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Waiving rights in mandatory arbitration clauses: a challenge for liberalism[1]

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Abstract:

This presentation focuses on the case of Jamie Leigh Jones v. Halliburton et al. (USA, 2009). Jones' employment contract with Halliburton/KBR had a clause stipulating that, in the case of rape she was giving up her right to a tort trial. By signing, she accepted to resort to KBR's private arbitration system. Jones was subsequently raped during a mission in Iraq. Due to the Department of State's gross negligence, she was barred from having a criminal trial, and her waiver prevented her from initiating a tort trial.

Waiving rights poses a serious challenge to neutrality-committed liberalism (NCL), as it takes consent as the basis for legitimacy. NCL's is committed to protecting liberty, rejects paternalism and does not have a coherent response to waivers. The laissez-faire option logically entails toleration voluntary slavery in the name of freedom, which contradicts NCL's goal to promote freedom. Yet condemning voluntary slavery means being paternalist, thus limiting freedom in the name of freedom. In both cases, consent to waiving rights leads NCL to a contradiction. The Jones case thus reveals a blind spot for this trend of liberalism. In this paper, I want to argue that in order to rescue NCL from internal contradiction, non-classically liberal arguments are needed.

Jamie Leigh Jones was 19-years-old when her employer Halliburton / Kellogg, Brown & Root (KBR) sent her from the US to Iraq. She arrived in Bagdad on the 25th July 2005, where she was to work as a clerical employee. She was given accommodation in barracks with a majority of men, despite KBR's promise to put her in women-only accommodation. Two days after arriving to Iraq, she complained to her superiors that the men she was forced to live with were sexually harassing her. KBR refused to provide her with alternative housing and mocked her pleas - Jones contends she was advised to "go to the spa".

According to the testimony, she says she woke up on the fourth day severely bruised in her room. She felt groggy and immediately suspected that she had been drugged by fellow KBR employees who had invited her for a drink on the previous night. She concluded that she had been raped.[2] She went to the KBR medical personnel who provided her with a rape kit to collect evidence but was then locked in a room, and detained for 24 hours. She was later interrogated for several hours by the KBR human resource managers, who said she could either stay and 'get over it'; or return home without the guarantee of a job on return.

This was only the beginning of a five-year legal nightmare for Jones. When she tried to seek justice, she found out she had no legal recourse. In American law, when someone declares to have been raped, they are theoretically entitled to both a criminal and a tort trial. The criminal trial has to be initiated by the state. It allows the latter to try the accused and possibly incarcerate them if found guilty. A tort trial is a private action, initiated by the plaintiff, who can directly sue the accused in order to obtain the payment of damages.

First, Jones was denied the right to have a criminal trial because the American legal system failed her by being grossly negligent. As KBR was operating in Iraq, criminal charges would have had to be pressed by the Department of State and the Department of Justice. Crimes against American citizens in Iraq fell under the Military Extraterritorial Jurisdiction Act and the special maritime and territorial jurisdiction. Jones should have been given the possibility of having a criminal trial since charges had been pressed at the time. However, the Department of State seems to have been lax concerning potential crimes committed by private contractors in Iraq such as KBR, although the US Government was employing them. An investigation started in the Jones case, but because of gross negligence, the forensic evidence was lost. As a consequence, there was not enough substantial evidence for her to have a trial. Therefore,

[2] "Jones et al. v. Halliburton Company et al." Justia. Available at:http://docs.justia.com/cases/federal/district-courts/texas/txedce/1:2007cv00295/103217/5/

because she was an American citizen working for a contractor during the Iraq war, she did not get the chance to see the men she accused face criminal charges.

Second, Jones was unable to have a tort trial, because she had signed a waiver. When signing her employment contract with KBR, Jones agreed to a clause stating the following "all personal injury claim[s] arising in the workplace (…) against other parent or affiliate of Employer, must be submitted to binding arbitration instead of to the court system." Jones' initials appeared at the bottom of this paragraph. This is called a mandatory arbitration clause or a waiver. It means that by signing it, Jones was waiving her right to any reparations against KBR or its employees. The fact that the term 'personal injury' was a euphemism that included sexual harassment and rape may seem odd, but it is in fact the legal category rape falls under.

