

# Listen Libertarians!:

## A Review of John Tomasi's *Free Market Fairness*

David Ellerman

Visiting Scholar, Philosophy Department,  
University of California at Riverside

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### **Part I: The fundamental consent-versus-coercion misframing**

John Tomasi's new book, *Free Market Fairness* [2012], has been well-received as "one of the very best philosophical treatments of libertarian thought, ever" (Tyler Cowen) and as a "long and friendly conversation between Friedrich Hayek and John Rawls—a conversation which, astonishingly, reaches agreement" (D. McCloskey).

The book does present an authoritative state-of-the-debate across the spectrum from right-libertarianism on the one side to high liberalism (that shares some shades of opinion with democratic socialism) on the other side. My point is not to question where Tomasi comes down with his own version of "market democracy" as a remix of Hayek and Rawls. My point is to use his sympathetic restatements of views across the liberal spectrum to show the basic misframings and common misunderstandings that cut across the liberal-libertarian viewpoints surveyed in the book. As usual, the heart of the debate is not in the answers to carefully framed questions, but in the framing itself.

The first and most basic misframing is the one that practically defines liberalism of all stripes, namely the framing of issues in terms of consent versus coercion, and then the taking of a high moral stand in favor of consent and contract as opposed to systems based on inherited status, divine rights, patriarchy, or totalitarian coercion. "Legitimate government must be founded on the consent of the governed." [p. 5]

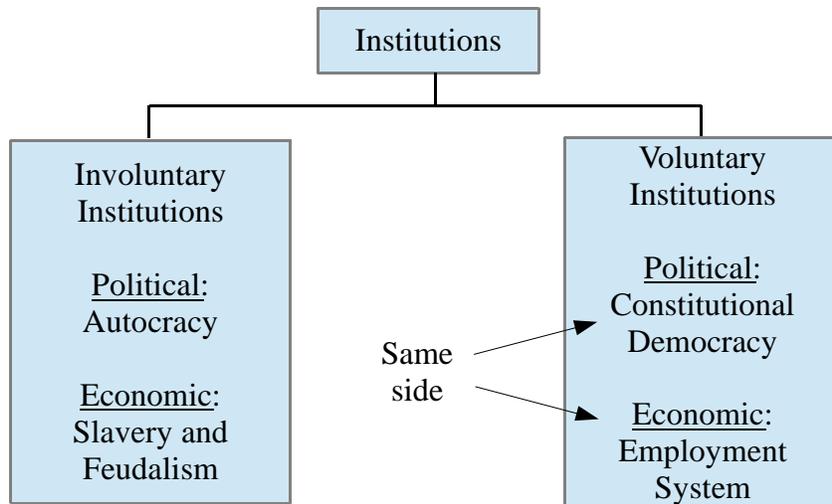


Figure 1: The standard liberal framing of coercion versus consent.

But this is a rather selective liberal view of intellectual history that simply ignores the fact that from Antiquity down to the present, the sophisticated defenses of political autocracy and even individual slavery *have been based on consent*.

For instance, the codification of Roman law in *Institutes* of Justinian gave three ways slavery could be legal and all had the incidence of consent and contract. One was an explicit contract. Another was a case where a person had by their own actions committed a crime worthy of capital punishment (e.g., being a prisoner in a war against Rome) and who then voluntarily agreed in a plea bargain to a lifetime of slavery instead of the capital punishment. And the third rationale is where a child of a slave mother is raised for eighteen or so years using the food, clothing, and shelter provided by the master, and this debt needs to be paid off through work (all the while accumulating more debt to the "company store") or some other payment that would be a buy-out or manumission from this debt peonage.

On the liberal idea of government based on the "consent of the governed," the great legal scholar, Otto von Gierke showed that at least by the Middle Ages,

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.... 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. 38-40]

If a doctrine has been a "philosophic axiom" at least since the Middle Ages, then liberal intellectual history might want to take note of it. For instance, where absolute monarchy existed as a settled condition, then the sophisticated legitimation was not by Locke's carefully chosen foil, the patriarchy and divine right of Filmer, but by the implied contract of subjection that had been vouchsafed by the prescription of time in the consent of the people.

Since the sophisticated defense of all stripes of autocracy could be viewed as based on a social contract of subjection, the *pactum subjectionis*, what then is the defining characteristic of democracy that seems to escape libertarian scholars? The relevant distinction is not the contrast of coercion versus consent (or status versus contract etc.), but the distinction between:

- 1) voluntary contracts that *alienate* and transfer the right of self-government, and

- 2) voluntary contracts that only *delegate* authority to representatives to govern in the name of the governed.

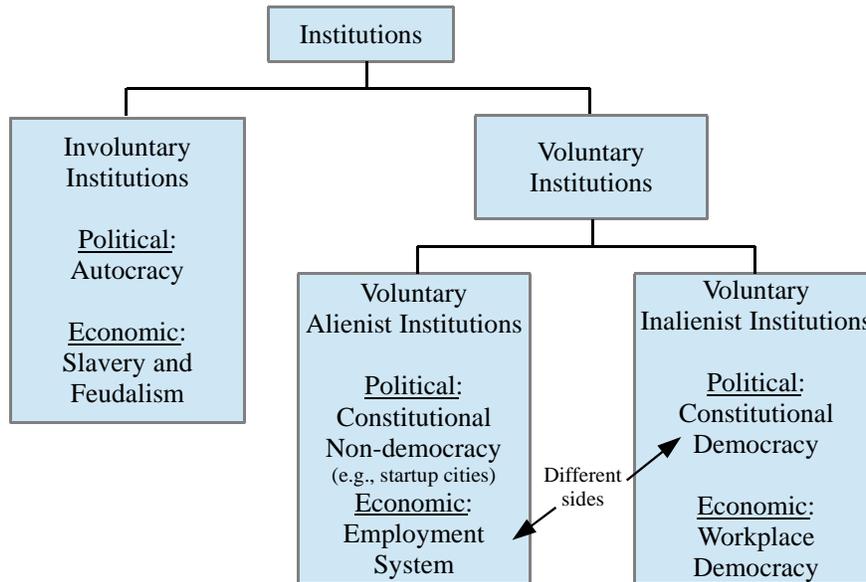


Figure 2: The reframing that distinguishes between alienation and delegation contracts.

Again Gierke explains.

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 Princes. One school explained this as a definitive and irrevocable alienation of power, the other as a mere concession of its use and exercise. ... On the one hand from the people's abdication the most absolute sovereignty of the prince might be deduced, ... . On the other hand the assumption of a mere "*concessio imperii*" led to the doctrine of popular sovereignty. [Gierke 1966, 93-94]

The civic republican scholar, Quentin Skinner, has emphasized the same contrast between alienation and delegation [1978].<sup>1</sup> Democratic theory is in fact based not on the courageous libertarian stand against coercion and in favor of the consent of the governed, but on a critique of the voluntary contracts of alienation as legally alienating that which is *de facto* inalienable. But the critique of contracts of alienating self-governance is not "available" to Tomasi or other libertarian thinkers who keep returning to the simple coercion versus consent framing of the question.

