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Economics, Law, and Contract Theory

Mises's writing includes both economic or descriptive analysis as well as normative or prescriptive analysis, but he was careful to treat them distinctly. (Kinsella 2023c, n45; Kinsella 2021; Mises 1981, ch. 1, §1, p. 27) For example, he distinguished the causal and descriptive concept of "ownership," or "control"—which he called sociological or catallactic ownership—from the legal or normative notion of legal *rights* of ownership (Mises 1981, ch. 1, p. 27). As he wrote:

> Ownership means full control of the services that can be derived from a good. This catallactic notion of ownership and property rights is not to be confused with the legal definition of ownership and property rights as stated in the laws of various countries. It was the idea of legislators and courts to define the legal concept of property in such a way as to give to the proprietor full protection by the governmental apparatus of coercion and compulsion, and to prevent anybody from encroaching upon his rights. As far as this purpose was adequately realized, the legal concept of property rights corresponded to the catallactic concept. (Mises 1998, pp. 678–79)

Mises thus distinguished between *possession* or the capacity to control or wield (use, employ) some resource—his catallactic or sociological "ownership"—and legal or juristic ownership, which is normative.[1] Likewise, Böhm-Bawerk (1962, p. 57) noted that "legitimate possession is something

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[1] Mises's terminology is potentially confusing to the reader because he uses the word ownership to refer both to legal ownership as well as for catallactic or sociological ownership, which really means possession. To call possession ownership implies that possession or control is a form of property right or ownership; to confuse matters further, there is in the law a legal "right to possess" that is distinct from both ownership and possession; see La. Civ. Code, arts. 3421–3423, 3425, 3431, 3440, 3444; La. Code Civ. Proc., art 3660 *et pass.*; Yiannopoulos (1991, p. 524); also Hausmaninger & Gamauf (2013, p. 97). It would be better to reserve the term *ownership* for legal rights and to use terms like possession or command to refer to an actor's actual control over a resource. See Yiannopoulos's comments

apart from and in addition to physical possession." This distinction has long been recognized by the Roman law and legal scholars.[2]

In a Robinsonade, we imagine one man alone dealing with nature. There is no trade, no exchange, no society, no division of labor, no norms, no property rights, no money, no economic calculation. In order to analyze our actual, modern world, economists introduce additional real-world assumptions, such as the existence of society, money, trade, legal systems and laws, and the state itself (Mises 2003, 1.I.6; Mises 1962, ch. 2, §5; Mises 1998, ch. 2, §10; Hoppe 2010, pp. 9–10, 142; Kinsella 2010b). As well, to analyze the implications or consequences of state intervention, some analyses assume various state laws that "hamper" free markets (Mises 1998, Part 6; Rothbard 2009, ch. 12).

In addition to assuming the existence of other people (society), free trade (exchange, the division and specialization of labor), and money (catallactics), certain legal institutions are also assumed to be present, namely property rights and contract. Legal ownership, or property rights, may be thought of as the legal institutional supports for possession and control of means. The legal system bolsters or complements the ability of actors to use and possess resources. When the law succeeds in securing property rights, then "the legal concept of property rights correspond[s] to the catallactic concept." (Mises 1998, ch. XXIV, §4, p. 679) Or as Böhm-Bawerk (1962, p. 58) explains, "legal rights carry economic significance only if and to the extent that they embody physical control, or at least imply a means of acquiring such control." Thus, for Böhm-Bawerk, "legal enforcement is only complementary to the effective power of disposal, and merely extends the latter in scope" (Campan 1999, p. 24).

Likewise, contract law may be considered to be the legal analogue or normative support for the economic institution of exchange. In a society with institutions of property rights (ownership) and contract law that support possession and exchange, the economist may assume their existence and take them into account for a more useful analysis.

The theory of the firm, for example, presupposes contracts, legal entities such as corporations and partnerships, state classifications like "employee" and "independent contractor," and so on. When analyzing the phenomenon of lending or credit, the economist assumes certain normative legal institutions and laws that undergird these practices. The economist assumes that there are property rights, contract rights, a legal system that backs all this up, and presumably a state or some form of legal system that provides this legal infrastructure. It is not often stated this clearly or explicitly, but these and other presumptions are at least implicit in a good deal of economic analysis.

For sound economic analysis of our modern world, it is essential to have a clear understanding of property rights and contract law.

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on the importance of precision in discussing property rights in Kinsella (2023c, App. I), and in Yiannopoulos (1991, p. 524).

