The Title-Transfer Theory of Contract

Papinian Press Occasional Paper, No. 1
Sept. 2024

[v.1.8]

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Papinian Press • Houston, Texas

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The text is set in Adobe Caslon.

ISBN Ebook 979-8-9890306-6-8

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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," from the legal or normative notion of legal *rights* of ownership: "Regarded as a sociological category ownership appears as the power to use economic goods. An owner is he who disposes of an economic good. … Thus the sociological and juristic concepts of ownership are different" (1981, ch. 1, §1, p. 27). In a later work, he referred to the former (sociological ownership) as catallactic ownership, which he distinguished from the legal and normative concept of ownership. 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, ch. XXIV, §4, 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

apart from and in addition to physical possession." This distinction has long been recognized by Roman Law and other 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. But the actor's actions have implications that are subject to economic analysis. Even for Crusoe, there are relevant economic concepts and analyses such as capital versus consumer goods (his fishing net versus the fish it catches), time preference (if he has patience he can grow crops that will yield results months later), opportunity cost (if he chooses end A he will forego end B), and so on. There may indeed even be *moral* aspects to his action, especially from the Randian or natural law point of view, but no political or interpersonal ethical implications.

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. It 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

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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 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, Vol. 4, 41.2.12.1, Ulpian, *Edict, book 70*); Kinsella (2023c, App. I); Yiannopoulos (1991, pp. 523–24).

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.

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. (See 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.

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 1986, 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 1986, 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."

Various theories of contract give different answers. (Barnett 1992) The reliance theory, for example, posits that the promisee will *rely* "to his detriment" on the promisor fulfilling his promise, and therefore the promisor must be obliged by the law to perform, to avoid upsetting the reliance interests or expectations of the promisee. This view is sometimes referred to as "detrimental reliance." (See also Kinsella 2023g, Part III.A, and 2023b, Part I.E, discussing promissory estoppel and detrimental reliance.) But as many have pointed out, the 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.'"[3] 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.[4]

In any case, predominant theories of contract all view contracts as binding legal obligations that result from promises, usually with certain formalities: in the common law, there has to be consideration given by the promisee. The doctrine of consideration has received considerable criticism; 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.

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[3] Buckley (1988, p. 804, quoting Atiyah 1981, p. 38). For further discussions of the circularity of reliance-based theories of contract, see Buckley (1988, p. 804), Barnett (1986, pp. 315–316), Barnett & Becker (1987, p. 452), and Kinsella (2023b, Part I.E). The difficulty with reliance theories was well known to some of their earliest proponents. See Fuller & Perdue, Jr. (1936), Epstein (1999), and Murphy (2014, p. 155).

[4] See note 13, below.

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. 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." (*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 and probably violates the Thirteenth Amendment to the US Constitution (Bosch 1969, p. 43; Kronman 1978, p. 376; Eisenberg 2005, p. 1036).

Thus, in practice, *all* contractual obligations really boil down to an obligation *to give*, i.e, *to transfer title to some 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.[5] 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 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, to some property or resource he owns, to some recipient who then becomes the new owner.[6] After all, as noted above, this is really the end result of the 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

[5] 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 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.

[6] 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.

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, referring to Spooner 1846, pp. 100–101 and Kant 1887, p. 101) 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 (1986, 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 revive an improved title-transfer theory, under which contracts are viewed not as binding promises but instead as consensual transfers of title to owned resources.

This is what the Rothbard and Evers title-transfer theory of contract (TTTC) does. Under the TTTC, we can discard with the pointlessly formalistic doctrine of consideration, and easily recognize the validity of gratuitous (gift) transfers as well as conditional exchanges. Almost every transaction that can be achieved under today's conventional contract theory can work with the TTTC, which is far more conceptually elegant and clearly rooted in the rights of ownership—the right or power of the owner of a resource to transfer it to another by manifested consent.

Implicit Theft

The TTTC theory is not without mistakes. One mistake made by Rothbard is his notion of "implicit theft," the idea that failing to make a future title transfer is always some type theft.[7]

[7] Rothbard also argues that one can develop a form of copyright by using contract to "reserve the right to copy," which I criticize in Kinsella (2023d, p. 390–91; 2023f, p. 415 n.46).

Rothbard (1998b, p. 133) recognizes that "[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." However, mere promises (*nudum pactum*) are not binding, and

> the only enforceable contracts (i.e., those backed by the sanction of legal coercion) 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 contracts are not enforceable because failure to perform is implicit theft; and failure to perform does not always imply theft, whether implicit or not. The concept of implicit theft is confused. 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, in Rothbard 1998d, p. 77, discussed below).

