

Argumentation Ethics: An Anthology



Transcribed by Kyle Rearden from

[The Last Bastille blog](#)

Formatted and Edited by Shane Radliff from [Liberty Under Attack](#)

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Foreword

Hans-Herman Hoppe's argumentation ethics has been an extremely divisive subject within the libertarian community, as pointed out by Dr. Walter Block and Kyle Rearden. Due to the implications argumentation ethics could have on libertarianism in general, I think the 26 years of discourse is extremely important, and is something that should be continued by philosophers and economists alike. That said, it has been an issue mostly forgotten, from what I can tell, until it was brought to my attention.

For those who may not be familiar with argumentation ethics, I think a short explanation is in order, to prepare you for the intellectual endeavor you are about to partake in. First off, any individuals who argue have already foresworn the use, or threat of initiatory force (that is, coercion). Secondly, argumentation ethics affirms self-ownership, which does not fall prey to being a performative contradiction. In short, any individual who makes arguments against private property must first exercise the implicit ownership of their own bodies (i.e. the use of their mouth, brain, vocal cords, etc.), which, if done, would result in a performative contradiction. Further examples of this were provided by Rearden:

“Examples of performative contradictions are all too easy to come by. Also known by some as [‘self-detonating statements’](#), any speaker who says, ‘I am dead,’ or ‘Language is meaningless,’ is completely full of shit, and this is easily provable, simply because *the very act of making the statement necessarily involves a contradiction*. Obviously, language inherently carries meaning, and dead men don't speak.”

Since my discovery of argumentation ethics, and Rearden's work on gathering and reposting all of the literature, I decided to put all of it in one place, to hopefully encourage more discussion on the subject. This anthology includes Hoppe's initial thesis, critiques, rebuttals, and praises from both sides of the fence. Related ideas include Stephen Kinsella's concept of dialogical estoppel, argumentation ethics as a communication theory by Christopher Zimny, and much more. The full list of authors involved in the discussion are: Hoppe, Murray Rothbard, Kinsella, Robert Murphy, Gene Callahan, Frank van Dun, Marian Eabrasu, and Zimny.

It's worth noting that any spelling and grammatical errors found in the original source documents have been left to uphold the integrity of the archive. That said, any errors found outside of that realm are solely the responsibility of the transcriber and the editor. Lastly, footnotes have been removed for ease of reading.

I hope libertarians and anarchists of various stripes and flavors find this anthology valuable, and deeply ponder Hoppe's thesis and the other arguments found herein. Hoppe has provided us with a great opportunity in the fields of economic and philosophical exploration, specifically as to whether or not the proprietarian ethic can be argumentatively justified in a praxeological manner (that is, *a priori*). The only question remaining is—will you seize it?

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March 2016

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The Ultimate Justification of the Private Property Ethic

By: Hans-Herman Hoppe

[Vol. 2 #1 Issue of Liberty](#)

September 1988

The mere fact that an individual argues presupposes that he owns himself and has a right to his own life and property. This provides a basis for libertarian theory radically different from both natural rights theory and utilitarianism.

Ludwig von Mises, in his masterpiece *Human Action*, explains the entire body of economic theory as implied in, and deducible from, a conceptual understanding of the meaning of action, plus a few general, explicitly introduced assumptions about the empirical reality in which action is taking place. He calls this conceptual knowledge the “axiom of action,” and he demonstrates how the meaning of action from which economic theory sets out, i.e., of values, ends, means, choice, preference, profit, loss, and cost, must be considered a priori knowledge: it is not derived from sense impressions but from impressions but from reflection (one does not see actions, but rather interprets certain physical phenomena as actions!); and, most importantly, it cannot possibly be invalidated by any experience whatsoever, because any attempt to do so would already presuppose an action (after all, experiencing something is itself an intentional action!).

Thus having reconstructed economics as, in the last resort, derived from an a priori true proposition, Mises can claim to have provided the ultimate foundation for economics. He calls such economics “praxeology,” the logic of action, in order to emphasize the fact that its propositions can be definitely proven by virtue of the indisputable action-axiom and the equally indisputable laws of logical reasoning (such as the laws of identity and contradiction) – completely independent, that is, of any kind of empirical testing (as employed, for instance, in physics).

The idea of praxeology and his construction of an entire body of praxeological thought earns Mises a place among the greats of modern Western tradition of rationalism in its search for certainty. But Mises does not think it is possible to provide a similarly apodictically certain foundation for ethics. To be sure, economics can inform us whether or not certain means are appropriate for bringing about certain ends, yet whether or not the ends can be regarded as just can be decided neither by economics nor by any other science. There is no justification for choosing one rather than another end. What end is ultimately

chosen is arbitrary from a scientific point of view. It is a matter of subjective whim, void of any justification beyond the mere fact of being liked.

Many libertarians (not to speak here of non-libertarians) agree with Mises on this point. Like Mises, they have given up the idea of a rational foundation of ethics. As does Mises, they make the most of the economic proposition that the libertarian private property ethic produces a higher general standard of living than any other, that most people actually prefer higher over lower standards of living, and hence that libertarianism should prove highly popular. But ultimately, as Mises certainly knew, such considerations can only convince someone of libertarianism who has already accepted the “utilitarian” goal of general wealth maximization. For those who do not share this goal, these considerations have no compelling force at all. And thus, in the final analysis, libertarianism is based on nothing but an arbitrary belief, however widespread.

In the following I will outline an argument that demonstrates why this position is untenable, and how, in fact, the essentially Lockean private property ethic of libertarianism can ultimately be justified. In effect, this argument supports the natural rights position of libertarianism as espoused by the other master-thinker of the modern libertarian movement, Murray N. Rothbard – foremost in his *Ethics of Liberty*. Yet the argument is different from the one typically offered by the natural rights tradition. Rather than this tradition, it is Mises, with his idea of praxeology and praxeological proofs, who provides the model.

I want to demonstrate that the libertarian private property ethics, and only the libertarian private property ethic, can be justified argumentatively, because it is the praxeological presupposition of argumentation. Many alternatives to a private property ethic can be proposed, of course, but their propositional content must contradict the ethic inherent in the demonstrated preference of the proposer’s own act of proposition making, i.e., by the act of engaging in argumentation.

One can say “people are, and always shall be indifferent towards doing things,” but this proposition would contradict and be belied by the act of proposition-making, which, in fact, would demonstrate subjective preference (of saying this rather than something else, or not saying anything at all). In the same way, non-libertarian ethical proposals are falsified by the reality of actually proposing them.

To reach this conclusion and to understand properly its importance and logical force, two insights are essential.

First, it must be noted that the question of what is just or unjust – or, for that matter, the more general question of what is or is not a valid proposition – only arises insofar as one is capable of propositional exchanges, i.e. of argumentation. The question does not arise vis-à-vis a stone or fish, because they are incapable of engaging in such exchanges and of producing validity-claiming propositions. Yet if this is so – and one cannot deny that it is without contradicting oneself, as one cannot argue a case that one cannot argue – then any ethical proposal, as well as any other proposition, must be assumed to claim

that it can be validated by proposition, must be assumed to claim that it can be validated by propositional or argumentative means. (Insofar as Mises formulates economic propositions, one must assume that he, too, claims this.)

In fact, in asserting any proposition, overtly or as an internal thought, one demonstrates one's preference for the willingness to rely on argumentative means in convincing oneself or others of something. There is then, trivially enough, no way of justifying by means of propositional exchanges and arguments. But then it must be considered the ultimate defeat for an ethical proposal if one can demonstrate that its content is logically incompatible with the proponent's claims that its validity is ascertainable by argumentative means. To demonstrate any such incompatibility would amount to an impossibility proof, and such proof would constitute the most deadly defeat possible in the realm of intellectual inquiry.

Second, it must be noted that argumentation does not consist of free-floating propositions but is a form of action requiring the employment of scarce means; and furthermore that the means, which a person demonstrates by preferring to engage in propositional exchange are those of private property.

No one could possibly propose anything, and no one could become convinced of any proposition by argumentative means, if one's right to make exclusive use of one's physical body were not already presupposed. It is one's recognition of another's mutually exclusive control over his own body which explains the distinctive characteristic of propositional exchanges: while one may disagree about what has been said, it is still possible to agree at least on the fact there is disagreement. And it is obvious, too, that such a property right in one's own body must be said to be justified a priori. Anyone who would try to justify any norm of whatever content must already presuppose an exclusive right of control over his body simply in order to say "I propose such and such." And anyone disputing such a right, then, would become caught up in a practical contradiction, since in arguing so one would already implicitly have accepted the very norm that one was disputing.

Furthermore, it would be equally impossible to sustain argumentation for any length of time and rely on the propositional force of one's arguments, if one were not allowed to appropriate in addition to one's body other scarce means through homesteading action, i.e., by putting them to use before someone else does, or if such means, and the rights of exclusive control regarding them, were not defined in objective, physical terms.

For if no one had the right to control anything at all, except his own body, then we would all cease to exist and the problem of justifying norms – as well as all other human problems – simply would not exist. Thus, the fact that one is alive presupposes the validity of property rights to other things. No one who is alive could argue otherwise.

And if a person did not acquire the right of exclusive control over such goods by homesteading, by establishing some objective link between a particular person and a particular scarce resource before anyone else had done so, but instead late-comers were assumed to have ownership claims to things, then literally no one would be allowed to do anything with anything unless he had the prior consent of all late-comers. Neither we nor our forefathers nor our progeny could survive, do survive or will survive if we were to follow this rule. Yet in order for any person – past, present or future – to argue anything it must evidently be possible to survive. And in order for us to do just this, property rights cannot be conceived as “timeless” and non-specific regarding the number of people concerned. Rather, property rights must necessarily originate through action at a definite times for specific acting individuals. Otherwise, it would be impossible for anyone to say anything at a definite time and for someone else to be able to reply. To assert that the first-user-first-owner rule of libertarianism can be ignored or is unjustified implies a contradiction. One’s assertion of this proposition presupposes one’s existence as an independent decision-making unit at a given point in time.

Lastly, acting and proposition-making would also be impossible, if the things acquired through homesteading were not defined in objective, physical terms (or if, correspondingly, aggression were not defined as an invasion of physical integrity of another person’s property), but instead in terms of subjective values and evaluations. For while every person can have control over whether or not his actions cause the physical integrity of something in change, control over whether or not one’s actions affect the value of someone’s property rests with other people and their evaluations. One would have to interrogate and come to an agreement with every person in the population to make sure that one’s planned actions would not change another person’s evaluations regarding his property. This is an absurd proposition: everyone would be long dead before this was accomplished. Moreover, the idea that only subjective values in property should be protected, rather than physical (objective) property itself, as is argumentatively indefensible. Even to make such an argument, one must presuppose that actions must be allowed prior to the actual agreement, because if they were not one could not even assert this proposition. The assertion of any proposition is possible only because property has objective borders, borders which every person can recognize as such as on his own, without having to agree first to anyone else with respect to one’s system of values and evaluations.

By being alive and formulating any proposition, then one demonstrates that any ethic except the libertarian ethic is invalid. If this were not so and latecomers supposedly had legitimate claims to things, or things owned were defined in subjective terms, no one could possibly survive as a physically independent decision-making unit at any given point in time, and hence no one could ever raise any validity claiming proposition whatsoever.

This concludes my a priori justification of the private property ethic. A few comments regarding a topic already touched upon earlier – the relationship of this “praxeological” proof of libertarianism to the utilitarian and to the natural rights position – will complete the discussion.

The justification of the private property ethic outlined above contains the ultimate refutation of the utilitarian position. In order to propose the utilitarian position, the validity of exclusive rights of control over one’s own body and one’s homesteaded goods must already be presupposed.

More specifically, the praxeological proof of the private property ethic shows the praxeological impossibility of the consequentialist libertarian position: the assignment of rights of exclusive control cannot be dependent on the outcome (“beneficial” or otherwise) of certain actions; one could never act and propose anything, unless private property rights already existed prior to any later outcome. A consequentialist ethic is a praxeological absurdity. Any ethic must, instead, be “aprioristic” or “instantaneous,” in order to make it possible that one can act here and now, proposing this or that, rather than having to suspend acting until later. An advocate of a “wait-for-the-outcome” ethic could not survive long enough to say anything if he were to take his own advice seriously. And to the extent that utilitarian proponents are still around, then, they demonstrate through their actions that their consequentialist doctrine is false. Acting and proposition-making requires private property rights now, and cannot wait for them to be assigned only later.

Although the praxeological proof of the private property ethic generally supports the natural rights position concerning the possibility of a rational ethic and fully agrees with the specific conclusions reached within the natural rights tradition (specifically by Murray N. Rothbard), it has at least two distinctive advantages.

It has been a common quarrel with the natural rights position, even on the part of otherwise sympathetic observers, that the concept of human nature is far too diffuse to allow the derivation of a determine set of rules of conduct. The praxeological approach solves this problem by recognizing that it is not the wider concept of human nature, but the narrower one of propositional exchanges and argumentation, which must serve as the starting point in deriving an ethic.

Moreover, it shows that an a priori justification for this approach exists insofar as the problem of true and false, or right and wrong, does not arise outside and apart from propositional exchanges; that no one could then possibly challenge such a starting point without a contradiction; and finally, that it is argumentation, then, which requires the recognition of private property, and that an argumentative challenge of the validity of the private property ethic is thus praxeologically impossible.

Secondly, there is a logical gap between “is” and “ought” statements which natural rights proponents, at least according to wide-spread opinion, have failed to bridge successfully, except for advancing some general critical remarks regarding the ultimate validity of the fact-value dichotomy. Here the

praxeological proof of libertarianism has the advantage of offering a completely value-free justification of private property. It remains entirely in the realm of is-statements, and nowhere tries to derive an ought from an is. The structure of the argument is this: (a) justification is propositional justification (an a priori true “is-statement”); (b) argumentation presupposes property in one’s body and the homesteading principle (another a priori true “is-statement”); and this (c) no deviation from this ethic can be justified argumentatively (another a priori true “is-statement”).

The praxeological proof also offers a key to an understanding of the nature of the fact-value dichotomy: ought-statements, it is often said, cannot be derived from is-statements; they belong to different logical realms. But one could not even state that there are facts and values if there were no propositional exchanges. This practice of propositional exchanges in turn already presupposes the prior acceptance of the private property ethic as valid. Cognition and truth-seeking as such have a value foundation. And the normative foundation on which cognition and truth rest if the recognition of private property rights.

Beyond Is & Ought

By: Murray Rothbard

[Vol. 2 #2 Issue of Liberty](#)

November 1988

Prof. Hans Hoppe, a fairly recent immigrant from West Germany, has brought an enormous gift to the American libertarian movement. In a dazzling breakthrough for political philosophy in general and for libertarianism in particular, he has managed to transcend the famous is/ought, fact/value dichotomy that has plagued philosophy since the days of the scholastics, and that had brought modern libertarianism into a tiresome deadlock. Not only that: Hans Hoppe has managed to establish the case for anarcho-capitalist-Lockean rights in an unprecedentedly hardcore manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison.

In the modern libertarian movement, only the natural rights libertarians have come to satisfyingly absolute libertarian conclusions. The different wings “consequentialists” – whether emotivists, utilitarians, Stirnerites, or whatever – have tended to buckle at the seams. If, after all, one has to wait for consequences to make a firm decision, one can hardly adopt a consistent, hard-nosed stance for liberty and private property in every conceivable case.

Hans Hoppe was schooled in the modern (in his case, Kantian) philosophic tradition, rather than in natural law, acquiring a Ph. D. in philosophy at the University of Frankfurt. He then moved to a dissertation in the philosophy of economics for his “second doctoral,” or habilitation degree. Here he became an ardent and devoted follower of Ludwig von Mises and his “praxeological” approach, as well as of the system of economic theory Mises built on this approach, which arrives at absolute conclusions derived logically from self-evident axioms. Hans has proven to be a remarkably productive and creative praxeologist (as far as I know) who arrived at the doctrine originally from philosophy rather than from economics. He therefore brings to the task special philosophic credentials.

Hoppe’s most important breakthrough has been to start from standard praxeological axioms (e.g., that every human being acts, that is, employs means to arrive at goals), and, remarkably, to arrive at a hard-nosed anarcho-Lockean political ethic. For over thirty years I have been preaching to the economics profession that this cannot be done: that economists cannot arrive at any policy conclusions (e.g., that government should do X or should not do Y) strictly from value-free economics. In order to come to a policy conclusion, I have long maintained, economists have to come up with some kind of ethical system. Note that all branches of modern “welfare economics” have attempted to do just that: to continue to be “scientific” and therefore value-free, and yet to make all sorts of cherished policy pronouncements (since most economists would like at some point to get beyond their mathematical models and draw politically-relevant conclusions). Most economists would not be caught dead with an ethical system of principle, believing that this would detract from their “scientific” status.

And yet, remarkably and extraordinarily, Hans Hoppe has proven me wrong. He has done it: he has deduced an anarcho-Lockean rights ethic from self-evident axioms. Not only that: he has demonstrated that, just like the action axiom itself, it is impossible to deny or disagree with the anarcho-Lockean rights ethic without falling immediately into self-contradiction and self-refutation. In other words, Hans Hoppe has brought to political ethics what Misesians are familiar with in praxeology and Aristotelian-Randians are familiar with in metaphysics: what we might call “hard-core axiomatics.” It is self-contradictory and therefore self-refuting for anyone to deny the Misesian action axiom (that everyone acts), since the very attempt to deny it is itself an action. It is self-contradictory and therefore self-refuting to deny that Randian axiom of consciousness, since some consciousness has to be making this attempt at denial. For if someone cannot attempt to deny a proposition without employing it, he is not

only caught in an inextricable self-contradiction; he is also granting to that proposition the status of an axiom.

Hoppe was a student of the famous neo-Marxist German philosopher Jürgen Habermas, and his approach to political ethics is based on the Habermas-Apel concept of the “ethics of argumentation.” According to this theory, the very fact of making an argument, of trying to persuade a reader or listener, implies certain ethical precepts: e.g., recognizing valid points in an argument. In short, the fact/value dichotomy can be transcended: the search for facts logically implies that we adopt certain values or ethical principles.

Many libertarian theorists have recently gotten interested in this kind of ethics (e.g., the Belgian anarchist legal theorist Frank van Dun, and the British Popperian Jeremy Shearmut). But theirs is a “soft” kind of argumentation ethics, for the question may always arise why one should want to keep an argument or dialogue going. Hoppe has gone way beyond this by developing a hard-core axiomatic, praxeological twist to the discussion. Hoppe is interested, not so much in keeping the argument going, but in demonstrating that any argument whatsoever (including of course anti-anarcho-Lockean ones) must imply self-ownership of the body of both the arguer and the listeners, as well as a homesteading of property right so that the arguers and listeners will be alive to listen to the argument and carry it on.

In a sense, Hoppe’s theory is similar to the fascinating Gewirth-Pilon argument, in which Gewirth and Pilon (the former a liberal, the latter a minarchist libertarian) attempted to say the following. The fact that X acts demonstrates that he is asserting that he has the right to such action (so far so good!), and that X is also implicitly conceding to everyone else the same right. That conclusion, though soul-satisfying to libertarians, and similar to praxeology in its stress on action, unfortunately didn’t make it – for, as natural rights philosopher Henry Veatch pointed out in his critique of Gewirth: why should X grant anyone else’s rights? But stressing self-contradiction in the arguments of non-anarcho-Lockeans, Hoppe has solved the age old problem of generalizing an ethic for mankind.

Nevertheless, by coming out with a genuinely new theory (amazing in itself, considering the long history of political philosophy) Hoppe is in danger of offending all the intellectual vested interests of the libertarian camp. Utilitarians, who should be happy that value-freedom was preserved, will be appalled to find that Hoppean rights are even more absolutist and “dogmatic” than natural rights. Natural rightsers, while happy at the “dogmatism” will be unwilling to accept an ethic not grounded in the broad nature of things. Randians will be particularly upset because the Hoppean system is grounded (as was the Misesian) on the Satanic Immanuel Kant and his “synthetic a priori.” Randians might be mollified, however, to learn that Hoppe is influenced by a group of German Kantians (headed by mathematician Paul Lorenzen) who interpret Kant as a deeply realistic Aristotelian, in contrast to the Idealist interpretation common in the U.S.

As a natural rightser, I don't see any real contradiction here, or why one cannot hold to both the natural rights and the Hoppean rights ethic at the same time. Both rights ethics, after all, are grounded, like the realist version of Kantianism, in the nature of reality. Natural law, too, provides a personal and social ethic apart from libertarianism; this is an area that Hoppe is not concerned with. A future research program for Hoppe and other libertarian philosophers would be (a) to see how far axiomatics can be extended into other spheres of ethics, or (b) to see if and how this axiomatic could be integrated into the standard natural law approach. These questions provide fascinating philosophical opportunities. Hoppe has lifted the American movement out of decades of sterile debate and deadlock, and provided us a route for future development of the libertarian discipline.

Punishment & Proportionality: The Estoppel Approach

By: Stephen Kinsella

[Vol. 12 #1](#) Issue of the [Journal for Libertarian Studies](#)

Spring, 1996

I. Introduction

No doubt punishment serves many purposes. It can deter crime and prevent the offender from committing further crimes. Punishment can even rehabilitate some criminals, if it is not capital. It can satisfy a victim's longing for revenge, or his relatives' desire to avenge. Punishment can also be used as a lever to gain restitution, recompense for some of the damage caused by the crime. For these reasons, the

issue of punishment is, and always has been, of vital concern to civilized people. They want to know the effects of punishment and effective ways of carrying it out.

People who are civilized are also 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. Hence the interest in punishment theories. As pointed out by Murray Rothbard in his short but insightful discussion of punishment and proportionality, however, the theory of punishment has not been adequately developed, even by libertarians

In this article I will attempt to explain how punishment can be justified. The right to punish discussed herein applies to property crimes such as theft and trespass as well as to bodily-invasive crimes such as assault, rape, and murder. As will be seen, a general retributionist/retaliatory, or *lex talionis*, theory of punishment is advocated, including related principles of proportionality. This theory of punishment is largely consistent with the libertarian-based *lex talionis* approach of Murray Rothbard.

II. Punishment and Consent

What does it mean to punish? Dictionary definitions are easy to come by, but in the sense that interests those of us who want to punish, punishment is the infliction of physical force on a person, in response to something that he has done or has failed to do. Punishment thus comprises physical violence committed against a person's body, or against any other property that a person legitimately owns, against any rights that a person has. Punishment is for, or in response to, some action, inaction, feature, or status of the person punished; otherwise, it is simply random violence, which is not usually considered to be punishment. Thus when we punish a person, it is because we consider him to be a wrongdoer of some sort. We typically want to teach him or others a lesson, or exact vengeance or restitution, for what he has done.

If wrongdoers always consented to the infliction of punishment once they were convicted of a crime, we would not need to justify punishment—it would be justified by the very consent of the purported wrongdoer. As the great Roman jurist Ulpian hundreds of years ago summarized this common-sense insight, “there is no affront [or injustice] where the victim consents.” It is only when a person resists us, and refuses to consent to being punished, that the need to justify punishment arises. As John Hospers notes, what is troublesome about punishment “is that in punishing someone, we are forcibly imposing on him something against his will, and of which he may not approve.”

I will thus seek to justify punishment exactly where it needs to be justified: at the point at which we attempt to inflict punishment upon a person who opposes the punishment. In short, we may punish one

who has initiated force, in a manner proportionate to his initiation of force and to the consequences thereof, exactly because he cannot coherently object to such punishment. It makes no sense for him to object to punishment, because this requires that he maintain that the infliction of force is wrong, which is contradictory because he intentionally initiated force himself. Thus, he is estopped, to use related legal terminology, or precluded, from denying the legitimacy of his being punished, from withholding his consent. As shown below, this reasoning may be used to develop a theory of punishment.

III. Punishment and Estoppel

A. Legal Estoppel

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

For legal estoppel to operate, there usually must have been detrimental reliance by the person seeking to estop the other. A showing of detrimental reliance is required because, until a person has relied on another’s prior action or representation, the action or representation has not caused any harm to others and thus there is no reason to estop the actor from asserting the truth or from rejecting the prior conduct.

As an example, in the recent case *Zimmerman v. Zimmerman*, a daughter sued her father for tuition fee debts she had incurred during her second and third years at college. In this case, when the daughter attended a local college (Adelphi University). However, the promise was a “mere” promise, because it was not accompanied by the requisite legal formalities such as consideration, and therefore did not constitute a normally binding contract. Nevertheless, during her first year at college, her father paid her

tuition for her, as he had promised. However, he failed to pay her tuition during the second and third years, although he repeatedly assured her during this time that he would pay the tuition fees when he had the money. This resulted in the daughter's legal obligation to pay approximately \$6,700 to Adelphi. In this case, although the promise itself did not rise to an enforceable contract (because of lack of legal formalities such as consideration), it was found that the father should have reasonably expected that his daughter would rely on his promise, and that she did in fact rely on the promise, taking substantial action to her detriment or disadvantage (namely, incurring a debt to Adelphi). Therefore, the daughter was awarded an amount sufficient to cover the unpaid tuition. The father was, in effect, estopped from denying that a contract was formed, even though one was not.

B. Dialogical Estoppel

As can be seen, the heart of the idea behind legal estoppel is the idea of consistency. A similar concept, "dialogical estoppel," can be used to justify the libertarian conception of rights, because of the reciprocity inherent in the libertarian tenet that force is legitimate only in response to force. The basic insight behind this theory of rights is that a person cannot consistently object to being punished as if he has himself initiated force. He is (dialogically) "estopped" from asserting the impropriety of the force used to punish him, because of his own coercive behavior. This theory also establishes the validity of the libertarian conception of rights as being strictly negative rights against aggression, the initiation of force.

The point where punishment needs to be justified is when we attempt to inflict punishment upon a person who opposes the punishment. Thus, using a philosophical, generalized version of "dialogical" estoppel, I want to justify punishment in just this situation, by showing that an aggressor is estopped from objecting to his punishment. Under the principle of dialogical estoppel, or simply estoppel for short, a person is estopped from making certain claims during discourse if these claims are inconsistent and contradictory. To say that a person is estopped from making certain claims means that the claims cannot even possibly be right, because they are contradictory. It is to recognize that his assertion is simply wrong because it is contradictory.

Applying estoppel in such a manner perfectly complements the very purpose of dialogue. Dialogue, discourse, or argument—terms which are used interchangeably herein—is by its nature an activity aimed at finding truth. Anyone engaged in argument is necessarily endeavoring to discern the truth about some particular subject; to the extent this is not the case, there is no dialogue occurring, but mere babbling or even physical fighting. Nor can this be denied. Anyone engaging in argument long enough to deny that truth is the goal of discourse contradicts himself, because he is himself asserting or challenging the truth of a given proposition. Thus, the assertion as true of anything that simply cannot

be true is incompatible with the very purpose of discourse. Anything that cannot be true is contrary to the truth-finding purpose of discourse, and thus is not permissible within the bounds of the discourse.

And contradictions are certainly the archetype of propositions that cannot be true. A and not-A cannot both be true at the same time and in the same respect. This is why participants in discourse must be consistent. If an arguer need not be consistent, truth-finding cannot occur. And just as the traditional legal theory of estoppel mandates a sort of consistency in a legal context, the more general use of estoppel can be used to require consistency in discourse. The theory of estoppel that I propose is nothing more than a convenient way to apply the requirement of consistency to arguers, to those engaged in discourse, dialogue, debate, discussion, or argument. Because discourse is a truth-finding activity, any such contradictory claims should be disregarded, they should not be heard, since they cannot possibly be true. Dialogical estoppel is thus a rule of discourse that rules out of bounds any inconsistent, mutually contradictory claims, because they are contrary to the very goal of discourse. This rule is based solely on the recognition that discourse is a truth-seeking activity and that contradictions, which are necessarily untrue, are incompatible with discourse and thus should not be allowed. The validity of this rule is undeniable, because it is necessarily presupposed by any participant in discourse.

There are various ways that contradictions can arise in discourse. First, of course, an arguer's position might be explicitly inconsistent. For example, if a person states that A is true and that not-A is also true, there is no doubt that he is incorrect. A, after all, as Ayn Rand repeatedly emphasized, is A; the law of identity is indeed valid and unchallengeable. It is impossible for a person to coherently, intelligibly assert that two contradictory statements are true; it is impossible for these claims both to be true. Thus he is estopped from asserting them, he is not heard to utter them, because they cannot tend to establish the truth, which is the goal of all argumentation. As Wittgenstein noted, "Whereof one cannot speak, thereof one must be silent."

An arguer's position can also be inconsistent without explicitly maintaining that A and not-A are true. Indeed, rarely will an arguer assert both A and not-A explicitly. However, whenever an arguer states that A is true, and also necessarily holds that not-A is true, the inconsistency is still there, and he is still estopped from (explicitly) claiming that A is true and (implicitly) claiming that not-A is true. The reason is the same as above: the arguer cannot possibly be right that (explicit) A and (implicit) not-A are both true. He might be able to remove the inconsistency by dropping one of the claims. For example, suppose someone asserts that the concept of gross national product is meaningful, and a minute later states the exact opposite, apparently contradicting the earlier assertion. To avoid inconsistency, he can disclaim the earlier statement (thereby necessarily maintaining that his previous statement was incorrect). But it is not always possible to drop one of the assertions, if it is unavoidably presupposed as true by the arguer. For example, the speaker might argue that he never argues (or engages in discussion, discourse, and the like). However, since he is currently arguing, he must necessarily, implicitly hold that he sometimes

argues. We would not recognize the contradictory claims as permissible in the argument, because contradictions are untrue. He would be estopped from maintaining these two contradictory claims, one explicit and one implicit, and he could not drop the second claim—that he sometimes argues—for he cannot help but hold this view while engaged in argumentation itself. To maintain an arguable (i.e., possibly true) position, he would thus have to renounce his first claim, that he never argues.

Alternatively, if we were to argue with someone so incoherent as to claim that he does not believe that arguing is possible despite his engaging in it, he would still be estopped from asserting that argumentation is impossible. For even if he does not actually realize that argumentation is possible (or, what is more likely, does not admit it), still, it cannot be the case that argumentation is impossible if someone is indeed arguing. Thus, if someone asserts that argumentation is impossible, this assertion contradicts the undeniable presupposition of argumentation—that argumentation is possible. His proposition is untrue on its face, for it contradicts the undeniably true presupposition of proposition-making as such. Again, then, he would be estopped from asserting such a claim, since it is not even possibly true.

Thus, because dialogue is a truth-finding activity, participants are estopped from making explicitly contradictory assertions, since they subvert the goal of truth-seeking by being necessarily false. For the same reason, an arguer is estopped from asserting one thing if it contradicts something else that he necessarily maintains to be true, or if it contradicts something that is necessarily true because it is a presupposition of discourse or, indeed, if it is necessarily true as an undeniable feature of reality. No one can disagree with these general conclusions without self-contradiction, for anyone disagreeing with anything is a participant in discourse, and therefore necessarily values truth-finding and, therefore, consistency.

C. Punishing Aggressive Behavior

The conduct of individuals can be divided into two types: (1) coercive or aggressive (i.e., actions that are initiations of force) and (2) non-coercive or nonaggressive. This division is purely descriptive, and does not presume that aggression is invalid, immoral or unjustifiable; it only assumes that (at least some) human action can be objectively classified either as aggressive or nonaggressive. Thus, there are two types of behavior for which we might attempt to punish a person: aggressive and non-aggressive. I will examine each in turn to show that punishment of aggressive behavior is legitimate, and punishment of nonaggressive behavior is illegitimate.

The clearest and most severe instance of aggression is murder, so let us take this as an example. In what follows I will assume that the victim himself (B), or his agent, C, attempts to punish a purported wrongdoer A. The specific identity or nature of the agent C is not relevant for our purposes here.

