A Memorandum

of

Law & Fact

about

Contracts

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Orientation and Framework

This memorandum of law and fact about contracts is founded on a Bible-based theology. In modern American law, this is generally problematic because of the much-vaunted "separation of church and state". The "separation of church and state" is based on the 1st Amendment. But the 1st Amendment does not call for a separation of church and state. It mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". This is explicitly a limitation on Congress, not on the courts, and not on anyone else. But because the principles expounded in the Declaration of Independence, Constitution, and Bill of Rights should be universally recognized and accepted in the American system of government, the courts should recognize, and have generally recognized, that this limitation on Congress also necessarily limits secular governments in general. Under such circumstances, it's fitting to interpret these two preeminent clauses of the 1st Amendment as meaning this: ***Secular government shall not impose an established religion, or prohibit anyone's free exercise of their religion***. Because every educated adult at the time of the writing of those documents knew exactly what an ***established religion*** was, it's necessary to acknowledge that the same meaning pertains in the 21st century. The founding documents disallow the establishment of any kind of church or religion. But even conforming to this 18th-century conception of the establishment of religion doesn't exhaust the scope of these establishment and free-exercise clauses, or sufficiently clarify the jurisdictional boundaries between church and state.

The boundary between church and state can be clarified by consideration of the following fact: The avoidance of established religion and the simultaneous avoidance of violation of free exercise of religion, would not necessarily lead to a libertine state of social chaos, in which there are no moral boundaries on human behavior. That's because what remains when religion is swept from the purview of secular government is not a complete vacuum in moral principles. There are principles embedded in the founding documents and common law that are prerequisites to the successful functioning of secular government. Even so, these principles have not been sufficiently defined. In this memorandum, this set of principles will be called the "**secular religion**". It is not a religion in the traditional sense of the word, but it is a set of principles that apply to all people within the secular government's jurisdiction. This kind of religion is the rationally necessary exception to the rule forbidding the establishment of religion.

It's obvious that the framers were attempting to establish some set of principles that would allow religious freedom, thwart secular government's propensity to

diminish such freedom, and still allow the successful functioning of secular government. Although the founding documents clearly aim at such a state of affairs, they are not clear enough, rigorous enough, or detailed enough, to define this **secular religion**. This is precisely why secular courts should allow admission of this memorandum of law and fact on contracts. Even though it's founded on a Bible-based theology, it does not attempt to establish Christianity, Judaism, or any other traditionally recognized churches or religions. Following Porter's **Hermeneutical Prologue for Discovering Basic Jurisdictional Principles**, this memorandum attempts to expound the **secular religion** at which the founders and framers aimed, as it pertains to contracts.

Although Porter's ***hermeneutical prologue*** describes the framers' **secular religion** as arising out of rigorous biblical **exegesis**, the typographical conventions used in this memorandum are not taken from there, but from Porter's **Theological Inventory of American Jurisprudence**. These are the typographical conventions used in this memorandum:

1) Terms that have a special definition within this memo (whether of legal, philosophical, theological, or any other origin), along with theological terms that are common in the field of Reformed Theology, are generally **underlined bold**.
2) Legal terms used with their ordinary legal meanings are generally in *underlined italic*.
3) Case citations are generally in *underlined italic*.
4) Important expressions are generally in ***bold italic***.
5) Non-English words are generally in *plain italic*.
6) Titles of books and other such bibliographical material are generally **bold**.

Words and phrases that have such special typography are generally defined in Helps files in Porter's ***inventory***. Any words and phrases that do not have such special typography should be understood to have vernacular definitions that may be refined by the context of this memorandum.

The ***hermeneutical prologue*** clearly shows that the Bible holds that modern human beings are created *party* to three **Covenants**.[1] In other words, being *party* to at least three **Covenants** is built in to being human, and transcends human choice. The most obvious **Covenant** to which all humans are *party* is the **covenant of works**, also known as the **Edenic Covenant**. Like all **Covenants** and *contracts*, the **covenant**

1 The **Edenic Covenant** (also known as the **covenant of works**), the **Adamic Covenant** (a.k.a. the **covenant of grace**), and the **Noachian Covenant** (a.k.a. "Noahic covenant").

of works has *terms*, and the *terms* are laws to those *party* to the **Covenant** or *contract*. In the case of the **covenant of works**, the *terms* that pertain to human *parties* are **natural laws**. Although the ***hermeneutical prologue*** presents the **natural law** as existing in three parts, or as a tripod, the **natural law** can be understood most essentially as the moral law that applies to all human beings, which human beings are not able to adequately keep, evidenced by the fact that all humans sin and die.[1] When humans violated the **covenant of works** in the garden of Eden, God divinely imposed another **Covenant**, the **covenant of grace**, also known as the **Adamic Covenant**. The **Adamic Covenant** allowed for the continued existence of the human race, even though in a **fallen** condition. Within a few generations of the **fall**, the human race became so reprehensible that God wiped them out with a flood, with the exception of eight people. After the flood, God made a **Covenant** with these eight people, and through them, with all subsequent humans. This memorandum calls this the **Noachian Covenant**. All subsequent **Biblical Covenants**, all subsequent human existence, and all subsequent human activities – including the making of *contracts* as part of everyday human life – all exist within the context established by these three **global Covenants**: the **Edenic Covenant**, the **Adamic Covenant**, and the **Noachian Covenant**. These three **Covenants** are each divinely imposed. Given that each subsequent **Covenant** is understood to be a set of amendments to the pre-existing **Covenant**, these **Covenants** apply to the entire human race, and that's why the ***hermeneutical prologue*** calls them **global**. Although the first two **Covenants** certainly contain moral law, they contain no biblical prescription of **human law**. The **Noachian Covenant** is critical to this memorandum because it is the only **global Covenant** through which the Bible prescribes **human law** that is applicable to all human beings. It thereby exists at the core of the **secular religion** at which the framers were implicitly aiming.

After the **Noachian Covenant**, the Bible's historical narrative tells of three other major **Covenants**, the **Abrahamic**, **Mosaic**, and **Messianic Covenants**. These latter three **Covenants** certainly have profound implications for humanity as a whole, but all people are not automatically *party* to these latter three **Covenants**. In contrast, all people are automatically *party* to the **Noachian Covenant**, just as they are to the **Edenic Covenant** and the **Adamic Covenant**. This arrangement has huge implications, because the **Noachian Covenant** has the only prescription of **human law** in Scripture that exists as a *term* of a **Covenant** that has **global in personam jurisdiction**, i.e., to which all people are automatically and inevitably *party*. **Human law** is merely law imposed by human against human. The *term* in

1 See Romans 5-8 (especially 8:2) as well as ample other cites, including Genesis 2:16-17 and James 1:15, to see that there is a causal relationship between sin and death.

the **Noachian Covenant** that prescribes **human law** is the Genesis 9:6 mandate against **bloodshed**. The analysis in the ***hermeneutical prologue*** finds that Genesis 9:6 **bloodshed** is metaphorical, and that this mandate should be understood to be against the destruction of the life of one or more other human beings, where such destruction can arise either **ex delicto** or **ex contractu**, but by no other means. Such destruction is defined as perpetration of death, damage, or injury to another's **primary** or **secondary property**.

Genesis 9:6 has essentially three clauses: (i)a clause imposing a negative obligation to avoid perpetrating **bloodshed** (such destruction of another's life); (ii)a clause imposing a positive obligation to execute justice against those who perpetrate **bloodshed**; and (iii)a clause that presents the motive for both the negative and positive obligations. The penalty for disobedience to the negative clause is essentially contained in the positive clause. But no penalty is given for disobedience to the positive clause. This means that the only enforceable **human law** that is explicitly prescribed in Genesis 9:6 arises out of the negative duty, but not out of the positive duty. So the positive duty remains obligatory as moral law, but not as a **globally** prescribed **human law**. So the Bible's only **global** prescription of **human law** is the negative mandate against humans perpetrating death, damage, or injury against the persons or property of other humans. The positive mandate to prosecute those who perpetrate such destruction remains a moral obligation. The negative duty is immediately enforceable as **human law**, while the positive duty is not immediately enforceable as **human law**. So vigilantism is lawful under this **global** negative duty. But a refusal to execute justice against **bloodshed** / destruction, cannot be lawfully prosecuted unless there is some subsidiary contract, subsequent to the **global Covenants**, that provides for such prosecution. So the positive duty can become enforceable as **human law** if there is some governing contract, but the **Noachian Covenant** in itself is not that governing contract, although it retains preeminence over such subsequent contracts.

Even though the Bible expounds numerous other moral laws, here meaning **natural laws** that have a **global in personam jurisdiction**, this negative mandate against destruction **ex delicto** or **ex contractu** is the only **human law** that the Bible prescribes for the entire human race. So according to the **hermeneutics** used in the ***hermeneutical prologue***, biblical authority is given for human enforcement against death, damage, or injury that arises **ex delicto** or **ex contractu**, regardless of whether the enforcement happens through a human government or not. But no biblical authority is given for the **global** enforcement against violations of moral law that do not involve perpetrations of **delicts**. This is because destruction of another's life that happens **ex contractu** is governed by the jurisdiction established

by the contract. All such destruction **ex contractu** is therefore **local**, as opposed to **global**. So the **global** negative duty is a **global** prohibition of perpetration of death, damage, or injury of other human beings, and that **global** subject matter jurisdiction encompasses both destruction **ex delicto** and destruction **ex contractu**, but because **local** contracts establish **local** jurisdictions, the **global** mandate against such destruction is mitigated in the case of **local** contracts. But there may also be extenuating circumstances for some presumed destruction that happens **ex delicto**.

There is no **global** authorization for enforcement against perceived violations of moral law that do not involve **bloodshed**. **Bloodshed**, destruction of another human being through death, damage, or injury of his/her **primary** or **secondary property**, is something that must be recognizable to all humans in general. This is because this is a **global** mandate within a **global covenant**. Presumed infractions against moral law that do not clearly destroy other people's **primary** or **secondary property** should never be included within the ambit of Genesis 9:6 destruction. For example, excessive alcohol consumption, taking drugs, and consensual extra-marital sex may each be morally reprehensible to Christians and others, and they may even cause incidental or non-proximate distress, but because they do not explicitly and proximately destroy other people's **primary** or **secondary property**, this lack of destruction precludes their inclusion within the ambit of **bloodshed**. Inclusion of such presumed moral deformities essentially converts moral law into **human law** without biblical authorization. This is true unless the *parties* are *party* to a **Covenant** that has **local in personam jurisdiction**, or have given some other form of contractual **consent** for such enforcement.[1]

This terse description of the ramifications of Genesis 9:6 is also a terse description of the **secular religion** at which the framers were intuitively aiming. Because this framework posits that all human beings are inevitably *party* to certain **Covenants**, this framework also posits that such **covenant** participation is built into human nature. It follows that according to this framework, the **social contract theory of government** is a crucial ingredient in any political philosophy or *jurisprudence* that is consistent with this framework. It also follows that **natural law**, herein understood to be primarily the universal moral law, is also a necessary ingredient in such philosophy and *jurisprudence*. Since **natural rights** are a rationally necessary subset of **natural law**, it follows that **natural rights** are also a necessary ingredient in such framework, philosophy, and *jurisprudence*.

This Bible-based **secular religion** at which the framers were intuitively aiming is a long way from popular in the modern American legal system. In fact, it is besieged

1 For more about this framework, see the ***hermeneutical prologue***.

by numerous competing schools of jurisprudence on numerous fronts. It's imperative for the courts in this country to focus on the vision of the framers, and to not be distracted by all this other static. Even though this nation has been built with many admitted flaws, it was built with this framework at its foundation. Absolutely crucial to this framework are the concepts of social contract, natural law, and natural rights. The prevailing schools in the modern legal profession – *legal positivism*, *legal realism*, etc. – show so little regard for *social contract*, *natural law*, and **natural rights**, that these schools are essentially laying the foundations for fiat law, fascism, collectivism, socialism, and even global totalitarianism. The ***hermeneutical prologue*** and the ***inventory*** combine with Porter's ***theodicy*** and his **Memorandum of Law & Fact Regarding Natural Personhood**, to refute the fundamental gist of these prevailing schools of jurisprudence. But there are also two other schools that deserve at least a mention in passing. One is based in Christian theology. The other is an exponent of secular libertarianism.

The Christian theology that deserves special mention is **theonomic reconstructionism** (also known as **Christian reconstructionism**). It posits a political philosophy and *jurisprudence* that rejects both **social contract theory** and **natural law**.[1] The rejection of both the *social contract* and the *natural law* is equivalent to rejection of the framework just sketched. Rejection of both of these is essentially laying the foundation for fiat law, fascism, collectivism, socialism, and even global totalitarianism. Since the ***hermeneutical prologue***, the ***inventory***, and the other works combine to answer the rejection of both *social contract* and *natural law*, it's not necessary to say anything more here about this "Christian" theology. So like the prevailing **secular** legal schools of jurisprudence, theonomic reconstructionism can essentially be skipped in this memorandum, as having been adequately addressed elsewhere. But this school of secular libertarianism rejects the *social contract* while holding fervently to *natural law* and **natural rights**, and in the process it posits an alternative theory of contracts that demands special attention.

While **Christian reconstructionism**, *legal positivism*, *legal realism*, etc., tend to replace the historic foundation in *social contract theory*, *natural law*, and **natural rights**, with fiat law, etc., Murray Rothbard's school of libertarianism tends to replace the historic framework by attempting to preserve **natural law** and **natural rights** while rejecting the *social contract* ***entirely***. By rejecting the *social contract*,

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1 For an overview of **theonomic reconstructionism**, see J. Ligon Duncan, III, "Moses' Law for Modern Government: The Intellectual and Sociological Origins of the Christian Reconstructionist Movement", 1994, *"A paper presented to the Social Science History Association, Atlanta, Georgia, USA"*, October 15, 1994. — URL: http://www.the-highway.com/recon_Duncan.html.

Rothbard's system rejects the principle in the founding framework that holds that human beings are inherently and inevitably participants in certain **Covenants**. A **social contract theory of government** grows out of the above framework, and is inherently related to the human need to satisfy the **global** mandate against **bloodshed**, i.e., against destroying others' **primary** and **secondary property**. *Social contract* theories developed by humanistic philosophers may deviate significantly from the framework discovered by the ***hermeneutical prologue***, but they and this framework all have in common the belief that governments are based upon *contracts*. In reaction to the fact that secular theorists and traditional jurisprudence, including the framers' inadequate implementation of the biblical framework, have so thoroughly missed the targeted framework, Rothbard's **anarcho-capitalism** rejects belief in the *social contract* entirely. But Rothbard's theory of contracts also offers something that is crucial to the proper implementation of the secular biblical framework.

Murray Rothbard (1926-1995) rejects the *social contract* based primarily on his theory of *contracts*, which he calls the "title-transfer" theory of *contracts*. Because this is an axe laid to the root of Bible-based *jurisprudence*, and because his ***title-transfer model*** of *contracts* is appropriate in the secular arena in some respects, even though it is not appropriate in the religious arena, it's critical to give his model special attention. So it's critical that this memorandum focus on specific portions of Rothbard's book, **The Ethics of Liberty**, and on two articles written by Williamson Evers, "Toward a Reformulation of the Law of Contracts" and "Social Contract: A Critique".[1] To whatever extent the ***title-transfer model*** is true, it will have a bearing on the existence of *lawful* government, and the existence of *lawful* taxing, **taking**, and spending.

Before proceeding with the examination of the ***title-transfer model***, in order to make sure that this memorandum remains in context, it's necessary to remember several other features of the biblical framework expounded in the ***hermeneutical prologue***: This memorandum follows the convention that a *contract* that people form specifically for the purpose of prosecuting perpetrators of **delicts** is called a **jural compact**. A *contract* that people form specifically for the purpose of *adjudicating contract* disputes, is called an **ecclesiastical compact**.[2] A *contract* that incorporates and encompasses both the **jural compact** and the **ecclesiastical compact**, and also

1 **The Ethics of Liberty**, **Evers' article on contracts** and **Evers' article on the social contract** can be found on the internet at, (i)URL: http://www.mises.org/rothbard/ethics/ethics.asp; (ii)URL: http://mises.org/journals/jls/1_1/1_1_2.pdf; and (iii)URL: http://mises.org/journals/jls/1_3/1_3_3.pdf; respectively.

2 In the narrow sense of the term, which is the only sense appropriate in this memorandum.

encompasses the customs, usages, rules, and all the other *contracts* by which people live from day-to-day, is called a **social compact**. A *contract* that is intended to encompass a plurality of **religions** is called a **secular social compact**. A *contract* that is intended to encompass only a single **religion** is called a **religious social compact**. — Each of these various kinds of **compacts** has a very specific **in personam jurisdiction** and a very specific **subject matter jurisdiction**. If such a **compact** is fully functional, then it will also have a very specific **geographical jurisdiction**. — In the process of examining the ***title-transfer model*** of *contracts*, it's safe to assume that whatever is valid about it will fit rationally into the Bible-based framework expounded in the ***hermeneutical prologue***.

