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CLASSICAL LIBERALISM AND THE ABOLITION OF CERTAIN VOLUNTARY CONTRACTS

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ABSTRACT

Classical liberalism tends to respond to the criticism of any voluntary market contract by promoting a wider choice of options and increased information and bargaining power so that no one would seem to be 'forced' or 'tricked' into an 'unconscionable' contract. Hence, at first glance, the strict logic of the classical liberal freedom-of-contract philosophy would seem to argue against ever abolishing any mutually voluntary contract between knowledgeable and consenting adults. Yet the modern liberal democratic societies have abolished (i.e., treated as invalid) at least three types of historical contracts: the voluntary slavery or perpetual servitude contract, the coverture marriage contract, and an undemocratic constitution to establish an autocratic government. Thus, the rights associated with those contracts are considered as inalienable. This paper analyzes these three contracts and shows that there is indeed a deeper democratic or Enlightenment classical liberal tradition of jurisprudence that rules out those contracts. The 'problem' is that the same principles imply the abolition of the employment contract, the contract for renting human beings, which is the foundation for the economic system that is often (but superficially) identified with classical liberalism itself. Frank Knight is taken throughout as the exemplary advocate of the economics of conventional classical liberalism.

KEYWORDS: inalienable rights, voluntary slavery contract, coverture marriage contract, non-democratic constitution, employment contract, renting of persons

INTRODUCTION

Would conventional—as opposed to democratic or Enlightenment—classical liberal jurisprudence ever implies the abolition of a mutually voluntary contract between consenting adults—as opposed to promoting other voluntary alternatives? We may lament that a person would be so desperate to make certain contracts (like selling a kidney) and desire to paternalistically outlaw such contracts. But that does not resolve the original problem of the person having no better voluntary alternatives. On strictly classical liberal or libertarian grounds, the non-paternalistic response is to expand the range of choices and opportunities so that no one would be desperate enough to make such extreme contracts. So, again, the question is: are there (non-paternalistic) grounds in conventional classical liberalism to abolish any mutually voluntary contract between consenting adults?

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Examples of injustice

We might start by considering the simplest examples of an injustice in jurisprudence. There are two 'canonical' examples:

1. False negative: When a factually guilty person is not convicted of the crime—like Type I error in statistics when a factually true hypothesis is not accepted (i.e., is rejected);
2. False positive: When a factually innocent person is convicted of the crime—like Type II error in statistics when a false hypothesis is not rejected (i.e., accepted).

These two types of injustice can be illustrated by the following kind of table.

Table 1: Type I and Type II Injustices

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

The basic underlying juridical principle of imputation that is violated in these injustices is: Impute legal responsibility according to factual responsibility.

Can a contract involve a similar factual-legal mismatch to make it unjust?

Example 1: The coverture marriage contract

The classic description of the coverture contract was by William Blackstone in his

Commentaries.

> 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), the section on husband and wife]

By the coverture marriage contract, the independent legal personality of the wife was extinguished. The feme covert was a legal dependent under the guardianship of her lord and baron husband.

To understand the argument for the abolition of coverture (as opposed to promoting many other marriage alternatives), consider where modern, liberal, and democratic societies do have a legal relationship of dependency and guardianship. In each case, there is a factual requirement of incapacity, such as children of minority age, which needs to be certified in order to apply to adults:

• Insanity or mental disability in adults; or
• Senility (e.g., advanced dementia or Alzheimer's disease).
The coverture marriage contract established this sort of legal dependency and guardianship for adults where:
• there was no factual requirement of impairment or incapacity;
• where satisfying such a factual requirement was not required to 'fulfill' the contract;
• becoming factually incapacitated is not the sort of thing a person can voluntarily do to 'fulfill' a contract; and
• thus, the traditional Law substituted another notion of 'fulfilling' the contract, namely, obey your "Lord and Baron" husband.

In short, the coverture contract was a legalized Type I injustice or 'fraud' on an institutional scale, i.e., establishing legal incapacity where there is no corresponding factual incapacity.

To get a better sense of the legalized fraud, suppose, for the sake of argument, there was some voluntary act by which a person could turn themselves temporarily into a person of diminished capacity. Then one might lament that anyone would want or need to make such a contract (like selling a kidney), but at least that contract would not be a legalized fraud—since the factual performance would (we assume) fulfill the factual requirements in the eyes of the law for adult incapacity and dependency. Moreover, the description of the Type I injustice as an institutional or legalized 'fraud' does not imply anything about the subjective intent of the legislators who codified the coverture contract or the subjective intent of the individual "Lord and Baron" husbands. The legislators of the time may well have considered women to be factually incapacitated, but the argument for the Type I mismatch is independent of their subjective intent.

