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Contract Theory, Title Transfer, and Libertarianism[1]

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Abstract: In the present paper we argue that the theory of contracts embraced by many libertarian scholars and relied upon by them in sundry important debates (e.g. over morality of the fractional reserve banking or loan maturity mismatching etc.), that is, the title transfer theory of contracts (TTT) should be rejected as not being able to account for the binding force of future-oriented contracts, including contracts deemed enforceable by those scholars themselves. The TTT claims that the only contracts that should be legally binding are these where the debtor's failure to abide by them constitutes a violation of the creditor's private property rights. However, as we argue, no default of the debtor in a future-oriented contract can in itself amount to such a violation.

Keywords: title transfer, contract theory, libertarianism, property rights, free market

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1. Introduction

Some libertarian scholars claim that the title transfer theory of contracts (henceforth TTT) is the only theory that accurately explains which contracts should be legally binding in a free society.[2] According to the TTT, a contract ought to be enforceable if and only if

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[2] For example, Evers points out that "the title-transfer model might well be the appropriate law of contracts for a free society" (Evers (1977): 10). For Rothbard the TTT is the "proper libertarian theory of enforceable contracts" and "a libertarian, natural-rights, property rights theory must therefore reconstitute contract law on the proper title-transfer basis" (Rothbard (1982/2002): 133, 147). Kinsella expresses

the debtor's failure to abide by the contract amounts to an implicit theft of the creditor's private property, that is, if and only if the defaulting debtor finds himself in possession of the creditor's property without the latter's consent. In turn, this can only happen if an alienable property title or possession had already been transferred between parties by the time the contract was breached. If, on the other hand, no such transfer had been made and therefore the debtor's failure did not result in an implicit theft of the creditor's property, the contract should not be enforceable, regardless of the debtor's promise, the creditor's detrimental reliance upon it or consideration given in exchange for it, etc. Under the TTT the debtor's duty not to infringe upon the creditor's private property rights is the only source of contractual obligation.

In the present paper we argue that the TTT should be rejected as not being able to account for the binding force of future-oriented contracts, including contracts that are central for the operations of the free market and openly classified as enforceable even by the libertarian proponents of the TTT themselves. Crucially, we demonstrate that no default of the debtor in a future-oriented contract can in itself amount to an implicit theft of the creditor's property. However, because according to the TTT the only contracts that should be legally binding are exactly those where the debtor's failure does amount to an implicit theft, then it follows that no future-oriented contracts should ever be enforceable if the TTT were to stand. Since this conclusion is not only generally unacceptable but also specifically rejected by libertarians, the TTT should be abandoned.

We will proceed in the following order: In section 2 we will provide a critical exposition of the TTT, focusing on its ambiguities concerning the question of what is implicitly stolen by the defaulting debtor. In section 3 we will analyze an example of a debt contract in order to track the effects of the TTT for the binding force of future-oriented agreements. Section 4 will apply our theoretical findings and discuss sundry types of future-oriented contracts that would be unenforceable under the TTT, or would engender rampant opportunism, as well as the implications this has for a free market economy. Section 5 concludes.

2. The Title Transfer Theory of Contracts: A Critical Exposition

A contract theory tries to ascertain which agreements between persons ought to be legally binding. Some theories claim that contracting parties ought to be duty-bound

a similar view when he writes that: "A much better grounding for contract law is found in the writings of libertarian theorists Murray Rothbard and Williamson Evers, who advocate a title-transfer theory of contract" (Kinsella (2003): 21). According to Davidson, a proper analysis of such intricacies of contract law as loan maturity mismatching or fractional reserve banking should stem from "first principles" and "an a priori argument, grounded in a foundational theory of property rights.... The tool ready-made for this purpose is the title-transfer theory of contracts (TTT), which is based on natural law principles that have been espoused by many theorists throughout the ages" (Davidson (2015): 11). Also, Selgin and White embrace the TTT in their analysis of legality and ethicality of fractional reserve banking. They "find the inherent- fraud position impossible to reconcile with... title-transfer theory of contract, which we accept, and which Rothbard otherwise uses to defend the freedom of mutually consenting individuals to engage in capitalist acts with their (justly owned) property" (Selgin and White (1996): 86). In turn Barnett finds the TTT to be among the few accounts which share "the claim that contractual obligation arises from a consent to a transfer of entitlements and is thereby dependent on a theory of entitlements" with his consent theory of contract (Barnett (1986): 299).

simply because they voluntarily chose to be so bound[3] or because they consented to transfer their alienable entitlements;[4] other theories focus on the promisee's reliance on the commitments undertaken by the promisor;[5] still other theories pay attention to the process of coming to an agreement[6] or to its economic efficiency[7] or fairness,[8] etc. What they all have in common and what makes them all contract theories is their attempt to identify sources of the binding force of certain agreements between persons, that is, sources of contractual obligation. What, on the other hand, renders them distinct, is that they identify these sources differently and consequently deem different contracts enforceable.

According to the TTT, agreements between parties ought to be legally binding if and only if a default of one party results in this party's detaining the other party's property without the latter's consent, that is, in an implicit theft. Contracts are enforceable because a property title or possession has been exchanged between parties and these parties are now duty-bound to act in such a way as to respect each other's newly acquired property rights. On this view the source of contractual obligation is simply a negative duty not to infringe upon another's private property rights. If a failure to fulfill an agreement entails violation of these rights, then such an agreement ought to be enforced by law. If it does not, then legal coercion should not take place. In this sense the TTT is derivable from, or is only an aspect of, the libertarian theory of private property rights.

[3] According to Fried, contractual obligation is "essentially self-imposed". As he points out: "By promising we put in another man's hands a new power to accomplish his will, though only a moral power: What he sought to do alone he may now expect to do with our promised help, and to give him this new facility was our very purpose in promising. By promising we transform a choice that was morally neutral into one that is morally compelled" (Fried (1981/2015): 8).

[4] As pointed out by Barnett, "contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent" (Barnett (1986): 270).

[5] See, *inter alia*, Atiyah who suggests that "promise-based liabilities are neither paradigmatic nor of central importance. Far from being the typical case of obligation, a promise-based liability may be a projection of liabilities normally based on benefit and reliance. Because these are normally found such powerful grounds for imposing obligations, it has been thought that the element of promise (express or implied) which is often combined with benefit-based and reliance-based liability, is itself the ground for the obligation.... this traditional attitude to promise-based obligations is misconceived.... the grounds for the imposition of such liabilities are, by standards of modern values, very weak compared with the grounds for the creation of benefit-based and reliance-based obligations" (Atiyah (1979): 4).

[6] For example, the common law doctrine of consideration. See, *inter alia*, Langdell (1880); Holmes (1881/2009).

[7] Which is usually associated with the economic analysis of law. See, *inter alia*, Posner (1973); Calabresi and Melamed (1972).

[8] For example, Rawls proposes that "to account for fiduciary obligations we must take the principle of fairness as a premise" (Rawls (1971/1999): 330). For Rawls "the principle of fidelity is the principle that bona fide promises are to be kept. It is essential..., to distinguish between the rule of promising and the principle of fidelity. The rule is simply a constitutive convention, whereas the principle of fidelity is a moral principle, a consequence of the principle of fairness.... The obligation to keep a promise is a consequence of the principle of fairness…I shall not regard promising as a practice which is just by definition, since this obscures the distinction between the rule of promising and the obligation derived from the principle of fairness. There are many variations of promising just as there are of the law of contract. Whether the particular practice as it is understood by a person, or group of persons, is just remains to be determined by the principle of justice" (ibidem: 328).

Both the distinctive nature of the TTT and its connection with the libertarian theory of private property rights have been encapsulated by Rothbard, the main proponent of the two:

> Unfortunately, many libertarians, devoted to the right to make contracts, hold the *contract itself* to be an absolute, and therefore maintain that *any* voluntary contract whatever must be legally enforceable in the free society. Their error is a failure to realize that the right to contract is strictly derivable from the right of private property, and therefore that 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). Hence, this proper libertarian theory of enforceable contracts has been termed the 'title-transfer' theory of contracts.[9]

Despite the name of the theory and what the above passages might suggest, it is not entirely clear which property, according to the TTT, is actually stolen by the defaulting party. To see why it is not clear, consider a future-oriented contract in which person A transfers x to person B at t_1 in exchange for B agreeing at t_1 to transfer y to A at t_2. Now if at t_2 B defaults and does not transfer y to A, the following question arises: According to the TTT, which property is stolen by B: x or y?

