

米塞斯编译社译丛

自由社会的法律根基

——副标题

LEGAL FOUNDATIONS of FREE SOCIETY

[美] 斯蒂芬·金塞拉 著

李三 译 校



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作者：[美] 斯蒂芬·金塞拉

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传递逻辑的力量

——奥地利学派丛书编译总序

哲学家休谟曾指出：“尽管人们在很大程度上受着利益的支配，但是即使是利益本身，以及所有的人类事务，也完全是由观念支配的。”经济学家凯恩斯也曾说过：“经济学家和政治哲学家的思想，不论正确与否，都要比人们通常所理解的力量大。事实上，这个世界就是由极少数思想统治的。”

无论我们多么不同意凯恩斯的经济学见解，他的这个论断无疑是对的。事实上，我们人之所以为人，不仅仅是因为我们遗传了自己祖先的生物性状，还因为我们接续了很多前人的思想观念。思想观念不同于基因遗传，它既不是“预装”的，也不是一成不变的，它是在接受前人观念的基础上形成自己的观念。

正如休谟所言，支配我们个体行动的根本因素，是我们的观念。但我们无法独立思考出自己关于经济、政治和社会问题的所有答案，我们需要借助前人的思想阶梯向上攀爬。

独立思考，大多数时候是一个褒义词，但如果刻意强调独立思考，却因此忽视了先贤们的那些智慧结晶，独立思考也许就会变成胡思乱想、失去章法。在具备真正的独立思考能力之前，我们需要阅读真正的优秀经典，进而锻造健全的思想观念。

只是“酒香也怕巷子深”，优秀经典并不会自动呈现在我们眼前，有些经典深藏于浩瀚的书籍文献之中亟待挖掘，而有些经典未必是我们熟悉的母语写就。所以至少有三项工作非常重要：其一，发现经典；其二，翻译经典；其三，解释经典。

奥地利学派丛书的编译工作，目的就是挖掘经典、引介经典、翻译经典，传递逻辑的力量，放大思想的光芒。

众所周知，奥地利学派并不属于主流经济学，国内外大学大都不会把奥地利学派的著作作为教科书。但是奥地利学派的影响力并未因此衰弱式微，相反，各行各业知道和认可奥地利学派的人越来越多。

他们对于奥地利学派的探索和财富追求无关，纯粹是出于对科学知识的热爱，出于对理论和逻辑的追求。正是这种热爱，让奥地利学派的思想火种遍布全球。

经过多年的努力，海外奥地利学派已经进入常态化发展阶段，既有长期运转的米塞斯

研究院，也有学术期刊。其中米塞斯研究院，作为奥地利学派思想传播的主阵地，提供了一个学术宝库，其书库涵盖了从纯粹经济原理，到自由意志主义理论，再到修正主义历史的大量经典文献。

其中作者既包括奥地利学派历代代表人物的代表性著作，也包括部分小众作品或者原来没有打算出版的稿件，还有像霍普、萨勒诺等在世奥派学者的最新著作。总之，米塞斯研究院的很多著作值得挖掘。奥地利学派丛书的编译工作，将主要引进米塞斯研究院的经典书籍。

我们之所以相信市场的力量，更多的也是因为相信逻辑的力量。经济学，终究是某种意义上的“经世济民”之学，其理论可以是纯粹形式逻辑的，但其作用却不能仅仅局限于理论。正确的经济学理论，以及基于此的思想观念，需要更多的人知道，需要影响大众的观念，进而影响人类的历史进程和文明走向。

为众人抱薪者，不可使其扼于风雪；为自由开路者，不可使其困于荆棘。寻求真理的过程，注定是艰难的。一个人可以走得很快，但一群人能够走得更远。

最后感谢米塞斯研究院，感谢各位译者的辛勤付出，感谢各位资助者的慷慨支持。对知识和真理的追求使我们相遇，让我们继续把逻辑的力量传递下去。

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米塞斯编译社

2023 年元月



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To Ethan, and his generation, in hopes that they and their descendants live in a freer world.