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

<sup>1</sup> In contrast, a comparable intellectual history from a standard liberal perspective, e.g., Israel 2010, ignores the alienation-delegation distinction emphasized by Skinner (and James Buchanan [1999]) and frames the issue as democracy based on consent of the governed versus the coercive systems of the past based on divine right, aristocracy, patriarchy, and conquest.

Fortunately, there is a deeper tradition that descends from the Reformation and Enlightenment and that is based on inalienable rights arguments against the voluntary alienation contracts *per se*. Alienation contracts such as the self-sale contract, the non-democratic constitution (*pactum subjectionis*), and the coverture marriage contract have all been outlawed in the western democracies—although there are contemporary libertarian attempts to revive consent-based non-democratic government in the idea of a "shareholder state," charter cities, "free cities," startup cities, and seasteading.

This inalienable rights critique is not a choice in the libertarian buffet because the contractual foundation for the governance of what most people do all day long, namely the employment contract, is an alienation contract. The employer is not the delegate, representative, or trustee of the employees and does not manage in the name of those managed. Hence the liberal insistence on the consent-versus-coercion framing is required so that the "legal relationship normally called that of 'master and servant' or 'employer and employee'" [Coase 1937, 403] and political democracy will appear on the *same* side of consent-versus-coercion framing (figure 1)—whereas they are on the opposite sides of the alienation-versus-delegation framing (figure 2). That is why the alienation-vs.-delegation framing is available to thinkers of civic republican bent like Quentin Skinner and to *democratic* classical liberals like James Buchanan, but is unavailable to libertarian thinkers who give the "loudest yelps for liberty" [Johnson 1913] on behalf of the renters of persons.<sup>2</sup>

James Buchanan is an example of a democratic classical liberal who gets it right concerning delegation versus alienation.

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]

Since the employees in a firm based on the "legal relationship normally called that of 'master and servant' or 'employer and employee'" are neither sovereigns nor principals, and the "voluntary agreement" is an alienation contract, not a "delegation of decision-making authority to agents," the "justificatory foundation for a liberal social order" "denies legitimacy" to that "social-organizational arrangement."

Similarly classical liberal democratic thought, as in Buchanan, makes the case for the "social-organizational arrangement" of democratic self-governance.

To Plato there are natural slaves and natural masters, with the consequences that follow for social organization, be it economic or political. To Adam Smith, by contrast, who is in this as in other aspects the archetype classical liberal, the

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<sup>2</sup> Libertarian thought does have a faux or sham "theory of inalienable rights" (mentioned by Tomasi) that will be treated in Part IV of this review.

philosopher and the porter are natural equals with observed differences readily explainable by culture and choice. [Buchanan 2005, p. 67]

This natural equality means the sovereigns-or-principals principle would apply to all and thus would rule out governance arrangements based on a voluntary contract of alienation of governance rights.

The postulate of natural equality carries with it the requirement that genuine classical liberals adhere to democratic principles of governance; political equality as a necessary norm makes us all small 'd' democrats. [Buchanan 2005, p. 69]

This would rule out the non-democratic governance contract agreed to by voluntarily moving to a charter city, a startup city, or a seastead city—all of which are enthusiastically supported by right-libertarianism.

[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 libertarian bottom line is that government must be based on consent which includes the possibility of exit when consent is withdrawn. Right-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 libertarian point is that there should be a "democratizing choice of law, governance, and regulation" which includes well-regulated pro-business non-democratic enclaves like old Hong-Kong and new Dubai. Libertarian models of consent-based non-democratic governments include the notion of "shareholder states" ([Tyler Cowen's phrase](#)), [proprietary cities](#), ["free cities" or "startup cities"](#), Patri (grandson of Milton) Friedman's floating [seastead cities](#), and Paul Romer's [charter cities](#) 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).

Tomasi continually repeats the standard clichés about consent versus coercion, and seems to have no inkling that this might be a superficial misframing of the real questions concerning the two voluntary options: 1) sovereigns-or-principals on the one hand, versus 2) alienation to become a subject on the other hand.<sup>3</sup> And there is little reason for Tomasi or other libertarians to reframe the debate since they are ably assisted in maintaining the consent-vs.-coercion misframing by the wide swath of left-wing thinkers who play the social role of the "useful fool" by accepting and thus 'validating' the misframing, and then simply arguing the opposite side of the dichotomy that the employment contract is not "really" voluntary.<sup>4</sup>

## **Part II: The misframing of property theory**

Tomasi echoes Nozick and a number of other libertarian thinkers in focusing on a rather bizarre "self-ownership" treatment of what is broadly known as Lockean property theory.

At least since the time humanity moved beyond primitive animism, it has been recognized that only persons can be responsible for anything. Things are not responsible agents; responsibility is

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<sup>3</sup> For more on the analysis of alienation versus delegation contracts, see Ellerman 1992, 2005, or 2010b.

<sup>4</sup> On "Marxism as a capitalist tool," see Ellerman 2010a.

always imputed back through an instrument to the human user. A basic function in seemingly any legal system is the determination in trials or other judgments as to who was in fact responsible for some misdeed so that the legal responsibility in terms of liabilities and penalties can be assigned accordingly. Responsibility works both ways; there is also the question of who was responsible for certain beneficial results. People should have the legal responsibility for both the positive and negative results of their deliberate actions, the "fruits of their labor." The theory of property is concerned with correctly assigning those rights and liabilities whenever new property is produced and old property is consumed, used-up, or otherwise destroyed.

That responsibility principle is essentially primordial; Locke did not invent it. But Locke is usually associated with explicitly applying that principle to the theory of property, particularly the questions of property creation. This is the Lockean principle of "getting the fruits of your labor" which is often called the *labor or natural rights theory of property* [e.g., Schlatter 1951]. The economic activities of production and consumption differ from exchange in that they inherently involve the initiation and termination of property rights; exchange does not. In production, the services of land, persons, and capital (to use the classical trinity) are the "inputs" that are used-up in the process of producing the products or "outputs" to be sold to the customers. Any private property system needs some mechanism to determine who holds the liabilities for the used-up inputs and who has the initial property rights to the outputs.

But here again there is a problem when production is organized under the employer-employee relationship as opposed to say a family farm or small artisan-operated workshop where people are working for themselves. All the human beings who work in a productive enterprise, working employers or employees, are jointly *de facto* responsible for using up all the inputs to the process, but *none* of those liabilities are legally assigned to the employees. Similarly that jointly responsible human activity produced the products or outputs, but *none* of the initial property rights to the produced outputs are assigned to the employees. Instead, the employees are legally treated as only the suppliers of one of the "inputs," labor services, and thus they are only one of the outside parties to whom the liability for that used-up input is owned, a liability usually paid off as wages and salaries.

