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A LIBERTARIAN THEORY OF CONTRACT: TITLE TRANSFER, BINDING PROMISES, AND INALIENABILITY

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INTRODUCTION

Property and Contract

The theory of property specifies how to determine which individuals own—have the right to control—particular scarce resources. By having a just, objective rule for allocating control of scarce resources to particular owners, resource use conflicts may be reduced. Nonowners can simply refrain from invading the borders of the property—that is, avoid using the property without the owner's consent.

Under the libertarian approach, the first to use an *unowned* scarce resource—the homesteader—becomes its owner.[1] The first possessor has better title in the property than any possible challenger, who is always a latecomer.[2] But property rights are not only acquired, they

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[1]See John Locke, *Two Treatises on Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1970), esp. book 2, chap. 5. An excellent background to the material covered here, see Murray N. Rothbard, "Property Rights and the Theory of Contracts," in *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 133–48; and Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1 (Winter 1977), pp. 3–13.

[2]The owner of a given resource is said to have a title to the property, i.e., is entitled to use it. On the function of property rights, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer, 1989), chaps. 1, 2,

may also be lost or transferred to others. For example, the owner may abandon the property so that it once more becomes unowned and available for appropriation by a new homesteader. Likewise, the owner may give or sell the property to another. The owner might also commit a crime or tort, thereby forfeiting his rights to the property, in favor of the victim.

Property theory concerns not only the initial acquisition of property rights but also their loss and transfer. Tort and punishment theory, as subsets of general property theory, describe how acts of aggression or negligence change rights to scarce resources.[3] Contract theory specifies how rights are transferred as the result of voluntary agreement between the owner and others. While some voluntary agreements are enforceable, others are not. The question for libertarians concerns when and why agreements are legally enforceable. In other words, how are rights voluntarily transferred?

Overview of Contract

The institution of contract is widespread. Contracts are used in a variety of situations, from simple barter to complex exchanges such as loans and employment contracts. A contract is a relation between two or more parties which includes legally enforceable obligations between them. Contracts result from agreement between parties to exchange promises or performance, e.g., one party promises to do (or not do) something, or to give (or not give) some thing to the other party.

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and 7, esp. pp. 5–6 and 8–18, discussing notions of scarcity, aggression, norms, property, and justification. See also the discussion of Hoppe's work on this topic in N. Stephan Kinsella, "Defending Argumentation Ethics: Reply to Murphy & Callahan," *Anti-state.com* (Sept. 19, 2002).

[3]Invasions of the borders—uninvited use—of others' property by a tortfeasor or aggressor results in a transfer of rights from the wrongdoer to the victim. By attacking someone, the aggressor transfers some rights in his body and/or property to the victim, for purposes of punishment and/or restitution. See N. Stephan Kinsella, "Inalienability and Punishment: A Reply to George Smith," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–99), pp. 79–93; Kinsella "Defending Argumentation Ethics"; and N. Stephan Kinsella, "A Libertarian Theory of Punishment and Rights," *Loyola of Los Angeles Law Review* 30 (1997), pp. 607–45. In causing damage to another's property through negligence (the commission of a tort), the tortfeasor becomes liable to the victim. In both cases, the wrongdoer loses rights, not because of any voluntary agreement, but by virtue of his action.

The promise may be made in exchange for things given or promised by the second party. Not all agreements are binding, but those meeting certain criteria are.[4] If the promises result in a contract, the force of law can be brought to bear to enforce the contract. In modern legal systems, when one party breaches the contract (fails to render the agreed-upon performance), the other party may sue to have appropriate "remedies" awarded. The remedies can include rescission (cancellation of the contract) and money damages.

Contractual obligations may be classified as obligations *to do* or *to give*.[5] An obligation to give may be viewed as a transfer of title to property, as it is an obligation to give ownership of the thing to another. An obligation to do is an obligation to perform a specific action, such as an obligation to sing at a wedding or paint someone's house. It is significant for our purposes that courts usually will *not* order *specific performance* (forcing the breaching or unwilling party to perform the contract), on the grounds that the plaintiff can usually be adequately compensated with money damages.[6] Further, money damages do not impose a heavy burden on the court to supervise performance, while specific performance would. Specific performance would often be counterproductive. Consider a singer who refuses to perform a promised contract, for example. If ordered to perform, the signer might well give a shabby performance. Therefore, in such cases, the singer would be ordered to pay monetary damages to the other party.

Even an agreement to sell a piece of property, such as a barrel of apples or a car, will usually not be enforced with specific performance;

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[4]"Agreement" is a broader term than "contract," because not all agreements are enforceable, and a given agreement might lack an essential element of a contract. For useful definitions of various legal terms used in this article, see *Dictionary.law.com*; see also Bryan A. Garner, ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West, 1999).

[5]See *Louisiana Civil Code*, arts. 1756 and 1986, describing obligations to do an act and obligations to give. See also Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (1986), pp. 269–321, at p. 189, discussing obligations to do and to give; Saúl Litvinoff, *Obligations* (St. Paul, Minn.: West, 1969), vol. 1; and Saúl Litvinoff, *The Law of Obligations* (St. Paul, Minn.: West, 1992), for a masterful discussion of the law and nature of obligations.

[6]Barnett, "A Consent Theory of Contract," p. 181. On the availability of specific performance in civil-law systems, see *La. Civ. Code*, art. 1986; and Litvinoff, *Obligations*, vol. 2, pp. 301–2.

instead, the court would order the promisor to pay the promisee a sum of money. Specific performance is typically granted only in the case of unique property, such as a particular portrait, or in the case of real estate, because each parcel of land is unique. Even in these cases, specific performance results in the transfer of title to the unique property from the owner to the other party.

Thus, in modern law, breach of contract results in a transfer of property—sometimes unique goods such as real property, but usually money—from the breaching party to the promisee. Thus, contracts are enforced today *not* by forcing a party to perform the promised action but by threatening to transfer some of the promisor's property to the promisee *if* the promisor does not perform. For an agreement to be enforceable under modern legal systems *means that* some of one party's property (whether money or some other owned good) can be forcibly transferred to the other party.