献给伊森和他那一代人，希望他和他的后代生活在一个更加自由的世界里。

Sir, I have found you an argument; but I am not obliged to find you an understanding.
—Samuel Johnson

先生，我为你找到了论点，但我没有义务为你找到理解。

——塞缪尔·约翰逊

even if the libertarian ethic and argumentative reasoning must be regarded as ultimately justified, this still does not preclude that people will act on the basis of unjustified beliefs either because they don't know, they don't care, or they prefer not to know. I fail to see why this should be surprising or make the proof somehow defective. More than this cannot be done by propositional argument.

—Hans-Hermann Hoppe

即使自由意志主义伦理和论证性推理必须被视为最终是合理的，但这仍然不能排除人们会基于不合理的信念行事，要么是因为他们不知道，他们不在乎，要么是他们宁愿选择不知道。我无法理解这许多人为什么会认为这些结论令人惊讶，或会认为论证过程存在某种缺陷。命题论证无法做到更多。

——汉斯-赫尔曼·霍普

序

Foreword

The question as to what is justice and what constitutes a just society is as old as philosophy itself. Indeed, it arises in everyday life even long before any systematic philosophizing is to begin.

关于何为正义以及如何构建正义社会的探讨，与哲学本身一样悠久。实际上，这一议题早在系统性哲学思维形成之前，就已深深植根于人类的日常生活之中。

All throughout intellectual history, one prominent answer to this question has been to say that it is “might” that makes “right.” Or more specifically: that what is right or wrong, just or unjust, is unilaterally decreed by a State qua territorial monopolist of violence. The self-contradictory nature of this “decisionist” position, i.e. of “legal positivism,” comes to light once we ask its proponents for a reason or evidence as to why we should believe the proposition that “might makes right” to be true and correct. By virtue of providing any such reason or evidence, however, and thus seeking—ultimately—unanimous agreement regarding the validity of the proposition in question, any such proponent implicitly acknowledges the presence of other reasonable and sensible persons and, importantly, that the question of right or wrong, true or not-true, then, is not a matter of “might” or “fiat,” but a question to be decided on the basis of common reason and experience instead. Yet reason and experience demonstrate, contrary to the proponent’s initial claim, that “might does not make right.” That “might is might” and “right is right,” but “no might can ever make a right.”

纵观人类思想史，对这一问题有一个耳熟能详的答案，即“强权即公理”。更确切地说，这种观点认为：是非曲直、正义与否皆由国家这一暴力的领土垄断者单方面裁定。然而，当我们要求这种“决定论”立场（即“法律实证主义”）的支持者提供理由或证据，以证明“强权即公理”这一命题的真实性和正确性时，这种“决定论”立场的自相矛盾之处便会暴露无遗。

事实上，通过提供任何此类理由或证据，试图最终就相关命题的有效性达成共识，支持者实际上已隐晦地承认了存在其他理性和明智之人。更重要的是，这样一来，对或错、真或假的问题便不再是一个“强权”或“命令”的问题，而是一个需要依据共同理性

和经验来决定的问题。然而，一旦运用理性和经验进行论证，便会推翻支持者的初始主张，即“强权并不代表公理”。“强权就是强权”，“公理就是公理”，但“任何强权都不可能造就公理”。

Aside from the decisionism championed by legal positivists, the most prominent answer in modern times to the question under consideration, then, has come from so-called social-contracts theorists.

除了法律实证主义者所秉持的决定论，近现代以来对一问题最有名、最有影响力的答案，来自所谓的社会契约论者。

According to them, what is just or not is determined by the terms of a contract concluded and agreed upon by all members of a society. — Yet this solution opens more questions than it answers and ends in a tangle of confusion. For one, no such contract has ever been concluded anywhere. Yet in the absence of any such contract, would people still be able to distinguish between right and wrong? Obviously, one would think so, because otherwise they would not even be able to rightfully conclude a—indeed any—valid contract. Put differently: there first must be a contractor—a person—and then there must be something rightfully owned and to be contracted by this person—private or personal property—before there can ever be a valid contractual agreement. Thus, personhood and private property logically—or more precisely: praxeologically—precede contracts and contractual agreements; and hence, trying to construct a theory of justice on the foundation of contracts is a fundamental praxeological error.