When all or the overwhelming number of the responsible human beings involved in a joint productive activity have *zero* legal liability for the used-up inputs and *zero* legal ownership of the produced outputs, then it is somewhat problematic to give an "account" for the activity in terms of the responsibility principle. Hence our libertarian scholars and social scientists need some other way to completely reframe the question preferably without even mentioning the r-word "responsibility" or expressions like "fruits of one's labor" (unless reinterpreted in some Pickwickian sense of "one's labor").

Here is where Locke's genius comes to the foreground and the libertarians' "self-ownership" theory comes into play. Instead of thinking of persons taking deliberate actions, think of each person as getting an initial amount of a commodity "labor" like an initial allotment of money or chips in a board game. Then persons can make exchanges with Nature by mixing their own labor with unowned natural resources and getting in exchange certain products. By ignoring all the creation and termination of property rights in ordinary production and consumption, and by sticking to a mythical Lockean initial state for the explanation of property rights, one can tell a "property rights" story without even mentioning the responsibility principle. Phrases like "fruits of one's labor" might be too suggestive, and, as far as this reader can tell, Tomasi manages to avoid that standard phrase in the entire book so the "self-ownership" interpretation of Lockean property theory has served that reframing purpose well.

But even if the phrase "fruits of one's labor" might be accidentally mentioned, then part of Locke's genius was showing that it could be given a Pickwickian interpretation compatible with the renting of persons. Instead of taking "one's labor" to mean the labor one performs (the usual interpretation), reinterpret it to mean the labor one "owns." Then the employer of employees, like the master of slaves, is always getting the "fruits of *his* labor." As Locke put it:

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 [sic], removing them out of that common state they were in, hath fixed my Property in them. [Locke, *Second Treatise*, section 28]

As C. B. Macpherson explains:

To Locke a man's labour is so unquestionably his own property that he may freely sell it for wages. ...The labour thus sold becomes the property of the buyer, who is then entitled to appropriate the produce of that labour. [Macpherson 1962, 215]

...

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, 221]

Now everyone knows that the responsibility for human actions cannot be transferred like a commodity. The simple example of a hired criminal emphasizes the *de facto* inalienability of responsibility. A hired killer might tell the judge that he "sold" his actions to his employer. He voluntarily agreed to "perform certain actions in return for agreed upon compensation" (a standard description of the labor contract), and that is the extent of his legal involvement. But the judge would no doubt be unmoved by this argument that the employer should have the sole legal responsibility for the fruits of "his labor." Of course, any contract to commit a crime is illegal but the hired killer is charged, along with his employer, with murder, not making an illegal contract. When Ronald Coase described the hiring or renting<sup>5</sup> of human beings as the "legal relationship normally called that of 'master and servant' or 'employer and employee'," he used a modern British law book on the employment relation. That same law book explains the case of the hired criminal as follows:

All who participate in a crime with a guilty intent are liable to punishment. A master and servant who so participate in a crime are liable criminally, not because they are master and servant, but because they jointly carried out a criminal venture and are both criminous. [Batt 1967, 612]

When the venture "they jointly carried out" was not a criminous venture but an ordinary productive enterprise, then it is hard for our liberal scholars and social scientists to argue that

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<sup>5</sup> According to the standard texts: "Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself: he must *rent* himself at a wage." [Samuelson 1976, 52 (italics in original)] Or "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, 323]

employees suddenly become non-responsible instruments "employed" by their "employer." Hence some alternative framing is required that simply will not raise these troublesome questions. Tomasi takes up the libertarian "self-ownership" theory with gusto and perhaps without any inkling that this framing hides the institutionalized violation of basic responsibility principle that *should* be the foundation of the private property system and other legal imputations.<sup>6</sup>

### **Part III: The contractual nature of the firm; the misframing about "productive property"**

In Part I above, we saw how Tomasi used the standard consent-versus-coercion misframing of the basic issues. In Part II, we considered the misframing involved in his treatment of the Lockean theory of property. In this Part III, we consider the conceptual misunderstanding of what Tomasi calls "productive property" which allows a basic capitalism-versus-socialism misframing of the debate about the so-called "capitalist" system.

In Parts I and II of this review, the points being made were relative simple; the distinction between contracts of alienation and of delegation, or the property-theoretic application of the ordinary juridical principle of imputing legal responsibility in accordance with *de facto* responsibility. In this Part III, the point is conceptually difficult and requires some use of careful and abstract thinking.

There is a fallacy that is almost always involved in the descriptions of the current free market private property system. This is the *fundamental myth* [Ellerman 1992] that the ownership of "capital," "productive property" (Tomasi's favorite phrase), or the "means of production," includes the right to manage any production process using those assets as well as the ownership rights to the products of that productive activity.

To see the fallacious nature of the view, one only has to take a few seconds to consider the case where the ownership of the productive assets (e.g., machines, buildings, land, or other capital goods) *stays the same*, but the assets are rented, leased, or loaned to another legal party who undertakes the productive process. Then the asset owner still has his ownership of the capital asset but has no ownership of the products or management rights over the process which might include rented or leased assets from many owners. One would think this suppose-the-capital-is-rented-out argument would be easily available to people on the right and left who constantly use phrases like "productive property" or "ownership of the means of production." But the misuse of these phrases is ubiquitous (on both the right and left) and takes many different forms. Even if a person, perchance, understood the argument in one context, they may still make the same mistake in other contexts.

For instance, one way to state the point is that "residual claimancy" is not a property right attached to the ownership of "productive property" or the "means of production"; residual claimancy is a market-contractual role determined by who hires what or whom in the marketplace. One would think that those who are (correctly) enamored with markets would take the trouble to understand the effects of market contracts (more on this in Part V). Those who unthinkingly talk about "ownership of the means of production" or the "private ownership of productive property" *as if* that ownership included residual claimancy are in effect acting like

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<sup>6</sup> For book-length treatment of the labor or natural rights theory of property and related questions, see Ellerman 1992. For more on "self-ownership," see Pateman 2002.

capital cannot be rented. But the characteristic feature of the misnamed "capitalist" economy we have today is not that capital cannot be rented—but that people can be rented.<sup>7</sup> Thus in this people-rental economy, the legal party that ends up "being the firm" in the sense of the residual claimant is determined by which way the rental or hiring contracts are made, e.g., by the owners of capital renting people, by people renting capital from its owners, or by some third party renting both the people and assets involved in a productive activity.

