

Contract Theory  
research

To: "N. Stephan Kinsella", NSKinsella  
From: J C Lester, INTERNET:lester@lika.demon.co.uk  
Date: 5/16/98, 8:48 AM  
Re: Re: Contracts

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To: "N. Stephan Kinsella" <NSKinsella@compuserve.com>  
From: lester@lika.demon.co.uk (J C Lester)  
Subject: Re: Contracts  
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>I think there may be more on cause etc. in your piece.

I see I do use the word, but I don't see that much hangs on it.

I was only trying

>to point out that you might find the cause-in-fact/proximate cause  
>distinction useful in some of these analyses.

You are offering me a tool, but not showing me what problem it solves. I can't see one.

Also, re Barnett, I don't  
>have time to get it out now, and I was not I thinking bringing in his whole  
>contract theory (I don't agree with all of it anyway). I believe I was  
>just trying to point out that the traditional "detrimental reliance"  
>reasoning is circular. This is what people have traditionally used to  
>justify contract theory, i.e. the idea of "binding" promises.

I don't use detrimental reliance to explain contracts, only the imposition that can result from broken promises.

But as has  
>been pointed out (Barnett is one example of this), this reasoning is  
>circular. For to "reasonably rely" on something, one's reliance must be  
>"reasonable". Yet if there is a clear rule in society saying that mere  
>promises are not binding, is is "reasonable" to rely on one? No.

It is clearly reasonable to alter one's behaviour to take account of promises and even rely on them (as in the swimming-lesson example). Not to do so, would be to miss valuable opportunities. That promises are not binding does not alter this.

The  
>point is a judge faced with deciding the issue, whatever he says justifies  
>itself. For if he says that reliance does not justify making promises  
>enforceable, then the rule has been laid down and in the future any  
>reliance will not be reasonable anyway. But if he says yes, then people  
>will tend to expect that their reliance will be upheld by a court. So  
>whatever a court does bootstraps itself; so the point is that detrimental  
>reliance cannot itself justify making promises enforceable. Other  
>arguments are needed.

I never said that naked promises (nudem pactum) are enforceable, only that breaking them can impose (it can, for instance, be an intentional form of

fraud).

>  
>This ties in to cause-in-fact thing, because this just means that not every  
>"cause-in-fact" of a bad thing is responsible for it.

Morally responsible?

If I promise you  
>something and you act in reliance on it, my promise is a cause-in-fact,  
>sure, as is your acting on it. But the real question is what is  
>responsible or proximate cause? I'd say, in this case, that no cost is  
>"imposed" (which requires a sufficient causal role in the imposing) by the  
>promisor, because the promisee had a choice: to disregard the promise and  
>treat it as a lie or as a bad prediction; or to change his actions based on  
>the expectation (reliance) that the promisor is correct that he will do  
>such-and-such. But the promisee's choosing the latter, choosing to take  
>that risk--why does that mean that he has been "imposed" on?

So it does not impose to promise a swimming lesson with the intention and  
then reality of leaving someone in deep water to drown?

>  
>Promises are not enforceable but breaking them can impose costs  
>(intentionally letting someone drown after offering a swimming lesson is a  
>clear case). Only in the clearest and most extreme cases will it be  
>practical to enforce damages--but not because there was a transfer of  
>property title.<  
>  
>My theory of contract is different.

I have not mentioned a theory of contract in the passage prior to your response.

It is more like Rothbard's. First of  
>all, I think there is a tendency of libertarians (you seem to share this)  
>to believe there is some almost mystical ability to "bind" or "commit"  
>oneself by mouthing words. I do not. This is not as crazy as it sounds  
>either.

Far from it; it is a very interesting criticism.

Even in conventional law a mere promise was never enough to "bind"  
>yourself. Later, some said that if others detrimentally relied on it, that  
>could be a special case in which the promise is enforceable. Or if there  
>is mutuality and "consideration".

Neither are my theory.

>But a naked promise was never enough.

Agreed.

>For the simple reason that why should what I say give you a "right" to  
>rely on it, especially if you haven't purchased that right?

I can rely on it and be imposed on--but that did not make it a contract.

>  
>To my mind we have rights in ourselves, which means that others are not  
>entitled to physically coerce us. This may be called "self-ownership" if  
>you like. But this does not at all imply that we can "alienate" our  
>bodies. The basic analysis is coercion.

Coercion (the use or threat of force) is not inherently unlibertarian. It  
is a complete confusion to try to define libertarianism in terms of it.

A may slap or otherwise  
>physically impose on B only if B first did similar to A. That is the  
>ultimate libertarian insight. So the question of when A has a right to do

>something with respect to B correlates to the question, when is it  
>permissible or justifiable for A to use force against B? The answer is  
>when it is in retaliation to force used by B.

Force is an utter red herring that confuses many, even most, libertarians. Sure, many types of force can be illiberal (unlibertarian), especially the most illiberal acts can involve force. But libertarian liberty cannot be defined in terms of force.

Because when B uses force he  
>would then contradict himself were he to object to the validity of A's use  
>of force.

You mean there is something inconsistent here. You do not spell out what.

But if B merely promises to be A's slave, this does in no way  
>impose force on A. Thus if A tries to use force against B, this is  
>initiatory force, since B's promise did not initiate force.

It is NOT inherently unlibertarian to initiate force. If you embezzle money you use no force. It can be entirely libertarian to initiate force to rectify the embezzlement.

>  
>I think it is difficult for many libertarians to accept this, because they  
>have been confused about promising for a long time. They think there is a  
>power or ability to "bind" yourself, to "commit" yourself, to "undertake"  
>to do something, by mouthing some incantation. I do not, and do not see  
>libertarians even attempt to justify this. Rather they keep assuming it.

I am not a justificationist. There is nothing wrong with making assumptions. I can explain my position, however. My 'incantation' of 'please operate' means that the scalpel is not an attack when the surgeon enters my body. My 'incantation' of 'do not operate' means that it is, if he goes ahead. I don't see anything very mystical here.

>  
>You yourself say: "One's body looks perfectly alienable (in the property  
>sense) to me. Suppose  
>we both have a rare blood type and I contract to let you have some blood  
>for an operation \_and\_ (because it is so important to you) on pain of  
>enforcement. I can't see why it would be unlibertarian to force me to stick  
>to my contract as I agreed".

>  
>You say "I can't see why it would be unlibertarian to force me to stick  
>to my contract as I agreed". This assumes there is an ability to  
>"contract" such that one's right to object to force is no longer there.  
>Why? It is unlibertarian to "force" you to do anything in general, unless  
>you have yourself first initiated force in such a way as to make the force  
>against you retaliatory and thus justified (libertarian).

This is a complete misunderstanding of liberty because you mistakenly think force is central. It is a common error and only a serious attempt to define liberty is likely to cure you of it.

You have to find  
>a justification if you advocate any use of force. I do not believe  
>repeating the mantra "but you promised" does the trick. I think a  
>fundamental mistake is made over and over in libertarian circles about the  
>nature of contracts.

I never said a mere promise is a contract.

>  
>In my view we have these rights to our bodies, based on reciprocity of  
>force, as I mentioned above.

Theories (of rights or anything else) are not based on anything. They are conjectures which we can only test by criticism.

Now from this I think we can also show we  
>have rights to acquire unowned property.

Property is derivable from liberty (see the end of my article on  
libertarian liberty). But force is quite irrelevant and need not be  
mentioned at all in the derivation.

This property itself is  
>inherently different from whatever "property" we have in ourselves. First,  
>we can acquire it; and we can also abandon or destroy it. These  
>unchallenged aspects of property are sufficient to build up the power to  
>alienate property, by giving it away. It is only a small leap to say that  
>this alienation can be conditional, and future-based (as you yourself also  
>maintain). But the reason is that \*any\* exchange of property is in a sense  
>conditional and future-based, simply because any exchange is not \*really\*  
>"simultaneous". I hand you a dollar; you then hand me the apple. If you  
>see the dollar is counterfeit whilst grasping it, you'll hold onto the  
>apple (conditional; future).  
>  
>So a contract, properly understood, is essentially a mutual, conditional,  
>future exchange of titles to external corporeal property. Has nothing to  
>do with promising.

Not my theory.

>  
>In some special situations, I agree, a "promise" is enforceable, in the  
>sense that lack of performing a promised action can give rise to a right of  
>others to use force against you. The law has recognized this too. E.g. if  
>I see a drowning swimmer, I have no duty to rescue. But if I jump in the  
>water and swim toward him as if to rescue him, in some cases I have no  
>right to abandon the attempt, because that jumping in causes other  
>potential rescuers not to jump in.

Detrimental reliance?

So it actually causes physical harm to  
>befall the victim. Or if I promise to be an airplane pilot, and try to  
>parachute out half-way through the trip, this would cause the passengers'  
>deaths, so they have a right to use force to stop him (or to punish him  
>after). But notice in this case there is \*real\* reliance not the fake,  
>bootstrapping kind.

>  
This seems more a question of degree or severity rather than reality.