他们认为，正义与否取决于社会全体成员共同缔结并认可的契约条款。然而这一解决方案引发的疑问比解答的困惑更多，最终陷入一团乱麻。首先，这样的契约从未在任何地方真正缔结过。但即便没有这种契约，人们是否仍能分辨是非？显然人们会认为可以，否则他们甚至无法正常缔结一份——事实上任何——有效契约。换言之：必须先存在缔约者——即个人——然后该人必须拥有正当占有并可缔约的标的物——私有或个人财产——才能形成有效的契约协议。因此，人格与私有财产在逻辑上——或更准确地说：在行动学上——优先于契约及契约性协议；故而试图以契约为基石构建正义理论，实则是根本的行动学谬误。

Moreover, with personhood and private property as the praxeological foundation of

contracts, then, any universal, all-encompassing and including social contract as imagined by social-contract theorists is impossible. Rather: on this basis, all contracts are contracts between identifiable and enumerable persons and concerning identifiable and enumerable things or matters. No contract can bind anyone other than the actual contractors, and no contract can concern things or matters other than those specified in the contract. Accordingly: Real persons with their various real, separate and exclusive properties simply can not—praxeologically cannot—conclude a contract as fancied by social contract theorists.

此外，以人格和私有财产作为契约的行动学基础，社会契约论者所想象的任何普适性的、包罗万象的社会契约便不可能存在。确切而言：在此基础上，所有契约都必须是可识别、可列举的特定主体之间，针对可识别、可列举的特定物项或事项达成的协议。任何契约既不能约束非缔约方，也不能涉及契约明示条款之外的物项或事项。由此可知：拥有各种真实、独立且排他性财产的现实个体——从行动学角度而言——根本不可能达成社会契约论者所臆想的那种契约。

For such a contract to be conceivable, a "new person" must be invented. A fictitious person, that can do what no real person can! This "new person," invented for the purpose by social contract theorists, then, is invariably some wildly unrealistic, severely "dis-embodied" entity, i.e., a person without any bodily needs or appetites; "pure" reason, if you will, freed from all constraints of time and place. — The theorists then ask what arrangement of the world such persons would agree on as just. And they then spin out an answer as to what they believe this agreement between such entities to be, and why. — Any such answer, however, whatever it may be, is always arbitrary, because the only thing that can possibly be known about fictitious people and an agreement among them is whatever has already been invested in such beings from the very outset, per assumption. Indeed, as John Rawls, the most celebrated modern social contract theorist, has admitted with captivating frankness, he had simply "define(d) the original position [of fictitious people placed behind a 'veil of ignorance,' HHH] so that we get the desired solution."¹ While the results that Rawls gets from his assumptions concerning the original position agree largely with the political views of the social democratic left, other social contract theorists, with different assumptions about the original meeting-of-the-minds, such as James M. Buchanan and his fictitious constructs of "conceptual contracts" and "quasi-unanimity," for instance, have proposed

answers more closely associated with the political right. Still other theorists have presented yet other results. Demonstrating, then, that the intellectual endeavors of social contract theorists, however ambitious and sophisticated they may appear, are ultimately no more than idle mental exercises: deriving wildly unrealistic conclusions from wildly unrealistic assumptions, i.e., examples of "garbage-in-and-garbage-out."

