LAW AND INTELLECTUAL PROPERTY IN A STATELESS SOCIETY

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> a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason.
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> —Thomas Paine[1]

Introduction

IT IS WIDELY RECOGNIZED THAT the institutional protection of property rights was a necessary (though probably not sufficient)[2] condition

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[1] Thomas Paine, "Introduction," *Common Sense* (1776).

[2] See Stephan Kinsella, "Hoppe: 'From the Malthusian Trap to the Industrial Revolution. Reflections on Social Evolution' (Property and Freedom Society 2009)," StephanKinsella.com (June 8, 2009).

for the radical prosperity experienced in the West since the advent of the industrial revolution. And property rights include so-called "intellectual property" (IP) rights.[3] Or so we have been told. The idea that IP rights are a legitimate type of property right, and a necessary part of a free market economy, has been taken for granted since the dawn of modern patent and copyright approximately two centuries ago.

Despite the widespread assumption that IP is legitimate, even its proponents seem somewhat uneasy with it. Thus they favor limited terms for patent and copyright—about 17 years for the former, and usually over 100 years for the latter—unlike the potentially perpetual ownership of traditional forms of property. And there is continual dissatisfaction with the state of the law, its ambiguities and arbitrary standards, and with patent office efficiency and competence, or lack thereof. There are incessant calls for "reform," and for curbs on "misuse" or "abuse" of patent and copyright. But in these complaints and debates, it is almost always taken for granted that some form of copyright and patent are essential, even if reform is needed.

In recent years, however, increasing numbers of libertarians have begun to doubt the very legitimacy of IP.[4] In this article I explain why many proponents of property rights and free markets have come to believe that patent and copyright should be abolished entirely, not merely reformed.

As a preliminary matter, it is necessary to describe the libertarian view of property rights. As this discussion will make clear, IP rights such as patent and copyright are inconsistent with the private property order that would characterize a stateless, private-law society. I will follow with a discussion of what practices or laws might prevail in the absence of IP.

The Libertarian Framework

Property, Rights, and Liberty

Libertarians tend to agree on a wide array of policies and principles. Nonetheless, it is not easy to find consensus on what libertarianism's defining

[3] In this article, IP refers primarily to patent and copyright unless the context indicates otherwise. For arguments against other forms of IP, such as trademark and trade secret, see Kinsella, *Against Intellectual Property*.

[4] See Stephan Kinsella, "The Death Throes of Pro-IP Libertarianism," *Mises Daily* (July 28, 2010); *idem*, "The Four Historical Phases of IP Abolitionism," *C4SIF Blog* (April 13, 2011); *idem*, "The Origins of Libertarian IP Abolitionism," *C4SIF Blog* (April 1, 2011).

characteristic is, or on what distinguishes it from other political theories and systems.

Various formulations abound. It is said that libertarianism is concerned with individual rights, property rights,[5] the free market, capitalism, freedom, liberty, justice, or the nonaggression principle. But are any of these ideas truly fundamental or foundational? "Capitalism" and "the free market," for example, describe the catallactic conditions that arise or are permitted in a libertarian society, but they do not encompass other aspects of libertarianism.[6] And individual rights, justice, and nonaggression collapse into property rights. As Murray Rothbard explained, individual rights are property rights.[7] And justice simply means giving someone his due, which depends on what his (property) rights are.[8]

The nonaggression 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. "Freedom" and "liberty" face

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[5] The 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 nonowners 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 Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," 17 *J. Libertarian Stud.* 11 (2003), at n. 32 and accompanying text; idem, *Against Intellectual Property*, *supra* note *, pp. 30–31, 49; also Randy E. Barnett, "A Consent Theory of Contract," 86 *Columbia L. Rev.* 269, 303 (1986), available at www.randybarnett.com.

[6] "Catallactics" is a term used by the Austrian economist Ludwig von Mises to refer to the economics of an advanced free market system which employs money prices and entrepreneurial calculation, as opposed to a barter or Crusoe economy. See the Wikipedia entry on "Catallactics" at en.wikipedia.org/wiki/Catallactics.

[7] Murray N. Rothbard, "Human Rights" As Property Rights," in *The Ethics of Liberty* (1998); *idem*, *For A New Liberty: The Libertarian Manifesto* (rev. ed.; New York: Libertarian Review Foundation, 1985), pp. 42 *et pass.*

[8] "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).

difficulties similar to that of the concept of aggression, as indicated in the common saying "your freedom ends where my nose begins!"

So capitalism and the free market are too narrow, and justice, individual rights, liberty, freedom, 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*. As Professor Yiannopoulos explains:

> *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 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*.[9]

In other words, property rights specify which persons own—that is, have the right to control—various scarce resources in a given region or jurisdiction. Yet every political theory advances *some* theory of property. None of the various forms of socialism deny property rights *per se*; each system will specify an owner for each contestable scarce resource.[10] If the state nationalizes an industry, it is asserting ownership of those means of

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[9] 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*, 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").

[10] For a systematic analysis of various forms of socialism, such as Socialism Russian-Style, Socialism Social-Democratic Style, the Socialism of Conservatism, and the Socialism of Social Engineering, see Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, chapters 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 16, *infra*.

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.[11]

Protection of and respect for property rights is thus not unique to libertarianism. What *is* distinctive about libertarianism is its *particular property assignment rules*: that is, the rules that determine who owns each contestable resource.

Property in Bodies

As indicated above, every legal system assigns a particular owner to each scarce resource. These resources obviously include natural resources such as land, fruits on trees, and so on. Things 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.[12] Both human bodies and nonhuman, scarce resources are desired for use as *means* by actors in the pursuit of various goals.[13]

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[11] Even 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.3.2.

[12] As Hoppe observes, even in a paradise with a superabundance of goods,

> [E]very 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*, *supra* note 5, at pp. 8–9. See also Stephan Kinsella & Patrick Tinsley, "Causation and Aggression," 7 *Q.J. Austrian Econ.* 97, 111–12 (2004) (discussing the use of other humans' bodies as means).

[13] This analysis draws on Ludwig von Mises's "praxeological" view of the nature of human action, in which actors or agents employ scarce means to causally achieve desired ends. See the section "The Structure of Human Action: Means and Ends" in Stephan Kinsella, "Intellectual Freedom and Learning Versus Patent and Copyright," *Economic*

Accordingly, any political theory or system must assign ownership or control rights in human bodies as well as in external things.[14] However, there are relevant differences between these two types of scarce resources that justify treating them separately.

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 "nonaggression 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."[15] Or, as Rothbard put it:

> 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.[16]

Notes No. 113 (Libertarian Alliance, Jan. 18, 2011), www.libertarian.co.uk/lapubs/econn/econn113.htm, and idem, "Ideas Are Free: The Case Against Intellectual Property," *Mises Daily* (Nov. 23, 2010), mises.org/daily/4848.

[14] The term "thing" here is used as a synonym for scarce resources, including not only material objects but also human bodies. This usage draws on the that of the civil law in which the term "things" refers to "material objects" that are "susceptible of appropriation"—that is, to "the objects of patrimonial rights." *See* Yiannopoulos, *Property*, *supra* note 9, §§ 12, 201; *Louisiana Civil Code*, Arts. 448, 453, *et pass.*

[15] Ayn Rand, "Galt's Speech," in *For the New Intellectual*, quoted in *The Ayn Rand Lexicon*, www.aynrandlexicon.com, "Physical Force" entry. Ironically, Objectivists often excoriate libertarians for having a "context-less" concept of aggression—that is, that "aggression" or "rights" are meaningless unless these concepts are embedded in the larger philosophical framework of Objectivism—despite Galt's straightforward definition of aggression as the initiation of physical force against others. However, there are distinctions to be drawn between property rights in an actor's body, and in external resources homesteaded by that actor or some previous owner. *See* on this Stephan Kinsella, "The relation between the non-aggression principle and property rights: a response to Division by Zer0," *Mises Economics Blog* (Oct. 4, 2011), archive.mises.org/18608/.

