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What Libertarianism Is

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Property, Rights, and Liberty

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

Various formulations abound. It is said that libertarianism is about: individual rights; property rights;[[1]](#footnote-1) the free market; capitalism; justice; the nonaggression principle. Not all these will do, however. Capitalism and the free market describe the catallactic conditions that arise or are permitted in a libertarian society, but do not encompass other aspects of libertarianism. And individual rights, justice, and aggression collapse into property rights. As Murray Rothbard explained, individual rights *are* property rights.[[2]](#footnote-2) And justice is just giving someone his due—which, again, depends on what his rights are.[[3]](#footnote-3)

The nonaggression principle is also dependent on property rights, since what aggression is depends on what our (property) rights are. If you hit me, it is aggression *because* I have a property right in my body. If I take from you the apple you possess, this is trespass, aggression, only *because* you own the apple. One cannot identify an act of aggression without implicitly assigning a corresponding property right to the victim.[[4]](#footnote-4)

So, as descriptive terms for our political philosophy, capitalism and the free market are too narrow, and justice, individual rights, and aggression all boil down to, or are defined in terms of, property rights.

What of property rights, then? Is this what differentiates libertarianism from other political philosophies—that we favor property rights, and all others do not? Surely such a claim is untenable. After all, a property right is simply the *exclusive right to control a scarce resource*—what I often refer to now as *conflictable* resources.[[5]](#footnote-5) Property rights specify which persons own—have the right to control—various scarce resources in a given region or jurisdiction. Yet everyone and every political theory advances *some* theory of property. None of the various forms of socialism deny property rights; each socialism will specify an owner for every scarce resource.[[6]](#footnote-6) If the state nationalizes an industry, it is asserting ownership of these means of production. If the state taxes you, it is implicitly asserting ownership of the funds taken. If my land is transferred to a private developer by eminent domain statutes, the developer is now the owner. If the law allows a recipient of racial discrimination to sue his employer for a sum of money—he is the (new) owner of the money.[[7]](#footnote-7) If the state conscripts someone, or imprisons them as the penalty for refusing to serve in the military, or for failure to pay taxes, or for using illegal narcotics, then the state is claiming legal ownership of the person’s body.

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

LIBERTARIAN PROPERTY RIGHTS

A system of property rights assigns a particular owner to every scarce (conflictable) resource.[[8]](#footnote-8) These resources obviously include natural resources such as land, fruits of trees, and so on. Objects found in nature are not the only scarce resources, however. Each human actor has, controls, and is identified and associated with a unique human body, which is also a scarce resource.[[9]](#footnote-9) Both human bodies and non-human scarce resources are desired for use as means by actors in the pursuit of various goals.[[10]](#footnote-10)

Accordingly, any political or legal system must assign ownership rights in human bodies as well as in external things.

The libertarian view is that individual rights—property rights—are assigned according to a few simple principles: *self-ownership,* in the case of human bodies; and, in the case of previously-unowned external things (conflictable resources), in accordance with principles of *original* *appropriation*, *contractual title transfer*, and *rectification*.[[11]](#footnote-11) Let us discuss these in turn in the following sections. Note that in this chapter I aim mostly to *describe* libertarian principles, not necessarily to justify them; subsequent chapters provide further arguments in support of these principles.

Property IN BODIES

Let us consider first the libertarian property assignment rules with respect to human bodies, and the corresponding notion of aggression as it pertains to bodies.[[12]](#footnote-12)

Libertarians often refer to the non-aggression principle, or NAP, as their prime value. As Ayn Rand said, “So long as men desire to live together, no man may *initiate*—do you hear me? No man may *start*—the use of physical force against others.”[[13]](#footnote-13) Or, as Rothbard put it:

The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the “nonaggression axiom.” “Aggression” is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.[[14]](#footnote-14)

In other words, libertarians maintain that the only way to violate rights is by *initiating* force—that is, by committing aggression. (Libertarianism also holds that, while the initiation of force against another person’s body is impermissible, force used *in response* to aggression—such as defensive, restitutive, or retaliatory/punitive force—is justified.[[15]](#footnote-15)) Now in the case of the body, it is clear what aggression is: invading the borders of someone’s body, commonly called battery, or, more generally, *using the body of another without his or her consent*.[[16]](#footnote-16) The very notion of interpersonal aggression presupposes property rights in bodies—more particularly, that each person is, at least *prima facie*, the owner of his own body.[[17]](#footnote-17)

Non-libertarian political philosophies have a different view. In these systems, each person has some limited rights in his own body, but not complete or exclusive rights. Society or the state, purporting to be society’s agent, has certain rights in each citizen’s body, too. This partial slavery is implicit in state actions and laws such as taxation, conscription, and drug prohibitions.[[18]](#footnote-18) The libertarian says that each person is the full owner of his body: he has the right to control his body, to decide whether or not he ingests narcotics, joins an army, pays taxes, and so on. Those various non-libertarians who endorse any such state prohibitions, however, necessarily maintain that the state, or society, is at least a partial owner of the body of those subject to such laws—or even a complete owner in the case of conscriptees or non-aggressor “criminals” incarcerated for life or executed. Libertarians believe in *self*-ownership. Non-libertarians—statists—of all stripes advocate some form of slavery.[[19]](#footnote-19)

SELF-OWNERSHIP AND CONFLICT AVOIDANCE

Without property rights, there is always the possibility of conflict over contestable resources. By assigning an owner to each resource, legal systems make possible conflict-free use of resources by establishing public, visible boundaries that non-owners can avoid. Libertarianism does not endorse just any property assignment rule, however.[[20]](#footnote-20) It favors *self*-ownership over *other*-ownership (slavery).[[21]](#footnote-21)

The libertarian seeks property assignment rules *because* he values or accepts various *grundnorms* such as justice, peace, prosperity, cooperation, conflict-avoidance, civilization.[[22]](#footnote-22) The libertarian view is that self-ownership is the only property assignment rule compatible with these *grundnorms*; it is implied by them. As Professor Hoppe has shown, the assignment of ownership to a given resource must not be random, arbitrary, particularistic, or biased if it is to actually be a property norm that can serve the function of conflict-avoidance.[[23]](#footnote-23) Property title has to be assigned to one of competing claimants based on “the existence of an objective, intersubjectively ascertainable link between owner and the” resource claimed.[[24]](#footnote-24) In the case of one’s own body, it is the unique relationship between a person and his body—*his direct and immediate control* over his body, and the fact that, at least in some sense, a body *is* a given person and vice versa—that constitutes the objective link sufficient to give that person a claim to his body superior to typical third party claimants.

Moreover, any outsider who claims another’s body cannot deny this objective link and its special status, since the outsider also necessarily presupposes this in his own case. This is so because in seeking dominion over the other, in asserting ownership over the other’s body, he has to presuppose his own ownership of his body, which demonstrates he does place a certain significance on this link, at the same time that he disregards the significance of the other’s link to his own body.[[25]](#footnote-25)

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

PROPERTY IN EXTERNAL THINGS

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

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

Unlike human bodies, however, external objects are not parts of one’s identity, are not directly controlled by one’s will—and, significantly, they are *initially unowned*.[[26]](#footnote-26) Here, the libertarian realizes that the relevant objective link is *original appropriation*—the transformation or embordering of a previously unowned resource, Lockean homesteading, the first use or possession of the thing.[[27]](#footnote-27) Under this approach, the first (prior) user of a previously unowned thing has a prima facie better claim than a second (later) claimant solely by virtue of his being earlier.

Why is appropriation the relevant link for determination of ownership? First, keep in mind that the question with respect to such scarce resources is: who is the resource’s *owner*? Recall that ownership is the *right* to control, use, or possess,[[28]](#footnote-28) while possession is *actual* control—“the *factual* *authority* that a person exercises over a corporeal thing.”[[29]](#footnote-29) The question is not who has physical possession; it is who has ownership. Thus, asking who is the owner of a resource presupposes *a distinction* between ownership and possession—between the *right* to control (or exclude) (ownership, or property rights), and *actual* control (possession; economic dominion). And the answer has to take into account the nature of previously-unowned things: to wit, that they must at some point become owned by a first owner.