Suppose that A murders B, and B's agent C convicts and imprisons A. Now, if A objects to his punishment, he is claiming that C ought not treat him this way. Otherwise, he fails to object. The ought is a "strict" one, since A claims that C must not punish him. By such normative talk, A claims he has a right to not be punished. In order to "object" to his punishment, A at the least must necessarily claim that the use of force is wrong (so that C should therefore not punish A). However, this claim is blatantly inconsistent with what must be his other position: because he murdered B, which is clearly an act of aggression, his actions have indicated that he (also) holds the view that "aggression is not wrong."

Thus A, because of his earlier action, is estopped from claiming that aggression is wrong. (And if he cannot even claim that aggression—the initiation of force—is wrong, then he cannot make the subsidiary claim that retaliatory force is wrong.) He cannot assert contradictory claims; he is estopped from doing so. The only way to maintain consistency is to drop one of his claims. If he retains (only) the claim "aggression is proper," then he is failing to object to his imprisonment, and thus the question of justifying the punishment does not arise. By claiming that aggression is proper, he consents to his punishment. If, on the other hand, he drops his claim that "aggression is proper" and retains (only) the claim "aggression is wrong," he indeed could object to his imprisonment; but, as we shall see below, it is impossible for him to drop his claim that "aggression is proper," just as it would be impossible for him to avoid maintaining that he exists or that he can argue.

To restate: A cannot consistently claim that murder is wrong, for it contradicts his view that murder is not wrong, evidence by or made manifest in his previous murder. He is estopped from asserting such inconsistent claims. Therefore, if C attempts to kill him, he has no grounds for objecting since he cannot now (be heard to say) that such a killing by C is "wrong," "immoral" or "improper." And if he cannot complain if C proposed to kill him, he surely cannot complain if C merely imprisons him.

Thus, we may legitimately apply force to, i.e. punish, a murderer, in response to his crime. Because the essence of rights is their legitimate enforceability, this establishes a right to life, i.e. to not be murdered. It is easy to see how this example may be extended to less severe forms of aggression, such as assault and battery, kidnapping, and rape.

D. Potential Defenses by the Aggressor

There are several possible objections to this whole procedure that A might assert. None of them bear scrutiny, however.

The Concept of Aggression. First, A might claim that our classification of actions as either aggressive or not is invalid. We might be smuggling in a norm or value judgment in describing murder as "aggressive," rather than merely describing the murder without evaluative overtones. This smuggled

norm might be what apparently justifies the legitimacy of punishing A, thus making the justification circular and therefore faulty. However, in order to object to our punishment of him, which is just the use of force against him, A must himself admit the validity of describing some actions as forceful—namely, his imminent punishment. If he denies that any actions can be objectively described as being coercive, he has no grounds to object to his punishment, for he cannot even be certain what constitutes punishment, and we may proceed to punish him. The moment he objects to this use of force, however, he cannot help admitting that at least some actions can be objectively classified as involving force. Thus, he is estopped from objecting on these grounds.

Universalizability. It could also be objected that the estoppel principle is being improperly applied, that A is not, in fact, asserting inconsistent claims. Instead of having the contradictory views that “aggression is proper” and “aggression is improper,” A could claim to instead hold the consistent positions that “aggression by me is proper” and “aggression by others against me, is improper.” However, we must recall that A, in objecting to C’s imprisonment of him, is engaging in argument. He is arguing that C should not—for some good reason—imprison him, and so he is making normative assertions. But as Professor Hans-Hermann Hoppe points out:

“Quite commonly it has been observed that argumentation implies that a proposition claims universal acceptability, or, should it be a norm proposal, that it is ‘universalizable.’ Applied to norm proposals, this is the idea, as formulated in the Golden Rule of ethics or in the Kantian Categorical Imperative, that only those norms can be justified that can be formulated as general principles which are valid for everyone without exception.”

This is so because propositions made during argumentation claim universal acceptability. “[I]t is implied in argumentation that everyone who can understand an argument must in principle be able to be convinced by it simply because of its argumentative force...” Universalizability is thus a presupposition of normative discourse, and any arguer violating the principle of universalizability is maintaining inconsistent positions (that universalizability is required and that it is not), and is thus estopped from doing so. Only universalizable norm propositions are consistent with the principle of universalizability necessarily presupposed by the arguer in entering the discourse.

The proper way, then, to select the norm that the arguer is asserting is to ensure that it is universalizable. The views that “aggression by me is proper” and “aggression by the state, against me, is improper” clearly do not pass this test. The view that “aggression is [or is not] proper” is, by contrast, perfectly universalizable, and is thus the proper form for a norm. An arguer cannot escape the application of estoppel by arbitrarily specializing his otherwise- inconsistent views with liberally-sprinkled “for me only’s.”

Furthermore, even if A denies the validity of the principle of universalizability and maintains that he can particularize his norms, he cannot object if C does the same. If he admits that norms may be particularized, C may simply act on the particular norm “It is permissible to punish A.”

Time. A could also attempt to rebut this application of estoppel by claiming that he, in fact, does currently maintain that aggression is improper; that he has changed his mind since the time when he murdered B. Thus, there is no inconsistency, no contradiction, because he does not simultaneously hold both contradictory ideas, and is not estopped from objecting to his imprisonment.

But this is a simple matter to overcome. First, A is implicitly claiming that the passage of time should be taken into account when determining what actions to impute to him. But then, if this is true, all C need do is administer the punishment, and afterwards assert that all is in the past, that C, like A, now condemns its prior action, but since it is in the past it can no longer be imputed to C. Indeed, if such an absurd simultaneity requirement is operative, at every successive moment of the punishment, any objection or defensive action by A is directed at actions in the (immediate) past, and thus become immediately irrelevant and past-directed. Thus it is that the irrelevance of the mere passage of time cannot be denied by A. For in order to effectively object to being punished, he must presume that the passage of time does not make a difference to imputing responsibility-incurring actions to individuals.

Second, in objecting to his punishment in the present, A necessarily maintains that force must not and should not occur. Even if A really does no longer believe that murder is proper, by his own current view his earlier murder was still improper, and A necessarily denounces his earlier actions, and is estopped from objecting to the punishment of that murderer (i.e. himself), for to maintain that a murderer should not be punished is inconsistent with a claim that murder should not, must not, occur.

Third, even if A argues that he never did hold the view that “murder is not wrong,” that he murdered despite the fact that he held it to be wrong, A still admits that murder is wrong, and that he murdered B, and still ends up denouncing his earlier action. Thus he is again estopped from objecting to his punishment, as in the situation where he claims to have changed his mind. Finally, if A maintains that it is possible to administer force while simultaneously holding it to be wrong, the same applies to C. So even if C is convinced by A’s argument that it would be wrong to punish A, C may go ahead and do so despite this realization, just as A himself claims to have done.

Thus, whether A currently holds both views, or only one of them, he is still estopped from objecting to his imprisonment.

E. Punishing Nonaggressive Behavior

As seen above, it is punishment of aggression that can be justified, basically because the use of force in response to force cannot sensibly be condemned. Is it ever legitimate to punish someone for nonaggressive behavior? If not, then this means that rights can only be negative rights against the initiation of force. As argued below, no such punishment is ever justified, because punishment is the application of force, to which a person is not estopped from objecting unless he, too, has used force. There is no inconsistency otherwise.

First, a nonaggressive use of force, such as retaliation against aggression, cannot be justly punished. If someone were to attempt to punish B for retaliating against A, an aggressor, B is not estopped from objecting, for there is nothing inconsistent or non-universalizable about maintaining both (1) use of force in response to the initiation of force, i.e. retaliatory force, is proper (the implicit claim involved in retaliation against A); and (2) use of force not in response to the initiation of force is wrong (the basis for B's objection to his own punishment). B can easily show that the maxim of his action is "the use of force against an aggressor is legitimate," which does not contradict "the use of force against nonaggressors is illegitimate." Rather than being a particularizable claim that does not pass the universalizability test, B's position is tailored to the actual nature of his prior action. The universalizability principle prevents only arbitrary, biased statements not grounded in the nature of things. Thus, the mere use of force is not enough to estop someone from complaining about being punished for the use of force. It is only aggression, i.e. initiatory force, that estops someone from complaining about force used against him.

Similarly, if A uses force against B with B's permission, A is not an aggressor and thus may not be punished. A may consistently assert that "using force against someone is permissible if they have consented" and that "using force against someone is impermissible if they have not consented." These are not inconsistent statements, and the former statement is not barred by the universalizability principle, because it rests on the recognition that the nature of a consented-to act is different than one objected to. Other actions, such as the publishing of a book or pornography, do not involve force or aggression at all, and thus there is no ground for punishing this behavior either, as such a non-aggressor may consistently object to punishment.

F. Property Rights

Thus far the right to punish for initiatory invasions of victims' bodies has been established, which entails a right in one's own body, or self-ownership. Although there is not space here to provide a detailed justification for rights in scarce resources outside one's body—property rights—I will briefly outline such a justification. Because rights in one's own body have been established, property rights may be established by building on this base. This may be done by pointing out that rights in one's body are meaningless without property rights, and vice-versa. This can be illustrated by the following example.

Imagine that A, a thief, admits that there are rights to self-ownership, but that there is no right to property. But if this is true, we can easily execute A simply by depriving him of external property, namely food, air, and/or space in which to exist or move. Clearly, the denial of a person's property through the use of force can physically harm his body just as direct invasion of the borders of his body can. The physical, bodily damage can be done fairly directly, for example by snatching every piece of food out of a person's hands (why not, if there are no property rights?) until he dies. Or it can be done somewhat more indirectly, by infringing upon a person's ability to control and use the external world, which is essential to survival. Such property-deprivation could continue until A's body is severely damaged, implying that physical retaliation in response to a property crime is permissible, or until A objected to such treatment, thereby granting the existence of property rights (for this can be the only grounds for his objection to being denied property). Just as one can aggress against another with one's body (e.g., one's fist) or external property (a club or gun), so one's self-ownership rights can be aggressed against by affecting his property and external environment.

Professor Hoppe's "argumentation ethics" defense of individual rights also shows that the right to homestead is implied in the right to self-ownership. First, Hoppe establishes self-ownership by focusing on propositions that cannot be denied in discourse in general. Anyone engaging in argumentation implicitly accepts the presupposed right of self-ownership of all listeners and even potential listeners, for otherwise the listener would not be able to consider freely and accept or reject the proposed argument. Second, because participants in argumentation indisputably need to use and control the scarce resources in the world to survive, and because their scarcity makes conflict over their use possible, norms are needed to determine the proper owner of these goods so as to avoid conflict. This necessity for norms to avoid conflicts in the use of scarce resources is itself undeniable by those engaged in argumentation, because anyone who is alive in the world and participating in the practical activity of argumentation cannot deny the value of being able to control scarce resources and the value of avoiding conflicts over such scarce resources. But there 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.

As Hoppe points out, since one's body is itself a scarce resource, it is "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." Thus, the right to homestead external scarce resources is implied in the fact of self-ownership, since "the specifications of the nonaggression principle, conceived of as a special property norm referring to a specific kind of good, must in fact already contain those of a general theory of property." For these reasons, whether self-ownership is established by Hoppe's argumentation ethics

or by the estoppel theory—both theories that focus on the dynamics of discourse—such rights imply the Lockean right to homestead, which no aggressor could deny any more than he could deny that self-ownership rights exist.

I will, for the remainder of this paper, place property rights and rights in one's body on the same level. Thus it is that under the estoppel theory one who aggresses against another's body or against another's external property is an aggressor, plain and simple, who may be treated as such.

IV. Types of Punishment and the Burden of Proof

A. Proportional Punishment

Just because aggressors can legitimately be punished does not necessarily mean that all concerns about proportionality may be dropped. At first blush, if we focus only on the initiation of force itself, it would seem that a victim could make a prima facie case that, since the aggressor initiated force—no matter how trivial—the victim is entitled to use force against the aggressor, even including execution of the aggressor. Suppose A uninvitedly slaps B lightly on the cheek for a rude remark. Is B entitled to execute A in return? A, it is true, has initiated force, so how can he complain if force is to be used against him? But A is not estopped from objecting to being killed. A may perfectly consistently object to being killed, since he may maintain that it is wrong to kill. This in itself is not inconsistent with A's implicit view that it is legitimate to lightly slap others. By sanctioning slapping, A does not necessarily claim that killing is proper, because usually (and in this example) there is nothing about slapping that rises to the level of killing.

It is proper to focus on the consequences of aggression in determining to what extent an aggressor is estopped, because the very reason people object to aggression, or wish to punish aggressors for it, is just because it has certain consequences. Aggressive action, by physically interfering with the victim's person, is undesirable because, among other reasons, it can cause pain, or injury, or can interfere with the pursuit of goals in life, or because it simply creates a risky, dangerous situation in which pain or injury or violence is more likely to result. Aggression interferes with one's physical control over one's life, i.e. over one's own body and external property.

Killing someone brings about the most undesirable level of these consequences. Merely slapping someone, by contrast, does not, in normal circumstances. A slap has relatively insignificant consequences in all these respects, and thus A does not necessarily claim that aggressive killing is proper

just because he slaps B. The universalization requirement does not prevent him from reasonably narrowing his implicit claim from the more severe “aggression is not wrong” to the less severe “minor aggression, such as slapping someone, is not wrong.” Thus B would be justified in slapping A back, but not in murdering A. I do not mean that B is justified only in slapping A and no more, but certainly B is justified at least in slapping A, and is not justified in killing him.

In general, while the universalization principle prevents arbitrary particularization of claims—e.g., adding “for me only’s”—it does not rule out an objective, reasonable statement of the implicit claims of the aggressor, tailored to the actual nature of the aggression and its necessary consequences and implications. For example, while it is true that A has slapped B, he has not attempted to take a person’s life; thus he has never necessarily claimed that “murder is not wrong,” so he is not estopped from asserting that murder is wrong. Since a mere slapper is not estopped from complaining about his imminent execution, he can consistently object to being executed, which implies that B would become a murderer if he were to kill A.

In this way we can see a requirement of proportionality—or, more properly, of reciprocity, along the lines of the *lex talionis*, the law of retaliation, of eye-for-an-eye—accompanies any legitimate punishment of an aggressor. “As the injury inflicted, so must be the injury suffered.” There are thus limitations to the amount of punishment the victim may administer to the aggressor, related to the extent of the aggression committed by the aggressor, because it is the nature of the particular act of aggression that determines the extent of the estoppel working against the aggressor. The more serious the aggression and the consequences that flow from it, the more the aggressor is estopped from objecting to, and consequently the greater the level of punishment that may legitimately be applied.

B. The Victim’s Options

At this point we have established the basic right to one’s body and to property homesteaded or acquired from a homesteader, as well as the contours of the basic requirement of proportionality in punishment. We now further consider the various types of punishment that can be justly administered.

As has been shown, a victim of aggression may inflict on the aggressor at least the same level or type of aggression, although proportionality imposes some limits on the permissible level of retaliation. In determining the maximum amount and type of punishment that may be applied, the distinction between victim and victimizer must be kept in mind, and we must recognize that, for most victims (i.e. those who are not masochists), punishing the wrongdoer does not genuinely make the victim whole and does not directly benefit the victim very much, if at all. A victim who has been shot in the arm by a robber and who has thus lost his arm is clearly entitled, if he wishes, to amputate the robber’s own arm. But this, of

course, does not restore the victim's arm; it does not make him whole. Perfect restitution is always an unreachable goal, for crimes cannot be undone.

This is not to say that the right to punish is therefore useless, but we must recognize that the victim remains a victim even after retaliating against the wrongdoer. No punishment can undo the harm done. For this reason the victim should not be artificially or easily restricted in his range of punishment options, because this would be to further victimize him. The victim did not choose to be made a victim, did not choose to be placed in a situation where he has only one narrow punishment option (namely, eye-for-an-eye retaliation). On the contrary, the responsibility for this situation is entirely that of the aggressor, who by his action has damaged the victim. Because the aggressor has placed the victim in a no-win situation where being restricted to one narrow type of remedy may recompense the victim even less than other remedies, the aggressor is estopped from complaining if the victim chooses among varying types of punishment, subject to the proportionality requirement.

In practice this means that, for example, the victim of assault and battery need not be restricted to only having the aggressor beaten (or even killed). The victim may abhor violence, and might choose to forego any punishment at all if his only option was to either beat or punish the aggressor. The victim may prefer, instead, to simply be compensated monetarily out of any (current or future) property of the wrongdoer. If the victim will gain more satisfaction from using force against the aggressor in a way different than the manner in which the aggressor violated the victim's rights (e.g. taking property of an aggressor who has beat the victim), the aggressor is clearly estopped from complaining about this, as long as proportionality is satisfied.

The non-equivalence of most violent crimes makes this conclusion clearer. Suppose that A, a man, rapes B, a woman. B would be entitled at least to rape A back, or to have A raped by a professional, private punishing company. But the last thing in the world that a rape victim might want is to be involved in further sexual violence, and thus this alone would give her a right to insist on other forms of punishment. To limit her remedy to having A raped would thus be to inflict further damage on her. B can never be made whole, but at least her best remedy (in her opinion) of a variety of imperfect remedies need not be denied her. She has done nothing to justify denying her such options. And in addition, in this case there simply is no equivalent. The only remotely similar equivalent is forcible anal rape of A, but even this is vastly different from rape of a woman. If nothing else, a woman might reasonably consider rape much more of a violation than would a man "similarly" treated, for these give rise to different consequences for the victim. Thus, if there is no possibility of exact "eye-for-an-eye" style retaliation for a given act of aggression, such as is the case with rape, then either (1) B may not punish A, or (2) B may punish A in another manner. Clearly, the latter alternative is the correct one, for a rapist is estopped from denying the right of his victim to punish him, and is also estopped from claiming a benefit due to there being no equivalent punishment, because this lack of the availability of an equivalent

punishment is a direct result of A's aggression. If B acts to mitigate the damage done to her by A (which includes not only the rape, but placing B in a situation where her remedies will all be inadequate, and where there is not even an equivalent punishment possible), A is estopped from objecting. Thus, for example, B may choose, instead, to have A's penis amputated, or even his arm or leg. Or B may choose instead to have A publicly flogged, displayed, and imprisoned for some length of time, or even enslaved for a time and put to work earning money for B. Alternatively, B may threaten A with the most severe punishment she has the right to inflict, and allow A to buy his way out of the punishment (or reduce its severity) with as much money as he is able or willing to offer.

Further, even if such rape of a man is somewhat equivalent to the rape of a woman, the rape of an innocent person (B) is typically much more of an offense than is a similar violation of a criminal (A) who evidently does not abhor aggression as much. A may even be a masochist and enjoy being beaten or sodomized, so a literally equal amount of punishment of A would not damage A as badly as A damaged B. A is also likely used to a lifestyle where force is used more routinely, so that "equal" punishment of A would not damage A to the extent it would damage B, who is unused to such violence. Thus B is entitled to inflict a greater amount of punishment on A than A inflicted on B, if only to more or less equalize the actual level of damage inflicted. Thus, if A permanently damages B's arm, B may be entitled to damage both of A's arms, or even all of A's limbs. (Just how much greater the punishment may be than the original aggression, and how this is determined, is discussed in further detail in Part IV.C, below.)

Similarly, a victim is entitled instead forcibly to take a certain amount or portion of the aggressor's property, if the punishment this would inflict on the aggressor would better satisfy the victim, or if the victim prefers this remedy for any reason at all, including greed, malice, or sadism. Of course, a mixture would be permissible as well. In response to rape, the victim might seize all of the ravisher's \$10,000 estate, have him publicly beaten, and enslaved for some number of years until his forced labor earns her \$100,000 more (assuming that this overall level of punishment is roughly equivalent to the rape).

Along the same lines, a property aggressor, such as a thief, may be dealt with any number of ways. The victim may satisfy himself solely out of the aggressor's property, if this is possible, or through corporal punishment of the aggressor, if this better satisfies the victim (as discussed in further detail below). In short, any rights or combinations of rights of an aggressor may be ignored by a victim in punishing the aggressor (implying that the aggressor actually does not have these purported "rights"), as long as general bounds of proportionality are considered.

Other factors may be considered that increase the amount of punishment that may be inflicted on the aggressor, over and above the type of damage initially inflicted by the aggressor. As explained above with regard to rape, aggression against an innocent, peaceful person may cause more psychic damage to the victim than would an equivalent action against the aggressor. Also, as Rothbard explains, a criminal, such as a thief A, has not only stolen something from the victim B, he has "also put B into a state of fear

and uncertainty, of uncertainty as to the extent that B's deprivation would go. But the penalty levied on A is fixed and certain in advance, thus putting A in far better shape than was his original victim." The criminal has also imposed other damages such as interest, and even general costs of crime prevention (for who can such costs be blamed on and recouped from, if not criminals, when caught?). As Kant pointed out, "whoever steals anything makes the property of all insecure."

This method of analyzing whether a proposed punishment is proper also makes it clear just why threat of violence or assault is properly treated as an aggressive crime. Assault is defined as putting someone in fear of receiving a battery (physical beating). Suppose A assaults B, such as by pointing a gun at him or threatening to beat him. Clearly B is entitled to do to A what A has done to B—A is estopped from objecting to the propriety of being threatened, i.e. assaulted. But what does this mean? To assault is to manifest an intent to cause harm, and to apprise B of this, so that he believes A (otherwise it is something like a joke or acting, and B is not actually in apprehension of being coerced). A was able to put B in a state of fear by threatening B. But because of the nature of assault, the only way B can really make A fear a retaliatory act by B is if B really means it and is able to convince A of this fact. Thus B must actually be (capable of being) willing to carry out the threatened coercion of A, not just mouth the words, otherwise A will know B is merely engaged in idle threats, merely bluffing. Indeed, B can legitimately go forward with the threatened action if only to make A believe it, so that he is actually assaulted. Although A need not actually use force to assault B, there is simply no way for B to assault A in return without actually having the right to use force against A. Because the whole situation is caused by A's action, he is estopped from objecting to the necessity of B using force against him.

General bounds of proportionality are also satisfied when the consequences and potential consequences to the victim that are caused by the aggression are taken into account. Thus, some crimes may be punished capitally if their consequences are serious enough, for example stealing a man's horse when his survival depends on it, as was done in the frontier West for the same reason. (This is one point on which I disagree with Rothbard, however, who argues that "it should be quite clear that, under libertarian law, capital punishment would have to be confined strictly to the crime of murder. For a criminal would only lose his right to life if he had first deprived some victim of that same right. It would not be permissible, then, for a merchant whose bubble-gum had been stolen, to execute the convicted bubble-gum thief." For one could imagine rare situations where theft of bubble-gum could legitimately be punished by execution, if the theft endangered the life of its owner.)

Aggression can also be in the form of a property crime. For example, where A has stolen \$10,000 from B, B is entitled to recoup \$10,000 of A's property. However, the recapture of the first \$10,000 is not punishment of A, but merely the recapture by B of his own property. B then has the right to take another \$10,000 of A's property, or even a higher amount if the \$10,000 stolen from B was worth much more to B than to A (for example, if A has a higher time preference or less significant plans to use the money

than B, which is likely, or if A has more money than B, which is unlikely). This amount may also be enhanced to take into account other damages such as interest, general costs of crime prevention, and also for putting the victim into a state of fear and uncertainty. It may also be enhanced to account for the uncertainty of knowing what the exact amount of retaliation or restitution ought to be, as this uncertainty is A's fault, not B's. Alternatively, at the victim's option, corporal punishment may be administered by B instead of taking back his own \$10,000—indeed, this may be the only option in instances where the thief is penniless, the stolen property spent or destroyed.

Thus, the victim of a violent crime has the right to select different mixtures and types of punishments. The actual extent or severity of punishment that may be permissibly inflicted, consistent with principles of proportionality, and the burden of proof in this regard, is discussed in the following section.

C. The Burden of Proof

Theories of punishment are concerned with justifying punishment, with offering decent men who are reluctant to act immorally a reason why they may punish others. This is useful, of course, for offering moral men guidance and assurance that they may properly deal with those who seek to harm them. We have established so far a prima facie case for the right to proportionately punish an aggressor in response to acts of violence, actions which invade the borders of others' bodies or legitimately acquired property. Once this burden is carried, however, it is just to place the burden of proof on the aggressor to show why a proposed punishment of him is disproportionate or otherwise unjustified.

As pointed out above, because it is the aggressor who has put the victim into a situation where the victim has a limited variety and range of remedies, the aggressor is estopped from complaining if the victim uses a type of force against the aggressor that is different from the aggressor's use of force. The burden of proof and argument is therefore on the aggressor to show why any proposed, creative punishment is not justified by the aggressor's aggression. Otherwise an additional burden is being placed on the victim, in addition to the harm already done him. If the victim wants to avoid shouldering this additional burden, the aggressor is estopped from objecting because it was the aggressor who placed the victim in the position of having the burden in the first place. If there is a gray area, the aggressor ought not be allowed to throw his hands up in mock perplexity and escape liability; rather, the line ought to come down on the side of the gray that most favors the victim, unless the aggressor can further narrow the gray area with convincing theories and arguments, for the aggressor is the one who brings the gray into existence.

Similarly with the issue of proportionality itself. Although proportionality or reciprocity is a requirement in general, if a prima facie case for punishment can be established (as it can be whenever force is initiated), the burden of proof lies with the aggressor to demonstrate that any proposed use of force, even including execution, mutilation, or enslavement, exceeds bounds of proportionality. As mentioned

above, in practice there are several clear areas: murder justifies execution; minor, non-armed, non-violent theft does not. But there are indeed gray areas in which it is difficult, if not impossible, to precisely delimit the exact amount of maximum permissible punishment. But again, this uncertain situation, this grayness, is caused by the aggressor. The victim is placed in a quandary, and might underpunish, or underutilize his right to punish, if he has to justify how much force he can use. Or he might have to expend extra resources in terms of time or money (e.g. to hire a philosopher or lawyer to figure out exactly how much punishment is warranted), which would impermissibly increase the total harm done to the victim. It is indeed difficult to determine the bounds of proportionality in many cases. But we do know one thing: force has been initiated against the victim, and thus force, in general, may be used against the victimizer. Other than for easy or established cases, any ambiguity or doubt must be resolved in favor of the victim, unless the aggressor bears his burden of argument to explain why the proposed punishment exceeds his own initial aggression.

Thus, several factors may be taken into account in coming up with an appropriate punishment. Suppose that an aggressor kidnaps and cuts off the hand of the victim. The victim is clearly entitled to do the same to the aggressor. But if the victim wishes to cut off the aggressor's foot instead (for some reason), he is, *prima facie*, entitled to do this. The victim would also be entitled to cut off both of the aggressor's hands, unless the aggressor could explain why this is a higher amount of coercion than his own. (I admit it is difficult to know how this argument would proceed, or even what would qualify as a good argument. But such concerns are the aggressor's worry, not the victim's, and there is an easy way to avoid being placed in this position: do not initiate force against your fellow man.) Merely cutting off one of the aggressor's hands might actually not be as extreme as was the aggressor's own action. For example, the victim may have been a painter. Thus the consequence of the aggressive violence might be that, in addition to endangering the victim's very life and causing pain, the victim suffers a huge amount of mental and financial damage. It might take cutting off all four of the aggressor's limbs, or even decapitating him, to inflict that much damage on him. We know that it is permissible to employ violence against an aggressor. How much? Let the aggressor bear the burden of figuring this out.

As mentioned above with respect to rape, the victim may be squeamish about violence itself and thus recoil at the idea of eye for an eye. If that is the victim's nature, he should not be penalized further by being forced to administer *lex talionis*. The aggressor must take his victim as he finds him, and is estopped from complaining because he placed the victim in the situation where the victim's special preferences can only be satisfied by a non-reciprocal punishment. Thus, the victim may instead choose to seize a certain portion of the aggressor's property. The amount of the award that is "equal" to the damage done is of course difficult to determine, but, if nothing else, similar principles could be used as are used in today's tort and criminal justice system. If the amount of damages is uncertain or seems "too high," it must be recalled that the aggressor himself originated this state of uncertainty, and thus he cannot now be heard to complain about it.

Alternatively, a more objective damage award could be determined by the victim bargaining away his right to inflict corporal punishment against the aggressor in return for some or all of the aggressor's property. This might be an especially attractive (or the least unattractive) alternative for a person victimized by a very rich aggressor. The established award for chopping someone's hand off might normally be, say, \$1 million. However, this would mean that a billionaire could commit such crimes with impunity. Under the estoppel view of punishment, the victim, instead of taking \$1 million of the aggressor's money, could kidnap the aggressor, and threaten to exercise his right to, say, chop off both of the aggressor's arms, slowly, and with pain. A billionaire may be willing to trade half, or even all, his wealth, to escape this punishment.

For poor aggressors, there is no property to take as restitution, and the mere infliction of pain on the aggressor may not satisfy some victims. They would be entitled to enslave the aggressor, or sell him into slavery or for medical testing, to yield the best profit possible.

Clearly the ways in which punishment can be administered are rich and various, but all the typically-cited goals of punishment could be accommodated under this view of punishment. Criminals could be incapacitated and deterred, even rehabilitated, perhaps, according to the victim's choice. Restitution could be obtained in a variety of ways, or, if the victim so chooses, retribution or revenge. Though it is difficult to precisely determine the boundaries of proportionately, justice requires that the aggressor be held responsible for the dilemma he has created as well as for the aggression he has committed.

The Ethics & Economics of Private Property

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October 15th, 2004

I. The Problem of Social Order

Alone on his island, Robinson Crusoe can do whatever he pleases. For him, the question concerning rules of orderly human conduct—social cooperation—simply does not arise. Naturally, this question can only arise once a second person, Friday, arrives on the island. Yet even then, the question remains largely irrelevant so long as no *scarcity* exists. Suppose the island is the Garden of Eden; all external goods are available in superabundance. They are “free goods,” just as the air that we breathe is normally a “free” good. Whatever Crusoe does with these goods, his actions have repercussions *neither* with respect to his own future supply of such goods *nor* regarding the present or future supply of the same goods for Friday (and *vice versa*). Hence, it is impossible that there could ever be a conflict between Crusoe and Friday concerning the use of such goods. A conflict is only possible if goods are scarce. Only then will there arise the need to formulate rules that make orderly—conflict-free—social cooperation possible.

In the Garden of Eden only two scarce goods exist: the physical body of a person and its standing room. Crusoe and Friday each have only one body and can stand only at one place at a time. Hence, even in the Garden of Eden conflicts between Crusoe and Friday can arise: Crusoe and Friday cannot occupy the same standing room simultaneously without coming thereby into physical conflict with each other. Accordingly, even in the Garden of Eden rules of orderly social conduct must exist—rules regarding the proper location and movement of human bodies. And outside the Garden of Eden, in the realm of scarcity, there must be rules that regulate not only the use of personal bodies but also of *everything* scarce so that *all* possible conflicts can be ruled out. This is the problem of social order.

II. The Solution: Private Property and Original Appropriation

In the history of social and political thought, various proposals have been advanced as a solution to the problem of social order, and this variety of mutually inconsistent proposals has contributed to the fact

that today's search for a single "correct" solution is frequently deemed illusory. Yet as I will try to demonstrate, a correct solution exists; hence, there is no reason to succumb to moral relativism. The solution has been known for hundreds of years, if not for much longer. In modern times this old and simple solution was formulated most clearly and convincingly by Murray N. Rothbard.

Let me begin by formulating the solution—first for the special case represented by the Garden of Eden and subsequently for the general case represented by the "real" world of all-around scarcity—and then proceed to the explanation of why this solution, and no other, is correct.