In any case, when she signed her employment contract, Jones consented to the fact that, if she was ever raped by a colleague, she would not be able to take her rapist to a tort court, and would have to resort to KBR's private arbitration system of justice. By signing this clause, she waived her tort rights but did not waive her criminal right to sue her assailants. Therefore, in theory, she should have had a trial, but in practice, because of the State Department's inaptitude on the one hand, and because of the tort waiver on the other hand, Jones was denied the right to have a trial. Hence Jones had no legal protection in case of rape. She could not get her assailants to be punished and she could not get reparations for costly medical bills she had to pay after her attack – she could get justice.

Jones was combative – she returned to the US and filed a complaint to get the right to sue her alleged assailants. This took her five years during which she campaigned to have her day in court. American senator Al Franken was touched by her case. In 2009, he proposed an amendment according to which the Pentagon should stop hiring companies, like KBR, that make their employees sign similar waivers. There was strong opposition to the amendment; many senators argued it posed a threat to free enterprise, but after making significant compromises the Senate finally approved it.[3] At the same time, a Texas district court eventually granted Jones the right to sue, by finding that this alleged rape was not related to her workplace.[4] The judge did not question the waiver *per se*, it was only thanks to a legal loophole that Jones eventually did have her day in court in 2011. This legal victory is exceptional as very few cases of waivers end up going to court, which is why the Jones case is one of the few that

[3] The ban would only apply to situations in which national security was at stake and to contracts worth over a million dollars.
[4] Jones v. Halliburton Co., United States Court of Appeals for the Fifth Circuit, 583 F.3d 228 (5th Cir. 2009)

has come to public's attention.[5]

Classical liberal thought such as Locke's, understands consent as the *sine qua non* criterion for legitimacy, which then presumes minimal states intervention in matters concerning individual choice. Liberalism is a contested term, but it can be minimally defined as a theory committed to protecting individual liberty, equality of rights and the emphasis on consent to authority functions as a delegitimisation of coercion.[6] The specific trend of liberalism that comes into play with the Jones case is one that refuses to invalidate waivers because they are based on presumed consent. We can identify this trend as the neutrality-committed libertarianism, which is characterised by a strong rejection of paternalism – state coercion justified in benevolent terms. Paternalists may believe they are helping individuals emancipate themselves by forbidding them to do certain things they are inclined to do. An example of this is the French ban of religious symbols and in particular of headscarves in schools. One of the arguments put forward was the liberation of women from oppressive patriarchal norms – the fact that women could be consent to wearing headscarves was simply besides the point, as advocates of this law believed them to be coerced into doing so. Neutrality-committed liberals see this form of state intervention as a serious threat to individual freedom and a threat to equality. They argue that consent should remain the sole basis for legitimacy if basic individual rights are to be protected, if minorities and non-conformists are to be treated as equal members of a political community.

Faced with an individual who is using consent to waive her tort rights, neutrality-committed liberalism (NCL) face two choices. The most obvious position is to argue for *laissez-faire,* and refuse to accept anything but consent as proof of legitimacy. But if we push this argument to its extreme, it would lead to accepting waiving all rights. In other terms, in a *reductio ad absurdum,* to tolerating voluntary slavery in the name of freedom, because NCL does not have the conceptual tools to administer some dose of state intervention. This is the case of libertarian/liberal Robert Nozick who finds himself forced to accept this: *"[the] question (…) is whether a free system will allow [an individual] to sell himself into slavery. I believe that it would. (…) any individual may contract into any particular constraints over*

[5] Unfortunately for Jones, the defence portrayed her as a fame-hungry malicious liar. Not only did she loose the case because the Court found the sexual intercourse to be consensual, but she also had to pay KBR $145,000 in legal costs. Susanna Kim, "Jamie Leigh Jones Ordered To Pay $145,000 In Court Costs After Failed Rape Claim", Sept. 30, 2011, Available at: http://Abcnews.Go.Com/Business/Jamie-Leigh-Jones-Ordered-Pay-145000-Contractor-Kbr/Story?Id=14635936

[6] Maurice Cranston, 'Liberalism' in *The Encyclopaedia of Philosophy*, Paul Edwards (ed.), New York: Macmillan & the Free Press, 1967, p. 459.

himself "[7]. But this can be understood as contradicting NCL's goal to promote freedom – the concept of a 'free and autonomous slave' is an oxymoron. Many liberals would agree that allowing voluntary slavery, in other words defining consent as the sole basis for legitimacy, leads to absurd consequences, as the voluntary slave would be treated unequally and deprived of any right in her political community. Thus, the other path is for NCL to exclude the option of voluntary slavery, but this necessarily involves being paternalist in some sense, and this entails limiting individual freedom in the name of freedom. This seems to contradict the goal of NCL and leaves the possibility for abuse of state authority, which is likely to make anyone committed to neutrality nervous.

