

Translatio versus *Concessio*:
Retrieving the Debate about Contracts
of Alienation with an Application
to Today's Employment Contract

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Liberalism is based on the juxtaposition of consent to coercion. Autocracy and slavery were based on coercion whereas today's political democracy and economic "employment system" are based on consent to voluntary contracts. This article retrieves an almost forgotten dark side of contractarian thought that based autocracy and slavery on explicit or implicit voluntary contracts. The democratic and antislavery movements forged arguments not simply in favor of consent but arguments that voluntary contracts to alienate (translatio) aspects of personhood were invalid—which made the underlying rights inalienable. Once understood, those arguments apply as well to today's self-rental contract, the employer-employee contract.

Keywords: *liberalism; consent; coercion; alienation contracts; inalienable rights; employment contract*

INTRODUCTION: THE SKELETON IN THE CLOSET OF LIBERALISM

Modern liberal thought juxtaposes today's political and economic order based on voluntary contracts to the coercive systems of autocracy and slavery in the past. But there is a skeleton in the closet. From at least the Middle Ages down to the present day, there has been a contractarian tradition which argued that non-democratic governments and economic forms of subjection could be based on explicit or implicit voluntary contracts. This "dark side" of contractarian thought

fully agreed with the liberal emphasis on (explicit or implicit) consent and with the condemnation of coercion.

If the historical democratic and abolitionist movements were to do more than fuss about the reality or quality of the consent to such contracts, then they needed to find an inherent flaw in those contracts to alienate one's self-governing rights to political or economic masters. If such alienation contracts were inherently flawed, then the rights that those contracts would pretend to alienate would be *inalienable rights*. Such a theory of inalienable rights was indeed developed; it descended from the Reformation through the Enlightenment—particularly the Scottish Enlightenment—to modern times.

Our entry point is the current corporate governance debate which is hopelessly miscast as a debate about “ownership” rather than about the employment relationship. After recovering the contractual underpinnings of the corresponding historical debates about governance, we delve into the dark side of contractarian thought to retrieve those arguments for autocracy and slavery based on explicit or implicit contracts (e.g., a voluntary slavery contract or a Hobbesian *pactum subjectionis*). Then we turn to the counterargument, the theory of inalienable rights that descends largely from the Reformation and the Scottish Enlightenment. The “problem” is that once understood, the inalienable rights critique of the alienation contracts applies as well to today's employment contract.

CORPORATE OWNERSHIP AND GOVERNANCE

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

To understand the corporate governance debates of today it may be useful to revisit this mentality of the kings, princes, and lords who “owned” their dominions. Although this “ownership” was never spread as widely as corporate shares are today, the owners also had to work through layers of retainers, overseers, and other agents. There was always an “agency problem” to see that the agents curbed their own self-interest and executed the wishes of the principals. Another commonality with today is the mentality that the governance over the people actually working their property was all part of the owners' dominion. The inhabitants of the king's, prince's, or lord's dominion had no standing in that governance. The rulers and their agents did not rule as delegates, representatives, or otherwise in the name of those inhabitants. The “very idea” seemed somewhat outlandish.

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

With the democratic revolutions of the last few centuries, the “Rulership” was taken out of “Ownership.” In the introduction to some of Frederic Maitland’s writings, Robert Schuyler quoted his description of the evolution of the word “landlord.” “We make one word of [landlord], and throw a strong accent on the first syllable. The lordliness has evaporated; but it was there once. Ownership has come out brightly and intensely; the element of superiority, of government, has vanished.”³ Today, the ownership of land does not include the governance right over people using the land. If there is no prior contract between an owner of land and someone using the land, then the landlord has the right to exclude the user (and to charge the continuing user with trespassing) but no right to automatically make the user into a “subject.”

If political governance was previously thought to be based on land ownership and now isn’t, then what about the connection between corporate ownership and workplace governance? What is the legal basis for the rights of government or management not over the land, buildings, or machinery of the corporation but over all the people who work in a corporation? One finds remarkably confused answers to that simple question. The most common answer harks back to the theory that “rulership” is part of ownership. The shareholders are the owners of the corporation and their governance rights are even seen as part of the ownership of capital assets. This view of the “rights of capital” seems to be one point of agreement between Marx and the defenders of the current system.

It is not because he is a leader of industry that a man is a capitalist; on the contrary, he is a leader of industry because he is a capitalist. The leadership of industry is an attribute of capital, just as in feudal times the functions of general and judge were attributes of landed property.⁴

This view survives today not simply among those who argue for the current system but even among such prominent critics as Robert Dahl. Dahl assumes that there is a “right to private ownership of an economic enterprise”⁵ which includes the governance not just of the physical and financial assets of the corporation but also of the people working in the company—as if “Rulership and Ownership were

blent” instead of the governance over people being the result of the employment contract. Dahl then weighs the “conflicting ideals” of democratic rights and property rights, and comes out in favor of democratic rights in the workplace. He does not consider the alternative view developed here that the conflict is not between democracy and private property but between democracy and the contract to alienate the right of self-governance in the workplace, the employment contract.⁶

The view that “Rulership and Ownership are blent” is also uncritically promulgated by most economists—for example, the “rights of authority at the firm level are defined by the ownership of assets, tangible (machines or money) or intangible (goodwill or reputation).”⁷ If by the “rights of authority” at the firm level, one only means the rights to exclude a trespasser, then that indeed is based on property rights. But if the “rights of authority” are taken to include the discretionary rights of management over the people working in the firm, then that requires the employment contract. The “governance” that is supposed to be exercised by the shareholders and their agents is not the giving of commands to land, buildings, or machines; it is indirectly and directly giving orders to the people who are working with those properties. The legal authority over the workers is not based on the ownership of assets but the ownership of the employees’ labor which was purchased in the employment contract. Thus changing corporate governance is not just about changing the bundle of rights involved in asset ownership. It is about the employment contract.

If the authority over workers is not based, as is so commonly thought, on asset ownership but on a contract, then perhaps there was also another accounting for the authority of kings, princes, and lords than “ownership.” Indeed, there was. Perhaps since Antiquity and certainly since the Middle Ages, there has been an alternative account, at least in theory, of the authority of kings, princes, and lords that was based not on ownership (much less “divine right”) but on an explicit or implicit voluntary contract, a pact of subjection or *pactum subjectionis*. And if undemocratic authority was based on a voluntary contract rather than Ownership of the Realm, then the democratic movement needed some critique of a voluntary contract of subjection. Part of our task is the retrieval of that largely forgotten fragment of intellectual history.

There is a related set of misunderstandings about the intellectual underpinnings of slavery and the abolitionist movement against slavery. Today, we see slavery simply as a coercive involuntary relationship. That may largely suffice as a matter of historical fact but that is not what the intellectual debate was about. Since Antiquity, there were rather sophisticated defenses of slavery as being based on contract, an implicit or explicit self-enslavement contract. The history of anti-slavery thought was not just fussing about the reality of any alleged consent; it is the history of theorizing about how a voluntary self-sale contract would be inherently invalid. We also need to retrieve that forgotten history.

This retrieval of the arguments of the democratic and abolitionist movements is not just an exercise in arcane intellectual history. Once understood, the recovered critiques of the *pactum subjectionis* and of the voluntary slavery contract apply as well to the contract at the basis of our current economic order, the employment contract.