>>>  
>I don't think we disagree here. In working things out on the basis of my  
>theory of liberty, I was merely not going into much detail.<

>  
>I didn't mean to be picky, and I don't think you need a lot of detail. I  
>just wanted to caution you that you might be using "record" in ambiguous  
>ways. If you mean simply a writing, fine; but realize that recordation  
>means recording a writing in a publicly-accessible record like the county  
>courthouse real property records.

I'm not sure how it might work out in different cases, but the contingent  
real version of recording cannot limit the philosophical possibilities.

>  
>  
>It seems to me that you might be liable to part with what you fraudulently  
>contract for--cash is an obvious example--even though you never had it (it  
>depends on the circumstances).<

>I am not clear on exactly what you mean. Lots of permutations can be  
>imagined.

I am intentionality not going into detail.

Let's say that there is no fraud and A promises B to give him  
>\$100 in a year (t1), in exchange for B giving A his TV set now (t0). If at  
>t1 A has no money, he has no retroactively "stolen" the TV. He might have  
>to give the TV back, or he might have a continuing obligation to re-pay B  
>the \$100 plus interest in the future as he acquire property; and certainly  
>such subsidiary contingent property-exchanges would be built into  
>commercial relationships. Otherwise A could walk away scot-free at t1 if  
>he happens to be broke.

>  
>Now if A has the \$100 the day before t1 (t1-1) and goes and spends it so he  
>won't have to pay, this itself is a type of theft. But if he just loses  
>his money in the stock market and his job over the year and thus is broke,  
>there is no theft.

>  
>On the other hand, if A has a fraudulent motive in mind at t0, and knows he  
>won't have the money or intends to run away with hte TV, then he is a thief  
>of the TV. Why? Because the title to the TV was conditional upon many  
>thing, one of which is lack of a fraudulent motive or intention on the  
>recipient's side. This can be understood as being an implicit condition or  
>it can be made express. But as B hands A the TV and A runs off with it, he  
>is stealing it because he does not have a right to use the TV. Because the  
>right to use it and receive it was conditional upon A's sincerity etc.,  
>which happens not to have been present.

These sounds more or less right. I can think of a few more details but I  
don't see where we are supposed to disagree, or what problem is being  
tackled.

>  
>Well, enough for now, back to drafting patent applications.

In my book, I apply my theory of liberty to copyrights and patents as  
well--in the usual broad-brush way (just because I have so much ground to  
cover). I take the liberty of appending that brief section.

Jan

#### e. Intellectual Property

Intellectual property is an important general issue for the theory of  
liberty. There has been no mention of it in our island example, but that is  
not because this topic is a matter of social convention. The observance of  
this conception of liberty has fairly clear implications as regards  
intellectual property, without reference to the laws or customs of any  
particular society. This is a vast and complicated area that poses novel  
problems. All that will be attempted here is to show very briefly and  
approximately how our libertarian formula applies.

Copyrights and patents appear to be similar in that they allow  
private ownership in the expression of ideas. There is some disagreement in  
the libertarian literature about whether, and why, one must protect  
neither, one, or both of copyrights and patents. But to attempt to take  
account of that literature directly could expand this  
imposed-cost-minimizing sketch into something of book-length proportions. I  
continue, therefore, to relate this account only at a few points to those  
of Nozick's and Rothbard's. I should acknowledge immediately that Nozick  
outlines a similar account of patents but, as usual, based on rights  
instead of liberty and not explicitly linked with welfare (1974, 182). I  
argue very generally here that copyrights and patents have to be protected  
from both libertarian and welfarist viewpoints. We first tackle copyright  
and the arguments for intellectual property.

The people who create the ideas embodied in a book, music score,  
and so forth, produce a resource that would not otherwise exist. They  
impose no cost on others by their creations. Those who use these  
intellectual products without permission (perhaps asserting that 'ideas  
cannot be owned') are imposing a cost as surely as they would be if they  
were to take physical products without permission (perhaps asserting that

'natural resources cannot be owned'). If liberty is to be observed, the creators must be regarded as having automatic ownership of the use of that resource. Neither do the creators impose a cost on others by passing their ownership on to their descendants, or anyone else. If someone builds a fine house (using libertarianly acquired resources) and that passes down to his descendants, then it would be an imposed cost to force them to hand it over to anyone else no matter much time has passed. A copyright protects an intellectual edifice that seems to be in an analogous position.

It is a useful thing from a welfarist viewpoint that such creations can be owned, for otherwise we should have a case of the tragedy of the commons in the realm of the creation of ideas. If people had no control over the physical expressions of the intellectual products that they took some time and energy to come by, create, or cultivate (without imposing costs on others), then the incentive to produce new intellectual products would be destroyed to a considerable extent. Of course, many people do choose to give their ideas freely: perhaps because they enjoy discussing ideas, or they are altruistic, or they value status or popularity more than cash, or they need the general idea to catch on before it has any commercial value. But if people had no chance to sell the fruits of their efforts in the intellectual realm, then many efforts would surely not be made.

In the interests of overall welfare, could there be a limit on copyright? It might seem that some dynastic drones could indefinitely live off the intellectual output of some ancestor without any such limit. But the fact that his work could make for some security for his descendants, might well be part of the motivation of the original copyrighter. More important perhaps, if works are compulsorily allocated to the public domain then the incentive to keep alive or revive some copyrighted piece might well be destroyed (thus, apparently, has much great music been neglected for centuries, or lost forever). If others might step in as soon as one had paid for the revival of a thing, it might be uneconomic to initiate the revival in the first place. As long as there is some owner it would be possible to buy it from him in order to exploit it. If there is no traceable owner, and no act of donation to the public domain,<sup>1</sup> then the property might libertarianly be held to be owned by whoever first invests in it by using it in any way (as it would be imposing a cost on him for others to reap the rewards of his investment<sup>2</sup>).

Similar libertarian and welfare arguments support the existence of patents. Patents present extra problems (and this is why they merit a separate category), but these are soluble in a non-arbitrary fashion that is compatible with liberty and welfare.

Nobody re-invents so much as a poem or a song, let alone an entire book or symphony. The main problem with technical innovations and full inventions is that, unlike almost all copyrightable material, if one person had not come up with them then others might have done so sooner or later. Does the first person have the libertarian property claim to the patent in perpetuity as with copyright? In almost all cases, no. If someone arrives at an idea that would probably<sup>3</sup> have been arrived at by another person in, for instance, about a year (the probability and time being determined in each case by professional experts), then he can have a full libertarian patent for only about a year (the kind or amount of investment involved is irrelevant to any claim). This is based on the idea that we are to follow the general libertarian, and welfarist, rule of internalizing externalities (of benefits as well as costs) as far as possible. To allow the individual to keep a longer patent would clearly be to allow him to exploit the discovery for longer than he is causally responsible for. His monopoly would then impose costs on others: on those who would have come up with the same idea<sup>4</sup> and possibly on consumers who are denied the lower prices that competition would have brought.<sup>5</sup> At the end of a full patent the idea can gradually enter the public domain, in proportion to the likely speed of independent invention and competition by others.<sup>6</sup>

There are bound to be hard cases when it comes to deciding the length of time that a full patent needs to run, and its period of decline, but approximations are far better than nothing; they are also better than some fixed period. Fixed periods are bound to give some, potential, inventions illiberally short patents and others illiberally long ones: the

time will not be enough to encourage some welfare-enhancing research and development; as long as the fixed period for a relatively unimaginative item, or for one likely to be soon independently invented, keeps the price up for no libertarian or welfare reason. Patent decisions need not be final: any judgement could be challenged in the private arbitration agencies or courts at any future time if new evidence comes to light.

Intellectual property is a sophisticated notion, but then so perhaps was physical property at one time in man's history. We see that the libertarian arguments for intellectual property are very similar to those for physical property. There is a tremendous increase in liberty and welfare when private physical property is understood and allowed. There is an analogous increase in liberty and welfare thanks to private intellectual property.

It is interesting that Rothbard does not accept patents at all, nor copyright except as understood contractually (1962, 652-60; 1977b, 71-75; and 1982, 123-4). It is not clear how his 'copyright contracts' alone can do the job of stopping non-purchasers from copying. He argues that there is "implicit theft" when one reproduces and sells a thing "in violation of his or someone else's [copyright] contract with the individual seller" (1962, 653; emphasis added). I cannot see how another's copyright contract on its own can bind me. By analogy, if someone rents your car and I steal it, then that is illiberal not because I am in violation of another's car-rental contract but because I have stolen what another person has (non-impositional) ownership of. Similarly, if I use an idea that another has the (non-impositional) ownership of expressing, then I impose on him. So I suggest that the view of liberty defended in this chapter is being tacitly appealed to in Rothbard's arguments. His knowledge of the history of the state-abuse of patents, plus his lack of a property-independent theory of liberty, has caused Rothbard to err here.

1. It could even be that acts of donation to the public domain are a nuisance and found to be invalid on libertarian grounds (or at least open to the first person to acquire by use). One cannot donate one's land to the public domain in perpetuity without thereby creating a tragedy of the commons, and the same might be true of some intellectual property.

2. However, if others would likely have re-discovered it in time, then we have a patent-like situation and patent rules might then apply.

3. I assume that, with modern world communications, genuinely independent later invention becomes less and less likely.

4. If such agents are plausibly identifiable, then they ought to receive a share of the patent at that time judged to be when they would have come up with the idea.