Thus, in both cases, consent to waiving rights leads NCL to very real difficulties. The Jones case reveals the existence of a blind spot for NCL. In this paper, I want to argue that NCL not only lacks the necessary conceptual tools to deal with the Jones case, but that it is precisely the nature of the NCL conceptual framework that creates this legal and moral dilemma. I wish to show that in order to rescue NCL from internal contradiction, we need to introduce non-classically liberal arguments.

The Jones case questions two central doctrines in liberal thought, which I shall study in turn. First, I will look at the doctrine of consent as the expression of individual autonomy. It can be argued that Jones' consent was neither informed nor free, yet the Court did not question her waiver. As we shall see, this leads to a problem – the consent standards are too low for NCL to be able to give a coherent response to the Jones case. This will lead us to use the ends / means distinction as a way to identify when waiving rights is problematic. Second, we will examine the inalienability doctrine according to which fundamental rights are not alienable or waiveable. We shall see that liberal theory also leads to a contradiction there because of its understanding of alienability, which is why we will need to fish arguments out of non classical liberalism. We will call upon to Raz' rights theory to resolve this paradox.

I.

In the contractarian tradition, consent is morally significant because it guarantees freedom. It is the central criterion for the state's legitimacy. When authority is based on consent, people have power over the state. Simply put; in Locke for example, consent is the antidote against tyranny and oppression. Reversely, with the consent of the people as a political

7 Robert Nozick, *Anarchy, State and Utopia*, Oxford UK: Blackwell, 1974, p 331.

fiction, the state no longer needs to impose its yoke by force, since individuals have already given their permission to be governed. In contract law, consent constitutes the moral basis for the validity of contracts. For a contract to be valid, contracting parties must be rational adults. Their consent must be free and informed. The doctrine of consent is based on the idea that consent expresses individual autonomy, which I understand minimally as self-determination. This doctrine implies that invalidating consent constitutes an infringement on autonomy.

However, in practice, it is very common for traditionally liberal states, such as the US, to invalidate certain contracts that are free and informed.[8] This is for example the case of organ sale, where states usually invoke moral reasons to argue that individual consent is not a sufficient condition to authorise contracting. In the Jones case, the law is absolutely not paternalistic towards her: it lets her deprive herself of the right to claim reparations she could be entitled to. It seems that the liberal discourse justifying arbitration clauses take consent at face value, but in fact, Jones' consent can be questioned[9].

Although she is a rational and mentally competent adult, Jones had no legal training when she signed her contract with KBR. She claimed she did not understand what the waiver implied at all. The court nevertheless did not find her ignorance to invalidate her waiver. How can it be said that Jones' consent was *informed* if she did not comprehend the terms of the waiver?

However, in practice, a simple signature is enough to ascertain consent. American law does not hold that lack of information is a sufficient reason to invalidate consent. It is irrelevant whether people understand or read the small print; even if evidence shows that people with no legal background tend not to read small print, and do not necessarily understand legal terms.[10] According to one commentator, for arbitration purposes, "the signature's 'blanket assent' is good enough."[11] The American Supreme Court's position is that "while these rights must be waived *voluntarily*, they need not be waived *knowingly.*"[12]

This is quite a surprising distinction to be making. Informed consent usually signifies the very opposite: the signatory party must understand what they agreeing to, because the entire

[8] I understand the US as a predominantly liberal country with liberal institutions, even though it is obviously also the product of several other intellectual and religious traditions.
[9] Here I am not addressing Jones' consent to sex, even though this is a rape case. It is interesting to note that this case portrays a double issue of consent but my interest lies in her consent to the waiver
[10] See David S. Schwartz, "Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration", in *Wis. L. Rev.*, n° 33, 1997.
[11] Stephen Ware, "Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights", In *Law and Contemporary Problems*, Vol: 67, Winter/Spring 2004, p. 171. (emphasis mine).
[12] Edward Rubin, "Toward A General Theory Of Waiver", in *UCLA Law Review*, n° 28, February 1981, p. 496.

point is to avoid fraud and thus to protect autonomy. It therefore seems that the Court's understanding of accepting something 'voluntarily and not knowingly' seems to be lowering the threshold of consent too low for it not to contradict itself.

