



*Rights Inalienable*  
*even with consent :*  
**A litmus test for classical liberalism**

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# Liberalism: Consent vs. Coercion

- Classical Liberalism: Basic framing question is: consent versus coercion.

Consent [democracy & employment]	Coercion
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- Past systems of autocracy (pictured as) not based on consent, e.g., divine right, patriarchy, or conquest; but
- Democracy based on consent.
- Past economic systems (pictured as) based on coercion (slavery and feudalism);
- Capitalism (i.e., employment contract) based on consent.
- Progress of society from status (coercion) to contract (Sir Henry Maine).

# Democratic capitalism based on consent

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- Milton Friedman: “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.”
  - Political democracy based on “consent of the governed”
  - Workplace governance based on voluntary labor contract.
  - The end of history!

# Dark Side of Liberal Contractarian Thought



- But sophisticated (e.g., not “divine right”) defenses of autocracy from Roman and medieval times were based on an explicit or implicit contract of alienation, *pactum subjectionis*, from people to ruler.
- And sophisticated defenses of slavery (not to mention feudalism) from Roman law onward were based on explicit or implicit self-sale contracts.

# Modern Liberal/Libertarian Thought




- Robert Nozick: free society should allow people to alienate right of self-government to a “dominant protective association.” “The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would.” (*Anarchy, State and Utopia*, p. 331)
- Modern Economics: “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.” (Economist Carl Christ in Congressional testimony)

# Modern society based on human rentals



- But self-sale is now outlawed in favor of self-rental contract of alienation.
  - \* “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.” [Paul Samuelson, *Economics*]
  - \* "The commodity that is traded in the labor market is labor services, or hours of labor. The corresponding price is the wage per hour. We can think of the wage per hour as the price at which the firm rents the services of a worker, or the rental rate for labor. We do not have asset prices in the labor market because workers cannot be bought or sold in modern societies; they can only be rented. (In a society with slavery, the asset price would be the price of a slave.)" [Fischer, Dornbusch, and Schmalensee 1988, *Economics*]
- Modern moral and legal philosophers (e.g., John Rawls, not to mention Nozick) have no inherent critique of the alienation contract to hire or rent persons—the employment contract that is the basis for our current economic system.
- They may fuss about the quality of the consent, coercive background conditions, exploitative wages, dangerous working conditions, etc.—but they have no inherent critique of renting other human beings. In fact, the voluntary renting of persons is not even raised as a moral problem to be discussed.

# Basic Thesis



Consent		Coercion
Delegation ( <i>concessio</i> ) [democracy]	Alienation ( <i>translatio</i> ) [employment]	

- Modern liberalism frames debate as being: Consent vs. Coercion (top row).
- But actual historical debates had autocracy and slavery defended on contractarian grounds with explicit or implicit alienation (*translatio*) contracts.
- Hence the democratic and anti-slavery movements developed theories of inalienable rights which were critiques of contracts of alienation (*translatio*) in favor of contracts of delegation (*concessio*).
- Thus the sophisticated historical debate was: *Concessio* vs. *Translatio* (2<sup>nd</sup> row).
- But the “problem” is that inalienable rights theory, once retrieved and understood in modern terms, also applies against the contract of alienation that is the basis of our current economic system, the self-rental or employment contract.

# History of Voluntary Slavery Contracts



- Bible: If at Jubilee, slave says “I will not go out from you”, slavery becomes permanent.
- Roman Law: Institutes of Justinian:
  - \* Explicit self-sale contract;
  - \* Plea-bargain death sentence (e.g., prisoner of war) into lifetime of servitude; or
  - \* Born of slave mother so years of food, clothing, and shelter need to be worked off over lifetime.
- Natural law philosophers, e.g., Grotius, Pufendorf, Suarez, were all quite explicit on alienability of liberty.



# John Locke: Father of Liberalism



- Locke only condemned slavery where master had right to kill slave. Civilized slavery contract was OK.
  - \* “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.” (2<sup>nd</sup> Treatise, §24)
- Locke also accepted the plea-bargain argument, e.g., for prisoners of war.
  - \* “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.” (2<sup>nd</sup> Treatise, §23)
- Locke also justified slavery in the Carolinas by seeing slaves as 9  
captives in wars in Africa who chose servitude over death.


# Rev. Samuel Seabury: Liberal Defender of Antebellum Slavery

- “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.” [*American Slavery Justified by the Law of Nature*, 1861]
- "'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. ' " [*American Slavery Justified by the Law of Nature*, 1861]

# History of Contracts of Subjection

- Roman law: Institutes of Justinian: “Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerning his *imperium*, have yielded up to him all their power and authority.”
- Medieval law: “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.” (Quentin Skinner)
- Thomas Hobbes: *Pactum subjectionis* is a “covenant of every man with every man, in such manner as if every man should say to every man, *I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that you give up your right to him and authorize all his actions in like manner.*” ( *Leviathan*, 1651)
- John Locke ignored Hobbes' consent-based theory and took Filmer as his foil (divine right & patriarchy) to establish the framing: democracy = govt based on consent of governed.
- Harvard's Robert Nozick: A free society would authorize voluntary alienation of one's right of self-determination to a “dominant protective association.”