The Type I & II error table can be used to illustrate the mismatches between legal and factual capacity where the coverture contract involved the Type I error.

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Table 2: Type I & II mismatches of factual and legal dependency

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

The point is that the coverture marriage should be abolished by the standards of classical liberal jurisprudence (and has been in the liberal democracies) not because it was involuntary, but

because it was a Type I mismatch and thus institutionally fraudulent. In a fraud, the legal contract says A but the factual performance to 'fulfill' the contract is not A but some B. The voluntary performance on the part of the feme covert is obedience (= B), not voluntarily turning oneself into a factually incapacitated adult (= A). But the legal contract then enforces of the consequences of A. That's an institutionalized fiction, i.e., a legalized fraud.

It is obvious that this analysis has nothing whatever to do with pragmatic, consequentialist, or utilitarian considerations such as the treatment of the wife by her husband, the size of the allowance given by the husband to wife, abusive relationships, or the legislative intent of the coverture laws.
Since the woman is just as much a de facto capacitated adult as before voluntarily agreeing to the contract (the Type I error), the coverture contract was essentially an institutional fraud sponsored by the legal system in patriarchal society that allowed the reduction of married women to the status of legal dependents to parade in the form of a voluntary contract.

Example 2: The voluntary slavery contract

Similar arguments were made by abolitionists against the voluntary self-sale contract. A voluntary contract for a person to take on the legal status of a non-person or thing cannot be factually fulfilled by any voluntary act—just as the feme covert does not voluntarily convert herself into a factually incapacitated dependent. Hence the legal system substitutes the same factual performance in order to count as 'fulfilling' the contract: obey your master, e.g., in the Bible, Eph. 6:5, Titus 2:9, 1 Peter 2:18, Col. 3:22.

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Thus, a voluntary slavery contract had the same sort of fraudulent mismatch; the contract made one a legal non-person but the factual performance that counted to 'fulfill' the contract was only voluntary obedience by a de facto person. Since the factual performance did not, in fact, fulfill a contract to alienate one's personhood, the contract was again a legalized fraud. The early Scottish abolitionist and legal scholar, George Wallace, juxtaposed the factual and legal status of the slave to argue for the invalidity of any slavery contract.

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

Any legal system that validated such a contract was still fully aware of the fraudulent Type I mismatch, e.g., whenever the "non-person" committed a crime. As one Antebellum Alabama judge explained: the slaves

> are rational beings, they are capable of committing crimes; and in reference to acts which are crimes, are regarded as persons. Because they are slaves, they are ... incapable of performing civil acts, and, in reference to all such, they are things, not persons. [Catterall 1926, p. 2447]

The institutional fraud was plain to all who would see it.

Forthright modern libertarians, such as Harvard's late Robert Nozick, have not seen any reason to abolish a voluntary slavery contract between consenting adults.

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

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

> But left-libertarians affirm, in contrast with most other liberal egalitarians, the extensive alienability of rights of self-ownership, encompassing, for example, the right to sell oneself into onerous

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> servitude or even permanent slavery. [Vallentyne et al. 2005, p. 212]

They continue to emphasize the point in a footnote.

> Of course, many will view the right to sell oneself into slavery as highly implausible. We believe, however, that the affirmation of this right of transfer is more in keeping with our status as autonomous, rational choosers than its denial. To *whom* would a duty not to sell oneself into slavery be owed? [Ibid., p. 212, fn. 21][1]

The answer to their rhetorical question is that there is no duty to not act like a slave or even a dog if anyone should so desire. The theory of inalienability is about what contracts the legal system should or should not validate, not about slavish, dog-like, or "capitalist acts between consenting adults" (Nozick's phrase).[2] They, of course, never consider the fact that voluntarily becoming a de facto non-person to fulfill the legal status resulting from such a contract is not factually possible for "autonomous, rational choosers."

This acceptance of a civilized voluntary slavery contract is not an innovation on *conventional* classical liberalism. Frank Knight pointed out that the foundations of classical liberalism, as he saw it, were laid well before Adam Smith.

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

All three of these classical writers had a notion of "inalienable rights" but it was more a rhetorical flourish than a serious theory since they would *only* rule out a slavery contract where the master had

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

[2] A libertarian can take a piece of paper and write out a "contract" to be his neighbor's "dog" so long as he is taken for a morning walk and gets a nice piece of meat for dinner. No law enforcement officer will show up to coerce the libertarian to stop sleeping in the dog-house, to take off the dog collar, and to stop drinking out of the toilet. The libertarian's "yelps for liberty" are not in that sense constrained by the theory of inalienable rights. But they should not expect the legal system to validate and enforce any such 'contracts' to be a slave, a dog, or the like. For instance, if the neighbor decided to deliberately "put down his dog," the legal system would rightly find him factually and then legally responsible for murder, not just animal abuse.