The answer must also take into account the presupposed goals of those seeking this answer: rules that permit conflict-free use of resources. For this reason, the answer cannot be whoever has the *resource or whoever is able to take it* is its owner. To hold such a view is to adopt a might makes right system where ownership collapses into possession for want of a distinction.[[30]](#footnote-30) Such a “system,” far from avoiding conflict, makes conflict inevitable.[[31]](#footnote-31)

Instead of a might-makes-right approach, from the insights noted above it is obvious that *ownership presupposes the prior-later distinction*: whoever any given system specifies as the owner of a resource *has a better claim than latecomers*.[[32]](#footnote-32) If he does not, then he is not an owner, but merely the current user or possessor, in a might-makes-right world in which there is no such thing as ownership—which contradicts the presuppositions of the inquiry itself. If the first owner does not have a better claim than latecomers, then he is not an owner, but merely a possessor, and there is no such thing as ownership. More generally, latecomers’ claims are inferior to those of prior possessors or claimants, who either homesteaded the resource or who can trace their title back to the homesteader or earlier owner.[[33]](#footnote-33) The crucial importance of the prior-later distinction to libertarian theory is why Professor Hoppe repeatedly emphasizes it in his writing.[[34]](#footnote-34)

Thus, the libertarian position on property rights is that, in order to permit conflict-free, productive use of scarce resources, property titles to particular resources are assigned to particular owners. As noted above, however, the title assignment must not be random, arbitrary, or particularistic; instead, it has to be assigned based on “the existence of an objective, intersubjectively ascertainable link between owner and the” resource claimed.[[35]](#footnote-35) As can be seen from the considerations presented above, the link is the physical transformation or embordering of the original homesteader, or a chain of title traceable by contract back to him.[[36]](#footnote-36)

As Hoppe summarizes self-ownership rights and property rights in external resources based in original appropriation and contractual title transfer:

But who owns what scarce resource as his private property and who does not? First: Each person owns his physical body that only he and no one else controls *directly* (I can control your body only in-directly, by first directly controlling my body, and vice versa) and that only he directly controls also in particular when *discussing and arguing* the question at hand. Otherwise, if body-ownership were assigned to some indirect body-controller, conflict would become unavoidable as the direct body-controller *cannot* give up his direct control over his body as long as he is alive; and in particular, otherwise it would be impossible that any two persons, as the contenders in any property dispute, could ever *argue and debate* the question whose will is to prevail, since arguing and debating *presupposes* that both, the proponent and the opponent, have exclusive control over their respective bodies and so come to the correct judgment *on their own*, without a fight (in a conflict-free form of interaction).

And second, as for scarce resources that can be controlled *only* indirectly (that must be appropriated with our own nature-given, i.e., un-appropriated, body): Exclusive control (property) is acquired by and assigned to that person, who appropriated the resource in question *first* or who acquired it through voluntary (conflict-free) exchange from its *previous* owner. For only the first appropriator of a resource (and all later owners connected to him through a chain of voluntary exchanges) can possibly acquire and gain control over it without conflict, i.e., peacefully. Otherwise, if exclusive control is assigned instead to *latecomers*, conflict is not avoided but contrary to the very purpose of norms made unavoidable and permanent.[[37]](#footnote-37)

CONSISTENCY AND PRINCIPLE

Not only libertarians are civilized. Most people give some weight to some of the above considerations. In their eyes, a person is the owner of his own body—usually. A homesteader owns the resource he appropriates—unless the state takes it from him “by operation of law.”[[38]](#footnote-38) This is the principal distinction between libertarians and non-libertarians: libertarians are consistently opposed to aggression, defined in terms of invasion of property borders, where property rights are understood to be assigned on the basis of self-ownership, in the case of bodies, and on the basis of prior possession or homesteading and contractual transfer of title, in the case of other things (plus transfers for purposes of rectification).

This framework for rights is motivated by the libertarian’s consistent and principled valuing of peaceful interaction and cooperation—  
in short, of civilized behavior. A parallel to the Misesian view of human action may be illuminating here. According to Mises, human action is aimed at alleviating some felt uneasiness.[[39]](#footnote-39) Thus, means are employed, according to the actor’s understanding of causal laws, to achieve various ends—ultimately, the removal of some *felt uneasiness*.

Civilized man feels uneasy at the prospect of violent struggles with others. On the one hand, he wants, for some practical reason, to control a given scarce resource and to use violence against another person, if necessary, to achieve this control. On the other hand, he also wants to avoid a wrongful use of force. Civilized man, for some reason, feels reluctance, uneasiness, at the prospect of violent interaction with his fellow man. Perhaps he has reluctance to violently clash with others over certain objects because he has empathy with them.[[40]](#footnote-40) Perhaps the instinct to cooperate is a result of social evolution. As Mises noted,

There are people whose only aim is to improve the condition of their own ego. There are other people with whom awareness of the troubles of their fellow men causes as much uneasiness as or even more uneasiness than their own wants.[[41]](#footnote-41)

Whatever the reason, because of this uneasiness, when there is the potential for violent conflict, the civilized man seeks justification for the forceful control of a scarce resource which he desires but which some other person opposes. Empathy—or whatever spurs man to adopt the libertarian *grundnorms*—gives rise to a certain form of uneasiness, which gives rise to *ethical action*. Civilized man may be defined as he who seeks justification for the use of interpersonal violence. When the inevitable need to engage in violence arises—for defense of life or property—civilized man seeks justification. Naturally, since this justification-seeking is done by people who are inclined to reason and peace (justification is after all a peaceful activity that necessarily takes place during discourse),[[42]](#footnote-42) what they seek are rules that are fair, potentially acceptable to all, grounded in the nature of things, and universalizable, and that permit conflict-free use of resources. Libertarian property rights principles emerge as the only candidate that satisfies these criteria. Thus, if civilized man is he who seeks justification for the use of violence, the libertarian is he who is *serious* about this endeavor. He has a deep, principled, innate opposition to violence, and an equally deep commitment to peace and cooperation.

For the foregoing reasons, libertarianism may be said to be the political philosophy that *consistently* favors social rules aimed at promoting peace, prosperity, and cooperation.[[43]](#footnote-43) It recognizes that the only rules that satisfy the civilized *grundnorms* are the self-ownership principle and the Lockean homesteading principle, applied as consistently as possible.

And as I have argued elsewhere, because the state necessarily commits aggression, the consistent libertarian, in opposing aggression, is also an anarchist.[[44]](#footnote-44)

**APPENDIX I**“PROPERTY”—CONCEPT AND TERMINOLOGY

As noted above, the material here was originally intended to appear in footnote 5, above. Due to its length, I include this material in this appendix.

*Concept and Definition of “Property”*

As Professor Yiannopoulos explains:

*Property* is a word with high emotional overtones and so many meanings that it has defied attempts at accurate all-inclusive definition. The English word *property* derives from the Latin *proprietas*, a noun form of *proprius*, which means one’s own. In the United States, the word *property* is frequently used to denote indiscriminately either the *objects* of rights … or the *rights* that persons have *with respect to things*. Thus, lands, automobiles, and jewels are said to be property; and rights, such as ownership, servitudes, and leases, are likewise said to be property. This latent confusion between rights and their objects has its roots in texts of Roman law and is also encountered in other legal systems of the western world. *Accurate analysis should reserve the use of the word property for the designation of rights that persons have with respect to things.*

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

[Property rights] *confer a direct and immediate authority over a thing.*[[45]](#footnote-45)

In this book, I endeavor to use the term “property” to refer to rights a person has with respect to a given thing or resource, instead of to the thing itself, but on occasion (partly due to the fact that many of these chapters are over 20 years old and I did not want to rewrite everything completely), I will employ the more colloquial usage where “property” refers to the object or resource or thing owned. It is sometimes necessary to avoid the inconvenience of nonstandard language in order to communicate (just as I use the term “intellectual property” in discussing modern patent and copyright law, even though I dislike the term,[[46]](#footnote-46) so that people understand what I’m referring to).