Judging from the above quotation as well as from the very name of the theory, we might be willing to say that the property stolen by B is y. For if the property title that "has already been *transferred*" were not the title to y, but exclusively to x, then at t_2 both x and y would be owned by B and therefore neither x nor y could possibly be stolen by B (special cases aside,[10] no one can steal one's own property). Hence, it seems that under the TTT, B's agreeing at t_1 to transfer y to A at t_2 should be interpreted as somehow amounting to B's transferring to A the property title of y, although without delivering the thing itself and then failing to do so on the due date. Because B's failure to deliver y on the due date – as by then already a rightful property of A – would according to the TTT constitute an implicit theft, B would be under a duty to abide by the contract.

Such an interpretation seems to be confirmed by Evers, another prominent proponent of the TTT, who, rejecting the legally binding force of promises, points out that:

> The modern libertarian view is that first title to the creditor's money is transferred to the debtor, then at later contractually-agreed-upon due date, title to the debtor's money is transferred to the creditor. Before the money falls due, the debtor has full title to it. Once the money falls due, the debtor who does not pay up is defrauding the creditor and is unjustly detaining his property.[11]

[9] Rothbard (1982/2002): 133.
[10] For example, cases such as *furtum rei suae* in the Roman contract of *pignus* or *commodatum*.
[11] Evers (1977): 11.

Since on this view the creditor has successfully transferred the title to his property to the debtor, the debtor cannot now be a thief of this property, for again, one cannot be a thief of one's own property. It is therefore the good which has not been delivered to the creditor, though the title to which has been transferred by the debtor, that the debtor seems to be stealing. Analogously, it seems to be *y*, not *x*, that in our imaginary contract between A and B is stolen by B.

Similarly, this intuition is confirmed by some passages from Rothbard's analysis of a typical debt contract between Smith and Jones in which Smith transfers $1000 to Jones at present in exchange for Jones agreeing now to transfer $1100 to Smith in a year. As Rothbard explains: "Our contention here is that Jones must pay Smith $1100 because he had already agreed to transfer title, and that nonpayment means that Jones is a thief, that he has stolen the property of Smith."[12] The fact (as well as other circumstances analyzed by us in the next section) that it is the $1100, not the $1000, that Jones must pay Smith might be understood as suggesting that the property title to $1100 has already been transferred from Jones to Smith and that now Jones should simply deliver the thing itself, that is, the $1100. Accordingly, our mental experiment could also be understood along these lines and B's agreement at t_1 to transfer *y* to A at t_2 could be interpreted as transferring the property title to *y* to A at t_1 whereas B's further detention of *y* on the due date could be viewed as amounting to an implicit theft of *y*. So again, it would be *y*, not *x*, that B would be stealing in our thought experiment.

However, accepting this conclusion as the correct interpretation of the TTT would be far too hasty. To see why, consider, for example, the following quote from Rothbard's earlier treatise *Man, Economy, and State*. Rothbard writes:

> when a debtor purchases a good in exchange for a promise of future payment, the good cannot be considered his property until the agreed contract has been fulfilled and payment made. Until then, it remains the creditor's property, and nonpayment would be equivalent to theft of the creditor's property.[13]

Judging from this passage – a quote openly inconsistent with Evers's "modern libertarian view" – it seems clear that the property stolen by the defaulting debtor is not the future payment he is supposed to make, but the good transferred to him by the creditor. Correspondingly, it also seems clear that on this understanding the TTT would predict – contrary to the previous interpretation – that in our imaginary contract between A and B it is *x*, not *y*, that is stolen by B.

Analogous conclusions are drawn by Rothbard at sundry junctures of his later work, *The Ethics of Liberty*, which is supposed to be representative of the mature version

[12] Rothbard (1982/2002): 134.

[13] Idem (1962/2009): 177. It is important to note that Rothbard does not talk here about a specific type of contracts, that is, a bailment or deposit contract, but about future-oriented contracts as such; he tries to explain the source of contractual obligations and suggests, following Lysander Spooner, that contracts of all types are binding because in all of them the creditor only transfers possession of his property to the debtor without transferring the ownership title thereto and so if the debtor defaults, he retains possession of a thing that is and has never ceased to be the creditor's rightful property. Thus, Rothbard depicts contracts here as kinds of bailments.

of the TTT. For example, when he talks about employment contracts in which the advance payment for the future performance has been made and the worker fails to fulfill his part of the contract, he does not think that the worker owes the employer the promised performance or damages for reneging on it; the only thing that the worker can legally be forced to do in this situation is to give back the received payment.[14] As Rothbard points out, "if the actor received an *advance* payment from the theater owners, then his keeping the money while not fulfilling his part of the contract would be an implicit theft against the owners, and therefore the actor must be forced to return the money."[15] Again, if we analogize this employment contract and our imaginary agreement between A and B, then we will see that this time it is x, not y, that according to the TTT is A's property stolen by B.

It is important to note that on this understanding of the TTT it is not true – contrary to what Rothbard claims in the above-quoted paragraph from *The Ethics of Liberty* – that "validly enforceable contracts only exist where title to property has already been *transferred*,"[16] for "when a debtor purchases a good in exchange for a promise of future payment, the good cannot be considered his property until the agreed contract has been fulfilled and payment made. Until then, it remains the creditor's property."[17] Certainly, either the creditor has already transferred the property title to the debtor and now the debtor is the owner of the good, or the good cannot be considered the debtor's property until the payment is made and remains the creditor's property. These two statements cannot both be true. If the second statement is to be preferred as the correct interpretation of the TTT, then it is even difficult to say why the theory is called the TTT, for transfers of property titles are not the source of contractual obligation. It would probably be more adequate to call this theory the bailment theory of contracts because it is clear that on this reading all contracts look similar to bailments where, *inter alia*, the ownership of a good stays with the creditor while possession thereof is transferred to the debtor.[18]

[14] According to an anonymous referee of this journal, if A pays the doctor, B, to treat A if A gets sick and later B lets A get extremely sick and does not treat him, then intuitively B owes A money. Yet it is unclear if B can transfer a title to his labor to A because the labor – future action – does not yet exist and, hence, there is currently no title to that which does not currently exist. We agree. Now this fact is a reason for the referee to conclude that even when viewed in its most favorable light, it is unclear if TTT is a plausible theory. And yet, as we can see in the main text above, Rothbard is quite explicit about his readiness to bite the bullet. His reasons for that are connected with the doctrine of inalienability of self-ownership rather than with his treatment of TTT or specifically the idea that there cannot be property titles to future things. At the same time, we are perfectly aware of the fact – as can be judged from various passages of the present paper – that labor contracts would be unenforceable under TTT and that this fact constitutes a strong argument against TTT. Nevertheless, we decided not to exploit this argument too much in this place in order to avoid entering the debate over inalienability and contaminating our argument against TTT with our stance on this latter issue. Instead, we opted for isolating TTT from other libertarian controversies in order to focus directly on its peculiar weaknesses.

[15] Rothbard (1982/2002): 138.

[16] Ibidem: 133.

[17] Idem (1962/2009): 177.

[18] As pointed out by Evers: "Nineteenth-century libertarian legal theorist Lysander Spooner tried to defend a return to treating debts as bailments.... While Spooner correctly sought to derive the law of contracts from the natural law pertaining to property titles, he was mistaken in his belief that this entailed a return to debt as bailment" (Evers (1977): 11).

So, which interpretation of the TTT is the correct one – the title transfer interpretation or the bailment interpretation? Judging from indeterminate and incoherent formulations of the theory present in the literature and evidenced above, it seems impossible to say. Fortunately, we do not have to decide it, for in the present paper we take a different tack: we examine the TTT on both interpretations and thereby preclude its proponents from trying to save the theory by switching from one reading to another. We suggest that the TTT fails regardless of the way in which it is interpreted. However, before we start our analytical work, one more point about the TTT is worth articulating: the TTT rejects the view that promises can ever be legally binding.[19]

According to the TTT, the defaulting party does not have to do or to give as stipulated in the contract because he so promised but exclusively because not doing so would amount to detaining the other party's property without the latter's consent; that is, it would be an implicit theft. Rothbard makes this clear when he says that promises cannot burden people with enforceable duties:

> An important consideration here is that contract *not* be enforced because a promise has been made that is not kept. It is not the business of the enforcing agency or agencies in the free market to enforce promises merely because they are promises; its business is to enforce against theft of property, and contracts are enforced because of the implicit theft involved.[20]

Not only are mere promises not binding under libertarian law, but promises accompanied by consideration are also unenforceable. As pointed out by Kinsella:

> if a mere promise (naked promise, or *nudum pactum*) is not enforceable, why does it become enforceable just because the promisee gives something small in return?... From the libertarian point of view, receiving consideration for a promise does not convert the promise into an act of aggression, nor is it clear how it causes the promise to effectuate a transfer of title any better than a naked promise would.[21]

The same applies to promises which elicit expectations in the mind of the promisee and lead him to rely on the commitments undertaken by the promisor. Since under libertarian

[19] An anonymous referee of this journal noticed that there is a *prima facie* tension between TTT rejecting promises as binding and TTT insisting that some acts can transfer rights. As the referee puts it: A problem with TTT rejecting the promissory theory is that the creditor and debtor do an act that transfers a right from one to the other. If an act transfers the right, then the promissory theory – or something like it – should be true. If an act does not transfer the right, then it is unclear why the right transfers. We share this concern, especially its first prong – see, *inter alia*, n. 14 above. On the other hand, the referee wonders whether this tension does not deprive TTT of all plausibility, even if this theory is viewed in its most favorable light. To this we would reply that if TTT contends – as it seems it does – that only some acts transfer rights whereas others (for example, naked promises) do not, then we should first examine whether those former acts really accomplish such transfers before we can derive definite conclusions about the plausibility of TTT in general. Our next section is devoted exactly to this task.

