Chapter 9

The Historical and Modern Arguments Against Contractual Slavery

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Abstract: This chapter is divided into two parts. Part I reviews the historical and modern arguments that forms of slavery or servitude should be legally allowed if based on consent (assuming it was genuine). The analogous arguments are also reviewed for the acceptability of non-democratic or autocratic government if based on the "consent of the governed." Part II examines the counterargument based on the theory of inalienable rights. The basic ideas were anticipated in antiquity and developed from the sixteenth to the nineteenth centuries. The inalienable rights argument is then restated without philosophical jargon in modern terms. To further cement the argument, the basis for abolishing the consensual coverture marriage contract in democratic countries is spelled out as an example. The overall conclusion is that any institution or practice—human trafficking is a modern case in point—that, in effect, treats a person as a non-person, as only a means instead of as an end-in-themselves, violates their inalienable rights and is illegitimate, even with consent.

Keywords: Coverture Marriage; Human Trafficking; Inalienable Rights; Kant's Personhood Principle; Pacts of Subjection; Perpetual Servitude; Voluntary Slavery

9.1 Introduction

Consent is, of course, a necessary condition for a legitimate institution or practice, but is it a sufficient condition? From ancient times down to the modern day, there have been arguments that consent is sufficient for the legitimacy of ancient and modern forms of slavery or servitude. Even today, consider the simple question of what was wrong with historical slavery in America or elsewhere. Perhaps the most common answer is that it was without consent; it was coercion on an institutional scale. It is easy to argue historically that slavery and associated forms of servitude had, at best, only the "fiction of consent" (Chakravarty 2022). But what about a "happy slave" (Herzog 1989) who gives genuine consent? If the lack of consent was the basic reason for the illegitimacy of historical slavery, then the implication is that a similar institution or practice would be acceptable if there were genuine, informed, and knowledgeable consent.

In Part I of this chapter, we review the old and more recent arguments that contractual forms of slavery or servitude are acceptable. In Part II, we review the counterargument that developed in Western thought in the form of the theory of inalienable rights. A right is inalienable if it may not be legally alienated or transferred, even with genuine consent.

9.2 Part I: Historical and Modern Arguments for Contractual Slavery or Servitude

9.2.1 Consensual Slavery in Roman Law

Given the role of Roman law in the development of Western jurisprudence, we might begin with the Roman law about slavery. In the codification of Justinian (482–565), the legal ways to become a slave were specified as follows:

> *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.* (Justinian 1948, I. Tit. III, sec. 4)

Interestingly, all three reasons for slavery, as listed in the quote above, had contractual interpretations. Firstly, there was contractual slavery by an explicit contract. The second reason was when one committed a capital crime (like fighting against the Roman Empire) and was captured; then one had a choice of being put to death or plea bargaining to be sold into slavery. Of course, the choice was an extreme one, but that was traditionally interpreted as slavery based on consent and contract. Thomas Hobbes (1588–1679) was clear on that point:

> *And this dominion is then acquired to the victor when the vanquished, to avoid the present stroke of death, covenants either in express words or by other sufficient signs of the will that, so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof at his pleasure. … It is not, therefore, the victory that gives the right of dominion over the vanquished but his own covenant.* (Hobbes 1958, [1651] II, Chap. 20)

The third reason, being born of a slave mother, was interpreted as offering the infant food, clothing, and shelter in return for the adult working off that debt as a long-term indentured servant. The German jurist, Samuel von Pufendorf (1632–1694), was also clear on that contractual interpretation:

> *Whereas, therefore, the Master afforded such Infant Nourishment, long before his Service could be of any Use to him; and whereas all the following Services of his Life could not much exceed the Value of his Maintenance, he is not to leave his Master's Service without his Consent. But 'tis manifest, That since these Bondmen came into a State of Servitude not by any Fault of their own, there can be no Pretence that they should be otherwise dealt withal, than as if they were in the Condition of perpetual hired Servants.* (Pufendorf 2003, [1673] 186-7)

Thus, the modern era inherited from antiquity a jurisprudence that not only allowed slavery but saw the incidence of contract in all the legal means of becoming a slave.