THE HIDDEN HISTORY OF CONTRACTARIAN ARGUMENTS
FOR SLAVERY AND AUTOCRACY

Modern Liberalism

How can there be an inherent rights violation in a fully voluntary contract? Perhaps the argument is that some contracts are not “fully voluntary” in some sociological or historical sense (Marx)—or that some voluntary contracts should be overridden on paternalistic grounds? No, those are not the arguments being recovered here. There is a critique of the voluntary “contracts of alienation”⁸ that was hammered out in the anti-slavery and democratic movements.

But that analysis has been lost to the mainstream of modern liberalism⁹ that focuses on the question of consent versus coercion. Today, the contract at the basis of the economic system is the employment contract, the voluntary contract to rent or hire oneself out to an employer for a certain purpose and time period. Ordinarily the word “hire” is preferred but I use the synonym “rent” to help us think out of the old mental ruts. The words are otherwise equivalent. Americans say “rent a car” and the British say “hire a car” but they mean the same thing. As Paul Samuelson puts it,

One can even say that wages are the rentals paid for the use of a man’s personal services for a day or a week or a year. This may seem a strange use of terms, but on second thought, one recognizes that every agreement to hire labor is really for some limited period of time. By outright purchase, you might avoid ever renting any kind of land. But in our society, labor is one of the few productive factors that cannot legally be bought outright. Labor can only be rented, and the wage rate is really a rental.¹⁰

Leaving aside the coercive nature of historical slavery, what about a truly voluntary self-sale contract to sell one’s labor by the lifetime instead of by the hour, week, or month? History has already ruled out such a voluntary slavery contract along with the institution of involuntary slavery. Again, as Paul Samuelson puts it, “Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself; he must rent himself at a wage.”¹¹

Robert Nozick, the late prominent moral philosopher from Harvard University, argued on strict libertarian grounds that the self-sale or voluntary slavery contract should be (re)validated.¹² This contract comes in both a collective and individual form. The collective form was historically known as the pact of subjection or *pactum subjectionis*, wherein a people alienated and transferred their right

to govern themselves to a monarch or some other form of a Hobbesian sovereign. Professor Nozick argued that a free libertarian society should validate that sort of a contract with a “dominant protective association”¹³ playing the role of the Hobbesian sovereign. And the same reasoning applied to the individual version of the alienation contract. “The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would.”¹⁴

Accordingly Nozick completely abandoned the notion of inalienable rights developed in the anti-slavery and democratic movements. But he kept the phrase by redefining it as a right that could not be taken away without one’s consent. But that is only a right as opposed to a privilege. Nozick had no notion of an “inalienable right” that may not be taken away even *with* one’s consent.

Nozick was not alone in this suggested revision of postbellum jurisprudence to again accept the self-sale contract. Nozick has neoclassical economics as a silent partner in this quest for liberty. Allocative efficiency requires full futures markets in all commodities including human labor. Any attempt to truncate self-rental contracts at, say, T years could violate market efficiency since there might today be willing buyers and sellers of labor $T + 1$ years in the future. Hence market efficiency requires full future markets in labor—essentially the self-sale contract. One might try to find a neoclassical textbook that admits this implication. But the Johns Hopkins University economist Carl Christ made the point quite explicit in no less a forum than congressional testimony.

Now it is time to state the conditions under which private property and free contract will lead to an optimal allocation of resources. . . . The institution of private property and free contract as we know it is modified to permit individuals to sell or mortgage their persons in return for present and/or future benefits.¹⁵

Thus Robert Nozick explicitly and neoclassical economics implicitly accept the self-sale contract. While the rhetoric of “inalienable rights” lingers on, the liberal mainstream has essentially lost the inalienable rights theory that descends from the Reformation and Enlightenment—the theory that explains how rights can be violated in a fully voluntary contract.

Retrieving the History of Voluntary Self-sale Contracts

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

But that is a gross falsification of the actual historical debates. In fact, from ancient times there have been defenses of slavery on *contractarian* grounds. The

Old Testament of the Bible is a convenient starting point for the intellectual history of slavery contracts. The Old Testament law was that, after six years of service, any Hebrew slave was to be set free in the seventh year, the year of the Jubilee.

But if he says to you, “I will not go out from you,” because he loves you and your household, since he fares well with you, then you shall take an awl, and thrust it through his ear into the door, and he shall be your bondman for ever.¹⁶

In the *Institutes* of Justinian, Roman law provided three legal ways to become a slave.

Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him.¹⁷

In addition to the third means of outright contractual slavery, the other two means were also seen as having aspects of a 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.¹⁸ Manumission was an early repayment of that debt. And Thomas Hobbes, for example, clearly saw a “covenant” in this ancient practice of enslaving prisoners of war.

And this dominion is then acquired to the victor when the vanquished, to avoid the present stroke of death, covenants either in express words or by other sufficient signs of the will that, so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof at his pleasure. . . . It is not, therefore, the victory that gives the right of dominion over the vanquished but his own covenant.¹⁹

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

Richard Tuck has traced another root of the alienability of liberty to a seemingly obscure medieval controversy about the meaning of apostolic poverty. Is a monk’s right (*ius*) to use food, clothing, and shelter a property right (*a dominium*) even though a monk may not sell these commodities? The thinkers who foreshadowed the non-democratic liberal tradition argued that one’s right or liberty to use commodities and, broadly, to act in the world was indeed a property right (*a dominium*). This led to the conclusion that liberty could also be traded away.

We can see from the history of this movement how the attack on apostolic poverty had led to a radical natural rights theory. If one had property in anything which one used, in any

way, even if only for personal consumption and with no possibility of trade, then any intervention by an agent in the outside world was the exercise of a property right. Even one's own liberty, which was undoubtedly used to do things in the material world, counted as property—with the implication that it could, if the legal circumstances were right, be traded like any other property.²⁰

For instance, the influential Spanish scholastic philosopher and jurist Francisco Suarez noted in 1612 this basic theme of the alienability of liberty:

[N]ature, although it has granted liberty and *dominium* over that liberty, has nevertheless not absolutely forbidden that it should be taken away. For . . . the very reason that man is *dominus* of his own liberty, it is possible for him to sell or alienate the same.²¹

Suarez developed the connection between voluntary slavery and the political *pactum subjectionis* which is a recurrent theme in the tradition of alienable natural rights to liberty.

If voluntary slavery was possible for an individual, so it was for an entire people. . . . A natural rights theory defense of slavery became in Suarez's hand a similar defense of absolutism: if natural men possess property rights over their liberty and the material world, then they may trade away that property for any return they themselves might think fit.²²

Hugo Grotius (1583-1645) was a pivotal figure in the development of natural rights political philosophy, but he also, in the alienable rights tradition, viewed man's natural right to liberty as a right which could be transferred with consent. Grotius was followed by Samuel Pufendorf (1632-1694), who argued that a servant could be hired for a certain time and would receive wages.

But to such a Servant as *voluntarily offers himself to perpetual Servitude*, the Master is obliged to allow perpetual Maintenance, and all Necessaries for this Life; it being his Duty on the other hand to give his constant Labour in all Services whereto his Master shall command him, and whatsoever he shall gain thereby, he is to deliver to him.²³

Rousseau noted this contractarian argument: "Pufendorf says that we may divest ourselves of our liberty in favour of other men, just as we transfer our property from one to another by contracts and agreements."²⁴ Perhaps the passage Rousseau had in mind was the following:

And as by private Contract, the Right of any thing which we possess, so by Submission the Right to dispose of our Strength and our Liberty of acting, may be convey'd to Another. Whence, if any Person should, for Instance, voluntarily and upon Covenant, deliver himself to me in Servitude, he thereby really confers on me the Power of a Master.²⁵

John Locke's *Two Treatises of Government* (1690) is a classic of liberal thought. Locke would not condone a contract which gave the master the power of life or death over the slave.

