A PRIORI OF JUSTICE:

The Ethics and Law of Society

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Introduction

Every theory of law is always built on some corresponding concept of justice. The history of mankind shows that this relationships was sometimes understood in a very loose manner, even though science and reason require lawmakers to act within a certain inelastic scheme. The title of this work refers us to a belief that justice is not something that can be established completely arbitrarily, but rather stems from the character of reality and actions of men. A closer investigation of law and its principles yields as a result easily distinguishable framework which can be called *the a priori of justice*. In this book we will attempt to discover the very core of law which cannot be undone by any power or theoretical argument.

Contemporary law is a domain of parliaments which first put the projects of new legislation to the vote and subsequently, if a given proposition is accepted, announce it as binding for everybody henceforth. This kind of practice contradicts with mechanisms underlying the western civilization from its very beginnings.

The most striking about this situation is the passive reaction of ordinary men who accept the imposition of many unjust regulations and other principles. People don't show any desire to change state of things and are mostly convinced of not being able to change anything. This kind of indifference was strongly criticized by Étienne de La Boétie in his *The Discourse on Voluntary Servitude*:

> Poor, wretched, and stupid peoples, nations determined on your own misfortune and blind to your own good! You let yourselves be deprived before your own eyes of the best part of your revenues; your fields are plundered, your homes robbed, your family heirlooms taken away. You live in such a way that you cannot claim a single thing as your own; and it would seem that you consider yourselves lucky to be loaned your property, your families, and your very lives. All

> this havoc, this misfortune, this ruin, descends upon you not from alien foes, but from the one enemy whom you yourselves render as powerful as he is, for whom you go bravely to war, for whose greatness you do not refuse to offer your own bodies unto death.[1]

Although many people agree with the first part of the above-mentioned criticism of the contemporary men, the latter one is very often put into doubt. A very common phenomenon is being reconciled with fate and fear of changing the *status quo*. But are ordinary men really bound to have no influence on the shape of law? Quite contrary, the history of ancient Rome and medieval Europe shows us that the best law was created in the process of market competition between individual lawyers.[2] Government didn't interfere with the justice as much as it does in our times.

Regrettably, the ever-spreading power of monarchs and princes contributed to the seizure of legislation by Leviathan. Today, after a few centuries of state's monopoly in this realm it is really hard to understand by many that law can be established by private institutions. A prominent Italian theoretician of law prof. Bruno Leoni explained the current situation on the following way:

> In Continental Europe, where railroads and telegraphs have been monopolized by the governments for a long time, very few, even among well-educated people, now imagine that in this country railroads and telegraphic communications are private businesses in the same way as movies or hotels or restaurants. We have become increasingly accustomed to considering law-making as a matter that concerns the legislative assemblies rather than ordinary men in the street and, besides, as something that can be done according to the personal ideas of certain individuals provided that they are in an official position to do so. The fact that the process of law-making is, or was, essentially a private affair concerning millions of people throughout dozens of generations and stretching across several centuries goes almost unnoticed today even among the educated elite.[3]

The omnipresence of the state and its ruthless politics of expropriation narrowed the perspective of today's people. They seem to believe that everything that exists must have been masterminded by the Leviathan. But as the example of law clearly shows in the not so distant past it used to be totally different.

In his book *Freedom and the Law* Bruno Leoni pointed out that the Roman concept of

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1 Étienne de La Boétie, *The Politics of Obedience: The Discourse of Voluntary Servitude*, Ludwig von Mises Institute, Auburn 2008, p. 46.

2 More information about historical evidence of private law enforcement will be included in Part 2.

3 Bruno Leoni, *Freedom and the Law,* Nash Publishing, Los Angeles 1972, p. 88-89.

private law – *ius civile* – was based on independence from the will of the state's legislature. This relationship was sustained during the whole period of the Republic and the Empire. There were, of course, some exceptions as during the reign of Julius Cesar, but the overall scheme was diametrically opposed to the present situation. The Roman tradition was also revived in the medieval Europe where the separation of *iurisdictio* from the Empire was one of the foundations of the social system.

Being a lawyer was once a profession similar to a scientist. Customers came to him pleading to resolve an issue which, according to the belief of the time, had its objective solution. Leoni compared the work of a lawyer to an engineer who advises an entrepreneur. The engineer is not attempting to impose on his client and the whole world his own ideas contradicting gravitation and other laws of the nature, but works hard to reconcile the laws of physics and mechanics with a given man-made project. In a similar way, law was once based on the nature of the world and this assured it autonomy from the power of the state. It was a private undertaking subject to the laws of the market. Various schools of law and independent tribunals competed between themselves contributing to the progress of civilization. But, as history shows, this positive trend was finally stopped.

Frank Chodorov describing the changes that the United States have undergone in the recent centuries pointed out to the metamorphosis of the city of Washington. It was once "a village on the Potomac where some legislators met for a few months in the year, to pass a few laws which little affected the welfare of the people, except when the laws had something to do with war. Debates in Congress were interesting to read about or to talk about, but the issues involved did not concern the making of a living or the manner in which one got by in this world"[4]. A very similar role was played once by European parliaments which gathered mainly to impose certain taxes in the event of war.

Unfortunately, the growing number of armed conflicts made holding parliamentary congregations a permanent state. "War is the health of the State"[5] and under the pretext of domestic and foreign threat it can impose even greater taxes in many forms. Parliaments ceased to play the role of temporary advisers and became a blind machine passing endless regulations at an enormous pace. They impose new laws with unprecedented frequency and completely ignore the property of individuals. Their seats were moved to big metropolis and are surrounded by

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[4] Frank Chodorov, *Out of Step: The Autobiography of an Individualist,* The Devin-Adair Company, New York 1962, p. 10.

[5] This is a famous quote from Randolph Bourne, in: Murray N. Rothbard, *The Betrayal of the American Right*, Ludwig von Mises Institute, Auburn, Al, 2007, p. 5.

hordes of lobbyists who want to use their power to pass laws and regulations that can benefit various interest groups.

Somehow remembering the previous role played by the legislature the leaders of states very often sustain the atmosphere of the foreign threat – the state of menace justifying the permanent existence of the legislative monster. In the past parliaments congregated to impose taxes in the situation of war, but today the enemy is a much broader term. According to the current state's propaganda the worst enemies of the modern world are also cultural and civilizational phenomena. The current martial law allegedly defends us against: global warming, unrestricted market economy, global terrorism, chauvinism, anti-semitism, fascism, homophoby or EU-scepticism.

If de la Boetie lived in our times, he would call us “wretched and stupid”. And we would have to accept it as it is evident that all the spurious threats are created by the Leviathan which is approved by nobody else but the people suffering from it. They let themselves be fooled that there are serious reasons for the state of permanent menace and believe in theory saying that only state has means to escape us from the chaos.

Our times are deprived of the normal functioning of law more than any period in the modern history. Since the enterprise of law was separated from the market competition, we have been living in an era of concentration camps, purposeful famines on a massive scale and total wars. The immediate reason for this is a total submission of the legal system to the state. This in turn contributes to a miserable quality of services and a growing immunity of the state itself. The Leviathan is not subject to any law, it only dictates it others. The state is unlawfulness.

I. What is the law?

The most important thing in a book about the law should be establishing what it actually is. The longstanding practice of enforcing the law by rulers and parliaments contributed to blurring the real meaning of this endeavor. Thus, in our times it is common to perceive the law as an unilateral undertaking of the state's legislature. Even our everyday language is laden with a predominant view that law has to be wisely dictated by the state's monopoly of coercion. However, as Bruce Benson points out, our contemporary legal institutions managed by the state have only developed in the last few centuries:

> Public police forces did not develop until the middle of the nineteenth century in the United States and Great Britain, and crime victims served as prosecutors in England until almost the turn of the century. Publicly financed and operated prisons are also a relatively recent development, arising in England near the end of the eighteenth century and in the United States even later.[6]

While the recent development has at times degenerated into totalitarianism or even genocide,t the real causes of these evils are hardly ever attributed to the state and its monopoly of law enforcement. What's even more appalling, the state is still given unlimited trust to continue actions that lead humanity into disaster.

Another significant characteristic of the state's legal monopoly is that it is justified in numerous ways which often contradict each other. It is crucial to understand that there is no single and coherent theory of the state's law enforcement, but rather a host of them which are upheld by various groups of interests. Christian democrats, monarchists, liberals, communists and others justify the state's hegemony in different ways, but this fact doesn't prevent them from being beneficiaries of the state's institutions and cooperating within the commonly approved framework.

Contrary to the legal positivism – the philosophy of all the statists, libertarianism is a theory based on a natural code of law and ethics which cannot be undone by any human being. Moreover, libertarianism is able to confirm the validity of this code and justify every part of it. The natural law is not any kind of wishful thinking, but forms a real foundation for all instances of positive law.

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[6] Bruce Benson, *To serve and protect*, New York University Press, New York 1998, p. 4.

The true character of law can only be established after we identify its market character. This argument is backed by abundant historical evidence[7], but we will focus on a purely theoretical justification of law. We will attempt to discover the principles underlying the theory and the practice of law. In other words, our goal will be to arrive at the very essence of law and identify the criteria according to which we can call it just or unjust.

In this perspective it is absolutely crucial to distinguish first between the two basic levels of law: the theoretical and the entrepreneurial (practical). These two are absolutely different as can be seen in the very reflection on the nature of law. Thinking of law is a different action than practicing it. Both these realms are independent and cannot be reduced to each other. A detailed discussion of this subject is not possible without some additional considerations which will follow in the book. They will deal with the object of law, with the law-making subject and with law enforcement. The theoretical level includes, for instance, this book and the theory which it proposes. The practical level, in turn, embraces individuals and their hired representatives – private entrepreneurs.

We also have to emphasize the fact that the aim of this book is not to formulate detailed rules of law and codes that would list the most appropriate punishment. This, as has already been mentioned, belongs to individuals engaged in the market of law enforcement. In this work we will only focus on the theoretical foundation of law which will be understood as a general, unwritten legal code. The three pillars of this code will be the property law, the retributive theory of punishment and a legal personalism.

The Theory of A Priori of Argumentation

Libertarians are convinced that the unwritten legal code they propose is a precondition for the existence of a just and moral social system[8]. The term 'necessary' is used here consciously and

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[7] Libertarian literature provides us with many descriptions of legal and security structures which worked in a total absence of any state. The best and most comprehensive summary can be found in Bruce Benson, *The Enetrprise of Law. Justice without the State*, Pacific Research Institute for Public Policy, San Francisco 1990. Another superb example is David Friedman's article on Medieval Iceland: *Private Creation and Enforcement of Law: A Historical Case*, Journal of Legal Studies 8 (March 1979): 399-415.; and D. Johnsen's description of Indian tribes, "The Formation and Protection of Property Rights," Journal of Legal Studies 15 (January 1986); and Walter Goldsmith : "Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge." American Anthropologist 53 (October-December 1951) p. 506-524.

[8] This was a view of Murray N. Rothbard:

purposefully as the libertarian concept of law is based on the theory pretending to be absolutely valid, irrespectively of time, space and any other circumstances. The person who first introduced this method of reasoning in the area of economy, ethics and philosophy is Hans-Hermann Hoppe. Building on the ideas of Ludwig von Mises and Murray Rothbard he created his own concept of *a priori of argumentation*. This method is based on the discovery of statements which cannot be denied without contradicting oneself at the same time. Their validity relies on the very fact of participation in a discussion. Such statements cannot be proved directly, but are indisputable due to their content. Their existence is not a new thing for philosophy – they've been a part of the traditional thought from the very beginning, at least in aristotelianism. A contemporary thomist philosopher, Mieczysław A. Krąpiec, explains the nature of the indisputable statements in the following way:

> Another absurd resulting from the pursuit of constructing a proof for every theorem is an immediate succession of committing the error of 'vicious circle'. What is to be proven is actually proven by the principle of contradiction, but if we wanted to authoritatively 'prove' the principle of contradiction, we would beg the question because the same would be thus proven by the same (*idem per idem*).
>
> Thus, standing on the ground of epistemological realism it is impossible to prove everything in a strict sense, but rather we are forced to accept certain statements based on induction. This acceptance is not arbitrary because, on one hand, such sentences force our intellect to agree with them due to their necessity inherent in their meaning and, on the other hand, because they can be elenctically proven by refuting the position denying their validity”[9].

Even though this concept stems from the science of economics, Hoppe gradually developed it and pointed to the possibility of applying it in the methodology of science and philosophy as such.

The theory of argumentation is mostly known in contemporary philosophy as a specialty of another German philosopher - Jürgen Habermas. In his works he also developed the ethics of argumentation, but his conclusions led him in a diametrically opposite direction to the one

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For every person, at any time or place, can be covered by the basic rules: ownership of one's own self, ownership of the previously unused resources which one has occupied and transformed; and ownership of all titles derived from that basic ownership-either through voluntary exchanges or voluntary gifts. These rules-which we might call the "rules of natural ownership"--can clearly be applied, and such ownership defended, regardless of the time or place, and regardless of the economic attainments of the society. It is impossible for any other social system to qualify as universal natural law; for if there is any coercive rule by one person or group over another (and all rule partakes of such hegemony), then it is impossible to apply the same rule for all; only a rulerless, purely libertarian world can fulfill the qualifications of natural rights and natural law, or, more important, can fulfill the conditions of a universal ethic for all mankind.

Murray Rothbard, *The Ethics of Liberty,* New York University Press, New York 1998, p. 43.

9 Mieczysław A. Krąpiec, *Realizm ludzkiego poznania,* RW KUL, Lublin 1995, p. 232.

suggested by Hoppe[10].

The most distinguishing feature of Hoppe's theory of argumentation is a search for reasons making a given sentence consistent (free of contradiction)[11]. The starting point of the whole system became the work of Austrian economist Ludwig von Mises – *Human Action*. Mises suggested there to found the edifice of economics on the unquestionable statement: a human acts.

> From the unshakable foundation of the category of human action praxeology and economics proceed step by step by means of discursive reasoning. Precisely defining assumptions and conditions, they construct a system of concepts and draw all the inferences implied by logically unassailable ratiocination. With regard to the results thus obtained only two attitudes are possible; either one can unmask logical errors in the chain of the deductions which produced these results, or one must acknowledge their correctness and validity.[12]

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[10] More on the theory of argumentation of Habermas see: Jürgen Habermas, Discourse Ethics: *Notes on a Program of Philosophical Justification*, in: *The Communicative Ethic Controversy,* ed. Seyla Benhabib and Fred Dallmayr, MIT Press, Cambridge, Massachusetts 1990; Jürgen Habermas, *The Theory of Communicative Action, Beacon Press, Boston 1985*,

[11] The most general rule of reality is the Principle of Contradiction. Its first formulation comes from Aristotle:

„There is a principle in existing things about which we cannot make a mistake5; of which, on the contrary, we must always realize the truth—viz. that the same thing cannot at one and the same time be and not be nor admit of any other similar pair of opposites. Of such axioms although there is a proof ad hominem, there is no absolute proof; because there is no principle more convincing than the axiom itself on which to base an argument, whereas there must be such a principle if there is to be absolute proof. But he who wants to convince an opponent who makes opposite statements that he is wrong must obtain from him an admission which shall be identical with the proposition that the same thing cannot at one and the same time be and not be, but shall seem not to be identical with it. This is the only method of proof which can be used against one who maintains that opposite statements can be truly made about the same subject. Now those who intend to join in discussion must understand one another to some extent; for without this how can there be any common discussion between them? Therefore each of the terms which they use must be intelligible and signify something; not several things, but one only; or if it signifies more than one thing, it must be made clear to which of these the term is applied. Now he who says that A is and is not denies what he asserts, and therefore denies that the term signifies what it does signify. But this is impossible. Therefore if "to be so-and-so" has a definite meaning, the opposite statement about the same subject cannot be true.

Aristotle, *Metaphysics,* (book 11, section 1062a), Green Lion Press, Santa Fe 2002.

For exposing the contradictions of sophists Aristotle used the method of reducing to the absurd (*reductio ad absurdum*) which was mostly based on referring to the arguments previously acknowledged by the participant of a discussion. In an identical way it is possible to prove also the Laws of Excluded Middle and Identity.

[12] L. von Mises, *Human Action*, Fox & Wilkes, San Francisco 1967, p. 57.

The statement 'a human acts' cannot be denied without simultaneously contradicting oneself because the every expression of disagreement is an action in itself. Raised in the tradition of German philosophy, Mises thought that the validity of this axiom is aprioristic. According to him, praxeology:

> aims at knowledge valid for all instances in which the conditions exactly correspond to those implied in its assumptions and inferences. Its statements and propositions are not derived from experience. They are, like those of logic and mathematics, a priori. They are not subject to verification or falsification on the ground of experience and facts. They are both logically and temporally antecedent to any comprehension of historical facts. They are a necessary requirement of any intellectual grasp of historical events. Without them we should not be able to see in the course of events anything else than kaleidoscopic change and chaotic muddle[13].

It is clear that Mises saw his praxeological science in Kantian perpsective and applied the notions derived from it. Or, at least, one can have such an impression if we consider the language that he used to describe the problems of epistemology and human science[14]. However, a closer investigation of his theory brings in a completely different result. Commenting on Misesian praxeology David Gordon pointed out that:

> Although Mises does indeed resort to Kantian language, nothing in his arguments depends on Kant's system. (…)
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> As Mises employs the term 'synthetic a priori proposition', for example, it simply designates a proposition that is necessarily true and not a tautology. Those who prefer an Aristotelian approach can easily translate Mises' terms into their own preferred usage[15].

Following Gordon's suggestion we can call the Misesian synthetic a priori proposition a necessarily true proposition. Its validity, as we will show below, is based on the structure of any action, participation in discussion and, what's most significant, on the structure of reality.

Hans-Hermann Hoppe didn't follow Gordon's suggestion and still prefers to use the Kantian terminology. As this work focuses mainly on the theory developed by prof. Hoppe we will use his preferred philosophical language. It doesn't, however, mean that we have to completely forget about the alternative; it is equally important and valid.

In his analysis of Misesian action axiom Hoppe comes to another conclusions. Having based praxeology on Kantian scheme, “Mises carries the Kantian epistemology beyond the point at which Kant himself left off”[16]. Mises overcame the idealism of Kant in which man was closed in a

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[13] Ibidem, p. 32.

[14] More on apriorism and methodology of preaxeology can be found: L. von Mises, *The Ultimate Foundation of Economic Science,* Kansas City: Sheed Andrews and McMeel, 1978.

[15] D. Gordon, The Philosophical Origins if Austrian Economics, Auburn, 1996, p. 8

[16] H-H. Hoppe, Economic Science and Austrian Method, Auburn, 1995, p. 8

world of a prioristic categories. Human mind was in this construction a prisoner of the schemes of cognition which blocked him an access to everything external to it. By presenting the action axiom Mises proved, however, that synthetic a priori judgments are possible as judgments concerning human action. Contrary to Kant who limited synthetic a priori judgments to mathematics and narrowly understood metaphysics of cognition, Mises overcame idealism and bound the realm of thought with the external world. As Hoppe explains:

> With his recognition of action as the bridge between the mind and the outside reality; he has found a solution to the Kantian problem of how true synthetic a priori propositions can be possible[17].

Synthetic a priori judgments are thus statements based on the action axiom. Hoppe claims that action underlies any kind of human knowledge. For instance, arithmetic is understandable only due to our experience of the repetition of action[18]. A similar conclusions are made for geometry, logic and other sciences.

According to Hoppe such a broad application and importance of the action axiom has its roots in human ability to participate in argumentation. Apart from the action axiom he also puts forward another basic axiom – *the a priori of argumentation*. Its classical wording is as following: "humans are capable of argumentation and hence know the meaning of truth and validity[19]". As in the case of the action axiom such statement cannot be denied without simultaneously contradicting oneself. Every attempt to make it would in fact confirm the ability to argue and the knowledge of truth.

By joining the two axioms: of action and argumentation, Hoppe develops a series of concepts which cannot be reduced to observable data. These notions are basic terms applied in economics: values, goals, means, choice, preference, cost, gain and loss. These categories of action acquire their indisputable status due to argumentation axiom. Hoppe explains it in the following way:

> For any attempt to disprove the validity of what Mises has reconstructed as implied in the very concept of action would have to be aimed at a goal, requiring means, excluding other courses of action, incurring costs, subjecting the actor to the possibility of achieving or not achieving the desired goal and so leading to a profit or a loss. Thus, it is manifestly impossible to ever dispute or falsify the validity of Mises's insights[20].

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[17] Ibidem, p. 9

[18] Ibidem, p. 30

[19] Ibidem, p. 27

[20] Ibidem,s. 25

Naturally, the list of categories is not limited to those mentioned above. The next ones will appear successively in the following chapters of this book. Hoppe highlighted the above categories in order to justify the methodology of the Austrian School of economics. According to him at the heart of the whole economics, the theory of law and philosophy as such lies the action axiom supported by the argumentation axiom.

Before we investigate this insight further, it would be useful to point out that, contrary to Hoppe's own suggestions, his theory can hardly be called another version of Kantism. Here is what Hoppe himself claims about a crucial for Kantism distinction between analytic and synthetic judgments:

> Regarding positivism’s supposedly exhaustive classification of analytic, empirical, and emotive propositions one must ask: What, then, is the status of this very axiom? It must be either an analytical or an empirical proposition, or it must be an expression of emotions. If it is taken to be analytical, then it is merely empty verbal quibble, saying nothing about anything real, but only defining one sound or symbol by another. Hence, one would simply have to shrug one’s shoulders and reply “so what?” The same response would be appropriate if the positivist argument were taken to be an empirical proposition. If this were the case, it would have to be admitted that the proposition might well be wrong and that one would be entitled to know the criterion on the basis of which one would have to decide whether or not it was. More decisively, as an empirical proposition it could merely state a historical fact and would thus be entirely irrelevant in determining whether or not it would be possible to ever produce propositions that were empirical and yet nonfalsifiable, or normative, yet nonemotive. Finally, if the positivist line of reasoning were assumed to be an emotive proposition, then according to its own doctrine it is cognitively meaningless and contains no claim to truth whatsoever, and one would not need to pay any more attention to it than to a barking dog[21].

By dismissing one of the most basic dogmas of modern philosophy, Hoppe postulates aprioristic philosophy bound with the external world by the action axiom. This kind of rationalism leads us inevitably to epistemological realism as the underlying principle of it is the reference to the objective world which exists independently from our minds. Hoppe, and Mises likewise, applies the language of modern philosophy, even though his proposition is typical of classical thought (aristotelianism, thomism).

The already referred to cohesion of synthetic a priori judgments with Aristotelian necessarily true propositions suggested by David Gordon enables us to view Hoppe's insights in a

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[21] H-H. Hoppe, *The Economics and Ethics of Private Property*, Ludwig von Mises Institute, Auburn 2006, p. 363

totally different light. Even Aristotle indicated that the first principles cannot be proved:

> We, on the other hand, hold that not every form of knowledge is demonstrative, but that the knowledge of ultimate principles is indemonstrable. The necessity of this fact is obvious, for if one must needs know the antecedent principles and those on which the demonstration rests, and if in this process we at last reach ultimates, these ultimates must necessarily be indemonstrable. Our view then is not only that knowledge exists, but that there is something prior to science by means of which we acquire knowledge of these ultimates[22].

According to Hoppe these ultimates are action and argumentation axioms with the first one having the foremost importance. What is equally important, Hoppe sees the whole science not as a deductive system applying the methods of modern logics, but rather in the perspective of praxeology referring us to the external world. The character of science is dictated by the character of the world, not by the constructs of human mind.

It is impossible to formalize and axiomatize Hoppe's theory as this would require abstracting from human action. It is because every proposition referring to action axiom derives its validity from the act of expressing it and inability to deny them. If anybody tried to translate these propositions to a formal language, the very act of translation would be arbitrary and void of the indisputable status.

Argumentation Ethics

Before we move on to another implications of a more methodological character, let's focus on some ethical consequences of action and argumentation axioms:

> Just as it is impossible to say and mean to say that there is no such thing as objective truth without in so doing actually presupposing objective criteria for the application of terms, so is it impossible to actually advocate ethical relativism. Because in order to advocate any ethical position whatsoever, one must be allowed to communicate rather than be coercively shut up and silenced, and thus, contrary to the relativist message itself, its messenger, in bringing it to us, must in fact presuppose the existence of objectively defined absolute rights[23].

According to Hoppe ethics is also based on the action and argumentation axioms . Its shape is dictated by the scarcity of goods available to man. If all things (including men and their bodies)

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[22] Aristotle, *Posterior Analytics* (72b).

[23] H-H. Hoppe, In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's 'The Rhetoric of Economics', w: The Review of Austrian Economics, vol. 3, p. 185

were available without any limits, there would be no conflict. Regrettably, the world's components are scarce and there is a limited number of goods and an access to them is also subject to limitations[24].

The foundations of argumentation ethics were created by Murray N. Rothbard in his *The Ethics of Liberty*. He pointed to John Locke's theory of property as a crucial element of the whole economy and social philosophy[25]. As any conflict arises only because of the scarcity of goods, the goal of ethics is establishing the rules of their allocation. This theory was neatly summarized by Hoppe in his Introduction to Rothbard's *Ethics*:

> In *The Ethics of Liberty* Rothbard gives the following answer to the question of what I am justified doing here and now: every person owns his own physical body as well as all nature-given goods which he puts to use with the help of his body before anyone else does; this ownership implies his right to employ these resources as one sees fit so long as one does not thereby uninvitedly change the physical integrity of another's property or delimit another's control over it without his consent. In particular, once a good has been first appropriated or homesteaded by "mixing one's labor" with it (Locke's phase), then ownership of it can only be acquired by means of a voluntary (contractual) transfer of its property title from a previous to a later owner. These rights are absolute. Any infringement on them is subject to lawful prosecution by the victim of this infringement or his agent, and is actionable in accordance with the principles of strict liability and the proportionality of punishment.
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> Taking his cues from the very same sources, Rothbard then offered this ultimate proof for these rules as just rules: if a person A were not the owner of his physical body and all goods originally appropriated, produced or voluntarily acquired by him, there would only exist two alternatives. Either another person, B, must then be regarded as the owner of A and the goods appropriated, produced, or contractually acquired by A, or both parties, A and B, must be regarded as equal co-owners of both bodies and goods.
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> In the first case, A would be B's slave and subject to exploitation. B would own A and the goods originally appropriated, produced, or acquired by A, but A would not own B and the goods homesteaded, produced, or acquired by B. With this rule, two distinct classes of people would be created--exploiters (B) and exploited (A)-to whom different "law" would apply. Hence, this rule fails the "universalization test" and is from the outset disqualified as even a potential human ethic, for in order to be able to claim a rule to be a "law" (just), it is necessary that such a rule be universally-

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[24] H-H. Hoppe, *The Economics* …, op. Cit., p. 333

[25] The historical process of establishing the view that economy (branch of praxeology) is inseperably bound with law and the crucial role played by Austrian economists and their precedessors in coming to this conclusion is shown by Josef Sima in: *Praxeology as Law & Economics*, Journal of Libertarian Studies, (Autumn 2004), p. 73-89.