[16] Rothbard, *For A New Liberty*, *supra* note 7, at p. 23. See also *idem*, *The Ethics of Liberty*, *supra* note 7: "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"

In other words, at least when it comes to human bodies, libertarians maintain that the only way to violate rights is by *initiating* force—that is, by committing aggression. And, correspondingly, that force used *in response* to aggression—such as defensive, restitutive, or retaliatory/retributive force—is justified.[17]

Now in the case of the body, it is clear what 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.[18] 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.[19] And the notion of self-ownership corresponds to the non-aggression

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(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:

> 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*, *supra* note 5, pp. 12, 7.

[17] See Stephan Kinsella, "A Libertarian Theory of Punishment and Rights," 30 *Loy. L.A. L. Rev.* 607 (1997); *idem*, "Punishment and Proportionality: The Estoppel Approach," 12 *J. Libertarian Stud.* 51 (1996).

[18] The 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.

[19] "*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 Libertarian Theory of Contract," *supra* note 5, pp. 11–37; idem, "Inalienability and Punishment: A Reply to George Smith," 14 *J. Libertarian Stud.* 79 (1998–99); and idem, "Knowledge, Calculation, Conflict, and Law," 2 *Q.J. Austrian Econ.* 49 (Winter 1999), at n. 32.

principle. Both imply each other, or are alternate ways of stating the same basic idea: that no person may use another's body without his or her consent; to do so is unjustified and impermissible aggression.

Non-libertarian political philosophies do not accept the libertarian self-ownership principle. According to them, 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. The state may limit or override the individual's control over his own body. This partial slavery is implicit in state actions and laws such as taxation, conscription, drug prohibitions, and other regulations and laws.

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. Others, however, maintain that the state, or society, is at least a partial owner of the bodies of those subject to such laws—or even a nearly complete owner in the case of conscriptees or nonaggressor "criminals" incarcerated for life, or those killed by government bombs. Libertarians believe in *self*-ownership. Non-libertarians—statists—of all stripes advocate some form of slavery. This is virtually implicit in the nature of the state as an agency that asserts the right to be "the ultimate arbiter in every case of conflict, including conflicts involving itself, [and that] allows no appeal above and beyond itself."[20] This arrangement permits the state to override individuals' self-ownership rights—to, in effect, become their master or overlord. As an illustration, consider this exchange between a communist party official and a farmer in China in 1978, when farmers were prohibited from private ownership of their crop yields:

> At one meeting with communist party officials, a farmer asked: "What about the teeth in my head? Do I own those?" Answer: No. Your teeth belong to the collective.[21]

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[20] See Hans-Hermann Hoppe, "The Idea of a Private Law Society," *Mises Daily* (July 28, 2006): "Conventionally, the state is defined as an agency that possesses two unique characteristics. First, the state is an agency that exercises a territorial monopoly of ultimate decision-making. That is, it is the ultimate arbiter in every case of conflict, including conflicts involving itself, and it allows no appeal above and beyond itself. Furthermore, the state is an agency that exercises a territorial monopoly of taxation. That is, it is an agency that unilaterally fixes the price private citizens must pay for its provision of law and order." See also Hoppe's definition of the state in note 49, *infra*.

[21] David Kestenbaum & Jacob Goldstein, "The Secret Document That Transformed China," NPR's *Planet Money* blog (Jan. 20, 2012).

Libertarians believe the farmer should own his teeth, his body, his home, his farm, and his crop yields.

Self-ownership and Conflict-avoidance

There is always the possibility of conflict over contestable (scarce) resources. This is in the very nature of scarce, or rivalrous, resources. By assigning an owner to each resource, the legal or property rights system establishes objective, publicly visible or discernible boundaries or borders that nonowners can avoid. This makes conflict-free, productive, cooperative use of resources possible. This is true of human bodies as well as of external objects.[22] If we seek rules that permit peaceful, productive, and conflict free use of our very bodies, some rules allocating body ownership must be established. These basic values, or *grundnorms*—peace, conflict-avoidance, prosperity—and related ones such as justice, cooperation, and civilization, are the reason that libertarians, indeed any civilized person who adopts these basic values, seek property assignment rules in the first place.[23] We prefer

[22] On 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*, *supra* note 5, 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).

[23] "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 political 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. On this, see Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, chapter 7; Stephan Kinsella, "New Rationalist Directions in Libertarian Rights Theory," 12 *J. Libertarian Stud.* 313 (1996); *idem*, "Defending Argumentation Ethics," *supra.*

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," *supra* note 17, pp. 51 and 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

society and civilization to mayhem and fighting and violence. Libertarians believe that self-ownership (and other property acquisition rules discussed further below) is the only property assignment rule compatible with these *grundorms*; it is implied by them.

As noted above, the libertarian view is that the appropriate body-ownership rule is that each person is, *prima facie*, a self-owner: each person owns his own body. It might be argued, however, that *any* property assignment rule would suffice to permit conflict-free use of resources, that the libertarian self-ownership rule is not necessary. As long as everyone knows who owns a given resource—even if it is a king or tyrant—then people can avoid conflict by respecting existing property boundaries. In the case of bodies, this would mean some form of slavery, where some people are owned partially or completely by others.[24] Whether a person *A* is a self-

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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.

[24] As Rothbard argues, there are only two alternatives to self-ownership: 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 equal quota 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, 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, as economics can tell us, this parasitism itself violates the basic economic requirement for human survival: production and exchange.

The second alternative, which we might call "participatory communalism" or "communism," holds that every man should have the right to own his equal quota share of everyone else. If there are three billion people in the world, then everyone has the right to own one-three-billionth of every other person. In the first place, this ideal itself rests upon an absurdity—proclaiming that every man is entitled to own a part of everyone else and yet is not entitled to own himself. Second, 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 this sort of "communist" world, *no one would be able to do anything, and the human race would quickly perish*.

owner, or owned by some other person or group *B*, everyone can know who gets to decide who can use *A*'s body, and thus conflict can be avoided so long as everyone respects this property right allocation.

The libertarian view is that only its particular property assignment rule—*self*-ownership, as opposed to *other*-ownership (slavery)—fulfills the conflict-avoidance role of property rights. This is so for several interrelated reasons.

First, as Professor Hoppe has argued, the assignment of ownership to a given resource must not be random, arbitrary, particularistic, or biased, if the property norm is to serve the function of conflict-avoidance.[25] This is because any possible norm designed to avoid conflict must be justified in the context of argumentation, in which participants put forth *reasons* in support of their proposed norms. The norms proposed in genuine argumentation claim universal acceptability, i.e. they must be universalizable. Reasons must be provided that can in principle be acceptable to both sides as grounded in the nature of things, not merely arbitrary or "particularistic" rules such as "I get to hit you but you do not get to hit me, because I am me and you are you." Such an arbitrary assertion fails to even attempt to justify the proposed norm. For another example, *B*'s claim that he owns his own body and also owns *A*'s body, while *A* does not get to own his own body, is an obviously particularistic claim that makes arbitrary distinctions between two otherwise-similar agents, where the distinction is not grounded in any objective difference between *A* and *B*. Such particularistic norms or reasons are not universalizable; that is, they are *not reasons at all*, and thus are contrary to the purpose and nature of the activity of justificatory argumentation.

When assigning property title to a disputed or contested resource, such as *A*'s body, some objective link must be found between the claimant and the resource, so that ownership can be established that can be recognized publicly by others and also acceptable as fair and as grounded in the nature of things. As I wrote elsewhere:

Murray N. Rothbard, in "Justice and Property Rights," *Egalitarianism as a Revolt Against Nature and Other Essays* (1974) (emphasis added). I discuss and quote more extensively from this piece in Stephan Kinsella, "Argumentation Ethics and Liberty: A Concise Guide," *Mises Daily* (May 27, 2011), at n. 1.