5. Though perhaps the consumers merely lose benefits they did not own rather than have a cost imposed on them.

6. Eventually entering the public domain does not seem to create the same tragedy of the commons as with copyright (see note 36). Perhaps this is because of the wider usefulness of general inventions, often followed by eventual complete obsolescence due to further inventions.

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Date: 5/16/98, 11:53 AM  
Re: Re: Contracts

Jan, thanks for your thoughtful response. I think I need to read your whole book. We won't square the circle otherwise. You keep using the "imposing" idea as if it is central, and maybe it is but I need to be convinced. Also you say force is not central to libertarianism, yet I think it exactly is. So again I need to see your arguments. I have not yet read all the papers you emailed me and I think some of it is in there, and I will read them.

Also, can you let me know what you mean when you say you are not a justificationist? But make assumptions? I don't know what you mean here.

I will try to reply to some of your points here, though. Many of my points are not meant to criticize but to express or clarify my position, so we can see if we disagree or not. I take it we do not in several ways like in the idea of fraud in contracting. I don't have your contract piece here at home so can't respond to some of your remarks now.

Message text written by J C Lester

>>I think there may be more on cause etc. in your piece.

I see I do use the word, but I don't see that much hangs on it.

>I was only trying

>to point out that you might find the cause-in-fact/proximate cause

>distinction useful in some of these analyses.

You are offering me a tool, but not showing me what problem it solves. I can't see one.<

I can't go into much detail now but I thought the idea of "cause-in-fact" is roughly what you are doing in your "imposing" theory. I.e. imposing a cost is the same as causing it to happen; yet if you are only the "cause-in-fact" maybe you are not responsible. Anyway, I need to understand your imposing theory before getting any more deeply into this.

Also, re Barnett, I don't

>have time to get it out now, and I was not I thinking bringing in his whole

>contract theory (I don't agree with all of it anyway). I believe I was

>just trying to point out that the traditional "detrimental reliance"

>reasoning is circular. This is what people have traditionally used to

>justify contract theory, i.e. the idea of "binding" promises.

I don't use detrimental reliance to explain contracts, only the imposition that can result from broken promises.<

Maybe I misunderstand, but that seems to me the same thing. If you are saying that A makes a promise, and B relies thereupon, and A's subsequent breaking of the promise amounts to an imposition on B, which then justifies any sort of retaliation against/punishment of A, then this does indeed seem to be justifying contracts by detrimental reliance. This is in fact exactly the detrimental reliance theory of contracts, or at least so it seems to me.

But as has

>been pointed out (Barnett is one example of this), this reasoning is

>circular. For to "reasonably rely" on something, one's reliance must be

>"reasonable". Yet if there is a clear rule in society saying that mere

>promises are not binding, is it "reasonable" to rely on one? No.

It is clearly reasonable to alter one's behaviour to take account of promises and even rely on them (as in the swimming-lesson example). Not to do so, would be to miss valuable opportunities. That promises are not binding does not alter this.<

but if you say that breaking the promise imposes a cost which is then a type of rights violation (or similar thereto) then you are saying promises can be binding.

>I never said that naked promises (nudum pactum) are enforceable, only that breaking them can impose (it can, for instance, be an intentional form of fraud).<

>So it does not impose to promise a swimming lesson with the intention and then reality of leaving someone in deep water to drown?<

This is more difficult I admit. I think it takes a lot to deal with this situation appropriately, a lot to carefully distinguish this from the typical promise. Ultimately I think in that case you are causing them to drown if you don't jump out there. For once they are in the water they are now actually relying, not trying to do the circular bootstrap type. Before the guy jumps in the water, he has not yet "relied" on the promise in the same sense as after he's in the water, because if the promisee backs out the promisor can choose not to jump in the water and endanger himself. The only harm to the promisee at that point is monetary. But monetary damages can be handled by way of a contract exchanging property. If the promisee didn't bargain for this why should he get it? This is very compressed I know but I think this is the way to distinguish actual reliance that would cause physical harm from the sham-reliance that relates only to monetary damage.

>I have not mentioned a theory of contract in the passage prior to your response.<

Seems to me that there is one implied by your theory if you think that detrimental reliance can justify the enforceability of some promises. This is a type of contract theory, namely a variant of the detrimental reliance theory, is it not?

Coercion (the use or threat of force) is not inherently unlibertarian. It is a complete confusion to try to define libertarianism in terms of it.

>Force is an utter red herring that confuses many, even most, libertarians. Sure, many types of force can be illiberal (unlibertarian), especially the most illiberal acts can involve force. But libertarian liberty cannot be defined in terms of force.<

Hmm. My whole paradigm rests thereupon. I'll need convincing here, so need to read your articles/book.

Because when B uses force he  
>would then contradict himself were he to object to the validity of A's use  
>of force.

You mean there is something inconsistent here. You do not spell out what.<

I spelled this out in some of my articles in detail. To be blunt and crude: If B objects to being punished for a previous act of aggression he must claim A's punishment/force against B would be wrong. But B clearly does not maintain that force is wrong since he used it against A. So he contradicts himself if he claims it to be wrong yet claims it to be okay. He must either particularize with sufficient non-arbitrary reasons (as the rules of discourse--which B has entered--require). But he cannot.

>It is NOT inherently unlibertarian to initiate force. If you embezzle money you use no force. It can be entirely libertarian to initiate force to rectify the embezzlement.<

Hmm. I guess I consider invasion of the borders of and/or exercise of control over another's body to be forceful. The same with the owner's property. If I steal your money I have used force to acquire possession thereof.

>I am not a justificationist. There is nothing wrong with making assumptions. I can explain my position, however.<

Can you explain what you mean here?

> My 'incantation' of  
'please operate' means that the scalpel is not an attack when the surgeon

enters my body. My 'incantation' of 'do not operate' means that it is, if he goes ahead. I don't see anything very mystical here.<

Me neither, for this is just a way that consent is manifested. That is why the surgeon's cutting you is not aggressive/initiatory, since it was done with consent. What is an incantation is to believe that saying \*now\* that you will consent \*later\* prevents you from \*not\* consenting later.

Epstein makes a good point, when he says that one clearly has the ability (and right) to do something to one's own body; so why not allow a proxy to do it for you. That is why consent justifies force. However, Jan-at-time-A can commit suicide or not at time A; but simply cannot make Jan-at-later-time-B do so. Jan-at-B will make that decision. So keeping the analogy up, if you cannot bind yourself now at time A to do something to yourself at time B, why could you delegate this to another?

>This is a complete misunderstanding of liberty because you mistakenly think force is central. It is a common error and only a serious attempt to define liberty is likely to cure you of it.<

Well, that's a harsh and serious charge. I'll need convincing.

>Theories (of rights or anything else) are not based on anything. They are conjectures which we can only test by criticism.<

I am not clear what you mean here.

>I don't think we disagree here. In working things out on the basis of my >theory of liberty, I was merely not going into much detail.<

>

>I didn't mean to be picky, and I don't think you need a lot of detail. I >just wanted to caution you that you might be using "record" in ambiguous >ways. If you mean simply a writing, fine; but realize that recordation >means recording a writing in a publicly-accessible record like the county >courthouse real property records.

I'm not sure how it might work out in different cases, but the contingent real version of recording cannot limit the philosophical possibilities.<

Jan, I'm not clear why we seem to be miscommunicating here. I will try once more to be explicit. I am not saying you have not gone into enough detail. I am saying that from my reading you are using "record" incorrectly, or possibly inconsistently. I am simply saying that to record something means to file it in some accessible location. As distinguished from the writing formality itself. Contracts can be oral or in writing; some have to be in writing to be valid. Some of the written contracts have to further be recorded to have effects on third parties. I may be wrong but that is all I am saying. I am not trying to criticize your lack of detail or even your insinuations about what will require a writing and/or recording or not. I too am not interested in those details very much. You seem to think I am arguing over what should be recorded or written or not. I'm not, I'm saying you appear to be mis-using legal terminology which may confuse people or appear odd.

>

>It seems to me that you might be liable to part with what you fraudulently >contract for--cash is an obvious example--even though you never had it (it >depends on the circumstances).<

>I am not clear on exactly what you mean. Lots of permutations can be >imagined.

I am intentionality not going into detail.<

That's fine, but I still don't see what general principle you are basing this on so am not sure if I agree with you are not, which is why I spelled out an example (below).

Let's say that there is no fraud and A promises B to give him >\$100 in a year (t1), in exchange for B giving A his TV set now (t0). If at

>t1 A has no money, he has no retroactively "stolen" the TV. He might have  
>to give the TV back, or he might have a continuing obligation to re-pay B  
>the \$100 plus interest in the future as he acquire property; and certainly  
>such subsidiary contingent property-exchanges would be built into  
>commercial relationships. Otherwise A could walk away scot-free at t1 if  
>he happens to be broke.  
>  
>Now if A has the \$100 the day before t1 (t1-1) and goes and spends it so he  
>won't have to pay, this itself is a type of theft. But if he just loses  
>his money in the stock market and his job over the year and thus is broke,  
>there is no theft.  
>  
>On the other hand, if A has a fraudulent motive in mind at t0, and knows he  
>won't have the money or intends to run away with the TV, then he is a thief  
>of the TV. Why? Because the title to the TV was conditional upon many  
>thing, one of which is lack of a fraudulent motive or intention on the  
>recipient's side. This can be understood as being an implicit condition or  
>it can be made express. But as B hands A the TV and A runs off with it, he  
>is stealing it because he does not have a right to use the TV. Because the  
>right to use it and receive it was conditional upon A's sincerity etc.,  
>which happens not to have been present.

