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A Libertarian Theory of Contract:

Title Transfer, Binding Promises, and Inalienability

While in law school in Louisiana (the only civil law state in the US), I was introduced to the Roman and civil law\* and also to contract law and theory. It was during my first-year contracts class, in 1988, that I conceived of my “estoppel” based theory of rights.† I also became interested in the Rothbard-Evers title-transfer theory of contract.†† I presented a paper on this topic in 1999, integrating the views of Rothbard and Evers with various concepts from the civil law and the common law.§ I later published an article on this in the Journal of Libertarian Studies, upon which this chapter is based.\*\*

\* Discussed in “Legislation and the Discovery of Law in a Free Society” (ch. 13).

† See “How I Became a Libertarian” (ch. 1), n.6 and accompanying text; “A Libertarian Theory of Punishment and Rights” (ch. 5).

†† See Murray N. Rothbard, “Property Rights and the Theory of Contracts,” in *The Ethics of Liberty* (New York: New York University Press, 1998; https://mises.org/library/property-  
rights-and-theory-contracts); and Williamson M. Evers, “Toward a Reformulation of the Law of Contracts,” *J. Libertarian Stud.* 1, no. 1 (Winter 1977; https://mises.org/library/toward-reformulation-law-contracts): 3–13. See also Kinsella, “Justice and Property Rights: Rothbard on Scarcity, Property, Contracts…,” *The Libertarian Standard* (Nov. 19, 2010), discussing the origins of the Rothbard-Evers contract theory.

§ Stephan Kinsella, “A Libertarian Theory of Contracts,” Austrian Scholars Conference, Mises Institute, Auburn, Ala. (April 17, 1999); also *idem*, “The Theory of Contracts,” Rothbard Graduate Seminar, Mises Institute, Auburn, Ala. (July 28–Aug. 2, 2002; <https://perma.cc/RQ5Z-S2GE>).

\*\* Stephan Kinsella, “A Libertarian Theory of Contracts: Title Transfer, Binding Promises, and Inalienability,” *J. Libertarian Stud.* 17, no. 2 (Spring 2003): 11–37. Related articles or discussions published after the original article include “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11); and various *Kinsella on Liberty Podcast* episodes, e.g.: “KOL225 | Reflections on the Theory of Contract (PFS 2017)” (Sep. 17, 2017); “KOL197 | Tom Woods Show: The Central Rothbard Contribution I Overlooked, and Why It Matters: The Rothbard-Evers Title-Transfer Theory of Contract” (Dec. 3, 2015); “KOL146 | Interview of Williamson Evers on the Title-Transfer Theory of Contract” (Aug. 5, 2014); “KOL020 | “Libertarian Legal Theory: Property, Conflict, and Society: Lecture 3: Applications I: Legal Systems, Contract, Fraud” (Mises Academy, 2011)” (Feb. 21, 2013).

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I. INTRODUCTION

*A. Property and Contract*

A system of property rights 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 scare resources to particular owners, resource use conflicts may be reduced. Nonowners can simply refrain from invading the borders of the owned resources—that is, avoid using the thing without the owner’s consent.[[1]](#footnote-1) Using a property rights scheme, it is at least possible for conflict to be avoided or reduced. This is the very purpose and function of property rights: to respond to the practical problem of conflict in a world of multiple actors.[[2]](#footnote-2)

Under the libertarian approach, people are self-owners, that is, they own their bodies. As for external resources, that is, previously-unowned conflictable resources, the first to use an *unowned* scarce resource—the homesteader—becomes its owner.[[3]](#footnote-3) This is called original appropriation or, sometimes, usually in the case of real (immovable) property, homesteading. The first possessor has better title in the resource than any possible challenger, who is always, with respect to him, a latecomer.[[4]](#footnote-4)

But property rights are not only acquired; they may be lost or transferred to others. For example, the owner may abandon the thing so that it once more becomes unowned and available for appropriation by a new homesteader. Likewise, the owner may give or sell the resource to another. The owner might also commit a crime or tort, thereby forfeiting his rights to the resource, in favor of the victim.[[5]](#footnote-5)

Property theory concerns not only the initial acquisition of property rights in conflictable resources, but also their loss and transfer. Tort and punishment theory, as subsets of general property theory, describe how acts of aggression or negligence change ownership rights to scarce resources.[[6]](#footnote-6) Contract theory specifies how rights are transferred as the result of voluntary agreement between the owner and others. While some voluntary agreements are said to be “enforceable,” others are not. The question for libertarians concerns when and why agreements are legally enforceable. In other words, how are (property) rights voluntarily (consensually) transferred?

*B. Overview of Contract*

Contracts are used in exchange—from simple barter to complex exchanges such as loans and employment contracts. In economics, exchange has to do with the motivations of the actor and his view of opportunity costs. In the positive law, in both the common law and civil law, a contract is seen as a relation between two or more parties which includes legally *enforceable obligations* between them.

Contracts result from *agreement* or *promises* between the parties, e.g., one party promises to another to do (or not do) something, or to give some (owned or ownable) thing to the other party. The promise may be made in exchange for things given or promised by the second party. The promises may be future-oriented and based on certain conditions. Agreements may be simple or complex; contemporaneous or future-oriented; unilateral donations or bilateral and reciprocal.

Not all agreements or promises result in a binding contract or legally enforceable obligations. Only those meeting certain criteria are, depending on the legal system.[[7]](#footnote-7) For example, in the common law, there must be *consideration*; in the civil law, there must be *cause*. The parties must have capacity. And so on. If the promises or agreement made results in a contract, the force of law can be brought to bear to enforce the contract—the agreement may be “enforced.” 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 usually include an award of money, called damages.

Under the positive law, contractual obligations may be classified as obligations *to do*, *not to do*, or *to give*.[[8]](#footnote-8) An obligation *to give* may be viewed as a transfer of title to property, as it is an obligation to give ownership of a 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.[[9]](#footnote-9) 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 singer might well give a shabby performance. For these and other reasons, in such cases, the singer would be ordered to pay monetary damages to the other party instead of ordered to sing.

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; instead, the court would order the promisor (obligor) to pay the promisee (obligee) a sum of money.

So-called “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. But note that, even in this case, specific performance results in the transfer of title to the unique property from the owner to the other party, which supports the Rothbard-Evers title-transfer theory of contract advocated below.

Thus, in modern positive law, “breach of contract”—failing to render the contractual obligations—results in a transfer of property—sometimes unique goods such as real property, but usually money—from the breaching party to the promisee. Contracts are enforced today *not* by forcing a party to perform the promised action but by threatening to transfer some of the promisor’s owned resources 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 owned resources (whether money or some other owned good, usually a unique good such as land or a painting) can be forcibly transferred to the other party.