[25] See Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, pp. 131–38. See also Kinsella, "A Libertarian Theory of Punishment and Rights," *supra* note 17, pp. 617–25; *idem*, "Defending Argumentation Ethics: Reply to Murphy & Callahan," *Anti-state.com* (Sept. 19, 2002).

> [T]here are only two fundamental alternatives for acquiring rights in unowned property: (1) by doing something with things with which no one else had ever done anything before, i.e. the mixing of labor or homesteading; or (2) simply by verbal declaration or decree. The second alternative is arbitrary and cannot serve to avoid conflicts. Only the first alternative, that of Lockean homesteading, establishes an objective link between a particular person and a particular scarce resource, and thus no one can deny the Lockean right to homestead unowned resources.[26]

Thus, as Hoppe has argued, 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.[27] 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 those of 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 and in asserting ownership over the other's body, he has to presuppose his own ownership of his body. In so doing, the outsider demonstrates that he *does* place a certain significance on this link, even as (at the same time) he disregards the significance of the other's link to his own body.[28]

For these reasons, libertarianism recognizes that only the self-ownership rule is universalizable and compatible with the *grundnorms* of peace,

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[26] Kinsella, "Punishment and Proportionality," at 63-64.

[27] Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, at 12.

[28] For elaboration on this point, see Stephan Kinsella, "How We Come To Own Ourselves," *Mises Daily* (Sept. 7, 2006); idem, "Defending Argumentation Ethics," *supra* note 23; Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, chapters 1, 2, and 7. See also Hoppe, "The Idea of a Private Law Society," *supra*: "Outside of the Garden of Eden, in the realm of all-around scarcity, the solution [to the problem of social order—the need for rules to permit conflicts to be avoided] is provided by four interrelated rules… First, every person is the proper owner of his own physical body. Who else, if not Crusoe, should be the owner of Crusoe's body? Otherwise, would it not constitute a case of slavery, and is slavery not unjust as well as uneconomical?"

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.[29]

Property in External Things

Libertarians apply similar reasoning in the case of other scarce resources—namely, external objects in the world. One key difference between bodies and external resources—and the reason for their separate treatment—is that the latter were at one point *unowned*, and are *acquired by* human actors who are *already necessarily body-owners*. This difference implies a related distinction: as noted above, in the case of bodies, the idea of aggression being impermissible immediately implies (*prima facie*) self-ownership. In the case of external objects, however, we must identify who the owner of the object is before we can determine what uses of it constitute aggression.

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[29] See Kinsella, "How We Come To Own Ourselves," *supra*. Note that if an agent *A* has committed an act of aggression against *B*, as discussed in note 19, *supra*, then *B*'s claim to be able to do things to *A*'s body without *A*'s permission *would* be making a distinction between *A* and *B*, but one grounded in the nature of things. As long as *A* and *B* have not attacked each other there is no *relevant* distinction between them, rendering any unequal allocation of rights between them (such as *B* can own or hit *A*, but not vice-versa) non-universalizable, particularistic, and unacceptable in genuine argumentation. But matters are different if *A* has forcefully invaded *B*'s body without *B*'s consent. In this case we could say *A* is estopped from denying *B*'s similar right to invade *A*'s body, that is, to retaliate or defend himself. For similar reasons, critics of Hoppe's argumentation ethics who claim that the very possibility of a master arguing with his slave invalidates argumentation ethics. In the case of chattel slavery, the master would be unable to argumentatively justify his use of force against the slave. He would be engaged in a contradiction: only peaceful, mutually-rights respecting norms can be argumentatively justified, because of the normatively peaceful presuppositions of argumentation itself; yet at the same time the master would be employing dominating force against the slave. The implicit logic of his stance in argumentation would condemn his enslaving actions. If he is consistent he would have to quit arguing and be a brute; or release the slave. But if the "master" is a victim who is employing some kind of force in response to aggression, such as retaliatory force, then in this case there would be no contradiction involved if the master/victim were to engage in discourse with his slave/aggressor, since he could point to a justification for treating the slave/aggressor as a slave. I discuss this point also in Kinsella, "Defending Argumentation Ethics," *supra*.

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 (rivalrous), 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. Thus, as in the case with bodies, 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 shared *grundnorms* of permitting peaceful, cooperative, 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*.[30] Here, the relevant objective link is *appropriation*—the transformation, possession or embordering of a previously unowned resource, i.e. Lockean homesteading.[31] Under this approach, the first (prior)

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[30] For further discussion of the difference between bodies and things homesteaded for purposes of rights, see Kinsella, "A Libertarian Theory of Contract," *supra* note 5, pp. 29 *et seq*.; and *idem*, "How We Come To Own Ourselves," *supra* note 28.

[31] On 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," *supra* note 22, and note 36, *infra*, and accompanying text. In particular, see Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, 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'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 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. *See* Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, pp. 10–14 and chapter 7. For further discussion of the nature of appropriation, see Jörg Guido Hülsmann, "The A Priori Foundations of Property Economics," 7 *Q.J. Austrian Econ*. 51 (2004).

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,[32] while possession is *actual* control—"the *factual authority* that a person exercises over a corporeal thing."[33] The question is not who has physical possession; it is who has ownership. Asking who is the owner of a resource presupposes a crucial *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—namely, that they must at some point become owned by a first owner to become goods at all.

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 endorse might-makes-right, where ownership collapses into possession for want of a distinction.[34] Such a system, far from avoiding conflict, makes conflict inevitable.[35]

An aspect of ownership and property rights that is not often made explicit is what has been called the "prior-later distinction." This is the idea that it *makes a difference* who came first.[36] The prior-later distinction is implicit in the very idea of ownership, as the owner has a better claim—again, *prima facie*—to his resource than "latecomers."[37] If the owner did not have a better claim to the resource than someone who just comes later and physically

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[32] See note 9, *supra*, and accompanying text.

[33] Yiannopoulos, *Property*, *supra* note 9, § 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]).

[34] See, in this connection, the quote from Adam Smith in note 11, *supra*.

[35] This is also, incidentally, the reason the mutualist "occupancy" position on land ownership is unlibertarian. See Stephan Kinsella, "A Critique of Mutualist Occupancy," *Mises Economic Blog* (Aug. 2, 2009), archive.mises.org/10386.

[36] See Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, at 169–70; idem, "Of Private, Common, and Public Property and the Rationale for Total Privatization," *Libertarian Papers* 3, 1 (2011), libertarianpapers.org; also Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," *supra* note 22.

[37] See Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," *supra*.

wrests it from him, then he is not an owner, but merely the current user or possessor, and we are operating under the amoral might-makes-right principle instead of property rights and ownership.

More generally, latecomers' claims are inferior to those of prior possessors or claimants, who either homesteaded the resource or who can trace their title back to the homesteader or earlier owner.[38] The crucial importance of the prior-later distinction to libertarian theory is the reason Professor Hoppe repeatedly emphasizes it in his writing.[39]

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[38] See *Louisiana Code of Civil Procedure*, Art. 3653, providing:

> To obtain a judgment recognizing his ownership of immovable property…the plaintiff…shall:
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> 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*, *supra* note 9, §§ 255–79 and 347 *et pass.*

One could make an analogy here, between the prior-later distinction and how it can be traced back to the original act of appropriation of a given resource, and Mises's regression theorem that explains the origin of the value of a commodity money. On the latter, see Ludwig von Mises, *Human Action*, 4th ed. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1996), at ch. XVII, § 4.