9.2.2 More Modern Arguments for Contractual Slavery or Servitude

One bastion of modern classical liberalism is the Chicago School of Economics, and one of its founders was Frank H. Knight (1885–1972). He emphasized that the foundations of classical liberalism were laid well before Adam Smith, stating:

> *The classical exposition of the new doctrine [free enterprise] in its positive aspect was Adam Smith's* Wealth of Nations*, published in 1776. Interestingly enough, the political and legal theory had been stated in a series of classics, well in advance of the formulation of*

> *the economic theory by Smith. The leading names are, of course, Locke, Montesquieu, and Blackstone.* (Knight 1947, 27, fn. 4)

Again, the interesting thing—almost totally neglected by the modern literature—is that all three of these founders (Locke, Montesquieu, and Blackstone) accepted a voluntary contractual form of slavery, occasionally, using some euphemism such as "drudgery" or "perpetual servitude". For instance, John Locke (1632–1704) retained the justification based essentially on a plea bargain made voluntarily after committing a capital crime. He wrote:

> *Indeed having, by his fault, forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it, may (when he has him in his Power) delay to take it, and make use of him to his own Service, and he does him no injury by it. For, whenever he finds the hardship of his Slavery out-weigh the value of his Life, 'tis in his Power, by resisting the Will of his Master, to draw on himself the Death he desires.* (Locke 1960, [1690] Second Treatise, §23)

Locke took the moral high ground about a voluntary contract for slavery that would give the master *absolute* power over the slave—like Roman slavery, where the master could kill a slave with impunity. He stated:

> *For a Man, not having the Power of his own Life, cannot, by Compact or his own Consent, enslave himself to anyone, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases.* (Locke 1960, [1690] Second Treatise, §23)

But, he continued, absenting that *arbitrary* power on the part of the master made this acceptable; it should not be called "slavery":

> *For, if once* Compact *enter between them, and make an agreement for a limited Power on the one side, and Obedience on the other, the State of War and* Slavery *ceases, as long as the Compact endures ... I confess, we find among the* Jews, *as well as other Nations, that Men did sell themselves; but, 'tis plain, this was only to* Drudgery, not to Slavery. *For, it is evident, the Person sold was not under an Absolute, Arbitrary, Despotical Power.* (Locke 1960, [1690] Second Treatise, §24)

Montesquieu (1689–1755) followed Locke in condemning the absolute power of the Roman master. But that did not preclude a "mild" alternative, as evident in the following:

> *This is the true and rational origin of that mild law of slavery which obtains in some countries; and mild it ought to be, as founded on the free choice a man makes of a master, for his own benefit; which forms a mutual convention between two parties*. (Montesquieu 1912, [1748] Vol. I, Bk. 15, Chap. 5)

Sir William Blackstone (1723–1780) also took the high ground in condemning harsh Roman slavery since contracts "when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is ... impossible" (Blackstone 1959, [1765] 71). He continued:

> *Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term.* (Blackstone 1959, [1765] 71-2, section on "Master and Servant")

Frank Knight was arguably the most philosophically sophisticated classical liberal economist of his day (and ours). But by that time, involuntary *and voluntary* slavery had been abolished.[1] Knight was wonderfully free of the intellectual cowardice of almost all conventional economists. Such economists constantly sing the virtues of free and voluntary market contracts without considering voluntary contractual long-term or "perpetual" servitude. Knight complained that such a voluntary contract is ruled out in the (postbellum) free enterprise system. He wrote:

> *The peculiar weakness of the position of one who owns earning power only in the form of personal capacities is, somewhat paradoxically, a consequence of the guarantee of personal freedom, general in modern nations, but logically not a part of the property system; in fact, it is a limitation on the ownership of one's own person. Because of such "inalienable rights" a man cannot "capitalize" his earning power because a contract to deliver labour in the future will not be enforced.* (Knight 1947, 26, fn. 3)

This legal exclusion of any right to capitalize or hypothecate one's future labor (e.g., as a perpetual servant) is "logically not a part of the property system;" it is even a defect of our free enterprise civilization. Knight continued:

> *It is one of the defects of our civilization that mechanism has not been involved to enable human ability to hypothecate its productive power in procuring resources to make it effective under its own direction and responsibility. (Knight 1965a, 350, fn. 1)*

If workers want security, here is how to have it.