[2] "The Roman jurists drew a distinction between possession (*possessio*), meaning *actual control* over a thing, and ownership (*dominium, proprietas*) as the legal right to the thing: 'Ownership and possession have nothing in common' (Ulpian); '[Possession] is properly a factual, not a legal, issue' (Ofi lius and Nerva the son)." Hausmaninger & Gamauf (2012, p. 1; footnotes omitted). See also du Plessis (2020, §6.5); Justinian (1985, 41.2.12.1); Kinsella (2023c, App. I); Yiannopoulos (1991, pp. 523–24).

The Conventional Approach to Contract Law

Promises and Binding Legal Obligations

The positive law recognizes various legal obligations or duties, such as obligations to respect others' property rights, to pay taxes, to avoid committing torts or acting negligently, and so on. Failing to meet an obligation usually has some kind of (legal) consequence, punishment, or remedy.

The positive law considers contractual agreement to be one source of legal obligation. Nowadays "contracts" are widely viewed by the law and in the mainstream as *binding legal obligations* that result from certain *promises* embodied in an agreement or contract. (Atiyah 1979, p. 139). As opposed to *real* rights—*in rem* or property rights—which are "good against the world" and impose (negative) obligations on others to respect those property rights, obligations that flow from contracts are *in personam* rights that affect only the parties to the contract—specifically, those in "privity of contract" with each other. If I own a home, a car, or my body, my *in rem* property rights in these things imposes a negative obligation on others not to trespass. This negative obligation is not the result of contract or agreement. Obligations that flow from binding agreements, or contracts, only bind the parties to the contract.[3] The relationship between parties to a contract is like a private law that applies only to them, not to the world at large.

As Randy Barnett observes: "The five best known theories or principles of contractual obligation—the will theory, the reliance theory, the fairness theory, the efficiency theory and the bargain theory—each have very basic shortcomings." (Barnett 1986a, p. 269; see also Barnett 1992, p. 1024 *et seq*.) The primary shortcoming of many theories of contract is that it is not quite clear *why* promises should be binding, that is, give rise to legally enforceable obligations. As Corbin (1963, p. 490, quoted in Barnett 1986a, p. 269) notes:

> The mere fact that one man promises something to another creates no legal duty and makes no legal remedy available in case of non-performance. To be enforceable, the promise must be accompanied by some other factor. … The question now to be discussed is what is this other factor. What fact or facts must accompany a promise to make it enforceable at law?

This sentiment is echoed by Eisenberg (1982, p. 640), who writes: "A promise, as such, is not legally enforceable. The first great question of contract law, therefore, is what kinds of promises should be enforced." After all, "No legal system enforces all promises." Barnett (2010, §4.2)

Various theories of contract give different answers (Barnett 1992, 2010 §§4.2 & 4.4). The reliance theory, for example, posits that the promisee will *rely* "to his detriment" on the promisor fulfilling his promise. Therefore the law obliges the promisor to perform, to avoid upsetting the reliance interests or expectations of the promisee (Barnett 2010 §4.4). This view is sometimes referred to as "detrimental reliance." (See also Kinsella 2023e, Part III.A, and 2023b, Part I.E, discussing promissory estoppel and detrimental reliance.) But as many have pointed out, the

[3] This is one reason
intellectual property rights, which are *in rem* or real property rights, cannot be generated from contractual agreements. Contracts affect only the parties but IP rights have to be *in rem* and affect those not party to the contract. IP rights are supposed to affect everyone, like other property rights. See Kinsella 2008, the section "Contract vs. Reserved Rights," and 2023h, n.46.

argument that a promise should be enforceable because others have relied on it is circular. This is because all these theories and justifications insist that the reliance be *reasonable* in order to give rise to an obligation (see, e.g., La. Civ. Code, art. 1967; *Gilmartin v. KVTV-Channel 13* 1998). However, if the legal system did *not* enforce promises then it would be unreasonable to rely on promises. "This circularity has been described as a 'secret paradox of the common law.'" (Buckley 1988, p. 804, quoting Atiyah 1981, p. 38. See also Barnett 1986a, pp. 315–316, Barnett & Becker 1987, p. 452, and Kinsella 2023b, Part I.E.) If promises did not give rise to contractual obligations, the promisee would simply have to rely on a promise at his own risk, taking into account the reputation of the promisor, or employ performance bonds (discussed below).