In the Garden of Eden, the solution is provided by the simple rule stipulating that everyone may place or move his own body wherever he pleases, *provided only that no one else is already standing there and occupying the same space*. And outside of the Garden of Eden, in the realm of all-around scarcity the solution is provided by this rule: Everyone is the proper owner of his own physical body as well as of all places and nature-given goods that he occupies and puts to use by means of his body, *provided that no one else has already occupied or used the same places and goods before him*. This ownership of "originally appropriated" places and goods by a person implies his right to use and transform these places and goods in any way he sees fit, *provided that he does not thereby forcibly change the physical integrity of places and goods originally appropriated by another person*. In particular, once a place or good has been first appropriated, in John Locke's words, by "mixing one's labor" with it, ownership in such places and goods can be acquired only by means of a voluntary—contractual—transfer of its property title from a previous to a later owner.

In light of wide-spread moral relativism, it is worth pointing out that this idea of original appropriation and private property as a solution to the problem of social order is in complete accordance with our moral "intuition." Is it not simply absurd to claim that a person should *not* be the proper owner of his body and the places and goods that he originally, i.e., *prior* to anyone else, appropriates, uses and/or produces by means of his body? For who else, if not he, should be their owner? And is it not also obvious that the overwhelming majority of people—including children and primitives—in fact act according to these rules, and do so as a matter of course?

Moral intuition, as important as it is, is not proof. However, there also exists proof of the veracity of our moral intuition.

The proof is two-fold. On the one hand, the consequences that follow if one were to deny the validity of the institution of original appropriation and private property are spelled out: If person A were *not* the owner of his own body and the places and goods originally appropriated and/or produced with this body as well as of the goods voluntarily (contractually) acquired from another previous owner, then only two alternatives would exist. Either *another* person, B, must be recognized as the owner of A's body as well as

the places and goods appropriated, produced or acquired by A, or *both* persons, A *and* B, must be considered equal co-owners of all bodies, places and goods.

In the first case, A would be reduced to the rank of B's slave and object of exploitation. B would be the owner of A's body and all places and goods appropriated, produced and acquired by A, but A in turn would not be the owner of B's body and the places and goods appropriated, produced and acquired by B. Hence, under this ruling two categorically distinct classes of persons would be constituted—

Untermenschen such as A and *Uebermenschen* such as B—to whom different “laws” apply. Accordingly, such ruling must be discarded as a human ethic equally applicable to everyone *qua* human being (rational animal). From the very outset, any such ruling is recognized as not universally acceptable and thus cannot claim to represent law. For a rule to aspire to the rank of a law—a *just* rule—it is necessary that such a rule apply equally and universally to everyone.

Alternatively, in the second case of universal and equal co-ownership, the requirement of equal law for everyone would be fulfilled. However, this alternative would suffer from an even more severe deficiency, because if it were applied, all of mankind would instantly perish. (Since every human ethic must permit the survival of mankind, this alternative must also be rejected.) Every action of a person requires the use of some scarce means (at least of the person's body and its standing room), but if all goods were co-owned by everyone, then no one, at no time and no place, would be allowed to do anything unless he had previously secured every other co-owner's consent to do so. Yet how could anyone grant such consent were he not the exclusive owner of his own body (including his vocal chords) by which means his consent must be expressed? Indeed, he would first need another's consent in order to be allowed to express his own, but these others could not give their consent without having first his, and so it would go on.

This insight into the praxeological impossibility of “universal communism,” as Rothbard referred to this proposal, brings me immediately to an alternative way of demonstrating the idea of original appropriation and private property as the only correct solution to the problem of social order. Whether or not persons have any rights and, if so, which ones, can only be decided in the course of argumentation (propositional exchange). Justification—proof, conjecture, refutation—is *argumentative* justification. Anyone who denied this proposition would become involved in a performative contradiction because his denial would itself constitute an argument. Even an ethical relativist would have to accept this first proposition, which is referred to accordingly as the *apriori of argumentation*.

From the undeniable acceptance—the axiomatic status—of this a priori of argumentation, two equally necessary conclusions follow. First, it follows from the a priori of argumentation when there is *no* rational solution to the problem of conflict arising from the existence of scarcity. Suppose in my earlier scenario of Crusoe and Friday that Friday were not the name of a man but of a gorilla. Obviously, just as Crusoe could face conflict regarding his body and its standing room with Friday the man, so

might he with Friday the gorilla. The gorilla might want to occupy the same space that Crusoe already occupied. In this case, at least if the gorilla were the sort of entity that we know gorillas to be, there would be no rational solution to their conflict. Either the gorilla would push aside, crush, or devour Crusoe—that would be the gorilla’s solution to the problem—or Crusoe would tame, chase, beat, or kill the gorilla—that would be Crusoe’s solution. In this situation, one might indeed speak of moral relativism. However, it would be more appropriate to refer to this situation as one in which the question of justice and rationality simply would not arise; that is, it would be considered an extra-moral situation. The existence of Friday the gorilla would pose a technical, not a moral, problem for Crusoe. He would have no other choice than to learn how to successfully manage and control the movements of the gorilla just as he would have to learn to manage and control other inanimate objects of his environment.

By implication, only if both parties in a conflict are capable of engaging in argumentation with one another, can one speak of a moral problem and is the question of whether or not there exists a solution to it a meaningful question. Only if Friday, regardless of his physical appearance, is capable of argumentation (even if he has shown himself to be capable only once), can he be deemed rational and does the question whether or not a correct solution to the problem of social order exists make sense. No one can be expected to give *any* answer to someone who has never raised a question or, more to the point, who has never stated his own relativistic viewpoint in the form of an argument. In that case, this “other” cannot but be regarded and treated as an animal or plant, i.e., as an extra-moral entity. Only if this other entity can pause in his activity, whatever it might be, step back, and say “yes” or “no” to something one has said, do we owe this entity an answer and, accordingly, can we possibly claim that our answer is the correct one for both parties involved in a conflict.

Moreover, it follows from the a priori of argumentation that everything that must be presupposed in the course of an argumentation as the logical and praxeological precondition of argumentation cannot in turn be argumentatively disputed as regards its validity without becoming thereby entangled in an internal (performative) contradiction.

Now, propositional exchanges are not made up of free-floating propositions, but rather constitute a specific human activity. Argumentation between Crusoe and Friday requires that both have, and mutually recognize each other as having, exclusive control over their respective bodies (their brain, vocal chords, etc.) as well as the standing room occupied by their bodies. No one could propose anything and expect the other party to convince himself of the validity of this proposition or deny it and propose something else unless his and his opponent’s right to exclusive control over their respective bodies and standing rooms were presupposed. In fact, it is precisely this mutual recognition of the proponent’s as well as the opponent’s property in his own body and standing room which constitutes the *characteristicum specificum* of all propositional disputes: that while one may not agree regarding the validity of a specific proposition, one can agree nonetheless on the fact that one disagrees. Moreover, this

right to property in one's own body and its standing room must be considered *a priori* (or indisputably) justified by proponent and opponent alike. Anyone who claimed any proposition as valid vis-à-vis an opponent would already presuppose his and his opponent's exclusive control over their respective body and standing room simply in order to say "I claim such and such to be true, and I challenge you to prove me wrong."

Furthermore, it would be equally impossible to engage in argumentation and rely on the propositional force of one's arguments if one were not allowed to own (exclusively control) other scarce means (besides one's body and its standing room). If one did not have such a right, then we would all immediately perish and the problem of justifying rules—as well as any other human problem—would simply not exist. Hence, by virtue of the fact of being alive property rights to other things must be presupposed as valid, too. No one who is alive can possibly argue otherwise.

If a person were not permitted to acquire property in these goods and spaces by means of an act of original appropriation, i.e., by establishing an objective (intersubjectively ascertainable) link between himself and a particular good and/or space prior to anyone else, and if instead property in such goods or spaces were granted to late-comers, then no one would ever be permitted to begin using any good unless he had previously secured such a late-comer's consent. Yet how can a late-comer consent to the actions of an early-comer? Moreover, every late-comer would in turn need the consent of other and later later-comers, and so on. That is, neither we, our forefathers, nor our progeny would have been or would be able to survive if one followed this rule. However, in order for any person—past, present or future—to argue anything, survival must be possible; and in order to do just this property rights cannot be conceived of as being timeless and unspecific with respect to the number of persons concerned. Rather, property rights must necessarily be conceived of as originating by means of action at definite points in time and space by definite individuals. Otherwise, it would be impossible for anyone to ever say anything at a definite point in time and space and for someone else to be able to reply. Simply saying, then, that the first-user-first-owner rule of the ethics of private property can be ignored or is unjustified implies a performative contradiction, as one's being able to say so must presuppose one's existence as an independent decision-making unit at a given point in time and space.

III. Misconceptions and Clarifications

According to this understanding of private property, property ownership means the exclusive control of a particular person over specific *physical* objects and spaces. Conversely, property rights invasion means the uninvited *physical* damage or diminution of things and territories owned by other persons. In contrast, a widely held view holds that the damage or diminution of the *value* (or price) of someone's property also constitutes a punishable offense.

As far as the (in)compatibility of both positions is concerned, it is easy to recognize that nearly every action of an individual can alter the *value* (price) of someone else's property. For example, when person A enters the labor or the marriage market, this may change the value of B in these markets. And when A changes his relative valuations of beer and bread, or if A himself decides to become a brewer or baker, this changes the value of the property of other brewers and bakers. According to the view that *value* damage constitutes a rights violation, A would be committing a punishable offense vis-à-vis brewers or bakers. If A is *guilty*, then B and the brewers and bakers must have the right to *defend* themselves against A's actions, and their defensive actions can only consist of physical invasions of A and his property. B must be permitted to physically prohibit A from entering the labor or marriage market; the brewers and bakers must be permitted to physically prevent A from spending his money as he sees fit. However, in this case the physical damage or diminution of the property of others cannot be viewed as a punishable offense. Since physical invasion and diminution are defensive actions, they are legitimate. Conversely, if physical damage and diminution constitute a rights violation, then B or the brewers and bakers do not have the right to defend themselves against A's actions—his entering of the labor and marriage market, his altered evaluation of beer and bread, or his opening of a brewery or bakery—do not affect B's bodily integrity or the physical integrity of the property of brewers or bakers. If they physically defend themselves nonetheless, then the right to defense would lie with A. In that case, however, it cannot be regarded as a punishable offense if one alters the value of other people's property. A third possibility does not exist.

Both ideas of property rights are not only incompatible, however. The alternative view—that one could be the owner of the value or price of scarce goods—is indefensible. While a person has control over whether or not his actions will change the *physical* properties of another's property, he has no control over whether or not his actions affect the *value* (or price) of another's property. This is determined by *other* individuals and their evaluations. Consequently, it would be impossible to know in advance whether or not one's planned actions were legitimate. The entire population would have to be interrogated to assure that one's actions would not damage the value of someone else's property, and one could not begin to act until a universal consensus had been reached. Mankind would die out long before this assumption could ever be fulfilled.

Moreover, the assertion that one has a property right in the value of things involves a contradiction, for in order to claim this proposition to be valid—universally agreeable—it would have to be assumed that it is permissible to act *before* agreement is reached. Otherwise, it would be impossible to ever propose anything. However, if one is permitted to assert a proposition—and no one could deny this without running into contradictions—then this is only possible because *physical* property borders exist, i.e., borders which everyone can recognize and ascertain independently and in complete ignorance of others' subjective valuations.

Another, equally common misunderstanding of the idea of private property concerns the classification of actions as permissible or impermissible based *exclusively* on their physical effects, i.e., without taking into account that every property right has a *history* (temporal genesis).

If A currently physically damages the property of B (for example by air pollution or noise), the situation must be judged differently depending on whose property right was established *earlier*. If A's property was founded first, and if he had performed the questionable activities before the neighboring property of B was founded, then A may continue with his activities. A has established an easement. From the outset, B had acquired dirty or loud property, and if B wants to have his property clean and quiet he must pay A for this advantage. Conversely, if B's property was founded first, then A must stop his activities; and if he does not want to do this, he must pay B for this advantage. Any other ruling is impossible and indefensible because as long as a person is alive and awake, he cannot *not* act. An early-comer cannot, even if he wished otherwise, wait for a late-comer and his agreement before he begins acting. He must be permitted to act immediately. And if no other property besides one's own exists (because a late-comer has not yet arrived), then one's range of action can be deemed limited only by laws of nature. A late-comer can only challenge the legitimacy of an early-comer if *he* is the owner of the goods affected by the early-comer's actions. However, this implies that one can be the owner of un-appropriated things; i.e., that one can be the owner of things one has not yet discovered or appropriated through physical action. This means that no one is permitted [to] become the first user of a previously undiscovered and unappropriated physical entity.

IV. The Economics of Private Property

The idea of private property not only agrees with our moral intuitions and is the sole just solution to the problem of social order; the institution of private property is also the basis of economic prosperity and of "social welfare." As long as people act in accordance with the rules underlying the institution of private property, social welfare is optimized.

Every act of original appropriation improves the welfare of the appropriator (at least *ex ante*); otherwise, it would not be performed. At the same time, no one is made worse off by this act. Any other individual could have appropriated the same goods and territories if only he had recognized them as scarce, and hence, valuable. However, since no other individual made such an appropriation, no one else can have suffered a welfare loss on account of the original appropriation. Hence, the so-called Pareto-criterion (that it is scientifically legitimate to speak of an improvement of "social welfare" only if a particular change increases the individual welfare of at least one person and leaves no one else worse off) is fulfilled. An act of original appropriation meets this requirement. It enhances the welfare of one person, the appropriator, without diminishing anyone else's physical wealth (property). Everyone else has the

same quantity of property as before and the appropriator has gained new, previously non-existent property. In so far, an act of original appropriation always increases social welfare.

Any further action with originally appropriated goods and territories enhances social welfare, for no matter what a person does with his property, it is done to increase his welfare. This is the case when he consumes his property as well as when he produces new property out of “nature.” Every act of production is motivated by the producer’s desire to transform a less valuable entity into a more valuable one. As long as acts of consumption and production do not lead to the physical damage or diminution of property owned by others, they are regarded as enhancing social welfare.

Finally, every voluntary exchange (transfer) of appropriated or produced property from one owner to another increases social welfare. An exchange of property is only possible if both owners prefer what they acquire over what they surrender and thus expect to benefit from the exchange. Two persons gain in welfare from every exchange of property, and the property under the control of everyone else is unchanged.

In distinct contrast, any deviation from the institution of private property must lead to social welfare losses.

In the case of universal and equal co-ownership—universal communism instead of private property—the price to be paid would be mankind’s instant death because universal co-ownership would mean that no one would be allowed to do anything or move anywhere. Each actual deviation from a private property order would represent a system of unequal domination and hegemony. That is, it would be an order in which *one* person or group—the rulers, exploiters or Uebermenschen—would be permitted to acquire property *other than* by original appropriation, production or exchange, while another person or group—the ruled, exploited or Untermenschen—would be prohibited from doing likewise. While hegemony is possible, it would involve social welfare losses and would lead to relative impoverishment.

If A is permitted to acquire a good or territory which B has appropriated as indicated by visible signs, the welfare of A is increased at the expense of a corresponding welfare loss on the part of B. The Pareto criterion is not fulfilled, and social welfare is sub-optimal. The same is true with other forms of hegemonic rule. If A prohibits B from originally appropriating a hitherto unowned piece of nature; if A may acquire goods produced by B without B’s consent; if A may proscribe what B is permitted to do with his appropriated or produced goods (apart from the requirement that one is not permitted to physically damage or diminish others’ property)—in each case there is a “winner,” A, and a “loser,” B. In every case, A increases his supply of property at the expense of B’s corresponding loss of property. In no case is the Pareto criterion fulfilled, and a sub-optimal level of social welfare always results.

Moreover, hegemony and exploitation lead to a reduced level of future production. Every ruling which grants non-appropriators, non-producers and non-traders control, either partial or full, over

appropriated, produced or traded goods, leads necessarily to a reduction of future acts of original appropriation, production and mutually beneficial trade. For the person performing them, each of these activities is associated with certain costs, and the costs of performing them increases under a hegemonic system and those of not performing them decreases. Present consumption and leisure become more attractive as compared to production (future consumption), and the level of production will fall below what it otherwise would have been. As for the rulers, the fact that they can increase their wealth by expropriating property appropriated, produced or contractually acquired by others will lead to a wasteful usage of the property at its disposal. Because they are permitted to supplement their future wealth by means of expropriation (taxes), present-orientation and consumption (high time preference) is encouraged, and insofar as they use their goods “productively” at all, the likelihood of misallocations, miscalculation, and economic loss is systematically increased.

V. The Classic Pedigree

As noted at the outset, the ethics and economics of private property presented above does not claim originality. Rather, it is a modern expression of a “classic” tradition, going back to beginnings in Aristotle, Roman law, Aquinas, the late Spanish Scholastics, Grotius and Locke.

In contrast to the communist utopia of Plato’s *Republic*, Aristotle provides a comprehensive list of the comparative advantages of private property in *Politics*. First, private property is more productive. “What is common to the greatest number gets the least amount of care. Men pay most attention to what is their own; they care less for what is common; or at any rate they care for it only to the extent to which each is individually concerned. Even when there is no other cause for inattention, men are more prone to neglect their duty when they think that another is attending to it.”

Secondly, private property prevents conflict and promotes peace. When people have their own separate domains of interest, “there will not be the same grounds for quarrels, and the amount of interest will increase, because each man will feel that he is applying himself to what is his.” “Indeed, it is a fact of observation that those who own common property, and share in its management, are far more often at variance with one another than those who have property in severalty.” Further, private property has existed always and everywhere, whereas nowhere have communist utopias sprung up spontaneously. Finally, private property promotes the virtues of benevolence and generosity. It allows one to be so with friends in need.

Roman law, from the *Twelve Tables* to the *Theodosian Code* and the *Justinian Corpus*, recognized the right of private property as near absolute. Property stemmed from unchallenged possession, prior usage established easements, a property owner could do with his property as he saw fit, and freedom of

contract was acknowledged. As well, Roman law distinguished importantly between ‘national’ (Roman) law— *ius civile*—and ‘international’ law— *ius gentium*.

The Christian contribution to this classic tradition—embodied in St. Thomas Aquinas and the late Spanish Scholastics as well as Protestants Hugo Grotius and John Locke—is twofold. Both Greece and Rome were slave-holding civilizations. Aristotle, characteristically, considered slavery a natural institution. In contrast, Western—Christian—civilization, notwithstanding some exceptions, has been essentially a society of free men. Correspondingly, for Aquinas as for Locke, every person had a proprietary right over himself (self-ownership). Moreover, Aristotle, and classic civilization generally, were disdainful of labor, trade, and money-making. In contrast, in accordance with the Old Testament, the Church extolled the virtues of labor and work. Correspondingly, for Aquinas as for Locke, it was by work, use, and cultivation of previously unused land that property first came into existence.

This classic theory of private property, based on self-ownership, original appropriation (homesteading), and contract (title transfer), continued to find prominent proponents, such as J. B. Say. However, from the height of its influence in the eighteenth century until quite recently, with the advance of the Rothbardian movement, the classic theory had slipped into oblivion.

For two centuries, economics and ethics (political philosophy) had diverged from their common origin in natural law doctrine into seemingly unrelated intellectual endeavors. Economics was a value-free “positive” science. It asked “what means are appropriate to bring about a given (assumed) end?” Ethics was a “normative” science (if it was a science at all). It asked “what ends (and what use of means) is one justified to choose?” As a result of this separation, the concept of property increasingly disappeared from both disciplines. For economists, property sounded too normative; for political philosophers property smacked of mundane economics.

In contrast, Rothbard noted, such elementary economic terms as direct and indirect exchange, markets and market prices as well as aggression, crime, tort, and fraud cannot be defined or understood without a theory of property. Nor is it possible to establish the familiar economic theorems relating to these phenomena without the implied notion of property and property rights. A definition and theory of property must precede the definition and establishment of all other economic terms and theorems.

Rothbard’s unique contribution, from the early 1960s until his death in 1995, was the rediscovery of property and property rights as the common foundation of both economics and political philosophy, and the systematic reconstruction and conceptual integration of modern, marginalist economics and natural-law political philosophy into a unified moral science: libertarianism.

VI. Chicago Diversions

At the time when Rothbard was restoring the concept of private property to its central position in economics and reintegrating economics with ethics, other economists and legal theorists associated with the University of Chicago such as Ronald Coase, Harold Demsetz, and Richard Posner were also beginning to redirect professional attention to the subject of property and property rights.

However, whereas for Rothbard private property and ethics logically precede economics, for the latter private property and ethics are subordinate to economics and economic considerations. According to Posner, whatever increases social wealth is just.

The difference between the two approaches can be illustrated considering one of Coase's problem cases: A railroad runs beside a farm. The engine emits sparks, damaging the farmer's crop. What is to be done?

From the classic viewpoint, what needs to be established is who was there first, the farmer or the railroad? If the farmer was there first, he could force the railroad to cease and desist or demand compensation. If the railroad was there first, then it might continue emitting sparks and the farmer would have to pay the railroad to be spark free.

From the Coasean point of view, the answer is twofold. First and "positively", Coase claims that it does not matter *how* property rights and liability are allocated as long as they *are* allocated and provided (unrealistically) that transaction costs are zero.

Coase claims it is wrong to think of the farmer and the railroad as either "right" or "wrong" (liable), as "aggressor" or "victim." "The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is, How should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would be to inflict harm on A. The real question that has to be decided is, Should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."

Further, given the "equal" moral standing of A and B, for the allocation of economic resources it allegedly does not matter to whom property rights are initially assigned. Suppose the crop loss to the farmer, A, is \$1000, and the cost of a spark apprehension device (SAD) to the railroad, B, is \$750. If B is found liable for the crop damage, B will install an SAD or cease operations. If B is found not liable, then A will pay a sum between \$750 and \$1000 for B to install an SAD. Both possibilities result in the installation of an SAD. Now assume the numbers are reversed: the crop loss is \$750, and the cost of an SAD is \$1000. If B is found liable, he will pay A \$750, but he will not install an SAD. And if B is found not liable, A is unable to pay B enough to install a SAD. Again, both scenarios end with the same result: there will be *no* SAD. Therefore, regardless of how property rights are initially assigned, according to Coase, Demsetz and Posner the allocation of production factors will be the same.

Second and “normatively”—and for the only *realistic* case of *positive* transaction costs—Coase, Demsetz and Posner demand that courts assign property rights to contesting parties in such a way that “wealth” or the “value of production” is maximized. For the case just considered this means that if the cost of the SAD is less than the crop loss, then the court should side with the farmer and hold the railroad liable. Otherwise, if the cost of the SAD is higher than the loss in crops, then the court should side with the railroad and hold the farmer liable. Posner offers another example. A factory emits smoke and thereby lowers residential property values. If property values are lowered by \$3 million and the plant relocation cost is \$2 million, the plant should be held liable and forced to relocate. Yet if the numbers are reversed—property values fall by \$2 million and relocation costs are \$3 million—the factory may stay and continue to emit smoke.

Both the positive and the normative claim of Chicago law and economics must be rejected. As for the claim that it does not matter to whom property rights are initially assigned, three responses are in order. First, as Coase cannot help but admit, it certainly matters to the farmer and the railroad to whom which rights are assigned. It matters not just how resources are allocated but also who owns them.

Second and more importantly, for the value of social production it matters fundamentally how property rights are assigned. The resources allocated to productive ventures are not simply given. They themselves are the outcome of previous acts of original appropriation and production, and how much original appropriation and production there is depends on the incentive for appropriators and producers. If appropriators and producers are the absolute owners of what they have appropriated or produced, i.e., if no liability vis-à-vis second- or third-comers arises out of acts of appropriation and production, then the level of wealth will be maximized. On the other hand, if original appropriators and producers can be found liable vis-à-vis late comers, as is implied in Coase’s “reciprocity of harm” doctrine, then the value of production will be lower than otherwise. That is, the “it doesn’t matter” doctrine is counterproductive to the stated goal of wealth maximization.

Third, Coase’s claim that the use of resources will be unaffected by the initial allocation of property rights is not generally true. Indeed, it is easy to produce counterexamples. Suppose the farmer does not lose \$1000 in crops because of the railroad’s sparks, but he loses a flower garden worth \$1000 to him but worthless to anyone else. If the court assigns liability to the railroad, the \$750 SAD will be installed. If the court does not assign liability to the railroad, the SAD will *not* be installed because the farmer simply does not possess the funds to bribe the railroad to install an SAD. The allocation of resources is *different* depending on the initial assignment of property rights.

Similarly, contra the normative claim of Chicago law and economics that courts should assign property rights so as to maximize social wealth, three responses are in order. First, any interpersonal comparison of utility is scientifically impossible, yet courts must engage in such comparisons willy-nilly whenever they engage in cost-benefit analyses. Such cost-benefit analyses are as arbitrary as the assumptions on

which they rest. For example, they assume that psychic costs can be ignored and that the marginal utility of money is constant and the same for everyone.

Second, as the numerical examples given above show, courts assign property rights differently depending on changing market data. If the SAD is less expensive than the crop damage, the farmer is found in the right, while if the SAD is more expensive than the damage, the railroad is found in the right. That is, different circumstances will lead to a re-distribution of property titles. No one can ever be sure of his property. Legal uncertainty is made permanent. This seems neither just nor economical; moreover, who in his right mind would ever turn to a court that announced that it may re-allocate existing property titles in the course of time depending on changing market conditions?

Finally, an ethic must not only have permanency and stability with changing circumstances; an ethic must allow one to make a decision about “just or unjust” *prior* to one’s actions, and it must concern something under an actor’s control. Such is the case for the classic private property ethic with its first-use-first-own principle. According to this ethic, to act justly means that a person employs only justly acquired means—means originally appropriated, produced, or contractually acquired from a previous owner—and that he employs them so that no physical damage to others’ property results. Every person can determine *ex ante* whether or not this condition is met, and he has control over whether or not his actions physically damage the property of others. In distinct contrast, the wealth maximization ethic fails in both regards. No one can determine *ex ante* whether or not his actions will lead to social wealth maximization. If this can be determined at all, it can only be determined *ex post*. Nor does anyone have control over whether or not his actions maximize social wealth. Whether or not they do depends on *others’* actions and evaluations. Again, who in his right mind would subject himself to the judgment of a court that did not let him know in advance how to act justly and how to avoid acting unjustly but that would judge *ex post*, after the facts?

Hans-Herman Hoppe's Argumentation Ethic: A Critique

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[Vol. 20 #2](#) Issue of the [Journal of Libertarian Studies](#)

Spring, 2006

One of the most prominent theorists of anarcho-capitalism is Hans-Herman Hoppe. In what is perhaps his most famous result, the argumentation ethic for libertarianism, he purports to establish an *a priori* defense of the justice of a social order based exclusively on private property. Hoppe claims that all participants in a debate must presuppose the libertarian principle that every person owns himself, since the principle underlies the very concept of argumentation. Some libertarians have celebrated Hoppe's argument as the final nail in the coffin for collectivism of any type; following Hoppe, they believe that to deny the libertarian ethic is not only wrong, but also internally *contradictory*. On the other hand, a number of other prominent libertarians characterize Hoppe's initial statement of his case as "one muddle after another" or a "tissue of bald assertions."

At the end of the symposium (in *Liberty*) that included both of the above-mentioned comments, Hoppe responded to his critics, contending that they had misunderstood his argument and misidentified what he took it to demonstrate. Hoppe's original paper is still cited, by some libertarians, as having established an irrefutable case for libertarian rights; for example, Kinsella says: "This [per Hoppe's argument], opponents of liberty undercut their own position as soon as they begin to state it." Therefore, we believe that the question of whether Hoppe was able to answer his critics adequately is worth examining.

We contend that Hoppe was not, and this project is fatally flawed, despite the fact that we are largely sympathetic to the conclusions to which it carries him. We intend to demonstrate that even on its own terms, the argument does not prove self-ownership in the way Hoppe wants. More important, we shall then demonstrate a crucial flaw in the argument, which renders it a *non sequitur*.

A SUMMARY OF HOPPE'S ARGUMENT

Insomuch as Hoppe's reasoning is at times complicated, and our critique occasionally will rely on subtle distinctions between our understanding of these matters and his, we encourage the reader to review Hoppe's own exposition, which is available online. However, let us here sketch (what we take to be) the essentials of Hoppe's argument, as well as placing it in its context in the history of political philosophy.

Hoppe pursues the ancient goal of removing all contingency and uncertainty from reasoned political discourse, making the conclusions reached by that activity logically demonstrable, rather than merely persuasive. Indeed, Hoppe must be counted, with Plato and Rousseau, as one of the few thinkers who has actually recognized what is necessary for an apodictic political theory to work: All conclusions must spring from a single principle. The introduction of “diverse and potentially conflicting axioms,” as in a natural rights attempt to arrive at apodictic political conclusions, is defeated by its own premises, since it is thrust back into the realm of contingency and persuasive discourse whenever it must arbitrate conflicts *between* two or more of the various natural rights it posits.

Hoppe opens his grab for this gold ring by noting that some propositions are self-contradictory. For example, if someone declares “I am not here at present,” and intends it to be taken literally, rather than as an indication he is daydreaming, we know he is talking nonsense, since “here” *means* the place a person presently occupies. Other propositions, while not inherently self-contradictory, can still be circumstantially so. To adapt an example from David Gordon, the statement “Bill Clinton is dead” is not in itself self-contradictory, but if Slick Willie himself were to say it (barring the possibility of communication from beyond the grave), it would become so. Philosophers call such a statement a *performative contradiction*.

Hoppe next invokes the “ethics of argumentation,” which was developed by Habermas and Apel. They contend that whenever people are engaged in debate, they have implicitly agreed to a certain set of norms, for example, that they will restrict themselves to peaceful means in their efforts to persuade other participants of their contentions. Hoppe claims that, beyond the norms suggested by Habermas and Apel, argumentation also presupposes that each individual properly has exclusive control over his own body, since he must use it to engage in any discussion. Furthermore, a transcendental analysis of argumentation also reveals, among other presuppositions, universal rights to homestead any ownerless resources and to engage in any voluntary exchange, since control of physical resources is necessary to maintain life, and one must remain alive if one is to argue one’s point of view. In short, to argue at all presupposes a libertarian view of the rights of individuals, so that it is a performative contradiction to argue against libertarianism. Furthermore, Hoppe claims that only argument can justify a proposition or belief.

Therefore, he concludes that the libertarian view of property rights is the only one that can possibly be defended by rational argument. Anyone who denied the libertarian doctrine would be unable to rationally *defend* his rival theory; the moment he engaged others in debate, he would implicitly be accepting the libertarian platform. The libertarian view of property is not merely correct, it is *irrefutably* correct, and we can claim for it apodictic certainty.

We close this section with a concise summary of Hoppe’s argument in his own words:

“One cannot deny [the law of contradiction] without presupposing its validity. But there is another such proposition. Propositions are not free-floating entities. They require a proposition maker who in order to produce any validity-claiming proposition whatsoever must have exclusive control (property) over some scarce mans defined in objective terms and appropriated (brought under control) at definite points in time through homesteading action. Thus, any proposition that would dispute the validity of the homesteading principle of property acquisition, or that would assert the validity of a different, incompatible principle, would be falsified by the act of proposition making in the same way as the proposition ‘the law of contradiction is false’ would be contradicted by the very fact of asserting it.”

WHY HOPPE’S ARGUMENT FALLS ON ITS OWN TERMS

As we stated above in the introduction, we believe that *even if* one grants the basic validity of Hoppe’s approach, his argument still fails to make the case for full self-ownership. At best, Hoppe has proven that it would be contradictory to argue that someone does not rightfully own his mouth, ears, eyes, heart, brain, and any other bodily parts essential for engaging in debate. But that clearly would not include, say, a person’s legs; after all, it is certainly possible for someone to engage in debate without having any legs at all. (Consider physicist Stephen Hawking, who is quite physically handicapped and yet manages to engage in propositional discourse of the highest caliber.)

To illustrate how the above foils Hoppe’s intention, imagine a collectivist arguing,

People should not have full ownership of their bodies, as libertarian theorists believe. For example, if somebody is sick and needs a kidney, then it is moral to use force to compel a healthy person to give up one of his.