[20] Rothbard (1962/2009): 177.

[21] Kinsella (2003): 17–18.

law no one has a property right to have one's expectations fulfilled, enforcing promises reasonably relied upon by the promisee would amount to a violation of the promisor's entitlements. As again indicated by Kinsella:

> for the libertarian, another problem with detrimental reliance is that it is not explained why a person's 'reliance' on the statements or representations of another gives the relying person a *right* to rely on this. Why can a person be forced to perform or be liable for failure to perform a promise, just because it is 'relied on' by another? The default assumption for the libertarian is that you rely on the statements of others at your own risk.[22]

But why exactly are promises not binding? What is so problematic from a libertarian point of view about individuals voluntarily assuming duties by promising? The ultimate reason for rejecting the idea that promises might have duty-generating powers seems to be a supposition that enforcing promises would amount to an initiation of violence and infringement on private property rights. As pointed out by Rothbard, "it may be considered more *moral* to keep promises than to break them, but any coercive enforcement of such a moral code... is *itself* an invasion of the property rights... and therefore impermissible in the libertarian society."[23] Promises are simply innocuous speech acts which neither invade the physical borders of other people's spheres of freedom as delineated by their private property rights nor transfer entitlements between persons and so ought not to be enforced by law since such an enforcement would itself violate private property rights. As summarized by Kinsella:

> the making of a promise is not the commission of aggression. At most, promises are evidence of an intent to transfer title. Therefore, there is no aggression to justify the enforcement action.... Therefore, contracts involve only conditional transfers of title to scarce resources external to the body. Promises cannot actually be enforced.[24]

The allegedly aggressive nature of promise enforcement seems therefore to be the reason for not recognizing duty-generating powers of promises and one of the reasons for adopting the account of contracts that is based on transfers of titles rather than on some types of promises.[25]

[22] Ibidem: 20.
[23] Rothbard (1982/2002): 138.
[24] Kinsella (2003): 25.
[25] Although the goal of the present paper is to assess exclusively the tenability of the TTT, it is nonetheless worth mentioning that the idea according to which the enforcement of promises violates private property rights is independently problematic. There is no doubt, not even among libertarians, that a mere speech act can extinguish rights. For example, a mere speech act that expresses A's willingness to take part in a boxing match is able to extinguish B's duty not to punch A (and A's correlative right not to be punched by B). As Kinsella says, "under libertarian theory, there are only three ways that it is permissible to use force against the body of another" and one of them is "if he consents to the force" (ibidem: 25). By the same token, a mere speech act which communicates that "the intent to own terminates" can extinguish rights to external resources (idem (2009): 190). When a promise is such a speech act, it must also be able to extinguish rights. For example, when A's promise today to

3. The Title Transfer Theory of Contracts: An Analysis

Let us now take a closer look at what the TTT is actually able to predict as far as contractual duties in future-oriented contracts are concerned. To do so, we propose beginning with Rothbard's hypothetical contract between Smith and Jones mentioned above. So, suppose that:

> Smith and Jones make a contract, Smith giving $1000 to Jones at the present moment, in exchange for an IOU of Jones, agreeing to pay Smith $1100 one year from now. This is a typical debt contract. What has happened is that Smith has transferred his title to ownership of $1000 at present in exchange for Jones agreeing now to transfer title to Smith of $1100 one year from now. Suppose that, when the appointed date arrives one year later, Jones refuses to pay. Why should this payment now be enforceable at libertarian law? Existing law... largely contends that Jones must pay $1100 because he has 'promised' to pay, and that this promise set up in Smith's mind the 'expectation' that he would receive the money. Our contention here is that mere *promises* are not a transfer of property title; that while it may well be the *moral* thing to keep one's promises, that it is not and cannot be the function of law... in a libertarian system to enforce morality (in this case the keeping of promises). Our contention here is that Jones must pay Smith $1100 because he had already agreed to transfer title, and that nonpayment means that Jones is a thief, that he has stolen the property of Smith. In short, Smith's original transfer of the $1000 was not absolute, but *conditional*, conditional on Jones paying the $1100 in a year, and that, therefore, the failure to pay is an implicit theft of Smith's rightful property.[26]

Even though this paragraph comes from Rothbard's later work, *The Ethics of Liberty*, which is supposed to be representative of the mature version of the TTT (of what Evers called "the modern libertarian view") and therefore expressing the title transfer interpretation of the theory, it is still not clear what is stolen by the defaulting debtor. Is it $1000 or $1100? Some passages suggest that it is the former whereas other formulations indicate that it is the latter.

For example, if we couple the utterance "Smith giving $1000 to Jones at the present moment" (indicating that at t_1 Smith transferred possession of $1000 to Jones) and the

make a transfer of property title to $1000 to B in the future is a speech act which communicates A's intent to extinguish today A's right (Hohfeldian liberty) not to make such a transfer in the future, then it extinguishes today A's right not to make the transfer in the future and burdens A with a duty to make it (on the Hohfeldian analysis of fundamental legal conceptions see Hohfeld (1913); Kramer (2002)). However, if some promises can extinguish rights, then the use of force against a promisor to the extent to which he is stripped of legal protection previously granted by rights which are now extinguished due to his promise hardly violates any rights. For example, if A promised B in a relevant way not to possess a piece of property and extinguished thereby his own rights to possess it, then if A takes possession of the property and B tries, within the limits of proportionality and necessity, to enforce the fulfillment of A's promise not to do so, he does not violate A's rights since they have been extinguished.

[26] Rothbard (1982/2002): 133–134.

sentence "Smith has transferred his title to ownership of $1000 at present in exchange for Jones agreeing now to transfer title to Smith of $1100 one year from now" (indicating that at t_1 Smith also transferred the title to $1000 to Jones and that Jones did not transfer the title to his $1100 to Smith at t_1) with the conclusion "Smith's original transfer of the $1000 was not absolute, but *conditional*, conditional on Jones paying the $1100 in a year, and that, therefore, the failure to pay is an implicit theft of Smith's rightful property" (indicating that the transfer of the title to $1000 made by Smith at t_1 either was not legally binding or ceased to be legally binding due to Jones's failure to fulfill the condition), then it might seem that what is implicitly stolen by Jones is not the $1100 (the title to which has never travelled from Jones to Smith), but the $1000. What the TTT seems to be suggesting here is that on the due date and as a result of his failure to fulfill the condition, Jones finds himself in possession of Smith's $1000 without having any title thereto. From this supposition the TTT tries in turn to derive the conclusion that Jones is under a legal duty to pay $1100, for unless he makes this payment, he becomes the thief of Smith's $1000.

On the other hand, if we look at the passage "Smith giving $1000 to Jones at the present moment, in exchange for an IOU of Jones, agreeing to pay Smith $1100 one year from now" (indicating that at t_1 Jones incurred a debt of $1100 to Smith) and couple it with Rothbard's explanation of why Jones's payment of $1100 should be enforceable, then it seems that the property stolen by Jones is $1100, not $1000. For the reason why Jones incurred a debt of $1100 to Smith at t_1 and the reason why the payment of $1100 ought to be enforceable at t_2 is not that Jones "has 'promised' to pay or that this promise set up in Smith's mind the 'expectation' that he would receive the money," but that "he had already agreed to transfer title." And since "mere *promises* are not a transfer of property title," Jones's agreeing to transfer title to $1100 might be understood – especially in the context of "the modern libertarian view" that *The Ethics of Liberty* is supposed to represent – as something more than just a promise, that is, as an act of somehow transferring the title to $1100, although without transferring the money itself.[27] Now because on the due date "Jones refuses to pay," he finds himself in possession of $1100 the title to which "has already been *transferred*" to Smith. So, he finds himself in possession of Smith's rightful property. From this it is supposed to follow that Jones ought to have a legal duty to pay $1100, for unless he makes this payment, he becomes the thief of Smith's $1100.