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the right to kill the slave. All three writers then 'turned around' and acknowledged that this notion of "inalienable rights" would not apply against a *civilized* voluntary slavery contract that had some rights on both sides. Here are the three pertinent quotes.

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

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

> 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), section on "Master and Servant"]

But we have seen that there are deeper classical liberal grounds to abolish the voluntary slavery contract because it was institutional fraud or mismatch by validating a contract that applied the de jure role of a non-person to de facto persons.[3]

[3]See George H. Smith [1997; 2013] for precisely this critique of the voluntary slavery contract by a libertarian.

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Table 3: Type I & II mismatches of factual and legal status as a person

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

As much as one might think these issues are behind us, some modern political philosophers apparently don't see the problem in the legalized fraud of treating a defacto person as a legal piece of property. One "prereview" in a prominent journal of political philosophy pointed out how the legalized fraud argument gets "off on the wrong foot."

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

Yes, there is "nothing obviously self-contradictory" in legally owning a "live human body" as a thing; it was the law in antebellum America and in much of the world for centuries before. And it does not logically deny that the "live human body" is "factually a person." The problem is in the injustice of the mismatch between the legal and factual status of the person—like in the injustice of holding a person legally guilty of a crime when they are factually innocent or vice-versa.

> Here again, this analysis of the voluntary slavery contract has nothing whatever to do with the consideration for the contract, the slave's real income (food, clothing, and shelter), how harshly the slave is treated, or other such considerations—not to mention any master's license to kill the slave. The argument has nothing to do with the legislators' subjective "intent to commit fraud" when they validated voluntary slavery contracts[4] nor with the subjective intent of the masters in such contracts.

[4]For instance, legislation was passed in Louisiana in 1859 "which would enable free persons of color to voluntarily select masters and become slaves for life" [Sterkx 1972, p. 149]. See also the section on "Voluntary Enslavement" in [Morris 1996, pp. 31-36].

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Example 3: Pactum subjectionis

The third example of a contract to alienate some aspect of people's personhood is the collective governance contract of a non-democratic constitution or *pactum subjectionis* by which people would voluntarily give up their legal status as citizens to become subjects of some sovereign.

> [A]s Rousseau shrewdly observed, Pufendorf had argued that a man might alienate his liberty just as he transferred his property by contract; and Grotius had said that since individuals could alienate their liberty by becoming slaves, a whole people could do the same, and become the subjects of a king. [Davis 1966, p. 413]

Since those were, by assumption, voluntary social contracts, democratic theory had to go beyond the simplistic idea of democracy as "government with the consent of the governed" and differentiate those voluntary pacts of subjection from democratic constitutions. The difference was in the theory of inalienability.

> The idea of natural rights could be used to defend either absolutist or liberal theories of government; the outcome of the argument turned on the theory of alienability that an author adopted. The question at issue was whether the members of a community could or actually did alienate all their rights in the act of constituting a government. If they did so they would have instituted an absolutist regime. Liberal theorists therefore argued that individuals retained some rights even after a government had been constituted. In the later debates Pufendorf's argument leaned more to absolutism, Locke's more to liberalism. [Tierney 1997, pp. 182-3]

As the legal scholar, Otto von Gierke put it:

> This dispute also reaches far back into the Middle Ages. It first took a strictly juristic form in the dispute ... as to the legal nature of the ancient '*translatio imperii*' from the Roman people to the *Princeps*. One school explained this as a definitive and irrevocable alienation of power, the other as a mere concession of its use and exercise on the one hand from the people's abdication the most absolute sovereignty of the prince might be deduced, ... On the other hand, the assumption of a mere '*concessio imperii*' led to the doctrine of popular sovereignty. [Gierke 1966, pp. 93-4]

Or as the American constitutional scholar, Edward S. Corwin said:

> During the Middle Ages the question was much debated whether the *lex*

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> *regia* effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty at the end of this period, like Marsiglio of Padua in his *Defensor Pacis*, took the latter view. [Corwin 1955, p. 4]

Contrary to Sir Henry Maine, from the viewpoint of democratic theory, "the movement of the progressive societies" has not been a movement "from Status to Contract" [Maine 1972, p. 100] but the movement from contracts of alienation to contracts of delegation.