Since it is not necessary to have two kidneys in order to argue, Hoppe has not succeeded in demonstrating the contradictory nature of such a collectivist claim.

Therefore, even on its own terms, his argument only establishes ownership over *portions* of one’s body. Now we will demonstrate that, at best, it also only establishes self-ownership of those body parts *during the course of the debate*. For example, supposed a collectivist argues,

“Generally speaking, people have the right to use their bodies as they see fit. However, during national emergencies, it is moral to use force to compel certain individuals to act in the public interest. In particular, if the nation is being invaded, the government may draft people into military service. Therefore, the libertarian claim to absolute self-ownership is unfounded.”

Has Hoppe shown that someone uttering the above (during a policy debate) is engaging in a performative contradiction? The collectivist is not using force *during the debate*; he is merely arguing that under certain conditions the use of force is appropriate to compel military service, thus denying the libertarian ethic. While we *disagree* with our hypothetical collectivist, we don't see how his claims are self-contradictory.

Before moving on, let us point one rejoinder that is *not* valid for the defender of Hoppe's argument. In response to considerations like the above, a Hoppeian might be tempted to say,

The fact that such collectivists would not be performing a contradiction at that moment is irrelevant. The beliefs of these collectivists necessarily rest on 'might makes right' when force is applied, and at that point, they show that they are not really interested in justifying their aggression. For example,

the Hoppeian might continue,

a person forced into the hospital to have a kidney removed certainly can't argue while he's under, and a person forced to the front lines to repel the invaders certainly isn't in a fair position to debate the justice of his condition. Therefore, these collectivist are engaging in a contradiction when they try to justify forced kidney transplants or the draft.

Hoppe himself as written:

"[I]n the same way as the validity of a mathematical proof is not restricted to the moment of proving it, so, then, is the validity of the libertarian property theory not limited to instances of argumentation. If correct, the argument demonstrates its universal justification, arguing or not."

Again, reasoning such as this is invalid; the defender of Hoppe must come up with a different way to respond to our arguments above. To see why this purported defense fails, considering the following proposition:

Not only do we feel that it is *consistent* to justify this proposition, but we actually believe the quoted proposition is *true*. (Before continuing, we urge the skeptical reader to decide for himself whether this proposition seems true or false, and in particular whether it seems compatible with a Rothbardian view of property rights.) Now, suppose that we are in an anarcho-capitalist society conforming to Hoppe's vision of justice. A certain man pays for his movie ticket, observes the sign on the wall that says, "ALL PATRONS AGREE TO REMAIN SILENT DURING THE FEATURE PRESENTATION EXCEPT FOR EMERGENCIES," buys some popcorn, and sits down in the theater. About ten minutes into the show, this man begins yelling at the screen, furious at the shoddy acting of several of the thespians. The people around him try "shhhh" for several minutes, to no avail. Eventually two burly men who work for the theater must use force to eject the man out onto the pavement.

Here is the interesting part of the tale: While he is being dragged out of the theater, the man demands that his escorts debate the justice of their actions. But rather than giving a rational exposition of the nature of property and contractual agreements, these brutes continue to urge him to keep his mouth shut! The man is horrified at this brazen refusal to even *try* to justify their violence against him. As he recounts the episode to his sympathetic friends hours later, the man points out the ultimate irony of the theater's rule: Not only is the prohibition against talking during a movie *wrong*, it is actually *unjustifiable*! For how can someone debate the justice of such a rule if he is forbidden to speak?!

Hopefully we can end our silly tale at this point. But in all seriousness, we must ask the reader: What *specifically* is wrong with our fictitious man's position? Among other flaws, one of his errors is the notion that a rule is indefensible if its application would make debate *at that particular moment* impossible (or difficult). In our example of the movie theater, we feel most Hoppeians would agree that it is perfectly acceptable to use force to uphold the rule, so long as the justice of the rule could be rationally defended *beforehand*, when force isn't being used to intimidate anyone.

Now is there any important difference *in this respect* between our example of the movie theater, and the earlier collectivist justifications of the military draft or organ transplant? Just because one can't argue on the front lines or in an operating room doesn't by itself prove that these outcomes are unjustified uses of force. It is true, as Hoppe points out, that once a proposition has been proven, the proof does not "expire" the moment the discussion of it ceases. But the conclusion of a valid proof is still only necessarily true when its premises are true. Hoppe has shown that bashing someone on the head is an illogical form of argumentation. He has not shown that the fact that one has ever argued demonstrates that one may never bash anyone on the head, nor has he demonstrated that one may not validly argue that it would be a good thing to bash so-and-so on the head. We cannot convince you of anything by clubbing you, but we may quite logically try to convince you that we should have the right to club you.

Our final point in this section is to note that, even setting aside all of the above difficulties, it's still the case that Hoppe has only proven self-ownership *for the individuals in the debate*. This is because, even on Hoppe's own grounds, someone denying the libertarian ethic would only be engaging in contradiction if he tried to justify his preferred doctrine *to its "victims."*

For example, so long as Aristotle only argued *with other Greeks* about the inferiority of barbarians and their natural status as slaves, then he would not be engaging in a performative contradiction. He could quite consistently grant self-ownership to his Greek debating opponent, while denying it to those whom he deems naturally inferior.

Once again, let us point out that the defender of Hoppe must exercise caution. It is tempting to respond to the above example by saying, "That's silly. If Aristotle tried to justify his views to a *barbarian* debating

opponent, he would necessarily be engaging in contradiction. Therefore, his views are in general unjustifiable.”

Why is this response illegitimate? Because, if we accept it, then we must also admit that human “domination” of “lower” animals is *also* unjustifiable. Human beings never ask polar bears their thoughts on zoos. Horses are never allowed to debate the justice of their position in society. But surely the Hoppeian would not consider the denial of self-ownership to *these* creatures as an unjustifiable practice. Indeed, there are debates all the time on the issue of animal rights, and humans do try to justify experiments on animals, slaughtering animals food, etc. But when they do so, it is always in order to convince *other human beings*. Nobody – not even animal rights activists – ever demands that we justify our practices to the animals themselves.

Of course, the Hoppeian might respond that horses are not as rational as humans, and therefore do not need to be consulted. But Aristotle need only contend the same thing about barbarians: they are not as rational as Greeks. Indeed, that was precisely why he held that they were naturally slaves. And the only way a libertarian could prove him wrong would be to argue that barbarians deserved the same rights as Greeks; i.e., one would have to start from scratch in trying to defend a libertarian concept of rights. Hoppe’s argument as such offers nothing to help in this task. To assume from the outset that whatever rights any particular individual enjoys (through argumentation), must therefore extend to all people – including newborn infants, the mentally retarded, as well as senile and comatose individuals, none of whom can successfully debate – is to beg the question.

This is crucial point, so let us approach it from a different angle. Suppose an animal rights activist reads Hoppe’s argument and is fully convinced of its coherence, and is in fact overjoyed at its ramifications. She immediately announces to the world that she now has irrefutable *proof* that slaughtering chickens is immoral. After all, how can someone possibly claim that a chicken need not have legal ownership of its body, without engaging in a performative contradiction?

We urge the skeptical reader not to dismiss our suggestion as ridiculous. What is the actual error of our hypothetical animal rights activist? There are many possible responses a Hoppeian might advance; our point does not depend on the specific reply. But whatever the reply may be, if it is equally applicable to any human being, then Hoppe’s argument must *not* make the universal case for libertarian rights, after all.

HOPPE CONFLATES USE WITH OWNERSHIP

In the previous section we argued that, even if one grants the basic validity of Hoppe’s approach, he has still not made the case for universal, full self-ownership in the libertarian sense. At best, all Hoppe has

proven is that it would be a performative contradiction for some- one to deny in an argument that his debating opponent (and perhaps those in the same “class”) own the body parts (such as eyes, brain, and lungs) necessary for debate, for the duration of the debate. This is a far cry from showing that it would be a contradiction for some- one to deny the case for libertarianism. In particular, a collectivist could argue that people can rightfully be forced to give up a kidney, or go to war, if such actions would help the rest of society.

But now we move on to a more fundamental objection to Hoppe’s argument: *One is not necessarily the rightful owner of a piece of property even if control of it is necessary in a debate over its ownership.* Because of this fact, a crucial link in Hoppe’s argument fails. Someone can deny the libertarian ethic, and yet concede to his opponents the use of their bodies for debate. There is nothing contradictory about this, as we shall demonstrate with a few examples.

First, imagine a devout theist who believes that God created the entire universe, and is therefore the rightful owner of everything, including the bodies of human beings. The theist might believe that God has granted humans *temporary control* over His property, just as a landlord leases an apartment. However, just as the landlord would prohibit certain destructive acts, so too (the theist might think) would God prohibit such things as suicide and prostitution. Because of his worldview, such a theist might argue (against a libertarian atheist, perhaps) that people do not own their bodies, and that it is perfectly legitimate for outsiders to use force to prevent someone from committing suicide.

Now, we grant that the theist would have a difficult time proving his case; indeed, we would disagree with his conclusions if such a theist really existed and advocated this stance. However, we do *not* think he has, by making such a case, in any way engaged in contradiction. Since we have come up with a logical counterexample to his sweeping result, Hoppe’s argument as it stands must be incorrect.

Second, imagine that a Georgist were to argue that everyone should own a piece of landed property. The Georgist could go so far as to claim that his position is the only justifiable one. He could correctly observe that anyone debating him would necessarily grant him (the Georgist) some standing room, and then he might deduce from this true observation the conclusion that it would be a performative contradiction to deny that everyone is entitled to a piece of land. We imagine that Hoppe would point out to such a Georgist that using a piece of land during a debate does not entitle one to its full ownership, and Hoppe would be correct. But by the same token, Hoppe’s argument for ownership of one’s body falls apart; Hoppe has committed the exact same fallacy as our hypothetical Georgist.

Finally, we point out with some irony that Hoppe and Rothbardian libertarians in general do *not* believe in universal self-ownership. In particular, they believe that *criminals* may be rightfully enslaved to pay off their debts to victims (or their heirs). Now we ask: Would it be contradictory for legal procedures in an anarchist society to allow convicted criminals the right to appeal? Couldn’t criminals take the stand

and *testify* as to their wrongful conviction? We can imagine a private judge saying to the criminal, “You currently do not possess full self-ownership rights, but we want the community to trust in the equity of our proceedings, so by all means, please explain your objections to your conviction.” Would such an utterance by the judge be contradictory?

If not, then it must *not* be true, after all, that one needs to own his body in order to debate. This is obvious; Thomas Paine wrote the first portion of *The Age of Reason* while imprisoned, the famous “Birdman of Alcatraz” submitted scholarly articles to journals while serving time for murder, and the imprisoned Timothy McVeigh certainly tried to justify the bombing to which he had confessed, in correspondence with Gore Vidal. Indeed, Ludwig von Mises, Murray Rothbard, and Hans Hoppe were denied their rights to self-ownership (by the governments claiming authority over them), yet they managed to advance plenty of arguments.

Hoppe’s response to this objection, when it was made by David Friedman, Leland Yeager, and others, was to point out that he was not denying the historical *existence* of slavery, but rather its justification. But Hoppe misunderstood his critics’ point. Friedman, for example, wasn’t merely saying that because slavery has existed, Hoppe must be wrong. Rather, Friedman argued that, because countless slaves have engaged in successful argumentation, Hoppe must be wrong when he claims that self-ownership is a prerequisite to debate.

This is a crucial point, so we wish to elaborate. Not only did Hoppe believe the particular evidence cited by his critics was harmless to his argument; he thinks *all* empirical facts are irrelevant. Hence, it’s not merely that he believes Friedman et al. were mistaken in their criticism, but that they completely misunderstood the type of claim he was making:

My entire argument, then, claims to be an impossibility proof. But not, as the mentioned critics seem to think, a proof that means to show the impossibility of certain empirical events, so that it could be refuted by empirical evidence [such as the existence of non-libertarian societies—RPM and GC]. Instead, it is a proof that it is impossible to justify non-libertarian property principles without falling into contradictions . . . empirical evidence has absolutely no bearing on it.

Misesian economists will no doubt appreciate Hoppe’s frustration; he believes he is in the analogous position of someone being asked to deal with ostensible “counterexamples” to the law of diminishing marginal utility. However, as we stated above, it is *Hoppe* who is misunderstanding the type of claim being made. Yes, Hoppe is arguing for a conclusion (namely, that only libertarian ethics are consistently justifiable) that by itself makes no empirical claims, and hence cannot be falsified by observation. However, Hoppe’s chain of arguments to *reach* that (empirically neutral) conclusion crucially relies on an empirical assumption, to wit, that a person needs to enjoy self-ownership (and all other libertarian rights) if he is to successfully debate. It is this empirical assumption that his critics attacked, and quite

successfully so: It is simply not true that one needs to own his body in order to fairly debate, just as one doesn't need to own standing room in order to fairly debate.

We do not wish to deny that there is a definite sense in which, if there is to be a legitimate give-and-take of ideas, the two parties in question must enjoy a degree of autonomy or "freedom." It would indeed be silly if the puppeteer "debated" his marionette, or if a man trained his dog to engage in a mock argument. Yet this transcendental self-ownership is not what Hoppe is after; even the heretic being burned at the stake ultimately has free will and "owns" his mind. It was ingenious for Hoppe to attempt to equate the conditions necessary for rational discourse with the property rules of radical libertarianism, but it is obvious to us that this attempted mapping fails.

CONCLUSION

We believe that we have demonstrated the inadequacy of Hans Hoppe's argumentation ethic as a proof that libertarianism is the only defensible political stance. In the second section we showed that, even on its own terms, Hoppe's proof at most establishes fleeting and partial ownership of one's body. In the above section, we showed that his proof doesn't even succeed in this, for it confuses temporary control with rightful ownership.

Let us emphasize that we realize Hoppe's observations are *consistent* with the rest of libertarian thought. For example, Hoppe advocates human self-ownership as an initial state of affairs, only to be denied to individuals in special circumstances, such as when they have been convicted of a crime. But the whole point of Hoppe's approach is not to argue that libertarianism is merely reasonable or preferable, but that it is logically undeniable; for his argument to work, he cannot afford to assume any libertarian principles at the outset. So if Hoppe's argument doesn't prove that criminals own themselves, then it can't prove that non-criminals do, either, since there's nothing in the argument itself concerning criminal behavior.

Hoppe's argument is an intriguing one, but it ultimately fails. Although we support Hoppe's goals, we cannot endorse flawed arguments aimed at achieving those goals, as the acceptance of such implies that we do not have better arguments on our side.

Argumentation Ethics & The Philosophy of Freedom

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[Vol. 1 #19](#) Issue of the [Libertarian Papers](#)

March 2009

I. Introduction

In justificatory argumentation, two or more persons seek to justify or to excuse a belief or action, to determine whether it is a belief one *ought* to accept (or to reject) or an action one *ought* to undertake (or to forgo), or whether the circumstances of the case present sufficient reasons (e.g., necessity, duress, compulsion, coercion, manipulation) for excusing a person for believing or doing something that is contrary to right. Philosophers, scientists, and lawyers regularly and publicly engage in such argumentations. In fact, most people do the same at least occasionally, albeit in private, at home, at work, in clubs and barrooms.

Twenty years ago, [Hans-Herman Hoppe presented the argument](#) that no justificatory argumentation can invalidate the principles of libertarian capitalism because those principles are presupposed in every dialogue in which their validity would be questioned. Moreover, “no other ethic could be so justified, as justifying something in the course of argumentation implies presupposing the validity of precisely this ethic of the natural theory of property.”

In this article I shall focus on the argument from argumentation itself rather than on its implications for political economy. My purpose is to clarify the relevance of argumentation or dialogue ethics for libertarian theorizing. I shall also endeavor to rebut some frequent criticisms of Hoppe’s theory, some of which have recently been revived by [Robert Murphy and Gene Callahan](#), but only insofar as they betray a serious misunderstanding of the argument from argumentation.

II. The Argument from Argumentation

The key to understanding the argument from argumentation is, first, that when they are told or asked (not) to believe, say, or do something people are likely and in fact entitled to question why they ought (not) to believe, say, or do it; and second, that an exchange of arguments is a justificatory argumentation only if all the participants acknowledge certain facts and abide by certain norms – norms that no one can

argue are invalid because adherence to those norms is a necessary condition of engaging in argumentation. In short, argumentation does not and cannot take place in a normative void:

“...any truth claim [...] is and must be raised and decided upon in the course of an argumentation. And since it cannot be disputed that this is so, [...] this has been aptly called “the a priori of communication and argumentation.” Now, arguing never consists of free-floating propositions claiming to be true. Rather, argumentation is always an activity, too. [...] It follows that intersubjectively meaningful norms must exist – precisely those which make some action an argumentation – which have special cognitive status in that they are the practical preconditions of objectivity and truth. Hence [...] norms must indeed be assumed to be justifiable as valid. It is simply impossible to argue otherwise, because the ability to argue so would in fact presuppose the validity of those norms which underlie any argumentation whatsoever.”

For example, one cannot seriously make the argument *that one ought not to argue*, or *that one ought not to take argumentation seriously*, without destroying the point of making that argument. A dialectical contradiction emerges when someone states: You ought to take seriously the argument that you ought not to take argumentation seriously. One who seriously makes an argument in fact refers himself and at least the members of his audience to the norm that they ought to take their own and one another’s arguments seriously and ought not to dismiss one another’s questions or counterarguments without giving relevant, pertinent reasons for doing so. Thus, when the claim is made that one ought not to take argumentation seriously and this claim is presented not as a joke but as a serious proposition for argumentation then the opposite norm, “One ought to take argumentation seriously,” is in any case simultaneously posited or presupposed as valid and binding, and is, moreover, argumentatively or dialectically irrefutable.

The point of engaging another in an argumentation is to make him understand the reasons or arguments for believing, saying, or doing something, in such a way that he comes round to the conclusion that believing, saying, or doing it is justified as being in accordance with reason. There is no point in getting another to understand why he ought not ask for reasons, or why ought not answer requests for reasons. What, indeed, shall we make of the argument, “Here are compelling reasons for why there can be no compelling reasons?”

There may be occasions, of course, when one *should* not ask for or give reasons, for example in an emergency or when there are other *prudential* considerations for not trying to engage another in argumentation. Nevertheless, the normative principle that one ought to act in accordance with reason remains intact: One is entitled to question whether the emergency or other prudential considerations upon reflection justify or excuse the action. It is also necessary to distinguish between “arguing about principles” and “arguing about particular cases (in which principles are entered as arguments)” – about, say, whether lying in a genuine argumentation is wrong to a specific other by lying. In the latter case, one

might for example want to inquire if the other (say, an agent of the Gestapo) had a justifiable right to know where the first man's son (suspected of being a resistance fighter) was hiding.

In our present academic culture, dominated by empiricism and tainted by its attendant positivism and scientism, prescriptions such as, "Be rational," "Obey the dictates of reason," or, "Submit to the law of reason," probably sound archaic. Nevertheless, they are all argumentatively valid, and undeniably so: no compelling reasons can be given for not considering them valid. Even people who do not want to be rational or hate being reminded of such prescriptions cannot fund such reasons. The best they can do is refuse to participate in argumentations and restrict themselves to one or another variety of "sales talk," making appeals to the others' fears and hopes, their greed and vanity, instead of their reason.

III. Dialectical Contradictions and Dialectical Truths

Hoppe's argument raises the question, *which* norms underlie the praxis of argumentation and are therefore logically undeniable for any person who claims to take argumentation seriously. However, it is beyond dispute that there are descriptive and normative statements, *dialectical truths*, that are in any case argumentatively undeniable, and other descriptive and normative statements, *dialectical contradictions*, that are in any case argumentatively untenable – even if they are neither analytic tautologies or contradictions, nor empirically or mathematically true or false statements. Of course, not every argumentatively justified conclusion is a dialectical truth; only argumentatively justifiable conclusions that depend only on arguments referring to the nature and condition of existence of argumentation qualify as dialectical truths.

I do not dialectically contradict myself when I try to convince my wife that our goldfish is not a rational being, but I do when I set out to convince my wife by rational argument that she is not capable of understanding or producing rational arguments. While asking and answering questions, and getting answers to my questions, I cannot without contradiction maintain that I am, or my opponent in a discussion is, not an answerable, responsible person. Thus, in any dialogue, the participants must accept it as a dialectical truth that each one of them is an "animal rationis capax," a being capable of reason – a *person* (as I shall henceforth write). Moreover, they must accept it as a dialectical truth that they are able to communicate and argue with each other and that each one of them is a separate person, capable of speaking his own mind and, unless specific sufficient reasons to the contrary are adduced, entitled to do so. The point of having a dialogue would be lost if one of the speakers were no more than a mouthpiece for the other with whom he is supposed to be arguing. There would not be a genuine dialogue if the participants were merely actors reading their lines from a script written by someone else. The very idea of a dialogue presupposes an irreducible plurality of natural persons. Thus, in our argumentation, neither you nor I can deny that the other is a separate, independent other person. Moreover, the participants cannot but recognize that they constitute a "community" of free (separate,

independent) persons of the same rational kind. *Freedom among likes* is a presupposition of argumentation, and cannot be denied in an argumentation.

It is a dialectical truth that, in the context of argumentation, logic and facts ought to be taken seriously. Any attempt to argumentatively deny, refute or defeat that norm would imply the appeal to take logic and facts seriously. Anyone who considered the attempt successful would have to admit that the logic of the argument or the facts it invoked are irrelevant for its conclusion. Similarly, it is dialectically true that one ought to be willing to respond to demands for reasons or justificatory arguments for, and to accept rational criticism of, everything one does or says.

It is a dialectical truth that silencing an opponent by forcibly gagging him, or intimidating him by threatening to inflict harm on him (or indeed on anyone else), is not a permissible move in an argumentation. “I’ll burn down your house, if you dare to disagree with me,” or “I’ll see to it that your children never get a decent job in this town,” is an illegitimate move in an argumentation, no less out of order than, “I’ll cut out your tongue.” Such moves would destroy the conditions under which argumentation can serve its purpose. More generally, it is dialectically true that one ought to respect the physical integrity of one’s opponents in an argumentation, not only their bodies but also their property (everything they own, i.e., *justifiably possess or control*, or are justified to repossess or bring back under their control). This is, of course, just another way of stating the respectability of the condition of “freedom among likes” that I mentioned earlier.

It is also a dialectical truth that bribing an opponent, say, by promising him money or a lucrative or prestigious position in return for his not asking certain questions or only giving desired answers, is not a permissible move in an argumentation. Such a move would vitiate the argumentation. It casts doubt on the opponent’s motive in asking questions or answering them, as it would be unclear whether he was engaging in argumentation or merely seeking to bag a reward.

Evidently, “Persons, i.e., beings capable of reason, ought to be rational,” is a dialectical truth and, “Our reason ought to be the slave of our passions,” is a dialectical contradiction.

The above are examples of dialectical truths, or of dialectical contradictions, some of them “descriptive,” others “prescriptive” or “normative.” Together with others, some of which will be mentioned below, they constitute what I shall call *the law of reason*.

IV. Rationally Justified Norms

Clearly, engaging in argumentation ethics a commitment to abide by a number of norms, because any violation of or departure from these norms impairs and possibly even destroys the purpose of argumentation itself. These norms come into play whenever questions about the justifiability of actions

of any kind (not only moves in an argumentation) are raised and submitted to argumentation. Any action, from merely holding one or another belief to producing large-scale effects in the physical world, may be questioned with respect to its justifiability. If an action cannot be argumentatively justified then it *is* unjustifiable; if it can be argumentatively justified then it *is* justifiable.

It is a dialectical contradiction to hold that an argumentatively justified conclusion is justified only within the context of argumentation itself – for example, that assaulting another person in the course of an argumentation is unjustified, but that assaulting him afterwards is justified even if he has not done anything that would justify the infliction of pain or harm. Similarly, because bribing a person in the course of an argumentation is unjustified, it is also unjustified outside the context of argumentation.

An argumentation that conclusively establishes that one is justified in claiming truth for a particular proposition, or validity for a normative principle, remains conclusive after the actual exchange of arguments has ceased. Of course, someone who did not hear the arguments may well reserve judgment until he has had a chance to evaluate them himself – but that too is an implication of the ethics of argumentation. However, a blunt refusal to accept the conclusion of an argumentation, unaccompanied by reasons that purport to justify the refusal, cannot commit anyone but the refuser himself and cannot be considered a justification in itself. A lazy skeptic can effortlessly respond to every argument with “I am not convinced”; but there is no point in engaging a lazy skeptic in an argumentation.

Moreover, dialectical truths oblige not just the actual participants in a dialogue in progress but all human persons. Justificatory argumentation appeals to reason, not to subjective preferences or personal quirks.

It is easy to refuse another person the opportunity to present his arguments, questions and answers, and thereby avoid having an argumentation *with him*. Nevertheless, such a refusal is not a conclusive rational proof that he is not capable of reason. A’s refusal to speak to B does not prove that B is beyond the pale of argumentative intercourse. Treating a person as if he were not a person is not justifiable on the mere ground that one has denied him the opportunity to prove himself capable of reason.

It is dialectically true that, in dealing with one’s likes (other human beings), one ought to *presume* that they are persons, at least until there is sufficient proof that they are not. The contrary presumption, that other people are not capable of reason anyway, is a dialectical contradiction, because it amounts to an aprioristic refusal to take their arguments seriously – it amounts to a refusal to even recognize their arguments as what they are: arguments. The *presumption of rationality* is implied in the practice of argumentation itself.

Obviously, the presumption of rationality is defeasible in particular cases. There may be occasions when someone is temporarily “out of his mind” or definitely “loses his mind.” Moreover, every human being goes through a stage early in life when his rational faculties and his knowledge of the world are still insufficient to allow him to participate in argumentations. However, it is customary not to hold young

children responsible for their actions, and customary to hold grown-ups responsible for their actions, unless the particular case reveals sufficient reason to think otherwise. Few people are inclined to question whether this is a rationally justifiable custom – and with good reason, I should think.

If a man proves himself an *animal rationis capax* by engaging others in argumentation, then he *is* a person and ought to be regarded and treated as such by other persons. My questions and answers do not magically transform a non-rational blob into a responsible, answerable being capable of reason, who will once again become a non-rational blob as soon as I turn my back to him – nor am I so transformed by another's questions and answers. There is no more evidence for the contrary proposition than there is for my saying that things exist only when I have an immediate sensation of them. Moreover, to assume the contrary would make all argumentations about anything other than the current argumentation itself pointless – and that would make the current argumentation pointless.

If there are norms that are undeniably valid for persons capable of arguing and actually participating in an argumentation then they are valid for all persons capable of arguing, even at times when they are not participating in an argumentation. Such norms are not like, say, the rules of chess that bind chess players only while they are playing the game. There is no *a priori* of chess to match the *a priori* of argumentation.

The ethics of argumentation does not contend “that whenever people are engaged in a debate, they have implicitly agreed to certain norms.” To accept that contention is to uproot the argument from argumentation and reinterpret it as an argument about a game defined by rules that the participants have agreed upon. If that were the case, then obviously only the participants in an actual argumentation would be bound by those rules, and only for the duration of the argumentation game. However, the point of the *a priori* and the ethics of argumentation is that in order to participate in an argumentation people *must* accept the norms that are implied in the nature of argumentation. Whether an exchange of questions and answers is or is not an argumentation does not depend on agreement, implicit or otherwise, on an arbitrary set of rules, but on compliance with the norms which *must* be adhered to if the exchange is to be an argumentation. Unlike the rules of chess, which define by stipulation what the game of chess is, the “rules” of argumentation are to be discovered in the nature of argumentation. Similarly, whether A proves B is not a matter of convention but of logic: “Although B does not follow logically from A, it is nevertheless the case that A proves B because we have agreed that a proof is constituted by rules that are different from the rules of logic” is no more than a roundabout way of saying “A does not prove B.”

To sum up: It is a dialectical truth that one should respect one's opponents in an argumentation as free and independent persons whom one should not even try to manipulate or intimidate with anything other than the force of one's arguments. Moreover, one cannot argue with dialectical consistency that argumentatively unjustifiable ways of dealing with other persons justifiably prevail outside the context of

argumentation – those others might be one’s opponents in a future argumentation. Therefore there can be no justification for having recourse to such ways of dealing with such others. In short: persons ought to respect their likes as free and independent persons.

Whether or not this is the principle of libertarianism or libertarian capitalism, it is in any case the rationally demonstrable foundation of the classical natural law ethic, the normative framework – the *law of reason* – within which natural persons (human beings, in so far as they are capable of reason) *ought* to solve their differences, disagreements and conflict. Within this framework, a jurisprudence of freedom can propose and critically consider ways in which people ought to, or may, interact in various sorts of situations without violating the normative requirements implied in their nature as beings capable of reason.

V. Significance for the History and Philosophy of Law

A man accused of having committed a crime does not prove his innocence by proving that he committed no crime during the whole time he was in court (where his case was being argued). The point of argumentation in court is to determine whether some particular action of his before he was hauled into court was justifiable or unjustifiable, excusable or inexcusable.

If a man proves his innocence with respect to a crime of which he has been accused, a *judge* would dialectically contradict himself if he were to say, “Congratulations, but I am going to hang you anyway. After all, it does not follow from the fact that you gave proof of your innocence that anybody ought to pay attention to it, especially after the trial is over.” An agent, officer, or magistrate in the service of a government might say such a thing without dialectical contradiction, but only if he makes no claim to do justice. An official condemns a man to the gallows, having heard only the arguments and witnesses of the prosecution and having denied the accused the right to defend himself. There is not a whiff of dialectical contradiction there as long as the official places himself in the realm of brute force or cunning manipulation, demonstrating by words or actions that he does not intend to justify his action. However, he would dialectically contradict himself if he were to go on to say that he has rendered justice and spoken truly as required by the ethics of argumentation. He would also dialectically contradict himself if he were to attempt to justify his refusal to justify his obviously unjust actions.

Perhaps the greatest merit of Western civilization that was, for a remarkably long time, it accepted the normative primacy of reason in human affairs, as the foundational principle of justice. This was the paradigm of natural law, which, in the words of Saint Thomas Aquinas, amounted to the recognition of “man’s rational participation in the eternal law.” Few thought of arguing against the principle that conflicts, disputes, and disagreements ought not to be settled otherwise than by means of rationally justified actions in accordance with rationally validated principles. Force, intimidation, manipulation,

and so on, may be excused on those occasions when they are used as a means in *ultima remedio* to help establish or re-establish justice, but never when they are used autonomously to bring about whatever one can get away with.

Thus, it was accepted that there is a “court of reason” and that men should (indeed, ought to) have and organize actual courts of justice to help ensure that reason should prevail. The idea of a court of justice as an island of reason, where arguments would be appreciated on their merits, and where attempts at intimidation, trickery and so on would be checked and weeded out, became central to the ideology of the West. Inside the courts, the ethic of dialogue or argumentation should reign supreme, regardless of how it fares in the rough-and-tumble of daily intercourse. Moreover, the findings of such a court, with respect to the justifiability of particular actions, should prevail over the emotional or calculated responses of those who witness or hear about them – at least to the extent that the court’s findings are justifiable.

Only reason can justify – and that reason is not manifested in a monologue of one side’s arguments, but in a dialogue, where arguments and counterarguments can be evaluated in an open confronted. This, it was taken for granted that a court ought to hear all the parties involved in a dispute and give them an opportunity to justify or at least excuse their actions (“Audi et alteram partem”); that judges should arrive at the truth of the matter (in their verdicts, that is, *vera dicta* or truth-sayings) solely on the basis of “the merits of the case” as they emerge from the accounts of reliable witnesses and the arguments presented in court by the parties to the conflict; and that these verdicts should have normative authority as long as they are not shown to be wrong (that is, not *vera dicta* after all). Whatever the degree of social, economic or political inequality in a society, respect for the process of finding justice and a commitment to uphold its findings were held to be the keys to freedom and justice. The courtroom should provide the conditions that make fair argumentation possible (“equality before the law” and, via the practice of permitting the parties to call on advisors and advocates, even a rough equality of intelligence and argumentative skills).

