Rethinking the Employment Contract:
What can today's corporate reform movement learn from the old anti-slavery and democratic movements?

David Ellerman
Economics Department
University of California at Riverside
david@ellerman.org and www.ellerman.org

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Introduction: Ownership and Governance

Often the question of corporate reform is approached through analyzing the notion of "corporate ownership." Perhaps reforms would consist in somehow expanding the class of owners from only the shareholders to some broader group of "stakeholders"? Another possibility is to rethink the notion of ownership, not just the class of owners. Perhaps some insight can be gained by looking at some of the major institutional changes of the past such as the abolition of slavery and the rise of political democracy during the last few centuries.

At one time, the king was seen as the owner of a country, the prince as the owner of a principality, and the feudal lord was the owner of his dominion. This "ownership" was not just a bare property interest in real estate; it included the governance of the people living on the land. The landlord was the Lord of the land. The governance of people living on land was taken as an attribute of the ownership of that land: "ownership blends with lordship, rulership, sovereignty in the vague medieval *dominium*,...." [Maitland 1960, 174] As Otto Gierke put it, "Rulership and Ownership were blent" [1958, 88].

To understand the corporate governance debates of today it may be useful to revisit the mentality of the kings, princes, and lords who "owned" their dominions. Although this "ownership" was never spread as widely as corporate shares are today, they also had to work through layers of retainers, overseers, and other agents. There was always an "agency problem" to see that the

agents curbed their own self-interest and executed the wishes of the principals. Another commonality with today is the mentality that the governance over the people actually working their property was all part of the owners' dominion. The inhabitants of the king's, prince's, or lord's dominion had no standing in that governance. The rulers and their agents did not rule as delegates, representatives, or otherwise in the name of those inhabitants. The "very idea" seemed somewhat outlandish.

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

With the democratic revolutions of the last few centuries, the "Rulership" was taken out of "Ownership." In the introduction to some of Frederic Maitland's writings, Robert Schuyler quoted his description of the evolution of the word "landlord." "We make one word of [landlord], and throw a strong accent on the first syllable. The lordliness has evaporated; but it was there once. Ownership has come out brightly and intensely; the element of superiority, of government, has vanished." [Maitland quoted in Schuyler 1960, 42] Today, the ownership of land does not include the governance right over people using the land. If there is no prior contract between an owner of land and someone using the land, then the land owner has the right to exclude the user (and to charge the continuing user with trespassing) but no right to automatically make the user into a "subject."

If political governance used to be based on land ownership and now isn't, then what about the connection between corporate ownership and workplace governance? What is the legal basis for the rights of government or management over all the people who work in a corporation? One finds remarkably confused answers to that simple question. The most common answer harks back to the theory that "rulership" is part of ownership. The shareholders are the owners of the corporation and their governance rights are even seen as part of the ownership of capital assets. This view of the "rights of capital" seems to be one point of agreement between Marx and the defenders of the system whose name was popularized by Marx, i.e., "capitalism."

> It is not because he is a leader of industry that a man is a capitalist; on the contrary, he is a leader of industry because he is a capitalist. The leadership of industry is an attribute of capital, just as in feudal times the functions of general and judge were attributes of landed property. [Marx 1967 (1867), 332]

And this view survives to our day, e.g., the "rights of authority at the firm level are defined by the ownership of assets, tangible (machines or money) or intangible (goodwill or reputation)." [Holmstrom and Tirole 1989, 123]

If by the "rights of authority at the firm level" one only means the rights to exclude a trespasser then that indeed is defined by the "ownership of assets." But the "rights of authority" are clearly taken to include the rights of management over the people working in the firm and it is quite easy to show that view mistaken. Simply consider the case of rented assets. An entrepreneur might lease assets A, B, and C from different owners. From each asset owner, the entrepreneur acquired the rights to use the assets within the scope of the rental contracts. Within the boundaries of those contracts, the entrepreneur has the full discretionary right to make his or her own decisions. It makes no sense to think that the entrepreneur's right of decision-making was part of the ownership of asset A and was acquired in the rental contract. Or was it part of asset B, or perhaps C? The right to govern the entrepreneur's own actions did not need to be "acquired" from the asset owners, only the use rights over those assets.

If the "rights of authority at the firm level" are thus not part of the "ownership of assets" then how do the managers (or ultimately the shareholders) get those rights over the workers? The answer is simple; the employment contract. After all, the "governance" that is supposed to be exercised by the shareholders and their agents is not the giving of commands to land, buildings, or machines; it is indirectly and directly giving orders to the people who are working those properties. The legal authority over the workers is not based on the ownership of assets but the ownership of the employees' labor which was purchased in the employment contract. Thus changing corporate governance is not about changing the bundle of rights involved in asset ownership. It is about the employment contract.

If the authority over workers is not based, as is so commonly thought, on asset ownership but on a contract, then perhaps there another accounting for the authority of kings, princes, and lords than "ownership." Indeed, there is. Perhaps since antiquity and certainly since the middle ages, there has been an alternative account of the authority of kings, princes, and lords that was based on an explicit or implicit voluntary contract, a pact of subjection or *pactum subjectionis*. And if undemocratic authority was based on a voluntary contract, then the democratic movement needed some critique of a voluntary contract of subjection wherein people transferred their right of self-government to a sovereign. Part of our task is to sketch that largely forgotten history.

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

By recalling the intellectual history of the contractarian arguments for and against non-democratic government as well as for and against slavery, we can obtain a valuable perspective on the contract at the basis of our current economic order, the employment contract.

The Hidden History of Contractarian Arguments for Slavery and Autocracy

Modern Liberalism

How can there be an inherent rights violation in a fully voluntary contract? This question has an answer, an answer that was hammered out in the anti-slavery and democratic movements. The intellectual roots of the answer can be traced back to the Stoics but the golden thread of the argument descends to modern times from the Reformation and the Enlightenment.