What this means is that, in reality, in modern contract law, there are really no contractual obligations “to do” anything. It also means contract breach is really impossible, as contracts are not enforceable obligations to do things. There are only obligations to transfer title to resources, either directly (agreement to pay a sum of money) or as a consequence of failure to perform a promised action (a conditional 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 resources (commonly called “property”) in the event of default, combined with reputation effects, is apparently sufficient to render contracting a useful institution.

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.[[10]](#footnote-10)

*C. 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 to be 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. Or, more generally, an owner of a resource is entitled to use force to defend his ownership rights in his body and in resources he or she owns. Ownership of an external resource means that the owner can withhold consent (exclude) others or invite them to use the resource.

In other words, viewed in property terms, a resource may be used only with the *consent* of its owner. Unprovoked aggression against another is a use of his resource (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.[[11]](#footnote-11) 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 be itself initiated force. Speech is (generally) non-aggressive, for example, because it does not invade others’ property borders, so it does not justify the use of responsive force.[[12]](#footnote-12) Libertarians oppose censorship and recognize a free-speech right because speech, *per se*, does not aggress (usually). 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 pointed out, a “mere promise” is not sufficient to create a binding contractual obligation.[[13]](#footnote-13)

For example, consider a budding singer who asks his famous actor friend to attend the singer’s concert. The famous 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 title begs the question that contract theory asks: Why does a promise serve to transfer title?

*D. 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 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, (an enforceable) contract requires a promise and *consideration*—something of value received in exchange for the promise.[[14]](#footnote-14) This is why a dollar, or ten dollars, 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.[[15]](#footnote-15) 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.[[16]](#footnote-16)

Yet the antiquated doctrine of consideration has long been criticized.[[17]](#footnote-17) It would prevent a contract from being formed in some situations that it seems they should be, such as gratuitous (gift) promises and even some commercial promises.[[18]](#footnote-18) Further, if a mere promise (naked promise, or *nudum pactum*) is not enforceable, why does it become enforceable just because the promisee gives something small in return? Given that only a token amount of consideration—a “mere 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 a value” to the recipient?[[19]](#footnote-19) 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 turn 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.

*E. 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.[[20]](#footnote-20) This doctrine seeks to protect the “expectations” or “reliance interest” of the promisee.[[21]](#footnote-21) 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.[[22]](#footnote-22)

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.[[23]](#footnote-23)

If there is “detrimental reliance,” 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 a hardship on the promisee.[[24]](#footnote-24) 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. But this is confused. 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.[[25]](#footnote-25) If the reliance is not reasonable, it is not really the promisor’s “fault” that the promisee relied. The promisor could not have anticipated outlandish reliance.

One major problem with this doctrine, however, is its circularity. In deciding whether to rely on a given promise, a reasonable person would take into account whether promises, in a given legal system, are enforceable. If promises without consideration are known to be unenforceable, for example, it would be unreasonable to rely on them 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.[[26]](#footnote-26) 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 them. Why can a person be forced to perform or 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.

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.

II. THE TITLE-TRANSFER THEORY OF CONTRACT

*A. 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.[[27]](#footnote-27) 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.

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.[[28]](#footnote-28) 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 title. They appear to think that because a promise is not enforceable, it therefore cannot serve to transfer title to property.[[29]](#footnote-29) 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. Contracts always involve communication and some type of language, when the owner of a resource communicates his consent to allow someone else to use or have his resource. Language is always contextual. There is no reason that use of the word “promise” cannot be intended to signify an intent to give contractual permission or consent.

Ultimately, contracts are enforceable 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.

*B. 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, since the future is uncertain. 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.

In addition, because the future is not certain,[[30]](#footnote-30) all 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 by fire. In this case, 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 each conditional. I give my dollar to you only on the condition that you give your chocolate bar to me, and vice-versa. Exchange contracts quite 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 to 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 implied condition that I have title to $100 at the designated future payment time (and that we both exist!).

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.[[31]](#footnote-31)

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 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 if I still own the coin.[[32]](#footnote-32)

Also, as evident in the beanie baby example above, the title-transfer theory of contract permits gift contracts (donations) as well as exchanges. The common law is 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 (like the civil law), does not discriminate between gratuitous and onerous contracts[[33]](#footnote-33)—between donations (gifts) and mutual exchanges. The owner of property may convey title to another, for any reason, whether pecuniary, charitable, or arbitrary, by manifesting and communicating his intent to do so. Gifts of property or title exchanges are all operative and, thus, enforceable.

*C. 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 promise “to do” or “not to do” as opposed to the promise “to give.” The only way to actually en*force* a promise to perform a given action is to have the right to inflict, well, physical *force*, as either punishment or 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 afterwards 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 option. 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.[[34]](#footnote-34)

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. These critics 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.[[35]](#footnote-35) 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 $3,000 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 $3,000 to Ethan on day X *if* he has painted my house (and *if* I own $3,000).” 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 today, in which contracts are widely used and relied upon. Indeed, although this approach to contracts seems odd to those used to the conventional “binding promises” view of contract, it is not really new. As Randy Barnett observes:

Viewing contract law as part of a more general theory of individual entitlements that specifies how resources may be rightly acquired (property law), used (tort law), and transferred (contract law) is not new.[[36]](#footnote-36)

III. CLARIFICATIONS AND APPLICATIONS

*A. 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.”[[37]](#footnote-37)

Yet, we must ask, why does manifesting one’s intent to transfer title actually do it? Why does the owner have the power or capacity 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 car or hammer 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 use (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. In this way, “contract” is just a consequence or application of ownership rights; the owner has the right to exclude or deny permission to others to use the owned resource, or he can consent to it. This must somehow be communicated by language.

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.[[38]](#footnote-38) 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 or 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 others. This is why Hoppe refers to acts of original appropriation as “embordering” or “produc[ing] borderlines for things.”[[39]](#footnote-39)

Acquiring is an action by which one manifests intent to own the thing by setting up public borders.[[40]](#footnote-40) Likewise, property is abandoned, and title thereto is lost, when the owner manifests an 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.[[41]](#footnote-41)

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 car or hammer to a neighbor and then abandons the item. In this case, the neighbor at first has possession, but not title, to the object. When the owner abandons it, the car, or hammer, becomes unowned again. As 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.[[42]](#footnote-42) By combining the power to permit others to use property with the power to abandon—both rights or powers of *owners*—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.[[43]](#footnote-43)

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, who can then re-homestead it.

*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.

*B. Property in the Body*

Under libertarian principles, 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 (to exclude), 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.

Now, 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 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—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. Or as Professor Hoppe points out, “any indirect control of a good by a person presupposes the direct control of this person regarding his own body; thus, in order for a scarce good to become justifiably appropriated, the appropriation of one’s directly controlled ‘own’ body *must already be presupposed as justified*.”[[44]](#footnote-44)

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.