It was a great idea, but of course the powerful, the rulers and their clients, often enough intervened in court proceedings and made a mockery of the independence of the courts of law, replacing them with boards of officials whose main function was (and is) to see to it that their master’s voice is heeded by all. The judges were replaced with “magistrates.” The *jurists*, whose main concern is the knowledge and application of the principles of justice, were replaced with *legists*, whose main occupation is to know and apply their masters’ wishes as these are revealed in their legal edicts and codes.

Nevertheless, even in this day of rampant legal positivism, the ideals of justice still fashion the way in which those boards and magistrates present themselves to the public at large and to their masters. Unlike bureaucrats and diplomats, the magistrates posing as judges do not claim authority on account of their loyal subservience to their masters, but on account of their “independence” from them. Paying lip

service to the ethics of dialogue and argumentation is vitally important for maintaining not only their position in society but also their status as possessors of a science of necessary things. While positivism rules the curriculum in the law schools, telling their students that only “the law” matters and that “the law” is nothing but a set of legal rules, edicts, and decisions promulgated by the authorities that other rules in the same set designate as “legal,” the schools never tire of instilling in their students the sense that the implications of positivism do not apply to the magistrates and the advocates they are being trained to become. Like scientists, they should be aware that they supposed to answer to a calling that transcends loyalty to any social or political regime. Like scientists, they should feel entitled to claim immunity from arbitrary interference, admittedly not as a general human right but as a professional privilege. And like scientists in the Age of Big Politicized Science, they should not have any qualms about serving and assisting the powers that be as long as the latter keep the pretence of their “independence.”

Albeit in an increasingly emaciated and perverted form, the ethics of argumentation still has a hold on the imagination as the bulwark of civilized co-existence, no matter how obscure the distinction between a scientist and a government expert, or between a judge and a magistrate, has become in public discourse. However, its force is sapped when the point of argumentation in a court no longer is to reveal which actions are justifiable and which are not but merely to determine which party complied with some set of arbitrary politically imposed rules. Then argumentation gives way to a contest to which one “legal mind” tries to outwit his opponent in a game that turns primarily on one’s skills in combing officially recognized legal classifications of facts, legal rules, other legal data such as precedents, and currently fashionable notions into “a strong case.” Similarly, the ethics of argumentation and dialogue loses its grip on the intercourse of scientists if convincing the authorities of the social or political relevance of one’s research becomes a priority.

The argument from argumentation is not a mere academic artifact without any practical significance. It underlies the Western tradition of the philosophy of law and its impressive harvest of principles of substantive and procedural justice, which command respect even after more than a century of systematic “debunking” at the hands of scientific positivists and others for whom man’s reason counts for nothing and his voice (“vote”) for everything.

VI. To Argue or Not to Argue

With few unfortunate exceptions, human beings are capable of reason. Unfortunately, many people prefer not to upgrade to the condition of an “animal rationale” by accepting or at least striving to live within the law of reason; many are opportunists, who appeal to the laws of reason, if at all, only when it suits them. For them, “What is in it for me?” is a far more pressing question than “What is the right thing to do?” Consequently, they prefer to get by on the basis of prudence rather than wisdom

(prudence controlled by reason), just as they would do in their interactions with animals and other natural phenomena. Nevertheless, few people can resist the urge to distinguish between right and wrong, and to claim justification for their judgments in matters of right and wrong. However, many want the reward of justification without arduous argumentation and likely to settle for prejudices rather than well-argued judgments: “Many people would sooner die than think. In fact they do.” That is not a refutation of the law of reason but an indication of man’s imperfection in the light of his most distinctive faculty: reason.

Consider Jonathan Swift’s statement that I have chosen as a motto for this paper: “[N]o person can disobey Reason, without giving up his claim to be a rational creature.” It expresses a dialectical truth, “Reason ought to be obeyed” (for one cannot consistently argue that reason ought not to be obeyed). It also states an argumentatively justified consequence of disobeying reason: one thereby gives up the claim to be a rational being (for one cannot consistently argue that one is a rational being and reject the obligation to abide by the dictates of reason). Recall that Swift defined the human being as an “animal *rationis capax*” – not as a being that is always and everywhere, as it were automatically, in tune with reason, but as one for whom it is a matter of choice whether or not he or she will accept to be rational: to live or to strive to live, to accept to judge and be judged, in accordance with the dictates of reason.

Obviously, it is physically possible for a human being to refuse to place himself under the authority of reason. However, he cannot without dialectical contradiction argue that the dictates of reason do not apply to him but only to others. The same holds for a man who wants to claim his rights according to the ethic of argumentation but refuses to recognize the obligations it imposes. That too is an argumentatively untenable position. Men who refuse to be bound by the ethics of dialogue or argumentation cannot hope to succeed in justifying that position argumentatively. Such people choose to act, and to interact with others, outside the “realm of reason.” Placing themselves outside the law of reason, the context where appeals to reason or justice can meaningfully be made, they choose to be *outlaws*. They not only give up the claim to be rational persons, they also free all others from the rationally, argumentatively valid obligations to treat them as persons according to the dictates of reason.

The point is that whether or not one activates one’s rational capabilities *is* a matter of choice. We can choose to enter in civilized commerce with one another by accepting that *a priori* of argumentation and all that it entails, or we can refuse to do so and play the Hobbesian jungle game. Some will choose the second option, thereby waiving their rights under the law of reason and justifying others to treat them as “wild things” (which one can try to manipulate but with which it is pointless to argue) – and if they do “injury contrary to right,” justifying others to treat them as “enemies.” There is no contradiction in their choice as long as they do not pretend to be able to argue that placing themselves outside the law of reason is “the right thing to do.” Indeed, some people succeed remarkably well in placing themselves

outside (or “above”) the law of reason. Nevertheless, they, their supporters, clients and apologists, cannot ever justify their stance in a rational argument. They may not care about that as long as they get their way, but that is their choice; it is not an argument with any rational force. Their choice to make themselves outlaws in no way invalidates the laws of reason.

VII. Outlaws and the Presumption of Innocence

Hoppe had no pressing reason to discuss the concept of an outlaw in the context of his comparison of socialism and capitalism. Nevertheless, the concept is essential for a correct appreciation of argumentation ethics. Not understanding this, critics such as Murphy and Callahan assume 1) that Hoppe’s theory implies that criminals are self-owners, who cannot rightfully be punished for their crimes because punishment violates their self-ownership; and 2) that, if the theory should deny that criminals are self-owners, it cannot claim self-ownership for anyone: “if Hoppe’s argument doesn’t prove that criminals own themselves, then it can’t prove that non-criminals do, either, since there is nothing in the argument itself concerning criminal behavior.”

Against Murphy and Callahan’s reading of it, we must point out that the argument from argumentation clearly distinguishes between persons who stay within the law of reason and persons who avoid or evade the law. Among the former self-ownership is argumentatively undeniable; among the latter the question of ownership (as distinct from effective control), let alone self-ownership (as distinct from effective self-control), does not even arise.

Of course, rational persons may be justified in using violence against a *brute* or a *criminal*, i.e., one who is by nature or by his own volition outside the law of reason, incapable or unwilling to submit to the test of justificatory argumentation. The ethics of argumentation restricts the range of one rational being’s lawful actions with respect to other rational beings, who like him accept the actions should be justifiable; it does not impose restrictions on what a rational being may do to a rock that threatens to crush him home, a bear that threatens to tear him apart, a criminal who tries to rob him. A thing that is outside the realm of the law of reason, or a man who makes himself an outlaw, say, by fleeing from justice or refusing to make restitution to those he has unlawfully wronged, is not (or is no longer) in the same position as one who continues to submit to the law of reason or as the repentant robber who recognizes that his actions were unjustifiable and makes a genuine offer of full restitution to his victim. Murphy and Callahan simply assume that bashing the head of an outlaw, a brute or an unrepentant robber, is just as much a violation of an argumentatively justifiable property right as is bashing the head of an innocent person or a repentant criminal. They are wrong.

My argument here refers to the theory of crime and punishment implied in the ethics of argumentation, a theory that is familiar to libertarians. Its bare outline is as follows: Suppose that one person, T (a

tortfeasor), intentionally or unintentionally, voluntarily or involuntarily, caused unlawful harm to another, V (his victim). Then there is an argumentatively justified obligation for T to undo, or compensate for, all the harm he caused V to suffer. This obligation corresponds to V's right not to suffer unlawful harm from another person. If T readily demonstrates his willingness and ability to make full restitution to V, the two must rely on negotiation, mediation, arbitration or adjudication to determine how and when full restitution is to be made. As soon as full restitution is made, the matter is settled, and V has no right to demand or extract *more* from T. In particular, V has no right to "punish" repentant T. However, if T *refuses* to honor his obligation to make restitution, for example by trying to evade being brought to justice, then he turns himself into a criminal. Consequently, V has the right to *enforce* his claim against unrepentant T, who is now no longer a mere tortfeasor but a criminal.

Thus, we have the *presumption of innocence*, i.e., the principle that no person shall be considered a criminal or punished as a criminal unless he willfully places himself outside the law of reason. Any "animal rationis capax" is to be presumed to accept the law of reason until it demonstrates that it does not. However, one who does place himself outside that law, not only gives up his claim to be a rational person but every other claim as well that invokes that law, including claims to ownership or self-ownership. As will become clear in the next section, none of this implies or even suggests that claims of ownership and self-ownership cannot be justified within the law of reason.

VIII. Self-ownership as Seen Through Positivist Spectacles

Argumentation ethics does not fit the modern academe's dominant paradigm of empirical science and its attendant positivistic and scientific methodologies. It is therefore no surprise that many of the academic critics of argumentation ethics have no use for it. Normative propositions such as "Being capable of reason, human persons ought to be rational" simply do not pass the positivists' muster and should therefore never be used in "scientific reasoning." Positivists do not care to argumentatively justify their rejection of such propositions: "dialectical truth" and "dialectical contradiction" are not in their methodological or epistemological repertoire. They do not, of course, deny that *they* themselves are capable of reason, and they do not deny that in their academic discourses they ought to show respect for truth and logic; ought to be willing to produce reasons or justifications for, and to accept rational criticism of, every thing they do or say; ought to respect each other as free and independent persons who should not even try to manipulate or intimidate one another with anything other than the force of their arguments; and indeed ought to respect the full range of libertarian rights in so far as they are relevant for academic intercourse. They are, however, unlikely to consider these norms rationally justified or even justifiable; they are far more likely to consider them as no more than "conventions" or "rules of the game," like the rules of chess. In the perspective of positivism, such rules are not grounded in a rational appreciation of the essence or final form of science; rather, they happen to be the rules effectively

followed by people who are conventionally regarded as scientists, and at least tolerated by public opinion and public authorities (the powers that be).

Consequently, the norms implied in argumentation ethics can enter the discourses of positivists only as “mere conventions” or as perhaps disguised empirical statements. Thus, we may expect two sorts of attack from positivists on any presentation of argumentation ethics such as Hoppe’s: 1) argumentation is a conventional game and as such its rules have binding force only for those who play the game and only for the duration of the game; 2) the ethics of argumentation implies empirical generalizations which can be shown to be false by suitable counterexamples. Murphy and Callahan, indeed, try both sorts of attack, although they certainly would not like being labeled as positivists. They sum up their critique as follows:

“[Even] on its own terms, Hoppe’s proof at most establishes fleeting and partial ownership of one’s body. [...His] proof doesn’t even succeed in this, for it confuses temporary control with rightful ownership.”

The first sentence says that Hoppe has only shown fleeting ownership of one’s body, namely, *ownership for the duration of the argumentation*, and even so only partial ownership, namely, *ownership of those parts of one’s body that one effectively needs to participate in an argumentation*. The second sentence states that Hoppe does not demonstrate ownership but only effective use of those parts of one’s body.

As we have seen already, the “fleeting ownership” criticism fails. What a justificatory argument justifies (whether or not that is an ownership claim) is justified not only while the argumentation is in progress and not only for those who actually participate in it but for all time and for all actual and potential arguers – for all persons. This is also true for the validity of the norm, “Beings capable of reason ought to respect each other as free, independent, separate persons,” which implies that they ought to abstain from using force or other non-rational means against one another unless there is justification for resorting to such means. As Hoppe put it:

“‘Nobody has the right to uninvitedly aggress against the body of any other person and thus delimit or restrict anyone’s control over his own body.’ This rule is implied in the concept of justification as argumentative justification... Since according to the nonaggression principle a person can do with his body whatever he wants as long as he does not thereby aggress against another person’s body, that person could also make use of other scarce means, just as one makes use of one’s own body, provided those other things have not already been appropriated by someone else but are still in a natural, unowned state.”

Clearly, it cannot be concluded from this that all human beings per se *are* self-owners. Moreover, there is no reason to suppose that the argument intends to show that all human beings as such *are* self-owners. Why then do so many critics seem to assume that the argument *intends* to prove precisely that, and therefore *fails* because it does not?

“At best, Hoppe has proven that it would be contradictory to argue that someone does not rightfully own his mouth, ears...and any other bodily parts essential for engaging in debate. But that clearly would not include, say, a person’s legs.”

It is dialectically true that the participants in an argumentation must have *physical control* over some parts of the world and in particular of their own bodies. This does not mean, however, that participants in an argumentation must have or even must be presupposed to have *ownership* of those parts of the world or their bodies. Ownership, unlike possession or effective control, is *not* a merely physical relation. ‘Ownership’ means justifiable control, that is, argumentatively justifiable control; therefore ownership can be determined only as a result of an argumentation about the justifiability of a person’s having possession or control of one or another means of action.

Nevertheless, Murphy and Callahan consider it “a more fundamental objection” that “one is not necessarily the rightful owner of a piece of property even if control of it is necessary in a debate over its ownership.” That proposition is simply true but the question is whether it is a relevant objection to Hoppe’s argument. Suppose I am charged with a crime in China. To comply with some minimal requirements of justice the Chinese court concedes that I should be assisted by a competent translator. I need one to be able to participate in the arguments made in court. Yet, my need for such a translator does not prove that the one I eventually get is my property. Did Hoppe say anything to suggest otherwise? I cannot find any place where he logically committed himself to such an absurdity and Murphy and Callahan do not direct me to one. Instead, they attempt to make Hoppe sound as if he were a Georgist. The insinuation is pointless. The fact that I need standing room in the Chinese court in order to be able to attempt to justify my actions does not make me the owner of a little piece of China. The Chinese are not contradicting themselves in conceding me standing room in the court without granting me ownership rights in Chinese soil. Murphy and Callahan suggest that if the Chinese are not contradicting themselves that also one who “concedes” another the use of his body or some parts of it for the duration of the discussion is not contradicting himself if he denies the other ownership of his body. True enough: denying that some person is a self-owner is not per se a dialectical contradiction. But that does not mean that his claim to be a self-owner – i.e., his claim that only he has justified and indeed justifiable possession and control of his body – cannot be justified.

Murphy and Callahan also claim that a theist may be wrong in asserting that God owns all of us, but insist that he is not thereby contradicting himself. Therefore, or so they say, the thesis of self-ownership is not without a logically coherent alternative and so cannot be necessarily true. They fail to see that a dialectical contradiction is not a *contradictio in terminis* but a contradiction between what is said and the saying of it. In this particular case, the moreover fail to note the difference between arguing about God and arguing with God. The question of God’s ownership would have to be decided in an argumentation with God, not with any self-proclaimed representative of God, who would have a hard time proving his

credentials anyway – so much so that it is doubtful that he would ever get to discuss the question of God’s ownership itself. The same applies to discussions about Society or The People’s having ultimate ownership of our bodies or other things.

The concept of ownership makes sense in the context of argumentation (the moral sciences), not in the context of describing the interaction of merely physical forces (the behavioral sciences). Unless I am prepared to argumentatively justify my actions and to accept justifying arguments made by or on behalf of others – in short, unless I agree to live within the law of reason, I cannot without dialectical contradiction claim ownership of anything, including ownership of myself. A wild animal, no matter how strong and cunning, makes no ownership claims; a man who does not care about the dictates of reason cannot consistently claim that his control over or use of some parts of the universe is to be respected because it is argumentatively justified.

In many cases, of course, possession or effectively control is unjustified, even unjustifiable. The argument from argumentation does not deny that. But neither does it deny that there are cases of justified or justifiable possession or effective control. Recall one more Swift’s definition of man as an “animal rationis capax,” bound by the argumentatively undeniable norm that it ought to be rational. Swift concluded: “No person can disobey Reason, without giving up his claim to be a rational creature.” We can now add: “Giving up the claim to be a rational creature entails giving up the claim to be a self-owner, or indeed an owner of anything whatsoever.” One who places himself outside the law of reason, thumping his nose at justificatory argumentation, cannot consistently claim to own what he possess or controls. In contrast, a person who lives within the bounds of reason will have no difficulty proving justifiable possession of any part of his body or indeed of any other thing that he acquired without injustice to anyone. After all, one cannot without dialectical contradiction *presume* that another person does not own his body. A person is to be regarded as a self-owner unless and until specific reasons are adduced for holding that his control of his body is not justified. It would be a dialectical contradiction to deny this: there is no point to engaging in an argumentation with someone who believes that no person has a right to use his body to express himself or to speak his mind.

To appreciate the undeniable justifiability of *the presumption of self-ownership*, it suffices to step out of the rarified atmosphere of academic discourse, where self-ownership is just a word or free-floating concept. Let us sit down, you and I, and facing one another argue about who may be presumed to own (justifiably control) whom: I me and you you (self-ownership); I you and you me; I both of us; you both of us; I and you both of us; or none of us either of us. Chances are that you and I are already in the perfect condition for an argumentation of that kind, if there is no prior event that has caused one of us to be indebted or subordinated to the other, say, as debtor to creditor or criminal to victim. It will soon become obvious that the presumption of self-ownership is the only argumentatively robust principle in the list, the only one that is part and parcel of the factual and ethical presuppositions of argumentation.

Of course, from the perspective of positivism this explication is to no avail: for the positivists, justification adds nothing to anything and ownership reduces to effective possession, either actual possession or possession recognized and protected by the powers that be; ethical notions must be eliminated from “scientific reasoning,” if not by simply ignoring them then by reinterpreting them as merely empirical concepts.

Disregarding Hoppe’s explicit protestations, even Murphy and Callahan prefer to interpret Hoppe’s dialectical statements about ownership (justifiable control) as empirical statements about the physical preconditions of the ability to speak (effective control) and to attack him by means of empirical counterexamples. Hence, their reference to the fact that a person without legs can argue with others and their conclusions that, since legs are not needed for the purpose of communication, Hoppe’s argument cannot even account for the fact that a person owns his own legs. Hence also, their reference to “slaves.” These do not *enjoy* libertarian rights, yet are able to argue. Therefore – or so Murphy and Callahan claim – libertarian rights are not necessary for the ability to argue, and Hoppe’s argument cannot account for self-ownership at all. However, because the general empirical statements against which they are directed are not part of Hoppe’s theory, the counterexamples do not affect the theory in the least.

Hoppe’s argument is not that “This is mine” follows from “I need this to be able to participate in an argumentation” because it would be contradictory to say, “Indeed, you need it, but I deny that it is yours.” The argument is that when A and B enter into an argumentation both of them do so under the dialectically valid presumptions of rationality, innocence, and self-ownership – presumptions that will hold until there is proof that they should be withdrawn. Neither A nor B can deny that he is arguing with *another* person, one who is both a person and another person – in the words of the time-honored formula, a separate “free and equal person.” Neither of them can justifiably claim to own any other participant’s justifiable possessions (his body or any part thereof, or any other, non-somatic means of action), or, of course, the law of reason itself. However, the fact that an outlaw (one who has placed himself outside the law of reason) needs his tongue to utter or his hand to write statements does not mean that he *owns* (as distinct from *possesses* or *has physical control over*) these body parts. One cannot at the same time repudiate the law of reason, which is what a criminal does, and invoke it to prove justifiable control, i.e., ownership.

Murphy and Callahan then claim that, even if one sets aside their remarks about fleeting and partial self-ownership,

it’s still the case that Hoppe has only proven self-ownership for the individuals in the debate...For example, so long as Aristotle only argued with other Greeks about the inferiority of barbarians and their natural status as slaves then he would not be engaging in a performative contradiction.

That is not true: Aristotle's general statement that barbarians have enough reason to obey orders and please their Greek masters but not enough to qualify as fully human is not defensible in an argumentation. If Aristotle had tried to justify his views to a moderately articulate barbarian, the contradiction would have been obvious. He could only try to avoid the humiliation of being caught in a dialectical contradiction by *refusing* to justify his views to the so-called barbarians, by refusing to give them a hearing. However, the attempt would have been in vain. For that refusal itself is a contravention of the ethics of dialogue and argumentation. It exemplifies not simply an intellectual mistake but a morally vicious stance. Any person, Greek or non-Greek, could have made that clear.

There is no way in which Aristotle – the Philosopher! – could have argued that his refusal to let the “barbarians” speak for themselves was argumentatively justified. Refusing to argue is not a form of producing an argument. There can be no argumentative justification for Aristotle's refusal to put his statements to the only relevant test: engage a non-Greek in an argumentation. After all, Aristotle was not merely stating the obvious, namely that the sentence ‘Greeks are rational in a way non-Greeks are not’ is not a *contradictio in terminis*. Yet, Murphy and Callahan claim (without argument) that Aristotle's refusal to talk to barbarians is as justified or as unjustified as our refusal to try to justify our views on zoos to a polar bear or a horse!

[T]he Hoppeian might respond that horses are not as rational as humans, and therefore do not need to be consulted. But Aristotle need only contend the same thing about barbarians: they are not as rational as Greeks.

What sort of argument is that? Do I need only contend that I am the only rational person in the world to *justify* the claim that nobody else is capable of arguing? We should soon discover that polar bears and horses are not creatures with which it is wise or safe or indeed possible to reason. Are Murphy and Callahan suggesting that that is exactly what Aristotle would have discovered if he had had a face-to-face discussion with a barbarian, any barbarian; and that he was therefore justified in refusing to give any barbarian an opportunity to prove him wrong?

Murphy and Callahan's contention, that refusing another person a hearing is just as rationally justifiable or unjustifiable as not giving animals a forum in which to expound their views on zoos and animal rights, is ridiculous. It is precisely in the context of argumentation that we cannot overlook the difference between another person and another animal without making complete fools of ourselves. In defense of Murphy and Callahan one might point out that academics, including most economists and social scientists, tend to deem scientific only theories *about* human beings that treat them not as potential opponents in an argumentation but only as suitable matter for “empirical research.” I should think that that is a fundamental flaw in much of contemporary social and economic science. In an enquiry relating to the foundations of ethics it is utterly out of place.

Murphy and Callahan then refer to David Friedman who argued that Hoppe must be wrong when he claims that self-ownership is a prerequisite to debate because countless slaves have engaged in successful argumentation. However, Hoppe did not make the empirical and absurd claim that a person is incapable of arguing merely because the powers that be *legally* classify him as a slave, or that being the *legally recognized* “owner” of one’s body is a necessary condition for being capable of engaging in argumentation. His argument was that such legal classifications and the actions they sanction or legitimize cannot be justified in an argumentation with the slaves or indeed in any argumentation that takes the presuppositions of argumentation seriously.

Consider, on the other hand, a master who enjoys debating the justifiability of slavery with his slaves after dinner and then sends them back to their cage, no matter what the outcome of the discussion may be. Consider, on the other hand, a master who frees his slaves after being exposed to the argument that slavery is not justifiable. Which of the two takes argumentation seriously? Which of the two acts as a rational being rather than a mere “animal rationis capax”? The first master obviously regards argumentation as no more than a parlor game; he refuses to argumentatively justify his actions outside that game and to make conform to justified principles. He demonstrates by his actions that he does not take argumentation seriously if it does not suit his purposes. Why should his opponents in the discussion, his “slaves,” take the argumentation in question seriously? Why should anyone? Hoppe answers: No one should take that argumentation seriously because it is not a genuine argumentation. Embracing Friedman’s avowed positivism, which instructs them to find an *empirical* difference between the moves of a genuine argumentation and those of a mock argumentation, Murphy and Callahan jump to the conclusion that they have refuted Hoppe. They are mistaken: to refute the Hoppeian argument from argumentation they would have to show that the first master and his “slaves” can with dialectical consistency engage in serious argumentation, accepting the dialectical principles such argumentation entails. Murphy and Callahan do not even try to make that argument.

Recall that Aristotle defended slavery with the argument that it is not primarily a conventional institution but a natural (and justifiable) condition of “inferior people.” His defense failed, as we have seen, because contrary to the requirements of the ethics of argumentation he had refused to submit his reasoning to the only test that could decisively refute it. The scandal of slavery is not in the fact that slaves are not, let alone cannot be, self-owners but in the fact that most of the people held as slaves are self-owners, unjustifiably deprived of their freedom. In other words, the scandal of slavery has very little to do with the persons held as slaves and very much with the people holding them unjustifiably as slaves.

IX. The Fallacy of Scientism

The conventions of academic writing tend to prevail over the requirements of the ethics of argumentation, even where adherence to those conventions leads to scientific fallacies. The basic convention is the subject-object distinction, in particular, the notion that the subjects (the researchers) and the objects of their research are qualitatively different sorts of entities. That notion is appropriate where the subject is a human person and the object some non-human, non-personal form of life or matter. However, it is inappropriate where both the subjects and the objects are human persons. There is a difference between theorizing about the human world *as if* it were separate realm of things with which we can have no intellectual, argumentative intercourse whatsoever, and theorizing from the human world about the human condition.

The scientific fallacy results when academics pretend to study the human world “from the outside” as if they (*rational* beings) are no part of it, as if the objects of their study (*human animals* or, perhaps, mere *black boxes*) are as different from them as are snails or crystals. On the one hand, the academics recognize that in their own disputes, where they face one another, they should abide scrupulously by the requirements of the ethics of dialogue, if they want to be accepted as members in good standing of their academic communities. Thus, in the communications and argumentative exchanges within their academic community, ill defined as it may be, they fully accept that argumentation is between one person and another, between an *I* and a *You*, and also that the success or force of the argumentation does not depend on who is the *I* and who the *You*. On the other hand, people outside the academic community should never be considered even a potential *You* or *I*; they are assigned the status of an impersonal *It* or *Them* and should not be regarded as rational persons of the same sort as the academics who theorize about them. Consequently, it makes no sense to think that *among themselves* those human animals or black boxes are rationally bound by, and entitled to treatment according, the ethics of argumentation in the way the academics are. As a corollary, statements about “ordinary people” should not be applied to the academics themselves.

The scientific and positivistic insistence on a radical subject-object dichotomy between “us” and “them” precludes that the two sides of the dichotomy are united by any *a priori* of argumentation. Indeed, scientism requires that the rationality of ordinary people be methodically disregarded: their *arguments* must be reinterpreted as instances of mere behavior to qualify as legitimate scientific data. In a similar vein, the ethical notions that define the academic community must be emptied of their primary ethical content before they can be applied to the human objects of research. As Anthony de Jasay memorably put it with respect to justice, it has no place in the contemporary academy’s “scientific” research concerning the human world. “Justice” is no more than a subjective relative value or it is a nominal standard imposed by the scientific observer that answers, say, to this or that quantifiable maximum or this or that calculable conditions of equilibrium in the pool of human matter. Libertarianism likewise must boil down to the *mere belief* that ordinary human beings have more or less the same rights relative to each other as academics have in their academic community. However, any

justification of that belief about the ethics of beings outside the academic community of scientists must be different in kind from the justification of the ethics of the academic community itself. Indeed, the subject-object dichotomy implies that rational, argumentative capacities cannot have the same kind of ethical implications for “ordinary people” that they have for intellectuals. Consequently, an academic’s commitment to libertarianism as a valid principle for *all* human persons has the same sort of contingent relation to the ethics of argumentation as any opinion or theory of animal rights has.

If the separation of mankind in two distinct species – “*we*, the arguers who make up the academic community, and *they*, the black boxes we define as relevant behavioral units” – is made into an axiom of the scientific study of the human world, the relevance of “our” ethical principles to ordinary mankind must be as contingent, arbitrary, or delusional as it is to mosquitoes or black holes. Hoppe explicitly refuses to accept that axiom. He most certainly does not appeal to the prevailing consensus in, or the mere conventions of, any particular humanity community, no matter how it labels itself. He appeals to the capacity of *all* human persons to recognize one another as persons, at least when they get involved in asking questions and giving answers, and arguing about the reasons for their questions and answers.

In scientific positivism the critics of argumentation ethics may well find all the arguments they need for their belief that an academic does not formally contradict himself when he says that human or other animals do (or do not) have one or another right. True as this is, it does not amount to an argumentative justification of any form of scientific positivism – unless, of course, it were true that academics belong to a different species than ordinary men and women.

The baneful influence of scientific positivism emerges most clearly in the context of education. What happens to education when the *a priori* ethic of argumentation no longer binds teachers and pupils in a single community of rational persons? The enthusiasm with which many academics support, say, Hume’s dictum that *reason is and ought to be the slave of the passions*, as if it were a deep insight into the truth about human nature, raises the question what sort of education could be built upon the positivist principle as it is applied to human affairs. At the individual level, it translates into, “Your reason is an ought to be the slave of your passions; do not question your desires, only the efficacy and efficiency of the means to realize them”; at the institutional level, it translates into, say, “Schools and universities, the pursuit of scientific knowledge itself, are and ought to be the slaves of politics – or if not of politics then of public opinion.” In either case, we seem to be left with no principle of education at all, for what is the purpose of an education if not to each us to learn to discern right from wrong?

Hume never leads us beyond the question of how to get what we want in the most efficient way, no matter what we want. To give only one example: Increase unemployment of certain classes of men may be an almost inevitable consequence of imposing an effective minimum wage. Some people (those who see their employment opportunities diminished or their labor costs increased by such a measure) will say that this is a reason for *not* imposing a minimum wage; others (employers fearing competition from

regions with lower wage rates, union members seeking to restrict entry into the labor market, politicians looking for a client base of people dependent on political redistribution and those hoping to become clients of such redistributive schemes) will say that it is a reason for imposing a minimum wage. Humean “reason,” having established the relation between minimum-wage legislation and unemployment, sits back until the balance of power among the passions tilts towards a particular goal and then enlists itself in the service of the winner. “Education” based in Humean reason teaches service to the ruling passion or opinion – in a word, conformism. Questions of right and wrong, justice and injustice, and the presumptions of rationality, innocence and self-ownership, lies outside its scope. At best, such questions are admitted only after they have been reduced to questions of compliance with existing, merely conventional rules. Of course, there is no reason to suppose that what lies outside the scope of Humean “reason” is irrelevant and cannot be subjected to justificatory argumentation. The effects of the adoption of Hume’s principle in “education” are easily observable in the proliferation of experts and social and economic theories that, while claiming to be scientific, are examples of sophisticated sales talk promising the greatest happiness to those who adopt them.

X. But Does It Justify Libertarianism ?

While I was working on my ethics of dialogue, some people began to call me a libertarian because of the considerable overlap between the conclusions I reaches (in particular about the State being unjustifiable) and positions defended in the writings of Murray Rothbard and others who by that time had made “libertarianism” a distinctive branch of American political philosophy. At least to the extent of that overlap, the ethic of dialogue or argumentation does justify Rothbardian libertarianism. Since I received the label “libertarian” because of my work on that ethic, I suppose I may say that my libertarianism is identical to that ethic. Rooted in the philosophy of law rather than any particular theory of economics, it is the philosophy of people who accept that the ethic of justificatory argumentation is the proper framework for discovering rationally undeniable norms for human interaction as well as justifiable solutions to particular disagreements and conflicts. Advocating such a framework is admittedly far less spectacular than promising a ready-made solution for every conceivable problem. Nevertheless, it is all that libertarian philosophy can offer if it is true to be the concept of freedom for all persons under the law of reason and the (in particular cases defeasible) presumptions of rationality, innocence, and self-ownership.