These sounds more or less right. I can think of a few more details but I  
don't see where we are supposed to disagree, or what problem is being  
tackled.<

None, just clarifying what I take to be the essence of contracting and fraud.

>In my book, I apply my theory of liberty to copyrights and patents as  
well--in the usual broad-brush way (just because I have so much ground to  
cover). I take the liberty of appending that brief section.<

I'll take a look.

Best, Stephan

To: J C Lester, INTERNET:lester@lika.demon.co.uk  
From: N. Stephan Kinsella, NSKinsella  
Date: 5/17/98, 8:17 PM  
Re: Re: Contracts

Message text written by J C Lester

>>Also, can you let me know what you mean when you say you are not a  
>justificationist? But make assumptions? I don't know what you mean here.

I follow Karl Popper's critical rationalist epistemology. Knowledge is gained by conjecture and refutation (or guess and test). We cannot find theories or make them more probable by evidence. A brief quotation from the introduction to Liberty, Utility, and Anarchy:<

Thanks, I'll study that further. But I am aware of Popper's general falsificationist theory. I do not agree with it so far as I follow it, instead Misesian dualism seems more appropriate. Have you seen the great article by Hoppe, "In Defense of Extreme Rationalism", a review-essay critique of a book by McCloskey? The dualism of Mises, Rothbard, Hoppe, et al., which criticizes the scientism/positivism of Popper et al., seems to me to be decisive.

>"Not imposing a cost" is supposed to be a formula that clarifies what libertarians are against. Whether such an imposition would sometimes be a "cause-in-fact" I'm not completely sure--but they certainly seems different at first sight to me.<

What I am saying is that if you impose a cost, this means you are "causing" the cost to be imposed, in general terms. This is where the distinction between cause-in-fact and proximate cause might be useful.

>No, it is a detrimental reliance theory of how breaking promises can impose costs (the aborted swimming lesson being very clear). There does not need to be any detrimental reliance in a contract, which is a clear gift or exchange of property title.<

Talking about this with you has helped me to clarify my own position on this, which is useful since I am trying to develop my own theory of contract. I think perhaps you are right that we have to distinguish between contracts (pure exchanges of property titles, which need no reliance or consideration etc.) and a right to compensation brought about by detrimental reliance. As for the former I think I disagree with you on the alienability of our bodies; I think contracts apply only to alienable, external property. As for the latter, I think I would be more wary of applying it where the reliance is circular. But I think we both agree they are separate sources for rights or obligations or whatever. They are distinct. This helps to see there has been confusion in contract law where people have muddled these together and, e.g., used detrimental reliance as a justification for contract law itself.

>Again, this seems a difference in severity rather than kind. I actually rely on my friend's meeting me as arranged and am inconvenienced by him if he forgets.<

To rely means to change your position or act based on the belief that another will do something. To the extent that your acting and the breaking of the promise causes you anything less than physical harm (this is perhaps too crude), it could be contracted for with money damages. So if that is not done, why give the careless party who didn't contract for payment a windfall? Yet let us say that you promise to fly me in an airplane and then you try to bail out. No amount of money will do me any good if I die.

>I see your distinction now. But I don't accept that 'actual reliance' concerns dangers of physical harm. This is something like your 'anti-force' view of liberty in another guise.<

You may be partly right. But if the force paradigm is accurate your critique here is not very significant.

>I spelled this out in some of my articles in detail. To be blunt and  
>crude: If B objects to being punished for a previous act of aggression he  
>must claim A's punishment/force against B would be wrong. But B clearly  
>does not maintain that force is wrong since he used it against A. So he

>contradicts himself if he claims it to be wrong yet claims it to be okay.  
>He must either particularize with sufficient non-arbitrary reasons (as the  
>rules of discourse--which B has entered--require). But he cannot.

C can initiate force to rectify an illiberal (but forceless) act; and D can react with force to prevent the rectification. There is not inconsistency in C's position when he objects to D's force. Unlibertarian acts are what is objected to--not force as such.<

In my own theory I would say that if C initiates force here, C's objection is \*prima facie\* (another useful legal concept) inconsistent \*unless\* he can show that he was entitled to do so. The burden of proof and argument is on him though. If your own theory makes sense then that would do the trick, but this remains to be seen (from my view).

>>It is NOT inherently unlibertarian to initiate force. If you embezzle  
>money  
>you use no force. It can be entirely libertarian to initiate force to  
>rectify the embezzlement.<

>  
>Hmm. I guess I consider invasion of the borders of and/or exercise of  
>control over another's body to be forceful. The same with the owner's  
>property. If I steal your money I have used force to acquire possession  
>thereof.

Then you have a tendentious and circular definition of 'force'. You do not have a clear theory of liberty from which libertarian property can be derived. If someone leans in a window and steals a radio he has not used force on anyone. You are apparently using 'force' to mean 'the violation of any rights that I think ought to exist'. This is a, probably unwitting, retreat to a charmed circle of tendentious definitions. Yet you are the one who usually objects to meaningless incantations, etc.<

Perhaps more refinement is indeed called for. But the basic paradigm seems sound to me: you have control and possession of your body and certain tangible pieces of property external thereto. Others can voluntarily choose to take actions which cause the borders of those pieces of property and/or my body to be invaded, thereby interfering with my ability to exercise control over the property/body. This seems to me pretty objective.

>> My 'incantation' of  
>'please operate' means that the scalpel is not an attack when the surgeon  
>enters my body. My 'incantation' of 'do not operate' means that it is, if  
>he goes ahead. I don't see anything very mystical here.<  
>  
>Me neither, for this is just a way that consent is manifested. That is why  
>the surgeon's cutting you is not aggressive/initiatory, since it was done  
>with consent.

Note that it is an act of force, however, it just happens to be consented to. Or, if no great force is used here, consider the dentist pulling out an obstinate (but decayed) tooth.<

No, it is not initiatory force. I suppose this is because if A consents to it then he is initiating it or at least participating in the cause of this force, and thus has no grounds to complain about it.

>> What is an incantation is to believe that saying \*now\* that  
>you will consent \*later\* prevents you from \*not\* consenting later.

Contracting now (not merely promising, but exchanging property titles) does prevent you from withdrawing the exchange later (whether you consent then or not)--even if you contracted to be thrown to the lions. You contracted away your title to your body.<

So you say. This is what I have not been convinced of--that we have the ability and right to contract our bodies away.

I think if we consider only our bodily rights and forget the existence of any type of property external to our bodies, we'd only speak of a right not to be hit or killed or raped etc. If we adhere to the rule that A may not hit B unless B consents or has first violated the rights of A (thereby justifying punishment for the rights-violation), then we would ask, if B \*contracts with\* (i.e., says words to) A, how does this justify A hitting B later? At the time A goes to hit B, does B consent? No. What is the relevant consent, his earlier consent or his consent at the time of the hitting? The latter, I'd say. Unless you can say that the earlier trumps the former--which requires an argument. Or did the promise by B or its being broken somehow violate A's rights? Only if a promise can alienate rights--which again, requires argument, since prima facie a promise is only spoken words.

>>This is a complete misunderstanding of liberty because you mistakenly  
>think  
>force is central. It is a common error and only a serious attempt to define  
>liberty is likely to cure you of it.<  
>  
>Well, that's a harsh and serious charge. I'll need convincing.

Not much in the realms of philosophical debate is actually harsh or serious. But if you try to come up with a plausible definition of libertarian liberty (one that withstands criticism) you will soon see that force can't be made to do the job.<

I don't mean to sound offended (I'm not). Only that your assertion is very significant to libertarian theory, if true, since it turns much of it on its head.

Without even getting to your theory in detail yet, I admit I am very skeptical that you can be right, for at least three reasons. (1) Because of your adherence to positivism (which prevents you from making ethical statements yet you do).

(2) Your rejection of the centrality of force. All libertarian questions, it seems to me, ask, when is it okay to use force against others? Do you disagree with this? E.g., every law is ultimately backed by force. That is why we ask whether given laws are valid or not--because we are concerned that the force called for thereby may not be justified or proper or moral. So if the ultimate question is when is it okay to use force, how much of a mistake can it be to focus on force when answering this question?

(3) Your focus on costs (although admittedly I have not seen your definition yet so this objection is only tentative), since I have seen many (apparently) similar notions demolished already, e.g. the notion of "harm" by Patrick Burke, etc. E.g. if I cut down my rose bushes I impose a "cost" on my neighbor because of his subjective evaluation thereof. But a sound theory of rights focuses on objective borders of property and thus does not equate actions that lower others subjective utility or value to rights-violations. I suspect your "cost" notion is at least a close cousin of this, though I'll reserve judgment till I have time to study it.