But that answer has however been lost to the mainstream of modern liberalism[1] that focuses on the question of consent versus coercion. The employment contract is the voluntary contract to rent or hire oneself out to an employer for a certain purpose and time period. Ordinarily the word "hire" is preferred but I use the synonym "rent" to help us think out of the old mental ruts. The words are equivalent. Americans say "rent a car" and the British say "hire a car" but they mean the same thing. As Paul Samuelson puts it:

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

Leaving aside the coercive nature of historical slavery, what about a truly voluntary self-sale contract to sell one's labor by the lifetime instead of by the hour, week, or month? History has already ruled out such a voluntary slavery contract along with the institution of involuntary slavery. Again, as Paul Samuelson puts it:

> Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself; he must **rent** himself at a wage. [1976, 52 (emphasis in the original)]

Robert Nozick, the late prominent moral philosopher from Harvard University, argued on strict liberal and indeed libertarian grounds that even the self-sale or voluntary slavery contract should be accepted. This contract comes in both a collective and individual form. The collective form was historically known as the pact of subjection or *pactum subjectionis*, wherein a people alienated and transferred their right to govern themselves to a monarch or some other form of a Hobbesian sovereign. Professor Nozick argued that a free libertarian society should validate that

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[1] I use "liberalism" in the European sense as "classical liberalism," not in the American sense juxtaposed to conservativism. The fundamental tenet of liberalism is a society based on voluntary contract, not coercion (including "status" as a type of coercion). As Henry Maine put it, "the movement of the progressive societies has hitherto been a movement *from Status to Contract*." [1861, reprinted 1972, 100] At the enterprise level, the characteristic feature of liberalism is the acceptance of the employment firm based on the employer-employee contract. I use the phrase "employment firm" rather than the misleading phrase "capitalist firm" since the characteristic feature of the conventional firm is the employment contract, not the private ownership of the means of production. More on this anon.

sort of a contract with a "dominant protective association" playing the role of the Hobbesian sovereign. [Nozick 1974, 15] And the same reasoning applied to the individual version of the alienation contract.

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

Accordingly Nozick completely abandoned the notion of inalienable rights developed in the anti-slavery and democratic movements. But he kept the phrase "inalienable right" by redefining it as a "right" that could not be taken away without one's consent. But that is only a right as opposed to a privilege. Nozick had no notion of an "inalienable right" that may not be taken away even with one's consent. The anti-slavery and democratic movements argued that even if a system of positive law accepted a voluntary contract to alienate such a right that such contracts were inherently invalid—and thus that the rights should be recognized as being inalienable.

Nozick was not alone in this suggested revision of post-bellum jurisprudence to accept the self-sale contract. Nozick has neoclassical economics as a silent partner in this quest for liberal justice. Allocative efficiency requires full futures markets in all commodities including human labor. Any attempt to truncate self-rental contracts at, say, T years could violate market efficiency since there might be mutually voluntary contracts to buy and sell labor T+1 years in the future. Hence market efficiency requires full future markets in labor—essentially the self-sale contract. Neoclassical textbooks loathe to admit this implication. But the Johns Hopkins University economist Carl Christ made the point quite explicit in no less a forum than Congressional testimony.

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

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

The Older History of Voluntary Self-Sale Contracts

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

But that is a gross falsification of the actual historical debates. In fact from ancient times, there have been defenses of slavery on contractarian grounds. The Old Testament of the Bible forms a convenient starting point for the intellectual history of slavery contracts. The Old Testament law was that, after six years of service, any Hebrew slave was to be set free in the seventh year, the year of the Jubilee.

> But if he says to you, "I will not go out from you," because he loves you and your household, since he fares well with you, then you shall take an awl, and thrust it through his ear into the door, and he shall be your bondman for ever. [Deut. 15:16-17; also Exodus 21:5-6]

Roman law, as codified in the *Institutes* of Justinian, provided three legal means of becoming a slave:

> Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him. [*Institutes* Lib. I, Tit. III, 4]

In addition to the third means of outright contractual slavery, the other two means were also seen as having aspects of contract. A person born of a slave mother and raised using the master's food, clothing, and shelter was considered as having agreed to a tacit contract to trade a lifetime of labor for these and future provisions. Manumission was an early repayment of that debt. And Thomas Hobbes, for example, clearly saw a "covenant" in this ancient practice of enslaving prisoners of war.

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

The point is not the factual absurdity of interpreting this as a covenant; the point is the attempt by Hobbes and many others to ground slavery on the basis of explicit or tacit consent. The dumbed-down consent-or-coercion liberalism of our day would disagree only on the factual question of what constitutes "consent."

Richard Tuck [1979] has traced another root of the alienability of liberty to a seemingly obscure medieval controversy about the meaning of apostolic poverty. Is a monk's right (*ius*) to use food, clothing, and shelter a property right (a *dominium*) even though a monk may not sell these commodities? The thinkers who foreshadowed the non-democratic liberal tradition argued that one's right or liberty to use commodities and, broadly, to act in the world, was indeed a property right (a *dominium*). This led to the conclusion that liberty could also be traded away.

> We can see from the history of this movement how the attack on apostolic poverty had led to a radical natural rights theory. If one had property in anything which one used, in any way, even if only for personal consumption and with no possibility of trade, then any intervention by an agent in the outside world was the exercise of a property right. Even one's own liberty, which was undoubtedly used to do things in the material world, counted as property — with the implication that it could, if the legal circumstances were right, be traded like any other property. [Tuck 1979, 29]

A Dominican theologian, Silvestro Mazzolini da Prierio, argued in 1515 that a free man could sell himself into unconditional slavery [see Tuck 1979, 49]. A Portuguese churchman, Luis de Molina, asserted in 1592 that:

> Man is *dominus* not only of his external goods, but also of his own honour and fame; he is also *dominus* of his own liberty, and in the context of the natural law can alienate it and enslave himself. ... It follows ... that if a man who is not subject to that law [i.e., Roman law] sells himself unconditionally in some place where the relevant laws allow him, then that sale is valid. [Molina quoted in Tuck 1979, 54]

The influential Spanish scholastic philosopher and jurist, Francisco Suarez, reiterated the basic theme in the concept of alienable natural rights:

> nature, although it has granted liberty and dominium over that liberty, has nevertheless not absolutely forbidden that it should be taken away. For ... the very reason that man is dominus of his own liberty, it is possible for him to sell or alienate the same. [quoted in Tuck 1979, 56]

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

> If voluntary slavery was possible for an individual, so it was for an entire people. ... A natural rights theory defense of slavery became in Suarez's hand a similar defense of absolutism: if natural men possess property rights over their liberty and the material world, then they may trade away that property for any return they themselves might think fit ... . [Tuck 1979, 56-7]

The feudal relations between lords and vassals were sometimes seen as contractual. The vassals held a higher station than the serfs.