Hence, the ambiguity identified by us in the previous section besets the TTT even if we focus exclusively on its mature version. However, having exposed it, we are not going to disentangle this Gordian knot of inconsistent interpretations. Instead, we are going to cut it, that is, analyze step by step whether the TTT is able to explain the binding force of the hypothetical contract between Smith and Jones on any interpretation. We will first assume that Smith's property that is allegedly stolen by Jones is the $1000 and then we will examine whether this assumption leads to the conclusion that Jones should have a legal duty to pay Smith $1100. We will demonstrate that this conclusion does not follow. Then we will change the assumption into the claim that Smith's property that is allegedly stolen by Jones is not the $1000 but the $1100, and check whether the desirable

[27] Then the passage "Jones agreeing now to transfer title to Smith of $1100 one year from now" could be interpreted not as saying that Jones did not transfer the title to $1100 at t_1 – as we suggested above – but as indicating, for example, that the title transfer made by Jones at t_1 triggered legal effects at t_2.

conclusion follows. We will again conclude that it does not. Our step-by-step analysis will therefore show that the TTT fails regardless of its interpretation and that it should be rejected as not being able to account for the binding force of future-oriented contracts.

3.1. Assumption 1: theft of the property transferred by the creditor

Suppose first that it is the \$1000 that is allegedly stolen by Jones at t_2. What would be a necessary condition for Jones's implicitly stealing Smith's \$1000? First of all, since the theft putatively committed by Jones is an implicit theft,[28] Jones does not have to take the \$1000 from Smith's possession in order to commit such a theft. But it is necessary that he detains Smith's money without his consent. This in turn can only happen if Smith's transfer of the property title to the \$1000 to Jones at t_1 – or, alternatively, Smith's transfer of lawful possession of the \$1000 to Jones at t_1 – was not legally binding or ceased to be legally binding at t_2 due to Jones's failure to fulfill the condition of transferring the \$1100 to Smith at t_2.[29] In such a case Jones would find himself at t_2 in unlawful possession of Smith's \$1000. From this fact the TTT would then try to derive the intermediate conclusion that thereby Jones committed an implicit theft of Smith's \$1000 and further the ultimate conclusion that therefore Jones should have a legal duty to pay Smith the \$1100.

The first problem with this reasoning is that Jones might fail to fulfill the condition of transferring the \$1100 to Smith at t_2 and thereby renege on the contract without detaining Smith's \$1000 at t_2. For in the meantime Jones might lose possession of Smith's \$1000 and at t_2 not find himself in unlawful possession of Smith's property. In such a case Smith's property would not be retained by Jones without Smith's consent and a necessary condition of committing an implicit theft would not be fulfilled. Since according to the TTT no contract should be enforceable unless the failure to abide by it involves an implicit theft, it follows that Jones should not have a legal duty to pay Smith the agreed upon \$1100 and the agreement between Smith and Jones should not be recognized by law. Thus, in the case of lost possession the TTT would not be able to account for the binding force of future-oriented contracts. However, since such contracts ought to be enforceable both from a general point of view and from a libertarian perspective (including the perspective of the proponents of the TTT themselves), the TTT should be rejected.

One might try to object to the above argument by pointing out that Jones's loss of possession of Smith's \$1000 was in itself an infringement upon Smith's rights and that Jones should therefore have a legal duty to pay Smith the \$1100 regardless of the fact that at t_2 he did not detain Smith's property. Was Jones not responsible for taking care of Smith's money until fulfilling his part of the contract? For example, is a bailee not supposed to keep possession of goods entrusted to him by a bailor? And is a loss of deposited property not an infringement upon the depositor's rights etc.?

[28] Let us remind ourselves that an implicit theft is defined by Rothbard as: "the other party's property is retained by the delinquent party, without the consent of the former (implicit theft)" (ibidem: 133).
[29] This could also happen if Jones embezzled or defrauded Smith's money. But there is no indication in the text that any such thing happened. Besides, it is independently problematic whether libertarianism would be able to account for fraud and embezzlement. On this see Child (1994); Zwolinski (2016); Ferguson (2018); Steiner (2019).

The prima facie credibility of this objection stems from the fact that under existing contract law losing possession of another's property is indeed often considered an infringement. However, it is important to note that it is only so considered because a duty to keep possession has already been created by the contract. Unless such a positive duty is created contractually in the first place (which often is the very point of a contract), the risk of a property loss falls on the owner. Yet where would such a duty come from in the case of Smith and Jones who are governed by the libertarian TTT? It could not simply be a duty correlative with Smith's property rights, for property rights are negative rights whereas a duty to keep possession is a positive duty. Neither could it come from Jones's promising to keep Smith's $1000 – even if Jones wanted to and even if he actually made such a promise (although there is no textual support whatsoever that he did) – for according to the TTT promises are binding if and only if the failure to abide by them amounts to an implicit theft of the promisee's property. An implicit theft in turn requires that the property of one party "is retained by the delinquent party, without the consent of the former."[30] Since in the case of lost possession there is obviously no retention of the other party's property and therefore there is no implicit theft, a promise to keep possession cannot be legally binding. Hence, the objection that Jones's loss of possession of Smith's $1000 is already an infringement upon Smith's rights should be rejected as far as the TTT is concerned.

But the problem faced by the TTT is much deeper than that. For even if Jones did not lose possession of Smith's $1000 in the meantime, he would still not infringe upon Smith's property rights by simply detaining his money at t_2. This should be especially clear for libertarians who are adamant defenders of negative rights. For if Smith's property rights to the $1000 are negative rights, they can be violated exclusively by acting and never by omitting or simply having a specific status. However, possession or detention of someone else's property is not an action that one can perform but a state in which one is.[31] Jones, who detains Smith's $1000 at t_2, is not performing an act of detaining but

[30] Rothbard (1982/2002): 133.

[31] An anonymous referee of this journal pointed out to us that at this juncture our argument crucially relies on the distinction between actions and states which is supposed to support our central claim that by withholding the creditor's property, the debtor is not acting and so not violating the former's property rights. In the referee's opinion, this move is too hasty and seems to rule out by *fiat* actions that are continuous rather than episodic while at least since Anscombe's *Intention* the concertina quality of action descriptions has been known and accepted. Accordingly, it is not clear why continuous tenses for verbs characterizing actions should be ruled out in this way. This is a deep, multilayered remark and so we will try to approach it one layer at a time. Let us therefore take the concertina quality of action descriptions first. Since we subscribe to Moore's version of Davidson's theory of action (see, *inter alia*, Moore (1993); Davidson (2001)), we fully embrace the accordion effect in action descriptions as long as it pertains to basic acts, that is, willed bodily movements such as moving one's fingers. In this respect we are in a very good company of authors who answer 'yes' to the question of "is that complex action identical to that basic act? There are two well-armed philosophical camps on this question. Those who hold 'coarse-grained' theory, such as Donald Davidson, Michael Bratman, Alan White, Lawrence Lombard, Jennifer Hornsby, and Elizabeth Anscombe, answer affirmatively" (Moore (1993): 280). Take a man who volitionally moves his finger on a trigger – a case exploited multiple times in Moore (1993; 1997; 2009) – which in turn causes death of another human being. We would be very much prepared to say that what this man is doing is not only moving his finger but also pulling the trigger, discharging a firearm and killing a person. By the same token, we would be willing to say after Anscombe that a man who moves his arm up and down on a pump handle also "operates the pump, replenishes the water supply, poisons the inhabitants" (Anscombe (1957/2000): 45); or after Davidson that a man who flips the switch also turns on the light, illuminates the room and alerts a prowler (Davidson (2001): 4). But at the same time, we would not say that these men perform

is related to the $1000, to Smith and to all other people in a specific way, that is, in a way which involves Jones's capability both to control the $1000 and to exclude all other