De Facto Inalienability

The doctrine that a person cannot, in fact, alienate their decision-making powers and responsible agency to factually fulfill an alienation contract has its roots in the Reformation doctrine of the inalienability of conscience. Here "conscience" means one's basic beliefs. No matter what one is told to believe by the priest or Pope, it is always inexorably one's own decision.

As Martin Luther put it:

> 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. [Luther 1942, p. 316]

The inalienability of one's decisions about one's beliefs was summarized by Ernest Cassirer as the actual "central principle of Protestantism" [Cassirer 1963a, p. 117]: "No one can believe for another." Roger Williams (1603-1683) was an early and clear advocate of the inalienability of conscience in America. As the modern editor of Williams' works on religious liberty put it: "Williams believed it absurd to suggest that persons could 'will or entrust such a power to the civil magistrate to compel their souls and consciences' to conform to convention or a government mandate, for conscientious conviction is by definition an inalienable experience over which no third party can assume control." [Davis 2008, p. 25]

This principle was then transformed in the Radical Enlightenment (Spinoza) and the Scottish Enlightenment (Francis Hutcheson) into the doctrine of inalienability based on one's personhood. 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." [Lynd 1969, p. 45] The crucial link was to go from the *de facto* inalienable liberty of conscience to a *theory* of inalienable rights based on the same idea. "Like the mind's quest for religious truth from which it was derived, self- determination was not a claim to

ownership which might be both acquired and surrendered, but an inextricable aspect of the activity of being human." [Lynd 1969, pp. 56-7]

And then "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important" [Wills 1979, p. 213]. Hutcheson provided the alternative language to describe a right where the contract to alienate the right was inherently invalid—the language of inalienable rights.

> Although the appeal to inalienable rights first arose in the context of religious freedom, it was quickly extended to spheres other than religion, as we find in Jefferson's appeal to the inalienable rights of "Life, Liberty and the pursuit of Happiness." This was one of the most significant developments in the history of libertarian thought. [Smith 2017, pp. 118-9]

As noted by George H. Smith, this notion of rights inalienable due to invalid contracts to alienate aspects of personhood, was indeed an important development in the history of classical liberal (or libertarian) thought since it accounted for the abolition of certain voluntary contracts. Ernst Cassirer provides a good summary of this argument that rules out the non-democratic *pactum subjectionis* not because it was involuntary but because it fraudulently assumed the alienation (as opposed to delegation) of the decision-making powers that are inalienably part of people's personhood.

> 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 1963b, p. 175]

Moreover, the classical liberal economist/philosopher, James M. Buchanan, arrived at the same conclusion that a classical liberal social order would only allow a constitution of delegation.
First, Buchanan makes the standard point about the necessity of consent.

> The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the

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> beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. [Buchanan 1999, p. 288]

Then he moves to a deeper level in classical liberalism and requires that in addition to being a "sovereign" in the marketplace, people may *at most* enter into delegative contracts where they are the principals.

> The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as *principals*. The premise denies legitimacy to all social- organizational arrangements that negate the role of individuals as either sovereigns or as principals. [Ibid.]

Thus, Buchanan is in the long line of *democratic* (as opposed to conventional) classical liberal theorists who exclude the constitutions of alienation (*pactum subjectionis*) in favor of democratic constitutions where the governors have the role of agents and representatives of the people as principals. Here again, this analysis and criticism of the non-democratic governance contracts of alienation have nothing whatever to do with whether the sovereign is a "good king," the material conditions of the subjects, or other consequentialist considerations.

Employment contract as the human rental contract

Before considering the employer-employee contract as the fourth example, it might be helpful to establish the conceptual nature of the contract. The employer-employee relationship is usually described by various euphemisms such as hiring, employing, giving a job to, and so forth. But from the economic viewpoint, it is the *renting* of a person essentially similar to renting a car (called `hire-cars' in the UK) or an apartment.

The 'Standard Reply' is "But they are not the same! Giving a job to someone is not the same as renting a car or an apartment." Of course, the details are not the same—like renting a car is not "the same" as renting an apartment. The point is that renting a person, car, or apartment is buying the flows of services of an entity instead of buying the entity itself—and in that more abstract sense, renting a person, a car, or an apartment are the same.[5]

While this 'renting' terminology is nonstandard when applied to persons, it is in fact not even controversial. As the foremost neoclassical economist and first American Economics Nobel winner, Paul Samuelson (1915-2009), put it:

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

Other prominent economists agree:

> Strictly speaking, the hourly wage is the rental payment that firms pay to hire an hour of labour. There is no asset price for the durable physical asset called a 'worker' because modern societies do not allow slavery, the institution by which firms actually own workers. [Begg, Fischer, & Dornbusch 1997, p. 201]

The human rental system we have today differs from involuntary slavery in two fundamental respects:

- The system today is based on a voluntary contract, the employer-employee contract; and
- The contract is only to sell a limited amount of one's labor, not the whole of one's labor.