> Actually only gentlemen could be vassals to a lord. The relation was marked by elaborate ceremonies at its beginning (homage) and was always regarded as a mutual relation of give and take, indeed, as a contractual relation. [Brinton 1950, 211-2]

But scholars disagree about the contractual aspects of medieval serfdom.

> While slavery is widely accepted as being an involuntarily achieved status (although there were cases of voluntary entry ... in ancient and medieval Europe), other forms of what are sometimes called "forced labor" are the result of voluntary agreement. Recently economic historians have reopened the discussion of whether European serfdom represented a voluntary exchange -- protection for labor services -- or whether it was a form of forced labor imposed from above. [Engerman 1973, 44]

Hugo Grotius (1583-1645) was a pivotal figure in the development of natural rights political philosophy, but he also, in the alienable rights tradition, viewed man's natural right to liberty as a right which could be transferred with consent.

> A man may by his own act make himself the slave of any one: as appears by the Hebrew and the Roman law. Why then may not a people do the same, so as to transfer the whole Right of governing it to one or more persons? [Grotius 1901 (orig. 1625), reprinted in Morris 1959, 89].

Grotius cites some explicit examples.

> For if the Campanians, formerly, when reduced by necessity surrendered themselves to the Roman people in the following terms: -- "Senators of Rome, we consign to your dominion the people of Campania, and the city of Capua, our lands, our temples, and all things both divine and human," and if another people as Appian relates, offered to submit to the Romans, and were refused, what is there to prevent any nation from submitting in the same manner to one powerful sovereign? [Grotius 1901 (orig. 1625), 63-4]

Grotius was followed on the Continent by Samuel Pufendorf (1632-94), who, as Rousseau pointed out, continued the alienist tradition of treating liberty as a property right.

> Puffendorf says that we may divest ourselves of our liberty in favour of other men, just as we transfer our property from one to another by contracts and agreements. [Rousseau 1973 (orig. 1755), second part]

In Locke's influential *Two Treatises of Government* (1690), he would not condone a contract which gave the master the power of life or death over the slave.

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

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

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

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

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

Locke seems to have justified slavery in the Carolinas by interpreting the raids into Africa as just wars and the slaves as the "captives" [viz. Laslett 1960, notes on §24, 325-326].

William Blackstone's codification of common law in his *Commentaries* (1765) was quite important in the development of English and American jurisprudence. Like Locke, Blackstone rules out a slavery where "an absolute and unlimited power is given to the master over the life and fortune of the slave." Such a slave would be free "the instant he lands in England."

> Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. [Blackstone 1959 (1765), 72, section on "Master and Servant"]

Having thus established that slavery could be based on contract, the liberal defenders of slavery had no need to condone kidnapping. But wherever slavery existed as a settled condition, then—like society itself—the institution could be seen as being based on a tacit contract.

An interesting case study in liberal intellectual history is the treatment of the American proslavery writers. The proslavery position is usually presented as being based on illiberal racist or feudal paternalistic arguments. Considerable attention is lavished on illiberal writers such as George Fitzhugh [e.g., Genovese 1971; Wish 1960; Fitzhugh 1960], while liberal contractarian defenders of slavery are passed over in silence. For example, Rev. Samuel Seabury [1969, orig. 1861] gave a sophisticated liberal defense of ante-bellum slavery in the Grotius-Hobbes-Pufendorf tradition of alienable natural rights theory.

> From all which it appears that, wherever slavery exists as a settled condition or institution of society, the bond which unites master and servant is of a moral nature; founded in *right*, not in *might*; ... . Let the origin of the relation have been what it may, yet when once it can plead such prescription of time as to have received a fixed and determinate character, it must be assumed to be founded in the consent of the parties, and to be, to all intents and purposes, a compact or covenant, of the same kind with that which lies at the foundation of all human society. [1969 (1861), 144]

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

> "Contract!" methinks I hear them exclaim; "look at the poor fugitive from his master's service! He bound by contract! A good joke, truly." But ask these same men what binds them to society? Are they slaves to their rulers? O no! They are bound together by the COMPACT on which society is founded. Very good; but did you ever sign this compact? Did your fathers every sign it? "No; it is a tacit and implied contract." [Seabury 1969, 153]

This puts modern contractarian liberals in the sensitive position of disagreeing with Seabury only on factual grounds. They are reduced to arguing on empirical grounds that the implied contract for society has "genuine" tacit consent, but that the implied slavery contract did not. It is no surprise that modern liberalism has just avoided this quandary by dumbing down the intellectual history of the slavery debates. The sophisticated liberal contractual arguments go down the memory hole; it's just a question of consent or coercion.

The Older History of Voluntary Contracts of Subjection

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

Here again, modern liberalism has dumbed down the intellectual history of the debate between autocracy and democracy to a simplistic question of coercion or consent. Democracy is presented as "government by the consent of the governed" and non-democratic governments are presented as being based on coercion. But again there was a liberal contractarian defense of non-democratic government from antiquity down to Nozick.

We may start with Roman law in our thumbnail sketch of the contractarian defense of autocracy. 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. [quoted in Corwin 1955, 4; or in Sabine 1958, 171]

The American constitutional scholar, Edward S. Corwin, noted the questions which would arise in the Middle Ages about the nature of this pact.