When stated in this simple way, it is relatively easy to get agreement that capital can be rented and thus that residual claimancy is determined by the pattern of contracts so "residual claimancy" is not "owned."<sup>8</sup> But then people will turn around and commit the fallacy in other ways—*particularly* when the legal party undertaking a productive activity is a corporation. Then they misinterpret the ownership of the corporation (an actual property right) as automatically including the "ownership" of residual claimancy in any productive activity using the corporation's assets—as if a corporation's assets could not be rented or leased out.<sup>9</sup>

But the ownership of a real estate company that owns a mall does not include residual claimancy in the stores that operate in the mall. Or the ownership of an oil company or cab company does not include the residual claimancy in the operation of the gas stations or cabs leased to independent operators. Depending on the contracts, a corporation can be just the owner of assets leased to other operators or it can be the operating company using those assets in a productive activity. Thus the residual claimancy in the going concern that uses capital assets owned by a corporation is not part of the ownership of the corporation but depends on the pattern of market contracts made by the corporation. This point is not "rocket science" and one would hope that free-market thinkers could grasp the point.<sup>10</sup>

This confusion about what is involved in the "ownership of the means of production" is an updated version the older relationship between the ownership of land and the governance of the people living on the land. In the distant past before land became a privately-owned, rentable, and salable asset, the governance or Lordship over people using the land was considered part and parcel of the Ownership of the land. As Maitland put it: "ownership blends with lordship,

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<sup>7</sup> "One can even say that wages are the rentals paid for the use of a man's personal services for a day or a week or a year. This may seem a strange use of terms, but on second thought, one recognizes that every agreement to hire labor is really for some limited period of time. By outright purchase, you might avoid ever renting any kind of land. But in our society, labor is one of the few productive factors that cannot legally be bought outright. Labor can only be rented, and the wage rate is really a rental." [Samuelson 1976, 569]

<sup>8</sup> The claim that residual claimancy was "owned" as part of the capital ownership but was transferred in the rental contract does not survive a simple symmetry argument. A given productive opportunity might have capital rented from capital suppliers A, B, and C, so it makes no sense to hold that the same residual claimancy in that opportunity was owned by each of many suppliers before the rental contracts.

<sup>9</sup> This is a conceptual point about the structure of property rights and is not about the bargaining power or transaction costs involved in renting capital out of a corporation.

<sup>10</sup> Economists can understand this simple point about residual claimancy, at least for a few minutes, until they turn to finance theory (and capital theory). Corporate finance theory as well as the older capital theory are based on definitions that capitalize the future value of the profits that result from residual claimancy into the current value of the capital asset (typically a corporation) even though the market contracts that amount to residual claimancy have hardly been made now for the entire future time periods. 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 asset) as if it were currently owned by the capital owners. Thus economists can understand the point in some non-threatening contexts, but the point is "unavailable" in other important and ideologically sensitive contexts where economists are called upon to fulfill their social role of giving a "scientific" account of the current system.

rulership, sovereignty in the vague medieval dominium,...." [Maitland 1960, 174] The landlord was the Lord of the land. But as land became simply real estate property, the basis for Lordship shifted to the contracts of subjection previously mentioned.

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]<sup>11</sup>

But socialists and capitalists alike—each for their own reasons—carried over the idea that "Rulership and Ownership were blent" [Gierke 1958, p. 88] when it came to the "ownership of the means of production."

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, pp. 450-451]

Marx's "ownership of the means of production," indeed Marx's notion of "capital," which was used to misname the current system, was based on this fallacy. By "capital" Marx did not simply mean financial or physical capital goods (which Marx called the "means of labor"); he meant those goods used by wage labor with private ownership of the means of production and where the capital owner is the "firm" in the sense of being the residual claimant. Otherwise, "capital" becomes just the "means of labor." In short,

Marx's "capital" = "means of labor" + "contractual role of being residual claimant."

If one wishes to use the word "capital" in that Marxian sense, then one gives up being able to talk about the "ownership" of capital since there is no "ownership" of the contractual role of being the residual claimant. But Marx continued to talk about "capital" (in the sense that includes residual claimancy) as being owned in a linguistic move that might be called a "semantic straddle" (i.e., an invalid argument based on using the same word with two different meanings in different parts of the argument).

Outside of Marxian muddles, there is a similar ambiguity in the common notion of "owning a factory." There is the ownership of factory buildings (and the ownership of corporations with such assets), but there is no "ownership" of the going-concern aspect of *operating* a factory as that is a contractual role in a market economy (residual claimancy). If the owner of a factory building leased it to an operating company, then the factory owner would not be the "firm" or residual claimant for the business being conducted in the factory. By using the same Janus-phrase "owning a factory" to straddle both meanings, one could seem to have an argument that the contractual role of operating a factory was "owned":

"Owning the factory" = "Owning the factory building" + "contractual role of residual claimant."

For instance, when it is argued to many economists today that "owning the factory" (in the sense of operating it) is a contractual role, not an extra owned property right, the typical response is: "Yes, but it is that role which is called the 'ownership' role." After thus using "ownership" to name a contractual role, the economists then straddle back to the old meaning and talk of "ownership" as a property right. If one wants to talk about the contractual role of residual

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<sup>11</sup> Note this is exactly the sequence followed in the firm when it is realized that "productive property" is rentable so the "Rulership" over employees could not be based on that "Ownership" but must be based on the "Contract of Subjection" between the employees and employer.

claimancy as the "ownership role" then one loses the freedom to switch back to the other meaning of "ownership" as a property right. It is surprisingly hard for well-trained social scientists to resist this use of the same phrase with different meanings in the same "argument," particularly when dealing with ideologically sensitive matters.

This confusion as to what is involved in the ownership of what Tomasi calls "productive property" is crucial to the misframing of the whole capitalism-socialism debate. The socialist side of the debate believes in the misframing as vehemently as the so-called "capitalist" side so that it will support their desired conclusion that any non-capitalist mode of production must involve social if not state ownership of the means of production. Here, as in other misframings, the socialist left and capitalist right are in symbiotic agreement about the framings while taking mirror-image positions, so they both agree to close the circle of debate and to disregard other views as marginal and ignorable.

One might imagine a debate between non-democratic and democratic government conducted by two sides with each believing that sovereignty and rulership was part of land ownership. Then the proponents of democracy would have to insist on social or public ownership of land in order to have popular control over a town while the temporal lords would insist on the private "ownership" of say a town or city—all as if governance rights were attached to the land as the "means of residence," not to the people who reside on the land.

Tomasi's treatment of the debate about workplace democracy is similarly misframed as being about "social" versus private ownership of the means of production. For instance, the Yugoslav notion of the self-managed firm was based on an utterly muddled notion of "social ownership." Many social democrats in the West who defend economic democracy [e.g., Dahl 1985] still see the conventional firm as being based on the muddled notion of "private ownership of the means of production" (rather than the contract to rent human beings). Since they see the governance and product rights as being part of that "private ownership of productive property," they see a "conflict" with democratic principles—which they would resolve in favor of democratic principles. Thus the democratic socialist version of this "high liberalism" wants to "socialize" those non-existent residual claimancy property rights—particularly in corporations that are so big that they are in some sense already "social." Thus the misframed debate about whether residual claimancy should be privately or socially "owned" misses the point that it is not owned at all. Being the firm (= residual claimant) is a market-contractual role, and the key institution in the misnamed "capitalist" system is not the "private ownership of productive property" but the voluntary contract for the renting of human beings.