> *If laborers were not guaranteed the "inalienable right" of freedom, that is, if they could make enforceable time contracts for work and thus capitalize their labor power they would in an economic sense be more secure—in the sense in which the slave has security*. (Knight 1956, 93, fn. 6)

The contractual basis for the current free enterprise system is the employment contract wherein the employer (typically now a company) hires, employs, rents, or leases the employees. As the pre-eminent neoclassical economist, Paul Samuelson (1915–2009) put 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*. (Samuelson 1976: 52 [his italics])

Abstracting from the different details, the primary difference between buying or renting some person or thing is the difference between buying all the services or only the services for a limited time. The classical economist, James Mill (1773–1836), made the point explicit in the case of persons:

> *The labourer, who receives wages sells his labour for a day, a week, a month, or a year, as the case may be. The manufacturer, who pays these wages, buys the labour, for the day, the year, or whatever period it may be. He is equally therefore the owner of the labour, with the manufacturer who operates with slaves. The only difference is, in the mode of purchasing. The owner of the slave purchases, at once, the whole of the labour, which the*

[1] In the United States (US), involuntary servitude was abolished by the Thirteenth Amendment to the Constitution in 1865 and the "Peonage Abolition Act of 1867 abolished voluntary as well as involuntary servitude" (Soifer 2012, 1607).

> *man can ever perform: he, who pays wages, purchases only so much of a man's labour as he can perform in a day, or any other stipulated time.* (Mill 1844, Chap. 1, Section II*)*

Even the intellectual defenders of antebellum slavery jabbed their Northern critics with that point:

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

But today, all these issues are seemingly left behind in the magnificent edifice of modern neoclassical microeconomics. The fundamental result is that a competitive equilibrium in all markets is efficient in the sense that there are no further transactions that would make some people better off and no one worse off. Markets for future-dated commodities cannot be legally capped at some future date (e.g., ten years from now) since there might today be willing buyers and sellers of the commodity beyond that date. When people are rented in the employer-employee contract, their labor services are the commodities bought and sold. Hence the notion of efficiency requires no future cut-off date for markets in future-dated labor. Thus, the free enterprise system requires (as Knight repeatedly and correctly pointed out) the legal right to capitalize all of one's future labor. As (Blackstone 1959: 71-2) put it, this is the old contract for "the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term."

Hence, the old question of a long-tenure master-servant contract (the old legal name for the employer-employee contract) is not left behind in modern economics after all. But out of some mixture of professional prudence and intellectual cowardice, there is no modern economics textbook (to the author's knowledge) that makes the point that "efficiency" in the free enterprise system requires re-legitimating the free and voluntary contract for a person to capitalize all their future labor (instead of only renting themselves out for limited periods). Remarkably, however, the point was made in no less a context than Congressional testimony about the requirements of "efficiency," evident in the following:

> *Now it is time to state the conditions under which private property and free contract will lead to an optimal allocation of resources ... The institution of private property and free contract as we know it is modified to permit individuals to sell or mortgage their persons in return for present and/or future benefits.* (Christ 1975: 337–38)

Consequently, we have a situation in which voluntary long-term labor contracts are outlawed based on inalienable rights arguments, but the professionals in the most prestigious social science of Economics "don't want to talk about it." It is not our job here to speculate why, but one modern "J. Philmore" (the pseudonym of a 1760 anti-slavery writer) suggests a reason:

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

9.2.3 Historical and Modern Arguments for Consensual Non-Democratic Government

The most superficial idea about democracy is that it is government "based on the consent of the governed." This idea implies a considerable 'neglect' of the history of political theory as consent-based arguments have been used since antiquity to try to legitimate non-democratic or autocratic governments.

Once again, we may begin 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 (Lib. I, Tit. II, 6):

> *Whatever has pleased the prince has the force of law, since the Roman people by the lex regia enacted concerning his imperium, have yielded up to him all their power and authority.* (Sabine 1958: 171)

As pointed out by the legal historian, Otto von Gierke (1841–1921), contractual arguments were used not to attack undemocratic power but to found it on consent:

> *In contrast to theories which would insist more or less emphatically on the usurpatory and illegitimate origin of Temporal Lordship, there was developed a doctrine which taught that the State had a rightful beginning in a Contract of Subjection to which the People was party.* (Gierke 1958: 38–39)

In terms of the liberal coercion-or-contract dichotomy, this natural rights tradition was grounded foursquare on contract, as Gierke stated:

> *Indeed that the legal title to all Rulership lies in the voluntary and contractual submission of the Ruled could therefore be propounded as a philosophic axiom.* (Gierke 1958: 39–40)

Or as the medievalist scholar, Brian Tierney (1922–2019) (1997: 182), put it: "The idea that licit rulership was conferred by consent of the community to be ruled was fairly commonplace at the beginning of the fourteenth century."