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.²⁶

Locke is ruling out a voluntary version of the old Roman slavery where the master could take the life of the slave with impunity. But once the contract was put on a more civilized footing, Locke saw no problem and nicely renamed it "drudgery."

For, if once *Compact* enter between them, and make an agreement for a limited Power on the one side, and Obedience on the other, the State of War and *Slavery* ceases, as long as the Compact endures. . . . I confess, we find among the *Jews*, as well as other Nations, that Men did sell themselves; but, 'tis plain, this was only to *Drudgery*, *not to Slavery*. For, it is evident, the Person sold was not under an Absolute, Arbitrary, Despotical Power.²⁷

Moreover, Locke agreed with Hobbes on the practice of enslaving the captives in a "Just War" as a *quid pro quo* exchange based on the ongoing 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.²⁸

Locke seemed to have justified slavery in the Carolinas by interpreting the raids into Africa as just wars and the slaves as the captives.²⁹

William Blackstone's codification of common law was quite important in the development of English and American jurisprudence. Like Locke, 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."

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.³⁰

An interesting case study in liberal intellectual history is the treatment of the American proslavery writers. The proslavery position is usually presented as

being based on illiberal racist or feudal paternalistic arguments. Considerable attention is lavished on illiberal writers such as George Fitzhugh,³¹ while liberal contractarian defenders of slavery are passed over in silence. For example, Rev. Samuel Seabury gave a sophisticated liberal defense of antebellum slavery in the Grotius-Hobbes-Pufendorf tradition of alienable natural rights theory.

From all which it appears that, wherever slavery exists as a settled condition or institution of society, the bond which unites master and servant is of a moral nature; founded in *right*, not in *might*; . . . Let the origin of the relation have been 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.³²

Seabury easily anticipated the retort to his classical tacit-contract argument.

“Contract!” methinks I hear them exclaim; “look at the poor fugitive from his master’s service! He bound by contract! A good joke, truly.” But ask these same men what binds them to society? Are they slaves to their rulers? O no! They are bound together by the COMPACT on which society is founded. Very good; but did you ever sign this compact? Did your fathers every sign it? “No; it is a tacit and implied contract.”³³

Why do we have today’s simplistic contrast between consent and coercion? If modern contractarian liberals had recognized the past contractarian arguments for slavery (and autocracy), then they might be in the uncomfortable position of disagreeing with those proslavery thinkers only in matters of fact. They might be reduced to arguing on empirical grounds that the implied contract for society has “genuine” tacit consent, but that the implied slavery contract did not. It is no surprise that modern liberalism has just avoided this quandary by promulgating the consent-or-coercion version of the slavery debates. The sophisticated contractual arguments to permit slavery go down the memory hole; it’s just a question of consent or coercion. And liberalism has taken a courageous moral stand foursquare in favor of consent.

Retrieving the History of Voluntary Contracts of Subjection

It was previously noted that there were both individual and collective versions of the contract to alienate the rights of self-governance. The full-blown rump-and-stump version of the individual contract was the self-sale contract previously considered. The collective version was the pact of subjection, the *pactum subjectionis*, which alienated and transferred the people’s rights of self-governance to a sovereign who then ruled in the sovereign’s own name—not as a delegate, representative, or trustee of the people. By the contract of subjection, the people became subjects of the sovereign.

Here again, liberalism has “dumbed down” the intellectual history of the debate between autocracy and democracy to a question of coercion or consent. Democracy is presented as “government based on consent of the governed” and non-democratic governments are presented as being based on coercion. But again there was a contractarian defense of non-democratic government from Antiquity down to Harvard’s Professor Nozick.

We may start with Roman law. 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: “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.”³⁴

The American constitutional scholar Edward S. Corwin noted the questions that arose in the Middle Ages about the nature of this pact.

During the Middle Ages the question was much debated whether the *lex regia* effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty at the end of this period, like Marsiglio of Padua in his *Defensor Pacis*, took the latter view.³⁵

It is precisely this question of *translatio* or *concessio*—alienation or delegation of the right of government in the contract—that is the key question, not consent versus coercion. Consent is on both sides of that alienation (*translatio*) versus delegation (*concessio*) question. The alienation version of the contract became a sophisticated tacit contract defense of non-democratic government wherever the latter existed as a settled condition. And the delegation version of the contract became the foundation for democratic theory.

The German legal thinker Otto Gierke was quite clear about the alienation-versus-delegation question.

This dispute also reaches far back into the Middle Ages. It first took a strictly juristic form in the dispute . . . as to the legal nature of the ancient “*translatio imperii*” from the Roman people to the 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.³⁶

The contractarian defense of non-democratic government was based on the *translatio* interpretation of the tacit social contract.

In contrast to theories which would insist more or less emphatically on the usurpatory and illegitimate origin of Temporal Lordship, there was developed a doctrine which taught that

the State had a rightful beginning in a Contract of Subjection to which the People was party.³⁷

In terms of the “coercion or contract” dichotomy, this tradition was grounded 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.”³⁸

A state of government which had been settled for many years was *ex post facto* legitimated by the tacit consent of the people. Thomas Aquinas (1225-1274) 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.³⁹

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.”⁴⁰

After noting that an individual could sell himself into slavery under Hebrew and Roman law, Hugo Grotius extends the possibility to the political level.

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?⁴¹

He goes on to cite 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?⁴²

Thomas Hobbes (1588-1679) made the best-known attempt to found non-democratic government on the consent of the governed. Without an overarching power to hold people in awe, life would be a constant war of all against all. To prevent this state of chaos and strife, men should join together and voluntarily transfer the right of self-government to a person or body of persons as the sovereign. This *pactum subjectionis* would be a

covenant of every man with every man, in such manner as if every man should say to every man, *I authorize and give up my right of governing myself to this man, or to this assembly of*

*men, on this condition, that you give up your right to him and authorize all his actions in like manner.*⁴³

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

THE COUNTERARGUMENT: INALIENABLE RIGHTS THEORY

We have seen that the debate about slavery and autocracy was not a simple consent-versus-coercion debate. From Antiquity down to the present, there were consent-based arguments for slavery and non-democratic government as being founded on certain explicit or implicit contracts. Hence in the counterarguments of the abolitionist and democratic movements, it was not enough to criticize the blending of ownership and rulership, the various notions of divine rights, or the coercion of people of another race who were considered of diminished capacity. The democratic and abolitionist movements needed to counter not the worst but the "best" arguments for slavery and autocracy. They needed to counter the arguments that slavery and autocracy could be based on explicit or implicit contracts.

Late medieval thinkers such as Marsilius of Padua (1275-1342) and Bartolus of Saxoferrato (1314-1357) laid some of the foundations for democratic theory in the distinction between consent that establishes a relation of delegation and trusteeship versus consent to an alienation of authority.