[39] See, e.g., Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, pp. 169–70; 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 Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," *supra* note 22; *idem*, "Defending Argumentation Ethics," *supra* note 23; and *idem*, "How We Come To Own Ourselves," *supra* note 28. As Hoppe explains in "The Idea of a Private Law Society," *supra* note 28,

> every person is the proper owner of all nature-given goods that he has perceived as scarce and put to use by means of his body, *before* any other person. Indeed, who else, if not the first user, should be their owner? The second or third one? Were this so, however, the first person would not perform his act of original appropriation, and so the second person would become the first, and so on and on. That is, no one would ever be permitted to perform an act of original appropriation and mankind would instantly die out. Alternatively, the first user together with all late-comers become part-owners of the goods in question. Then conflict will

To sum up, 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.[40] As can be seen from the considerations presented above, the link is the physical transformation or embordering by the original

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> not be avoided, however, for what is one to do if the various part-owners have incompatible ideas about what to do with the goods in question? This solution would also be uneconomical because it would reduce the incentive to utilize goods perceived as scarce for the first time.

See also, in this connection, de Jasay, *Against Politics*, *supra* note 31, further discussed and quoted in Kinsella, "Thoughts on the Latecomer and Homesteading Ideas," *supra* note 22. See also de Jasay's argument (note 31, *supra*) 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 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. See also on this Murray N. Rothbard's discussion of the "relevant technological unit" in "Law, Property Rights, and Air Pollution," *Mises Daily* (April 22, 2006 [1982]), mises.org/daily/2120; also B.K. Marcus, "The Spectrum Should Be Private Property: The Economics, History, and Future of Wireless Technology," *Mises Daily* (Oct. 29, 2004), mises.org/daily/1662, and *idem*, "Radio Free Rothbard," 20 *J. Libertarian Stud.* 17 (2006), mises.org/journals/jls/20_2/20_2_2.pdf.

[40] Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, p. 12.

homesteader, or a contractual chain of title traceable back to him (or to some previous possessor whose claim no one else can defeat).[41]

Consistency and Principle

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."[42] This is the principal distinction between libertarians and typical non-libertarians (excluding criminals, sociopaths, tyrants, government leaders, and so on): 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 in the case of non-bodily external objects, rights are understood on the basis of prior possession or homesteading and contractual transfer of title.

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[41] On the title transfer theory of contract, see Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," 1 *J. Libertarian Stud.* 3 (Winter 1977), mises.org/journals/jls/1_1/1_1_2.pdf; Rothbard, "Property Rights and the Theory of Contracts," in *idem*, *The Ethics of Liberty*, *supra* note 7; Kinsella, "A Libertarian Theory of Contract," *supra* note 5. See also references in note 38, *supra*, including Art. 3653 of the *Louisiana Code of Civil Procedure*, providing that, in the case of a dispute over immovable property (land or realty), "When the titles of the parties are traced to a common author, he is presumed to be the previous owner."

[42] State 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 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").

This framework for rights is motivated by the libertarian's consistent and principled valuing of peaceful interaction and cooperation—in short, of civilized behavior. Consider the Misesian view of human action. According to Mises, human action is aimed at alleviating some *felt uneasiness*.[43] Thus, the actor employs scarce means, according to his understanding of causal laws, to achieve various ends—ultimately, the removal of uneasiness.

Just as felt uneasiness in general is the cause of action aimed at alleviating it, a certain type of "moral" uneasiness gives rise to the practice of normative justification aimed at its alleviation. To-wit, civilized man (evidently) feels morally 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 and uneasiness at the prospect of conflict or violent interaction with his fellow man. Perhaps he is reluctant to violently clash with others over certain objects because he has empathy with them.[44] Perhaps the instinct to cooperate is a result of social evolution. As Mises noted,

> 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.[45]

Whatever the reason, because of this uneasiness, when there is the potential for violent conflict, the civilized man *seeks justification* for the use of force or violence to control or defend the use of a desired scarce resource that some other person opposes or threatens. Empathy—or whatever spurs man to adopt the libertarian *grundnorms*—gives rise to a certain form of uneasiness, which gives rise to the attempt to justify violent action.

Civilized man may be thus 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

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[43] Mises, *Human Action*, *supra*, at 13–14, *et pass.*

[44] For further discussion of the role of empathy in the adoption of libertarian *grundnorms*, see note 23, *supra.*

[45] Mises, *Human Action*, *supra*, p. 14.

during discourse),[46] what they seek are rules that are fair, potentially acceptable to all relevant parties, grounded in the nature of things, and universalizable, and which permit conflict-free use of resources.

As noted in foregoing sections, libertarian property rights principles emerge as the only candidate that satisfies these criteria. We favor *prima facie* self-ownership of bodies, as the only fair and justifiable body ownership rule that permits conflict-free of the resources of our bodies. And in the case of resources external to human bodies, we favor property rights on the basis of prior possession or homesteading and contractual transfer of title. That is, the libertarian position on property rights in external objects is that, in any dispute or contest over any particular scarce resource, the original homesteader—the person who appropriated the resource from its unowned status, by embordering or transforming it (or his contractual transferee)—has a better claim than latecomers, those who did not appropriate the scarce resource. This is the only fair and justifiable property assignment rule that permits harmonious, productive, conflict-free use of such external scarce resources.

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.[47] It recognizes that the only rules that are compatible with the *grundnorms* of civilized men are the self-ownership principle and the Lockean homesteading principle, applied as consistently as possible.

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[46] As Hoppe explains, "Justification—proof, conjecture, refutation—is *argumentative* justification." Hoppe, *The Economics and Ethics of Private Property*, *supra* note 39, p. 384; also *ibid*, p. 413, and also Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, p. 130 *et pass.*

[47] For this reason Henry Hazlitt's proposed name "cooperatism" for the freedom philosophy, has some appeal. See Henry Hazlitt, *Foundations of Morality* (Irvington-on-Hudson, New York: Foundation for Economic Education, 1994 [1964]), p. xii, mises.org/books/foundationsofmorality.pdf.

The State

Libertarians oppose all forms of crime (aggression). Thus we oppose not only private aggression: we also oppose *institutionalized* or public aggression. The opposition to institutionalized aggression is based on the view, espoused by Bastiat, that an act of aggression that is unjust for a private actor to perform remains illegitimate when performed by agencies, institutions, or collectives.[48] Murder or theft by ten, or a hundred, or a million, people is not better than theft by a lone criminal. It is for this reason that libertarians view the state itself as inherently criminal. For the state does not just happen to engage in institutionalized aggression; it necessarily does so on a systematic basis as part of the very nature of the state. As Hoppe notes:

> What must an agent be able to do to qualify as a state? This agent must be able to insist that all conflicts among the inhabitants of a given territory be brought to him for ultimate decision-making or be subject to his final review. In particular, this agent must be able to insist that all conflicts involving himself be adjudicated by him or his agent. And implied in the power to exclude all others from acting as ultimate judge, as the second defining characteristic of a state, is the agent's power to tax: to unilaterally determine the price that justice seekers must pay for his services.[49]

Such an agency necessarily commits aggression against either human bodies or owned property (usually both), either by taxing, or by outlawing

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[48] "Sometimes the law defends plunder and participates in it. Thus the beneficiaries are spared the shame and danger that their acts would otherwise involve… But how is this legal plunder to be identified? Quite simply. See if the law takes from some persons what belongs to them and gives it to the other persons to whom it doesn't belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish that law without delay—No legal plunder; this is the principle of justice, peace, order, stability, harmony and logic." Frédéric Bastiat, *The Law* (Dean Russell, trans., 1998 [1850]).

[49] See Hans-Hermann Hoppe, "Reflections on the Origin and the Stability of the State," LewRockwell.com (June 23, 2008), www.lewrockwell.com/hoppe/hoppe18.html; also Stephan Kinsella, "The Nature of the State and Why Libertarians Hate It," *The Libertarian Standard* (May 3, 2010), www.libertarianstandard.com/2010/05/03/the-nature-of-the-state-and-why-libertarians-hate-it/.

competition (usually both).[50] For these reasons, the consistent libertarian, in opposing aggression, is also anarchist.[51]

This also implies that legislation is illegitimate—as legislation requires a state—and that a law that is purely a result of legislation, and that cannot emerge in a decentralized legal order, is also invalid.[52]

Libertarianism Applied to IP

Given the foregoing libertarian (and Austrian-economics-informed) understanding of property rights, it is clear that the institutions of patent and copyright are simply indefensible. Here is why.