Thus, in modern contract law, there are really no contractual obligations "to do" anything. There are only obligations to transfer title to property, either directly (agreement to pay a sum of money) or as a consequence of failure to perform a promised action (obligation to pay a sum of money if the promised performance does not occur). It should be noted that, despite the lack of a legal compulsion to perform a contract, the institution of contract is alive and well. The legal threat of transfer of some of the promisor's property in the event of default, combined with reputation effects, is apparently sufficient to render contracting useful.

At a minimum, contract theory purports to justify the transfer of title to the property of parties to a contract. And in the case of specific performance, debtors' prison, and voluntary slavery, contract theory must justify the use of force against the parties. Not surprisingly, then, a variety of arguments have been set forth attempting to explain why agreements may be enforced.[7]

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[7]Barnett, "A Consent Theory of Contract," provides a useful discussion of the multitude of contract theories which have been proposed. For a recent work discussing contract theory, see Harry N. Scheiber, ed., *The State and Freedom of Contract* (Stanford, Calif.: Stanford University Press, 1999). See also Richard Craswell, "Contract Law: General Theories," section 4000 in *Encyclopedia of Law & Economics* (Cambridge: Cambridge University Press, 2000); Morris R. Cohen, "The Basis of Contract," *Harvard Law Review* 46 (1933), p. 573; Charles Fried, *Contract as Promise* (Cambridge,

Speech, Promises, and Libertarianism

The question especially interests libertarians. By endorsing a given theory of contract, we are, in effect, supporting the transfer of property rights from the owner to others, in certain circumstances.

Why does making a promise or agreeing or "committing" to do something result in a transfer of rights from the promisor to the promisee? To many—even to many libertarians—it seems elementary and obvious: if you promise to do something, you may be forced to do it. Some libertarians and laymen assume that an individual has some power or ability to legally "bind" or obligate himself by simply promising to do something. However, this assumption is groundless. Not all promises are enforceable, nor should they be.

As a general matter, libertarians hold that the use of force is permissible only in *response* to *initiated* force. Viewed in property terms, property may be used only with the consent of its owner. Unprovoked aggression against another is a use of his property (or his body) without his consent, and is therefore prohibited. As a result of the act of aggression, the victim becomes entitled to use the aggressor's property (or body) for, e.g., purposes of punishment. That is, by committing aggression—using a victim's property without consent—some or all of the aggressor's property rights are transferred to the victim. Because the aggressor used the victim's property as if it were his own (although it is not), the victim may use the aggressor's property as if it is his own.[8] This is why initiated force (aggression) is impermissible, while responsive force—force in response to aggression—is not.

It is impermissible to use force in response to *non*-invasive actions, since this would itself be initiated force. Speech is (generally) nonaggressive, for example, because it does not invade others' property borders, so it does not justify the use of responsive force.[9] Libertarians

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Mass.: Harvard University Press, 1982); and Charles J. Goetz and Robert E. Scott, "Enforcing Promises: An Examination of the Basis of Contract," *Yale Law Journal* 89 (1980), p. 1261.

[8]See Kinsella, "Defending Argumentation Ethics"; Kinsella, "A Libertarian Theory of Punishment and Rights"; Kinsella, "Inalienability and Punishment"; and N. Stephan Kinsella, "New Rationalist Directions in Libertarian Rights Theory," *Journal of Libertarian Studies* 12, no. 2 (Fall 1996), pp. 313–26.

[9]I say "generally" because speech acts can be one means by which a person causes aggression. For example, a crime lord ordering an underling to murder someone is complicit in murder, as is the captain of a firing squad murdering

oppose censorship and recognize a free-speech right because speech, *per se*, does not aggress. The recipient of noxious or unwanted speech is free to ignore it and go about his business. The boundaries of his body and property are not invaded by speech, and his actions are not physically restrained by the mere words of others. The same holds true of promises, at least at first glance. As even mainstream contract theorists have long pointed out, a "mere promise" is not sufficient to create a binding contractual obligation.[10]

For example, consider a budding singer who asks his famous actor friend to attend the singer's concert. The actor says, "I'll be there." The singer is pleased, hoping that the actor's fame will add publicity to the event. To the singer's disappointment, though, the actor fails to show up. Did the actor violate any of the singer's rights? Of course not. What if the actor had said, "I promise to attend your concert"? The actor told, or promised, the singer that he would go to the concert, but he did not by these speech-acts aggress against the singer or his property.

A promise, then, would seem to be unenforceable unless it somehow gives rise to or involves an act of aggression, that is, it somehow causes an uninvited use—invasion of the borders—of another's property. But a promise seems to be merely a speech-act; it does not appear to aggress against anyone.

If promises are not aggression, then the only other way that promises could be enforceable is if the promise resulted in a transfer of property rights from the promisor to the promisee. Then the promisee could "enforce" the contract by simply using the (former) property of the promisor, title to which has transferred to the promisee. However, to state that promises transfer property titles begs the question that contract theory asks: Why does a promise serve to transfer title?

Consideration

Many theories have been set forth in an attempt to explain or justify why the law enforces contracts, and why it makes some promises "binding" or enforceable. It is only a special type of promise, or a

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an innocent man, when he states, "Ready, aim, fire!" In general, however, speech does not cause invasion of others' property. I will address these issues in further detail in a forthcoming article on causation and the law.

[10]See, e.g., Shael Herman, "Detrimental Reliance in Louisiana Law—Past, Present, and Future (?): The Code Drafter's Perspective," *Tulane Law Review* 58 (1984), pp. 707–57, at 711.

promise plus *something else*, that results in a legally binding contract under today's legal systems.