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.⁴⁴

As Marsilius 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.⁴⁵

According to Bartolus, 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"⁴⁶

The task was to develop arguments that there was something inherently invalid in the alienation or *translatio* contracts, and thus that the rights which these con-

tracts pretended to alienate were in fact inalienable. The key is that in consenting to such an alienation contract, a person is agreeing to, in effect, take on the legal role of a non-adult, indeed, a non-person or thing. Yet all the consent in the world would not in fact turn an adult into a minor or person of diminished capacity, not to mention turn a person into a thing. The most the person could do was obey the master, sovereign, or employer—and the authorities would “count” that as fulfilling the contract. Then all the legal rights and obligations would be assigned according to the “contract” (as if the person in fact had diminished or no capacity). But since the person remained a *de facto* fully capacitated adult person with only the contractual role of a non-person, the contract was impossible and invalid. A system of positive law that accepted such contracts was only a fraud on an institutional scale.

Applying this argument requires prior analysis to tell when a contract puts a person in the legal role of a non-person. Having the role of a non-person is not necessarily explicit in the contract and it has nothing to do with the payment in the contract, the incompleteness of the contract, or the like. Persons and things can be distinguished on the basis of decision making and responsibility. For instance, a genuine thing such as a tool or machine can be alienated or transferred from person A to B. Person A, the owner of the tool, can indeed give up making decisions about the use of the tool and person B can take over making those decisions. Person A does not have the responsibility for the consequences of the employment of the tool by person B. Person B makes the decisions about using the tool and has the *de facto* responsibility for the results of that use. Thus a contract to sell or rent a tool such as a shovel from A to B can actually be fulfilled. The decision making and responsibility for employing the tool can *in fact* be transferred from A to B.

But now replace the tool with person A. Suppose that the contract was for person A to sell or rent him or herself to person B—as if a person were a transferable or alienable instrument that could be “employed” by another person. The *pactum subjectionis* is a collective version of such a contract but it is easier to understand the individualistic version. The contract could be perfectly voluntary. For whatever reason and compensation, person A is willing to take on the legal role of a talking instrument (to use Aristotle’s phrase). But the person A cannot in fact transfer decision making or responsibility over his or her own actions to B. The point is not that a person should not or ought not do it; the point is that a person *cannot* in fact make such a voluntary transfer. At most, person A can agree to cooperate with B by doing what B says—even if B’s instructions are quite complete. But that is no alienation or transference of decision making or responsibility. Person A is still inexorably involved in ratifying B’s decisions and person A inextricably shares the *de facto* responsibility for the results of A’s and B’s joint activity—as everyone recognizes in the case of a hired criminal regardless of the completeness of the instructions.

Yet a legal system could “validate” such a contract and could “count” obedience to the master or sovereign as “fulfilling” the contract and then rights are

structured as if it were actually fulfilled (i.e., as if the person were actually of diminished or no capacity). But such an institutionalized fraud always has one revealing moment when even the most slavishly conforming observers can see the legal fiction behind the system. That is when the legalized thing would commit a crime. Then the “thing” would be suddenly metamorphosed—in the eyes of the law—back into being a person to be held legally responsible for the crime. For instance, an antebellum Alabama court asserted that slaves

are rational beings, they are capable of committing crimes; and in reference to acts which are crimes, are regarded as persons. Because they are slaves, they are . . . incapable of performing civil acts, and, in reference to all such, they are things, not persons.⁴⁷

Since there was no legal theory that slaves physically became things in their “civil acts,” the fiction involved in treating the slaves as “things” was clear. And this is a question of the facts about human nature, facts that are unchanged by consent or contract. If the slave had acquired that legal role in a voluntary contract, it would not change the fact that the slave remained a *de facto* person with the law only “counting” the contractual slave’s non-criminous obedience as “fulfilling” the contract to play the legal role of a non-responsible entity, a non-person or thing.

The key insight is the difference in the factual transferability of a thing’s services and our own actions—the person-thing mismatch. I can voluntarily transfer the services of my shovel to another person so that the other person can employ the shovel and be solely *de facto* responsible for the results. I cannot voluntarily transfer my own actions in like manner. Thus the contract to rent out my shovel is a normal contract that I fulfill by transferring the employment of the shovel to its employer.

The inalienability argument applies as well to the self-rental contract—that is, today’s employment contract—as to the self-sale contract or pact of subjection. I can certainly voluntarily agree to a contract to be “employed” by an “employer” on a long- or short-term basis, but I cannot in fact “transfer” my own actions for the long or short term. The factual inalienability of responsible human action and decision making is independent of the duration of the contract. That factual inalienability is also independent of the compensation paid in the contract—which is why this inalienability analysis has nothing to do with exploitation theories of either the Marxian or neoclassical (i.e., paying less than the value of marginal productivity) varieties.

Where the legal system “validates” such contracts, it must fictitiously “count” one’s inextricably co-responsible cooperation with the “employer” as fulfilling the employment contract—unless, of course, the employer and employee commit a crime together. The servant in work then becomes the partner in crime.

All who participate in a crime with a guilty intent are liable to punishment. A master and servant who so participate in a crime are liable criminally, not because they are master and servant, but because they jointly carried out a criminal venture and are both criminous.⁴⁸

When the “venture” being “jointly carried out” by the employer and employee is not criminous, then the facts about human responsibility are unchanged. But then the fiction takes over. The joint venture or partnership is transformed into the employer’s sole venture. The employee is legally transformed from being a co-responsible partner to being only an input supplier sharing no legal responsibility for either the input liabilities or the produced outputs of the employer’s business. And then the intellectual defenders of our economic civilization based on the renting of human beings can point out that the system is founded on a voluntary contract—unlike those coercive systems of the past.

Some Intellectual History of the Person-Thing Mismatch

Where has this key insight—that a person cannot fit the legal role of a non-person (even voluntarily)—erupted in the history of thought? The Ancients did not see this matter clearly. For Aristotle, slavery was based on “fact”; some adults were seen as being inherently of diminished capacity if not as “talking instruments” marked for slavery “from the hour of their birth.” Treating them as slaves was no more inappropriate for Aristotle than treating a donkey as an animal.

The Stoics held the radically different view that no one was a slave by his or her nature; slavery was an *external* condition juxtaposed to the internal freedom of the soul. After being essentially lost during the Middle Ages, the Stoic doctrine that the “inner part cannot be delivered into bondage”⁴⁹ reemerged in the Reformation doctrine of liberty of conscience. Secular authorities who try to compel belief can only secure external conformity.

Besides, the blind, wretched folk do not see how utterly hopeless and impossible a thing they are attempting. For no matter how much they fret and fume, they cannot do more than make people obey them by word or deed; the heart they cannot constrain, though they wear themselves out trying. For the proverb is true, “Thoughts are free.” Why then would they constrain people to believe from the heart, when they see that it is impossible?⁵⁰

Martin Luther was explicit about the *de facto* element; it was “impossible” to “constrain people to believe from the heart.”

Furthermore, every man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; and as little as he can open or shut heaven or hell for me, so little can he drive me to faith or unbelief. Since, then, belief or unbelief is a matter of every one’s conscience, and since this is no 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.⁵¹

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

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.⁵²

Hutcheson appeals to the inalienability argument in addition to utility. He contrasts de facto alienable goods where “the translation of them to others can be made effectually” (like the aforementioned shovel) with factually inalienable faculties where “the translation cannot be made with any effect.” This was not just some outpouring of moral emotions that one should not alienate this or that basic right. Hutcheson actually set forth a *theory* which could have legs of its own far beyond Hutcheson's (not to mention Luther's) intent. He based the theory on what in fact could or could not be transferred or alienated from one person to another.