I am not using legal terminology at all. It is a coincidence that there is a technical legal term with the same name. There is also a technical sense of 'long run' in economics ('the period within which all factors are variable'), ditto many otherwise ordinary expressions. I don't see the need to drop the ordinary usage (though I might mention that in case legal eagles think I am misusing the legal term).<

I'll not belabor this again, but let me just say that to use "record" to mean file a written document in some courthouse is not some arcane usage, but used by lots of non-lawyers and probably well-known to most businessmen too as well as lots of savvy laymen. So my last suggestion is simply that you should not use the word "record" to mean "fix in writing" but only to refer to the act of placing a written document in some publicly-accessible location. This is a lot of electron-ink to spill over what was simply a semantic suggestion to you.

Well, gotta run, the wife is asking for attention.

Stephan

CC: LibProfs list, INTERNET:libprofs@lumina.ucsd.edu  
Date: 4/2/98, 4:51 PM  
Re: Re: "Binding" and contracts

Message text written by Jan Narveson

>  
>Well, one of the fundamental precepts of libertarianism is that the use of  
>force is impermissible except in response to an initiation of force. I  
>really don't see how one can be a libertarian without accepting at least  
>some version of this.

"Some version of" is the problem. It is simplistic to think that the only kind of invasions of oneself there can be are in the mode of physical aggressions. You come near me and shout in my ear all day long, I tell you to stop, and you don't: you are an aggressor, and I may defend myself from you, by physical means if necessary. If I have to tie you up to keep you from doing this, I may. Your doing that is using me without my permission, which is exactly what self-ownership, hence libertarianism, forbids.<

First of all ownership of land itself can help resolve this issue: what do the rules promulgated by the property owner say about whether such shouting is permissible?

Second, this seems to me only to illustrate a borderline case. Yelling in an ear actually does cause serious physical harm to occur, plus it amounts to a threat. It is not a severe a case of physical harm as hitting someone, but it can still be classified as force. We can always point to things that are clear examples of force and others that clearly are not; and then we can find borderline or gray areas in between. That's life.

>  
>Here is my point. Clearly, consent justifies forceful action against  
>others, like in the boxing example. The question is, does \*prior\* consent  
>prevent you from revoking the consent later?

Not just like that. But it certainly prevents you from unilateral revoking on your own terms, indeed.<

That is the question. Why?

>  
> Some of you on this  
>discussion keep arguing against this simply by repeating that you can  
>"promise" not to object in the future, or you can "agree" \*now\* to being  
>coerced later. But this does not justify this ability.

I'm not clear what you mean by 'this'. If you mean, simply repeating it doesn't, of course it doesn't.<

What I am saying is that I have not yet seen any reason provided for the proposition that saying "I will do such-and-such in the future" means that others are entitled to use force against me if I do not. This is the hidden assumption in all of the statements about promising being binding.

>But if you mean that agreeing to it doesn't,  
I don't see how you can maintain that, if you also think that libertarians may DO what they want. Doing what you want includes making binding arrangements that extent into the future: that's part of our domain of possible activity. To do those, we must bind ourselves - that's the idea of such things.<

"Doing what you want includes making binding arrangements that extent into the future"? Oh, you mean, if I tell you I will do something, then if I don't you have had your rights violated? Why?

>  
>In contract law, if I "promise" to do something by a well-formed contract  
>(which has certain formalities like consideration, mutuality, etc.), courts  
>generally \*will not force\* me to perform, if I refuse to do so or if I  
>announce my intention not to. Nor will they inflict punishment on me if I  
>am sued for breach. All they will do is award a sum of money to the other  
>party--either reasonable damages or some contractually pre-specified amount  
>of "liquidated damages." If you look at it, what this means is that you  
>simply cannot "obligate" yourself to perform; all you can really do is  
>obligate yourself to pay damages based on a condition.

And what about collection? If you refuse to pay, then what? Do I get to extract payment by threats of force? I take it I do. It is certainly often done, and so far as I know, done with the help of the forces of the law.<

If I am holding onto your property and refuse to turn it over, force may be used to retrieve it. But this is similar to saying that one may use force against an aggressor in self-defense. The aggression itself justifies retaliation, and the holding-onto-your-property also does, as it is a form of trespass. The fact that this latter situation might arise \*because\* I previously transferred title to property does not imply that I can also use words to alienate my rights to defend myself. That is a different thing.

That is why I said that what I am getting at is not trivial, since it does have implications for libertarian theory, in particular for the idea of slavery or debtors' prison. If I borrow \$100 from you and agree to repay it in a year with 6% interest, what this means is that you have given me title to \$100 of your money now, and I have transferred to you \$106 of my money-that-I-own-in-one-year. If I am broke at the due date, there is no money to give you. I am not currently refusing to turn over your property; rather, this is more akin to the situation of making an impossible contract. Of course any reasonable bargainers would include extra conditional transfers to cover this eventuality: namely, "and if you do not have \$106 at the due date, so much of any future money you come to own transfers to me at such and such a rate of interest". This can justify garnishing wages etc. But none of this would justify debtor's prison. So, \*no\*, you can't use force against a deadbeat if he is just broke; only if he is refusing to turn over your property.

>Now, the basic question of libertarianism is, when is force permissible?  
>We say it is permissible, in general, in defense of or retaliation against  
>aggression, that is initiatory force. This has a certain symmetry about  
>it of course.

>  
I initiate force against you if I make an arrangement with you wherein you do x (which you have done) and I do y (which I have not). I have now helped myself to a bit of you: I have told you that I will do so and so, that you can rely on it, and you do. You have been taken for a ride if I don't, and that can be, and often is, every bit as damaging to you as a kick in the shins or worse.<

Your analysis here assumes that promising \*does\* transfer rights. Otherwise this collapses. The question is, why does "telling" someone something in such a case entitle them to "rely" on it? This is circular reasoning again, because "reasonable reliance" is only reasonable if one is in fact entitled to rely on it; so you can't rest the entitling on reliance. In my view this traditional justification of contract law is well known to be wrong; see Barnett's theory of contracts.

>  
>Now, for a promise to perform a certain task to be truly "binding" in the  
>sense you think it is--that is for it to mean more than that I have  
>alienated property (money--damages) conditional upon my not-performing--it  
>means that if A promises to do something for B, B is \*entitled\* to use  
>force against A to compel A to perform, or to punish him if he does not.  
>Well, let's look at it. B is in general entitled to use force against A  
>only if A aggressed against B. Mere mouthing of words did not amount to  
>aggression.

Promising is not "mere mouthing of words". Which words you mouth obviously matters. If it's mere mouthing, it's not promising - and it's a misuse of the language by means of which we communicate with each other.<

I understand what we \*mean\* by promising. I agree with you that it means what you say it does, or at least the speakers want it to mean that. I agree that it would be useful to be able to bind ourselves. I just don't agree that anyone here has even hinted at a reason why we \*can\*.

>  
> But this is what is under question!  
> You cannot keep saying that "But that's what A wanted" or "that's what A >said." It is no response to say that B relied on the promise; because >detrimental reliance by the promisee has long been shown to be a sham >argument for basis of contract law, as it is circular.

Sorry, my friend. At the beginning of our exchange, suppose, we try to make it as clear as humanly possible that when you promise me that you will do x, what that means is that I can RELY on you to do it, and that you have AUTHORIZED me to take various actions, including ones that put me to considerable loss or risk if you don't perform. "Mere words!", you say! Well, all of your proclamations of natural rights are also "mere words" if those are.<

"Can" rely? Sure, you can do whatever you want. But if you rely on what I said, why does it give you a \*right\* to rely on it? Why isn't it caveat emptor? Because I "want" you to rely on it? So what?

>  
>I do not even deny the usefulness of being \*able\* to bind myself in this >fashion.

Glad to hear that. But you go on to deny the possibility of those words having that use when you say what you do.<

Yes, I would like (I think) for it to be possible for us to bind ourselves by promises. But we can't, or at least I don't see how we can. This is similar to free speech. I would sometimes like to be able to ban pornography or at least some types of speech I find abhorrent. But I also realize this violates tenets of libertarianism. In the promising case, what you are saying is that B is (sometimes) justified in using force against A, even when A did not ever use force against B. Where was A's initiation of force? Where was A's causal role in having force applied to B? The only place you can find it is by saying that, "Well, B relied on A's promise." Well, maybe that was stupid of him!

>If your words don't put me in a position such that I can exact compensation, if need be by force, for your failure to perform as you said you would, then they are, when dealing with SOME people, as good as useless.<

Well, this is simply not true. As I have explained, today's system is actually very similar to the idea I have urged for understanding contracts, since usually only monetary damages are payable and specific performance is rarely awarded, and debtors' prison is illegal. Yet, behold, there are millions of contracts engaged in each year, with great economic benefits. And for some reason people tend to try not to break them. Maybe it is for moral reasons, maybe there is a social stigma, maybe they don't want to be held liable for (mere?) monetary damages. But whatever the reason, the absence of a physical penalty does not seem to be deterring the practice and utility of contracting in the real world.