four (or five in Davidson's case) actions each. Following Anscombe, Davidson and Moore, we would rather say that they only perform one action each, although an action having many descriptions. What is this action? For Anscombe it is the man's action A in the A-D series, that is, moving his arm: "the only distinct action of his that is in question is this one, A. For moving his arm up and down with his fingers round the pump handle *is*, in these circumstances, operating the pump; and, in these circumstances, it *is* replenishing the house water-supply; and, in these circumstances, it *is* poisoning the household" (Anscombe (1957/2000): 46). For Davidson it is flipping the switch but clearly flipping the switch is only a description of moving one's arm. For Moore it is the shooter's moving his finger. At any rate, the point is that as long as there is a basic act, that is, a willed bodily movement, we are perfectly at home with the accordion effect applying to such a basic act and so do not rule out continuous descriptions of actions. Moreover, even if a complex action such as killing were effectuated by many basic acts taking place over a long interval of time, we would still be willing to say that there was a single continuous action of killing. As Moore puts it: "A single movement of a trigger finger may constitute such a killing, but so may repeated blows given by the killer over some period of time" (Moore (1993): 284). Now the second layer. The situation seems very different with the case under consideration. For if we were to use, by virtue of the accordion effect, the continuous tense 'possessing' as a description of Jones's action, there would have to be some willed bodily movement of Jones which we could describe in this way in the first place. And again, if there were such a basic act of Jones, we would be perfectly willing to do so as we embrace the concertina quality of action descriptions. However, in our case it was Smith, not Jones, who performed such a bodily movement (that is, he, for example, clicked the 'transfer' button on his computer). Thus, there was no willed bodily movement of Jones to which we could apply the accordion description so as to interpret this basic act of Jones as Jones's continuous complex action of possessing Smith's money. The third layer. Is Jones's withholding Smith's property not such a basic act which we could describe, by virtue of the accordion quality of action descriptions, as possessing Smith's property? No, for there is no willed bodily movement of Jones that would constitute his withholding Smith's property and on the Davidsonian-Moorean account of action, basic acts simply are willed bodily movements. Jones's withholding Smith's property is then better classified as an omission rather than an action, for what it comes to is the absence of any willed bodily movement of Jones that would cause Smith's property to return to Smith. As pointed out by Moore: "actions are event-particulars of a certain kind, namely willed bodily movements…. [In turn] omissions are the absence of any willed bodily movements. An omission by A to save X from drowning at t is just the absence of any willed bodily movements by A at t, which bodily movements would have had the property of causing X to survive the peril he faced from drowning" (ibidem: 28). However, if withholding Smith's property is an omission, then there is no help coming from this direction for libertarians who reject the idea of violating property rights by omission. Which takes us to the fourth layer. As we mentioned above, on the Davidsonian-Moorean account, "human actions are a kind of event" (ibidem: 366), that is, a kind of "a concrete particular consisting of an object undergoing change over an interval of time" (idem (2009): 335). Or more precisely, "there are three aspects of events, on this account: a (spatially located) object that exists in its own right; a change (the having then the absence) in some property or properties of that object; and a temporal interval during which the change takes place" (ibidem: 335). Thus, we could say, simplifying the matter a bit for the sake of discussion, that on this account taking possession of x is clearly an event, for there is a change in properties of an agent over time such that at t_1 the agent lacks the property of possessing x and then at t_2 he has this property. By the same token, in the case of losing possession the agent first has the property of possessing x and then lacks this property, making it clear that losing possession is also an event (although not an action, for it is not constituted by the agent's willed bodily movements). But then possession itself – signifying the state of the agent having the property of possessing x over time rather than any change in this property – cannot be an event. And not being an event, it cannot be an action either. For these reasons, for example, "possession crimes are generally defined so that either an act (of acquiring possession) or an omission (to rid oneself of possession) are prerequisites to liability. Thus, it is not the *state* of possessing that is being punished, but either the act of taking possession, or (in the cases where the defendant comes into possession without doing anything) the omission to rid oneself of possession" (idem (1993): 21).

people from dealing with it.[32] Since possession or detention is not an action, but a state, position or relation, then Jones's detention of Smith's \$1000 at t_2 cannot in itself breach any negative duty that Jones might have and correlatively it cannot infringe upon Smith's property rights either. Of course, for example taking possession of Smith's \$1000 would be an action and if performed without Smith's consent it would indeed constitute a breach of Jones's negative duty and a correlative violation of Smith's property rights. Yet in the case under consideration there is no mention of Jones's taking possession of Smith's \$1000, nor of any other action performed by Jones with Smith's money. To the contrary, it is clearly stated that Jones did nothing at all, let alone took the \$1000 from Smith's possession – it was Smith himself who transferred the money to Jones.

Now it follows that if Jones's detention of Smith's \$1000 at t_2 cannot in itself constitute an infringement upon Smith's negative property rights, then it cannot constitute an implicit theft either. For unless one stretches the concept of an implicit theft beyond measure, it clearly presupposes some violation of property rights. If there is no violation of property rights, then there is no theft, implicit or explicit. This of course shows not only that the definition of an implicit theft (as a state in which "the other party's property is retained by the delinquent party, without the consent of the former") is too broad (for it includes cases which do not involve violation of property rights), but most of all that the TTT is unable to account for the binding force of another type of future-oriented contract, that is, contracts in which possession of the creditor's property is kept by the defaulting debtor.

Incidentally, this damaging consequence of the TTT seems to be an aspect of its background libertarianism according to which all first-order duties are negative. For only if such duties exist outside the remit of contracts and torts/crimes and A mistakenly transfers x to B, then B cannot have a first-order positive duty to transfer x (as his unjustified gain) back to A and so not transferring it back cannot be a violation of any such duty. At the same time B's detention of x cannot be a violation of any negative duty either, for it is not doing anything at all. Not being a violation of any first-order duty, positive or negative, B's detention of x simply cannot generate any second-order duty.

By the same token, if Smith transferred \$1000 to Jones in exchange for Jones agreeing to transfer \$1100 to Smith in the future, then Jones's alleged duty to abide by the agreement, that is, to transfer the \$1100 to Smith on the due date, cannot be explained by his breach of a putative negative duty not to detain Smith's \$1000 (for due to the fact that being in a specific state of detaining property of another cannot constitute a wrongdoing, there can be no such duty), nor can it be explained by his breach of an alleged first-order positive duty to return the unjustified gain of the \$1000 (for libertarianism rejects the

[32] As Steiner points out, the concept of possession "refers to either or both «control» and «exclusion of others». But it is clear that, where the former is used, it is intended to be synonymous with the latter. That is to say, one *controls* (in the sense of *possesses*) a thing inasmuch as what happens to that thing – allowing for the operation of physical laws – is determined by no other person than oneself." Steiner (1994): 39. Compare also von Savigny: "by the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded" (Von Savigny (1848/1979): 2).

existence of any first-order positive duties).[33] And of course the last way in which Jones's duty to abide by the agreement would normally be explained, namely by his breach of the contractual duty to transfer the $1100 to Smith, would also be blocked for the TTT due to a glaring infinite regress. For under the TTT there could be no contractual duty on Jones to transfer the $1100 to Smith unless his default amounted to an implicit theft of the $1100.[34] However, it would amount to such an implicit theft only if there were a contractual duty on Jones to transfer the $1100 to Smith.

Finally, it is important to realize that even if we assumed that Jones's detention of Smith's $1000 at t_2 would be a violation of the latter's rights (or that Jones's lack of Smith's $1000 at t_2 due to the lost possession or expenditure thereof would also be an infringement), the TTT would still be unable to account for the binding force of the contract between Smith and Jones, provided that Jones gave Smith back his $1000 on the appointed date. For if on the appointed date Jones returned the money, then he would obviously not commit an implicit theft of Smith's property, regardless of what he did with the money in the meantime and therefore he would be absolved from any legal responsibility for failing to pay Smith the agreed upon $1100. But if Jones is able to discharge his legal duties to Smith by simply returning the latter's money, then there is nothing binding about their contract in the first place. No chain of law was created by their agreement which would put Jones's future payment into Smith's hands today.[35] Thus, even if we conceded, *arguendo*, that Jones would indeed infringe upon Smith's rights by detaining, losing or spending Smith's $1000 and leaving it at that, the fact that returning Smith's money on the due date would preclude any such infringement from setting in would demonstrate that the exchange between Smith and Jones did not give rise to any new duty. Jones did not become duty-bound to do anything else than what he was normally – under the above assumptions – required by libertarian law to abstain from doing, namely detaining, losing, or disposing of another's property without consent. No contractual obligation to perform an action otherwise not required of Jones – that is, paying Smith the agreed upon $1100 – was created by the agreement.