*“Things”*

As Yiannopoulos notes:

Accurate definition of the word *things* is indispensable in view of the fact that only things in the legal sense may be objects of property rights.… In most legal systems, including common law jurisdictions, Louisiana, and legal systems of the French family, the word things applies both to physical objects and incorporeals [intangibles]. In legal systems following the model of the German Civil Code, however, the word things applies only to corporeal objects that are susceptible of appropriation.[[47]](#footnote-47)

Thus, the concept of “thing” in the civil law (*res* under Roman law; *bien* (good) and *chose* (corporeal thing) under French law; *Sache* under German law) denotes certain objects of rights in the law.

Things are also divided into different types, such as common, public, and private; corporeals and incorporeals; and movables and immovables.[[48]](#footnote-48) Things are divided into other types, as well, such as things in commerce and out of commerce, consumable and non-consumable, and so on.[[49]](#footnote-49)

The civil law concept of things, especially private things, more or less corresponds to the notion of economic goods, or appropriable objects having a pecuniary value, which itself is close to the concept of *conflictable* (contestable, rivalrous, scarce) resources I use in this book to refer to the types of things that can be the subject of property rights—that can be owned (see the section “Conflictable vs. Scarce,” below). They are things that can be used by acting man as means of action—possessed—and in society, that can be owned (property rights).[[50]](#footnote-50)

*Property as a Right to Exclude*

Technically speaking, a property right is not a right to *control* a resource but a *right to exclude others from using the resource*. Ironically, this is how patent rights work, although most non-specialists have trouble understanding this; having a patent on an invention does *not* allow the inventor to make or use it, but only to *prevent others* from doing so.[[51]](#footnote-51)   
I have explained elsewhere why property rights do not give the owner a right to control or use the resource.[[52]](#footnote-52) However, for our purposes in this chapter, this distinction is not particularly germane.

*Property as a Right between People*

Moreover, as noted in “A Libertarian Theory of Contract” (ch. 9), n.1, property rights can be conceived of not as a right between a human actor and an owned object, but rather as a right *as between human actors*, but *with respect to particular (owned) resources*.

As Judge Alex Kozinski writes:

But what is property? That is not an easy question to answer. I remember sitting in my first-year property course on the first day of class when the professor … asked the fundamental question: What are property rights? … I threw up my hand and without even waiting to be called on I shouted out, “Property rights define the relationship between people and their property.”

Professor Krier stopped dead in his tracks, spun around, and gave me a long look. Finally he said: “That’s very peculiar, Mr. Kozinski. Have you always had relations with inanimate objects? Most people I know have relations with other people.”

That was certainly not the last time I said something really dumb in class, but the lesson was not lost on me. Property rights are, of course, a species of relationships between people. At the minimum, they define the degree to which individuals may exclude other individuals from the use and enjoyment of their goods and services….[[53]](#footnote-53)

*Conflictable vs. Scarce*

As noted elsewhere, in recent years I tend to emphasize the rivalrous or “conflictable” nature of ownable resources to avoid the inevitable equivocation when the term “scarce” is used. When I refer to scarce resources in this book it is to be understood as meaning conflictable resources.[[54]](#footnote-54)

**APPENDIX II**MUTUALIST OCCUPANCY

As noted above, the material here was originally intended to appear in footnote 31, above. Due to its length, I include this material in this appendix.

As pointed out in the text above, any workable and just legal system must distinguish ownership from possession, and must recognize the prior-later distinction. Instead of a might-makes-right approach, the owner of a resource has a better claim than latecomers. If he does not, then he is not an owner, but merely the current user or possessor, in a might-makes-right world in which there is no such thing as ownership.

I have observed that this is also the reason the mutualist “occupancy” position on land ownership is unlibertarian and unjust.

Mutualist Kevin Carson writes:

For mutualists, *occupancy and use* is the only legitimate standard for establishing ownership of land, regardless of how many times it has changed hands. An existing owner may transfer ownership by sale or gift; but the new owner may establish legitimate title to the land *only by his own occupancy and use*. A change in occupancy will amount to a change in ownership.… The *actual occupant is considered the owner of a tract of land*, and any attempt to collect rent by a self-styled [“absentee”] landlord is regarded as a *violent invasion of the possessor’s absolute right of property*.[[55]](#footnote-55)

Thus, for mutualism, the “actual occupant” is the “owner”; the “possessor” has the right of property. If a homesteader of land stops personally using or occupying it, he loses his ownership. Carson contends this is compatible with libertarianism:

[A]ll property rights theories, including Lockean, make provision for *adverse possession and constructive abandonment of property*. They differ only in degree, rather than kind: in the “stickiness” of property.… There is a large element of convention in any property rights system—Georgist, mutualist, and both proviso and nonproviso Lockeanism—in determining what constitutes transfer and abandonment.[[56]](#footnote-56)

In other words, Lockeanism, Georgism, and mutualism are all types of libertarianism, differing *only in degree*. In Carson’s view, the gray areas in issues like adverse possession and abandonment leave room for mutualism’s “occupancy” requirement for maintaining land ownership.[[57]](#footnote-57)

But the concepts of adverse possession and abandonment cannot be stretched to cover the mutualist occupancy requirement. The mutualist occupancy view is essentially a *use* or *working* requirement, which is distinct from doctrines of adverse possession and abandonment. The doctrine of abandonment in positive law and in libertarian theory is based on the idea that ownership *acquired* by *intentionally* appropriating a previously unowned thing may be lost when the owner’s intent to own terminates. Ownership is acquired by a merger of possession and intent to own. Likewise, when the intent to own ceases, ownership does too—this is the case with both abandonment of ownership *and* transfer of title to another person, which is basically an abandonment of property “in favor” of a particular new owner.[[58]](#footnote-58)

The legal system must therefore develop rules to determine when property has been abandoned, including default rules that apply *in the absence of clear evidence*. Acquisitive prescription is based on an implicit presumption that the owner has abandoned his property claims if he does not defend it within a reasonable time period against an adverse possessor. But such rules apply to *adverse* possessors—those who possess the property *with the intent to own* and in a sufficiently public fashion that the owner knows or should know of this.[[59]](#footnote-59) The “public” requirement means that the possessor possesses the property openly as *owner*, adverse or hostile to the owner’s ownership—which is *not* the case when, for example, a lessee or employee uses an apartment or manufacturing facility under color of title and *permission* from the owner. Rules of abandonment and adverse possession are default rules that apply when the owner has *not* made his intention sufficiently clear—by neglect, apathy, death, absence, or other reason.