Stephan

Chris Westley?

ownership of property rights, and thus homesteading. They are essential to our survival. So, symmetrically, it is true that I need property rights to survive, and if B violates this he is using force to condemn me to death or perhaps something less extreme. So why may not I use similar force against him? Indeed, why should I be restricted or inconvenienced in my manner of punishment just because of how he chose to punish me? If he robs me, and then tries to say I can only use force against his property and not him, then he is being too accommodated. Similar to eye-for-an-eye application to rape. If a man A rapes a woman B, I'd say he deserves the same and then some, but there is no "the same". Whose fault is this? It's not B's, and to let A get off because there is simply no equivalent is manifestly unjust. He shouldn't benefit a bit just because it is difficult for the victim B to think of an equivalent. Indeed I'd say that the burden of proof at this point shifts to A: B can propose virtually *anything* as a reasonable equivalent, e.g. chopping A's legs and arms off. If A can argue why not, let him, but it's his responsibility to do so because it was his intentional action in the first place that caused B to be in the dilemma of not knowing what punishment to achieve. A has done enough harm to B, without putting her in such a situation, so B should not be required to be in that situation—i.e., put the burden of proof on A. Similarly, then, why let a robber choose that he can only be punished in a property-way? Screw his preference, and let the victim decide, bodily or property infliction of force.

\* \* \*

In sum, I think a property-aggressor can be punished by taking his property too. This is enough anyway for a first-order type of punishment, for a "weak" version of property rights. But because this can be utilized to actually kill him, it's effectively the same so we can do directly what we could do indirectly and punish him bodily. (Indeed this is just why property rights are real, in addition to bodily rights.) And even if this second step is doubted, we can punish property-aggressors *after the fact* by taking enough of their property for restitution (which gets us at least part of the way towards property rights; sort of a weak version of property rights); and plus we can actually use bodily force during a robbery because the guy is a threat to our very bodies at this point.

### **Proportional Punishment**

## **IV. CONTRACT RIGHTS**

Contract: implications from proportionality and property ideas. Rothbard, Evers, Barnett.

Chris,

Well I decided to go on and compose a few thoughts before getting your response to my questions. I had some free time tonight after I got home so decided to do this. I will try to give a sketchy summary, but I'll try to start from some fairly basic axioms or premises and then build upwards. By the way, I can think of plenty of topics that might be interesting to discuss at a CLO meeting, if you ever need help planning things for the agenda. For instance, gossipy-type

things like Randians, Rothbard/Rockwell, etc. But another interesting thing would be for everyone to give a brief summary of why they think rights are justified and their favorite book on political theory.

Another thing that would be interesting would be a discussion of \*what\* rights are. I am telling you, I think there is something very powerful in this line of inquiry. The very definition of rights is elusive and very hard to grasp. In fact I do not believe I have ever heard a good definition of a "right". If you think of it you'll see what I mean. This is related to the difficulty in defining other normative/valuative concepts like "should" and "ought", and "must", and "good" and "bad." I believe ultimately Rand had a good insight (related to Hoppe's theories) into the fact that anyone who is still alive has chosen to live, and thus value life. We can't show that someone "should" choose to stay alive, because "should" implies value, which implies valuing something. If someone chooses to commit suicide they don't value life, so it makes no sense to tell them they should. Anyway, this is a "hypothetical" imperative, and there are no categorical ones--but it doesn't matter, because the only people this question could matter for are choosing to live, so the "hypothetical" nature is effectively categorical. So you could find a descriptive basis in reality for values: IF you want to live (and everyone alive does), THEN you should do X. This is a hypothetical imperative that no one can deny, so it's categorical. Anyone alive does value life, and this is the fundamental \*value\*--this is what, I think, you can build "good" and "bad" from. And from these, you can build "shoulds" "oughts" and even "musts". E.g., IF you value some things, then you SHOULD do X to get it. This way the should sounds hypothetical, but you can always reduce it down to the ultimate value of life, which cannot be denied.

And I believe you can build rights out of shoulds--but even this is very difficult. A right to do X means more than that B "should not" prevent it. It has something to do with the use of force by A, and its legitimacy (and legitimacy is just another normative term).

My point is that I don't think rights have been carefully defined, and when they are you see lots about their nature. But I think I must start at the beginning to figure these things out. Before starting with my contract idea, let me mention one more thing. Given the fact that we end up regressing to fundamentals in these meetings anyway, wouldn't it be good to directly start there, at least sometimes, and clear away the obstacles from the very foundation and then build from there. Related idea: it might be interesting for one of us to provide a written essay (published or not, just carefully written at least) for others to read and to provide basis for discussion at the next meeting. Obviously from my point of view I'm thinking, for example, of my estoppel article. But I'd enjoy doing that with others too, and not just on foundational issues, even more mundane things and applications, current events etc. I think my ideas at the last CLO meeting that were difficultly (a word?) received would have been accepted and understood more had I first explained my estoppel view from the beginning. But on the other hand if we do that it might just be like me lecturing to people, which I don't think would be interesting anyway, from a dialogical point of view. But then what can I say? Phil, I think, was asking me my view on children's rights. I think I have an approach, but it's only comprehensible if you start from a commonly-understood foundation and build from there. You just can't start mid-stream because others will eventually disagree with your conclusions because they haven't accepted your bases yet. So to do that you must have a long, drawn out discourse from first principles. I don't

think others would be interested in that so maybe some things are just not suited for discussion in such a context.

But let me try here to get the ball rolling with you. If you see any false or dubious assumptions or conclusions I'm making (and you may because I recall you saying you are somewhat of a consequentialist, which I am not, I don't think) stop me there.

I will assume your at least partial familiarity with Hoppe's argumentation ethic and my estoppel argument. By the way, I just finished the draft of an article on legislation versus common law, but there's a long section in there summarizing Hoppe's and my estoppel theory, in more detail than I do in my St. Mary's piece on Hoppe. If you want a copy, of at least that portion, let me know and I'll get it to you.

I believe Hoppe's argument soundly establishes self-ownership and ownership of property. I believe my estoppel approach does this too, but in a different way, but my approach lends itself to looking at punishment and retaliation, and the operation of rights, more. However, my estoppel approach as I've presented it so far justifies only self-ownership, I have not yet completely worked out the property-ownership aspects of it. But no matter, I believe Hoppe has shown both very well. So I will take his argument for granted, as being valid, here. And I will resort to my estoppel argument mainly when focusing on retaliation etc. because it lends itself to that.

So, the only things we have rights to are our bodies and property we acquire. But property rights has a specific meaning, it means rights in \*scarce resources\*. The whole reason, according to Hoppe, that we need ownership principles, is to have rules that determine who can use a resource that there might otherwise be physical conflict over. I find the apple first; another may take it away from me. We live in a physical world, and we must live off of it and control it to survive. We must control it to survive. But if there is no ownership then all control is precarious, so we must have ownership (I'm assuming Hoppe's argument as background here--I summarize it in the St. Mary's piece). But then it must be determined either objectively or not. Ultimately, Hoppe shows, there are only two ways to assign ownership to property: by letting the first acquirer (the homesteader) own it--this is very objective and "intersubjectively ascertainable", i.e. visible and thus respectable by all. Plus this way is the only way compatible with the already-accepted ownership of one's self (the only reason you own yourself is because you were the "first" possessor).

The only other alternative is essentially to allow mere verbal decree to determine ownership. But this allows any number of competing parties to simultaneously declare their ownership of any given property, which does not resolve conflicts in the use of scarce resources, which any property theory must do, since the whole point of property rights is to allow scarce resources to be owned and controlled. Further, if people could own things by mere decree, they could decree others' bodies to be theirs, which contradicts self-ownership.

Now this is basically Hoppeian, but notice that the libertarian non-aggression axiom of course flows naturally from this. To own your body and other alienable property means others have no right to physically interfere with/invoke it. The important thing here is to realize how and

why property was justified in the first place: because it is a \*scarce resource\*. This is important in the contract rights issue and other issues, discussed below.

Now briefly examine the estoppel argument. It says that if you go to use violence against a rapist, to punish him for example, we only have a moral issue if the rapist \*objects\*. But if he has initiated force (he has), it makes no sense for him to object, because this is inconsistent. He claims that he believes it is wrong to use force (what else can he mean to tell you that you should not attack him?); yet he obviously does not believe this because otherwise he would not have raped your sister etc. So he must contradict himself to object; yet in objecting he is attempting to establish a discourse or dialogue with you, the object of which is to discover truth. But contradictions are always untrue, and thus have no place in discourse. Thus we do not allow him to utter a statement that would cause a contradiction, because it cannot help to establish the truth; no one can be inconsistent and be correct, because contradictions cannot be. Anyway, intuitively, how can anyone legitimately complain if they are assaulted, if they themselves just assaulted someone? It's common sense. Further, take for granted for now Hoppe's establishing of both self-ownership and ownership in other scarce resources: clearly aggression against one's body or other property are all species of coercion, to which an estoppel-based retaliation is justified.

So I think if you buy all this, or at least if it seems plausible, you can see how you could derive therefrom the typical libertarian political theory. But now the question of some other rights comes into the picture. We have the difficult questions of our fallibility--what if we execute an innocent man, even though we were very sure he was guilty? What rights to babies, retards, feuses have? I think these potentially have answers, and I think I see a partial way for at least some of them, but let me focus on some other difficult areas here. I mean intangible rights like intellectual property (copyright, trademark, trade secret, patent), contract, and reputation (defamation = libel and slander). (By the way, libel is written defamation, and slander is oral defamation.) And what about threats and fraud?

