, who would, of course, be property. . . . We must not confuse the agency actually performing the work [DE: the employer] with the personality of its owner [DE: the employee], and it appears that a tool or a building or a piece of land is in this regard similar to a man's [DE: an employee's] hand or brain. (Knight 1965, pp. 126–127)

In ordinary life, treating other persons as things like "a tool or a building or a piece of land" would be considered a form of moral insanity. But in view of the physics envy

(Mirowski 1989) of Economics, it is a hallmark of being scientific. In our simple example of a production vector (Q, –K, −L), the actions L of persons were treated separately from the services K of things. But in most of the technical literature, a production function $y = f(x_1,\ldots,x_n)$ or a production vector might be written as $(y, -x_1,\ldots, -x_n)$ without even a symbolic distinction between the services of things and the actions of persons.

In other contexts, such as the definition of "Pareto optimality," economists show awareness of the person-thing distinction by only considering the utility function or preference ordering of persons and never revealed "preference orderings" of the lower animals such as Knight's "horses" or other things such as "material equipment." But when it comes to describing the human rental system and making it appear scientific and natural, economists treat human actions and the services of things alike as being causally effective services in the employ of the employer.

Mistake #2: Applying the Imputation Principle to the Services of Things

In ordinary life, conventional economists understand perfectly well that legal or moral responsibility can only be imputed to persons, not to things. If an economist is called in for jury duty concerning a murder committed with a gun, we can be assured that the economist will not ask: "Why isn't the gun also put on trial since it was partly responsible for the crime?"[13] It is only in their professional role as safe and sane social scientists in service to the human rental system that economists are "called upon" to "forget" the distinction between the responsible actions of persons and the causally efficacious but non-responsible services of things.

One of the founders of MP theory, Friedrich von Wieser (1851–1926), explicitly recognized the distinction.

> The judge . . . who, in his narrowly-defined task, is only concerned with the legal imputation, confines himself to the discovery of the legally responsible factor,—that person, in fact, who is threatened with the legal punishment. On him will rightly be laid the whole burden of the consequences, although he could never by himself alone—without instruments and all the other conditions—have committed the crime. The imputation takes for granted physical causality. (Wieser 1930, p. 76)

Wieser goes on to spell out a reasonably clear version of the implications of the imputation principle for appropriation in production.

> If it is the moral imputation that is in question, then certainly no one but the labourer could be named. Land and capital have no merit that they bring forth fruit; they are dead tools in the hand of man; and the man is responsible for the use he makes of them. (Wieser 1930, p. 79)

It has been repeatedly emphasized that the professional defenders of the human rental system do not judge the system according to some normative principles; they

[13]The marginal productivity of a thing like a tool of the trade is a technical characteristic of the thing and has nothing to do with the owner being active or passive, virtuous or not, or even alive or dead. As Samuelson puts it: "Note that the man who owns land does not have to be a particularly deserving citizen in order to receive this rent. A virtuous and poor landowner will be given exactly the same rent by competition as will a wealthy wastrel. It is the productivity of the acre of land that is being paid for, and not the personal merits of the landowner." (Samuelson 1976, p. 562).

judge normative principles according to whether or not the principles are compatible with the system. If some purported principle conflicts with the system, then that is akin to a *reductio ad absurdum* so, clearly, the purported principle is not valid.

Thus, instead of noting that the human rental system was incompatible with the principle of moral or legal imputation, Wieser tries to turn that "bug" into a "feature" by postulating that a *different* notion of "imputation" is clearly needed in Economics.

> In the division of the return from production, we have to deal similarly … with an imputation, – save that it is from the economic, not the judicial point of view. (Wieser 1930, p. 76)

Instead of considering the legally or morally responsible factors (which could only be the people involved in the enterprise), economists need to deal with the "economically responsible factors" (Ibid., header on p. 77) which erases the distinction between responsible human actions and the "physical causality" of the services of things.

Mistake #3: Misframing the Question of Imputation in the First Place
We have previously emphasized the algebraic symmetry in the concept of the "whole" product. The metaphors of MP theory focus on dividing the output-pie or, in value terms, dividing the revenue-pie between the various inputs. But there is the symmetrical matter of metaphorically imputing the cost-pie (value of input-liabilities) between the outputs—as if the outputs were responsible agents using up the inputs and thus creating those liabilities or costs. The usual economical reasoning works symmetrically in both ways.

In MP theory, the idea is to impute to the marginal and thus each unit of an input the value of the extra output (the marginal value product) that can then be produced. And in competitive equilibrium, the marginal value productivity of each commodity input will equal its market price.

Symmetrically, economic theory can impute to the marginal unit of the output the value of the extra inputs (the marginal cost) that must be used up to produce that output. And in competitive equilibrium, the marginal cost of the output is equal to its market price.

Thus, one can metaphorically picture the input-liabilities as being imputed to the outputs (as if the outputs were responsible agents using up those inputs) just as economists routinely picture the output-assets as being imputed to the inputs (as if the inputs were all responsible agents).

There is no technical error in these results. The marginal value productivity and marginal cost represent the mathematical notion of a Lagrange multiplier in a constrained optimization problem (Ellerman 1984). But as a picture of the imputation of output-assets to inputs or the symmetrical imputation of input-liabilities to outputs, it is only a metaphor parading as if these were according to the legal/moral imputation principle.

Insofar as Economists (or other *aficionados* of the pathetic fallacy) might somehow be motivated to consider the actual facts about imputation in production, there is:

- no legal imputation of the output-assets to the input-suppliers and
- no legal imputation of the input-liabilities to the output-demanders.

Instead, there is a single legal party that stands between the input-suppliers and the output-demanders, and that legal party, by virtue of the market mechanism of appropriation, legally appropriates 100% of the input-liabilities and 100% of the output-assets, i.e., that legal party legally appropriates the whole product of the enterprise. Those are the legal facts. But Economics prefers to avoid the legal facts in favor of a metaphorical interpretation of the applied mathematics of constrained optimization.

As the application of the juridical principle of imputation applied to property appropriation, the labor theory of property does not give a different demand price (or, technically, Lagrange multiplier) for labor *treated as a commodity* (i.e., as a mere causally efficacious factor). It addresses a different question altogether and implies that labor should not be treated as a commodity (in the invalid human rental contract) in the first place. It is doubtful that many orthodox Economists are willing to grasp this point since it challenges and reframes the distributive shares narrative that has been fixed in the Science of Economics for well over a century. Economists will always tend to map the argument back into the distributive shares framing (as if the argument was that labor was the only causally efficacious factor).

What is that different question? The non-metaphorical question of appropriation is:

"Who is to be that whole product appropriator (i.e., the firm as a going concern) in the first place:

- the employer (e.g., "Capital" or the entrepreneur) as in the private human rental system,
- Labor (i.e., all the people working in the enterprise) as in the system of workplace democracy, or
- the Government (in the various public human rental systems of socialism or communism).[14]

The usual question addressed by MP theory is the *question of distribution*, the size of the distributive shares going to the various factors of production (e.g., how the plantation income is split between the masters and slaves). The prior question of

[14]Much ink has been spilt by Knight (1965) and others on the near tautology that the party who "bears the risks" (i.e., appropriates the negative product) should also appropriate the positive product. Of course, *one* party appropriates the *whole* product (i.e., both the positive and negative products). The real question is: who is to be that one party? The descriptive answer is whichever party takes on the contractual role of buying or hiring the necessary inputs—but that almost always involves the juridically invalid contract to rent human beings. With that contract abolished, the answer to the question of who is to appropriate the whole product is "the people who produced it"—as is shown in the fundamental theorem for the property system.

"Who is to be the firm (in the going concern sense) in the first place?" might be called the *question of predistribution*.[15]

The non-metaphorical principle of imputation answers *that predistributive* question since all the people working in an enterprise are *jointly* factually responsible for using up the input commodities and for producing the outputs. The non-metaphorical imputation principle thus does *not* propose a different price than MP theory for human actions treated as an alienable commodity; it implies that human actions should not be treated as a marketable commodity in the first place. It implies that the legal party consisting of the people working in the enterprise should be the members of the firm, not a rented input to the enterprise.[16] Thus, the property-theoretic analysis gives the same result as the previous analysis of the invalidity of the human rental contract.

Contemporary "Criticism" of MP Theory

We have seen how the criticism of MP theory took us outside the conceptual orbit of conventional and even heterodox and progressive economics by invoking concepts of juridical imputation which applies only to persons and not to things regards of the "productivity" (in the sense of causal efficacy) of the things. Even though these concepts were correctly described by the juridically trained Austrian economist, Fredrich von Wieser, in 1889, the notions quickly and unsurprisingly passed out of the Economics literature and are not found (to the author's knowledge) in any Economics text or monograph throughout the nineteenth or twentieth century.[17] Even other Austrian economists, such as Eugen Böhm-Bawerk, were quite explicit that the responsible actions of persons are to be treated just like causally "activated" services of "corporeal goods."

> We must conceive of the *act of utilization of goods* as follows. Regardless of their form, all corporeal goods undergo utilization by virtue of the activation for the delivery of useful renditions of service of the forces of nature residing in them. This is no less true if the corporeal goods are persons or living creatures than it is if they are things. It applies with equal truth to the ditch-digger, the porter, the operator of a machine, to beasts of burden and other animals, such as a draft horse or a watchdog. In their case, just as in that of inanimate corporeal goods, it is the concrete activations of "harnessable" or "tractable" inherent forces of nature or renditions of power which yield to man the usefulness which he derives from these corporeal goods. (Böhm-Bawerk 1962, pp. 67–68)

[15]The phrase "predistribution" is due to Jacob Hacker (2011) but it was Branko Milanovic who suggested the application to worker ownership. For instance, legislation to increase worker ownership through Employee Stock Ownership Plan (ESOPs) or worker cooperatives is predistributive while raising taxes on the 1% is redistributive.

[16]Thus, all the economic and philosophical discussions about the justice of size of the income a worker gets from their enterprise are addressing the wrong question. The basic question is whether the income is received as the rental rate in a human rental contract or as a member's share of the net value added in a democratic firm.

[17]A communist government might well be envious of the degree and duration of such thought control in the Economics profession—where economists think of themselves as undogmatic free thinkers and even social scientists.

Economists, to do their professional duty, cannot recognize the "activation" of services from "corporeal goods" such as workers as the de facto responsible actions of persons. However, Wieser himself repeats in a later book his point about the non-metaphorical juridical principle of imputation in the case of criminous actions.

> As soon as the judge has established the causal nexus and the presumption of sanity, he is bound to attribute the entire result to the accused. This is true even though he may know very well that the accused could never have accomplished it alone without instruments and without the peculiar contributing circumstances. (Wieser 1927, p. 115)

Perhaps people become robots or automatons when their actions are not criminous? In the case of production, it should also be noted that the imputation is for not only the positive (output-assets) results but also for the negative (liabilities for used-up inputs) results since as Wieser put it: "Land and capital have no merit that they bring forth fruit; they are dead tools in the hand of man; and the man is responsible for the use he makes of them."

The criticism based on the juridical principle of imputation (or labor theory of property) and on the distinction between responsible human actions and the non-responsible services of things is absent not only in conventional Economics but is not to be found even in the most progressive literature such as Stiglitz (2012), Galbraith (2012), Piketty (2014), Atkinson (2014), Keen (2011, Chap. 6), Thurow (1975, Appendix), or even Rawls (1971)—who tend to focus on today's extreme inequality of wealth and income.[18] None of these writers has a *theory* to criticize MP theory per se as a theory about imputation. Remarkably, some even explicitly accept the whole ruse of MP theory as representing the principle of people getting the fruits of their labor!

> Accepting the marginal productivity theory of distribution, each factor of production receives an income according to how much it adds to output (assuming private property in the means of production). In this sense, a worker is paid the full value of the results of his labor, no more and no less. Offhand this strikes us as fair. It appeals to a traditional idea of the natural right of property in the fruits of our labor. Therefore to some writers the precept of contribution has seemed satisfactory as a principle of justice. (Rawls 1971, p. 308)

Rawls and the other progressive commentators go on to "criticize" only the empirical applicability to the existing economic system—which leaves the MP theory standing as a distributive *ideal*. Rawls, as a moral philosopher, surely understood the difference between the responsible actions of persons and the mechanical causality of the services of things, but he did not bring that distinction to bear on his treatment of MP theory. Rawls, who was considered as the leading progressive moral philosopher, adds conceptual insult to moral confusion by saying that MP theory would lead to a "just outcome" if the "underlying market forces were "appropriately regulated."

> The marginal product of labor depends upon supply and demand. What an individual contributes by his work varies with the demand of firms for his skills, and this in turn varies

[18]We might take a time machine back to the era of slavery to consider the reaction of morally sensitive intellectuals to the similarly extreme inequality of income and wealth between masters and slaves. Certainly, a universal basic income would have helped.

> with the demand for the products of firms. An individual's contribution is also affected by how many offer similar talents. There is no presumption, then, that following the precept of contribution leads to a just outcome *unless* the underlying market forces, and the availability of opportunities which they reflect, are appropriately regulated. (Rawls 1971, p. 308 [emphasis added])

The economic "critics" stay within the framing of the competitive paradigm by pointing out all the ways in which the actual economy falls short of the competitive ideal:

- markets in general and labor markets, in particular, are far from being perfectly competitive;
- information imperfections abound which undercut the informational assumptions behind the competitive model;
- there are great difficulties in actually measuring "marginal productivity" at the firm level;
- most economic decision-making is not governed by the rational maximization of the neoclassical theory; and
- all of this adds up to an economy suffused with non-competitive rents and rent-seeking behavior.

All this was acknowledged long ago by sophisticated defenders of the system of human rentals such as Frank Knight.

Knight was quite clear that the competitive model should *not* be seen as a descriptive model of the existing economy—but as an ideal model to shape *and limit* the permitted policy suggestions to: "How can we more closely approximate the ideal of a perfectly competitive economy?"