Hutcheson goes on to show how the “right of private judgment” or (Luther's) “liberty of conscience” is inalienable.

Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable.⁵³

Hutcheson pinpoints the factual nontransferability of private decision-making power. In the case of the criminous employee, we saw how the employee ultimately makes the decisions himself (through ratification and voluntary obedience) in spite of what is commanded by the employer. Short of coercion, an individual's faculty of judgment cannot in fact be short-circuited by a secular or religious authority.

A like natural right every intelligent being has about his own opinions, speculative or practical, to judge according to the evidence that appears to him. This right appears from the very constitution of the rational mind which can assent or dissent solely according to the evidence presented, and naturally desires knowledge. The same considerations 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.⁵⁴

Democratic theory carried over this theory from the inalienability of conscience to a critique of the Hobbesian *pactum subjectionis*, the contract to alienate and transfer the right of self-determination as if it were a property that could be transferred from a people to a sovereign. Few have seen these connections as clearly as Staughton Lynd in his *Intellectual Origins of American Radicalism*. When commenting on Hutcheson's theory, Lynd noted that when "rights were termed 'unalienable' in this sense, it did not mean that they could not be transferred without consent, but that their nature made them untransferrable."⁵⁵ The crucial link was to go from the inalienable liberty of conscience to a theory of inalienable rights.

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.⁵⁶

Or as Ernst Cassirer put it,

There is, at least, *one* right that cannot be ceded or abandoned: the right to personality. . . . They charged the great logician [Hobbes] with a contradiction in terms. If a man could give up his personality he would cease being a moral being. . . . There is no *pactum subjectionis*, no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity.⁵⁷

In the American Declaration of Independence, "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important."⁵⁸ But the theory behind the notion of inalienable rights was lost in the transition from the Scottish Enlightenment to the slave-holding society of antebellum America. The phraseology of "inalienable rights" is a staple in our political culture, e.g., our 4th of July rhetoric, but the original theory of inalienability has been largely ignored or forgotten.

I have focused on the path from the Reformation through the Scottish Enlightenment. There is also a path directly through German philosophy that might be mentioned. Hegel gave the most explicit treatment that—like Hutcheson—juxtaposed the alienability of things (like a shovel) with the inalienability of the aspects of our personhood (decision making and responsibility).

The reason I can alienate my property is that it is mine only in so far as I put my will into it. Hence I may abandon (*derelinquere*) as a *res nullius* anything that I have or yield it to the will of another and so into his possession, provided always that the thing in question is a thing external by nature.⁵⁹

But alienation clearly cannot be applied to one's own personality. "Therefore those goods, or rather substantive characteristics, which constitute my own pri-

vate personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible.”⁶⁰

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.⁶¹

This argument had legs of its own and reached beyond Hegel’s intent. The argument so clearly applied also to the master-servant contract that Hegel tried to invoke some metaphysical mumbo-jumbo to differentiate the self-sale and self-rental contract.⁶²

Hegel’s precedent was also important in showing yet another opportunity missed by Marx. Marx was not only wrong in accepting that rulership was blended with ownership, in accepting the liberal framing of the question as consent versus coercion (while differing on the factual question of the labor contract being coercive or not), and in accepting that the system should be analyzed by a (labor) theory of value rather than a (labor) theory of property. Marx even missed the inalienability critique clearly spelled out before him by Hegel.⁶³

Application to the Employment Contract

Today the inalienability theory has to be retrieved from its roots in the critique of the contractarian arguments for slavery and autocracy. Once recovered, it is seen that the inalienability arguments apply as well to the individual self-rental contract and the collective *pactum subjectionis* of the workplace, the individual and collective versions of the employment contract. The mismatch of a person in a non-responsible “thing” role and the non-transferability of decision making and responsibility apply as well for eight hours a day as for a lifetime of labor.

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

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

Now once one understands this fundamental distinction between the alienation and the delegation social contracts, what additional information is needed to make the application to the employment contract? Does any contemporary political scientist think that the employer is the delegate, representative, or trustee of the employees? Who thinks that the employer manages in the name of the employees? Yet few political theorists have pointed out the obvious.

The manager in industry is not like the Minister in politics: he is not chosen by or responsible to the workers in the industry, but chosen by and responsible to partners and directors or some other autocratic authority. Instead of the manager being the Minister or servant and the men the ultimate masters, the men are the servants and the manager and the external power behind him the master. Thus, while our governmental organisation is democratic in theory, and by the extension of education is continually becoming more so in practice, our industrial organisation is built upon a different basis.⁶⁴

And very few legal thinkers have also noted the obvious.

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.⁶⁵

Perhaps the public-private distinction somehow makes a difference? Does anyone think that the persons who have a de facto inalienable capacity for decision making in the public sphere suddenly morph into talking instruments in the private sphere?

Since the answers are so blindingly obvious, the usual response is apparently to not think about it. "Responsible" thinkers just don't go there. There are not only glass ceilings but glass walls that define the accepted corridors of thought. Responsible thinkers are equipped with uncanny radar so they can roar down the

glass corridors of orthodox thought without ever getting close to the walls—all the while seeing themselves as brash free thinkers—even as social scientists—exploring the vast unknown. This radar-like instinct, inbred by the ambient society, constantly and almost unconsciously warns them away from the glass walls—away from irresponsible speculations (except perhaps in the pink of youth before ambient society has done its work) and down the avenues of safe, sane, sound, and serious research.

Responsible thinkers can fall back on the consent or coercion framework. Democracy is government by the consent of the governed, and the employees give their consent to the employment contract, so where is the problem? Yesterday there indeed were inherent human rights violations by institutions based on coercion, but today we happily live in a liberal society where all the institutions are founded on consent. Yes, even today there probably are cases where workers are overworked, underpaid, and even perhaps coerced by their employers, and these abuses need to be corrected. But such acknowledged abuses do not amount to any inherent rights violation in the free and voluntary contract for the renting or, rather, the hiring of human beings. Such is the Happy Consciousness of today's responsible liberal thinkers.

In addition to seeing the employment contract as the collective workplace *pactum subjectionis*, it can also be seen as the individual contract to hire or rent oneself out—just as one might rent out an instrument or tool. The inalienability counterargument was that people cannot in fact transfer the employment of themselves to an employer as they can the employment of a tool. The employer cannot be solely *de facto* responsible for the results as if the employees were only non-responsible tools. This is again blindingly obvious and fully recognized by the law when the employer and employee commit a crime. Of course, a contract to commit a crime is invalid but the legality of the contract is not the issue. Does anyone really think that employees morph into non-responsible instruments when their actions are legal? How can one avoid the conclusion that the employees and working employers are jointly *de facto* responsible for the results of their enterprise? Again, it is better not to think about it.

There are many “stories” in conventional economic, political, and legal theory to help one avoid thinking about these issues. As Luther himself emphasized, the mind cannot be forced to go where it does not want to go. One stream in modern apologetics is to argue that it is acceptable for a person to be rented or “employed” for eight or so hours a day (as in the self-rental contract) but not indefinitely (as in the self-sale contract). My pseudonymous spoof⁶⁶ of Nozick shows the flaws in those arguments in ironic agreement with Nozick that the self-rental and self-sale contracts stand together—or fall together. The inalienable rights arguments against both contracts were left unmentioned in the hopes of pushing readers to find arguments on their own to reject both contracts—as was done by Carole Pateman (see below).