Threats can be dealt with I think in this way. If you point a gun at my head and threaten to kill me, and you really do intend to kill me and you convey this understanding to me, then what have you done to me? This is important from the estoppel point of view. Notice that estoppel can apply to more than force. If you eat sunflower seeds and tell me you think people should not eat sunflower seeds, perhaps a good case could be made that you are estopped from arguing this--i.e., you are \*incorrect\* in maintaining a contradictory thing. For you can't help but maintain that "people should not eat sunflower seeds" is untrue (for you are eating them!), at the same time you say "people should not eat sunflower seeds". Thus you are contradicting yourself, and are just plain wrong since A and not-A can't be true at the same time. But so what if you can't be correct about this!? Who cares? It still doesn't justify my use of force against you! Your merely being wrong doesn't justify my assaulting you. It's only in the context of discussing force (e.g. where you hit me and then seek to evade punishment by claiming that hitting is wrong) that estoppel has any meat. But, then, this is just why the libertarian belief is correct--that the only rights we have are to not have force initiated against us or our property.

But what about a threat. If Evil (E) threatens me, what has E done to me? He has done more

than just chew sunflower seeds! He has done at least this: he has intended to physically harm me, and he has made me \*believe\* it. Clearly, I am entitled to do "the same" to E, by estoppel. (Similarly, in the sunflower seed case, I would be entitled to "do the same" to you--but what is this? Eat sunflower seeds while uttering nonsense? Sure, I can do this "in response" to your doing the same, but this doesn't justify my hitting you.) But what is "the same" here? Suppose I try to get even with E by holding a gun to his head and yelling at him that I will kill him. Well, if I am not permitted to actually shoot him, then he won't believe it and won't be scared; and I really won't intend to do it even though I say I am. We'll both be play-acting. For me to put him in the same position as he put me in (or roughly the same, at least on the order of magnitude of the harm done), I have to actually intend to harm him, and he has to believe it. But this obviously can only be accomplished if I have the right to do it. I am not saying you are entitled to kill someone just because they threatened you; there is a proportional punishment requirement (in my estoppel article I discuss this). So maybe I am only entitled to threaten to stab him, for example. But for the threat to be real, I must have the right to do it so I can truly intend to, and so he can really believe I might do it. And at that point I have the option whether to go on and stab him or to walk away after having scared the piss out of him (or after having traded my right to stab him for half his earnings for the rest of his life).

So I think you can see how a genuine threat must be an initiation of force, since it justifies a retaliatory force. I think fraud is justified too, but let me go into the other bogus concepts first (contracts, intellectual property, reputation).

If we can own property, clearly this is different from possession. I can hand you my wallet and still own it. So there's a way to own something even though not possessing it; and there's a way to deliver possession to another and for him not to own it. Further, if we have the right to acquire ownership we can at least abandon it; and we also can abandon it "in favor" of another. I.e., we can alienate our property, we can give or sell it to others. But this cannot require physical deliver/transfer of the item. Delivery might be one way of giving another ownership of something, provided other factors are there, like your intent to give it. You abandon something by intending to do so; clearly it is your expressed intent to let ownership go, in favor of another, that is the way we give/sell things to others. So I can give you ownership of something, like my car, even while I still possess it; just like I can still own it while I loan it to you temporarily and you possess it for a little while.

I think you can alienate property conditionally too; why not, it's just a formal way of expressing your will to relinquish the ownership of certain property. Instead of saying "you now own this" you can say, "you own this only if X is true" or "only if you also pay me \$100". Similarly, conditions take time to verify so a simultaneity requirement is not required; i.e. I can make the conditional transfer effective in the future: "On day X you will own this car IF Y has occurred." In this way you can have bilateral or even multilateral webs of these conditional property transfers form most of the typical agreements we see today.

If I say, "Tomorrow this goat becomes yours, if you today pay me \$200", then tomorrow the ownership of the goat is yours. And if I \*refuse\* to give it to you I am stealing your goat and you can use force to retrieve it, and even to collect damages from me or punish me for coercing you (by stealing from you). Now a lot of this way to view contracts is already in Rothbard's

Ethics of Liberty, so I wonder why the CLO group was so unimpressed by this theory of contracts; surely it's not that easily dismissed, unless Rothbard is just amateur? But I disagree with Rothbard in part. He says, suppose I don't have the goat the next day, for whatever reason. Well, then I am "stealing" the goat, he says. But I disagree. There is no goat to steal. It's just like I said, "here, this pile of gold [pointing to an empty yard] is yours if you give me your cow." Now, there is no pile of gold, so what exactly am I stealing? It makes no sense. So I think that even if I intentionally kill and eat the goat the night before, and thus there is no goat the next day, then still I have stolen nothing. It is merely impossible for me to perform, to give you a nonexistent goat. Certainly, though, you could imply warranty-terms (which are also conditional property transfers) in the contract: "And if I have no goat to give you tomorrow, then \$250 will be refunded to you; and if I have not \$250 tomorrow in this case, then \$250 plus interest at X rate becomes yours as it enters my possession from my salary from that day forward." But there is never stealing, unless the debtor \*has\* possession of the property and refuses at that instant to deliver it. Much more detail is swimming in my head here, but enough for now.

But where does "contract" come into this? Think of the right to free speech. Uttering words simply does not initiate force. Thus if I say something, I am not estopped from objecting to your physical force against me. That is why there's a right to free speech. But what is different about a "promise"? "I promise to paint your barn". So what? Does this initiate violence? No; so it doesn't justify retaliatory force. So it's not "binding". Now if I say, "IF you give me \$100 now, and IF I do not paint your barn tomorrow, THEN \$150 of my property will become yours on the next day." Rothbard would say that if you don't paint the barn, then you have "stolen" the \$100; but I disagree, the \$100 might be gone. How can you steal that which does not exist?

This way of constructing "contracts" out of mutual bilateral conditional property transfers can achieve things similar to today's "enforceable" or "binding" contracts. But where's the difference, then?

If promises can somehow be "binding", then that means you are justified in using force against someone merely because of what they said--yes, because of "mere words". But why would this be true? The CLO group didn't buy this, but think about it--if you say "mere words" can somehow justify force, where does freedom of speech go? What is the principle here? Further, if you can "bind" yourself by mere words, you could sell yourself into slavery, and a court could enforce specific performance--i.e., they could order you at gunpoint to paint the barn. Today's courts are reluctant to carry out the implications of "binding" promises--they won't specifically enforce contracts, nor enforce a slavery contract. Buy why not? The reasoning is contorted. Under my theory it's clear that slavery and specific performance would never be proper--this would be the use of force against nonaggressors. Further, the CLO group seemed to think the difference irrelevant, but it's not. First, it is just \*wrong\* to say that promises can be "binding"--they just cannot be. Second, to say that promises can be binding (and that this is equivalent to my view), implies that words can justify force, so this is a serious weakening of many things like the nonaggression principle itself as well as freedom of speech. They are \*not\* equivalent because I never say that you are entitled to use force against someone because of what they said. Indirectly only: "mere words" can indeed transfer title to alienable property;

and if I then withhold it I am an aggressor/thief. Force can be used against me now because I have done something more: I have used physical force to deny someone their property (which, admittedly, became "their" property by "mere words").

And note that the comment that you can "sell your labor" is confused. Labor isn't a tangible, corporeal existent thing that is a scarce resource that can have an owner. You don't "own" it any more than you own your thoughts or emotions. You only own your body and your alienable, tangible property, and have a right to do anything you want with them provided others' rights are respected.

Well that's enough for now. Perhaps you see where I'm coming from, and maybe can point out something I've missed. I also think there are interesting related points concerning voluntary conscription in the army (I think, unlike slavery, this might be enforceable in certain circumstances); intellectual property; defamation; selling body parts and whether changing one's mind is stealing your own liver... etc.

NSK>> The very definition of rights is elusive and very hard to grasp. In fact I do not believe I have ever heard a good definition of a "right". If you think of it you'll see what I mean. This is related to the difficulty in defining other normative/valuative concepts like "should" and "ought", and "must", and "good" and "bad." I believe ultimately Rand had a good insight (related to Hoppe's theories) into the fact that anyone who is still alive has chosen to live, and thus value life. We can't show that someone "should" choose to stay alive, because "should" implies value, which implies valuing something. If someone chooses to commit suicide they don't value life, so it makes no sense to tell them they should. Anyway, this is a "hypothetical" imperative, and there are no categorical ones--but it doesn't matter, because the only people this question could matter for are choosing to live, so the "hypothetical" nature is effectively categorical. So you could find a descriptive basis in reality for values: IF you want to live (and everyone alive does), THEN you should do X. This is a hypothetical imperative that no one can deny, so it's categorical. Anyone alive does value life, and this is the fundamental \*value\*--this is what, I think, you can build "good" and "bad" from. And from these, you can build "shoulds" "oughts" and even "musts". E.g., IF you value some things, then you SHOULD do X to get it. This way the should sounds hypothetical, but you can always reduce it down to the ultimate value of life, which cannot be denied.