The real debate is not about "socializing" private property but about the abolition of the voluntary self-rental contract in favor of firms that generalize the family firm and self-employed business person to a larger scale where all the people working in the firm are its legal members. Far from socializing private property, that would for the first time base the appropriation (and termination) of private property on the just basis of the juridical responsibility principle. It would perfect private property, not socialize it, as was pointed out by earlier free market advocates of the labor theory of property such as Thomas Hodgskin [1973 (1832)].

Of course, today's human-rental system is "a" private property system just as was the earlier private property system of human ownership (and which was no less vigorously defended in the name of "private property"). Instead of seeing the workplace democracy of jointly "self-employed" people as the perfection of private property, the "private ownership" misframing

allows the defenders of the human-rental system to strike the pose as the "defenders" of private property.

Tomasi uses the same ownership-determines-governance misframing to pigeon-hole all those who support workplace democracy as being "market socialists" who oppose private productive property. But we noted above in Parts I and II, the misframings exploited by Tomasi are actually shared by much of the left, particularly the misframing about the "private ownership of the means of production." There are many high liberals and democratic socialists who themselves (mis-)frame their support of workplace democracy as a "socializing" of productive property. These muddle-headed democratic socialists, not to mention Marxists,<sup>12</sup> are a great boon to libertarian scholars and social scientists who can then defend the peculiar institution of renting people and appropriating the positive and negative fruits of their labor as "*the* private property system" rather than its complete abuse.

#### **Part IV: The faux "inalienable rights" theory**

In Part I, we saw how Tomasi used the standard consent-versus-coercion misframing of the basic issues. In Part II, we considered the misframing involved in his treatment of the Lockean theory of property. In Part III, we considered the conceptual misunderstanding of what Tomasi calls "productive property" which allows the basic capitalism-versus-socialism misframing of the debate about the so-called "capitalist" system. In this Part IV, we consider the rather fake "inalienable rights" theory that is consistent with right-libertarian principles.

While Tomasi clearly approaches the Hayek-Rawls remix from the side of right-libertarianism, he thinks that Harvard's late stellar libertarian thinker, Robert Nozick, had gone too far, particularly in Nozick's acceptance of the non-democratic pact of subjection, not to mention the voluntary slavery contract. Nozick pointed out that the libertarian philosophy would accept both these contracts as being valid or legally permitted. He argued that a free libertarian society should validate that sort of a political contract with a "dominant protective association" [Nozick 1974, p. 15] playing the role of the Hobbesian sovereign. And the same reasoning would re-validate the individual version of the alienation contract.

The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would. [Nozick 1974, p. 331]

Even Nozick is reported to have had second thoughts in his later life precisely on the question of inalienability, although Nozick never developed a *theory* of inalienability that would overturn his earlier position.

In any case, Tomasi repeatedly refers to the "liberal doctrine of inalienable rights" [e.g., p. 51]. But Tomasi does not enlighten the reader about this liberal theory of inalienable rights that Nozick was unable to discover and yet would provide a definitive critique of individual slavery contracts and the political *pactum subjectionis* (and perhaps the coverture marriage contract).

But Tomasi is correct that there is indeed a liberal "theory of inalienable rights" and it also goes back at least to Locke. Unfortunately, it is a rather fake or sham "inalienable rights" theory since it does not even rule out a civilized form of the voluntary slavery contract (never mind the *pactum subjectionis* or coverture marriage contract). Again, it was Locke's genius to choreograph the pattern that would be repeated over and over by liberal thinkers.

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<sup>12</sup> For still more on the symbiotic misframings mutually agreed upon by Marxism and liberal thought, see Ellerman 2010.

The Lockean theory starts by taking some outrageously total example of an alienation contract, e.g., that gave the slave owner the right to kill the slave. The standard example was Roman slavery where the owner could arbitrarily kill a slave (e.g., to feed his goldfish). Then liberal thinkers, "high liberals" or otherwise, take a high moral stand against such alienation contracts.

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. [Locke, *Second Treatise*, § 23]

This is the fount and source of the liberal theory of inalienable rights. But this is only an intellectual sleight of hand. After taking this edifying stand, Locke pirouettes in the next section and accepts a slavery contract that has some rights on both sides.

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. [Locke, *Second Treatise*, § 24]

Of course, any legal regime that bothered to paper over a slavery relation with a contract would have rights and limited powers on both sides—at least in the law books (e.g., the slave owner would *not* have the right to kill a slave to feed his goldfish). And just as Locke suggested how to linguistically reinterpret expressions like "fruits of one's labor" (see Part II), so he suggested that contractual slavery should be called "drudgery."

It might be noted that Locke also accepted the other principal legitimation for enslavement, namely as a voluntary choice of a plea bargain in the case of a capital crime.

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. [Locke, *Second Treatise*, § 23]

Locke seems to have justified slavery in the American colonies by interpreting the slaves as "captives" in just wars in Africa who took the plea bargain and who were then sold into the Atlantic slave trade [viz. Laslett 1960, notes on §24, pp. 325-326].

The contractual defense of slavery was also used in the debate over slavery in Antebellum America, although one would hardly know this from the usual liberal histories of the debate.<sup>13</sup> The contract might be explicit. In the years prior to the Civil War, there was explicit legislation in six states "to permit a free Negro to become a slave voluntarily" [Gray 1958, p. 527; quoted in Philmore 1982, p. 47].<sup>14</sup> Or the contract might be implicit.

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<sup>13</sup> For instance, McKittrick [1963] collects together essays of fifteen pro-slavery writers but does not include a single writer who argues on a contractual basis such as Samuel Seabury, not to mention the whole alienable natural rights tradition of Locke, Hobbes, Grotius, Pufendorf, Molina, Suarez, and many others [see Ellerman 1992].

<sup>14</sup> For instance in Louisiana, legislation was passed in 1859 "which would enable free persons of color to voluntarily select masters and become slaves for life." [Sterkx 1972, 149]

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]

"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]

The point is that the Lockean inalienable right theory would not rule out a civilized explicit or implicit slavery contract, and the Lockean *volte-face* provided the pattern to be followed by later writers using this classical doctrine of "inalienable rights."

What about the English common law tradition? William Blackstone, in his codification of English common law, stuck to Locke's choreography. Blackstone rules out a slavery where "an absolute and unlimited power is given to the master over the life and fortune of the slave." Such a slave would be free "the instant he lands in England." After such an edifying stand on high moral ground, Blackstone pirouettes 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"]

Other classical liberal rule-of-law thinkers, such as Montesquieu, employed the same Lockean choreography in their treatment of inalienability but we might jump over to modern times and include the dean of high liberalism, John Rawls.