> Economic theory is not a descriptive, or an explanatory, science of reality. Within wide limits, it can be said that historical changes do not affect economic theory at all. It deals with ideal concepts which are probably as universal for rational thought as those of ordinary geometry. (Knight 1969, p. 277)

Hence all the *empirical* "criticism" of MP theory by progressive and heterodox economists is:

- beside the point since MP theory is not intended as a "descriptive" theory,
- stays within the framing for reforms ("How to better approximate the competitive ideal?"), and
- leaves MP theory untouched as the distributive *ideal* in the competitive case.

The Fundamental Theorem of Property Theory

Economic and legal institutions can be evaluated according to certain norms. In the economics of the price system, the norm is allocative efficiency (also called "Pareto optimality"). The fundamental theorem of price theory states that under certain assumptions (e.g., no externalities and complete futures markets), a competitive equilibrium in the price system is allocatively efficient, e.g., (Arrow 1951).

We have seen that underlying the invisible-hand mechanism of the price system is the invisible judge mechanism of the private property system, the market mechanism of appropriation. The corresponding fundamental theorem of property theory states

that under certain natural conditions about the property transfers in the market (essentially no thefts and no breaches), the market mechanism of appropriation functions correctly according to the juridical imputation principle, i.e., the invisible judge makes the correct imputations.

It is useful to put historical tags on the external conditions about transfers and on the internal conditions about appropriation. The conditions on transfers—no property transfers without consent (no thefts) and no breaches of contracts—will be called "Hume's conditions" because of his emphasis on *"transference by consent,* and *of the performance of promises.*" (Hume 1978 (1739), Book III, Part II, Section VI, p. 526). The responsibility principle concerning appropriation might be called the "Lockean principle." Then the fundamental theorem then takes the form: "Hume implies Locke."

Fundamental theorem for the property mechanism:

> If there are no breaches and no property transfers without consent in the market contractual transfers, then the market mechanism of appropriation imputes legal responsibility in accordance with de facto responsibility, i.e., operates correctly in terms of the responsibility imputation principle.[19]

The theorem describes the operation of a genuine *non-fraudulent* private property market economy. Since we have seen that the human rental system violates the imputation principle in production, the theorem implies (by contraposition) that the system must violate one of the assumptions about contractual transfers. The whole previous analysis of the human rental contract showed that it violated the no-breach assumption, not the consent assumption. Responsible human action cannot be actually transferred from one person to another so the contract for the purchase and sale of labor services is always inherently breached. As Ernst Wigforss phrased it almost a century ago:

> [F]rom a labor perspective the invalidity of the particular contract structure lies in its blindness to the fact that the labor power that the worker sells cannot like other commodities be separated from the living worker. (Wigforss 1923, p. 28)

Instead, the Law in the human rental system accepts an alternative performance—"Obey the employer"—as the actions that count as "fulfilling" the labor contract—which makes the labor contract into an institutionalized fraud. But obeying the employer is one form of voluntary cooperation between responsible persons who are *still* factually jointly responsible for the results as the Law fully admits in the case of the hired criminal. And it seems that employees do not morph into part-time robots when their actions are legal.[20]

[19]For a more detailed but non-technical statement and proof of this theorem, see Ellerman (2014).

[20]It is also an interesting historical footnote that Marx got it precisely wrong in his view that there could be exploitation in the "hidden abode of production," while the sphere of exchange "is in fact a very Eden of the innate rights of man" (Marx 1977 (1867), Chap. 6). By the fundamental theorem, any misimputation in the "hidden abode of production" (treated here in Part II on property) must be reflected in a contractual violation (i.e., the non-transferability of responsible agency violates the no-breach condition) in the "sphere of exchange" (treated here in Part I on contracts).

3.3 History of Property Theory

Some Early History of the Labor Theory of Property

One of the distinctive features of the modern treatment of the labor theory of property presented here is the idea that it is the application of the juridical theory of imputation applied to the questions of creation and termination of property, i.e., to the appropriation of newly created assets and liabilities. The imputation principle goes back to the ancient principle that justice means giving everyone their due. But we will begin this historical overview with early intimations of the labor theory of property in the Middle Ages.

Richard Schlatter gave an authoritative history of what he calls the "natural right" or "labour theory of property" in his classic book *Private Property: The History of an Idea* (1951). For our purposes, the identifiable history of the labor theory goes back at least to John of Paris (1255–1306). In one key passage, John of Paris defends the property of laypersons against ownership by the government or Church.

> [L]ay property is not granted to the community as a whole as is ecclesiastical property, but is acquired by individual people through their own skill, labour and diligence, and individuals, as individuals, have right and power over it and valid lordship; each person may order his own and dispose, administer, hold or alienate it as he wishes, so long as he causes no injury to anyone else, since he is lord. Such properties therefore are not mutually interordered or interconnected nor do they have any common head who might dispose of and administer them, since each person may arrange for his own what he will. Thus neither prince nor pope has lordship or administration of such properties. (John of Paris 2002, p. 103; also quoted in Schlatter 1951, p. 47)

The historian of political theory, Janet Coleman, has given the fullest treatment of John of Paris' labor theory of property by tracing it back to Thomist ideas.

> This distinctive and controversial Thomist theory of corporeal individuation leads John of Paris to an understanding of human effort and labour in the world of things as a distinguishing feature of human potential when it is actualized as human existence. He presents a theory of human acquisition that is natural and which is the means by which men not only survive but are individually who they are as a consequence of their actions. (Coleman 2000, p. 126)

However, John of Paris was not alone in his Lockean ideas.

> John of Paris's unusual and 'Lockean ideas before their time' are not unique to his *De Potestate regia et papali*, however; they are almost word for word out of a formal theological quodlibetal debate held by Godefroid of Fontaines in 1295-6, held at the university of Paris, where questions from the floor in this public session were discussed by Godefroid as magister. (Coleman 1985, p. 84)

Locke's Theory of Property

The *locus classicus* of the labor theory of property is usually taken to be in John Locke. The core of Locke's theory of property is presented in Chap. V, "Of Property," in the *Second Treatise* in *Two Treatises of Government*.

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others. (Locke 1960, §27)

This is Locke's classic statement of the labor theory of property, the theory that people have the right to the fruits of their labor. Locke's argument is set in a hypothetical original state of society prior to the accumulation of capital when nature is a resource common to all. The "right" Locke postulates is a natural right that is not dependent on the particular positive laws in a society. Indeed, the labor theory of property is sometimes referred to as the "natural rights theory of property" (e.g., in Schlatter 1951). The theory is intended as a normative or prescriptive theory, not a positive or descriptive theory. A given legal system might or might not recognize this natural right, but the theory holds that society should recognize and codify the natural right to the fruits of people's labor in the system of positive laws.

The labor theory of property has throughout its history been entwined with and often totally confused with the labor theory of value. The admixture of the two labor theories was present even in Locke who had a somewhat rudimentary form of the labor theory of value. The subsequent history of the labor theory of property has been largely a history of clarifying and elucidating the theory by disentwining it from the labor theory of value. But the mixture of the two labor theories was present from Locke onward. In the following representative quote from a modern commentator, both theories are mentioned in the same sentence.

> The citizens of his [Locke's] ideal commonwealth own property, whose possession is defined as a natural right; but the title to property is secured by labor, which is the source of value. (Lichtheim 1969, p. 108)

Indeed, the two theories are sometimes almost identified when it is held that labor is the sole source (not measure) of the value of the produced property and that therefore labor should get the title to the property.

The classical laborists or Ricardian Socialists, such as Thomas Hodgskin, looked back not to Ricardo but to Locke for the labor basis to property.

> I heartily and cordially concur with Mr. Locke, in his view of the origin and foundation of a right of property. ... [Hodgskin then quotes the basic passages from Locke] Thus the principle Mr. Locke lays down is, that nature gives to each individual his body and his labour; and what he can make or obtain by his labour naturally belongs to him. (Hodgskin 1973 [1832], pp. 25–26)

Halevy notes that "Hodgskin, a philosopher at the same time as he is an economist, finds the true source of the labour theory of value in Locke" (1956, p. 181). Hodgskin points out the inconsistency of orthodox social theorists who pay lip service to Locke's theory and then defend the usual arrangements of property.

> It is not a little extraordinary that every writer of any authority, since the days of Mr. Locke, has theoretically adopted this view of the origin of the right of property, and has, at the same time, in defending the present right of property in practice, continually denied it. This is the logical consistence of literary logicians. (Ibid., p. 26)

Locke's labor theory of property has what seems to be a paradoxical position in the history of thought. On the one hand, Locke is seen as the father of orthodox liberal democratic theory and Locke's property theory usually receives theoretical support from orthodox theorists.[21] On the other hand, the labor theory of property, with or without the labor theory of value, has been used as the basis for radical critiques of "capitalism." It is part of our purpose here to address this seeming paradox.

A Re-examination of Locke's Theory

Was Locke a closeted critic of the human rental system? Is the critique of human rentals based on the labor theory of property the descendant of Locke's theory? In the standard passages quoted from Locke, the person reaping the "fruits of his labor" is working as a self-employed proprietor. The crucial test is Locke's treatment of wage labor. This attitude and Locke's theory as a whole is illuminated by the justly famous Turfs passage.

> Thus the Grass my Horse has bit; the Turfs my Servant has cut; and the Ore I have digg'd in any place where I have a right to them in common with others, become my Property, without the assignation or consent of any body. The labour that was mine, removing them out of that common state they were in, hath fixed my Property in them. (Locke 1960, §28)

In the stock phrase "fruits of one's labor," it has almost always been assumed that Locke would take "one's labor" to mean the labor that a person *performs*. On the contrary, we now see that Locke interprets "one's labor" to mean the labor that one *owns*, not the labor that one performs. The servant performs the labor of cutting the turfs from the common, but the master owns the labor. Hence the master can say; "The labour that was mine, removing them out of that common state they were in, hath fixed my Property in them."

Thus, Locke's theory applied to wage labor is based less on a principle than on a pun, the pun of always interpreting the phrases such as "one's labour," "his labour," "the labour that was mine" to mean the labor owned rather than the labor performed. In that sense, Locke's theory of property was not the labor theory of property as usually interpreted. For centuries, commentators have misread Locke, always interpreting "one's labor" to mean the labor one performed. One modern commentator, C. B. Macpherson, has clearly understood the nature of Locke's theory.

> To Locke a man's labour is so unquestionably his own property that he may freely sell it for wages. A freeman may sell to another "for a certain time, the Service he undertakes to do, in exchange for Wages he is to receive" (Locke, §85). The labour thus sold becomes the property of the buyer, who is then entitled to appropriate the produce of that labour. (Macpherson 1962, p. 215)

[21]The most sophisticated attempt to co-opt the Lockean theory in defense of the human rental system is the interpretation of MP theory as satisfying the "principle on which property is supposed to rest." (Clark 1899, p. 9).

If one rereads the classical passages with an eye to the distinction between owned labor and performed labor, then one can see that Locke's emphasis all along was on the ownership of the labor.

> The Labour of his Body, and the Work of his Hands, we may say, *are properly his*. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it *something that is his own*, and thereby makes it his Property. ... For this *Labour being the unquestionable Property of the Labourer*, no Man but he can have a right to what that is once joyned to,. . . . (emphasis added, §27)

Since the labor theory of property has always been read into Locke, even by the classical laborists such as Hodgskin, Locke has looked like the ally, unwitting perhaps, of the radical critics of the human rental system. But the implied radical critique was only in the eye of the beholder, not in Locke. In that sense, Locke was not a Lockean.

> When Locke's assumptions are understood as presented here, his doctrine of property appears in a new light, or, rather, is restored to the meaning it must have had for Locke and his contemporaries. For on this view his insistence that a man's labour was his own . . . has almost the opposite significance from that more generally attributed to it in recent years; it provides a moral foundation for bourgeois appropriation. (Macpherson 1962, p. 221)

Further textual exegesis by Locke scholars (e.g., Tully 1980 and the references cited therein) has not, in my opinion, significantly shaken Macpherson's conclusion.

Using the tools of the modern treatment of property theory to interpret Locke, we can see that he was simply describing laissez-faire market appropriation where labor is the only exclusively owned factor. When labor is applied to commonly owned land and natural resources, then, as usual, the positive product is legally appropriated by the party which assumed the negative product, the costs of the used-up inputs. But if labor is the only exclusively owned input, then the *owner* of the labor laissez faire appropriates the product. That is *exactly* what Locke was describing. A comparable situation exists today when labor is applied to commonly owned resources such as fish or minerals in the ocean. When employees catch fish from the ocean (or cut turfs from the common), the employer laissez faire appropriates the fruits of "his labor."

Locke imported into his so-called state of nature not only the whole employment relation (one of the great artificialities of history) but the laissez-faire mechanism of appropriation used by positive law. Locke's theory, being a description of this positive law mechanism, is without moral force. The laissez-faire mechanism states that since the last legal owner of the input-assets has borne (appropriated) the input-liabilities or negative product, that party should also have the legally defensible claim on the positive product. But from the normative viewpoint, there is no reason why the owner of the input-assets ought to appropriate (i.e., "swallow") the input-liabilities as opposed to being compensated for the used-up inputs. Letting the costs of production lay where they fall and assign the ownership of the product accordingly is just the laissez-faire solution; it is the invisible judge looking the other way.

The labor theory of property (juridical imputation principle) imputes the negative product (the liabilities for the used-up inputs) to the party de facto responsible for

using up the inputs. The ownership of the un-used-up input only determines *to whom* that rightful appropriator of the input-liabilities should be liable to for the inputs.

Sometimes a theory is best understood and situated when it is generalized. How does Locke's theory generalize when capital is introduced? When privately owned capital is introduced, then the party that bears the costs of the services of the labor and capital will laissez faire appropriate the fruits of "his labor and capital." In the following remarkable passage, James Mill accurately describes, without the benefit of the usual distributive shares metaphor, the employer's laissez-faire appropriation of 100% of the produce by bearing 100% of the costs.