若要让这样的契约成为可能，就必须创造一个“新人”。一个虚构之人，能够做到任何真实人类都无法做到之事！这个由社会契约论者刻意炮制出来的“新人”，总归是某种极度不切实际、严重“去肉身化”的存在——即一个没有任何身体需求或欲望之人；如果你愿意的话，可以称之为摆脱了所有时空束缚的“纯粹”理性体。社会契约论者们进一步发问，这样的人会认为怎样的世界安排才是正义的。随后，他们会提供一个答案，阐述他们对于这些虚构主体之间协议的理解及其依据。——然而，无论这样的答案会如何，都难免显得任意武断，因为关于这些虚构主体及其协议，唯一可知的仅是那些从一开始便基于假设赋予他们的特质。事实上，正如当代最著名的社会契约论者约翰·罗尔斯（John Rawls）以其独特的坦率所承认的那样，他仅仅“定义了被置于‘无知之幕’之下的虚构个体的原始立场，从而得出了我们所需的解决方案”。¹ 尽管罗尔斯从其关于原初立场的假设中得出的结论在很大程度上与社会民主左派的政治主张相吻合，但其他社会契约论者对此却有不同的原初思想交锋假设。例如，詹姆斯·布坎南（James M. Buchanan）通过其“概念性契约”（conceptual contracts）和“近乎一致”（quasi-unanimity）等虚构模型，推导出更贴近政治右派的主张。还有其他理论家提出了不同的研究成果。这表明，社会契约论者的智力追求，无论其显得多么雄心勃勃与精妙复杂，最终不过是一场徒劳、无聊的思维游戏——从极度不切实际的假设中推导出同样荒诞不经的结论，完美诠释了计算机领域的那句箴言：“垃圾进，垃圾出”。

But there is another, more sinister aspect to the idea of a social contract that comes to light once anyone of the various contractual agreements as fancied by social contract theorists is actually put to the test, implemented and enforced. Because implementing and enforcing the terms of a contract that no real person had or could have agreed on means, in effect, that all real contracts between real people are superseded and

¹ John Rawls, *A Theory of Justice*, revised ed. (Cambridge, Mass.: Harvard University Press, 1999), p. 122.

约翰·罗尔斯：《正义论》，修订版（剑桥，马萨诸塞州哈佛大学出版社，1999），第122页。

replaced by the terms of some alleged agreement among fictitious people as the ultimate judge in matters of right and wrong. The word “contract,” then, with its positive connotations, is used by social contract theorists to advance a program that is actually destructive of all contracts. They declare non-contracts and non-agreements to be contracts and agreements and contracts and agreements to be non-contracts and non-agreements. — Thus, ultimately, social contract theory turns out barely less arbitrary than the decisionism of legal positivists. For its proponents, the question of right or wrong may not be considered a matter of mere decree as for some strict positivists. Instead, for them, it is the intuitions and fancies of some philosophers that are supposed to do the job. But this is hardly less arbitrary, one would think! And, of course, since no real person had or could have agreed to any so-called social contract, its enforcement then always requires an agency not itself founded on agreement and contract but on disagreement, violence and coercion instead: a State. And just like legal positivists, then, social contract theorists invariably turn out to be statist, too, assigning and entrusting the role of the ultimate arbiter of right and wrong to the State qua territorial monopolist of violence. Another popular answer to the question under consideration is that of utilitarianism. Utilitarians essentially contend that the very rules that maximize or promise to maximize total social utility or bring about the greatest happiness to the greatest number of people are and should be considered just. Apart from other difficulties connected with its consequentialism, however, this answer can be quickly dismissed as fatally flawed for the simple reason that there exist no units of utility or happiness, and hence, that any interpersonal comparison of utility or happiness and any aggregation of individual utility or happiness to “social utility” or “social happiness” must be considered impossible (or, if still invoked, as entirely arbitrary).

然而，社会契约论还暗藏着一个更为险恶的面向——当社会契约论者设想的任何一种契约协议真正经受实践检验、被付诸实施并强制执行时，这个阴暗面就会暴露无遗。因为强制执行一份现实中无人真正签署也不可能签署的契约条款，实际上意味着所有真实个体间的真实契约都被虚构人物之间的所谓协议条款所取代，并以此作为是非对错的终极裁判标准。社会契约论者正是利用“契约”这个词的正面内涵，来推行一个实质上摧毁所有契约的议程：他们将非契约与非协议宣称为契约与协议，同时将真正的契约与协议贬斥为非契约与非协议。——因此归根结底，社会契约论的任意性几乎不亚于法律实证主义者的决定论。对于其拥护者而言，是非问题或许不像某些严格