In any case, predominant theories of contract view contracts as binding legal obligations that result from promises, usually with certain formalities. For example, in the common law, there has to be "consideration" given by the promisee. This doctrine has received considerable criticism (Barnett 1986a, pp. 287–91, 1991, p. 149–50, 2010, §4.2; Mason 1941, pp. 832–42). Some argue that it makes no sense to require the promisee to pay something even very small to the promisor to make the promise binding (Evers 1977, p. 4; Rothbard 1998b, 147–48 n.18; Kinsella 2023b, Part I.D). By contrast, the civil law does not require consideration and holds that valid contracts must merely have a lawful *cause* (La. Civ. Code, arts. 1966–1970; Levasseur 2010, ch. 5; Litvinoff 1987).

Obligations To Do, Obligations To Give, and Specific Performance

Conventional theories of contract are thus problematic and somewhat incoherent. This can be seen by considering how the binding promises view of contract deals with specific performance.

According to the *Restatement (Second) of Contracts* (1981, section 1), "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." "In essence, a contract is an *enforceable promise*" (Barnett 2010, p. XX). Indeed, "mainstream contract theory is dominated by the conception of 'contract as promise'" (Barnett 1992, p. 1025).

Civil law systems are similar in this respect:

> According to civil law systems, a contract is an agreement whereby one party is bound to another. … The Louisiana Civil Code defines a contract as an agreement between parties that creates, modifies or extinguishes an obligation. The French Civil Code contains a similar definition: a contract is an agreement (*convention*) that binds one party to another to give, to do, or not to do something. (Larroumet 1986, p. 1209)

The obligations that emerge from the making of certain promises may be classified as obligations *to do* (to paint your house), *not to do* (to abstain from drinking; to not work for a competitor), or *to give* (to sell you my house or horse). (See La. Civ. Code, arts. 1756, 1986, 1987, 2931, 663; La. Code Civ. Proc., arts 3601, 3603; Tannenbaum 1954; Levasseur 2009, §1.2; Levasseur 2010, §8.2.1; Kinsella 2023b, p. 208)

Failure to perform a contractual obligation is considered a *breach of contract* which gives rise to a remedy. But what remedy? In the case of an obligation *to give* something, the law can enforce the promised obligation to give by recognizing the promisee as the new owner of the thing transferred. In this way, contract law is embedded in or an application of property law. But what about obligations *to do* something, that is, to perform some action? Will the court order what is

called *specific performance*, compelling the promisor to perform certain *acts*? If the court can enforce an obligation *to give*, why cannot it not enforce a promise *to do* something by ordering or compelling the promisor to perform? After all, the positive law often enforces other legal duties or obligations with force—jailing someone who commits murder or evades taxes, for example.

And yet courts generally will not compel specific performance of contractual obligations *to do* something, to perform an action. The standard argument is that it would be too difficult for the court to monitor the performance and ensure that it was adequately performed. Instead, the courts usually award monetary damages to compensate the promisee/obligee for the "breach" of contract. (*Restatement of Contracts*, 1932, §379; Tannenbaum 1954) Another reason US courts would be reluctant to order specific performance is that requiring someone to perform a personal service smacks of involuntary servitude (Kronman 1978, p. 376) and probably violates the Thirteenth Amendment to the US Constitution (Bosch 1969, p. 42; *Bailey v. State of Alabama* 1911). (Barnett's consent theory of contract similarly holds that failure to perform a promised personal service only results in the payment of damages. See Barnett 1986b, pp. 180, 190–91, 197–98; 1987, p. 1993; and 1991, pp. 159, 162, 171.)

Thus, in practice, all contractual obligations really boil down to an obligation *to give*, i.e., *to transfer title to some owned thing*. The positive law of contract, though worded in the language of obligations, binding promises, breach of contract, obligations "to do" and so on, in the end simply amounts to a system of transferring title to owned resources, usually money or, in some cases, title to some unique good like land or a painting.[4] Contracts are simply, in practice, means of transferring title to owned resources; promises are not really binding after all even in the positive law. Yet the institution of contracting is alive and well.

The Title-Transfer Theory of Contract

Williamson Evers (1977), in the first article in the first issue of the *Journal of Libertarian Studies*, and Murray Rothbard (1998b), in a chapter first published in his 1982 book *The Ethics of Liberty* (1998), challenged the conventional "binding promises" view of contract. They advocated instead a *title-transfer theory*, in which contracts are seen as merely *ways of transferring title*, by an owner (the transferor), to some property or resource he owns, to some recipient (the transferee) who then becomes the new owner.[5] After all, as noted above, this is really the end result of the