With that in mind, it is fair to say that only libertarian rights can be argumentatively justified, because only libertarian rights define a context in which the conditions necessary for justificatory argumentation can be respected universally.

A final caveat: The arguments from the *a priori* of argumentation and the ethics it entails do not, and are not intended to, supplant the study of the natural law of the human world (that is to say, the natural conditions that market the difference between order and disorder in the human world). They complement it by proving how we can be rational and argumentatively justify certain actions or statements if we are conscious of the fact that we, all of us, are *in* that world. The relative novelty of the world, “libertarianism,” should not blind us to the fact that the complementarity of natural law and reason has been known and appreciated for a long time already. Nor should the radical nature of libertarianism blind us to the fact that it is radical only because it presses the demand for interpersonal justification among free and equal persons into corners where the argument from authority, be it God, Society, Science, Utility, or whatever other Convenient Abstraction, used to reign unchallenged.

A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics

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[Vol. 1 #20](#) Issue of the [Libertarian Papers](#)

March 2009

I. Introduction

The aim of this article is to defend the usage that Hans-Herman Hoppe makes of *performative contradiction* for justifying the *self-ownership axiom*. “Any person who would try to dispute the property right in his own body would become caught up in a contradiction, as arguing in this way and claiming his argument to be true, would already implicitly accept precisely this norm as being valid.” The stake of this argument is to show with the help of performative contradiction that only the libertarian ethics based on self-ownership axiom can be justified. Better explanations of this idea will be provided in the next section.

Hoppe himself has done a lot of work in elaborating on his own argumentation ethics and in replying to some of his critics. Other scholars accurately reassumed and retraced the history and the key moments of the debate. Leaving aside the debates already closed, this paper concentrates on ignored and still unanswered critiques. For a clearer exposition, we distinguish between strategies of critique. On the one hand, there is a general type of critique which disputes the capacity of performative contradiction in justifying any ethical principle. On the other hand, there is a specific type of critique which contests the ability of performative contradiction in justifying the self-ownership axiom.

This article will first reiterate the argument by performative contradiction and its importance within the libertarian framework. Second, some of the general critiques and misunderstandings will be discussed. Third, focus will be given to the very specific and challenging critiques of the use that Hoppe makes of performative contradiction. The critiques formulated by Callahan and Murphy will be reviewed before answering them. Finally, the perspectives for new research opened by this argumentation will be emphasized. The main advances of this paper consist in providing a broader and systematic discussion of the debate on libertarianism's justification, in preventing future misunderstanding of Hoppe's argumentation and in formulating an original and pertinent reply to Callahan and Murphy's critiques.

II. The Argumentation by Performative Contradiction and its Importance for Libertarianism

Avoiding repetition, the choice to revisit a debate binds us to briefly present its intellectual roots. The idea of "performative contradiction" denotes an inconsistency between acting and saying. To utter a performative sentence is to make explicit what act one is performing. Paradigmatic cases of performatives involve saying something which, by the very act of saying itself, constitutes an act of the mentioned type. For example, saying "I promise I will meet you at the movie" is a promise in itself. A performative contradiction occurs when the agent denies the conditions without which her action would not take place. This type of contradiction becomes obvious in verbal discourse when someone denies what it is required for her own speech. For example, it is absurd to say "there are no statements." This statement contradicts its *conditio sine qua non*: a statement is required to say "there are no statements." *Mutatis mutandis*, it is absurd to say: "I am not alive." This statement contradicts another statement ("I am alive") which is a *conditio sine qua non* to formulate the former statement. Conversely, a person could not claim to be dead without contradicting the very fact that she has to be alive for saying "I am dead."

This argument was used for the very first time by Aristotle in the book Γ of *Metaphysics*. Aristotle uses this argument for justifying the necessity of the principle of non-contradiction:

"But even this can be demonstrated to be impossible, in the manner of a refutation, if only the disputant says something. If he says nothing, it is ridiculous to look for a statement in response to

one who has a statement of nothing, in so far as he has not; such a person, in so far as he is such, is similar to a vegetable. By ‘demonstrating in the manner of a refutation’ I mean something different from demonstrating, because in demonstrating one might be thought to beg the original [question], but if someone else is cause of such a thing it must be refutation and not demonstration. In response to every cases of that kind the original [step] is not to ask him to state something either to be or not to be (for that might well be believed to beg what as originally at issue), but at least to signify something both to himself and to someone else; for that is necessary if he is to say anything. For if he does not, there would be no statement for such a person, either in response to himself or to anyone else. But if he does offer this, there will be demonstration, for there will already be something definite. But the cause is not he who demonstrates but he who submits; for eliminating statement he submits statement. Again, anyone who agrees to this has agreed that something is true independently of demonstration. First, then, it is plain that this at least is itself true, that the name signifies to be or not to be that everything was so-and-so and not so-and-so.”

To put it briefly, Aristotle argues that it is self-contradictory to deny the principle of non-contradiction. This is so because any statement that we want to communicate presupposes the non-contradiction principle. The Aristotelian argument is shared by most of the Scholastic authors. In his commentary of Aristotle’s *Metaphysics*, Thomas Aquinas uses the concept of “retorsive argument” (*redargutio elenchica*) for revealing the logical fallacy of rejecting a thesis which is presupposed *in actu exercito* i.e. in the course of the refutation. Performative contradiction initially formulated by Aristotle is extremely fashionable in logic, metaphysics, and ethics. The *retorsive argument* is widely used and discussed by contemporary philosophers. *Performative inconsistency* and *pragmatic auto-contradiction* are different names for the same argumentative process. However, this procedure of argumentation by performative contradiction became famous with Jürgen Habermas and Karl-Otto Apel which use it for justifying normative statements:

“The demonstration of performative contradictions in particular cases serves to refute skeptical counterarguments. Apel and I employ this method to discover universal pragmatic presuppositions of argumentation and to analyze their normative content. In this way I attempt to justify a principle of universalization as a moral principle. The initial intention is simply to demonstrate the moral-practical questions can indeed be decided on the basis of reasons.”

In the opinion of these authors:

“ultimate foundation is not possible by deduction but by transcendental reflection on the presuppositions of actual thought that cannot be denied without committing a performative self-contradiction. [...] Such a foundation would require that we could show by transcendental reflection that together with our acts of thinking we also must indisputably presuppose a principle or some fundamental norms of morality.”

According to Habermas:

“Karl-Otto Apel proposes the following formulation in regard to the general presuppositions of consensual speech actions: to identify such presuppositions we must, he thinks, [...] call to mind ‘what we must necessarily always already presuppose in regard to ourselves and others as normative conditions of the possibility of understanding; and in this sense, what we must necessarily always already have accepted.’ Apel here uses the aprioristic perfect (immer schon: always already) and adds the mode of necessity to express the transcendental constraint to which we, as speakers, are subject as soon as we perform or understand or respond to a speech act. In or after the performance of this act, we can become aware that we have involuntarily made certain assumptions, which Apel calls ‘normative conditions of the possibility of understanding.’”

Rasmussen dismisses Habermas’s defence of the argument from performative contradiction and doubts about its success “in establishing a normative basis from which to assess conceptions of justice.” Among all its various applications, performative contradiction became the nub of important debates for the justification of libertarianism. Stephan Kinsella calls into view the fact that “in recent years, interest has been increasing in rationalist-oriented rights theories or related theories, some of which promise to provide fruitful and unassailable defenses of individual rights. These arguments typically examine the implicit claims that are necessarily presupposed by action or discourse. They then proceed deductively or conventionally from these core premises, or axioms, to establish certain apodictically true conclusions.” Kinsella exposes several variants of the argument from performative contradiction and pertinently discusses their contribution in justifying the property rights.

Although he does not explicitly mention the terms of performative contradiction, Murray N. Rothbard uses this argument for unveiling the existence of an irrefutable type of ethical statement – the axiom:

“We may note, that a proposition rises to the status of an axiom when he who denies it may be shown to be using it in the very course of the supposed refutation. Now, any person participating in any sort of discussion, including one on values, is, by virtue of so participating, alive and affirming life. For if he were really opposed to life, he would have no business in such a discussion, indeed he would have no business continuing to be alive. Hence, the supposed opponent of life is really affirming it in the very process of his discussion, and hence the preservation and furtherance of one’s life takes on the stature of an incontestable axiom.”

The ethical axiom that Rothbard has in mind is self-ownership. “Each man should be permitted (i.e. have the right to) the full ownership of his own body.” Hoppe reformulates this argument more accurately and gives it all the weight needed for formulating a strong defense of libertarianism. Hoppe defines the performative contradiction in the following terms:

“It must be considered the ultimate defeat for an ethical proposal if one can demonstrate that its content is logically incompatible with the proponent’s claim that its validity be ascertainable by argumentative means. To demonstrate any such incompatibility would amount to an impossibility proof; and such proof would constitute the most deadly smash possible in the realm of intellectual inquiry.”

Hoppe observes that “the right to self-ownership” is very similar with the statement “I am alive.” One has to be not only a living person but she has to be also a non-coerced self-owner in order to deny the right to self-ownership. Hence, Hoppe purports to show that denying the right to self-ownership is self-contradictory:

“Such property right in one’s own body must be said to be justified a priori. For anyone who would try to justify any norm whatsoever would already have to presuppose an exclusive right to control over his body as a valid norm simply in order to say, ‘I propose such and such.’ And anyone disputing such right, then, would become caught up in a practical contradiction, since arguing so would already implicitly have to accept the very norm which he was disputing.”

Were this argument valid, libertarianism would be the only theory of justice that can be justified. By libertarianism it is intended the normative set of propositions derived from the self-ownership axiom. “In effect, this argument supports the natural rights position of libertarianism as espoused by the other master thinker of the modern libertarian movement, Murray N. Rothbard – above all in his *Ethics of Liberty*.” Showing that only the self-ownership axiom can pass the test of performative contradiction, justifies the preference for it. Libertarianism should be preferred to any other theory of justice, because only libertarianism is non-contradictory. To be sure, this fact does not impede conflicts to arise or non-libertarian solutions to be provided. Hoppe’s argument shows only that it would be absurd (i.e., self-contradictory) to adopt a non-libertarian ethic:

“I demonstrate that only the libertarian private property ethic can be justified argumentatively, because it is the praxeological presupposition of argumentation as such; and that any deviating, non-libertarian ethical proposal can be shown to be in violation of this demonstrated preference. Such a proposal can be made, of course, but its propositional content would contradict the ethic for which one demonstrated a preference by virtue of one’s own act of proposition-making, i.e., by the act of engaging in argumentation as such. [...] Likewise, non-libertarian ethical proposals are falsified by the reality of actually proposing them.”

If libertarianism is the correct ethical theory, the foremost political implication which follows from this idea is anarchy:

“As simple as the solution to the problem of social order is and as much as people in their daily lives intuitively recognize and act according to the ethics of private property just explained, this

simple and undemanding solution implies some surprisingly radical conclusions. Apart from ruling out as unjustified all activities such as murder, homicide, rape, trespass, robbery, burglary, theft, and fraud, the ethics of private property is also incompatible with the existence of a state defined as an agency that possesses a compulsory territorial monopoly of ultimate decision-making (jurisdiction) and/or the right to tax.”

To sum up, the major stake of the argument by performative contradiction is the justification of anarchy. If only the self-ownership axiom can pass the test of performative contradiction, then only libertarianism can represent a coherent ethical theory. Libertarianism encloses the anarchist claim that State is immoral because it violates the self-ownership axiom.

This strategy of basing the defense of libertarianism on the argument by performative contradiction attracted very quickly the attention and the admiration of numerous libertarian scholars. Moreover, Hoppe’s argument from performative contradiction has a major influence on the libertarian scholars. However, given the importance of libertarianism’s political implications, the critiques of its justification are inflowing from many directions. This paper proposes to show that they are not successful in their aim. For reasons of clarity, the exposition of the current critiques will be divided in two types: very general (targeting the use of performative contradiction) and more specific critiques (targeting the justification of the self-ownership axiom). Since we estimate that the first type of critiques have a broader of application, it is appropriate to address them from introducing, in the section after, some of the critiques explicitly formulated against the self-ownership axiom.

III. General Critiques

By discussing general problems with the argument by performative contradiction we expect to prevent some of the numerous misinterpretations gravitating around it. What can be proved when the argument by performative contradiction is used? The argument by performative contradiction is generally employed as a test for the identification of ethical axioms. Hoppe claims that among all possible candidates to an ethical axiom, only self-ownership can pass this test. Since all the other candidates are internally inconsistent, it appears that only libertarianism can be considered as a just ethics. In other words, the argument from performative contradiction provides us the reasons for preferring libertarianism to any other ethical system. To be sure, the performative contradiction does not prove more than this. Bearing this fact in mind, we can now see more easily why some critiques of Hoppe’s justification by performative contradiction of self-ownership misinterpret it.

Terrell misinterprets the role of performative contradiction when he considers that this type argumentation is not a *trustworthy revelatory document*:

“The self-ownership is not intuitively obvious. It is a statement that is essentially arbitrary and must be accepted by faith. Questions of faith certainly bear on economics, but without an internally consistent, trustworthy revelatory document, these questions cannot be answered definitively. Neither Rothbard nor Hoppe present or even argue the existence of such a document. [...] The entire system derived from the faith-based assertion is therefore on shaky ground. Those who do not share Rothbard’s or Hoppe’s faith will not necessarily accept this first axiom.”

This critique wrongly assumes that performative contradiction is similar to a revelation. Based on this assumption, Terrell observes that performative contradiction fails to reveal the truth of self-ownership axiom and concludes that only faith can justify this axiom. To be sure, performative contradiction is not a *revelation* but *it reveals* which ethical axiom can be consistently defended. By testing the ethical axioms against the performative contradiction, we observe that only the self-ownership axiom is logically consistent. If performative contradiction is a valid argumentative strategy, then libertarian appears to be the only ethical system which can be defended through argumentation. Those who do not accept the self-ownership axiom will endorse a logically inconsistent axiom. Obviously, this is not a question of faith but of logical soundness.

Another misinterpretation of performative contradiction regards the role of argumentation. [Robert P. Murphy and Gene Callahan take Hoppe’s argument](#) to mean that:

“bashing someone on the head is an illogical form of argumentation. [Hoppe] has not shown that the fact that one has ever argued demonstrates that one may never bash anyone on the head, nor has he demonstrated that one may not validly argue that it would be a good thing to bash so-and-so on the head.”

At the outset, the argument by performative contradiction does not aim at demonstrating that bashing someone on the head is an illogical form of argumentation. If performative contradiction is a valid argument, then it shows that it is self-contradictory (and illogical) *to establish a norm* allowing people to bash someone else on the head. The purpose of performative argumentation. This job is usually done by the principles of logic.

However, from the common sense point of view, we may say that bashing someone on the head is not an argumentation at all and that surrender in front of a physical threat is not the equivalent of being convinced by argumentation. Deleting this common sense distinction between aggression and argumentation would hinder any theory of justice. Actually, were the barrier between argumentation and coercion to be removed, the theory of justice would have no more sense. Any action would be an aggression and any aggression would be an argumentation. Obviously, such a situation is absurd. By qualifying this observation as “obvious,” I primarily refer to the common sense and secondly to the libertarian definition of aggression. In his defense of Hoppe’s performative contradiction, [Frank van](#)

[Dun discusses extensively the meaning of argumentation](#). However, besides the debate on the meaning of argumentation, the argument from performative contradiction shows that it would be self-contradictory to adopt a norm which denies the right to self-ownership. Furthermore, performative contradiction does not aim at effectively impeding one to bash someone else on the head. The argument by performative contradiction only indicates that from a libertarian point of view bashing someone else on the head is unjust. It is unjust because it violates the self-ownership axiom. Libertarianism is just because it is the only defensible ethical system. This is the case because only the ethical system based on the axiom of self-ownership can pass the test of performative contradiction.

Let us now explicate another misunderstanding concerning the argument by performative contradiction. In addition to performative contradiction, Hoppe formulates an argument regarding the universalization of a normative statement. “Quite commonly it has been observed that argumentation implies that a proposition claims *universal* acceptability, or, should it be a norm proposal, that it is ‘universalizable.’” In developing this idea, Hoppe endorses the so called *Kantian Golden Rule* and claims that every normative statement should be universally applicable. “Applied to norm proposals, this is the idea, as formulated in the Golden Rule of ethics or in the Kantian Categorical Imperative, that only those norms can be justified that can be formulated as general principles which are valid for everyone without exception.” Otherwise, i.e., if a statement is not universally applicable it could not be taken into account as a normative proposition:

“Checked against this criterion all proposals for valid norms which would specify different rules for different classes of people could be shown to have no legitimate claim of being universally acceptable as fair norms, unless the distinction between different classes of people were such that it implied no discrimination.”

The role of the *Kantian Golden Rule* is reiterated by Kinsella during his defense of Hoppe’s justification of libertarianism:

“Universalizability acts as first-level ‘filter’ that weeds out all particular norms. This reduces the universe of possibly justified normative claims but does not finish the job since many incompatible and unethical norms could be reworded in universalizable ways.”

The idea of universalizable ethics is the target of several critiques. Terrell asserts that “Rothbard and Hoppe depend upon the rule of ethics that an ethical system must apply equally to all people. They do not present a reason why this rule of ethics must hold true.” Callahan and Murphy also believe that “to simply declare that ownership rights must be ‘universalizable’ is not help, either. [...] The basic dispute between Aristotle, the animal rights activist, and Hoppe is precisely over which group of living beings ownership rights must be ‘universalizable.’” These scholars argue that the self-ownership axiom cannot be universalizable and it may be restricted to some humans. “Aristotle need only contend [...] about

barbarians [that] they are not as rational as Greeks.” Since self-ownership is not universalizable, it can be extended to animals:

“Suppose an animals rights activist reads Hoppe’s argument and announces to the world that she now has irrefutable proof that slaughtering chickens is immoral. [...] We urge the skeptical readers not to dismiss our suggestion as ridiculous. What is the actual error of our hypothetical animals rights activist? There are many possible responses a Hoppeian might advance; our point does not depend on the specific reply. But whatever the reply may be, if it is equally applicable to any human being, then Hoppe’s argument must not make the universal case for libertarian rights, after all.”

There are three remarks that show why this critique misinterprets the argument by performative contradiction. First, it can be noted that the problem pinpointed by Callahan and Murphy is not specific to libertarianism but is common to *every* normative theory. This observation is very important. The argument by performative contradiction shows that libertarianism is the only ethical system which is logically self-consistent. The only way of criticizing this idea is to show either that libertarianism is inconsistent or that the difficulties enclosed with libertarianism are overcome by another ethic. When Callahan and Murphy argue that the self-ownership axiom is not universal, they do not explain how this alleged difficulty of libertarianism is overcome by another ethic. In fact, this problem of defining the application field for a norm is an age-old philosophical problem. Second, the success of the argument by performative contradiction does not rely at all on the universality of self-ownership. Were this argument successful or not, it is irrelevant from this perspective to know which is the exact range of application of the norm that passed the test of performative contradiction. To put it differently, universality and performative contradiction are two different and completely separate features of ethics. While the latter provides the reasons for preferring an ethical system, the former establishes its range of application.

Third, universality as a necessary condition for normative statements is practically void of sense. Let us consider a partial (non-universal) formulation of self-ownership: “only dark-hair humans are self-owners.” One may claim that this proposition fails to pass the universality test because it can not be applicable to every human being. Let us now consider it more carefully. The statement says that dark-hair humans are self-owners and it says also that the non-dark-hair humans are not self-owners. Formulated in these terms there is no doubt that this statement is universally applicable to every single human being. While this statement concerns every single human it discriminates between dark-hair and non-dark-hair humans. Hence, the trouble with this statement is not its partiality but its discriminatory character. Any ethics distinguishes those to whom the norms apply from those outside the normative realm. A non-discriminatory ethics is simply inconceivable.

Now we can see better that the trouble with the statement: “only dark-hair humans are self-owners” is neither that it is not universal, nor that it discriminates. This statement *is universal*, and *it cannot not*

discriminate. The “problem” enclosed with this statement concerns the criterion (dark-hair humans) used to identify the self-owners. Scholars with interests in ethical issues have different opinions about the proper criterion which delimitates the realm of ethics. The formulation of a criterion is an essential condition for building an ethical system. But this matter is very different from the debate stimulated by performative contradiction which concerns the justification of an ethical system. The question, “Which criterion to use for defining self-ownership?,” is logically independent of the question, “Can the self-ownership axiom be justified?” Whereas the former regards the content of an ethical system, the latter concerns its defence. Given the aim of this article, we will not develop further this idea notwithstanding numerous reflections that it inspires.

To sum up, there is no doubt that a norm must apply universally to every moral person. The critiques, apparently directed towards the *Kantian Golden Rule* are in fact targeting the criterion used for identifying those to whom the *Kantian Golden Rule* applies. Therefore, this type of critiques, formulated by Terrell but also by Callahan and Murphy is misguided. Some issues related with this type of critique and which are regarding more particularly the axiom of self-ownership will be expanded in the next section.

Before taking into account more specific critiques, let us now discuss the last general critique of the argument by performative contradiction: the *is-ought problem*. This program is well known since David Hume observed that a common argumentation in ethics consists in making observations using descriptive sentences (using the verb *is*) and then deriving normative conclusions (using the verb *ought*). Poincaré resume this idea very clearly:

“The rationale is simple; there is a rationale, how could I put it? Purely grammatical. If the premises of a syllogism are both of them statements with a verb in indicative, the conclusion will also be a statement with a verb in indicative. In order to obtain a conclusion with a verb in imperative, it is necessary that at least one of the premises has a verb in imperative.”

This argument is often associated with the debate on naturalistic fallacy. Gewirth sees in the idea of performative contradiction the opportunity to overcome the naturalistic fallacy. Ross replies it by showing its limits. More recently, Godefridi calls upon *is-ought problem* for criticizing Hoppe’s defense of the self-ownership axiom:

“Here it is an ingenious and fascinating attempt of using the argumentation ethics of Apel and Habermas for defending Rothbard’s axiom. However it is not persuasive. One has still to demonstrate that the ethical thinking needs argumentation. [...] Furthermore, there is no doubt that the argumentation supposes the control over my body and the space where it stays. But this control should not be confounded with appropriation. The dichotomy control/appropriation and fact/value are of the same type.”

According to Godefridi, performative contradiction does not suffice for solving the naturalistic fallacy. “Facts and values belong to different levels. From what it is we can not conclude what ought to be; the existence of a fact can say anything about its legitimacy.”

Let us now show why this critique generally addressed against the performative contradiction is misguided when it is used against Hoppe’s argumentative strategy. To be sure, naturalistic fallacy does not say that it is an error to deduce normative statements at all but only that there is an error to deduce them from descriptive statements. In the way that Hoppe formulates it, performative contradiction cannot be criticized on these grounds. Hoppe maintains that defending any non-libertarian theory of justice is self-contradictory. This statement is entirely descriptive. Let us explicate its premises. First, in order to solve conflicts, a solution is always required. Performative contradiction proposes to justify the set of solutions grounded on the ethical axiom of self-ownership. Second, when choosing a norm one cannot dismiss the principle of non-contradiction. At this point, Hoppe’s argument by performative shows that when choosing this solution it is important to observe that only the self-ownership axiom is not self-contradictory. Clearly, this rationale does not deduce an *ought-statement* from an *is-statement*. It emphasizes the self-contradiction in denying an *ought-statement*, i.e. the self-ownership axiom. For refuting the self-ownership axiom, one has to be free from coercion. As Hoppe himself put it, “in making this assertion, one need not claim to have derived an ‘ought’ from an ‘is.’ In fact, one can readily subscribe to the almost generally accepted view that the gulf between ‘ought’ and ‘is’ is logically unbridgeable.”

After these preliminary discussions we will continue with the analysis of the critiques that are explicitly tackling the justification by performative contradiction of the self-ownership axiom.

IV. Specific Critiques

In the following, we will present three critiques formulated by Gene Callahan and Robert Murphy. The critiques are targeting the fact that Hoppe’s case in favor of the self-ownership axiom was made at best for some parts of the body and/or for those persons who are actually involved in a debate. Callahan and Murphy also maintain that Hoppe’s argument is inconsistent because it conflates use with ownership. Let us now analyze each particular critique and show how it can be dismissed.

According to the first type of critique formulated by Callahan and Murphy, there are some parts of our body, like kidneys, legs and so on which are not essential for elaborating an argumentation. Hence, Hoppe’s justification of the self-ownership axiom excludes these parts of our body. “At best, Hoppe has proven that it would be contradictory to argue that someone does not rightfully own his mouth, ears, eyes, heart, brain, and any other bodily parts essential for engaging in debate. But that clearly would not include, say, a person’s legs; after all, it is certainly possible for someone to engage in debate without

having any legs at all.” Therefore, Hoppe’s argument – even if valid – is not applicable to actions such as cutting the legs or taking a kidney of a person:

“To illustrate how the above foils Hoppe’s intention, imagine a collectivist arguing: People should not have full ownership of their bodies, as libertarian theorists believe. For example, if somebody is sick and needs a kidney, then it is moral to use force to compel a healthy person to give up one of his. Since it is not necessary to have two kidneys in order to argue, Hoppe has not succeeded in demonstrating the contradictory nature of such a collectivist claim.”

Before replying to this critique, let us remember that according to Hoppe, it is contradictory to deny the self-ownership axiom because one has to be a self-owner for denying it. To put it briefly, the critique of Callahan and Murphy does not target the justification of the self-ownership axiom but the definition of self-ownership. These scholars claim that Hoppe provides a very restrictive definition of self-ownership. “[Hoppe’s] argument only establishes ownership over *portions* of one’s body.” This critique does not suffice to contest the defense by performative contradiction of the self-ownership axiom. Clearly, the capacity of argumentation does not change if the speaker loses a kidney. Therefore, we have to agree with Callahan and Murphy that kidneys and legs are irrelevant for argumentation. Moreover, we may agree also that the definition of self-ownership becomes very restrictive if we are not taking into account the parts of our body which are unused in the course of argumentation. Indeed, if the definition of self-ownership should include only the organs that are actually used during an argumentation, then it could not be extended to kidneys and legs. However, it is not necessary for self-ownership to be defined according to the body parts used while arguing. Self-ownership can be also defined in terms of argumentation capability, corporal identity, intentionality, free-will, memory, etc. Each of these various ways of defining self-ownership includes all parts of the body.

Besides the debates on self-ownership definition, it is important to note that Callahan and Murphy’s critique does not affect the success of the argument by performative contradiction in justifying the self-ownership axiom. Their critique deals only with the definition of self-ownership. For example, disputing the fact that the owner should use fences for delimiting her land does not specify who should own the respective land. There are two different matters: defining the self-ownership and justifying the self-ownership axiom. Even though they are both essential features of libertarianism, they are entirely independent one from another. Now we can see better that the only way to assert non-contradictory that “it is moral to use force to compel a healthy person to give one of his kidneys” is to use a very restrictive definition of self-ownership (which excludes kidneys). But even in this case one may say that kidneys are homesteaded by the self-owner. If it is immoral to use force to compel a self-owner to give up a piece of land that belongs to her, *a fortiori* it is immoral to compel a self-owner to give up *her* kidney. However, using this restrictive definition of self-ownership does not suffice for criticizing the defense by performative contradiction of the self-ownership axiom.

Nonetheless, it is noteworthy that Hoppe uses the criterion of “argumentation capability” for defining self-owners. “The question of what is just or unjust [...] only arises insofar as I am and others are capable of propositional exchanges – argumentation. The question does not arise for a stone or fish because they are incapable of producing validity-claiming propositions.” Based on this definition, Hoppe distinguishes also ethical from technical problems. “Only if both parties to a conflict are capable of propositional exchange, i.e., of argumentation can one speak of an ethical problem.” As it can clearly be observed, Hoppe’s definition of self-ownership refers to the body as a whole without excluding specific parts of the body. Any living being capable of argumentation is treated as a single unit. Therefore, even if the kidneys or the legs are not required in argumentation they are nonetheless included in Hoppe’s definition of self-ownership.

This definition specifies the necessary and sufficient condition for being a self-owner: the capability of argumentation. This means, no more and no less, that the only self-owners are all beings capable of argumentation. If I am considered a self-owner, then I must be treated as such, i.e., as having legs, arms, eyes, kidneys, etc. Whether these parts of my body (unrelated with my capacity of arguing) are biologically linked to my self-ownership or they are homesteaded, it is nothing but a detail. In both cases they *belong to me*. The common sense language clearly supports this idea. Usually we do not say, “The kidney situated on the left of my body was kidnapped.” But we say: “I was forced to give up *my* kidney.” Having one or two kidneys is beside the point of the definition of self-ownership. A living being that loses a kidney will still be considered a self-owner, precisely because of the fact that having a kidney is less relevant for her capacity to argue. The debate on the definition of self-ownership stops here. Beyond this debate on the definition of self-ownership there is the debate on the justification of the self-ownership axiom. From an ethical point of view it is crucial to understand if the respective person loses her kidney voluntarily or under coercion. The argument from performative contradiction establishes that it is unjust to be forced to give up a kidney because it denies the axiom of self-ownership. Denying the self-ownership axiom is self-contradictory.

To sum up, this first critique falls short of its target inasmuch as it is directed towards the definition of self-ownership. To be sure, there is no logical bond between the definition of self-ownership and the justification of the axiom of self-ownership. On the one hand, this type of critique has no effect at all on the justification of the self-ownership axiom using the argument from performative contradiction. On the other hand, Hoppe’s definition of self-ownership includes all the body parts of a living being capable of argumentation.

Let us now discuss a second critique formulated by Callahan and Murphy. Starting from the previous idea, they express an analogous claim saying that one of the two members of the contradiction may sometimes be absent. Since the justification of self-ownership depends on the effective argumentation, the absence of argumentation would cancel the grounds on which the self-ownership axiom can be

defended. “We will demonstrate that, at best [performative contradiction] only establishes self-ownership of those body parts *during the course of the debate*.” In this case, one would claim that in certain conditions it would be appropriate to institute compulsory military service:

“For example, suppose a collectivist argues: ‘Generally speaking, people have the right to use their bodies as they see fit. However, during national emergencies, it is moral to use force to compel certain individuals to act in the public interest. In particular, if the nation is being invaded, the government may draft people into military service. Therefore, the libertarian claim to absolute self-ownership is unfounded.’ Has Hoppe shown that someone uttering the above (during a policy debate) is engaging in a performative contradiction?”

The answer to this question is “yes.” Hoppe’s argument by performative contradiction suffices to show that the person who pronounces the phrase, “Self-owners should coercively be drafted into military service,” is engaging in a performative contradiction even if she is not debating with a candidate to military service. When people are drafted (even in an emergency case) the self-ownership axiom is violated. The argument applies even in the absence of the respective persons. The critique of Callahan and Murphy misinterprets the two members of the performative contradiction. These authors consider that the performative contradiction arises when two persons disagree. Indeed if this were the case, then the absence of one member would *ipso facto* cancel the performative contradiction, since there is no more an ongoing debate. However, this is not the case. While an argumentation or a debate requires two persons, the contradiction requires two contradictory statements. Furthermore, the performative contradiction arises between a claim and the conditions for expressing the respective claim. In this particular case, the self-owner who argues, “Self-owners should be drafted into military service,” has to presuppose the self-ownership axiom in order to argue that. The contradiction arises between asserting and denying the self-ownership axiom. As Frank van Dun explains, the performative contradiction is not a contradiction in terms. Hence, it is irrelevant if the person concerned by the respective statement is involved in an ongoing debate as it is irrelevant who the partners of the debate are (provided that they arguing).