[33] It is probably worth adding that even if Smith, not being able to count on Jones's returning the $1000 on his own accord or on libertarian law requiring him to do so, wanted to take it himself from Jones, he would be permitted to do so only if his regaining the money did not involve infringing upon Jones's rights. For example, if the $1000 were in Jones's mailbox and the only way to get it required breaking into the box, Smith would not be permitted to do so. This of course is just another deadlock created by libertarianism – the most famous one being Nozick's entrapment problem (see Nozick (1974/2014): 55) – for although Smith has a private property right to the $1000, he at the same time has a duty not to take possession thereof. On other libertarian deadlocks see: Block (2016); Dominiak (2019).

[34] Remember that now we are talking about the last way in which the TTT could try to explain Jones's duty to abide by the agreement, that is, by resorting to Jones's breach of his alleged contractual duty to transfer the $1100 to Smith. If there were such a contractual duty, then Jones's breach thereof could be interpreted as an implicit theft. Then it would be the implicit theft of the $1100, not of $1000.

[35] As pointed out by Fried, we need contracts because "we need a device to permit a trade over time: to allow me to do A for you when you need it, in the confident belief that you will do B for me when I need it. Your commitment puts your future performance into my hands in the present just as my commitment puts my future performance into your hands. A future exchange is transformed into a present exchange" (Fried (1981/2015): 13–14). Nothing of this sort happens in the case of Smith and Jones.

We therefore conclude that on the assumption that it is the $1000 that is implicitly stolen by defaulting Jones, the TTT fails in its attempt to explain the binding force of the contract between Smith and Jones. First of all, it fails to prove its point in the case of lost possession, for it is unable to account for a duty to keep possession. Second, it fails to prove its point in the case of kept possession too, for being committed to the negative nature of property rights it cannot subscribe to the view that omissions or states such as possession can violate negative rights. Finally, it fails to make its point because it is generally unable to account for the creation of contractual obligation due to the fact that returning the transferred property to the creditor would preclude any possible breach of the debtor's duty, showing thereby that no new duties were created by the agreement.

3.2. Assumption 2: theft of the property the title to which was transferred by the debtor

We shall now turn to the question of whether the TTT fares any better under its modern interpretation, that is, on the assumption that it is the $1100 that is implicitly stolen by Jones. Since many of our arguments in this subsection will bear heavily on the points made in the previous subsection, we can be much more concise here.

Let us remind ourselves that on this interpretation Jones's agreeing at t_1 to pay Smith $1100 at t_2 (in a year) is understood as Jones's transferring to Smith at t_1 the property title to the $1100, although this transfer takes its full legal effects in a year. Jones's transferring at t_1 the property title to the $1100 to Smith is of course unaccompanied by the transfer of the money itself – the latter is supposed to follow the former at t_2. This is on these grounds that it is presumed by the TTT that if Jones fails to deliver the money at t_2, he will then become an implicit thief of the $1100, as of then already a rightful property of Smith.

However, it should be clear by now that all points concerning lost possession and continued detention made in the previous subsection apply to the present case as well. Hence, it cannot consistently be argued that Jones's default in itself amounts to an implicit theft of Smith's $1100, for if Jones lost possession of the money or kept detaining it, he would thereby not infringe upon Smith's negative rights. For Jones's losing possession to constitute an infringement upon Smith's rights, Jones would have to have a duty to Smith to keep possession. But as we have seen in the previous subsection, the TTT is utterly unable to account for such a duty. Neither can the libertarian TTT maintain the claim that the state of possession – as opposed to an act of taking possession of another's property – constitutes a violation of negative rights. So, it can be concluded that no infringements upon Smith's rights result from Jones's failure to deliver the money on the due date in cases of lost possession and continued detention. However, since there can be no implicit theft unless there is a violation of rights and since according to the TTT there can be no contractual obligation unless the defaulting debtor commits an implicit theft of the creditor's property, the contract between Smith and Jones would have to be considered, at least in the above cases, unenforceable.

There is yet one more problem with this "modern libertarian view" of the TTT. This interpretation of the TTT assumes, as we have just seen, that the debtor transfers the

title to his property to the creditor at t_1 and that this very fact explains why the debtor's failure to deliver the property to the creditor on the due date amounts to the debtor's unlawfully detaining the creditor's (as of now) rightful property. As a matter of fact, this view must assume that such a transfer happened, for otherwise the debtor's agreement at t_1 to transfer the property to the creditor at t_2 would be nothing more than a mere promise (while under the current assumption it is a title transfer, although a transfer taking its full legal effects at t_2). However, this assumption comes at a considerable cost because it disqualifies as unenforceable all contracts in which at t_1 the debtor does not own the money (as it is often the case in typical debt contracts) which he would be willing to obligate himself to pay to the creditor at t_2.

For example, if in the debt contract between Smith and Jones it happened to be the case that Jones did not own the $1100 at t_1, then he could not possibly transfer the property title to the $1100 to Smith at t_1 because trivially no one can have the property title to the property one does not own and no one can transfer the title one does not have.[36] In such a case Jones's agreeing at t_1 to pay Smith $1100 at t_2 would have to be understood not as transferring the title, but as making a mere promise. Clearly then if Jones did not own the $1100 at the time of agreeing to transfer it to Smith in a year, the contract between Smith and Jones could not be considered enforceable under the modern view of the TTT. By the same token, any debt contract in which at the time of striking it the debtor would not own the money equal to the amount he would be obligated to pay to the creditor on the due date would be unenforceable according to this version of the TTT. Since such a limitation (as well as limitations considered in previous paragraphs of

[36] An anonymous referee of this journal expressed a concern that if eternalism is true, then all times and everything in them are equally real. Thus, just as a contractor need not be in the same space as the object to which he has the title, he need not be at the same time as the object to which he has the title. Accordingly, as he can transfer the title to the object located in another space, he can transfer the title to the object located at another time. In reply to this interesting remark, we would like to offer the following observations. First, our argument is not necessarily that Jones cannot transfer the title to an object at t_1 because he does not have this object at t_1 *but will have it in the future*. He might have it or not have it in the future. Now it seems to us that our argument is immune against eternalism in the second case, for then it simply says that Jones cannot transfer the title to an object he will never have (we abstract from the possibility of transferring titles to objects at past temporal locations as practically irrelevant). But that is a minor point. Second, supposing that eternalism is true, it is still unclear whether (1) Jones, finding himself at the present temporal location, has the title at the present temporal location to an object at a future temporal location or whether (2) he has the title at a future temporal location to an object at the future temporal location. In the latter case, it would be relatively easy for libertarians to explain how he could acquire this title – for example, he might have mixed his labor with the object at a future temporal location – but he would still be unable from his present temporal location to transfer the title at a future temporal location, for neither he nor anyone else at the present temporal location has access to future temporal locations. In the former option, it could seem relatively easy to explain the title transfer (Jones has the title at the present temporal location and he transfers it at the present temporal location), but it would be impossible for libertarians, with their historical theory of justice, to explain its acquisition. Since all titles reduce to the first acquisition which in turn is understood in the Lockean terms of labor-mixing, then Jones's title at the present temporal location must have been acquired at this or earlier temporal location by mixing labor with the object located at that latter temporal location. However, since the object in question is *ex hypothesi* located only at a future temporal location, it could not have been so acquired and Jones's alleged title thereto seems to be hanging in the air. Or so it seems to us.

the present subsection) on the binding force of future-oriented contracts would be both absurd and utterly damaging for the theory whose ambition is to provide the appropriate contract law for the free society, we conclude that the TTT in its modern interpretation also fails to explain the source of contractual obligation in future-oriented contracts and should therefore be rejected.

3.3. Would Future-Oriented Contracts Ever Be Enforceable Under the TTT?

What seems to us to be the crucial point of the above analysis is the realization that it is literally impossible for the debtor to commit an implicit theft of the creditor's property simply by reneging on the future-oriented contract, that is, simply by not doing or not giving what he should normally be obligated to do or to give. Of course, if the debtor had a contractual duty to make a title transfer, to deliver the property, to perform a specific action, etc., then abstaining from doing these things would indeed constitute infringements of the creditor's contractual rights and one could then perhaps even try to stretch the concept of implicit theft so as to cover such infringements. The problem is that the TTT would like to have it the other way around. It would like to explain the existence of such contractual duties by the concept of implicit theft. Thus, instead of claiming that the debtor's abstentions are infringements on the creditor's rights because the debtor incurred contractual duties to do various things, it claims that the debtor incurred these duties because abstaining from doing these various things would be an implicit theft of the creditor's property. This is a mistake. Abstaining from doing things, especially things one does not have an independent positive duty to do, cannot constitute theft. For a theft, even an implicit one, to take place, there must be some action performed by the debtor (barring the aforementioned "stretched" possibility of breaching positive duties) that violates the creditor's negative property rights. By simply not performing his part of the future-oriented contract the debtor does not perform any action at all and so cannot violate any negative rights of the creditor or commit any theft. It therefore follows that under the TTT no future-oriented contracts should be enforceable because no default in such contracts can ever amount to an implicit theft of the creditor's property.