In the ***hermeneutical prologue***, it's assumed that *contracts* should always be enforced as written, as long as they conform to the **jurisdictional** boundaries just sketched, and unless there is something *unconscionable* about them.[1] What is always *unconscionable* in every **geographical jurisdiction** is the intentional or unintentional perpetration of a **delict**. This is because the mandate against **delicts** is **global**, and no one can escape it by entering into a *contract*. So under a **secular social compact**, if a *contract* invokes the perpetration of a **delict**, the *contract* is proportionally unenforceable and void. So all *contracts* that invoke **delicts** are *unconscionable*. But on the other hand, some *contracts* are *unconscionable* even if they do not invoke **delicts**. Under a **religious social compact**, a *contract* might be *unconscionable*, void, and unenforceable even if it does not invoke the perpetration of a **delict**. This can happen if the *contract* violates the **religion**'s moral code. Under the **jurisdiction** of a **religious social compact** that prohibits fornication, a *contract* to fornicate would be *unconscionable*, *void ab initio*, and unenforceable, even though fornication is not a **delict** under strict *construction* of the **bloodshed** mandate. So the issue of what is conscionable and what is *unconscionable* within a given **jurisdiction** is crucial to determining whether a *contract* can be enforced within that **jurisdiction**.

The context established in the **Ethics of Liberty** makes it clear that people who advocate the ***title-transfer*** theory of *contracts* do not take **jurisdiction** as being absolutely crucial to the enforcement of *positive law*. Such neglect of **jurisdiction** is a huge mistake. Nevertheless, in essence, the ***title-transfer model*** tries to draw a clear distinction between what is an enforceable *contract* and what is not, and it does so by differentiating what is conscionable and what is not. Its authors deserve some thanks for that. While insuring that the ***hermeneutical prologue***'s **jurisdictional** framework is maintained, the essential issue that needs to be determined in this memorandum is this: Do Rothbard and company draw the line

1 See Porter, TIAJ, Article III § 2 cl 1 (Unconscionable Contracts). — URL: ../../../Books/TIAJ/html/0_TIAJ/0_4_1_0_1_Art_III_Sec_2_Cl_1_(Uncon_Con).htm.

between conscionability and *unconscionability* in the right place?[1] If a court does not correctly draw the line between a conscionable *contract* and an *unconscionable contract*, then the court will inevitably err on one of two sides: (i)If the court enforces what is in fact an *unconscionable contract* because it *construes* the *contract* to not be *unconscionable*, then the court is lending its power to inflict undeserved harm on the *contract*'s vulnerable *party*. (ii)If the court refuses to enforce a *contract* because the court believes the *contract* is *unconscionable*, when in fact it is not *unconscionable*, then the court fails to do its job, and fails to render *equity* where *equity* is demanded and needed. — In the final analysis, the ***title-transfer model*** fails not because it fails in regard to conscionability, but because it fails in regard to **jurisdiction**, and that failure leads it to reject the *social contract*. Even so, the ***title-transfer model*** is a worthy effort at protecting the individual's **natural rights** against government that has in many respects gone almost completely rogue. It thereby has legitimacy in the secular arena that it lacks within religious jurisdictions.

Rothbard begins Chapter 19 of **The Ethics of Liberty** by saying, "The right of property implies the right to make contracts about that property: to give it away or to exchange titles of ownership for the property of another person." This does not conflict in any way with the secular framework expounded in the ***hermeneutical prologue***. He goes on to speak of "libertarians" who ostensibly believe in this initial statement, but who fail to properly construe it. Then he says, "[T]he only enforceable contracts (i.e., those backed by the sanction of legal coercion) should be those where the failure of one party to abide by the contract implies the theft of property from the other party." When examined thoroughly, it's possible to accept this statement as true within the secular arena, but not necessarily true within the religious arena. From the ***hermeneutical prologue***'s perspective, it's possible to agree with this latter claim only by using definitions of "property" and "theft" that Rothbard would probably not accept. Rothbard is certainly attempting to solve a legitimate problem in making this claim. But his solution is deficient. In fact, the logic associated with this latter premise leads Rothbard to reject the *social contract* entirely.

Based on the fact that the ***title-transfer model*** uses definitions of "property" and "theft" that are appropriate within the scope of **jural societies** and **secular social compacts**, this memorandum will start by giving the Rothbardian libertarians the benefit of the doubt, and assuming that their ***model*** may be perfectly valid within this **jural** and **secular** context. The remainder of this memorandum is dedicated to (i)describing the problem that Rothbard and his colleagues were trying to solve;

1 This is part of the process of delineating **subject-matter jurisdiction** within **ecclesiastical courts**.

(ii)describing Rothbard and company's solution; and (iii)presenting the solution expounded in the ***hermeneutical prologue***.

Promise-Expectation vs. Contract-Enforcement

"[I]n the early 1720s, the libertarian English writers John Trenchard and Thomas Gordon, in their *Cato's Letters*-widely influential in forming the attitudes of the American colonies-wrote as follows:

> All men are born free; liberty is a gift which they receive from God himself; nor can they alienate the same by consent, though possibly they may forfeit it by crimes. No man. . . can . . . give away the lives and liberties, religion or acquired property of his posterity, who will be born as free as he himself was born, and can never be bound by his wicked and ridiculous bargain."[1]

In recognition of the fact that **Cato's Letters** had an important influence on the thinking of the founding generation, and also because this issue of the **alienability**[2] of **natural rights** via *consent* goes to the core of the ***title-transfer model***, it's necessary to ask two questions: (i)Can people **consent** to their partial or total enslavement, i.e., to the **alienation** of their **natural rights**? (ii)Can people arrange to have their "posterity" partially or totally enslaved, i.e., to **alienate** their posterity's **natural rights**? The answer to the second question is an emphatic "No!". This memorandum addresses this issue by allowing for the existence of **denizens**.[3] But the first question is more difficult and is the core subject of this memorandum. — The **Declaration of Independence** says that such **rights** are ***unalienable Rights***. But what does this mean in regards to **consensual** *agreements* and *contracts*? In essence, the remainder of this memorandum will be spent answering these questions about **consensual** **alienation**.

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1 Taken from endnote #17 of **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

2 It's necessary to use a customized definition of *alienate*. This is because the legal definition pertains primarily to *real property*, and also because it pertains especially to transfer of property from one person to another. In keeping with the Latin etymology of the word – which is concerned more about estrangement and less about whatever entity receives the estranged object, or how it is estranged – this memorandum defines **alienation** as the loss or estrangement of any kind of **primary** or **secondary property**, regardless of how or to whom it is estranged. This memorandum distinguishes conventional *alienate* from the memorandum's concept of **alienate** typographically.

3 See Porter, TIAJ, Article I § 8 cl 4 / denizen. — URL: ../../../Books/TIAJ/html/0_TIAJ/0_2_1_3_Art_I_Sec_8_Cl_4.htm#Denizen.

Rothbard ends Chapter 19, "Property Rights and the Theory of Contracts", with the following paragraph:

> The current law of contracts is an inchoate mixture of the title-transfer and the promise-expectations approaches, with the expectations model predominating under the influence of nineteenth- and twentieth-century legal positivism and pragmatism. A libertarian, natural-rights, property-rights theory must therefore reconstitute contract law on the proper title-transfer basis.[1]

Given the debased status of the American legal system, it's difficult to argue with Rothbard's characterization of the "law of contracts" as "inchoate". He's saying that it's a half-baked conglomeration of two different concepts of what a ***contract*** is. He believes that these two conceptions are competing for dominance in the arena of ***contract adjudication***. According to Rothbard and Evers, the two conceptions are the "title-transfer" approach and the "promise-expectations" approach. Rothbard is clearly saying that he believes the promise-expectations model is dominating this competition. In the first paragraph in Chapter 19, he bemoans the fact that many "libertarians" default into believing in the promise-expectations model. He says,

> Unfortunately, many libertarians, devoted to the right to make contracts, hold the contract itself to be an absolute, and therefore maintain that any voluntary contract whatever must be legally enforceable in the free society. Their error is a failure to realize that the right to contract is strictly derivable from the right of private property.[2]

He's right to bemoan the "absolute" belief in the promise-expectations model. A strictly secular conception of the right to contract may indeed be "derivable from the right of private property". But the biblical framework makes it obvious that the right to contract is much more fundamental than secular logic, alone, is able to reveal. The Rothbardian conception must remain within the larger context targeted by the ***framers*** in order to retain its validity.

Contract-Formation vs. Contract-Enforcement

Every ***contract***, by definition, contains promises. Promises are necessary ingredients in the creation of every ***contract***. If there are no promises, then there is

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1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

2 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

no *contract*, because where there is no promise, there is no promise to perform; and where there is no promise to perform, no *obligations* are placed on any of the *parties*; and where there are no *obligations*, there are no *benefits* accruing to the other *party* by way of the *obligations*; and where there are no *benefits*, there is no *consideration*; and where there is no *consideration*, there is no incentive to enter the *contract* in the first place. Where there is no promise, there is no *contract*. Implicitly, Rothbard admits this by using the verb "agree" as a euphemism for "promise" in the illustrative cases he presents in Chapter 19. But he never admits explicitly in **The Ethics of Liberty** that a promise is an inevitable component of every *contract*. Both he and Evers choose instead to maintain an assault on the "promise-expectations" model of *contracts*.

Wherever a promise exists, whoever believes in the promise is expecting that it will be fulfilled. If A promises B that A will do *X*, why would B ever enter the *contract* if B did not have some reasonable expectation that A would deliver on A's promise? Without B's expectation, B would never enter the *contract*. — This line of reasoning shows that both promise and expectation are necessary, inevitable, and defining components to the creation of every *contract*. But the fact that Rothbard, Evers, and company appear to completely overlook this fact is not sufficient reason to dismiss their arguments with complete incredulity. This is because they have a legitimate grievance.

Williamson Evers sees the same lack of cohesion in the *adjudication* of *contracts* that Rothbard sees. He says,

> Many of the problem areas in the law of contracts stem from the historical fact that the law of contracts has been fashioned out of material that does not fit together logically. Some jurists view contracts as conventions serving to secure people's expectations. … On the other hand, other jurists, particularly those who base their legal theory upon the natural rights philosophical tradition, view contracts as instruments by which rights to things (both present and future alienable goods) are assigned, delineated, transferred or exchanged.[1]

So according to Evers, the "problem areas in the law of contracts" are problem areas because "promise-expectations" jurists are wrong while the "natural rights" jurists are right, and all these problems would go away if the promise-expectations jurists would follow their smarter colleagues. — Rothbard and company have a legitimate

1 "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

grievance against the *status quo* in *contract* law.[1] Even so, in their efforts at resolving their grievance, they have exceeded legitimate boundaries. They have a legitimate complaint against "promise-expectations" jurists because the latter do not adequately honor *private* **property rights**, i.e., **natural rights**. In their efforts at correcting the problem, Rothbard and Evers discard the nexus between promise/expectation and *lawful contracts*, and they also discard the *social contract* as a foundation for *lawful* government. From the perspective of the ***hermeneutical prologue***, the prerequisites to ridding *contract adjudication* of its "inchoate" inclinations are three: (i)making a clear distinction between the promise-expectations theory of *contract*-formation and the promise-expectation theory of *contract*-enforcement; (ii)clearly defining what constitutes an *unconscionable contract* by determining what **property** is **alienable** and what **property** is not; and (iii)clearly defining the *lawful* **jurisdictions** of **ecclesiastical courts** so that they do not exceed or neglect such **jurisdictions**.[2]

Sample Case

In his criticism of the promise-expectation theory of *contracts*, Rothbard presents the following case:

> Suppose that a celebrated movie actor agrees to appear at a certain theater at a certain date. For whatever reason, he fails to appear. Should he be forced to appear at that or at some future date? Certainly not, for that would be compulsory slavery. Should he be forced, at least, to recompense the theater owners for the publicity and other expenses incurred by the theater owners in anticipation of his appearance? No again, for his agreement was a mere promise concerning his inalienable will, which he has the right to change at any time. Put another way, since the movie actor has not yet received any of the theater owners' property, he has committed no theft against the owners (or against anyone else), and therefore he cannot be forced to pay damages.[3]

He says the "movie actor agrees". This is a euphemism for the *movie actor and the theater owners made promises to each other*, which shows that Rothbard implicitly

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1 Even though Rothbard and Evers were writing in the 70s and 80s, the law has not become less "inchoate" since then, but has instead proceeded to become more "inchoate". It's therefore reasonable to continue speaking of these circumstances in the present tense.

2 Because **ecclesiastical courts** are a function of the ***hermeneutical prologue***'s *jurisprudential* framework, this implies the acceptance of the ***hermeneutical prologue***'s **social compact theory of government**.

3 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

agrees that promises are a necessary ingredient in *contract* formation. Then the actor "fails to appear", meaning that the actor broke his promise. Under the current "inchoate" state of *contract adjudication*, the actor would probably not be "forced to appear"; although the court might force the actor "to recompense the theater owners". Under a pure promise-expectations model, the actor would be forced to appear, or at least to recompense the owners. But under Rothbard's ***title-transfer model***, the court would neither force the actor to appear nor force the actor to compensate the owners. This is because the actor's "agreement was a mere promise concerning his inalienable will, which he has the right to change at any time". When Rothbard says that the presumed *contract* was a "mere promise", he means that the actor had not "received any of the theater owners' property". The actor could therefore not be accused of "theft".

This case displays the basic assumptions of the ***title-transfer model***: (i)Rothbard presumes the non-existence or irrelevance of **religious ecclesiastical courts**. (ii) Rothbard presumes that both promises and expectations "are only subjective states of mind, which do not involve transfer of title". (iii)Rothbard assumes that even if penalties for non-performance were written into the *contract*, the *contract* is unenforceable if there is no *title* transfer. (iv)Rothbard believes that any promise concerning *alienable* ***labor*** is unenforceable because it is a promise with respect to the "inalienable will". In other words, Rothbard assumes that the will, the human ability to choose, is *inalienable*, and that this *inalienability* extends to promises about one's ***labor***.

Importance of Penalties

Based on the idea that penalty should be proportional to offense, it's certainly true that the actor should not be forced to appear. After all, how does anyone force anyone else to do anything? In the words of the godfather, by *giving them an offer they can't refuse*. In other words, with threats. By giving them a choice between something bad and something absolutely horrible. Use of such force to persuade must always be measured against the original offense. The actor's failure to appear certainly didn't deserve threats of having his children wiped out, or his legs broken, or his home looted. In fact, in a **secular jurisdiction** that is concerned only with the protection of **property**, it's very difficult to determine what threat is deserved. Since Rothbard mentions no penalties or remedies written into the original *contract*, it's necessary to assume that there are none in the original *contract*. So even if there is real *ex contractu* damage to the owners for which the actor is responsible, the lack of pre-defined penalties for non-performance makes it difficult to conclude that the actor should be forced to appear.

Rothbard also asks, "Should he be forced … to recompense … for … expenses incurred …?". The issue again is this: How can the theater owners force the actor to recompense? If it's assumed that they will use a **secular ecclesiastical court**, rather than seeking to find *equity* through a ***vigilance committee*** or through mafiosi, then the same question goes to the court: How, Judge, are you going to force the actor to recompense? The judge's methods are the same as the mafiosi's: *by giving the actor an offer he can't refuse*. The only difference between the judge and the mafia is that the judge has the backing of a monolithic police force, and the judge is backed by the awesome mythology of ***statism***. Force and myth are hardly substitutes for *equity*. So it's necessary to conclude again that if there is no penalty for non-appearance written into the original *contract*, then in a **secular jurisdiction**, the actor should not be forced to recompense.

Even though there is agreement between the ***hermeneutical prologue*** and Rothbard about his conclusions, the ***hermeneutical prologue***'s rationale for eschewing forced appearance and forced compensation are different from Rothbard's. Rothbard says that the actor's "agreement was a mere promise concerning his inalienable will, which he has the right to change at any time". According to this view, the human will, i.e., the human ability to choose, is so exalted that no human being can ever burden another human being's choices. The exception to this that Rothbard and company acknowledge, is indicated by the above quote of **Cato's Letters**: "All men are born free; liberty is a gift which … possibly they may forfeit … by crimes." If this criminal forfeiture of liberty is *lawful*, it is necessarily **ex delicto**. In addition to this **ex delicto** class of justifiably **alienated** wills, according to the ***hermeneutical prologue***, it's necessary to also acknowledge another class of exceptions that arise *ex contractu*, relations like these: parent-child, guardian-ward, and mentor-dependent *contracts*. Even if Rothbard doesn't acknowledge these latter exceptions to his will-*inalienability* rule, the fact that he acknowledges the **ex delicto** breed of will **alienation** proves that the will is not *inalienable* in an absolute sense.