Under the common law doctrine of bargained-for consideration, the (enforceable) contract requires a promise and *consideration*—something of value received in exchange for the promise.[11] This is why a dollar is often given (or stated to be given) by one party who is receiving something from another party. The consideration may be another promise or something else of value. For example, in a bilateral contract, the parties obligate themselves reciprocally so that each one's promised obligation serves as the consideration for the other's promise.[12] The value of the consideration given need not match the value of the thing received. In fact, even consideration as small as a "peppercorn" will suffice.[13]

Yet, the antiquated doctrine of consideration has long been criticized.[14] It would prevent a contract from being formed in some situations that it seems they should, such as gratuitous (gift) promises, and even some commercial promises.[15] Further, if a mere promise (naked

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[11]Saúl Litvinoff, "Still Another Look at Cause," *Louisiana Law Review* 48 (1987), pp. 3–28, at 18–19; *Restatement of the Law Second, Contracts 2d* (St. Paul, Minn.: American Law Institute Publishers, 1981), § 71; Barnett "A Consent Theory of Contract," pp. 287–91.

[12]See *La. Civ. Code*, arts. 1908–1909, describing unilateral and bilateral obligations. In civil law systems, "consideration" is not required, but there must be a lawful "cause" which is "the reason why" a party obligates himself. See *La. Civ. Code*, arts. 1966 and 1967; Litvinoff, "Still Another Look at Cause"; Herman, "Detrimental Reliance in Louisiana Law," p. 718; Malcolm S. Mason, "The Utility of Consideration—A Comparative View," *Columbia Law Review* 41 (1941), pp. 825–48; Jon C. Adcock, Note, "Detrimental Reliance," in "Obligations Symposium," *Louisiana Law Review* 45 (1985), pp. 753–70. For a discussion of further differences between common law and civil law legal systems, see N. Stephan Kinsella, "Legislation and the Discovery of Law in a Free Society," *Journal of Libertarian Studies* 11 (Summer 1995), p. 132; and N. Stephan Kinsella, "A Civil Law to Common Law Dictionary," *Louisiana Law Review* 54 (1994), pp. 1265–305.

[13]*King County v. Taxpayers of King County*, 133 Wash. 2d 584; 949 P.2d 1260 (Wa.S.Ct. 1997), at n.3.

[14]See Barnett, "A Consent Theory of Contract," pp. 287–91, for discussion and criticism of the bargain theory of consideration. See also Mason, "The Utility of Consideration."

[15]See Mason, "The Utility of Consideration," pp. 832–42.

promise, or *nudum pactum*) is not enforceable, why does it become enforceable just because the promisee gives something small in return? Given that only token consideration—a peppercorn—is sufficient to make a promise enforceable, doesn't the doctrine of consideration elevate form over substance? Why can we not dispense with the formality and make mere promises, or at least promises with some kind of sufficient formality, enforceable? Further, under Austrian value theory, how can we say the thing given in return "has value" to the recipient?[16] Maybe he accepts it only as a formality to satisfy the courts.

From the libertarian point of view, receiving consideration for a promise does not convert the promise into an act of aggression, nor is it clear how it causes the promise to effectuate a transfer of title any better than a naked promise would.

Promissory Estoppel and Detrimental Reliance

The requirement of consideration can sometimes lead to seemingly harsh results, because some promises will be unenforceable if there is no consideration, but they will be relied upon by the promisee. A classic example is the grandfather who promises his granddaughter he will pay her tuition if she goes to college. However, in exchange, she gives nothing of legally recognized value, so there is no consideration and, thus, no binding contract. Halfway through her college career, the old man may change his mind and stop paying. What is the granddaughter to do? Can she sue to enforce the promise to pay for her tuition? Under the standard theory of contract, she cannot prevail, because consideration is missing.

The equitable doctrine of promissory estoppel is used in common law systems to form an alternative basis for enforcement of contracts.[17]

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[16]See Ludwig von Mises, *Human Action: A Treatise on Economics*, 4th ed. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1996), pp. 94–96, and 102–3; Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," in *Method, Money, and the Austrian School*, vol. 1 of *The Logic of Action* (Cheltenham, U.K.: Edward Elgar, 1997), pp. 211–54.

[17]Barnett, "A Consent Theory of Contract," p. 276 n. 25, discusses the role of detrimental reliance in enforcing promises that would otherwise be unenforceable for lack of consideration. Herman, "Detrimental Reliance in Louisiana Law," p. 713 n. 19, discusses the use of promissory estoppel in common law jurisdictions as a substitute for consideration. See also Litvinoff, "Still Another Look at Cause," p. 19. Thomas P. Egan, "Equitable Doctrines Operating

The doctrine seeks to protect the "expectations" or "reliance interest" of the promisee.[18] The *Restatement (Second) of Contracts*, for example, provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[19]

Similarly, the Louisiana Civil Code provides:

> A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise.[20]

If there is "detrimental reliance," then promissory estoppel can be invoked to enforce the promise. Even though there is technically not a valid contract, because, for example, the promisee gave no consideration, the promisor is "estopped" to deny this because this would work

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Against the Express Provisions of a Written Contract (or When Black and White Equals Gray)," *DePaul Business Law Journal* 5 (1993), pp. 261–312, at pp. 263–69 and 305–10, discusses the historical and philosophical basis of contract law and the development of the doctrine of promissory estoppel. For additional discussion of promissory estoppel and detrimental reliance, see Randy E. Barnett and Mary E. Becker, "Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations," *Hofstra Law Review* 15 (1987), pp. 443–97; Adcock, "Detrimental Reliance"; and Christian Larroumet, "Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law," *Tulane Law Review* 60 (1986), p. 1209.

[18]See Evers, "Toward a Reformulation of the Law of Contracts"; and Rothbard, "Property Rights and the Theory of Contracts," p. 133.

[19]*Restatement (Second) of Contracts* § 90(1) (1979). Civil law systems provide similar grounds for enforcement of promises. The idea of detrimental reliance can be found in Roman law and in the Latin maxim *venire contra proprium factum* (no one can contradict his own act). Herman, "Detrimental Reliance in Louisiana Law," p. 714.

[20]*La. Civ. Code*, art. 1967. See also Litvinoff, "Still Another Look at Cause," pp. 18–28.

a hardship on the promisee.[21] In the case of the granddaughter, she can prevail in court under this theory. In this way, detrimental reliance is used as an alternative ground for contract enforcement. The idea of protecting the expectations or reliance interests of promisees is also sometimes seen as the primary justification for enforcing contracts.