Example 4: The human rental contract

Things, as opposed to persons, cannot be responsible for anything. Only persons can be responsible for anything, be it a crime or not. This distinction is perfectly standard in jurisprudence (liberal or otherwise). As Immanuel Kant put it: "A *person* is the subject whose actions are susceptible to imputation. … A *thing* is something that is not susceptible to imputation." [Kant 1965, pp. 24-5]

The modern jurist, Hans Kelsen, describes the associated norm of imputation.

> Since the connection between delict and sanction is established by a prescription or a permission—a "norm"—the science of law describes its object by propositions in which the delict is connected with the sanction by the copula "ought". I have suggested designating this connection "imputation." This term is the English translation of the German *Zurechnung*. The statement that an individual is *zurechnungfähig* ("responsible") means that a sanction can be inflicted upon him if he commits a delict. The statement that an individual is *unzurechnungsfähig* ("irresponsible")—because, for instance, he is a child or insane—means that a sanction cannot be inflicted upon him if he commits a delict The idea of imputation (*Zurechnung*) as the specific connection of the

[5]There is a related linguistic dodge that might be mentioned, namely the talk of "renting services." But the rented entity has to be returned to the owner after the time period of the contract, and the services of a car (car-days), apartment (apartment-months), or person (person hours) are used up and cannot be returned. When an entity is rented, then the flow of services of the entity are purchased or bought, not "rented."

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> delict with the sanction is implied in the juristic judgment that an individual is, or is not, legally responsible (*zurechnungsfähig*) for his behavior. [Kelsen 1985, p. 364]

The juridically trained Austrian economist, Friedrich von Wieser, noted this difference between persons and things in 1889:

> The judge ... who. confines himself to the discovery of the legally responsible factor—that person, in fact, who is threatened with the legal punishment. On him will rightly be laid the whole burden of the consequences, although he could never by himself alone—without instruments and all the other conditions—have committed the crime. The imputation takes for granted physical causality. [Wieser 1930 (1889), p. 76]

Wieser restates the point in economic terms:

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

So, what are the facts about responsibility in a firm? The facts are that all the people who work in an enterprise, employees and working employers, are jointly *de facto* responsible for both:

- the negative results, i.e., using up the inputs, and
- the positive results, i.e., producing the outputs of the firm.

But the legal system tells a different story. The employees (qua employees) jointly:

- owe zero percent, 0%, of the liabilities for the used-up inputs; and
- own zero percent, 0%, of the produced outputs of the enterprise.[6]

[6]These are the actual property rights and obligations involved in the conventional firm. Unfortunately, most economists and philosophers use a "distributive shares" metaphor as if the employer and employees (or, for that matter, the master and slaves in a plantation) are in some sort of partnership where they each get their "share" of the results. Then attention is focused on whether or not the metaphorical shares were 'fair' or not, e.g., Rawls [1971, p. 308]. See any Economics text for that discussion about ordinary firms, and see Fogel and Engerman [1974] and David et al. [1976] for that analysis of slave plantations.

This is precisely the legal position of rented things, i.e., "dead tools in the hand" of the employer. Thus, the human rental contract operates as if that human responsibility can be alienated and transferred to the employer who thus should have 100% of the legal responsibility for the positive and negative product, the assets and liabilities created in production. In modern economics, the list or 'vector' of those assets and liabilities created in a productive opportunity is called the "production vector" or "input-output vector" but for historical reasons, we will call it the *whole product* since it lists the 'whole' results of production, both positive and negative.

But an employee cannot voluntarily alienate their responsible agency to fulfill the human rental contract—just as the *feme covert* or voluntary slave could voluntarily take on the factual status to fulfill their contracts. Hence the legal system substitutes another factual performance to count as 'fulfilling' the human rental contract, namely obey your employer. All people can do voluntarily is to, say, obey another's orders to do this or that, which means they are inextricably factually co- responsible for the results.