> During the Middle Ages the question was much debated whether the *lex regia* effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty ... took the latter view. [Corwin 1955, 4]

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

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

> This dispute also reaches far back into the Middle Ages. It first took a strictly juristic form in the dispute ... as to the legal nature of the ancient "*translatio imperii*" from the Roman people to the 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, 93-94]

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

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

In terms of the liberal "coercion or contract" dichotomy, this tradition was grounded foursquare on contract.

> Indeed that the legal title to all Rulership lies in the voluntary and contractual submission of the Ruled could therefore be propounded as a philosophic axiom. [Gierke 1958, 39-40]

A state of government which had been settled for many years was ex post facto legitimated by the tacit consent of the people. Thomas Aquinas (1225-74) expressed the canonical medieval view.

> Aquinas had laid it down in his *Summary of Theology* that, although the consent of the people is essential in order to establish a legitimate political society, the act of instituting a ruler always involves the citizens in alienating—rather than merely delegating—their original sovereign authority. [Skinner 1978, 62]

In about 1310, according to Gierke,

> Engelbert of Volkersdorf is the first to declare in a general way that all *regna et principatus* originated in a *pactum subjectionis* which satisfied a natural want and instinct. [Gierke 1958, 146]

Late medieval thinkers such as Marsilius of Padua (1275-1342) and Bartolus of Saxoferrato (1314-57) laid some of the foundations for democratic theory not in the simplistic distinction between coercion versus the "consent of the governed" but in the distinction between consent that establishes a relation of delegation and trusteeship versus consent to an alienation of authority.[2]

> The aforesaid whole body of citizens or the weightier part thereof is the legislator regardless of whether it makes the law directly by itself or entrusts the making of it to some person or persons, who are not and cannot be the legislator in the absolute sense, but only in a relative sense and for a particular time and in accordance with the authority of the primary legislator. [Marsilius 1980 (1324), 45]

Bartolus defends "those cities which *de facto* recognise no superior in temporal affairs, and so possess *Imperium* in themselves" [1588, vol. 6, 669]. The citizens "constitute their own *princeps*" so any authority held by their rulers and magistrates "is only delegated to them (*concessum est*) by the sovereign body of the people" [1588, vol. 6, 670; quoted in Skinner 1978, 62]

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

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[2] "The theory of popular sovereignty developed by Marsiglio [Marsilius] and Bartolus was destined to play a major role in shaping the most radical version of early modern constitutionalism. Already they are prepared to argue that sovereignty lies with the people, that they only delegate and never alienate it, and thus that no legitimate ruler can ever enjoy a higher status than that of an official appointed by, and capable of being dismissed by, his own subjects." [Skinner 1978, 65]

> 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 (Orig. 1651), 142].

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

The Counterargument: Inalienable Rights

We have seen that the debate from antiquity up to the present about slavery and autocracy was not a simple consent-versus-coercion debate. Instead there were consent-based arguments for slavery and non-democratic government as being based on certain explicit or implicit contracts.

What were the counterarguments against such contracts in the abolitionist and democratic movements? The most basic counterarguments were not about efficiency and were not quibbles about the quality of the consent to explicit or implicit contracts. Instead arguments developed that there was something inherently invalid in such alienation or *translatio* contracts, and thus that the rights which these contracts pretended to alienate were in fact inalienable.

There is a simple logical structure to the inalienable rights arguments against the alienation contracts such as the self-sale contract or the pact of subjection. In consenting to such a contract a person was agreeing to, in effect, take on the legal role of a non-person or thing. Yet all the consent in the world would not in fact turn the person into a thing. The person would play an agreed upon role such as obeying the master, and the authorities would "count" that as fulfilling the contract to have the role of a non-person. Since the person remained a de facto person with only the contractual role of a thing, the contract was impossible and invalid. A system of positive law that accepted such contracts was only a fraud on an institutional scale.

But how are persons and non-persons differentiated? Persons and things can be distinguished on the basis of decision-making and responsibility. For instance, a thing such as a tool can be alienated or transferred from person A to B. Person A can indeed give up making decisions about the use of the tool and person B can take over making those decisions. Similarly person A does not have the responsibility for the consequences of the employment of the tool by person B. Person B makes the decisions about using the tool and has the de facto responsibility for the results of that use. Thus a contract to sell or rent a tool from A to B can be fulfilled. The decision-making and responsibility for employing the tool can in fact be transferred from A to B.

But now replace the tool by person A himself or herself. Suppose that the contract was for person A to sell or rent himself or herself to person B—as if a person was a transferable or alienable instrument or tool. The contract could be perfectly voluntary. For whatever reason and compensation, person A is willing to take on the legal role of a talking instrument (to use Aristotle's phrase). But the person A cannot in fact transfer decision-making or responsibility over his or her own actions to B. At most person A can agree to cooperate with B by doing what B says. But that is no alienation or transference of decision-making or responsibility. Person A

is still inexorably involved in ratifying B's decisions and person A inextricably shares the de facto responsibility for the results of A's and B's joint activity.

Yet a legal system could "validate" such a contract and could "count" obedience to the master or sovereign as "fulfilling" the contract. But such an institutionalized fraud always has one revealing moment where even the most slavishly conforming observers can see the fiction behind the system. That is when the legalized thing would commit a crime. Then the "thing" would be suddenly metamorphosed back into being a person to be held legally responsible for the crime. For instance, an antebellum Alabama court asserted that slaves

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

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

The key insight is the difference in the factual transferability of a thing's services and our own actions—the person-thing mismatch. I can voluntarily transfer the services of my shovel to another person so that the other person can employ the shovel and be solely de facto responsible for the results. I cannot voluntarily transfer my own actions in like manner. Thus the contract to rent out my shovel is a normal contract that I fulfill by transferring the employment of the shovel to its employer. I can certainly voluntarily agree to a contract to be "employed" in like manner by an "employer" on a long or short term basis, but I cannot in fact "transfer" my own actions. Where the legal system "validates" such contracts, it must fictitiously "count" my inextricably co-responsible co-operation with the "employer" as fulfilling the employment contract—unless, of course, the employer and employee commit a crime together. The servant in work then becomes the partner in crime.