Copyrights pertain to "original works," such as books, articles, movies, and computer programs. They are grants by the state that permit the copyright holder to prevent others from using their own property—e.g., ink and paper—in certain ways. Thus copyright literally results in censorship—not surprising given its origins in suppressing the spread of ideas not favored by crown and church.[53] For example, shortly before his death, author J.D.

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[50] States invariably claim both powers, but either one alone is sufficient to give the state its unique status, and in fact each power implies the other. The power to tax alone would provide the agency with the ability to outcompete competing agencies that do not have this power, in the same way that public (government) schools outcompete private schools. Thus, the power to tax gives the taxing agency the practical ability to monopolize the field and outlaw or restrict competition. And the power to exclude competition alone would permit the monopolizing agency to charge monopoly prices for its services, akin to a tax.

[51] See 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), www.arts.uwaterloo.ca/%7Ejnarveso/articles/Anarchist%27s_Argument.pdf and Hans-Hermann Hoppe, "Anarcho-Capitalism: An annotated bibliography," *LewRockwell.com* (December 31, 2001), www.lewrockwell.com/hoppe/hoppe5.html.

[52] See Stephan Kinsella, "Legislation and the Discovery of Law in a Free Society," *J. Libertarian Stud.* 11 (1995): 132.

[53] The Stop Online Piracy Act (SOPA), recently defeated through widespread Internet-based outrage, is a good example of a threat to freedom of expression in the name of copyright law. See Stephan Kinsella, "SOPA is the Symptom, Copyright is the Disease: The SOPA wakeup call to ABOLISH COPYRIGHT," *The Libertarian Standard* (Jan. 24, 2012). Regarding the origins of copyright, see Michele Boldrin & David K Levine, *Against Intellectual Monopoly* (2008), ch. 2, againstmonopoly.org; Eric E. Johnson, "Intellectual Property's Great Fallacy" (2011), available at ssrn.com/abstract=1746343 ("The monopolies now understood as copyrights and patents were originally created by

Salinger, author of *Catcher in the Rye*, convinced U.S. courts to actually ban the publication of a novel called *60 Years Later: Coming Through the Rye*, based on copyright claims. And when a grocery store in Canada mistakenly sold 14 copies of a new Harry Potter book a few days before its official release on Saturday, July 16, 2005, a Canadian judge "ordered customers not to talk about the book, copy it, sell it or even read it before it is officially released at 12:01 a.m. July 16."[54]

Patents grant rights in "inventions"—useful machines or processes. They are grants by the state that permit the patentee to use the state's court system to prohibit others from using their *own property* in certain ways—from reconfiguring their property according to a certain pattern or design described in the patent, or from using their property (including their own bodies) in a certain sequence of steps described in the patent.[55]

Both patent and copyright are simply state grants of monopoly privilege. In both cases, the state is assigning to *A* a right to control *B*'s property: *A* can force *B* not to engage in certain actions with *B*'s resources. Since ownership is the right to control, IP grants to *A* a co-ownership right (a negative servitude) in *B*'s property.[56] This clearly cannot be justified under libertarian principles. *B* already owns his property. With respect to him, *A* is a latecomer. *B* is the one who appropriated the property, not *A*. It is too late for *A* to homestead the resource in question—*B*, or his ancestor in title, already did that. The resource is no longer unowned. Granting *A* ownership rights in *B*'s property is quite obviously incompatible with basic libertarian principles. It is nothing more than redistribution of wealth. IP is therefore unlibertarian and unjustified.

Utilitarianism

Why, then, is this a contested issue? Why do some libertarians still believe in IP rights?

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royal decree, bestowed as a form of favoritism and control. As the power of the monarchy dwindled, these chartered monopolies were reformed, and essentially by default, they wound up in the hands of authors and inventors."); Tom W. Bell, *Intellectual Privilege: A Libertarian View of Copyright* (2009 draft, available at www.intellectualprivilege.com).

[54] See Stephan Kinsella, "The Patent, Copyright, Trademark, and Trade Secret Horror Files," *Mises Economics Blog* (Feb. 3, 2010), archive.mises.org/11600.

[55] For examples, see *id.*

[56] See Stephan Kinsella, "Intellectual Property Rights as Negative Servitudes," *Mises Economics Blog* (June 23, 2011).

One reason is that they approach libertarianism from a utilitarian perspective instead of a principled one. They favor laws that increase general utility, or wealth. And they believe the state's propaganda that state-granted IP rights actually do increase general wealth.

The utilitarian perspective itself is bad enough, because all sorts of terrible policies could be justified this way: why not take half of Henry Ford's fortune and give it to the poor? Wouldn't the total welfare gains to the thousands of recipients be greater than Ford's reduced utility? After all, he would still be a billionaire afterwards. To take another example: if a man is extremely desperate for sex, could not his gain be greater than the loss suffered by his rape victim (say, if she is a prostitute), thus justifying rape, in some cases, on utilitarian grounds? Most people will recognize that there is something wrong with utilitarian reasoning if it could lead to such results.

But even if we ignore the ethical and methodological problems[57] with the utilitarian or wealth-maximization approach, what is bizarre is that utilitarian libertarians are in favor of IP when they have not demonstrated that IP does increase overall wealth. They merely assume that it does and then base their policy views on this assumption.

It is beyond dispute that the IP system imposes significant costs, in monetary terms alone, not to mention costs in terms of liberty.[58] The usual argument, that the incentive provided by IP law stimulates additional innovation and creativity, has not even been proven.[59] It is entirely possible (even likely, in my view) that the IP system not only imposes many billions of dollars of cost on society but actually impedes innovation, adding damage to injury.

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established that the value of the purported gains is greater than the costs.[60] If one asks advocates of IP how they know there is a net gain, the result is silence (this is especially true of

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[57] On the defects of utilitarianism and interpersonal utility comparisons, see the sources cited in Kinsella, *Against Intellectual Property*, at n. 40.

[58] See studies cited in Stephan Kinsella, "Reducing the Cost of IP Law," *Mises Daily* (Jan. 20, 2010), mises.org/daily/4018; *idem*, "What are the Costs of the Patent System?," *Mises Economics Blog* (Sep. 27, 2007), archive.mises.org/7223.

[59] See Stephan Kinsella, "Yet Another Study Finds Patents Do Not Encourage Innovation," *Mises Economics Blog* (July 2, 2009), archive.mises.org/10217.

[60] See Boldrin & Levine, *Against Intellectual Monopoly*, *supra* note 53; and references in note 59, *supra.*

patent attorneys). They cannot point to any study to support their utilitarian contention; they usually just point to Article 1, Section 8 of the Constitution (if they are even aware of it), as if the backroom dealings of politicians two centuries ago are some sort of empirical evidence in favor of state grants of monopoly privilege.

In fact, as far as I am able to tell, *every* study that attempts to tally the costs and benefits of copyright or patent law concludes either that these schemes cost more than they are worth, or that they actually reduce innovation, or that the research is inconclusive. There are no studies unambiguously showing a net societal gain.[61] There are only repetitions of state propaganda.

The Founders only had a hunch that copyrights and patents might "promote the Progress of Science and useful Arts"[62]—that the cost of this system would be "worth it." But they had no serious evidence. A hundred and fifty years later there was still none. In an exhaustive 1958 study prepared for the U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, economist Fritz Machlup concluded:

> No economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss upon society. The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to these assumptions… If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one.[63]

And the empirical case for patents has not been shored up at all in the last fifty years. As George Priest wrote in 1986, "[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."[64]

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[61] See Stephan Kinsella, "Yet Another Study Finds Patents Do Not Encourage Innovation," *Mises Economics Blog* (July 2, 2009); *idem*, "The Overwhelming Empirical Case Against Patent and Copyright" (Oct. 23, 2012).