*C. Rothbard on Inalienability*[[45]](#footnote-45)

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 the action that had been promised, implying some rights in the body had been alienated merely by making the promise. Likewise, 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.”[[46]](#footnote-46) 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. (This is, in fact, Walter Block’s view.)[[47]](#footnote-47) 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.[[48]](#footnote-48) 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 only have 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.[[49]](#footnote-49) In effect, the aggressor’s body 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 ownership implies the power to transfer the property’s title: the owning-implies-selling fallacy. 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 repel 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.

**1. Addendum: Rothbard’s Mistake?**

As pointed out in note 45, above, in the years since I published the original article upon which this chapter is based, I have rethought some of my criticism of Rothbard’s take on inalienability. In this chapter, I have retained my original criticism, above, from the original article, and will now try to explain my current perspective.[[50]](#footnote-50)

In other chapters I argued that rights in our bodies stem from the fact of our direct control of our bodies, drawing on Hoppe’s arguments, while property rights in external, previously unowned resources arise from original appropriation or title transfer from a previous owner by contract or for purposes of rectification.[[51]](#footnote-51) I have a better claim to my body than others since I have direct control over it, which gives me a more objective link to the resource of my body than to anyone else, who compared to me can at best have only indirect control of my body. Now when someone commits an act of aggression, he therefore, in effect, gives irrevocable permission to the victim to use force against the aggressor’s body for purposes of self-defense or proportionate retaliation or rectification.

But in the case of an attempted voluntary slavery contract, the promisor, by saying, “I promise to be your slave,” or “I give my body to you” does not commit an act of aggression. It does not create any victim who has a right to retaliate against him. So if the would-be slave decides to renege on his promise and run off, the would-be master has no right to use force to stop him. It is always current consent that matters. If a girl promises a kiss at the end of the date and the boyfriend an hour later kisses her, she cannot claim it was nonconsensual. In effect, she communicated her consent, she set up a standing presumption that is reasonable to rely on—until and unless she changes her mind. If at the end of the date she announces she no longer wants a kiss, it is *that* consent that matters. It is always the most recent consent that matters since this is the best evidence for what was consented to. There is nothing in libertarianism that says people cannot change their minds. To simply state that you can make an irrevocable, binding promise is just question-begging since it is just another way of sneaking in the assumption that our bodies are alienable, even though our rights to our body do not stem from homesteading or acquisition but rather from our direct control of them.

In other words, the fundamental argument against the enforceability of voluntary slavery contracts is that ownership of bodies is based on the person’s direct control over their body. But this is similar to the “will” that Rothbard relies on in his opposition to voluntary slavery. So, as noted in the section above, when Rothbard says voluntary slavery contracts are illegitimate since it is impossible to alienate one’s will—he is basically right. Without committing an act of aggression, that is. And promising to be a slave is not an act of aggression.[[52]](#footnote-52)

*D. Theft and Debtors’ Prison*

Although he rejects the enforceability of voluntary slavery contracts, Rothbard inconsistently views 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.[[53]](#footnote-53)

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 confused. Rothbard senses that this could justify debtors’ prison, which is tantamount to voluntary slavery, which he has already rejected. So he tries to avoid this result by arguing that imprisoning a defaulting debtor goes “far beyond proportional punishment” and, thus, is “excessive.”[[54]](#footnote-54) But why? If failure to pay a debt is “implicit theft,” why can’t the “thief” be treated as such and punished?

One reason Rothbard has to come up with a convoluted argument to avoid the voluntary slavery implicit in debtor’s prison is that he didn’t follow his own contract theory to its logical conclusion. He writes:

[W]hen 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 made. Until then, it remains the creditor’s property, and nonpayment would be equivalent to theft of the creditor’s property.[[55]](#footnote-55)

This is the mistake that leads him to also classify failure to repay a debt as “implicit theft.” Suppose creditor-lender *A* loans $1000 to debtor-borrower *B* in exchange for *B* paying $1100 (principal plus interest) to *A* in a year. Now the very purpose of loaning money is to enable the borrower to *spend* it on some project. For example, *B* needs to pay *C* for supplies to start his snow-cone stand business. The hope is that the business is successful, *B* makes a profit, and is able pay *A* $1100. But for *B* to use or spend the money, to pay *C*, he has to fully own the money, unconditionally. In this bilateral and mutual arrangement, there are two title transfers: a present, unconditional transfer of $1000 now; a future, uncertain, and conditional payment of $1100 in the future. Why is the second transfer conditional? Because the future is uncertain. Future things don’t yet exist. They might never come to exist. *B*’s business may fail. He may be dead. He may be bankrupt. *A* is well aware of this and, in fact, this is one reason he charges interest.

Rothbard has lost sight here of the necessity that any property rights schema be able to answer the question of who can use what resource *now*, rather than waiting for some future information, otherwise people would not be able to survive because they could not use resources to produce and consume in the present.[[56]](#footnote-56) So the idea of implicit theft leads Rothbard to assume that debtor’s prison is in principle justifiable, which then forces him to wriggle out of it by simply declaring it to be disproportionate punishment. The entire concept of “implicit theft” must be rejected as hopelessly muddled and incompatible with libertarian principles of property rights and justice.

Fortunately, we do not need such a convoluted argument to condemn debtor’s prison. The real reason the defaulting debtor may not be punished is that he is simply 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.[[57]](#footnote-57)

Of course, contracts would normally contain default or explicitly spelled out ancillary title transfers to address the unavoidable possibility of future default. For instance, a default title transfer that is ancillary to the main title transfers 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.

*E. Fraud*

As noted earlier,[[58]](#footnote-58) libertarians often claim to believe in the non-aggression principle, or NAP, and that the NAP prohibits not only the initiation of force against the person of someone else (self-ownership) but also prohibits the use of force against the *property* of someone else—*or threats* thereof, *or fraud*.[[59]](#footnote-59) But including owned resources under the NAP rubric is somewhat awkward, since aggression would seem to literally refer to physically attacking another’s body. And then threats and fraud are just tacked on. As I previously noted, using the NAP as a shorthand for this cluster of relative rights is fine as long it is kept in mind that the justifications for these are different. I argued in chapters 2, 4, and elsewhere that self-ownership rights (and thus the prohibition on aggression) stem from each person’s direct control of his body; but that actors also acquire property rights in external, previously-unowned resources by original appropriation or contractual acquisition from a previous owner. I argued in chapter 5 (section IV.F) why threats are also types of aggression under libertarian principles.

The theory of contract espoused here demonstrates that fraud is properly viewed as a type of theft, if defined properly. The problem is that even some libertarians use the term loosely, which leads to error. Sometimes it is just used to mean dishonesty; other times in support of the idea of “implicit theft,” a concept I have criticized above.[[60]](#footnote-60) But because of the sloppy use of the term, failure to provide clear definitions, and lack of appreciation of Rothbard’s and Evers’s groundbreaking title-transfer theory of contract elaborated, refined, and extended in this chapter, libertarian theory is left vulnerable to criticism, such as that of James Child and others, discussed below.

