What Libertarianism Is

Stephan Xinsella

PROPERTY, RIGHTS, AND LIBERTY

ibertarians tend to agree on a wide array of policies and principles. Nonetheless it is not easy to find consensus on what libertarianism's defining characteristic is, or on what distinguishes it from other political theories and systems.

Various formulations abound. It is said that libertarianism is about: individual rights; property rights; the free market; capitalism; justice; the non-aggression principle. Not all these will do,

Stephan Kinsella (stephan@stephankinsella.com) is Editor of *Libertarian Papers*. He thanks Juan Fernando Carpio, Paul Edwards, Gil Guillory, Manuel Lora, and Patrick Tinsley for helpful comments.

¹The term "private property rights" is sometimes used by libertarians, which I have always found odd, since property rights are necessarily public, not private, in the sense that the borders or boundaries of property must be *publicly visible* so that non-owners can avoid trespass. For more on this aspect of property borders, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Boston: Kluwer Academic Publishers, 1989), pp. 140–41; Stephan Kinsella, "A Theory of Contracts: Binding Promises, Title Transfer, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003): n. 32 and accompanying text; idem, *Against Intellectual Property* (Auburn, Ala.: Ludwig von Mises Institute, 2008), pp. 30–31, 49; also Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (1986): 303.

however. Capitalism and the free market describe the catallactic conditions that arise or are permitted in a libertarian society, but do not encompass other aspects of libertarianism. And individual rights, justice, and aggression collapse into property rights. As Murray Rothbard explained, individual rights are property rights.² And justice is just giving someone his due, which depends on what his rights are.³

The non-aggression principle is also dependent on property rights, since what aggression is depends on what our (property) rights are. If you hit me, it is aggression *because* I have a property right in my body. If I take from you the apple you possess, this is trespass, aggression, only *because* you own the apple. One cannot identify an act of aggression without implicitly assigning a corresponding property right to the victim.

So capitalism and the free market are too narrow, and justice, individual rights, and aggression all boil down to, or are defined in terms of, property rights. What of property rights, then? Is this what differentiates libertarianism from other political philosophies—that we favor property rights, and all others do not? Surely such a claim is untenable. After all, a property right is simply the exclusive right to control a scarce resource.⁴ Property rights specify

Property may be defined as an *exclusive right to control an economic good* . . .; it is the name of a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of man with respect to *things of value*. People everywhere and at all times desire the possession of things that are necessary for survival or valuable by cultural definition and which, as a result of the demand placed upon them, *become scarce*. Laws enforced by organized society

²Murray N. Rothbard, "'Human Rights' as Property Rights," in *The Ethics of Liberty* (New York and London: New York University Press, 1998); idem, *For A New Liberty: The Libertarian Manifesto* (rev. ed.; New York: Libertarian Review Foundation, 1985), pp. 42 *et pass*.

³"Justice is the constant and perpetual wish to render every one his due. . . . The maxims of law are these: to live honestly, to hurt no one, to give every one his due." *The Institutes of Justinian: Text, Translation, and Commentary*, trans. J.A.C. Thomas (Amsterdam: North-Holland, 1975).

⁴As Professor Yiannopoulos explains:

which persons own—have the right to control—various scarce resources in a given region or jurisdiction. Yet everyone and every political theory advances *some* theory of property. None of the various forms of socialism deny property rights; each socialism will specify an owner for every scarce resource.⁵ If the state nationalizes an industry, it is asserting ownership of these means of production. If the state taxes you, it is implicitly asserting ownership of the funds taken. If my land is transferred to a private developer by eminent domain statutes, the developer is now the owner. If the law allows a recipient of racial discrimination to sue his employer for a sum of money—he is the owner of the money.⁶

Protection of and respect for property rights is thus not unique to libertarianism. What is distinctive about libertarianism is its *particular property assignment rules*—its view as to *who is the owner* of each contestable resource, and how to determine this.

control the competition for, and guarantee the enjoyment of, these desired things. What is guaranteed to be one's own is property. . . . [Property rights] confer a direct and immediate authority over a thing.

A.N. Yiannopoulos, *Louisiana Civil Law Treatise*, *Property* (West Group, 4th ed. 2001), §§ 1, 2 (first emphasis in original; remaining emphasis added). See also *Louisiana Civil Code* (http://tinyurl.com/lacivcode), Art. 477 ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law").