In fact, the very idea of abandonment rests on the distinction between ownership and possession. Property is more than possession; it is a right to possess, originating and sustained by the owner’s *intention* to possess as owner. And abandonment occurs when the intent to own terminates. This happens even when the (immediately preceding) owner temporarily maintains possession but has lost ownership, as when he gives or sells the thing to another party.[[60]](#footnote-60)

Clearly, default abandonment and adverse possession rules are categorically different from a working requirement, whereby ownership is lost in the *absence of use*.[[61]](#footnote-61) Ownership is not lost by nonuse, however, and a working requirement is *not* implied by default rules regarding abandonment and adverse possession. See, e.g., Louisiana Civil Code, art. 481 (emphasis added): “The ownership and the possession of a thing are distinct.… Ownership exists independently of any exercise of it and *may not be lost by nonuse*. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor.” Carson is wrong to imply that abandonment and adverse possession rules can yield a working (or *use* or *occupancy*) requirement for maintaining ownership. In fact, these are distinct legal doctrines. Thus, when a factory owner contractually allows workers to use it, or a landlord permits tenants to live in an apartment, there is no question that the owner *does not intend to abandon* the property, and there is no *adverse* possession (and if there were, the owner could institute the appropriate action to eject them and regain possession).[[62]](#footnote-62) There is no need for “default” rules here to resolve an ambiguous situation.[[63]](#footnote-63)

A final note here: I cite positive law here not as an argument from authority, but as an illustration that even the positive law carefully distinguishes between possession and ownership—and also between a *use* or *working* requirement to maintain ownership, and the potential to lose title by abandonment or adverse possession—to illustrate the flaws in Carson’s view that an occupancy requirement is just one variant of adverse possession or default abandonment rules. Furthermore, the civilian legal rules cited derive from legal principles developed over the ages in largely decentralized fashion, and can thus be useful in our own libertarian efforts to develop concrete applications of abstract libertarian principles.[[64]](#footnote-64)

1. Although the term “private property rights” is widely used, property rights are in a sense necessarily public, since the borders or boundaries of property must be publicly visible so that non-owners can avoid trespass. For more on this aspect of property borders, see Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010; www.hanshoppe.com/tsc), pp. 167–68; “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), at n.38; “Law and Intellectual Property in a Stateless Society” (ch. 14), Part II.C, note 7 and accompanying text, text at notes 24–25, and Part III.B; Stephan Kinsella, Against Intellectual Property (Auburn, Ala.: Mises Institute, 2008), pp. 30–31, 49; “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), text at n.24. See also idem, “How To Think About Property (2019),” StephanKinsella.com (April 25, 2021); and Randy E. Barnett, “A Consent Theory of Contract,” Colum. L. Rev. 86 (1986; www.randybarnett.com/pre-2000): 269–321, at 291, 303. [↑](#footnote-ref-1)
2. Murray N. Rothbard, “‘Human Rights’ as Property Rights,” in The Ethics of Liberty (New York: New York University Press, 1998; https://mises.org/library/human-rights-property-  
   rights); idem, For a New Liberty, 2d ed. (Auburn, Ala.: Mises Institute, 2006; https://mises.org/library/new-liberty-libertarian-manifesto), p. 42 et pass. See also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), Part IV.B. [↑](#footnote-ref-2)
3. “Justice is the constant and perpetual wish to render every one his due.… The maxims of law are these: to live honestly, to hurt no one, to give every one his due.” J.A.C. Thomas, ed., The Institutes of Justinian: Text, Translation, and Commentary, J.A.C. Thomas, trans. (Amsterdam: North-Holland Publishing Company, 1975). [↑](#footnote-ref-3)
4. The standard libertarian litany is that the nonaggression principle (the NAP; sometimes also called the nonaggression axiom by libertarians, in an idiosyncratic usage of the term “axiom,” no doubt inspired by Ayn Rand’s idiosyncratic use of the term axiom) prohibits the initiation of force against the person or property of someone else—or threats thereof, or fraud. Some libertarians or libertarian critics argue that trespass to owned resources, fraud, and threats do not quite fit into the NAP because these things are not actually “aggression,” as the term is properly understood. (See, e.g., the criticisms of libertarianism for being unable to explain why fraud may be prohibited, by James Child and Benjamin Ferguson, as discussed in “A Libertarian Theory of Contract” (ch. 9), Part III.E. The NAP in a literal sense prohibits hitting or using someone’s body (“aggression”) without their permission, which implies self- or body-ownership. Thus, the NAP implies self-ownership, and vice-versa. They are merely different ways of expressing the same view: owning one’s body implies that aggression against it is impermissible; the prohibition against aggression implies self/body-ownership. (See also “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23).)

   The rationale for body-ownership, however, is extended by libertarians to develop similar property rights in external resources; and also to prohibit threats and fraud. (See ibid.) Thus, in my view, the term “nonaggression principle” is an acceptable shorthand for basic libertarian property rights principles—self-ownership plus ownership of external resources based on original appropriation, and fraud and threats—as long as it is kept in mind that in literal terms it refers to body-ownership and that the other property rights are extensions of and based on this primary property right. See also Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform,” StephanKinsella.com (May 30, 2022); idem, “KOL259 | “How To Think About Property”, New Hampshire Liberty Forum 2019,” Kinsella on Liberty Podcast (Feb. 9, 2019); “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23); “Libertarianism After Fifty Years: What Have We Learned?” (ch. 25); Kinsella, “KOL229 | Ernie Hancock Show: IP Debate with Alan Korwin,” Kinsella on Liberty Podcast (Nov. 16, 2017); idem, “KOL161 | Argumentation Ethics, Estoppel, and Libertarian Rights: Adam Smith Forum, Moscow (2014),” Kinsella on Liberty Podcast (Nov. 7, 2014). [↑](#footnote-ref-4)
5. In revising this chapter, this footnote grew to unmanageable length. I have placed the relevant commentary in Appendix I, below. [↑](#footnote-ref-5)
6. For a systematic analysis of various forms of socialism, from Socialism Russian-Style, Socialism Social-Democratic Style, the Socialism of Conservatism, the Socialism of Social Engineering, see Hoppe, A Theory of Socialism and Capitalism, chaps. 3–6. Recognizing the common elements of various forms of socialism and their distinction from libertarianism (capitalism), Hoppe incisively defines socialism as “an institutionalized interference with or aggression against private property and private property claims.” Ibid., p. 2. See also the quote from Hoppe in note 14, below. [↑](#footnote-ref-6)
7. Even the private thief, by taking your watch, is implicitly acting on the maxim that he has the right to control it—that he is its owner. He does not deny property rights—he simply differs from the libertarian as to who the owner is. In fact, as Adam Smith observed: “If there is any society among robbers and murderers, they must at least, according to the trite observation, abstain from robbing and murdering one another.” Adam Smith, The Theory of Moral Sentiments (Indianapolis: Liberty Fund, [1759] 1982), II.II.3. [↑](#footnote-ref-7)
8. As Hoppe points out in the Foreword, regarding the principle of “private property and original appropriation: Logically, what is required to avoid all conflict regarding external material objects used or usable as means of action, i.e. as goods, is clear: every good must always and at all times be owned privately, i.e. controlled exclusively by some specified person.”

   Note also that it is only scarce (conflictable) things that can be owned, that is, be the subject of property rights. For example, as noted in the section “IP Rights as Negative Easements” in “Against Intellectual Property After Twenty Years” (ch. 15), information or knowledge (recipes, in general), as a non-scarce, non-conflictable thing, cannot be owned; any law purporting to assign property rights in such things is just a disguised reassignment of property rights in existing conflictable resources (money, factories, printing presses, etc). [↑](#footnote-ref-8)
9. As Hoppe observes, even in a paradise with a superabundance of goods:

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

   Hoppe, A Theory of Socialism and Capitalism, pp. 8–9. See also Hans-Hermann Hoppe, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in The Great Fiction: Property, Economy, Society, and the Politics of Decline (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf); Hans-Hermann Hoppe, “On The Ethics of Argumentation,” Property and Freedom Podcast (episode 163; 2016; www.PropertyAndFreedom.org); and “Causation and Aggression” (ch. 8) (discussing the use of other humans’ bodies as means).

   N.b.: correlating (not: equating) an actor’s “self” or person with his corporeal body is not mystical or incoherent, as some (even soi-disant libertarian!) critics confusingly maintain, any more than it is mystical to conceptually distinguish the mind from the brain. See “How We Come to Own Ourselves” (ch. 4), at n.1 et pass. [↑](#footnote-ref-9)
10. See “Causation and Aggression” (ch. 8). [↑](#footnote-ref-10)
11. As Narveson writes:

    Robert Nozick has most usefully divided the space for principles on the subject of property into three classes: (1) initial acquisition, that is, the acquisition of property rights in external things from a previous condition in which they were unowned by anyone in particular; (2) transfer, that is, the passing of property (that is to say, property rights) from one rightholder to another; and (3) rectification, which is the business of restoring just distributions of property when they have been upset by admittedly unjust practices such as theft and fraud.