> The great capitalist, the owner of a manufactory, if he operated with slaves instead of free labourers, like the West India planter, would be regarded as owner both of the capital, and of the labour. He would be owner, in short, of both instruments of production: and the whole of the produce, without participation, would be his own. (Mill 1844, Chapter I, section II)

That is the application of Locke's theory in the general case when both capital and labor are privately owned inputs to production.

The elder Mill's argument, that the employer's claim on the product is as good as the slave owner's claim, is ironically correct. Today's employer, like yesterday's slave owner, has used a legalized fraud, which pretends that the worker is an instrument, to arrive at the position of being the "owner of both instruments of production" so that he can then make a legally defensible claim on the positive product.

The truth about the employer's appropriation occasionally "slips out" in the literature of orthodox Economics—usually before the appropriate distributive metaphor has been established as the Official Truth. James Mill's factual and non-metaphorical description of employer's appropriation–"the whole of the produce is his"–is an example. He described the actual property rights involved in a human rental firm before David Ricardo (1772–1823) had established the Official Metaphor of Distributive Shares which conquered Economics "as completely as the Holy Inquisition conquered Spain." It is clear why modern orthodox economists now prefer to hide behind the facade of the distributive shares metaphor rather than address the actual structure of property rights in the human rental firm. Even though one legal party owns the entire production input–output vector of an enterprise, i.e., the whole product, the happy consciousness of modern Economics describes the outcome of production in terms of the "division of the product" (e.g., between employer and employees or between the master and their slaves) seemingly without any second thoughts about *actual* property rights and liabilities.

William Wollaston: The First Lockean Theorist of Property

William Wollaston (1660–1724) is best known as a Deist whose singular work was T*he Religion of Nature Delineated* (1759). But that book also contains a treatment of the Lockean labor theory of property that was not limited by Locke's Pun ("The labour that was mine...") concerning his servant's labor. In the sense in which the Lockean theory of property was historically understood (i.e., sans pun), Wollaston may have been the first Lockean property theorist. As with the theory of inalienability descending from the Reformation doctrine of the inalienability of conscience, the

libertarian scholar, George H. Smith, has given a modern restatement of Wollaston's significance (1978).

Wollaston begins by distinguishing the de facto responsible actions of a person from the services of an instrument, a distinction about which the clerics of modern Economics must have a learned ignorance.

> 1. That act, which may be denominated morally good or evil, must be the act being capable distinguishing, choosing, and acting for himself' or more, briefly, an intelligent and free agent. Because in proper speaking no act at all can be ascribed to that, which not imbued with these capacities. For that, which cannot distinguish, cannot choose and that, which has not the opportunity, or liberty of choosing for itself, and acting accordingly, from an internal principle,' acts, acts at all, under a necessity incumbent ab extra. But that, which acts thus, is in reality only an instrument in the hand of something which imposes the necessity; and cannot properly be said to act, but to be acted. The act must be the act of an agent: therefore not of his instrument. (Wollaston 1759, pp. 3–4)

Wollaston goes on to state the labor theory of property in a manner free of Locke's Pun.

> II. There are some things, to which (at least before the case altered by voluntary subjection, compact, or the like) every individual man has, or may have, such a natural and immediate relation, that he only of all mankind can call them his. . . .
>
> Furthermore the labor of B cannot be the labor of C: because it is the application of the organs and powers of B, not of C. to the effecting of something; and therefore the labor is as much B's as the limbs and faculties made use of are his.
>
> Again, the effect or produce of the labor of B is not the effect of the labor of C: and therefore this effect or produce is B's, not C's; as much B's as the labor was B's and not C's. Because what the labor of B causes or produces, B produces by his labor; or it is the product of B by his labor: that is, it is B's product, not C's, or any other's. And; if C should pretend to any property in that, which B only can truly call his, he would act contrary to truth.[k] (Wollaston 1759, pp. 235–236)

The footnote k represents perhaps the first application of the labor theory of property as a critique of wage labor, an application that Locke prudently avoided by referring to his employee's labor as "the labour that was mine. . . ."

> [k] If B works for another man, who pays him for his work, or labor, that alters not the case. He may commute them for money, because they are his." (Ibid. fn. k, p. 236)

In the previous footnote, Wollaston says that "And therefore the produce of a man's labor is often still called his labor" so footnote k can be read as saying that in spite of being paid like a servant, B still has a property right in "the produce of [his] labour" and may sell ("commute") it for money.

Over a century later, Pierre-Joseph Proudhon (1809–1865) expressed much the same idea in his treatment of the labor theory of property.

> Whoever labors becomes a proprietor—this is an inevitable deduction from the acknowledged principles of political economy and jurisprudence. And when I say proprietor, I do not mean simply (as do our hypocritical economists) proprietor of his allowance, his salary, his wages,—I mean proprietor of the value which he creates, and by which the master alone profits.
>
> . . .Many persons talk of admitting working-people to a share in the products and profits; but in their minds this participation is pure benevolence: they have never shown—perhaps

> never suspected—that it was a natural, necessary right, inherent in labor, and inseparable from the function of producer, even in the lowest forms of his work.
>
> This is my proposition: *The laborer retains, even after he has received his wages, a natural right of property in the thing which he has produced.* (Proudhon 1970 [1840], p. 112)

Many historians of economic thought lazily classify Proudhon as a "Ricardian socialist" even though he, like the others in that classification, were not "socialists" in any twentieth century meaning of that word.[22]

The Ricardian Socialists

Various versions of the labor theory of value were used in the classical economic theories of Adam Smith and David Ricardo, without recognizing any property-theoretic implications. Smith used labor as a measure of value in the sense that price could be viewed in terms of the labor it commanded. Ricardo interpreted the price of a commodity, for the most part, in terms of the labor directly or indirectly embodied in the commodity. The property-theoretic version of the labor theory was developed by the small band of radical economic thinkers known as the "Ricardian socialists" or classical "laborists" (e.g., in Lichtheim 1969, p. 135).

In England, the principal Ricardian socialists or classical laborists were Thomas Hodgskin (1787–1869), William Thompson (1775–1833), and John Francis Bray (1809–1897), and in France, Pierre-Joseph Proudhon.[23] Historians of economic thought have viewed the Ricardian socialists less as thinkers in their own right and more as precursors to Marx. This has affected the parts in the Ricardian socialists' thought which are emphasized, namely the parts that were later developed by Marx. Indeed, many aspects of the Marxian labor theory of surplus value and exploitation can be found in the Ricardian socialists. But the Ricardian socialists or classical laborists also explicitly developed the labor theory of *property*, and this property-theoretic theme did not survive—at least explicitly—in the value theoretic focus of Marx's thought.[24] The deficiencies in their "classical" treatment of the labor theory of property, i.e., their neglect of the negative product in their "whole product" concept and their failure to use the juridical notion of responsibility to explain the uniqueness of labor, will be considered in the next section.

"Labor's Claim to the Whole Product": Deficiencies in the Classical Laborist Treatment of LTP

The development of the labor theory of property by the classical laborists such as Hodgskin, Thompson, and Bray, as exemplified in the slogan "Labor's Claim to the Whole Product," suffered from several major deficiencies—which are addressed in the modern theory presented here. While the use of the phrase "whole product" is

[22]Indeed, the word "socialism," like the word "capitalism," admits so many pejorative and conflicting meanings that neither word is *used* in this book and are only mentioned.

[23]See Stark (1943), Lowenthal (1972), and Foxwell's Introduction in Menger (1899) for a description of this school.

[24]"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 1977, p. 121).

borrowed from them, they failed to symmetrically include the all-important negative product in their concept of the whole product. They referred to the positive product, the produced outputs, as the "whole product." But the classical laborists' claim of "Labor's right to the whole product" is incoherent without the inclusion of the negative product.

The classical laborists did, of course, realize that inputs do not fall like manna from heaven; worker-managed firms would have to pay for their inputs. For instance, when considering machinery and materials, Thompson noted that "the labourer must pay for the use of these, when so unfortunate as not himself to possess them" (1963, p. 167). But Thompson and the others did not *systematically* emphasize the negative product. That seemed to leave them open to the idea that the positive product can be appropriated without also appropriating the negative product, an idea which might be called "*immaculate appropriation*." Many critics have accused LTP proponents of advocating immaculate appropriation.

Consider, for example, an economy of democratic firms where Machine Inc. produces capital goods such as machine lathes which are used by Appliance Inc. to produce consumer goods. The Machine Inc. workers' appropriation of the positive fruits of their labor is meaningless unless the Appliance Inc. workers appropriate the negative fruits of their labor (i.e., bear the liabilities for using up the machine services). Unless the Machine Inc. workers will give away their positive product for free, the Appliance Inc. workers must bear the negative fruits of their labor and satisfy those liabilities by leasing or buying the capital goods from Machine Inc. or some intermediary machinery dealer. The classical laborists' failure to explicitly include the negative product in their notion of the whole product left them open to the orthodox banality that Labor cannot expect to get all the outputs without taking due account of the other scarce factors, i.e., they "seemed to deny that scarce land and time-intensive processes can also contribute to competitive costs and to true social costs. . ." (Samuelson 1976, p. 545).

Another major deficiency in the classical laborists' development of the labor theory of property was their failure to interpret the theory in terms of the juridical norm of legal imputation in accordance with de facto responsibility. The basic juridical principle of imputation is that de jure or legal responsibility is to be imputed in accordance with de facto or factual responsibility. In other words, the juridical principle of imputation is the labor theory of property applied in the context of civil and criminal trials, and the labor theory of property is the juridical principle applied in the context of property appropriation. This equivalence was perhaps not evident in the classical treatment of the labor theory of property because that treatment ignored the negative product, and yet it is the negative side of the imputation principle that is applied explicitly in civil and criminal trials.

The lack of this juridical interpretation in the classical treatment led to the classical laborists' notorious failure to ever justify the slogans such as "Only labor is creative" or "Only labor is productive." Orthodox economists could correctly observe that all the factors of production, including land and capital, were "productive" in the causal sense that to add to or subtract from the employment of these factors would accordingly add to or subtract from the product. A person can dig a

bigger hole in an hour using a shovel than with their bare hands. It is indeed true that land (including natural resources) and capital are "productive" in this sense of being causally efficacious in production. Otherwise, there would be no occasion to use them. The reason that machine tools are used in metalworking and that good luck charms and magical incantations are not used is that the tools are much more efficacious.

The point is that while all the factors are "productive" in the sense of being efficacious, only labor is *responsible*. Capital goods and natural resources, no matter how useful they may be, cannot ever be responsible for anything. Guns and burglary tools, no matter how efficacious and "productive" they may be in the commission of a crime, will never be hauled into court and charged with the crime. Only human beings can be responsible for anything. The responsibility is imputed back through the causally efficacious tools as perfect conductors to their human users. As Wieser said, the imputation "takes for granted physical causality." Thus, only the humans involved in production can be responsible for the positive and negative results of production. Hence the juridical principle of imputation (i.e., the labor theory of property) implies that the workers (in the inclusive sense) should have the legal liability for the used-up inputs and the legal ownership of the produced outputs.

The Labor Theory of Property Versus the Labor Theory of Value

It takes a theory to kill a theory, so to criticize the orthodox marginal productivity theory as an ideal applied to labor, it takes an alternative theory about labor. One must go outside the usual orbit of concepts covered in neoclassical, Austrian,[25] or even most heterodox economics. The classical economics of Adam Smith and David Ricardo had a labor theory of value that applied under certain circumstances. Could the ideas of a "labor theory" be developed in some manner to criticize the human rental system? In the nineteenth century, the "labor theory" was developed in two quite different ways: (1) as a labor theory of value principally developed by Marx and (2) as a labor theory of property.

The upper fork in Fig. 3.3 (used in Ellerman 2017) represents "that small band of economic radicals who between 1820 and 1840 put forth the claim of labor to the whole product of industry" (Blaug 1958, p. 140) including Thomas Hodgskin, William Thompson, Pierre-Joseph Proudhon, and the other so-called Ricardian socialists (although they were neither). They tried to develop the inchoate "labor

[25]In addition to Friedrich von Wieser, a clear exception was the neo-Austrian economist, Don C. Lavoie, who in his referee report on the manuscript eventually published as (Ellerman 1992) said: "The book's radical re-interpretation of property and contract is, I think, among the most powerful critiques of mainstream economics ever developed. It undermines the neoclassical way of thinking about property by articulating a theory of inalienable rights, and constructs out of this perspective a 'labor theory of property' which is as different from Marx's labor theory of value as it is from neoclassicism. It traces roots of such ideas in some fascinating and largely forgotten strands of the history of economics. It draws attention to the question of 'responsibility' which neoclassicism has utterly lost sight of. It is startlingly fresh in its overall approach, and unusually well written in its presentation. … It constitutes a better case for its economic democracy viewpoint than anything else in the literature." (Lavoie 1991).

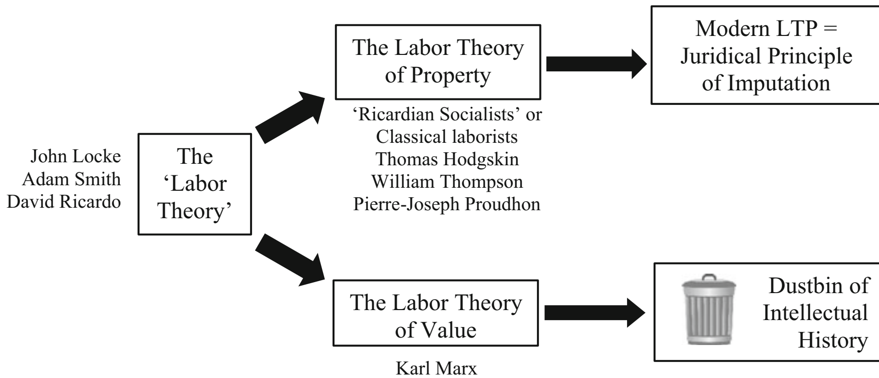

Fig. 3.3 The Fork in the Road: How to Develop the "Labor Theory"

theory" into a labor theory of *property* rather than a labor theory of *value*.[26] In the history of economic ideas, these early attempts to develop a labor theory of property were largely overshadowed by Karl Marx's monumental attempt to develop a labor theory of value—whose eventual failure has made it into the official "Opposition" recognized by orthodox Economics.[27]

Some economists have tried to reinterpret the labor theory of value as connected to natural rights notions of property.