> equally-valid for everyone.
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> In the second case of universal co-ownership, the requirement of equal rights for everyone is obviously fulfilled. Yet this alternative suffers from another fatal flaw, for each activity of a person requires the employment of scarce goods (at least his body and its standing room). Yet if all goods were the collective property of everyone, then no one, at any time and in any place, could ever do anything with anything unless he had every other co-owner's prior permission to do what he wanted to do. And how can one give such a permission if one is not even the sole owner of one's very own body (and vocal chords)? If one were to follow the rule of total collective ownership, mankind would die out instantly. Whatever this is, it is not a human ethics either.
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> Thus, one is left with the initial principles of self-ownership and first-use-first-own, i.e., original appropriation, homesteading. They pass the universalization test - they hold for everyone equally - and they can at the same time assure the survival of mankind. They and only they are therefore non-hypothetically or absolutely true ethical rules and human rights[26.]

Commenting on Rothbard's theory of ethics elsewhere[27] Hoppe points out that at the very core of it lies the a priori of argumentation. First of all, it is impossible to deny the ownership of one's own body because the very act of denying presupposes the use of body. And as far as all the goods that were homesteaded or voluntarily traded are concerned, their allocation to particular individuals rests on the ownership of body. Anything can become one's property only as a result of an action of a person having his own body. Moreover, as Hoppe pointed out in the above quotation, it is impossible to uphold any other concept of property as this would lead to a practical contradiction, i.e. death from starvation or another catastrophe.

Murray Rothbard never called his method a priori argumentation, but referred to the tradition of natural law. However, as Hoppe noticed, "Rothbard, in what I consider his most crucial argument in defense of a private property ethic, not only chooses essentially the same starting point—argumentation"[28]. Indeed, in this crucial issue for ethics and economics Rothbard uses nothing else but the action axiom and indicates to the impossibility of rational denying this argument supporting his reasoning with the method a priori of argumentation.

Hoppe enhances this argument by showing that the popular in natural law tradition postulate of 'universalization' is wrong in itself if it's not related to the argumentation axiom:

> However, while some norms might not pass the test of universalization, if enough attention were paid to their formulation, the most ridiculous norms (and what is more relevant even openly

26 Ibidem, p. xvi-xvii

27 H-H. Hoppe, *The Economics …*, op. cit., p. 331

28 Ibidem., p. 321

incompatible norms) could easily and equally well pass it. For example, “everybody must get drunk on Sundays or else he will be fined” or “anyone who drinks any alcohol will be punished” are both rules that do not allow discrimination among groups of people and thus could both claim to satisfy the condition of universalization”[29].

Ethical formulas derive their validity only from the reference to the property law based on the action axiom:

> Thus it can be stated that whenever a person claims that some statement can be justified, he at least implicitly assumes the following norm to be justified: “nobody has the right to uninvitedly aggress against the body of any other person and thus delimit or restrict anyone’s control over his own body.” This rule is implied in the concept of argumentative justification. Justifying means justifying without having to rely on coercion. In fact, if one formulated the opposite of this rule (i.e., everybody has the right to uninvitedly aggress against other people [a rule, by the way, that would formally pass the universalization test!]), then it is easy to see that this rule is not and never could be defended in argumentation. To do so would presuppose the validity of precisely its opposite (i.e., the aforementioned principle of nonaggression))[30].

The shape of ethics is thus dictated by the property law of body and things that were homesteaded or voluntarily received from other people. The basic principles of practical reason can be justified by referring to the same principles. For instance, the principle: 'do good'[31] derives its validity from the indisputable fact of body ownership and ability to argue. For by the very act of participating in a discussion we confirm the idea that our participation is better than not doing it or doing other things. The preference presupposes doing good. The fact that people do evil does not contradict with that, but only confirms that people also have free will andmake mistakes with recognizing this important principle.

One of the most frequent allegations to Hoppe's theory is that even if all the principles dictated by the action and argumentation actions are *true*, they are still not *binding*. This objection can be also expressed in the following way: granted that the argumentation-derived non-agression

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[29] Ibidem, p. 317

[30] Ibidem., p. 318

[31] See M. Krąpiec, *Ja – człowiek*, Lublin 1991, p. 229-230, where the author indicates to the maxim „the good should be done” as the foundation of phronetic cognition and a counterpart of consistency in action. This principle is justified by him in completely argumentative way:

> „He who questions consistency principle by the very act of questioning is thinking about something and expressing his thoughts. Thinking is a sign (formal, a transparent sign), and expressing in words or in writing is a (primary) sign of thinking. If, then, the one who questions consistency principle is expressing something and thus thinking about something, he also uses signs, i.e. he differentiates between being and non-being; he states that his thinking is something, some kind of being which at the same time and in the same respect isn't a non-being, isn't a non-thinking”. (M. Krąpiec, *Realizm ludzkiego poznania,* Lublin 1995, p. 120)

principle is true, how is it opposed to the aggression itself? Hoppe dismisses this argument in the following way:

> Why indeed?! But then, why should the proof that 1+1=2 make any difference? One certainly can still act on the belief that 1+1=3. The obvious answer is "because a propositional justification exists for doing one thing, but not for doing another." But why should we be reasonable, is the next comeback. Again, the answer is obvious. For one, because it would be impossible to argue against it; and further, because the proponent raising this question would already affirm the use of reason in his act of questioning it[32].

Hoppe proves that any ethics needs to have a reference to the property law. The question now arises: is any rational ethics tantamount to the ethics of private property? According to the action and argumentation axioms there should be no doubt about it. If any statement that can be justified assumes the principle of body ownership, then surely any ethical principle has to be based on property law. Having based ethics on the theory developed by Rothbard, Hoppe does not try to put the existing ethics on its head, but rather point to its underlying principles. These principles, as in Aristotle's theory, are simply discovered by applying the elenctic method, i.e. reducing the opposite statement to absurd.

In order to understand this issue more thoroughly, let's focus on another applications of a priori of argumentation.

The Aprioristic Division of Reality into the Causal and Teological Realms. Further Implications.

The causality principle has had in the history of ideas numerous enemies. One of the greatest of them was perhaps David Hume[33]. Even though contemporary philosophy harmoniously ruled that Hume was right in his criticism, Hoppe proves that causality principle cannot be rationally denied. The causal character of reality is inseparably related with the human action which is always attuned to cause and effect[34]. The very fact of argumentation provides us with certainty that there exist two basic spheres of reality and scientific investigations: causal and teological:

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[32] H-H. Hoppe, *The Ethics* …, op. cit., p. 407.

[33] See: D. Hume, *A Treatise on Human Nature*, Oxford University Press: Oxford 2007.

[34] The causal nature of action was shown above in the text (p. 3).

> In fact, one can neither deny nor undo the view that there are two categorically different realms of phenomena, since such attempts would have to presuppose causally related events qua actions that take place within observational reality as well as the existence of intentionally rather than causally related phenomena in order to interpret such observational events as meaning to deny something. Neither a causal nor a teleological monism could be justified without running into an open contradiction: in physically stating either position and in claiming to say something meaningful in so doing, the case is in fact made for an indisputable complementarity of both a realm of causal and teleological phenomena[35].

Conducting his reasoning in this way, Hoppe defends at the same time not only the causality principle, but also the concept of free will. Human action is not determined by anything, but is subject to free will. Causality, in turn, is already implied in the acts of action and argumentation in favor of any kind statement:

> the principle of causality must be understood as implied in our understanding of action as an interference with the observational world, made with the intent of diverting the "natural" course of events in order to produce a different, preferred state of affairs, i.e., of making thing happen that otherwise would not happen, and thus presupposes the notion of events which are related to each other through time-invariantly operating causes[36].

For Hoppe causality is one of the categories of action. It doesn't mean, however, that causality is only a specific feature of action – the above two quotations make it sufficiently clear that it also refers to the external world. The term “category of action” needs to be understood here in a slightly different way. For Hoppe action is “an anchor of reality” and a tool helping in overcoming philosophical idealism. In this perspective argumentation a priori based on the action axiom is a guarantee of a methdological and epistemological realism. In his effort of defending the method of Austrian School of economy Hoppe stumbled on the philosophical principle of a fundamental importance.

Leaving Hoppe's language for a while, we can collate his discoveries with the tradition of realistic philosophy (Thomism). All the principles and notions of existential thomism can be re-formulated into the language of argumentation theory[37].

One of the best examples if this argument is a justification which M. A. Krąpiec provides for the causality principle:

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[35] H-H. Hoppe, *The Ethics …*, op. cit., p. 291.

[36] H-H. Hoppe, *Economic Science … ,* op. cit., p. 31.

[37] See. The analyses of polish thomist Mieczysław A. Krąpiec included in his major works: *Metafizyka*, Lublin 1997; *Realizm ludzkiego poznania*, op. cit.

> The causality principle, just as other first principles, cannot be proved without simultaneously committing an error of 'vicious circle'. Any 'direct' proof rests on the causality principle, i.e. on something that it attempts to prove[38].

Krąpiec in a fully argumentative way justifies also the principle of Sufficient Reason (i.e. a formula stating that everything that exists has its sufficient reason within or outside itself. If within, these are constitutive elements of a being, outside in all other cases).

> Whoever denies the inner reason (sufficient), at the same time negates also the Identity principle which is the foundation of any properly built judgment, i.e. human thinking. For if a triangle is not a triangle by its own structure – then it is a triangle and is not at the same time, which is an absurd[39].

All the principles of traditional metaphysics can be justified in the same, argumentative way. This explains why the pre-Austrian economic thinkers appeared first at the medieval universities where the realistic Thomism was practiced.[40] We have already demonstrated the impossibility of denying the principles of Consistency, Causality, Purposefulness and Sufficient Reason. The Identity principle can be easily defended in a similar way. The method suggested by Hoppe constitutes a great re-discovery of the principles known in the ancient and medieval philosophy. The unique contribution of Hoppe is a further rectification and improvement of the age-old theory and showing its new applications in the realm of law, economy and social theory.

As we already know now, Hoppe indicated to the primacy of action axiom and argumentation axiom as its particular case. According to him the indisputable status of action binds our scheme of notions with the real world and guarantees its adequacy. And it is this fact that the *libertarian theory of law* is based on: because it is using the unshakable and apodictic structure of notions, libertarianism is not just one of possible options for society, but a groundwork for any social theory. The praxeological-aprioristic foundation is not and cannot be one of the possibilities. It is a prerequisite for all of them.

Hoppe's theory is based on indisputable propositions and that's why the libertarian legal code claims to be universally valid. Because each of the main rules of this code has a reference to action and argumentation axioms, they cannot be rationally denied by anybody as this would entail a performative contradiction.

In light of this we can clearly see why other legal theories are so much different from the

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38 M. Krąpiec, *Realizm …*, op. cit., p. 159.

39 Ibidem, p. 140.

40 Murray Rothbard, *An Austrian Perspective on the History of Economic Thought, vol. I : Economic Thought before Adam Smith*. Ludwig von Mises Institute, Auburn 2006. p. 97- 134.

one suggested in this work. The libertarian theory of law and ethics is based on the fundamentals of human sciences. It is not an effect of wishful thinking of a better, more colorful future, but a scientific analysis of the preconditions of a human action and argumentation. The libertarian legal code is not an outcome of anybody's imagination, but strictly related with the nature of reality. In other words, this code cannot be any different because the character of the world and action will never change[41].

It is also worth to mention that law and ethics are not directly related with the issue of knowledge. The main proponent of a knowledge approach to economy and philosophy was Friedrich von Hayek who argued that the key issue about socialism, and with law alike, is a centralization of knowledge[42]. Knowledge, however, is something relative to an individual, and thus available to particular men here and now. The abuses of the state and the following undesirable effects, such as lower standard of living and the destruction of capital are allegedly an effect of the ignorance of the knowledge possessed by individuals. This approach, however, lacks any reference to property and action or argumentation axioms. Hayek defines liberty as a state in which an individual is totally free in utilizing his *knowledge*, but he doesn't mention a word about a fundamental fact of self-ownership[43]. In the meantime, as we proved above, this fact is implied in any proposition related with action. The stress that Hayek puts on knowledge leads inevitably to philosophical subjectivism which is a key factor of his thought[44].

As we already mentioned at the very beginning, law has also another, practical layer. The question now arises: does it also have an indisputable status? After all, one could point out that if libertarians claim to have an apodictic certainty on the theoretical level, they should have no problems in implementing their knowledge as well. Our answer is that is not necessarily true. The enterprise of executing the law, apart from universally valid theory, is always relative to particular circumstances. In vast majority of cases an aggressor is not known and there are many unknown

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[41] Lon Fuller suggested that the formal requirements for any legal system should include: making the rules of law known, understandability of law and infrequent changes in the regulations among others (Lon Fuller, *The Morality of Law,* Yale University Press, New Haven, p.38-39.). Looking for a deeper, argumentative justification of these rules is, however, a vain attempt.

[42] This problem is mainly expressed in the following works: *The Constitution of* Liberty, University of Chicago Press, 1978; The *Counterrevolution of Science,* The Free Press of Glencoe, London 1955; and *Law, Legislation and Liberty*, vol. I, University of Chicago Press, Chicago 1960. Among many theoreticians influenced by Hayekian approach we can also mentions Randy E. Barnett and his work *The Structure of Liberty*. *Justice and the Rule of Law*, Oxford University Press, 1998.

[43] Hayek's concept was fundamentally critised by Hoppe in: *A Property Or Knowledge Problem?* The Review of Austrian Economics, vol. 9, nr. 1, 1996, p. 143-149.

[44] Jakub Wozinski, "Hayek and the Departure from Praxeology," *Libertarian Papers* 2, 24 (2010).

factors which have to be investigated. None of theses things can be done through philosophical speculation; there needs to be somebody who “clears” the situation of ambiguity and attempts to discover the actual sequence of events (causes, motives, goals, etc.). Only after this often arduous work it is possible to set a given crime together with the timeless scheme of libertarian legal code. This enterprise is a kind of art which has its own masters and laborers. This is exactly why there needs to be a market for law execution which is absent in our contemporary world.

Praxeology and Formal Logic[45]

When libertarians present the theory of economics and ethics based on action and argumentation axioms, they often encounter criticism that deductive systems have many limitations already explained by formal logic. It is time to first explain why the tools of contemporary logic do not apply in praxeology and then elaborate on praxeology’s methodological character.

The most frequent objections to any science of a deductive character are that (1) deduction always has to be based on some presumptions which cannot be verified; (2) from arbitrarily chosen premises one can induce any sort of conclusions; (3) deductive science often tends to ignore new developments in natural science and limits itself to the realm of its own intellectual investigations. While it is true that, historically, the development of deductive science tends to confirm the above objections there is no need, however, to renounce deduction itself because of this. As Professor Hans-Hermann Hoppe has successfully demonstrated[46], praxeology based on the argumentation axiom (or, we could also say the other way round: the a priori argumentation theory based on the action axiom) can function as a deductive science avoiding all the problems that were previously inconclusive.

Let us now turn to the question asked in the title of this article. Formal logic is a science built on abstraction. It abstracts from the way individuals in the world are described to find out more about the structure of language. All this is done with the assumption widely accepted today that language itself is the main focus of philosophy. Contrary to this, praxeology is mostly interested in direct discovering the laws and regularities of the external world. In other words, the

[45] This text apperaed previously on the webpage of Polish Instyt Misesa: http://mises.pl/blog/2010/05/08/wozinski-prakseologia-a-logika-formalna/.

[46] Professor Hoppe has dedicated numerous articles to describe his method. The most complete discussion can be found in: H-H. Hoppe, *The Economics … , op. cit.*; H-H. Hoppe, *The Theory of Socialism … , op. cit*.; H-H. Hoppe, *Economic Science …, op. cit*.

argumentation theory is only a *means* to discover the truths governing the reality. Therefore, language is not the main focus of praxeology, but serves as a tool for other purposes. Thus, it cannot be maintained that praxeology is just another form of modern philosophy as it is practiced after the linguistic turn.

In order to discern the uniqueness of praxeology and its method, it will be useful to point to the character of its axioms. When we say: "A human acts" and claim it to be an undeniable judgment, we rest on the very act of expressing that. Or, to be more precise, the relevant thing here is that we communicate a judgment which becomes self-evident at the moment of uttering it. The action axiom can be expressed in many natural languages, but it will always mean the same. And it is the very understanding of the axiom by argumentation participants which makes it the basis for the entire body of knowledge.[47] Contrary to the significance of the action axiom in praxeology, from the point of view of formal logic the action axiom seems to be nothing more than a judgment presenting itself as:

A (x)

where x is a human being and A is the predicate: 'acts'.

But such a formulation of the action axiom fails to refer to action itself. And it is irrelevant whether we use predicate calculus, propositional logic or any other notation. This is because *any* formal logic uses notation which can function only through any interpretation provided by natural languages. Moreover, it makes a huge difference to say "a human is capable of action" rather than "there is an 'x' that 'A' ". The former is self-evident and depends on the meaning conveyed by the notions used, whereas the latter is meaningless without some implicitly assumed interpretation of the symbols used. We thus see clearly that in order to translate praxeological judgments into formal logic it is necessary to take an additional step of supplying auxiliary interpretational judgments, such as: "x is a human being," which are void of an a priori validity inherent in the action axiom.

There is no point in translating the science of human action into formal language because the act of translation invalidates the reference to the external world. In fact, almost all the modern theories of linguistic philosophy are in overt contradiction with praxeology as they explore the representation of its judgments, not the judgments themselves. This can be seen on the example of the well-known incompleteness theorems proved by Kurt Gödel. According to him, any computable axiomatic system cannot be proved to be consistent within itself. Therefore, many logicians might argue that praxeology tries to achieve the impossible: namely, that it attempts to

[47] H-H. Hoppe, *Economic ...,* op. cit. , p. 7

prove its axioms within itself. But praxeology is not a system of computable axioms. All the judgments that we interpret as necessarily true are just derived from the action axiom which serves as the core for the whole system of human science knowledge. But the action axiom cannot be interpreted as meaning that praxeology is a computable axiomatic system with the number of axioms being 1. Unlike formal logic, praxeology is a science using a totally different method, which means that such logical interpretations are irrelevant for it. Moreover, as pointed above, Gödel's incompleteness theory applies only to the meta-language describing the language of the action axiom.

Modern logic has developed numerous theories allegedly forcing us to reconsider the ordinary habits of thinking. There are, for example, fuzzy or paraconsistent logics which claim to have proved that the law of noncontradiction is not necessarily a law of reality, but simply a habit of thought. And yet, praxeology treats such logical theories as nothing more than games based on arbitrary principles. They are meaningless because they are not related to action. As Professor Hoppe explained, all the basic laws of classical logic have their grounding in action.[48] We only understand the laws of excluded middle or of identity as categories of action. It is because we cannot do something and not do it at the same time. Non-classical logics simply fail to notice that they operate on meta-language. The only thing which it can indeed prove is that the minds of logicians are full of invention and imagination. This point was made previously by Murray Rothbard in *Man, Economy and State*:

> The suggestion has been made that, since praxeology and economics are logical chains of reasoning based on a few universally known premises, to be really scientific it should be elaborated according to the symbolic notations of mathematical logic. This represents a curious misconception of the role of mathematical logic, or "logistics." In the first place, it is the great quality of verbal propositions that *each one* is meaningful. On the other hand, algebraic and logical symbols, as used in logistics, are not in themselves meaningful. Praxeology asserts the action axiom as true, and from this (together with a few empirical axioms—such as the existence of a variety of resources and individuals) are deduced, by the rules of logical inference, all the propositions of economics, each one of which is verbal and meaningful. If the logistic array of symbols were used, each proposition would not be meaningful. Logistics, therefore, is far more suited to the physical sciences, where, in contrast to the science of human action, the conclusions rather than the axioms are known. In the physical sciences, the premises are only hypothetical, and logical deductions are made from them. In these cases, there is no purpose in having meaningful propositions at each step of the way, and therefore symbolic and mathematical language is more useful.

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[48] Ibid., p. 29-31.

> Simply to develop economics verbally, then to translate into logistic symbols, and finally to retranslate the propositions back into English, makes no sense and violates the fundamental scientific principle of Occam's razor, which calls for the greatest possible simplicity in science and the avoidance of unnecessary multiplication of entities or processes.
>
> Contrary to what might be believed, the use of verbal logic is not inferior to logistics. On the contrary, the latter is merely an auxiliary device based on the former. For formal logic deals with the necessary and fundamental laws of thought, which must be verbally expressed, and logistics is only a symbolic system that uses this formal verbal logic as its foundation. Therefore, praxeology and economics need not be apologetic in the slightest for the use of verbal logic—the fundamental basis of symbolic logic, and meaningful at each step of the route[49].

But not only traditional laws of reality and action are being undermined by modern logicians. Also the concept of truth is very often attacked as untested and naïve because it has proper formal interpretation. The traditional form of the definition of truth was based on correspondence between the mind to what is outside it. Although it was not interpreted in terms of action, it relied upon objective reality, external to our thoughts. In deep contrast to it, the modern truth definition proposed by Alfred Tarski maintains that truth can only be ascribed to judgments of meta-language to the language in which we utter a given sentence. Again, as in the case of principles of action, our reply is that the truth is not a characteristic of thought but of reality. Tarski's definition is only workable in a system created in complete ignorance of the reality of action. The often discussed resemblance between Gödel's Incompleteness and Tarski's Undefinablity theorems has its reason in the fact that they describe a representation of reality, not the reality itself. Contrary to that, praxeology is grounded in reality by the fact of our ability to argue using scarce resources (our bodies and external things).

Thus, we can call praxeology a deductive science only insofar as it maintains some resemblance to the previously practised sciences which was referred to as deductive. Nevertheless, praxeology turns out to have a unique character which cannot be described as either inductive or deductive. Genetically, we learn of things through the process of induction: as we grow up we learn about more and more things and gradually discover some regularities of the world. However, our knowledge obtains its structure and grounding only through action which is based on deduction. Praxeology, just as philosophy, is a science which appeared as a fully-fledged discipline quite late in the history of mankind. It took many centuries until we learned that our knowledge is based on action. When Ludwig von Mises "stumbled" upon action[50], he discovered

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[49] M. Rothbard, *Man* ..., op. cit., p. 75-76.

[50] L. von Mises, *Human Action ... , op. cit.*.

an Archimedes' point from which we can set off to reconstruct the whole knowledge.

Of course, when we point to the action axiom as a crucial point of philosophy, we do not mean it to be some kind of ἀρχή (arche) governing the whole world. It is not the main constituent of all beings as presocratics wanted, but simply a *tool* by means of which humans discover the world. It does not mean either that the whole world as we see it is relative to action. Action is transparent to reality and does not distort it in any way. If it did, we could not find any basis for our argumentation. It is simply impossible to claim that there is a factor which makes the sets of notions that debating people use totally incompatible with each other.[51] Action relates all humans to objective reality and makes it impossible to justify any philosophy striving to mediate our knowledge.

The expression *a priori* may sometimes imply some kind of idealism. Hoppe was aware that using the terminology of Kantism may cause some misunderstandings. But, as he explained:

> "We must recognize that such necessary truths are not simply categories of our mind, but that our mind is one of acting person. Our mental categories have to be understood as ultimately grounded in categories of action[52].

Again, it does not mean that action is a kind of category similar to those suggested by Immanuel Kant which mediate our knowledge and make impossible the cognition of *the thing in itself*. Hoppe clearly explains that "action is a bridge between the mind and outside reality"[53] which indicates that *a priori* has to be understood in a special way. As David Gordon explains it:

> As Mises employs the term 'synthetic a priori proposition', for example, it simply designates a proposition that is necessarily true and not a tautology. Those who prefer an Aristotelian approach can easily translate Mises' terms into their own preferred usage."[54]

We can clearly see that the necessary truths described by Hoppe are not *a priori* in the classical meaning as they are not formed in complete abstraction from experience. This is because our mind and experience (external world) melt into one through action. This crucial point of junction provides us with necessary truths which are not mere words, but judgments anchored in reality.

At the beginning of this article it was said that deductive sciences are very often ignorant of things discovered by natural sciences and that they neglect contributions of , say, modern physics. Heisenberg's Uncertainty Principle is often invoked as a proof that philosophy has to reconsider its own principles. However, in the light of the above discussion of a unique character of action, we

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[51] H-H. Hoppe, *In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's …, op. cit.*, p. 185.

[52] H-H. Hoppe, *Economic science …,* op. cit., p. 9

[53] Ibid.

[54] D. Gordon, *The philosophical … , op. cit.*, p. 8.

can easily refute such allegations. First of all, because praxeology is based on the action axiom providing us with a crucial point of junction between the mind and reality; and secondly, because the necessary truths discovered by praxeology cannot be undone. As long as humans are able to act, 2 + 2 will always be four and even the discovery of extraterrestrial life could not disprove it.[55]

Praxeology turns out to be a unique science with its own method. The categories applied in main modern methodology of science fail to describe its specific character. Even though concepts similar to those proposed by Ludwig von Mises and Hans-Hermann Hoppe have been used in philosophy before, it must be emphasized that the two philosophers have in fact discovered a completely new method to be used not only in economics, but also in other areas of philosophy. It is not an exaggeration to say that by identifying the true bases of our knowledge, they outlined new directions of scientific investigation.

SELF-OWNERSHIP AND HOMESTEADING

Having investigated the methodological structure of the libertarian legal code, we can finally answer the question asked in the title of this chapter: what is the law?

It is generally believed that law is a set of norms which have to be obeyed and punishments for those who break them. This intuition is absolutely right, but at the same time highly inaccurate. First of all, we have to answer a question how to discover these norms in a world of so many lifestyles and points of view? Moreover, we have the same problem in the question of the methods of punishment. Again, we can resort to the theory developed by Hoppe who makes us focused on certain underlying principles which inevitably constitute a part of any type of thinking. The answer to our question is already included in the seemingly prosaic fact of action and argumentation.