Again, the fraud is out in the open for all who would see it—in the criminal case. A standard British law-book on the employer-employee relation notes:

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

The obvious question is what happens *in fact* when the employer and employees "jointly carried out a [*non*-]criminal venture"? Do the employees suddenly turn factually into machines being "employed" by the all-responsible employer? No, the factually inalienable co-responsibility of the employees is the same as before. It is the response of the Law that changes. No crime has been committed so no need to hold a trial to assign the legal responsibility in accordance with the factual responsibility. The employer assumes and pays off the input liabilities and then has a 100% claim on the produced outputs, and the employees thus have 0% of the negative and positive fruits of their labor—in violation of the property theoretic version of the juridical principle of imputation, the labor or natural rights theory of property [Schlatter 1951].

Since there is no actual transfer of responsible human agency from the labor-seller to the labor- buyer, the whole contract to buy-and-sell labor, i.e., to rent persons, is a legalized fraud on an institutional scale, and thus should be abolished along with the self-sale contract and coverture marriage contract on classical liberal grounds. Here again, this analysis and critique of the employment contract have nothing whatever to do with 'exploitative' wage rates (in either a Marxist or neoclassical sense), the working conditions, the employees' feelings of being dominated (in a civic republican sense) or

alienated (in a Marxist or other psychological or humanist sense), or other consequentialist considerations.

For instance, Karl Marx's labor theory of value and exploitation, setting aside all its other problems, would be only a critique of low wages, not a critique of the human rental system itself. Marx himself let this fact slip out in his discussion of overtime pay.

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

Thus, the supposed critique is of the labor not being "paid for at its full value," not of the employment system itself.[7] Marx brought a value-theoretic knife to a gun fight about contracts and property rights. An argument that "wages are too damn low" is a call for higher wages, not for abolishing the wage system.

Ernst Wigforss, one of the founders of Swedish social democracy, made this point in arguing for the inalienability-invalidity of the human rental contract in 1923.

> There has not been any shortage of attempts to squeeze the labor contract entirely into the shape of an ordinary purchase-and-sale agreement. The worker sells his or her labor power and the employer pays an agreed price. …But, above all, from a labor perspective the invalidity of the particular contract structure lies in its blindness to the fact that the labor power that the worker sells cannot like other commodities be separated from the living worker Here we perhaps meet the core of the whole modern labor question, [Wigforss 1923, p. 28]

The modern political theorist, Carole Pateman, makes the same point in her 1988 book about the coverture contract writ large as "The Sexual Contract": "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." [Pateman 1988, p. 150][8]

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

[8]This analysis is further developed in the context of the modern discussion of "self-ownership" in Pateman [2002].

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A thing, like a tool, a beast of burden, a truck, or an apartment can be factually transferred to the use or *employment* of another person to factually fulfill a rental contract. Responsible human action, i.e., labor, cannot be separated or factually transferred or alienated from the "employed" person— unlike the services of anything that is rented out, e.g., a tool, a mule, a truck, or an apartment.

Frank Knight as an 'exceptional' classical liberal thinker

Most 'responsible' social scientists and legal scholars 'tippy-toe' around the mismatch between labor services as factually responsible human actions and their legal role as merely causal productive services like those of capital or land. But Frank Knight was a noteworthy exception; he was by far the most deep-thinking and outspoken of the defenders of the human rental system.

He knew that he had to collapse any relevant distinction between factually responsible human labor and the causally efficacious or productive services of things so that: "For 'labor' we should now say 'productive resources'." [Knight 1956, p. 8]

> In a deeper analysis, the error in the whole classical position...roots in the special character and role assigned to labor. More generally still, it consists in confusing conceptual analysis with ethical evaluation. From the former standpoint, labor and capital instruments, including land, are all alike, simply productive resources. [Knight 1956, p. 87, fn. 70]

> To conclude this brief discussion of the productive services, we may merely notice the invalidity of … commonly assumed grounds of distinction between labor and property services. … It is characteristic of the enterprise organization that labor is directed by its employer, not its owner, in a way analogous to material equipment. Certainly, there is in this respect no sharp difference between a free laborer and a horse, not to mention a slave, who would, of course, be property. [Knight 1965, p. 126]

And if all the employees in an enterprise are just supplying services like the productive services of things, then the only human actions responsible for the positive and negative results of the enterprise are the actions of the employer/entrepreneur.

> Under the enterprise system, a special social class, the business men, direct economic activity; they are in the strict sense the producers, while the great mass of the population merely furnish them with productive services, placing their persons and their property at the disposal of this class; the entrepreneurs also guarantee to those who furnish productive services a fixed remuneration. [Knight 1965, p. 271]

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We have seen how the inherent invalidity of a personhood alienation contract, like a voluntary slavery contract, can also be expressed as the inalienability of the rights such contracts would legally alienate. As if to anticipate our argument, Frank Knight continually criticized the notion of "inalienable rights" as not allowing workers to hypothecate or mortgage their future labor in order to obtain present resources, e.g., to start their own business.