⁵For a systematic analysis of various forms of socialism, from Socialism Russian-Style, Socialism Social-Democratic Style, the Socialism of Conservatism, the Socialism of Social Engineering, see Hoppe, *A Theory of Socialism and Capitalism*, chaps. 3–6. Recognizing the common elements of various forms of socialism and their distinction from libertarianism (capitalism), Hoppe incisively defines socialism as "an institutionalized interference with or aggression against private property and private property claims." Ibid., p. 2. See also the quote from Hoppe in note 9, below.

⁶Even the private thief, by taking your watch, is implicitly acting on the maxim that *he* has the right to control it—that he is its owner. He does not deny property rights—he simply differs from the libertarian as to *who the owner is*. In fact, as Adam Smith observed: "If there is any society among robbers and murderers, they must at least, according to the trite observation, abstain from robbing and murdering one another." Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Fund, [1759] 1982), II.II.3.

PROPERTY IN BODIES

A system of property rights assigns a particular owner to every scarce resource. These resources obviously include natural resources such as land, fruits of trees, and so on. Objects found in nature are not the only scarce resources, however. Each human actor has, controls, and is identified and associated with a unique human body, which is also a scarce resource. Both human bodies and non-human scarce resources are desired for use as means by actors in the pursuit of various goals.

Accordingly, any political theory or system must assign ownership rights in human bodies as well as in external things. Let us consider first the libertarian property assignment rules with respect to human bodies, and the corresponding notion of aggression as it pertains to bodies. Libertarians often vigorously assert the non-aggression principle. As Ayn Rand said, "So long as men desire to live together, no man may *initiate*—do you hear me? No man may *start*—the use of physical force against others." Or, as Rothbard put it:

every person's physical body would still be a scarce resource and thus the need for the establishment of property rules, i.e., rules regarding people's bodies, would exist. One is not used to thinking of one's own body in terms of a scarce good, but in imagining the most ideal situation one could ever hope for, the Garden of Eden, it becomes possible to realize that one's body is indeed the prototype of a scarce good for the use of which property rights, i.e., rights of exclusive ownership, somehow have to be established, in order to avoid clashes.

Hoppe, *A Theory of Socialism and Capitalism*, pp. 8–9. See also Stephan Kinsella & Patrick Tinsley, "Causation and Aggression," *Quarterly Journal of Austrian Economics* 7, no. 4 (Winter 2004): 111–12 (discussing the use of other humans' bodies as means).

⁸Ayn Rand, "Galt's Speech," in *For the New Intellectual*, quoted in *The Ayn Rand Lexicon*, "Physical Force" entry (www. aynrandlexicon.com). Ironically, Objectivists often excoriate libertarians for having a "context-less" concept of aggression—that is, that "aggression" or "rights" is meaningless unless these concepts are embedded in the larger philosophical framework of Objectivism

⁷As Hoppe observes, even in a paradise with a superabundance of goods,

The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the "nonaggression axiom." "Aggression" is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.⁹

In other words, libertarians maintain that the only way to violate rights is by *initiating* force—that is, by committing aggression. (Libertarianism also holds that, while the initiation of force against another person's body is impermissible, force used *in response* to aggression—such as defensive, restitutive, or retaliatory/punitive force—is justified.¹⁰) Now in the case of the body, it is clear what

If . . . an action is performed that uninvitedly invades or changes the physical integrity of another person's body and puts this body to a use that is not to this very person's own liking, this action . . . is called aggression. . . . Next to the concept of action, property is the most basic category in the social sciences. As a matter of fact, all other concepts to be introduced in this chapter—aggression, contract, capitalism and socialism—are definable in terms of property: aggression being aggression against property, contract being a nonaggressive relationship between property owners, socialism being an institutionalized policy of aggression against property, and capitalism being an institutionalized policy of the recognition of property and contractualism.

Hoppe, A Theory of Socialism and Capitalism, pp. 12, 7.

despite Galt's straightforward definition of aggression as the initiation of physical force against others.

