

Can Libertarianism Sustain a Fraud Standard?*

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The notion of a market transaction is a central feature of libertarianism. It is a primary means of social interaction beyond bonds of intimacy and family. The market which is built upon it, along with the voluntary gifts, represents the only allowable allocation mechanisms at an economy-wide level. As usually set out, adults having normal capacities must be free to engage in any market transaction absent force or fraud.¹ The appropriate role of the state is merely to see that these two disruptions of free market transactions do not occur. A third function often allowed to the state is the enforcement of contracts.²

It is clear that basic libertarian moral principles, as usually understood, exclude the use of force in transactions and grant the state minimal, legitimate power to prevent or arrest its private application. Moreover, they empower the state to use forceful coercion to require restitution (and perhaps punishment) where forceful transfers have occurred. I shall argue here, however, that the basic moral principles of libertarianism do not support a prohibition of fraud enforced by the use of state power. This is a very strong claim. Not only does a no-fraud requirement not follow from libertarian first principles, it is

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1. Sometimes, the ban on fraud which libertarians (and often economists, as well) impose takes the form of a requirement of perfect information. However, both bans are implicitly or explicitly there in virtually all libertarian presentations. See Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988), chap. 15, passim; and Robert Nozick, *Anarchy, State and Utopia* (New York: Basic, 1974), pp. 26, 63–65, 152, and passim.

2. I shall endeavor to avoid the issue of contracts and speak, wherever possible, of simultaneously executed transactions, so that the additional moral complexities of keeping promises do not arise.

inconsistent with them. Thus, the state may neither use the criminal sanction to prevent fraud, nor lend its coercive authority to those who would recover damages for fraud in tort, or rescind transactions based on fraud in the inception. In short, fraudulent transactions are permissible transactions at least as far as the law and the state go. If this is true, it follows that the only doctrine compatible with a libertarian theory of transactions is the most "hard boiled"³ version of caveat emptor. Though a particularly hard-line libertarian might simply accept this conclusion, most do not.⁴ W

DEFINING THREE STANDARDS

The discussion shall turn on three possible standards of appropriate behavior in conducting sales and purchases in a market environment.

The "hard boiled" caveat emptor standard.—A seller⁵ is permitted to engage in any form of lying, misrepresentation, deceptive practice, or trickery. The only stricture is that she may not engage in anything which constitutes or, even implicitly, threatens force or constitutes theft by stealth. ✓

The weak fraud standard.—A seller is prohibited to make explicit misrepresentation of material facts.

The strong fraud standard.—Conduct prohibited in the weak fraud standard is prohibited, plus the implicit suggestion of material falsehood and the omission of material fact with the intent to deceive.⁶ ✓

3. This very apt description is due to Israel Kirzner, *Discovery, Capitalism and Distributive Justice* (Oxford: Blackwell, 1989), passim.

4. This is true not only of Narveson and Nozick. See, e.g., Tibor Machan in "Advertising: The Whole or Only Some of the Truth," *Public Affairs Quarterly* 1 (1987): 59–71; or Ayn Rand, *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), pp. 333 ff., among others. Indeed, I have read or talked to many libertarians on this point and have not found one who is willing to countenance fraud. W

5. We shall treat the seller as the only candidate for the commission of fraud or related wrongs and the buyer as the only candidate victim. This is in accord with convention, but it is only that. Buyers can defraud, misrepresent, trick, and perform all related forms of immoral conduct, as well.

6. The strong fraud standard is best expressed in the entry "Fraud" in *Black's Law Dictionary*. For a more detailed discussion, see William L. Prosser, *Law of Torts* (St. Paul: West Publishing, 1964), chap. 20. Moreover, the Federal Trade Commission has long held that both implicit misrepresentation and omission of material fact constitute false and deceptive advertising. See *Moretrench Corp. v. FTC*, 127F.2d 792 at 795. The most current standard in commercial law is, for most cases, stronger than a strong fraud standard. This is the implied warranty of merchantability. Historically, the warranty theory differs from the deceit theory at the base of fraud. Fraud is an intentional deception. An implied warranty of merchantability is a strict liability standard. However, the latter prohibits virtually all those practices which the former does and many more besides. See Robert J. Nordstrom, *Law of Sales* (St. Paul: West Publishing, 1970), chap. 4, pp. 228–66. Indeed, Machan, while none too clear in his formulation, at one point, seems to adopt the stronger implied warranty of merchantability; see Machan, "Advertising," p. 68. W

A second formulation of the thesis of this essay is that, while most libertarians wish to adopt one of the last two standards, they are constrained to adopt the first.⁷ The reason is that the first follows from their moral first principles and each of the last two is inconsistent with them. But, to see this, we must investigate libertarian first principles.