The only type of “fraud” that can count as a violation of libertarian principles, is when it amounts to a type of theft. The Rothbard-Evers title-transfer of contract (after being pruned of its confused “implicit theft” branches) can help to make this clear. Suppose Karen buys a bucket of *apples* from Ethan for $20.[[61]](#footnote-61) 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” type activities, like pawning off rotten apples. (Good faith is also a default background interpretative condition to the contractual title transfers.)[[62]](#footnote-62) 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.

This is akin to the legal notion of larceny by trick:

Under common law, larceny is the trespassory taking and carrying away of the personal property of another with the intent to steal. Larceny by trick is distinguishable in that a defendant who commits larceny by trick *obtains only possession of the personal property of another, not title of that property*. Also, the defendant who commits larceny by trick obtains possession of the property by intentionally making a false statement to the victim.[[63]](#footnote-63)

This libertarian take on fraud is also more or less compatible with conventional legal doctrines: “In law, fraud is intentional deception to secure unfair or unlawful gain, or to deprive a victim of a legal right.”[[64]](#footnote-64)

The reason this conception of fraud follows from libertarian property rights principles and the title-transfer theory of contract is that ownership of a resource (including one’s body) gives one the right to exclude others from using the resource. The owner can grant permission or deny permission by communicating his consent to others. In the case of alienable, owned things, the owner can allow someone to use the thing temporarily (loaning my car to a friend for a day), give it outright (a gift), or agree to give up title to it in exchange for some act or other title transfer from the other party. This is what contracting *is*: the exercise of property rights by the owner communicating his consent about who can use the property and under what conditions. If I loan you my car, you are the temporary possessor, not the owner. Possession and ownership are distinct. I can transfer ownership but not possession, or vice-versa; or both; or neither. In the example above, when Ethan takes possession of Karen’s $20, he only has possession, not ownership, since Karen made the transfer of title to the money conditional upon the apples being genuine.[[65]](#footnote-65)

Once understood this way, the criticisms of libertarianism for being unable to justify fraud law can be seen as confused and flawed. James W. Child, for example, is wrong in asserting that “the basic moral principles of libertarianism do not support a prohibition of fraud.”[[66]](#footnote-66) Benjamin Ferguson argues that Child is correct that libertarianism does not prohibit fraud, but that we can oppose fraud by “appealing to an external theory of moral permissibility.”[[67]](#footnote-67) Ferguson is also incorrect, like Child, in his first point, so the second part of his thesis is unnecessary; libertarianism already prohibits fraud and does not need patching with external theories.

IV. 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.

1. As noted previously, technically speaking, property rights are best viewed as rights to exclude others from using a resource rather than a right to use; and the term property, to be precise, should be used to refer to the (ownership) relationship between a human owner and an object (scarce, conflictable resource), not to the owned material object itself. Thus, your car is not your “property”; you have a property right in your car. On all this, and on the use of terms like conflictable or rivalrous to refer to ownable scarce resources, see Kinsella, “On Conflictability and Conflictable Resources,” StephanKinsella.com (Jan. 31, 2022); “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.62; and “What Libertarianism Is” (ch. 2), at n.5.

   Even more precisely still, property rights can be conceived of as rights between human actors, but with respect to particular resources, although this distinction makes little difference for our present purposes. On this point see, e.g., Emanuele Martinelli, “On Whether We Own What We Think” (draft, 2019; https://www.academia.edu/93535130/On\_Whether\_We\_Own\_What\_We\_Think), p. 6 (“Property is a relation between a person and a thing.”); Svetovar Pejovich, “Towards an Economic Theory of the Creation and Specification of Property Rights,” in Henry G. Manne, ed., Economics of Legal Relationships (West Group, 1975), p. 40 (emphasis in original) (“[P]roperty rights are defined not as relations between men and things but, rather as the behavioural relations among men that arise from the existence of things and pertain to their use.”; quoted in Boudewijn Bouckaert, “What is Property?”, Harv. J.L. & Pub. Pol'y 13, no. 3 (Summer 1990): 775–816, at 795); Andrew Koppelman, Burning Down the House (St. Martin’s Press, 2022), p. 79 (“It’s sometimes said that property is a relation between a person and a thing, but that’s confused. Property rights are relations between people. If I legitimately own something (rather than merely possessing it, as might be true of stolen goods), everyone else on the planet has an obligation to keep their hands off it. If that’s going to be true, then there has to be some reasonable basis for thinking that they have that obligation.”); and Alex Kozinski, “Of Profligacy, Piracy, and Private Property,” Harv. J.L. & Pub. Pol’y. 13, no. 1 (Winter 1990; https://perma.cc/Z8AD-634V): 17–21, p. 19:

   But what is property? That is not an easy question to answer. I remember sitting in my first-year property course on the first day of class when the professor … asked the fundamental question: What are property rights? … I threw up my hand and without even waiting to be called on I shouted out, “Property rights define the relationship between people and their property.”

   Professor Krier stopped dead in his tracks, spun around, and gave me a long look. Finally he said: “That’s very peculiar, Mr. Kozinski. Have you always had relations with inanimate objects? Most people I know have relations with other people.”

   That was certainly not the last time I said something really dumb in class, but the lesson was not lost on me. Property rights are, of course, a species of relationships between people. At the minimum, they define the degree to which individuals may exclude other individuals from the use and enjoyment of their goods and services….

   See also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.62; and “What Libertarianism Is” (ch. 2), at n.5 and Appendix I. [↑](#footnote-ref-1)
2. See “What Libertarianism Is” (ch. 2); and other references in note 4, below. [↑](#footnote-ref-2)
3. See John Locke, Second Treatise on Civil Government (1690; https://www.johnlocke.net/2022/07/two-treatises-of-government.html), chap. 5, “Of Property”; “What Libertarianism Is” (ch. 2); “How We Come to Own Ourselves” (ch. 4); “A Libertarian Theory of Punishment and Rights” (ch. 5); Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform,” StephanKinsella.com (May 30, 2022). [↑](#footnote-ref-3)
4. The owner of a given resource is said to have a title to the resource, i.e., is entitled to use it. It is a property right since it becomes an extension of the owner’s ability to interact with the world, i.e., one of his attributes or “properties”; he is the proprietor or has a proprietary interest in the thing. As Bouckaert writes:

   [T]he definition of property is simultaneously simple and complex. It is simple because we can distinguish a generally accepted common-sense notion of property; that is, something that belongs to somebody in a legitimate way, something that is “proper” to somebody.

   Boudewijn Bouckaert, “What is Property?”, Harv. J.L. & Pub. Pol'y 13, no. 3 (Summer 1990): 775–816, at 775.