⁹Rothbard, For A New Liberty, p. 23. See also idem, The Ethics of Liberty: "The fundamental axiom of libertarian theory is that each person must be a self-owner, and that no one has the right to interfere with such self-ownership" (p. 60), and "What . . . aggressive violence means is that one man invades the property of another without the victim's consent. The invasion may be against a man's property in his person (as in the case of bodily assault), or against his property in tangible goods (as in robbery or trespass)" (p. 45). Hoppe writes:

¹⁰See Stephan Kinsella, "A Libertarian Theory of Punishment and Rights," *Loyola of Los Angeles Law Review* 30 (1997): 607–45; idem, "Punishment and Proportionality: The Estoppel Approach," *Journal of Libertarian Studies* 12, no. 1 (Spring 1996): 51–73.

aggression is: invading the borders of someone's body, commonly called battery, or, more generally, *using the body of another without his or her consent.*¹¹ The very notion of interpersonal aggression presupposes property rights in bodies—more particularly, that each person is, at least *prima facie*, the owner of his own body.¹²

Non-libertarian political philosophies have a different view. Each person has some limited rights in his own body, but not complete or exclusive rights. Society or the state, purporting to be society's agent, has certain rights in each citizen's body, too. This partial slavery is implicit in state actions and laws such as taxation, conscription, and drug prohibitions. The libertarian says that each person is the full owner of his body: he has the right to control his body, to decide whether or not he ingests narcotics, joins an army, and so on. Those various non-libertarians who endorse any such state prohibitions, however, necessarily maintain that the state, or society, is at least a partial owner of the body of those subject to such laws—or even a complete owner in the case of conscriptees or non-aggressor "criminals" incarcerated for life. Libertarians believe in *self*-ownership. Non-libertarians—statists—of all stripes advocate some form of slavery.

SELF-OWNERSHIP AND CONFLICT AVOIDANCE

Without property rights, there is always the possibility of conflict over contestable (scarce) resources. By assigning an owner to each resource, legal systems make possible conflict-free use of

¹¹The following terms and formulations may be considered as roughly synonymous, depending on context: aggression; initiation of force; trespass; invasion; unconsented to (or uninvited) change in the physical integrity (or use, control or possession) of another person's body or property.

^{12&}quot; Prima facie," because some rights in one's body are arguably forfeited or lost in certain circumstances, e.g. when one commits a crime, thus authorizing the victim to at least use defensive force against the body of the aggressor (implying the aggressor is to that extent not the owner of his body). For more on this see Kinsella, "A Theory of Contracts," pp. 11–37; idem, "Inalienability and Punishment: A Reply to George Smith," 14, no. 1 Journal of Libertarian Studies (Winter 1998–99): 79–93; and idem, "Knowledge, Calculation, Conflict, and Law," Quarterly Journal of Austrian Economics 2, no. 4 (Winter 1999): n. 32.

resources, by establishing visible boundaries that non-owners can avoid. Libertarianism does not endorse just any property assignment rule, however.¹³ It favors *self*-ownership over *other*-ownership (slavery).

The libertarian seeks property assignment rules *because* he values or accepts various *grundnorms* such as justice, peace, prosperity, cooperation, conflict-avoidance, civilization.¹⁴ The libertarian

¹⁴"Grundnorm" was legal philosopher Hans Kelsen's term for the hypothetical basic norm or rule that serves as the basis or ultimate source for the legitimacy of a legal system. See Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press, 1949). I employ this term to refer to the fundamental norms presupposed by civilized people, e.g., in argumentative discourse, which in turn imply libertarian norms.

That the libertarian grundnorms are, in fact, necessarily presupposed by all civilized people to the extent they are civilized — during argumentative justification, that is—is shown by Hoppe in his "argumentation ethics" defense of libertarian rights. See on this Hoppe, A Theory of Socialism and Capitalism, chap. 7; Stephan Kinsella, "New Rationalist Directions in Libertarian Rights Theory," Journal of Libertarian Studies 12, no. 2 (Fall 1996): 313–26; idem, "Defending Argumentation Ethics," Anti-state.com (Sept. 19, 2002).

For discussion of *why* people (to one extent or the other) *do* value these underlying norms, see Stephan Kinsella, "The Division of Labor as the Source of Grundnorms and Rights," *Mises Economics Blog* (April 24, 2009), and idem, "Empathy and the Source of Rights," *Mises Economics Blog* (Sept. 6, 2006). See also idem, "Punishment and Proportionality," pp. 51 & 70:

People who are civilized are . . . concerned about *justifying* punishment. They want to punish, but they also want to know that such punishment is justified—they want to legitimately be able to punish. . . . Theories of punishment are concerned with justifying punishment, with offering decent men who are reluctant to act immorally a reason why they may punish others. This is useful, of course, for offering moral men guidance and assurance that they may properly deal with those who seek to harm them.