[4] When the promisor fails to deliver a unique asset like real estate or a painting, instead of awarding monetary damages for the breach, the court may award ownership of the promised item to the promisee. This is confusingly referred to in the law as "specific performance." (See the extended quote by Horwitz below regarding enforcing an executory contract—a future, conditional transfer; Evers 1977, n.11—to deliver stock as being enforced by specific performance, for example. See also Levasseur 2010, §8.2.1.) However, enforcing an obligation *to give* should *not* be viewed as specific performance *at all*; that term should be reserved for *compelling* the promisor-obligor to perform certain actions—*to do* something. Ordering the promisor to hand over a plot of land or painting or other unique good is no different than ordering him to hand over an amount of money. Such a decision simply recognizes that the promisee is the rightful owner of the money, painting, or land and that the promisee is entitled to its possession under property law. This is another illustration of how contract law is just an application of and based on the more fundamental category of property law.

[5] Rothbard had previously suggested something along these lines in his 1962 treatise *Man, Economy, and State* (2009, ch. 2, §13, pp. 177–79) and later in an article first published in 1974 (Rothbard 2011, p. 347), but this approach was not fully developed until Evers (1977). See Kinsella (2010a), discussing the origin of the TTTC.

existing system of contract law since courts don't compel specific performance anyway. Why not just be direct and clear about this?

Other scholars have noted that contracts can be viewed as title transfers instead of as binding promises. "In Blackstone's *Commentaries*, ... contract and succession are both dealt with as a *means by which the title to property gets transferred*." (Atiyah 1979, p. 89; emphasis added; see also pp. 102–103) Horwitz (1977, p. 162) notes that:

> as 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.

Evers (1977, p. 7) notes that: "[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." And as Barnett (1986a, p. 292) 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.

It is time to discard promise-based theories of contract, to reject the notion of binding promises and breach of contract, and to develop an improved title-transfer theory of contract (TTTC), under which contracts are viewed not as binding promises but instead as consensual transfers of title to owned resources.

Some Implications of the TTTC

Breach of Contract, "Damages," and Performance Bonds

It is important to note that the TTTC implies that *there is no such thing as contract breach*, since in this view, contracts are not enforceable or binding promises but merely title transfers—whether gratuitous and unconditional, or mutual and related conditional title exchanges, or one-way title transfers conditioned on the performance of a service or some other condition.[6] Levasseur & Gruning (2015, §2.3.4 *et pass*.) The contract (the title transfer, or set of related title transfers)

[6] A service or employment agreement only involves *one* title transfer: of money from the employer, to the employee conditioned on his performing certain actions. See Kinsella (2023g, text at notes 40–43). See also note 10, below, regarding the sale of a hope.

might specify the payment of monetary "damages" if one party fails to perform a certain action—a so-called "performance bond"—but this is just another title transfer. (Evers 1977, p. 6; Rothbard 1998b, pp. 138–39, Rothbard 2009, ch. 2, §13, pp. 177–79; see also Barnett 1986b, pp. 180, 190–91, 197–98; 1987, p. 1993; and 1991, pp. 159, 162, 171) The concept of "efficient breach" of the law and economics scholars also, in effect, recognizes that the concept of "breach" of contract makes little sense; in this view, the failure to perform some specified action simply triggers the payment of some monetary payment, or "damages." (berg 2005, pp. 977–78 *et pass.*)

Such conditional title transfers, or performance bonds, could also be employed to ensure that the debtor's failure to repay a loan does not mean that he is off the hook if he happens to insolvent on the due date. Most loan agreements would have backup conditional title transfers (whether implied or explicit) such as "if the debtor is unable to pay $1100 on the due date then he hereby transfers $1100 plus interest whenever he acquires sufficient funds/assets." However, the *failure* to pay on the due date, or on later due dates, is not itself a form of theft, as I discuss below.

In addition to specifying backup conditional title transfers in case the debtor is insolvent on the due date, other conditional title transfers may be employed. For example, some simple loans may permit the debtor to use the loaned money for any purpose, but others may permit only certain specified uses, such as remodeling a restaurant. In this case the loan agreement could be structured to contain conditional title transfers whereby the title to the loaned funds transfers back to the creditor at the moment the debtor attempts to spend the funds in an impermissible way, such as gambling. If the borrower attempts to spend the $1000 on lottery tickets, for example, then title instantly transfers to back to the creditor. At this point the debtor is merely *in possession of* money *now owned* (once again) by the creditor, and must return it and not spend it. If at this moment the (former) debtor buys lottery tickets he is actually stealing the creditor's money—not the future $1100 that is not yet due, but the $1000 held by the debtor but now owned by the creditor because of the triggering of the conditional title transfer term in the contract. Note that this is a case of *actual theft*, not the Rothbard's "implicit theft" discussed below.