   On the function of property rights, see generally Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010; www.hanshoppe.com/tsc), chaps. 1, 2, and 7, esp. pp. 13–15 & 18–30, discussing notions of scarcity, aggression, norms, property, and justification; idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in The Great Fiction: Property, Economy, Society, and the Politics of Decline (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf). See also the discussion of Hoppe’s work on this topic in “Defending Argumentation Ethics” (ch. 7). On the prior-later distinction, see “What Libertarianism Is” (ch. 2), at notes 32–36 and accompanying text, et pass.; “Defending Argumentation Ethics” (ch. 7), the section “Objective Links: First Use, Verbal Claims, and the Prior-Later Distinction.” [↑](#footnote-ref-4)
5. For more on the issue of abandonment and a criticism of the Mutualist-libertarian position on it, see “What Libertarianism Is” (ch. 2), n.31 and accompanying text and Appendix II. For further discussion of the issue of “forfeiting” or waiving rights, see “Knowledge, Calculation, Conflict, and Law” (ch. 19), n.81 and “A Libertarian Theory of Punishment and Rights” (ch. 5), n.88 and Appendix: The Justice of Responsive Force. [↑](#footnote-ref-5)
6. Invasions of the borders—uninvited use—of others’ owned resources 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 defense, punishment, and/or restitution. See “Inalienability and Punishment: A Reply to George Smith” (ch. 10); “Defending Argumentation Ethics” (ch. 7); and   
   “A Libertarian Theory of Punishment and Rights” (ch. 5). 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. Re negligence, see Kinsella, “The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld,” Mises Economics Blog (Sep. 1, 2009). [↑](#footnote-ref-6)
7. 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. See, e.g., also Louisiana Civil Code (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=67&level=Parent), art. 1906: “A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.” See also ibid., art. 1757: “Obligations arise from contracts and other declarations of will.” Thus, “A contract is, therefore, a juridical act because by their ‘agreement,’ or exchange of wills, the parties to it create, modify or extinguish obligations.” Alain A. Levasseur, Louisiana Law of Conventional Obligations: A Précis (LexisNexis, 2010), “Introduction”; see also idem, Louisiana Law of Obligations in General: A Comparative Civil Law Perspective, A Treatise (Durham, NC: Carolina Academic Press, 2020), chap. 1, ¶ 17 et pass.

   For useful definitions of various legal terms used in this chapter, see Dictionary.law.com and the latest edition of Black’s Law Dictionary; also Gregory Rome & Stephan Kinsella, Louisiana Civil Law Dictionary (New Orleans, La.: Quid Pro Books, 2011). [↑](#footnote-ref-7)
8. See Louisiana Civil Code, arts. 1756 and 1986, describing obligations to do (an act) and obligations to give; also Levasseur, Louisiana Law of Conventional Obligations: A Précis, chap. 3, art. 3; chap. 6 (preamble); chap. 8 (preamble); Saúl Litvinoff, The Law of Obligations: Part I: Obligations in General, 2d ed. (St. Paul, Minn.: West Publishing Company, 2001), § 1.4; Randy E. Barnett, “Contract Remedies and Inalienable Rights,” Social Policy and Philosophy 4, no. 1 (Autumn 1986; https://tinyurl.com/44adafte): 179–202, at p. 189; idem, “Rights and Remedies in a Consent Theory of Contract,” in R.G. Frey & C. Morris, eds., *Liability and Responsibility: Essays in Law and Morals* (Cambridge University Press, 1991), p. 158; and, more generally, Alain A. Levasseur, Louisiana Law of Obligations in General: A Précis, 3rd ed. (LexisNexis, 2009); idem, Louisiana Law of Obligations in General: A Comparative Civil Law Perspective, A Treatise; and Saúl Litvinoff, Obligations, vol. 1 (St. Paul, Minn.: West Publishing Company, 1969). [↑](#footnote-ref-8)
9. Barnett, “Contract Remedies and Inalienable Rights,” pp. 180–82; idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 154–55. On the availability of specific performance in civil-law systems, see Louisiana Civil Code, art. 1986; and Litvinoff, Obligations, vol. 2, pp. 301–302. [↑](#footnote-ref-9)
10. Randy E. Barnett, “A Consent Theory of Contract,” Colum. L. Rev. 86 (1986; www.randybarnett.com): 269–321 (as well as the version thereof incorporated into idem, “Rights and Remedies in 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,” Harv. L. Rev. 46 (1933): 573; Charles Fried, Contract as Promise (Cambridge, Mass: Harvard University Press, 1982); and Charles J. Goetz & Robert E. Scott, “Enforcing Promises: An Examination of the Basis of Contract,” Yale L. J. 89, no. 7 (June 1980; https://scholarship.law.columbia.edu/faculty\_scholarship/249/): 1261–1322. [↑](#footnote-ref-10)
11. See “A Libertarian Theory of Punishment and Rights” (ch. 5), “Dialogical Arguments for Libertarian Rights” (ch. 6), “Inalienability and Punishment” (ch. 10), and “Defending Argumentation Ethics” (ch. 7). [↑](#footnote-ref-11)
12. I say “generally” because speech acts can certainly 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 an innocent man when he states, “Ready, aim, fire!” In general, however, speech does not cause invasion of others’ property. These issues are discussed in further detail in “Causation and Aggression” (ch. 8). [↑](#footnote-ref-12)
13. See, e.g., Shael Herman, “Detrimental Reliance in Louisiana Law—Past, Present, and Future (?): The Code Drafter’s Perspective,” Tul. L. Rev. 58 (1984): 707–57, p. 711 (“No legal system supposes that all promises should be enforced. Identifying which promises deserve judicial enforcement is crucial to any system of laws.”). [↑](#footnote-ref-13)
14. Saúl Litvinoff, “Still Another Look at Cause,” La. L. Rev. 48, no. 1 (Sep. 1987; https://digitalcommons.law.lsu.edu/lalrev/vol48/iss1/5/): 3–28, pp. 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; idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 148–49, et pass. [↑](#footnote-ref-14)
15. See Louisiana Civil 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 Louisiana Civil Code, arts. 1966 & 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 L. Rev. 41 (1941): 825–48; Jon C. Adcock, Note, “Detrimental Reliance,” La. L. Rev. 45, no. 3 (Jan. 1985; https://digitalcommons.law.lsu.edu/lalrev/vol45/iss3/5/): 753–70. For a discussion of further differences between common law and civil law legal systems, see “Legislation and the Discovery of Law in a Free Society” (ch. 13); and Rome & Kinsella, Louisiana Civil Law Dictionary. [↑](#footnote-ref-15)
16. King County v. Taxpayers of King County, 133 Wash. 2d 584; 949 P.2d 1260 (Wa.S.Ct. 1997), at n.3. Yet as noted above, with inflation, people often nowadays use $10 instead of $1 in some attempt to satisfy the gods. [↑](#footnote-ref-16)
17. See Barnett, “A Consent Theory of Contract,” pp. 287–91, and idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 148–49, et pass., for discussion and criticism of the bargain theory of consideration. See also Mason, “The Utility of Consideration.” [↑](#footnote-ref-17)
18. See Mason, “The Utility of Consideration,” pp. 832–42. [↑](#footnote-ref-18)
19. See Ludwig von Mises, Human Action: A Treatise on Economics, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; https://mises.org/library/human-action-0), 94–96 and 102–103; Murray N. Rothbard, “Toward a Reconstruction of Utility and Welfare Economics,” in idem, Economic Controversies (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies). [↑](#footnote-ref-19)
20. 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 Against the Express Provisions of a Written Contract (or When Black and White Equals Gray),” DePaul Bus. L. J. 5 (1993): 261–312, at pp. 263–69 & 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 & Mary E. Becker, “Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations,” Hofstra L. Rev. 15 (1987; www.randybarnett.com/pre-2000): 443–97; Adcock, “Detrimental Reliance”; and Christian Larroumet, “Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law,” Tul. L. Rev. 60, no. 6 (1986): 1209–30. [↑](#footnote-ref-20)
21. See Evers, “Toward a Reformulation of the Law of Contracts”; and Rothbard, “Property Rights and the Theory of Contracts,” p. 133. [↑](#footnote-ref-21)
22. American Law Institute, 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. [↑](#footnote-ref-22)
23. Louisiana Civil Code, art. 1967. See also Litvinoff, “Still Another Look at Cause,” pp. 18–28. [↑](#footnote-ref-23)
24. See Litvinoff, “Still Another Look at Cause,” pp. 23–24. For further discussion of promissory estoppel, see “A Libertarian Theory of Punishment and Rights” (ch. 5), Part. III.A, “Legal Estoppel.” [↑](#footnote-ref-24)
25. Barnett, “A Consent Theory of Contract,” p. 275. [↑](#footnote-ref-25)
26. For discussions of the circularity of reliance theories of promising, see F.H. Buckley, “Paradox Lost,” Minn. L. Rev. 72 (1988; https://scholarship.law.umn.edu/mlr/1293/): 775–827, at p. 804; Barnett, “A Consent Theory of Contract,” pp. 274–75, 315–316; and Barnett & Becker, “Beyond Reliance,” pp. 446–47, 452. [↑](#footnote-ref-26)
27. 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 suggest some additions and changes. I also discuss the origin of the Rothbard-Evers contract theory in my post “Justice and Property Rights.” Randy Barnett has also contributed important insights to the theory of contracts. See Barnett,   
    “A Consent Theory of Contract”; idem, “Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud,” Harv. J. L. & Pub. Pol'y 15 (1992; www.randybarnett.com/pre-2000): 783–803; and idem, “The Sound of Silence: Default Rules and Contractual Consent,” Va. L. Rev. 78 (1992; www.randybarnett.com/pre-2000): 821–911. [↑](#footnote-ref-27)
28. 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 the original: “The consent that is required [to transfer rights to alienable property] is a manifestation of an intention to alienate rights.” [↑](#footnote-ref-28)
29. 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, with Power and Market, Scholar’s ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), p. 177:

    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 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 ibid., pp. 176–80; and Rothbard, “Property Rights and the Theory of Contracts,” pp. 137–38. [↑](#footnote-ref-29)
30. See Hans-Hermann Hoppe, “On Certainty and Uncertainty, Or: How Rational Can Our Expectations Be?”, in The Great Fiction. [↑](#footnote-ref-30)
31. One problem with using US dollars as an example is that the USD system is a fiat currency, and it is not clear anymore what exactly is “owned” by people holding dollar bills of various denominations or federal-government insured bank-accounts with fiat dollars. The reader can substitute owned gold coins instead of fiat for conceptual clarity. As I have argued, even bitcoins are not properly ownable, and the status of ownership of state-created fiat money is even murkier. See Kinsella, “Nobody Owns Bitcoin,” StephanKinsella.com (April 21, 2021). But we assume here $1000 represents title to a certain amount of something ownable, like gold.

    As for so-called “conveyances,” it is interesting to note one difference in the common law and the civil law is that, in the civil law, “Land is not ‘conveyed’ by deed but is sold.” Patrick H. Martin & J. Lanier Yeates, “Louisiana and Texas Oil & Gas Law: An Overview of the Differences,” La. L. Rev. 52, no. 4 (March 1992; https://digitalcommons.law.lsu.edu/lalrev/vol52/iss4/3/): 769–860, at 787. See also “Legislation and the Discovery of Law in a Free Society” (ch. 13), Part V.B, discussing the relative superiority of the civil law in its more streamlined conception of real property rights. See also ibid, Part III.C.4, re Hoppe’s comments about the relative merits of the civil law system over the common law system. [↑](#footnote-ref-31)
32. Part of the confusion here stems from conflating the economic-descriptive-wertfrei realm and the normative realm of law and rights. In human action—in praxeological terms—there is employment of means, which requires control of resources. Every action requires choice among possible ends and this requires losing the next-highest valued end, which is reflected in the economic concept of opportunity cost. This could be viewed as a primordial type of exchange, that even Crusoe could engage in: he “exchanges” the chance to spend a night in leisure for the opportunity to catch more fish in the future (by spending his Friday night, no pun intended, to make a fishing net). In society, A might exchange something he controls with B; each benefits ex ante. When there are property rights and a developed legal system, then sales, exchange, and so on have a legal aspect and exchange refers to legal owners transferring their ownership over ownable, scarce resources to someone else, usually reciprocally and conditionally. [↑](#footnote-ref-32)
33. See Louisiana Civil Code, arts. 1909 & 1910, describing gratuitous and onerous contracts. [↑](#footnote-ref-33)
34. See Part III below. [↑](#footnote-ref-34)
35. See Rothbard, “Property Rights and the Theory of Contracts,” pp. 138–141; Evers, “Toward a Reformulation of the Law of Contracts,” p. 9; Barnett, “A Consent Theory of Contract,” p. 304 n. 143; idem, Barnett, “Contract Remedies and Inalienable Rights,” pp. 190–91, 197; and idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 145, 170, discussing similar performance-enforcing schemes through title-transfers to “money damages,” which Rothbard and Evers refer to as a performance bond. [↑](#footnote-ref-35)
36. Barnett, “A Consent Theory of Contract,” p. 292, and idem, “Rights and Remedies in a Consent Theory of Contract,” p. 137. See also Morton J. Horwitz, The Transformation of American Law, 1780–1860 (Harvard University Press, 1977), p. 162:

    [A]s late as the eighteenth century contract law was still dominated by a title theory of exchange…

    To modern eyes, the most distinctive feature of eighteenth century contract law is the subordination of contract to the law of property. In Blackstone’s Commentaries contract appears for the first time in Book II, which is devoted entirely to the law of property. Contract is classified among such subjects as descent, purchase, and occupancy as one of the many modes of transferring title to a specific thing.…

    As a result of the subordination of contract to property, eighteenth century jurists endorsed a title theory of contractual exchange according to which a contract functioned to transfer title to the specific thing contracted for. Thus, Blackstone wrote that where a seller fails to deliver goods on an executory contract, “the vendee may seize the goods, or have an action against the vendor for detaining them.” Similarly, in the first English treatise on contract, Powell wrote of the remedy for failure to deliver stock on an executory contract as being one for specific performance.