¹³On the importance of the concept of scarcity and the possibility of conflict for the emergence of property rules, see Hoppe, *A Theory of Socialism and Capitalism*, p. 134; and the discussion thereof in Stephan Kinsella, "Thoughts on the Latecomer and Homesteading Ideas; or, Why the Very Idea of 'Ownership' Implies that only Libertarian Principles are Justifiable," *Mises Economics Blog* (Aug. 15, 2007).

view is that self-ownership is the only property assignment rule compatible with these *grundorms*; it is implied by them. As Professor Hoppe has shown, the assignment of ownership to a given resource must not be random, arbitrary, particularistic, or biased, if it is to actually be a property norm that can serve the function of conflict-avoidance.¹⁵ Property title has to be assigned to one of competing claimants based on "the existence of an objective, intersubjectively ascertainable link between owner and the" resource claimed.¹⁶ In the case of one's own body, it is the unique relationship between a person and his body—his *direct and immediate control* over his body, and the fact that, at least in some sense, a body is a given person and vice versa—that constitutes the objective link sufficient to give that person a claim to his body superior to typical third party claimants.

Moreover, any outsider who claims another's body cannot deny this objective link and its special status, since the outsider also necessarily presupposes this in his own case. This is so because in seeking dominion over the other, in asserting ownership over the other's body, he has to presuppose his own ownership of his body, which demonstrates he does place a certain significance on this link, at the same time that he disregards the significance of the other's link to his own body.¹⁷

Libertarianism realizes that only the self-ownership rule is universalizable and compatible with the goals of peace, cooperation, and conflict avoidance. We recognize that each person is *prima facie* the owner of his own body because, by virtue of his unique link to and connection with his own body — his direct and immediate control over it — he has a better claim to it than anyone else.

¹⁵See Hoppe, *A Theory of Socialism and Capitalism*, pp. 131–38. See also Kinsella, "A Libertarian Theory of Punishment and Rights," pp. 617–25; idem, "Defending Argumentation Ethics."

¹⁶Hoppe, A Theory of Socialism and Capitalism, p. 12.

¹⁷For elaboration on this point, see Stephan Kinsella, "How We Come To Own Ourselves," *Mises Daily* (Sept. 7, 2006); idem, "Defending Argumentation Ethics"; Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1, 2, and 7.

PROPERTY IN EXTERNAL THINGS

Libertarians apply similar reasoning in the case of other scarce resources—namely external objects in the world that, unlike bodies, were at one point *unowned*. In the case of bodies, the idea of aggression being impermissible immediately implies self-ownership. In the case of external objects, however, we must identify who the owner is before we can determine what constitutes aggression.

As in the case with bodies, humans need to be able to use external objects as means to achieve various ends. Because these things are scarce, there is also the potential for conflict. And as in the case with bodies, libertarians favor assigning property rights so as to permit the peaceful, conflict-free, productive use of such resources. As in the case with bodies, then, property is assigned to the person with the best claim or link to a given scarce resource—with the "best claim" standard based on the goals of permitting peaceful, conflict-free human interaction and use of resources.

Unlike human bodies, however, external objects are not parts of one's identity, are not directly controlled by one's will—and, significantly, they are *initially unowned*. Here, the libertarian realizes that the relevant objective link is *appropriation*—the transformation or embordering of a previously unowned resource, Lockean homesteading, the first use or possession of the thing. Under this

¹⁸For further discussion of the difference between bodies and things homesteaded for purposes of rights, see Kinsella, "A Theory of Contracts," pp. 29 *et seq.*; and idem, "How We Come To Own Ourselves."

¹⁹On the nature of appropriation of unowned scarce resources, see Hoppe's and de Jasay's ideas quoted and discussed in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," and note 24, below. In particular, see Hoppe, *A Theory of Socialism and Capitalism*, pp. 13, 134–36, 142–44; and Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order* (London & New York: Routledge, 1997), pp. 158 *et seq.*, 171 *et seq.*, *et pass*. De Jasay is also discussed extensively in my "Book Review of Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order,*" *Quarterly Journal of Austrian Economics* 1, no. 3 (Fall 1998): 85–93. De Jasay's argument presupposes the value of justice, efficiency, and order. Given these goals, he argues for three principles of politics: (1) if in doubt, abstain from political action (pp. 147 *et seq.*); (2) the feasible is presumed free (pp. 158 *et seq.*); and (3) let exclusion stand (pp. 171 *et*

approach, the first (prior) user of a previously unowned thing has a *prima facie* better claim than a second (later) claimant solely by virtue of his being earlier.