The theory of detrimental reliance rests on the notion that a promise sets up an "expectation" of performance in the mind of the promisee which induces him to act because he reasonably relies on this expectation. Of course, every time someone acts, he is "relying" on some understanding of reality. This reliance might be quite ridiculous or unreasonable. Thus, all detrimental reliance theories and doctrines inevitably qualify the theory by saying that a promise is enforceable only if the promisee *reasonably* or *justifiably* relied on the promise.[22] If the reliance is not reasonable, it is not the promisor's "fault" that the promisee relied; the promisor could not have anticipated outlandish reliance.

One problem with this theory, however, is its circularity. In deciding whether to rely on a given promise, a reasonable person would take into account whether promises are enforceable. If promises without consideration are known to be unenforceable, for example, it would be unreasonable to rely on it because it is known that the promisor is not obligated to keep his promise! Thus, reliance depends on enforceability. Yet, the detrimental reliance doctrine makes enforceability itself depend on reliance, hence the circularity.[23] As such, conventional theories of contract enforcement are defective.

For the libertarian, another problem with detrimental reliance is that it is not explained why a person's "reliance" on the statements or representations of another gives the relying person a *right* to rely on this. Why can a person be forced to perform or be liable for failure to perform a promise, just because it is "relied on" by another? The default assumption for the libertarian is that you rely on the statements of others at your own risk.

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[21]See Litvinoff, "Still Another Look at Cause," pp. 23–24. For further discussion of promissory estoppel, see Kinsella, "A Libertarian Theory of Punishment and Rights," pp. 612–13.

[22]Barnett, "A Consent Theory of Contract," p. 275.

[23]For various discussions of the circularity of reliance theories of promising, see F.H. Buckley, "Paradox Lost," *Minnesota Law Review* 72 (1988), pp. 775–827, at p. 804; Barnett, "A Consent Theory of Contract," pp. 274–75, 315–16; and Barnett and Becker, "Beyond Reliance," pp. 446–47, 452.

As we see, then, the mainstream theories proposed to date that are purported to justify and explain the institution of contract have been, by and large, inconsistent and unsatisfying.

THE TITLE-TRANSFER THEORY OF CONTRACT

Evers-Rothbard Title-Transfer Theory

A much better grounding for contract law is found in the writings of libertarian theorists Murray Rothbard and Williamson Evers, who advocate a *title-transfer* theory of contract.[24] As Rothbard and Evers point out, a binding contract should be considered as one or more *transfers of title to (alienable) property*, usually title transfers exchanged for each other. A contract should have nothing to do with promises, which at most serve as *evidence* of a transfer of title. A contract is nothing more than a way to give something you own to another person.

Title may be conveyed without ever promising anything. I can, for example, manually give you a dollar in payment for a soda. No words need be exchanged. Or I can simply state my intention to give you something I own: "I hereby give you my car," or even "I hereby give you my car in three days." There need be no "promise" involved. In general, title is transferred by manifesting one's intent to transfer ownership or title to another.[25] A promise can be one way of doing this, but it is not necessary. Rothbard and Evers seem to have a fixation on the word "promise" and do not agree that a promise can convey

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[24]The theory discussed in this section is largely based on that developed by Rothbard, "Property Rights and the Theory of Contracts," and Evers, "Toward a Reformulation of the Law of Contracts," although I have made some additions and changes. Randy Barnett has also contributed a large number of important insights to the theory of contracts as well. See Barnett, "A Consent Theory of Contract"; Randy Barnett, "Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud," *Harvard Journal of Law & Public Policy* 15 (1992), pp. 783–803; and Randy Barnett, "The Sound of Silence: Default Rules and Contractual Consent," *Virginia Law Review* 78 (1992), pp. 821–911.

[25]Evers, "Toward a Reformulation of the Law of Contracts," p. 12 n. 20, endorses making "objectively observable conduct symbolizing consent the standard for determining whether consent has been given." See also Barnett, "A Consent Theory of Contract," p. 303: "Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its alloted boundary-defining function." And, on p. 305, emphasis in original: "The consent that is required [to transfer rights to alienable property] is a *manifestation of an intention to alienate rights*."

title. They appear to think that because a promise is not enforceable, it cannot serve to transfer title to property.[26] However, a promise can be intended and understood to convey title and, thus, can operate to do so. In certain contexts, the making of a promise can be one way to manifest one's intent to transfer title.

Ultimately, contracts are enforced simply by recognizing that the transferee, instead of the previous owner, is the current owner of the property. If the previous owner refuses to turn over the property transferred, he is committing an act of aggression (trespass, use of the property of another without permission) against which force may legitimately be used.

Conditional Transfers of Title

The simplest title transfers are contemporaneous and manual. For example, I hand a beanie baby to my niece as a gift. However, most transfers are not so simple, and are conditional. Any future-oriented title transfer in particular is necessarily conditional, as are exchanges of title. For example, before dinner, I tell my niece that she gets the beanie baby after dinner *if* she behaves during dinner. The transfer of title is future-oriented, and conditional upon certain events taking place. *If* my niece behaves, *then* she acquires title to the beanie baby. Future transfers of title are usually expressly conditioned upon the occurrence of some future event or condition.

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[26]Rothbard, "Property Rights and the Theory of Contracts," p. 141; and Evers, "Toward a Reformulation of the Law of Contracts," p. 6. But see also Murray N. Rothbard, *Man, Economy, and State* (Los Angeles: Nash Publishing, 1962) p. 153: "Contract must be considered as an agreed-upon exchange between two persons of two goods, present or future. . . . Failure to fulfill contracts must be considered as theft of the other's property. Thus, when a debtor purchases a good in exchange for a promise of future payment, the good cannot be considered his property until the agreed contract has been fulfilled and payment is made. . . . An important consideration here is that contract not be enforced because a promise has been made that is not kept. It is not the business of the enforcing agency or agencies in the free market to enforce promises merely because they are promises; its business is to enforce against theft of property, and contracts are enforced because of the implicit theft involved. Evidence of a promise to pay property is an enforceable claim, because the possessor of this claim is, in effect, the owner of the property involved, and failure to redeem the claim is equivalent to theft of the property." See also pp. 152–55; and Rothbard, "Property Rights and the Theory of Contracts," pp. 137–38.