The reason the TTTC works is *not* because failure to perform results in implicit theft. It is simply because the owner of the resource *is the owner* and as such has the power and the right to consensually transfer title to someone else—either as a gift, or in exchange for some action or title transfer from the transferor. Now 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 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; there is nothing "implied" about it.

When a contract specifies future a title transfer and the specified time arrives, the second party at that moment (automatically) becomes the owner of whatever resource has been transferred. Failure of the first party to hand over the property now owned by the second party is a type of theft or trespass—a detention of the resource. This is because, under property law, the second party *now owns* the resource that was transferred by operation of the contract. But of course—and this is important to recognize: this is *only the case* if the specified resource *still exists* and is owned by the first party at the time of transfer. If it does not exist then *there is and can be no transfer*.

For example, if *A* borrows $1000 from *B* and agrees to pay $1100 to *B* in a year, but fails to do so, Rothbard would call this "implicit theft"—theft of the $1100. But there is no such thing as implicit theft. Either *A* owns $1100 on the due date or he does not. Let us take both cases. First, if *A* does own $1100 on the due date, then *B* becomes the owner automatically, by operation of the contract. *A* is now in possession of *B*'s money. If *A* refuses to turn it over to *B* or to allow *B* to take it, then *A* is committing *actual* theft, not implicit theft. He is detaining money now owned by *B*; he is preventing *B* from accessing his own resource. 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." In this case, the contract operates to transfer title to *B* precisely because *A* was the owner and had the right and power to transfer it. It is not because failure to perform would be implicit

theft. Any theft that occurs happens when *A* detains and refuses to release what is now *B*'s property. That is an action of theft or trespass, not contract breach; it is actual theft or detention, not implicit.

But suppose that on the due date *A* is penniless. He simply does not have or own $1100 to transfer to *B*. In this case, *there is no title transfer* and there is nothing for *A* to steal or detain. There is no act of theft by *A*, either implicit or explicit. In both cases there is no need to resort to the notion of "implicit theft" to explain why *A* and *B* were able to enter into the loan contract. *B*, as owner of $1000 present dollars, can transfer it to *A* in exchange for *A* making a conditional future title transfer. *A* has the power to transfer a future $1100 to *B*, but as the future is uncertain, this transfer is *necessarily conditional* on *A actually owning* $1100 in the future, on the specified due date. *A* cannot do the impossible and transfer something to *B* that *A* does not have. It would be like *A* saying "I hereby give you this magical miniature unicorn that I have in my pocket." This does not transfer title to anything to anyone because *A* does not own a nonexistent miniature unicorn.

Some might argue that if *A* fritters away the lent money—say, on gambling—and thus makes himself unable to repay the loan later, then this is a type of theft. But it depends on what the terms of the contract are. If the loan is for *A* to use any way he wants instead of on a particular project (as is often the case in many consumer loans), then spending the money on gambling is perfectly permissible. If the loan is made for a particular purpose, such as to remodel a restaurant, then the lender can either take the risk that the borrower might use the money unwisely, or he might take other steps, like giving the loaned money to an escrow agent or keeping the money in a bank account which requires the lender's approval to release to specified vendors. Such steps might add complexity and cost. The loan agreement might also include conditional title transfers such as "The borrower may only spend the loaned funds on approved expenses related to remodeling the restaurant; if the borrower attempts to spend the loaned funds for any other purpose then title to the remaining funds held by the borrower immediately transfers back to the lender." Thus, if *A* attempts to spend the $1000 on lottery tickets, then title instantly transfers to *B* and *A* is *in possession of* money now owned by *B*, and must return it and not spend it. If *A* then buys lottery tickets he is actually stealing *B*'s money—not the future $1100 that is not yet due, but the $1000 held by *A* but now owned by *B* because of the conditional title transfer term in the contract.

Rothbard's mistake here is two-fold. First, he assumes that the reason a contract is enforceable, or effective, is that failure to do so is implicit theft. But as noted above, the contract is enforceable because the owner of a resource has the right to transfer it—as Rothbard says in the first sentence of his chapter, "[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." This power of an owner is sufficient to explain his ability and right to transfer it by contract. There is no need to invoke implicit theft as the reason for making such transfers enforceable or operable.[8]

Second, Rothbard assumes there can be theft of something that does not exist. Obviously, there cannot be. A non-existent thing cannot be owned, transferred, or stolen. Rothbard has lost

[8] See the section "Implicit Theft and Debtor's Prison," below, for viewing title transfers as an abandonment in favor of the recipient. See also Justinian (1985, Vol. 4, 41.7.5.1, Pomponious, *Sabinus, book 32*): "What someone has abandoned becomes mine immediately; just as, when someone scatters largesse or releases birds, although he does not know the person whom he wishes to have them, they yet become the property of the person to whom chance takes them, so a person who abandons something is deemed to wish it to become the property of another."