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

Since the "inalienable rights" restrictions on selling or collateralizing future labor are "logically not a part of the property system" in the human rental economy, those restrictions must be set aside for the idealized competitive model of the human rental system to achieve allocative efficiency; otherwise, there might willing buyers and sellers of future labor who would be forbidden to make a mutually beneficial transaction. As another conventional economist put it in Congressional testimony:

> Now it is time to state the conditions under which private property and free contract will lead to an optimal allocation of resources... The institution of private property and free contract as we know it is modified to permit individuals to sell or mortgage their persons in return for present and/or future benefits. [Christ 1975, p. 334]

And to consistently round-out his argument, Knight must give an alternative rationale for the abolition of a voluntary slavery contract than "inalienable rights" or the inherent invalidity of such a contract on classical liberal grounds.

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

Thus, slavery was abolished because it was cheaper to rent workers rather than to own them.

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Classical liberal jurisprudence and the abolition of certain voluntary contracts

We now have seen four examples of Type I mismatches and institutionally fraudulent contracts that legally alienated certain factually inalienable aspects of one's personhood and thus should all be abolished on democratic or Enlightenment classical liberal grounds:

- the voluntary slavery or self-sale contract;
- the coverture marriage contract;
- the *pactum subjectionis*; and
- the human rental or self-rental

contract. Hence, we can abstract the common features:

- All the contracts put a normal capacitated adult into the legal role of a person of diminished or no capacity (within the scope of the contract);
- All the contracts are not factually fulfilled by the person voluntarily becoming a person of diminished or no capacity;
- All the historical contracts hence substituted another voluntary performance that would count as 'fulfilling' the contract, namely the promise[9] to;
  - obey your master,
  - obey your husband,
  - obey your ruler, and
  - obey your employer.

All the contracts were the institutional basis for a legalized fraud; legally treating a normal capacitated person as a person of diminished or no capacity within the scope of the contract. The critique is not of the persons who, for whatever reason, accepted such contracts and 'fulfilled' them by their promised voluntary obedience.

> The critique is of any *legal system* that accepts such personhood- or personal-alienation contracts as legally valid. A bedrock principle of classical liberal jurisprudence is that contracts must be voluntary *and non-fraudulent*.[10] In other words, the inalienability critique of human rentals is about the *institution*, not about individual acts. Upon first hearing the neo-abolitionist critique, one common response is to defend some individual act, not the institution (i.e., the employment contract)—such as: "After Uncle Ralph died, Aunt Louise *hired* the neighbor's boy to mow the lawn with Ralph's lawnmower. Are you saying she is

[9]The argument is not that one should not or cannot promise to obey; the argument is that such a promise does not turn one into a person of diminished or no capacity (within the scope of the contract).

[10]This might be contrasted with the usual left-wing criticism that just escalates one's notion of "voluntariness" until the contracts one wants to criticize are seen as "involuntary."

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> a bad person?" No, the theory of inalienability does not say that Aunt Louise is a bad person; it says that any legal institution validating and enforcing a contract to legally alienate aspects of personhood that are de facto inalienable is an institutionalized injustice.[11]

But the analysis here is that the personhood alienation contract may well be voluntary (i.e., in the obedience 'fulfillment' sense) but such contracts are Type I mismatches and thus objectively fraudulent.

Does this juridical theory of inalienability have an explanatory or clarifying power? The theory implies the:

- abolition of the voluntary slavery contract;
- abolition of the *pactum subjectionis* as a basis for political government; and
- abolition of the coverture marriage contract.

In the last two centuries, the most important social changes in the industrialized countries have been:

- the abolition of slavery, involuntary and voluntary (19th century);
- the acceptance of democracy as the only legitimate form of government (19th century); and
- the abolition of the coverture marriage contract and other advances in the Women's Movement (e.g., married women's property acts in the 19th and early 20th centuries).

It is easy to nod in agreement when a theory implies the abolition of institutions that have already been abolished. One of the more amusing aspects of arguing these questions today is philosophers, economists, and legal theorists defending the human rental system from a normative basis that is so weak that it does *rule out* any of the three historically abolished contracts. But they are conveniently "against" those already abolished contracts for a variety of consequentialist reasons that hardly imply abolition as opposed to having a wider variety of available contracts.