THE LIBERTARIAN POLITICAL MORALITY

Unfortunately, there is no complete libertarian system in the form that Rawls, Gauthier, or Raz have produced systems of political philosophy, that is, one-volume works which begin with moral first principles and work their way to a fully developed political philosophy.⁸ For all its brilliance, Robert Nozick's *Anarchy, State and Utopia* begins by assuming a great deal about rights and then, rather unsystematically, discusses the emergence of the minimal state, distributive justice, and the concept of utopia. Although his discussion of distributive justice, as we shall see, contains some of the elements of a political morality, it is, in no way, a systematic presentation of one. Jan Narveson's more recent *The Libertarian Idea* follows Nozick in providing insightful discussions on rights, property, the market, and libertarian policies.⁹ In neither, however, do we get a derivation of a political philosophy from first principles. The more popular libertarian writers Ayn Rand, Murray Rothbard, and Tibor Machan have produced voluminous writings much, though not all, polemical and none even vaguely formally resembling a Rawlsian system (Rand's pretensions to the contrary).¹⁰

Thus, anyone who wishes to analyze the first principles of a libertarian political philosophy is left to reconstruct it him- or herself.

7. Another way to formulate the issue presented in this paper is just this: Does the libertarian system yield a requirement of fully voluntary exchange versus merely free (unforced) exchange? Libertarians (and economists, as well) typically talk of their requirement of voluntary exchange, which they then often go on to define as exchange without force or fraud. Generally, voluntariness requires reasonably accurate and complete information upon which to act. Feinberg (see n. 27 below) and others have written on how much information is needed for voluntariness. But our question is not how much information the buyer needs to make the transaction "voluntary." It is just who has the burden of providing adequate, relevant, and true information? Of course, we cannot allow the libertarian to define his way out of the problem we pose.

8. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971); David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

9. Narveson does attempt to provide libertarianism with a systematic contractarian foundation. Our concern, however, is not with the foundations of a right-based political morality, but with derivations from its first principles.

10. I have used primarily Rand's *Capitalism: The Unknown Ideal*. For Murray Rothbard, see esp. *For a New Liberty: The Libertarian Manifesto*, rev. ed. (New York: Cullier, 1978). Tibor Machan's most comprehensive statement of his political philosophy is *Human Rights and Human Liberties* (Chicago: Nelson Hall, 1975).

However, thankfully, it is not an impossible job, owing to the amazing congruence of virtually all libertarian thinkers as regards first principles. This is true even when they themselves treat such principles as implicit or tacit and also where they derive them from different moral foundations, for example, natural rights or contractarianism. Nonetheless, before embarking on such a reconstruction, a few disclaimers are in order.

First, it is obvious that, in setting out a libertarian political philosophy from first principles in a few pages, the most we can provide is the briefest sketch, but one sufficient for our purposes.

Second, we will not inquire into the moral foundations of the set of first principles. Most libertarians are natural rights theorists and spend substantial time on those foundations. Jan Narveson is a contractarian, and the most systematic part of his book is an attempt to show that contract is the proper foundation for libertarianism. Richard Epstein is a rule utilitarian.¹¹ Our concern is not with the general moral theory in which the first principles of libertarianism are grounded but with the conclusions which they conjointly yield or, more particularly in our case, fail to yield.

Last, we shall treat libertarianism as a political morality. That is, we take libertarianism to be a moral theory about the use of sovereign power.¹²

Suitable disclaimers having been entered, let us begin our sketch of libertarian first principles.

Self-Ownership

Almost all libertarians begin with some claim of self-ownership. Murray Rothbard tells us that "each individual, as a natural fact, is the owner of *himself*, the ruler of his own person" (emphasis in original).¹³

Jan Narveson quotes Rothbard on this point and tells us that this is a good statement of the "libertarian thesis."¹⁴

11. Richard Epstein, *Takings: Private Property and the Powers of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985); see esp. chap. 15.

12. Libertarianism could be, and sometimes is, construed as a moral theory simpliciter. For example, it is almost definitive of libertarianism that there exists no duty to aid. For some libertarians, this is a moral fact, i.e., one does not have a moral duty to aid. We will assume that libertarianism is a political morality. Thus, in this case, one might have a moral duty to aid but the state could have no authority to enforce such a duty.

13. Murray Rothbard, *Power and Market* (Menlo Park, Calif.: Institute for Humane Studies, 1970), p. 76. See also his *For a New Liberty: A Libertarian Manifesto*, pp. 28 ff., and his "Justice and Property Rights," in *Property in a Humane Economy*, ed. Samuel L. Blumenfeld (La Salle, Ill.: Open Court, 1974), pp. 106–15.

14. Narveson, p. 66.

Ayn Rand does not use the legal metaphor of ownership explicitly but speaks of the same thing when she tells us: "There is only one fundamental right (all others are its consequences or corollaries): a man's right to his own life . . . which means: the freedom to take all actions required by the nature of a rational being for the support, the furtherance, the fulfillment and the enjoyment of his own life."¹⁵

Robert Nozick also puts forward a notion of self-ownership. People, he tells us while citing Kant, are ends and not merely means or resources to be used by others for their own ends. This requirement upon interactions with other people holds because people are "distinct individuals" each with "his own life to lead."¹⁶ Indeed, in his famous discussion of redistribution as partial slavery, he explicitly refers to self-ownership, and the argument there makes no sense without assuming it.¹⁷