    Jan Narveson, The Libertarian Idea, reissue ed. (Broadview Press, 2001), p. 69. See also Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), ch. 7, section I; Roderick T. Long, “Why Libertarians Believe There is Only One Right,” C4SS.org (April 7, 2014; https://c4ss.org/content/25648) (“Libertarian property rights are, famously, governed by principles of justice in initial appropriation (mixing one’s labour with previously unowned resources), justice in transfer (mutual consent), and justice in rectification (say, restitution plus damages)”); and Gary Chartier, Anarchy and Legal Order: Law and Politics for a Stateless Society (Cambridge University Press, 2013), at 64–65, et seq., elaborating on the “baseline possessory rules” corresponding to original appropriation and contractual title transfer. Regarding transfers made for purposes of rectification, see ibid., chap. 5, “Rectifying Injury,” esp. §II.C.2, and “A Libertarian Theory of Punishment and Rights” (ch. 5), at Parts IV.B and IV.G.

    See also Kinsella, “The Limits of Libertarianism?: A Dissenting View,” StephanKinsella.com (April 20, 2014); idem, “KOL345 | Kinsella’s Libertarian “Constitution” or: State Constitutions vs. the Libertarian Private Law Code (PorcFest 2021),” Kinsella on Liberty Podcast (June 26, 2021). [↑](#footnote-ref-11)
12. This issue is discussed in further detail in “How We Come to Own Ourselves” (ch. 4); see also “A Libertarian Theory of Punishment and Rights” (ch. 5). [↑](#footnote-ref-12)
13. Ayn Rand, “Galt’s Speech,” in For the New Intellectual, quoted in “Physical Force” entry, The Ayn Rand Lexicon: Objectivism from A to Z, Harry Binswanger, ed. (New York: New American Library, 1986; https://perma.cc/L4YA-96CC). Ironically, Objectivists often excoriate libertarians for having a “contextless” concept of aggression—that is, that “aggression” or “rights” is meaningless unless these concepts are embedded in the larger philosophical framework of Objectivism—despite Galt’s straightforward, physicalist definition of aggression as the initiation of physical force against others. In “Q&A on Libertarianism,” The Ayn Rand Lexicon (http://aynrandlexicon.com/ayn-rand-ideas/ari-q-and-a-on-libertarianism.html), for example, (someone at) the Ayn Rand Institute writes:

    The “libertarians,” in this usage of the term, plagiarize Ayn Rand’s non-initiation of force principle and convert it into an axiom, denying the need for and relevance of philosophical fundamentals—not only the underlying ethics, but also the underlying metaphysics and epistemology.… libertarianism declares that the value of liberty and the evil of initiating force are self-evident primaries, needing no justification or even explanation—leaving undefined such key concepts as “liberty,” “force,” “justice,” “good,” and “evil.” It claims compatibility with all views in metaphysics, epistemology, and ethics—even subjectivism, mysticism, skepticism, altruism, and nihilism—substituting “hate the state” for intellectual content.

    See also Peter Schwartz, “Libertarianism: The Perversion of Liberty,” in Ayn Rand, The Voice of Reason: Essays in Objectivist Thought (Meridian, 1990) and the “Libertarians” entry in The Ayn Rand Lexicon (http://aynrandlexicon.com/).

    But as noted above, Rand own’s formulation in support of the NAP—“no man may initiate—do you hear me? No man may start—the use of physical force against others”—relies on rudimentary concepts like physical force and the initiation thereof, which do not really require much explanation; rather, her theory builds on these fairly uncontroversial concepts. Just as her theory can use these basic concepts as building blocks, libertarians can coherently use these principles in articulating what we oppose, without lapsing into subjectivism, nihilism, etc. People can communicate with language without adopting the whole of Objectivism, after all. See also Walter Block’s response to Schwartz: “Libertarianism vs. Objectivism: A Response to Peter Schwartz,” Reason Papers No. 26 (Summer 2003; https://reasonpapers.com/archives/): 39–62. [↑](#footnote-ref-13)
14. Rothbard, For a New Liberty, p. 23. See also idem, “Property and Criminality,” in idem, The Ethics of Liberty: “The fundamental axiom of libertarian theory is that each person must be a self-owner, and that no one has the right to interfere with such self-ownership” (p. 60), and “What … aggressive violence means is that one man invades the property of another without the victim’s consent. The invasion may be against a man’s property in his person (as in the case of bodily assault), or against his property in tangible goods (as in robbery or trespass)” (p. 45). Hoppe writes:

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

    Hoppe, A Theory of Socialism and Capitalism, pp. 22, 18.

    In earlier years of the modern libertarian movement (see “Libertarianism After Fifty Years: What Have We Learned?” (ch. 25); Kinsella, “Foreword,” in Chase Rachels, A Spontaneous Order: The Capitalist Case For A Stateless Society (2015; https://archive.org/details/ASpontaneousOrder0)), what most libertarians now refer to as the non-aggression principle was sometimes called the non-aggression axiom, probably because of Rand’s somewhat idiosyncratic use of the term axiom in her philosophy. See “Axioms” entry The Ayn Rand Lexicon (http://aynrandlexicon.com/lexicon/axioms.html). Rothbard himself, who was initially heavily influenced by Rand, sometimes uses this phraseology, as can be seen in the passages quoted above. Not all libertarians believe the NAP is “axiomatic” in Rand’s sense—a proposition that is self-evidently true because its denial results in contradiction—but all consistent and coherent libertarians oppose the legitimacy of aggression, for whatever reasons, and thus favor the non-aggression principle (i.e., self-ownership), at least to a large extent. [↑](#footnote-ref-14)
15. See “A Libertarian Theory of Punishment and Rights” (ch. 5). [↑](#footnote-ref-15)
16. The following terms and formulations may be considered as roughly synonymous, depending on context: aggression; initiation of force; trespass; invasion; unconsented to (or uninvited) change in the physical integrity (or use, control or possession) of another person’s body or property. See also Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform”; idem, “Hoppe on Property Rights in Physical Integrity vs Value,” StephanKinsella.com (June 12, 2011). For further discussion of how to define the concept of “rights,” see “Dialogical Arguments for Libertarian Rights” (ch. 6), n.22 and accompanying text, et pass. [↑](#footnote-ref-16)
17. “Prima facie,” because some rights in one’s body are arguably forfeited or lost in certain circumstances, e.g. when one commits a crime, thus authorizing the victim to at least use defensive force against the body of the aggressor (implying the aggressor is to that extent not the owner of his body). For more on this see “A Libertarian Theory of Contract” (ch. 9), Part III.B; “Inalienability and Punishment: A Reply to George Smith” (ch. 10); and “Knowledge, Calculation, Conflict, and Law” (ch. 19), at n.81 and accompanying text. [↑](#footnote-ref-17)
18. See Robert W. McGee, “The Body as Property Doctrine,” in Christoph Lütge, ed., Handbook of the Philosophical Foundations of Business Ethics (Springer, 2013). [↑](#footnote-ref-18)
19. Similarly, Hoppe argues:

    There can be no socialism without a state, and as long as there is a state there is socialism. The state, then, is the very institution that puts socialism into action; and as socialism rests on aggressive violence directed against innocent victims, aggressive violence is the nature of any state.

    Hoppe, A Theory of Socialism and Capitalism, p. 177. [↑](#footnote-ref-19)
20. On the importance of the concept of scarcity and the possibility of conflict for the emergence of property rules, see Hoppe, A Theory of Socialism and Capitalism, pp. 20–21, 160, et pass.; and the discussion thereof in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas; or, Why the Very Idea of ‘Ownership’ Implies that only Libertarian Principles are Justifiable,” Mises Economics Blog (Aug. 15, 2007). [↑](#footnote-ref-20)
21. See also “How We Come to Own Ourselves” (ch. 4). [↑](#footnote-ref-21)
22. “Grundnorm” was legal philosopher Hans Kelsen’s term for the hypothetical basic norm or rule that serves as the basis or ultimate source for the legitimacy of a legal system. See Hans Kelsen, General Theory of Law and State, Anders Wedberg, trans. (Cambridge, Mass.: Harvard University Press, 1949). I employ this term to refer to the fundamental norms presupposed by civilized people, e.g., in argumentative discourse, which in turn imply libertarian norms.