> Man alone is alive, nature is dead; human work alone creates values, nature is passive. Man alone is *cause*, as Rodbertus said later, whilst external nature is only a set of *conditions*. Human work is the only active cause which is capable of creating value. This is also the origin of the concept 'productive factor'. It is not surprising that the classics recognized only *one* productive factor, viz., labour. The same metaphysical analogies that were used to establish natural rights were also used to expound the idea of natural or real value. It is an example of the previously mentioned attempt of the philosophy of natural law to derive both rights and value from the same ultimate principles. (Myrdal 1969, p. 72)

The ever-eccentric Thorstein Veblen even saw the natural rights theories as being implicit in Marx.

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[26]The property-theoretic focus was obvious from just the titles of their books: "*The Natural and Artificial Right of Property Contrasted*" (Hodgskin 1973 [1832]) or "*What is Property?*" (Proudhon 1970 [1840]).

[27]The dean of the American Institutionalist School of economics was Warren Samuels (1933–2011) who had the theory of property as one of his specialties. After studying my treatment of the labor theory of property over a period of years, he (after retirement) started writing a paper entitled "On Precursors in the History of Economic Ideas: Is Karl Marx a Precursor of David Ellerman?" He showed me the first two drafts and I argued, as pictured in the "fork in the road" diagram, that the labor theory of property as developed, say, by Hodgskin or Proudhon, was the *alternative* to Marx's treatment of the labor theory of value, so that Marx was *not* a "precursor" to the modern treatment of the labor theory of property. Unfortunately, Samuels died while working on the third draft of the paper so it was never published (see Ellerman 2014 for some excerpts from the second draft).

> By his later training he is an expert in the system of Natural Rights and Natural Liberty, ingrained in his ideals of life and held inviolate throughout. He does not take a critical attitude toward the underlying principles of Natural Rights. ... He is only more ruthlessly consistent in working out their content than his natural-rights antagonists in the liberal-classical school. His polemics run against the specific tenets of the liberal school, but they run wholly on the ground afforded by the premises of that school. (Veblen 1906, p. 577)

Veblen even saw the tenet of "Labour's Claim to the Whole Product" (Menger 1899) as being implied in Marx and taken from the classical laborists (or "Ricardian socialists").

> The laborer's claim to the whole product of labor, which is pretty constantly implied, though not frequently avowed by Marx, he has in all probability taken from English writers of the early nineteenth century, more particularly from William Thompson. These doctrines are, on their face, nothing but a development of the conceptions of natural rights which then pervaded English speculation and afforded the metaphysical ground of the liberal movement. (Veblen 1906, p. 578)

But even this implied "tenet is better preserved, in fact, among the 'idealists,' who draw for their antecedents on the French Revolution and the English philosophy of natural rights, than among the latter-day Marxists." (Veblen 1907, fn. 37 on 311). Hence the Fork in the Road diagram sees the labor theory of property as stemming from the English "Ricardian socialists" and Proudhon rather than Marxism.

Today, the critique of the labor theory of value has become such a part of the DNA of orthodox Economics that economists cannot even "hear" about the labor theory of *property* without automatically assuming one is talking about some labor theory of *value*. The response of conventional economists is usually something like this.

> What you are probably trying to say is that "Only labor produces value, and thus all value should go to labor." Yes, we have heard all that before, so let me tell you why that value theory is completely discredited.

Hence no orthodox text, to the author's knowledge, even discusses the modern treatment of the labor theory of property—which has *nothing* to do with value or price theory.

Some modern orthodox economists "bend over backward" to find some sympathetic interpretation of Marx's labor theory of value. But they are no more successful than Marx in finding the R-word "responsibility" or the I-word "imputability" (or the Z-word "zurechnungfähig" in German) that differentiate the actions of persons from the services of things (in spite of Wieser being perfectly clear on the matter). Here are some representative examples.

> Marx emphasized that labor is not the only useful factor of production. However, he did argue that it is the only useful factor of production contributed by *human society*. In this sense he considered it necessary to define all value and, therefore, all surplus value (profit, interest, and rent) as something that is produced by labor. (Baumol and Blinder 1982, p. 775)
>
> The crucial descriptive aspect remains the capturing of the human dimension of production and distribution in the labour theory of value viewed as a category of descriptive statements, rather than the possibility of 'determining' or 'predicting' prices on the basis of values, . . . (Sen 1978, p. 183)

> The point of the value theory may than be summed up as follows: goods are indeed produced by labor and natural resources together. But the relevant *social* source of production is labor, not an inanimate "land." (Baumol 1974, p. 59)

But all these attempts to relevantly characterize responsible human actions as being the only "human" or only "social" factors of production do not tie into any relevant principle (e.g., imputation principle) that might have unwelcome consequences. Thus, one might as well characterize human labor as the only productive service provided by a featherless biped.

Instead of trying to sympathetically reinterpret Marx or the labor theory of value in terms of some "featherless biped theory of value," most conscientious orthodox economists exhibit their version of intellectual integrity by "taking on the opposition" which means finding the nearest Marxist to serve as the "useful fool" and lecturing them on the deficiencies of Marxism, socialism, and communism.[28] The real alternative to the public or private human rental systems, the system of workplace democracy, is ignored.

These attempts are particularly pathetic when one considers that late in the nineteenth century, Wieser spelled out with perfect clarity (as previously quoted) the differences in terms of responsibility and imputability between the actions of persons and the services of land and capital. Inside the "temple of their hireling hearts" (Shelley), do conventional economists actually understand the difference between the responsible actions of persons and the causally efficacious services of things, but then prudently refrain from applying that distinction to their "scientific" analysis of the human rental system?

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[28]Robert Solow's review (Solow 2006) of Duncan Foley's book, *Adam's Fallacy* (Foley 2006) is an excellent example of this genre. Moreover, from the side of the dwindling band of Marxist economists, it seems that allegiance to the labor theory of value and exploitation primarily plays the role of a "badge of Red courage" to establish one's identity and credibility as being "against the system."

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Chapter 4
Governance: The Case Against the Employment System Based on Democratic Theory

Conventional classical liberalism dumbs down the intellectual history of democratic theory into the question of consent versus coercion. Democracy is then represented as "government by the consent of the governed." But from Antiquity onward there have been intellectual defenses of autocracy based on consent (the *pactum subjectionis*) which continue to this day in the arguments for charter cities, startup cities, or seasteads with old Hong Kong or new Dubai being examples of non-democratic cities based on consent. Moving to and residing in such a city is taken as consent to its non-democratic structure. Hence the historical Democratic Movement had to develop arguments not just against coercion but against a voluntary contract of subjection or undemocratic constitution. The key distinction was not consent versus coercion but consent to a contract to alienate self-governance rights versus a contract to only delegate certain governance decisions to a representative government—*translatio* vs. *concessio*. This chapter recaptures the intellectual history of democratic thought and shows that when expressed in clear modern terms, it applies to all organizations such as firms. Finally, the argument is recapitulated in the context of the corporate governance debate in the last subchapter.

4.1 Intellectual History of Consent-Based Non-democratic Government

In this Part III, we move from the labor contract (Part I) and property appropriation (Part II) to the question of governance in the human rental firm.[1] Today, the industrialized democracies exhibit one of the most remarkable "disconnects" in history—when account is taken of the high level of literacy and education. Wars

[1]Two recent books have explicitly raised the question of governance in firm (Anderson 2017; Ferreras 2017).

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D. Ellerman, *Neo-Abolitionism*, https://doi.org/10.1007/978-3-030-62676-1_4

are fought, lives and treasure are sacrificed, all in the name of "democracy"—and yet hardly a word is said back home about democracy in the workplace where most adults spend much of their waking hours. How can a "democratic society" be so schizophrenic and bifurcated in its vision of democratic rights that a person could be seen as having an inalienable right to self-determination as a citizen but at the same time can be seen as routinely alienating the right to self-determination in the workplace? If such a disconnect was observed in a totalitarian society, it would be considered as the result of massive brain-washing and false consciousness.

Around the middle of the nineteenth century, democracy became the accepted norm for political governance in most of the industrialized countries. Hence the human rental system needed some prophylactic barrier to protect the workplace from the democratic germ. One surprisingly successful response was the erection of the *public–private distinction* to "explain" why one's rights of democratic self-governance did not extend to the workplace. Monarchical and aristocratic modes of thought did not vanish with the democratic political revolutions; they went private. Feminist thought has learned to reject the "It's private" argument for human rights not extending to the place of living. But even today, many people accept "It's private" as the knee-jerk response as to why the rights of self-governance supposedly do not apply to the place of work.

This routine acceptance is reinforced by one of the fundamental errors in Marxism and in socialism/communism in general, namely their whole-hearted acceptance of the public–private distinction coupled with the condemnation of the *private* human rental system (e.g., "private ownership of the means of production") in favor of universal *public* employment. Thus, both sides in the "Great Debate" between public versus private human rentals agree on the framing of the question, so it should be no surprise to find widespread acceptance of that framing.

The real question about governance in the workplace is not between the public or private renting of human beings. It is about the validity of human rentals in the first place, and, on that question, the conventional classical liberal framing is the "coercion versus consent" framework. The potted intellectual history is that previously coercion was the standard, but now with the human rental system and political democracy, consent prevails. A classic statement of this basic theme is Sir Henry Maine's assertion that

> the movement of the progressive societies has hitherto been a movement *from Status to Contract*. (1972, p. 100)

This Whiggish view defines "political democracy" as "government based on the consent of the governed" and since the employment system is also based on the voluntary human rental contract, the current system is seen as being fundamentally sound since both the political and economic institutions are based on consent.

Again, this framing illustrated in Fig. 4.1 is based on grossly defective intellectual history. From Antiquity down to the present day, the sophisticated defense of non-democratic governance was that it was based on a (perhaps implicit) social contract that alienated the governance rights to the sovereign.

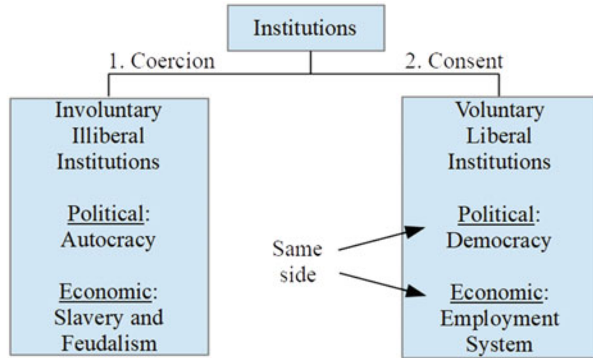

Fig. 4.1 The conventional classical liberal coercion-versus-consent framing

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, p. 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; and in Sabine 1958, p. 171)

In general, wherever non-democratic rule was sustained over a long period of time in a settled condition (with the police and army keeping the condition "settled"), then the people were viewed as having agreed to such an implicit contract of alienation that was sealed by the prescription of time. Thomas Aquinas (1225–74) expressed the canonical medieval view.

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

In the early Middle Ages, governance was part of the "dominion" based on land ownership—that Marx carried over to capital. But as the idea of grounding rulership on land ownership receded in the late Middle Ages, the idea of a *contract* of rulership became widespread.

> Then, when the question about Ownership had been severed from that about Rulership, we may see coming to the front always more plainly the supposition of the State's origin in a Contract of Subjection made between People and Ruler. (Gierke 1958, p. 88)

The intent of this contractarian thought was at first not to attack undemocratic power but to found it on consent:

> 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 alienist natural rights 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)

Or as the medieval scholar, Brian Tierney, put it: "The idea that licit rulership was conferred by consent of the community to be ruled was fairly commonplace at the beginning of the fourteenth century." (1997, p. 182).

In spite of being a "philosophic axiom" and a "commonplace" idea by the late Middle Ages, it is surprising how many conventional liberal scholars today (e.g., Israel 2010) display a learned ignorance of this whole intellectual history.[2] The conventional view is that the case for democratic government is made by arguing for government based on the consent of the governed—in contrast to easily dismissible strawman notions such as divine right, patriarchy, and conquest.

That history continued. In about 1310, according to Gierke,

> Engelbert of Volkersdorf is the first to declare in a general way that all *regna et principatus* originated in a *pactum subjectionis* which satisfied a natural want and instinct. (Gierke 1958, p. 146)

William of Ockham (1290–1349) is sometimes cited as the first to expound the idea of consent-based legitimacy in *The Dialogue* (1343).

> Ockham cites as one provision of natural law ... the requirement that rulers should be elected by consent—probably the first time in the history of political thought that governmental legitimacy was defined as derived from consent based on natural law. ... Ockham adds that subjects can relinquish or transfer to others their right of election (he cites the case of the Holy Roman Empire).... (Sigmund 1971, pp. 56–57)

Hugo Grotius (1583–1645) was a pivotal figure in the development of natural rights political philosophy, but he also, in the alienist tradition, viewed man's natural right to liberty as a right which could be alienated with consent.

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

Grotius cites some explicit examples.

> For if the Campanians, formerly, when reduced by necessity surrendered themselves to the Roman people in the following terms:—"Senators of Rome, we consign to your dominion the people of Campania, and the city of Capua, our lands, our temples, and all things both divine and human," and if another people as Appian relates, offered to submit to the Romans, and were refused, what is there to prevent any nation from submitting in the same manner to one powerful sovereign? (Grotius 1901, pp. 63–64)

Thomas Hobbes (1588–1679) made the best-known attempt to ground an absolute monarchy or oligarchy on the consent of the governed. Without an overarching

[2]It seems there are two very different interpretations of "intellectual history": the history of ideas and the history of intellectuals.

power to hold people in awe, life would be a constant war of all against all. To prevent this state of chaos and strife, men should join together and voluntarily alienate and transfer the right of self-government to a person or body of persons as an absolute 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, p. 142)

There is an intellectual version of the economic notion of the *opportunity cost* of Plan A is whatever is foregone by choosing the best alternative Plan B. In the intellectual version, if one wants to argue for Option A, then one needs to defeat the best arguments for the best alternative "steelman" Option B, not some clearly inferior strawman Option C. The steelman alternative to democracy is a consent-based non-democratic system, not government based on divine right, military leadership,[3] patriarchy, conquest, or the like. Today, it would seem that most orthodox political theorists in particular and social scientists, in general, are "in favor of democracy" without having any definitive argument or theory to rule out the consent-based non-democratic alternative. Any such genuine *theory* to rule out the steelman alternative (as opposed to an isolated opinion or judgment) might also have unwelcome consequences.