Without going through all the “ducking and diving” of modern apologetics, perhaps the best story goes something like this.

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

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

In the slavery contract, the slaves know well what is expected of them; in return for their consideration (e.g., purchase price and ongoing food, clothing, and shelter), they are to obey the master within the scope of the slavery contract (which, incidentally, would not include crimes). Similarly, the master knows that he or she, in return for providing the consideration, is acquiring the right to decide what the slaves are to do within the scope of the contract. Everyone knows what everyone else is expected to do. There is no need for language in the contract about playing the role of a “thing” or anything like that.⁶⁷ It is a perfectly straightforward voluntary contract. When the two parties both fulfill their part (paying consideration and following directions), then the contract is fulfilled and that is the end of the matter.

When the antebellum law talked about slaves having the legal role of “things,” that was an unnecessary extravagance. A slavery contract would need no such language; it is a straightforward *quid pro quo*, the consideration is given in return for obedience—till death do they part.⁶⁸

Structure of Rights in the Employment Firm

The employment contract does not “say” that employees have the role of non-persons, so is the argument that insensitive employers might “treat” employees as things? No, it is not an argument about how workers are treated, worked, or paid. But how can a person be treated as a non-person in a contract if the person can walk away from the contract? This question implicitly assumes the consent-or-coercion framework—as if coercion were the only way to treat a person as a non-person. But as with the voluntary slavery contract and the other historical exam-

ples of alienation contracts (see below), the question is, what is the structure of rights, or lack thereof, within the contract that the person voluntarily enters and voluntarily sustains? In the employment firm, is that structure essentially the same as if workers had rented tools rather than their selves to the employer? To see that the employees have the legal role of non-responsible entities, one has to apply some analysis to take the mind where the mind does not want to go.

In a proprietorship, the proprietor has the legal responsibility (both positive and negative) for the results of the proprietor's de facto responsible actions. That is, the proprietor is liable for the costs of the used-up inputs and the proprietor may claim and sell the output that is produced. Thus the proprietor does not have a non-responsible role. Similarly for the partners in a partnership.

In an owner-operated corporation, the corporation is a legal person separate from the owner or owners as individuals. Thus when the working owner or owners carry out the work of the company, it is technically the company as a separate legal person that has the legal liability for the used-up inputs and the legal claim on the produced outputs. But the owners are the legal members of that company, so through their corporate embodiment they have the legal responsibility for the positive and negative results of their de facto responsible actions. In economics, this is sometimes called the role of the "residual claimant" (liable for the input costs and getting the output revenues whose net is the residual). Thus the owner-operators of a company also do not have the legal role of a non-responsible entity or thing.

We have seen that the employees are inextricably de facto co-responsible along with the working employers for the results (positive and negative) of their enterprise. But the employees as employees are *not* legal members of the company. Yet it is the company that has the legal liability for the used-up inputs (the employees' labor simply counting as one of those inputs) and the legal claim on the produced outputs. Since the employees are not legal members of that corporate body, they have no share of the legal responsibility for either the positive or negative fruits of their de facto responsible actions. Thus it is that the employees take on a legally non-responsible role in the employment contract in spite of there being no language to that effect in the labor contract and in spite of their continuing de facto responsibility. It has nothing to do with employers being nasty or nice to workers, with how hard employees are worked, with the size of the rental (wage) payments or the incompleteness of the contract, or the like.

It is important to compare the employees' role with that of the other factor suppliers who supply to the company actual things or the services of things such as land, machinery, intermediate goods, or loan capital. Those factor suppliers as factor suppliers also are not legal members of the company so they bear none of the legal liability for the costs (their supplied inputs being one of the costs) and have no legal claim on the outputs. This is where the difference in the factual transferability of persons and things comes into the analysis. The suppliers of

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

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

things can alienate and transfer their inputs to the employer so those factor suppliers have no de facto responsibility for the employer's use of the factors.

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

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

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

On the positive side, there is the basic juridical principle of responsibility that legal responsibility should be imputed in accordance with de facto responsibility. This is the principle behind every trial—to try to assign or impute the legal responsibility for some crime or tort to those who are in fact responsible. The responsibility principle implies that there should be no off-diagonal elements in table 1. The people who work in a firm should be the legal members of the firm, and the people who only supply things to the firm should not be members of the firm. All firms should be democratic organizations whose members are the people working in them.

Other Types of Alienation Contracts

One “benefit” of this analysis is that one might correlate with or even imagine other types of alienation contracts which may or may not have been historically realized. Another historical example of this sort of institutionalized fiction was the older and now legally invalid *coverture marriage contract* that “identified” the legal personality of the wife with that of the husband.

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a femme covert, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.⁶⁹

The baron-femme relationship established by the coverture marriage contract exemplified the identity fiction in past domestic law. A female was to pass from the cover of her father to the cover of her husband (as in the vestigial ceremony where the bride’s father “gives away” the bride to the groom)—always a “femme covert” instead of the anomalous “femme sole.” The identity fiction for the baron-femme relation was that “the husband and wife are one person in law” with the implicit or explicit rider, “and that one person is the husband.” A wife could own property and make contracts, but only in the name of her husband. Again, obedience counted as “fulfilling” the contract to have the wife’s legal personality subsumed under and identified with that of the husband.⁷⁰

The coverture marriage contract is now outlawed in favor of the partnership version of the marriage contract but one could imagine a modernized sex-neutral *dependency contract*. One adult with full capacity would voluntarily agree to become a “dependent” of another adult, the “guardian” or “sponsor,” in return for whatever consideration. The independent and adult legal personality of the “dependent” would be “suspended” in favor of the sponsor. The dependent could only make contracts and hold property under the name of the sponsor. The relevant identity fiction would be that “the sponsor and dependent are one person in law—and that one person is the sponsor.” The language of the contract could be adjusted so as not to offend modern sensitivities as long as it was understood what the contract means. Obedience by the adult dependent to the sponsor would count as “fulfilling” this contract and the legal rights would be allocated accordingly (e.g., all property belonging to the sponsor).

This hypothetical modernized sex-neutral version of the coverture contract would be invalid for the same reasons as the original coverture contract, the self-sale contract, or the employment contract. The adult “dependent” remains a de facto adult, the law would accept obedience to the sponsor as “fulfilling” the contract, and then the legal rights would be assigned accordingly as if the “dependent” was actually a non-adult.⁷¹

Another imagined example of an invalid alienation contract would be the *consumptive employment contract*. Typically a consumer buys consumption goods, self-manages his or her own consumption activity, and takes the liability for the consumed good as well as appropriates any waste product. The “employment” concept could be applied to consumption by having the consumer, instead of paying for the consumer good, pay an “employer” to “employ” the consumer in the consumption of the good. Then the employer would legally take on the legal liability for the used-up input to the consumption process, would manage the process, and would appropriate any waste product that might be sold, say, to a recycling center. Instead of the employer paying the productive-employee to transfer value-adding labor, the consumptive-employee is paying the employer to accept the transfer of the value-subtracting consumption activity (like a negative form of labor). While some contracts between the elderly and nursing homes might seem to be of this type, this type of consumption employment contract seems little used. In any case, the critique of the production employment contract would apply as well to the consumption version. Responsible human action, net value-adding or net value-subtracting, is not de facto transferable.