Consideration and Gift Transfers

Under the TTTC, we can discard with the pointlessly formalistic doctrine of consideration, and easily recognize the validity of gratuitous (gift) transfers, just as civil law systems do.[7] (See, e.g., La. Civ. Code, arts. 1468 & 1910; Levasseur 2010, ch. 1, Art. 2) Every contract is ultimately a transfer of ownership and need not be backed by consideration or be part of an exchange, even though many contracts will involve conditional, mutual title exchanges.

Fraud

Another benefit of the TTTC is that it helps make clear why fraud should be viewed as a type of aggression. Libertarians oppose "not only the initiation of force against the person of someone else (self-ownership) but also … against the *property of* someone else—or *threats thereof*, or *fraud*." (Kinsella 2023b, Part III.E, emphasis added) Fraud is considered to be a type of aggression since it "involves the appropriation of someone else's property without his consent, and

[7] Barnett's consent theory of contract also dispenses with the necessity for consideration. Barnett (1986a, pp. 311–12, 1991, pp. 149–50).

is therefore 'implicit theft.'" (Rothbard 1998d, p. 77) I have explained elsewhere why trespass against owned property, and threats, are types of aggression (Kinsella 2023e, Parts III.F and IV.F). But why exactly is fraud a type of aggression?

For libertarianism, aggression just means the use of someone's property without their consent—i.e., trespass, or theft. In the TTTC, when titles are contractually exchanged, there usually are conditions placed on the transfers, according to the understanding of the parties, their "meeting of the minds." The conditions specified are communicated via language, which is informed by custom and context. For someone to say "yes" or "no" to a use of his body or property, or to consent to transfer title to a resource, communication must be possible (Kinsella 2023b, Parts II.A and III.A; Kinsella 2023f, pp. 289–92).

Now when there is a mutual, bilateral title exchange, each party transfers ownership to his good only if certain conditions are met, such as the nature and qualities of the other party's good, as specified by the parties' communications with each other—the contract. For example, suppose *A* wants to sell his apples to *B* in exchange for *B*'s bananas. In this case, each transfer is made conditional upon certain conditions being the case—that the apples are supposed to be fresh, real apples, for example. The title to *B*'s bananas transfers to *A* only if this condition is met. If *A* knowingly gives rotten apples to *B* and runs off with the bananas, he is now in possession of stolen goods since *B*'s consent was conditional on *A* giving him good, real apples, acting in good faith, and so on.[8] As I note in Kinsella (2023b, p. 238), "This is akin to the legal notion of larceny by trick." (Note: this case is not comparable to a debtor being *unable* to repay his debt later, since being unable to repay does not imply any misrepresentation; moreover, being insolvent is a status, not an action.)

In short, the TTTC, combined with a libertarian understanding of property rights, explains why fraud may be prohibited, and is a type of aggression: because the defrauder is using a resource owned by the defrauded party without his consent.

Property Rights and Contractual Title Transfer

Why can the owner agree to title transfers? Because "[t]he 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." (Rothbard 1998b, p. 133)

This property right, this right of ownership, is sufficient to explain why the owner of a thing may, by consent, transfer it to another. As ownership is essentially the *right to exclude* (Kinsella 2023c, App. I, 2023b, p. 204 n.1), the owner of a resource has the right to permit or exclude people from using it. This right to exclude is an *incident of ownership*; it is what is *means* to own something.

The grant of consent or permission to use can be *temporary*, as in inviting a dinner guest to your home or allowing a friend to borrow your car, in which case the owner maintains ownership and eventually regains possession, or it can be *permanent* in which case title is transferred. In effect,

[8] On good faith as it pertains to contractual matters, see La. Civ. 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 2020, ¶¶ 39–43; Levasseur 2010, §8.1.2; Litvinoff 2001, §1.8.

a title transfer is a means of *abandoning ownership* of a thing *in favor of* the transferee.[9] Thus, the right to exclude (property rights, ownership) implies the right to transfer (contract). The right to contract, to transfer title, is simply an implication of the (more fundamental) right of ownership.

A title transfer can be made unconditional, as in the case of a gift; or it can be made conditional on some future event (such as the performance of a service by the party to be paid) or condition or reciprocal (present or future) title transfer. It can be simple, or it can be complicated.