The idea of such a social contract even had a name, the *pactum subjectionis*, the contract by which people give up being citizens and become subjects of some sovereign. Hobbes even supplied some language. This *pactum subjectionis* would be a:

> *covenant of every man with every man, in such manner as if every man should say to every man, I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that you give up your right to him and authorize all his actions in like manner.* (Hobbes 1958, [1651] 142)

The real beginning of democratic theory was in going beyond the necessary condition of the "consent of the governed" to a social contract or constitution that was not an alienation contract at all but a delegation contract of certain rights to those who govern in the name of and recallable by the governed. The intellectual history of the development of democratic theory in terms of that alienation versus delegation distinction is given by Otto von Gierke (1966) and Quentin Skinner (1978).

Thus, we see that the notion "alienation with consent is sufficient" was applied not only to persons (as in voluntary servitude or self-sale contracts) but also to whole polities (as in the *pactum subjectionis*). Grotius stated:

> *It is lawful for any Man to engage himself as a Slave to whom he pleases as appears both by the Hebrew and Roman Laws. Why should it not therefore be as lawful for a People that are at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without reserving any Share of that Right to themselves?* (Grotius 1901, [1625] bk. I chap. V, sec. 8)

This same idea was carried into modern times by the right-wing libertarian tradition, as exemplified by Harvard professor, Robert Nozick (1938-2002):

> *[I]f one starts a private town, on land whose acquisition did not and does not violate the Lockean proviso [of non-aggression], persons who chose to move there or later remain there would have no right to a say in how the town was run, unless it was granted to them by the decision procedures for the town which the owner had established.* (Nozick 1974: 270)

In general, he accepted that a free society should allow people in an already established town, city, or state to jointly alienate their political sovereignty to a "dominant protective association" (Nozick 1974: 15). That same idea carried over to the case for the (re)validation of the self-sale contract.[2]

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

Other modern right-wing libertarians also argue for the validity of a self-sale contract:

> *There is all the world of difference between voluntary and coercive slavery. The physical invasions might be identical in the two cases, but the ethical analysis of each is diametrically the opposite. The only problem with real world slavery was that it was compulsory; the slave did not agree to take on this role.* (Block 2015: 161)

9.3 Part II: The Counterargument: The Theory of Inalienable Rights

9.3.1 Ancient Anticipations of Inalienable Rights Theory

The notion of "inalienable rights" is sometimes used only as a rhetorical device, as in "the inalienable right" to clean water or decent shelter (see Glendon 1991). In contrast, our goal is to review the *theory* of inalienable rights that explains what is wrong with certain institutions and practices, even if based on consent.

A theory of inalienable rights that would condemn the sale (including the self-sale) of human beings as opposed to, say, the sale of farm animals, needs to consider the difference between humans and the lower animals. For Aristotle, slavery was based on "fact"; some people were "talking instruments" who were marked for slavery "from the hour of their birth." (Aristotle

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

1991, *Politics*, Bk. I, p. 7, 254a20-1254a23). The treatment of them as slaves was no more inappropriate for Aristotle than treating a donkey as an animal.

The break from this viewpoint was made by the ancient Greek school of Stoicism. The Greek Stoic, Chrysippus, challenged Aristotle's notion that some people were slaves by nature. By virtue of their rational and social nature, the Roman Stoic, Cicero, saw all men as equal under the *jus naturale.* The historian of political thought, George Sabine (1880–1961), found in the Stoics an anticipation of the Kantian theme of treating all humans as persons, that is, as ends-in-themselves, rather than as things. He wrote:

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

Thus, Chrysippus even anticipated the connection between the ordinary wage-labor or employment relationship and the rump-and-stump lifetime servitude relationship. The Roman Stoic, Seneca, further developed the idea of external bondage and internal freedom of the soul:

> *It is a mistake to imagine that slavery pervades a man's whole being; the better part of him is exempt from it: the body indeed is subjected and in the power of a master, but the mind is independent, and indeed is so free and wild, that it cannot be restrained even by this prison of the body, wherein it is confined.* (Seneca 1995, III, 20, cited in Cassirer 1963a: 103)