    See also Evers, “Toward a Reformulation of the Law of Contracts,” p. 7: “[Lysander] Spooner and other legal philosophers like Immanuel Kant have constructed theories of the law of contracts based on property titles rather than on promise.” Referring to Lysander Spooner, Poverty: Its Illegal Causes, and Legal Cure, Part 1 (1846; http://www.lysanderspooner.org/works), pp. 100–101; and Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right (Edinburgh: T.&T. Clark, 1887; https://oll.libertyfund.org/title/hastie-the-philosophy-of-law), p. 101. [↑](#footnote-ref-36)
37. Rothbard, “Property Rights and the Theory of Contracts,” p. 133, emphasis added. [↑](#footnote-ref-37)
38. In this sense all property is “public,” not “private.” See also “What Libertarianism Is” (ch. 2), n.1. On the objective function of property rules, see Hoppe, A Theory of Socialism and Capitalism and idem, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Auburn, Ala.: Mises Institute, 2006, www.hanshoppe.com/eepp); 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”; for similar comments, see idem, “Rights and Remedies in a Consent Theory of Contract,” p. 144. [↑](#footnote-ref-38)
39. Hoppe, A Theory of Socialism and Capitalism, p. 24, also pp. 167–68. [↑](#footnote-ref-39)
40. This insight calls to mind Rosalyn Higgins’s observation that “Law, far from being authority battling against power, is the interlocking of authority with power.” Rosalyn Higgins, Problems and Process: International Law and How We Use It (Clarendon Press; Reprint edition, 1995), p. 4 (quoted in Kinsella, “Book Review of Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994),” Reason Papers No. 20 (Fall 1995): 147–53, at 149). Likewise, ownership of a resource involves both the intent to own (“authority”) and the initial possession and/or embordering (“power”). [↑](#footnote-ref-40)
41. The theory for transferring property advocated herein bears a conceptual resemblance to the common-law practice of “quitclaiming” and also to the Roman law doctrine of “traditio.” Traditio was a legal mechanism used to transfer ownership of certain types of things (res nec mancipi) by physically transferring possession or control of the thing, coupled with intent to transfer. See, e.g., W.W. Buckland, A Text Book of Roman Law from Augustus to Justinian, 3d ed. rev’d by Peter Stein, reprint with corrections (Cambridge University Press, 1975), at LXXXIII, pp. 226–27; also Gaius, Institutes of Roman Law, with a translation and commentary by Edward Poste, 4th ed., revised and enlarged by E.A. Whittuck (Oxford: 1904; https://oll.libertyfund.org/title/gaius-institutes-of-roman-law), Book II, §19 (p. 133), §§ 24–26 (pp. 136–39), §§ 40–41 (p. 153), §65 (p. 164), and §95 (p. 174); and Alan Watson, Failures of the Legal Imagination (University of Pennsylvania Press, 1988; https://archive.org/details/failuresoflegali0000wats), p. 90 et pass. (For a brief discussion of the concept of “thing” in the civil and Roman law, see “What Libertarianism Is” (ch. 2), Appendix I.)

    As for quitclaim deeds: conventional conveyances of property operate by a deed, but a quitclaim deed operates by way of a release, similar to abandonment. 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,” La. L. Rev. 55, no. 1 (Summer 1994; https://digitalcommons.law.lsu.edu/lalrev/vol55/iss1/8/): 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. See also Louisiana Civil Code, art. 2502:

    Art. 2502. Transfer of rights to a thing

    A person may transfer to another whatever rights to a thing he may then have, without warranting the existence of any such rights. In such a case the transferor does not owe restitution of the price to the transferee in case of eviction, nor may that transfer be rescinded for lesion.

    Such a transfer does not give rise to a presumption of bad faith on the part of the transferee and is a just title for the purposes of acquisitive prescription.

    If the transferor acquires ownership of the thing after having transferred his rights to it, the after-acquired title of the transferor does not inure to the benefit of the transferee. [↑](#footnote-ref-41)
42. 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. [↑](#footnote-ref-42)
43. See also “What Libertarianism Is” (ch. 2), notes 33 and 36, for more on this issue. [↑](#footnote-ref-43)
44. See the Hoppe quote in “How We Come to Own Ourselves” (ch. 4), at n.17 (emphasis added). For further discussion of these issues, see “What Libertarianism Is” (ch. 2), the sections “Property in Bodies” and “Property in External Things,” and, in particular, n.26; and “How We Come to Own Ourselves” (ch. 4). [↑](#footnote-ref-44)
45. Note: In my original article, first presented in 1999 and published in 2003, in the above section, I criticized some aspects of Rothbard’s argument for inalienability. I now think it is possible that his approach is more compatible with my own than I originally realized. I retain in this chapter most of the original critique in this section (revised and updated), and follow it with an addendum, below (Part III.C.1), explaining my current view. [↑](#footnote-ref-45)
46. Rothbard, “Property Rights and the Theory of Contracts,” p. 133, emphasis added. But other passages indicate he did not think this applied to bodies:

    The basic reason is that the only valid transfer of title of ownership in the free society is the case where the property is, in fact and in the nature of man, alienable by man. All physical property owned by a person is alienable, i.e., in natural fact it can be given or transferred to the ownership and control of another party. I can give away or sell to another person my shoes, my house, my car, my money, etc. But there are certain vital things which, in natural fact and in the nature of man, are inalienable, i.e., they cannot in fact be alienated, even voluntarily. Specifically, a person cannot alienate his will, more particularly his control over his own mind and body. Each man has control over his own mind and body. Each man has control over his own will and person, and he is, if you wish, “stuck” with that inherent and “inalienable ownership. Since his will and control over his own person are inalienable, then so also are his rights to control that person and will. That is the ground for the famous position of the Declaration of Independence that man’s natural rights are inalienable; that is, they cannot be surrendered, even if the person wishes to do so.