Why is appropriation the relevant link for determination of ownership? First, keep in mind that the question with respect to such scarce resources is: who is the resource's *owner*? Recall that ownership is the *right* to control, use, or possess,²⁰ while possession is *actual* control—"the *factual authority* that a person exercises over a corporeal thing."²¹ The question is not who has physical possession; it is who has ownership. Thus, asking who is the owner of a resource presupposes a distinction between ownership and possession—between the right to control, and actual control. And the answer has to take into account the nature of previously-unowned things: to-wit, that they must at some point become owned by a first owner.

The answer must also take into account the presupposed goals of those seeking this answer: rules that permit conflict-free use of resources. For this reason, the answer cannot be *whoever has the resource or whoever is able to take it* is its owner. To hold such a view is to adopt a might makes right system where ownership collapses

seq.). In connection with principle (3), "let exclusion stand," de Jasay offers insightful comments about the nature of homesteading or appropriation of unowned goods. De Jasay equates property with its owner's "excluding" others from using it, for example by enclosing or fencing in immovable property (land) or finding or creating (and keeping) movable property (corporeal, tangible objects). He concludes that since an appropriated thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership. Thus, the principle means "let ownership stand," i.e., that claims to ownership of property appropriated from the state of nature or acquired ultimately through a chain of title tracing back to such an appropriation should be respected. This is consistent with Hoppe's defense of the "natural" theory of property. Hoppe, A Theory of Socialism and Capitalism, pp. 10–14 & chap. 7. For further discussion of the nature of appropriation, see Jörg Guido Hülsmann, "The A Priori Foundations of Property Economics," Quarterly Journal of Austrian Economics 7, no. 4 (Winter 2004): 51–57.

²⁰See note 4 and accompanying text, above.

²¹Yiannopoulos, *Property*, § 301 (emphasis added); see also *Louisiana Civil Code*, Art. 3421 ("Possession is the *detention* or *enjoyment* of *a corporeal thing*, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name"; emphasis added).

into possession for want of a distinction.²² Such a "system," far from avoiding conflict, makes conflict inevitable.²³

For mutualists, occupancy and use is the only legitimate standard for establishing ownership of land, regardless of how many times it has changed hands. An existing owner may transfer ownership by sale or gift; but the new owner may establish legitimate title to the land only by his own occupancy and use. A change in occupancy will amount to a change in ownership. . . . The actual occupant is considered the owner of a tract of land, and any attempt to collect rent by a self-styled ["absentee"] landlord is regarded as a violent invasion of the possessor's absolute right of property.

Kevin A. Carson, *Studies in Mutualist Political Economy* (Self-published: Fayetteville, Ark., 2004, http://mutualist.org/id47.html), chap. 5, sec. A (emphasis added). Thus, for mutualism, the "actual occupant" is the "owner"; the "possessor" has the right of property. If a homesteader of land stops personally using or occupying it, he loses his ownership. Carson contends this is compatible with libertarianism:

[A]ll property rights theories, including Lockean, make provision for *adverse possession and constructive abandonment of property*. They differ only in degree, rather than kind: in the "stickiness" of property.... There is a large element of convention in any property rights system—Georgist, mutualist, and both proviso and nonproviso Lockeanism—in determining what constitutes transfer and abandonment.

Kevin A. Carson, "Carson's Rejoinders," *Journal of Libertarian Studies* 20, no. 1 (Winter 2006): 133 (emphasis added). In other words, Lockeanism, Georgism, mutualism are all types of libertarianism, differing only in degree. In Carson's view, the gray areas in issues like adverse possession and abandonment leave room for mutualism's "occupancy" requirement for maintaining land ownership.

But the concepts of adverse possession and abandonment cannot be stretched to cover the mutualist occupancy requirement. The mutualist occupancy view is essentially a *use* or *working* requirement, which is distinct from doctrines of adverse possession and abandonment. The doctrine of abandonment in positive law and in libertarian theory is based on the idea that ownership *acquired* by *intentionally* appropriating a previously unowned thing

²²See, in this connection, the quote from Adam Smith in note 6, above.