According to the ***hermeneutical prologue***, the human will is merely the power to choose, nothing more, nothing less. To exalt it into something more is merely to enter into idol construction, and to thereby remove the argument from the legitimate arena of argumentation about the freedom of the will, to a religious arena in which the will must be worshipped, and therefore cannot be the object of legitimate argumentation. It's necessary to acknowledge that Rothbardian libertarianism suffers this flaw, even while it's also necessary to acknowledge the Rothbardian contribution to secular contract adjudication.

Regarding **ex delicto alienation** of the will, if A damages B's **primary property**, then A's liberty is forfeit proportional to the damage to B's **primary property**. Such damage to **primary property** generally demands an *action* **ex delicto** and not an *action ex contractu*. Evidence shows that Rothbard and Evers agree that such a *public* or *private delict* deserves *retribution* or *recompense* or some penalty or remedy **ex delicto**.[1] But damages that arise *ex contractu* arise by way of non-performance of *contractual* obligations. Damages that happen in any way other than through a *contract* are damages that may give rise to an *action* **ex delicto** (assuming human culpability), but not to an *action ex contractu*. Clearly Rothbard is not acknowledging that an *action ex contractu* is justified in this case. The damage in this *contract* between the actor and the theater-owners, brought on by the possibility that the theater owners spent a lot of money for advertising and preparing for the event, according to Rothbard, is simply part of the risk of doing business. The issue that is crucial to Rothbard is that the actor "committed no theft against the owners". "Theft" is crucial to the ***title-transfer model***. As indicated above, the first paragraph of Chapter 19 says, "[T]he only enforceable contracts … should be those where the failure of one party to abide by the contract implies the theft of property from the other." To Rothbard and company, since "the actor has not received any of the theater owners' property", the actor could not possibly have stolen anything from the theater owners. Therefore the *contract* is unenforceable. Or so the analysis goes thus far.

If the owners lost a lot of money via the actor's non-appearance, it's obvious that they are damaged by way of the actor's non-performance. The damage is obviously *ex contractu*. Theft is usually assumed to be a crime, and therefore assumed to give rise to *actions* **ex delicto**. But the kind of theft that Rothbard is talking about in his theory of *contracts* is theft that happens by way of non-performance. His use of the word, "theft" is essentially a hyperbolic reference to transfer of *title*, *ownership*, *possession*, etc., in violation of a *contract*'s performance requirements. He says that even if the owners were damaged by the actor's non-performance, there was never any transfer of *title*, *ownership*, *possession*, etc., and therefore no grounds for executing *contractual* penalties against the actor, even if such penalties were written

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1 This is clear because they both believe in "the duty of non-aggression" (Examples: Evers, "Social Contract: A Critique", last paragraph; and Rothbard, **The Ethics of Liberty**, Chapters 14 and 30.). Such a duty carries with it a right to defend oneself, one's property, and other persons or properties against aggression. What Rothbard and company mean by "aggression" is essentially the same as what the ***hermeneutical prologue*** means by **delict**. — The section below, "Lawful Social Contracts", addresses the fact that they believe this "duty" exists outside any *contractual* nexus.

into the original *contract*. Under such circumstances, Rothbard claims the *contract* is unenforceable.

From the perspective of the ***hermeneutical prologue***, it's true that this contract is unenforceable. But from the same perspective, it's necessary to be suspicious of Rothbard's claim that there is no theft, and it's also necessary to be suspicious of his analysis of this case on other grounds. In the agreement between the actor and the theater owners, when the two *parties* made promises to each other, it's possible that they surrendered **property** *interests* to one-another. The actor may have given the theater owners an *interest* in his ***labor*** as an actor. Likewise, the theater-owners may have given the actor an *interest* in their ***land*** and ***labor*** as sponsors of the event. When the actor failed to show, and the theater owners wanted compensation and therefore took the case to a **secular ecclesiastical court**, and the theater owners submitted their copy of the *contract* to the court as exhibit A, then the three issues to the court were these: (i)Does the *contract* give the court **in personam jurisdiction** over the *parties* to the *contract*? (ii)Does the court have **subject-matter jurisdiction** over the *contract*? (iii)Does the court have **geographical jurisdiction** over the *contract*? If the court determined that it probably had **jurisdiction** on all three counts, it would proceed to hear evidence. The core issue the court would then need to decide is to what degree the *contract* is enforceable. Is the *contract* unenforceable because it's *unconscionable*? In this case, there's nothing *unconscionable* about this *contract*. On the other hand, is the *contract* unenforceable because it offers no remedies or penalties for non-performance on either side? Rothbard mentions no remedies or penalties written into the *contract*, so it's necessary to assume that none exists. So the court finds itself needing to create remedies and penalties for these *parties* who neglected to insert such remedies and penalties into the original *contract*. Is the court obligated to modify the *contract* by creating such *terms* out of nothing?

If *parties* to a **secular** *contract* fail to write penalties into their *contract*, then the court should consider something essential about **human law**. A moral proscription that is not accompanied by a prescribed penalty does not suffice as **human law**. If the court wants to avoid putting itself into the position of being a perpetrator of a **delict** against one of the *litigants*, then it's important for the court to assume that the *parties* did not intend for the *contract* to be enforced as *positive law*, because **human law** by definition demands the existence of human-executed penalties. If the *parties* did not intend for the *terms* of the *contract* to be *positive law*, then it would be gross presumption for the court to find otherwise. If the *parties* intend for it to be *positive law*, then they should provide evidence of that intent by showing the penalties in the original *contract*.

This is where the ***hermeneutical prologue*** is in agreement with Rothbard. It's possible that Rothbard may be wrong in saying that there is no "theft". In fact, it's possible that the actor has stolen (in Rothbard's hyperbolic sense) the theater owners' *interest* in his ***labor***, an *interest* that he offered to the owners at the initiation of the *contract*. If the court could reliably put a monetary value on the **property** *interest* that the actor gave, then perhaps the court could resolve the dispute in the owners' favor by *giving the actor an offer he could not refuse*, namely, compensate the owners or else. But given that this is a **secular ecclesiastical court**, and given that the **property** *interest* that the actor gave is difficult to monetize, it would be more appropriate for the court to treat the case like this: "If you, Actor, and you, Owners, care so little about your **property** that you enter *contracts* that have no penalties or remedies for non-performance, then you can suffer the consequences. I, the judge, recognize that this is a conscionable *contract*, but I am offered insufficient evidence to render a conscionable decision. I find this *contract* outside my limited **subject-matter jurisdiction** because you have offered insufficient evidence that you were serious about transferring *title* to your respective **property** *interests*. I therefore lack evidence for conscionable enforcement."

Even though Rothbard believes that there is no transfer of **property** while the ***hermeneutical prologue*** does not hold that, the **property** *interest* is so difficult to define in rigorous monetary terms that it would be imprudent for the judge to demand that the actor compensate the theater owners. Because of insufficient evidence, such a demand would probably create a **delict** perpetrated by the court. The same is true if the court forced the actor to appear. It's therefore necessary to agree with Rothbard's final solution to this case. But Rothbard and the ***hermeneutical prologue*** reach this conclusion by a different means. The theater owners should have gotten a *performance bond*, or they should have written penalties and remedies into the *contract* with sufficient specificity to allow *lawful* enforcement.

Summary of this case: Since this is a **secular** *contract*, and since there is no evidence to the contrary, it's necessary to conclude that the actor's agreement with the theater owner was unenforceable. The actor's will is probably *inalienable* in *law*, but whether it's *inalienable* in *fact* is a different issue. His ***labor*** is not *inalienable* because ***labor*** is necessarily *alienable* in a free market because such *alienation* is inherent in earning wages. But the actor's promise of future ***labor*** may be *inalienable*, but perhaps it's not. Even though the actor may have surrendered a **property** *interest* in his ***labor*** to the theater owners, there is insufficient evidence to enforce the *contract* in any way. The court essentially lacks **subject-matter jurisdiction**.

Title-Transfer & Promise

Proof of *contractually* prescribed penalty is important. Proof of **property** transfer is also important. Pertinent to both of these points is this quote by Evers of Lysander Spooner:

> A man may make as many naked promises to pay money, as he pleases, and they are of no obligation in law. On the other hand, if a man have received value from another, with the understanding that it is not a gift, or that an equivalent is to be paid for it, the debt is obligatory - that is, the obligation to deliver the equivalent is binding -whether there be any formal promise to pay or not.[1]

If *possession* or *title* has been clearly transferred, and it's clear that such transfer is not a gift, then the default *status* of the transfer is that it's a debt that must be repaid, or a *bailment* that the *bailee* must return to the *bailor*. The default obligatory remedy/penalty is repayment or redelivery of the entrusted property. So under such circumstances, the penalty need not be spelled out in black and white. This is because the purpose of a **secular ecclesiastical court** is to resolve cases *equitably* (meaning with minimal damage to just claims to **property**), and doing so in such cases doesn't require the penalty to be spelled out, because it's obvious. But of course the transfer of **property** in the actor-owners case was not obvious.

Because of different priorities in **secular** versus **religious ecclesiastical courts**, they inevitably have different default remedies and penalties. As evident in the actor-owners case, **secular ecclesiastical courts** that follow the ***property-interest model*** might presume that **property** *interest* does not automatically transfer the instant a promise regarding such property is made. This allowance has to be made because the primary function of a **secular social compact** is to protect **primary** and **secondary property rights**, where protection of such **rights** is a function of the **global covenant**. This means that the primary function of a **secular ecclesiastical court** is to resolve *contract* disputes with minimal damage to just claims to such **primary** and **secondary property**.

In a **religious social compact**, the presumption of the **religious ecclesiastical court** may be that **property** *interest* transfers simultaneously with the making of the

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1 This is a quote of Lysander Spooner, **Poverty: Its Illegal Causes** (in Vol 5 of Charles Shively, ed., **The Collected Works of Lysander Spooner**, Weston, Mass: M S Press, 1971). The quote appears in "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

promises. If such an assumption is not made, the promises that create the **religious social compact** may carry no weight. For example, suppose a new member joins a **religious** community, and at the time of joining enters into a *contract* with the rest of the community. The new member promises to abide by the community's moral code, which he knows includes a high regard for sexual purity. He knows that this **religious social compact** has not established any explicit penalties specifically for fornication. But he also knows that the maximum penalty for non-**delictual** violation of the moral code is expulsion from the community and forfeiture of ***land*** in the community that's owned by the violator. He also knows at the time of joining that violations of the moral code are tried by the **religious social compact**'s **ecclesiastical court**, which consists of a board of elders. After promising to abide by the moral code, this new member fornicates with his sheep while, unbeknownst to him, his neighbor watches. He goes before the board of elders and the case is treated as a non-performance claim under a *bilateral contract*, the *plaintiff* being the people of this **religious** community and the *defendant* being this new member. The court finds in favor of the *plaintiff* and determines that the penalty is the maximum under their **social compact**.

This case begs the question: Under the ***title-transfer model***, how could this community ever enforce their moral code when the ***title-transfer model*** requires more than a mere promise, and requires instead an actual transfer of *title*? The most obvious answer to this question is that the new member would transfer *absolute title* to his ***land*** to the **religious** community at the same time he promises to abide by the community's moral code. The most obvious objection to this arrangement is that it sounds a lot like Jim Jones/Jonestown-style communism – people handing over everything they own to the proletariat's dictator for the sake of participating in the community.

The ***title-transfer model*** may work fine in a **secular ecclesiastical court**. But it is deeply flawed in a **religious ecclesiastical court**. Here's a reasonable solution to this problem: **Secular ecclesiastical courts** exist to resolve *contract* disputes with minimal damage to just claims to **property**, under the **global covenant**'s definition of **property**. Because of this, the presumption in **secular ecclesiastical courts** must be that **property** *interests* are transferred only when it's clear and obvious that they are transferred. In contrast to this, **religious ecclesiastical courts** exist primarily to enforce the **religious** community's moral code on *parties* to the **religious social compact**. The *parties* are people who by definition have promised to abide by such moral code. Because of this totally different orientation under the **religious social compact**, the presumption in **religious ecclesiastical courts** must be that **property** *interests* transfer simultaneously with promises, and are limited by the substance of

the promise. — In the case of this fornicator, the **property** *interest* that he would transfer to the **religious** community at the time of his initial promise would look like this: "The ***land*** that I'm hereby purchasing in this community will remain mine as long as I choose to remain a member in good standing of this community, and as long as I do not violate this community's moral code so extremely that I am expelled from the community. I acknowledge that under the latter condition, I forfeit all claim to ownership of the ***land***, and the ***land*** will be sold to other members of the community."

Clearly promises must carry radically different weight under **religious** versus **secular social compacts**.

Focusing again on secular *contracts*: The *contract* between the actor and the theater owners was **secular**, meaning that by default under such *contract*, non-performance disputes are meant to be settled in a **secular ecclesiastical court**. Furthermore, under the ***property-interest model***, when the actor and the theater owners signed their *contract*, each *party* may have given **property** *interests* to the other *party* in exchange for the other's **property** *interest*. More specifically, the actor may have given the owners an *interest* in his ***labor*** as an actor. Likewise, the owners may have given the actor an *interest* in their ***land*** and ***labor***. When the actor didn't show up to perform, and the owners filed *suit* against him in a **secular** court to recover damages caused by the actor's non-performance, the court was presented with a problem: Does the court recognize the exchange of **property** *interests* or not? As shown above, the focus of a secular court must be on executing justice without perpetrating **delicts** in the process. This means that the contract's lack of articulated penalties tends to void the presumed exchange of **property** *interests*. The fact that it may be difficult to measure such **property** *interests* in pecuniary terms also tends to void the presumption of that exchange. There is at least one more important factor that tends to make the contract unenforceable in a **secular** court: As Rothbard puts it, "a man can alienate his labor service, but he cannot *sell* the capitalized future value of that service".[1] In effect, the actor is presuming to sell the capitalized future value of his service to the theater owners. According to Rothbard, the actor cannot do this because the actor would be thereby alienating his will. This is an act of selling oneself into slavery. According to **Cato's Letters**, one cannot alienate the liberty that God gives to every human, even by consent. But when taken to its rational limits, this belief would make marriage contracts unenforceable, along with all **religious social compacts**. That's why it's necessary to make a radical distinction between **secular social compacts** and **religious social compacts**, and

1 **The Ethics of Liberty**, Chapter 7, "Interpersonal Relations: Voluntary Exchange". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

between **secular ecclesiastical courts** and **religious ecclesiastical courts**. For the sake of keeping **secular** courts from perpetrating **delicts**, it's necessary to make this further concession to Rothbard's view. Within **secular** courts, it must be true that "a man can alienate his labor service, but he cannot *sell* the capitalized future value of that service". In the same way that a **secular** court cannot enter into adjudication of a case in which there is no tangible issue to be adjudicated, in which there is therefore no cause of *action*, it should not attempt to adjudicate a case in which the issues and alleged damages are too murky for a reliable judgment. Any **secular** court that ventures to pass judgment in such a case is a court cavalier about perpetrating **delicts** against *litigants*.