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

When the "venture" being "jointly carried out" by the employer and employee is not criminous, then the facts about human responsibility are unchanged. But then the fiction takes over. The joint venture or partnership is transformed into the employer's sole venture. The employee is legally transformed from being a co-responsible partner to being only an input supplier sharing no legal responsibility for either the negative or positive results of the employer's business.

Some Intellectual History of the Person-Thing Mismatch

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

The Stoics held the radically different view that no one was a slave by their nature; slavery was an *external* condition juxtaposed to the internal freedom of the soul.

After the Dark Ages, the Stoic doctrine that only the body is enslaved and that the "inner part cannot be delivered into bondage" [Seneca quoted in Davis 1966, 77] re-emerged in the Reformation doctrine of liberty of conscience. Secular authorities who try to compel belief can only secure external conformity.

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

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

> Furthermore, every man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; and as little as he can open or shut heaven or hell for me, so little can he drive me to faith or unbelief. Since, then, belief or unbelief is a matter of every one's conscience, and since this is no lessening of the secular power, the latter should be content and attend to its own affairs and permit men to believe one thing or another, as they are able and willing, and constrain no one by force. [Luther 1942 (1523), 316]

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

> Our rights are either *alienable*, or *unalienable.* The former are known by these two characters jointly, that the translation of them to others can be made effectually, and that some interest of society, or individuals consistently with it, may frequently require such translations. Thus our right to our goods and labours [sic] 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. [1755, 261]

Hutcheson appeals to the inalienability argument in addition to utility. He contrasts de facto alienable goods where "the translation of them to others can be made effectually" (like the aforementioned shovel) with factually inalienable faculties where "the translation cannot be made with any effect."

Hutcheson goes on to show how the "right of private judgment" or "liberty of conscience" is inalienable.

> Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable. [261-62].

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

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

Democratic theory carried over this theory from the inalienability of conscience to a critique of the Hobbesian *pactum subjectionis*, the contract to alienate and transfer the right of self-determination as if it were a property that could be transferred from a people to a sovereign.

> 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, 56-57]

Or as Ernst Cassirer puts it:

> There is, at least, *one* right that cannot be ceded or abandoned: the right to personality…They charged the great logician [Hobbes] with a contradiction in terms. If a man could give up his personality he would cease being a moral being. … There is no *pactum subjectionis,* no act of submission by which man can give

> up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity. [Cassirer 1963, 175]

In the American Declaration of Independence, "Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important" [Wills 1979, 213]. But the theory behind the rhetoric of "inalienable rights" was lost in the transition from the Scottish Enlightenment to the slave-holding society of ante-bellum America.[3]

Application to the Employment Contract

Today the inalienability theory has to be recovered from its roots in the critique of the liberal contractarian defense of slavery and autocracy. By dumbing down the question to "consent or coercion," modern liberalism has lost sight of both the contractarian arguments for slavery and autocracy as well as the counterarguments in the form of inalienable rights theory. Once recovered, it is seen that the inalienability arguments apply as well to the individual self-rental contract and the collective *pactum subjectionis* of the workplace, the individual and collective versions of the employment contract. The mismatch of a person in a non-responsible "thing" role and the non-transferability of decision-making and responsibility apply as well for eight hours a day as for a lifetime of labor.

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

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

Now once one understands this fundamental distinction between the alienation and the delegation social contracts—and is aware of that distinction in the history of democratic thought—what additional information is needed to make the application to the employment

[3] See Ellerman 1992 of more intellectual history on these topics

contract? Does anyone think that the employer is the delegate, representative, or trustee of the employees? Does anyone think that the employer manages in the name of the employees?[4] Does anyone think that the persons who have a de facto inalienable capacity for decision-making in the public sphere suddenly morph into talking instruments in the private sphere? Since the answers are so blindingly obvious, the usual response is apparently just to not think about it. Just don't go there. Then one can fall back on the consent or coercion framework. Democracy is government by the consent of the governed, and the employees give their consent to the employment contract so where is the problem?

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

There are many "stories" in conventional economics and legal theory to help one avoid thinking about these issues. As Luther himself emphasized, the mind cannot be forced to go where it does not want to go. Without going through all the "ducking and diving" of modern apologetics, perhaps the basic story goes something like this.

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

This is the simple "obey and get paid" story that one should tell oneself to avoid thinking too hard about the actual structure of rights in the employment firm and to avoid thinking about the

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[4] "The manager in industry is not like the Minister in politics: he is not chosen by or responsible to the workers in the industry, but chosen by and responsible to partners and directors or some other autocratic authority. Instead of the manager being the Minister or servant and the men the ultimate masters, the men are the servants and the manager and the external power behind him the master. Thus, while our governmental organisation is democratic in theory, and by the extension of education is continually becoming more so in practice, our industrial organisation is built upon a different basis." [Zimmern 1918, 263]

R-word (responsibility). Before taking note of the rights structure, it is useful to see that the same kind of story can be told about a voluntary master-slave relationship based on selling labor by the lifetime.

> In the slavery contract, the slaves know well what is expected of them; in return for their consideration (e.g., purchase price and perhaps ongoing food, clothing, and shelter), they are to obey the master within the scope of the slavery contract (which, incidentally, would not include crimes). Similarly, the master knows that he or she, in return for providing the consideration, is acquiring the right to decide what the slaves are to do within the scope of the contract. Everyone knows what everyone else is expected to do. There is no need for language in the contract about playing the role of a "thing" or anything like that.[5] It is a perfectly straightforward voluntary contract. When the two parties both fulfill their part (paying consideration and following directions), then the contract is fulfilled and that is the end of the matter.

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

To see that the employees (or the slaves) have the legal role of non-responsible entities, one has to apply some analysis to take the mind where the mind does not want to go. In a proprietorship, the proprietor has the legal responsibility (both positive and negative) for the results of the proprietor's de facto responsible actions. That is, the proprietor is liable for the costs of the used up inputs and the proprietor may claim and sell the output that is produced. Thus the proprietor does not have a non-responsible role. Similarly for the partners in a partnership.