²³This is also, incidentally, the reason the mutualist "occupancy" position on land ownership is unlibertarian. As mutualist Kevin Carson writes:

Instead of a might-makes-right approach, from the insights noted above it is obvious that *ownership presupposes the prior-later*

may be lost when the owner's intent to own terminates. Ownership is acquired by a merger of possession and intent to own. Likewise, when the intent to own ceases, ownership does too—this is the case with both abandonment of ownership *and* transfer of title to another person, which is basically an abandonment of property "in favor" of a particular new owner. See Kinsella, "A Theory of Contracts," pp. 26–29; also *Louisiana Civil Code*, Art. 3418 ("A thing is abandoned when its owner relinquishes possession with the intent to give up ownership") and Art. 3424 ("To acquire possession, one must *intend to possess as owner* and must take *corporeal possession* of the thing"; emphasis added).

The legal system must therefore develop rules to determine when property has been abandoned, including default rules that apply in the absence of clear evidence. Acquisitive prescription is based on an implicit presumption that the owner has abandoned his property claims if he does not defend it within a reasonable time period against an adverse possessor. But such rules apply to adverse possessors — those who possess the property with the intent to own and in a sufficiently public fashion that the owner knows or should know of this. See Yiannopoulos, Property, § 316; see also Louisiana Civil Code, Art. 3424 ("To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing"; emphasis added) and Art. 3476 (to acquire title by acquisitive prescription, "The possession must be continuous, uninterrupted, peaceable, public, and unequivocal"; emphasis added); see also Art. 3473. The "public" requirement means that the possessor possesses the proper openly as *owner*, adverse or hostile to the owner's ownership—which is not the case when, for example, a lessee or employee uses an apartment or manufacturing facility under color of title and permission from the owner. Rules of abandonment and adverse possession are default rules that apply when the owner has not made his intention sufficiently clear - by neglect, apathy, death, absence, or other reason.

(In fact, the very idea of abandonment rests on the distinction between ownership and possession. Property is more than possession; it is a right to possess, originating and sustained by the owner's *intention* to possess as owner. And abandonment occurs when the intent to own terminates. This happens even when the (immediately preceding) owner temporarily maintains possession but has lost ownership, as when he gives or sells the thing to another party (as I argue in Kinsella, "A Theory of Contracts," pp. 26–29).)

Clearly, default abandonment and adverse possession rules are categorically different from a working requirement, whereby ownership is lost in the *absence of use*. See, e.g., *Louisiana Mineral Code*, § 27 (http://law.justia.com/louisiana/codes/21/87935.html) ("A mineral servitude is extinguished by: . . . prescription resulting from nonuse for ten years"). Loss of ownership is *not* l ost by nonuse, however, and a working requirement is *not* implied by default rules

distinction: whoever any given system specifies as the owner of a resource, he has a better claim than latecomers.²⁴ If he does not, then he is not an owner, but merely the current user or possessor, in a might-makes-right world in which there is no such thing as ownership—which contradicts the presuppositions of the inquiry itself. If the first owner does not have a better claim than latecomers, then he is not an owner, but merely a possessor, and there is no such thing as ownership. More generally, latecomers' claims are inferior to those of prior possessors or claimants, who either

regarding abandonment and adverse possession. See, e.g., Louisiana Civil Code, Art. 481 ("The ownership and the possession of a thing are distinct. . . . Ownership exists independently of any exercise of it and may not be lost by nonuse. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor"; emphasis added). Carson is wrong to imply that abandonment and adverse possession rules can yield a working (or use or occupancy) requirement for maintaining ownership. In fact, these are distinct and independent legal doctrines. Thus, when a factory owner contractually allows workers to use it, or a landlord permits tenants to live in an apartment, there is no question that the owner *does not intend to abandon* the property, and there is no adverse possession (and if there were, the owner could institute the appropriate action to eject them and regain possession; see Yiannopoulos, Property, §§ 255, 261, 263-66, 332-33, 335 et pass.; Louisiana Code of Civil Procedure (http://tinyurl.com/lacodecivproc), Arts. 3651, 3653 & 3655; Louisiana Civil Code, Arts. 526 & 531). There is no need for "default" rules here to resolve an ambiguous situation. (For another critique of Carson, see Roderick T. Long, "Land-Locked: A Critique of Carson on Property Rights," Journal of Libertarian Studies 20, no. 1 (Winter 2006): 87–95.)