Other libertarians, as well, make self-ownership the keystone of their theory.¹⁸

Of course, self-ownership, in a philosophical sense, trades on the legal metaphor of property ownership. Perhaps, then, the best way to understand self-ownership is to unpack the legal metaphor. Ownership constitutes a collection of rights over the thing owned, especially the right to exclude others.¹⁹ This collection of rights would include inter alia the right to possess, to use, to enjoy, to manage, to control, generally to dispose of.²⁰ Self-ownership, then, means the exclusive right to manage and control one's own body, one's own activities, one's own

15. Rand, pp. 321–22.

16. Nozick, pp. 30–31, 33.

17. Ibid. p. 172. For a convincing argument that self-ownership is indeed the central feature of Nozick's system and the most cogent, but not the only, central thesis of all libertarianism, see Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon Press, 1990), pp. 103–25.

18. See Eric Mack's "Agent-Relative Values, Deontic Restraints and Self-Ownership," in *Value, Welfare and Morality*, ed. R. G. Frey and C. Morris (Cambridge: Cambridge University Press, 1993), and his "Self Ownership and the Right of Property," *Monist* (1990): 519–63. Both Fred Miller, in his "The Natural Right to Private Property," in *The Libertarian Reader*, ed. Tibor R. Machan (Totowa, N.J.: Rowman & Littlefield, 1982), and Ellen Frankel Paul in *Property Rights and Eminent Domain* (New Brunswick, N.J.: Transaction Books, 1987), chap. 3, esp. pp. 224–39, presuppose and make use of a notion of self-ownership at a foundational level.

19. *Corpus Juris Secundum* defines property as (inter alia) "that dominion or indefinite right to use . . . generally to the exclusion of others" (73 *CJS*, 166). It holds further that an essential attribute of property is a "right of exclusion" which, it is frequently held, "may be exercised to the exclusion of all others, freely and without restriction" (73 *CJS*, 168–69). Of the many, more theoretical, discussions of the legal conception of property ownership, one of the best is A. M. Honoré, "Ownership," in his *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon, 1987), pp. 161–92. See especially the eleven incidents of ownership discussed on pp. 165–79.

20. See 63A *American Jurisprudence, Second*, 228–29.

plans and projects, and, thus, one's own life. Along with it goes the powerful right to exclude others, that is, to not allow them management or control of oneself.

Private Ownership of Property

The second central and, for our purposes, independent, moral postulate of libertarianism is the right to own nonself property, that is, things in the world external to self and one's body.²¹ We can conclude then that libertarians assume two very broad, basic, first-order rights: that to self-ownership and that to own legitimately acquired property.²² Needless to say, it is an archtypically libertarian position to insist that these rights hold against the sovereign with the same force as they do against other individuals.

These two, the right to self-ownership and the right to the ownership of private property, are Hohfeldian claim rights. My right to self-ownership imposes a duty on you, and all others including the sovereign, not to interfere with me or my life. Similarly, my right to own and enjoy my private property imposes a correlative duty on all not to interfere with it. We might call these rights of noninterference derivative or special case rights, instances of the global rights to self-ownership and to property ownership, respectively.

But, what constitutes interference with person or property? Obviously, if we too broadly define interference, we limit self-ownership or property ownership, perhaps to a point of vacuity. If your wearing a red shirt which offends my aesthetic taste constitutes interference with my life by you, then your right of self-ownership is drastically reduced.

Libertarians are virtually unanimous with Rothbard who, cited above, identifies interference with forceful aggression. One may not

21. Following Locke, most libertarians attempt to derive property ownership from self-ownership. Self-ownership leads to ownership of one's labor which leads, ultimately, to ownership of the products of one's labor, namely, private property. However, for our purposes, a libertarian could merely introduce the right to own property as a second independent postulate.

22. The notion of "legitimate acquisition" calls upon two further postulates. The first is that of a legitimate transfer of legitimately owned property and is provided by Nozick in the "historical theory of the justice of distribution" (Nozick, pp. 153-60). The second, never adequately handled by the historical theory (or any other extant theory), is the very difficult problem of original entitlement. We can, however, pass over these complexities. It is enough to know that libertarians must (and most do claim to) have a theory of legitimate entitlement. That fills out a general right to own property with specific legitimate entitlements to specific pieces of property, given a general right to own property. It might be tempting for the libertarian to slip a prohibition against fraud into the notion of legitimate transfer rather than to treat it as a direct limitation on self-ownership. However, if all of our objections about a ban on fraud at the level of moral first principles hold they ought to pertain here as well.

use force or threats of force to interfere with self-ownership or ownership of property. And, at this foundational level, that is the only sort of interference prohibited.²³

Two Second-Order Rights

For the libertarian, there are two familiar second-order rights. The first is the right to defend against forceful attack and coercion by force or threats of force. The second right is to defend one's legitimately acquired property against seizures by force or threats of force in the same way. The foundation of the state as sovereign flows from individuals deputizing it to exercise these second-order rights in their behalf. It is, then, solely these two second-order rights to defend personal security and property which legitimizes the sovereign power of the libertarian state and its actions.²⁴

There is only one more important feature of the libertarian rights system. The list of two rights is exhaustive. So, a kind of exhaustivity principle must be included. There are no other rights arising in the state through deputization. The single most important feature of the libertarian political philosophy can now be formulated: The sole, legitimate power of the sovereign arises from its being deputized to act under these two second-order rights: to protect person and property from forceful aggression or seizure. This is consonant with a close reading of libertarian texts, with their strong dedication to self-ownership, their deep suspicion of sovereign power, and their determination to severely limit it.