Actually, this distinction may not be as counterintuitive as it sounds. There are several justifications for arguing that a signature should be sufficient proof of consent and that the 'voluntarily but not knowingly' distinction holds. First, it is impossible to prove *ex post* that a person did or did not understand a clause. We cannot know the mental state they were in. The only evidence available is what the person claims afterwards.[13] Second, it would be extremely costly and impractical to perform a cognitive test before each transaction to ensure all parties grasp the terms of a contract. A third argument would be that it is the signatory party's responsibility to make sure that they understand what they are signing. Jones cannot be said to be a victim of a waiver-fraud since she wilfully signed it.

Here one could retort that, in any case, the main issue with the Jones case is not whether her consent was *informed* but whether it was *free*. This means evaluating her degree of wilfulness. To do this, we first need to look at the historical evolution of rights and waivers in the US, to see whether Jones had a choice in accepting the waiver. Evidence indicates that people waive rights on a daily basis, for example when obtaining credit cards, phone contracts, etc. In fact, waiving has become so common that a study published in 2004 shows that in Los Angeles, over a third of an average consumer's transactions were covered by arbitration clauses.[14]

As Katherine Stone explains, the waiver phenomenon developed gradually. In the 1930s, in American workers started to organise themselves in unions, which gave them consequential bargaining power[15]. Workers were later allowed to strike collective bargains with employers, which lessened unions' influence. When the latter became powerless, workers still enjoyed a vast amount of rights, such as the right not to be discriminated against, protection for whistle-blowers, the right to strike, protection from sexual harassment, etc. However, the lawsuit culture in the US enticed a general fear of being sued, and companies argued that

[13] There is precisely the same difficulty in rape trials: in the absence of material evidence, it is virtually impossible to prove or disprove consent. Trials then focus on the general character of the alleged rape victim, and very often Courts find that they were not beyond reproach, which is what happened to Jones: her entire life was exposed and questioned. This is why, as Carol Pateman argues, rape victims rarely obtain justice because "consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission". Carol Pateman, "Women and Consent" in *Political Theory*, Vol. 8, n° 2, May 1980, p. 150.

[14] Linda J. Demaine & Deborah R. Hensler, " 'Volunteering' to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience", in *Law & Contemporary Problems*, Winter/Spring 2004, p. 55.

[15] Katherine Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s", in *Denver University Law Review*, 73, 1996, p. 1017-50.

workers' rights were an unnecessary financial burden. The culmination of this process was the notorious McDonalds' 'hot coffee' case, in which an elderly woman won over $2,000,000 in damages for getting burnt from hot coffee.[16] The case became the symbol of so-called frivolous lawsuits and lead to a campaign in favour of waivers, so that companies would be protected from paying high reparations in tort trials.[17]

Today America has a large private arbitration system.[18] By signing waivers, employees agree to take tort claims to companies' private arbitration courts, instead of suing the employer in a state court. Waivers are taken to be convenient means of unclogging the costly and ineffective American justice system: as arbitration spreads, cases are solved faster and fewer disputes are likely to be treated by the state[19]. Arbitration is also designed to protect businesses from costly lawsuits, and in this respect, it is particularly effective since arbitration committees tend not to find the employer at fault at all, probably because arbitration committees are set up and paid for by the company they are supposed to be judging. Arbitrators may decide on their own consciences and a court of law may not question their conclusions. There is no precedent, no transparency, proceedings are held behind close doors, information relative to complaints cannot be publicly disclosed.

Only a small minority of American courts have found arbitration clauses to be unconscionable, and have invalided them on these grounds. Since there are no more Unions, workers such as Jones are isolated and have no bargaining power. Emphasising the notion of consent and voluntariness and making it the sole basis for legitimacy singles out individuals and leaves them too weak to disagree, which is why the legal term is 'mandatory arbitration'.

Then if waivers are becoming mandatory, does this mean that one cannot freely consent to them? Aristotle explains that actions actively performed by a rational agent are voluntary even in the face of coercion. The example he gives to distinguish voluntary and involuntary actions is the case of people throwing cargo overboard in storms at sea. He argues that: "without qualification, no one jettisons cargo *voluntarily*; but for his own safety and that of others any sensible person will do it".[20] There is no doubt that, *prima facie*, the ship's