# Charter Cities = Modern Non-democratic Govt accepted by Liberalism

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- "Charter cities" (Paul Romer) or "Free cities" newly built cities in developing country governed by a (benevolent liberal) foreign agency or a corporation.
  - "Seastead cities" = Waterworld version (Patri Friedman).
  - All residents consent to this by voluntarily moving to new city, and they are free to exit.
  - Non-democratic govt. based on consent of the governed = "*pactum subjectionis*" at municipal level.
  - Little or no critique of idea by right-libertarians or Austrian economists. i.e., modern classical liberals.

# Coverture Marriage Contract



- William Blackstone:

- \* "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, 1765]


- Now outlawed in advanced democracies but with vestiges of woman passing from coverture of father to husband:

- \* Father "giving away the bride" in wedding ceremony, and
  - \* Wife going from family name of father to that of husband.


# History of Liberalism's faux inalienable rights theory I

- John Locke again set the pattern for liberalism:
  - \* "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 refers to extreme Roman slavery where master had the right to kill the slave. But once it was a contract with rights on both sides, he did his pirouette to accept a civilized slavery contract.
  - \* "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]

# Faux inalienable rights theory II

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- William Blackstone, in his codification of English common law, stuck to Locke's choreography.
    - \* He rules out a slavery where "an absolute and unlimited power is given to the master over the life and fortune of the slave." Such a slave would be free "the instant he lands in England."
  - After such an edifying stand on high moral ground, Blackstone pirouettes by adding:
    - \* "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 1765, *Commentaries*, section on "Master and Servant"]

# Faux inalienable rights theory III

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- Montesquieu used same Lockean pattern and was echoed in our time by John Rawls.
    - \* "To sell one's freedom is so repugnant to all reason as can scarcely be supposed in any man. If liberty may be rated with respect to the buyer, it is beyond all price to the seller."  
[Montesquieu, *Spirit of the Laws* (1748), Vol. I, Bk. XV, Chap. II].
  - Rawls paraphrases this argument from Montesquieu and goes on to argue that in the original position, the
    - \* "grounds upon which the parties are moved to guarantee these liberties, together with the constraints of the reasonable, explain why the basic liberties are, so to speak, beyond all price to persons so conceived." [Rawls 1996, *Political Liberalism*, 366]



# Faux inalienable rights theory IV



- But Montesquieu goes on to note: "I mean slavery in a strict sense, as it formerly existed among the Romans, and exists at present in our colonies." [Vol. I, Bk. XV, Chap. II] Then Montesquieu performs his pirouette by noting that this would not exclude a civilized or "mild" form of the contract.
  - \* This is the true and rational origin of that mild law of slavery which obtains in some countries; and mild it ought to be, as founded on the free choice a man makes of a master, for his own benefit; which forms a mutual convention between two parties." [Vol. I, Bk. XV, Chap. V]
- And Rawls follows suit with his pirouette:
  - \* "This explanation of why the basic liberties are inalienable does not exclude the possibility that even in a well-ordered society some citizens may want to circumscribe or alienate one or more of their basic liberties." [Rawls 1996, *Political Liberalism*, 366-7]

# History of Inalienable Rights Theory I



- Stoics: Body can be enslaved but soul is “*sui juris*”—the “inner part cannot be delivered into bondage”.
- Martin Luther: In the Reformation, the inner part that cannot enslaved becomes *liberty of conscience*:
  - \* “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?” (*Concerning Secular Authority*, 1523)

# History of Inalienable Rights Theory II




- From liberty of conscience to inalienable rights:
  - \* Baruch Spinoza: "no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment, or be compelled so to do. For this reason government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty and a usurpation of the rights of subjects, to seek to prescribe what shall be accepted as true, or rejected as false, or what opinions should actuate men in their worship of God. All these questions fall within a man's natural right, which he cannot abdicate even with consent." (*Theologico-Political Treatise*, 1670)
  - \* Francis Hutcheson: "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." (*System of Moral Philosophy*, 1755)

# History of Inalienable Rights Theory III



- Thomas Jefferson: “Jefferson took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important.” [Garry Wills, *Inventing America*, 1979].
  - \* “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”
- “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.” [Staughton Lynd, *Intellectual Origins of American Radicalism*, 1969].