There is however a possibility that the defaulting debtor does something over and above simply not performing his part of the contract. For example, he sells, transforms, or destroys the creditor's property after the title transfer took its full legal effects. Now there is a violation of the creditor's property rights and the concept of implicit theft can be invoked. For example, if – on the second interpretation of the TTT – instead of paying Smith the $1100 on the due date, Jones first just keeps the money and then spends it on his needs (so as not to even have the *tantundem*), he thereby commits an infringement on Smith's property rights and insofar as appropriating another's property can be understood as an implicit theft, he commits the latter too.[37] It is clear that as an effect of this violation Jones incurs a second-order duty to compensate Smith for his losses. What is not clear however, is whether this second order duty can be of much help to the TTT.

[37] On the merger of the crime of larceny and embezzlement in a more general offence of appropriation see Fletcher (1978/2000): 9–10.

First of all, resorting to a compensatory duty in order to explain Jones's alleged contractual duty to pay Smith the agreed upon $1100 would not work at all in the case in which only a fraction of Smith's $1100 (for example, $100) were spent by Jones (whereas the rest were kept or lost beforehand). For why should compensation for appropriating Smith's $100 correspond to $1100 and not to what was actually implicitly stolen by Jones, that is, to $100? It seems that Rothbard's "theory of proportional punishment – that people may be punished by losing their rights to the extent that they have invaded the rights of others"[38] – supports the verdict that instead of $1100, Jones should pay Smith about $200, that is, "*double* the extent of theft: once, for restitution of the amount stolen, and once again for loss of what he had deprived another."[39] However, if what the principle of proportionality implies is indeed that Jones should pay Smith $200 or so, then resorting to a compensatory duty cannot explain what the TTT wants to explain, namely Jones's obligation to pay Smith the agreed upon $1100.

This in turn points to a more general problem that besets the idea that a second-order duty to rectify the implicit theft may be the source of contractual obligation under the TTT. Although it might seem that agreements that involve additional acts of appropriation (for example, by selling or destroying) of the entire property transferred within their confines could indeed be contingently enforceable due to those acts being independently prohibited by libertarian law, it is important to note that there is nothing in the nature of these agreements that can account for this enforceability. To see that, suppose that Smith and Jones not only did not have any agreement but also that they never met. In such a case, if Smith transferred to Jones $1100 by mistake and Jones spent it, Jones would be forced to compensate Smith in accordance with the principle of proportionality for the implicit theft of his property. However, exactly the same situation would take place if Smith and Jones had an agreement. In such a case, if Jones spent Smith's $1100, he would also be forced to compensate Smith in accordance with the same principle of proportionality for the same implicit theft of his property. Hence, their agreement would make no difference to the situation and likewise the enforceability of the compensatory payment would have nothing to do with their contract. In this sense the enforceability in question would not be the enforceability of their agreement at all. Accordingly, the TTT would thereby fail to answer the most important question of any contract theory, that is, which agreements between people ought to be legally binding, for under this interpretation no agreements would ever be binding.

In other words, in the case of Jones's spending Smith's $1100 despite the agreement, a duty to pay Smith $1100 or so as a matter of compensation would not stem from anything connected with their agreement, promise made by Jones, Smith's reliance upon it, meeting of their minds, bargaining processes leading to the agreement or acts of expressing consent, etc. Neither would it stem from Jones's reneging on their agreement. Instead, this duty would be incurred exclusively by virtue of an independent operative fact, that is, an action performed by Jones and consisting in spending Smith's money or otherwise appropriating it.

[38] Rothbard (1982/2002): 92.
[39] Ibidem: 88.

Similarly, we should reject the reasoning that since the compensatory payment is enforceable, there must be a second-order duty to pay compensation; and since there is a second-order duty to pay compensation for appropriating Smith's $1100, there must be a first-order duty not to appropriate it; and since the only way not to appropriate it is to abide by the agreement with Smith, there must be a duty to abide by the agreement with Smith and so the agreement is binding. We should reject it because as we saw above, it is not true that abiding by the contract is the only way to avoid appropriating Smith's $1100. Jones might also simply keep possessing Smith's $1100 without violating thereby any of his rights.

It therefore seems that even if some enforceable compensatory payments actually coincided or corresponded with what would otherwise be required by justice in contracts, this contingency would have nothing to do with agreements between parties. For under the TTT no default of the debtor in a future-oriented agreement could by itself amount to a breach of contract or give rise to a compensatory duty. Accordingly, no future-oriented contracts would ever be strictly speaking binding if the TTT were to stand.[40]

4. Issues with the Title Transfer Theory in Practice

In this section, we will discuss two related issues that arise from the TTT. The first is that there are a number of common contractual arrangements that advocates of the TTT

[40] This conclusion of course raises the question of what sort of contract theory would be compatible with libertarianism. For example, an anonymous referee of this journal asks: The law – at least American contract law – requires that the breaching party give the non-breaching party the benefit (reasonable reliance, contract price, and profit) that she expected to receive were the non-breaching party to have fulfilled the contract. Is this something that libertarians should accept or is their theory compatible with restitution (for example, contract price) or reliance (for example, contract price and reliance cost) damages? Of course, answering this question fully would take another paper. Thus, in this place we would only like to make a few modest remarks. First of all, libertarian ownership rights, including self-ownership rights, seem alienable. In this respect we are willing to follow Nozick (1974/2014: 58); Steiner (1994: 232); Block (2003: 40–41), *passim*. We also agree with Fried that "contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individual have rights" (Fried (1981/2015): 2). Likewise, we share Steiner's conviction that the libertarian free market is a *caveat emptor* regime (Steiner (2019): 100) and, as put by Evers, that "[a]ny expenses incurred because of reliance are simply costs of poor entrepreneurship" (Evers (1977): 6–7). All of this suggests that libertarian right-holders can be viewed as having powers of waiver over their own rights and so as being able to dispose of those rights in socially conventional speech acts such as promises, incurring thereby various duties. Promises are therefore binding for them not because promisees rely on them in their cost-generating activities, but because they are vehicles by which promisors can waive their rights and assume duties. In a word, libertarianism seems to be in sync with some version of the contract-as-promise theory (see Fried (1981/2015)). Accordingly, the most appropriate remedy for a contractual breach seems to be some scheme of enforcing specific performance. As pointed out by Fried, "if a person is bound by his promise and not by the harm the promisee may have suffered in reliance on it, then what he is bound to is *just its performance*" (ibidem: 19). Or even more pertinently, as put by Block, "this leaves open the question of whether the contract should be upheld, e.g., specific performance required, or if the contract violator should merely be forced to return the money he was paid, perhaps with an additional amount as a penalty. In my view, in a fully free market system, there would be two kinds of contracts: those that specify specific performance, and those that allow financial penalties and monetary recompense. In the absence of any such distinction, I would enforce specific performance with the understanding that the contractually obligated person could buy his way out of the contract at a mutually agreeable price" (Block (2003): 72).

would consider legitimate but would not be enforceable under the theory. The second issue is that it leaves substantial scope for opportunistic behavior.

As an illustration of a common type of contract that would be unenforceable under the TTT, consider a futures contract. Futures contracts often involve the agreement to trade goods for which at least one of the parties does not currently possess title – corn that will be harvested in 6 months' time, for example. Additionally, the buyer of the future corn agrees to pay a certain monetary price for the future corn when it is delivered, not when the futures contract is struck. Thus, such a contract is invalid and unenforceable from the perspective of TTT, as no titles are transferred when the agreement is made; what is exchanged are promises to perform on a specified date, and, as mere promises, they are unenforceable under the TTT.