In addition, because the future is uncertain,[27] future-oriented title transfers are necessarily conditioned upon the item to be transferred *existing* at the designated time of transfer. Title to something that does not exist cannot be transferred. Consider the situation where I own no hamster but tell my niece, "Here, I give this hamster to you." In this case, "this hamster" has no referent so no title is transferred. Likewise, the future beanie baby transfer is conditional not only on the expressly stated condition—the niece performing the specified action (behaving)—but also on the unstated condition that the beanie baby *exists* at the designated future transfer time. During dinner, the cat might destroy it, or it might be lost, or consumed in fire. Even if the niece behaves, there is no beanie baby left for her to acquire. In effect, when agreeing to a future title transfer, the transfer is inescapably accompanied by a condition: "I transfer a thing to you at a certain time in the future—if, of course, the thing exists."

Like future title transfers, title exchanges are also necessarily conditional. This is true even of a simple, contemporaneous exchange. I hand you my dollar and you hand me your chocolate bar. Because it is an *exchange* rather than two unrelated transfers, the title transfers are conditional. I give my dollar to you only on the condition that you give your chocolate bar to me, and vice versa. Exchange contracts often involve at least one future title transfer which is given in exchange for either a contemporaneous or future title transfer by the other party. In this case, each title transfer is conditional upon the other title transfer being made. Also, any future title transfers are conditional upon the future existence of the thing to be transferred.

Many types of contracts can be formed by imposing various conditions on the title transfers involved. For example, suppose that we make the following wager: *If* the horse Starbucks finishes first, *then* I transfer to you $100; otherwise, the $10 you gave me remains mine to keep. In this case, you transferred title to $10 me at the moment of the wager, conditioned on my agreeing, at the moment of the wager, to a future, conditional transfer of $100 to you. I transferred title to $100 to you in the future, on two conditions: the explicit condition that Starbucks wins, and the implicit condition that I have title to $100 at the designated future payment time.

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[27]See Hans-Hermann Hoppe, "On Certainty and Uncertainty, Or: How Rational Can Our Expectations Be?" *Review of Austrian Economics* 10, no. 1 (1997), pp. 49–79.

In a loan contract, the creditor conveys title to money (the principal) to the debtor in exchange for a present agreement to a future transfer of money (principal plus interest) from the debtor to the creditor. For example, Jim borrows $1000 now from Bank to be repaid in a year with $100 interest. Analyzed in terms of title transfers, Bank transfers title to $1000 of its money to Jim in the present, in exchange for (conditioned on) Jim contemporaneously agreeing to a title transfer to future property; and Jim's future title transfer is executed in exchange for the contemporaneous $1000 title transfer.

A contract in which payment is to be made for the performance of a service, such as an employment arrangement, is not an exchange of titles because the employee does not transfer any title. Although it may be referred to as an exchange of title for services, such a contract is better viewed as a unilateral, but conditional, future transfer of title to the monetary payment, conditioned upon the specified services being performed. That is, *if* you mow my lawn, *then* title to this gold coin transfers to you. Again, the transfer of title in this case is both expressly conditional and future-oriented. Title to the coin transfers only if the lawn is mowed, and I still own the coin.

Also, as evident in the beanie baby example above, the title-transfer theory of contract permits gift contracts as well as exchanges. Conventional legal systems are reluctant to enforce gift contracts because of the lack of consideration. Under the rubric of "hard cases make bad law" (such as the grandfather promising to pay his granddaughter's tuition), such systems use the circular theory of promissory estoppel to enforce such contracts.

The title-transfer theory of contract, on the other hand, does not discriminate between gratuitous and onerous contracts.[28] The owner of property may convey title to another, for any reason, whether pecuniary, charitable, or arbitrary, by manifesting his intent to do so. Gifts of property or title exchanges are all operative and, thus, enforceable.

Enforcement of Promises

Although a variety of contractual arrangements can be constructed using conditional transfers of title, there would seem to be no way to compel someone to perform an agreed-upon *action*, such as a service. The only way to actually *enforce* a promise to perform a given action

[28]See *La. Civ. Code*, arts. 1909–1910, describing gratuitous and onerous contracts.

is to have the right to inflict force, either as punishment or as inducement to perform, on the defaulting party's body. A promise to paint a house or sing at a party, for example, can be enforced only by threatening to use force against the promisor to force him to perform, or by punishing him afterward for failing to perform.

However, under libertarian theory, there are only three ways that it is permissible to use force against the body of another: if he consents to the force, if he is committing or has committed aggression, or if his body is owned by someone else.

As noted above, the making of a promise is not the commission of aggression. At most, promises are evidence of an intent to transfer title. Therefore, there is no aggression to justify the enforcement action. Assuming the promisor does not consent to being punished, the second option is likewise unavailable. The third option assumes that the promisor has, in effect, transferred his rights in his body to the promisee, i.e., sold himself into slavery. However, although one may be considered to be a self-owner, one's body is inalienable.[29]

Therefore, contracts involve only conditional transfers of title to scarce resources external to the body. Promises cannot actually be enforced. The inability of the title-transfer theory to enforce promises might be seen, by some, as a defect of the theory. They predict chaos and the loss of the ability to have binding commitments. However, as noted above, even in modern legal systems, there is almost never enforcement of contractual obligations "to do" things. The primary enforcement mechanism utilized is to order the party in breach of contract to pay money damages to the other party, not to perform the promised service. The inability to "enforce" promises in today's legal system has not resulted in the death of contract.

The same result can be obtained under the title-transfer theory of contract by using conditional title-transfers to provide for "damages" to "enforce" promises to perform. When a contract to do something is to be formed and the parties want there to be an incentive for the specified action to be performed, the parties agree to a *conditional* transfer of title to a specified or determinable sum of monetary damages where the transfer is conditional upon the promisor's *failure* to perform.[30]

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[29]See the section on "Clarifications and Applications," below.