Any theoretical argumentation assumes the ownership of our bodies. Words simply cannot be expressed by themselves – there have to exist humans utilizing their limited bodies. Scarcity of bodies can be justified by the very fact of participating in a discussion: if we argue, we have to be

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[55] As Murray Rothbard explains: „Now the crucial question arises: how have we obtained the truth of this axiom [action axiom – JW]? Is our knowledge a priori or empirical, "synthetic" or "analytic"? In a sense, such questions are a waste of time, because the all-important fact is that the axiom is self-evidently true, self-evident to a far greater and broader extent than the other postulates. For this Axiom is true for all human beings, everywhere, at any time, and could not even be conceivably violated." M. Rothbard, *In Defense of Extreme Apriorism*, in: *The Logic of Action one,* Edward Elgar Pub. 1997.

separate units[56]. Otherwise, if the whole reality was just one person, no argumentation would make a sense. Thus, if we want to participate in a discussion, we have to agree on the independence of our bodies, and also on their scarcity. Our bodies are scarce resources – as my interlocutor you don't have an access to my body (one can, of course violate somebody else's freedom and not allow to speak, but this kind of communication is irrational and cannot be justified in any way)[57].

Having established the indisputability of ownership of the most basic scarce resource – body, we can easily distinguish another indisputable fact of scarcity of resources available in nature. Any conflict assumes scarcity. People come into conflict with each other just because the world is limited in its totality and its resources are scarce. The situation of unlimited availability of all resources is completely irrational as it would assume an absolute monism (the whole world would consist of one god-like person) and thereby would be irrational. As we already proved, reality is plural and that's why there have to exist certain rules restricting the use of scarce resources by individuals.

It turns out that the very reflection about argumentation which is seemingly a tool of knowledge brings in an answer to our question. If the principles of self-ownership and homesteading are universally valid, any violation of them is certainly wrong. Law, as a set of norms and punishments, has to be subordinate to these principles as well. Subordinate to or perhaps equivalent to?

Hoppe's insight on the nature of ethics leads us to a surprising implication. Ethics and economics, states Hoppe, are required only insofar as goods are scarce[58]. Human thoughts are not scarce as anybody can have them. Every person can think about anything he or she wants without

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[56] Frank van Dun argues similarily:

> The very idea of a dialogue presupposes an irreducible plurality of natural persons. Thus, in our argumentation, neither you nor I can deny that the other is a separate, independent other person.

Frank van Dun “Argumentation Ethics and the Philosophy of Freedom,” Libertarian Papers 1, 19 (2009), p. 6.

[57] See Hoppe's analysis:

> And third, that argumentation is a conflict-free way of interacting. Not in the sense that there is always agreement on the things said, but in the sense that as long as argumentation is in progress it is always possible to agree at least on the fact that there is disagreement about the validity of what has been said. And this is to say nothing else than that a mutual recognition of each person's exclusive control over his own body must be presupposed as long as there is argumentation (note again, that it is impossible to deny this and claim this denial to be true without implicitly having to admit its truth).

H-H. Hoppe, *A Theory of socialism … , op. cit.*, p. 132

[58] H-H. Hoppe, *The Economics and Ethics … , op. cit*., s. 333.

the violation of somebody else's property rights. We also have no access to other people's thoughts; we are only ourselves and can't even imagine having two personalities (two minds)[59]. Any objection pointing to the uniqueness of, e.g. minds of geniuses, completely misses the point. Once discovered, a brilliant idea can be shared by many people. But even if a genius doesn't want to make his invention public, it doesn't disprove our argument.

Thus, property law cannot apply to the realm of thought as it is not a scarce resource[60]. *Any conflict that can be rationally described concerns only scarce resources[61].* Law, as a set of norms and punishments, should therefore be understood as an extension of self-ownership and ownership of things that were homesteaded or voluntarily exchanged with other people. The theory of law is tantamount to property law. Its main goal is to show how the general principles of self-ownership, homesteading and voluntary exchange should be applied in particular circumstances.

As we have already mentioned, establishing all circumstances of law violation is a task for entrepreneurs – people who are skilled in it. The task for a theoretician should only be a defense of all the basic rules which are argumentative and praxeological certainties. This is why in the next chapters we will focus primarily on key issues of legal theory which are totally independent of any given cultural and social context. Even though the Austrian School of Economics argues that everybody is an entrepreneur, our goal will be to extract the preconditions for being an entrepreneur; the preconditions of any action performed in the context of other people.

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[59] Split personality cannot disprove our argument, because it only shows that people with such affliction are unable to function in scoiety without the help of sane persons.

[60] Scarcity is peculiar to matter. As states Mieczysław A. Krąpiec:

> In a human being there is such an [immaterial – JW] aspect, because the fact of our consciousness is a proof our identity. Negating our identity is irrational. Thus, apart from alternating matter there exists in ourselves something which is a cause of our existential identity throughout our lives. This real "cause" of identity is self-conscious, because I know well that I am myself, as the same being, the same center to which all the alternate physiological and psychical acts are referred to. I feel as the same being and I am conscious of my identity. Apart from the alternate element there is also another, self-conscious element in my being which is a cause of my identity and invariability; the element which in self-conscious "I" is an ultimate cause of identity. If then in "self" through philosophical explanation we discover a human soul, it is the soul which is a cause of self-consciousness of "self". It is not anything existentially changeable, but, contrary to that, as a cause of self-conscious identity it is the "immaterial" part of a man. *Ja – człowiek,* Wydawnictwo KUL, Lublin 2005, p. 148-149.

[61] Even if somebody does not agree with our thoughts, he refers to a scarce resource (our body through which we express them) and wants us to use it in a different way. Although our thoughts are not scarce, they would not be possible without our body which is a scarce thing.

II. Property Law

Within the libertarian movement there is a group of people who strongly believe that there exists more than one valid theory of property law[62]. They reject the argumentative-praxeological method suggested by Austro-libertarians[63]. It is argued that there are other possible methods of

[62] Perhaps the most famous critique was formulated by Bob Murphy and Gene Callahan: *Hans-Hermann's Hoppe Argumentation Ethic: A Criticque*, available at: http://www.anti-state.com/murphy/murphy19.html.

[63] This term refers to this part of libertarian movement which based its theory on the Austrian School of

property distribution. Their arguments can be grouped into the following categories.

The first of them refers to a question of *exclusiveness of ownership*. Proponents of plurality in property law argue that homesteading principle is an usurpation towards the whole society. In their vision man is a product of society and therefore the principles of utilizing property are also subject to the social context. This concept can be described as a part of influential nowadays ethnic relativism. Adherence to this theory, however, puts us in a contradiction. Because if all theories and rules of social life are relative to ethnic-cultural context, what to say about this proposition itself? Is it also but a proposition relative to this context or does it pretend to be universally valid? The peculiarity of libertarian legal and ethical code, as we have shown in the first chapter, consists in a universal validity, independently of time and space. Cultural context is for legal theory totally irrelevant – it can only be interesting for entrepreneurs executing the law who have to reconstruct the crime in particular circumstances.

Another frequently expressed objection to our theory is a view that property law is not necessarily available only for individuals. This type of collectivism completely ignores the fact the only alternative to exclusiveness of ownership is a world communism[64]. As Murray Rothbard justly noticed, for exclusive ownership there are only two logical alternatives: either a late-comer or all the people. The first option turns out to be irrational when we discover that the late-comer is in fact everybody as even the person who comes after us would have to wait for the decision of the person who comes after him, etc. The other option turns out to be practically impossible when we realize that every person would need a decision of the whole world's population to eat even a small apple. It would inevitably lead to a massive death from starvation. Thus, exclusive ownership of body and things cannot be denied without committing a contradiction.

There are also attempts to apply in the theory of property certain elements of utilitarianism[65]. In this view the ownership of a given thing should be established according to a maximal utility that can be derived from using it. The inner contradiction of this theory was shown, among others, by Murray Rothbard who proved that the concept of utility is relative to individuals and cannot be calculated in any way[66]. Utility composes itself in a certain order and cannot have a

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Economics. The most influential representatives of it are Murray N. Rothbard and Hans-Hermann Hoppe, among others.

[64] See the analysis made by Murray Rothbard in: The Ethics …, op. cit., p. 48-49, and Hoppe's summary in the introduction to this work on p. xvi-xvii.

[65] See legal analysis from the point of view of economics and utility principle in: David Friedman, *The Machinery of Freedom*, Open Court, Chicago 1989, p. 183-200.

[66] See Ludwig von Mises, Human …, op. cit., 289-291 and M. Rothbard, *Man* …, op. cit., p. 879,

common denomination. It cannot be added up or subtracted in a an effort to find the best solution for society. A person who claims to have a right to decide on somebody else's behalf referring to a higher social utility not only commits an error but is also highly immoral.

Some opponents of our theory try also to deny the self-ownership through linguistic manipulation. They claim that from the fact of discussion does not imply the self-ownership, but only a certain control or just ownership of mouths or brain. This kind of argument attributes to the Asutro-libertarian concept of law something that it has never claimed. First of all, a priori argumentation uses only a very general category of body and it doesn't claim that body is only something that is fully healthy and having all the limbs and organs. Still, there are people who are able to argue while at the same time not having legs, eyes, etc. and sometimes even deprived of a few senses. It is a proof that every man has a body – a certain material object which enables him to communicate. So far there has been no human being without a body.

The argument that calling *the control over body* self-ownership is an abuse is totally wrong as it attempts to separate a special category which doesn't exist. This error stems from the contracts are made in the form of rental or a conditional exchange. A farmer who rents somebody's land is not its owner, even though he currently uses it. But as far as the ownership of our bodies is concerned, we have to agree that it cannot be alienated. It is simply impossible to give the control over our bodies and decisions for some time to somebody else. If anybody states "I don't own my body – I am my body", it is nothing but word-play which can only be entertaining for somebody, but is meaningless. This issue was clearly explained by Murray Rothbard:

> the only valid transfer of title of ownership in the free society is the case where the property is, in fact and in the nature of man, alienable by man. All physical property owned by a person is alienable, i.e., in natural fact it can be given or transferred to the ownership and control of another party. I can give away or sell to another person my shoes, my house, my car, my money, etc. But there 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[67].

[67] M. Rothbard, *The Ethics … , op. cit.*, p. 47-50.

HOMESTEADING

We can now treat the discussion with the proponent of plurality in property law as closed and focus primarily on the mechanism of libertarian theory of law. In the previous chapter we pointed to its foundation, i.e. self-ownership and ownership of resources which were appropriated through homesteading or voluntary exchange. The characteristic feature of homesteading is that it requires a certain real transformation of the world external to our minds. In other words, as a result of homesteading a given thing changes its physical characteristic[68], i.e. it changes its *location*. The most frequent example of homesteading principle are the Lockean apples gathered from the tree. As owners of our bodies we appropriate a given apple by taking it into our hands if we are the first to make it.

Naturally, there are things that cannot be gathered or picked up, e.g. soil from the whole land. In such situation there is a temptation to call homesteading any kind of transformation of the previously unowned resource. Further examination of this issue shows, however, that any transformation also can be reduced to change in location, even if to a smaller extent. Cultivation of soil consists primarily in constant moving it (ploughing, raking, etc.), changing its location. A mere walking on the ground doesn't make it anybody property. Homesteading is a purposeful action which in the case of ground necessitates changing its location (in this case, homesteading occurs at the moment of the first ploughing). The practice of digging border stakes does not make any property in land as well. This is because if we accepted this principle, a new-comer to a virgin continent could simply dig four stakes next to each other and claim to be an owner of the whole continent (as it lies outside the stakes).

The change of location accompanying homesteading also cannot be denied without simultaneously contradicting oneself. Participating in a discussion relies on using the primary scarce resource – a human body. It would be impossible to make it without constant moving our body (changing its location) – be it mouths, hands or any other part of our body. Our ability to use our body (self-ownership) manifest mainly by our communication with parts of our body.

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[68] John Locke holds that the factor which makes things our property is labor:

> "He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask then when did they begin to be his? . . . And 'tis plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and com-mon." in: John Locke, *An Essay Concerning the True Origin, Extent, and End of Civil Government,* V. p. 27-28, in: *Two Treatises of Government*, P. Laslett, (ed.) (Cambridge: Cambridge University Press, 1960), p. 305-7

If things were appropriated by simply thinking of them, this would entail an insoluble conflict of establishing whose thought was the first. Moreover, thoughts cannot be owned, as was already explained in Chapter I. Thus, homesteading requires a *real* contact between two units: a man and some material resource. Other people cannot be homesteaded because each man is already presented with a *fait accompli* of self-ownership. A man is conceived together with his own body and since then he is a self-owner – a homesteader. We stress here the change of location because this is the only possible way of manifesting the control over a given object and because our self-ownership (the foundation of any property) can only be justified through communication (argumentation) which is nothing but moving our body. Lockean *labour* and Rothbardian *energy* are unreliable criteria as they stress the process of homesteading. Energy or labour alone can't help in appropriating a given thing. For instance, many people can try to catch and tame a horse, but only the one who is able to control it and take wherever he wants can call himself an owner. In the same way, one can work a lot and use a lot if one's energy to gather an apple from the tree, but the act of homesteading happens only when the apple is finally grabbed. To homestead a thing means being able to change its original location.

There is also another requirement related with homesteading: it has to be made visible to other people. This problem would be absent in a world with only one man, but in our real world it is necessary to manifest our ownership to other people. It is because if the man described by John Locke first gathered apples and then threw them to the ground and left, he would make a great problem for another person who stumbled upon them. In other words, our homesteading needs to clearly observable for other people who are potential homesteaders.

The problem of manifesting our homesteading is related with the chronology of human life. Each man is born naked and owns just his own body. First of all, he uses the property of his parents or guardians, still being unable to develop his ownership to any other things which are not simply given to him. By growing up, he learns how to use his own body to acquire new things. He takes them into his hands, pockets, bags, rooms, houses, flats or stores – he *locates* them in particular places. Thus, the manifestation of homesteading consists in *moving a given thing into o a previously-owned place* (body or ground). If a homesteaded horse or apple is left outside his previously-owned property (land or hands), he can no longer claim rights to them.

This criterion cannot be treated as restriction of property law and making concessions to society. Quite contrary, it has to be understood as a natural requirement of the world with scarce resources and the possibility of conflict. By manifesting our homesteading we also secure ourselves against the situation in which we have doubts whether things can still be appropriated

or not. By moving a given thing into the sphere of previously appropriated resources (body, land or buildings) we fulfill the requirement of ownership as explained by the argumentation axiom: we own our body because we are able to move it and communicate, which is also a rule for any other type of ownership.

It also worth to mention here about the *instrumentality* related with homesteading principle. The basic tool of acquiring any new things is our body. Man quickly learned how to use many kinds of tools to accommodate his life. Fisherman use fishing net, lumberjacks cut trees down with chainsaw etc. In today's world it very often happens that the process of homesteading a given resource is fully automated. It doesn't mean, however, that the ownership is any way weakened. Quite contrary, it only confirms our scheme of using our bodies as a tool helping in acquiring new things. For any thing that we own we can point to a chain of acquisitions: beginning with our body, through our cars, machines and any other tools which help us to achieve the goal of homesteading. This chain confirms the fact that any appropriation is only possible thanks to the previously-owned resources which were moved into the sphere of our property.

The Transfer of Homesteaded Resources

All the material things known to man can be divided in the following way:

- objects homesteaded through the change of location;
- objects not yet homesteaded belonging to the nature or abandoned by other people.

The first class of objects can in turn be divided into:

- objects homesteaded which changed the owner;
- objects homesteaded which didn't change the owner.

Whereas homesteading requires only the change of location, the transfer of ownership requires one additional factor. A natural outcome of appropriating a given thing from the nature is the possibility of selling it to somebody else. It can be done after agreeing on a certain price or simply by offering somebody a gift. The aspect of price can be ignored here. The relevant thing is *voluntariness* of the exchange. Contrary to homesteading where a given thing had to be moved, the act of exchanging requires also a voluntary agreement of both parties. Another difference is that the exchanged object doesn't have to change its location; both parties of the exchange can agree on a *surety* which is re-located and serves as a guarantee for the contract.

Homesteading dominates societies at the early stages of development. They have a frequent contact with previously unowned resources and have to do things like: cutting trees, hunting etc. As they gradually develop even greater part of natural resources becomes transformed in one or different way. Society begins to create goods of a higher order[69]. For instance, logs and moss which were previously used only to make fire can also be used for building houses. With the course of time, some people begin to specialize and become carpenters. Their specialization is only possible thanks to the property law which enables lumberjacks to cut the trees down, sell it to raftsmen who, in turn, sell the wood to carpenters. The wood homesteaded by lumberjacks is initially their own property, but thanks to a voluntary agreement with raftsmen they renounce it in exchange for money which raftsmen also receive later on after selling wood to carpenters.

Strange as it may seem, but in the case of exchanging property titles there is also an underlying change of location. In the age of transactions made on our computers we sometimes don't realize the fact that every lawful exchange requires some change of location.

In order to understand it better, let's imagine two primitive men. One of them is a fisherman and the other a lumberjack. They both want to exchange their homesteaded things: the fisherman wants to have some firewood, and the lumberjack is in the need of fish to eat. Previously each of them appropriated (changed the location of) some amount of resources they now wish to exchange. In order for any of them to become a new owner of fish or firewood they need to change its location (and place it in the sphere of previously-owned resources) – in this case they need to grab it by their hands and take it to their own place. From this moment onwards each of them has the right to decide about the location of the exchanged firewood and fish respectively.

As the civilization develops, the homesteaded resources become even more abundant – that's why there appears a technical problem of how to make a given resource (e.g. one hundred cubic metres of cut down wood) an object of exchange without the need to move it straight away as it may weigh many tones. As solution to this problem men learned to use objects which were *sureties* of exchange. The surety can be anything: gold, a piece of paper or any other object. Due to many reasons, as we will explain below, the best surety turned out to be a contract written down on a piece of paper (which today is gradually superseded by digital record).

If a given thing is too big, too remote or cannot be moved directly and personally due to

[69] See the great description of social progress as measured by producing successive goods of higher order by Carl Menger, *Principles of Economics,* Ludwig von Mises Institute, Auburn 2006, p. 51-89.

any other reason, but there is a mutual agreement on performing the exchange, both parties can *intentionally* use a different thing as a *surety*. Their mutual agreement simply cannot have a mental character[70] - that's why they necessarily have to agree that instead of moving the exchanged object directly, they will re-locate a certain *material* substitute. When Murray Rothbard stated in his *The Ethics of Liberty*[71] that a mere promise cannot be a binding contract because breaking it doesn't violate anybody's property law, he implicitly based his argument on the fact that *promise is void of material surety*. A promise is a thought embodied by our body – but our own body is and will always remain only our property; our body is inalienable. Only by transferring the promise into some other, material object (surety) through the intentional act of the exchanging people it is possible for a legal contract to take place[72].

In the early stages of social development sureties could be many things, according to a custom prevailing in a given society. But as we already mentioned, the character of reality and resources dictates further refinement of any tool. Let's use another example: a merchant can buy furniture from some carpenter only in a given time or place and the sale depends on many circumstances, If both parties of the exchange trust each other (e.g. they are members of the same family), they don't have to use any kind of surety and trust "on word". In this way they can save themselves time and problems, but in the case of conflict they remain without any means which could help them in executing their expectations. That's why, because of uncertainty related with any contract, people learned to sign written contracts which detailed all the conditions of the title transfer. A written contract is the most natural form of surety because it gives a possibility of a detailed description and elucidation of all the conditions. The intentionality of contract can be expressed in the most convenient way by writing down all the aspects of transferring the title.

Naturally, surety is totally voluntary. It has sense only if one party (or both parties)

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[70] The reason why thoughts cannot be property was explained previously in Chapter I.

[71] M. Rothbard, *The Ethics …*, op. cit., p. 79.

[72] Thus, Stephan Kinsella makes a mistake by criticizing Murray Rothbard for his „fixation" on the word „promise":

> In general, title is transferred by manifesting one's intent to transfer ownership or title to another. A promise can be one way of doing this,but it is not necessary. Rothbard and Evers seem to have a fixationon the word "promise" and do not agree that a promise can convey title. They appear to think that because a promise is not enforceable, it cannot serve to transfer title to property. However, a promise canbe intended and understood to convey title and, thus, can operate to do so. In certain contexts, the making of a promise can be one way to manifest one's intent to transfer title.

Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability*, in: *Journal of Libertarian Studies* Volume 17, nr 2 (spring 2003), p. 11-37. Kinsella forgets that for a legally binding contract (transfer of titles) it is necessary to have a material, alienable surety. Without this substratum a promise is nothing but a thought.

requests a performance bond[73]. As we already mentioned above, family members or friends who are exchanging goods can do without a surety. Their mutual trust is something similar to surety (but not surety itself). This is why a large amount of sureties (known to us mostly in the form of a small-print contracts attached to products) indicates increased uncertainty among people. The predictability of our social environment doesn't necessitate verbal promises to be supported with a material surety; the need to use it stems from uncertainty and fear of the violation of property rights[74].

A family living together is not usually treated as a group of people who exchange goods with each other, though it is just what they make. The fact that they share their resources (money, food, means of transport, clothes etc.) without any kind of contract or surety doesn't mean that their exchanges don't take place. Quite contrary – they definitely exist and are very frequent, but are not subject to law due to the absence of surety.

Property Abandonment

Any act of homesteading implies also the possibility of abandonment. We may simply get bored with a given thing or it may become useless. But is abandonment a completely different category of action than a simple contract? There are many reasons to believe that not necessarily. In fact abandonment happens any time we exchange things with other people as we no longer need these objects. Otherwise the exchange would not take place. The analysis of preference scales[75] makes it clear that exchanging a given good into another is an evidence of its marginal utility. Thus, property abandonment has no special status and it is subject to the same limitations related with uncertainty as an ordinary exchange. Naturally, the only difference here is that the abandoned thing may become a part of natural resources which means that it is located outside the realm of previously-owned resources.

A more often discussed question is the abandonment of property by unknown man, a person lost in the war or in other circumstances. Indeed, there are sometimes situations in which

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[73] Murray Rothbard explains the character of performance bonds and traces their historical examples in: *The Ethics …*, op. cit.., p. 137-8.

[74] The state as an institution constantly increasing social time preference rate is directly responsible for the process of the expansion of complicated contracts (sureties) through forceful expropriation which contributes to a reduced confidence in ownership.

[75] See a profound description of the human preference scales in: Ludwig von Mises, *Human …*, op. cit., p. 119-126.

we have to deal with a thing that the owner of which is probably dead. In such circumstances the person who appropriates (homesteads) a given good takes the risk of possible reappearance of the lost person. Again, the ownership is established according to the chronology of homesteading and it is valid unless the unknown previous owner comes back and claims back his property.

Abandonment in today's world is a relatively rare thing due to the fact that most of the natural resources available on Earth have already been homesteaded. Previously it was possible to leave a given thing in a desert or uninhabited area, but as these became scarce, the abandonment takes a form of a contract for, e.g. waste management or supporting charities with things that are no longer useful for their original users.

Ownership or Title Ownership?

Another very important issue related with the theory of private property is the question whether through homesteading and voluntary exchanges people become owners of a *thing* or rather owners of a *title* to the thing. Ownership implies direct control, whereas title a certain indirectness. Stephan Kinsella suggests that:

> there is a distinction between title to property, which is alienable by mere contract; and rights related to one's body, which are not alienable by promise or contract (speech act) but are alienable by act of aggression[76].

The distinction between title and ownership makes sense only as a means of highlighting the central role of human body and the will connected with. As an inalienable center of all actions it is a precondition for the appropriation of any alienable objects. Ownership and title ownership, however, have to be understood as equivalent and referring to the same fact, i.e. the of connection of body with will.

Conditional Exchange and Rental

Placing and adjective “conditional” before exchange might suggest that it is just one of many types of legal exchanges (contracts). But in fact every kind of exchange is a transfer of titles

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[76] S. Kinsella, *Inalienability and Punishment: A Reply to George Smith*, Journal of Libertarian Studies (winter 1998-99), p. 92.

under certain conditions which are mutually agreed to by the contractors. Gifts offered by family members and friends cannot be legally exercised because they are just verbal, mental declarations. They have no *material ground* in the external (to our bodies) reality. For a legal exchange to take place it is necessary to use a surety which can be the exchanged object or another thing that is more convenient in use.

Perhaps the greatest error that can be committed in the interpretation of title transfers is a belief that by exchanging with somebody a given thing our control over it is irrevocably finished. Proponents of this view very often refer to a rent in which very often the person renting a given resource can practically do anything with it, as long as the real owner doesn't object to it. They claim that conditional exchange is a violation of property rights and that all the functions attributed to it are in fact the same as in rent.

What is the difference between conditional exchange and rent? In order to understand it properly, we have to look back to the concept of homesteading. According to this indisputable principle every person who managed to gain a spatial control over a given resource becomes its owner. Insofar as this person does not violate anybody else's rights, he can use it for any purpose. A homesteaded thing is connected with the homesteader by the real change in the external world – the change of location. If any other person wants to have an access to that thing, he has to accept all the conditions dictated by the original owner. This owner may decide about the length and character of his ownership; he can limit it spatially and temporally and reserve it only for particular persons and actions that he wishes to. Thus, the difference between conditional exchange and rent is that in the case of rent the owner *limits the time* of using a given good while simultaneously retaining his ownership, whereas in the case of conditional exchange some part of conditions are renounced *without time limit*. The agreement on open-ended annulling at least one aspect of control over a given property is equivalent to the actual title transfer.

Conditional exchange, together with the necessary aspect of renouncing without time limit of at least one aspect of control over property, can also have many other conditions, both limited and unlimited in time. For instance, by selling somebody a CD with my song I can restrict that the buyer does not copy it at all or does not copy it in the next 25 years. Similarly, I can sell somebody my book and restrict that nobody is allowed to copy it unless I agree. The ban on copying the book limits the ownership in one way, but the new owner can move the book at will without my permission.

The view that the new owner of a good can do with it anything he wants without any limits is false. Quite contrary, he is bound with the conditions included in the contract. The inability to

make with an exchanged thing whatever we want is not a violation of property rights, but their enhancement because it secures the will of the original homesteader. The first owner of a resource can decide on its future and shape it by contracts made with other people.

It may seem for somebody that homesteaders and previous owners are given here some inhuman power of dictating other people what they can do: because if homesteaders can request all the later owners to perform certain actions, their power seems to be great and extending over many generations. We shouldn't forget, however, about another aspect of exchange: it has to be voluntarily agreed by both parties. It means that any person who wishes to exchange something cannot request an excessive price because exchange will not take place(the condition of not copying a book or a record may bid it up substantially). If somebody wanted to sell records that could only be listened to once in a year, he would probably not attract too many customers. This is why an "average" exchange does not include any unusual requests from the new owners, but they are quite likely to appear in contracts of a high value.