9.3.2 Developments in the Sixteenth to Nineteenth Centuries

The Dark Ages were indeed dark for the development of these ideas. But they were revived in the Reformation idea of the inalienability of conscience. Here, "conscience" refers not to one's inner voice but to one's basic beliefs—in this case, religious beliefs. The fundamental idea is that everyone must make up their own mind as to their beliefs—even if they choose to believe whatever they are told by a priest or Pope. This is still *their* decision. Martin Luther (1483–1546) made it a basic tenet of the Reformation that secular authorities who try to compel belief can only secure external conformity. He wrote:

> *Besides, the blind, wretched folk do not see how utterly hopeless and impossible a thing they are attempting. For no matter how much they fret and fume, they cannot do more than make people obey them by word or deed; the heart they cannot constrain, though they wear themselves out trying. For the proverb is true, "Thoughts are free." Why then would they constrain people to believe from the heart, when they see that it is impossible?* (Luther 1942, [1523], 316)

It was impossible to "constrain people to believe from the heart."

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

> *content and attend to its own affairs and permit men to believe one thing or another, as they are able and willing, and constrain no one by force.* ((Luther 1942, [1523], 316)

Of all the commentary on the Reformation, the last of the Marburg Kantians, Ernest Cassirer (1874–1945), stated this point most clearly as the "central principle of Protestantism", namely that "No one can believe for another" (Cassirer 1963b: 117). The priest or Pope cannot believe for one; it is inexorably one's own decision.

One might contrast notions of classical liberalism with any serious notion of inalienable rights with democratic classical liberalism (Ellerman 2021). One of its leading lights, the late George H. Smith (1949–2022), understood the Stoic antecedents and the role of the Reformation's inalienability of conscience. This is evident in the following:

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

And that is how the notion of the factually inalienable part of being a person re-emerged in the Reformation, as he stated:

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

It was an atheist and a Jew, Benedict de Spinoza (1632–1677), who first translated the Protestant doctrine of the inalienability of conscience into the notion of a right that was inalienable "even with consent." Consent was insufficient. Spinoza made the point in the political context as the argument against the political alienation contract or *pactum subjectionis*. He wrote:

> *However, we have shown already (Chapter XVII) that no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment or be compelled so to do. For this reason, government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty and a usurpation of the rights of subjects, to seek to prescribe what shall be accepted as true, or rejected as false, or what opinions should actuate men in their worship of God. All these questions fall within a man's natural right, which he cannot abdicate even with consent.* (Spinoza 1951, [1760] 245)

George H. Smith highlighted another passage from Spinoza: "Inward worship of God and piety in itself are within the sphere of everyone's private rights and cannot be alienated" (Spinoza 1951 [1760]: 245). Spinoza elaborated:

> *I admit that the judgment can be biased in many ways, and to an almost incredible degree, so that while exempt from direct external control it may be so dependent on another man's words, that it may fitly be said to be ruled by him; but although this influence is carried to great lengths, it has never gone so far as to invalidate the statement, that each man's understanding is his own, and that brains are as diverse as palates.* (Spinoza 1951 [1760]: 257)

The argument for inalienable rights and even the language was brought into Anglo-American thought by one of the founders of the Scottish Enlightenment, Francis Hutcheson (1694–1746). Hutcheson arrived (perhaps independently of Spinoza[3]) at the same idea of inalienability in the form that would later enter the political lexicon through the *American Declaration of Independence*. He wrote:

> *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 labors is naturally alienable. But where either the translation cannot be made with any effect, or where no good in human life requires it, the right is unalienable, and cannot be justly claimed by any other but the person originally possessing it.* (Hutcheson 1755: 261)

Hutcheson contrasted *de facto* alienable goods, where "the translation of them to others can be made effectually," with factually inalienable faculties, where "the translation cannot be made with any effect." This is a theory about human action, not just an expression of moral emotions that one 'ought' not alienate this or that basic right. He based the theory on what could or could not be transferred or alienated from one person to another (i.e., one's conscience):

> *Thus, no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable* (Hutcheson 1755: 261-2)

Together, the Jew, Spinoza, and the Presbyterian, Hutcheson, bridged the gap between the religious inalienability of conscience and the political theory of inalienable rights. As Smith wrote:

> *Although the appeal to inalienable rights first arose in the context of religious freedom, it was quickly extended to spheres other than religion, as we find in Jefferson's appeal to the inalienable rights of "Life, Liberty and the pursuit of Happiness." This was one of the most significant developments in the history of libertarian thought.* (Smith 2017: 118–19)

The conventional scholarly view has been that "Jefferson copied Locke" (Becker 1958: 79). But as we have seen, Locke had no serious theory of inalienability, and he, in fact, condoned a limited voluntary contract for slavery, which he euphemistically called "drudgery." The modern political writer, Garry Wills, argued that Jefferson was less influenced by the Englishman (Locke) than by the Scotsman (Hutcheson). "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important" (Wills 1979: 213).

Immanuel Kant (1724–1804) acknowledged that "every man has inalienable rights which he cannot give up even if he would ..." (Kant 1974, [1793]: 72). He also stated:

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

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

This explanation might be based on Kant's notion of proprietary right derived from intentional possession by one's will, as Ryan argued:

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

But Kant's best-known and most insightful doctrine was his version of the categorical imperative, the Personhood Principle:

> *Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.* (Kant 1964, [1785] 96)

Kant explained this using the distinction between persons and the lower animals:

> *Beings whose existence depends, not on our will, but on nature, have none the less, if they are non-rational beings, only a relative value as means and are consequently called things. Rational beings, on the other hand, are called persons because their nature already marks them out as ends in themselves—that is, as something which ought not to be used merely as a means—and consequently imposes to that extent a limit on all arbitrary treatment of them (and is an object of reverence).* (Kant 1964, [1785] 96)

While Kant enunciated the seminal Personhood Principle, it was Gregor Hegel (1770–1831) who gave perhaps the clearest (by the standards of German metaphysics) philosophical critique of the self-sale contract. The embodying of one's will in things through purposive human activity or labor is the basis of appropriation. Hegel wrote:

> *A person has as his substantive end the right of putting his will into any and everything and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things.'* (Hegel 1967, [1821] §44)

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

> *Since property is the embodiment of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite. … The fact that a thing of which I can take possession is a res nullius is … a self-explanatory negative condition of occupancy ….* (Hegel 1967, [1821]: §51)

As a person, an individual in effect takes possession of themselves and thus becomes ineligible for appropriation by others. He continued:

> *It is only through the development of his own body and mind, essentially through his self-consciousness's apprehension of itself as free, that he takes possession of himself and becomes his own property and no one else's.* (Hegel 1967, [1821]: §57)

Although Hegel wavered in applying the argument to all people, it provided the fundamental argument against slavery:

> *The alleged justification of slavery … depend[s] on regarding man as a natural entity pure and simple, as an existent not in conformity with its concept … The argument for the absolute injustice of slavery, on the other hand, adheres to the concept of man as mind, as something inherently free.* (Hegel 1967, [1821]: Remark to §57)

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

> *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.* (Hegel 1967, [1821]: §65)

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

> *Therefore, those goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible.* (Hegel 1967, [1821]: §66)

A person cannot, in fact, vacate and transfer that responsible agency that 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.* (Hegel 1967, [1821]: Remark to §66)

These arguments against contractual servitude were also applied against the political notion of contractually based non-democratic government:

> *There is, at least,* one *right that cannot be ceded or abandoned: the right to personality. Arguing upon this principle the most influential writers on politics in the seventeenth century rejected the conclusions drawn by Hobbes. They charged the great logician with a contradiction in terms. If a man could give up his personality, he would cease being a moral being. He would become a lifeless thing—and how could such a thing obligate itself—how could it make a promise or enter into a social contract? This fundamental right, the right to personality, includes in a sense all the others. … There is no* pactum subjectionis, *no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity.* (Cassirer 1963a: 175)

9.3.3 The Inalienable Rights Argument Restated in Modern Terms

We have outlined the historical development of the theory of inalienable rights that forms the basis for the *abolition* (not just the regulation) of voluntary slavery, ancient or modern (human

trafficking), and the corresponding collective contract or constitution, the *pactum subjectionis*. But one might lose track of the basic point in following the long historical trail.