Another type of contract that would be unenforceable under the TTT is a marriage contract. Rothbard uses the example of marital engagements to criticize theories of contract based in promises or expectations:

> Suppose that A promises to marry B; B proceeds to make wedding plans, incurring costs of preparing for the wedding. At the last minute, A changes his or her mind, thereby violating this alleged "contract." What should be the role of a legal enforcing agency in the libertarian society? Logically, the strict believer in the "promise" theory of contracts would have to reason as follows: A voluntarily promised B that he or she would marry the other, this set up the expectation of marriage in the other's mind; *therefore* this contract must be enforced. A must be *forced* to marry B.[41]

Rothbard's argument proves too much, for it denies the possibility of having a marriage contract at all. In exchange for A's promise to marry B, B transfers title of an engagement ring to A, but according to Rothbard, this does not create a binding contract under the TTT.[42] But, if that is the case, neither would a wedding ceremony. Although a bride and groom transfer titles to rings as part of the ceremony, they are not exchanging the title to one ring in receipt of the other. Rather, each party is transferring title to a ring in exchange for *the promise* to have and to hold from this day forward, for better, for worse, for richer, for poorer, etc.[43] Thus, under the TTT, either both the engagement and the wedding are binding contracts (at least those that involve the transfer of title) or neither is. Since Rothbard holds that engagements are not binding, then he must also hold that marriages cannot be binding. If such is the case, however, then this creates space for opportunism that contracts are meant to prevent. In marriage, the costs to the

[41] Rothbard (1982/2002): 134.

[42] According to Brinig, the custom of the engagement ring did not arise in America before the Great Depression. She argues that the reason a diamond engagement ring became a common thing to exchange for the promise of marriage was due to states passing legislation to abolish the cause of action called the "breach of promise to marry." This action entitled a woman whose fiancé had broken their engagement to sue him for damages "including the actual expenses she had incurred in reliance on the marriage. She might also recover for her embarrassment, humiliation, and loss of other marriage opportunities" (Brinig (1990): 204). The expensive engagement ring arose to serve as a performance bond for the promise to marry when these promises were no longer enforced by courts.

[43] This analysis also applies for other various wedding traditions involving transfer of property titles. The title transferred may be a dowry instead of a ring, for example.

woman – of childbearing and rearing, foregone income – are borne up front. She bears these costs partly in exchange for the promise that the husband will provide for her and their children until death do them part. But since she necessarily holds up her end of the bargain before her husband holds up his, without a binding contract he can simply leave the arrangement as soon as he considers it in his interest to do so, without penalty. The TTT offers no enforceable contracts to prevent such opportunism.[44]

A further type of contract that could not be consummated under the TTT, though one proponents of the theory consider legitimate, is the blackmail contract. A blackmail contract involves the transfer of title to some property, typically money, in exchange for the *promise* not to divulge a secret.[45] From this description, it is clear why such an arrangement would be invalid under the TTT: while title is being transferred by one party, what they are receiving in exchange is a mere promise, which cannot be binding on the promisor. An analogous arrangement is considered by Rothbard[46] involving a famous actor who agrees to appear at a certain theater at a certain date but fails to do so. Rothbard states that even if the actor were paid in advance for his services, he is not bound to perform (or to pay damages); however, if he does not return the money, he is engaging in implicit theft. Whatever one wishes to call this type of arrangement, it cannot be called a binding contract. In its failure to be binding, it would defeat the entire point of a contract. Applying the same reasoning to blackmail, any time after the deal is struck the blackmailer can threaten to renege in order to extract more money from the blackmailed. "Legalizing blackmail"[47] under this theory of contract would do little to ensure that such agreements are enforced, and possibly even less considering that the blackmailer can renege on agreements without the threat of criminal penalty.

Such opportunism created by the non-bindingness of contracts under the TTT extends to other scenarios. Consider the case of *Alaska Packers Association v. Domenico* (1902). A fishing company promises to pay a certain amount of money in exchange for laborers' promise to travel to the coast of Alaska and work. However, after arriving, the laborers withhold their labor to obtain higher wages. Since replacing them with other workers would take too long considering the duration of the fishing season, the company promises the higher wages. The workers then perform the work, but the company pays the wages they originally promised. It is not clear that there was any breach of contract given the facts just described, as it is not clear that there was any contract even made according to the TTT. Since the fishermen gave only a mere promise to engage in labor to which they could not be bound, no binding contract was made in the original agreement with the fishing company. Likewise, since the second agreement involving higher wages was a mere promise, it is unclear that the company was bound to pay them. Even

[44] For an economic analysis of the bilateral monopoly and room for opportunism in marriage, see Friedman (2000): 174–175; Cohen (1987).

[45] There are imaginable scenarios in which a blackmail contract could be consummated under the title transfer theory of contract, such as where the title to money is transferred for the title to all possessed copies of incriminating photos or videos, but if what is to be exchanged is a mere promise not to divulge information, it is unclear how, under title transfer theory, the promisor is under contractual obligation.

[46] Rothbard (1982/2002): 137–138.

[47] On the claim that blackmail should be legalized under libertarian law, see Block (2013).

if we were to consider the second agreement binding on the part of the fishing company, it should immediately be apparent how such a legal theory of contract would allow greater room for opportunism, precisely what contracts are meant to prevent. Because the conditions of a long-term contractual relationship may not be mutually beneficial at every point in time in the course of the relationship is why binding contracts are necessary for such arrangements to be made, lest they depend solely on the honor of those making the agreement.

One is only bound by their imagination in thinking of scenarios in which, if contracts are not binding since they are based on mere promise, there is opportunism that would render such contracts ultimately useless. If a homeowner pays premiums to a fire brigade in exchange for the promise that they will arrive at his home with firefighters, fire trucks, and fire hoses when a fire alarm is triggered, but the only penalty for failure to put out the fire is refunding of premiums, there is an opportunity for the fire brigade to renegotiate the price upwards to the full value the owner places on the possessions he will lose if the fire is not extinguished. And this would be true of any promised service without which the purchasers would be put in a dire situation – even if they had the foresight to purchase the service in case of an emergency. One might argue that, in a free market, engaging in such opportunism would be a rare event, as companies would wish to avoid having a reputation for not fulfilling their contracts. While this may be the case,[48] it cannot be all there is to ensure that contracts are enforced, as then there would then be no point to having a legal system of contract enforcement. Such a legal system would just be redundant if all that was needed to ensure contractual compliance were competition and reputation.

Ultimately, we see a disconnect between the wide variety of exchanges that can be made in Rothbard's economic theory of the free market and his legal theory of contract. Indeed, if the TTT were followed, many of exchanges that occur in the free market would not be legally binding. As mentioned above, for any type of future-oriented contract, where there is an agreement to transfer property title in the future, the source of contractual obligation is unclear. Without such obligation and the ability of the legal system to enforce the contract, many types of exchanges may become impossible. We have mentioned agricultural futures contracts, which can be mutually beneficial for both the farmer and the speculator. A farmer can buy protection against low future prices for their output by locking in a price per bushel with a speculator months before harvest. However, the farmer may find that, at harvest time, the price per bushel is higher than what he agreed to sell it to the speculator for. In the short run at least, it would be in the farmer's financial interest to break his contract with the speculator and sell his bushels at the higher market price.[49] Without the ability to legally bind oneself to perform in the future, some mutually beneficial exchanges will not be made. This will especially be the

[48] While competition and reputation play a significant role in ensuring that contracts are fulfilled, the legal system plays a role as well. This is why countries with less robust contract enforcement have, for example, firms that rely more on kinship ties to reduce opportunism.

[49] Indeed, farmers not delivering on the agreement is what some fair-trade coffee co-ops have found when world coffee prices are higher than what co-ops agreed to pay coffee growers ahead of time. See Feenstra and Taylor (2014): 82.

case in more anonymized markets with standardized exchanges. The speculator who originally purchases a futures contract may not be the one who collects on it in the future, as it is a standardized derivative that can be sold. In such kinds of exchanges, reputation as a mechanism becomes more costly to use to ensure that contracts are upheld.

5. Conclusion

The TTT attempts to provide a justification for legally enforceable agreements that derives from property rights and implies that failure to abide by such agreements results in implicit theft of property. It is presented as an alternative to other contractual theories that rely on promise, consideration, or reliance. Despite the required element of implicit theft, the theory is unclear on what, in a contractual default, is being stolen.

We have shown that irrespectively of whether by the stolen object we understand the property transferred by the creditor, or the one transferred by the debtor, the TTT is unable to account for why a legally enforceable obligation is created. The theory fails to prove its point in the case of lost possession, for it is unable to account for a duty to keep possession, or in the case of kept possession, since omissions or states cannot violate negative rights. The fact that returning transferred property to the creditor is sufficient for discharging the debtor's duties belies the notion that an obligation was created. In trying to explain the existence of contractual duties by the concept of implicit theft, TTT puts the cart before the horse: it must assume a pre-existing duty to act in order for failure to act to be property rights violation, whereas the duty is what it sets out to explain.

As a result of these shortcomings, the TTT is unable to justify future-oriented contracts, as well as a number of contracts libertarians would consider to be valid. Without the ability to legally enforce such contracts, the free market would be considerably hampered. Therefore, libertarians ought to reject the TTT.

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