    That the libertarian grundnorms are, in fact, necessarily presupposed by all civilized people to the extent they are civilized—during argumentative justification, that is—is shown by Hoppe in his “argumentation ethics” defense of libertarian rights. See Hoppe, A Theory of Socialism and Capitalism, chap. 7; “Dialogical Arguments for Libertarian Rights” (ch. 6); and “Defending Argumentation Ethics” (ch. 7).

    For discussion of why people (to one extent or the other) do value these underlying norms, see Kinsella, “The Division of Labor as the Source of Grundnorms and Rights,” Mises Economics Blog (April 24, 2009), and idem, “Empathy and the Source of Rights,” Mises Economics Blog (Sept. 6, 2006). See also “A Libertarian Theory of Punishment and Rights” (ch. 5), text at notes 3 and 77:

    Civilized people are also concerned about justifying punishment. They want to punish, but they also want to know that such punishment is justified. They want to be able to punish legitimately—hence the interest in punishment theories.…Theories of punishment are concerned with justifying punishment, with offering decent people who are reluctant to act immorally a reason why they may punish others. This is useful, of course, for offering moral people guidance and assurance that they may properly deal with those who seek to harm them. [↑](#footnote-ref-22)
23. See Hoppe, A Theory of Socialism and Capitalism, pp. 157–65. See also “A Libertarian Theory of Punishment and Rights” (ch. 5), Parts III.C “Punishing Aggressive Behavior” and III.D “Potential Defenses by the Aggressor”; “Defending Argumentation Ethics” (ch. 7); Kinsella, “The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle,” StephanKinsella.com (Nov. 10, 2011); “How We Come to Own Ourselves” (ch. 4), n.15; and “Dialogical Arguments for Libertarian Rights” (ch. 6), n.43 and accompanying text. [↑](#footnote-ref-23)
24. Hoppe, A Theory of Socialism and Capitalism, p. 23. See also “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11). For further discussion of the necessity of objective property rules that can determine what resources may be used now, without having to wait for the approval of late-comers, see “How We Come To Own Ourselves” (ch. 4), n.14 and accompanying text. [↑](#footnote-ref-24)
25. For elaboration on this point, see “How We Come To Own Ourselves” (ch. 4), the sections “Direct Control” and “Summary”; “Defending Argumentation Ethics” (ch. 7); “Law and Intellectual Property in a Stateless Society” (ch. 14), Part II.C; Hoppe, A Theory of Socialism and Capitalism, chaps. 1, 2, and 7. See also the quote by Auberon Herbert and the related citation to Rothbard in “How We Come to Own Ourselves” (ch. 4), n.7. [↑](#footnote-ref-25)
26. For further discussion of the difference between bodies and things homesteaded for purposes of rights, see “A Libertarian Theory of Contract” (ch. 9), Part III.B; and “How We Come to Own Ourselves” (ch. 4). See also Kasper Lippert-Rasmussen, “Against Self-Ownership: There are No Fact-Insensitive Ownership Rights Over One’s Body,” Philosophy & Public Affairs 36, no. 1 (2008): 86–118, at 88–89 (footnotes omitted):

    [R]ight- and left-libertarians … agree that:

    The Asymmetry Thesis: Ownership of external resources is intrinsically different, morally, from ownership of one’s mind and body.

    For example, each person enters the world owning himself or herself, but ownership of external resources is acquired through personal exercise of the moral power to acquire such ownership.

    Nozick’s subscription to the asymmetry thesis is evident in his admittedly rather sketchy, but broadly Lockean, account of how one can become the owner of an unowned external object, for he offers no comparable account of how one can become the owner—morally speaking—of one’s own—nonmorally speaking—mind and body. Absent special circumstances, such as organ theft, one simply starts owning oneself. Similarly, Otsuka thinks that ownership of external things is conditional upon the satisfaction of an egalitarian proviso enjoining equal opportunities for welfare; he assumes that ownership of oneself is not conditional in this sense.

    Citing Robert Nozick, Anarchy, State, and Utopia (Oxford: Basil Blackwell, 1974), pp. 174–82 and Michael Otsuka, Libertarianism Without Inequality (Oxford: Oxford University Press, 2003), pp. 22–29.

    See also Olle Torpman, “Mid-Libertarianism and the Utilitarian Proviso,” J. Value Inquiry (Sept. 2, 2021; https://philpapers.org/rec/TORMAT-4), at §1.1 (last emphasis added):

    Libertarianism’s most salient thesis concerns full moral self-ownership, according to which every person has fundamental moral rights to anything that counts as herself—including her body parts, organs, blood, eggs, sperms, stem cells, thoughts, etc. We may call these personal resources. Most versions of libertarianism also allow people to gain moral ownership over natural resources (i.e., non-personal resources)—such as land, minerals, water, air, etc. We may call these external resources. While the rights to our personal resources are natural and thus in need of no acquisition, the rights to external resources must somehow be acquired…

    Citing Eric Mack, “The Natural Right of Property,” Social Philosophy and Policy 27, no. 1 (2010): 53–78, at 54, and Bas van der Vossen, “What counts as original appropriation?,” Politics, Philosophy & Economics 8, no. 4 (2009): 355–373, at 368. [↑](#footnote-ref-26)
27. “Original appropriation” is the broader concept for the acquisition of previously-unowned scarce (conflictable) resources, including land or realty (immovables), while “homesteading” is sometimes used as a subset of original appropriation that involves immovables (land), such as a “homestead.” However, homesteading is often used more generally and in this book I often use “homesteading” synonymously with original appropriation to refer to appropriation of any type of unowned, conflictable resource, whether movable or immovable.

    On the nature of appropriation of unowned scarce resources, see Hoppe’s and de Jasay’s ideas quoted and discussed in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas,” and note 32, below. In particular, see Hoppe, A Theory of Socialism and Capitalism, pp. 24, 160–62, 169–71; and Anthony de Jasay, Against Politics: On Government, Anarchy, and Order (London & New York: Routledge, 1997), pp. 158 et seq., 171 et seq., et pass. De Jasay is also discussed extensively in “Review of Anthony de Jasay, Against Politics: On Government, Anarchy, and Order” (ch. 20). De Jasay’s argument presupposes the value of justice, efficiency, and order. Given these goals, he argues for three principles of politics: (1) if in doubt, abstain from political action (pp. 147 et seq.); (2) the feasible is presumed free (pp. 158 et seq.); and (3) let exclusion stand (pp. 171 et seq.). In connection with principle (3), “let exclusion stand,” de Jasay offers insightful comments about the nature of homesteading or appropriation of unowned goods. De Jasay equates property with its owner’s “excluding” others from using it, for example by enclosing or fencing in immovable property (land) or finding or creating (and keeping) movable property (corporeal, tangible objects). He concludes that since an appropriated thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership. Thus, the principle means “let ownership stand,” i.e., that claims to ownership of property appropriated from the state of nature or acquired ultimately through a chain of title tracing back to such an appropriation should be respected. This is consistent with Hoppe’s defense of the “natural” theory of property. Hoppe, A Theory of Socialism and Capitalism, pp. 20–24 & chap. 7. For further discussion of the nature of appropriation, see Jörg Guido Hülsmann, “The A Priori Foundations of Property Economics,” Q.J. Austrian Econ. 7, no. 4 (Winter 2004; https://mises.org/library/priori-foundations-property-economics-0): 51–57. [↑](#footnote-ref-27)
28. See note 5 and accompanying text, above, and Appendix I. [↑](#footnote-ref-28)
29. A.N. Yiannopoulos, Louisiana Civil Law Treatise, Property (West Group, 4th ed. 2001), § 301 (emphasis added); see also Louisiana Civil Code (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=67&level=Parent), art. 3421 (“Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name” (emphasis added)). See also discussion of this point in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), at n.35 et pass. [↑](#footnote-ref-29)
30. See, in this connection, the quote from Adam Smith in note 7, above. [↑](#footnote-ref-30)
31. This is also, incidentally, the reason the mutualist “occupancy” position on land ownership is unlibertarian and unjust. In revising this chapter, this footnote grew to unmanageable length. I have placed the relevant commentary in Appendix II, below. [↑](#footnote-ref-31)
32. See Kinsella, “Thoughts on the Latecomer and Homesteading Ideas.” [↑](#footnote-ref-32)
33. See Louisiana Code of Civil Procedure, art. 3653, providing:

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

    (1)   
    Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof; or

    (2)   
    Prove a better title thereto than the defendant, if the court finds that the latter is not in possession thereof.