Once title is transferred, the (new) owner can retrieve possession of his property using property law, if necessary. For example, if it is currently held by the previous owner and he refuses to allow the new owner to take it, this is actual, not implicit, theft. As Blackstone is quoted as saying above, in such a case "the vendee may seize the goods, or have an action against the vendor for detaining them." Thus, a contract can change the owner of a resource, at which point the new owner can use property rights to enforce his ownership.

Implicit Theft

In their criticism of previous theories of contract, Rothbard (1998b, p. 141) and Evers (1977, p. 6) maintain that a "mere promise"—called *nudum pactum* in the Roman law—is not enforceable, but an agreement to transfer resources by contract should be. As noted in the preceding section, the right and capacity to transfer resources is fully explained by the inherent rights of ownership.

Yet Rothbard introduces the confusing concept of "implicit theft" in an attempt to explain why contracts are enforceable when mere promises are not (Evers does not). As he (1998b, p. 133) writes:

> the right to contract is strictly derivable from the right of private property, and therefore … the only enforceable contracts … should be those where the failure of one party to abide by the contract implies the theft of property from the other party. In short, a contract should only be enforceable when the failure to fulfill it is an implicit theft of property. But this can only be true if we hold that validly enforceable contracts only exist where title to property has already been transferred, and therefore where the failure to abide by the contract means that the other party's property is retained by the delinquent party, without the consent of the former (implicit theft).

But as noted above, the right to contract is just an implication of ownership or property rights. Contracts are not enforceable because "failure to perform is implicit theft"; and failure to perform does not always imply theft. The concept of implicit theft is confused and is not needed to explain contractual title transfers. There is no such thing as implicit theft, nor does Rothbard ever fully define or justify this concept (he also relies on this concept in his discussion of fraud, discussed below).

It is true that there can be *implied contracts* or implied terms in a contract, since contracts are formed by some type of communication between the parties and language is highly contextual. If I sit down in a restaurant there is an implied understanding that I have agreed to pay for the meal afterwords—I have in effect stated "I hereby transfer a future payment to you upon

[9] Discussed further in the section "*Implicit Theft and Debtor's Prison*," below.

completion of my meal." But there is no such thing as "implicit theft." Theft means taking the owned property of another person without his consent.

Rothbard's argument, besides being unnecessary, assumes there can be theft of something that does not exist. Obviously a non-existent thing cannot be owned, transferred, or stolen. Rothbard has lost sight of the fact that any *future* title transfer (an executory contract) is *always, necessarily* conditional. This is because the future is uncertain. As Rothbard (2009, p. 7) elsewhere recognized:

> Another fundamental implication derived from the existence of human action is *the uncertainty of the future*. This must be true because the contrary would completely negate the possibility of action. If man knew future events completely, he would never act, since no act of his could change the situation. Thus, the fact of action signifies that the future is uncertain to the actors.

In a loan contract, the lender gives ownership to *present* funds (say, $1000) *in exchange* for the borrower transferring *future* funds to the lender, usually an amount equal to the loaned amount plus interest (say, $1100). But the sum to be paid back *is not the same as* the loaned sum. There are *two separate title transfers*. This is a critical, and often overlooked, point, due to the way loans are described. The "loaned" funds *are intended to be spent*, or "consumed." As one scholar (du Plessis 2020, p. 186, emphasis added) notes, under Roman Law, "the transferee normally receives ownership of the money: if you borrow money from a friend, you are not expected to give back the very coins or notes that you receive, but only an equivalent. *The actual money transferred becomes yours*." Or as Huerta de Soto (2020, ch. 3, §2, p. 119, emphasis added) explains: "a loan implies the transfer not only of ownership of the lent item, but of its full availability as well, and therefore the borrower *can make full use of it*, by investing it, *spending it*, etc." See also Huerta de Soto (2020, ch. 1, §2, p. 3). As a modern example, as provided in the Louisiana Civil Code (art. 2905), "The borrower in a loan for consumption becomes owner of the thing lent."

Thus the "loan" of $1000—really, a transfer—is more akin to a loan for consumption (*mutuum* in the Roman law) than a loan for use (*commodatum*). (See Huerta de Soto 2020, ch. 1, §1; La. Civ. Code, arts. 2891 & 2904) The transfer of $1100 is a *conditional, uncertain* future title transfer to a *separate* sum of money that the borrower may, or may not, own, on the due date. It is distinct from the original $1000 "loaned" (really: transferred) by the lender, which is transferred at the time of the initial loan and then *fully owned* by the borrower so that he is able to spend (consume) it. A future title transfer is similar to what is called the "sale of a hope" and is conditional upon the transferred thing existing at the specified time of transfer.[10] If the debtor *A* is penniless on the future transfer date, no transfer happens and *A* cannot be said to be stealing anything owned by creditor *B*. There is no theft, implicit or explicit. A nonexisting thing can neither be owned nor stolen.