The first point to make is that the argument against voluntary slavery is *not* that any such 'consent' is really just veiled coercion. Even when the consent is genuine by any standards (e.g., the famous Betty's Case (Soifer 1987)),[4] then one superficial argument is that this only proves the person is mentally incompetent, so the law must paternalistically prevent such contracts. That is *not* an argument based on inalienable rights.

The inalienable rights argument starts with the facts about the factual inalienability of aspects of one's personhood. Of course, one can sign a contract to be a non-person or thing or talking instrument, but there is no consensual action to turn oneself, even temporarily, into a non-person. All one can do is to obey one's master. What a boon it would be for hired criminals to be able to turn themselves temporarily into tools or instruments in the hands of their employer so they would not be factually responsible for the crimes they commit. But no such performance to 'fulfill' a contract to be a temporary instrument is possible; they can only obey their employer. However, the law fully recognizes the facts that they are still factually co-responsible for the results, as evident in the following:

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

The core of the inalienable rights argument is not about the niceties of consent versus coercion; it is about the mismatch between the potential legal contract or legalized practice and the facts about the inalienability of personhood. If the potential contract or legal practice puts a factual person into the legal status of a non-person, then the contract or practice is *ipso facto* invalid, null, and void. Since the rights in question are thus not validly alienable, they are called inalienable rights. To repeat, it is not about the vagaries of consent; it is about the mismatch between the legal status and factual status of a person.

In the case of historical slavery, the mismatch was always rather obvious to those who cared to look. One antebellum judge stated the legalized fraud rather openly and seemingly without irony when he wrote that the slaves:

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

The abolitionists noted the miraculous transformation that took place when the slaves committed crimes:

> *The slave, who is but "a chattel" on all other occasions, with not one solitary attribute of personality accorded to him, becomes "a person" whenever he is to be punished.* (Goodell 1969: 309)

Harvard's late libertarian professor, Robert Nozick, had no notion of rights that could not be alienated, even with consent. He argued that the law should respect any "capitalist acts between

[4] See also Franklin (1969) and Morris (1996).

consenting adults" (Nozick 1974: 163). Suppose a libertarian in Nozick's world grew envious of his wealthy neighbor's treatment of his dogs, so he proposed a contract to be his neighbor's dog so long as he got several walks every day and a nice piece of meat for dinner. In Nozick's idealized legal system, the law would not interfere while the consenting adults carried out their cosplay; they would not stop the libertarian from sleeping in the doghouse or drinking out of the toilet. But suppose the neighbor soon grew tired of the consensual contract and decided to 'put down his dog.' Should the law in Nozick's world accuse the neighbor of breaking the contract or animal cruelty or murder? The answer is obvious, and Nozick is reported (Boaz 2011) to have admitted in later life that some rights should be inalienable.[5] However, he never developed any theory with those implications, despite the long history of those ideas in Western thought (as outlined above).

Perhaps another historical example of an abolished contract (in modern democracies) will help emphasize that it is not about the finer points of consent and paternalism that are much debated by philosophers and jurists.

9.3.4 Another Example: Abolition of the Old Coverture Marriage Contract

Sometimes, a contract may adversely affect one of the contractual parties or third parties. This calls for better regulation of the contracts or better enforcement of the existing regulations. It also calls for ensuring that the parties have an array of alternative contractual arrangements available.

What these aspects of a contract do not call for is its abolition or the outlawing of a potential contract with such adverse effects. Yet we have seen that there *have* been historical cases of the abolition of certain contracts (e.g., voluntary slavery or voluntary peonage). Individually or collectively, contracts to sell one's votes, citizenship rights, or a people's collective self-governing rights have also been abolished or rendered legally invalid. When a contract has been abolished (instead of being allowed in a regulated form), it is safe to speculate that there is an inalienable rights argument behind the abolition.

Another type of historical contract that has been abolished in democratic countries is the old coverture marriage contract. This extinguished the wife's independent legal personality in the sense that "the husband and wife are one person in law; and that person is the husband." In English common law, Lord Blackstone gave an influential description of this contract:

> *By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.* (Blackstone 1959, [1765] section on husband and wife)

There are factual conditions (e.g., being a minor, imbecility, insanity, senility, dementia, etc.) when it is appropriate for the law to put someone under the guardianship of another person. Yet none of these conditions held in the coverture marriage. This form of marriage was abolished

[5] This is an advance from the thinking of the young Nozick, who used the standard libertarian definition of an inalienable right as a right that may not be taken away without consent. In contrast, the deeper democratic tradition of classical liberalism (outlined here) took an inalienable right as one that may not be taken away even with consent. Any so-called "right" that could be taken away without consent is better termed a "privilege." Any genuine right that may not be taken away without consent is just an alienable right.

in the late nineteenth and early twentieth centuries in the various married women's property acts of democratic countries (Speth 1982). Only vestiges of the coverture contract remain in the custom of the father of the bride 'giving away' his daughter to her husband and the wife assuming the husband's family name as if she were passing from the 'cover' of the father to the 'cover' of the husband.