实证主义者认为的那样仅凭法令就能决定。相反，他们认为应该由某些哲学家的直觉和想象来裁决。但人们会认为，这种做法的任意性丝毫未减！当然，由于现实中从未有过、也不可能有人真正同意过所谓的社会契约，其执行必然需要一个并非基于同意与契约、而是建立在分歧、暴力与强制之上的机构：即国家。于是和社会契约论者一样，法律实证主义者最终也不可避免地成为国家主义者，将是非的终极裁决者角色赋予并委托给作为暴力的领土垄断者——国家。针对该问题的另一种流行解答则是功利主义。功利主义者普遍主张，那些能够最大化社会总效用、承诺实现这一目标或为绝大多数人带来最大幸福的规则，则被视为正义，而且理应被认定为正义。然而，除了与其结果[▲]相关的诸多难题外，这一观点迅速暴露出其致命缺陷。其核心问题在于，效用或幸福并无统一衡量单位，因此，任何试图进行人际间效用或幸福的比较，或是将个体效用或幸福汇总为“社会效用”或“社会幸福”的努力，必然被视为不可行（若仍被采用，则纯属主观臆断）。

With the answers of legal positivists, social contract theorists and utilitarians all rejected as fundamentally flawed, however popular they may be, the only remaining answer, then, comes from the old, premodern intellectual tradition of natural law and natural rights. It is also in this nowadays rather unfashionable intellectual tradition, broadly conceived, that Stephan Kinsella's here presented work must be placed. Natural law and rights theorists contend that the principles of just human conduct can be discovered from the study of human nature. On the one hand, such study reveals that humans are endowed with reason, as manifested by the indisputable fact that they can speak and communicate with one another, from person to person, in a common language. On the other hand, this study shows that humans are also actors (and in combination then: reasonable actors). Speaking and communicating itself are purposeful activities directed at a goal. Yet even if and when we are not speaking or communicating but do things silently, we are still acting and cannot but act as long as we are not asleep, comatose or dead.

然而，随着法律实证主义者、社会契约论者和功利主义者的答案都被驳斥为存在根本性缺陷——无论这些理论多么流行——唯一剩下的解答只能源自古老的前现代思想传统：自然法与自然权利。从广义上讲，在此介绍的斯蒂芬·金塞拉的这一部作品，也属于这一不被时代所追捧的思想传统。自然法和自然权利的理论家认为，可以从对人性的研究中发现人类正义行为的原则。一方面，这类研究揭示人类被赋予理性，这

体现于一个无可争辩的事实：人们能够使用共同的语言进行人际间的对话与交流。另一方面，该研究表明人类同时也是行动人（综合而言可称为理性的行动人）。言语交流本身就是有目的的活动。即便当我们保持沉默、拒绝言语交流，只要此时我们处于清醒状态而非睡眠、昏迷或死亡，我们依然在持续行动——这是人类无法逃避的存在方式。

Further, this study also reveals the “deep structure” of human action,i.e. what all actions of all humans have in common. Every individual actor (and only individuals act!), whatever he does, pursues a goal or end the attainment of which he considers more satisfying than the satisfaction to be expected from acting differently. Every actor is thereby placed in a given environment, at a specific point in time and space, with specific external surroundings of men and materials, and equipped with his own nature-given bodily makeup and mental endowment; and every action, then, whatever it may be, invariably aims to alter an actor's specific present situation to his personal advantage and greater satisfaction. In any case, to reach his goals, whatever they may be, an actor invariably must employ means. At a minimum, he must employ his own physical body and brain (plus the body's standing room) as means for the attainment of some expected bodily or psychic gain, and he must thereby use up some time that he also could have used differently.