In Locke's time, that consent-based non-democratic alternative was Thomas Hobbes' *pactum subjectionis*. Locke had no genuine inalienable rights theory to counter Hobbes, so he used the dodge of ignoring Hobbes and took Robert Filmer (1588–1653) as his strawman or foil.[4] Filmer's patriarchal theory (1680) did not require the consent of the governed anymore that the father's governance over his children required the consent of the children.

The tradition of allowing non-democratic government based on the consent of the governed is brought up to date by the late Harvard philosopher, Robert Nozick, who argued that a free society should allow people to jointly alienate their political sovereignty to a "dominant protective association" (Nozick 1974, p. 15).

[3]The idea that monarchy should rightfully follow from military leadership in making a revolution (the "father of the country") or defending a country from conquest is reproduced in the human rental system in the idea that the entrepreneur should rightly own a company (as a going concern). Somehow, all the other people involved in the effort are reduced to tools or instruments employed by the *übermensch* entrepreneur. Since the legal system allows the entrepreneur (or a small entrepreneurial group) as "great leaders" to legally rent all the other people in the enterprise (so the employees have the legal role of rented tools), then the popular consciousness and particularly the business press have to promote that as the factual situation. Thus, the press uses phrases like "Elon Musk's SpaceX rockets" or "Jeff Bezos' moon lander" as if their entrepreneurship and share ownership in the companies made them the real creators of those rockets and spaceships. This is the theme: "If it's legal, then it must be factual; otherwise the whole system is a fraud." Indeed.

[4]In contrast, George Lawson, who may be considered a substantial but unacknowledged precursor of John Locke (MacLean 1947), was explicitly critical of Hobbes (Lawson 1657).

> [I]f one starts a private town, on land whose acquisition did not and does not violate the Lockean proviso [of non-aggression], persons who chose to move there or later remain there would have no right to a say in how the town was run, unless it was granted to them by the decision procedures for the town which the owner had established. (Nozick 1974, p. 270)

The conventional classical liberal or libertarian bottom line is that government must be based on consent which includes the possibility of exit when consent is withdrawn. This libertarianism is, of course, not *against* democratic government; the point is that democracy is only one choice among other consent-based rule-of-law governments. The choice between them is based only on consequentialist or pragmatic matters.

> The choice between autocracy and democracy should be decided according to the standard of best results. Which political system best promotes the common good over the long run? (Arneson 2004, p. 41)

The libertarian point is that there should be a "democratizing choice of law, governance, and regulation" (language from an old startup cities website) which includes well-regulated pro-business non-democratic enclaves like old Hong Kong and new Dubai.[5] Libertarian models of consent-based non-democratic governments include the notion of "shareholder states" (Cowen 2014), proprietary cities, free cities, startup cities, Patri (grandson of Milton) Friedman's floating seastead cities (Quirk and Friedman 2017), and Economics Nobel laureate Paul Romer's charter cities (Mallaby 2010; Freiman 2013), all of which see the resident-subjects as having agreed to a *pactum subjectionis* as evidenced by their voluntary decision to move to and remain in the city or state (assuming free exit).

4.2 Intellectual History of the Case for Democratic Governance

In view of this long line of contractual arguments for allowing consent-based non-democratic government based on a *pactum subjectionis*, the tradition behind what today might be considered as *democratic* classical liberalism needs to develop a counter-argument that there was something inherently wrong with such a voluntary contract. The real debate was within the sphere of consent and was between the alienation (*translatio*) and delegation (*concessio*) versions of the basic social contract or political constitution—as illustrated in Fig. 4.2.

As usual, the "incomparable Gierke" traces the intellectual history of this alienation-versus-delegation argument.

[5]The Boston Consulting Group (BCG) has done a study concluding that the UAE under the guidance of "the vision of His Highness Sheikh Mohammed bin Rashid Al Maktoum, Vice President and Prime Minister of UAE and Ruler of Dubai" has become "one of the happiest countries in the world." (Campbell 2019) The BCG did not reveal how much they were paid by "His Highness" for the study.

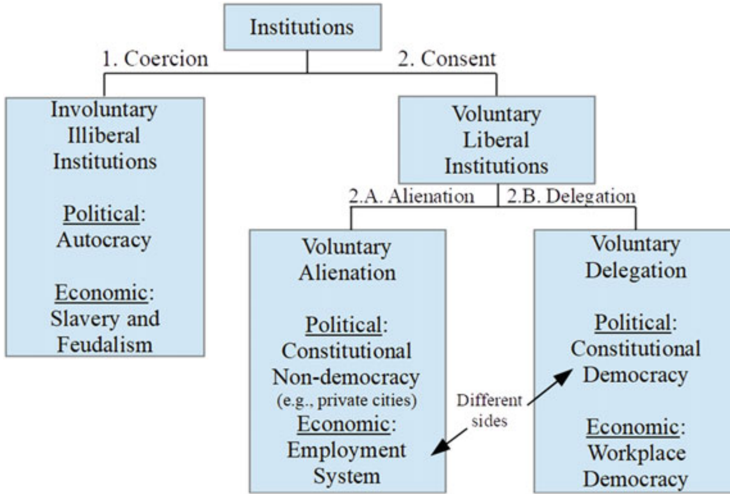

Fig. 4.2 The real debate in classical liberalism: Consent-based alienation or delegation

> This dispute also reaches far back into the Middle Ages. It first took a strictly juristic form in the dispute . . . as to the legal nature of the ancient "*translatio imperii*" from the Roman people to the Princeps. One school explained this as a definitive and irrevocable alienation of power, the other as a mere concession of its use and exercise. . . . On the one hand from the people's abdication the most absolute sovereignty of the prince might be deduced. . . . On the other hand the assumption of a mere "*concessio imperii*" led to the doctrine of popular sovereignty. (Gierke 1966, pp. 93–94)

And Tierney concurs.

> In the centuries before Ockham, medieval jurists had argued endlessly, without ever reaching a consensus, about whether the Roman people alienated its rights in creating an emperor (the "translation theory") or merely conceded to the ruler the exercise of rights that remained with the people (the "concession theory"). (Tierney 1997, p. 183)

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

> During the Middle Ages the question was much debated whether the lex regia effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty at the end of this period, like Marsiglio of Padua in his *Defensor Pacis*, took the latter view. (Corwin 1955, p. 4)

Corwin provides the modern translation of *translatio* as *alienation*, and of *cessio* as *delegation*. The consent-based non-democratic constitution is a contract of *alienation*, while the consent-based democratic constitution is a *delegation*. Quentin Skinner's history of modern political theory (1978) continually highlights this alienation-versus-delegation.

> The theory of popular sovereignty developed by Marsiglio [Marsilius] and Bartolus was destined to play a major role in shaping the most radical version of early modern constitutionalism. Already they are prepared to argue that sovereignty lies with the people, that they only delegate and never alienate it, and thus that no legitimate ruler can ever enjoy a higher

> status than that of an official appointed by, and capable of being dismissed by, his own subjects. (Skinner 1978, Vol. I, p. 65)

As Marsilius of Padua (1275–1342) put it:

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

According to Bartolus of Saxoferrato (1314–1357), the citizens "constitute their own *princeps*" so any authority held by their rulers and magistrates "is only delegated to them (*concessum est*) by the sovereign body of the people" (Skinner 1978, Vol. I, p. 62).

What Sir Henry Maine *should* have said is that the progress of society is from contracts of alienation to contracts of delegation. This tradition of allowing only a delegation contract of governance finds a modern representative in the Economics Nobel laureate, James M. Buchanan (1919–2013). Quite contrary to the claims of a recent book (MacLean 2017), Buchanan is a clear representative of *democratic* classical liberalism who rules out any socio-organizational form where the individual is not a sovereign (e.g., individual acting in the marketplace) or a principal in a delegation of decision-making authority.

> 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. The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as *principals*. The premise denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals. (Buchanan 1999, p. 288)

Thus the mature Buchanan "denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals" which rules out all the consent-based rule-of-law non-democratic schemes (e.g., startup cities, charter cities, etc.) of the non-democratic strain of libertarianism and conventional classical liberalism. The governance contract that people supposedly agree to by moving into and remaining in a non-democratic city is a contract of alienation where the subjects are neither sovereigns nor principals.

If the distinction between an alienation and a delegation of self-governing rights has been clear since the Middle Ages, how can so many classical liberal scholars seem unaware of it? One explanation is that many authors talk only about "hierarchy" without distinguishing the hierarchy between the governors and the governed

in the democratic case and the non-democratic case.[6] A democratic workplace need not eliminate hierarchy. It only requires that control rights are delegated, not alienated, to those at the top of the hierarchy. The boss is recallable like any other official in a democracy.

Another way to confound the distinction is simply to use the verb "to delegate" as a synonym for alienation. For instance, it might be said that the consensual subject "delegates" governing rights to the sovereign in the *pactum subjectionis*—even though the sovereign is hardly the delegate or agent of the subjects as principals.

The distinction is also confounded by the opposite mistake of loosely describing a genuine delegation of decision-making as an alienation of one's decision—instead of an agreement to jointly make one's decision according to the recommendation and decision of one's agent.

There is another reason for the learned ignorance of contracts that are invalid "even with consent." The progress in the abolition of the slavery contract, the *pactum subjectionis*, and the coverture marriage contract sponsors the historical revisionism of mapping the issue back into the consent-coercion framing. It is then 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. The avowed standards of voluntariness are suitably escalated so that those abolished practices were all *really* social coercion, and *that's* why those contracts were abolished. Hence the conventional consent-versus-coercion classical liberalism is sufficient to account for the abolition of those "so-called contracts." And thus 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 clearly voluntary employment contract.

Marxism obligingly reinforces the conventional liberal framing of the issue by disagreeing only about the voluntariness of the labor contract by invoking still higher standards of consent. In this manner, the concepts of "coercion" and "consent" on the left have become pieces of conceptual silly putty to be molded to support one's pre-analytical judgment and political identity, rather than as serious analytical concepts.

Civic republicanism, at least in some strands, also does not focus on the inalienability critique of political contracts of alienation. In the civic-republican tradition, as represented by Philip Pettit, it would seem that having one person "track the interests" (Pettit 1997, p. 11) of other people is describing the notion of delegation in the principal–agent relation where the agent is supposed to make decisions in the interests of the principals. But that identification is not made. Indeed, at least this brand of civic republicanism is not intrinsically anti-monarchical (Ibid., p. 20) since a "good king" might take an interest in the welfare of his subjects—and similarly, a "good employer" might take an interest in the welfare of their employees. And perhaps Thomas Jefferson tracked the interests of his slave Sally Hemings.

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[6]This is a much-favored way for economists to avoid the issues, e.g., Economics Nobel laureate Oliver Williamson (1975).

There is another tradition of civic-republicanism, namely labor republicanism (Gourevitch 2015), that described wage-labor rhetorically as "wage-slavery" and as being antithetical to the republican ideal of non-domination. Singing the virtues of non-domination fosters the ideal of the family farmer, independent proprietor, and even worker cooperatives, but it falls far short of being a *theory* based on inalienable rights, the labor theory of property, and democratic theory to abolish the human rental contract. In particular, the possible domination of the employer over the employee and the accompanying psychological alienation is part of the well-acknowledged disutility of work that might be counterbalanced by wages, benefits, stronger collective bargaining, and better labor regulations. Thus, that line of civic republican argumentation falls far short of implying that the human rental contract should be abolished.[7]

Another possible reason for their learned ignorance (about voluntary alienation versus delegation) is that conventional classical liberals realize at some level that the contractual basis for their human rental system is a contract of alienation, not delegation. Not even the most dedicated of intellectual defenders of the system, e.g., Frank Knight, claims that the employees are the principals and the employer is their agent, delegate, or representative. In particular, after Buchanan forcefully "denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals," he himself somehow *neglects* to recognize that the worker *qua employee* within the scope of the employment contract is neither sovereign nor principal. How can an Economics Nobel laureate, who over his whole professional life studied an economic system based on the employment relation, fail to "notice" that it violates his own dictum for a "liberal social order"? Apparently, that conclusion is just unthinkable.

Insofar as the topic even comes up, the usual dodge is to picture the employee as the principal and sole proprietor in the business of selling their own labor services—just as the perpetual servant or coverture wife was the principal and sole proprietor in the business of selling larger chunks of their personhood. Aside from providing some amusement to future scholars, these "arguments" just ignore the whole inalienability analysis that is the root of the critique of those contracts to legally alienate aspects of personhood (e.g., responsibility and decision-making). That is the

[7] Part of the problem is the relatively low standards for what passes for a *theory* or *principle* in the social sciences. In a relationship like the employer–employee relation, after mutually beneficial changes have been made, then the situation is more akin to a zero-sum game where the gain for one side is at the expense of the other side. Showing how certain changes would benefit the employees at the expense of the power and economic returns to the employer does not constitute a *principled theory* implying that the changes should be made. It is an expression of moral sympathies for one side as opposed to the other in a contested relationship. Those sympathies may well be laudable but they do not constitute a principled argument that is independent of "taking sides." The neo-abolitionist argument is that the legal system should not validate an institutional fraud (or "institutional robbery" in J. B. Clark's phrase). The abolition of the human rental system would have beneficial consequences for the otherwise rented people (just as the abolition of slavery benefited the slaves), but moral sympathies for employees (or slaves) are not the basis of the argument.

basis for abolishing those personhood-alienation contracts, not the rather contrived picture of the persons being the principal and sole-proprietor in the business of legally alienating aspects of one's personhood.