[16] Liebeck S Vs. Mcdonalds et al., case D-202-Cv-199302419, filed 03/12/1993, Albuquerque District.
[17] The two cases are linked, as Jones appeared in the documentary "Hot Coffee", released in 2011 at the Sundance film festival. According to filmmaker Susan Saladoff, the Liebeck case was publicized to instigate tort reform and more mandatory arbitration.
[18] See Michael Peabody, "Eliminating the Mandatory Trade-off: Should Employees Have the Right to Choose Arbitration?" in *Pepperdine Dispute Resolution Law Journal*, Vol. 1: Issue 1, Article 8, 2012.
[19] This is another reason why the Jones case is exceptional since she did manage to eventually get her day in court.
[20] Aristotle, *Nichomachean Ethics*, trans. David Ross, Oxford: Oxford University Press, 1925. Chapter III, from 1110 a 5, p. 48. (emphasis mine)

commander would not throw the cargo overboard – he does so because he thinks he is in danger. Aristotle concludes that although the situation is complex, if we have to decide on the nature of the commander's actions, then they are more voluntary than not, "since they are worthy of choice."[21] The goods would not be thrown overboard without his intervention – he is consequently an agent. This entails that he is both morally and legally responsible for his choice.

This is coherent with our modern understanding of responsibility since the Nuremberg principles – saying one was simply obeying orders is not a good enough excuse to escape legal responsibility.[22] In other words, coercion does not preclude legal responsibility. People are held accountable for their actions, even if they find themselves in unfortunate circumstances in which they were 'forced' to act in a way that they would rather not *prima facie*. Thus, even if Jones did not understand the contract, we must hold that her accepting to sign it must count for something - arguing that it did not would be tantamount to stripping her from her responsibility.

We can even go further here and challenge the idea that she was in fact coerced. Jones contacted KBR and applied for a position with their company. One could argue here that it would be hard pressed to say that she was therefore coerced by their job-offer. However, we could retort that if she was faced with the alternative of unemployment and debt, she was arguably 'forced' to accept the waiver. At the time of her accepting a clerical position with KBR, Jones had very little skills and had to accept the bad hand KBR was dealing her. Since she found herself in a dead-end situation, her consent to work with KBR and accept the waiver would not express her autonomous judgement. As Michael Peabody argues "the 'voluntary' submission to arbitration may in fact be more of a 'take it or leave it' coercion of an adhesive contract."[23]

David Zimmerman thinks it is a mistake to hold that wage offers are coercive. For him, neither poverty nor the lack of reasonable options are coercive. Financial offers are only coercive if A, (the person who is offering) has deliberately put the other party B, in a position in which he has no choice.[24] Zimmerman gives the example of A kidnapping B and putting him on an island, then offering B the choice to perform hazardous work in his factory or starve. This is

[21] Ibid, 1110 b, p. 49.
[22] "Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." In Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950.
[23] Michael Peabody, *op.cit.*, p. 118.
[24] David Zimmerman, "Coercive Wage Offers", in *Philosophy and Public Affairs*, vol. 10, 1981, p. 133.

a case of coercion because A has created the lack of alternatives that B is facing. On the other hand, if C meets B on the same island and offers him the same sort of work in a different factory, his offer is not coercive because C has not created the situation in which B is trapped. Therefore, KBR's offer would not be coercive, as it did not create the situation of lack of choice Jones possibly found herself to be in. This argument is not entirely convincing, because as Joel Feinberg argues, regardless of the causes of B's weak bargaining position, "once he is in the vulnerable circumstances, C's offer (…) has all the appearance of being coercive".[25] From B's point of view, he has no choice, regardless of who put him in this situation.

We can accept this and at the same time ask why would it necessarily be so wrong if Jones was in fact coerced. For Alan Wertheimer, it is impossible to draw the line between cases in which coercion is morally wrong from cases in which it is benign. This makes it a redundant concept: "we do not say, for example, that a wage contract is non-consensual just because [someone] has to work and had no better alternatives."[26] Accepting that having no other choice invalidates consent would imply that most employment contracts would be void, as most people would rather *not* work and be paid for doing nothing, (according to Wertheimer). Therefore, we should not invalidate contracts on the basis that people who sign them have no better alternatives. It would certainly not be a sufficient reason to doubt their consent. Thus coercion is not necessarily problematic *per se*.

The quandary arises from what the employer might be tempted do, knowing that he is in a dominating position. In *Capital*, Marx explains that because of market forces workers are not forced to work for a particular employer, but no matter whom they work for, the working conditions are the same. Marx says that if workers do negotiate their working hours with their employers, the former will necessarily consent to working extremely long hours.[27] And thus the author concludes the state needs to step in, and impose restrictions on working hours to protect workers from the quasi-enslavement they would otherwise be forced to consent to.