    Ibid., pp. 134–35. [↑](#footnote-ref-46)
47. See various references in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11); see also Kinsella, “Thoughts on Walter Block on Voluntary Slavery, Alienability vs. Inalienability, Property and Contract, Rothbard and Evers,” StephanKinsella.com (Jan. 9, 2022). [↑](#footnote-ref-47)
48. Murray N. Rothbard, “Interpersonal Relations: Ownership and Aggression,” in The Ethics of Liberty (New York: New York University Press, 1998), pp. 40–41, reproduced in idem, “A Crusoe Social Philosophy,” Mises Daily (December 7, 2021; https://mises.org/library/crusoe-social-philosophy); 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, 2d ed. (Oxford University Press, 2014), pp. 78–82; idem, “Contract Remedies and Inalienable Rights,” pp. 186–95; idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 156 et seq.; 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; https://perma.cc/8U8C-ZTAR): 49–54 & 68–69, at 68; idem, “Inalienable Rights?” Liberty 10, no. 6 (July 1997; https://perma.cc/4CUE-KG7G): 51–56. [↑](#footnote-ref-48)
49. For further discussion of the theory of inalienability and the legitimacy of punishment, see “Inalienability and Punishment” (ch. 10) and “A Libertarian Theory of Punishment and Rights” (ch. 5). [↑](#footnote-ref-49)
50. I discuss this also in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), the section “Fallacy 1: You Can Sell What You Own,” and in Kinsella, “Thoughts on Walter Block on Voluntary Slavery, Alienability vs. Inalienability, Property and Contract, Rothbard and Evers.” [↑](#footnote-ref-50)
51. See “How We Come to Own Ourselves” (ch. 4) and “Goods, Scarce and Nonscarce” (ch. 18). See also Hoppe’s pithy summary of these basic rules, in “A Realistic Libertarianism,” LewRockwell.com (Sept. 30, 2013; https://www.hanshoppe.com/2014/10/a-realistic-libertarianism/) and in idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” pp. 85–87. [↑](#footnote-ref-51)
52. I suspect Rothbard would have come around on this issue had he lived longer. After all, he accepted Hoppe’s argumentation-ethics defense of rights as an improvement on his natural law-based defense. I believe he also would have come around on intellectual property. Alas.

    I respond further to disagreements with Walter Block on this subject in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11). [↑](#footnote-ref-52)
53. Rothbard, “Property Rights and the Theory of Contracts,” p. 144; also see pp. 137–38. Evers has a similar view: “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). This analysis is confused. What “property” is “detained” if the debtor has no funds? And where is the “fraud”? David Boaz, The Libertarian Mind: A Manifesto for Freedom (Simon & Schuster, 2015), chap. 3, the section “Freedom of Contract,” 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. 176–80. [↑](#footnote-ref-53)
54. Rothbard, “Property Rights and the Theory of Contracts,” p. 144. [↑](#footnote-ref-54)
55. Rothbard, Man, Economy, and State, with Power and Market, p. 177. [↑](#footnote-ref-55)
56. See, on this, the comments by Hoppe and others in “How We Come to Own Ourselves” (ch. 4), n.14 and “Defending Argumentation Ethics” (ch. 7), n.31. [↑](#footnote-ref-56)
57. 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. Ibid., pp. 137–38. See also the quote from Evers in note 53, above, misusing the concept of fraud. [↑](#footnote-ref-57)
58. See “What Libertarianism Is” (ch. 2), n.4; also “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11) and “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23). [↑](#footnote-ref-58)
59. Writes Rothbard:

    Defensive violence, therefore, must be confined to resisting invasive acts against person or property. But such invasion may include two corollaries to actual physical aggression: intimidation, or a direct threat of physical violence; and fraud, which involves the appropriation of someone else’s property without his consent, and is therefore “implicit theft.”

    Rothbard, “Self-Defense,” in The Ethics of Liberty (https://mises.org/library/right-self-defense), at p. 77. [↑](#footnote-ref-59)
60. See, e.g., the quote from Evers in note 53, above. [↑](#footnote-ref-60)
61. Let’s put aside for now the problem with owning fiat money (see note 31, above); let’s assume $20 represents something ownable, like some amount of gold. [↑](#footnote-ref-61)
62. On good faith as it pertains to contractual matters, see Louisiana Civil Code, art. 1759: “Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation” and art. 1983: “Contracts must be performed in good faith.” See also Levasseur, Louisiana Law of Obligations in General: A Comparative Civil Law Perspective, A Treatise, ¶¶ 39–43; idem, Louisiana Law of Conventional Obligations:   
    A Précis, § 8.1.2; Litvinoff, The Law of Obligations, § 1.8. [↑](#footnote-ref-62)
63. “Larceny by trick,” Legal Information Institute (Cornell Law School; www.law.cornell.edu/wex/larceny\_by\_trick) (emphasis added). See also “Larceny: Larceny by Trick” (Wikipedia; https://en.wikipedia.org/wiki/Larceny#Larceny\_by\_trick). For a somewhat similar approach to fraud as the one I advance here, see Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society (Cambridge University Press, 2013), chap. 2, § IV.E.3 (p. 73) and chap. 5, § II.C.2.vi (p. 278–79). [↑](#footnote-ref-63)
64. “Fraud” (Wikipedia; https://en.wikipedia.org/wiki/Fraud). [↑](#footnote-ref-64)
65. See also the discussion of trademarks and fraud in “Reply to Van Dun: Non-Aggression and Title Transfer” (ch. 12). For further discussion of the law of fraud, see Barnett, “Rational Bargaining Theory and Contract”; idem, “The Sound of Silence: Default Rules and Contractual Consent”; and Rothbard, “Property Rights and the Theory of Contracts,” p. 143. For further commentary on the points made in this section, see Kinsella, “KOL044 | ‘Correcting some Common Libertarian Misconceptions’ (PFS 2011),” Kinsella on Liberty Podcast (May 2, 2013); idem, “Fraud, Restitution, and Retaliation: The Libertarian Approach,” StephanKinsella.com (Feb. 3, 2009); and idem, “The Problem with ‘Fraud’: Fraud, Threat, and Contract Breach as Types of Aggression,” Mises Economics Blog (July 17, 2006). [↑](#footnote-ref-65)
66. James W. Child, “Can Libertarianism Sustain a Fraud Standard?”, Ethics 104, no. 4 (July 1994): 722–38, at 722. [↑](#footnote-ref-66)
67. Benjamin Ferguson, “Can Libertarians Get Away With Fraud?”, Economics and Philosophy 34 (2018; https://perma.cc/HL4Z-S2KC; pdf: https://perma.cc/799P-Y8SP): 165–84. Will Wilkinson also argues that standard libertarian principles can’t prohibit fraud. See the discussion in Bryan Caplan, “Fraud and Punishment,” EconLog (Feb. 1, 2009; https://perma.cc/67YF-XMEZ). [↑](#footnote-ref-67)