If any liberal thinker was going to develop a sophisticated counterargument to Nozick's libertarian endorsement of the slavery contract, then surely it would be his Harvard high-liberal counterpart, John Rawls. But in Rawls' rather brief treatment of inalienability (in *Political Liberalism*), he follows the Lockean choreography, as transmitted by Montesquieu, by first arguing against an extreme contract that would alienate *all* the basic liberties. As Montesquieu stated the argument:

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 (1748), Vol. I, Bk. XV, Chap. II].

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

grounds upon which the parties are moved to guarantee these liberties, together with the constraints of the reasonable, explain why the basic liberties are, so to speak, beyond all price to persons so conceived. [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 (1748), Vol. I, Bk. XV, Chap. II] Then Montesquieu performs his *volte-face* by noting that this would not exclude a civilized or "mild" form of the contract.

This is the true and rational origin of that mild law of slavery which obtains in some countries; and mild it ought to be, as founded on the free choice a man makes of a master, for his own benefit; which forms a mutual convention between two parties. [Montesquieu 1912 (1748), 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. 366-7 and fn. 82]

Since any modern civilized form of a slavery contract (e.g., a lifetime labor contract) in "a well-ordered society" as envisaged by Nozick, by economic theory,<sup>15</sup> or even by Rawls, would *not* involve alienating *all* the basic liberties, the mighty mountain of the liberal "doctrine of inalienable rights," so proudly mentioned by Tomasi, seems to have produced only a mouse.

Right-libertarians have produced a few other arguments against the slavery contract, and these arguments have been answered from a Nozickian perspective in Philmore's *Libertarian Case for Slavery* [1982]. The principal argument is that contracts should allow for exit or breach. The fugitive slave laws would not be in accord with libertarian strictures against personal coercion so the slavery contract would seem to be unenforceable.

Of course, any contract where one party performs upfront (like the lump sum payment from master to slave or the home mortgage money supplied to a home buyer) and the other party performs over an extended period of time, there must be some provisions to allow exit or breach in a manner that is not unjust to either party. For instance, home mortgages would be "unenforceable" if the home owner could just stop making payments, stay in the house, and the mortgage lender had no recourse. Hence the mortgage institution requires some default-recourse mechanism such as foreclosure on the house.

In a similar manner, right-libertarians have pointed out that a contractual slavery system would not work if the slave buyer made a lump sum payment in the beginning and then the slave could cease to work at some future date without consequence. This is, of course, not an argument against a slavery contract *per se* but a call for some recourse mechanism in the case of breach that is fair for both sides (but not something draconian like the fugitive slave laws). This can be dealt with on libertarian grounds.

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<sup>15</sup> The crown jewel of modern economics, the Fundamental Theorem of Welfare Economics ("A competitive equilibrium is allocatively efficient"), must assume that the legal system has been "modified to permit individuals to sell or mortgage their persons" [Christ 1975, p. 334]. Otherwise there might be willing parties on both sides of such an outlawed contract so a competitive equilibrium would not be allocatively efficient (Pareto optimal).

Thus, if A has agreed to work for life for B in exchange for 10,000 grams of gold, he will have to return the proportionate amount of property if he terminates the arrangement and ceases to work. [Rothbard 1962, p. 441; quoted in Philmore 1982, p. 50]

This libertarian recourse mechanism could be easily implemented using an escrow account. The lump sum payment such as the 10,000 grams of gold would be placed in an escrow account in a bank, and then, as the slave performed the labor over the course of time, the bank would periodically release proportional amounts to the slave or his designated beneficiaries.

Indeed, such a mechanism of delayed payments makes the slavery contract essentially into a long term human-rental or employment contract.

The only difference is, in the mode of purchasing. The owner of the slave purchases, at once, the whole of the labour, which the man can ever perform: he, who pays wages, purchases only so much of a man's labour as he can perform in a day, or any other stipulated time. [Mill 1826, Chapter I, section II]

This example points out why one cannot expect any serious inalienability theory to come out of right-libertarian thought. In the *Libertarian Case for Slavery*, Philmore made the point explicitly.

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]

Hence any serious theory of inalienability (e.g., based on the *de facto* non-transferability of responsible human action as we see in the hired criminal example) is simply unavailable to libertarian scholars and social scientists embedded in the "free market free enterprise system" that values the contractual freedom to rent people—and thus such an inalienable rights theory will not be found in Tomasi's book that is "one of the very best philosophical treatments of libertarian thought, ever."

Although unavailable to right-libertarian thought (for the stated reasons), there is a theory of inalienable rights that descends from the Reformation inalienability of conscience through the Enlightenment and through the abolitionist, democratic, and feminist movements to modern times.<sup>16</sup> The basic idea is rather simple. Due to the factual status as being mature person of normal capacity, people qualify for certain basic rights *qua persons*. Since that factual status is unchanged by voluntarily agreeing, for whatever reason, to a personal alienation contract to give up any of those rights, the person still qualifies *qua person* for those rights and thus the alienation contract is inherently invalid. Of course, a legal system can still "validate" such a contract and count obedience to one's master, sovereign, husband, or employer as "fulfilling" the contract, and then legally enforce the consequences. But as a result of the aforementioned social movements, voluntary self-sale contracts, non-democratic pacts of subjection, and coverture marriage contracts have all been abolished in the advanced democracies, in spite of them all being allowed under the right-libertarian sham "doctrine of inalienable rights." Only the system of human-rental contract remains, and, in that regard, libertarian thought has so far done its job well.

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<sup>16</sup> For more on inalienable rights theory, see Ellerman 1992, 2005, and 2010.

## **Part V: The property invisible hand mechanism**

In Part I, we saw how Tomasi used the standard consent-versus-coercion misframing of the basic issues. In Part II, we considered the misframing involved in his treatment of the Lockean theory of property. In Part III, we considered the conceptual misunderstanding of what Tomasi calls "productive property" which allows the basic capitalism-versus-socialism misframing of the debate about the so-called "capitalist" system. In Part IV, we considered the rather fake "inalienable rights" theory that does not even rule out a civilized form of the self-sale contract or a non-democratic constitution (see the libertarian-sponsored charter, free, or startup cities idea)—all of which are now outlawed in the advanced democracies.

One of the strengths of Tomasi's Hayekian tilt in his Hayek-Rawls remix is his emphasis on spontaneous orders and invisible hand mechanisms as exemplified in a market economy. But, here again, the debate is largely based on a misframing of the question.

To understand the misframing, suppose the slavery debate in the Antebellum South was based on an assumption shared by both sides that slavery, involuntary and voluntary, was an inherent part of a private property market economy. Then the libertarian scholars and social scientists of the day would defend the system on the basis of private property and the freedom of contract, and abolitionists would be seen as anti-market enemies of consent-based spontaneous orders.

Yet today we would, I hope, see this as a misframing of the slavery debate. Slavery, in either its involuntary or voluntary consent-based versions of owning another person, would be seen as an abuse of private property, and voluntary slavery contracts would be seen as an abuse of the idea of market contracts. Thus the abolitionists would not today be seen as being necessarily anti-property or anti-market.