[62] *U.S. Const.*, Art. I, Sec. 8, Cl. 8. For more background on the origins of copyright in America, see references in note 53, *supra*.

[63] Fritz Machlup, *An Economic Review of the Patent System* 79-80 (1958), c4sif.org/resources.

[64] George Priest, "What Economists Can Tell Lawyers About Intellectual Property," 8 *Res. L. & Econ*. 19 (1986).

Similar comments are echoed by other researchers. François Lévêque and Yann Ménière, for example, of the Ecole des Mines de Paris (an engineering university), observed in 2004:

> The abolition or preservation of intellectual property protection is… not just a purely theoretical question. To decide on it from an economic viewpoint, we must be able to assess all the consequences of protection and determine whether the total favorable effects for society outweigh the total negative effects. Unfortunately, this exercise [an economic analysis of the cost and benefits of intellectual property] is no more within our reach today than it was in Machlup's day [1950s].[65]

More recently, Boston University Law School Professors (and economists) Michael Meurer and Jim Bessen conclude that on average, the patent system discourages innovation. As they write: "it seems unlikely that patents today are an effective policy instrument to encourage innovation overall" (p. 216). To the contrary, it seems clear that nowadays "patents place a drag on innovation" (p. 146). In short, "the patent system fails on its own terms" (p. 145).[66]

And in a recent paper, economists Boldrin and Levine state:

> The case against patents can be summarized briefly: there is no empirical evidence that they serve to increase innovation and productivity.... This disconnect is at the root of what is called the "patent puzzle": in spite of the enormous increase in the number of patents and in the strength of their legal protection, the US economy has seen neither a dramatic acceleration in the rate of technological progress nor a major increase in the levels of research and development expenditure…
>
> Our preferred policy solution is to abolish patents entirely to find other legislative instruments, less open to lobbying and

[65] François Lévêque & Yann Ménière, *The Economics of Patents and Copyrights* 102 (2004).

[66] James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (2008).

> rent seeking, to foster innovation when there is clear evidence that laissez-faire undersupplies it.[67]

The Founders' hunch about IP was wrong. Copyright and patent are not necessary for creative or artistic works, invention, and innovation. They do not even encourage it. These monopoly privileges enrich some at the expense of others, distort the market and culture, and impoverish us all.[68] Given the available evidence, anyone who accepts utilitarianism should be *opposed* to patent and copyright.[69]

Libertarian Creationism

Another reason why many libertarians favor IP is their confusion about the origin of property and property rights. They accept the careless observation that an individual can come to own things in three ways: through homesteading an unowned thing, by contractual exchange, and by creation. Therefore, they reason, if you own what you create, this is especially true for useful ideas. For example, libertarian philosopher Tibor Machan has stated: "it would seem that so called intellectual stuff is an even better candidate for qualifying as private property than is, say, a tree or mountain."[70] And Objectivist philosopher David Kelley writes: "[T]he essential basis of property rights lies in the phenomenon of creating value… [F]or things that

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[67] Michele Boldrin & David K. Levine, "The Case Against Patents," *Journal of Economic Perspectives* vol. 27 no. 1 (Winter 2013): 3–22.

[68] See, e.g., Stephan Kinsella, "Leveraging IP," *Mises Economics Blog* (Aug. 1, 2010); and *idem*, "Milton Friedman on the Distorting Effect of Patents," *C4SIF Blog* (July 3, 2011).

[69] Another problem with the wealth-maximization approach is that it has no logical stopping point. If adding (and increasing) IP protection is a cost worth paying to stimulate additional innovation and creation over what would occur on a free market—that is, if the amount of innovation and creation absent IP law is *not enough*, then how do we know that we have enough now, under a system of patent and copyright? Maybe the penalties or terms should be increased: impose capital punishment, triple the patent and copyright term. And what if there still is not enough? Why don't we expropriate taxpayer funds and set up a government award or prize system, like a huge state-run Nobel prize with thousands of winners, to hand out to deserving innovators, so as to incentivize even more innovation? Incredibly, this has been suggested, too—even by Nobel Prize winners. See Stephan Kinsella, "$30 Billion Taxfunded Innovation Contracts: The 'Progressive-Libertarian' Solution," *Mises Economics Blog* (Nov. 23, 2008).

[70] Tibor Machan, "Intellectual Property and the Right to Private Property," Mises.org working paper (2006), discussed in Stephan Kinsella, "Owning Thoughts and Labor," *Mises Economics Blog* (Dec. 11, 2006).

one has created, such as a new product, one's act of creation is the source of the right, regardless of scarcity."[71]

The mistake is the notion that creation is an independent source of ownership, independent from homesteading and contracting. Yet it is easy to see that "creation" is neither necessary nor sufficient as a source of ownership. If you carve a statue using your own hunk of marble, you own the resulting creation because you already owned the marble. You owned it before, and you own it now.[72] And if you homestead an unowned resource, such as a field, by using it and thereby establishing publicly visible borders, you own it because this first use and embordering gives you a better claim than latecomers.[73] Thus, creation is not necessary for ownership to arise.

But suppose you carve a statue in someone else's marble, either without permission, or with permission, such as when an employee works with his

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[71] Quoted in Stephan Kinsella, "Rand on IP, Owning 'Values', and 'Rearrangement Rights,'" *Mises Economics Blog* (Nov. 16, 2009).

[72] See, on this point, Sheldon Richman, "Intellectual 'Property' versus Real Property," Foundation for Economic Education website (June 12, 2009), fee.org/articles/tgif/intellectual-property/ ("If someone writes or composes an original work or invents something new, the argument goes, he or she should own it because it would not have existed without the creator. I submit, however, that as important as creativity is to human flourishing, it is not the source of ownership of produced goods… So what is the source? Prior ownership of the inputs through purchase, gift, or original appropriation. This is sufficient to establish ownership of the output. Ideas contribute no necessary additional factor. If I build a model airplane out of wood and glue, I own it not because of any idea in my head, but because I owned the wood, the glue, and myself. If Howard Roark's evil twin trespassed on your land and, *using your materials*, built the most creatively original house ever seen, would he own it? Of course not. *You* would—and you'd have every right to tear it down.").

[73] See Kinsella, "What Libertarianism Is," *supra*; Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 5, at chs. 1, 2, and 7; David Hume, *A Treatise of Human Nature* (ed. Selby-Bigge), Oxford, 1968, Book III, Part II, Section III note 16 ("Some philosophers account for the right of occupation, by saying, that every one has a property in his own labour; and when he joins that labour to any thing, it gives him the property of the whole: But, 1. There are several kinds of occupation, where we cannot be said to join our labour to the object we acquire: As when we possess a meadow by grazing our cattle upon it. 2. This accounts for the matter by means of accession; which is taking a needless circuit. 3. We cannot be said to join our labour to any thing but in a figurative sense. Properly speaking, we only make an alteration on it by our labour. This forms a relation betwixt us and the object; and thence arises the property, according to the preceding principles.").

employer's marble by contract. You do not own the resulting statue, even though you "created" it. If you are using marble stolen from another person; your vandalizing it does not take away the owner's claims to it. And if you are working on your employer's marble, he owns the resulting statue. Thus, creation is not sufficient for ownership rights to arise.

This is not to deny the importance of knowledge, or creation and innovation. Human action, which necessarily employs (ownable) scarce means, is also *informed* by technical knowledge of causal laws or other practical information. An actor's knowledge, beliefs and values affect the ends he chooses to pursue and the causal means he selects to achieve the end sought (as discussed further in the next section).