此外，这项研究还揭示了人的行动的“深层结构”，即所有人的所有行动的共同点。每一个体行动人（并且只有个体才会行动！），无论其从事何种活动，都旨在追求某一目标或目的，对他而言，该行动所带来的满足感，相较于其他行动所预期的满足感更为令人满意。因此，每位行动人都身处特定的环境、特定的时间和空间之中，与特定的外部人员和物质环境相伴随，并拥有自身天性所赋予的身体构造和精神禀赋。由此可见，任何行动，无论其性质如何，无一例外地旨在改变行动人的当前状况，以更有利于其个人利益和获得更大的满足感。在任何情况下，为了实现目标，不论目标为何，行动人都必须借助手段。至少，他必须运用自己的身体和大脑（以及身体所占据的空间）作为手段，以达成预期的物质收益或精神满足。为此，他不可避免地需要耗费一定的时间，而这些时间原本可用于其他用途。

Generally, however, a person's actions involve more than the purposeful use of one's physical body and mind. It involves also various elements of the external world that, unlike a person's own body, can only be indirectly controlled by means of one's directly controlled body. Such elements of the external world that can be indirectly controlled

and manipulated by a person and that are recognized or believed by an actor to be suitable for the attainment of his ends are called means. Those elements of the external world beyond or believed to be beyond human control on the other hand are referred to as external conditions under which a person's actions are to take place. The choice of means employed by a person for the attainment of his ends is always a matter of ideas, i.e. of reason and reasoning. An actor always chooses such an allocation and arrangement of means that he believes to bring about some desired result. The choice of means is validated by their result. A person's actions then are always guided by some ideas about cause and effect: performing A, B and C will lead to X, Y and Z. But man is not infallible and a person's ideas concerning cause and effect or the interconnectedness and regularity of events may be false, and a person's action based on these ideas then will lead to failure rather than the anticipated success, inducing the person to learn, i.e. to revisit and possibly revise his original ideas.

但通常而言，人的行动不仅包含有目的地直接运用自我身心。它还涉及外部世界的各种要素，这些要素与个人的身体不同，只能通过个人直接控制的身体来间接控制。行动人能间接操控且认为适合实现其目标的外部要素，被称为“手段”；反之，超出（或被认为超出）行动人控制的外部要素则构成“行动的外部条件”。个人为实现其目的而选择使用的手段，始终取决于观念——即理性与推理。行动人总会选择那些他相信能带来预期结果的手段配置与安排方式。手段选择的正确与否由结果来验证。因此，人的行动始终受到特定因果观念的指导：执行 A、B 和 C 将导致 X、Y 和 Z。但是，人非圣贤、孰能无过，个体关于因果关系或事件间相互关联性和规律的认知可能存在谬误，基于这些观念的行动将导致失败而非预期中的成功，从而促使个体学习——即重新审视并尽可能修正其原有观念。

Given this insight into the general human condition, it becomes immediately clear what a human ethic or a theory of justice worth its salt must accomplish. It must give an answer to the question of what am I and what is every other person permitted (or not permitted) to do, right now and right here, wherever a person may find himself and whatever his external surroundings of men and materials may be. More specifically, what is a person permitted (or not permitted) to do in an interaction with another person? And: what external entities is a person permitted (or not permitted) to bring under his control to be used as means toward his personal ends?

鉴于对人类普遍状况的深刻洞见，一套名副其实的伦理体系与正义理论的本质任务已然明晰——无论个体身处何种时空情境，面对怎样的人力与物质环境，都必须明确回答：身处此情此景，每个个体被允许（或禁止）采取何种行动？具体聚焦于人际互动层面，则必须明确：在互动中哪些行动是正当的？在追求个人目标的过程中，哪些外部资源可以被正当控制并转化为行动的手段？

Because no person can ever stop acting, from his beginnings as a person until his very end (except when asleep, comatose or dead), these questions arise again and again, without end, for everyone, wherever and whenever he may find himself and must act. Obviously, then, an answer to pressing questions such as these cannot wait for the establishment of the institution of a State, the conclusion of a contract (which would actually have to presuppose a valid answer to these very questions in order to make it a valid contract) or the arrival of some future consequences. Instead, the answer must be discoverable and recognizable from the very outset, from the first, immediate insight into the nature of man as a reasonable actor. And indeed, this is so once the purpose, the ultimate end, of all reason and reasoning is recognized and acknowledged. As already noted, human reason is manifested in the indisputable fact that one person can communicate with another person in a common language (and different languages are inter-translatable). The purpose of speaking and communicating with one another, then, even if and when expressing one's disagreement with another person's say-so in meaningful words, is to guide or coordinate the actions of different persons by words or meaningful symbols alone. This endeavor may succeed and words help guide or coordinate the actions of different persons to mutual satisfaction. Or the endeavor may fail. But in any case, the goal of speaking and communicating is always and invariably the same: to maintain peace and seek peaceful cooperation or coexistence—and in reverse: to avoid conflict, i.e., physical clashes or conflagrations of people that are destined to result whenever and wherever two or more people pursue their own different goals with the help of one and the same person's body or one and the same indirectly controlled or controllable external means of action at the same time.