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

    See also Louisiana Civil Code, arts. 526, 531–32; Yiannopoulos, Louisiana Civil Law Treatise, Property, §§ 255–79 & 347 et pass. [↑](#footnote-ref-33)
34. See, e.g., Hoppe, A Theory of Socialism and Capitalism, pp. 168–71; idem, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp), pp. 327–30; see also discussion of these and related matters in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas”; “Defending Argumentation Ethics” (ch. 7), the section “Objective Links: First Use, Verbal Claims, and the Prior-Later Distinction.” In particular, for further discussion of the necessity of objective property rules that can determine what resources may be used now, without having to wait for the approval of latecomers, see “How We Come To Own Ourselves” (ch. 4), n.14 and accompanying text.

    See also, in this connection, de Jasay, Against Politics, further discussed and quoted in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas,” as well as in “Review of Anthony de Jasay, Against Politics” (ch. 20). See also de Jasay’s argument (note 27, above) that since an appropriated thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership. De Jasay’s “let exclusion stand” idea, along with the Hoppean emphasis on the prior-later distinction, sheds light on the nature of homesteading itself. Often the question is asked as to what types of acts constitute or are sufficient for homesteading (or “embordering” as Hoppe sometimes refers to it); what type of “labor” must be “mixed with” a thing; and to what property does the homesteading extend? What “counts” as “sufficient” homesteading? We can see that the answer to these questions is related to the issue of what is the thing in dispute. In other words, if B claims ownership of a thing possessed (or formerly possessed) by A, then the very framing of the dispute helps to identify what the thing is in dispute, and what counts as possession of it. If B claims ownership of a given resource, he wants the right to control it, to a certain extent, and according to its nature. Then the question becomes, did someone else previously control “it” (whatever is in dispute), according to its nature; i.e., did someone else already homestead it, so that B is only a latecomer? This ties in with de Jasay’s “let exclusion stand” principle, which rests on the idea that if someone is actually able to control a resource such that others are excluded, then this exclusion should “stand.” Of course, the physical nature of a given scarce resource and the way in which humans use such resources will determine the nature of actions needed to “control” it and exclude others. See also on this Rothbard’s discussion of the “relevant technological unit” in Murray N. Rothbard, “Law, Property Rights, and Air Pollution,” in Economic Controversies (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies); also B.K. Marcus, “The Spectrum Should Be Private Property: The   
    Economics, History, and Future of Wireless Technology,” Mises Daily (Oct. 29, 2004, https://mises.org/library/spectrum-should-be-private-property-economics-history-and-future-wireless-technology) and idem, “Radio Free Rothbard,” J. Libertarian Stud. 20, no. 2 (Spring 2006; https://mises.org/library/radio-free-rothbard): 17–51. [↑](#footnote-ref-34)
35. Hoppe, A Theory of Socialism and Capitalism, p. 23. [↑](#footnote-ref-35)
36. To be clear, this does not mean that ownership or title can be established only if one can trace one’s title back to “Adam” or the first homesteader. See the “common author” rules noted in note 33, above; Kinsella, “Rothbard on the ‘Original Sin’ in Land Titles: 1969 vs. 1974,” StephanKinsella.com (Nov. 5, 2014); idem, “Mises, Rothbard, and Hoppe on the ‘Original Sin’ in the Distribution of Property Rights,” StephanKinsella.com (Oct. 7, 2014); and “Libertarianism After Fifty Years: What Have We Learned?” (ch. 25). Many libertarians are tripped up by this issue. See, e.g. R.W. Bradford, “A Contrast of Visions,” Liberty 10, no.4 (March 1997; https://perma.cc/7FDT-G7FD): 57–63, at 58.