In spite of the abundance of legal precedent in the historical alienation contracts such as the self-sale contract, the *pactum subjectionis*, and the coverture marriage contract, today’s employment contract, and even some hypothetical alienation contracts (the “dependency contract” and the consumptive employment contract), legal theory has yet to focus on the general notion of an alienation contract.⁷² All these contracts have the same scheme. An adult person with full capacity voluntarily agrees for whatever reason and in return for whatever consideration to accept a lesser legal role. But they do not in fact alienate their capacity as a person in order to fulfill that diminished legal role. Instead the law accepts their (non-criminous) obedience to the master as “fulfilling” the contract. Then the rights and obligations follow the legal role (e.g., the slave of a master, the subject of a sovereign, the femme covert of her baron, the employee of the employer, and so forth)—*as if* the person were not in fact a person of full capacity. The whole scheme amounts to a fiction and fraud on an institutional scale that nonetheless parades upon the historical stage as a contractual institution based on consent.

Concluding Remarks

Liberalism exhibits a comfortable learned ignorance of the long history of contractarian defenses of slavery and non-democratic governments as being based on consent. And liberalism also has “lost” the inalienability theory hammered out in the anti-slavery and democratic movements that descend from the Reformation and Enlightenment. Instead, the basic question is posed in liberalism as the juxtaposition of coercion versus consent.

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.⁷³

Since democracy is pictured as being “government based on the consent of the governed” and since the employment firm is also based on consent, both are seen as part of the liberal progress from societies based on coercion to societies based on consent.

Contrary to the blinkered vision of liberal apologetics, we have seen that the subtle issues lie all within the domain of consent (little subtlety is required to be against coercion). The “consent of the governed” to a Hobbesian *pactum subjectionis* is not democracy, and the employment contract is the mini-Hobbesian contract for the workplace. Thus once the question is posed as consent to alienation versus consent to delegation, then the daunted affinity of “liberal-capitalism” with democracy is demolished. The historical bedfellows of the employment contract are the *pactum subjectionis* and the self-sale contract. A true affinity to democracy would entail the abolition of the employment contract in favor of all firms being organized as workplace democracies.

A similar reversal occurs concerning property rights. A basic principle in jurisprudence is the responsibility principle that, whenever possible, legal responsibility should be assigned or imputed according to the de facto responsible party. For instance, in a trial the idea is to make an official decision on the factual question of whether or not the defendant is the de facto responsible party. If so, then legal responsibility is imputed accordingly. The more positive application of the responsibility principle is the old idea often associated with John Locke that people should appropriate the fruits of their labor.⁷⁴ This labor theory of property is both positive and negative since new products are only produced by using up other things as inputs. Hence the question of assigning legal responsibility is two-sided, to assign the ownership of the product and the liability for the used-up inputs to the people who, by their de facto responsible actions, produced the outputs by using up the inputs.

Hence a private property system based on the basic principle of justice (imputing to people what they are responsible for) would have the legal members of each firm be exactly the people who work in the firm (which would eliminate the off-diagonal elements in table 1, above). Thus a system based on justice in private property would entail workplace democracy.

It is time to move beyond the simplistic morality play of consent-or-coercion, and to see the history of subjection with the consent-based apologetics of the intellectual clerks of the past and present. And it is time to understand the deeper intellectual history of the anti-slavery and democratic movements based on the enduring idea that persons do not fit into the legal role of non-persons—even with consent. This theory, unsurprisingly overlooked by modern liberalism, bequeaths

to our day the call for the contract to rent human beings to follow the self-sale contract, the social contract of subjection, and the coverture marriage contract into the dustbin of history.

Far from the present employment system being based on democracy and private property, it is precisely the principles of democracy and justice in property that call for the abolition of the employment contract in favor of a private property market economy of democratic firms.

NOTES

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

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

3. Quoted in Maitland, *Frederic William Maitland, Historian*, 42.

4. Karl Marx, *Capital: A Critique of Political Economy*, vol. 1 (1867; reprint, New York: International Publishers, 1967), 332.

5. Robert Dahl, *A Preface to Economic Democracy* (Berkeley: University of California Press, 1985), 62.

6. For more on this ill-posed juxtaposition of democratic rights and property rights, see David Ellerman, "Review of Robert Dahl's *A Preface to Economic Democracy*," *Commonweal* 112, no. 18 (1985): 584-86.

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

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

9. I use *liberalism* in the European sense as *classical liberalism*, not in the American sense juxtaposed to conservatism. The fundamental tenet of liberalism is a society based on voluntary contract, not coercion (including "status" as a type of coercion). As Henry Maine famously put it, "[T]he movement of the progressive societies has hitherto been a movement from Status to Contract." Henry Maine, *Ancient Law* (1861; reprint, London: Dent, 1972), 100. At the enterprise level, the characteristic feature of liberalism is the acceptance of the employment firm based on the employer-employee contract. I use the phrase *employment firm* rather than the misleading phrase *capitalist firm* since the characteristic feature of the conventional firm is the employment contract, not the private ownership of the means of production. Without the employment contract, the conventional corporation could only be a holding bin for assets that could only be used by being rented out (if not used by the asset owners)—just as without the master-slave relationship, a slave (cotton) plantation would only be a cotton farm.

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

11. *Ibid.*, 52 (emphasis in the original).

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

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

14. *Ibid.*, 33.

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

16. See Deuteronomy 15:16-17; and Exodus 21:5-6.

17. See Institutes Lib. I, Tit. III, 4.

18.

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. (Samuel Pufendorf, *The Whole Duty of Man, According to the Law of Nature* [1673; reprint, Indianapolis, Ind.: Liberty Fund, 2003], 186-87)

19. Thomas Hobbes, *Leviathan* (n.p., 1651), bk. 2, ch. 20.

20. Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979), 29.

21. Suarez quoted in *ibid.*, 56.

22. *Ibid.*, 56-57.

23. Pufendorf, *The Whole Duty of Man*, 185.

24. Jean-Jacques Rousseau, "Discourse on the Origin of Inequality," in *The Social Contract and Discourses*, trans. G. D. H. Cole (1755; reprint, London: J. M. Dent & Sons, 1973), 105.

25. Samuel Pufendorf, *Of the Law of Nature and Nations*, trans. B. Kennet (Oxford, 1703), bk. 7, ch. 3, 160.

26. John Locke, *Two Treatises of Government* (1690; reprint, New York: New American Library, 1960), §23.

27. *Ibid.*, §24.

28. *Ibid.*, §23.

29. See Peter Laslett, "Introduction with Notes," in P. Laslett, *John Locke: Two Treatises of Government* (New York: New American Library, 1960), notes on §24, 325-26.

30. William Blackstone, "Master and Servant," in *Ehrlich's Blackstone*, ed. J. W. Ehrlich (1765; reprint, New York: Capricorn Books, 1959), 72.

31. See Eugene Genovese, *The World the Slaveholders Made* (New York: Vintage Books, 1971); Harvey Wish, ed., *Ante-bellum* (New York: Capricorn Books, 1960); or George Fitzhugh, *Cannibals All! or, Slaves without Masters*, ed. C. Vann Woodward (1857; reprint, Cambridge, Mass.: Harvard University Press, 1960).

32. Samuel Seabury, *American Slavery Justified by the Law of Nature* (1861; reprint, Miami, Fla.: Mnemosyne, 1969), 144.