The Ownership of Sight, Silence, Climate, Sunlight, Air, Etc.

Because we have already proved that property can only be material (scarce) objects that can be homesteaded through the change of their location, the explanation of problematic issues related with functioning of human senses becomes a much easier task. Strange as it may seem, the question of property in relation to senses still causes many misunderstandings. Below we will examine the most frequent errors committed in this area.

The first category of phenomena that allegedly can be appropriated are *mental* results of the functioning of senses: sight, hearing, taste, smell and touch. For example, in case of the sense of hearing one cannot own the auditory impression that the fiddler's play is inimitable; one can only own violin and ear with the whole auditory system (part of our self-ownership). In case of each of the senses we should distinguish between the mental and material effect. Sounds (material waves) affect our auditory system (which is also material, scarce) and create a certain impression (material). But the phenomenon of "impregnable science" is not scarce, because it is a mental evaluation of the material impressions. In the same way no one can own "unique view". We can only appropriate or purchase scarce objects making up the view and be the owners of our own bodies.

There are, however, situations in which somebody can make a direct aggression on our

bodies by affecting our senses. For instance, our neighbor who tried to take off from his premises with his jet could hurt our hearing sense which is part of our self-ownership. In such a case our description of this situation as a “terrible rumble” is irrelevant – if we want to sue our neighbor we need to prove the material effect of his action (impairment of our auditory system).

Any conflicts related with affecting our sensory organs in a negative way should be judged according to *temporal precedence*. This view is a logical consequence of accepting the principle of homesteading. The right to decide about the future of a given object always belongs to the person who managed to control it spatially as first (change its natural location and re-locate it to the sphere of previously-owned resources). For instance, if a person A establishes in a given place a quarry which implies the noise of drills and trucks transporting the mining spoil, another person B cannot simply move into neighborhood and request A to stop making noise. This is because A was the first to homestead the natural resources and the noise was made even before B arrived. Every time then conflict arises about disturbing the silence, spoiling some view or worsening the quality of air, it is necessary to establish the chronology of ownership of the resources which are responsible for the conflict.

It is also crucial here to separate the direct *affecting the sensory organ* and *sense itself*. While the first one is a material (scarce) object, the latter is not. If we claimed that the whole sensory cognition is limited to the material (scarce) aspect, it would imply for men a contradiction of not being able to feel, taste, hear, etc. the same reality. All people would only be able to speak about their material impressions which are different from those perceived by others and it would make any rational conversation impossible. *As in the case of thoughts which are not scarce and thus enable us to refer to the same reality, our senses also have a mental component which is not scarce and enables the reference to the same, objective external world*. Thus, it is impossible to forbid anybody looking, tasting or hearing our property from his own land unless it is mutually agreed in a contract.

Property of sunbeams or air puts us in a completely different situation. They are not senses nor its material counterpart, but a separate, material object. Modern physics enabled us to find out that sunbeams, just as air, are millions of small particles[77]. Their appropriation is possible, even though they are normally not perceived as scarce due to their abundance. Nevertheless, air can become scarce, e.g. in case of taking it to the Moon where it is deficit. It means that even

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[77] The problem of waves will be discussed in the following chapter. The category of materiality which we use in this work should not be understood physically, but philosophically. The issue of establishing what are the ultimate components of the matter is a purely technical issue and is irrelevant to the interpretation of materiality that we apply here.

sunbeams and air can be appropriated and subject to homesteading principle and other rules of exchange and abandonment, although it only happens in rare circumstances.

In the case of air pollution the burden of proof that the emission of a given substance caused some material harm rests with the claimant. As in the example of quarry it is crucial here to establish the chronology of ownership – i.e. whether the polluter started emitting the harmful substance first or whether the polluted air invaded somebody else's property. If a big polluting plant was established on an uninhabited area and the contaminated air existed there before the arrival of somebody else, this person would not be able to claim any compensation back from the plant owner.

As far as sunlight are concerned, their source is a star called the Sun. These rays are absorbed and reflected by many objects: other celestial bodies, atmosphere, clouds, etc. This incessant flow of rays can only be appropriated by a person who stops it as first on its way from the Sun. Therefore, we are unable to claim the right to "be exposed to sunlight". If, for example, somebody wants to build in our neighborhood a skyscraper, we cannot forbid him to make it unless we have some previous contract restricting that. In the case of sunlight we can only own the rays who were not previously "caught" by anybody else.

The Property of Waves

Our view of property rights acquired through homesteading requires a certain reformulation of the principles of ownership in the realm of waves. In the legislation imposed by the state we can come across the category of broadcasting licenses which grant a given person or organization the right to use a portion of the frequency spectrum in a given geographical area for broadcasting purposes. This practice, however, violates the homesteading principle which is based on the temporal precedence. As Murray Rothbard noticed, in case of waves:

> This scarce factor is appropriable and ownable by man. In a free society, ownership of these channels would accrue to individuals just like that of land or animals: the first users obtain the property. The first user, Jones, of the wave length of 1,000 kilocycles, would be the absolute owner of this length for his wave area, and it will be his right to continue using it, to abandon it, to sell it, etc. Anyone else who set up a transmitter on the owner's wave length would be as guilty of invasion of another's property right as a trespasser on someone else's land or a thief of someone else's

livestock[78].

From the physical point of view, wave is a disturbance of air (or other medium). The broadcast wave is created with special transmitters. A person who creates waves is their owner because he changes the location of medium. Having them transmitted, this person owns the waves until they finally disperse. This dispersion can happen in many ways and is dependent on many factors. Thus, if on a given area there are two people transmitting waves which interrupt each other, we have to establish the temporal precedence. The space can only be occupied by the waves that arrived as first. It doesn't mean, however, that the air which is disturbed in the way that it transmits waves can be homesteaded. It is only property as long as the wave lasts.

This principle applies to all types of waves: acoustic, magnetic, etc. as they are all scarce resources. The principle of temporal precedence, however, is not unlimited in time and requires a constant action. If a given person stopped emitting waves on a given area, it should not be able to object the fact some other person started to use his frequency. Each wave is a disturbance of some carrier, but the ownership of the carrier is dependent on the range of wave. For example, if a given wave has a range of 20 kilometers, its owner can only own the disturbance of the air (or a different carrier) within 20 kilometers. Naturally, it doesn't mean that by emitting waves we appropriate all the objects they encounter, but we only own the wave itself as a scarce resource. The fact that wave is carried by objects that might have been already somebody's property is irrelevant here as long as wave doesn't affect other person's control over his property. For example, exposure to X-rays can even kill, which surely cannot be told about radio waves which can't affect the spatial character of any object.

Homesteading principle requires everybody to gain a spatial control over an object and make it easily discernible to other people. In case of emitting waves we are only able to make our ownership visible and identifiable only when it can be detected. Any wave gets distracted after turning off the emitter or after coming a long way. As soon as it happens, the carrier comes back to its previous state and ownership comes to an end.

Emitting waves as a method of appropriating is strictly limited as it usually happens in a certain context of ownership. For example, if a person X wants to broadcast in city Y, he encounters many obstacles like buildings, streets, etc. Even if the wave that he produces is able to create some minimal vibration in all the objects it comes across, it is not able to affect the control over them. Radio wave cannot hurt anybody, but only make radio play.

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[78] M. Rothbard, *Man, Economy …, op. cit.*, p. 173.

To sum up, waves and radiation can only be used in homesteading only insofar as they cause some real and visible change of natural location. This re-location doesn't have to be visible only through some sophisticated apparatus. From the perspective of property rights there are only two relevant factors: distinguishable for others change of location (and not only some particles which make up for a larger entity) and joining it with the previously appropriated resources.

When acoustic or radio waves come across somebody's property it doesn't mean any aggression because they don't affect the control over it. In the same way, the water that was waved can't be owned until somebody puts up a fence restricting an access to it. If somebody wanted to appropriate a lake by entering it and making waves on the surface, it would not constitute a homesteading as water would not be spatially controlled. A mere making waves that are easily dispersed can't serve as a tool for appropriation unless they are powerful enough to gain a permanent control over a given object.

The Inalienability of Body

In order to discuss one needs a body. But each of us has a different body with different features: there are people who have no legs or arms, but still are able to discuss and function in society. What exactly is a human body if it is necessary for our discussion ability – is it only our brain or also something more than that?

Our body is inalienable – one cannot abdicate it without simultaneously annihilating it. Every person is constantly joined to his body which he homesteaded when he was conceived. However, there are some parts of our body which can be alienated: we can cut our hair and sell it to wigmaker. Similarly, though not commercially, patients undergo surgeries as a result of which they lose some organs attacked by cancer or give them to other people, e.g. bone marrow or blood. These examples, although they are only empirical evidence of human practice, show clearly that our body is alienable to a certain extent.

If we want to obtain a deeper theoretical justification of the possibility of alienation some parts of human body, we have to come back to a priori of argumentation. In light of this theory every man is able to use a scarce resource called body. As we already mentioned, the critics of a priori argumentation method argue that all we can prove with it is the existence of our mouths or brain, but speaking of body is an abuse.

Such criticism can be easily refuted by pointing to the irreducibility of a bodily factor in any

act of communication. We are not disembodied apparitions, but humans with material bodies. If we don't need our leg in the discussion, it can be cut off. The second leg can be cut off as well. If anybody argues that we can discuss also without our arms, they can be removed as well. And what about ears and nose? Lips and mouths? We will spare here the further violent description, but it is vital to notice that by reducing our body sooner or later we will come across a situation in which life will be no longer possible. It doesn't mean, of course, that we mean to indicate some fundamental part of our body which, such as heart, brain or spinal marrow; it is irrelevant. Human body is a certain coordinated system which should be treated as a whole. As we already mentioned, we can sell our hair to wigmaker or a kidney to a rich man, but the indisputable fact remains that our body is *necessary* in our ability to discuss. A young man's body can be perfect, and the body of a disabled person can be reduced to nothing more than a head and a torso, but in each case it is a precondition for a discussion.

When we speak of body's inalienability, we can only understand it as an irreducible core of it which enables discussion. Particular parts of our body can be alienated, such as blood which can become part of another organism. Organ transplantations and other surgeries are a proof of the fact that there is some inalienable part of our body. This part can be discovered through argumentation which shows it as the irreducible core joined with our will (a mental factor which is not scarce).

The fact that many people temporarily can't argue doesn't mean, of course, that self-ownership and the ability of appropriating is limited only to the young and healthy. People who are not yet born, new-born babies, old and disabled, mentally ill and others are all incapable of a discussion. But we can certainly say that all people, irrespectively of an age, health or agility have a free will. This cannot be rationally denied as one cannot argue that people don't have a free will because the very act of denying assumes the will to deny (one could also not make it). An it is will connected with our body which is the irreducible factor making it impossible to become somebody else and incarnate anybody else's body. In case of the people who currently are unable to communicate the free will is sometimes limited only to some mental processes that we may not have an access to. A paralysed man may even not be able to move on his own by a centimeter, but it doesn't change the fact that he has body connected with the free will.

The connection with the body doesn't mean, of course, that the free will is limited only to body. Sometimes we may be forced to do something under a threat of killing us and we may do it even though we don't want to. This is another proof of the fact that apart from the scarce resource which is our body there is in ourselves also a certain immaterial part.

The attribution of free will to every person can also be justified in the following way. Each man is born at a certain moment of time. None of us pre-existed nor lives eternally. Everybody was conceived as a result of an interaction of a man with a woman (or at least, as a result of joining their respective gametes). If a child was born without a contact with the man (or their gametes), women could have any number of children they wanted at any time. Each of us begins our existence not in the moment of birth, but of joining the respective gametes. Treating any other moment as the beginning of a human life is completely arbitrary as only the conception bears the reference to human action. If man began to live at a later time than conception, this would mean that his existence comes from himself or from his mother. Mother herself is unable to make children, which we already explained; and the same applies to a child who is either a man or a woman who can't make children on their own. Therefore, each person homesteads his body in the moment of conception which is also the only possible moment of acquiring free will. Because we are able to argumentatively prove that every person has a free will, it necessarily needs to exist from the moment of conception. One cannot want to have a free will, it already exists with us from the beginning. Otherwise man would begin his life later than in the moment of conception which we already proved to be contradictory.

This short explanation helped us to understand that at the very beginning of our body-mind connection (our life) each of us is incapable of communication. This means also that even though many people may be currently seriously ill or disabled (even for a life-time), it doesn't contradict with their self-ownership and free will which are acquired at the moment of conception.

SUCCESSION

An implicit principle in many legal system is a succession. According to it, in case of somebody's death all the property and even commitments of a deceased person is inherited by his immediate family. Is this principle just a custom or can it be justified in a more profound way?

As we already established, every man is a certain entity: a combination of a scarce resource called body and a resource which is not scarce: our mind and will. Everybody is a self-owner and can also become the owner of other material objects through homesteading and voluntary exchange. People are joined by many relationships, but they are separate entities all the time (the question of a pregnant mother will be examined later in Chapters III and IV). But are there any

persons with whom we are related in a special way from the legal perspective?

A spontaneous answer to this question might be that such persons are our family. But even though family makes us similar genetically or in a different way our bodies are still independent entities. The fact that some people are closer to us because of some emotional bonds is completely irrelevant from the legal point of view. As owners of our bodies we can homestead or exchange objects as long as we are alive and we lose this power when we cease to exist and pass away. The natural borders for our ownership are other people (owners of unique bodies) and our death. The death is a moment of disintegration of our body and thoughts and it marks a definite end of our ability to appropriate. After our death we can only “influence” the world insofar as they committed themselves to some actions through contract (conditional exchange).

We own our body when we are alive, but we can also oblige our contractors to perform some actions with it even after our death. We can distinguish a few possibles scenarios.

The most basic one is that in which the deceased person, for whatever reason, does not specify or forgets to clearly inform before the death what is the preferred future of his body and property. At the moment of death our body is disintegrated and returns to the state of nature. If it finds itself in the place which belongs to nobody, it can be homesteaded by any person. If the death comes on somebody's property, the body belongs to the owner of the land. If this owner doesn't want to keep the body on his terrain, he can simply sell it to another person. Even though according to the contemporary custom the deceased person's body has to be given back to the family or the state, in situation when no contract was signed before the death the body belongs to the land's owner.

In order to avoid such unclear situations as these people may use conditional exchanges in which other people can be committed to perform certain actions. In most cases people sign contracts with hospitals, nursing homes and other people taking care of them in which the latter ones commit themselves to take care of the body or give it to family straight after death. It is also possible to write a will or another contract which state that the property in the moment of death will be forwarded to another person. If such contracts are supported by surety they can commit not only to inherit somebody's property, but also to be liable for that person's debts. Treating family as natural heirs is highly misleading as it is up to a given person to point to the future users of his property. Even though in the contemporary world there is a commonly accepted custom which says that the property of a deceased person has to be shared between his closest family, it finds no justification in the theory of law. Moreover, in most cases the family take over the property of a deceased person simply because they are the first who discover the death and they

can benefit from that fact by homesteading the unowned resources. If the deceased didn't sign any contract regulating the future of his body and property, it is quite natural that it is his family who can benefit by appropriating his resources.

Naturally, in a free society there would be hardly any person without a contract regulating the future of his body and property after his death. This is because such persons would deter any contractors as their liability would be substantially reduced. Suicides committed due to financial problems are not rare so if somebody could not guarantee that after his death there would be somebody responsible for any part of losses incurred by the other party, he would not be an attractive business partner to other people and would make no business. Today the liability for the commitments of the deceased people is usually either secured by insurance companies, imposed on families, or sometimes taken over by the state. In a free society, however, we can imagine that the role played by insurance companies would be even greater as today's state-imposed system allows to limit the liability through the legislation that enables debtors to evade their responsibility, e.g. by going to prison.

The death is an event that confirms our theory of homesteading. In the moment of our conception we begin to exist together with our body and it takes a few year until we learn how to use our body to appropriate other objects. First of all, we move objects into the sphere of our body: we take them into our hands, we put them on our body, etc. Later on, we learn to own a certain place which we call our home. Gradually we extend the number of objects which are our property. Sometimes there are so few of them that they are just our clothes, but there may be a situation when we have no space to accommodate everything that we own. But the real basis of any property is our body which is a precondition for any extension of our ownership. The death, which is the disintegration of our body, ends our control over ourselves and other things. The cycle of human life comes full circle.

Common property

Common property is a concept that was ruled out during the discussion of homesteading principle. Postulating common property leads to an inevitable practical (performative) contradiction. This crucial argument was explained by Murray Rothbard:

> Consider, too, the consequences of denying each man the right to own his own person. There are then only two alternatives: either (1) a certain class of people, A, have the right to own another class, B; or (2) everyone has the right to own his own equal quotal share of everyone else. The first

> alternative implies that while Class A deserves the rights of being human, Class B is in reality subhuman and therefore deserves no such rights. But since they are indeed human beings, the first alternative contradicts itself in denying natural human rights to one set of humans. Moreover, as we shall see, allowing Class A to own Class B means that the former is allowed to exploit, and therefore to live parasitically, at the expense of the latter. But this parasitism itself violates the basic economic requirement for life: production and exchange.
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> The second alternative, what we might call "participatory communalism" or "communism," holds that every man should have the right to own his equal quotal share of everyone else. If there are two billion people in the world, then everyone has the right to own one two-billionth of every other person. In the first place, we can state that this ideal rests on an absurdity: proclaiming that every man is entitled to own a part of everyone else, yet is not entitled to own himself. Secondly, we can picture the viability of such a world: a world in which no man is free to take any action whatever without prior approval or indeed command by everyone else in society. It should be clear that in that sort of "communist" world, no one would be able to do anything, and the human race would quickly perish. But if a world of zero self-ownership and one hundred percent other ownership spells death for the human race, then any steps in that direction also contravene the natural law of what is best for man and his life on earth[79].

Thus, common property is ruled out by the homesteading principle. However, after the appropriation the owner has the right to control his property any way he wants to as long as it doesn't violate anybody else's property. Therefore, he can join a group of people living together and exchange things without any sureties, e.g. a religious order, a family or a group of hippies. But by entering such groups he can't expect that his property would be secured in the same way as when he lived alone[80]. Common property is possible, but only if it's understood as secondary to homesteading. It is possible to share with somebody our property, but this action cannot be protected by any surety and therefore cannot be legally enforced. Strictly speaking, however, common property is a contradiction as it is ruled out by the homesteading principle. Any person entering a community needs to bear in mind that by sharing his property with other people he risks losing it for good as he can no longer demonstrate that his property is located in the sphere

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[79] Murray Rothbard, *For a New Liberty.* Ludwig von Mises Institute, Auburn, Al. 2006, p. 20.

[80] Of course, a community can establish some rules regulating the responsibility of its members and even appoint people who decide on its behalf. It doesn't, however, change the fact that from the legal perspective all the resources used by the community *have to* be assigned to a specific, individual person (owner) who is legally responsible for it. If members of a community, e.g. a married couple, trust themselves enough, they don't have to attach a great importance to the way their property is shared between them. However, in relation to other members of society they have to specify the ownership of each object as in case of any unlawful action the injured has the right to claim the compensation if one of the members evaded responsibility.

of the already appropriated resources.

For many people common property is a kind of ideal which got allegedly destroyed by the state which imposed the individual ownership. This concept can be easily refuted by pointing to the fact that the state is in itself totally opposed to a homesteading principle which is the basis of any property[81]. Private ownership is not imposed by anybody, but the original way of appropriating resources available in the nature.

The state as an institution contributing to desocialization destroys the natural communities in a totally different way. Through endless expropriation it constantly raises the time preference rate and increases uncertainty. If theft is institutionalized through taxes, licenses or inflation, it naturally implies smaller savings and makes people more focused on today. Another effect of the existence of the state is even greater complexity of contracts. The state and its constant expansion make all contractors less confident and prone to secure even the simplest exchanges with elaborate contracts. The system of legalized theft imposed by the state contributes to even greater uncertainty and to a further reduction of exchanges not supported by any surety.

Friends or family members exchanging goods without any contract make it just because they *trust* themselves and are certain about the future course of action. In a society where appears
the state this kind of exchanges tend to disappear because uncertainty and the rate of time preference are constantly raised by the unlawful expropriation. Thus, we can say with certainty that in a free, libertarian society a big part of exchanges would not have to be supported with any surety as the social preference rate would be much lower. In a society that would not be plagued with constant theft there would be a larger space for establishing communities based on an entirely free flow of goods. The vanishing of common property is, therefore, not a result of the imposition of individual ownership, but a result of even greater aggression on private property.

THE INTENTION AND PURPOSEFULNESS OF A CRIMINAL ACTION

Any action is necessarily purposeful[82]. All the physiological process taking place in our body are completely unconscious; only action is preceded by reflection and decision. One category of

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[81] The desocialization process initatied by the state was descibed by Hans-Hermann Hoppe: *Democracy, The God That Failed,* New Brunswick, NJ: Translation Publishers, 2001.

[82] L. von Mises, A human … , op. cit., p. 92 and passim.

action is homesteading which consists in purposeful use of our body and other objects in appropriating natural resources. But another type of action is unlawful aggression against somebody else's property. We can distinguish in any lawful and unlawful actions two basic layers: the mental reflection preceding the action and the action's material outcome. In other words, if every action is accompanied (preceded by) reflection, it has to be distinguished from the final result of the action. As Hans-Hermann Hoppe explains:

> However, in addition to a physical appearance, actions also have an internal, subjective aspect. This aspect cannot be observed by our sense organs. Instead, it must be ascertained by means of understanding (*verstehen*). The task of the judge cannot—by the nature of things—be reduced to a simple decision rule based on a quasi-mechanical model of causation. Judges must observe the facts and understand the actors and actions involved in order to determine fault and liability[83].

This distinction is crucial for establishing the legal responsibility for any action. On the other hand, however, we have to remember about the fact that only scarce objects can be owned. Reflection is a mental phenomenon and cannot be qualified as a basis for legal execution. Murray Rothbard, who was the first person to base the legal system on scarcity, is often criticized for proposing a mechanistic concept of law. Such allegations are, however, erroneous as Rothbard definitely didn't intend to deny the distinction between reflection and the physical outcome, but was rather more concerned with the scarcity requirement for any property.

In his criticism of Rothbard Hoppe uses an example of a visit that a person B pays in A's house during which B is killed by the lightning. Hoppe asks a question: should A be legally responsible for the death of B? He then answers that Rothbard's reply would be against the responsibility and claims it to be insufficient:

> What needs to be added to Rothbard's criterion would seem to be this: No one is liable for "accidents" involving his person and property. Instead, the risk of accidents and the insurance against them must be assumed individually (by each person and property owner for himself). People can be held liable only for their actions, whether intentional or negligent (but not for accidents involving them). Actions, however, involve both "objective" (external) and "subjective" (internal) elements. Hence, the exclusive inspection of physical events can never be considered sufficient in determining liability (there must be fault, too, and one can only speak of fault if an event is caused by an action))[84].

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[83] Hans Hermann Hoppe, *Property, Causality and Liability*, in: The Quarterly Journal of Austrian Economics, vol 7, nr 4 (winter 2004), p. 94.

[84] Ibidem, p. 90.

Hoppe seems to have completely forgotten here about the aspect related with homesteading[85]. Lightning is a part of nature and can be homesteaded as any other scarce object. In most cases our contact with lightning means our death, although there are some rare examples of a purposeful homesteading (e.g. for scientific purposes). In each case of property rights violation, as we already mentioned, there needs to be some material, scarce element that is subject to some kind of aggression. Damages are not possible in the realm of thought, but are caused only by specific scarce objects (people or other things). Thus, there are only two kinds of possible damages: those related with some already appropriated resources (e.g. a gun) or those caused by the nature which were not intended by anybody. Nobody can be blamed for being hit by lightning because it is independent of human will just as an earthquake. However, in case of a damage suffered due to unintended “action” of somebody's property, the blame can be put on the property's owner (e.g. if a wardrobe falls on a person A visiting the house of B, then B is responsible for A's injury). If homesteading consists in changing the location of a given resource, then surely the responsibility for all the damages caused by a given property, even though there may be no purposeful action involved, rests with its owner, because it is he who changed the object's original, natural location. Had he not moved it to another place, the damage would have never taken place.

Hoppe uses also another example of two people A and B hunting deer, where A's stray bullet injures B. According to Hoppe in case of dispute between them one had to establish whether this happened intentionally or by negligence. He also implies that Rothbard would make A bear all the costs of medical treatment and also pay some additional compensation. In this situation Rothbard is of course correct, because A's gun wouldn't shot B if it wasn't appropriated by A. The risk of unintended damages caused by our property has to be borne by every owner; even B needs to take into account unfortunate accidents with his gun which may hurt even himself. Even though A didn't intend to hurt B, he definitely wanted to purchase his gun. Hoppe makes a mistake in this subject. While he is correct by saying that every action has two layers: the intentional (mental) and the physical (material) and that there happen many unintended accidents, the intentionality is always present in the act appropriation. As long as a given accident is not caused by any natural catastrophes (floods, volcano eruptions, falling trees, etc.), it is always related with some scarce resource which has been previously appropriated by somebody who changed its location. The intentionality doesn't have to be present at the very act of inflicting the damage, but it is always present in the moment of appropriating a given object. Thus, Rothbard's

[85] We will come back to this issue in Chapter VI where we will discuss the damages caused by property.

concept cannot be called mechanistic, but only fulfilling the requirements imposed by the homesteading principle and the scarcity requirement.

The legal responsibility is always determined by purposefulness, but sometimes it has to be sought in actions performed in the past. The judge establishing legal responsibility should focus not only on the sequence of events immediately preceding the accident, but also on the intentional acts of homesteading and exchanges that happened in the distant past. For example, a drunk driver who killed a pedestrian is not held responsible for the intention of riding into innocent person, but for the previous decision to drive after drinking an alcohol.

THE PROBLEM OF LYING, OBJECTIVE ETHICS AND SUBJECTIVE MORALITY

Acting man is naturally determined to make good. The principle “do good” should be treated as a basic motive for any action, because it cannot be rationally denied. Even if somebody wanted to deny it, he would simultaneously confirm the idea that it is good to express the disagreement (otherwise he would not deny at all). Just as it is impossible to say that one shouldn't use reason[86], it is also contradictory to say that evil should be a motive of our actions. Mieczysław A. Krąpiec explained it in the following way:

> In practical order, in order of action there are also analogous first principles-axioms, such as “one has to do good and avoid evil”. This principle is nothing else but the application of the Principle of contradiction to action[87].