In contrast to both the ***property-interest model*** arising out of the ***hermeneutical prologue***, and Rothbard's ***title-transfer model***, jurists who only recognize the promise-expectation concept of *contract* enforcement will vacillate based on sentiments between assuming that *title*-transfer accompanies promise, as in a **religious social compact**, and that *title*-transfer does not accompany promise, as in a **secular social compact**. They may see that the actor made a promise to the owners, that the owners' expectations were not met, and that the actor therefore needed to compensate the owners. Or perhaps the actor will put on such a convincing show in court that the court will be swayed to be partial to the actor. Either way, a case like this is extremely error-prone. It becomes *fiat equity*. Such courts are breeding grounds for bribery and corruption. By assuming **jurisdiction** where there is none, such jurists expand the power of the state beyond its *lawful* boundaries. That's why it's necessary to agree with the following quotes, at least so long as they are assumed to be limited to **secular** courts:

> Rothbard: "mere promises or expectations cannot be enforceable, but only contracts that transfer property titles".[1] — Although it may seem a bit cosmetic, it's important to translate this into language compatible with the ***hermeneutical prologue***. So the proper expression here would be, … *only contracts that transfer titles [to* **property** *interests]*.
>
> Rothbard: "For the important question is always at stake: has title to alienable property been transferred, or has a mere promise been granted?"[2]

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1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

2 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

> Evers: "Why should the law enforce promises? Keeping one's promises may well be part of leading a good, morally correct life. But being considerate toward one's spouse is also morally excellent yet it is not a concern of the police. Keeping promises may enhance one's reputation. But that should be incentive enough to keep promises normally, without judicial involvement. If law enforcement is to take on the task of enhancing people's reputations, irrespective of their wishes, let this task be argued for directly. Many aspects of social life may well be facilitated, as Pound argues, by stability and predictability. But the marketplace can meet consumer demand in these areas. In some cases, insurance schemes may be used to pool risks. In other cases, performance bonds may be used to make erratic conduct costly. Both these marketplace remedies require only a legal approach treating contracts as transfers of title. Thus, despite Pound's eloquence, it is not immediately clear that courts and law enforcement agencies should hold people to their promises *per se*."[1]
>
> Evers: "It is not promising which is essential, Spooner noted, but rather the transfer of title to an alienable good. Such a title-transfer model for the law of contracts is an alternative to the expectations-oriented approach. Both the title-transfer model and the promised expectations model are more logically defensible and consistent than the present mixed content of the law of contracts."[2]
>
> Evers: "People cannot really have a property right to their expectations, which are mere subjective mental states. Neither should the law attempt to give them any such rights."[3]

Here's another of Rothbard's illustrative cases where Rothbard and the ***hermeneutical prologue*** reach similar conclusions, but for different reasons:

> Suppose that A promises to marry B; B proceeds to make wedding plans, incurring costs of preparing for the wedding. At the last minute, A changes his or her mind, thereby violating this alleged "contract." … Logically, the strict believer in the

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1 "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

2 "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

3 "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

> "promise" theory of contracts would have to reason as follows: A voluntarily promised B that he or she would marry the other, this set up the expectation of marriage in the other's mind; therefore this contract must be enforced. A must be forced to marry B.[1]

Rothbard is setting up a strawman here, because virtually no one in the **secular** arena in modern America would really conclude that "A must be forced to marry B". Rothbard admits that he's setting up a strawman in the next paragraph:

> As far as we know, no one has pushed the promise theory this far. Compulsory marriage is such a clear and evident form of involuntary slavery that no theorist, let alone any libertarian, has pushed the logic to this point. Clearly, liberty and compulsory slavery are totally incompatible, indeed are diametric opposites. But why not, if all promises must be enforceable contracts?[2]

It's safe to say that most legal scholars (especially these days) do not claim that "all promises must be enforceable contracts". Most rather claim that where promises exist and where there is real *consideration*, whatever that is, a *contract* exists. — On its face, it may appear that the sensible thing to do is to have the party that reneges reimburse the other party for at least half of the offended party's expenses. But this runs into the same guesswork as in the actor-owners case. It's better for a **secular** court to avoid running the high risk of turning the court into a perpetrator of **delicts**, thereby making the court no better than an agent of organized crime. If people in the **secular** arena want their *contracts* enforced in **secular** courts, then they need to explicitly indicate when **property**-*interest* titles transfer and what penalties and remedies run with such transfers, and they need to avoid attempting to sell capitalized future value of labor service. **Secular** courts, whose **subject-matter jurisdiction** is limited to **physical property**, have no business trying to read the minds of their *litigants*.

Rothbard:

> The old "breach of promise" suit forced the violator of his promise to pay damages to the promisee, to pay the expenses undergone because of the expectations incurred. But while this does not go as far as compulsory slavery, it is equally invalid. For there can be no property in someone's promises or expectations; these are only subjective states of mind, which do not involve transfer of title, and therefore do not involve implicit theft.

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1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

2 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

> They therefore should not be enforceable, and, in recent years, "breach of promise" suits, at least, have ceased to be upheld by the courts. The important point is that while enforcement of damages is scarcely as horrendous to the libertarian as compulsory enforcement of the promised service, it stems from the same invalid principle.[1]

It's necessary to agree that in a **secular** "breach of promise" suit, "enforcement of damages is scarcely as horrendous … as enforcement of the promised service". It's necessary to also agree that where no *interest* in **property** accompanies the promise, "enforcement of damages" and "enforcement of promised service" stem "from the same invalid principle", the invalid principle being that a promise with no transfer of **property** deserves enforcement. Such a promise deserves enforcement in neither **secular ecclesiastical courts** nor **religious ecclesiastical courts**. But as indicated above, the presumption in a **religious** court is prone to be towards **property** *interest* transferring with promise, while it is the opposite in a **secular** court. So it's necessary to agree that in a **secular** court, both promise and expectation are merely subjective mental states. But in a **religious** court, expectations are merely subjective mental states but promises are presumed to be more than mere mental states, because **property** *interests* are presumed to transfer with promises in such **religious** courts.

In a **secular** court, a promise is purely and only an expression of intent. It is merely a subjective mental state because intent is merely a subjective mental state. In a **religious** court, a promise is more than merely an expression of intent, and more than merely a subjective mental state. In all courts, an expectation is merely a subjective mental state. Mental states are necessary prerequisites to the formation of any *contract*, but mere subjective states of mind are absolutely inadequate to reliable *contract*-enforcement.

On top of these points of agreement with the ***title-transfer model***, the ***hermeneutical prologue*** must add the following: If the agreement to be married involved an explicit agreement regarding wedding expenses and preparations, then the agreement involved a real **property** *interest* in such ***land***-and-***labor***. But that doesn't make the *contract* enforceable in a **secular** court. If the *contract* contains explicit penalties and remedies for non-performance, then the *contract* is much more likely to be enforceable.

Property *interests* are no more subjective states of mind than *encumbrances* on *real property*. The *encumbrance* is a genuine **property** *interest* belonging to the encumbering *party*.

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1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

It's a good thing that "'breach of promise' suits … have ceased to be upheld by the courts". Breach of promise in a **secular** court is a moral issue, and largely in agreement with Rothbard, it's necessary to claim that moral issues that do not involve **physical property** should not be enforced in **secular** courts. However, if the *contract* involves transfer of a genuine **property** *interest*, i.e., *interest* in an economically valuable entity, then this definitely falls within the *lawful* purview of a **secular ecclesiastical court**.

It's necessary to further amend Rothbard's position like this: "The theory of contract enforcement should have had nothing to do with 'compensation'; its purpose should always be to enforce property rights, and to guard against the implicit theft of breaking contracts which transfer title to [**property** *interests* in] alienable property. Defense of property[-*interest*] titles and only such defense-is the business of enforcement agencies."[1] This statement is valid to the extent that such "enforcement agencies" are **secular**.

Property-Interest Model

It's important to remember that regarding *contracts*, the ***hermeneutical prologue***'s agreement with Rothbard extends only to **secular ecclesiastical courts**. **Religious ecclesiastical courts** have **subject-matter jurisdiction** over far more than mere **physical property**. Such **physical property** is within the scope of the **global covenant**, and is therefore potential **subject matter** of *lawful action* within **secular** courts, and **secular** courts are limited to such **subject matter**.

It must be assumed that when people voluntarily commit themselves to living in community with a group of people, where the purpose of the community is to honor and abide by a morality and set of doctrines that is alien to the **secular** community, they do so because they believe that they have greater freedom in such community and under such morality than they have elsewhere. Therefore, what may appear to be bondage to an outsider may in fact be freedom to an insider. If there is no *contract* between the insider and the outsider, then the outsider has no business imposing legal sanctions against the insider unless the insider arguably perpetrated **delicts** that are clearly and obviously violations of the **global** mandate against **delicts**. Then and only then can **secular** authorities cross the **jurisdictional** boundaries of that **religious social compact** in order to exercise *lawful police powers* over perpetrators of **delicts** within such **religious** community.

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1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

Even though the ***hermeneutical prologue*** and this memorandum don't claim that Bible-based **human law** is anywhere close to perfect or complete, they do claim that this ***property-interest model*** of *contracts* is a non-negotiable starting point for *contract adjudication* in the same way that the ***property-interest model*** of **secondary property** is a non-negotiable starting point for understanding **secondary property** in general.[1] Even with such certainty it's necessary to admit that evaluating damage in monetary terms can be difficult, and when a court finds such evaluation too difficult, prudence demands treating the case as outside the court's *lawful* **subject matter**. **Physically** verifiable damage to **physical property** is a prerequisite to resolution of any broken *contract* in the **secular** arena, and Rothbard's "theft" is certainly a form of damage. Even so, people have a right to bind themselves into *contracts* that have *terms* that specifically govern morality and commonly held doctrinal beliefs, as long as they don't expect a **secular** court to enforce those terms.

The ***property-interest model*** of *contracts* is applicable to all *contracts*. In the case of **religious social compacts** that are concerned largely with the maintenance of a particular moral code, any violation of that moral code by a *party* to the **social compact** would naturally go into their **ecclesiastical court**, on the grounds that everyone in the **religious social compact** has a *contractual* **property** *interest* in every other *party*'s behavior. The **religious ecclesiastical court** would naturally have *original jurisdiction*. But on some rare occasions it might be possible for a case based on a moral violation that is not overtly **delictual** to be appealed into a **secular ecclesiastical court**. The question then becomes: How could the **religious social compact** ever prove to a **secular ecclesiastical court** that the **religious social compact** has a **property** *interest* in non-**delictual** behavior? The **religious social compact** might prove this in a **secular** court by showing that they live under a living *restrictive covenant*, and that the offending *party* has violated the *restrictive covenant*, and that by doing so, the offending *party* has damaged the value of the community's **property** in the eyes of said community. Whether the offending *party*'s behavior is right or wrong would never be an issue in the **secular** court, only whether he did what the community says he did, and whether that's a violation of their *restrictive covenant*. Hard-core advocates of the ***title-transfer model*** may argue against this on the grounds that the promises that contribute to the formation of a *restrictive covenant* cannot alienate the will, the capacity to make unencumbered choices, by making promises about future behavior. Under such circumstances, they would be arguing that such promises about future behavior alienate the will, and cannot be enforced in **secular** courts. As long as **secular** courts are dominated by **secular**

1 Regarding the ***property-interest model*** of **secondary property**, see URL: ../../../Books/TIAJ/html/0_TIAJ/0_A_2_Am_V_(Free_Market).htm#PropertyInterestModel.

humanism and inchoate legal theories, as they are these days, it would be perilous for a **religious social compact** to grant **jurisdiction** to a **secular ecclesiastical** *appellate* court unless it is certain that the *law* and the *facts* are on its side. On the other hand, even if these inchoate legal theories didn't exist, and even if all the **secular ecclesiastical courts** were dominated by the ***title-transfer theory***, it would likely be fruitless for a **religious social compact** to appeal such a case into a **secular ecclesiastical court**.

Any claim by Murray Rothbard and company that such **religious** *contracts* are inherently unenforceable because each *party* grants **property** *interest* in future behavior to every other *party*, is inherently imposition of the **secular religion** onto people who have opted to live primarily under a **religious social compact**. Rothbard's theory of *contracts* certainly has legitimate value in the **secular** arena, in that it demands clear transfer of *title* before a *contract* is enforceable. But people who want to live among people who share their morals and worldview have a right to segregate themselves from **secular humanists** and others who have no regard for their moral code. The distinction between the **secular** and the **religious** is inherently dependent upon **jurisdiction**, more specifically, upon the combination of **geographical**, **personal**, and **subject-matter jurisdictions**.

So this ***property-interest model*** holds in both **secular ecclesiastical courts** and **religious ecclesiastical courts**. But the latter courts use definitions of property that are custom designed by their **social compact**. **Religious jural** courts would have the same definition of property as exists everywhere under the **global covenant**. If a dispute in a **religious ecclesiastical court** is somehow appealed into a **secular ecclesiastical court**, then one should expect that **secular** court to apply **secular** principles to resolve the *contract* dispute.

Conclusion: The "promise-expectations" theory may be fine as a theory of *contract* formation and definition, but it is absolutely inadequate as a basis for *contract* enforcement. The ***title-transfer model*** offers more *equitable contract* enforcement in the **secular** arena. The ***property-interest model*** is more likely to satisfy the *contract*-enforcement needs of both **secular** and **religious social compacts**. This is because, to a large extent, the ***property-interest model*** is the ***title-transfer model*** in **secular jurisdictions**, and is the promise-expectations model in **religious jurisdictions**.

Nuanced Ownership, Alienability, & Involuntary Servitude

In "Property Rights and the Theory of Contracts", Rothbard says,

> Another important point: in our title-transfer model, a person should be able to sell *not only* the full title of ownership to property, but also part of that property, retaining the rest for himself or others to whom he grants or sells that part of the title. Thus, … valid and enforceable would be restrictive covenants to property in which, for example, a developer sells all the rights to a house and land to a purchaser, *except* for the right to build a house over a certain height or of other than a certain design. The only proviso is that there must, at every time, be *some* existing owner or owners of *all* the rights to any given property. … If the reserved right has been abandoned, and no existing person possesses it, then the owner of the house may be considered to have "homesteaded" this right, and can then go ahead and build the tall building. Covenants and other restrictions, in short, cannot simply "run with the property" forever, thereby overriding the wishes of *all* living owners of that property.
>
> This proviso rules out *entail* as an enforceable right. Under entail, a property owner could bequeath this land to his sons and grandsons, with the proviso that *no future* owner could sell the land outside the family (a deed typical of feudalism). But this would mean that the living owners *could not* sell the property; they would be governed by the dead hand of the past. But *all* rights to any property must be in the hands of living, existing persons. It might be considered a moral requirement for the descendants to keep the land in the family, but it cannot properly be considered a legal obligation. Property rights must only be accorded to and can only be enjoyed by the living.[1]

Rothbard makes two important points in this excerpt. The first and more obvious is that **property** can be the object of multiple *interests* that are divided among multiple *parties*. The second point is that he marks a serious problem in existing *real estate* law that is *owned* or *encumbered* by multiple *parties*, specifically, that such *real property* can sometimes be "governed by the dead hand of the past". Rothbard is right to criticize *encumbrances* and restrictions that "run with the property". "Covenants and other restrictions … [that] 'run with the property' forever, thereby overriding the wishes of *all* living owners of that property", are a remnant of *feudalism* that

1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

deserves immediate abandonment. Allowing "the dead hand of the past" to *encumber* **property** is insane.

This passage from Rothbard's **Ethics** also shows that *restrictive covenants* can be compatible with his ***title-transfer theory***. As long as they don't contain terms that are promises about future behavior that are unenforceable because they alienate the will, and as long as they run with the owners and not with the property, they should be allowable within **secular ecclesiastical courts**.

Geographical Jurisdictions of Ecclesiastical Courts

In a **religious social compact** this "dead hand" problem could be easily avoided, even though the **compact** would be designed to have a perpetual existence. The reason it could be avoided is because the **religious social compact** would presume certain things about the nature of ***land*** *ownership*. First, the **religious social compact** would presume that no *lawful* government was capable of having *dominion* over ***land***. **Secular social compacts**, being *lawful* governments, would claim **geographical jurisdiction** over all their territory, but their **subject-matter jurisdiction** would be limited primarily to enforcement against **delicts** because it would be limited primarily to **jural subject matter**.[1] Furthermore, the **religious social compact** would presume that no *lawful* **secular social compact** would have *original jurisdiction* over **delicts** perpetrated within the **religious social compact**'s **geographical jurisdiction**, because the **religious social compact**'s **jural society** would have such *original jurisdiction*. So there would be no inherent restrictions imposed on a **religious social compact**'s ***land*** from outside the **compact**. Restrictions on ***land*** use imposed from within the **religious** community would be imposed based on **consent**, by way of whatever **consensual** mechanisms were built into the **compact**. In short, **religious social compacts** might be considered to be *restrictive covenants*, but the restrictions would run with such **compact**, not with the ***land***. The restrictions would be part of the **subject-matter jurisdiction** of the **religious social compact**, and would apply to the ***land*** only so long as the **religious social compact** or one of its individual human *parties owned* the ***land***. All the ***land***

1 Of course their **subject-matter jurisdiction** would also be limited to the **subject-matter jurisdiction** of **secular ecclesiastical courts**. But such courts would have no general **subject-matter jurisdiction** over anything, and would be limited by the *terms* of whatever *contract* was at issue in the court. — For more about the contrast between *dominion* and the *lawful* **geographical jurisdiction** of a **secular social compact**, see Porter's TIAJ, 5th Amendment: Original Intent (URL: ../../../Books/TIAJ/html/0_TIAJ/0_A_1_Am_V_(Original_Intent).htm).

rights associated with *absolute ownership* of the ***land*** would be distributed within the **religious social compact** in whatever way the **compact** chose, by whatever decision-making mechanisms were built into the **compact**'s organizational structure. If all the people in a **religious social compact** died or abandoned the **social compact**, excepting one person, then the ***land*** rights associated with *absolute ownership* of whatever ***land*** was left would default to being the **property** of this one person. If this one person sold whatever ***land*** was left, then, since this person had *absolute ownership*, the restrictions on the use of the ***land*** would be defined in the new *conveyance*, and would not be dictated by "the dead hand of the past".[1]

When **religious social compacts** own *real property*, and if they put restrictions into the *covenant* that governs that property, it's reasonable to assume that there would be conditions built into the **social compact** for the **compact** to be amended, and thereby the restrictions in the *covenant* to be amended. — The living owners of *real property* who happen to live on *property* that is governed by the *covenant* of such a **religious social compact** would be assumed to be *party* to the **compact**, or tenants of *parties* to the **compact**. But if the owners have *absolute title* short by whatever *encumbrances* the **social compact** imposes, then the transferability of that *property* would be limited by that **religious social compact**. The "living owner" would not be "governed by the dead hand of the past". He would be governed by the living hand of the present, namely, the **religious** government of the **religious social compact**, where such government is defined by whatever rules have been set up to rule those *party* to the **compact**, where such rules are the practical implementation of that community's **religion** and moral code.