Now transpose the misframing over to the current debate about the human-rental system (mis-specified as "capitalism"). Consider the income distribution that results from, say, the 1% being able, in effect, to rent the 99% and appropriate the positive and negative fruits of their labor. Both sides of the misframed debate within the liberal spectrum agree that this is the consequence of free markets and private property. Hence those high liberals and liberal social democrats who oppose these consequences look to the visible hand of the state and non-market income redistribution to mitigate these effects, and thus they might be seen as anti-market and anti-private productive property. This allows libertarian scholars and social scientists to strike the pose of defending the human-rental system in the name of contractual liberty (rather than an abuse, like a self-sale contract, of market contracts), and to defend the employer's appropriation of the fruits of the labor of all who work in the enterprise as being a core part, rather than an abuse, of the private property system.

In the debate about the current system, which is distorted by the serial misframings, the biggest irony is perhaps that the right-libertarians, and classical liberals for that matter, do not even *see* the most fundamental invisible hand mechanism of all.

Before the invisible hand of the price mechanism can even get traction in the exchange of commodities, there must be some mechanism for private property rights to be initiated and terminated in all the production and consumption activities. This was the fundamental insight of the late Ronald Coase [1960]; property rights (positive and negative) need to be assigned in order for markets to work. The invisible hand price mechanism presupposes an invisible hand *property* mechanism.

Hence one would think that the liberal scholars and social scientists of our day would place great emphasis on analyzing just how the private property system works—rather than be satisfied with

the misconstrued notion of "ownership of the means of production" or "productive property" that can be defeated in a matter of seconds with a conceptual suppose-capital-is-rented-out argument (see Part III). Never mind the rather silly attempt to base an account of the private property system on the idea of "self-ownership" in a mythical Lockean original position. But these misconstrued and simplistic ideas do have one great virtue; they give an "account" for the current human-rental system and thus they fulfill the task of the "social science" embedded in that system (not unlike the political economists and philosophers embedded in the ante-bellum human-ownership system). "Unfortunately" a serious analysis of the private property system does not give a satisfactory "account" of the human-rental system.

The imputation of the legal responsibility for the destruction of property is done explicitly by the visible hand of the legal system in trials for property damages. But property is used-up, consumed, or destroyed in all production and consumption activities, so what is the legal mechanism to impute those liabilities where no trial is held? And when new property is created, what is the mechanism for that legal responsibility (i.e., the property right rather than property liability) to be assigned?

There *is* such an invisible hand mechanism at the foundation of *any* private property system. Like the price mechanism, the property mechanism is a laissez-faire mechanism that requires no intervention by the legal system as long as certain conditions are met. If we use the metaphor of an invisible judge holding a trial, then the invisible judge always issues the laissez-faire ruling: "Let it be." Thus, for instance, the imputation of the liability for used-up piece of property is automatically assigned to the last buyer of the property (since the last buyer bears that cost if the legal system lets it be). But if the property had in fact been stolen or converted from the last owner without consent or contract, then that constitutes grounds to set aside the imputation of the invisible judge, and to bring in the legal system and a visible judge in a damage suit or other legal proceedings. A successful suit and the resulting material damages would correct the laissez-faire imputation by reassigning the property liability to the *de facto* and now *de jure* responsible defendant.

In a production activity, there is both the using-up of inputs and the production of the output-assets so both property liabilities and property assets need to be assigned. Again, the laissez-faire mechanism is the natural one of letting the input-liabilities lie where they have fallen (i.e., in the hands of the last buyer or owner of all the inputs), which then gives that legal party the legally defensible claim as the first owner of the produced outputs. The role of being the last buyer of the inputs and first owner of the outputs is the legal role of being the "residual claimant." This is also why residual claimancy is a contractual role, not a property right (as explained in Part III). One party contracts to buy all the inputs to be used up (some inputs might be already owned), bears those costs, and thus claims the product to be sold and receives in net money terms, the residual. That party may or may not be the owner of the productive property such as the buildings or machinery whose services were paid for by the residual claimant.

As in the case of the invisible hand of the price system, certain basic conditions must be met for the invisible judge of the property system to make the right imputations that would be made by a visible judge. What are the conditions so that the laissez-faire imputations will satisfy the responsibility principle used by visible judges?

The fount and source of the idea of invisible hand mechanisms was the Scottish Enlightenment, and the necessary conditions on the property mechanism were clearly stated by Adam Smith's good friend, David Hume. In addition to the meta-condition of the stability of property, Hume's

two conditions were: "*transference by consent, and of the performance of promises.*" [Hume 1978 (1739), Book III, Part II, Section VI, 526] That is, all transfers of property between people needed to be covered by consent (or, more formally, by contract), and all contracts need to be fulfilled by the actual transference or delivery of the conveyed property.

If either of these conditions failed, e.g., theft or breach, then that presumably constitutes grounds for a visible judge of the legal system to intervene and to overrule the imputations of the invisible judge. If, on the other hand, the two conditions are fulfilled, then the possession and *de facto* responsibility for using up or creating the property is automatically correlated with the last-buyer/first-seller role. That is, when Hume's conditions are satisfied, then the laissez-faire imputation to last-buyer/first-seller automatically satisfies the responsibility principle of imputing legal responsibility in accordance with *de facto* responsibility [Ellerman 2004, 2014]. This fundamental theorem about the private property system shows that Hume's conditions imply that (the non-Pickwickian) Locke's fruits-of-your-labor principle is satisfied ("Hume implies Locke").

This is the most fundamental invisible hand mechanism at the foundation of any private property market economy; the price mechanism affecting the terms of exchange cannot come into play without the assignment of property rights and liabilities in production and consumption. But right-libertarians and classical liberal economists, who otherwise constantly praise spontaneous orders and invisible hand mechanisms, are distinctly incurious about the invisible judge mechanism involved in all production and consumption.

They are incurious for good reasons. Firstly, the mechanism addresses the question of initiating and terminating property rights, and the whole idea of the fundamental myth about the "ownership of the means of production" is to subsume the product rights into that prior ownership (as analyzed in Part III). Hence the role of the *contracts* in the invisible judge mechanism is invisible to those who hold the fundamental myth. Secondly, the question of the imputation of legal responsibility for the initiation and termination of property rights raises the whole matter of responsibility that is well hidden behind the other stories, such as the "self-ownership" story or the Pickwickian version of the "fruits of one's labor" principle (in either Locke's version or Friedman's version considered below).

When the "science of economics" thought it *could* give a satisfactory "account" of these property questions using marginal productivity theory at the end of the 19<sup>th</sup> century, then it was briefly willing to raise these otherwise invisible and unmentionable topics.

For instance, when the legally-trained Austrian economist, Friedrich von Wieser, wanted to use marginal productivity theory to address the question of imputation (i.e., assigning legal responsibility), then he parenthetically mentioned that according to the *usual* notion of legal or moral responsibility, then only the human users of tools could be responsible, never the tools themselves.