Even though man is naturally determined to make good, it doesn't mean, of course, that he is not able to do any evil. The example of the institutionalized theft (the state) witnesses that evil may become strong and prevail. Its existence, however, is caused by the fact that people can simply make mistakes in their actions by contradicting the principles of reason and violating the objective ethics. We determine ourselves to perform particular actions through our will which can always act against the good discovered by our reason.

Nevertheless, the motive of our action can't change the fact that from the legal point of view people violate property rights. Property rights do not apply to our mind, will and motivations, and are reserved to the physical result of an action. In this perspective we will discuss now the problem of lying, i.e. intentional misleading somebody. Superficially it seems that the principle

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[86] H-H. Hoppe, *The Ethics* ..., op. cit., p. 407.

[87] M.Krąpiec, Realizm ... , op. cit., p. 255.

“one shouldn't lie” should be universally valid as it is included in the more general principle “do good”. The closer examination of this issue, however, shows us that the principle of not telling lies is subject to numerous limitations.

First of all, we should remember that the person expressing the proposition “one shouldn't lie” is a specific person who owns his body. The proposition can't be expressed on its own. At the very basis of any action lies self-ownership. As we already proved, self-ownership is also the foundation for the appropriation of other resources through homesteading and voluntary exchanges. Therefore, insofar as somebody uses his property and respects the property of other people, his lies have no legal consequences.

We can point here that there are even professions which require not telling the truth, e.g. comedians. People may voluntarily agree to pay somebody for entertaining them with stories that have nothing to do with the reality. There are even situations when we have to lie in order to protect our self-ownership, e.g. when somebody threatens to kill us if we don't say what he wants. All these examples confirm the idea that the requirement to tell the truth is absolutely subordinate to the property law. All this is justified by the fact that the very discussion about telling lies and truth presupposes self-ownership.

In situations when somebody violates our property the principle “one shouldn't lie” can be justly violated. If, for example, our territory is trespassed by a murderer who requests us to say where are our children, we have the right to lie because in this way we save the lives of our children. This is justified by the fact that the trespasser violated our property, namely, he denied the principle “one shouldn't lie” (which comes under more general “do good” principle). Having broken the non-agression principle he enabled in this way his victim to violate the principle requiring telling the truth. In these circumstances disclosing the information about our children would be tantamount to a participation in crime. Above all, however, lying is always justified as long as it doesn't contradict with the property law.

Thanks to the above example we can clearly see that the abstractly understood good cannot serve as the basis for ethics. If we relied only on certain general principles, such as “Inflicting pain is immoral” or “Any coercion is wrong”, we would refused victims the right self-defense which is nothing but an active resistance to somebody's aggression. This confirms also the character of good which is not any platonic general notion, but is always referred to individual objects.

According to libertarians law is equivalent to ethics because any conflict is only possible only due to the scarcity of resources. The general principle requiring us to do good can also be

referred to our self – the subject of our thoughts which are not scarce. Man is able to reflect on himself and therefore there exists a certain area which totally abstracts from scarce objects. It turns out that even in this realm of our self which is unavailable to other people we can also act against reason and good. All the human reflections and thoughts which are not related directly with the scarce resources are therefore excluded from the interest of ethics, because they are only available to our own selves. The reflection that we make over our actions is usually called in the philosophical tradition a conscience. Its goal is to evaluate if a given action is in line with the general principle "do good". Ethics can only deal with the material substratum of our actions which is man as a psycho-physical entity controlling his property.

If law, understood as a general property law code, is equivalent to ethics, the issue of lying should be always discussed in the perspective of the property rights. If somebody lies to another person, but doesn't violate his property, we can only call his action bad only *subjectively*, in a unscientific way. The subjective morality is different from ethics just because it is arbitrary, while the latter is subject to necessary principles of ownership. For example, if we sold our car to somebody and gave him wrong information about its state, this would be both immoral and subject to a legal action. But if we lied to our friend about the amount that we keep on our account, this could be classified as immoral only subjectively, but having no legal consequences. The latter example is different from the first one by the fact that both colleagues didn't sign any contract committing them to give each other the correct information about their respective accounts. The mere exchange of thoughts is not supported by any surety. A lie which is not supported by any surety can be treated as subjectively wrong, but not objectively and ethically wrong. Every person has the inalienable right to use his body and property with the only limits being other people's property. This includes an intentional misleading in situations which are not backed by any contract. Other people may react to it in many different ways: they can totally accept it, tolerate it or dislike it. Those who dislike the liar very much can use a wide range of actions: they can boycott him, spoil his opinion or try to make contracts with him committing him to a different behavior. But lying in itself is never unlawful.

III. Restitution Based on The Argumentation Theory

Estoppel As a Justification of Punishment.

It is generally believed that the libertarian concept of punishment is *restitution*. As Murray Rothbard noticed, in the history of mankind restitution was applied by numerous societies:

> The idea of primacy for restitution to the victim has great precedent in law; indeed, it is an ancient principle of law which has been allowed to wither away as the State has aggrandized and monopolized the institutions of justice. In medieval Ireland, for example, a king was not the head of State but rather a crime-insurer; if someone committed a crime, the first thing that happened was that the king paid the "insurance" benefit to the victim, and then proceeded to force the criminal to pay the king in turn (restitution to the victim's insurance company being completely derived from the idea of restitution to the victim). In many parts of colonial America, which were too poor to afford the dubious luxury of prisons, the thief was indentured out by the courts to his victim, there to be forced to work for his victim until his "debt" was paid[88].

And further:

> In fact, in the Middle Ages generally, restitution to the victim was the dominant concept of punishment; only as the State grew more powerful did the governmental authorities encroach ever more into the repayment process, increasingly confiscating a greater proportion of the

[88] M. Rothbard, *The Ethics …*, op. cit. p. 87.

criminal's property for themselves, and leaving less and less to the unfortunate victim[89].

But is restitution the best the best theory of punishment only because it is widely accepted among libertarians or due to historical record? In this Chapter we will attempt to prove that restitution has an indisputable status just as other elements of property rights.

In order to understand the concept of punishment properly we have to come back for a while to unlawful action. In Chapter II we presented the property rights as a natural consequence of our self-ownership, homesteading and voluntary exchanges. Having defined all these notions, we were able to specify a criminal (immoral) action as a violation of self-ownership and the ownership of other objects. Therefore, if the all property rights can be justified argumentatively, it is also logical that any violation of these rights is also a violation of the principles of argumentation. Applying an old legal concept of *estoppel*, Stephan Kinsella explains why victim has the right to claim form his aggressor punishment proportional to the inflicted damage:

> Estoppel is a well-known common-law principle that prevents or precludes someone from making a claim in a lawsuit that is inconsistent with his prior conduct, if some other person has changed his position to his detriment in reliance on the prior conduct (referred to as "detrimental reliance"). Estoppel thus denies a party the ability to assert a fact or right that he otherwise could. Estoppel is a widely-applicable legal principle that has countless manifestations. The Roman law and today's civil law contain the similar doctrine *venire contra factum proprium*, or "no one can contradict his own act." Under this principle, "no one is allowed to ignore or deny his own acts, or the consequences thereof, and claim a right in opposition to such acts or consequences." The principle behind estoppel can also be seen in common sayings such as "actions speak louder than words," "practice what you preach" or "put your money where your mouth is," all of which embody the idea that actions and assertions should be consistent. As Lord Coke stated, the word "estoppel" is used "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."[90].

In short, we can say that an aggressor by violating the property law simultaneously determines the range of his own punishment. The aggressor can't rationally justify his objection to the punishment because it is simply reflected by his unlawful action. For example, having stolen somebody's bike, the thief can't protest against coercive taking it back from him. As states Kinsella:

> To object to his punishment, B must engage in discourse with A; he must at least temporarily

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89 Ibidem.

90 Stephan Kinsella, *Punishment and Proportionality: The Estoppel Approach*, Journal of Libertarian Studies 12:1 (Spring 1996), p. 53.

adopt the stance of a peaceful, civilized person trying to persuade A, through the use of reason and consistent, universalizable principles, of why A should not punish him. But to do this, B must in essence claim that A should not use force against him (B), and to do this B must claim that it is wrong to use force. But since B has initiated force, he has admitted that (he believes that) it is proper to use force, and B would contradict himself if he were to claim the opposite[91].

There are, however, situations in which retrieving our property is impossible – e.g. if it got destroyed. In that case aggressor can be forced to pay compensation in another form, reflecting the value of the irreversibly destroyed object. One example of such irreversible damage is homicide. Human's life can't be given back just as a stolen bicycle. Victim's heirs have therefore the right to claim from the murderer money compensation or some other satisfaction. The limit for punishment can be the sum of all the commitments taken by the killed person. For example, the killer of a father who provided for the whole family can be forced to pay for the subsistence of all the children until they become independent. In this way the aggressor would be able to restore the lost property.

Estoppel justifies not only returning the stolen property, but also additional compensation. An aggressor always violates the property law twice: first of all he denied it to the victim, and secondly he denied it to himself. This issue was explained by Murray Rothbard:

But how are we to gauge the nature of the extent? Let us return to the theft of the $15,000. Even here, simple restitution of the $15,000 is scarcely sufficient to cover the crime (even if we add damages, costs, interest, etc.). For one thing, mere loss of the money stolen obviously fails to function in any sense as a deterrent to future such crime (although we will see below that deterrence itself is a faulty criterion for gauging punishment). If, then, we are to say that the criminal loses rights to the extent that he deprives the victim, then we must say that the criminal should not only have to return the $15,000, but that he must be forced to pay the victim another $15,000, so that he, in turn, loses those rights (to $15,000 worth of property) which he had taken from the victim. In the case of theft, then, we may say that the criminal must pay double the extent of theft: once, for restitution of the amount stolen, and once again for loss of what he had deprived another[92].

The historical exemplification of this rule was provided by Bruce Benson:

Measurable damages plus one-fifth to cover the unmeasurable part of the harm was apparently the

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[91] Stephan Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, Journal of Libertarian Studies, Autumn1996, p. 318.

[92] Murray Rothbard, The Ethics *… , op. cit.,* p. 88.

> rule of thumb established among the ancient Jewish community. Other societies have developed other rules. In some legal systems, well known rules evolved that detailed the payment to be made for every type of offense. In medieval Iceland, the magnitude of the payment also depended in part on whether the offender tried to hide or deny the offense: an offender who pled guilty, thereby lowering the costs of pursuit, prosecution, and trial, faced a lower fine. Similarly, in many primitive and medieval societies, restitution payments have been a function of the status of both the victim and the offender, perhaps in order to achieve other goals besides restoration of the victim, such as more effective deterrence. Repeat offenders were also treated differently than first-time offenders. In Anglo-Saxon England, for instance, an offender could "buy back the peace" on a first offense, but a repeat offender was an outlaw with no protection (no property rights). In other societies with restitution focuses, repeat offenders face capital punishment[93].

Estoppel is a twofold weapon against aggressor. First of all, it allows to retrieve the lost property (or some equivalent if it got irreversibly destroyed), and later on it also enables to turn the act of coercion against the offender and punish him in the same way[94].

This principle is sometimes called also: "two teeth for one tooth". The "two teeth" that victim can claim from offender is not anything abstract. The double compensation for the inflicted damage is not arbitrary, but accounts for indisputable right of the victim. This right isn't, of course, an obligation; as exclusive owners of our property we can choose the extent of punishment from the range: no punishment whatsoever – a double compensation. Murray Rothbard explained it on the example of capital punishment:

> But, in libertarian law, there would be no compulsion on the plaintiff, or his heirs, to exact this maximum penalty. If the plaintiff or his heir, for example, did not believe in capital punishment, for whatever reason, he could voluntarily forgive the victim of part or all of his penalty. If he were a Tolstoyan, and was opposed to punishment altogether, he could simply forgive the criminal, and that would be that. Or-and this has a long and honorable tradition in older Western law-the victim or his heir could allow the criminal to buy his way out of part or all of his punishment. Thus, if proportionality allowed the victim to send the criminal to jail for ten years, the criminal could, if the victim wished, pay the victim to reduce or eliminate this sentence. The proportionality theory only supplies the upper bound to punishment-since it tells us how much punishment a victim may

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93 Bruce Benson, *Restitution in Theory and Practice*, The Journal of Libertarian Studies, (Spring 1996), p. 80.

94 Stephan Kinsella formulates it in the following way:

> it is the nature of the particular act of aggression that determines the extent of the estoppel working against the aggressor. The more serious the aggression and the consequences that flow from it, the more the aggressor is estopped from objecting to, and consequently the greater the level of punishment that may legitimately be applied.

Stephan Kinsella, *Punishment … , op. cit.*, p. 65.

rightfully impose[95].

The proportionality theory based on a priori of argumentation is the only possible theory of punishment, because all the other theories are completely arbitrary. If all property rights can be reduced to the argumentatively justified self-ownership, their violation can be reduced to the violation of argumentation principles as well.

We should also discuss here for a while another important issue. In libertarian literature the return of stolen property (or repair of a damage) is usually included in the compensatory part of punishment. Even though it is commonly agreed that each punishment can be divided into two parts: retributive and compensatory, it is also claimed that paying for the damages is a part if compensation. But closer examination of the act of offense shows clearly that this belief should be corrected.

Any offense consists in aggression on somebody's property. Offender refuses his victim the right to use his property in the most preferred way, but he also refuses all his contractors the right to obtain the service that the victim was supposed to deliver. As an example we can use here a car. If one day a supplier was robbed of his truck, he would lost not only the physical vehicle, but also the possibility of transporting some goods or people. Even though a truck is just a material object, it can also play a crucial role in delivering many services to other people. Naturally, the victim cannot claim that there are many other possible contracts that he might have made, had he not been stolen his truck; the retribution is limited only to material losses. In a free society a person who was stolen a car would be required to present the whole documentation proving the incurred damages. This is a practice known to us contemporary in many areas, e.g. in insurance claims.

The principle "two teeth for one tooth" serves here only as an approximation, a useful tool for establishing the extent of punishment. For example, if somebody was stolen a bike, the first, retributive part of punishment would include returning the bike and covering all the possible damages incurred, whereas the second, compensatory part, would require paying an additional compensation the value of which would be equal to the first, retributive part. The "first tooth" would be the bike plus damages and this sum would be at the same time the amount payable as the "second tooth".

We should note here that including all the damages in the first, retributive part of punishment is not dictated by any revenge or other motivation. By violating somebody's property

[95] M. Rothbard, *The Ethics …* , op. cit., p. 86-87.

the offender violated also the property of other people who signed contract with the victim. His aggression is not limited only to the physical invasion on the location of other person's property, but also affects the intended use of it. In fact, the coercive re-location of victim's property lasts as long as the offender doesn't return the stolen objects or repairs the damages.

The retributive part of punishment should be seen in the perspective of the whole bundle of incurred costs. According to the estoppel theory, offender refuses victim the right to decide about the property for the time preceding the punishment. Including all these costs into the second, compensatory part of punishment is totally wrong as it suggests that, for example, in case of a car theft, the cost of renting a car would be born by the innocent victim who couldn't work with his own vehicle.

The retributive theory of law cannot be confused with deterrence which completely abstracts from the property law. While it is correct that in a sense punishment serves as a deterring factor, but this is dictated by the very nature of offense. Aggression is an action that justifies the double punishment in itself. Public executions have sense only insofar as the offender previously organized a public execution for his victim.

The Justification of Retribution and Compensation

A very weak point in the theory of punishment is compensation. It is widely believed that the best type of compensation is money, even though this view has never been successfully justified.

At first, this issue seems simple, especially if offender irreversibly destroys a given object. For example, an ancient manuscript can't be reinstated, so the offender has to give the victim some other thing which the victim treats as having an equal value. First of all we may point out that paying no compensation can't be any solution as it would imply that any person could destroy anything and bear no responsibility for that. This seemingly unimportant statement assigns us the crucial task of establishing the punishment based on the axiom and argumentation axioms. Even the offender has certain inalienable rights and, as we already mentioned, his offense determines the extent of his own punishment. His punishment can't be arbitrary. In other words, we have to extract the right to compensation from the fact of committing a crime.

Let's deal first with the retributive part of punishment in which property becomes

irreversibly damaged. The victim has right to defend his property law and receive in return some other object or service the value of which would correspond to the loss. But the question is how to establish the value of the object (or service) and the object itself? We know from economics that value is always subjective and dependent on the individual scale of preference. But the value attached to exchanged objects is different for both parties. For many centuries it was believed that the exchanged objects have identical value, but it was a fatal mistake. Because offense constitutes a denial of voluntary exchange, it seems that establishing the value of retribution seems impossible for parties that are still in conflict. Is it necessary for some third party to forcefully impose on both parties the character of retribution? Absolutely no.

In order to better understand the whole issue let's focus again on the irreversible destruction of property. We still face the necessity of establishing another object or service that will serve as a retribution. The victim who suggests another object or service makes no arbitrary claim, but only tries to avoid the absurdity of no punishment for the offense. In such situations it is necessary either to reach a voluntary agreement or to ask a third person (arbitrator) who will evaluate the inflicted damage. The only difference between establishing retribution and voluntary exchange is that parties of this process are somewhat “forced” to collaborate on the resolution of their dispute.

In practice this would look in the following way: after discovering the offense made by A, the person B would contact A to inform that B has to pay him a certain amount of money (or give some other object or service). B would have two possibilities: either agree or refuse. In the first case we would have an example of conditional exchange supported with a surety. The surety would be the irretrievable object or service. Mutual agreement would finish the dispute. But A could also say that B requests too much. In such case B would have to either reduce his claim in order to reach an agreement or escalate it to a third party. Before we proceed with the description of the escalation, let's discuss first the end of the dispute. This end would be represented by victim's receiving of some other object or service as a retribution for the lost property. The voluntary and mutual agreement is a real resolution of the dispute because at the moment of agreement the victim evaluates the damaged property and places it on top of his preference scale. The retribution received from the offender is equal to the price at which the victim would have given up the damaged thing, had it not been damaged. Establishing the “real” price of the damaged property from the time preceding the offense is pointless as no good (or service) has an intrinsic value, but is always subject to fluctuations and changes in valuation. The process of reaching an agreement is, therefore, a valid way of establishing how precious the damaged

property was.

But as we already mentioned, the offender can also refuse to collaborate and try to avoid the claim made by his victim. The proceedings of such scenario was described by Morris and Linda Tanehills:

> In a non-contractual dispute, as in a contractual one, both parties would have to agree on the arbitration agency they wanted to employ, and they would have to bind themselves, contractually with the agency, to abide by its decision. If the disputants couldn't settle the matter themselves, it is unlikely that either one would refuse to submit to arbitration because of the powerful market forces impelling toward dispute-settlement[96].

Thus, the victim has always the *right* to request from the offender to sign a contract with *some* arbitration agency (or some other person). Again, the choice of agency would be subject to voluntary agreement. But the *offender cannot refuse his victim the right to arbitration*. This would simply mean the practical impossibility of establishing the retribution and therefore the impossibility of punishment. The victim has the right to request from the offender in which the offender commits himself to subject himself to the decision of the arbitrator. If even this was refused, the offender would become an outlaw. Again, this is not dictated by the desire to take revenge, but by the practical necessity of resolution of the problem of irreversible damage. The offender *can't have* the right to prevent his victim from establishing the extent of retribution because that would imply a contradiction. If offender evades any kind of responsibility and any kind of arbitration, he can be punished at will.

> An individual who commits a major offense against someone else and then further refuses to yield to the legal justice system would be an outlaw. In primitive legal systems (as well as others that have not drawn their authority from a central state government), anyone was free to take an outlaw's life and property. Such a contingency would probably arise in a modern system of privatized law and order as well[97].

We can of course say with high probability that in vast majority of cases victims and offenders, in order to reduce the costs, would try to limit the actions of third parties. The costs would be borne by losing party, but market processes will make both disputants adjust their expenses according to the expected result of their dispute. Thus, market creates natural incentives for the resolution of disputes: the victim can't claim too much because of the possibility of a losing in arbitration,

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[96] Morris i Linda Tanehill, *The Market … ,* op. cit., p. 75.

[97] Bruce Benson, *Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion*, in: The Journal of Libertarian Studies, Autumn 1990, p. 35.

whereas the offender for the same reasons can't underplay his fault. The resolution of their dispute is naturally facilitated by the will to minimize losses. In many countries of the world, such as Japan, the mutual agreement is the most desirable settlement of disputes. As Bruce Benson writes:

> A key feature of Japanese culture that apparently underlies the success of restitution is that there is no acceptable excuse for criminal activity. Criminals are expected to acknowledge their guilt, repent, and seek absolution from their victims, and this is the dominant focus of each stage of the criminal justice process. In fact, the vast majority of all criminals show repentance, admitting responsibility to the victim through an intermediary (e.g., family, friend), before public prosecution.
> (…)
> Over 21 percent of the criminals who could be referred for prosecution are released by the police without additional criminal proceedings. They have the power to do this for simple cases where they and the victims are satisfied that the offender is sufficiently remorseful[98].

Naturally, the state police (or any other third party not contracted by the disputing parties) should have in such cases nothing to say, but for us it is crucial to notice the fact that the mechanism of reaching an agreement between disputing parties is also present in our times, against all the obstacles set up by the state.

The method of establishing the retributive part of punishment for the damaged property is also the method of establishing the second, compensatory part. In line with estoppel the retribution (voluntary or forced upon offender) for the damage and the costs incurred form a certain pool. This pool when doubled determines the limit for a punishment. Any further claims made my victim should be invalid. And offender who accepts punishment ceases to be an offender.

THE TEMPORAL CHARACTER OF PUNISHMENT

In many modern legal systems imposed by the State we can find an element called the expiration of punishment which has many justifications. In the legal system of a free society imposing on victim any time limits for the imposition of punishment would be unthinkable. If offender managed to hide from punishment for 50 years, but suddenly came out, he could be punished irrespectively of circumstances (even if he died, the compensation could be claimed from his heirs).

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[98] B. Benson, *Restitution in Theory … ,* op. cit., p. 86-87.

The very idea of punishment's expiration is a contradiction in itself. Its essence can be summarized in the following way: there exists a certain point of time when person X who committed an aggression against Y becomes exempt from the responsibility for his crime, even though no punishment was executed. In other words, proponents of the expiration principle claim that the estoppel principle ceases to be valid whenever some third party (the state) decides so. First of all, we can notice that crime *always* precedes punishment. If somebody tried to punish somebody before crime, he would be an offender himself. By committing a crime offender loses the right to deny his victim that he can be punished. This inability lasts until delivering the punishment. When this happens the offender regains his ability and he can no longer be forced to do anything against his will.

In light of the above we can see that the principle of expiration contradicts the absolute right to punishment because it artificially limits the time of imposing the punishment. Every punishment is strictly limited to an individual: estoppel can be used only by the victim (otherwise it would lead to a practical contradiction as everybody in the world could impose the punishment). The offender doesn't commit a crime against the whole society, but against particular person and only this person (or another person delegated by him) has the right to use estoppel. If anybody else claims this right to himself instead of the victim, he automatically becomes a criminal.

Fetal Life

The question of fetal life is a source of many controversies[99]. But all these controversies are a result of total abstraction from the property rights, which is quite paradoxical if we consider the frequency of discussions about the "ownership of belly". The crucial issue for us is when man becomes a self-owner.

In the previous chapter we have already proved that each man begins to exist at the moment of conception because of the action that precedes it. This is because no-one can reproduct children out from himself, but it is necessary for a man and a woman to join their respective gametes. The action of joining gametes is the only conceivable beginning of a human life because. If man began to live at a later time than conception, this would mean that his existence comes from himself or from his mother. Mother herself is unable to make children and

[99] Abortion will also be discussed in Chapter VII where we will focus on penalization. In this paragraph we will focus primarily on the question of when human becomes a self-owner.

the same applies to a child who is either a man or a woman who can't make children on their own. Therefore, each person homesteads his body at the moment of conception which is also the only possible moment of acquiring free will.

But this argument can be further enhanced by the principle of estoppel which states that no man can deny his own actions. Here we can ask also: are we not allowed to deny only our actions? Apart from conscious and purposeful actions our self-ownership includes also many unconscious processes. In our bodies there function many systems: nervous, digestive or respiratory. In Chapter II we already refuted the argument that man is legally responsible only for purposeful actions which are a direct reason of violating somebody's property. We proved that the basic criterion of responsibility is homesteading and the purposeful change of location. In light of this the estoppel principle can also be applied to unconscious processes taking places in our bodies. For example, if our body "contaminates" another person, he can claim some compensation for that no matter what were the circumstances. We cannot avoid responsibility because the cause of contamination was our body which we control.

In case of a human fetus we cannot speak of a will to be in a certain place, in the womb of this or that mother. Man does not preexist and cannot chose a body to appear in. Even though we have a free will from the moment of conception, we don't have it before to decide[100]. For whatever reasons man appears in the body of his mother, he is already *faced with the fact* of owning a unique body. Everybody, for reasons that are irrelevant here, is connected with his own basic resource – a body which is his first property.

Why do we stress the moment of conception and not the moment of the appearance of nervous system or birth? According to the unquestionable principle of inability to deny one's own actions and processes taking place in one's own body (estoppel), no man can deny another person the right to live from the very beginning, even if initially life involves only some biological, unconscious processes. In light of the property law if anybody said that somebody else can be killed during his fetal life, he would contradict himself as he himself was previously a fetus. Property law states clearly that man loses the right to life only when he deprived of it somebody else. In case of a child before birth it is practically impossible for it to kill anybody. The only exception would be mother's death as a result of pregnancy, but in this case the we can apply the principle of temporal precedence: it is mother (or person who raped her against her will) who decided to be pregnant and this decision is legally binding. Child as such is in such a situation

[100] Free will exists in man from the moment of conception even though at the very beginning it is very limited due to the fact that human body is not yet fully developed.

always innocent.

Some proponents of abortion present sometimes a theory which can be called "the luck of the born". According to it each man during his fetal life is just an object which can be removed at will, but if it manages to survive, it becomes a person with inalienable right to live. Again, expressing such views is an overt contradiction. As we already proved, the only possible aggression on somebody else's body is a punishment for a previous offense. Offender makes himself unable to deny the punishment being imposed on him. His punishment has no time limits: the victim has the right to impose it at any time he chooses to. That's why the capital punishment cannot "expire" on its own, unless the victim decides so. The moment of birth doesn't change here anything.

The logical consequence of theory of "parasitic expropriator" would be the permission for killing anybody with no responsibility. Because if all of us commits during his fetal life a crime which can be punished with death, the punishment is valid until it is imposed (until mother decides to pardon the offense)[101].