From this, we can conclude that liberals have framed consent in such a way that it can always be verified. It is defined so minimally that Jones can be said to have been consenting, even if her consent was neither totally informed nor free. This does not mean that her consent is meaningless. As we saw, consent is the mark of responsibility so we cannot argue that her acceptance of the contract holds no moral weight. Consent *is* important. Yet the reason why

[25] Joel Feinberg, *The Moral Limits of the Criminal Law. Vol. 3: Harm to Self*, Oxford, UK: Oxford University Press, 1986, p. 244.
[26] Alan Wertheimer, *Exploitation*, Princeton: Princeton University Press, 1999, p. 52.
[27] Karl Marx, *Capital*, I, Section iii, Chapter X.

liberals value consent in the first place is that it is supposed to be the expression of autonomy – in the Jones case, it would be hard pressed to say that accepting the waiver expresses her autonomy.

In order to clarify, we need to take into consideration the motive for consent, which NC-liberals rarely do. Let us consider the case of Joe, who is deeply religious person committed to his faith and wants to become a novice in a very strict religious order. To be a member of this religious community, he has to sign a contract saying that he consents to live by the rules of the order. The way his time is spent is fixed by stringent and precise rules; he has very little decision to make, the way he dresses, eats, speaks, the people he sees, how he may interact with them, everything follows austere guidelines. He follows them to the letter and therefore his freedom of movement, of speech, of thought perhaps, all become limited in some sense. We can say that in way, Jones and Joe both consent to waive some of their rights.

But there are three central differences here; the most obvious being that Joe's motives and his agreement to abandon some freedoms have to do with his faith, whilst Jones' acceptance of her contract have nothing to do with her beliefs, but simply reveal her need of a job. So in a sense, hers concerns the public sphere or the market, when Joe's choice is more intimate. Second, as Joe's order is based on voluntary association, Joe is not bound by state law to stay: he can exit the agreement whenever he decides that he does not want to live in this community anymore, whereas Jones' waiver is enforced by the law. The third and most crucial point is that Joe consents to waiving his rights because that is *precisely* what he wants *prima facie*; and consequently his consent is indeed the expression of his autonomous will. It is *x* that he wants (waiving). There are many ways we could try explain his goal, yet we do not want to focus on psychological explanations here. All we can say is that restraint of freedom is precisely what he desires. For Jones though, she accepts to waive a right in order to gain employment. Her waiver is only an unsavoury means to an end; thus her consent cannot be equated with her autonomous will. *Prima facie*, she does not want *y.*

Hence, forbidding Jones to waive a right is not analogous to disallowing Joe's voluntary submission. In the first case, Jones is prevented from *y* (not her goal), when in the second case; Joe is prevented from *x* (his goal). One could argue on this basis, that banning waivers would not infringe on Jones' autonomy because she could find other means to get to *x*: by finding a job that does not require *y*. But sat the legislators find that Joe's community is too strict and inhumane, and that more lenient arrangements need to be made for its members' own good. This would constitute a threat to Joe's autonomy because it would then be impossible for him to

get to *x*. This simple distinction between ends / means may allow liberals to distinguish between cases and identify when consent is really the expression of autonomy. It also enables liberals to argue that waiving rights may not always be problematic *per se*. This does not imply however that Jones' consent to *y* should not be held valid, for she *did* consent. This distinction only suggests that using a scale of consent based on ends / means may yield less counterintuitive results than what we have seen in part I.

II.

This takes us to the second part of our analysis, which focuses on the liberal inalienability doctrine. In American law, the rights to life, liberty and the pursuit of happiness are inalienable.[28] According to the natural right inalienability doctrine, fundamental rights cannot be sold, transferred, bought or waived, etc.: they cannot be separated from their holder.[29] The reason for this limitation on certain rights is that they are understood to be too important for ownership to be transferred. Individuals possess them *qua* human beings. As Rousseau agues in the *Social Contract,* "to renounce one's liberty is to renounce to one's essence as a human being, the rights and also duties of humanity."[30] Denying someone their rights or allowing them to be treated as if they did not have any would then amount to denying their humanity.