No Duty to Aid and a Principle of Self-Responsibility

One thing that all libertarians seem to agree upon is that there exists no general duty (or at least no enforceable duty) to aid others because of their need, however dire. Contracts, role relationships (e.g., parent-child), and other special obligations, always voluntarily assumed, are exceptions. Still, if I fall ill or find myself drowning, etc. I have no general moral claim of aid enforceable upon my fellow women or men.

This follows logically from the mere fact of self-ownership and the existence of only two rights, that is, to personal security against

23. It is noteworthy, however, that no libertarian, of whom I am aware, considers the telling of lies or deception or even promise breaking as a basic interference with the ownership of person or property. At this foundational level, it simply is never included or even discussed.

24. Note that libertarians authorize the sovereign to protect against forceful seizures of property, not against the broader category of involuntary surrender of property. Surely, no libertarian would want the state empowered to interfere with sales of property at sacrifice prices due to the press of necessity or with sales based on mistakes solely the fault of the buyer, yet such sales may be involuntary or at least less than perfectly voluntary on one party's part.

attack and security of property, both of which establish negative duties. They tell us what one cannot do to others, while being silent on what one must affirmatively do.

It follows from this strong ban on duties to aid that I, and I alone, am responsible for myself. My claims on others are limited to the negative duties my rights to person and property impose upon them and contract duties they voluntarily assume. I call this logical consequence, rather unfelicitously, a principle of self-responsibility.

The principle of self-responsibility can be variously taken in the first instance as a moral duty to self or merely a counsel of prudence. However construed, it does necessarily play one crucial moral function. It acts as a bar to any moral agent who has engaged in a legitimate transaction and now wants, through moral claim, to rescind the transaction or demand additional compensation. It says, literally, you have no right.²⁵ (Obviously, it bars all other noncontractual claims of aid, as well.)

A Capacity to Exercise Market Competence

One easily overlooked additional requirement for libertarian moral systems must be explicitly set out in any discussion of fraud. The subjects who possess these rights and duties and to whom the principle of self-responsibility is attached must have sufficient capacities to engage in practical reasoning and to be moral agents. This requires a level of agency we might call general competence. Of course, libertarianism is not peculiar in restricting the domain of moral agency to such subjects.²⁶ But it must, along with other liberal political moralities, contain such an assumption.

For our purposes, this is crucial because it allows us to set out some prerequisites in terms of capacity for agents to enter into market transactions and to be morally bound by the execution of such transactions. By relying on much recent work on the notion of general competence and the related notion of a capacity for autonomy, we can formulate the constituents of the competence to enter market transactions.²⁷

25. It must be confessed that a principle of self-responsibility is only implicit in libertarian systems. Libertarians, typically, do not explicitly state it, though many talk of "responsibility for self." Certainly, it is consonant with the spirit of libertarianism and I know of no libertarian who explicitly or implicitly rejects it.

26. See, e.g., Rawls, pp. 12, 19, 505; and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), p. 272.

27. These abilities, which are constitutive of general competence or, as some authors put it, a capacity for autonomy, depend on discussions in Ruth Faden and Tom Beauchamp, *A History and Theory of Informed Consent* (New York: Oxford University Press, 1986), chaps. 7 and 8, esp. pp. 288–90; Joel Feinberg, *Harm to Self* (Oxford: Oxford University Press, 1987), chap. 18; Lawrence Haworth, *Autonomy* (New Haven, Conn.: Yale University Press, 1986), chaps. 1 and 2; and Lawrence H. Davis, *Theory of Action* (Englewood Cliffs, N.J.: Prentice Hall, 1979), chap. 5, esp. p. 114.

They would include the following deliberative capacities: (1) to acquire, understand and appraise information, which includes considering its probability of truth or falsity and its relevance; (2) to entertain a stable set of preferences by which choice among various options with various payoffs can be made; and (3) in light of this information and these values, to consider choices and weigh the possible risks, costs, and benefits of those choices. This includes the risk and cost of acting on false information. These would be combined with the broadly volitional capacities to arrive at decisions on the basis of those deliberations and act in accord with those decisions.

We can now use the general competence requirement to flesh out the principle of self-responsibility. For generally competent adults, the principle of self-responsibility requires them to use their competence when entering market transactions (hereinafter "market competence"). That is to say, one must engage one's critical, deliberative abilities, 1–3 above. If, while having market competence, one does not pay attention and think through problems which the market presents, the principle of self-responsibility bars moral appeal outside oneself.²⁸

LEGITIMATE TRANSFERS OF PROPERTY ENTITLEMENTS

Let us now see why, contrary to libertarian claims, fraudulent market transactions are within the class of legitimate transfers of property entitlements in any libertarian system. But first we must explore unproblematically legitimate transfers and see what makes them legitimate.