[30]See Rothbard, "Property Rights and the Theory of Contracts," pp. 138–41; Evers, "Toward a Reformulation of the Law of Contracts," p. 9; Barnett, "A

This provides a result similar to today's system where the party who fails to perform owes monetary damages to the other party.

For example, if Karen wants to "hire" Ethan to paint her house, she agrees to pay Ethan $3000 on a specified future day X if he has painted her house by that day. In other words, Karen makes the following conditional conveyance of title: "I hereby transfer title to $3000 to Ethan on day X IF he has painted my house (and IF I own $3000)." But such a unilateral arrangement only obligates Karen. She may want to give Ethan an extra incentive to perform (in addition to the prospect of payment and his promise-keeping reputation). For example, she may be planning an important business-related poolside party at her house, for which it is important that various promisors perform certain actions, such as mowing the lawn, cleaning the house and the pool, and showing up to serve as waiters and chefs. She would like to be able to obtain *damages* from Ethan in the event of nonperformance, and can, thus, contract with him so that he agrees to pay a specified or determinable sum of money *in the event that* he does not perform.

In sum, conditional title transfers can be used to provide for damages payable upon nonperformance of a promised service. This provides for almost the same type of enforcement mechanism used in modern legal systems, in which contracts are widely used and relied upon.

CLARIFICATIONS AND APPLICATIONS

Transfer of Title to Homesteaded Resources

The title-transfer theory of contract assumes that the property owner can transfer title in the property to others by manifesting his intent to do so. The theory takes for granted that ownership of homesteaded property is *alienable* by the will of the owner. Writes Rothbard: "The right of property *implies* the right to make contracts about that property: to give it away or to exchange titles of ownership for the property of another person."[31]

Consent Theory of Contract," p. 304 n. 143; and Randy E. Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy & Policy* 4, no. 1 (1986), pp. 179–202, at 190–91, 197, discussing similar performance-enforcing schemes through title-transfers to "money damages," which Rothbard and Evers refer to as a performance bond.

[31]Rothbard, "Property Rights and the Theory of Contracts," p. 133, emphasis added.

Yet, we must ask, why does manifesting one's intent to transfer title actually do it? Why does the owner have the power or ability to do this? This power is implied by several interrelated aspects of the ownership of homesteaded property. First, note that the owner, who has the sole right to control the resource, can permit others to use it. For example, he can lend his ox to his neighbor. This highlights the distinction between *ownership* and *possession*. The owner has rights to a thing even if he does not possess it. Note also that "permitting" others to use one's property is done by manifesting (communicating) one's consent to the borrower. The manifested consent of the owner of a good to permit its use by others is what distinguishes a licit act (such as a loan) from an illicit act (such as theft); it is what distinguishes invited guests from trespassers. In short, because the owner of property has the right to control it, he can, through a sufficiently objective manifestation or communication of his consent, permit others to possess the thing while he maintains ownership.

Second, homesteaded property was at one time *acquired*. It can, therefore, also be abandoned. One is not stuck with something forever just because one once homesteaded it. But acquiring and abandoning both involve a manifestation of the owner's intent. Recall that the very purpose of property rights in scarce resources is to prevent conflicts over the use of resources. Thus, property rights have an unmistakably public aspect: the property claimed has boundaries visible (manifested) to others.[32] One essential aspect of property is that it publicly demarcates one's bounds of ownership so others can avoid using it. If the bounds are secret and unknowable, conflicts cannot be avoided. To know *that* a thing is owned by another and to avoid uninvited use of the other's property, the property's borders must be publicly known.

In fact, one reason that the first *possessor* of a scarce resource acquires title to it is the need for borders to be objective and public. The result of using a thing—either by transforming the thing in an apparent way up to certain borders or by setting up a publicly discernible border around the property—can be objectively apparent to

[32]In this sense, all property is "public," not "private." On the objective function of property rules, see Hoppe, *A Theory of Socialism and Capitalism*; and Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston: Kluwer, 1993); also Barnett, "A Consent Theory of Contract," p. 303: "Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function."

others. This is why Hoppe refers to acts of original appropriation as "embordering" or "produc[ing] borderlines for things."[33]

Acquiring is an action by which one manifests intent to own the thing by setting up public borders. Likewise, property is abandoned, and title thereto is lost, when the owner manifests intent to abandon and, thereby, to relinquish ownership. This intention is not manifested merely by suspending possession or transferring it to another, since possession can be suspended without losing ownership. Thus, a farmer who leaves his homesteaded farm for a week to buy supplies in a far away city does not thereby lose ownership, nor has he manifested any intent to abandon his farm. For these reasons, an owner of acquired property does not abandon property merely by not-possessing it, but he *does* have the power and the right to abandon it by manifesting his intent to do so.

Ownership of acquired property includes the right to use the property, to permit (license) others to use it (maintain ownership while giving possession to another), and to abandon ownership by manifesting the intent to do so. Combining these aspects of ownership, it is clear that an owner of property can transfer title to another by "abandoning" the good in favor of a designated new owner. If one can abandon title to property to the world in general, then *a fortiori* one can do "less," and simply abandon it "in favor" of a given person.[34]

Consider the case where the owner abandons the property outright. In this case, it once more becomes unowned and available for appropriation by a new homesteader, i.e., the next person to possess it. For example, suppose one lends his ox to a neighbor, and then abandons it. In this case, the neighbor at first has possession, but not title, to the ox. When the owner abandons it, the ox becomes unowned again. As

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[33]Hoppe, *A Theory of Socialism and Capitalism*, p. 13; also pp. 140–41.

[34]The theory for transferring property herein advocated bears a conceptual resemblance to the common-law practice of "quitclaiming." Conventional conveyances of property operate by a deed, but a quitclaim deed operates by way of a *release*. It is intended to pass any title or right owned by the transferor to the transferee, without warranting that anything is, in fact, owned. See Gregory Michael Anding, Comment, "Does This Piece Fit?: A Look at the Importation of the Common-Law Quitclaim Deed and After-Acquired Title Doctrine into Louisiana's Civil Code," *Louisiana Law Review* 55 (1994), pp. 159–77; and *Black's Law Dictionary*, defining "quitclaim." The quitclaim is a type of abandonment "in favor" of another, which effectively functions as a conveyance or transfer of the title.

an unowned resource, it is now subject to re-appropriation by the next possessor, who happens to be the neighbor who is already in possession.[35] By combining the power to permit others to use property with the power to abandon, it is possible to transfer title to a particular transferee.