Rothbard (1998b, p. 134) argues that the failure to repay the $1100 in the future is theft, even though it does not exist, because the transfer of the original $1000 was conditional on a *later repayment*: "Smith's original transfer of the $1000 was not absolute, but conditional, conditional on

[10] See La. Civ. Code, art. 2451: "Sale of a hope. A hope may be the object of a contract of sale. Thus, a fisherman may sell a haul of his net before he throws it. In that case the buyer is entitled to whatever is caught in the net, according to the parties' expectations, and even if nothing is caught the sale is valid." See also La. Civ. Code, arts. 1912, 2450 and 1767; Levasseur & Gruning (2015, §2.3.4).

Jones paying the $1100 in a year, and that, therefore, the failure to pay is an implicit theft of Smith's rightful property." But the transfer $1000 is *not* conditioned on a *future event* such as later repayment; it is instead conditioned on the borrower *now agreeing* to an uncertain, conditional *future* title transfer. When the borrower agrees now, to an uncertain, future title transfer, he has already met, in full, the condition set by the lender.

It is important to recognize that the status of the $1000 that was transferred to the borrower, and his right to spend or use the funds, *cannot be determined at a later date*. It must be known and determinable at the time the original contract is made. The $1000 transferred cannot be "presumptively owned" by the borrower for a year—during which time he had *full* property rights over the $1000 and thus was *able to spend it*, to transfer ownership of it to a third party *as if he owns it*—and then be "retroactively" reclassified in the future depending on future events, like failure to repay the loan. A property rights system must be able to decide in *the here and now* who owns what (Hoppe 2010, pp. 169–70; Kinsella 2023c, pp. 24–25 & n.34; Kinsella 2023f, pp. 60–63). The legal system cannot wait a year to decide whether the borrower really owned the $1000 that was loaned to him, for otherwise he cannot spend it and use it for whatever project he has in mind. The borrower-transferee must own the $1000 *unconditionally* and outright at the time of transfer. (See also La. Civ. Code art. 1767 *et seq*.; Levasseur 2009, §2.2-1.1.)

Thus, failure to repay a loan, or failure to transfer title to a nonexistent future thing, is in no way theft. Rothbard's theory of implicit theft must be rejected as unworkable and flawed. The TTTC works fine based on the property rights of owners and does not need to rely on the confused and flawed concept of implicit theft.

Implicit Theft and Debtor's Prison

By avoiding the unnecessary and flawed notion of implicit theft, we can avoid a difficulty Rothbard finds himself in. Rothbard (1998b, pp. 134–36) rightly argues that voluntary slavery contracts are not enforceable. As he observes, even after making a voluntary slavery contract, the would-be slave still retains his *will*, which is inalienable. This is because man "discovers the natural fact of his mind's command over his body and its actions: that is, of his natural *ownership* over his self" (Rothbard 1998e, p. 31), i.e., of his body. So far, so good. This is similar to my own argument for inalienability (based on Hoppe), namely that ownership of one's body does not stem from homesteading an unowned thing (as is the case for external resources), but rather from one's *direct control over* one's body (Kinsella 2023b, Part III.B; Kinsella 2023d, p. 52–53; Hoppe 2023, p. xvii). A contract to sell one's body is unenforceable *because* enforcing it would be an act of aggression against the would-be slave, as he has not himself committed any act of aggression justifying the use of (retaliatory) force against his body. (See also Barnett 1991, p. 160; but *cf*. Block 2003)

By contrast, people come to own formerly-unowned scarce resources by original appropriation, or by a contractual title transfer from a previous owner. These previously-unowned resources were all *acquired*, either by original appropriation or by contractual transfer from a previous owner. Such owned things can also be "un-acquired" or abandoned, either outright, or "in favor of" someone else. (Kinsella 2023b, Part III.A; also Justinian 1985, 41.7.5.1) This is precisely why *owned things* can be sold or given away—transferred—by contract. One's body, by contrast,

cannot be sold, since, as Rothbard correctly observed, one's will is inalienable and so the body cannot be alienated by contract.