Transfers for Value (Transactions)

If I freely²⁹ exchange an item with you for money or bartered goods, and if I am generally competent, then that transfer is both legitimate and binding. Why are these legitimate transfers legitimate, given the libertarian moral structure? First, self-ownership entails my right to do with myself as I will, to manage and dispose of myself. I freely entered

28. Recall that the principle of self-responsibility bars a general duty to aid, so it is much broader than a call to use only one's market competence on pain of paying the price of inattention or negligence in market matters. It also applies in one's intercourse with the physical world whether choosing to cross a shaky footbridge or failing to store adequate food for the winter.

29. The term "freely" is used quite consciously. Joel Feinberg, consistent with most moral philosophers, takes "voluntary" to include an information element and, thus, takes fraud to be an interference with voluntariness. See Feinberg, chap. 20 and 25, esp. pp. 285–300. Thus, should we employ the term "voluntary," instead of "freely," we would beg the question as to the role of information and the obligations for its truthful conveyance. "Freely" should be taken to mean transfer by a person of normal capacity without force or threats of force, nothing else.

the marketplace and freely bargained while there. Second, my right to personal security has been respected. No one overpowered me and removed my property. Nor did anyone threaten to do that. Third, my right to own and control my property was not violated. No one stole it while I was away. I freely disposed of it as I chose. A very similar account can be given for gift, the other legitimate means of transfer.

Notice what happened, especially in the transfer for value. A proposed transaction was submitted to the agent and to his capacity for market competence. We might say with the law that it was offered and accepted.

Thus, we can discern two features of a legitimate transaction. First, there must be an offer and an acceptance. Second, between the offer and the acceptance there must be an opportunity presented by the offeror to the offeree to engage her capacities of market competence. Indeed, the offer constitutes an invitation on the part of the offeror to the offeree to engage her capacities. The invitation to engage those capacities of market competence implies that there can be no intentional effort on the part of the offeror to circumvent those capacities of competence of the offeree by circumventing her entirely. Just what constitutes "circumventing" we shall discuss below.³⁰

Given these two features of any legitimate transaction, that is, offer and acceptance and an intervening opportunity to engage market competence, the principle of self-responsibility bars any claims one might make to rescind or amend the transaction after the transfer. One is morally bound to accept the transfer.

Compare the features of a legitimate and binding transfer, as set out above, to unproblematically illegitimate transfers.

Transfers Using Force

It is clear that when someone overcomes another by force and forcefully seizes her property, both libertarian rights are violated and the "transfer" is illegitimate. Unproblematically, one's right to be person-

30. Note, this does not mean that such offers are pristine and free of efforts by the offeror to influence the outcome of the exercise of those capacities by the offeree. Of course not. Such influence is evidenced in everything from the features of the product to the music played while the sales pitch is given. One very important kind of influence is the information which the offeror provides, and the offeror will typically choose the information to be imparted with such influence in mind. This is especially true, of course, in the case of fraud. For, false information is chosen or true information suppressed or both. But any transaction, by the very nature of a transaction, requires a submission to one's capacities constituting market competence, whatever the efforts to influence the outcome of the function of those capacities of market competence may be. As we shall see, influence of the agent, as defined here, and circumvention of her, as defined below, are completely different and inconsistent, one with the other. Indeed influence presupposes noncircumvention.

ally secure from attack is violated. Its illegitimacy, in turn, clearly follows from libertarian moral principles, specifically, self-ownership and the derivative right not to be aggressed upon. Likewise, one's rights of property ownership have clearly been violated.

Notice, a transfer using force does not even look like a transaction. There is no offer; there is no acceptance. The person overcome by force has no opportunity to engage her market competence. In transfers using force, the deliberative agent, qua agent, is completely circumvented.³¹

Transfers Using Threats of Force

Threats of force are interesting because they do engage one's capacities of controlling and disposing of oneself. They require at least minimal competence. Nonetheless, our personal right not to be forcefully attacked and attendant right not to be coercively threatened with forceful attack is violated. So, a transfer involving threat of force is clearly an illegitimate transfer on libertarian grounds.³²

Transfers Using Theft by Stealth

If I sneak into your garage one night, hot-wire your car and quietly remove it, I have clearly performed an illegitimate transfer. Yet, what have I violated? I did not forcibly remove your car from you. Nor did I do it by threat of force. Nonetheless, I violated your legitimate entitlement to your car. Yet, we must be careful for, if we define your legitimate entitlement to your car to mean that the property cannot

31. Dan Greenberg has objected that the notion of "circumvention" and, alternatively, "going through an agent" are metaphorical. Perhaps so, but in a very deep sense. To remove the metaphor, we might say that force or stealth (see below) adopt means which, first, do not make use of the property owner as a deliberative agent in the transfer and, second, actually take steps to frustrate the exercise of her agency. Let "circumvention" stand for that. However, spatial metaphors referring to agency have a distinguished provenance. Aristotle often spoke this way, as when he said of voluntary action that "the originating cause lies *in* the agent himself" and that "the moving principle is *in* the agent himself" (emphasis added), *The Ethics of Aristotle*, trans. J. A. K. Thomson (London: Penguin, 1955), pp. 111, 115. Moreover, such spatial metaphors are often used outside of philosophy, where accurate depiction of the relationship of agent to information and control is central. In modern system designs, the flow chart often includes a human decision maker by showing the information line going through her and then issuing in a command.