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

We have seen that the employees are inextricably de facto co-responsible along with the working employers for the results (positive and negative) of their enterprise. But the employees as

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[5] As a pro-slavery writer put it: "Slavery is the duty and obligation of the slave to labor for the mutual benefit of both master and slave, under a warrant to the slave of protection, and a comfortable subsistence, under all circumstances. The person of the slave is not property, no matter what the fictions of the law may say; but the right to his labor is property, and may be transferred like any other property, or as the right to the services of a minor or apprentice may be transferred.... Such is American slavery, or as Mr. Henry Hughes happily terms it, 'Warranteeism'." [Elliott 1860, vii]

employees are not legal members of the company. Yet it is the company that has the legal liability for the used up inputs (the employees' labor simply counting as one of those inputs) and the legal claim on the produced outputs. Since the employees are not legal members of that corporate body, they have no share of the legal responsibility for either the positive or negative fruits of their de facto responsible actions. Thus it is that the employees take on a legally non-responsible role in the employment contract in spite of there being no language to that effect in the labor contract and in spite of their continuing de facto responsibility.

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

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

Table 1: Responsibility for the (positive and negative) results of a company

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

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

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

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

New Paths and New Perspectives

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

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

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

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

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

of the product and the liability for the used-up inputs to the people who, by their de facto responsible actions, produced the outputs by using up the inputs.

Hence a private property system based on the basic principle of justice (imputing to people what they are responsible for) would have the legal members of each firm exactly the people who work in the firm. Thus a system based on justice in private property would entail workplace democracy. In contrast, the current system based on the employment contract ends up not assigning the assets and liabilities created in production to those who created them but rather assigns them to a largely absentee class of shareholders who did not create them.

It is time to move beyond the simplistic liberal morality play of consent-or-coercion and to see the whole history of subjection linked to the consent-based apologetics of the intellectual clerks of the past and present. And it is time to understand the deeper intellectual history of the anti-slavery and democratic movements based on the enduring idea that persons do not fit into the legal role of things—even with consent. This theory, overlooked by modern liberalism, is part of our own history. It bequeaths to our day the call for the abolition of the whole institution of renting human beings.

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

Concluding Remarks: Getting From Here to There

The Approach through Employee Ownership

I will now turn to the more practical questions of getting from here to there, from our current economic system very much based on the unchallenged employment relation to a system of economic democracy where all firms are democratic firms.

One strategy is through employee ownership, the firm by firm creation of more-or-less democratic firms by start-ups or buy-outs using legal forms such as worker cooperatives or joint-stock corporations with employee stock ownership plans (ESOPs).

This strategy is important for the simple reason that it fosters local experimentation. In spite of all the public rhetoric about political democracy, our society is actually rather anti-democratic in what people do all day long, i.e., in their work. The very idea of the firm as a small democratic polity seems to be so new and strange that much experimentation is needed to find out how it might work.

The downside of the employee ownership approach is that it "buys into" the idea that the enterprise is a piece of property with owners. This is a basic misunderstanding of a private property market economy. Land, buildings, machinery, and financial capital all have owners. There are two quite different ways in which the owners of capital can use it. The owners can try to hire in a complementary set of inputs including the "labor input" and then undertake a certain productive opportunity. Or the owners of capital can hire the capital out to others who may undertake production. Who ends up undertaking production is determined by how those contracts are made—by who ends up hiring what or whom. Thus the undertaking of

production—being the firm—is a contractual position, not a pre-existing property right that was part of the ownership of capital.

This is rather confusing since the legal parties that make the contracts to undertake production are typically corporations and corporations do have owners. Hence we hear the loose expressions about the "ownership of the firm" or "ownership of the enterprise." But there is no "ownership" of a pattern of contracts. Absent the contracts to hire in other factors or even to hire out the corporate assets, the corporation is only an input owner. Absent the employment contract, the corporation is indeed still owned but it is only an empty asset-holding shell. It is the contracts that determine if a corporation becomes an enterprise undertaking production or a supplier of inputs to other parties who are undertaking productive opportunities. At one point the Studebaker corporation leased one of its factories to Chrysler Corporation. Studebaker "owned the means of production" (the factory) but Chrysler was the firm or enterprise undertaking production using those capital assets. There is no "ownership" of a contractual fact-pattern; there is no "divine right of capital" that necessitates people renting themselves to the owners of capital.

The idea that the ownership of capital includes the "ownership of the firm" using that capital is the fundamental myth of our present economic system. Understanding this myth is the *pons asinorum*[6] in understanding property rights. It is why the name "capitalism" is a misnomer for the employment system. "Capital" does not include the "ownership of the enterprise." The question of who *is* the firm (not who "owns" the firm) is determined by the contracts. And the characteristic feature of our present system is the voluntary contract for the renting of the people working in an enterprise, the employment contract. Hence I have used the phrase "employment system" although older names such as "wage system" or "wage labor system" are also better than the misnomer "capitalism."

Part of the road to workplace democracy is crossing the *pons asinorum* to see what is actually owned and what isn't owned in our current system. Democracy is not at war with private property but with the employment contract to rent human beings. The approach to workplace democracy through employee ownership doesn't really cross that bridge; it tends to "buy into" the idea of the employees as the new "owners of the firm." A democratic firm is not a corporation where its class of owners or shareholders is (temporarily) co-extensive with its employees.

In an employee ownership case, there is even confusion about just what "ownership" is being purchased. Since the other parties to a corporation's contracts are free to contract with other partners in the future, one cannot "buy" for the future the contractual position that the corporation had in the past. When one buys a corporation, one is actually buying only a set of capital assets organized in a corporate body. One hopes that the "goodwill" of the contractual partners will continue beyond their current contracts but that is not "purchased" along with the corporate shares.