Modern technology made it possible to perform artificial insemination in which masculine and feminine gametes are joined in laboratory conditions. After joining many gametes (which involves creating each time a unique human being) there follows a selection of the most promising one which is then installed in mother's womb. From the legal point of view such an action is a homicide as it is equivalent to killing somebody who already began to exist. Again, according to the legal category of estoppel which requires us to act according to our words rules out treating the unborn children as objects. Every man *necessarily* had to trough the same period of life any attempt to deny anybody else the right to fetal life is a performative contradiction. Man and woman always produce (unless their health is impaired) their specific gametes, but each respective gamete is not a child until it successfully joins with its counterpart. The fact that fetus at the early stages of development doesn't resemble an adult person and performs only limited "actions" doesn't change the fact that this early period of life is necessary for each man.

Children And Their Rights

Having discussed the question of fetal life, we can now turn to the period of life from the

[101] The argument that this punishment is really valid and that mother who wants to give birth to a child forgives completely forgets about the fact child cannot control the place in which it appears on the world.

birth to maturity. Despite the fact that birth is very often treated as a landmark in human life, from the legal perspective it has a minor importance. Even though as consequence of it mother becomes separated from her child, the baby is still unable to live independently from her.

The most controversial issue related with children is the moment of gaining independence. The moment of becoming a fully-fledged self-owner is still a subject of many controversies. First of all we can notice that in the first stage of life each child is unable to homestead and exchange things and is completely dependent on its parents (or guardians). Here such persons will be called *trustees*[102]. Can they be called the owners of a child? No, because ownership implies control with no time limit, and kids cease to be kids when they are grown up. Even in case of disabled people who most probably will never be able to live on their own, if one day they managed to become self-reliant, they would become fully-fledged self-owners. Trusteeship of parents and guardians is inherently temporarily limited and that's why it is a kind of care obligation assumed at the moment of conception.

The basic criterion of homesteading is the change of location. Homesteading is an act of changing the natural place occupied by the resource and placing it in the sphere of the already appropriated resources (controlling it). In case of conception homesteading is impossible because before it happens the child *is nowhere*. If anybody claimed that the child exists before conception, he would have to agree that it must have been in one of the parents' bodies. But if each man existed before in his parent's body, we would have to deny the independence of our bodies and agree that all people live eternally from the beginning of the world. The only way to avoid this absurd is to say that each man begins his life at a certain moment of time which is called conception. Murray Rothbard would be correct in saying that mother has the right to decide about her womb only if child appeared there as a result of the change of location. (In a similar way, in case of in vitro procedure a laboratory technician performing is not the owner of human embryo, but its trustee). Because conception is not a change of child's location, it doesn't create trustee's ownership of baby. Trustee has therefore no unlimited power over his child and is obliged to provide him an assistance.

The homesteading principle requiring the change of object's location and joining it with other property remains valid even in the area of children rights. Little man in the first years of his life cannot fully control his location. First of all he moves together with his mother's body and it takes a very long time until he finally learns the art of walking. He encounters many difficulties and

[102] M. Rothbard, *The Ethics … ,* op. cit., p. 100.

the material world is still a challenge for him. A small child is simply unable to homestead because it cannot control things sufficiently. It is unable to distinguish between its own things and things belonging to other people so as to avoid possible conflict. That is why his trustees are responsible for all its actions.

The breakthrough in the process of growing up occurs when child gains the ability to appropriate, i.e. when he is able to consciously and purposefully appropriate goods and be responsible for his actions. In libertarian literature this breakthrough is usually associated with the ability to run away[103] and earn one's living. This view is correct, but it has no grounding in the ability to appropriate.

It is obvious that maturity can be reached an various age and everything depends on many personal circumstances. Moreover, the ability to appropriate is not always equivalent to the will to become independent. In most cases children choose a very long dependence on their parents which helps them to make a good start but makes them subject to the rules imposed by their trustees. As Murray Rothbard pointed out, the state violates children rights to leave their parents' houses by imposing laws limiting the child's labor or by other regulations which make their full time work next to impossible. By narrowing the chances for employment and controlling even greater part of resources the state makes it impossible for children to become independent before reaching a certain statutory age.

As we already mentioned, parents and guardians are never the owners of children, but only their trustees. The question now arises if the trusteeship can be exchanged just as any other title or not. Even earlier we pointed out that legal exchange is only the exchange which was supported by surety. Obviously, a surety can only be a thing previously owned by one of the exchanging parties. But children simply cannot be owned and they cannot serve as a surety. Even if we use a different object, such as a written contract, it doesn't change the fact that children cannot be traded and demand a legal execution of the exchange involving them. Trusteeship enables only to hire a service of guardianship or ask family or friends to take care of children in case of a bad material situation. For example, if a given family has serious financial difficulties and parents are afraid that they will not be able support their children, they can ask another person to fulfill their trusteeship obligation for free or for a fee. In many societies this obligation in emergency situations was usually taken over by immediate family or friends, but it often happens that guardians become completely different people. But even a high amount of money paid to the new

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[103] Ibidem, p. 103; and Williamson M. Evers, *Rawls and Children,* Journal of Libertarian Studies, vol. 2, nr 2, p. 119.

guardians cannot change the fact that children cannot be a subject of exchange. The trusteeship established at the moment of conception remains valid until the day of gaining independence or the death of the trustee.

No matter if conception happened as result of voluntary action or a rape, for each baby there exists at least one legal trustee for the time of his independence (the only exception would be the natural death of both parents; for people who want to take the child over we should apply the homesteading principle). Parental rights can be justly taken from somebody only when parents try to kill the child. Such attempt constitutes the violation of trusteeship and children self-ownership. In such situation the trusteeship can be taken over by any other person in a similar way to homesteading (according to temporal precedence). This *seizure of trusteeship* can happen in many different circumstances, for example the death of parents or in the case of parental power abuse. The only difference between the seizure of trusteeship and homesteading is that in the first case one cannot gain a full ownership, but only a limited control as it involves gaining independence by the child. The new trusteeship becomes legally responsible for the life of his child and all damages caused by it.

The care over child is also related with some particular actions which have to be performed in order to sustain its life. Child cannot be deprived of life in any conceivable way. Child abandonment should be treated as nothing but a homicide as it violates the main obligation of any trustee: sustaining the child's life. Slightly more complicated is the question of care that the child should receive. The word 'care' itself suggests many positive actions and we will attempt here to indicate which of them are obligatory and which are optional.

Even though we know with certainty that child cannot be killed, we also cannot indicate any natural obligation to provide a golden house and caviar. On the other hand, no trustee should be prevented from spending enormous amounts of money on his children. Where is the border between neglect and correct care, between legal and illegal actions?

The only possible border that can be established according to the property law is death. Argumentation estoppel applied to children rights establishes only the prohibition of murder, but no positive commitments. According to this concept nobody can deny one's own actions, or more precisely, disagree if somebody does with his property the same that he previously did to this other person's property. In case of adult persons (those who are able to appropriate and live independently from his trustees) there is no difficulty in distinguishing between lawful and unlawful actions as all of them are determined by clearly defined property rights. But as far as children are concerned, the whole issue becomes much more complicated. Child is a self-owner

but in the first years of its life it is fully dependent on the property of his trustees. It cannot fully control its body and sustaining its life requires a constant care, such as feeding, washing, etc. Thus, almost every action of trustees involves something that for adult (independent) persons would be the violation of property rights. More precisely, from the legal point of view in contact with small children it is impossible to distinguish actions that are a forceful aggression or lawful fulfilling of trusteeship. For example, by feeding a child we often make it cry and protest against what is necessary to keep it alive. A similar thing may happen when we force our child to undergo a surgery vital for his life. An adult person may always refuse any help and die by neglecting his illness, but trustees are always required to sustain their child's life due to their legal obligation. Superficially, it may seem that parents or guardians violate the child's rights, but in fact they act to its advantage. Controversial though it may seem, parents and guardians can legally slap or even hit baby as long as it doesn't affect the child's life. Despite of their aggressive nature, they can't be distinguished from other actions that trustees perform in order to sustain the child's life, e.g. changing a diaper. Therefore we have to agree that until a child becomes an independent self-owner able to appropriate its parents or guardians can do with it everything except for killing it.

In a free society it is very likely that all the parents' abuses would be limited by security agencies which in their membership codes would specify which actions could and could not be taken with regards to children. Although specific regulations would be established by the market, we can predict that the agencies would create a voluntary code similar to the common sense rules accepted by the majority of society. Private social service companies would perform their job much better than the current ones run by the state. Competition and feedback provided by increased incomes would help to find the best solution to avoid situations which are generally treated as an abuse. Even though this kind of supervision could not be imposed on anybody, the persons who didn't sign a contract with any insurance-protection agencies would be a rare occurrence as individuals with no insurance and arbitrators would be treated as outlaws.

Here we should also stress that the libertarian law is unable to determine any specific, positive commitments towards children as they are dependent on many particular circumstances. The method of argumentation is only able to show us the obligation of sustaining the child's life (which is equivalent to a negative prohibition: one cannot kill). Obviously, this prohibition implies also some positive actions, such as feeding or medical treatment, but as such they are not a part of any universal law.

A child who feels that his parents or guardians abuse their obligation and force him to something that he doesn't want may always resort to escape. If all mechanisms of social service

companies fail and there is no chance for voluntary settlement of their dispute, the child may simply run away and begin its own independent life or ask other adults for help. In such situation the basic requirement for the new trustees is to be able to prove that the child wasn't "stolen", but simply appeared in their house as a result of a voluntary action.

ELDERLY AND SEVERELY ILL PEOPLE

Elderly and severely ill people, just as small children, have a limited control over their own property. However, contrary to small children, they have already marked the reality with their appropriations: as young and healthy people they managed to re-locate many things which became their property. Age or illness may slightly disturb the control over property, but they don't eliminate it. Only death makes the property of a man return to the sphere of unowned resources (unless some previous contract specifies that it is bequeathed to somebody).

Elderly and severely ill people very often require an assistance similar to that which is given to small children. They can't eat, drink nor do anything on their own. In such situations carers become their trustees who in order to sustain their life assist them in this or another way. As we already mentioned, trusteeship is fundamentally different from ownership as it is inherently limited in time. But trusteeship of adult people is different from the trusteeship of children also by the fact that there is no person who is naturally obliged to guarantee the care (unless there was signed a contract). Conceiving a child puts its parents a legal commitment of taking care of it because it is their action that created the child. At a certain point of time child can become independent and quit this obligation. A severe illness or old age are not a result of anybody's purposeful action and so it is impossible to point to the person who should be responsible for taking care of such people. The only exception are people severely ill from the birth who most probably will never be able to become independent. In such case their parents or guardians are responsible for taking care of them without any time limits which can only expire by natural death or miraculous recovery.

In most cases the care over ill and elderly people is provided by family or friends and happens without any contractual agreements. From the legal point of view all such people always need to bear in mind that in case of recovery the ill person could always file against them for the mistakes in treating them. That's why a very useful tool helping to avoid such situations would be last will – documents specifying the most preferred actions that other people may perform with

their property (body and goods) in case of emergency such as death or illness. Such document could also take the form of a contract committing other people to provide assistance and taking care. It is highly probable that the security and insurance agencies would include such services in their contracts. We can also predict that such services would be one of their most important tasks and that they would compete by offering the best assistance in order to attract more customers. It doesn't mean, of course, that all people with no exception would have to sign contracts with insurance companies, but there would also be strong incentives not to make it due to the threat of becoming an outlaw.

Trusteeship over elderly and severely ill people cannot be exchanged on the same terms as exchanging objects because man cannot become anybody's property. The person obliged contractually to take care over an ill or old person can, of course, hire somebody to take over his obligation, but the new carer cannot decide to abandon his obligation. In such situation the original carer is obliged to fulfill the requirement by all means and, if necessary, has to hire a new assistant.

In case of people who are mentally ill property law cannot make any special concessions, no matter how problematic the illness may be. Every person at the moment of conception becomes a self-owner and has to bear responsibility for all the actions that he performs purposeful or not. The natural factor weakening the quite difficult legal situation of the mentally ill is the parental assistance which sometimes has to be extended to the age that is usually treated as maturity. Their trusteeship consists first of all in taking care of children, but also making sure that they don't make any damages to other people's property. For example, a small child could easily set a wood on fire not understanding all the implications of such an action, but it surely couldn't bear responsibility for all the damages caused in this way.

If a small child from an early age gives away symptoms of mental illness, parents have to extend their trusteeship without time limit. But mental illness may also, and it frequently does, appear at a later time when somebody is already independent. Such a person may sometimes cause extensive damages, but there are no “automatic” extenuating circumstances[104]. The best way to prevent such situation is to purchase an insurance which would cover the costs of any liabilities. In the free society such policies would most probably be included in the contracts signed with protection agencies.

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[104] This issue will be discussed separately in sub-chapter „Extenuating circumstances”.

The Universalization of Laws. The Argumentation Ethics and The Natural Law.

The argumentative estoppel turns out to be essential in understanding the question of universalization of law. The universalization principle has been applied in social theory for ages and adopted many different justifications, but with the course of time it gained even stranger interpretations. This happened because it was discussed in a total abstraction from the property law. But every action has an actor, an *owner of a body*. Action cannot take place without an active person. Thus, the golden rule[105] should be understood as implying property law based on self-ownership, homesteading and title transfers. Only then it receives it original meaning and can avoid contradictions:

> However, while some norms might not pass the test of universalization, if enough attention were paid to their formulation, the most ridiculous norms (and what is more relevant even openly incompatible norms) could easily and equally well pass it. For example, “everybody must get drunk on Sundays or else he will be fined” or “anyone who drinks any alcohol will be punished” are both rules that do not allow discrimination among groups of people and thus could both claim to satisfy the condition of universalization[106].

Universalization should therefore be always understood in the context of argumentatively justified property law, because it is the fact that self-ownership cannot be denied without simultaneously contradicting oneself which establishes its universal validity.

We have already mentioned the question of universalization earlier while discussing the issue of abortion and proving that the person who denies the child during its fetal life the right to exist at the same time denies his own self-ownership. It turned out that no man can deny his own actions nor unconscious processes taking place in his body. As a self-owner every man *has to* bear full responsibility not only for his purposeful actions, but also for all the things happening with his property. For example, if our body infects somebody with some illness, even though it wasn't made purposefully, we bear the legal responsibility because we are owners of our body and consciously control its presence.

The argumentation theory is often criticized and its enemies claim that according to it property law should only belong to people who are currently able to argue, and not to people who

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[105] In Kant's words stating that one should always do what one wants to become a universal law.

[106] Hans-Hermann Hoppe, *The Ethics … ,* op. cit.*, p*. 317.

are very old, paralysed or very young and therefore unable to participate in a discussion. The best tool helping to refute such allegations is estoppel. By postulating accordance between words and actions (and unconscious process happening in our body) it forces us to ascribe to all people the same property rights that we want to be respected for ourselves. Thus, because everybody had to go through the fetal period of his life, everybody is entitled to the right to life from the moment of conception. If anybody claimed otherwise, he would thus deny his own self-ownership (would commit a performative contradiction). Moreover, because every discussion presupposes respecting the control over the body, the disputant has to agree on the right to self-ownership of all the people who don't even participate in a given discussion. Even if there was a man who was never to express a single word and was unable to communicate with anybody, it is the common experience of being conceived which decides that all people with no exception are self-owners and are entitled to the same property rights as established through argumentation.

The ethics based on action and argumentation axioms is undoubtedly referred to the old tradition of natural law, but they cannot be treated as equivalents. As we already mentioned, Hans-Hermann Hoppe claims that even though Murray Rothbard based his legal and ethical theory on the natural law, its justification was based on argumentation theory[107].

As the very name suggests, the natural law is based on the concept of nature. In philosophical tradition this concept means a source of action but in a broader sense than in economy or law. Action in Aristotelian-Thomistic tradition was always understood as one of the qualities of substance (the basic ingredient of reality) and one of the ten principal categories[108]. The basic category was being, i.e. substance (for example, man, tree, sun, etc.) because it is always an object for qualities and it can exist independently[109]. Other categories which were called accidents referred to dependent entities, such as place or number. For example, number 5 doesn't exist on its own, but always in relation to real substances, e.g. 5 cars. Similarly, white color can't exist independently from white objects. Action in this scheme was correctly treated as an accident, but it was similar to reception and it was not reserved to man, but also to other substances. For example, an action for a flower was flourishing in spring and for animal – hunting for another one. The traditional *actio* is much a broader concept from the one that we apply here, because we are only interested in a conscious *human action*. Human nature is different from the nature of

[107] H-H. Hoppe, *The Ethics …*, op. cit., p. 331.

[108] Aristotle, *The Categories, On Interpretation, Prior Analytics*, Harvard University Press, Cambridge, Massachussets, 1962.

[109] M. Krąpiec, Metafizyka, op. cit., p. 301-311.

substances that are not rational and human action has a specific characteristic. While it is correct that it also comes under certain regularities of the whole world because it is a substance, but its action is totally different from the actions of trees or animals as it is conscious. Argumentation ethics is different form the natural law just because it only concerns human nature. If in our investigation of the human nature we wanted to apply the same criteria as in researching the nature of all substances, we would never notice the special characteristic of a man – the only being who at the same time has an access to a scarce object (his own body) and the realm of thoughts which is not scarce. It is important to say here that until Murray Rothbard the natural law tradition never fully understood it. Argumentation ethics is a subpart of the natural law, but with its own specific character.

Here we can also note that the natural law tradition came close to our implications in the time when it was based on the argumentative analysis of existence. St. Thomas Aquinas based his whole philosophy on the existence as a basic and unquestionable characteristic of all beings. This Thomistic spirit of establishing the unquestionable elements of the reality (principles of non-contradiction, identity, etc.) contributed to the appearance of economic school of Salamanca[110]. This tradition was abandoned due to many political and religious reasons[111] and contributed to a substantial change in the character of natural law theory. Instead of searching for unquestionable components of reality and undeniable facts about human nature it became a game of concepts totally abstracted from the reality.

The theory discussed here doesn't contradict with the original natural law theory, but it is its reinterpretation conducted with a better methodological precision. Obviously, the ethics based on argumentation axioms rules out the existence of the state as immoral which is unthinkable for most of the adherents of the natural law theorists. Their error stems from hypostatizing a being called "the state" which simply cannot be reconciled with realistic philosophy in which the only substances are beings like a man, a tree or a dog, but not "people". Regrettably this fact has been ignored by almost all theoreticians of law in the last centuries[112]. The state was attributed all the characteristics which are reserved only for humans. Such categories as: national interest, social

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[110] Murray Rothbard, *An Austrian Perspective* ... op. cit., p. 97- 134.

[111] Rothbard claims that it was caused mostly by the following events: the gradual increase of domination of Franciscan fideism over Thomistic rationalism, the vanishing of Latin culture in favor of national languages concentrated around local states and the Protestant rejection of medieval culture and philosophy. Ibidem, p. 135-136.

[112] A record of this error can be found in Leo Strauss, *Natural Right and History*, The University of Chicago Press, Chicago 1963.

advantage or common good. The place of real, individual beings (substances) has been taken by various mental creations such as state, European Union or international community. This ballast was discarded only with the appearance of libertarian thinkers, with the biggest contribution of Murray Rothbard.

EXTENUATING CIRCUMSTANCES

In modern legislation imposed by the state there are certain categories which weaken the responsibility for the committed crime and are used completely arbitrarily. The most popular extenuating circumstances are: action under (strong) emotion, mental disorder or bad material situation. Sometimes court hire well-paid specialists whose obligation is to objectively investigate if such conditions indeed took place. Their decision may sometimes highly influence or even prejudge the court's decision. This procedure, however, completely ignores the victim's right to demand a full punishment irrespectively of the circumstances. Any crime concerns only the victim and the offender, and not the offender and the whole society. Even if there was an offender who committed some crime against almost all members of society, his offense would have to be treated individually with relation to each person. Thus, punishment can only be limited by the victim (or his representative, e.g. protection-insurance agency) who is the only person entitled to decide whether extenuating circumstances indeed took place. Considering all the motives behind offender's action and all other circumstances he is free to impose a full double punishment or completely give it up.

Here we should also consider the question if extenuating circumstances are objective or rather arbitrary. According to modern trends there are many situations when certain illnesses or extraordinary circumstances help offenders escape their punishment. But, as we have already proved before, responsibility is a category which is not limited only to actions immediately preceding a given offense. Sometimes a crime doesn't involve any purposeful action of the offender. In such situation we always have to establish the structure of ownership. For example, if in a car driven by a person X suddenly brake gets damaged and as a result of that the car runs down some pedestrian, the person X cannot be said to have caused the accident intentionally. But intentionality (purposefulness) was in this case present at the moment of purchasing the car. And it is this intentionality which is relevant in establishing legal responsibility.

Similarly, in case of a murder committed under strong emotion, e.g. after discovering that

one's wife betrayed, the relevant fact is not the emotions felt by the murderer, but the fact that he purchased a gun. From the victim's point of view there are no extenuating circumstances, but only a “mechanical” chain of events which is the basis for the victim's right to impose the punishment. Extenuating circumstances only make sense as an individual evaluation made by the victim (or his contractual representative) who is free to consider the context of the crime and show understanding or empathy, but it also its inalienable right not make it. All the legal principles imposing on the victim some superior circumstances which limit the extent of the punishment are completely arbitrary and are a crime towards the victim who becomes unable to claim his rights.

In a free society it is likely that there will exist a counterpart of today's state-imposed principles in the form of voluntarily signed codes and sets of principles which would recommend or oblige to accept a certain patterns limiting the punishment, although no one could be forced to agree on them. We can easily imagine that various agencies would have different regulations and would compete to attract customers with reasonable standards. Some of them might attract Tolstoyans who are opposed to any punishment and other agencies might aim at proponents of the biggest punishment possible. Of course, we are unable here to determine the exact shape of all these codes as it is would be established in the process of competition.

The Withdrawal of Agreement

We have already mentioned that human body is inalienable due to its permanent connection with mind. But controlling our body sometimes consists also in performing with certain actions classified as services. For example, in return for money a worker builds a house. Because money serve in this exchange as a surety, the customer expect from the worker that he will build the house, and if the worker doesn't make it, the customer has the right to claim the money back. The question now arises: does the worker always *has to* complete his work, even if he breaks the contract or can he simply pay the compensation and escape his commitment? It is very often claimed that human body is inalienable and because of that no one can legally bind his will with a future action. This opinion is often supported by the argument that it is impossible to become somebody's slave because free will is inalienable. But this statement misses the point as it completely ignores the fact that breaking a valid contract (supported by surety) violates victim's free will.

First of all we should notice that every person is free to administer his own property and he can do with it whatever he wants unless he violates somebody's property. We also know that coercion is justified only when it's used by the victim – due to argumentative estoppel the offender cannot deny his own punishment. Thus, the worker who refuses to complete his job can be forced to make it, because he is bound with a legal agreement. He broke the agreement which means that he violated the property right of his client. Having taken cash advance (or signed a contract), he committed himself to transfer to his client a certain service. Because he failed, he appropriated it to himself. The client has the right to impose a punishment and he is free to choose it from the range: no punishment whatsoever – double punishment. He can, of course, decide to hire a new worker who will be more reliable, but if the contract doesn't exclude it, he can also coerce the offender to complete his commitment.

Murray Rothbard viewed work contract as a mere promise and therefore objected to forcing employees to perform job that they agreed to in their contract[113]. According to him the basic criterion for a valid title transfer is alienability. Thus, because free will and our self cannot be alienated, they cannot be transferred to anybody. The fallacy of this argument consists in forgetting about surety requirement[114]. The promise supported by surety doesn't require surrendering one's will for unlimited time, but only a specific service that has to be delivered to another person, e.g. cutting hair or fixing a car. Every contract involves transferring some good or delivering some service, but never surrendering will. The fact that fulfilling a contract requires the use of free will is completely irrelevant as the will becomes materialized if the contract is supported by a surety.

Rothbard is, in turn, correct when he claims that in a free society services would be supported by performance bonds which would specify all the conditions of the contract. He also points out that employers could create special “blacklists” and exchange their databases of unreliable workers with each other. It is also possible that protection agencies would create certain patterns of such performance bonds which would accommodate signing contracts.

Ultimately, the person committing oneself to perform a certain action through legal contract would have at his disposition a mechanism protecting him from being forced to complete the obligation. We should remember, however, that such a point in contract stressing the

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[113] M. Rothbard, The Ethics ... , op. cit., p. 135-136

[114] Although later on (pp. 137-38) Rothbard quotes an example of an actor who is obligated to fulfill his obligation only if he previously accepted a fee (surety), but later on insists that worker has the right not to come to work irrespectively of the contract that he signed.

possibility of being unable to fulfill the obligation would affect the credibility of contractor. This could even deter from signing contracts with such workers. Another point is the character of the service: cleaning windows and building a skyscraper both require a different kind of performance bond.

The proposition outlined above manages to avoid the absurdity of the view that anybody has the right to withdraw from his commitment before receiving the payment (as Rothbard seems to have suggested). The surety can take the form of cash payment, but also a piece paper (contract). Obviously, no-one works only for the piece of paper, but for the salary promised on it, but receiving the salary is dependent on performing certain actions which should not be forgotten.

IV. Who Is The Legislator?

Modern legal theories usually claim that law is legislated by government agencies. In the Western countries this function is delegated to democratic parliaments which first of all discuss certain propositions and later on vote for them. Once agreed, the new law is published and comes into life from the set term. Even though it is widely believed that the power is (or should be) separated into executive, legislative and judicial branches, in fact there is only one subject controlling the whole power: the state. Even though the state creates within its structures certain divisions responsible for the the classical elements of power, it does not affect the evident fact that the all the governmental ministries, parliaments, courts and other agencies are all funded by the same tax system. This model of power is typical of Eastern tyrannies[115]. In the medieval Europe there existed a completely different, libertarian scheme of legislation. An evidence for this argument is provided by Bruno Leoni:

> Although Greece could be described to a certain extent by historians as a country with a written law, it is doubtful that this was true of ancient Rome. We probably are so used to thinking of the Roman legal system in terms of Justinian's Corpus Juris that is, in terms of a written law book, that we fail to realize how Roman la,v actually worked. A large part of the Roman rules of law was not due to any legislative process whatever. Private Roman law, which the Romans called jus civile was kept practically beyond the reach of legislators during most of the long history of the Roman Republic and the Empire[116].