32. One possible libertarian move is to try to derive the ban on fraud from the duty not to use force or threats of force against others. Indeed, Ayn Rand makes just this argument (p. 333). Fraud, she says, involves the "indirect use of force." This is so because "it consists of obtaining material values without their owner's consent" (ibid.). This is either question begging or mistaken. Rand's use of the term "consent" threatens to beg the question since "informed consent" assumes an information element. However, if we use the term "free consent" where "free" means what we have defined it to mean, Rand is simply wrong.))

be removed from you by force or threat of force, or theft by stealth, we open up a line of argument for the libertarian. She can simply insist that we add the additional disjunct "or fraud." So we must have an independent argument for why theft by stealth violates the requirement for legitimate entitlement and, thus, one's right to hold property as well.

Recall the technical legal definition of property ownership we introduced above for this purpose.³³ As we saw, an entitlement to a specific piece of property is an exclusive right to possess, use, control, and dispose of said piece of property. It is, of course, that precise right which is violated when I hot wired your car and removed it from your garage. Notice two crucial facts. First, there was no offer and no acceptance. Second, in doing this by stealth, I did it without your awareness. You were given no opportunity to engage your market competence to choose to freely transfer as you are in the process of a legitimate market transaction. Your competent agency was circumvented by my intentional action, much as it was when my henchmen held you down while I seize your property, that is, forceful transfers.

FRAUDULENT TRANSFERS

Let us take, as a paradigm example of a fraudulent transaction, the swap Jack made in the nursery story of his cow for three "magic" beans. Assume Jack was of majority and possessed market competence. What are the salient features of this transaction?

First, like the threat of force case but unlike the force or theft by stealth case, this interaction looks like a transaction. There was an offer and there was an acceptance. Something is being offered in exchange for something else. Moreover, Jack was aware of this. He knew what he was doing under the description of entering a transaction. Thus, Jack had the opportunity to engage his capacities of market competence in the transaction. Indeed, the two con men submitted the proposed transaction to him and his market competence for consideration. Of course, they tried to influence him by lying. Notice, the con men tried to influence him through this capacity for competence appraisal and decision. One would do the same in a legitimate transaction by truthfully pointing out a special, desirable feature of the product.

Does any part of the libertarian moral machinery ban this transaction? Let us see. Certainly, Jack's right to self-ownership, management, or control was not compromised. He was not forced to yield the cow. He was not threatened with force or violence.

Was this like a theft by stealth? No, for all the reasons given above. Jack was aware a transaction was proposed. He had an opportunity

33. See nn. 19 and 20 above.

to engage his market competence fully. He had every opportunity to be critical, even skeptical, of the story about the beans. He was not. There was no effort to circumvent his agency by stealth. Indeed, this kind of transaction, like a legitimate one, depends upon going through his deliberative agency.

We are left with the principle of self-responsibility. And, alas, it explicitly states what is already implicit in what we said above. Jack could have thought to doubt the two con men's claims as to the beans' properties. Had he been less gullible and directed more critical attention toward those claims, he might have done so. Indeed, he was given information to process and appraise. Of course, some of it was false. But, the determination of the probability of the truth of information acquired is part of the function of information appraisal and critical deliberation. Jack has this capacity and the principle of self-responsibility required that he use it. Jack has no morally enforceable claim for rescission or additional compensation.³⁴

DERIVING A FRAUD STANDARD FROM CONTRACT³⁵

One possible move would be to give up the state's right to enforce a ban on fraud directly. Instead, if we preserve the libertarian state's power of contract enforcement, private parties will prevent fraud by contract. For certifying the truth of information given upon sale would be a kind of warranty, and warranties are contracts. Thus, a libertarian state can enforce warranted truth in pretransaction communication. Given this, soon no one would deal with those who refuse to so warrant their representations. ✓

This is a promising move for the libertarian. Indeed, if we insist upon maintaining the state's authority to enforce contracts, it may be fatal to the thesis set out in this essay. But can the libertarian state maintain the authority to enforce contracts in the face of this analysis

34. Recall that Rand equated fraud with force (see n. 32 above). We are now in a position to see clearly and completely why that move is bound to be stymied. (1) Force violates a person's right to personal security. (2) With force, there can be no offer and no acceptance. (3) Therefore, there is no opportunity for the intervening engagement of the offeree's capacity of market competence. (4) Thus, force circumvents the agent's capacity for general competence. By comparison, fraud (1a) violates no libertarian rights. (2a) Fraud requires an offer and an acceptance, and (3a) it requires, indeed trades on, a submission of the proposed transaction to the offeree's market competence. (4a) Thus, it cannot circumvent and must go through the market competent agent-offeree. Fraud is much more like the threat of force. Indeed, it has 2a through 4a in common with the threat of force. But, crucially, the threat of force violates the right to personal security (1a), whereas fraud clearly does not.