Margaret Radin explains that liberal doctrine tends to see rights as inalienable, except property rights, which are fully alienable. According to her, liberal thought has been replaced by a predominant economic rhetoric that tends to view all rights as alienable. When liberalism had no qualms about accepting some dose of paternalism and making certain things beyond the scope of consent, such as waiving rights; this economic doctrine "has invited us to view all inalienabilities as problematic".[31] Radin is right as there seems to be growing suspicion and questioning of inalienability,[32] since the doctrine of human rights, which was one of the last attempts to found rights in natural law. For Radin, "in universal market rhetoric - the discourse

[28] Stephen Ware, *op.cit.*, p. 167.
[29] For a more complete definition see Margaret Radin, "Market inalienability", in *Harvard Law Review*, June 1987, Vol. 100, n°8, p. 1853.
[30] Jean-Jacques Rousseau, "The Social Contract" in *The Social Contract and the First and Second Discourses*, ed. Susan Dunn, Yale University Press, 2002, p. 159.
[31] Margaret Radin, *op.cit.*, p. 1851.
[32] As Radin argues, there is a continuum of opinions on commodities, ranging from Marx who argues in favour of inalienability, to legal thinker Richard Posner who advocates for everything to be alienable, on the basis of market efficiency. For example, he famously defended a market for babies in the late 70s. Elisabeth Landes & Richard Posner, "The Economics of the Baby Shortage", in *Journal of Legal Studies*, vol 7, n°2, June 1978, p. 323-348.

of complete commodification - everything that is desired or valued is conceived of and spoken of as a 'good'." [33]

This rhetoric is paradoxically liberal, in a Lockean sense. Locke' contract theory is based on an exception, on a foundational waiver: the individual in the state of nature relinquishing his natural rights in order to benefit from state protection. The possibility of waiving rights is thus the very premise of the entire liberal enterprise. It is therefore in no position to hold rights to be inalienable. Rousseau claims that the goal of the contractarian discourse was to convince men to accept domination: "all gladly offered their necks to the yoke, thinking they were securing their liberty (…) even the soberest judged it requisite to sacrifice one part of their liberty to insure the rest, as a wounded man has his arm cut off to save the rest of his body."[34] In the classic contractarian fiction, rights were in this sense *designed* to be waived.

The problem is, as we have seen before, that if rights are alienable then voluntary slavery is a morally and legally legitimate option. Voluntary slavery is something philosophers have always identified as an issue[35]. It is a particularly challenging for liberals committed to state neutrality because they risk contradiction. For Mill, individuals are autonomous and their choices should be respected as long as they do not harm anyone but themselves in the process, which is the 'harm principle'. Mill argues that voluntary slavery is an "extreme case" because it pushes the demand for autonomy to its very limits. Slavery should be forbidden because "by selling himself for a slave, he abdicates his liberty, he foregoes any future use of it, beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself (…) it is not freedom, to be allowed to alienate his freedom*"*.[36] Therefore, for Mill "the principle of freedom cannot require that he should be free not to be free",[37] and claiming the opposite is contradictory. Yet Mill does not apply this reasoning to other activities that could be argued to limit freedom such as accepting to work as a servant, although one could argue that the servant would perform the exact same day-to-day task as the domestic slave, except that he is getting a salary for his work. Mill's diagnostic is

[33] Margaret Radin, *op. cit.*, p.1861.
[34] Jean-Jacques Rousseau, "The Discourse on the Origins and Foundations of Inequality Among Mankind" in *The Social Contract and the First and Second Discourses*, ed. Susan Dunn, Yale University Press, 2002, p. 125.
[35] For example in Locke, slavery is impermissible because of self-ownership. John Locke, *Two Treatises of Government*, ed. Peter Laslett, Cambridge, UK: Cambridge University Press, 1988, p. 287. For Hobbes, the war captive's consent to slavery is valid. Thomas Hobbes, *Leviathan*, ed. Richard Tuck, Cambridge, UK: Cambridge University Press, 2001, p. 141.
[36] John Stuart Mill, *On Liberty*, New York: Prometheus Books, 1986, p. 116.
[37] *Idem*.

different; for him what characterises slavery is its relation to time, since it is an irreversible commitment over an unlimited period. The servant can quit at any point, just like the example we mentioned above of Joe. On the contrary, the slave is stuck because he cannot exit slavery. Therefore, from a Millian perspective, in the case of slavery, the state has no choice but to be paternalist.[38] But Mill's conclusions have been accused of being self-contradictory because the rest of his work is staunchly anti-paternalistic, so this exception seems difficult to justify[39]. Mill advocates for human experiments and freedom to act according to one's belief without having to fear the moral prejudice of others. One could argue that voluntary slavery is a preference that should be respected in a perfectly fair and open-minded society, since it does not have any directly identifiable negative consequences on others – it can be defined as purely self-regarding harm. It thus seems that there can be no convincing response to the challenge of voluntary slavery when one is committed to respecting state neutrality in the name of individual freedom.