Why was this form of marriage legally abolished? Were all coverture marriages considered involuntary? Why not allow a suitably regulated form of coverture marriage and recognize an array of alternative marriages? The answer, it would seem, is again the mismatch between the legal form of the contract—as if the wife voluntarily became factually incompetent to fulfill the contract—and the facts of the wife remaining fully competent.

We saw in the case of slavery how the slave who was a 'thing' under civil law suddenly blossomed into responsible agency when they committed a crime. A writer in the nineteenth-century feminist movement noted the opposite miraculous transformation when an adult daughter married:

> *During all this period [DE: being an unmarried adult daughter, a feme sole], the law supposes young women to be as capable as young men, of self-government, taking all direct power over their actions out of the hands of all persons, and by rendering them amenable for the breach of every law, just like men. … But as soon as adult daughters become wives, their civil rights disappear; they fall back again, and remain all their lives—should their owners and directors live so long—into the state of children or idiots … What is this mysterious circumstance in the connexion of marriage, which alters so completely the nature and interests of woman as an individual, rational, and sentient being; while it not only leaves the individual nature and interests of man untouched, but expands them, as it were, by merging in his interests those of another being equally capable of individual feelings and wishes with himself?* (Thompson 1825: 59)

In short, there was no factual alienation of those aspects of the wife's personhood; that legalized superstructure of the coverture marriage was only legalized fraud and ipso facto invalid in the "light of natural law" (to put it in the older parlance). That is, the rights attached to the personhood of the adult woman are therefore inalienable. Again, I must repeat, the argument had nothing to do with the question of how voluntary coverture marriages were.

9.4 Concluding Remarks

The inalienability argument is based on the facts of human nature, not just on moral assertion or on an exegesis about consent. As Davis wrote:

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

The key to the inalienable rights argument is this contradiction or mismatch between the legal status and the factual status of the slave. It has nothing to do with whether the slave is considered to have consented to be treated as a non-person, thing, or object.

One must turn to science fiction to consider how humans might, in fact, be turned into part-time non-persons.[6] Suppose a small computer was implanted in a person's brain so that by flipping a switch the individual was 'taken over' and employed by the computer under the control of an external user or employer. In William Gibson's science fiction example of such a part-time sexual robot, he tellingly described it as: "Renting the goods, is all" (Gibson 2000: 143). When in the robot mode, the individual would have no ability to terminate or even influence their 'actions' (or rather behaviors) deliberately. When the computer was switched off, the individual would regain conscious control and be able to act in the usual deliberate and responsible manner. One could vary the example by imagining drugs that could temporarily turn a person into a part-time zombie. The point of such examples is that the person is temporarily robbed of their personhood.

The core of the theory of inalienability is the fact that a person cannot *by any voluntary action* turn themselves into a part-time non-person, a thing, or even a person of diminished capacity. Therefore, any institution or practice that, in effect, treats a person as a non-person or person of diminished capacity, as merely a means rather than as an end-in-themselves—such as modern-day human trafficking and other forms of contemporary bondage, peonage, and slavery—is illegitimate, *even with consent*. In other words, it is not a question of consent—no matter how defined.

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[6] Both George H. Smith (1997, 54) and the author Ellerman (1973, 18) independently arrived at the science fiction example of a human with a computer chip implanted in their brain as a genuine example of one 'person' actually (rather than fictitiously) being 'employed' by another. Smith (1997, 54) and Ellerman (1973, 3) also both used the example of a non-robotic rented person committing a crime at the behest of their employer—where the Law fully recognizes the factual inalienability of moral agency in the case of a hired criminal. The conventional classical liberal argument that people can factually alienate their responsible agency would be very good news to hired criminals since it implies that only their employer is factually responsible for the crime they were hired to commit.

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