So, when Rothbard says, "all rights to any property must be in the hands of living, existing persons", he is right. But when he says, "It might be considered a moral requirement for descendants to keep the land in the family [(or in the **religious social compact**)], but it cannot properly be considered a legal obligation", he's right, and he's wrong. He's right in this: It's certainly true that it "might be considered a moral requirement". Mere moral obligations are outside the *lawful* **subject matter jurisdiction** of **secular social compacts**; so Rothbard is right in saying that keeping "the land in the family [(or the **religious social compact**)] … cannot properly be considered a legal obligation", when he has **secular** laws in mind. He's wrong in this: Rothbard is wrong to claim that a moral obligation that pertains to land ownership "cannot properly be considered a legal obligation" when he applies his

1 Under the present essentially *feudal* conception of ***land*** *ownership*, *absolute ownership* is the exception rather than the rule. It's unlikely that there will be a shift from the present state of bondage into a completely non-*feudal* concept of ***land*** unless people stubbornly and persistently challenge existing laws in existing courts.

claim to **religious social compacts**. All *parties* to the **religious social compact** have a **property** *interest* in the land under consideration. They have **property rights** that cannot be ignored. So under such circumstances, "a moral requirement" can certainly and "properly be considered a legal obligation". — In acknowledging that Rothbard has a legitimate grievance, it's evident that he is rightly pointing out how inappropriate *feudal* land concepts (like entail) are these days. Even if he's wrong in saying that keeping "the land in the [**religious social compact**] … cannot properly be considered a legal obligation", he's right in pointing out how backward existing land laws are.

The relationship between **religious social compacts** and **secular social compacts** is comparable to the relationship defined by the 10th Amendment. Powers not explicitly given to **secular social compacts** are reserved to **religious social compacts** and to individual people. This especially includes ***land*** *ownership*. *Lawful* **secular social compacts** can never impose *zoning*, building permit requirements, property taxes, or any other kind of *encumbrance* on ***land*** without immediately becoming *unlawful*. *Encumbrances* run with *lawful* ***land*** *owners*. ***Land*** *ownership* by **secular social compacts** is severely restricted by the **subject matter** of such **compacts**.[1] So *encumbrances* and ***land*** *ownership* are generally "reserved to … the people", and to the **religious social compacts** and subsidiary **secular social compacts** (not States) they construct.

Alienation in General

Even though *interests* in ***land*** shared by multiple owners may be complex in implementation, conceptually it's fairly simple. In contrast, multiple *interests* in a single human being's ***labor*** is not so simple. This is because unlike ***land***, ***labor*** is directly connected to the human's body and will, i.e., with **natural rights**, **primary property**, and the ability to choose.

In general, **natural rights** cannot be **alienated**. But the fact that people can surrender their **natural rights** by perpetrating **delicts** shows that the claim in the **Declaration of Independence** might not be as absolute as some people assume it to be. It says, "all men … are endowed by their Creator with certain unalienable Rights". But the *framers*, along with most natural rights theorists, acknowledge that murderers generally surrender their **right** to stay alive and free by committing murder. This clearly demands an understanding about how **natural rights** can be **alienated**, if, indeed, it's even right to claim that they can be **alienated**.

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1 For more about such restrictions, see Porter, TIAJ, 5th Amendment: Original Intent. — URL: ../../../Books/TIAJ/html/0_TIAJ/0_A_1_Am_V_(Original_Intent).htm.

In general, **secondary property** is **alienable** while **primary property** is not. As it's defined in Porter's ***hermeneutical prologue***, **primary property** is essentially ownership of one's body. It thereby certainly includes ownership of one's ability to choose. This claim about the *inalienability* of **primary property** is obvious because, if one completely **alienated** his body, then he would surrender not only *title* and *ownership*, but also *possession*. If one ceased to possess one's body, then one would cease to be alive. It's clear that there are degrees of **alienation**. A slave who is compliant and who acquiesces to his slavery is a human being who has abandoned his claim to self-*title* and self-*ownership*, even though it's impossible for him to utterly abandon self-*possession*, except by death. — This situation demands explanations of the parameters and subtlety of **alienability** of **primary property** before either accepting or rejecting the ***title-transfer model***'s claims about the limits on the *alienability* of promised ***labor***.

In "Interpersonal Relations: Voluntary Exchange", Rothbard says the following:

> In the free society … all ownership reduces ultimately back to each man's naturally given ownership over himself, *and* of the land resources that man transforms and brings into production. The *free market* is a society of voluntary and consequently mutually beneficial exchanges of ownership titles between specialized producers. It has often been charged that this market economy rests on the wicked doctrine that labor "is treated as a commodity." But the natural fact is that labor service is indeed a commodity, for as in the case of tangible property, one's own labor service *can* be alienated and exchanged for other goods and services. A person's labor service is alienable, but his *will* is not. … The distinction between a man's alienable labor service and his inalienable will may be further explained: a man can alienate his labor service, but he cannot *sell* the capitalized future value of that service. In short, he cannot, in nature, sell himself into slavery and have this sale enforced–for this would mean that his future will over his own person was being surrendered in advance. In short, a man can naturally expend his labor currently for someone else's benefit, but he cannot transfer himself, even if he wished, into another man's permanent capital good. For he cannot rid himself of his own will, which may change in future years and repudiate the current arrangement. The concept of "voluntary slavery" is indeed a contradictory one, for so long as a laborer remains totally subservient to his master's will voluntarily, he is not yet a slave since his submission is voluntary; whereas, if

> he later changed his mind and the master enforced his slavery by violence, the slavery would not then be voluntary.[1]

Even though Rothbard admits that ***labor*** is *alienable*, it's his opinion that "a man … cannot *sell* the capitalized future value of that service". By taking this position, the ***title-transfer model*** essentially makes all *contracts* for future ***labor*** unenforceable. As Rothbard said, "[T]here can be no property in someone's promises or expectations; these are only subjective states of mind which do not involve transfer of title".[2] — It's necessary to agree that expectations are merely subjective states of mind. But it's also necessary to claim that promises may at times be immediately attached to **property** *interests*, where such **property** *interests* constitute *lawful* claims of *ownership*, and are therefore as objective as *encumbrances* on ***land***. The presumption in **secular ecclesiastical courts** is necessarily that **property** *interests* do not cohabit promises. The presumption in **religious ecclesiastical courts** must be that **property** *interests* do cohabit promises. Even though these are preliminary findings, it's necessary to explore more thoroughly the possibilities that, (i)a strictly written **secular** *contract* might constrain **property** *interests* to cohabitation of promises, and (ii) **property** *interests* might not cohabit promises in a **religious ecclesiastical court**, given a strictly written *contract*. — It's absolutely critical to understand the connection between promises of future ***labor*** and **property** *interests*.

As a preliminary to proceeding to examine such issues relative to **status**, it should help to examine more thoroughly the subtle limits on the *inalienability* of **primary property**. — If it's claimed that the human body and will are *inalienable* in *title*, *ownership*, and *possession*, then what happens when a man goes into a barbershop and has part of his *inalienable* body cut off to be left on the floor as refuse? Here's a more interesting case: Suppose a laboratory offers a man a million dollars if the man will surrender his left hand to the laboratory. Or here's a similar case: Suppose person A, a kidney dialysis patient, *contracts* with person B to allow doctor C to extract one of B's kidneys so that it can replace one of A's failed kidneys. — In each of these three cases, part of the human body is **alienated**. Rothbard and company claim that the human body is *inalienable*.

> [T]here are certain vital things which, in natural fact and in the nature of man, are inalienable, i.e., they cannot in fact be alienated, even voluntarily. Specifically, a person cannot alienate his *will,* more particularly his control over his own mind and

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1 **The Ethics of Liberty**, Chapter 7, "Interpersonal Relations: Voluntary Exchange". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

2 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

> body. Each man has control over his own mind and body. Each man has control over his own will and person, and he is, if you wish, 'stuck' with that inherent and inalienable ownership. Since his will and control over his own person are inalienable, then so also are his rights to control that person and will.[1]

It's clear that there are three components to the human being that Rothbard is addressing here: (i)the body, (ii)the mind, and (iii)the will. The context also makes it clear that by "person", Rothbard means the combination of mind and body, in juxtaposition to the will. In spite of his fervent speech regarding the will, he never really gives a rigorous definition of it. The ***hermeneutical prologue*** and this memorandum do. The human will is nothing more and nothing less than the ability to choose. Under some circumstances, the human capacity to choose is naturally limited, and to the extent that it's limited, it can be said to be **alienated**. For example, infants have extremely limited capacities to choose. The same is true of people with mental and physical disabilities. These can be said to be natural disabilities to the extent that they arise without any intervention or aggression on the part of any other human being. But they are nonetheless disabling, and implicit in such natural disabilities is some degree of **alienation** of the will, because disabilities diminish the given person's range of choices. So when Rothbard and company claim that "Each man has control over his own mind and body … [and] over his own will and person", such "control" is far more limited than these secular libertarians may admit. Every adult person certainly has responsibility and accountability "over his own will and person", but these are not equivalent to control. No human has complete control over his/her will and body, evidenced by the fact that all people are vulnerable to disease and death. Although Rothbard's zeal for protecting human liberty is admirable, the limitations on the human mind, body, and will are not as negligible as he makes it seem. In fact, even the fittest of what the ***hermeneutical prologue*** calls "miniature sovereigns" have natural disabilities, evidenced by the fact that all humans are finite in time and space, even if they live eternally into the future. All these things are manifestly true without even entertaining the possibility that mind, body, and will can be wholly or partially destroyed by other humans. When this latter possibility is entertained, it's necessary to ask the question: How, when, where, under what circumstances, is **alienability** of the human mind and body *lawful*, and how does one draw the line between *lawful* **alienation** of the human mind and body, and *unlawful* **alienation**? Furthermore: How, when, where, under what circumstances, is **alienability** of the human will *lawful*, if it is, and if it is, how does one draw the line between *lawful* **alienability** of the human will and *unlawful*?

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1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". URL: http://www.mises.org/rothbard/ethics/ethics.asp.

If someone sneaks up on someone else and clips a lock of hair off the target's head, that would be *assault*, theft, and a **delict**. But if the same target goes to the barbershop to get a trim, the target enters into an *implied contract* with the barber. The barber does something similar to what the thief did. But instead of filing criminal charges against the barber, the target pays and tips him. Clearly self-*ownership* of the human body is not *inalienable* in any absolute sense. In fact, death is the ultimate act of **alienation** of the target's body. — If someone sneaks up on someone else and sticks a knife in the target's heart, that would be the ultimate **delict** against the target. The target is hereby involuntarily **alienated** from his body. If the same target goes into some specialized shop and says, "I'll pay you to kill me.", that person would be proposing an *unconscionable contract*, because *contracts* never excuse **delicts**.[1] The target would be asking the shop to perpetrate a **delict**. The target would be trying to "put out a contract" on himself. No one can *lawfully* have *license* to perpetrate a **delict** or enter a *contract* to damage someone else. If the target goes into the same shop and says, "sell me some of that stuff so I can go kill myself", and if the shop owner sells the stuff to the target and the target uses it to commit suicide, neither the target nor the shop owner has committed a **delict** or entered an *unconscionable contract*. This is because suicide is not a **delict**. Suicide is certainly hideously immoral, and should be treated that way by whatever **religious social compact** agrees that it's hideously immoral. But it's not the duty of **secular** government to enforce morality, *per se*, but rather to enforce that subset of morality that constitutes laws against violations against **primary** and **secondary property**, i.e., to enforce the **secular religion**. In the name of self-*ownership*, the target gets to kill himself, i.e., to utterly **alienate** and dis-*possess* himself from his body. The shop owner might refuse to sell the stuff on moral grounds, and he would certainly be within his rights to do so. But if he sells the target the stuff, even with the knowledge that the target intends to permanently **alienate** his body from himself, this is not a **delict**, and is not the business of any **secular social compact**.[2]

Clearly, within the **secular** arena, the degree to which a person **alienates** himself from his body is no one else's business. If a man cuts his own hair, that's no reason

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1 *Actions ex contractu* are merely *actions* aimed at remedying damages that arise out of *contracts*. Nevertheless it's crucial to maintain the distinction between damages that arise out of *contracts* from **delicts** that do not arise out of *contracts*. Such distinction is the basis for the distinction between the **jural society** and the **ecclesiastical society**, a distinction that is essential because of the differences in **in personam jurisdiction**.

2 See Porter, TIAJ, Article III § 2 Clause 1 (Unconscionable Contracts) / suicide. — URL: ../../../Books/TIAJ/html/0_TIAJ/0_4_1_0_1_Art_III_Sec_2_Cl_1_(Uncon_Con).htm#Suicide.

for **secular** law enforcement to get involved. If a man cuts his hand off to sell it to a laboratory, ditto. If a man gives or sells a kidney, ditto. If a man kills himself, ditto. These are all instances of self-**alienation**. Some are harmless. Some are not. In no case of self-**alienation** is such self-**alienation** a *lawful* cause for any *action* **ex delicto**. But the degree to which and manner in which other people get involved in the target's **alienation** of his body determines the extent to which other people become *party* to *unconscionable contracts* and/or perpetrators of **delicts**.

Actions **ex delicto** are relatively simple. One *party* damages another and there is no private agreement governing the damage. But damage arising out of a *contract* is different. The *parties* exchange promises for their mutual benefit. The promises create mutual obligations. When one *party* fails to perform his obligations, the other *party* is damaged by this failure. Now the question becomes this: Should the court treat this damage as nothing more than part of the risk of doing business, or part of the risk of being alive in an imperfect world? Or should the court treat this damage as penalizable under the *terms* of the *contract*? Rothbard says that if the non-performing *party* has not gained a **property** *interest* ("title") in the damaged *party*'s **property**, the damaged *party* has no case because the damage is merely a function of living in a risky and imperfect world. But he says that if the non-performing *party* has gained such a **property** *interest* ("title"), then the non-performer is a hyperbolic "thief". How does this formula apply to these various cases of **alienation**?

Rothbard claims that neither body nor will is **alienable**.[1] In contrast to this claim, this memorandum's claims above make it obvious that the body is **alienable**. Therefore, it's necessary to conclude that Rothbard must be speaking, in the same way the *framers* of the **Declaration** must have been speaking, of some ideal concept of **alienability** that somehow transcends these facts about haircuts, dismemberment, and death. It's probable that Rothbard and company were building their system with borrowed capital, where that capital was largely from the *framers*. It's also probable that the *framers* were also building their system with borrowed capital, where that capital came from the combination of 17th and 18th century *natural law* theorists and the Bible. Even if these system builders don't recognize it or acknowledge it, the

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1 "[T]here are certain vital things which, in natural fact and in the nature of man, are inalienable, i.e., they cannot in fact be alienated, even voluntarily. Specifically, a person cannot alienate his *will,* more particularly his control over his own mind and body. Each man has control over his own mind and body. Each man has control over his own will and person, and he is, if you wish, "stuck" with that inherent and inalienable ownership. Since his will and control over his own person are inalienable, then so also are his rights to control that person and will." — **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

ultimate source for all this borrowed capital is the Bible. But the *framers* have been much more conscious of, and respectful towards, the contents of the Bible than any of these other builders have been. That's probably one reason why the American system has been more successful than any of the others.

Under **natural law**, before the **fall**, it stands to reason that the human body was *inalienable*. Before the "law of sin and death" was activated (Romans 8:2; Genesis 2:16-17; James 1:15; etc.), **alienation** of the soul from the body was not a function of human existence. In that condition, the human body was *inalienable*, and **natural rights** were *inalienable*. Then that antelapsarian **status** of the human race was different from the race's modern status. Clearly, Scripture teaches about the degree of **alienability** of **natural rights**, of the human body, of the human will, etc. This memorandum therefore needs to recall what the ***hermeneutical prologue*** discovered about **status**.

The Hermeneutical Prologue's View of Status

Status is defined herein as ***one's legal relationship to God***. **Status** is defined by **natural rights**, **privileges**, and **disabilities**.

All humans are created with the same set of **natural rights**, and these **rights** come from being created in the image of God. **Natural rights** are a subset of the **natural law**, where the **natural law**, in this context, is primarily the moral law that defines the behavioral boundaries of the *imago Dei*, i.e., of the image of God in every human being. God gave the **natural law** and **natural rights** as *terms* of the **covenant of works**, the **Edenic Covenant**. Because all people continue to be created in the image of God, all people continue to have the same set of **natural rights**.

This behavioral boundary around the *imago Dei*, the **natural law**, also contains **natural disabilities**. These **natural disabilities** that derive directly from the **natural law** (more precisely, that are part of it) are limitations built into being human, limitations like these:

(i) No human is **omniscient**.