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....

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 1889, pp. 76-79]

Therefore he concluded that the usual legal or moral responsibility was clearly inappropriate for the "science" of economics to account for the usual mode of production (the human-rental system), so he postulated a notion of "economic responsibility" that was identified with the marginal productivity of any causally efficacious factor—responsible persons or non-responsible things.

At about the same time in America, John Bates Clark thought he could treat the question of property appropriation using marginal productivity theory, so he was willing to enunciate the principle of people getting what they produce as "the principle on which property is supposed to rest".

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]

But on closer examination, marginal productivity theory was only a theory of input demand (i.e., part of *price* determination) and did not even address the actual structure of the appropriation of the property rights and liabilities in production. The ownership of the product is not shared or distributed among the input suppliers (as pictured in the distributive shares metaphor<sup>17</sup>) just as the input liabilities are not assigned to the output demanders (in spite of the marginal cost pricing of outputs dual to the marginal productivity pricing of inputs). *One* legal party (the residual claimant) appropriates 100% of the input liabilities and 100% of the produced outputs, and thus received their net value, the residual.

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: and the whole of the produce is his. [Mill 1826, Chapter I, section II]

Hence marginal productivity theory fell flat as a theory to "account" for the *actual* imputations of property assets and liabilities in production in the system to rent (not to mention own) the people working in an enterprise. Thus, as the "science" of economics developed in the 20<sup>th</sup> century, it

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<sup>17</sup> We could have done a separate part of this review on the misframing of the "distributive shares metaphor" since in fact one party holds 100% of the input liabilities and owns 100% of the produced outputs. The distributive shares metaphor ignores the whole question of who that party should be, and instead focuses on the size of the liability to an input supplier and treats the liability (e.g., human rentals or wage-salary payments) "as if" it represented a "portion of the day's product." Arguing about "distributive shares" in the human-rental system is a misframing akin to arguing about the distribution of real income (e.g., food, clothing, and shelter) in the previous human-ownership system of slavery.

developed a certain incuriosity about the legal or moral imputation described by Wieser and about "the principle on which property is supposed to rest" as described by Clark.

Some economic scientists still tried to use the theory as a Pickwickian "capitalist ethic" to account for each input supplier's fictitious "share of the product" using a fictitious notion of responsibility: "To each according to what he and the instruments he owns produces." [Friedman 1962, 161-162] But "the instruments he owns" do not produce anything (just as guns do not commit crimes) since as Wieser pointed out: "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, perhaps inadvertently, showed the metaphorical, fictitious, and Pickwickian nature of "economic responsibility" in marginal productivity theory packaged as the "capitalist ethic." Wieser's admission did not jive with the "capitalist ethic," and thus the admission was not repeated (to the author's knowledge) in *any* economics textbook, Austrian or neoclassical, throughout the entire 20<sup>th</sup> century (and beyond). It is "better" to leave those facts about legal or moral imputation unmentioned, to exhibit a distinct incuriosity about just how the property system assigns legal responsibility, and to tell an altogether different story based on the serial misframings that are accepted across the spectrum of liberal and libertarian thought and are even validated by the "official" opposition of the socialist left.

Returning to the laissez-faire mechanism of appropriation, we previously noted that people do not suddenly become non-responsible tools or robots when their actions at the behest of their employer are legal. They are still inexorably *de facto* co-responsible for using up the inputs and producing the outputs along with any working employer.

For instance, we may employ a shovel and be *de facto* responsible for the results. And we can rent out the shovel to another person and *de facto* turn the shovel over to them to be employed by them and they will be *de facto* responsible for the results. But the same transfer cannot be made when the rental concept is applied to persons.

A person factually cannot stop "employing" themselves and voluntarily turn over that employment to another person as their "employer" who would then be *de facto* responsible for the results—in spite of the libertarian discourse about a person's "self-ownership" and then transfer of their responsible agency. At most, the "employee" voluntarily co-operates with the "employer" by following the latter's instructions, but then they are both inexorably *de facto* co-responsible for the results. Yet the laissez-faire mechanism imputes 0% of the input liabilities and 0% of the output assets to the employees.

Since the satisfaction of Hume's two conditions implies that the invisible judge will correctly impute legal responsibility according to *de facto* responsibility, one of Hume's conditions must be systematically violated by the renting of human beings. And so it is. The hired criminal example shows that responsible human action cannot in fact be alienated from one person to another. In the labor contract, the commodity bought and sold cannot actually be transferred from seller to buyer so *the "labor contract" is inherently breached*. Hence as long as no crime is committed, the key fact or "trick" in this human-rental system is that the legal system passively accepts the employees *obeying* the employer as "fulfilling" the contract for the transfer and delivery of labor services. Then since all the contracts are "in order" and "fulfilled" (rather than breached), the visible judges have no grounds to intervene and the invisible judge will automatically impute all the input liabilities, and thus all the output assets, to the last buyer of all the inputs, the employer.

But when a crime is committed, the *de facto* responsibility of the involved human agents does not suddenly change. What changes is that the legal authorities have cause to intervene, to set aside the contract (the basis for the invisible judge's imputation), and to look at the actual facts. The actual facts are what they were all along; co-responsible co-operation between employees and working employers.

A master and servant who so participate in a crime are liable criminally, not because they are master and servant, but because they jointly carried out a criminal venture and are both criminous." [Batt 1967, 612]

The servant in work becomes a partner in crime.

This is where the inalienable rights theory that descends from the Reformation and Enlightenment [Ellerman 1992, 2010] ties up with an appreciation of the laissez-faire property mechanism at the foundation of any private property system. The flaw is *not* in the private property mechanism but in the invalid human-rental contract that causes the mechanism to misimpute. The flaw is in the contract that pretends to legally alienate that which is *de facto* inalienable (i.e., a person's responsibility for their deliberate actions) and in the legal system's institutionalized fraud ("institutional robbery" in Clark's bold phrase) of recognizing that alienation contract as valid and counting the *de facto* co-responsible co-operation of the employees as "fulfilling" the contract so "the capitalist is the owner of both instruments of production: and the whole of the produce is his."

Thus there are several reasons why the most fundamental of all invisible hand mechanisms is "invisible" to the rather incurious libertarian scholars and social scientists who otherwise are quite keen to study such mechanisms.

## Concluding remarks

Tomasi's book is valuable as a sympathetic restatement of the full range of liberal thought. Thus the book provides an excellent opportunity to analyze the serial misframings shared by all the shades of liberal scholarship that he surveys. There are many smaller judgments, opinions, and associations in the book that might be challenged, but their importance pales in comparison with the basic conceptual misframings of the issues that pervade libertarian thought as well as the embedded "social sciences" of the Austrian and neo-classical variety that need to give a scientific account of the current economic system based on the voluntary renting of human beings.

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