Setting aside all the myths and confusions, the heart of a democratic worker "buy-out" is a reversal in the contract between capital and labor where current labor has also become a supplier

[6] The "ass' bridge" was the early theorem in Euclidean geometry curriculum such that if a student couldn't get across that bridge, then his talents were elsewhere.

of some of the capital. In a company reorganized on a democratic basis, a person becomes a member solely on the basis of working in the company, not on the basis of supplying capital. Nevertheless, worker-members may supply capital as part of the original deal or as a membership fee, and they will acquire more capital as part of their labor-based earnings is retained in the firm rather than paid out. This member-supplied capital is recorded in a set of internal capital accounts that bear interest like any other borrowed capital and that is paid out over a period of time. Since the worker's membership rights (voting and net revenue rights) are based solely on their human participation in the firm (i.e., their de facto responsible activity in the firm), those rights are independent of the capital in their capital account.

These questions have come up in a poignant way in my own past work on employee buyouts in the Industrial Cooperative Association and elsewhere. It is safe to say that most or all employees come into a buy-out with full belief in the fundamental myth. They are "buying the firm" so they will then be the "owners of the firm" regardless of whether or not they work in the firm in the future. At what point does the democratic consultant try to persuade the workers to structure the new company so that they are not the new "owners" who may rent future workers? When they think they are "buying the firm," is it some type of "bait and switch" to then suggest a new company structure where both present and future workers will be members based on their labor and that their membership rights will be independent of the capital in their accounts?

These are some of the practical problems in trying to use "employee ownership"—with its attendant intellectual baggage—as a path to workplace democracy. In spite of having spent many years taking this path, I now think that, for both practical and theoretical reasons, other paths should be explored.

But before leaving the "employee ownership" path, I might remark about a related path of "capital strategies" through various union-controlled or public-sector pension funds. Instead of letting management usurp the control rights "rightfully" belonging to the absentee owners of shares, these institutional investors are trying to use those rights to get corporations to do various worthwhile things. This is even being touted as a new form of "public accountability" in something like "pension fund socialism." In terms of the analogy with slavery, this "capital strategy" is even worse than the manumission strategy of fighting slavery by buying slaves and freeing them. In this case, the idea is, in effect, for good and well-intended people to buy slaves and then to "do good" for them as slaves.

If the capital strategy approach was to have any emancipatory potential then the "labor-oriented" institutional investors should use their influence on a company to transform the company into a democratic firm so that, among other things, it would not be "owned" by the absentee suppliers of capital ("labor-oriented" or not). Since that is rather unlikely to happen, I must be very skeptical that much good will come from the well-meaning absentee suppliers of capital—regardless of the "labor-oriented" label.

Since the idea is to convert a firm into a democratic polity whose "citizens" or members are the people being managed in the firm, it is by no means clear that an ownership-based or capital-based strategy is best. Suppose that instead of a residency-based democratic government in a municipality that the city was ruled by the land-owners using land-based voting rights. One

strategy to change the system would be for all the current residents who were landless and thus couldn't vote to use one means or another to buy the necessary land and thus get the vote. Then the idea is that they would use their land-based votes to change the system so that all current and future residents could vote regardless of land ownership. It's possible but unlikely for this to work due to means being used contradicting the originally sought-after end.

The other strategy where the means contradict the end is a path to workplace democracy through collective bargaining by labor unions. In the late 19th century, there were reform unions who aimed to replace the "wage system" with the "cooperative commonwealth" [see Grob 1969; Lasch 1991]. But throughout most of the 20th century, the labor movement has withdrawn that challenge and has tried only to get "more, more, and more" within the employment contract. In return, the role of unions in collectively bargaining the employment contract has been enshrined in labor legislation. Thus trade unions have become part and parcel of the employment system. Any strategy that would expect the unions to work to abolish the employment system must be viewed with some skepticism.

Other Paths to Workplace Democracy

What are the other paths to workplace democracy where the means may not contradict the end?

One approach is German-style codetermination. Corporate law is changed so that employees in a company acquire what is typically minority representation on the supervisory board of a company. Since this representation is independent of share ownership, this approach has the virtue of directly approaching the democratic structure of labor-based voting rights—at least for part of the board representatives. Full membership rights would also include net income rights, and then with the partial retention of net income, the workers would need some structure of internal capital accounts to keep track of their share of retained income. And finally the process could be completed by converting the absentee shares into some form of non-voting preferred shares or variable income bonds. This path to workplace democracy might have some potential in continental Europe.

The post-war history in Japan has created another partial path. With the family ownership of the old *zaibatsu* groups discredited by the war, the American occupying reformers tried to set an Anglo-American system of stock market capitalism. But instead, the older corporate groups reconstituted themselves with sizable cross-holdings of shares. Share cross-ownership within these new *keiretsu* groups was the method used to neutralize the control of absentee shareholders while keeping the legal structure of the Anglo-American joint stock company. The cross-owners within the group would delegate the control rights (for non-distressed operation) to each company's management and all the shares were treated as fixed income preferred stock. Thus the membership rights in such firms were in some sense "internalized" to the firm. There was more a transformation in the internal corporate culture than in the legal structure. The managers recognized that they were trustees managing in the name of the company which in human terms meant the people who made up the company. But there was no actual legal structure to enact that accountability. With these caveats, it could be seen as a type of "employee sovereignty."

> The fundamental principle underlying the Japanese model of mixed economy is anthropocentricism, or what Keisuke Itami refers to as "peoplism." Peoplism is

> given concrete expression in the form of employee sovereignty with the corporation, and an emphasis on the independent, land-owning farmer within agriculture. This principle is clearly different from the ideological foundations of Western capitalism, and it would be incorrect to assume that the Japanese system belongs to the same regime just because it uses market mechanisms extensively and exists side by side with a democratic political system. [Sakakibara 1993, 4]

Ronald Dore [1987] has contrasted the company as community model in Japan with the Anglo-American concept as of the company as a piece of property. Koji Matsumoto has emphasized these labor-oriented aspects of the Japanese firm.