(ii) No human is **omnipotent**.

(iii) No human is **omnipresent**.

Such **globally** common **natural disabilities** are inherent in the **covenant of works** / **Edenic Covenant**. With the advent of the **covenant of grace** / **Adamic Covenant**, all humans received other **globally** common **natural disabilities**. When humanity entered a compact with Satan, God divinely imposed the **covenant of grace** as a set of appendments to the **natural law** that would allow humanity and the **natural law**

to continue to exist even though humanity had acquired a new set of **disabilities**. Some of the **natural disabilities** that were new with the **covenant of grace** were these:

(i) All humans sin.

(ii) All humans die, i.e., suffer **alienation** from their body.

(iii) All humans are vulnerable to **delicts** perpetrated by other humans.

With the advent of the **Noachian Covenant**, all humans received the last of their **globally** common **natural disabilities**, such as:

(i) All humans are morally obligated to avoid perpetrating **delicts**.

(ii) All humans are morally obligated to participate in the prosecution of behavior that destroys, to some extent, another person's life, regardless of whether such destruction happens **ex delicto** or **ex contractu**.

There are many **natural rights**, but the **natural rights** most relevant to **human law** are these:

(i) the just claim to one's **primary property**;

(ii) the capacity to own **secondary property**; and

(iii) the capacity to make *contractual* agreements with other people.

Before the **fall**, people were not vulnerable to having these just claims violated. After the **fall**, all people are generally vulnerable. Such vulnerability entails that all of the Rothbardian libertarian's seemingly absolute claims about the inalienability of body, mind, and will, are also vulnerable. In a perfect state of affairs, involuntary alienation of these would never exist. But in humanity's far-from-perfect circumstances, the extent to which one of these can be alienated is nowhere near as important as the extent to which any given society or person will tolerate involuntary alienation of body, mind, or will. Rothbard makes plausible claims about the inalienability of the will, based on pure logic. But the fact is that human choices can be manipulated by electromagnetic fields without the targeted person even knowing that it's happening.[1] So the will certainly can be alienated. The big question is, should it be?

The ***hermeneutical prologue*** distinguishes **natural rights** from **natural privileges** like this: **Natural rights** are capacities, just claims, or abilities that are given equally to all people. All people are equal in such **rights**. **Natural privileges** are capacities, just claims, or abilities that God gives to each person so that such things contribute to that person's uniqueness, thereby uniquely defining each

1 Porter, **Theodicy**, Part I, Chapter B, sub-chapter 2, "Evidence that the Mind Is Vulnerable to Brain Manipulation".

person. **Natural rights** are *inalienable* in the sense that any effort at **alienating** such **rights** is inherently an effort at making a human being less than a miniature sovereign. It's rational to believe that such **rights** are in fact *inalienable* in people who are able to keep the **natural law** perfectly. But people who aspire to keep the **natural law** – even though they know they are sinners who can keep it perfectly only through the imputed righteousness of Christ and never through their flesh-borne efforts – must necessarily acknowledge that such **rights** are in fact **alienable** in humanity's **fallen** condition. They must acknowledge that such **rights** must be protected by extraordinary means. In accordance with the chronological **exegesis** proposed and executed through the ***hermeneutical prologue***'s slightly modified Reformed hermeneutic, such extraordinary means are constituted by **jural societies**, **ecclesiastical societies**, **secular social compacts**, and **religious social compacts**.[1]

All people are equal in the **natural right** to own **property** and the **natural right** to form **consensual** agreements with other people. These two **rights** manifest differently in different human beings. For example, ownership of one's body is a **natural right** that must be recognized and honored by all human beings, but this ownership of one's body manifests as a **natural privilege**, a gift of God, that makes each human unique, because every body is unique.

The ***hermeneutical prologue*** recognizes two different kinds of **natural disabilities**: those that are common to all people, and in which all people are equal, and those that God gives uniquely to each person, thereby contributing to that person's uniqueness, and uniquely defining each person. All human beings have these **natural disabilities**: the inability to be **omniscient**, the inability to be **omnipotent**, and the inability to be **omnipresent**. God disabled all humans from having these capacities when He created the human race. These **disabilities** are therefore built into the human race, are innate, and are attributes of human nature. In contrast, He did not make all people male, or all people female. No one is completely enabled as both at the same time. Being male or female is an attribute that contributes to each person's uniqueness, and when one is male, one is **disabled** from being female, and vice versa. Likewise, when a person is localized in a specific space and time, no one else occupies that specific space and time, and other people are **disabled** from occupying that specific space and time, and that particular space and time therefore contributes to that person's uniqueness.

The **natural rights**, **natural privileges**, and **natural disabilities** that God gave to each human in the **covenant of works** / **Edenic Covenant**, i.e., at creation, are

1 See the ***hermeneutical prologue*** to see the **hermeneutics** used to reach these conclusions.

the core of every human being's **status**. Such core **status** relates directly to the **covenant of works** and **natural law**. The **covenant of grace** / **Adamic Covenant** also impacts every human being's **status**, but this impact cannot be properly understood without a proper understanding of the **fall**.

When the people ate the forbidden fruit, it was clearly an act of violating the **natural law**. The fact that the fruit was of the "tree of knowledge of good and evil" hints at what kind of violation it was. Human beings are **disabled** from being **omniscient** as part of the **covenant of works**. Even so, in order to live in obedience to the **natural law**, ***it's necessary for humans to know what they need to know when they need to know it, and to do what they need to do when they need to do it, so that they naturally avoid acting against natural law (sinning) in thought, word, and deed***. Deciding what actions are good and what actions are bad is a necessary prerequisite to being able to do what one needs to do when one needs to do it. Having knowledge about good and bad is a necessary prerequisite to making such decisions. So the act of choosing the forbidden fruit was either an act of trying to be **omniscient** when they were **disabled** from being **omniscient**, or it was an act of trying to procure knowledge that was irrelevant to the need to know what they needed to know and do what they needed to do to stay in harmony with the **natural law**. Either way, the people in the garden violated the **natural law**, which is sin, and received the necessary penalty, death. But rather than receiving immediate death, God divinely imposed appendments to the **Edenic Covenant** that would allow the people to propagate the race before dying (Genesis 2:16-17; 3:15-19). This set of appendments was the **Adamic Covenant**, also known as the **covenant of grace**. The **covenant of grace** allowed people to live short, toilsome lives, to propagate the race, and then to die. It's called the **covenant of grace** because it carries the promise of redemption from the law of sin and death for God's **elect** (Genesis 3:14-15; Romans 5-8). In the meantime, all people became **disabled** from being able to completely obey the **natural law**, and the entire race now exists in a state of relative depravity. The fact that all people die is proof that all people sin. The fact that all people sin is proof that all people exist in a state of being **disabled** from complete obedience to the **natural law**. It is a **natural disability** that is part of every human being's **status**.

In addition to the **disability** of being innately and inherently sinful – which is the same as the **disability** of not being able to keep the **natural law** completely, meaning that all humans live under the **natural law**'s penalty for violating the **natural law**, the penalty being the law of sin and death (Genesis 2:16-17; Romans 8:2; James 1:15; etc.) – the human race also has the **natural privilege** of existing

within God's plan of redemption. This **natural privilege** is also an aspect of every human being's **status**.

The historical narrative in Genesis 1-9 makes it clear that murder was a violation of **natural law** all along. This is obvious because, among other things, murder is **alienation** of something that should never be **alienated** (unless it's **alienated** as a sovereign act of God as opposed to **alienation** through a criminal act by human). But by way of the **Noachian Covenant**, God divinely imposed the need to translate this moral law against murder into **human law**. He puts this need to implement this moral law as **human law** into the fundamental makeup of every human being. He does this by establishing a human-imposed penalty for **bloodshed** as a *term* of this **global Covenant**. Since Genesis 9:6 **bloodshed** is metaphorical, and since a common-sense understanding of this metaphor is that it refers to any kind of destruction of another's life **ex delicto** or **ex contractu**, the subject matter of this divinely prescribed **human law** is such destruction. Human beings hereby become explicitly **disabled** from the possible option of being careless and reckless about **delictual** behavior and solemn contractual obligations. This **disability** regarding punishment of **delicts** and contract violations becomes part of every human being's **status**. It's clear that when a community of human beings conscientiously observes this **disability** with the intention of remedying it, the resulting **privilege** is life in a peaceful community.

After the **Noachian Covenant** there are no other **Covenants** in the Bible that have **global** **in personam jurisdiction**. There are therefore no other **globally** imposed **natural disabilities** and **natural privileges**. All **natural disabilities** and **natural privileges** that any given human being has, that do not derive from these three **Biblical Covenants**, are **privileges** and **disabilities** that God gives to some people, but not to all. Saying that some **privileges** and **disabilities** are **natural**, means that God gives them without regard to human choice. For example, if God has given someone the **natural privilege** of having blue eyes, He has given that person the **natural disability** of not being endowed with brown eyes. Such a **natural disability** is not **global** because other people are endowed with brown eyes, green eyes, etc.

In addition to **natural privileges** and **disabilities**, people also have **conventional privileges** and **disabilities**. For example, people who have "repetitive motion syndrome" (rms) don't have this **disability** because God **naturally** endowed them with it regardless of their will, their choice. On the contrary, they chose to do the same set of motions iteratively. So they acquired the **disability** by **convention**, rather than **naturally**. It's certain that God is **sovereign**; so He is the ultimate cause of everything. In **natural rights**, **natural privileges**, and **natural disabilities**, God

does not use human volition as a secondary cause of the given **rights**, **privileges**, and **disabilities**. In **conventional privileges** and **disabilities**, God DOES use human volition as a secondary cause, and that volition carries moral accountability.

Conventional privileges and **disabilities** exist in two kinds: **contractual** and non-**contractual**. If the person with rms had a *contract* with an employer that stipulated that he/she would not get rms on the job, then the rms would be covered by the *contract* and would be a **contractual conventional disability**. But if he/she did not have such a *contract*, then even if the **disability** were acquired on the job, it would be a non-**contractual conventional disability**. Since *contracts* by definition should have *express* or *implied terms* that stipulate methods of enforcement, they are by definition within the realm of **human law**. Such *contracts* are thereby attributes of a given person's *status*.

Status (as distinguished from **status**) is one's legal relationship with the rest of society, in the **human-law** sense of the word "legal". In the same way that **human law** is a subset of **divine law**,[1] which is a subset of **natural law**, which is a subset of **eternal law**; *status* is a subset of **status**.[2] *Status* is a set of attributes that contribute to the given person's **status**.

Alienability of the Will

It's obvious that ***labor*** is *alienable*. If it weren't, it would be impossible for wage earners and hourly workers to trade their ***labor***. The *alienation* of ***labor*** becomes a problem in *contract adjudication* when a person makes a promise about what he/she is going to do in the future. Rothbard believes that any promise concerning *alienable* ***labor*** is unenforceable because it is a promise with respect to the "inalienable will". In other words, Rothbard assumes that the will, the human ability to choose, is *inalienable*, and that this *inalienability* extends to promises about one's ***labor***. This memorandum has already argued that **religious social compacts** allow enforcement of promises even though such promises are considered unenforceable "naked promises"[3] under **secular social compacts**. To support this argument, it's now necessary to examine the basis of Rothbard's claim that all promises of future

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1 **Secular humanists** and others may dismiss the existence of **divine law**, but that doesn't *discharge* any obligations inherent in **global human law** prescribed by the **divine law**.

2 For more about the relationships between the four overarching sets of laws, see the ***hermeneutical prologue***.

3 *naked promise* — "One given without consideration, equivalent, or reciprocal obligation, and for that reason not enforceable at law." — **Black's 5th**, p. 1092.

behavior that are not accompanied by a transfer of *title* to **physical property** are unenforceable. In short, the question is this: To what degree, and under what circumstances, is a promise of future behavior enforceable? This question sets the scope of the problem. After examining **status** and how *status* relates to **status**, the question should be easier to answer.

Now that it's recognized that the **alienability** spoken of by Rothbard and the *framers* pertains to an ideal standard, a standard established by **natural law** and, in the case of the *framers*, a standard based on the fact that all people have the *imago Dei*, this memorandum will consider **alienability** of the will. At issue are the boundaries between "a man's alienable labor service and his inalienable will", which is the basis for Rothbard's axiom: "[A] man can alienate his labor service, but he cannot *sell* the capitalized future value of that service".[1]

When Rothbard says,

> [A] man can naturally expend his labor currently for someone else's benefit, but he cannot transfer himself, even if he wished, into another man's permanent capital good. For he cannot rid himself of his own will, which may change in future years and repudiate the current arrangement.[2]

the first thing to ask in response is this: *So where's the damage?* When a man pledges himself to future ***labor***, and then changes his mind, and the other *party* tries to enforce the agreement, then there would be damage by way of the enforcement. But until the master in this "slave contract" attempts to enforce the *contract* against the will of the slave, and as long as the slave is performing voluntarily, there is no damage. "[V]oluntary slavery" is an oxymoron. There is no such thing because slavery is by definition involuntary. When a slave acquiesces under *duress*, that acquiescence is not **consent**, and it's not voluntary, because it is *coerced*. But as long as a slave is working without *duress*, without *coercion*, without *extortion*, and without *fraud*, the slave is not really a slave.

The same basic reasoning applies to a *contract* for future ***labor***. There is absolutely nothing wrong with a *contract* for future ***labor*** as long as it remains completely voluntary. If there is no *duress*, *coercion*, etc., then a **jural** court has no innate **jurisdiction**. As long as the ***labor*** is completely voluntary, neither **jural** nor **ecclesiastical secular** courts have **jurisdiction** because there is no damage. If the ***labor*** becomes involuntary, then a **secular ecclesiastical court** would treat the

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1 **The Ethics of Liberty**, Chapter 7, "Interpersonal Relations: Voluntary Exchange". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

2 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

contract as an *unconscionable contract*. As soon as the ***labor*** became involuntary, a **jural** court would have **subject-matter jurisdiction** because the *contract* would be nullified by its *unconscionability*. This means that Rothbard and the ***title-transfer model*** are essentially correct under a **secular social compact**: "[A] man can alienate his labor service, but he cannot *sell* the capitalized future value of that service."[1] The situation for a **jural society** under a **religious social compact** would be essentially the same. But the situation under a **religious ecclesiastical society** is more complex and demands examination of the parameters of the human will's *inalienability*.

If a man simultaneously joins a **religious social compact**, vows to abide by the **compact**'s moral code, and buys ***land*** within the **geographical jurisdiction** of that **compact**, then the man has entered a *contract* to **alienate** his will, according to Rothbard, because "his future will over his own person was being surrendered in advance".[2] Under Rothbard's hyperbolic definition of slavery, a *contract* to avoid behaving in a certain way in the future is as much attempted **alienation** of the will ("slavery") as a *contract* to perform some future ***labor***. According to Rothbard's line of reasoning, if there is no *title*-transfer, a promise to not do something in the future is as much "slavery" and "alienation of the will" as a promise to do something. — Again, it's necessary to ask, where and when did the damage arise?

In the above fornication case, the new member of the **religious** community made an *unconscionable contract* under Rothbardian *jurisprudence* by making a promise regarding his future behavior. ***Land*** forfeiture and exile from the community were the penalty for breaking his promise. This was an absolutely rotten *contract* according to Rothbard, but it was a *lawful contract* and a *lawful* decision of a **religious ecclesiastical court** according to the ***property-interest model*** of contracts. That *contract* was *lawful* because the linkage between present will and future behavior is not as strong as Rothbard and Evers claim. Also, the **religious ecclesiastical court**'s decision was *equitable* because the penalty did not involve anything *inalienable* in law.

(i)Linkage between present will and future behavior: Similar to the way the human body is **alienable**, the human will is **alienable**. Under obedience to the **covenant of works** and its **natural law**, neither body nor will is **alienable** at all because both are intimately and directly connected to being created in the image of

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1 The old distinction between "cannot" sell and "may not" sell applies here. In fact, a man CAN "sell the capitalized future value" of his labor because there's nothing to stop him if he's got a buyer. But the sale cannot be *lawfully* enforced in a **secular ecclesiastical court**.