Historical example, no matter how meaningful, cannot serve as a theoretical justification of the libertarian theory of law. The inclination for historical evidence can only help as an illustration, but is insufficient as an argument.

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[115] Karl August Wittfogel describes the unilateral process of law creation in oriental despotism in the following way:

> The ruler who exercises complete administerial, managerial, judicial, military, and fiscal authority may use his power to make whatever laws he and his aides deem fit. Expediency and inertia favor the perpetuation of most of these laws, but the absolutist regime is free to alter its norms at any time; and teh history of hydraulic civilizations testifies to the periodic promulgation of new laws and codes. The „Collected regulations" (*hui yao*) of Imperial China, the Law Books (*sharma shastra*) of India, and the administrative and judicial writings of the Byzantine and Islamic East are all cases in point.
>
> In these and other comparable instances the regime represents a definite structural and operational pattern, a 'constitution'. But this pattern is not agreed upon. It is given from above, and the rulers of hydraulic society create, maintain, and modify it, not as the controlled agents of the society, but as its masters.

Karl August Wittfogel, *Oriental Despotism: A Comparative Study of Total Power*, Yale University Press, New Haven 1957, p. 102-103.

[116] Bruno Leoni, *Freedom … ,* op. cit., p. 82-83.

In showing man as a subject creating legislation we will need to come back to Chapters I and II where we reconstructed the libertarian theory of self-ownership, appropriation, exchange and law as such. In light of the arguments presented there we identified law with the property law, i.e. self-ownership and ownership of all resources that are homesteaded or voluntarily exchanged. In Chapter III we also established that offender is only a person who violates the property law and showed the principles of imposing a punishment. The enterprise of creating legislation is usually understood as dictating certain legal principles by the state occupying a certain area. Our arguments, however, have shown that property rights cannot be limited spatially nor temporarily. The rules that we discovered are valid irrespectively of circumstances and no state can ever deny them.

The property rights obtained in the process of homesteading has no limits in time (other than death). The owner has the right to decide about his property with no time limits. We have already explained above that conditional exchange is equivalent to renunciation of at least one aspect of ownership with no time limitations. Thus, we can conclude that all appropriated objects are subject to somebody's exclusive control in all possible aspects. If all law is the same to property rights which can be discovered through the argumentative analysis, it means that law cannot be created by anybody, because it already exists; it is already presupposed in the fact of discussion. This argument is absolutely correct on the theoretical level of law. The practical level, however, has its own specific character which already became clear at the time when we explained that victim may choose any punishment from the range: no punishment whatsoever – double punishment.

The freedom of imposing the punishment (from the range) has its roots in the property law. When we appropriate things we also gain the right to get rid of them whenever we want (of course with the respect for property rights of other people). Offender who violates our property rights at the same time violates also the control over our property. If he initiated the aggression, it is in the interest of the victim to be able to regain the control over his property. Obviously, one cannot also exclude the possibility of letting the offender go away with no punishment at all, no matter how rare would be such situations.

Recovering the stolen property and imposing a punishment is always accompanied by inconvenience and costs. As any enterprise it also bears a risk of being unsuccessful. Because situations in which victim is able to catch the offender on his own are extremely rare, victims would have to use the services of third parties. This help could also be provided by family members as a non-contractual assistance. All these means are, of course, voluntary and victim

would be totally free not to chase the offender for many reasons (insignificant harm or impossibility of detecting offender, etc.). In a free society this problem would be solved by protection agencies:

> In a laissez-faire society, insurance companies would sell policies covering the insured against loss of value by aggression (the cost of the policy based on the worth of the values covered and the amount of risk). Since aggressors would, in most instances, pay the major costs of their aggression, the insurance companies would lose only when the aggressor could not be identified and/or apprehended, when he died before making full reparations, or when the reparations were too great for him to be able to pay in his lifetime[117].

Nevertheless, not all cases of property rights violation are as simple and uncomplicated as stealing a scooter or a book. For example, in case of very complex contracts serving as sureties for some exchanges committing an offense may involve very sublime actions. Sometimes contract can be breached by not fulfilling precise requirements indicated by one of the contractors. In order to avoid insoluble disputes contractors may protect themselves by using the services of arbitration agencies which could be indicated in the contract as a body responsible for giving a final judgment[118].

The choice of insurance and arbitration agencies is of course voluntary. Every man has the right to decide about his property and this fact remains unchanged even if there occurred an act of aggression. The tools serving to protect the property rights are only probable, though based on rich historical evidence, practical solutions of the problems that a free society would come across. The law is legislated by individuals acting within the frame of libertarian legal theory. It exists independently of individuals, but not as a kind of platonic ideas. Man discovers it through his self-ownership, homesteading and voluntary exchanges as the way that the world exists, i.e. he finds out that law is independent from human will and inherent in the nature of the world.

In one sense, law is not constituted by anybody. Through argumentation libertarian theoretician of law merely discovers the objective and indisputable legal code. Thus, law cannot be legislated as it is independent of anybody's will and is valid irrespectively of time and space. But in another sense, when we refer to the execution of law, we can discern a certain area within which people are justified in creating some legal principles. We mean here the right to decide about our own property in relation to punishment which can be chosen from the range: no punishment at all – double punishment and also the right to delegate our representatives to

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[117] Morris i Linda Tannnehill, *The Market for Liberty*, Lansing 1990, p. 91.

[118] Ibidem, p. 75.

execute the punishment and resolve the dispute. In the free society this task would be entrusted to special protection and insurance agencies.

Even though we can almost be sure that in the free society the power of executing the law would be delegated to hired representatives bound by voluntary contracts, we should not forget that they would be inferior to individuals. Hired representatives and other agencies responsible for executing the law would only have as much power as the individuals would grant them.

V. INTELLECTUAL PROPERTY

The constant progress of civilization makes it inevitable that even bigger part of law becomes classified as concerning intellectual property. In spite of often complicated technologies this realm of property is governed by exactly the same principles as other types of property. This is because any kind of technology or idea is necessarily invented by acting man and tools that he has at its disposition.

A very misleading is the very term "intellectual property". Even though it is hard to find for it an alternative, it implies that it is possible to own something that belongs to the mental world. However, as we have shown in Chapters I and II, thoughts cannot be owned. In the meantime the state-imposed legal systems ascribe to people exclusive control over certain ideas (thoughts), no matter how absurd this may sound. For example, patent rights prohibit people who didn't sign any contract with the patent owner to use their own resources in the way they would prefer to. Thanks to the collaboration with the government, the inventor of an object X is able to prohibit everybody to make a similar or identical invention, even though they might make it completely independently of him.

The enemies of intellectual property, such as Stephan Kinsella, use the example of irrational patent rights to criticize the whole idea of intellectual property by referring to the requirement of scarcity:

> Thus, property rights must have objective, discernible borders, and must be allocated in accordance with the first-occupier homesteading rule. Moreover, property rights can apply only to scarce resources. The problem with IP rights is that the ideal objects protected by IP rights are not scarce; and, further, that such property rights are not, and cannot be, allocated in accordance with the first occupier homesteading rule[119].

Later on, however, Kinsella makes a very important mistake when discussing the copyright:

> ideas are not scarce. (…) Similarly, if you copy a book I have written, I still have the original (tangible) book, and I also still "have" the pattern of words that constitute the book. (...)
> If you take my car, I no longer have it. But if you "take" a book-pattern and use it to make your own physical book, I still have my own copy[120].

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[119] Stephan Kinsella, *Against Intellectual Property*, Ludwig von Mises Institute, Auburn 2001, p. 31.

[120] Ibidem, p. 32

The striking error of the absolute opponents of the intellectual property couldn't have a more expressive example. First of all, we should always remember that if we are lawful owners of our property, we are free to use it for any purpose which doesn't collide with the property rights of other people. *If we write a book, create a computer program or record a song, we are always the owners of scarce, material objects used for their registration* (respectively: paper, computer disc or CD). Contrary to what Kinsella claims, intellectual property does not concern ideal (mental) objects. As the owners of individual material objects we have the right to specify the rules governing the access to our property, including the ban on copying. *Waiving this right would be equivalent to the violation of property rights*. The author of a book, computer program or recording has the right to sign with other people contract regulating the exact use of the object that he originally owned. One example of such restrictions is the ban on copying.

The most important issue about the intellectual property is determining the access to material resources. Kinsella quotes an example of a man living in a cave[121] who for the first time in history discovers the method of building houses. If the contemporary IP laws were applied to his invention, he could prohibit all other people to build houses which would hamper the progress of civilization. This abstract example fails to realize that there is something like an access to property. As we have proved in Chapter II senses as such cannot be owned, but only their physical counterparts. If anybody builds a house, he cannot prohibit other people to watch it from the nearby area. The only situation when the owner of the house would be legitimate in his prohibition would require signing a contract, e.g. on not watching the interior of the house after entering it. The caveman could build his house in the interior of a cave or cover it completely with leaves or branches in order to prevent other people from seeing it. But if one day wind blew the leaves away and the house became visible, the owner would no longer be able to prevent other cavemen from building a similar house.

Identically, a very popular singer, programmer or painter who worked on their epochal work in mystery for a very long can restrict the access to their work in any way they want: for example, by allowing only limited number of people to enter their house and asking them to first sign a contract committing them to never disclose the mystery. If supported by surety, such a contract could successfully restrict an access to some very important objects.

The key issue about the intellectual property is *restricting an access*. In a free society it would be possible to individually restrict an access to any kind of property through voluntary

[121] Ibidem, p. 44.

contracts. For example, an author of a book could request their readers not to copy them within the next 10 years, 1 year or put no limitations on copying at all. The crucial thing here would be the contract specifying an exact use of objects. Authors of books, programs or recordings would be able to choose the most preferred access to their works and inventions, of course in accordance with the demand on their products and services.

Official Secret and Blackmail; The Ownership of "Reputation".

In this paragraph we will discuss the question of official and personal secrets. Modern state-imposed legal systems enable to protect certain kind of information which, if published, would be detrimental to their owners. Regrettably, this kind of protection involves the process of violating third parties' property rights through unlawful assignment of property rights to mental phenomena. If a given company or person wants to reserve a given piece of information only to itself, it needs to take an effort of restricting an access to the objects that are the secret. Thus, it needs to make sure about two things:

a) that the people living on a nearby area can't discover the mystery located on their property by simply using their senses; and

b) that the people having an access to their secret signed a valid contract committing them not to disclose the secret under the threat of punishment.

All other people who don't have a sensual contact with their secret or who didn't sign any contract can't be required to not to say it or use for any other purposes if they happened to come across the same idea or guessed it. In the same way, if the mystery is just a piece of information, the "owner" of it needs to make sure that he assured to his mystery no sensual contact with other people and that all the people who are disclosed his secret sign a contract prohibiting them to disclose the information to anybody else.

In case of "leak" of some disadvantageous information there can occur a blackmail. Blackmail is usually denounced as such and in certain circumstances one can be even prosecuted for using it. Most people forget, however, that blackmail is a fully lawful action if the secret leaked due to failure assure the 2 requirements that we have just discussed. As Walter Block pointed out:

> Blackmail is the offer of trade. It is the offer to trade something, usually silence, for some other good, usually money. If the offer of the trade is accepted, the blackmailer then maintains his silence and the blackmailee pays the agreed-upon price. If the blackmail offer is rejected, the

blackmailer may exercise his rights of free speech and publicize the secret[122].

As we already mentioned, we cannot forbid any person who simply used his senses or who didn't sign any contract to use thus received knowledge for any kind of purpose. Blackmail is therefore the most ordinary trade offer which involves silence of the blackmailer and money of the blackmailee. We should underline here again that blackmail is only justified if the secret got disclosed due to secret holder's error.

Here we should also briefly discuss the question of “violating personality rights” which is often used as a reason for filing numerous lawsuits. According to this idea some people, especially if they are deemed as “public persons”, have the right to “good name”. The good opinion about them is treated as their property. As Murray Rothbard pointed out, human views and opinions belong to the realm of thoughts and cannot be appropriated:

> In a free society, as we have stated, every man is a self-owner. No man is allowed to own the body of another, that being the essence of slavery. This condition completely overthrows the basis for a law of defamation, i.e., libel (written defamation) or slander (oral defamation). For the basis of outlawing defamation is that every man has a „property in his own reputation” and that therefore any malicious or untruthful attack on him or his character (or even more, a truthful attack!) injures his reputation and therefore should be punished. However, a man has no such objective property as „reputation”. His reputation is simply what others think of him, i.e., it is purely a function of the *subjective* thoughts of others. Therefore, I cannot invade a man's property by criticizing him publicly. Further, since I do not own others' minds either, I cannot force anyone else to think less of the man because of my criticism[123].

The only way to limit or avoid bad opinions, gestures or other communicates from other people is to bound them with voluntary contracts or persuade them. These contracts could commit people not to perform certain actions on some restricted area. In a free society it is likely that insurance agencies would develop certain ethical codes of conduct which would require everybody to behave in a certain way. Nevertheless, the counteraction to “defamation” or “personal rights violation” has sense only sense as a preventive or persuasive effort.

Property of Trademarks and Company Names

Trademarks are inseparable part of market economy. Connotations which come to mind

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[122] Walter Block. *Defending the Undefendable*, Ludwig von Mises Institute, Auburn 2008, p. 41.

[123] Murray Rothbard, *Man …* , op. cit., p. 182-183.

while seeing company's logo are often crucial in the decisions taken by customers. No wonder that entrepreneurs strive to obtain absolute control over their own trademarks which are often the main asset of many companies. Current regulations allow to restrict that only one company has the exclusive right to call its product with a name X and use special logo. In order to obtain this privilege companies have to pay a certain amount of money and meet some requirements (varying according to states). It means that, more or less, thanks to the state monopoly of coercion some people are granted the right to exclusive use of a certain combination of signs, This privilege means nothing but the violation of the property rights of other people.

This violation becomes clearer once we realize that everyone can influence other people's decisions only voluntarily. Therefore, if producer X wants his product Y to be the only one having this name, he can achieve this goal by signing contracts with the biggest number of people possible or simply by persuading them. In practice this is unfeasible, because any other person Z who didn't sign with X any contract, but had a sensual contact with product Y, can legally produce a similar good and name it Y. X can't blame Z for any offense, because he didn't restrict an access to his property sufficiently.

In fact, the most important factor related with trademarks is distribution. Goods of a high quality are normally not sold in obscure places, but in shops reflecting the quality of the goods sold. For example, Ferrari cars are not sold on backstreets in suburbs, but in showrooms in attractive neighborhood. In a free society one could produce his own Ferrari looking identically to the original one, but if it wouldn't have a sufficient quality, he would have no customers. If customers find out that the good or service is of bad quality, they will go to competition. Therefore, the burden of delivering the good or service of high quality should rest on distributors who guarantee to their customers that they sell only the original product.

Contrary to modern practice of placing the ® mark which is protected by the state, from the legal point of view it is completely meaningless. If a producer didn't oblige his customers with a proper contract specifying if they can disclose any information about his product, any third party who would see (or discover it through a different sense) a given trademark, could produce identical good and use for it the same name or logo.

Producers could only protect themselves against “brand thieves” by using the services of private certificate companies. Such companies would guarantee the originality and high quality of products with their own marks or logos. Such information placed on a product would only be a suggestion for customers who would still be free to choose. Nevertheless, any person who wasn't bound with any contract could still produce an identical good. The only restraints that property

right puts on people imitating famous brands is to give an exact information about their products. Thus, for example, if somebody sells a computer under the name of a well known company, but it turns out to malfunction, he is responsible for the property rights violation and needs to compensate his customers.

In the same way functions the mechanism of assigning property rights for names. Even though we are self-owners we cannot own our names as they belong to the realm of thought. Names are not scarce and can be owned by more than one person. If we don't want other people to use our name, we can only persuade them or sign contracts committing them not to use it in the way that we don't want them to. In the same way as in case of trademarks, we can use the services of certificate companies. Nevertheless, our name can be used by as many people as possible. After all, the only guarantee of our identity is not our name, but particular body connected with mind and will – this is the only component that we have monopoly for. This identity cannot be used by anybody else but the self-owner. Even though it is generally thought that the set of our identity details is our property, it is only a result of a custom. In a free society the responsibility for upholding such a good custom would rest on the protection agencies which would run an official record of their clients and probably issue ID cards. However, in case of contracts signed outside the legal system created by the private law enforcement agencies, it would be up to contractors to set the terms of establishing each other's identity to prevent any dispute.

VI. Unusual Situations

Slavery, Euthanasia, Martial Arts and Chicken-Race, That Is The Alienability of Body in Practice

In Chapter II we discussed the general principles of alienating body. We established that body is an irreducible component of every man and is inseparably connected with our will. We are able to alienate big parts of our body, but we are unable to alienate our will and body as such. We can only dispose of or trade some parts of it. We quoted an example of blood donation and transplantations. Such situations are not controversial, even though they are not any different from other changes in the structure of human body.

As we already explained, body can be partially alienated and we can use it for certain exchanges. The range of alienability is only limited by “voluntary servitude”. Man as a self-owner can do with his body anything he wants: he can take care of it, neglect it or even destroy it. This is a natural consequence of being the owner of one's own body. Property law is superior to any biological, medical or cultural factors. One of the many natural consequences of self-ownership is also the possibility of committing a suicide.

Slavery is automatically ruled out if it requires surrendering one's free will. Such a situation is simply impossible and contradictory because of the irreducible nature of body and will connected with it. It is implied in the very fact of discussion, which we explained in Chapter I. Thus, it is impossible to transfer our will to somebody else and then to evade responsibility for our actions. As long as we own our bodies, the free will is necessarily connected with it. The only way to get rid of body and free will is to commit a suicide.

But is it possible to sign a contract with another person to be killed? This question requires a separate discussion. Lawful contract was specified as one in which the exchange is supported by material surety. Gifts, that is one-sided transfers of some goods, are only lawful also when they are supported in the same way. Euthanasia (if understood as voluntary agreement of the

terminally ill to pass away with the assistance of another person) is a specific kind of exchange because as a result of it one of the parties irrevocably loses self-ownership. Nevertheless, even though a contract for taking one's own life can be supported by surety for only one of the parties, it is still a valid form of action. Moreover, a person voluntarily agreeing to lose his life would have to prepare sufficient proof for his agreement in order to avoid a situation in which after the death the contractor would be blamed for homicide.

We already mentioned before that among people who trust themselves a lot (family, close friends) there is no need to support exchanges with surety. For example, objects used in a household circulate without any written contracts. Can the question of taking one's life be solved in the same way? In some respect yes. That's why euthanasia is only lawful insofar as the contractors are able to demonstrate the evidence of the voluntariness of agreeing to take one's life. It is because after the life is taken it is impossible for the deceased to argue in defense of his contractor. If the voluntariness of death has no strong evidence any third party would be able to use such situation to appropriate the property of the deceased person and accuse “the assistant of death” of illegal action. Therefore, the problem with euthanasia concerns mainly delivering a sufficient proof for any third party who might want to homestead the property of the deceased person.

Another manifestation of the right to use our body in any way we want are martial arts. Many boxers and other sportsmen die on the ring during or just after the fight or game. Stephan Kinsella explains what it means to be able to alienate some parts of our body:

> Boxers in a ring, or duelers dueling, do not have their rights violated when struck by fist or bullet. This is because they consented to these exchanges of force. To alienate one’s right means that one is unable to withhold consent to some action that would otherwise infringe the right if there were no consent[124]

Thanks to our free will each of us can hire another person whose task would be to defeat us in a fight (game) based on certain principles. In this way fighting people are free to choose the method of fight, even one in which there is a possibility of one's death (of course, in such case the contract requires abundant evidence in order to prevent third party's interference). Law needs to allow to such contracts in order to avoid contradiction with self-ownership and homesteading principles. In the same way function the “chicken races” in which both parties agree to take part in a competition in which one or both parties can die[125]. In such cases there many possible scenarios:

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[124] Stephan Kinsella, *Inalienability …*, op. cit., p. 88.

[125] The possibility of hiring streets for such races is discussed by Walter Block in: *The Privatization of Roads*

no wounded people, crash or death. All of them should be allowed because they are a natural consequence of self-ownership. The only complication related with them concerns delivering a proof that the contract was definitely voluntary[126].

AD COELUM

Another controversial issue is the "ownership" of space over land. According to many people the owners of a given piece of land become automatically the owners of the space located above it as well as the soil below. The absurdity of such proposition becomes clear when we recall the homesteading principle which states clearly that ownership is limited only to objects which we are able to control, i.e. change their natural location and join with other resources that were previously appropriated. Even though it is generally claimed that we own also the space over our land, we are unable to constantly control it. The only way to gain control (ownership) over the space is to fill it with our property.

Theoretically we can protect ourselves from unwanted constructions in close neighborhood or above us by erecting large piles or aerials which would make it impossible for others to build anything[127]. Any controversies related with such situations should be judged upon the chronological criterion which is dictated by the homesteading principle. For example, if somebody builds a house on a surface of land as the first, he has the right to demand his neighbor who might decide to build another house on top of his property not to throw wastes on him nor make noises harmful to his ears.

In the same way, in case of the alleged ownership of the layers of soil below our property no man can demand anybody else not to build a tunnel or mine unless it directly (materially) affects his property. The absurdity of the proposition that we own also the soil below our land becomes clear once we realize that this implies that each land owner should also own some land on the opposite side of the globe. Therefore, we should base our discussion on the homesteading principle. Just as in the case of constructions built on top of one's property, the appropriation of soil layers below one's property is naturally limited. For example, a tunnel or coal mine built below

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& Highways, Ludwig von Mises Institute, Auburn 2009, p. 340.

[126] This role was played formerly by a second – a third party with good reputation who vouched for the correct procedure of a duel.

[127] Walter Block quotes an example of a large umbrella over a city which would block the sun and cover the whole landscape, but would be absolutely legal. Walter Block, *The Privatization ... ,* p. 301-302.

a piece of land can't infringe upon the material structure of the above soil layers. The constructor of a tunnel needs to be very careful in order to avoid any damages – he has to build deep enough and make sure that his construction will not affect the property of his neighbor.

Damages Inflicted by Property

The objects that we appropriate can sometimes cause appear in the role of “aggressor”. This includes both animate (animals and plants) and inanimate objects. The owner of these objects always bears a full financial and legal responsibility for the inflicted damages. The fact that there might be no purposefulness in such damages cannot be categorized as extenuating circumstances, because the act appropriation of the object was definitely purposeful. For example, if our dog bites a pedestrian it can hardly be called purposeful. But the will to buy the dog at some earlier time was definitely intended and made on purpose. In the homesteading principle there is implied a spatial control over any owned object (resource). If this object manages to escape and we are unable to control it, we should consider whether we would still like to own it or not as it may inflict some damages to other people's property.

The logic behind the responsibility for the damages inflicted by our property is based on the undeniable fact that a given object which caused the aggression would be in the place where the offense happened, hadn't it been previously placed there by the owner (as a result of homesteading or exchange). This real change in the object has the power of proof in the possible court case. Even if the object which caused harm changed its location in the way that was not intended by its owner, the victim has the right to claim the compensation due to the intentionality of the act of appropriation.

Animal Rights

In the previous chapter we have discussed briefly the issue of damages inflicted by animals. Because the question of animal rights is still a point of many controversies, it requires a separate treatment.

First of all, the property law theory based on action and argumentation axioms is only

restricted to beings which are able to discuss[128]. While some animals are able to perform certain actions similar to appropriation and use some limited method of communication, they are unable to think reflexively and incapable of engaging in propositional exchange with humans. As Murray Rothbard pointed out: "The fact that animals can obviously not petition for their "rights" is part of their nature, and part of the reason why they are clearly not equivalent to, and do not possess the rights of, human beings[129]. The fact that children are also unable to argue and defend their rights is irrelevant. Their temporary inability to be independent is compensated by the trusteeship of their parents. Rothbard states also that a child can become a self-owner, whereas an animal cannot. According to estoppel theory we might also add that the person who would oppose this proposition was definitely a child, but certainly not an animal. If we wanted to base our view only on the proposition an animal can't become a man, it would be a weak argument based on empirical observation. But if we refer to the events that already happened in the past (being a child), our argument becomes even stronger.

Generally speaking, every person is free to treat animals and plants as objects endowed with property rights, but one cannot force to such views anybody else. Animals can be appropriated at will and people should be able to make with them whatever they want, including killing them. Any controversies, such as cruelty towards animals, should be solved through non-aggressive methods: persuasion, boycott or contracts. It also can't be excluded that in a free society it would be the protection agencies which would create a certain code of treating animals in order to maintain a good reputation. Nevertheless, any person should be free to make with his property whatever he wants.

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[128] While people may not be able to argue, animals are not able to argue at all.

[129] M. Rothbard, *The Ethics …* , dz. cyt., p. 156.

VII. Penalization

Abortion

The most basic problem of modern human sciences is that they are not referred to property rights and this applies especially to many defenders of unborn children. The two key issues related with abortion are: 1) demarcating the border between mother and child (particularly in the perspective of the development of pregnancy); and 2) positive (in a material sense) obligations of parents towards the child.

We should begin here from the basic fact of self-ownership which is a fundamental and indisputable fact in the discussion about the property rights. Every person is allocated a unique body which is controlled by him. However, in the moment that a child is conceived, the whole situation gets slightly more complicated which is one of the hot spots of the libertarian theory of law. Murray Rothbard called unwanted child a "parasitic invader" who invades mother's privacy[130]. However, the author of *The Ethics of Liberty* completely ignores the basic fact that child appears in mother's womb with no such intention. It simply cannot choose any other place for its prenatal development. Rape is an act of purposeful aggression, but the resulting pregnancy is absolutely natural for the child. "Invader" is a mismatched name because agreeing to it would necessitate calling an invader every person as everybody lived in a womb of his mother. If everybody,

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[130] M. Rothbard, *The Ethics …*, op. cit., p. 98.

irrespectively of mother's decision, begins his life with an act of aggression, there is no reason to think that at a later time the punishment will suddenly expire[131].

Walter Block and Roy Whitehead in *Compromising the uncompromisable*[132] quote an example of a man who wakes up after surgery joined with the body of another person, which they claim to be similar to conception. They ask a question who is the owner of the common body[133]. The error of this comparison lies in the artificiality of such surgery. The task of kidnapping and then performing the surgery was performed by particular people: kidnappers and surgeon. Quite contrary, in the case of conception the people responsible for it are usually both parents or at least one of them, but *never* a child. If mother was raped, father can be legally forced to pay for child's living, but the child is always innocent and couldn't intend its own conception.