由于人从成为人之初直至生命终结（除睡眠、昏迷或死亡状态外）都无法停止行动，这些关于“必须做什么”的问题便会无止境地反复出现——无论何时何地，只要人意识到自身存在并必须采取行动时就会面临这样的永恒诘问。显然，对于这些紧迫问题的解答，不能依赖于国家制度的建立、契约的签订（实际上，契约的有效性前提是

对这些关键问题进行有效解答），或是等待未来某些后果的出现。相反，答案必须从一开始便被发现和识别，从人类作为理性行动人的本质出发，第一时间直接洞察得出。事实上，一旦我们认清所有理性推理的终极目标，答案便自然显现。如前所述，人类理性体现在一个无可争辩的事实中：一个人能够通过共同语言与另一个人交流（且不同语言之间可以互译）。因此，即使当人们用有意义的言辞表达对他主张的异议时，其对话与交流的目的，也在于仅通过言语或有意义的符号来引导或协调不同个体的行动。这种努力可能取得成功——言语确实能帮助引导或协调不同个体的行动，从而实现彼此满意的结果。抑或这番努力终将失败。但无论如何，言语交流的目标始终如一：维系和平、寻求和平合作或和平共处——反过来说，即是避免冲突，避免人与人之间注定会发生的肢体冲撞或激烈对抗，这种冲突必然发生于两个或更多人同时借助同一个人的身体，或同一间接控制（或可控）的外部行动手段来追求各自不同目标之时。

The objective for a human ethic or a theory of justice, then, is the discovery of such rules of human conduct that make it possible for a—indeed, any—bodily person to act—indeed, to live his entire active life—in a world made up of different people, a “given” external, material environment, and various scarce—rivalrous, contestable or conflictual—material objects useable as means toward a person’s ends, without ever running into physical clashes with anybody else.

人类伦理或正义理论的目标，在于发现这样一套行为规则：它能使一个（实际上是任何一个）具身个体在由多元人群、“既定”（“given”）外部物质环境、以及各类稀缺（具有竞争性、可争夺性或可冲突性）物质资源构成的世界中行动——确切说是度过其全部能动生命历程，这些资源可作为实现个人目的的手段，同时确保永远不会与他人发生物理冲突。

Essentially, these rules have been known and recognized since eternity. They consist of three principal components. First, personhood and self-ownership: Each person owns—exclusively controls—his physical body that only he and no one else can control directly (any control over another person’s body, by contrast, is invariably an indirect control, presupposing the prior direct control of one’s own body). Otherwise, if body-ownership were assigned to some indirect body-controller, conflict would become unavoidable as the direct body-controller cannot give up the direct control over his body as long as he is alive. Accordingly, any physical interference with another person’s body must be consensual, invited and agreed to by such a person, and any non-consensual

interference with his body constitutes an unjust and prohibited invasion.