2 **The Ethics of Liberty**, Chapter 7, "Interpersonal Relations: Voluntary Exchange". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

God. But under the "law of sin and death" (Romans 8:2; Genesis 2:16-17; James 1:15; etc.) that is the penalty clause of the **covenant of works**, both become **alienable** in *fact*. Both remain *inalienable* in *law*, but both become **alienable** in *fact*. They remain *inalienable* in *law* because humans remain image-bearers. Humans continue even after the **fall** and after the **deluge** to have the *imago Dei* (Genesis 9:6; James 3:9). The moral law for humans remains the same, i.e., the human body and will remain *inalienable* under the **natural law**. In other words, if humans ignore the fact that the human race is under the curse, i.e., that humans exist under the penalty clause of the **natural law** that was implemented in the **covenant of grace**, the human body and will are *inalienable* in both *law* and *fact*. But ignoring the curse does nothing to make it go away. All people sin. All people die. All people are vulnerable to God, nature, and mankind, in their bodies, in their minds, and in their wills. Body, mind, and will are **alienable** in *fact*, even if not in *law*. Under the **human law** prescribed by the **Noachian Covenant**, body, mind, and will are not involuntarily **alienable** in *law*. But the Genesis 9:6 mandate against destruction of life by one against another is a partial and fallible remedy to human **alienability**-in-*fact*. The **global** mandate against destruction of life by one against another essentially mandates conversion of the **natural law**'s posture of *inalienability* of body, mind, and will into **human law** enforcement of such *inalienability*, and the enforcement goes against **alienators**-in-*fact*. — This thus sketches the **status** of every human being relative to **alienability** of body, mind, and will.

If someone enters a *contract* by promising something, thereby expressing present intent, i.e., present will, regarding future behavior, one is essentially linking present will and future body. If there is an *implied* or *express* penalty in the *contract* for non-performance, then one is thereby binding oneself under **human law**. One is essentially saying that the **alienability**-in-*fact* that justly applies to perpetrators of **delicts** should apply to oneself if one breaks the *contract*, because through the given *contract*, one is acknowledging that one's non-performance will damage the other *party* to the *contract*. As already established, if genuine, Rothbardian, hyperbolic theft exists by way of such non-performance, then a **secular ecclesiastical court** is certainly justified in demanding that the situation be rectified. But if such theft does not exist, such a demand is not justified in the **secular** arena. On the other hand, if the promise pertains to behavior and only to behavior – where a **secular** court could not recognize **property** *interest* transfer while a **religious ecclesiastical court** could – the **property** *interest* transfer that the court recognizes is binding, i.e., the linkage between one's will, expressed in the *contract*, and one's future behavior, is binding as **religious human law**.

Given the **status** that all humans have in common, here's how **alienability**-in-*fact* / *inalienability*-in-*law* relate to *title*, *ownership*, and *possession*: All **natural rights** under the **natural law** are *inalienable*-in-*law*, including self-*ownership* (**primary property**), ability to choose (will), the ability to own **secondary property**, and the **right** to *contract*. All people have *title* to these things, meaning that all people are *entitled* to them. But *ownership* and *possession* are contingent because these things are not *inalienable*-in-*fact*. Human beings are conceived with *title* to these things, but are **disabled** from immediate *ownership* and *possession* of them. People who do not understand the **disabilities** of the **covenant of grace** assume that they will naturally grow into complete *ownership* and *possession* of these things. But the **covenant of grace** makes clear that all people under the curse will die before they attain full *ownership* and *possession* of all the **natural rights** to which they are *entitled*.[1] Under the curse, the entire human race is **alienated**-in-*fact* from full self-*ownership* because the human ability to choose/human will is incapable of choosing in complete harmony with the **natural law** because, among other things, human perception is inherently corrupted. According to the Bible, these things are universally true, and it's also universally true that the only way to acquire full *ownership* and *possession* of these **natural rights** is to become fully obedient to the **natural law**, and the only way to become fully obedient to the **natural law** is for God to **sovereignly** extend **saving grace** by which the righteousness of Christ is forensically imputed so that the **saved** individual receives such full *ownership* and *possession* at the final judgment, i.e., at the resurrection of the dead. According to a reliable reading of the Christian Bible, this is the only means by which full *ownership* and *possession* are available. But of course this begs the question: How do such **Biblical laws** and **Biblical facts** relate to the *status* of any given human, and to enforcement of *contracts*?

Any given human being's *status* is necessarily dependent upon two different sets of **human laws**, **secular** laws (including *private* **secular** *contracts*) and **religious** laws. The **secular** laws that are *lawful* are based on the Genesis 9:6 negative and positive duties, and pertain strictly to **globally** recognizable **property**. The **religious** laws derive from whatever **religious social compact(s)** the given person participates in, if any. In a **secular ecclesiastical court**, a promise of future behavior cannot be counted as enforceable, not because the human will is *inalienable*, as Rothbard claims, but because the promise is irrelevant to *contract* enforcement if there is no transfer of **globally** recognizable **property**. In a **religious ecclesiastical court**, a promise of future behavior might be counted as enforceable, and it might not, depending on the nature of the **religious social compact**.

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1 Unless the curse is first lifted.

All people should be cautious about entering into *contracts*. Anyone who enters a *contract* that links present will and future behavior should not enter the *contract* unless there is some kind of escape clause. For example, in the fornication case, the new member should make sure, before entering the *contract*, that the *contract* allows him to resign from his *contract* and recoup his investment before indulging in risky behavior.

(ii)Penalty not involving anything inalienable-in-law: If the penalty in the fornicator case had been death, incarceration, dismemberment, or enslavement, then the penalty would have involved something *inalienable* in *law*, i.e., something that violates **natural rights** even though it might not violate natural *fact*. A *contract* like this would be *unconscionable* because it would entail the perpetration by the community of a **gross delict** against the fornicator. In other words, with penalties like these, the community would be putting itself at odds with both its own **jural society** and the **jural society** of the **secular social compact** to which it was *party*. — The fornicator made a promise about his future behavior, and he knew when he made the promise that the maximum penalty for breaking his promise was **alienation** of **secondary property**, i.e., the ***land***. Being **secondary property**, the ***land*** was *alienable* in both *law* and *fact*.

A promise is an expression of intent, not a guarantee of certainty. Such expressions of intent are essential to the stability of all communities, even though they are expressions of human wills that are **alienable** in *fact*. This new member backed his promise about his **alienable** behavior with *alienable surety*, his ***land***.

Given **fallen** conditions, a promise is merely a statement of intent. The promissor essentially says, "This is my choice, my will, and my intent today. My will may be something different tomorrow. In other words, tomorrow I may change my mind, thereby **alienating** my will one day from my will the next. So my will is **alienable** in *fact*, even though it is *inalienable* under **natural law**. Because it is **alienable** in *fact*, and because my entry into this *contract* is a function of my fallible choice, my will is **alienable** under the **human law** established by this *contract*, even though it is *inalienable* under **natural law**."

This fornicator case shows the distinction between *title*, *ownership*, and *possession* as it pertains to the **fallen**, **global** human will, i.e., as viewed from the **human law** perspective. By making a promise to the community regarding his future behavior, this new member was essentially *encumbering* his choices, his will. The will, the ability to choose, is no more **alienable** in *fact* than *possession* of the body is **alienable**. No one can utterly abandon *possession* of their body without dying. Likewise, no

one can abandon making choices without dying.[1] So this *encumbrance* is not in the nature of an **alienation** of *possession*. The man continues to be morally accountable for his choices, so such an *encumbrance* of the will cannot be in the nature of an **alienation** of *ownership* of his will. But it is clearly an **alienation** of a part of his *title* to his will. Mr. Fornicator is *entitling* the **religious** community to a **property** *interest* in his will, his choice. It's certainly true that the ability to choose cannot be **alienated** under **natural law**. But it's also true that giving someone else influence over one's will by giving them conditional *ownership* of some valuable **secondary property** is a choice that one can make that in no way **alienates** the ability to choose. That's what the new member did when he promised not to fornicate. He gave the community conditional *ownership* of his ***land***, with the original intention of not satisfying the condition. He knew that as long as he kept his word, his ***land*** would remain safely in his *possession*. He exercised his *inalienable* will (under **natural law**) by choosing risky behavior. He stepped into a trap of his own devise. There is no **alienation** of the will involved in this *contract*. There is only *alienation* of *alienable* **secondary property**.

Secular social compacts have no business enforcing morality in this way, because **secular social compacts** pertain only to damage to **primary** or **secondary property**. As already indicated,[2] if a case like this fornicator case were appealed into a **secular ecclesiastical court** from a **religious ecclesiastical court**, the **secular** court would be right to hear the case using its own definitions of **property**, damage, etc. Since it's a **secular** court, it would not be appropriate to use **religious** standards in its procedures. This means that it would never have *original jurisdiction* over a case like the fornicator case, because there would be no presumption of **property** *interest* transfer at the time the promise was made. A **secular ecclesiastical court** does not exist to enforce morality in general, but only to enforce the **secular religion** as it pertains to contracts. Promises about moral behavior therefore carry no *lawful* weight in **secular ecclesiastical courts**. There must be a very deliberate and explicit transfer of **property** *interest* to establish cohabitation of **property**-transfer and promise in **secular** courts, and the promise should not be merely in regards to obedience to a **religious** moral code.

Conclusion: Because the human will is not as *inalienable* as Rothbard claims it is, promises of future behavior are not always as *naked* as he claims.

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1 A person might abandon making choices while someone else feeds them and hydrates them intravenously. For most people, such an existence would be close enough to dying to be equivalent.

2 URL: #Appeal.

Other Acts of Self-Alienation

In addition to **alienation**-of-the-will-in-*fact* through *contracts* for future behavior, there are also situations where people essentially surrender (i.e., **alienate**-in-*fact*) at least some of their **natural rights** by putting them into *bailment*. For example, children are essentially in *bailment contracts* with their parents or guardians. Other people who lack *capacity*, like alzheimer's patients, the mentally ill, etc., essentially enter *bailment contracts* with their caretakers. In the **secular** arena, such *contracts* need to be explicit and rigorous.

Bible-believing people should readily see that there is a latent need in all people to join themselves to a **jural society**. Since history supplies ample evidence showing that **jural society**'s can easily become *unlawful*, there is ample evidence to show that people should participate in **jural societies** with extreme caution. Nevertheless, the Bible is clear: All people have an innate **covenantal** obligation to support the **jural society** in its primal purpose, but that moral obligation is not inherently **human law**. It becomes **human law** only when one voluntarily participates in the **jural society**.

Participation in the **Noachian Covenant** is not under *duress*, even though it is built in to every human being's **status**. It is God's **sovereign** right and power to do with His creatures whatever He wants. As the Westminster Confession of Faith puts it, "God from all eternity, did … ordain whatsoever comes to pass; yet so, as thereby neither is God the author of sin, nor is violence offered to the will of the creatures".[1] *Duress* is use of violence or threat of violence to persuade. God's influence on His creatures is far more subtle and thorough. Although God through moral suasion mandates that humans participate in **jural compacts**, **ecclesiastical compacts**, and **social compacts**, He does not use *duress* to force them to participate. Nor does He mandate in the positive duty clause that humans prosecute others who refuse to participate in such compacts or to pay taxes and **takings** related thereto.

The claim that citizens are automatically in *bailment contracts* with the State is basically a claim by ***statists*** that people are inept, and are obligated to align themselves with the *de facto* government more than they are obligated to protect their own and others' **natural rights**. Such a claim is a perversion of the **Noachian Covenant**'s prescription of **human law**, not a satisfaction of it.

1 Chapter III, i.

More Sample Cases

According to Williamson Evers,

> One can readily see that a suit for breach of promise of marriage or arresting people for desertion from the military are entirely consistent with the promised expectations model. But under the title-transfer model, promises of marriage would be naked promises …, employees of the military would be free to quit their jobs as other persons are, and divorce would be no-fault.[1]

It should be obvious by now that given a **secular** marriage, the basic premises of the ***title-transfer model*** would apply. This means that unless there are very explicit mitigating *terms*, their marriage *contract* would consist of *naked promises*. Under this scenario, the **property** *interest* that A owes to B, and vice versa, strictly in terms of their mutual promises to be married, is non-existent to any *lawful* **secular** court. Therefore the **secular** marriage *contract* is essentially unenforceable.

The Rothbard-Evers team makes a mistake when it comes to their claims about the military. The military is essentially a function of the **jural society**. The military is to external threats what the **jural** police are to internal threats. Like the **jural** police, the military of a **secular social compact** exists to execute justice against perpetrators of **delicts**. The difference between such **jural** police and such **jural** military is that the military focuses on large-scale foreign **delicts** while such police focus on smaller-scale domestic **delicts**. Under a *lawful* **jural society**, people who join either of these two forces must take an oath of office in the same way that all officers of the **jural society** must take an oath of office. The oath is essentially a *contractual* promise. Unlike promises in ordinary **secular** *contracts*, the *contractual* promises of **jural society** office-holders are essentially **religious**. The **religion** that the **jural society** exists to protect is the **secular religion**, i.e., the **religion** that demands the execution of justice against destruction of life **ex delicto** or **ex contractu**. As is evident in the motive clause of Genesis 9:6, this **secular religion** is based on the existence of the *imago Dei*. The existence of the *imago Dei* gives great worth to every human being, even to those who are doomed to an eternity in hell. Proof of the existence of such great worth cannot be induced from **physical** sense data or systems like the theory of evolution. It is a **religious** presupposition. That's why the oaths of **jural** office-holders are essentially **religious**. As such the **secular** presumption of separation of promise from **property** *interest* does not apply. Instead, courts must necessarily presume that in regard to such **jural** oaths, **property** *interest* cohabits

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1 "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

promise. This means that contrary to Evers' claim, "employees of the military would [**not**] be free to quit their jobs as other people are". Even so, it's important to stress in passing that this argument does not apply if the military service is compulsory, i.e., if the military employment *contract* was entered under *duress*.[1] *Duress* is still *lawful* grounds for voiding such a contract. On the same basic principle, forced taxation and takings are voided.

Here's another of Rothbard's interesting cases:

> Suppose that Smith makes the following agreement with the Jones Corporation: Smith, for the rest of his life, will obey all orders, under whatever conditions, that the Jones Corporation wishes to lay down. Now, in libertarian theory there is nothing to prevent Smith from making this agreement, and from serving the Jones Corporation and from obeying the latter's orders indefinitely. The problem comes when, at some later date, Smith changes his mind and decides to leave. Shall he be held to his former voluntary promise? Our contention-and one that is fortunately upheld under present law-is that Smith's promise was not a valid (i.e., not an enforceable) contract.[2]

Such a *contract* is rightly understood to be an *unconscionable contract*. The *unconscionability* becomes obvious the instant that Smith wants out. Before then, the *unconscionability* exists in latent form as threatened enforcement. Such *contracts* are *unconscionable* when **natural rights** are violated, i.e., when the will is influenced by *duress* or *coercion*, or a threat towards the same. If there are no penalties or threats of penalties, then this is an agreement that is inherently unenforceable. — Here's another way to look at a *contract* like this: This is a gift given by Smith to the Jones Corp. As long as Smith chooses to give his ***labor*** to the Jones Corp., this is not an *unconscionable contract*, but a gift. The instant that Smith chooses to NOT give his ***labor*** to the Jones Corp., the gift is terminated. If Jones Corp. refuses to acknowledge the new situation, the gift *contract* becomes *unconscionable*, and therefore not a *contract* in *fact*, but a **delict** perpetrated by Jones Corp.

Because this *contract* has no limits (i.e., "for the rest of his life"), because it stipulates no conditions under which Smith can escape the servitude, and because it is assumed to be a **secular** *contract*, it is a mere promise, and not a *contract* under **secular jurisdictions**.

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1 For more about ***compulsory military service***, see Porter, TIAJ, The Emperor's Parade of Horribles / The Draft. — URL: ../../../Books/TIAJ/html/0_TIAJ/0_8_6_Am_I_(Parade_of_Horr).htm#CompulsoryMilitarySrvc.

2 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

According to Evers,

> Rousseau argued trenchantly against the validity of a slave contract: When a man renounces his liberty he renounces his essential manhood, his rights, and even his duty as a human being.[1]

Fallen human beings have an innate inclination to enter into *contracts* whereby they enslave themselves to others. Humans do this for the sake of misperceived benefits and advantages (like largesse from the public coffers). This propensity to voluntary enslavement is what allows tyrants to build empires. The nature of Rousseau's system makes it clear that he did not have a solution to this problem. When the people tire of their bondage, they tend to go to the opposite extreme and refuse to be obligated to anyone. *Unconscionable contracts* are not *unconscionable* because one of the *parties* volunteers to be victimized. They are *unconscionable* because one of the *parties* volunteers to victimize.

Also according to Evers,

> An adequate title-transfer model must distinguish between alienable and inalienable goods. … Living human beings always are possessed of a will, and any attempt to deprive them of control over it is an attempt at dehumanization. Compelling personal service or compelling specific performance of labor is an illegitimate attempt to alienate another's will. Likewise a human cannot rightfully alienate his liberty of will and sell himself into slavery.[2]

In the **secular** arena, it's necessary to agree with everything that Evers is claiming here. His claim that "a human cannot rightfully … sell himself into slavery" deserves further commentary. In a moment of weakness someone might sell oneself into slavery. By itself this is not *unlawful* even though it may be immoral. It becomes *unlawful* when someone tries to enforce such a sale or threatens to enforce the sale.