Thus, the coherent libertarian position on abortion, contrary to Rothbard's arguments, needs to state the following: mother cannot kill the child nor cause its death by neglect. Obviously, mother can't be forced to take any particular actions which are generally thought of as advantageous for children, but she has a duty to keep the child alive until it gains independence. Mother also cannot make the child's independence impossible through neglect. Also, if some mother decided to take her child's life, she can be stopped from doing that by anybody in the same way as any person can defend a victim who is about to be killed. Today's pro-lifers who strongly recommend to fight for life through the state would have a chance to create organizations whose goal would be the protection of endangered children.

In a free society with low time-preference it also highly probable that the unborn children would be protected also by the private insurance agencies. Generally speaking today's high level abortion can be attributed to the state-induced high level of time-preference. Having many children is typical of societies which don't consume everything, but save for the future. In society where all couples decided not to have any children anymore there would ensue a total consumption of capital as there would be nobody to save for. Therefore, the more children are born, the more future-oriented the society. Thus, if a given society makes a lot of abortion, it is a

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[131] While pro-choice libertarians (such as Murray Rothbard) believe that calling child “a parasitic invader” is only justified when woman doesn't want pregnancy, but her decision to give birth doesn't affect the fact that the child can't take any decision. Parasitism has to be intended, and this element is absent in case of small children.

[132] Walter Block and Roy Whitehead, Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy, Appalachian Journal of Law, vol. 4:1, 2005.

[133] Almost identical example is quoted by Williamson M. Evers who speaks of a famous violinist who can be saved only by forceful blood transfusion arranged by Society of Music Lovers: *Journal of Libertarian Studies*, vol. 2, nr 1, p. 3-4.

proof that consumption becomes superior to saving. In a free society abortions would occur less frequently.

It is also very likely that the insurance agencies would create some kind of social service checking if mothers treat their children properly or not. Perhaps the extent of this voluntary, contractual control would be one of the main points of the contract signed with agencies and mark the differences between them. Again, the exact shape of these regulations would have to be discovered through market competition.

Another important issue related with expectant mothers who didn't want to be pregnant are positive actions which mothers should take toward the small inhabitant of her body. As already mentioned, we are unable to indicate any exact actions that should be taken unless a specific action is required. For example, if a child is about to die of starvation, it needs to be fed. It means that the required positive actions are always relative to given circumstances.

A very interesting proposition of solving the problem of unwanted pregnancy was presented by Walter Block in his article *Compromising the uncompromisable*. Although he generally upholds the Rothbardian view on abortion, he introduces a new term: evictionism. He means by it that child can be removed from the mother's womb as soon as possible in order to avoid abortion. Block, quoting new discoveries in the field of medicine, claims that soon this procedure may become available even in the initial stage of pregnancy. We can point here that the eviction doesn't end the responsibility for child's death as Block seems to suggest. Child cannot be simply left on its own as would mean an imminent death. Parents are bound with trusteeship from the moment of conception until the day that the child becomes independent.

From the legal point of view abortion is untypical. It is because defenseless child is deprived of life by its family – by people who in most cases are plaintiff on behalf of the killed person. Who is the person who can legitimately impose the punishment upon the offenders (parents and medician)?

In order to have a better understanding of this issue we can use an example of a murder on a homeless man. This man lived on the street for years and no-one can establish his identity: he has no family nor friends. One day there comes another man and kills him for fun. Can this crime not punished because there is no plaintiff? Does it mean that the state-run legal system which prosecutes the murderer *ex officio* is superior to the libertarian private law system? Quite contrary. Even though one can imagine a situation in which after a murder on homeless person there would be no plaintiff, but it is highly unlikely due to the possibility of gaining profits. In libertarian society the prosecution would be performed either by private insurance agencies or

bounty killers. The latter, mostly known from westerns and depicted there as ruthless people, were actually very beneficial and played an important role in the execution of law in America.

The killer of a homeless man would not be unpunished, but intensively sought after. Here again comes into play the homesteading principle which – the person who catches the murderer can impose on him a punishment. The punishment can be material compensation, for example in the form of payment. Here we come to a very important issue: in a free society imposing the capital punishment by bounty killers would be possible, but in fact it would hardly ever happen due to material profits that could be obtained. After all, there would be not too many people who wanted to chase offenders just to kill them with and have no financial satisfaction[134]

Now we should also discuss briefly the extent of financial punishment that can be imposed on the murderer of a homeless man or unborn child. First of all, we should point to the fact that there is no universal price of human's life. We can, however, establish the sum of all unfulfilled commitments of the dead persons. For example, if father of family is killed, his murderer should bear all the costs of bringing up the orphans until they become independent. Or if an entrepreneur is killed, his murderer has to compensate all the contractors. Certainly, in case of unborn child or a homeless man it is hard to point to any particular commitments that would have fulfilled hadn't they been killed. That's why the level of the financial punishment that can be imposed on their murderers should be much lower than in the case of, e.g. a millionaire. The punishment would mainly dependent on the nature of murder, the costs of detaining the offender and other procedural costs.

Capital Punishment

According to the theory that we discuss, by taking one's life the offender deprives himself the right to deny that his life should also be taken. If as a result of our action (or as a result of some accident involving our property for which we are also responsible[135]) somebody irreversibly loses the ability to control his body, we lose the ability to deny that we should also lose such a control. The person imposing the punishment cannot, of course, do whatever he wants. It is

[134] One may argue that mothers could hire murderers and later on pardon their offense, but in reality this problem would be solved by private protection agencies which would strive to eliminate such situations through their own investigations. Their reputation would certainly be their biggest asset and they couldn't afford to allow to such practices.

[135] This question was discussed in paragraph „The Intention and Purposefulness of a Criminal Action”.

erroneous to think that if somebody killed a man he can also be killed in the act of revenge in whatever way. Quite contrary, the murderer who, for example, killed with a gun, can only be killed in the same way unless he agrees and wishes to die in another way. If before killing a man he didn't torture him, he can't be tortured himself. If anybody attempted to torture the murderer before his death in an unjustified way, he would himself be an offender and incur a similar punishment on himself.

The victim's heirs shouldn't, however, be forced to incur costs of imposing a punishment that they could never afford. For example, there are sometimes murders committed in a sophisticated way which involve high sums of money[136]. In such situations the libertarian legal code would enable to take the offender's life in the least money-consuming way. All this is because it is necessary to avoid the absurdity of a situation in which the offender would force his victim's heirs again to control their property in the way that they don't prefer. Thus, the heirs or other victim's representatives could kill the murderer in a more conventional way, as quickly as possible. It doesn't mean, of course, that the punishment can be imposed with the smallest cost possible (which might imply very brutal acts, such as beating to death), but it only applies to situations in which the act of murder was excessively expensive.

Obviously, as we have already explained, choosing the extent of punishment from the range: no punishment at all – double punishment rests with the victim or victim's representatives or heirs[137]. The issue gets slightly complicated only in case of murderer's death preceding the punishment. In a free society, however, me might expect that insurance agencies would protect even against such a disaster.

At the moment of taking his victim's life, the murderer loses the right to deny that taking his life is lawful. According to the concept of double punishment he can be punished twice because he denied to right of life to the victim and to himself. As obviously life can't be taken twice, what is the exact nature of punishment?

In case of a stolen property the whole issue was much less complicated: stolen bike has to be returned, all the losses compensated and a respective compensation has to be paid. But if offender takes someone's life (body and will), how to establish the extent of punishment? The answer is simple: in the same way as in a casual offense. The victim's representatives or heirs would contact the murderer and called to settle a dispute. They might suggest that they want his

[136] For example, the heirs of the former Russian Federal Security Service officer Alexander Litvinenko who was poisoned by radioactive substance might not afford a similar substance to impose a punishment on his murderers.

[137] M. Rothbard, *The Ethics …* , op. cit., p. 88-89.

death or some amount of money (or other commodity). The offender could either accept it or refuse it. If he agreed, the punishment would end the dispute. If he disagreed, they would have to agree on an arbitrator. If the offender didn't agree even to that, he would become an outlaw and could be killed instantly.

Thus, the double punishment in case of murder can either be death or compensation mutually agreed between the parties. For example, let's imagine a family which lost one of its members. According to law they can either kill the murderer or request from him compensation for all the costs incurred as a result of the victim's absence and a corresponding second, compensatory part of punishment. Suppose that they manage to catch the murderer and intend to communicate to him that they wish to receive a compensation x and later on kill him. As in case of each offer, he may turn it down completely or reply that he doesn't want to evade responsibility, but the punishment is too harsh. The latter case is easier to solve as it requires only hiring an arbitrator. However, in the first case there may even appear a situation in which murderer, even after proving his guilt, would still refuse any kind of collaboration. Here we should remember that their fate would be becoming an outlaw which can be punished by any person in whatever way. If offender denies the right to settle a dispute, he negates property rights as such.

Another important issue is the murderer's death and the relationship between his offense and inheritance. The problem can be described in the following way: if one can inherit the commitments of the deceased person, is it also possible to inherit a punishment? Or, to put in another way, is it possible to inherit somebody's capital punishment?

Let's suppose that a man X kills a man Y and then commits a suicide. The heirs of Y manage to find the heirs of X. What kind of punishment can they expect? Can they demand only a compensation or also a death of one of the heirs? Generally speaking, if a person from a family X didn't take part in the offense, he cannot be forced to bear any kind of responsibility unless he agreed to it in some kind of contract. Thus, all the terms of inheriting a given property should describe legal responsibility in case of death. In our situation the heirs of X can be legally killed only if they previously agreed to such possibility in their contract with X. In such case the heirs of Y could suggest the heirs of X the most preferred way of receiving compensation and mutually agree on the best solution or use the services of arbitrator.

IMPRISONMENT

One of the most significant effects of the state's hegemony on the market of security services are prisons and imprisonment as such. There are many reasons to regard it as a natural consequence of the legal monopoly of the state. The sate, which is the biggest and the best organized criminal group, is based on constant expropriation. In order to maintain its power, it had to re-formulate the concept of punishment. If the biggest thief in the world constantly manages to escape any responsibility for his crimes, it inevitably affects the overall shape of law execution.

The function of prisons in a free society should be restricted to just two cases: temporary arrest (if offender refuses any cooperation) or punishment for offenders who previously imprisoned their victims. In the first case keeping somebody in an arrest is not a violation of property rights, because a person who refuses to use the services of any arbitrator denies property rights as such. We should point out here that suspect person cannot be imprisoned unless it clearly refuses any cooperation or reacts with aggression. One shouldn't also forget that arrest implies always a risk that it was a mistake and that the person who makes it is responsible for any claims made by the mistaken offender.

The other situation would be extremely rare and would involve certain costs borne by the victim. Nevertheless, one cannot exclude it as such as the victims of very long imprisonment may always demand the same for their aggressors.

To sum up, the most frequent form of punishment which is imprisonment is an unlawful act towards an aggressor unless he previously imprisoned his victim. By putting in prison millions of offenders the state commits a crime against both victims and offenders. The first are harmed by the inability to execute a preferred punishment, the latter by being punished in the way that didn't deserve.

CRIMINAL ORGANIZATION (THE STATE) AND THE STRATEGY OF DEFEATING IT

The question of penalization for being a member a criminal organization called the state has not yet been satisfactorily discussed[138]. This is probably a result of the fact that the extent of the crimes committed by the state is such enormous that people can't even imagine any punishment for all the numerous offenses. The closer examination of this issue shows, however,

[138] Murray Rothbard dedicated to this issue a whole chapter of his *The Ethics of Liberty* (p. 255-273), but he focused there on the gradual advance to the free society. See also: Walter Block, *Toward a Libertarian Theory of Guilt and Punishment for the Crime of Statism*, in: *Property, Freedom & Society*, (ed. S. Kinsella and J.G. Hülsmann), Ludwig von Mises Institute, Auburn 2009, p 137-148.

that the problem lies not in the scale of the phenomenon, but in the will to punish the aggressors.

First of all we should understand what is the state. Contrary to its followers, it is not anything separate to the individuals that create it. Each state is always made up of the group of people (or, to be more precise, a certain categories of their actions) which acts in its name and uses a special ideology. It would be a mistake to claim that the state are only the current officials: prime ministers, presidents, ministers and their assistants. There is also a long list of the state's employees: doctors, teachers, railway workers, etc. and other people who actively participate and benefit from the regulations that the state imposes. All of them contribute to the crime against the people who are opposed to the state. It is important, however, that there is in a society at least one libertarian truly opposed to the state. After all, one can imagine a situation in which there would be only one state with no enemies and millions of followers who blissfully trust the state. In such case there would be no crime, even if some followers of the state disagree with its extent. From the legal point of view the fact if one member of a criminal group pushes for 80% robbery or just 5% is completely irrelevant. His income would come from organized robbery in any of the variants.

In the legal system imposed by the state there are sometimes punishments for officials who abused their power. But the state always punishes for some specific actions and *never the crime of statism*. The key point in disputes over power abuse is whether a given person is the follower of the state or its enemy. First of all, every act of coercion by the follower of the state on the opponent of this institution should be treated as a crime. Members and followers of the state should be treated as criminal group and their contracts as invalid (as they repeatedly refuse to use the services of an independent arbitrator which makes them outlaws), because they are based on stolen property. The only lawful contracts can be made between opponents of the state who constantly express their disappointment with the existence of this institution.

The existence of at least one libertarian in a society (even if 99,9% of population agree on the state) invalidates all the state's regulations and legislation because they imply a total control over the property of all people living on a given area. Thus, the followers of the state shouldn't be surprised if the state-imposed law cannot guarantee them any rights. An organization based on constant coercion cannot bring a different result.

We can notice here that everyday life illustrates this view quite well. The best example are social security systems which rest on money transfers from the young people to the old. State's regulations are constantly changed and as a result of this in many countries such systems are in fact already bankrupt. The people involved in these involuntary money transfers (young workers,

pensioners) are never asked about their opinion directly, but the decisions are imposed on them by politicians. This is just one example of endless examples of how the state breaks the law on a daily basis.

The state is different from the usual criminal group because the latter consists of people specialized in a certain kind of crime, whereas the state commits all kind of offenses, interfering with all spheres of life of its compulsory members. Being a member of a usual criminal group doesn't mean that one cannot live an ordinary life as some bandits have a normal profession and act against law only in certain situations. In case of the state, expropriation became the sole occupation for millions of people who often dedicate it their whole life.

In light of the above we can now understand better what is the main problem about imposing the punishment for participating in the state. It is not the matter of documentation or finding proof for the criminal actions as the states always keeps many records of its activity. The problem isn't either catching the offenders. The main problem is the will of society which usually blindly accepts the state and removes its guilt.

For the crime to happen it is necessary for the victim to oppose. If the victim can't react to the violation of his property rights, but instead calls the aggressor “protector” or “guard”, there can be no crime, but voluntary transfer of goods. That's why the state can be defeated only if its structures are left by big number of people. The abandonment of the state could happen through boycotting its services (whenever possible) and refusing to work for him (directly). There have been states in history which managed to gain almost total control – such as Soviet Union – but even in such situation it is possible to oppose the state in a limited way. Sometimes being a libertarian means only persuading people or opposing the state in a symbolic way – after all, no victim can be forced to fight an open battle with the state as he may value his life.

One cannot also say that any resistance to the state is futile as its power is such enormous that it will never be defeated. Some people try to refute libertarian arguments by saying that if opponents of the state really dislike this institution, they should not leave their houses and walk on the streets which also belong to the state. This argument, however, completely ignores the context of being the compulsory member of the state. One should remember that the state is a coercive monopoly of security and legal services on a given. It constantly uses a coercion. It can be compared to a big camp in which there are closed millions of its subjects. If somebody thinks that the opponent of the state should refrain from walking on the streets of the camp or decide to die of starvation, he commits a grave error. The state is not any kind of organization that can be boycotted just as a local grocery shop or laundry: each person is *forced* to live within it. Thus,

libertarians can legitimately use the services of the state to the extent that they think it is necessary to overthrow the current statist system.

Nevertheless, libertarians should be able to prove their opposition in case there comes an occasion to sue the state for its crimes. In order to make it they may refer to the documentation: libertarian newspapers, Internet web sites, video tapes, etc. showing their engagement in the movement against statism.

Obviously, it is possible that as in case of any crime victims of statism may decide to pardon their aggressors. This gesture cannot be, however, imposed on anybody nor dictated by a third party. The decision whether to punish or not should always belong to the victim or its representatives. If they decide that the only way to come back to normal world is to forgive all the mistakes, they are free to act according to it. But other victims should also be free to impose a double punishment with no exception. The theory of law can't restrict this right which belongs to everybody.

Overthrowing the state as the main enemy of liberty is definitely a big task. Referring to de la Boetie Murray Rothbard argued that it can only be accomplished through changing the social opinion about the state. The fact that the state is harmful and evil is unquestionable, even though most of people try to think differently. From the legal point of view diving into the reasons of such situation is senseless. Whether a crime is committed purposefully or not is completely irrelevant for the victim. According to homesteading principle each person is responsible for all damages inflicted by him or his property, irrespectively of whether the damage was made intentionally or not. People responsible for the crime of statism can't be excused and say that they were misled. If anybody claims that he accepted the state for fear of being anathematized or due to his thoughtlessness, he can only appeal to his victims, but he cannot claim them to be any extenuating circumstances objectively decreasing his guilt.

Absolutely erroneous is a view that holds that the state is a well-organized minority. Each state is always based on the will of the vast majority of people who for their unlawful actions need to obtain almost unanimous acceptance. The fact that the state is sometimes directly controlled by some smaller group is completely irrelevant as there are always also other groups wishing to take over the power. The best illustration of this argument can be Russian bolsheviks who managed to gain control even though they were in minority. But the crucial fact about this takeover was that there were also other political groups, such as mensheviks or royalists, who competed for the power and who accepted a very powerful state as well. Had there been no other followers of the state in Russia at the time other than bolsheviks, they would have never taken

over the control. Each state is based on widespread acceptance of its existence, no matter what are the differences between all of its followers.

Obviously, a mere accepting the state is a question of thoughts and will which are not scarce. Speaking in favor of the state cannot make anybody an offender. One can only commit a crime of statism by participating in the unlawful expropriation enabled by the state. Thus, to make it absolutely clear, the followers of the state are guilty not because they verbally support the state, but because they benefit from the illegal actions taken under the name of the state. When it comes to the opponents of the state, the situation is a little bit different. Because the state is a totalitarian organization which controls almost all aspects of life, individuals who oppose it cannot engage in an open battle. An open battle with the state would in fact require fighting with all the people as taxes are usually included in the services and goods sold in the market. Victim is not required to resist the offender physically – one have to only manifest its disagreement with the unlawful action, especially when the state wields such an enormous power. In case of an ordinary robber this manifestation is usually not a problem as other people usually try to help in catching him and don't call him “a protector”. But in case of the robbery committed by the state this manifestation becomes harder as other people don't try to help, but exchange our property between themselves. In this way they become co-responsible for the crime of our expropriation.

Sometimes it may happen that the property stolen from the opponent of the state may be returned to him through some service or subvention provided by the state. This reprobate practice of the state may put the enemies of the state in a bit complicated situation. Therefore, we should remember that living under the hegemony of the state is very specific and forces to compulsory co-existence of offender and their victims. This situation can be compared to living in a huge camp where almost all the property: from roads to the police, belongs to the state (the criminal). The victim of statism cannot be blamed for using the services provided by the state, because he found himself in the camp against his will.

Another important issue concerns the range in which the victim can use the resources provided by the state. As already explained, we certainly cannot deny him the right to use the streets or grocery shops because it would imply an imminent death. But will we say the same about flying on holidays from the airport owned by the state, which can hardly be called a necessity? In such situation the victims of statism are required to use the services of private companies as much as it's possible (if they can afford them). For example, if we can choose between buying in a private shop and a shop owned by the state, we should always choose the first one. Similarly, in case of Tv stations, airlines, newspapers and all other branches of market,

we should support the companies that are not directly owned by the state. But in areas monopolized by the state (such as police or judicial services) we should feel free to use the services of the state as we simply have no other choice. If anybody claims that one could still live without them, he completely ignores the omnipresence of the state.

Generally speaking, the victims of statism are required not to work in public companies whenever they have the choice[139]. Another requirement is the promotion of libertarianism in any possible way. This can be done through issuing books or holding meetings explaining the true nature of the state or creating libertarian organizations. All theses initiatives shouldn't be supported by the state's funds.

The question of reaction to the crime of statism surely can't be called simple, but it only reflects the nature of the crime committed by the state. In order to understand it even better, let's use an example of an ordinary thief. If he steals a good that belongs to a person X, and then shares it with other people W, Y and Z who know that the property was stolen, they would be equally responsible for the same crime. The peculiar characteristic of the state is that people like W, Y and Z are not few, but there are millions of them. That's why the manifestation of the disagreement to the crime of statism seems sometimes impossible and futile, especially when almost any exchange with the followers of the state seems to confirm that we agree on our expropriation. We shouldn't forget, however, that victims cannot be blamed for the practical hardships that were caused by the offenders. Because libertarians are usually in minority, one has to include all the circumstances of their decisions and choices. Experiencing the social hostility towards their views, they have to exist in a very unfriendly surroundings. They can't be expected to effectively oppose millions of the followers of the state. The can't be expected to do something that is unfeasible, such as boycotting the state's roads. If we wanted to require them to manifest the disagreement with the act of violence committed on them in a regular way, they would have to boycott almost the whole world. The victims of statism can't behave just as the victims of an ordinary crime, because the crime committed on them is different than any other one. One has to remember they are required by the followers of the state to accept their situation and exist peacefully with their torturers. They cannot resist directly because they would be immediately fought by the police, army or other state's representatives.

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[139] In a communist Russia this was impossible as private initiative was simply banned. Still, even in a country like Soviet Union it was possible to be a libertarian by simply promoting the ideas of a free society. One is never required to fight with the state directly, especially in times of terror. But as soon as the situation improves, the victims of statism have to openly manifest their disagreement withe the status quo.

Someone might argue that if the state cannily makes it impossible to boycott itself, one cannot speak about any crime. Thankfully, it is not so bad. As we already explained, victim cannot be blamed for the troubles caused by the offender. If the state's aggression prevents any boycott of the offender and his partners, from the legal point of view the victim has to only express his opposition. This opposition can be expressed, for example, in libertarian magazines or organizations which hopefully once will serve as a proof that the state was not unanimously accepted.

The ultimate goal for libertarians remains building a strong and numerous movement against the unjust social system imposed by the state in order to establish a tribunal which will judge all the crimes of statism and punish all responsible. For this to happen, the state has to be weakened inasmuch as possible. If somebody wants to punish the state, he needs to be able to confront it physically. The success of libertarianism is thus dependent on the gradual dismantling of the state up until the moment that it can no longer resist its enemies – libertarians.

The victims of statism are potentially very reach for the crime committed against them is very often continued over decades and involves gigantic losses. If we also remember that each victim can impose a double punishment, we have to admit that each libertarian is possibly a millionaire. Obviously the main concern of the state is to never let a process against itself which in fact would end its existence. This is probably one of the main reasons why libertarianism is constantly outlawed from the public debate and treated as an enemy.

VIII. Free Market: Good for Man or for People?[140]

Free market can be defended in many ways. Not all of its followers, however, realize that only some of them are absolutely correct. The most erroneous are arguments expressed from the utilitarian point of view, i.e. speaking of the social benefits of the laissez-faire reforms.

First of all, we should point to the fact that the subject of the market exchange is an individual. Actions can't be taken by the group of people. There is nothing like ends or decisions of society as a separate entity. The same applies to choices: only individuals are able to make them. This leads us to another important observation made by Ludwig von Mises:

> acting man has a scale of wants or values in his mind when he arranges his actions. On the basis of such a scale he satisfies what is of higher value, i.e., his more urgent wants, and leaves unsatisfied what is of lower value, i.e., what is a less urgent want[141]

Human scales of preferences constantly change each time we take a decision. It is evident that values are something that are absolutely subjective and relative to individual. Mises adds also that

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[140] This text appeared in a different form previously in the Polish magazine *Najwyższy Czas!* (nr 14(985)) under the title. „ ... a wszystkim żyłoby się lepiej."

[141] L. von Mises, *Human* ... , op. cit., sp. 94.

the “The only source from which our knowledge concerning these scales is derived is the observation of a man’s actions”[142]. This means that the only way to find out what is good for a man is to let him act freely. But the crucial thing about action is that it has to be voluntary, otherwise it there is a coercion.

From our analysis we can clearly see that we can call a social interaction beneficent for both parties only if it takes place. Any interaction is a kind of action. In fact, each action is an exchange – an exchange of a state X into the state Y, that is for the state that is more satisfactory. But what about the situation in which exchange is not voluntary? Who is the beneficiary of the coercion. Certainly the person who uses coercion. The other part of interaction – the victim of coercion – always loses. Any speculations on whether coercion might in fact be beneficent for the victim contradict with the fact of human action.

In light of the above the typical pro-market argumentation turns out to be completely wrong. Why? Simply because the most frequent justification of the free market states that introducing laissez-faire reforms the social welfare will increase. But social welfare is not anything that can be measured, so a person advocating the free market runs into contradiction by implying that social welfare can be compared and have different levels.

Social agreement on the existence of the state which constantly expropriates people completely distorts the scales of preferences. The victims of the state are forced to take decisions that they would not have taken had there been no state coercion. The state controls many actions of its subjects and constantly forces them to readjust their goals. This constant aggression contributes to the fact that it is impossible to indicate to the extent of our freedom. There is no difference if the state affects only ten or thousand of our actions, our decisions are always affected by the reduction of freedom (sovereign control over our property).

Obviously, libertarians also advocate a free society and claim that their proposition is better than others. Thus, one could have an impression that libertarianism also implies some sort of utilitarianism. On the contrary, the main difference between libertarianism and utilitarian pro-market theories is that the first one states that stateless society is the only rational social system. It doesn't allow any alternative more or less beneficent social systems, but advocates the only just social system. In other words, libertarianism doesn't recommend stateless society as better than others, but claim it to be a precondition of any social order. Social welfare can't be measured, but it exists and it is tantamount to a free, libertarian society.

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[142] Ibidem, p. 95.

The implications of this view are that a free society can't be imposed by any state regulation. It can only come through a gradual dismantling of the state. Reforms conducted by the state have only sense insofar as they lead to a destruction of statism which is an ultimate goal for all libertarians.

To sum up, the state can be invalidated even by a single man. The resistance of at least one person is sufficient to make the state a huge criminal group. After all, one could imagine a society consisting of 100% of the state followers which would mean that there would be no crime whatsoever. But there is an alternative: a free society in which people are free to decide about their own property. One in each 100% of people benefit.

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