35. This rejoinder has been put to me by several commentators. However, it was presented in its most cogent form independently by Dan Greenberg and an anonymous referee for *Ethics*.

of fraud? Whence comes the authority to enforce contracts if a breach of contract involves no violation of the two libertarian rights? Moreover, a contract cannot be considered a legitimate entitlement, and thus be protected under the right to property, if one is responsible for anticipating insincere promises, just as one is false information. The self-responsibility principle and its requirement to use fully one's market competence seems to cut off the state's contract enforcement powers as thoroughly as it does its antifraud powers and for the same reasons. This is the subject matter for another paper, but, perhaps, enough doubt about contract enforcement powers in the libertarian state has been raised to blunt this formidable counterargument for our present purposes.

Another strategy we might adopt against this counterargument would be to examine typical libertarian theories of contract to see if they presuppose the wrongness of fraud or the duty of truthfulness as foundational to contract. If so, it might prove illustrative of how deeply the assumptions of informed consent and voluntariness with its information element go, perhaps unconsciously, in libertarian thought, yet without foundation in the basic moral axioms of the theory. It would also, of course, render the counterargument, at least for these theories of contract, circular.³⁶

THE INCONSISTENCY OF LIBERTARIANISM AND A BAN ON FRAUD

If we are correct, the libertarians have no moral machinery for deriving the weak fraud standard. But I have claimed that not only can they not derive a fraud standard from their moral first principles but also that it is inconsistent with those principles.

36. Two good examples of such libertarian theories of contract are offered by Eric Mack and Randy Barnett. Eric Mack's "Natural and Contractual Rights," *Ethics* 87 (1977): 153–59, clearly presupposes a right not to be deceived in order to establish a contract right. The right not to be deceived is based upon a general right not to be coerced which, in turn, is based upon the wrongness of "rendering a person's behavior involuntary" (p. 153). Remember, "voluntary" contains an information element; see Feinberg. Mack's ban explicitly includes actions done due to ignorance. So, voluntariness, with its information element and the burden laid upon the seller to provide for it, is presupposed by Mack's theory of contract. Obviously, such a theory of contract cannot, then, be adduced as a justification for a fraud standard without vicious circularity. Randy Barnett, also, introduces a contract theory of a broadly libertarian sort. See "A Consent Theory of Contract," *Columbia Law Review* 86 (1986): 269–321. Unfortunately for this approach, Barnett's theory, as the name implies, rests entirely upon the notion of consent, and its definition (pp. 300–309), implicitly assumes that by consent we mean informed consent with one or both parties having the burden of providing adequate and appropriate information, i.e., of not committing fraud in the inception. Moreover, Barnett explicitly founds consent upon voluntariness (p. 296) with its always presupposed information element. Once again, the presupposition of no fraud lies at the foundation of a libertarian theory of contract.

Why is it inconsistent? Could the libertarian not simply add a ban on fraud to her two moral axioms as a new axiom? Note, a ban on fraud gives enforcement rights to the state and other individuals (in tort) to interfere with the fraudulent seller's self-ownership. At first blush, that sounds highly "unlibertarian," but such interference with self-ownership certainly does not disqualify it. The ban on forceful interference with person or property interferes with self-ownership, also. However, there are several arguments against the mere addition of an axiom banning fraud.

First, it seems *ad hoc* and arbitrary.³⁷ But an axiom's being *ad hoc* does not make it inconsistent. However, the apparently *ad hoc* nature of the fraud ban might succeed in shifting the burden of proof to its advocate. Surely, there must be some rational argument produced in answer to the question, "Why add this axiom." Second, the self-ownership axiom is so strong in libertarianism that we should treat it as a presumptive trump. That is, it trumps other possible axioms which limit self-ownership unless some good argument overcomes the presumption. These two arguments should succeed in shifting the burden.

Given the shift in the burden of proof shown above, another stronger series of arguments might follow. There are a number of slippery slope arguments which show the inconsistency of a fraud standard with self-ownership. But these arguments have a special and especially powerful form, as slippery slope arguments go. The form of the argument follows: we have axioms A_1 and A_2 (self-ownership and the right to own property) which are positively definitive of the system. They cannot be sacrificed without giving up the very nature of the system. Now, let A_3 be a ban on fraud. It is not, of itself, necessarily inconsistent with A_1 and A_2 . For the sake of this argument alone, we shall allow that A_3 limits A_1 and A_2 a little but not "too much," whatever that might mean. But, if we accept A_3 , we have no nonarbitrary criteria for keeping out A_4, A_5, \dots, A_n . Perhaps no one A_i , like A_3 , is inconsistent with A_1 and A_2 , though we have no guarantee of this. Nonetheless, the conjunction of A_3 through A_n is, that is, you cannot chip away at A_1 and A_2 too much through limiting A_i s without destroying A_1 and A_2 , and with them goes the whole game.