In every theory of *contracts*, it's essential to address the issues of (i)how the theory relates to sales, and (ii)how the theory relates to gifts. Sales are fairly simple under this ***property-interest model***. They are ordinary *bi-lateral contracts* that have a relatively short *duration*, i.e., that are consummated over a fairly short period of time. When they are not quickly consummated, they involve debt. Here Rothbard shows how the ***title-transfer model*** enforces a debt *contract*:

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1 "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

2 "Toward a Reformulation of the Law of Contracts", **Journal of Libertarian Studies**, Vol. 1, No. 1. pp. 3-13. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf.

> Suppose that Smith and Jones make a contract, Smith giving $1000 to Jones at the present moment, in exchange for an IOU of Jones, agreeing to pay Smith $1100 one year from now. This is a typical debt contract. … Suppose that, when the appointed date arrives one year later, Jones refuses to pay. … Existing law … largely contends that Jones must pay $1100 because he has 'promised' to pay, and that this promise set up in Smith's mind the 'expectation' that he would receive the money. Our contention here is that mere promises are not a transfer of property title … Smith's original transfer of the $1000 was not absolute, but conditional, conditional on Jones paying the $1100 in a year, and that, therefore, the failure to pay is an implicit theft of Smith's rightful property.[1]

When Smith gives Jones $1000 in exchange for an IOU, Smith retains *title* to the $1000 even while he surrenders *possession* to Jones. Another way of saying this is that Jones's *title* to the $1000 is *encumbered* by the conditions of the *contract*. As Rothbard says, the "title-transfer" is conditional. Promise-expectations theorists may say that it's conditioned on a promise. Rothbard apparently agrees with that. There is no genuine "title-transfer" ever in a debt transaction like this. There is only exchange of *possession*. In other words, Smith gives *possession* of the $1000 to Jones, and retains a **property** *interest* in it. That **property** *interest* precludes a genuine transfer of *title*. Even so, assuming that this is a **secular** *contract*, Rothbard is right in saying that this is hyperbolic theft.

Here Rothbard shows how the ***title-transfer model*** treats gifts:

> What of *gift*-contracts? Should they be legally enforceable? Again, the answer depends on whether a mere promise has been made, or whether an actual transfer of title has taken place in the agreement. Obviously, if A says to B, "I hereby give you $10,000," then title to the money has been transferred, and the gift is enforceable; A, furthermore, cannot later demand the money back as his right. On the other hand, if A says, "I promise to give you $10,000 in one year," then this is a mere promise, what used to be called a *nudum pactum* in Roman law, and therefore is not properly enforceable. The receiver must take his chances that the donor will keep his promise. But if, on the contrary, A tells B: "I hereby agree to transfer $10,000 to you

1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

> in one year's time," then this is a declared transfer of title at the future date, and should be enforceable.[1]

Again, in the **secular** arena, the ***title-transfer model*** and the ***property-interest model*** are essentially the same.

Lawful Social Contracts

The ***title-transfer model*** clearly eliminates the possibility of creating fully functional **religious social compacts**. This is a huge conflict with the Bible-based ***property-interest model***. But the ***title-transfer model*** doesn't merely eliminate **religious social compacts**. It also eliminates all reasonable and coherent attempts at developing reliable Bible-based *jurisprudence*. Rothbard:

> There is one vitally important political implication of our title-transfer theory, as against the promise theory of valid and enforceable contracts. It should be clear that the title-transfer theory immediately tosses out of court all variants of the "social contract" theory as a justification for the State. Setting aside the historical problem of whether such a social contract ever took place, it should be evident that the social contract, whether it be the Hobbesian surrender of all one's rights, the Lockean surrender of the right of self defense, or any other, was a mere promise of future behavior (future will) and in no way surrendered title to alienable property. Certainly no past promise can bind later generations, let alone the actual maker of the promise.[2]

As already indicated,[3] the ***hermeneutical prologue*** and this memorandum certainly do not argue against Rothbard's claim that the promises of past generations cannot bind current or future generations. But as shown in the preceding sections, Rothbard's claim that "no past promise can bind … the actual maker of the promise" is not absolute. His claim may be true within the **jurisdiction** of a **secular social compact**, but it is not necessarily true under the **jurisdiction** of a **religious social compact**. **Religious social compacts** must be allowed the freedom to recognize evidence from all three fields of perception and action,[4] even while **secular** courts are mostly limited to evidence from the **physical** field of perception and action. This

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1 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

2 **The Ethics of Liberty**, Chapter 19, "Property Rights and the Theory of Contracts". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

3 URL: #Denizen.

4 Specifically, **Spiritual**, **psychic**, and **physical**.

allows **religious social compacts** the ability to maintain their own moral code, and maintenance of their own moral code must necessarily allow such **compacts** to treat promises as inextricably connected to **property** *interests*. If a *contract* dispute within a **religious social compact** is ever appealed into a **secular** court, the **secular** court would be compelled to use the definition of **property**, and the presumed absence of linkage between promise and **property** *interest*, that is appropriate to **secular** courts. This keeps non-**secular** morality from being enforced in **secular** courts, except to the extent that **secular** and **religious** moral codes may overlap. This arrangement mitigates the concerns of Rothbard, Evers, and other adherents to the ***title-transfer model*** about the "inchoate" nature of current *contract adjudication*. The ***title-transfer model*** is nevertheless aimed at intentionally or unintentionally hacking down the entire biblical edifice.

If the ***title-transfer model*** were given the absolute authority that Rothbard clearly believes it deserves, he would be right in claiming that it "tosses out … the 'social contract' theory as justification for the State". But Rothbard is hereby assuming that his model has more authority than it deserves. The ***title-transfer model*** has a place in defining evidence necessary for a claimant to satisfy his burden of proof in a **secular ecclesiastical court**. For Rothbard to presume, without adequate proof, that the ***title-transfer model*** eliminates the possibility of forming a **social compact**, is essentially for him to assume that the **secular religion** should replace the Scriptures from which it arose. In fact, the **secular social compact** is not "a mere promise of future behavior". It is based on each *party*'s promise, where that promise is directly and intimately linked to the **global** proscription of the destruction of one life by another and the **global** need to execute justice against such destruction. The **secular social compact**, the **jural compact**, and the **secular ecclesiastical compact** are all entered voluntarily. But the fact is that the **secular religion** is still a religion, even though it is unique among religions, and because it is a religion, **property** *interests* accompany promises. Such promises are inextricably connected to **property**, because the promise, in order to be of any value, must be an immediate surrender of *interest* in the promissor's **property**. It's not a surrender of *interest* in all of the promissor's **property** by any means. It is surrender of only so much *interest* in the promissor's **property** as is necessary for the **jural society** to fulfill its *lawful* duties as defined by its extremely limited **subject-matter jurisdiction**. According to the Bible, this **property** *interest* derives from the **bloodshed** mandate. This **bloodshed** mandate applies to all human beings without exception. Formation of a **jural society** for the sake of ensuring the satisfaction of that mandate is better than trying to satisfy it as a lone ranger. Rothbard is right in claiming that one generation cannot bind another. He is also right in recognizing that State power is abused so much in human history that it needs to be held under constant scrutiny, and corrected by all possible means.

This is precisely why participation in these **secular** compacts must be voluntary, and why such **secular** compacts should always have escape clauses for **denizens**.

According to Williamson Evers:

> In the end, therefore, social contract theory is incompatible with natural-rights liberal theory since this latter theory derives rights from the factual premise of the inalienability of the will and hence rules out from the start legitimate self-enslavement. Instead, we can recognize that the duty of obedience to the rule of just law can be explained, without any recourse to a social contract, in terms of the duty of non-aggression which is the necessary correlative of human rights.[1]

Evers claimed that none of the *social contract theories* that he examined in his "Social Contract: A Critique" avoided the *social contract*'s propensity to impose slavery on it's people. As he said,

> Most importantly, all the social contract theories appear to entail in practice a contract of at least partial self-enslavement to Socrates' Athenian regime, to Hobbes' sovereign, to Locke's majority, to Rousseau's popular law-making assembly and administrative government, or to Rand's law-enforcement monopoly.[2]

So based on his examination of these flawed philosophies, he throws out the *social contract theory* entirely. He says, "the duty of obedience to the rule of just law can be explained, without any recourse to a social contract, in terms of the duty of non-aggression", as though this by itself will suffice to protect people against people who don't care about other people's **rights**. By eliminating the *social contract*, Evers, Rothbard, and company supply no mechanism for the protection of **natural rights**, other than the possible use of private security guards. Such security guards – if they are not overseen by a system of *due process* that relies on millennia of aggregated *jurisprudence* – are nothing more than establishment of ***vigilance committees***. As such, they are nothing more than regression into a state in which war-lords protect their turf against other war-lords. So this proverbial act of tossing the baby out with the bath water is nothing more than another prescription for utopian disaster.

In "Robert Nozick and the Immaculate Conception of the State", Rothbard says,

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1 "Social Contract: A Critique", **Journal of Libertarian Studies**, Vol. 1, No. 3, pp. 185-194. — URL: http://mises.org/journals/jls/1_3/1_3_3.pdf.

2 "Social Contract: A Critique", **Journal of Libertarian Studies**, Vol. 1, No. 3, pp. 185-194. — URL: http://mises.org/journals/jls/1_3/1_3_3.pdf.

> A basic fallacy is endemic to all social-contract theories of the State, namely, that any contract based on a promise is binding and enforceable. If, then, *everyone*—in itself of course a heroic assumption—in a state of nature surrendered all or some of his rights to a State, the social-contract theorists consider this promise to be binding forevermore.[1]

The ***property-interest theory*** of *contracts* does not suffer from this "basic fallacy" that Rothbard claims "is endemic to all social contract theories of the State". That's because the ***property-interest model*** does not claim that "any *contract* based on a promise is binding and enforceable". It claims that **secular** *contracts* are usually **not** binding and enforceable if they are based merely on a promise. On the other hand, it claims that **religious** *contracts* usually **are** binding and enforceable based on a promise. Furthermore, it claims that *contracts* that are created and enforced under the original **jurisdiction** of a **secular social compact** are inherently **secular** *contracts*. But the *contracts* that create and maintain **secular** government – as distinguished from *contracts* that merely exist under the **jurisdiction** of the **secular** government – are *contracts* that are inherently **religious**. This is because **secular** government exists only for the sake of satisfying the limited functions surrounding the **global** prohibition against **bloodshed**. **Bloodshed** can exist in two and only two forms, **ex delicto** and **ex contractu**. The **jural compact** exists to prosecute **bloodshed** that arises **ex delicto**, and the narrowly defined **ecclesiastical compact** exists to prosecute **bloodshed** that arises **ex contractu**. Both of these subsidiary compacts exist solely for the sake of protecting **natural rights** to **primary** and **secondary property**, such functions being the sole purpose of the **secular religion**. With these distinctions made, it should be clear that the ***property-interest theory*** does not claim that "If … everyone … in a state of nature surrendered all or some of his rights to the State, … this promise … [is] binding forevermore". The ***property-interest model*** doesn't set the "state of nature" against "the State" as though the two are polar opposites. On the contrary, the "state of nature" exists perpetually because the **natural law** exists perpetually. As long as people perpetrate death, damage, and injury against other people or their property, the demand for institutional machinery for redressing such grievances will not vanish into utopia. Such demand is what creates the need for **jural compacts**, **ecclesiastical compacts**, and **secular social compacts**, not promises that are presumed to be binding forever.

When Evers says, "we can recognize that the duty of obedience to the rule of just law can be explained, without any recourse to a social contract, in terms of the

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1 **The Ethics of Liberty**, Chapter 29, "Robert Nozick and the Immaculate Conception of the State". — URL: http://www.mises.org/rothbard/ethics/ethics.asp.

duty of non-aggression", he makes a presupposition based on his **religion**. From where does his "duty of non-aggression" come? Can it be induced from natural sense data? No! Is it deduced from some axiomatic system? In the final analysis it's obvious that it's from an axiomatic system, and it's obvious that his system, like all axiomatic systems, is ultimately a **religion**. His axiomatic system is built from borrowed capital, where such capital originated historically primarily from the Bible. In the final analysis, all axioms are essentially laws, and from the biblical perspective, all laws are essentially *terms* of **covenants** and *contracts*. The ***hermeneutical prologue*** recognizes a system of **covenants** and *contracts* that establish relationships between their axioms/laws/*terms*, and these relationships establish **jurisdictions**. If **jurisdictions** are not crucial to law enforcement, then laws hang in the ether without sufficient regard to how they should be applied. The ***title-transfer model*** is therefore utopian and insufficiently holistic. It's like a fine car with a V-8 engine that's only firing on four cylinders. Even though Rothbard and Evers reject the *social contract*, it's clear that they are operating in the same philosophical tradition as the social contractarians that they criticize. That is a tradition that mimics Scripture, pretends it's not mimicking Scripture, and does a thoroughly deficient job at such mimicry and pretense.

In a Bible-based *social contract*, the people do not surrender their sovereignty. They merely designate *agents* to comprise the **jural society**, and agents to comprise the narrowly-defined **ecclesiastical society**. These two societies do not become the *sovereign*. *Sovereignty* remains with the people. Because history speaks clearly and loudly that human governments are prone to absolute corruption, it's important for every human being to only deal with **secular** governments from the perspective that every human being is a miniature sovereign, and is the source of whatever *lawful* authority such governments may have. If nothing else, doing so keeps people from giving knee-jerk obedience to *unlawful* governments.

The **bloodshed** mandate in the **Noachian Covenant** is two-sided. The negative side says, paraphrasing, *Thou shalt not destroy life, liberty, or property of other people*. The positive side says, *Thou shalt execute justice against anyone guilty of destroying life, liberty, or property of other people*. Participation in this **Covenant** transcends human choice. All human beings are subject to this biblical prescription of **global human law**. The human will, the human ability to choose, is emphatically not so exalted that it transcends **alienability** on this front. Murderers, even if they choose otherwise, deserve to pay with their lives, because their actions have **alienated** their **natural rights**. They have surrendered their ***unalienable Rights***. This sentiment, expanded to apply to **bloodshed** in general, and not merely to murder, is the rightful motivation for forming **secular social compacts**. The ***statists'*** vision of imperial

glory is a dream from hell that deserves repudiation at every possible opportunity. A crucial aspect of that repudiation demands acknowledgement of the fact that the **global** moral obligation to enforce against destroyers of life does not translate immediately into **human law**, but depends upon volition for such translation.

The **Noachian Covenant** is a *contract* that no one can opt out of. No amount of will exaltation frees anyone from its obligations. The **covenant of works** establishes that humans are created in the image of God (Genesis 1:26-27). The **Noachian Covenant** acknowledges this and obligates all humans to submit to the minimal duties of avoiding the destruction of life, liberty, and property and executing justice against destroyers of life, liberty, or property. These obligations in no way excuse the destruction of life, liberty, and property perpetrated by such enforcers.

Cited Resources

Black, Henry Cambell; **Black's Law Dictionary**, 5th edition, 1979, West Publishing Co., St. Paul, Minnesota.

Duncan, J. Ligon, III; "Moses' Law for Modern Government: The Intellectual and Sociological Origins of the Christian Reconstructionist Movement", 1994, *"A paper presented to the Social Science History Association, Atlanta, Georgia, USA"*, October 15, 1994. — URL: http://www.the-highway.com/recon_Duncan.html.

Evers, Williamson M.; "Toward a Reformulation of the Law of Contracts", Vol. 1, No. 1. pp. 3-13, **Journal of Libertarian Studies**, Murray N. Rothbard, ed., Pergamon Press, 1977. — URL: http://mises.org/journals/jls/1_1/1_1_2.pdf

_____, "Social Contract: A Critique", Vol. 1, No. 3, pp. 185-194, **Journal of Libertarian Studies**, Murray N. Rothbard, ed., Pergamon Press, 1977. — URL: http://mises.org/journals/jls/1_3/1_3_3.pdf.

Porter, Charles R.; **Hermeneutical Prologue for Discovering Basic Jurisdictional Principles**; 2019; Jural Society Press; Eden Prairie, Minnesota. — URL: http://BasicJurisdictionalPrinciples.net.

_____, **Theodicy: Science, Bible, & Law**; 2013; Jural Society Press; Eden Prairie, Minnesota. — URL: http://BasicJurisdictionalPrinciples.net.

_____, **Basic Jurisdictional Principles: Theological Inventory of American Jurisprudence**, 2006; Jural Society Press; Eden Prairie, Minnesota. — URL: http://BasicJurisdictionalPrinciples.net.

_____, **A Memorandum of Law & Fact Regarding Natural Personhood**, 2014; Jural Society Press; Eden Prairie, Minnesota. — URL: http://BasicJurisdictionalPrinciples.net.

Rothbard, Murray N.; **The Ethics of Liberty**, 1998, 2002, New York University Press, New York, New York. — URL: http://mises.org/rothbard/ethics/ethics.asp.

Spooner, Lysander; **Poverty: Its Illegal Causes** (in Vol 5 of Charles Shively, ed., **The Collected Works of Lysander Spooner**, Weston, Mass: M S Press, 1971.

Cited Resources