33. *Ibid.*, 153.

34. Lib. I, Tit. II, 6. Quoted in Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press, 1955), 4; or George H. Sabine, *A History of Political Theory* (New York: Henry Holt, 1958), 171.

35. Corwin, *The "Higher Law" Background of American Constitutional Law*, 4 n. 8.

36. Otto von Gierke, *The Development of Political Theory* (New York: Howard Fertig, 1966), 93-94.

37. Gierke, *Political Theories of the Middle Age*, 38-39.

38. *Ibid.*, 39-40.

39. Quentin Skinner, *The Renaissance*, vol. 1 of *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978), 62.

40. Gierke, *Political Theories of the Middle Age*, 146.

41. Hugo Grotius, *The Rights of War and Peace* (1625; reprint, Washington, D.C.: M. Walter Dunne, 1901), 63.

42. *Ibid.*, 63-64.

43. Thomas Hobbes, *Leviathan* (1651; reprint, Indianapolis, Ind.: Bobbs-Merrill, 1958), 142.
44. Skinner, *The Renaissance*, 65.
45. Marsilius of Padua, *Defensor Pacis*, trans. Alan Gewirth (1324; reprint, Toronto: University of Toronto Press, 1980), 45.
46. Quoted in Skinner, *The Renaissance*, 62.
47. Helen T. Catterall, *Judicial Cases concerning Slavery and the Negro* (Washington, D.C.: Carnegie Institute, 1926), 247.
48. Francis Batt, *The Law of Master and Servant* (London: Pitman, 1967), 612.
49. Seneca quoted in David Brion Davis, *The Problem of Slavery in Western Culture* (Ithaca, N.Y.: Cornell University Press, 1966), 77.
50. Martin Luther, "Concerning Secular Authority," in *Readings in Political Philosophy*, ed. F. W. Coker (New York: Macmillan, 1942), 316.
51. *Ibid.*, 316.
52. Francis Hutcheson, *A System of Moral Philosophy* (London, 1755), 261.
53. *Ibid.*, 261-62.
54. *Ibid.*, 295.
55. Staughton Lynd, *Intellectual Origins of American Radicalism* (New York: Vintage Books, 1969), 45.
56. *Ibid.*, 56-57.
57. Ernst Cassirer, *The Myth of the State* (New Haven, Conn.: Yale University Press, 1963), 175.
58. Garry Wills, *Inventing America* (New York: Vintage Books, 1979), 213.
59. Georg W. F. Hegel, *Hegel's Philosophy of Right*, trans. T. M. Knox (1821; reprint, New York: Oxford University Press, 1967), §65.
60. *Ibid.*, §66.
61. *Ibid.*, remark to §66.
62. *Ibid.*, §67.
63. For more intellectual history of inalienability theory, see David Ellerman, *Property & Contract in Economics: The Case for Economic Democracy* (Cambridge, Mass.: Blackwell, 1992). This book is out of print, but the rights have reverted to me so the full text can be downloaded at <http://www.ellerman.org>.
64. Alfred E. Zimmern, *Nationality and Government* (London: Chatto & Windus, 1918), 263.
65. Abram Chayes, "The Modern Corporation and the Rule of Law," in *The Corporation in Modern Society*, ed. E. S. Mason (New York: Atheneum, 1966), 39-40.
66. J. Philmore (pseudonym for David Ellerman), "The Libertarian Case for Slavery: A Note on Nozick," *Philosophical Forum* 14 (Fall 1982): 43-58. Reprinted in David Ellerman, *Intellectual Trespassing as a Way of Life: Essays in Philosophy, Economics, and Mathematics* (Lanham, Md.: Rowman & Littlefield, 1995).
67. As a pro-slavery writer put it,

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, or as the right to the services of a minor or apprentice may be transferred. . . . Such is American slavery, or as Mr. Henry Hughes happily terms it, "Warranteeism." (E. N. Elliott, "Introduction," in *Cotton Is King and Pro-Slavery Arguments*, ed. E. N. Elliott [Augusta, Ga., 1860], vii)

Or again,

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. (Edward B. Bryan, *Letters to the Southern People* [Charleston, S.C., 1858], 10)

Or from a better known thinker,

The only difference is, in the mode of purchasing. The owner of the slave purchases, at once, the whole of the labour, which the man can ever perform: he, who pays wages, purchases only so much of a man's labour as he can perform in a day, or any other stipulated time. (James Mill, *Elements of Political Economy* [London, 1826], ch. 1, sec. 2)

68. In a voluntary slavery, lifetime servitude, or “warrantee” contract, one party performs most of their part in the beginning while the other party performs their part over an extended period—as in a home mortgage contract. And, as in a mortgage contract, the party who performs over the extended period does not have the “freedom” to walk away or exit the contract at any point without legal consequences—even though they may feel “coerced” to perform their part of the contract (which, incidentally, is how the pro-slavery contractarians viewed the “coercion” involved in the institution). Thus if the “warrantee” wants to exit the contract, the legal authorities might have to enforce repayment of an appropriate portion of the purchase price. As the libertarian economist Murray Rothbard put it, “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.” Murray Rothbard, *Man, Economy, and State* (Los Angeles: Nash, 1962), 441.

69. Blackstone, “Husband and Wife,” in *Ehrlich's Blackstone*, 83.

70. In Carole Pateman's analysis of this sort of a “sexual contract” in a more general setting, she independently pointed out the connection to the employment contract and the de facto inalienability of labor.

The contractarian argument is unassailable all the time it is accepted that abilities can ‘acquire’ an external relation to an individual, and can be treated as if they were property. To treat abilities in this manner is also implicitly to accept that the ‘exchange’ between employer and worker is like any other exchange of material property. . . . The answer to the question of how property in the person can be contracted out is that no such procedure is possible. Labour power, capacities or services, cannot be separated from the person of the worker like pieces of property. (Carole Pateman, *The Sexual Contract* [Stanford, Calif.: Stanford University Press, 1988], 147-50)

71. Many modern feminist thinkers understand well the fiction and fraud involved in the old coverture contract where the husband had all the external legal rights and obligations for the “one person in law.” However, with the exception of Carole Pateman and perhaps a few others, there seems to be little recognition of the same type of fiction and fraud involved in the employment contract where the employer takes all the legal ownership of the produced products and carries all the legal liabilities for the de facto jointly responsible activities of the people working in the enterprise.

72. One reason is that progress by abolishing the slavery contract, the *pactum subjectionis*, and the coverture marriage contract tends to be accompanied by the historical revisionism of mapping the issue back into the consent-coercion dichotomy. Once those contracts are moved to the other side of the legal ledger, it becomes a political incorrectness of the blaming-the-victim variety to think that there could ever have been voluntary slaves, voluntary subjects in an autocracy, or voluntary wives in a coverture contract. It was all really coercion, and that's why those “contracts” were abolished. Hence there is no need for another theory and no reason to compare those coercive “contracts” of the past with today's voluntary employment contract. And Marxism obligingly reinforces that framing

of the issue by taking the view that—like the revisionist version of the abolished contracts—the labor contract is “really” coercion.

73. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 13.

74.

[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. (Stephen Perry, “Libertarianism, Entitlement, and Responsibility,” *Philosophy & Public Affairs* 26, no. 4 [1997]: 352)

The question of whether or not this was Locke’s theory is considered in Ellerman, *Property & Contract*.

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