A final note here: I cite positive law here not as an argument from authority, but as an illustration that even the positive law carefully distinguishes between possession and ownership; and also between a *use* or *working* requirement to maintain ownership, and the potential to lose title by abandonment or adverse possession, to illustrate the flaws in Carson's view that an occupancy requirement is just one variant of adverse possession or default abandonment rules. Furthermore, the civilian legal rules cited derive from legal principles developed over the ages in largely decentralized fashion, and can thus be useful in our own libertarian efforts to develop concrete applications of abstract libertarian principles. See Stephan Kinsella, "Legislation and the Discovery of Law in a Free Society," *Journal of Libertarian Studies* 11, no. 2 (Summer 1995): 132–81; also idem, "Knowledge, Calculation, Conflict, and Law," pp. 60–63 (discussing Randy Barnett's views on the distinction between abstract legal rights and more concrete rules that serve as guides to action).

²⁴See Kinsella, "Thoughts on the Latecomer and Homesteading Ideas."

homesteaded the resource or who can trace their title back to the homesteader or earlier owner.²⁵ The crucial importance of the prior-later distinction to libertarian theory is why Professor Hoppe repeatedly emphasizes it in his writing.²⁶

To obtain a judgment recognizing his ownership of immovable property . . . , the plaintiff . . . shall:

- (1) Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof; or
- (2) Prove a better title thereto than the defendant, if the court finds that the latter is not in possession thereof.

When the titles of the parties are traced to a common author, he is presumed to be the previous owner.

See also Louisiana Civil Code, Arts. 526, 531–32; Yiannopoulos, Property, §§ 255–79 & 347 et pass.

²⁶See, e.g., Hoppe, A Theory of Socialism and Capitalism, pp. 141–44; idem, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Boston: Kluwer, 1993), pp. 191-93; see also discussion of these and related matters in in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas"; idem, "Defending Argumentation Ethics"; and idem, "How We Come To Own Ourselves." See also, in this connection, Anthony de Jasay, Against Politics, further discussed and quoted in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," as well as in Kinsella, "Book Review of Anthony de Jasay, Against Politics." See also de Jasay's argument (note 17, above) that since an appropriated thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership. De Jasay's "let exclusion stand" idea, along with the Hoppean emphasis on the prior-later distinction, sheds light on the nature of homesteading itself. Often the question is asked as to what types of acts constitute or are sufficient for homesteading (or "embordering" as Hoppe sometimes refers to it); what type of "labor" must be "mixed with" a thing; and to what property does the homesteading extend? What "counts" as "sufficient" homesteading? We can see that the answer to these questions is related to the issue of what is the thing in dispute. In other words, if B claims ownership of a thing possessed (or formerly possessed) by A, then the very framing of the dispute helps to identify what the thing is in dispute, and what counts as possession of it. If B claims ownership of a given resource, he wants the right to control it, to a certain extent, and according to its nature. Then the question becomes, did someone

²⁵See Louisiana Code of Civil Procedure, Art. 3653, providing:

Thus, the libertarian position on property rights is that, in order to permit conflict-free, productive use of scarce resources, property titles to particular resources are assigned to particular owners. As noted above, however, the title assignment must not be random, arbitrary, or particularistic; instead, it has to be assigned based on "the existence of an objective, intersubjectively ascertainable link between owner and the" resource claimed.²⁷ As can be seen from the considerations presented above, the link is the physical transformation or embordering of the original homesteader, or a chain of title traceable by contract back to him.²⁸

CONSISTENCY AND PRINCIPLE

Not only libertarians are civilized. Most people give some weight to some of the above considerations. In their eyes, a person is the owner of his own body—usually. A homesteader owns the resource he appropriates—unless the state takes it from him "by operation of law."²⁹ This is the principal distinction between libertarians and

else previously control "it" (whatever is in dispute), according to its nature; i.e., did someone else already homestead it, so that B is only a latecomer? This ties in with de Jasay's "let exclusion stand" principle, which rests on the idea that if someone is actually able to control a resource such that others are excluded, then this exclusion should "stand." Of course, the physical nature of a given scarce resource and the way in which humans use such resources will determine the nature of actions needed to "control" it and exclude others.

²⁷Hoppe, A Theory of Socialism and Capitalism, p. 12.

²⁸On the title transfer theory of contract, see Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1, no. 1 (Winter 1977): 3–13; Rothbard, "Property Rights and the Theory of Contracts," chap. 19 in idem, *The Ethics of Liberty*; Kinsella, "A Theory of Contracts."