> Although there is some danger of oversimplification in making such a statement, the most direct description of this situation is that Japanese corporations 'are controlled by, and exist for, their employees'. Japanese corporations are thus united bodies of corporate employees. [Matsumoto 1991, 27]

It is not a coincidence that we have seen these two partial paths towards workplace democracy develop in the two countries where the old system was discredited by defeat in World War II. Perhaps other paths will develop out of the discrediting of the old system in the post-socialist revolutions of 1989-90. But it is too soon to tell since the first response has usually been a swing of the pendulum to the other extreme.

It is a truism that each country has its unique history. As long as one gets away from the idea that there is One Best Way or blueprint for all private property market economies, then many local experiments will take place. For example, Korea industrialized with the family-owned choebals playing a major role. There was no defeat in war to discredit the family owners but there was some discrediting with the East Asian crisis. In any case, diminishing returns is being felt with the generational turnover. Korea is also a relatively small country that would eventually have its major companies under foreign ownership and control unless something is done. They might find their own version of the Japanese path to replace foreign control with insider control and more cooperative labor relations as the family ownership diminishes.

The Path through the Corporate Governance Debate

Where does this leave the Anglo-American economies? I have emphasized that the labor contract is fundamentally different from the other input supply contracts. Human labor is not de facto transferable. Even though the employees have the legal role as the outside suppliers of an input, in fact they are the firm as an organization of people. This leads to a remarkable schizophrenia. There are two firms. There is the firm in the eyes of the law whose members are the shareholders scattered far and wide and who typically trade into the stock simply as an investment without any intent or capacity to play a human role in the firm. This is the firm that has a "meeting" once a year. In contrast to this de jure firm, there is the de facto firm consisting of the people who work in the firm—who have a meeting every working day to actual produce the product and conduct the business of the firm.

Table 1 can be rephrased using these notions of the legal (de jure) company and the de facto company.

Table 2: Who's In and Who's Out of the Two Companies

	Inside de facto company	Outside de facto company
Inside legal company	Shareholders working in company	Absentee "members" (shareholders) of company
Outside legal company	Employees of company	Suppliers of things to company

Ordinary consciousness often reflects the de facto company. The employees are often thought of as the members of the organization. Consider the following from a perfectly standard managerial accounting textbook.

> An organization can be defined as a group of people united together for some common purpose. A bank providing financial services is an organization, as is a university providing educational services, and the General Electric Company producing appliances and other products. An organization consists of *people*, not physical assets. Thus, a bank building is not an organization; rather, the organization consists of the people who work in the bank and who are bound together for the common purpose of providing financial services to a community. [Garrison 1979, 2]

Garrison is talking entirely about the de facto company, not the company as it exists in law. This same redefinition of the firm now has roots in ordinary consciousness. Look at the books on the business shelves in your local book store. Find a book that uses some expression like "members" of the company. Chances are that the author, like Garrison above, is referring to the employees (including managers) of the firm, not the far-flung shareholders (who are the legal "members").

As public stock markets have spread shares far and wide, the idea that the stockholders are in any real sense the "owners" or "members" of a publicly traded company has become a sheer fantasy. There are two groups invested in keeping the fantasy alive. There are economists, lawyers, and assorted ideologues who will gladly adapt themselves to whatever is the ruling orthodoxy and vigorously defend it—until it changes. And there are the managers who have mightily profited from the eclipse of the shareholders. They have every interest in keeping the fantasy of "shareholders' capitalism" alive as the cover-story for the reality of managerial capitalism.

John Maynard Keynes saw that the public stock markets had caused the "euthanasia of the rentier, of the functionless investor" [Keynes 1936, 376] while Adolf Berle and Gardner Means described the result as the "separation of ownership and control" [Berle and Means 1932, 89]. But this delegitimization of the old "property" rationale for membership in the company has so far lead to more de facto managerialism than to a relegitimization of membership based on internal democracy.

Here is the entry point for another path to workplace democracy. The separation of ownership and control along with the unaccountability of managers and the resulting abuses has created the "corporate governance problem." Who is to be the new legitimate members of the company?

While a few cherish the hope for the resurrection of the "responsible private owner" in massive institutional investors run by portfolio-managing bureaucrats, others search the horizon for various "stakeholders" who together with the regulatory agencies and law courts might create a "new accountability." But they are searching for legitimacy in all the wrong places.

There already is a class of members who make up the firm, the de facto firm consisting of the people who work in it. And since the staff of a company are the de facto firm, they are the ones who could actually monitor the management of their company and address the corporate governance problem directly.

> The only cohesive, workable, and effective constituency within view is the corporation's work force. [Flynn 1973, 106]

And there already is a legitimacy norm for questions of governance, democracy. The notion of "shareholders' democracy" is not only impractical but is incoherent since the shareholders are not themselves under the authority of the managers.

> The analogy between state and corporation has been congenial to American lawmakers, legislative and judicial. The shareholders were the electorate, the directors the legislature, enacting general policies and committing them to the officers for execution. …
> Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation whose consent must be sought. [Chayes 1966, 39-40]

Many parties have their interests affected by a company and better judicial and regulatory means are needed to protect those legitimate outside interests. But those (de facto and de jure) outside parties are not governed or under the authority of company management. Only the de facto firm, the people working in a company are under the authority of the management within in the scope of the employment contract. Hence the path to democracy in the workplace is to redefine the de jure firm so that it matched the de facto firm (which would eliminate the off-diagonal elements in table 2 above). This was well put by the English conservative Lord Eustice Percy sixty years ago.

> 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 withdraw meaningless privilege from the imaginary one. [Percy 1944, 38; quoted in Goyder 1961, 57]

Although the corporate governance problem has been with us throughout the 20th century, the path to workplace democracy through the corporate governance question seems even more

appropriate today. It is a process of gradually reconstituting the corporation. All the work towards greater participation of workers in the affairs of their company points in this direction. In some respects, the psychological transformation is already there; the people who make up the de facto company are often seen as the real members of the company. What remains is finding ways to effect the legal transformation, the withdrawing of privilege from the imaginary company of shareholders and the legal recognition of the actual members of the company.

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