In order to escape this difficulty, another perspective on rights is needed, and for this we need to abandon the question of alienability and classical liberalism. Joseph Raz's caveat on rights is most useful here. He argues that right-based moral theories are fundamentally flawed because rights are not self-appointed entities. If rights do exist, then they must necessarily be linked to correlative duties[40]. This is an essential and yet simple distinction to be making. By framing rights as necessarily correlated to duties, the question of alienability becomes irrelevant. You may have a right to a fair trial, thus someone has a duty to give you a fair trial, regardless of what you may consent to. Without Raz's caveat, the concept of rights leads to a contradiction. If we rephrase the Jones case in Razian terms, the problem is therefore not that she may or may not have consented to waiving her right, but that the American state did not fulfil its duty towards her, by failing to give her a criminal and tort trial. Moreover, we can say that KBR also failed Jones because even if someone would consent to selling their rights, there would exist a duty not to buy them.

[38] Some libertarians have arguments to say that on the contrary, if we take the existence of rights and freedoms seriously, then consistency entails that rights should be alienable. As Robert Nozick argues in *Anarchy State and Utopia*, if individual freedom is taken seriously people have to be free to waive rights and accept voluntary slavery. Interestingly, Nozick does not believe that waiving rights is incompatible with democracy. If people voluntary waive all of their rights and become slaves, as a result of a long process, everyone would end up owning everyone else. This system of communal ownership would ultimately become a democratic state. Nozick is not arguing that this is what would or should happen if rights are allowed to be waived, but simply that democracy and voluntary slavery may not so opposed in nature.

[39] On this question, see for example: Richard Arneson, "Mill versus Paternalism" in *Ethics*, vol. 90, n° 4, July 1980, p. 471-72; Joel Feinberg, *op. cit.*, p. 74-79;

[40] Joseph Raz, "Right-Based Moralities", in *Theories of Rights*, ed. Jeremy Waldron, Oxford: Oxford University Press, 1984, p. 195.

Additionally, for Raz, the existence of a right must necessarily be tied to an interest – Jones may be said to have a right to a fair trial because her well being is a sufficient reason to hold someone responsible for the duty of providing her with justice. We could go even further and argue that American society as a whole has an interest in upholding this duty, since waivers threaten the democratic nature of society by negatively affecting the equality of rights of its citizens. On the American job market, women with more economic opportunities do not need to waive tort rights, while those with fewer options, like Jones, do. In other words, it means that rape is a less serious crime for less privileged women because they do not benefit from full deterrence, which is the combination of the threat of imprisonment (criminal trial) and paying damages (tort trial). Personal safety is a strong if not fundamental human interest. Because of the waivers, companies go unchecked and can do as they please without any concern for employee welfare. KBR's arbitration clauses for employees to waive rights in case of rape was an indicator that there was a risk for employees to be raped during their contract with this firm. In outlining his support for the Franken Amendment, Senator Leahy argued "sadly more and more companies use mandatory arbitration to sweep cases of sexual assault and harassment under the rug. They prefer it precisely because it's all done behind closed doors."[41] This allows us to conclude that liberalism, if left untouched will lead to contradicting its own principles, such as equality of rights, which is why it needs to be complemented by the Razian caveat.

We set out to understand how liberalism deals with the contradiction posed by consent to waiving rights. This first lead us to realise that liberals intentionally designed consent in a minimal fashion, in order to validate political authority. This is why the court can understand Jones' consent to be valid, even though she was probably not informed and even if her consent was quite likely coerced. This counter-intuitive understanding of consent still has some weight though because it is necessary in establishing agency and legal responsibility. We concluded our first part by suggesting a simple distinction between means and ends, which allows us to distinguish between mandatory arbitration and religious restrictions. We suggested that it would possible to ban waivers without infringing on individual autonomy, if waivers are perceived by the agent as costs to attain their end.

In our second part, we looked at the inalienability doctrine and voluntary slavery. We also saw here that it was liberalism's own framing of inalienability that created an internal contradiction. Because liberal theory designed the concept of rights as waiveable, liberals find

[41] Senator Al Franken on his personal website, available at: http://www.Franken.Senate.Gov/?P=Issue&Id=211

it impossible to justify the impermissibility of voluntary slavery. We concluded by accepting Raz's caveat according to which rights must always be linked to correlative duties. This brought us to say that the US government and KBR failed Jones: the state had a duty to grant her fair criminal and tort trials, and KBR had a duty not to buy her tort right. Moreover, we showed that because Raz demands that rights correspond to strong interests, it could be argued that American society as a whole had an interest in having justice enforced regardless of consent, since waivers violate the liberal notion of equality of rights.