CW>I agree that "should's" must always follow "if's". That's a good point. But I'm not sure that "valuing life" is a very well-defined thing. It doesn't make a very specific "if" on which to base your statement. Just because I value my life--enough to do what is required to continue living--that implies very little about what sort of life I value. I don't think you can make many categorical statements about what furthers life, since the definition of "life" is still subjective. You haven't defined "life" as anything other than what it means to each individual, and if you did, your "proof" wouldn't be valid.

Maybe this isn't so much an argument with the Hoppe/Kinsella view as with Objectivism. I'm not sure. What do you think?

I think you are right. This seems to be a somewhat valid point of Objectivism to too

poorly-defined. I'm saying this, in part: even if "shoulds" are impossible to define any more precisely, no one can deny they know what at least some "shoulds" mean. E.g., you really can't define "reality" or existence with more basic terms, but everyone knows what the concept means a priori, so could not deny this, because in any act of awareness or existence or denial, you are aware of existence, etc. Now maybe "rights" can be expressed in terms of more basic, but still normative, terms, like value, good, should. Now these may themselves be irreducible, but even so no one can deny that they know what these terms mean or that they have referents. So the example of anyone living necessarily valuing "life" is just to show that no one could deny knowing what it means to value something. Indeed anyone living who has ever made a choice demonstrates a preference for that which he chose over that which was foregone (the opportunity cost) which also is an instance of "valuing". So how can anyone deny that there is such a thing as "value"?

And not only do people value in general, anyone living values life, i.e. living, as opposed to not living. This is as opposed to the Objectivist view that anyone living values life of man qua man etc., because I agree, that may be too vague to be useful. But then Rand did point out the stark alternative of life versus death, which is true; but how she developed it further is something different which I am not really looking into. If anyone living values, and values life, then you can see how this can sort of support the "if-should" hypothetical set of norms that might be used to compose the concept "rights." Specifically, "IF you value life [which anyone alive does], THEN you SHOULD do \_\_\_\_\_." Now it might be a reach to say "then you should live as a rationally-self-interested Randian qua man" etc., but certainly we can think of some uncontroversial things to fill in the blank, even if very general. E.g., if you value life, then you should take actions that tend to promote your life, or that tend to avoid your death. Thus all imperatives are really hypothetical, but all the ones anchored in valuing life itself are categorical for all those people who are living!

NSK > > And I believe you can build rights out of shoulds--but even this is very difficult.

CW > But can you build any "shoulds" from the fact that I value life?

See the above. My point is that when I try to defend that there are some rights, and use the concepts "value" or "should" to do it, it is not a valid criticism by any living person (and who else could criticize me?) that "should" or "value" are fallacious concepts. He himself values things and must recognize many hypothetical shoulds (including "categorical" ones anchored in the undeniable fact of valuing life), so it's nonsense for him to take this line of attack.

> To me, that's a way to build a foundation. Only it's not really building one, it's more like discovering one that already exists. You take something you know is right, a corner of a building that you are leaning on--to extend the metaphor, then you see where that leads, you feel along the wall. You discover what the rest of the building is like by extending out from that corner. Eventually you'll know the shape of the whole building.

I think the truth is out there to be discovered, not created. There is such a thing as natural law, and that's what we're trying to understand. And what better way to understand than to feel out from what we already know?

I agree with this view of objective truth. This reminds me of the common-law method, whereby judges discover the law case at a time, each new case (with new factual situation) hopefully fleshing out the law a little more. That's why legislation is incompatible with law.

NSK >> But let me try here to get the ball rolling with you. If you see any false or dubious assumptions or conclusions I'm making (and you may because I recall you saying you are somewhat of a consequentialist, which I am not, I don't think) stop me there.

CW > Some of your arguments below do sound "consequentialist", at least as I understand the term.

I don't think so; I'm not starting with some arbitrarily postulated goal. E.g., if my preference were for individual as well as general human welfare, and I sought policies to promote this, this would be consequentialist. Unless I could justify my preferences in the first place, the policies are contingent. But how can anyone argue against such general well-meaning goals? These are pretty uncontroversial. But in my arguments I am trying to establish some goals that are not just my preference, but are undeniably valid. E.g. Hoppe's argumentation ethic simply focuses on the fact that anyone who does argue must presuppose the value of property rights etc. This is an undeniable valued thing. Thus given this we can evaluate things consistent or inconsistent with it etc. But I don't see this as consequentialist, because the desired consequences aren't merely desired, they're established dialogically, they are necessarily accepted as true by all.

NSK >> I believe Hoppe's argument soundly establishes self-ownership and ownership of property. I believe my estoppel approach does this too, but in a different way, but my approach lends itself to looking at punishment and retaliation, and the operation of rights, more. However, my estoppel approach as I've presented it so far justifies only self-ownership, I have not yet completely worked out the property-ownership aspects of it. But no matter, I believe Hoppe has shown both very well. So I will take his argument for granted, as being valid, here. And I will resort to my estoppel argument mainly when focusing on retaliation etc. because it lends itself to that.

So, the only things we have rights to are our bodies and property we acquire. But property rights has a specific meaning, it means rights in \*scarce resources\*. The whole reason, according to Hoppe, that we need ownership principles, is to have rules that determine who can use a resource that there might otherwise be physical conflict over. I find the apple first; another may take it away from me. We live in a physical world, and we must live off of it and control it to survive.

CW > This isn't a consequentialist argument? It sounds utilitarian to me.

There is a link there I think. Any truths must be able to be established in discourse or at least consistent with discourse, with argumentation. Anyone that argues must recognize as true many things, and thus any of these things cannot be untruths. And no one could, in an argument ever meaningfully challenge them. For instance, the fact that there is communication or discourse or argumentation. Or the fact that there is a speaker and a listener. Or, the fact that the listener should be free to make up his mind regarding the speaker's arguments. This last one is why there are rights, in Hoppe's theory, because people who voluntarily, peacefully engage in discourse are respecting each other's rights and are recognizing the value of each person having a sphere of autonomy. So it is simply undeniable by anyone that argumentation is a good thing, a thing that should be able to occur--how can anyone argue otherwise? If it is, then the ability to survive is an undeniably good thing too, because arguers must be alive to argue. And clearly the use of property, i.e. scarce resources, in the world is necessary to survive; and since conflict is possible regarding the use of scarce resources, it is also desirable to have some way to decide when and who can or may control property, otherwise no one can control it and no one will survive and be left to argue. Indeed conflict-avoidance is also an undeniable goal since that is a goal of argument in the first place. (This is a little rough; fleshed out more properly and in detail in the Irrationalism article I just mailed you, where I discuss Hoppe.) It is not consequentialist, it is simply true.

If it is true that some form of property rights, i.e. control of property, is necessary to allow people to survive in the real world, which is an undeniable goal of argument, then no one can deny at least some form of property rights. This is again just an observation, not consequentialist. And if it is also demonstrably true (and I think it is) that there are only two fundamental alternatives for property rights systems--homesteading and ownership by mere verbal decree--then the latter is clearly incompatible with the goal of property rights in the first place, i.e. conflict avoidance.

NSK >> We must control it to survive. But if there is no ownership then all control is precarious, so we must have ownership (I'm assuming Hoppe's argument as background here--I summarize it in the St. Mary's piece). But then it must be determined either objectively or not.

CW > Ohhhh... we need property rights, so we must find a way to justify them. Hence, we create our theories.

I'm not sure I'm comfortable with this (for reasons sketched above, natural law, etc) though I'm also not sure I disagree!

That sounds like a very honest, open-minded mindset, which I agree with. You're not ruling things out ahead of time just because you think you don't like the possible conclusions or results. To me that is the proper way to view things--the truth is the ultimate goal of inquiry, regardless of whether we like it or not. That's why I'm amazed when people criticize, for example, my atheism, by saying, "But, but, if there's no God, how can there be morals?!" Of course the answer is, even if "no-God" implies we are in an amoral universe, this still doesn't mean there is a God! Maybe there just are no

morals, then, but whatever the truth is is not affected by your abhorrence of it! And, also, there are morals independent of God anyway, for why else is God characterized as "Good," as if the standard of "good" is an external, objective standard that even God lives up to (and thus cannot be the source of or standard for).

NSK > > The only other alternative is essentially to allow mere verbal decree to determine ownership. But this allows any number of competing parties to simultaneously declare their ownership of any given property, which does not resolve conflicts in the use of scarce resources, which any property theory must do, since the whole point of property rights is to allow scarce resources to be owned and controlled.

CW > If the whole point of our theories (and therefore the whole point of "rights") is to arrive at a goal we already have in mind, I definitely call that "consequentialist". Maybe I don't understand the word.

I think I addressed this above. It's not a goal we already have in mind, in terms of a mere preference or arbitrary starting point; it's a *\*necessary\** goal that all individuals undeniably must admit the validity of, and I see this as completely different from consequentialism, or at least the sort of consequentialism that is subject to criticism.

## V. INTELLECTUAL PROPERTY AND REPUTATION RIGHTS

Intellectual Property: same thing. Rothbard, Palmer, (Barnett?), et al.

## VI. CONCLUSION