sight of the fact that any *future* title transfer is *always, necessarily* conditional. This is because the future is uncertain. As he previously wrote:

> 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. (2009, p. 7)

When *A in the present* makes a *future* title transfer, the future transfer is necessarily conditional upon the thing existing and *A*'s owning it at the specified time of transfer, as well as any other conditions specified by the parties (such as *B*'s having performed some promised service). 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.[9]

Therefore, failure to repay a debt is either *detaining* the creditor's property (the $1100 now held by *A* but owned by *B*), which is actual, not implicit, theft; or the debtor is *bankrupt* and is not stealing anything from the creditor or in possession of anything owned by the creditor, as *there is nothing to steal*. None of this, by the way, implies that the debtor *A* is off the hook if he happens to broke on the due date; most loan agreements would have backup conditional title transfers (whether implied or explicit) such as "if *A* is unable to pay $1100 on the due date then he hereby transfers $1100 plus interest whenever he acquires sufficient funds/assets." The important point to note is that inability to pay, or "not paying," cannot be characterized as theft;[10] it is not even an action, it is a status.

What about the original $1000 loaned to *A*? Does failure to pay the $1100 to *B* at the later time mean that *A* has somehow "implicitly stolen" the original $1000? No, because the $1000 was transferred outright to *A* at the time the loan was made. The original loan contract is more properly understood as comprising two mutual but separate title transfers: *B* transfers $1000 *now, unconditionally*, to *A* (for *A* to spend and use in some project), in exchange for *A* making an uncertain and conditional future title transfer of $1100 to *B*. *A* does the opposite: he *now* makes a conditional future transfer of $1100 to *B*, *in exchange for B*'s otherwise unconditional transfer of an *unencumbered* $1000 to *A* now. The transfer of $1000 must be otherwise *unconditional* in order for *A* to be able to use or spend it. I cannot stress how important this point is.[11]

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[9] 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." Also art. 2450: "A future thing may be the object of a contract of sale. In such a case the coming into existence of the thing is a condition that suspends the effects of the sale." And art. 1767: "A conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive."

[10] See also the discussion of performance bonds in note 13, below.

[11] It is important to keep in mind the nature of such a loan transaction: the sum to be paid back *is not the same as* the loaned sum. It is intended to be spent, or "consumed." As one scholar (du Plessis 2020, p. 186) notes, discussing the loan of coined money 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." Thus the loan of $1000 is more akin to a mutuum contract, that is, a loan for consumption, than a loan for use, or commodatum. See Huerta de Soto (2020, ch. 1, §1); La. Civ. Code, arts. 2891 & 2904. Thus, the future payment of principal plus interest, or $1100, is a conditional, uncertain future title

The second, future transfer is conditional—an "executory" contract (Evers 1977, n.11)—since it is in the future and the future is uncertain: it is conditional on the future $1100 existing and being owned by *A*. *B* gives a certain, present $1000 to *A now*—*unconditionally*—and *A* gives a *possible* $1100 back to *B* at a future date (like the sale of a hope), in exchange. If *A* is bankrupt on the due date, there is nothing for him to steal from *B*; the $1100 does not exist, and the original $1000 cannot be "retroactively stolen" since it was *not* stolen. It was transferred consensually by *B*, to *A*, for *A*'s use, in exchange for *B* receiving an uncertain, future title transfer.

Rothbard maintains that the transfer of the original $1000 is conditional on a *later repayment*. He writes (Rothbard 1998b, p. 134): "Smith's [*B*'s] original transfer of the $1000 was not absolute, but conditional, conditional on Jones [*A*] paying the $1100 in a year, and that, therefore, the failure to pay is an implicit theft of Smith's rightful property." Rothbard is correct that Smith's transfer of $1000 was conditional upon Jones agreeing *now* to make a *future* (uncertain, conditional) title transfer to a future $1100. But *Smith did this*; the condition is fulfilled since Smith initiated the specified future title transfer. The $1000 is, at the time of the initial transfer, now owned by Jones (our *A*) and his to spend.

What needs to be recognized is that the status of the $1000 that was transferred to *A* cannot be determined at a *later date*. It cannot be "presumptively owned" by *A* for a year—during which time *A* 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 has to be able to decide in *the here and now* who owns what (Kinsella 2023c, pp. 24–25 & n.34; Kinsella 2023f, pp. 60–63; Hoppe 2010, pp. 169–70). We cannot wait a year to decide whether *A* 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. *A* must own the $1000 *unconditionally* and outright. (See also La. Civ. Code, art. 1767 *et seq*.; Levasseur (2009, §2.2-1.1.))