Whenever the candidates for mandatory military service and the speaker who hails for this type of recruiting are self-owners the latter one will be caught in a performative contradiction. Again the only manner to overcome this contradiction is to maintain that the candidates for compulsory military service are not self-owners, i.e., living beings capable of argumentation. But as we previously explained, we have to observe that this critique does not target the success of the argumentation by performative contradiction in justifying the self-ownership axiom but rather the definition of self-ownership. What Callahan and Murphy would contest in this case is the distinction between self-owners and non-self-owners. Summing up, it appears that, in spite of its appearance, this critique also is not directed against performative contradiction and that it points out a difficulty which is not specific to libertarianism. In

addition it confounds the performative contradiction with the debate on the definition of self-ownership.

The third critique of Callahan and Murphy is probably the most complex and challenging. For providing it a satisfactory answer, it is crucial to follow attentively all its steps. In a nutshell, the critique maintains that Hoppe's argument "confuses temporary control with rightful ownership." Indeed there is a clear distinction that all philosophers agree upon between sitting on a chair and being its owner. "*One is not necessarily the rightful owner of a piece of property even if control of it is necessary in a debate over its ownership.*" Starting from the distinction "control" versus "ownership," Callahan and Murphy criticize Hoppe's argument on several aspects. They immediately deduce from this distinction that self-ownership does not overlap the effective control of a body. By reformulating a previous critique of David Friedman these authors assert that there are individuals (like slaves and prisoners) who, in spite of the fact that they are not self-owners, can nonetheless make use of their own bodies:

"If not, then it must not be true, after all, that one needs to own his body in order to debate. This is obvious; Thomas Paine wrote the first portion of The Age of Reason while imprisoned, the famous 'Birdman of Alcatraz' submitted scholarly articles to journals while serving time for murder, and the imprisoned Timothy McVeigh certainly tried to justify the bombing which he had confessed, in correspondence with Gore Vidal. Indeed, Ludwig von Mises, Murray Rothbard, and Hans Hoppe were denied their rights to self-ownership (by the governments claiming authority over them), yet they managed to advance plenty of arguments."

From this standpoint, even though their self-ownership is denied, slaves and prisoners continue to argue. Based on this idea, Callahan and Murphy assert that self-ownership is not a requirement for argumentation. To maintain that self-ownership is a necessary condition for argumentation Hoppe must intend by self-ownership the *use* of the body. Summing up this critique, Hoppe's argument seems to be caught between Scylla and Charybdis of ethics. Either the concepts *use* and *ownership* are conflated or it is admitted that self-ownership is not a necessary condition for argumentation. Each of these alternatives would defeat Hoppe's argument by performative contradiction.

In spite of the fact that this critique seems definitive, a closer look will reveal to us its flaws. Contrary to the claim of Callahan and Murphy, the argument of performative contradiction does not conflate *use* with *ownership*. The illusion of this conflation comes from the fact that when they are applied to the body of an intentional agent, "use" and "ownership" simply overlap. However, "use" and "ownership" can be distinguished on logical grounds. Clearly, from the very fact that one sits on a chair it is impossible to infer that she is its owner. To determine the ownership, one has to find out who decides upon its use. This distinction between "use" and "ownership" is commonly illustrated by the difference in a form between manager and owner. The function accomplished by a manager who takes all the current decisions concerning the use of resources in a firm is different from the function of an

owner who decides as a last resort. The last resort decision is epitomized by the fact that the owner *can* decide to fire the manager. In fact, the owner decides who should make the current decisions in a firm. Besides this distinction, the crucial question in ethics is: “Who has the legitimate ownership?” A different formulation may be: “Who has the right to own a specific resource?” Of course, from an ethical point of view an owner, i.e., a person who effectively controls as a last resort a specific good, is not necessarily its legitimate owner. Here it is an obvious question to ask: am I the legitimate owner of the chair on which I am sitting right now?

Let us now apply this idea to self-ownership. If one can lose the ultimate control of a form by selling it, she can *never* lose control of her body. The difference consists on the fact that contrary to the ownership on land, the ownership on the body cannot be denied or abandoned. It is conceivable that a person does not own a piece of land. But it is inconceivable that a person does not own herself. By definition, self-ownership can be withdrawn only by cancelling the agent’s intentionality (free-will and conscience), i.e., by transforming her into a zombie or robot. For most of the scholars, this is the common way to understand self-ownership. “Man can neither be inherited, nor sold, nor given; he can be no one’s property.” Now it appears clearly why the “use of the body” and the “self-ownership” (even though they are logically distinct) have the same extension. While it is possible to sit on a chair without being its owner, it is impossible to use a body without being its owner. This is the case because, one cannot not use her own body and one cannot not decide as a last resort of the action of her own body.

While the ownership in her own body cannot be alienated, one can be nonetheless coerced to act otherwise than she would have wished. This is the case of slaves, prisoners, victims of occasional robberies, etc. The master does not own a slave as one may own a piece of land. An owner of slaves does not own bodies but can coerce the self-owners to use their own bodies according to her wishes. Since land can be acquired, sold or stilled, the question to ask from an ethical standpoint is: am I the legitimate owner of the land? Obviously, the body cannot be acquired, sold, or stilled but it can be aggressed. Therefore, the right to self-ownership means the right to be free from coercion. As we have seen since the beginning of this article, this is precisely the sense of the self-ownership axiom. From this point of view, slaves should be considered self-owners. The slaves have as a last resort the ultimate choice to obey their master or to revolt against her.

Moreover, it is precisely because slaves own themselves that slavery can be ruled out as an unjust institution. Slavery, in the ordinary language sense, does not mean actual ownership of someone else’s body, but it means systematic and physical threat or effective violence upon a person. As a matter of fact, we may say that slavery is permanent and explicit robbery and crime. While a robber threatens her victim only once (or from time to time), a master threatens everlastingly her slaves. However, robbery and slavery are inherently grounded on the distinction between aggressor and victim. In order to distinguish a free relationship from robbery and slavery, it is necessary to clearly identify not only the

aggressor but also the victim. Obviously, only the owners are eligible as victims. The particularity of ownership in body is that these two terms (ownership and body) cannot be separated. It would be impossible to say that I do not own myself. Therefore, if any threat or violence is permanently and explicitly exercised against my body, then *ipso facto* (as an owner of my body) I can claim to be a victim. If valid, the argument from performative contradiction is designed precisely to prove that it is self-contradictory to maintain that self-owners must be physically threatened or aggressed.

The argument from performative contradiction asserts the unjustness of aggression and justifies by the same token the self-defense and the mutiny. Additional arguments are required for justifying the punishment of aggressors. Libertarian authors justify why and how the aggressors should be punished. It is noteworthy that [Kinsella uses the estoppel principle for justifying the punishment theory](#):

“The estoppel principle shows that an aggressor contradicts himself if he objects to others’ enforcement of their rights. Thus, unlike Hoppe’s argumentation ethics approach, which focuses on presuppositions of discourse in general, and which shows that any participant in discourse contradicts himself if he denies these presuppositions, the estoppel theory focuses on the discourse between an aggressor and his victim about punishment of the aggressor, and seeks to show that the aggressor contradicts himself if he objects to his punishment.”

However, as far as it concerns the argument from performative contradiction, it is important to remember that prisoners and slaves are self-owners. This is precisely the criterion that helps us to identify aggression as an ethical problem. Hence, the claim that “there are persons who are not self-owners but they can argue” fall short. The slave will be caught in a performative contradiction just like any free individual if she denies the self-ownership axiom.

Let us now advance a step further into this argumentation and try to understand the rationale of the idea on which Callahan and Murphy ground their critique: “slaves are not self-owners but they do argue.” The examples chosen by the authors define a particular category of slaves and prisoners. A closer look to these examples shows people that are no longer coerced or physically threatened by their masters. The slaves are allowed to write, speak, and argue. The number of alternatives for each action of the slave depends on the master’s will: the liberty to have her hair cut, or two hours of liberty per day between 9 A.M. and 11 A.M., or the liberty to vote for her master, or the liberty of speech. Considering that slavery has degrees, let us now imagine that a slave has two hours of freedom per day and that the slave spends her time making a very convincing speech on the non-violation of self-ownership.

Obviously, during this discourse the slave is no more a slave since the master *does not force* the slave to obey anymore. Clearly, in this particular case there is no difference at all between slave and free person. When slaves argue freely they *act like* freemen. From this point of view, there is no categorical difference between a “slave” allowed to have two hours of freedom per day and a “freeman” threatened twenty-two

hours per day. In both cases, the performative contradiction argument indicates that it is contradictory to deny the self-ownership axiom. The two-hours-per-day-free-person will be caught in a performative contradiction if, during these two hours of freedom, she denies the self-ownership axiom. To put it differently, the fact that slaves and prisoners can argue demonstrates that during their discourse they are acting like freemen. As a matter of fact, it was probably between 9 A.M. and 11 A.M. that Epaphroditus (Epictetus's master), allowed Epictetus to study philosophy and eventually receiving his freedom that Epictetus started lecturing on his own account. Furthermore, it is precisely for preserving his freedom of speech that Epictetus fled Rome after the edit of Domitian.

Summing up, in the type of examples invoked by Callahan and Murphy, slaves are self-owners that are allowed to speak freely. The very fact that they argue, demonstrates that during the specific moment of their argumentation they are not coerced. Hence, even for Epictetus it is self-contradictory to deny the self-ownership axiom. This is the case of Epictetus but also of the taxpayers in a democracy. They are coerced self-owners allowed to freely formulate their speech. Moreover, the argument from performative contradiction rules occasional and systematic violence as unjust actions, precisely because the agents that are aggressed are self-owners like Epictetus and not merely random parts of nature.

But of course, the taxpayers of a democratic State are a privileged type of slaves especially when they are compared with the subjects of a totalitarian State. Let us now assume the worst position for a slave: no liberty and especially no free speech at all. Suppose that the slave is not allowed to speak as she would like to and if she does, she would be killed. What kind of argumentation could such a slave elaborate? As self-owner the last choice that she has is between obeying and rebelling against the rule that impedes her free expression. By the very action of rebelling against the rule, she demonstrates her self-ownership. Let us put into parenthesis the consequences and the risks that she incurs by choosing this course of action. If she manages to speak according to her free-will and not as a command of her master, then in this unique situation she *acts like* a free self-owner. In this case also, the premise advanced by Callahan and Murphy falls short. If rebel slaves can manage to argue by themselves it is because, originally, they are self-owners. Hence, for a rebel slave disobeying the interdiction to free-speech, it is self-contradictory to deny the self-ownership axiom. Also, it is fundamental to remember that by declining the self-ownership to a slave it would be impossible to maintain that slavery is unjust.

Let us now take into account the last example: the slave decides to obey any free-speech restriction. By demonstrating her preference for this outcome she remains her self-owner. However, in this case coercion plays an important role. By definition, coercion switches the order of the preference scale. As a consequence of this fact, it can be asserted that the slave does not argue as she would argue in the absence of the free-speech restriction. This issue refers to an everlasting debate concerning the responsibility under coercion. Usually, the debate encompasses numerous examples of involuntary obedience. If a soldier kills someone else under the physical threat of her superior would she be a

criminal? Most of the authors agree on the fact that if effective coercion is verified, then the soldier (slave, prisoner) is not responsible for her situation. The disagreement arises when it comes to the definition of aggression. Most of the authors who agree that persons under coercion are not responsible, disagree on what aggression means.

If we put into parenthesis the debate on the definition of aggression, then it is important to observe that if a slave decides to obey the free-speech interdiction and to repeat her master's argumentation, then no one would consider her the author of the argumentation. Imagine a slave who, under the physical threat of her master, writes an academic paper in the view to deny the self-ownership axiom. According to Callahan and Murphy, in this case there is no performative contradiction. We have a coerced self-owner who denies the self-ownership axiom. However, it is noteworthy that this conclusion considers that the slave under physical threat is the author of this argumentation. Such an intellectual maneuver would delete the most fundamental distinction of ethics: liberty versus coercion. If the fact of being under physical threat does not make any difference in assigning the responsibility, then there are no more grounds for distinguishing free and coercive relationships. Therefore, if we want to continue the debate in the realm of ethics, we must reject this maneuver and assume that coercion and freedom are two separate categories.

If the slave obeys the free-speech interdiction, she is not arguing anymore. To be sure the slave remains self-owner even if she decides to obey instead to rebel. Eventually she may argue this decision by pointing at the advantages of obeying instead of rebelling. While formulating these arguments she demonstrates her preference for not arguing any longer. Unfortunately, in this case, her first is also her last argumentation. Starting from this moment she stops arguing by herself and she only repeats the argumentation of her master. Of course, along with her intentionality, she maintains the possibility to rebel against her master and to overcome the previous choice to obey. Now it appears clearly that if a slave obeys (while remaining self-owner), she stops arguing anymore. Therefore, the proposition, "slaves are not self-owners but they argue," again falls short. In this case, the slave, although capable of argumentation, is not effectively arguing. By definition, coercion and argumentation are two incompatible actions. This explains why self-owners under the free-speech interdiction do not argue by themselves.

Before considering a new aspect of this critique let us sum up our reply to Callahan and Murphy's critique that slaves and prisoners argue in spite of the fact that they are not self-owners. An attentive analysis of slavery allows us to discern three states of affairs: slaves granted with the right to free-speech, slaves rebelling to the free-speech interdiction and slaves obeying the free-speech interdiction. If a slave can argue, it is either because she benefits from the freedom granted by her master or because she rebels. In both cases the slave self-contradicts by denying the self-ownership axiom. The third state of affairs is the case of the slave who obeys her master's interdiction to free-speech. As a consequence of this fact she

does no longer argue by herself. The reader may observe that our reply is based on the assumption that coercion and argumentation are distinct. This distinction is indeed an important presupposition of the present argumentation but also of ethics. One should try to picture the consequences for ethics of its rejection. How would look like a book on the history of ethics without this distinction? Besides the fact that even for rejecting this assumption one has to argue, such a maneuver would make worthless the debate on the self-ownership axiom, i.e., its defense but also its critique. Hence, the argument from performative contradiction may be restated in the following terms: *in the realm of ethics*, it is self-contradictory to deny the axiom of self-ownership.

Let us now advance a step further and take into account another facet of this critique. Based on the fact that use and ownership do not overlap, Callahan and Murphy maintain something more. They claim that for arguing we need more than our body. Whereas using a chair it is not an indispensable condition for argumentation, using a piece of land it is. During an argument one may sit on a chair, stand up, drive a car, etc., but a physical space is always required for her existence and *a fortiori* for her argumentation. Therefore, argue Callahan and Murphy, if we take the argument by performative contradiction seriously, then we should accept that the precise piece of land on which a person stands in the course of her argumentation represents her property:

“Imagine that a Georgist were to argue that everyone should own a piece of landed property. The Georgist could go so far as to claim that his position is the only justifiable one. He could correctly observe that anyone debating him would necessarily grant him (the Georgist) some standing room, and then he might deduce from this true observation the conclusion that it would be a performative contradiction to deny that everyone is entitled to a piece of land.”

While in the case of a body, “use” and “ownership” overlap *de facto*, in the case of land they are not necessarily the same. In order to formulate an argumentation, one needs to *use* a piece of land but not necessarily to *own* it. The physical space which is required for formulating an argumentation can either be lend or owned. Hence, the argument by performative contradiction cannot be used by the “Georgist” for justifying her pretence on land property. The statement asserting that “the piece of land used for argumentation ought to be owned by the agent who uses it during his argumentation,” can be refuted without committing any performative contradiction. Contrary to the self-ownership axiom, the “Georgist axiom” cannot simply pass the test of performative contradiction. This is so, because there it is a categorical difference between ownership in land and self-ownership. Whereas it is necessary to be a self-owner in order to argue, it is contingent if one is the owner or the user of the land occupied in the course of her argumentation.

This categorical difference between ownership on land and on body has two main grounds: *intentionality* and *reflexivity*. The agent of action is *intentional* while the land is not. Derived from this fact there is a second feature: *reflexivity*. In the case of self-ownership, the “owner” and “the

object of ownership” have the same extension. Summing up all our argumentation, we can now declare the insufficiency of the current critiques directed against Hoppe’s usage of performative contradiction for justifying the self-ownership axiom.

V. Conclusion

We conclude by emphasizing the theoretical perspectives opened by the argumentation discussed in this article. At the outset, it is important to observe that this article defends Hoppe’s argument by performative contradiction against its *current* critiques. This defense should not be confounded with the endorsement of Hoppe’s argument. To be sure, replying to the critics of an idea does not mean upholding it. The justification of self-ownership by performative contradiction is not necessarily free from critique and new arguments showing its insufficiencies may be formulated. However, in order to avoid misinterpretations, these new attempts to criticize should take into account the findings of the present argumentation. In a nutshell, the performative contradiction does not substitute the definition of self-ownership, the theory of aggression or the theory of punishment. Although they are important features the libertarian ethics, these theories must be constructed on separate grounds. Let us now briefly recall into attention the misinterpretations of performative contradiction.

One of the wrong directions from which to attack the argument by performative contradiction is to focus on the universal and the discriminative character of self-ownership. The range of application of the self-ownership axiom is irrelevant for its defense. Another wrong direction in criticizing the justification by performative contradiction of the self-ownership axiom is the definition of self-ownership. This definition contains obvious and age-old difficulties common to every theory of justice. In addition, the justification of the self-ownership axiom remains unaltered when the definition of self-ownership changes. The definition of self-ownership only establishes who are the subjects to whom the norms apply. The justification of the self-ownership axiom sets up the norms that should be applied. These two issues, even though they are essential features of any ethical theory, are logically distinct in the sense that criticizing one does not affect the other. However, Hoppe provides a pertinent definition of self-ownership: the capability of argumentation. Finally, it would be pointless to use the naturalistic fallacy for criticizing Hoppe’s argument. The statement: “the right to self-ownership is necessary for denying the self-ownership axiom” is descriptive. This statement has not normative grounds but only logical limits. Obviously, an absurd norm is not a pertinent candidate for the axiom of ethics.

Even though some types of critiques can be prevented in this way, new critiques may be formulated on different grounds. As we can observe from their exposition in this article, the critiques addressed to Hoppe’s argument concentrate exclusively on the possibility of justifying self-ownership by performative contradiction. Hoppe’s critics focus on what can be deduced from the performative

contradiction. They seem to agree with Hoppe that there is a performative contradiction and to disagree on the capacity of this idea to justify the self-ownership axiom. Our systematic replies to these critiques indicate that this way of attack may be inefficient. There is a perfect symmetry between *self-ownership* and *self-contradiction*. As we pinpointed at the end of the last section, this symmetry is grounded on the reflexivity of an intentional agent. This is the reason why *it is always self-contradictory for an intentional agent to deny the axiom of self-ownership*.

While this way of criticizing the justification of the self-ownership axiom was shown to be unproductive, future research may focus on the very meaning of performative contradiction. From this point of view, we believe that a pertinent way of revisiting (and eventually efficient way of criticizing) that argumentative procedure by self-contradicting is to study thoroughly its logical structure. As far as we can see in the light shed by this article, the concept of “reflexivity” helps to distinguish between *self-ownership* (reflexive) and *ownership on nature* (non-reflexive). Further inquiry on the reflexive character of self-contradiction should help us to better understand the relationship between ownership and the conditions for acceding to ownership. The reflexive dimension of ownership refers in fact altogether to the *ownership on our body* and to the *condition for acquiring ownership on nature*. As to the latter, self-ownership is a necessary (but insufficient) condition for becoming an owner. For homesteading a piece of land, one must own herself in the first place. However, these two levels (self-ownership and the condition for owning parts of nature) represent the nub of the argument by performative contradiction. A comprehensive study of both levels (ownership and the condition for acceding to ownership) can stimulate important reflections for the foundation of ethics in general and for the justification of libertarianism in particular.

This analysis would go beyond the purpose of this article, which has been attained: the classification and the systematic reply to current critiques formulated against Hoppe’s justification by performative contradiction of the self-ownership axiom.

Rejoinder to Murphy and Callahan on Hoppe’s Argumentation Ethics

By: Walter Block

[Vol. 22 #1](#) of the [Journal of Libertarian Studies](#)

2011

I. INTRODUCTION

Although I shall have highly critical things to say about Murphy and Callahan, I am delighted they have written it, and very happy that the refereeing system organized by the editor of *The Journal of Libertarian Studies*, Roderick Long, saw fit to accept it for publication. And this for two reasons.

First, a minor one: there are those who accuse libertarianism of being a cult. A necessary (but not sufficient condition for such a statement is that all members be in thrall to the eminent leader. Well, Murphy and Callahan (hence, MC) are certainly members in good standing of the libertarian community. With the passing of Murray N. Rothbard, Hoppe has a good a claim as anyone, and a much better one than many, to being the new leader of the libertarian movement, at least insofar as being its most eminent and accomplished theoretician. And yet, while MC is of course respectful of Hoppe, it is a highly critical attack on the libertarian construct for which he is most justifiably famous: argumentation ethics. Yet, MC are still members in good standing in this community. So much for that unwarranted charge.

Second, there is a fierce battle now taking place within the libertarian community over this issue. I do not think we have seen the last word on this matter, including the present attempt; there are simply too many leading libertarian theoreticians on both sides of it for that to be the case. I think that the best way to resolve all such issues is through debate, and, yes, argument. Here, I am sure, all participants on both sides would agree. For this reason I welcome MC to the lists, and am delighted to be playing a small role in this myself at present.

Third, Hoppe's argumentation ethics claims that people who argue against private property commit a performative contradiction, insofar as they are using private property (their own bodies, plus room to stand in, or a chair to sit on) to do so. MC are using, what else, argument, to attempt to refute the Hoppe thesis. This, alone, of course does not demonstrate that these two authors are themselves committing a performative contradiction. But it does at least furnish further evidence, as if any were needed, of the centrality of argument to the intellectual process. There are many libertarians who have whined and grouched about the Hoppe thesis, or who have confined their remarks to unrefereed blogs, and web sites. MC have not limited themselves to that route. Instead, they have published their reflections in a peer reviewed scholarly journal, and have thus made themselves into far greater targets, as if of course fitting and proper. For this alone they deserve congratulation.

With these introductory remarks I am now ready to consider, and reject, several of the criticisms leveled at Hoppe by MC.

II. HOPPE'S ARGUMENT DOES NOT "FAIL ON ITS OWN TERMS"

1. *Ownership of portions of one's body, only*

According to MC, Hoppe has, at best, established ownership of only those portions of one's body, that are necessary for speech, but not one's entire body. For example, arms and legs and a second kidney are not required to engage in argument. People without these body parts are capable of argumentation. So, an attack on these "unnecessary" body parts that constitutes a violation of the libertarian non-aggression axiom would not be ruled out of court by Hoppe's thesis.

Let us take this argument as literally as its authors offer it, in our attempted refutation of it. The brain, too, is a body part. It, too, along with the lungs, the lips, the tongue, the larynx, etc., are necessary for speech, even if arms and legs, etc., are not. However, if in the course of the argument one's intellectual opponent cuts off one's foot, thus would necessarily be an assault on the brain, at least given the nerves, pain receptors, of which the body is composed. It cannot be denied that this would be an indirect assault. The foot, after all, resides quite a few inches away from the seat of reasoning. But still the brain would shut down and the victim would be rendered incapable of continuing the argument. So, Hoppe's argument from argument *would* vitiate against any such ploy, contrary to MC.

2. *Temporary ownership, only, during the course of the debate*

According to MC, at best the Hoppe perspective can establish a performative contradiction *during* a debate, and thus bodily integrity and private property rights for this time *only*, not afterwards. This seems problematic at first glance, since even these authors full well realize that the Pythagorean Theorem hold true not only during its actual proof, or demonstration thereof, but for all time. However, they offer their movie scenario as a buttress for this critique of theirs. Here, a patron of a theater is tossed out on his ear for violating his contractual obligation to keep quiet during the showing of the movie. He protests that the "brutes" who are giving him the old heave ho refuse to verbally defend their (justified) act in the process of throwing him out. Even these authors, characterize their argument as "silly," but challenge their readers as follows:

"But in all seriousness, we must ask the reader, what specifically is wrong with our fictitious man's position? Among other flaws, one of his errors is the notion that a rule is indefensible if its application would make debate at that particular moment impossible (or difficult). In our example of the movie theater we feel most Hoppeians would agree it is acceptable to use force to uphold a rule, so long as the justice of the rule could be defended beforehand, when force isn't being used to intimidate anyone."

What is wrong with this fictitious man's position is that it has nothing to do with Hoppe's thesis, and thus cannot lay a glove on it. Hoppe is saying that if someone says property rights are invalid, he (performatively) contradicts himself by relying on his property rights in himself to do so. The private police who are removing the loud mouth from the premises, by stipulation, *say* nothing. So, the issue of a performative contradiction does not even arise. Of course, "He has not shown that the fact that one has ever argued demonstrates that one may never bash anyone on the head, nor has he demonstrated that one may not validly argue that it would be a good thing to bash so-and-so on the head," in his particular movie scenario. But there is a *lot* that argumentation ethics has not demonstrated: the Pythagorean theorem, that sliced bread is a great innovation, that $2+2=4$, that trade is mutually beneficial in the ex ante sense, that this latter statement is praxeologically true, among many other things. Give the man a break. Argumentation ethics cannot deliver the mail or take out the trash either.

3. "Hoppe has only proven self-ownership for the individuals in the debate."

MC toss the kitchen sink at Hoppe on this one: Aristotle, Greeks, barbarians, horses, chickens, infants, comatose people etc. The point is, rights have always and ever in any libertarian analysis been understood to apply to the entire human race, and only to the entire human race. Rothbard has been very clear on the issue of supposed animal rights. When and if they petition us for these rights, and promise to respect ours, and live up to that undertaking, then and only then will they be granted. No matter what ethical theory of rights we might consider, ones based on rationality, utilitarianism, babies and comatose people will present special problems. It is a mite unfair to tax Hoppe's ethical theory in this way, when there are *no* others that pass such a stringent test.

But even this is unfair to Hoppe. It is to more broadly interpret him than is justified. The argument from argument only applies to people who *argue*, and chickens, horses, babies and comatose people simply are not in it. As for non Greeks (barbarians) they are certainly capable of arguing. If they do, they would commit a performative contradiction if they initiated violence against a Greek. And vice versa. Let Aristotle or any of his homies lay an aggressive hand on a barbarian, and they do so, only, by committing a performative contradiction if *ever* they open their yaps in argument about it, that is, claim, using their bodies and private property, that invasions are licit. And, as we know, these philosophers did nothing if not argue. Therefore, they are logically estopped from so doing.

Let me put this point in other words. If a man has ever argued, in his entire life, that he had rights, or that others did not, if he ever argued *at all*, then he is logically estopped from violating rights. If he engages in an uninvited border crossing, he commits a performative contradiction. But, suppose he is a mute who never wrote, spoke, or argued about anything. Then, he may commit all the mayhem he wants to, and he is beyond Hoppe's reach. The "fault" of the argumentation ethics is that it is limited to people

who *argue*. The “excuse” I offer in Hoppe’s defense is that not every theory can do everything. This libertarian theoretician offered us a *limited* theory, and on its own grounds it is impervious to the criticisms of MC. The fault of these latter two authors is that they misinterpret Hoppe’s thesis; they expand it beyond the scope given to it by Hoppe. Argumentation ethics is *limited* to *arguers*; and thus this non arguing mute is *not* guilty of a performative contradiction no matter how many people’s rights he violates.

III. HOPPE DOES NOT CONFLATE USE AND OWNERSHIP

1. *Temporary Control and the Deity*

According to MC: “*One is not necessarily the rightful owner of a piece of property even if control of it is necessary in a debate over its ownership.*” These are two difficulties here. First, all that is needed for Hoppe’s point to go through is temporary control. Forget about property rights in human beings for the moment. Remember, Hoppe’s arguer needs not only a body, but also a place to sit or stand while he engages in discourse. But, and here is the essence of the criticism of MC on this point, it is by no means necessary that the speaker own the land or the house in which he is located, nor the chair on which he is sitting. Mere temporary ownership, or tenancy, rental, etc., will do just fine. For even there the speaker is the legitimate *user*, albeit not *owner*, of the property in question. If such a person then denounces ownership, that is, attacks private property, he is guilty of a performative contradiction. He is undermining the very institution, property rights, that enables him to legitimately speak in the first place. For tenancy, too, is dependent on ownership of property. If the person from whom the speaker rents the land, the house, or the chair is not the legitimate *owner* of it, then his, the arguer’s, right to use it as a sounding board, a megaphone, a place to sit to stand and speak, is to that extent illegitimized.

Second, this ploy of utilizing the Deity for the purpose of criticizing argumentation ethics is itself illegitimate. It is well known that libertarianism is a theory that concerns the relationship between man and man, not between man and God. When recourse is made to the latter, all bets are off. MC are meticulous in their practice of warding off all sorts of weird counterexample possibilities. They even go so far as to rule out “communication from beyond the grave.” Well, if they wish to “waste trees” in this manner, that is their business. But to criticize Hoppe for not engaging in this practice by obviating critiques based on God’s ownership of men, seems a bit harsh.

2. *Georgeism*

MC use their Georgist example to demonstrate that mere use does not guarantee permanent ownership. One could, after all, be a renter, as in the previous Deity case. But so what? Use of the body, and private property on whatever basis establishes just that sort of performative contradiction. If God is in the picture then man owns his body subject to His will. But, *within* these parameters, it is still a performative contradiction to use a “temporarily” owned body to denigrate the legitimacy of temporarily owned bodies.

Hoppe’s theory, I admit, was couched in terms of fully, or permanently owned bodies. He did not explicitly anticipate this objection. But, his theory easily incorporates in: temporarily owned people, too, are guilty of committing a performative contradiction when they denigrate property rights; for, they are doing so with things (their bodies, their standing room) that are permanently owned, just by Other people, in the case of God.

It cannot be denied that there is such a thing as a legitimately owned slave. For example, there are rightfully convicted criminals. They can licitly be forced, “to pay off their debts to their victims (or their heirs).” Are they capable of arguing? Of course. However, an obedient slave, a duly convicted criminal, *cannot* legitimately (may not) properly argue without his owner’s or jailor’s permission. If the slave-criminal argues, he is doing so with illegitimately owned property. His body is the licit property of someone else, so he is engaging in a sort of theft. However, on the other hand, if his master agrees that he argue, then he can do so in a manner in keeping with just law. If the slave-prisoner is not granted permission, then MC’s point is moot; the slave cannot legitimately speak in the first place. So his “argument” may safely be ignored by any ethical theory, including, specifically argumentation ethics.

Now take the case of the illegitimately held slave. An innocent person is captured, kidnapped, enslaved. He can speak, but he does (ethically) own his own body. So this criminal-slave example avails MC nothing vis-à-vis Hoppe.

According to MC: “because countless slaves have engaged in successful argumentation, Hoppe must be wrong when he claims that self-ownership is a prerequisite to debate.” But not a single one of them argued legitimately, unless it was with his (justified) owner’s – jailor’s permission. If so, then the slave did argue, using legitimately held property, that of his proper master. In any case, Hoppe never argued that self-ownership is a prerequisite to debate. He only said, correctly, that a man may not, except on pain of performative contradiction, use private property to argue against private property. But the slave-convict, as we have seen, did use private property. His owner’s, on temporary loan (permission to speak) from his proper owner. MC try again: “a person needs to enjoy self-ownership (and all other libertarian rights) if he is to successfully debate.” But to repeat, the slave-convict is “enjoying” self-ownership, on “loan” to “him,” so to speak, while he articulates his points.