That is why conventional thought has a vested interest in the superficial intellectual history that does not delve too far into the abolitionist arguments that descend from the Reformation and Enlightenment in the Anti-Slavery, Democratic, and Feminist Movements. Hence conventional thinkers get nowhere near the old abolitionist arguments that once modernized and understood imply the abolition of the human rental or employment contract. That social change is far from being carried out, and who wants

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

to be a marginalized pariah like the abolitionists in the Antebellum era? When any theory implies the abolition of a bedrock institution in a society, then the people born, raised, and building their careers in that society will consider the institution as natural and, of course, legitimate, and thus such a theory will be considered a *reductio ad absurdum*.

The democratic alternative

The alternative to the human rental system is:

- genuine system of private property (people getting the fruits of their labor);
- genuine system of non-fraudulent market contracts;
- everyone is a member of the democratic enterprise where they work;
- people are jointly working for and governing themselves in the workplace; and
- jointly appropriating the positive and negative fruits of their labor.

With remarkable courage and clarity, the Tory thinker, Lord Eustace Percy, put the fundamental task as follows:

> Here is the most urgent challenge to political invention ever offered to the jurist and the statesman. The human association which in fact produces and distributes wealth, the association of workmen, managers, technicians and directors, is not an association recognised by the law. The association which the law does recognise—the association of shareholders, creditors and directors—is incapable of production and is not expected by the law to perform these functions. We have to give law to the real association, and to withdraw meaningless privilege from the imaginary one. [Percy 1944, p. 38]

Note that Percy's two associations correspond precisely to the:

1. Type I association that factually “produces and distributes wealth” but is not even "recognised by the law” and
2. Type II association which "the law does recognise" is factually “incapable of production and is not expected by the law to perform these functions.”

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Table 3: Type I & II mismatches between legal and factual responsibility for the whole product of an enterprise.

	Table of injustices due to mismatch of	Factual for the	Responsibility Whole Product
	factual and legal responsibility for Whole Product	Factually responsible for the Whole Product	Not factually responsible for the Whole Product
Legal	Held legally responsible for the Whole Product	True positive	Type II injustice: Non-responsible party gets legal responsibility
Responsibility for the Whole Product	Not held legally responsible for the Whole Product	Type I injustice: Factually responsible Party is legally Non-responsible	True negative

CONCLUDING REMARKS

The '*problem*' in conventional classical liberal philosophy, economics, and jurisprudence is well illustrated by the case of James M. Buchanan. Consider, for example, the previous quote by the Nobel-prize-winning economist where he "denies legitimacy to all social-organizational arrangements that negate the role of individuals either as sovereigns or as principals." [Buchanan 1999, p. 288] The phrase "all social-organizational arrangements" certainly includes the employment relation. But, no one thinks that the employees are the principals and the employer is the agent, delegate, or representative of the employees in the employer-employee relation.

Unlike Frank Knight, who better understood what he 'had' to do (e.g., identify responsible human action with the causally efficacious or 'productive' services of things), Buchanan and most other classical liberal scholars seem blithely unaware of the problem. Buchanan did not even notice in the economics system where he lived his whole life and in which he received the Economics Nobel Prize, that the employees are not the principals in the most common "social- organizational arrangements"; nor did he ever cast any doubt on the human rental relationship. It is just beyond the orbit of serious consideration.

Insofar as the topic even comes up, the usual dodge is to picture the employee as the principal and sole proprietor in the business of selling their own labor services like one as a "resource- owner" might sell the services of an apartment or truck one owned, and just as the perpetual servant or coverture wife was the principal and sole proprietor in the business of selling larger chunks of their personhood. Aside from providing some amusement to future scholars, these 'arguments' just ignore the whole inalienability analysis that is the root of the critique of those contracts to legally alienate aspects of personhood (e.g., responsibility and decision-making). That is the basis for abolishing those

personhood-alienation contracts, arguments just ignored by the rather contrived but standard Economics picture of the owners of human resources being the principal and sole-proprietor in the business of legally alienating aspects of one's personhood.

The philosophy of conventional classical liberalism historically developed, in part, as a defense of the system of private property and market contracts of which the employment contract has always been an integral part—even though that contract:

- violates the non-fraudulent condition by putting the factually co-responsible employees into the legal position of non-responsible instruments;
- violates the normative basis for private property appropriation since the employees legally appropriate 0% of the positive and negative fruits of their labor, and
- violates the restriction to delegative contracts since the employment contract is a collective contract to alienate the employees' self-governing rights to the employer within the scope of the employment.

Hence, it is a considerable 'problem' for conventional classical liberalism if its own deeper principles, which implied the abolition of the voluntary slavery contract, the coverture marriage contract, and the social contract of a non-democratic constitution, also imply the abolition of the employment contract.

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