It is true that creation is an important means of increasing *wealth*. As Hoppe has observed,

> One can acquire and increase wealth either through homesteading, *production* and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways.[74]

While production or creation can certainly increase *wealth*, it is not an independent source of ownership or rights. Production is not the creation of new matter; it is the transformation of things from one form to another—the transformation of things someone already owns, either the producer or someone else. Using your labor and creativity to transform your property into more valuable finished products gives you greater wealth, but not additional property rights.[75] (If you transform someone else's property, he owns the resulting transformed thing, even if it is now more valuable.)

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[74] Hans-Hermann Hoppe, "Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order," 4 *Rev. Austrian Econ.* 55 (1990), at p. 60, mises.org/journals/rae/pdf/rae4_1_3.pdf. Emphasis added.

[75] See Stephan Kinsella, "Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and 'Rearranging,'" *Mises Economics Blog* (Sep. 29, 2010), archive.mises.org/14045. See also Pierre-Joseph Proudhon, "Les Majorats littéraires," trans. Luis Sundkvist (1868), *Primary Sources on Copyright* (1450–1900), eds L. Bently & M. Kretschmer, at pp. 11 *et seq.* ("The masters of science instruct us all—and the supporters of literary property are the first to argue this—that man does not have the capability of creating a single atom of matter; that all his activity consists of appropriating the forces of nature, of channeling these and modifying their effects, of composing or decomposing substances, of changing their forms, and, by this steering of the natural forces, by this transformation of substances, by this separation of elements, of making nature [*la création*]

In other words, creation is not the basis for property rights in scarce goods. Creating something does not make you its owner. A mother who creates a child does not own it. A vandal who creates a mural on someone else's property does not own it. An employee who creates a consumer device using his employer's facilities and materials does not own it. Creation is not sufficient to generate rights. And those who transform their own property to create a more valuable product own the resulting product because they already owned the original material, not because of creation. The creator of an idea does not thereby own the idea.[76]

The Contractual Approach

Many libertarians also argue that some form of copyright or patent could be created by contractual techniques—for example, by selling a patterned medium (book, CD, etc.) or useful machine to a buyer on the condition that it not be copied or revealed to others. For example, Brown sells an innovative mousetrap to Green on the condition that Green not reproduce it.[77]

For such contractual IP to emulate statutory IP, however, it has to bind not only seller and buyer, but all third parties. The contract between buyer and seller cannot do this—it binds only the buyer and seller. In the example given above, even if Green agrees not to copy Brown's mousetrap, Black has no agreement with Brown. Brown has no contractual right to prevent Black

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more useful, more fertile, more beneficial, more brilliant, more profitable. So that all human production consists (1º) of an expression of ideas; (2º) a displacement of matter.").

[76] In fact, as Proudhon notes, "in the strict sense of the term, we do not produce our ideas any more than we produce physical substances. Man does not create his ideas—he receives them. He does not at all make truth—he discovers it. He invents neither beauty, nor justice—they reveal themselves to his soul spontaneously, like the conceptions of metaphysics, in the perception of the phenomena of the world, in the relations between things. The intelligible estate [*fonds*] of nature is, in the same way as its tangible estate, outside of our domain: neither reason, nor the substance of things are ours. Even that very ideal which we dream about, which we pursue, and which causes us to commit so many acts of folly—this mirage of our understanding and our heart—we are not its creators, we are simply those who are able to see it." Proudhon, "Les Majorats littéraires," at p. 12. Or as Isaac Newton put it, "If I have seen further it is only by standing on the shoulders of giants." Letter to Robert Hooke (15 February 1676).

[77] This is Rothbard's example, from "Knowledge, True and False," in *The Ethics of Liberty*, *supra* note 7, which is discussed at pp. 51–55 in Kinsella, *Against Intellectual Property*, *supra* note *.

from using Black's own property in accordance with whatever knowledge or information Black has.

Now if Green were to sell Brown's watch to Black without Brown's permission, most libertarians would say that Brown still owns the watch and could take it from Black. Why doesn't a similar logic apply in the case of the mousetrap design?

The difference is that the watch is a scarce resource that has an owner, while the mousetrap design is merely information, which is not a type of thing that can be owned. The watch is a scarce resource still owned by Brown. Black needs Brown's consent to use it. But in the mousetrap case, Black merely learns how to make a mousetrap. He uses this information to make a mousetrap, by means of his own body and property. He doesn't need Brown's permission, simply because he is not using Brown's property.

The IP advocate thus has to say that Brown owns the information about how his mousetrap is configured. This move is question begging, however, since it asserts what is to be shown: that there are intellectual property rights.

If Black does not return Green's watch, Green is without his watch, precisely because the watch is a scarce good. But Black's knowing how to make a mousetrap does not take away Green's own mousetrap-making knowledge, highlighting the nonscarce nature of information or patterns. In short, Brown may retake his property from Black but has no right to prevent Black from using information to guide his actions. Thus, the contract approach fails as well.[78]

Learning, Emulation and Knowledge in Human Action

Another way to understand the error in treating information, ideas, recipes, and patterns as ownable property is to consider IP in the context of human action. Ludwig von Mises explains in *The Ultimate Foundation of Economic Science* (1962) that "[t]o act means: to strive after ends, that is, to choose a goal and to resort to means in order to attain the goal sought" (p. 4). Knowledge and information of course play a key role in action as well. As Mises puts it, "Action… is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and *guided by ideas concerning the suitability or unsuitability of definite means*" (p. 34, emphasis added).

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[78] On the title-transfer theory of contract, see Evers, "Toward a Reformulation of the Law of Contracts," *supra* note 41; Rothbard, "Property Rights and the Theory of Contracts," *supra* note 41; Kinsella, "A Libertarian Theory of Contract," *supra* note 5.

Moreover, "[m]eans are necessarily always limited, i.e. scarce, with regard to the services for which man wants to use them."[79] This is why property rights emerged. Use of a resource by one person excludes use by another. Property rights are assigned to scarce resources to permit them to be used productively and cooperatively, and to permit conflict to be avoided. In contrast, ownership of the information that guides action is not necessary. For example, two people who each own the ingredients (scarce goods) can simultaneously make a cake with the same recipe.

Material progress is made over time because information is *not* scarce. It can be infinitely multiplied, learned, taught, and built on. The more patterns, recipes, and causal laws that are known, the greater the wealth multiplier as individuals engage in ever-more efficient and productive actions. It is *good* that ideas are infinitely reproducible. There is no need to impose artificial scarcity on ideas to make them more like physical resources, which—unfortunately—*are* scarce.[80]

IP, Legislation, and the State

A final problem with IP remains: patent and copyright are statutory schemes, schemes that can be constructed only by legislation, and therefore *have always* been constructed by legislation. A patent or copyright code could no more arise in the decentralized, case-based legal system of a free society than could the Americans with Disabilities Act or Medicare. IP requires both a legislature, and a state. For libertarians who reject the legitimacy of the state,[81] or legislated law,[82] this is the final nail in the IP coffin.

Imagining an IP-Free World

It is fairly straightforward to explain what is wrong with IP: patent and copyright are artificial state-granted monopoly privileges that undercut and invade property rights, as elaborated above. But the consequentialist and utilitarian mindset is so entrenched that even people who see the ethical problems with IP law sometimes demand that the IP opponent explain how innovation would be funded in an IP-free world. How would authors make money? How would blockbuster movies be funded? Why would anyone invent if they could not get a patent? How could companies afford to develop pharmaceuticals if they had to face competition?

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[79] Mises, *Human Action*, *supra*, p. 93.

[80] For elaboration on the ideas discussed in this section, see Kinsella, "Intellectual Freedom and Learning Versus Patent and Copyright," *supra*.

[81] See note 51, *supra*, and accompanying text.

[82] See Kinsella, "Legislation and the Discovery of Law in a Free Society," *supra*.