But the topic rarely even comes up. The usual response is not to think about it.[8] "Responsible" liberal thinkers, almost by definition, do not go there. There are not only glass ceilings but also glass walls that define the accepted corridors of thought. Responsible thinkers have a warning system like the new cars that warn their drivers if they wander "out of their lane" ("Is it serious, responsible work?", "Is it publishable?", "Is it scientific?", "Will it adversely affect my job prospects?", and so forth). Such thinkers can then 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 to "stay in your lane"—away from irresponsible speculations (except perhaps in the pink of youth) and down the corridors of safe, sound, and serious social "science." George Orwell (1903–1950) put it well about the role of orthodoxy even in liberal society.

> At any given moment there is an orthodoxy, a body of ideas which it is assumed that all right-thinking people will accept without question. It is not exactly forbidden to say this, that or the other, but it is 'not done' to say it, just as in mid-Victorian times it was 'not done' to mention trousers in the presence of a lady. Anyone who challenges the prevailing orthodoxy finds himself silenced with surprising effectiveness. A genuinely unfashionable opinion is almost never given a fair hearing, either in the popular press or in the highbrow periodicals. (Orwell 1995, p. 163)

Responsible political theorists can also fall back on the consent-or-coercion framework, a framing accepted even by their standard Marxist foils (who are hardly going to raise the basic distinction in democratic political theory between voluntary contracts of alienation versus delegation). Hence liberal thinkers can safely characterize political democracy as government by the consent of the governed, and the employees give their consent to the employment contract so where is the problem? Hence the standard narrative is something like the following.

> 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 treated coercively by their employers, and these abuses really need to be regulated and corrected. But such acknowledged abuses do not amount to any inherent rights violation in the voluntary contract for giving people jobs—so there is no call to abolish the employment contract.

Such is the Happy Consciousness of today's "responsible" and conventional classical liberal thinkers. There is no conspiracy to avoid or hide these questions. There is no need. Conventional intellectuals see no promise or payoff in thinking along such

[8] Notable exceptions would be two past presidents of the American Political Science Association, Robert A. Dahl (1985) and Carole Pateman (1988).

lines so there are no secret thoughts, no bad faith, to be hidden behind a cloak of conspiracy or hypocrisy. Instead of estrangement, there is the Happy Consciousness that all is fundamentally well in our institutions—the consciousness that one is "at home" in this society. But morally sensitive thinkers are, of course, aware of the difficult and often seemingly intractable problems of implementing the sound principles embodied in our institutions. But on the neo-abolitionist question of there being something *structurally* wrong with a socioeconomic system based on renting people, no shadow of doubt darkens the brow of our intellectual and moral leaders. However, there is much genuine hand wringing and anguished distress concerning those in the bottom layers, the "mudsill" of society, who have to rent themselves out for such a low wage or who cannot find anyone to rent them at all.

The inalienable rights argument 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 by some voluntary action. The employer cannot be solely de facto responsible for the results as if the employees were only automatons or non-responsible tools. These facts are 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. The issue is the de facto responsibility of the employee actions, criminous or not. Does anyone really think that employees factually 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? The facts are as obvious as they are unacceptable to serious social scientists who are not inclined to pariah status or professional isolation to the fringe. However, a serious social scientist may occasionally register some cognitive dissonance.

> [B]oth the principal and the agent, the person who hires the hit man and the hit man who carries out the murder, are held liable. ... The general thesis in the hit-man case is straightforward: [but] agents are not held responsible for actions that, if taken under one's own authority, are not criminal [DE, e.g., normal work], but they are held personally responsible for actions that are criminal acts as defined by the law of the land. (Coleman 1982, p. 99)

To conclude this chapter on democratic governance, it should be emphasized how the alienation-versus-delegation argument fits into that overarching de facto inalienability argument. The "consent of the governed" was common to both the alienation and delegation theories, so what was the key distinction?

> The idea of natural rights could be used to defend either absolutist or liberal theories of government; the outcome of the argument turned on the theory of alienability that an author adopted. The question at issue was whether the members of a community could or actually did alienate all their rights in the act of constituting a government. If they did so they would have instituted an absolutist regime. Liberal theorists therefore argued that individuals retained some rights even after a government had been constituted. In the later debates Pufendorf's argument leaned more to absolutism, Locke's more to liberalism. (Tierney 1997, pp. 182–183)

Under normal circumstances (e.g., no drugs or physical coercion), a person cannot—not "should not" but *cannot*—alienate their decision-making capacity to another.

The Reformation doctrine of the inalienability of decision-making about one's basic religious beliefs is true of all human decision-making—such as voluntary co-operation in the workplace. Hence any contract that legally alienates people's decision-making capacity to some ruler or sovereign (or employer) cannot be factually fulfilled—so the substitute performance of "obey your ruler" defined fulfillment of the *pactum subjectionis* for the subjects. The non-fraudulent social or political contract or constitution is a contract of delegation where people agree to make their decisions according to those of their agents, representatives, or delegates who are tasked with making those decisions in the name of and in the interests of those people as their principals.

Hence the argument against the voluntary contractual alienation of governance rights in this Part III has the same form as the arguments for the invalidity of the human rental contract (discussed in Part I) and the invalidity of the employer's legal appropriation of 100% of the positive and negative fruits of the labor of the people working in the enterprise (discussed in Part II).

Since arguments about democracy in the workplace are sometimes couched in terms of corporations (the standard legal form of business) and corporate governance, the last chapter in Part III will review the current debate about the governance of corporations.

4.3 The Debate About Corporations

Introduction

Since workplace democracy would be instituted within the legal shell of a corporation, it is not beside our purposes to review the current debate about corporate governance. Much of the analysis and criticism about workplace issues is today couched in terms of corporate governance. This chapter shows how to parse and address the arguments and the result is the same conclusion about workplace democracy.

One does not ask about "the goal" or "the purpose" of a democratic polity like a municipality. A democratic organization has whatever goals or purpose the members agree upon. Yet the notion of democracy is apparently so remote from the debate about corporate governance that debate rages about "the goal"; is it maximizing shareholder value or some set of inchoate social goals of "stakeholders"?

I will argue that on these and other questions about corporations and the underlying rights of capital, there are numerous fallacies and sins of both omission and commission. One starting point is a focal point of the debate; the famous 2010 Citizen United case of the US Supreme Court.

Citizens United and Corporate Personhood

Corporate personhood was not the basis for the Citizens United decision. Justice Stevens' dissenting opinion noted that the majority opinion was based on the rights of associational speech. In theory, a corporation is an association of people, the

members,[9] and thus the members, like in a trade union or NGO, may exercise their First Amendment rights through their association. Justice Stevens' dissent derived from the rather farcical nature of considering corporate "political speech" as the associational speech of the far-flung shareholders.

> It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least. (Stevens 2010)

Is "Shareholder Democracy" the Answer?

Since the shareholders are the "members" of the corporation, perhaps the problem is just that "shareholder democracy" is so imperfectly realized. But is this even a correct application of the notion of democracy? Democracy is a method of governing people, not property, and the managers of make up the "government" of a corporation are only managing the (indirect) property of the shareholders, not the persons of the shareholders qua shareholders. If "democracy" is to be just any system of making decisions by voting, then having the Russians taking a vote to elect the government of Poland would quality as "democratic" governance.

> Yet in fact there is democracy in the typical investor-owned firm; it is just that the investors of capital do the voting rather than the workers. Converting to worker ownership means not only enfranchising the workers but also disenfranchising the firm's investors while continuing to deny the franchise to the firm's consumers. (Hansmann 1996, p. 43)

One might say that the American Revolution enfranchised the Americans but also disenfranchised the English while continuing to deny the franchise to the French to elect the American government.

Somehow, the notion of democracy as self-government seems lost in the whole sad discussion of "shareholder democracy."

> 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)

[9] "In general, the shareholders are the members of the company and the terms 'shareholders' and 'members' may be used interchangeably." (Hannigan 2012, p. 304)

In the case that a corporation was a democracy of the people actually governed (within the scope of their work) by the elected management, e.g., as in a Mondragon worker cooperative, then seeing political speech by the corporation as representing the members would not be "fanciful" to use Justice Steven's phrase.

Abolishing Corporate Personhood Is Not the Answer

The point of corporate "personhood" could be made just as well by saying that the corporation is a different legal party from its shareholders. Moreover, the shareholders do not have "limited liability" for the debts for a separate legal party such as the corporation; they have no such personal liability for corporate debts. And the corporation has full liability for its debts. The whole debate about personhood is ill-founded and the calls for abolishing corporate personhood, e.g., the book by Tombs and Whyte (2015) entitled: *The Corporate Criminal: Why Corporations Must Be Abolished*, are most ill-advised.

In the apparent attempt to weaken the claim of shareholder primacy, a number of legal and political thinkers have emphasized that the shareholders only own their shares, not the corporate assets, as their private property, e.g., Stout (2012), Ciepley (2013, 2019), or Robé (2011). The fact that the shareholders do not own the corporate assets as their personal property is only the other side of the balance sheet from the fact that the shareholders do not owe the corporate liabilities as their personal liabilities. In a classic example of what Wittgenstein called the "bewitchment of language," it is even said that a "the corporation owns the 'corporation'" (Ciepley 2019).

Contrary to left-wing complaints, the corporation is an important social invention that allows non-rich people to join together and make an investment in a risky venture without jeopardizing their personal assets. And associations of citizens (i.e., non-profit corporations) allow non-rich people to have an amplified political voice that they would not have individually. It is hard to imagine any change more politically favorable to the rich 1% than restricting the exercise of political voice to natural persons. That would rule out associational speech by trade unions, NGOs, and other civic associations, all of which are not natural persons. Then John Q. Public and Charles Koch would each have the right to as much political voice as they could individually afford. Saving political democracy does not mean abolishing corporate personhood and associational speech but to completely regulate the role of money in elections and in Congress, e.g., Lessig (2011, 2019).

Distinguishing Positive and Negative Control Rights

In the corporate governance debate, there is much "loose talk" about "having a say" in this or that decision. Perhaps this goes back to an old maxim in Roman law: "What touches all is to be approved by all" (Tierney 1982, p.21). Today this idea is often formulated as the "Principle of Affected Interests... Everyone who is affected by the decisions of a government should have the right to participate in that government" (Dahl 1970, p. 64) and is often used to support a stakeholder theory of corporate governance. Yes, people should have the right and the means to protect their legitimate interests. But we need to differentiate between two very different ways to protect one's affected interests.

1. *Negative* or *decision-constraining control right* is to constrain the decision of another party that will affect one's interests. This usually takes the form of the decision to not buy a product or not supply a service in the marketplace. Economic theory criticizes a monopoly seller or a monopsony buyer as leading to inefficiency, but there is the additional problem that it effectively neutralizes the buyer's or seller's negative control rights. Negative externalities (e.g., pollution) also adversely affect one's interests outside of a market relationship so there needs to be other means to protect those interests.
2. *Positive* or *decision-making control right* is to participate in the decision of another party to protect one's interests. The Affected Interests Principle is evoked to argue for all stakeholders (i.e., all whose interests are affected) to somehow participate in a corporation's decision making. But practical and theoretical difficulties quickly arise.

There does not seem to be any plausible form of representation of all whose interests are affected. When a cell phone manufacturer makes design or pricing changes, that affects all users throughout the world using those phones, but there hardly seems to be any way for the consumers to elect representatives to "protect their interests." Their best protection is to use their negative control rights provided by competition in the marketplace. Corporate legal thinkers hence may opt in favor of a fiduciary notion—which suffers from a similar problem of the accountability of the fiduciaries to their beneficiaries as well as the legitimacy of those beneficiaries having decision-making rights in the first place.

Stakeholder theory and the affected interests principle are rather fatally flawed because they consider some hypothetical positive control rights as the solution to the very real problem of negative control rights that are *ineffective* due to monopoly/monopsony power, negative externalities, lack of information about corporate plans, and government regulations that are inadequate or poorly enforced. Efforts should be redirected toward campaigning for stronger anti-trust, environmental, and corporate transparency measures rather than asserting ineffective claims for asserting positive stakeholder governance rights.

The Debate About Corporate Governance

The classic book by Berle and Means (1932) documenting the "separation of ownership and control" in sizable publicly traded companies inaugurated the active debate about the legitimacy of effectively unconstrained managerial power. We have seen that the notion of shareholder democracy is a nonstarter for theoretical and practical reasons. A small group of large institutional shareholders (e.g., mutual investment funds or private equity firms) might exert effective shareholder control, but the managers of those large institutions do not have any more legitimacy than the managers of the corporation itself. The ultimate natural-person shareholders rely on the "Wall Street Rule" to protect their interests, i.e., on exercising their *negative* control rights by selling the shares of a company or those of an intermediary institution. The question of who should have the positive control rights is still left open.

The idea that the shareholders are the owners, members, and residual claimants in a corporation did not originate in Milton Friedman's newspaper polemic (1970) or in the neoliberalism of the Chicago School of Economics. On the management side of the managerial versus shareholder capitalism debate, one idea was that management should be treated as a profession (like being a doctor or lawyer), e.g., Berle (1959). In the large publicly traded corporations, the managerialist thesis was that managers are the custodians of essentially "social" resources and should be bound by a professional code of ethics and by their fiduciary duty to respect the "social" interests of all stakeholders. The perspective of managers as managing or governing *people* inside firms was ignored in favor of formulating the problem as one of *asset* management in the interests of "society" as a whole. This idea differed from "democratic socialism" only in that the managers were not the employees of a politically democratic government but were independent professionals bound by their own "Hippocratic Oath" to further "social" interests. But the managerialist conception did not include any actual accountability mechanisms or positive control rights on the part of "society."