Ultimate Foundation of Private Property, Part I: Argumentation Ethics

By: [Christopher Zimny](#)

Published on [The Daily Anarchist](#)

December 20th, 2013

Hans-Hermann Hoppe claims to have discovered the ultimate foundation of property rights in an argument that he calls “argumentation ethics”. (For two essays by Hoppe on this topic, see [here](#) and [here](#).) The goal of his argument is to show what social norms must be considered valid prior to debate about any other social norms. This is an admirable undertaking, and he succeeds in showing exactly what norms all arguments necessarily presuppose. His argument [captured the admiration of his mentor](#), Murray N. Rothbard, who called it “a dazzling breakthrough for political philosophy,” and it sparked a fiery debate since its original publication in 1988, which still continues among libertarian circles today.

I wish to add to this debate, for I find it to be lacking in one critical regard: it fails to show how individuals recognize the property rights of other people if no argument takes place. In particular, [Robert Murphy and Gene Callahan](#) have criticized argumentation ethics partially for this fact, though they did so improperly, and were met with rebuttals by numerous high-profile libertarians such as [Walter Block](#) and [Stephan Kinsella](#) (who attached to Hoppe’s case his own principle of estoppel, which I will go over in the next part). Here, I will add my own contribution to the discussion by examining Hoppe’s use of the principle of performative contradiction in his argument. In the next part, I will completely reconstruct his case for property rights by showing that their ultimate foundation rests in a broader mode of action than that which Hoppe claims.

Hoppe makes his case in the following fashion: Individuals who wish to avoid conflict over scarce resources may submit themselves to civil discourse. Several implications stem from this fact alone, and they constitute Hoppe’s ethic. Hoppe points out that whenever one argues, even with oneself, one presupposes that one has exclusive control and legitimate ownership of one’s own body, and in order to argue, one must have previously appropriated goods (such as sustenance, etc.) in order to survive up to the point of making the argument; in short, this constitutes property external to one’s own body. Now, when one engages in an argument with another person, insofar as one expects the other person to understand what is being said, one must assume that the other person also has the right to his or her own body and the right to the goods that the other person used up to the point of making the argument, and it follows from this that any undue aggression against these implicitly recognized rights is an illegitimate invasion of them (what is also called the “non-aggression principle”).

In further elaboration of his argument, Hoppe says that with regard to social norms, all of these things must be implicitly assumed by individuals who wish to maintain peace (and thus to those who argue as opposed to immediately resorting to violent action). If these things were not assumed, in short, the entire human race would have died out long ago and no one would be around to argue about anything, let alone social norms. Too, the preference for conflict over peace, and war over debate, would defeat the entire purpose of norms (for the purpose of having social norms is to maintain a well-ordered society and prevent conflict; without these desires, norms would be pointless, if they could even be said to exist in the first place).

Furthermore—and crucial to his case—is that no person could argue otherwise. If a person attempted to dispute these truths either with himself or another person, one would be making an argument; hence, one would implicitly affirm exactly what one is trying to argue against. Too, he links his argument to the deductive science of human action (called “praxeology”) by showing that an act of argumentation is itself an action from which certain truths can be deduced, which were shown above. (On this point also see his paper, “On Praxeology and the Praxeological Foundations of Epistemology”.) He concludes his case by saying that this framework for discussion—which inherently recognizes and establishes respective property rights—is the only legitimate one in which norms can be discussed, and that it shows, too, the ultimate foundation of private property.

I want to draw attention to the particular fact that Hoppe grounds the ultimate truth of his argumentation ethics, and more widely, praxeology itself, in the fact that neither can be refuted through argumentation—that whenever a person tries to dispute these things he implicitly assumes them to be true (what is called a “performative contradiction”)—and these truths are thereby shown to be self-evident, or axiomatic. For Hoppe, the very fact that they cannot be disputed gives them their ultimate foundation.

However, I must contend that it is not a consequence of the fact that people cannot rationally deny them that makes such truths absolute. It is precisely the opposite; that such truths cannot be rationally denied is a consequence of their being absolute. The reason that axioms are what they are is that no further deduction is possible past a particular point—the axiom itself. As such, axiomatic truths are ultimate givens. No further reasoning can explain the fact that action is purposive behavior. Because of its axiomatic nature, then, its implications pervade all action. This is precisely what leads anyone who attempts to deny them into a performative contradiction. A man who says, “I am not acting,” therefore must performatively contradict himself, for he is ipso facto acting purposively. The role performative contradiction is such that it can be used as a tool to detect or discover axiomatic truths. It does not establish them as such.

This point is crucial to fully understanding the ground on which Hoppe erects his argument. Since, according to Hoppe, the ultimate foundation of property rights rests completely on the fact that they cannot be argued away, his ethic is fully predicated upon the specific act of argumentation.

Now, it is true that individuals who act and make choices (and thus internally argue) affirm their own self-ownership and their ownership of external objects. This follows directly from the fact that man acts. The rights of property are thereby axiomatically established for all actors. However, and this must be emphasized, this establishment stems from the logic of action itself, not from the fact that they cannot be argued against; indeed, to repeat, the foundation of property rights cannot be disputed precisely because they are implied in the logic of action.

Even if we disregard this problem with Hoppe's construction, further problems lie with the argumentation ethic's intersubjective recognition of such established rights. According to Hoppe, the recognition of Person B's property rights by Person A would be impossible if Person A did not actually argue with Person B. Yet, assume that Person A aggressed against Person B anyway. Then, the aggressor "is beyond Hoppe's reach[, for] the 'fault' of the argumentation ethics is that it is limited to people who argue." (Block, "Rejoinder to Murphy and Callahan".) But one senses intuitively that such aggression actually is a violation of property rights, regardless of the fact that Person A never actually argued with Person B in order to acknowledge Person B's rights.

So we see that a second problem with his argument is the insufficiency of his ethic's mutual recognition of property rights. This is precisely where Hoppe fails to establish mutual recognition of rights for all actors who interact with each other in some fashion, because only actors who specifically argue with one another mutually recognize each other's rights. The glaring hole in his case is that it leaves out any pair of actors who don't actually argue with one another.

On Hoppe's own terms, then, mutual recognition of property rights is not absolutely established prior to argument between the two actors; it is so established only afterward. This seems out of line with the absolutely a priori character that Hoppe wants to ascribe to his case. The first fault is Hoppe's improper grounding of the property ethic. The second major problem is the insufficiency of his ethic's recognition of property rights. In order to remedy these flaws, I will reconstruct Hoppe's case in the mere act of communication itself, rather than the specific act of argumentation. This reconstruction will constitute the second part of this essay.

However, before we press on into Part II, a word should be said about the remarkable achievement of argumentation ethics as such. Hoppe's argument is nevertheless extremely important because it delineates what ideas can and cannot be legitimately argued about when a discussion which attempts to justify a stance on ethics is had. As far as that aspect of his case is concerned, Hoppe is correct. To be clear, as Hoppe is quick to point out, all propositions are by definition arguments, and his insights

remain wholly applicable in such cases. I cannot and do not wish to take anything away from his case in this regard. Instead, what I will focus on in the next part is solely the proper establishment of the private property ethic itself. I will argue that as far as that goes, it is misplaced, and the foundation instead must be in a wider sphere than that which he suggests, i.e., the general sphere of communication, rather than the specific act of argumentation.

Ultimate Foundation of Private Property, Part II: Presuppositions of Communication

By: [Christopher Zimny](#)

Published on the [Daily Anarchist](#)

April 24th, 2014

In [Part 1](#) I disputed the foundation on which Hans-Hermann Hoppe builds his argument ethics. Because his argument is based on the implications of argumentation *itself*, his argument leaves no room for recognition of ownership by actors who do *not* argue with one another. In Part 2, I will review these points, but focus mainly on reconstructing Hoppe's argument *using the basic act of communication*, rather than the act of argumentation *itself*.

Thus, let us begin.

I object (I do not *reject*, since I would be caught in a performative contradiction) to Hoppe's justification of the libertarian ethic on the grounds that it requires argumentation itself in order for his insights to follow. In his construction, self-ownership and property rights are only granted to actors who actually undertake discussion with one another in order to avoid conflict over scarce resources. But suppose an actor does not engage in discourse or does not desire a conflict-free environment. Hoppe's ethic, as proposed, simply does not apply to such an actor. (Indeed, Walter Block, an ardent supporter of Hoppe's argument, [admits](#): "Suppose [an actor] is a mute who never wrote, spoke or argued about anything. Then, he may commit all the mayhem he wants to, and he is beyond Hoppe's reach. The 'fault' of the

argumentation ethics is that it is limited to people who *argue*.”) This renders the conclusions drawn from his argumentation ethics—including Stephan Kinsella’s estoppel approach, which I will discuss as well—contingent upon both arguing and the wish to avoid conflict, falling short of the *universal* characteristic that Hoppe seems to have in mind for his argument, which ostensibly shows that all actors have property rights. Here, I aim to remedy that.

Property rights do not exist because there is a wish or a need for peace among actors. They exist *prior* to peace or conflict. They follow directly from the implications of action itself, whether one acts alone or toward another.

First, I will substitute “argumentation” with “communication”. This opens Hoppe’s argument to all actors everywhere, whether they are arguing or not. Since argumentation is a form of communication, Hoppe’s insights remain unchanged, and the libertarian ethic remains undeniable without performative contradiction. Communication applies to *any form* of meaningful interaction with one or more actors. Whether a man speaks, writes, exhibits some meaningful facial expression, or hits another man over the head, he communicates. Thus communication itself allows Hoppe’s original implications of irrefutable recognition of property ownership and nonaggression to stand in *all* cases of action whatever.

A Detour: Distinguishing Between Man and Animals

It must be qualified who, precisely, is an actor in the praxeological sense, and therefore to whom the rights of private property apply. For this, I turn to Ludwig von Mises in *Human Action*:

“We interpret animal behavior on the assumption that the animal yields to the impulse which prevails at the moment. As we observe that the animal feeds, cohabits, and attacks other animals or men, we speak of its instincts of nourishment, of reproduction, and of aggression. We assume that such instincts are innate and peremptorily ask for satisfaction. But it is different with man. . . . [Man] arranges his wishes and desires into a scale, he chooses; in short, he acts. What distinguishes man from beasts is precisely that he adjusts his behavior deliberately. Man is the being that has inhibitions, that can master his impulses and desires, that has the power to suppress instinctive desires and impulses. . . .”

“If we were in a position to interpret such [animal] behavior as the outcome of purposeful aiming at certain ends, we would call it action and deal with it according to the teleological methods of praxeology. But as we [find] no trace of a conscious mind behind this behavior, we suppose that an unknown factor—we call it instinct—[is] instrumental. We say that the instinct directs quasi-purposeful animal behavior and unconscious but nonetheless serviceable responses of human muscles and nerves. . . . We must never forget that this word instinct is nothing but a landmark to

indicate a point beyond which we are unable, up to the present at least, to carry our [praxeological] scrutiny.”

Praxeology—and thus the rights of property—apply definitely to man. Whether praxeology proper and the rights of property apply to animals as quasi-actors is yet an open question. I must leave this important matter to be discussed elsewhere. Here, I am concerned with deriving the rights of acting man and not of quasi-actors.

Ownership of Objects Outside of the Body

All goods are used exclusively by a specific actor at a specific point in time. Such objects have a history of *exclusive use* and a history of *de facto* ownership, which are separate things. The individual, in order to claim ownership of an object, must *physically* appropriate the good. He must artificially deviate it from its natural course for use as a means to some *conscious* end. If an object in nature has never been used before by an actor, and an actor physically takes it from nature, one may rightfully call oneself the *de facto* owner of the object. Since no one else made use of it before, another actor's claim to ownership is *ipso facto* an illegitimate claim. When the original appropriator of a good uses it to create another good, this good, too, becomes his own. It is an extension of what was originally appropriated from nature. This is production of properly owned goods. When a person trades any properly owned goods for the goods of any other person gained in the same way, this is an exchange of properly owned goods. When a person gives such goods away, it is a gift of properly owned goods. Thus is the history of properly owned goods. Any person's conscious deviation of a good from this chain of ownership is *ipso facto* an illegitimate appropriation—or expropriation. (It is possible for a man to exclusively use an illegitimately gotten good, i.e. stealing it, or for a man to damage a legitimately owned good of another actor, which interferes with this actor's ownership of the good. Both of these actions constitute aggression against property. Redress against such aggression is discussed below.)

Presuppositions of Intrapersonal Communication

Inherent in the ability to act is the ability to communicate with oneself. One must consciously choose what ends one wishes to meet in order to act. This is a self-evident, praxeological truth. Without this ability, one would be unable to act. One would by definition be an inanimate object. Actors act. And in order to act, actors must communicate with themselves.

Communicating with oneself presupposes ownership of oneself. An individual is the first user of himself—the first to appropriate himself from nature. Therefore, he is the proper and exclusive controller of them, for no one has a better claim to the actors own mind and body than the actor himself.

Because of this fact, asserting otherwise would result in a performative contradiction, for in the very act of declaring that one does not own oneself, one recognizes proper and exclusive ownership of oneself.

One could not communicate with oneself, nor could one act, without existing in order to do so. Existing as a conscious actor at any particular point in time implies previous action using means outside of one's body prior to an action. In other words, communication presupposes exclusive control over objects outside of the body. If it were otherwise, the individual would not exist to communicate. Exclusive use of objects by actors at some point in time implies a history of exclusive and legitimate use of such objects, ultimately dating back to an act of original appropriation. In short, communication and acting presuppose exclusive use of objects outside of the body, and since exclusive use by certain actors has taken place at a certain point in time, that such objects necessarily have a history of exclusive and legitimate use.

Thus, *contra* Hoppe, Robinson Crusoe may live on an island and exclusively own his own body as well as legitimately own his possessions, regardless and independent of another actor's existence on the island. These principles are presupposed insofar as Crusoe communicates with himself, which he necessarily does as a condition of acting. There is no need for Friday to introduce potential conflict, nor for Crusoe to have discourse with him, in order to establish Crusoe's self-ownership and proper ownership of property. Ownership of property is necessarily antecedent to peace, conflict, and discourse.

Presuppositions of Interpersonal Communication

Indeed, meaningful, i.e., interpersonal, conflict would never arise if only one actor were present. Such conflict could only arise if another actor presented himself, and still there would be no conflict if the two actors never communicated. Thus, the nonaggression principle only becomes apparent at the same moment it becomes needed—that is, when the two actors *decide to communicate*, whether argumentatively or leisurely, physically or verbally. (This, too, is an important deviation from Hoppe, who claims that the nonaggression principle only becomes apparent *after the two actors decide to submit themselves to discourse*.)

As I have shown, in order to relate in any way with himself or his fellow man, man must make use of some mode of communication. Through communication with his fellow man, the principle of nonaggression is necessarily established. When one communicates (or even intends to communicate) with another person, one is required to assume that the receiver of the communication is able to understand and contemplate it. If one did not expect the other to understand the communication, the statement itself would, naturally, not be interpersonal communication but words spoken in self-contemplation. In brief, by communicating (or intending to), one supposes that the receiver is also an actor. Therefore, one presupposes and recognizes the receiver's equal self-ownership. Since one, by

virtue of being an actor, has already recognized ownership of objects outside of the body and their history of ownership, one must assume the receiver's exclusive control of objects outside of the receiver's body and their history of ownership. Without such use and ownership, the receiver of one's communication would not exist to receive the communication. Since this is necessarily assumed, it is presupposed that undue aggression against the receiver of one's communication or the receiver's legitimately owned property is an illegitimate invasion of property rights. (In order to avoid misinterpretation, I hasten to mention that such mutual recognition does not establish specifically what property is owned or *specifically* when it was legitimately owned, just as no praxeological theorem can give *quantitative* insight, but can only give *qualitative* insight. The history of ownership of a good itself is a matter of examination and dispute should conflict over it arise.)

Communication Ethics and Communicative Estoppel

Stephan Kinsella has added an important element to Hoppe's argumentation ethic which he calls "dialogical estoppel". Instead of focusing on discourse between two rights respecting actors, as Hoppe does, Kinsella considers discourse between an aggressor and his victim. Kinsella shows that an aggressor is unable to argumentatively justify an objection to being punished for his aggression, for the aggressor has established that aggression, at least to the degree that he himself has aggressed, is a legitimate invasion of property rights. Thus, the aggressor could never meaningfully object to being punished for his crime. He is "estopped". However, as Kinsella admits, an aggressor is *only* estopped if he *argues*, for only then is he caught in a performative contradiction. Thus, Kinsella's argument too is *contingent upon discourse*.

I want to reconstruct his argument as well and show that an aggressor is estopped *prior* to any actual discourse by drawing it from the principle of nonaggression as I discussed it above. As I have intimated, an aggressor communicates with his victim in the very act of aggressing. Since he communicates with the victim, he performatively contradicts the principle of nonaggression that he has thus supposed. The aggressor, through his communication with the victim, has established that aggression, at least to the extent that he himself has aggressed, is a legitimate invasion of property rights, and could thus never meaningfully object to being punished for his crime. In other words, a criminal is estopped from objecting to punishment for his crime the very *moment that he commits the crime*. A man who robs another man or communicates with his fists is *ipso facto* estopped. The victim's equal degree of punishment of his aggressor for violation of his rights therefore constitutes due redress. Not a word needs to be said. There is no need for the aggressor to performatively contradict himself through argumentation in order to establish the principle of communicative estoppel.

A Final Word on Argumentation Ethics and Dialogical Estoppel

Here, I want to take the matter of private property, crime, and punishment as provided by Hoppe and Kinsella to their logical conclusion. Suppose that all actors remained silent, choosing not to partake in any discourse whatever. Thus, there will be no discourse over scarce resources or over the bodies of the actors and the space that they occupy. Hoppe would hand such a society potential conflict over scarce resources and nothing that they could use to deal with their conflicts, for they do not speak. But the case becomes worse, for if one follows his “argumentation ethics”, there is by definition no presupposition—and therefore no mutual establishment—of self-ownership or property rights. And there can be no invasion of such rights, for such rights are nonexistent; the discourse that presupposes and establishes them has never taken place. Property rights—as Hoppe says, the only viable solution for potential conflict—are prevented from coming into existence in the first place. Thus, one would follow Kinsella’s “dialogical estoppel” approach to nowhere. An actor who commits a violent act against another actor would never even need to open his mouth to defend himself, for there would be no crime to defend himself against. He would not have invaded anyone’s property rights, for they were never presupposed and established by dialogue to begin with. Not only would the estoppel principle never be needed, it would not even exist.

It seems evident in light of such a hypothetical example which ethic is better equipped for actors in general. Hoppe’s argumentation ethic and Kinsella’s approach to estoppel apply only to actors who argue, whereas communication ethics as I have constructed them necessarily apply to all actors universally, stemming from the *a priori* implications of action itself. Thus, the actors in such a society would nevertheless presuppose and establish self-ownership and private property through communication, and, insofar as they communicate with one another, nonaggression and estoppel.

Conclusion

All actors inherently presuppose the principles of action, self-ownership, and private property, and insofar as communication is intended in any form by one actor to another, one presupposes the principles of nonaggression and estoppel. The truth of these principles cannot be undone by any actor, for they are implied in the concept of action itself. With such axiomatic ground for the existence of private property thus established, the essence of Hoppe’s argumentation ethic has been wholly vindicated.

Concerning Estoppel

By: [Christopher Zimny](#)

Published on the [Daily Anarchist](#)

April 26th, 2014

Argumentation ethics or communication ethics does not establish what is morally right or wrong, it only establishes what is the case. For instance, the praxeological theorem of exchange shows only what happens when two actors trade goods; it does not say this is a morally good thing (at least in an objective sense). The praxeological theorem of theft (in the economic sense, not the ethical sense) states only the conditions under which theft can take place. It does not say or prove that theft is a morally bad thing.

Argumentation ethics and my adaption of it, communication ethics, logically shows, in short, that whenever one communicates, even with oneself, one presupposes that one has exclusive control and legitimate ownership of one's own body and objects outside of the actor's body; in order to communicate with another person, insofar as one expects the other person to understand what is being said, one must assume that the other person also has these same rights. It follows that any undue aggression against these implicitly recognized rights is an illegitimate invasion of them.

Now, because communication ethics establish praxeological truths, it cannot prove that they are moral truths. It merely establishes that actors have property rights, and that removal of legitimately owned property is aggression. The connotation of what ought or should be done in a case of aggression comes from the logical implications of retribution for aggression, i.e., the estoppel approach.

Kinsella's dialogical estoppel shows that an aggressor is unable to meaningfully object to being punished for aggression insofar as he actually attempts to defend himself against punishment, for the aggressor has established through action that aggression, at least to the degree that he himself has aggressed, is a legitimate invasion of property rights. In my reconstruction of Kinsella's argument, the aggressor is implicitly estopped the very moment he commits an invasion of property rights; there is no need for the criminal to object against punishment for his crimes so that estoppel can be recognized.

I have several thoughts on estoppel which are problematic for the praxeologist who is:

- 1) Attempting to show that an aggressor, in his action, affirms that retribution is a legitimate action, when it is clearly not, if one follows communication ethics up to this point (homesteading, history of ownership, intrapersonal, and especially interpersonal communication).

And;

2) Attempting to derive a standard of justice (which does, by the way, imply or connote that there is an objectively correct or incorrect, morally right or wrong standard of retribution or recompense), for which no praxeological standard can be found.

Where the former is concerned: the principle of estoppel assumes that an aggressor implicitly recognizes that aggression—at least to the same degree that he himself has violated the property of another—is legitimate. But insofar as the principle of mutual recognition of property rights holds true (and it does) through interpersonal communication, a person’s violation of another’s property rights cannot imply that the aggression is legitimate, not even subjectively, i.e., for the aggressor himself. For it is the case—indeed, it is objectively the case—that the aggressor has acted in an illegitimate way toward the victim’s property. The aggressor’s actions therefore cannot be said to be legitimate in any sense at all. This cuts the head off the estoppel approach, and thus renders the rest of it void of any use.

However, even if one assumes that estoppel is valid, the idea crumbles into shambles and smithereens if one attempts to apply it in reality. The estoppel approach says, in effect, that the victim is entitled to equal recompense from the criminal. But what does equal recompense mean? If a person steals a ring, for instance, what qualifies as proper recompense? A new ring? The same ring? The monetary value of the ring? Or perhaps a totally different article of equal value? And what of the time and efforts used to recover it? The victim is entitled to—what? But in a way all of these questions are beside the point, for the praxeologist knows that value is in the eye of the beholder. In other words, the value of any good is completely subjective, and unique to every actor. This is a basic economic truth. Therefore, there is no standard of measurement, and no objective or praxeological way to determine what “equal recompense” actually means. The praxeologist is at an utter loss here. Thus, even if the estoppel approach follows from the principles of private property and non-aggression, it is an inoperable concept, and quite nearly meaningless. (In fact, the only situation in which it might be applicable, because the situation is so absolute, would be if the aggressor murdered someone. In this case, using this standard, it is quite obvious that the murderer deserves death. But even still, suppose he murders two people—one can’t very well kill a man twice.)

So, considering these things, what should one think of the estoppel approach to aggression? It is an illogical concept from the start if it is said to stem from the principles of private property and non-aggression, and from the praxeological point of view its application leads to naught.

Although I did write in affirmation of it in my article on communication ethics, I now think it’s an empty concept. While it has good merit for what it is (and good on Kinsella for the attempt to tie it into argumentation ethics), it makes no more sense than a round square, and can no more be applied to reality than Plato’s theory of forms.

Some Thoughts on Argumentation Ethics

By: Kyle Rearden

Published on [The Last Bastille](#) blog

March 16th, 2016

*“Since I received the label ‘libertarian’ because of my work on that ethic, I suppose that I may say that my libertarianism is identical to that ethic. **Rooted in the philosophy of law rather than any particular theory of economics**, it is the philosophy of people who accept that the ethic of justificatory argumentation is the proper framework for discovering rationally undeniable norms for human interaction as well as justifiable solutions to particular disagreements and conflicts. **Advocating such a framework is admittedly far less spectacular than promising a ready-made solution for every conceivable problem.** Nevertheless, it is all that libertarian philosophy can offer if it is true to be the concept of freedom for all persons under the law of reason and in the... presumptions of rationality, innocence, and self-ownership. With that in mind, it is fair to say that **only libertarian rights can be argumentatively justified, because only libertarian rights define a context in which the conditions necessary for justificatory argumentation can be respected universally.**” [emphasis added]*

– [Frank van Dun](#)

[Argumentation ethics](#), simply put, is a logical [proof](#) that demonstrates the [performative contradictions](#) within any political ideology *except* for [libertarian anarchism](#). It upholds the validity of the [non-aggression principle](#) by showing that individuals who argue with each other have not only foresworn coercion, but also affirmed [self-ownership](#), because they are exercising property rights in the very act of arguing itself. Fundamentally, Professor Hans-Herman Hoppe’s concept insists on integrity by opposing hypocrisy.

Examples of performative contradictions are all too easy to come by. Also known by some as “[self-detonating statements](#),” any speaker who says, “I am dead,” or “Language is meaningless,” is completely full of shit, and this is easily provable, simply because *the very act of making the statement necessarily involves a contradiction*. Obviously, language inherently carries meaning, and dead men don’t speak.

In that same vein, any speaker who claims, “Property rights do not exist,” just contradicted himself, mainly because he had to exercise property rights in order to utter the statement, whether it be in the form of his throat and mouth *or* his fingers and a keyboard. This, more so than any other reason, is why [antiproprietary](#) diatribes are nonsensical, because those who despise private property must exercise property rights in the very act of promoting Marxoid socialistic dribble. Self-evidently, this demonstration does not require an economics degree.

Plainly stated, argumentation ethics is the yardstick by which to determine *who* has [natural liberty](#). Feminists could use argumentation ethics to argue that women have rights, but the cost of this is that feminists will have to give up for their affection for socialism. [Anti-spanking advocates](#) could use argumentation ethics to argue that children have rights, but the cost of this is that these advocates would also find themselves acknowledging parental rights as well. Animal rights proponents could prove the intelligent sentience of any animal by having *the animal itself* argue; obviously, if the animal could do this himself, he would no longer be an “animal,” but rather an intelligent, sentient, rational [individual](#) of a species much like humanity, thereby proving that humans are not alone in the universe.

Generally speaking, argumentation ethics delegitimize [the State](#). As professor Hoppe has said in both [March](#) and [May of 2011](#), respectively:

*“...the State is an **expropriating property protector**.”*

*“...a tax-funded life-and-property protection agency is a contradiction in terms: an **expropriating property protector**.”*

Just as there is no such thing as “consensual raping” or “virtuous corruption,” government cannot be said to protect property rights, because everything it has was first confiscated at the point of the sword. In this sense, an existential threat like [civil asset forfeiture](#) becomes more of a *fait accompli* since Leviathan is inherently an “expropriating property protector,” as historically evidenced by the levying of the [1791 whiskey tax](#), which occurred **before** [the ratification of the federal Bill of Rights](#).

There exists literature about argumentation ethics that spans twenty-six years. They are as follows:

- 1988: [The Ultimate Justification of the Private Property Ethic & Beyond Ought & Is](#)
- 1996: [Punishment & Proportionality: The Estoppel Approach](#)
- 2004: [The Ethics & Economics of Private Property](#)
- 2006: [Hans-Hermann Hoppe’s Argumentation Ethics: A Critique](#)

- 2009: [Argumentation Ethics & the Philosophy of Freedom & A Reply to the Current Critiques Formulated Against Hoppe's Argumentation Ethics](#)
- 2011: [Rejoinder to Murphy & Callahan on Hoppe's Argumentation Ethics](#)
- 2013: [Ultimate Foundation of Private Property, Part 1: Argumentation Ethics](#)
- 2014: [Ultimate Foundation of Private Property, Part 2: Presuppositions of Communication & Concerning Estoppel](#)

A brief overview is necessary to understand where everybody who contributed to the literature is coming from. Hoppe first said that the very act of arguing itself justifies property rights, and later that same year in 1988, none other than Dr. Murray Rothbard humbly admitted that Hoppe had proven him wrong, in that it is possible to derive a private property ethic from value-free axioms, and that this was done not from someone who was an economist, but rather a philosopher. Stephen Kinsella proposed that his **dialogical estoppel** was the enforcement mechanism for argumentation ethics. In 2004, Hoppe stated that original appropriation (that is, [homesteading](#)) is justified by argumentation ethics; two years later, Robert Murphy and Gene Callahan critiqued argumentation ethics by saying that discourse, at best, only justified *partial* self-ownership, and at worst, confused temporary control with rightful ownership.

In 2009, both Frank van Dun and Marian Eabrasu specifically rebutted Murphy and Callahan; the former by saying that discourse is self-evident of *animal rationis capax* and that those who willfully violated self-ownership are subject to punishment, and the latter who said that libertarianism is preferable as a theory of justice because it is the only one that is non-contradictory. Two years later, Dr. Walter Block admitted that between libertarians, argumentation ethics is quite controversial, so therefore the only way to resolve this conflict is for both sides to continue debating the veracity of argumentation ethics itself. Finally, in recent years, Christopher Zimny argued that argumentation ethics was a *communications* theory, and that this is what grounds self-ownership axiomatically, yet, he thought that Kinsella's dialogical estoppel was unworkable due to its reliance on the proportionality of punishment being founded on the subjective theory of value for what constitutes justice.

[Epistemologically speaking](#), as with anything else, the burden of proof for the validity of argumentation ethics lays squarely upon the shoulders of Hoppe and Kinsella, as per Hitchens' razor. These two claim makers must not attribute unprovable conspiracies against their opponents in bad faith, and they must avoid unnecessary convolution. With that said, how well did they fair, especially against their critics?

Having read the above cited literature, I think Hoppe has obeyed Occam's, Hanlon's, and Hitchens' razors in proposing his idea of argumentation ethics, so I join Rothbard, Kinsella, Van Dun, Eabrasu, and Block in their defense of the idea against the admirable yet lame critique offered by Murphy and Callahan. I will even agree with Zimny to the extent that argumentation ethics is a communications

theory, and as such, rivals other communication theories, whether they be “[non-violent communication](#)” or anything else.

In my mind, the validity of libertarian communication theories pivots not on argumentation ethics *per se*, but rather on Kinsella’s dialogical estoppel. Whether it be an extension of argumentation ethics or a parallel to it, dialogical estoppel carries rather profound implications, if it is indeed true. For instance, [authoritarian sycophants](#) would not be able to complain about being punished for their advocacy of the State. By the same token, the State itself would also be dialogically estopped from demonizing the [right of revolution](#) simply due to the fact that the State deserves punishment for its very long history of crimes against humanity, including [democide](#). Any such [libertarian revolution](#) would simply be punishment against the State, whether this takes the form of [vigilantism](#) or [assassination markets](#).

Why, then, is argumentation ethics so divisive amongst libertarians? Much like [abortion](#) or [copyright](#), argumentation ethics is a direct application of first principles, but what those principles are, are not universally shared by all those individuals *claiming* to be libertarians, as was elucidated by Sam Konkin back in 1985 [regarding the historical corruption of political labels](#); hence the false dichotomies of adjective-laden libertarians, such as [thick versus thin](#), [brutalist versus humanitarian](#), and “[left](#)” [versus paleo](#). I also suspect another profound reason for this divisiveness are the implications I’ve just outlined regarding the validity of dialogical estoppel in justifying an ethical imperative for libertarians to forcibly punish the State.

Overall, I think that argumentation ethics is useful for justifying natural liberty. It also has the potential as a tool to gauge [the quality of individuals you are vetting](#). I will leave you now with half of the second verse to Morrakiu’s tribute to argumentation ethics, which is entitled, [Drop It Like It’s Hoppe](#):

I do philosophy well, like an ancient Greek
 You’re way out of your league son, so to speak
 Rights aren’t granted by Allah, Zeus, or Thor
 Buddah, or Krishna, or any of his other forms
 That we can argue shows that they’re accepted norms
 To which the vast majority of us conform
 So, let the premise of the State be seen unveiled
 Democracy is the god that fizzailed.

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