When I see such demands and questions, I am reminded of John Hasnas's comments in his classic article "The Myth of the Rule of Law."[83] After arguing against the state and for anarchy, Hasnas observes:

> What would a free market in legal services be like?
>
> I am always tempted to give the honest and accurate response to this challenge, which is that to ask the question is to miss the point. If human beings had the wisdom and knowledge-generating capacity to be able to describe how a free market would work, that would be the strongest possible argument for central planning. One advocates a free market not because of some moral imprimatur written across the heavens, but because it is impossible for human beings to amass the knowledge of local conditions and the predictive capacity necessary to effectively organize economic relationships among millions of individuals. It is possible to describe what a free market in shoes would be like *because we have one*. But such a description is merely an observation of the current state of a functioning market, not a projection of how human beings would organize themselves to supply a currently non-marketed good. To demand that an advocate of free market law (or Socrates of Monosizea, for that matter) describe in advance how markets would supply legal services (or shoes) is to issue an impossible challenge. Further, for an advocate of free market law (or Socrates) to even accept this challenge would be to engage in self-defeating activity since the more successfully he or she could describe how the law (or shoe) market would function, the more he or she would prove that it could be run by state planners. Free markets supply human wants better than state monopolies precisely because they allow an unlimited number of suppliers to attempt to do so. By patronizing those who most effectively meet their particular needs and causing those who do not to fail, consumers determine the optimal method of supply. If it were possible to specify in advance what the outcome of this process of selection would be, there would be no need for the process itself.

[83] John Hasnas, "The Myth of the Rule of Law," *Wisconsin Law Review* (1995): 199.

In other words: the answer such a challenge might be, as Leonard Read said, "I don't know."[84]

To return to the current subject: with the advent of state IP legislation, the state has interrupted and preempted whatever other customs, business arrangements, contractual regimes and practices, and so on, that would no doubt have arisen in its absence. So it is natural for those accustomed to IP to be a bit nervous about replacing the current flawed IP system with… a vacuum. It is natural for them to wonder, "Well, what would occur in its absence?" As noted above, the reason we are not sure what an IP-free world would look like is that the state has snuffed out alternative institutions and practices.

Consider the analogous situation in which the FCC preempted and monopolized the field of property rights in airwaves just as they were starting to develop in the common law. Nowadays people are used to the idea of the state regulating and parceling out airwave or spectrum rights and might imagine there would be chaos if the FCC were abolished. Still, we have some idea as to what property rights might emerge in airwaves absent central state involvement.[85]

In any case, because people are bound to ask the inevitable: we IP opponents try to come up with some predictions and solutions and answers. Thus, in the end we must agree with Hasnas:

> Although I am tempted to give this response, I never do. This is because, although true, it never persuades. Instead, it is usually interpreted as an appeal for blind faith in the free market, and the failure to provide a specific explanation as to how such a market would provide legal services is interpreted as proof that it cannot. Therefore, despite the self-defeating nature of the attempt, I usually do try to suggest how a free market in law might work.

So, how would content creators be rewarded in an IP-free market? First, we must recognize that what advocates of IP want is a world where competition is tamed. Their view is that

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[84] Leonard Read, "I Don't Know," *Mises Daily* (Nov. 2, 2011 [1965]).

[85] For more on this see David Kelley & Roger Donway, *Laissez Parler: Freedom in the Electronic Media* (1985), as discussed in Stephan Kinsella, "Why Airwaves (Electromagnetic Spectra) Are (Arguably) Property)," *Mises Economics Blog* (Aug. 9, 2009).

> Governments adopt intellectual property laws in the belief that a privileged, monopolistic domain operating on the margins of the free-market economy promotes long-term cultural and technological progress better than a regime of *unbridled competition*.[86]

Thus, they favor the grant of monopolies by the state that shelter various market actors from competition. But in a free society with no IP rights, content creators and innovators would face competition just as others do.

It must be recognized that the position of the creator of content that is easily copied or imitated is no different in kind from that of any other entrepreneur on the market. Every producer faces competition. If a given entrepreneur makes profit, competitors notice this and start to compete, eroding the initial profits made. Thus market actors continually seek to innovate and find new ways to please consumers in the pursuit of elusive profits. Most producers face a variety of costs, including costs of exclusion. For example:

> Movie theaters, for example, invest in exclusion devices like ticket windows, walls, and ushers, all designed to exclude non-contributors from enjoyment of service. Alternatively, of course, movie owners could set up projectors and screens in public parks and then attempt to prevent passers-by from watching, or they could ask government to force all non-contributors to wear special glasses which prevent them from enjoying the movie. "Drive-ins," faced with the prospect of free riders peering over the walls, installed—at considerable expense—individual speakers for each car, thus rendering the publicly available visual part of the movie of little interest… The costs of exclusion are involved in the production of virtually every good imaginable.[87]

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[86] Jerome H. Reichman, "Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System," *Cardozo Arts & Ent.* L.J. 13 (1995): 475 (emphasis added), quoted in Stephan Kinsella, "Intellectual Property Advocates Hate Competition," *Mises Economics Blog* (July 19, 2011).

[87] Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline Law Review* 12 (1989), at pp. 284–85, quoted in Kinsella, *Against Intellectual Property*, n.67.

What this means is that it is the responsibility of entrepreneurs whose products are easily imitated to find a way to profit, and that they may not use state force to stop competitors. In a sense, this is already the situation facing content creators. Piracy is real and is not going away, unless the big media special interests succeed in having the Internet shut down. Even in the face of widespread file sharing and disregard for copyright, creativity is at an all time high.[88] The only solution to piracy and file sharing is to offer a better service.[89] For example, offering DRM-free movies or music for a reasonable price, as comedian Louis C.K. did, earning $1M in about two weeks.[90] Or use crowd-source fundraising mechanisms like Kickstarter—computer game company Double Fine Productions recently used Kickstarter to raise $400,000 to fund a new adventure game ($300,000 for game development, and $100,000 to make a documentary about the process). In fact, as of this writing, $1,095,783 had been raised, from 28,921 backers, in *one day*.[91]

And there are a variety of tactics people can adopt in different industries. A singer or musician can garner fans from his recordings, even if they are distributed for free, and charge fees for concerts. Movie studios can sell tickets to movies that have advantages over home viewing, such as better sound, 3D, large screens, and the like. Most non-fiction authors—such as bloggers or law professors publishing law review articles for free—do not get paid now, but engage in this activity to enhance their reputation and employability, for ad revenues, or for other reasons. A novelist could become popular with her first few books and then get fans to pre-purchase the sequel before releasing it, or get paid to be a consultant on/endorser of a movie version.[92]

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[88] Mike Masnick, "We're Living In the Most Creative Time In History," *Techdirt* (Feb. 12, 2012).

[89] See, e.g., Mike Masnick, "Hollywood Wants To Kill Piracy? No Problem: Just Offer Something Better," *Techdirt* (Feb. 6, 2012); Paul Tassi, "You Will Never Kill Piracy, and Piracy Will Never Kill You," *Forbes* (Feb. 3, 2012).

[90] Stephan Kinsella, "Comedian Louis C.K. Makes $1 Million Selling DRM Free Video via PayPal on his own website," *C4SIF.org* (Dec. 22, 2011).

[91] See www.kickstarter.com/projects/66710809/double-fine-adventure, accessed by the author at 8:30 p.m. CST, Feb. 9, 2012. See also Mike Masnick, "People Rushing To Give Hundreds Of Thousands Of Dollars In Just Hours For Brand New Adventure Game," *Techdirt* (Feb. 9, 2012); Kyle Orland, "Double Fine seeks to cut out publishers with Kickstarter-funded adventure," *ars technica* (Feb. 9, 2012).

[92] Stephan Kinsella, "Conversation with an author about copyright and publishing in a free society," *C4SIF.org* (Jan. 23, 2012); see also *idem*, "Innovations that Thrive Without

We cannot forecast all the ways human entrepreneurial creativity will discover to profit and flourish in a free society with no state-granted protections from competition. But there is every reason to think that in a private-law society, we would be unimaginably richer and freer, with more diversity and intellectual creativity than ever before. The state is nothing but a hindrance to everything good about human society.

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