# Hegel's Inalienability Critique of Slavery Contract



“The reason I can alienate my property is that it is mine only in so far as I put my will into it. Hence I may abandon (*derelinquere*) as a *res nullius* anything that I have or yield it to the will of another and so into his possession, provided always that the thing in question is a thing external by nature. ... Therefore those goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible.” [*Philosophy of Right*, §65-66]

# General Form of Inalienability Theory



- Alienation contract is one that puts person in legal position of a non-person or a person of diminished capacity.
- But genuine consent of adult person with full capacity to an alienation contract cannot create a *de facto* non-person or *de facto* diminished capacity.
- Hence the Law accepts a surrogate performance as ‘fulfilling’ the contract: “Obey the master.”
- But then the **legal** rights of the person are legally reduced to those of a non-person or diminished person as long as the contract is ‘fulfilled’ by obeying the master.
- Thus alienation contract is legalized fraud on institutional scale.
- Since the contract to be a non-person or diminished person **cannot** actually be fulfilled, it is an impossible and inherently invalid contract.
- Hence any rights one has *qua person* are inalienable since one remains a person post-contract and thus still qualifies for the rights—so the alienation is null and void.

# Criminality: Understanding Inalienability



- Moment of Truth: Legal system admits the legal fiction behind alienative relation when legal ‘non-person’ commits a crime.
- Antebellum judge ruled 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.”
- Same for modern alienation relation where persons are rented:
  - \* “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.” (*Law of Master and Servant*, 1967)

# Political version: Alienation vs. Delegation

- Started with late Medieval and Renaissance distinction between contracts of alienation (*translatio*) and delegation (*concessio*).
  - \* "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]
  - \* "During the Middle Ages the question was much debated whether the *lex regia* effected an absolute alienation (*translatio*) of the legislative power to the Emperor, or was a revocable delegation (*cessio*). The champions of popular sovereignty at the end of this period, like Marsiglio of Padua in his *Defensor Pacis*, took the latter view." [Edward Corwin, 1955]
  - \* "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." [Quentin Skinner, 1978]



# Inalienability Critique of *Pactum Subjectionis*


- “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.” [Ernest Cassirer, *Myth of the State*, 1963]

# Application to Employment Contract




- Employer-employee or employment contract can be viewed as the rental version of the self-sale contract and as the workplace version of the *pactum subjectionis*.
- As rental contract, it is legal alienation of responsible human actions. Surrogate performance is “obey the employer” and resulting legal rights are same as for a rented instrument: no legal ownership of produced products and no legal liability for used-up inputs—only get the rental payments (wages or salaries) for the labor.
- Moment of truth is the criminous employee: The servant in work becomes the partner in crime—with full legal co-responsibility along with employer for the results of actions they perform together (“fruits of their labor”).

# The Workplace *Pactum Subjectionis*

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- As a workplace constitution, the collectively bargained employment contract is a contract of alienation, not delegation. The employer is not the delegate, representative, or trustee for the employees.
  - “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.” (Abram Chayes, 1966)
  - And contract with those who are governed, i.e., those who are under the authority of management, is the employment contract, a contract of alienation.

# Rethinking Corporations

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- Common view is that corporate owners right to manage workers is based on the ownership of the corporation—just as in medieval times, owner of land was lord over those living on the land.
  - But corporate ownership is only indirect ownership of corporate assets and thus right to make workers trespassers—not the right to manage them.
  - Management rights come solely from the employment contract, not directly from asset ownership.
  - This if the person-rental contract is invalid, then conventional corporations are only asset-holding shells whose only economic return can come from renting out assets to the producers in labor-managed firms such as worker cooperatives.
  - “Capitalist” production not based on “private ownership of means of production” but on the employment contract—and thus “capitalism” is a misnomer.

# Marx as Perfect Foil for “Capitalism” Debate



- On every major question, Marx accepted the capitalist misformulation of the question.
- “Capitalism”: A system based on property or on contract? Marx not only accepted but sponsored the idea of the system as based on “private ownership of the means of production.”
- Liberalism: Marx accepted the “consent vs. coercion” framing but argued that the system was “really” coercive.
- Sphere of analysis: Marx did not challenge capitalist claim of *quid pro quo* in labor contract, but hoped to prove “exploitation” in the sphere of production.
- Value theory: Marx accepted analysis of production using value theory and developed his own (rather hopeless) “labor theory of value” rather than the labor theory of property appropriation.

# Conclusions



- Liberalism’s basic question of “consent vs. coercion”.
- Retrieval of contractual defenses of slavery and autocracy.
- Real debate was between contracts of alienation (*translatio*) and contracts of delegation (*concessio*).
- Retrieval of inalienability theory of anti-slavery and democratic thinkers.
- Marx being wrong on all major questions—and thus was perfect foil for those defending the employment system.
- Inalienable rights theory implies abolition of employment (self-rental) contracts along with the already abolished self-sale contracts, political constitutions of subjection, and coverture marriage contracts.



# The End

Inalienable Rights: A Litmus Test for Liberal Theories of Justice. *Law and Philosophy*. 29 (5 September): 571-599, 2010.

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Along with the book “*Property and Contract in Economics: The Case for Economic Democracy*”