    On the title transfer theory of contract, see “A Libertarian Theory of Contract” (ch. 9); Williamson M. Evers, “Toward a Reformulation of the Law of Contracts,” J. Libertarian Stud. 1, no. 1 (Winter 1977; https://mises.org/library/toward-reformulation-law-contracts): 3–13; Rothbard, “Property Rights and the Theory of Contracts,” in The Ethics of Liberty (https://mises.org/library/property-rights-and-theory-contracts). [↑](#footnote-ref-36)
37. Hans-Hermann Hoppe “A Realistic Libertarianism,” LewRockwell.com (Sept. 30, 2013; https://www.hanshoppe.com/2014/10/a-realistic-libertarianism/); see also similar argument in idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” at pp. 85–87. [↑](#footnote-ref-37)
38. State laws and constitutional provisions often pay lip service to the existence of various personal and property rights, but then take them back by recognizing the right of the state to regulate or infringe the right so long as it is “by law” or “not arbitrary.” See, e.g., Constitution of Russia, art. 25 (“The home shall be inviolable. No one shall have the right to get into a house against the will of those living there, except for the cases established by a federal law or by court decision”) and art. 34 (“Everyone shall have the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by the law”); Constitution of Estonia, art. 31 (“Estonian citizens shall have the right to engage in commercial activities and to form profit-making associations and leagues. The law may determine conditions and procedures for the exercise of this right”); Universal Declaration of Human Rights, art. 17 (“Everyone has the right to own property alone as well as in association with others.… No one shall be arbitrarily deprived of his property”); art. 29(2) (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”). [↑](#footnote-ref-38)
39. Ludwig von Mises, Human Action: A Treatise on Economics, Scholar’s ed. (Auburn, Ala: Mises Institute, 1998; https://mises.org/library/human-action-0), pp. 13–14, et pass. [↑](#footnote-ref-39)
40. For further discussion of the role of empathy in the adoption of libertarian grundnorms, see note 22, above. [↑](#footnote-ref-40)
41. Mises, Human Action, p. 14. [↑](#footnote-ref-41)
42. As Hoppe explains, “Justification—proof, conjecture, refutation—is argumentative justification.” Hoppe, The Economics and Ethics of Private Property, p. 384; also ibid., p. 413; and Hoppe, A Theory of Socialism and Capitalism, p. 155 et pass. [↑](#footnote-ref-42)
43. For this reason Henry Hazlitt’s proposed name “cooperatism” for the freedom philosophy, has some appeal, to me at least. See Kinsella, “The new libertarianism: anti-capitalist and socialist; or: I prefer Hazlitt’s ‘Cooperatism,’” StephanKinsella.com (June 19, 2009). [↑](#footnote-ref-43)
44. See “What It Means to Be an Anarcho-Capitalist” (ch. 3); also Jan Narveson, “The Anarchist’s Case,” in Respecting Persons in Theory and Practice (Lanham, Md.: Rowman & Littlefield, 2002; https://perma.cc/2P24-H4JL). [↑](#footnote-ref-44)
45. Yiannopoulos, Louisiana Civil Law Treatise, Property, §§ 1, 2 (citations omitted; last two emphases in first paragraph added; first emphasis of second paragraph in original and remaining emphasis added; emphasis added in third paragraph). See also Louisiana Civil Code, art. 477 (“Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law”). See also “Against Intellectual Property After Twenty Years” (ch. 15), n.31 and accompanying text; J.W. Harris, Property and Justice (Oxford University Press, 1996), pp. 9, 11–13, et pass. (discussing different uses of the term “property”); and “A Libertarian Theory of Contract” (ch. 9), n.1. See also Kinsella, “Libertarian Answer Man: Self-ownership for slaves and Crusoe; and Yiannopoulos on Accurate Analysis and the term ‘Property’; Mises distinguishing between juristic and economic categories of ‘ownership,’” StephanKinsella.com (April 3, 2021). [↑](#footnote-ref-45)
46. See Kinsella, “Intellectual Properganda,” Mises Economics Blog (Dec. 6, 2010); “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.I. See also the discussion of Böhm-Bawerk on the use of inaccurate terms, in “On the Logic of Libertarianism and Why Intellectual Property Doesn’t Exist” (ch. 24), n.32. [↑](#footnote-ref-46)
47. Yiannopoulos, Louisiana Civil Law Treatise, Property, § 2 (emphasis added). [↑](#footnote-ref-47)
48. Louisiana Civil Code, arts. 448, 453. See also J.W. Harris, “The Elusiveness of Property,” in Peter Wahlgren, Perspectives on Jurisprudence: Essays in Honor of Jes Bjarup (Stockholm Institute for Scandinavian Law, 2005; https://perma.cc/SW6Z-FYTV), p. 128 (discussing different views on whether property rights only include tangible or corporeal things or whether it is broader). [↑](#footnote-ref-48)
49. See Yiannopoulos, Louisiana Civil Law Treatise, Property, §§ 1–2, 12–16, 18–44. [↑](#footnote-ref-49)
50. Emanuele Martinelli, “On Whether We Own What We Think” (draft, 2019; https://www.academia.edu/93535130/On\_Whether\_We\_Own\_What\_We\_Think), p. 6 (“Thing is taken to be ‘anything one could use’”). On the distinction between possession and ownership, see the section “Property in External Things,” above. [↑](#footnote-ref-50)
51. See 35 U.S.C. §271, https://www.law.cornell.edu/uscode/text/35/271; Connell v. Sears, Roebuck Co., 722 F.2d 1542, 1547 (Fed. Cir. 1983; https://casetext.com/case/connell-v-sears-roebuck-co) (“the right to exclude recognized in a patent is but the essence of the concept of property”), citing Schenck v. Nortron Corp., 713 F.2d 782 (Fed. Cir. 1983; https://casetext.com/case/carl-schenck-ag-v-nortron-corp); Bitlaw, “Rights Granted Under U.S. Patent Law,” https://www.bitlaw.com/patent/rights.html; see also Thomas W. Merrill, “Property and the Right to Exclude,” Neb. L. Rev. 77 (1998; https://scholarship.law.columbia.edu/faculty\_scholarship/3553): 730–55, p. 749 and n.10 and related text, in particular; Harris, Property and Justice; James Y. Stern, “The Essential Structure of Property Law,” Mich. L. Rev. 115, no. 7 (May 2017; https://repository.law.umich.edu/mlr/vol115/iss7/2/): 1167–1212, p. 1171 n.15, referencing and comparing Bloomer v. McQuewan, 55 U.S. 539, 549 (1852) (“The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent.”), Robert Patrick Merges & John Fitzgerald Duffy, Patent Law and Policy: Cases and Materials (6th ed. 2013), p. 49 (“Unlike other forms of property, however, a patent includes only the right to exclude and nothing else.” (emphasis omitted), and Frank H. Easterbrook, “Intellectual Property Is Still Property,” Harv. J.L. & Pub. Pol’y 13, no. 1 (Winter 1990; https://chicagounbound.uchicago.edu/journal\_articles/309/): 108–118, p. 112 (“[A] right to exclude in intellectual property is no different in principle from the right to exclude in physical property.”). [↑](#footnote-ref-51)
52. See “Against Intellectual Property After Twenty Years” (ch. 15), n.62 and Part IV.H et pass. See also Kinsella, “The Non-Aggression Principle as a Limit on Action, Not on Property Rights,” StephanKinsella.com (Jan. 22, 2010) and idem, “IP and Aggression as Limits on Property Rights: How They Differ,” StephanKinsella.com (Jan. 22, 2010). [↑](#footnote-ref-52)
53. Alex Kozinski, “Of Profligacy, Piracy, and Private Property,” Harv. J.L. & Pub. Pol’y. 13, no. 1 (Winter 1990; https://perma.cc/Z8AD-634V): 17–21, p. 19. See further references in “A Libertarian Theory of Contract” (ch. 9), n.1. [↑](#footnote-ref-53)
54. See “Against Intellectual Property After Twenty Years” (ch. 15), text at n.29. On the term “conflictable,” see Kinsella, “On Conflictability and Conflictable Resources,” StephanKinsella.com (Jan. 31, 2022); see also “How We Come to Own Ourselves” (ch. 4), text at n.10; “A Libertarian Theory of Punishment and Rights” (ch. 5), at n.62; “Dialogical Arguments for Libertarian Rights” (ch. 6), at n.6; “Causation and Aggression” (ch. 8), at n.19. [↑](#footnote-ref-54)
55. Kevin A. Carson, Studies in Mutualist Political Economy (Self-published: Fayetteville, Ark., 2004; http://mutualist.org/id47.html), chap. 5, sec. A (emphasis added). [↑](#footnote-ref-55)
56. Kevin A. Carson, “Carson’s Rejoinders,” J. Libertarian Stud. 20, no. 1 (Winter 2006; https://mises.org/library/carsons-rejoinders): 97–136, p. 133 (emphasis added). [↑](#footnote-ref-56)
57. For a critique of Georgism, see Rothbard, “The Single Tax: Economic and Moral Implications,” in Economic Controversies. [↑](#footnote-ref-57)
58. See “A Libertarian Theory of Contract” (ch. 9), Part III.A; also Louisiana Civil Code, art. 3418 (“A thing is abandoned when its owner relinquishes possession with the intent to give up ownership”) and art. 3424 (“To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing”; emphasis added). [↑](#footnote-ref-58)
59. See Yiannopoulos, Louisiana Civil Law Treatise, Property, § 316; see also Louisiana Civil Code, art. 3424 (“To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing”; emphasis added) and art. 3476 (to acquire title by acquisitive prescription, “The possession must be continuous, uninterrupted, peaceable, public, and unequivocal”; emphasis added); see also art. 3473. [↑](#footnote-ref-59)
60. As I argue in “A Libertarian Theory of Contract” (ch. 9), Part III.A at n.31 and accompanying text et seq. [↑](#footnote-ref-60)
61. See, e.g., Louisiana Mineral Code, § 27 (http://law.justia.com/louisiana/codes/21/87935.html) (“A mineral servitude is extinguished by: … prescription resulting from nonuse for ten years”). [↑](#footnote-ref-61)
62. See Yiannopoulos, Louisiana Civil Law Treatise, Property, §§ 255, 261, 263–66, 332–33, 335 et pass.; Louisiana Code of Civil Procedure (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=68&level=Parent), arts. 3651, 3653 & 3655; Louisiana Civil Code, Arts. 526 & 531). [↑](#footnote-ref-62)
63. For another critique of Carson, see Roderick T. Long, “Land-Locked: A Critique of Carson on Property Rights,” J. Libertarian Stud. 20, no. 1 (Winter 2006; https://mises.org/library/land-locked-critique-carson-property-rights): 87–95. [↑](#footnote-ref-63)
64. See “Legislation and the Discovery of Law in a Free Society” (ch. 13); also “Knowledge, Calculation, Conflict, and Law” (ch. 19), the section “The Third-Order Problem of Knowledge and the Common Law,” text at n. 24 et seq. (discussing Randy Barnett’s views on the distinction between abstract legal rights and more concrete rules that serve as guides to action). I discuss some of this also in “A Critique of Mutualist Occupancy,” StephanKinsella.com (Aug. 2, 2009). [↑](#footnote-ref-64)