Another way to look at it is to consider the general rule that the first possessor has better title in the property than other challengers who are, compared to the first possessor, latecomers. If property is abandoned conditionally in favor of a particular transferee, then the transferee has "better title" because, as between these parties, the previous owner has abandoned it, and, thus, does not have better title. And as between the transferee and any third party, the transferee benefits from the prior title of the previous owner because, from the point of view of the third parties, the transferee is a licensee of the prior owner, and/or an earlier possessor than the third parties.

As an analogy, consider a person sitting in a tree with his loaf of bread. Below him, others occasionally pass. He can eat the bread if he wishes, or hold onto it, or, if he wants, he can just drop it, abandoning it to whichever passerby seeks to pick it up. This would be analogous to outright abandonment. Or, he can toss it to a particular friend in the crowd, thus abandoning it and "guiding it" to a desired recipient at the same time.

This is the reason why an owner can transfer title to others: scarce unowned resources are acquired, and can be abandoned. Property that can be abandoned by manifesting's one's consent to undo or cease a previous acquisition can be given to particular others.

Property in the Body

Under libertarianism, an individual has the sole right to control his body as well as scarce resources originally appropriated by the individual or by his ancestor in title. Since ownership means the right to control, an individual may be said to own his body and homesteaded resources he has acquired. He is a "self-owner" as well as an owner of acquired resources. In the case of acquired resources, the rights of ownership include the right to transfer title to others because one can *abandon*, by manifested intent, a previously unowned resource that

[35]The owner need not wait until the owner-to-be has possession to make the transfer. For example, the owner could make his abandonment conditional upon the desired recipient possessing the property.

was *acquired* by manifested intent. In other words, rights in acquired resources may be alienated at will because of the way in which they come to be owned.

By contrast, although one may be said to own—to rightfully control—one's body, the same reasoning regarding acquisition, abandonment, and alienability does not apply. The act of *acquisition* presupposes that there is an individual *doing the acquiring*, and an *unowned thing* acquired by possessing it. But how can someone "acquire" his body? One's body is part of one's very identity. The body is not some unowned resource that is acquired *by* the intentional embordering action of some external, already existing acquirer.

Because the body is not some unowned resource that an already existing individual chooses to acquire, it makes little sense to say that it can be abandoned by its owner. And since alienation of property derives from the power to abandon it, the body is inalienable. A manifestation of intent to "sell" the body is without effect because a person cannot, merely by an act of will, abandon his or her body. Title to one's body is inalienable, and it is not subject to transfer by contract.

Rothbard on Inalienability

Rothbard, viewing contracts as transfers of title to alienable property, rejected the enforceable-promises view of contracts, with mere promises being unenforceable. He also maintained that rights to control—i.e., one's ownership of, or title to—one's body were inalienable.

These views are not unrelated. In fact, promises being unenforceable necessarily implies the inalienability of the body, and vice versa. If promises were enforceable, then one could be punished or coerced into performing, implying some rights in the body had been alienated merely by making the promise. And if one could alienate title to one's body by an act of will, this would mean that promises could be enforceable. For example, one could make a conditional transfer of title to one's body *if* one does not perform a specified service. This would justify punishment or coercion against the promisor's body, which is now owned by the promisee. Thus, alienability of the body and the enforceable promises view of contract go hand in hand. One implies the other.

So Rothbard, in rejecting the enforceable-promises theory of contract, has to also reject body alienability, as he does. However, this conclusion is apparently inconsistent with other strands of his rights theory. Rothbard wrote that "[t]he right of property *implies* the right

to make contracts about that property."[36] Since he also views individuals as "self-owners," meaning that one owns one's body, then one has "the right to make contracts about that property," according to his earlier pronouncement. To avoid accepting body alienability, Rothbard must find a reason why the body, although owned, is *not* alienable—even though the owner of property "can make contracts about it."

What argument does he produce to show that our bodies are not alienable? Like other libertarians, Rothbard, in essence, argues that slavery or other personal service contracts are not enforceable because there is some sort of logical *impossibility* involved in voluntarily alienating one's rights to one's body.[37] He reasons that it is literally impossible to transfer one's actual will to another, so a promise to do so is null and void; title thereto cannot be transferred. It is like contracting to sell the sun to someone. Such a contract, having an impossible object, would be null and void from the outset.

The problem with this view is that it assumes that a person's will has to be transferred in order for him to become a slave, or for others to have the right to control his body. But this is not necessary. Rather, the slave owner need only have the *right* to use force against the recalcitrant slave. It is true that one cannot alienate *direct* control of his body; one person can have only indirect control of another's body. Yet, we own animals, even though the animals retain direct control over their actions. The owner exerts indirect control over the animal's actions, e.g., by coercing or otherwise manipulating the animal to get the animal to do what the owner desires.

Likewise, aggressors may be jailed or punished—in short, "enslaved"—by the victim or his agent or heirs.[38] In effect, the aggressor

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[36]Rothbard, "Property Rights and the Theory of Contracts," p. 133, emphasis added.

[37]Rothbard, *Ethics of Liberty*, pp. 40–41; and Rothbard, "Property Rights and the Theory of Contracts," pp. 134–36. See also Randy E. Barnett, *The Structure of Liberty: Justice and The Rule of Law* (Oxford: Clarendon Press, 1998), pp. 77–82; Barnett, "Contract Remedies and Inalienable Rights," pp. 186–95; Tibor R. Machan, *Human Rights and Human Liberties* (Chicago: Nelson Hall, 1975), pp. 116–17; George H. Smith, "A Killer's Right to Life," *Liberty* 10, no. 2 (Nov. 1996), p. 49; and George H. Smith, "Inalienable Rights?" *Liberty* 10, no. 6 (July 1997), p. 54.