Rothbard's theory of implicit theft must be rejected as unworkable and flawed.

Implicit Theft and Debtor's Prison

By avoiding the unnecessary and confusing notion of implicit theft to explain why the TTTC still works and is superior to promise-based theories, we also avoid a difficulty Rothbard finds himself in. In his chapter on the TTTC, Rothbard (1998b, pp. 134–36) explains why 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

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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 by the creditor-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.

The distinction between the original loaned sum ($1000) and the future sum to be repaid ($1100) can be made clearer if we consider the case of a gratuitous, unilateral title transfer where there is no present title transfer, or loan, but only a single future title transfer. Suppose *A* says "I hereby give to *B* $1100 in a year, as a gift." This is a valid contract (since the TTTC does not require consideration, unlike the common law) but the future title transfer is still conditional upon the future $1100 existing and owned by *A* at the future date. If *A* is penniless on the future transfer date, no transfer happens and *A* cannot be said to be stealing anything owned by *B*.

natural *ownership* over his self" (Rothbard 1998e, p. 31). 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, but rather from one's direct control of one's body (Kinsella 2023b, Part III.B & III.C; Kinsella 2023f, p. 52 *et seq*.; Kinsella 2022; 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.

Note that the inalienable right to own one's body does not come from homesteading or original appropriation (Hoppe 2023, p. xvii; Kinsella 2023c, pp. 16–21, 26; Kinsella 2023f, pp. 53 *et seq*.; Kinsella 2023b, Part III.B; Kinsella 2023i, pp. 270–72). By contrast, human actors 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 from a previous owner. Such owned things can also be "un-acquired" or abandoned, either outright, or "in favor of" someone else. This is precisely why *owned things* can be sold or given away—transferred—by contract. (Kinsella 2023b, Part III.A) 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 implies a person can, in effect, sell himself into slavery. This is because if the deadbeat debtor has committed implicit theft—an act of aggression—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).[12] 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 2023i.)

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. 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 Walter Block's reliance on the TTTC to defend slavery contracts collapses).[13]

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[12] 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.

[13] 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).

Note also that in the TTTC, there is no such thing as contract breach, since contracts are not enforceable or binding promises, but merely sets of conditional title transfers. The contract might specify the payment of monetary "damages" if one party fails to perform a certain action, but this is just a title transfer. On the use of these "performance bonds," see Evers (1977, p. 6), Rothbard (1998b, pp. 138–39), and Rothbard (2009, ch. 2, §13, pp. 177–79), although I disagree with Rothbard that failure to pay a performance bond is implicit theft; whether it is theft or not depends on whether the promisor owns the specified funds at the time the performance bond is to be paid. The concept of "efficient breach" of contract of the law and economics scholars also, in effect, recognizes that the concept of "breach" of contract

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 is therefore 'implicit theft.'" (Rothbard 1998d, p. 77) I have explained elsewhere why trespass against owned property, and threats, are types of aggression (Kinsella 2023g, 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 & III.A; Kinsella 2023h, 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. For example the apples are supposed to be fresh, real apples. 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.[14] As I note in Kinsella (2023b, p. 238), "This is akin to the legal notion of larceny by trick."

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. (Discussed in further detail in Kinsella 2023b, Part III.E.)[15]

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. 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

makes little sense; the failure to perform simply triggers the payment of some monetary payment, or "damages." See, e.g., Eisenberg (2005, pp. 977–78 *et pass.*).

[14] 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.

[15] Note: this case is not comparable to a debtor being unable to repay his debt later, since he did not misrepresent anything; the future title transfer is inherently uncertain because the future is uncertain, as noted above.

ownership of owned things.

The title-transfer theory of contract argues that contracts concern the transfer of property titles rather than promises or mutual 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 aligns contract law with the principles of property rights and non-aggression.

The TTTC recognize that owners have the right to convey their resources by consent, 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 gratuitous or not. It thus permits gratuitous contracts without inventing arcane doctrines or burdensome formalities. It also provides a conceptually elegant theory of contract, rooted in property rights, that can provide "damages" when one party does not performe 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 movement.

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 (1986).[16] 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, pp. 183, 197, 200, 201, 204), Hoppe, Hülsmann & Block (2006, pp. 207–34), Huerta de Soto (2020, pp. 9, 31, 155, 749, 753), Hülsmann (2002/03, p. 410 *et seq.*). 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 justified using the clearer framework of the TTTC, such as restrictive covenants, co-ownership arrangements, trusts, corporations and partnerships, and so on.

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[16] 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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