Yet Rothbard's "implicit theft" argument would imply that a person can, in effect, sell himself into slavery. This is because if a deadbeat debtor has committed implicit theft—an act of aggression—by "stealing" the nonexistent future thing that he is unable to provide to the debtor, then he may be punished (Rothbard 1998c). Rothbard in fact concedes that, in principle, debtor's prison is thus justifiable (Rothbard 1998b, pp. 143–44).[11] But this is nothing but a form of voluntary slavery contract, which Rothbard (1998b, pp. 134–35) has already opposed. (In fact Walter Block uses Rothbard's arguments about implicit theft and debtor's prison to argue that under the TTTC, voluntary slavery contracts are indeed enforceable. See Kinsella 2023g.) Thus Rothbard's views are in contradiction here.

Rothbard tries to wriggle out of this dilemma by arguing that imprisoning a deadbeat debtor would be disproportionate punishment, but this is clearly a makeweight argument. Rothbard cannot on the one had argue that voluntary slavery contracts are unenforceable because the will is inalienable and then argue that one may be imprisoned because of a contractual promise that treats a non-existent and fictional act of "implicit theft" as actual theft. However, if we abandon the idea that contract breachers are "implicit thieves," then this problem disappears, Rothbard's opposition to voluntary slavery contracts makes sense once more, and his contract theory becomes more coherent (and Block's reliance on the TTTC to defend slavery contracts collapses).[12]

Conclusion

Conventional theories of contract are unsatisfying because they fail to explain why promises should be binding. Reliance based theories fail, for example, because they are circular. And contract law is premised on the notion that contracts are binding, even though specific performance is not available as a remedy. This means that all contractual obligations really are just ways of transferring ownership of owned things.

The TTTC argues that contracts concern the transfer of property titles rather than promises or obligations. A valid contract involves a consensual transfer of ownership rights between parties. This distinguishes enforceable agreements from mere promises, as only property rights violations are subject to legal enforcement. The TTTC emphasizes that the core of contractual agreements lies in the legal transfer of control over resources. This approach connects the descriptive, economic concepts of possession and exchange with the legal concepts of ownership/property rights and contractual title transfer.

The TTTC recognize that owners have the right to convey their resources by consent, rooted in their ownership rights of exclusion, without invoking problematic reliance-based arguments or viewing promises as creating legally binding obligations. It does not require consideration, as owners are free to transfer their property to others for any reason, whether

[11] Evers (1977, p. 11 n.5), by contrast, says that failure to repay a loan is fraudulent even if the debtor has no money, but that this only implies that creditor would have a lien on the debtor's future earnings. He says nothing about debtor's prison.

[12] Alessandro Fusillo observed to me that Rothbard might not have been aware of the fact that his notion of "implicit theft" echoes the concept of quasi delicts. See La. Civ. Code, arts. 2315 & 2316; Levasseur (2009, §1.1.1.D).

gratuitous or not. It thus permits gratuitous contracts without inventing arcane doctrines or burdensome formalities. It also provides a conceptually more elegant theory of contract, rooted in property rights, that can provide "damages" when one party does not perform a promised action, similar to modern legal systems. It eliminates the concept of breach of contract, thus avoiding the need for the "efficient breach of contract" theory of the law and economics scholars.

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

Future research to further develop this theory could involve determining to what extent this approach is compatible with the consent theory of contract of Barnett (1986a).[13] In addition, scholars could identify aspects of conventional contract law that appear to be unjustified in light of the TTTC. The view of fraud laid out here in light of the TTTC could be used to examine various accusations of "fraud" by proponents of intellectual property (who sometimes argue that acts of copying are "fraudulent" and thus patent and copyright laws are justified; see Kinsella (2009; 2016)) and by opponents of fractional reserve banking (who oppose fractional reserve banking on Austrian economic grounds but who also argue that the practice is inherently fraudulent; see Rothbard (2008, pp. 93, 97, 99, 290 *et pass.*), Hoppe (2006b), Hoppe, Hülsmann, and Block (2006, pp. 207–34), Huerta de Soto (2020, pp. 9, 31, 155, 749, 753), Hülsmann (2002/03). Finally, work could be done to identify aspects of property and contract law that are difficult to explain or justify under the standard approach but that could be explained under the TTTC, such as restrictive covenants, co-ownership arrangements, trusts, corporations and partnerships, and so on.

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[13] Barnett disagrees with the TTTC. In personal correspondence with me he wrote: "A 'title transfer theory' does not identify the legal/conceptual criteria by which commitments to transfer entitlements become legally enforceable, which is what contract theory seeks to identify. That criteria, I maintain, is the manifestation of intent to be legally bound or 'consent.' As a label for the theory of contractual obligation, 'title transfer' begs the question." (Barnett 2024) Needless to say, I disagree with Barnett here.

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