[38]For further discussion of the theory of inalienability and the legitimacy of punishment, see Kinsella, "Inalienability and Punishment"; and Kinsella, "A Libertarian Theory of Punishment and Rights."

is owned by his victim. This is despite the fact that the jailed aggressor still retains a will and direct control of his body; the jailer can only exert indirect control over him. The "impossibility" of an aggressor alienating his will does not prevent him from alienating *title* to his body—giving someone else the right to exert (admittedly indirect) control over his body—by committing an act of aggression.

It would seem, therefore, that the impossibility of alienating one's will does not prevent a person from being owned by others, or others from having *rights* to control the person's body. Thus, the impossibility of alienating the will should not be a barrier to making contracts regarding the right to control one's body.

Rothbard's error was to presume that property ownership implies the power to transfer the property's title. This necessitated the convoluted and flawed impossibility-of-the-will argument in favor of body-inalienability. The modified title-transfer theory proposed here recognizes that the body is "owned" only in the sense that a person has the sole right to control the body and invasions of its borders. But the body is not homesteaded and acquired, and cannot be abandoned by intent in the same way that homesteaded property can.

Theft and Debtors' Prison

Rothbard and Evers view failure to pay a debt or other agreed upon future title transfer as "implicit theft." Writes Rothbard:

> The debtor who refuses to pay his debt has stolen the property of the creditor. If the debtor is able to pay but conceals his assets, then his clear act of theft is compounded by fraud. But even if the defaulting debtor is not able to pay, he has *still* stolen the property of the creditor by not making his agreed-upon delivery of the creditor's property.[39]

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[39]Rothbard, "Property Rights and the Theory of Contracts," p. 144; also see pp. 137–38. Evers states: "Once the money falls due, the debtor who does not pay up is defrauding the creditor and is unjustly detaining his property . . . *even if* the debtor does not have the funds on hand to pay the creditor." Evers, "Toward a Reformulation of the Law of Contracts," p. 11 n. 5, emphasis added. David Boaz, *Libertarianism: A Primer* (New York: The Free Press, 1997), pp. 80–81, mirrors Rothbardian contractual analysis, as well as the Rothbardian error that it is implicit theft for a debtor to fail to pay a debt on the due date. See also Rothbard, *Man, Economy, and State*, pp. 152–55.

Rothbard is partly correct here. If, on the due date, the debtor is able to pay, then refusal to pay is theft. This is because the title to some of the money held by the debtor transferred to the creditor on the due date. At that moment, the debtor is in possession of the creditor's property. Failure to turn it over is tantamount to theft or trespass—it is a use of the creditor's property without his permission.

But Rothbard's view that it is theft "even if the defaulting debtor is not able to pay" is unjustified. Rothbard senses that this position could justify debtors' prison, but tries to avoid this result by arguing that imprisoning a defaulting debtor goes "far beyond proportional punishment" and, thus, is "excessive."[40] But why? If failure to pay a debt is "implicit theft," why can't the "thief" be treated as such and punished?

The solution is to recognize that the defaulting debtor may not be punished simply because he is not a thief at all. If the debtor is bankrupt, there is no property to steal. The debtor is not "refusing" to turn over "the" money owed. There *is* no money to be turned over. How can there be theft of a non-existent thing? As discussed above, all future title transfers are necessarily conditioned on the thing's existing at the specified transfer time. Failure to transfer something that does not exist cannot be theft; rather, one of the conditions for the title transfer has simply not been satisfied.[41]

Of course, contracts would normally contain default or explicit ancillary title transfers to address the unavoidable possibility of future default. For instance, a default title transfer that is ancillary to the main title transfer might be that the debtor also transfers title to $1100 plus accrued interest at any time after the original due date, if he is unable to repay on the due date, if and when he gets a paycheck or otherwise comes into money. Such ancillary provisions can be explicit in written contracts, or be assumed as default provisions in accordance with custom and context.

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[40]Rothbard, "Property Rights and the Theory of Contracts," p. 144.

[41]For similar reasons, Rothbard is also incorrect that a prospective employee who receives advance payment for future performance is necessarily a thief if he does not return the money. Only if the prospective employee still possesses the money and then refuses to pay it is he a thief. Similarly, I believe Rothbard is incorrect in assuming that failure to meet a performance bond (monetary damages payable in the event of non-performance) is "implicit theft" from the promisee. See Rothbard, "Property Rights and the Theory of Contracts," pp. 137–38.

Fraud

The theory of contract espoused here demonstrates that fraud is properly viewed as a type of theft. Suppose Karen buys a bucket of apples from Ethan for $20. Ethan represents the things in the bucket as being *apples*, in fact, as apples of a certain nature, that is, as being fit for their normal purpose of being eaten. Karen conditions the transfer of title to her $20 on Ethan's not knowingly engaging in "fraudulent" activities, like pawning off rotten apples. If the apples are indeed rotten and Ethan knows this, then he knows that he does *not* receive ownership of or permission to use the $20, because the condition "no fraud" is not satisfied. He is knowingly in possession of Karen's $20 without her consent, and is, therefore, a thief.[42]

CONCLUSION

The title-transfer theory of contract avoids the problems of detrimental reliance and consideration-based defenses of contract. It permits gratuitous contracts without inventing arcane doctrines or burdensome formalities, and provides a conceptually elegant theory of contract that can provide damages for breach of promises to perform, similar to modern legal systems.

This view of contract also solves the problems of voluntary slavery contracts and debtors' prison and avoids convoluted arguments for inalienability. Finally, the framework presented herein provides a justification for outlawing fraud.

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[42]Thus, James W. Child, "Can Libertarianism Sustain a Fraud Standard?" *Ethics* 104, no. 4 (July 1994), pp. 722–38, at 722, is incorrect in concluding that "the basic moral principles of libertarianism do not support a prohibition of fraud." For further discussion of the law of fraud, see Barnett, "Rational Bargaining Theory and Contract"; and Rothbard, "Property Rights and the Theory of Contracts," p. 143.

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