²⁹State laws and constitutional provisions often pay lip service to the existence of various personal and property rights, but then take it back by recognizing the right of the state to regulate or infringe the right so long as it is "by law" or "not arbitrary." See, e.g., *Constitution of Russia*, Art. 25 ("The home shall be inviolable. No one shall have the right to get into a house against the will of those living there, except for the cases established by a federal law or by court decision") and Art. 34 ("Everyone shall have the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by the law"); *Constitution of Estonia*, Art. 31 ("Estonian

non-libertarians: libertarians are consistently opposed to aggression, defined in terms of invasion of property borders, where property rights are understood to be assigned on the basis of self-ownership, in the case of bodies; and on the basis of prior possession or homesteading and contractual transfer of title, in the case of other things.

This framework for rights is motivated by the libertarian's consistent and principled valuing of peaceful interaction and cooperation—in short, of civilized behavior. A parallel to the Misesian view of human action may be illuminating here. According to Mises, human action is aimed at alleviating some *felt uneasiness*. Thus, means are employed, according to the actor's understanding of causal laws, to achieve various ends—ultimately, the removal of some felt uneasiness.

Civilized man feels uneasy at the prospect of violent struggles with others. On the one hand, he wants, for some practical reason, to control a given scarce resource and to use violence against another person, if necessary, to achieve this control. On the other hand, he also wants to avoid a wrongful use of force. Civilized man, for some reason, feels reluctance, uneasiness, at the prospect of violent interaction with his fellow man. Perhaps he has reluctance to violently clash with others over certain objects because he has empathy with them.³¹ Perhaps the instinct to cooperate has is a result of social evolution. As Mises noted,

citizens shall have the right to engage in commercial activities and to form profit-making associations and leagues. The law may determine conditions and procedures for the exercise of this right"); *Universal Declaration of Human Rights*, Art. 17 ("Everyone has the right to own property alone as well as in association with others. . . . No one shall be arbitrarily deprived of his property"); Art. 29(2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society").

³⁰Ludwig von Mises, *Human Action*, 4th ed. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1996), pp. 13–14, *et pass*.

³¹For further discussion of the role of empathy in the adoption of libertarian *grundnorms*, see note 14, above.

There are people whose only aim is to improve the condition of their own ego. There are other people with whom awareness of the troubles of their fellow men causes as much uneasiness as or even more uneasiness than their own wants ³²

Whatever the reason, because of this uneasiness, when there is the potential for violent conflict, the civilized man seeks justification for the forceful control of a scarce resource which he desires but which some other person opposes. Empathy - or whatever spurs man to adopt the libertarian *grundnorms* – gives rise to a certain form of uneasiness, which gives rise to ethical action. Civilized man may be defined as he who seeks justification for the use of interpersonal violence. When the inevitable need to engage in violence arises—for defense of life or property—civilized man seeks justification. Naturally, since this justification-seeking is done by people who are inclined to reason and peace (justification is after all a peaceful activity that necessarily takes place during discourse),33 what they seek are rules that are fair, potentially acceptable to all, grounded in the nature of things, universalizable, and that permit conflict-free use of resources. Libertarian property rights principles emerge as the only candidate that satisfies these criteria. Thus, if civilized man is he who seeks justification for the use of violence, the libertarian is he who is serious about this endeavor. He has a deep, principled, innate opposition to violence, and an equally deep commitment to peace and cooperation.

For the foregoing reasons, libertarianism may be said to be the political philosophy that *consistently* favors social rules aimed at promoting peace, prosperity, and cooperation. It recognizes that the only rules that satisfy the civilized *grundnorms* are the self-ownership principle and the Lockean homesteading principle, applied as consistently as possible.

³²Ibid, p. 14.

³³As Hoppe explains, "Justification—proof, conjecture, refutation—is argumentative justification." Hoppe, *The Economics and Ethics of Private Property*, p. 384; also ibid, p. 413, and also Hoppe, *A Theory of Socialism and Capitalism*, p. 130 *et pass*.

And as I have argued elsewhere, because the state necessarily commits aggression, the consistent libertarian, in opposing aggression, is also an anarchist.³⁴ \$\sim\$

³⁴See Stephan Kinsella, "What it Means to be an Anarcho-Capitalist," *LewRockwell.com* (Jan. 20, 2004); also Jan Narveson, "The Anarchist's Case," in *Respecting Persons in Theory and Practice* (Lanham, Md.: Rowman & Littlefield, 2002).