The debate between the managerialist and shareholder conceptions of corporate governance came to a head in the 1990s when managers found that they could sufficiently further their own interests through stock options (and stock buybacks) while all the time pledging or at least feigning fealty to the idea of shareholder primacy. Some legal theorists even jumped on the bandwagon and unconscionably declared "the end of history" by the victory of shareholder primacy in the corporate governance debate, e.g., Hansmann and Kraakman (2000). The managers' true allegiance was shown in the ballooning top-to-bottom ratios (300+) in corporate compensation and in their willingness to use corporate investment funds for stock buybacks to ensure that their own stock options were in the money, e.g., Lazonick (2018).

But now it seems some corporate managers want a more dignified role. Many elite corporate managers are getting tired of acting as if they were the hired hands of the shareholders and the agents of shareholder primacy. The stakeholder theory provides them with an alternative cover story as they discover new "social responsibilities" to the various interest groups—all without any hint of actual effective accountability mechanisms or any source of legitimacy for that role, e.g., Business Roundtable (2019).

Who Can and Should Control Corporate Management?

The stakeholder notion of affected interests as well as the call for "shareholder democracy" fails to address the theoretical and practical questions of: (1) who should legitimately control corporate management and (2) who can do so effectively? The answer to the first question is given by democratic principles: "the people who are managed by the corporate management," and the answer to the practical question is: "The only cohesive, workable, and effective constituency within view is the corporation's work force." (Flynn 1973, p. 106) In spite of Robert Dahl's mention of the affected interests principle (1970), when it came to later specifying the "alternative," he made no use of that principle or the stakeholder theory. Without equivocation, he

advocated "a system of economic enterprises collectively owned and democratically governed by all the people who work in them.[1]"[10] (Dahl 1985, p. 91).

But these answers are clearly beyond the safe-space of almost all "responsible" legal, economic, and political thinkers, so the "corporate governance debate" will continue.

Cooperative Corporations as an Important Analytical Concept

The original conception of a corporation (which has Roman and medieval roots) was a group of natural persons engaged in certain joint activities "that possessed a juridical personality distinct from that of its particular members." (Tierney 1982, p. 19) But that original idea was completely corrupted by having those activities actually carried out by the *employees* of the corporation.

Is the cooperative corporation the revitalization of the idea of people joining together to carry out certain cooperative activities and to democratically govern those joint activities?

> A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise. (International Cooperative Alliance 2015, p. ii)

However, this high-minded idea was quickly undercut by the use of employees to carry out the actual cooperative activities—with the exception worker cooperatives where the work is carried out by the members.

Take the example of a consumer cooperative. What is the cooperative activity carried out by the members? It is not consumption; that would be a commune or kibbutz. Typically, the consumer members just carry out the "cooperative activity" of shopping in the co-op—perhaps with some vestigial "work requirement" for members such as handing out cheese samples to customers for a few hours each month.[11] In some upscale consumer cooperatives, many members were scandalized when it was discovered that some members were having their work requirement performed by their nannies or servants. Yet, the consumer members are empowered to govern the consumer cooperative which is a distribution business—whose work is actually carried by the employees of the cooperative.

This sort of corruption of the cooperative ideal is even more pronounced in the agricultural marketing and processing cooperatives (e.g., Land O'Lakes or Ocean Spray), sometimes called "producer cooperatives," where the members are the "farmers" selling their raw products through the cooperative. These agribusinesses run on hired labor and even the "producer" members may be companies whose work is carried out by employees.

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[10]The footnote reads: "In clarifying my ideas on this question I have profited greatly from a number of unpublished papers by David Ellerman, cited in the bibliography,. . . ."

[11]Most consumer co-ops do not have a work requirement and thus they are perfectly mirrored by non-cooperative supermarkets which give "members" a discount secured by showing a bar-coded "rewards card" at checkout.

Only in worker cooperatives are the actual activities of the corporation carried out by the members and the people governed by the management are the same members of the company.

Are all Rights Property Rights?

Is membership really the same as ownership? People have many membership rights that are personal rights while other rights are property rights. One's voting rights in a city (or municipal corporation) are based on residing in the city, but those rights may not be bought or sold so they are personal rights, not property rights. In a cooperative corporation, the membership rights are based on the functional role of "patronage" in the cooperative (e.g., working in a worker cooperative or shopping in a consumer cooperative). When membership rights are supposed to be based on having a certain functional or patronage role, then it makes no sense to treat them as alienable property rights. A "buyer" may not have the functional role, and if the person had the functional role, there would be no need to "buy" the rights.

Personal and property rights are easily distinguished in terms of inheritability (or "bequeathability"). When a person dies, personal rights like one's vote in municipal elections are extinguished while property rights like the votes of one's corporate shares are passed on to one's estate and heirs. When membership rights, as in a conventional corporation, may be inherited or in general, may be bought and sold, then they are property rights so then the members are referred to as "owners."

How Is a Conventional Corporation Related to a Cooperative Corporation?

A democratic firm like a worker cooperative is sometimes called a "labor-managed firm" or LMF (Vanek 1977). Some researchers have tried to set up a neat symmetry between labor-managed firms and "capital-managed firms" (KMFs) in which the latter are identified with the conventional joint stock company, the "capitalist" corporation, e.g., Dow (2003). The membership rights in the KMFs supposedly go to the "capital suppliers" just as they go to the labor suppliers in the LMFs. Similar ideas seem firmly planted in the popular and academic consciousness. Somehow, the corporate ownership rights are based on the ownership of capital goods. The rights of the shareholder are supposedly based on the shareholder's supply or investment of capital in the company.

Henry Hansmann (1990, 1996) has developed this idea in his treatment of the conventional joint stock corporation. The patrons are different in different types of cooperatives. In a consumer co-op, the members patronize the co-op by buying there. In a marketing co-op, the members sell their outputs through the cooperative. In a worker cooperative, the members patronize the cooperative by working there. Hansmann's theory is that the conventional corporation is essentially a "capital cooperative" or "lenders' cooperative" (1996, p. 14).

> The members of the capital cooperative each lend the firm a given sum of money, which the firm uses to purchase the equipment and other assets it needs to operate (say, to manufacture widgets—or cheese). The firm pays the members a fixed interest rate on their loans, set low enough so that there is a reasonable likelihood that the firm will have net earnings after paying this interest and all other expenses. The firm's net earnings are then distributed pro rata among its members according to the amount they lent, with the distributions taking place

> currently, as dividends, or on liquidation. Similarly, voting rights are apportioned among members in proportion to the amount they have lent to the firm. To supplement the capital that it obtains from its members, the firm may borrow money from lenders who are not members but who simply receive a fixed rate of interest (which may be different from the fixed rate paid to members) without sharing in profits or control. (Hansmann 1996, p. 14)

Hansmann goes on to argue that this is "precisely the structure that underlies the typical business corporation" (Ibid., p. 14).[12]

The real problem in Hansmann's thesis is that shares can be obtained for any of the reasons that any property is transferred. To attract a prized employee, a company might issue new shares as a signing bonus. Workers might receive new shares in lieu of or in addition to cash wages. Or one could receive shares for any consideration whatever. And one can receive shares in return for no consideration, that is, as a gift or inherited property. In summary, shares may be acquired in any of the ways that property may be acquired:

1. Creating shares by the founders of a corporation;
2. Purchased from an existing corporation for money;
3. Purchased from other shareholders;
4. Acquired as a labor, hiring, or performance bonus;
5. Acquired as a gift for no consideration; or
6. Inherited.

There is no necessary connection between acquiring shares and supplying capital to the corporation (#2 above).

The alternative hypothesis is not to see the conventional corporation as a special type of cooperative (with patronage as "supplying capital") but as the limiting case of a cooperative where there is no patronage requirement at all. Start with the idea of a cooperative in which the membership rights are assigned to those who have a certain patronage role, as in a worker, consumer, or marketing cooperative. Then, take the limit as the patronage role goes to zero. In the limit, the membership rights would become free-floating with no patronage prerequisite necessary to qualify one for membership. With the patronage requirement nil, the shares (which represent the underlying membership rights) become just pieces of property that can be acquired for any of the usual reasons listed above. The so-called capitalist corporation is misnamed—another offspring of the fundamental myth. The conventional joint stock corporation is not a "capital cooperative" or capital-patronage cooperative; it is the "*zero-patronage cooperative*" corporation.

Hansmann's work reminds us that "membership" is the basic concept that cuts across associations, cooperatives, and conventional joint stock corporations. Indeed, Hansmann points out that "All firms are cooperatives" (2013) but with different criteria for membership. And contrary to Hansmann's idea of a "capital-suppliers cooperative," membership in a joint stock corporation is the limiting case of being devoid of any qualifying role—unlike, say, residence in a municipality that is

[12]This analysis of Hansmann's argument was first presented in Ellerman (2007).

required to vote in city elections. Hence corporate membership rights become free-floating property rights that may be freely bought and sold, rather than qualified for or earned.

In this manner, one arrives at the notion of a *universal corporation* whose shares are free-floating property unattached to any role of supplying labor or capital or patronizing the company in any way or being related to the company in any other way (than as "shareholder"). A little more thought reveals that this is indeed what the joint stock company has become. This, in part, accounts for the flexibility and staying power of this legal form. This approach shows the unique limiting role, and hence, universality of the so-called capitalist corporation that has colonized legal systems throughout the world.

Conclusions on Corporations

Our purpose has been to analyze a miscellany of fallacies blaming the corporate form for a litany of problems. But the corporate form itself, at least in its original conception, is not the problem. Blaming "corporations" for the ills of the current system of renting human beings is like blaming glass bottles for alcoholism.

The important idea to preserve is the original and ancient idea of a corporation as a group of natural persons engaged in certain joint activities "that possessed a juridical personality distinct from that of its particular members." (Tierney 1982, p. 19) This original conception of the corporation is well described in Davis (1961), Raymond (1966), and in Abram Chayes' *Introduction* in the Davis book.

> We can here perhaps note a final irony, at least. The concept of the corporation began for us with groups of men related to each other by the place they lived in and the things they did. The monastery, the town, the gild, the university, all described by Davis, were only peripherally concerned with what its members owned in common as members. The subsequent history of the corporate concept can be seen as a process by which it became progressively more formal and abstract. In particular the associative elements were refined out of it. In law it became a rubric for expressing a complicated network of relations of people to things rather than among persons. The aggregated material resources rather than the grouping of persons became the feature of the corporation. (Chayes 1961, p. xix)

The point that is little, if at all, mentioned in the corporate law literature is that the original joint activity of the members could only be squeezed out since it was replaced by the joint activity of the employees (including managers) of the corporation. Absent the employment relation, an absentee-owned corporation could only be an unpopulated asset holding-bin renting out the assets instead of renting in employees—and even that renting out of assets would probably require some employees (if the shareholders are "absentee"). In other words, the *absentee-owned* corporation is, conceptually speaking, a "wholly-owned subsidiary" of the human rental relation, the employment contract.

One legal institution, the renting of human beings, has completely corrupted and undermined the original conception of the corporation. With the active members of a corporation replaced by employees, membership could be debased into "ownership" held by absentee shareholders. The corruption of the notion of membership in the corporation was carried to its logical conclusion in the modern corporation of the joint stock or limited liability variety.

Thus, the original conception of the corporate embodiment for people engaged in a joint human activity was turned into a piece of property like a piece of real estate or "a large, composite machine" (Miller and Modigliani 1961, p. 415) to be bought and sold in the marketplace. It is supposedly just an asset deal, the purchase and sale of "aggregated material resources"—since "the associative elements were refined out of [the modern corporations]"—just as "buying Greenland" was seen by an occupant of the American White House as a "real estate deal."

An interesting aspect of the whole corporate governance debate is how so many legal, political, and economic thinkers have completely lost sight of the concept of democracy in the organizations where people spend most of their waking hours. There is no doubt about who are the people who make up an organization (hint: it is not the corporate shareholders). Hence the application of the notion of democratic self-governance to an organization gives a clear answer to the question of who should be the members of the organization. As John Dewey put it:

> [Democracy] is but a name for the fact that human nature is developed only when its elements take part in directing things which are common, things for the sake of which man and women form groups—families, industrial companies, governments, churches, scientific associations and so on. The principle holds as much of one form of association, say in industry and commerce, as it does in government (Dewey 1948, p. 209).

The human rental relation and the degeneration of membership into ownership seem to have eclipsed the democratic ideal in so many learned thinkers today who would otherwise pledge their undying allegiance to democratic self-governance in the *public* sphere. The feminist movement has learned well that "It's private" is not a justification for denying women their basic human rights "inside the household." But many people (including many feminists) seem to take "It's private" as a sufficient reason to deny the basic human rights of self-governance inside the firm. It is only because of the professionally prudent forgetting of democratic ideals in the workplace that the whole question of corporate governance and purpose is "up for grabs" in the first place.

Abolitionism led to the elimination of the direct market for the involuntary and even the voluntary buying and selling of other human beings. Instead, we have today the institution for the voluntary renting of other human beings—and that in turn has allowed the complete corruption and debasement of the original idea of the corporate embodiment for people carrying out certain joint activities. The idea of a corporation is not the problem. The root problem is the institution for the employing, hiring, leasing, or renting of human beings and hence the neo-abolitionist call for the abolition of that human rental institution in favor of all corporations being democratic associations of the people carrying out the activities of the corporations.[13]

[13]For more on the corporate governance debate, see Ellerman (2020).

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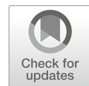
Chapter 5
Summary and Conclusions



Conventional classical liberalism poses the fundamental question as "consent versus coercion." Hence it provides no argument for completely abolishing a truly voluntary contract. Instead classical liberalism promotes greater freedom of contract, a veritable smorgasbord of different voluntary contracts should be available. Yet, in the advanced democratic countries, at least three types of voluntary contracts have been abolished: a contract for voluntary slavery or lifetime servitude, a non-democratic constitution for a city or state, and the coverture marriage contract. This historical fact points to a deeper tradition of classical liberalism which might called "democratic classical liberalism." Our task has been threefold: to recover the intellectual history of this deeper form of classical liberalism, to express it clearly in modern terms, and finally to show that the arguments against those already abolished contracts to alienate some aspects of personhood also apply against the current voluntary contract to rent, hire, employ, or lease human beings. The deeper themes in democratic classical liberalism can be grouped into three groups: inalienable rights theory, the labor or natural rights theory of property, and the democratic theory based on social or collective contracts of delegation rather than alienation. This concluding chapter briefly recapitulated these basic theories.