For example, an advocate of the fraud ban might argue that market efficiency requires a ban on fraud, but this is a dangerous

37. The explication adopted in this paper explicitly adds an exhaustivity principle, i.e., that is all the rights there are. That makes any additional rights-bearing axiom contradictory. But this move merely shifts the argument to the adequacy of the explication. Surely, some libertarians talk as if, in addition to the two second-order rights protecting self-ownership and the right to property, there is an exhaustivity principle. However, as an argument this move depends upon the adequacy of my explication and in no way demonstrates that a fraud ban is inconsistent with the two main axioms of libertarianism.

move for a libertarian. Consider what would happen if we allow consequential arguments of this sort. The list of additional moral axioms could go on and on, each justified by a consequential argument and each chipping away at self-ownership.

The first slippery slope argument had to do with consequential arguments for new axioms. There are other arguments which hold that the acceptance of the fraud ban itself gives reasons for the admission of more self-ownership-limiting axioms, ones for which we have no nonarbitrary means of exclusion.

From market to nonmarket truth telling.—Why should we limit the prohibition of lying to market contexts? What is the moral difference between market-related and bureaucratic, political, or social lying? Surely, any of the latter could be more hurtful. Indeed, why not a general duty of veracity enforceable by the state? Yet, this is surely a libertarian nightmare, completely inconsistent with self-ownership.

From fraud to nonfraud lying in the marketplace.—This argument is more narrow than the last but equally telling. Not all lying in the sale of a product is fraud. If you are trying to sell a red car to a customer and he asks whether you prefer the red color to the green color of the car on the lot across the street, it is not fraud to lie. Or, imagine that the customer tells you about his income, expenses, and debts then asks, "Can I afford this car?" Surely no libertarian would say that the state is justly empowered to see that you tell the truth in this case. In negotiations, a query, "What is your lowest price?" will almost always be met with a lie, at least early on. Would a libertarian want to ban this? Why not, if you accept a fraud ban? Consider the way a ban on these activities intrudes into your own beliefs and preferences and the apparent requirement of paternalism in the case of the customer's budget. How completely unlibertarian! Yet, how can fraud be differentiated from these sorts of market misrepresentations in a way that is defensible, given libertarian first principles?

From fraud to other moral problems in the marketplace.—The libertarian wants to ban fraud (and breach of contract). What about innocent mistakes by either party resulting in a "bad bargain" for one? What about transactions which transpire at exorbitant and unfair prices? What about transactions stemming from unequal bargaining power, including those entered under economic duress? Why not rescind transactions the consequences of which do not work out as planned by one party? No doubt there are other candidates as well. How can you ban fraud without banning these transactions? Yet, banning these would clearly sacrifice self-ownership.

What is the cumulative force of these various slippery slopes?³⁸ When we protect people from noneconomic forms of lying or from

38. The following points were clarified for me by Will Kymlicka in correspondence.

marketplace lying which is not fraudulent or from their own market mistakes, we are cutting back the domain of the principle of self-responsibility. We are protecting people against themselves or at least against their failure to anticipate these problems and to take adequate precautions. The agent in question was competent. His rights to self-ownership and property ownership were not infringed upon. Still, it seems that this is not enough. The libertarian must be willing to give up the assignment of responsibility to the agent for no good libertarian reason. So these slippery slope arguments endanger the principle of self-responsibility. Yet we saw that this principle follows directly from self-ownership. So if the principle of self-responsibility is endangered so is self-ownership and with self-ownership goes the whole libertarian framework.

THE WEAK AND STRONG FRAUD STANDARDS

Suppose we are wrong. Suppose, by some stratagem not contemplated here, the libertarian can derive a ban on outright lies about the product in the process of making market transactions, thus reaching the weak fraud standard. There is still an additional, deeply libertarian reason why the strong fraud standard cannot be reached. If self-ownership means anything, it means that, absent contract, you do not have a draft on me, my activities, or my life. Yet, the strong fraud standard includes a requirement that I have an affirmative duty to go beyond silence and impart to you material facts about a product I am offering to sell you. That is very much a part of modern commercial law. Yet the libertarian seems certain to fall short of this as an enforceable moral requirement, for it undeniably represents a not contracted for draft upon one's services.

CONCLUSION

That its first principles permit fraud is a deep problem for libertarianism. First, the result seems counterintuitive. Indeed, such permission must be so, for every libertarian I know of introduces a fraud standard or, what we have seen amounts to the same thing, a requirement for fully voluntary exchange. Moreover, wholesale fraud could cause some kinds of markets to fail, and a libertarian without market institutions is in a sad state, indeed. At the very least, any market fraud causes suboptimal market outcomes, surely a condition of discomfort for libertarians. Last, the "hard boiled" caveat emptor standard is wildly at variance with modern commercial law. If libertarianism is put forth as a position with serious credibility for practical policy issues, this is an unfortunate result. Perhaps partisans of the free market should look for a moral theory of market transactions somewhat more ampliative than the libertarian theory.

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