5.1 Conventional Classical Liberalism

This book illuminates the *problem* that is inherent to most of the conventional liberal philosophy, economics, and jurisprudence. The problem is well-illustrated by the case of a prominent political philosopher and Nobel-prize-winning economist, James M. Buchanan, who "denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or as principals." (Buchanan 1999, p. 288) Yet, no one thinks that the employees are the principals and the employer is the agent, delegate, or representative of the employees in the employer–employee relationship. Frank Knight understood what he "had" to do, e.g., identify responsible

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human action with the causally efficacious or productive services of things. But Buchanan and most other classical liberal scholars seem blithely unaware of (or ideologically blind to) the problem—or deliberately ignore it for prudential reasons. Buchanan did not even notice in the economic system where he lived his whole life and in which he received the Economics Nobel Prize, that the employees qua employees are neither the sovereigns nor principals in the most common "social-organizational arrangements." In an uncanny echo of communist or fascist dictatorships, there are some thoughts that are beyond the pale for "responsible" thinkers.

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

- violates the non-fraudulency condition by putting the factually co-responsible employees into the legal position of non-responsible instruments;
- violates the normative basis for private property appropriation, i.e., "the principle on which property is supposed to rest." (Clark 1899, p. 9), since the employees legally owe 0% of the negative product and own 0% of the positive product, i.e., appropriate 0% of the positive and negative fruits of their labor; and
- violates the restriction to delegation contracts since the employment contract is a collective contract to alienate the employees' self-governing rights to the employer within the scope of the employment.

We have seen that there was a deeper tradition of *democratic* or Enlightenment classical liberalism that implied the abolition of the voluntary slavery contract, the coverture marriage contract, and the social contract of a non-democratic constitution, and that (once recovered and restated in clear modern terms) also implies the abolition of today's human rental contract.

5.2 Summary: Inalienable Rights Theory

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

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

Hence, we can abstract the common features:

- All the contracts put a normal capacitated adult into the legal role of a person of diminished or no capacity within the scope of the contract (not in the outside role of making the contract);
- All the contracts are not factually fulfilled by the person voluntarily becoming a person of diminished or no capacity;
- All the historical contracts hence substituted another voluntary performance that would count as "fulfilling" the contract;
  - obey your master,
  - obey your husband,
  - obey your ruler, and
  - obey your employer.

The *factual* basis of the inalienability argument should be emphasized. The argument is *not* that certain rights are so important for human well-being that they should be treated as inalienable. The argument is based on the factual inalienability of responsible agency and decision-making. Hence, any legal contracts to alienate those capacities cannot be fulfilled (so fulfillment is redefined as "obedience") and thus they are fraudulent and invalid contracts.

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

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

Does this juridical theory of inalienability have any historical explanatory or clarifying power? Under the consent-versus-coercion framing of conventional classical liberalism, there could be no reason to *abolish* a voluntary contract between consenting adults. The conventional classical liberalism should allow a wide menu, a veritable *smorgasbord*, of voluntary arrangements instead of abolishing any.

Yet the theory developed here based on the deeper tradition of democratic classical liberalism implies the:

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

In the last two centuries, the most important social changes in the Western industrialized countries have indeed been:

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

Clearly, the actual historical changes go deeper than *conventional* classical liberalism. Yet it is surprising how many conventional classical liberal economists, political scientists, and legal thinkers who will rush to defend the human rental contract on the basis of the "liberty of contract" when they have no normative theory strong enough to imply the abolition of the voluntary contracts already abolished. They find little incentive to go beyond the usual "yelps for liberty" to understand the deeper democratic classical liberal tradition that did inspire and account for the abolition of the voluntary contracts for lifetime servitude and coverture marriage in addition to the legal invalidity of the voluntary constitutions for non-democratic cities or states, e.g., the charter cities, startup cities, or seastead cities.

It is easy to nod in agreement when a theory implies the abolition of institutions that have already been abolished. However, the same juridical theory implies the abolition of the human rental or employment contract, and that social change is far from being publicly considered, much less carried out. When any theory implies the abolition of an institution in a society, then the people born and raised in that society will consider the institution as natural and, of course, legitimate, and thus such an abolitionist theory will be considered a *reductio ad absurdum*.

5.3 Summary: The Natural Rights or Labor Theory of Property

The ancient principle of justice, "Give each person their due," is expressed in modern terms as the juridical principle of imputation: "Assign legal responsibility according to factual responsibility." The application to questions of property appropriation of assets or liabilities yields the natural rights or labor theory of property. Modern Economics has made a determined attempt to hijack this principle in its professional service to the human rental system. The idea is to ignore the actual legal structure of the human rental firm. That is, the employees jointly owe 0% of the liabilities and own 0% of the assets created by their responsible human actions in production. Economics redirects attention to a metaphorical "division of the product" into the "distributive shares" as if the human rental firm (or slave plantation for that matter) was some sort of a partnership between various suppliers. Then conventional as well as progressive economists lament how the many distortions in the actual economy create non-competitive rents so the actual distribution of income falls short of the competitive ideal where each input gets "the product contributed to

the total by its own performance ('what a man soweth that shall he also reap')" (Knight 1956, p. 292).

There are three fundamental mistakes/errors, which were treated in the Part II property-theoretic analysis:

1. Treating the responsible actions of persons on a par with the causally efficacious services of things;
2. The metaphorical version of the juridical imputation principle that is applied both to the actions of persons and the services of things even though the juridically trained Austrian economist, Friedrich von Wieser, pointed out in the nineteenth century that the legal or moral imputation "takes for granted physical causality" so that the "legal responsibility" is only assigned to the factually responsible persons on whom "will rightly be laid the whole burden of the consequences"; and
3. Taking the fundamental question as the question of "distributive shares" instead of the pre-distributive question of who is to appropriate the whole product, i.e., who is to be the firm, in the first place.

There is a saying, often attributed to Schopenhauer, that "All truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident." But there is a zeroth stage when it is simply ignored. Conventional Economics can always ignore the application of the imputation principle as the labor theory of property since it can pretend that the only alternative is the Marxist labor theory of value and exploitation which argues that labor is systematically not "paid for at its full value" (as Marx put it in *Capital Vol. I*, Chap. 10, Sect. 3). Marx's blundering critique of "private property in the means of production" even allows the human rental system, where the private employer legally appropriates the positive and negative fruits of the employees' labor, to parade upon the historical stage as the system embodying the "the principle on which property is supposed to rest" (Clark 1899, p. 9).[1]

From the viewpoint of the neo-abolitionist critique of the human rental system, Marx and Marxists are:

- wrong in accepting that rulership was blended with the ownership of capital goods (i.e., Marx's promotion of the fundamental myth),
- wrong in thus criticizing the "private ownership" of capital,
- wrong in accepting the classical liberal framing of the question as consent-versus-coercion (while differing only on the factual question of the labor contract being "really" coercive or not),

[1]But after a half-century or a century, that third stage of self-evidence may eventually be reached. Then the descendants of today's orthodox economists, political scientists, and other social scientists might well ask of them: "What part of renting human beings didn't they understand?", "What part of getting the fruits of your labor didn't they understand?", and "What part of workplace democracy didn't they understand?"

- wrong in accepting that the system should be analyzed and criticized by a labor theory of value rather than the labor theory of (private) property,
- wrong in missing the inalienability critique of the labor contract clearly spelled out before Marx by Hegel, and thus
- wrong in characterizing the "sphere of exchange" as "a very Eden of the innate rights of man."

Thus, it is imperative for Economics, in its professional service to the human rental system, to keep some vestiges of Marxist socialism/communism alive to serve as its foil. Then Economics can safely and credibly ignore the real alternative system with non-fraudulent contracts, property rights based on people getting the fruits of their labor, and democratic governance in what most people do all day long. Economists can prove their intellectual integrity by taking on "The Opposition" by lecturing some surviving Marxists on the problems in the labor theory of value and exploitation.[2]

For a genuine analysis of production, we may turn to the Tory thinker, Lord Eustace Percy (1887–1958), who with remarkable courage and clarity put the fundamental task as follows:

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

At some time in the future, scholars will look back in amazement how the overwhelming bulk of economic, political, and legal thinkers of our time could shamelessly support the "imaginary" association and ignore the "real association."

Table 5.1 illustrates that Percy's two associations correspond precisely to the:

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

[2] And Marxists can maintain their integrity by beating a retreat into the dark forest of sociology or by predicting 10 out of the last three economic crises.

Table 5.1 Type I & II mismatches between legal and factual responsibility for the whole product of an enterprise

<table>
<tr><td colspan="2" rowspan="2">Table of injustices due to mismatch of factual and legal responsibility for Whole Product</td><td colspan="2">Factual Responsibility for the Whole Product</td></tr>
<tr><td>Factually responsible for the Whole Product</td><td>Not factually responsible for the Whole Product</td></tr>
<tr><td rowspan="2">Legal Responsibility for the Whole Product</td><td>Held legally responsible for the Whole Product</td><td>True positive</td><td>Type II injustice: Non-responsible party gets legal responsibility</td></tr>
<tr><td>Not held legally responsible for the Whole Product</td><td>Type I injustice: Factually responsible Party is legally Non-responsible</td><td>True negative</td></tr>
</table>

5.4 Summary: Democratic Theory and the Democratic Alternative

Conventional classical liberalism frames the governance question as “coercion versus consent.” This allows political democracy and the economic system based on the employment contract to appear on the same side of the question since both are based on governance by “the consent of the governed.”

Yet, from Antiquity down to the present, there has been the argument that non-democratic government may be legitimately based on an implicit or explicit consensual *contract* of subjection, a *pactum subjectionis*. Hence, the defenders of democratic government (e.g., the tradition of *democratic* classical liberalism) had to dig deeper and develop arguments against voluntary non-democratic government. The principal argument was that people’s capacity for decision-making cannot be *alienated*—an argument that descended from the Radical Enlightenment as the secular version of the Reformation’s inalienability of conscience. Hence any purported social contract that pretended people could alienate their decision-making power to a sovereign was an impossible and fraudulent contract—and thus the attendant rights of self-governance are inalienable. At most, people can be principals to *delegate* the formation of certain decisions to delegates, representatives, or agents where the latter are tasked to make their decisions in the interest of and in the name of their principals. Thus, the rise of democratic theory in the late Middle Ages took the form of reinterpreting the implicit social contract as a contract of delegation instead of alienation. A contract to legally alienate some aspect of personhood cannot be factually fulfilled and is thus invalid.

> There is, at least, *one* right that cannot be ceded or abandoned: the right to personality. Arguing upon this principle the most influential writers on politics in the seventeenth century rejected the conclusions drawn by Hobbes. They charged the great logician with a contradiction in terms. If a man could give up his personality he would cease being a moral being.

> He would become a lifeless thing—and how could such a thing obligate itself—how could it make a promise or enter into a social contract? This fundamental right, the right to personality, includes in a sense all the others. ... There is no *pactum subjectionis,* no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity. (Cassirer, 1946, p. 175)

This analysis of governance in terms of delegation instead of alienation is abundantly clear in the work of intellectual historians such as Otto von Gierke, Quentin Skinner, and Brian Tierney. But the alienation-versus-delegation analysis is not "available" to conventional classical liberalism in its service to the human rental system. Not even the most intellectually servile economist, political scientist, or legal theorist would hold that the employer is the delegate, representative, or agent of the employees so that framing *must* be ignored in favor of repeated platitudes about political and economic governance based on the consent of the governed. And following the unholy alliance with the vestiges of Marxian socialism, the only alternative to the private human rental system is pictured as its socialization in some system of social or government employment.

The real alternative to the human rental system, public or private, is:

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

This book is about theory and principles, but principles need to be broadly understood in order for fundamental change to take place in an orderly and principled manner, e.g., by a Second Emancipation Proclamation amending the Constitution to abolish the human rental contract and to democratize all (larger than family-sized) enterprises.[3] With universal workplace democracy, one might expect lower incentives for local pollution, consumer rip-offs, and anti-competitive corporate machinations that are the natural result of absentee ownership. But the usual liberal regulatory state would still be required to backstop those improved incentives in addition to enforcing the abolition of the human rental system.

[3]For instance, one way to make the change would be to reconstitutionalize all publicly traded and large companies by converting all current "equity shares" into what they really are anyway, namely, variable-income debt securities, and then redefine the voting members and residual claimants of the corporation as the current employees. In privately held companies above family-size, there could be a mandatory conversion within say six years using a 30% democratic Employee Stock Ownership Plan (ESOP) the first two years, then another 30% the next two years, and finally the last 40% after 4 years. In this manner, the private owners would get paid out over time (at some standard valuation) since there would be, by assumption, no public market for their securities. The ESOPs could be leveraged by straight bank debt, government-guaranteed bank debt, or seller finance (see Ellerman 1990). See Brockway (1995, Appendix H, On the Reform of Corporations) for a description of a similar transition.

In closing, we cannot do better than quote the visionary corporate leader, Owen D. Young (1874–1962), founder of RCA, President and Chairman of General Electric, and Time magazine Man of the Year for 1929:

> Perhaps some day we may be able to organize the human beings engaged in a particular undertaking so that they truly will be the employer buying capital as a commodity in the market at the lowest price.. . . If that is realized, the human beings will then be entitled to all the profits over the cost of capital. I hope the day may come when these great business organizations will truly belong to the men who are giving their lives and their efforts to them, I care not in what capacity. Then they will use capital truly as a tool and they will be all interested in working it to the highest economic advantage. . . . Then we shall dispose, once and for all, of the charge that in industry organizations are autocratic and not democratic. ... Then, in a word, men will be as free in cooperative undertakings and subject only to the same limitations and chances as men in individual businesses. Then we shall have no hired men. (Young 1927, p. 392)

Yes, then we shall have no more rented people.

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