本质上，这些规则自古便广为人知且得到普遍认可。它们涵盖三个核心要素。首先，人格与自我所有权：每个人都拥有——即排他性掌控——自己的身体，唯有本人可直接控制自身，他人对身体的任何控制本质上均为间接控制，且以控制者首先具备对自己身体的直接控制权为前提。否则，若将身体所有权赋予间接控制者，冲突将不可避免，因为只要个体存活，直接控制者就无法放弃对自己身体的直接掌控。因此，任何对他人的身体干涉均须获得当事人的同意、邀请及许可，未经同意的身体干涉均构成不正义且被严禁的侵犯行为。

Second, 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. The purposes of different actors then may be as different as can be, and yet no conflict will arise so long as their respective actions involve exclusively the use of their own private property. And how can external objects become private property in the first place without leading to conflict? To avoid conflict from the very start, it is necessary that private property be founded through acts of original appropriation, because only through actions, taking place in time and space, can an objective—intersubjectively ascertainable—link be established between a particular person and a particular object. And only the first appropriator of a previously unappropriated thing can acquire this thing as his property without conflict. For, by definition, as the first appropriator he cannot have run into conflict with anyone else in appropriating the good in question, as everyone else appeared on the scene only later. Otherwise, if exclusive control is assigned instead to some late-comers, conflict is not avoided but contrary to the very purpose of reason made unavoidable and permanent.

其次，关于私有财产与先占问题：从逻辑层面分析，在使用或可用的外部物质对象（即财货）作为行动手段时，避免冲突的必要条件显而易见——每件物品必须始终并在任何情况下都归私人所有，即由特定个体排他性控制。这样一来，即便不同行动人的目的截然不同，只要他们各自的行动仅涉及对私有财产的排他性使用，就不会产生冲突。那么，外部对象最初是如何在不引发冲突的情况下成为私有财产的呢？为避免初始阶段就产生冲突，必须通过先占行动来确立私有财产。因为只有在特定时空内发生的行动，才能在某个特定个体与特定物品之间建立起客观且主体间可确认的联系。

并且，只有对先前无主之物的首位占有者，才能无冲突地将该物据为己有。根据定义，作为首位占有者，他在占有相关物品时不可能与任何后来者发生冲突，毕竟其他所有人都是在他之后才出现的。反之，若将排他性控制权赋予某些后来者，不仅无法避免冲突，反而违背理性的根本目的，导致冲突变得不可避免且持续存在。

Third, exchange and contract: Other than per original appropriation, property can only be acquired by means of a voluntary—mutually agreed upon—exchange of property from some previous owner to some later owner. This transfer of property from a prior to a later owner can either take the form of a direct or “spot” exchange, which may be bi or multi-lateral as when someone’s apples are exchanged for an other’s oranges, or it may be unilateral as when a person makes a gift to someone else or when someone pays another person with his property now, on the spot, in the expectation of some future services on the part of the recipient. Or else the transfer of property can take the form of contracts concerning not just present but in particular also prospective, future-dated transfers of property titles. These contractual transfers of property titles can be unconditional or conditional transfers, and they too can involve bi or multi-lateral as well as unilateral property transfers. Any acquisition of property other than through original appropriation or voluntary or contractual exchange and transfer from a previous to a later owner is unjust and prohibited by reason. (Of course, in addition to these normal property acquisition rules, property can also be transferred from an aggressor to his victim as rectification for a previous trespass committed.)

第三，交换与契约：除了先占之外，财产只能通过自愿的方式，即双方达成一致，从原所有者转移至新所有者。这种财产转移既可以采用直接或“现货”交换形式（如双边或多边交易：某人用苹果换取他人的橙子），也可以采取单边形式（如赠与他人礼物，或一方即时支付财产以换取对方未来的服务）。此外，财产转让还可以采取契约形式，不仅涉及当前财产所有权的转让，还涉及潜在的、未来日期的财产所有权转让。这些契约性财产权转让可以是无条件的，也可以是有条件的，同样可能涉及双边、多边或单边的财产权转让。任何非通过先占、自愿或契约性交换实现的财产获取，以及从前任所有者到继任所有者之间的非自愿转让，都是非正义的，且为理性所禁止。（当然，除这些常规财产获取规则外，财产也可作为对先前侵权行为的纠正，从侵犯者转移至受害者手中。）

Drawing on the long, but in today’s world largely forgotten or neglected, intellectual

tradition of natural law and natural rights theory with its three just briefly sketched principal components, then, the most elaborate, systematic, rigorous and lucid presentation of a theory of justice up until then had been developed in the course of the second half of the 20th century by economist-philosopher Murray N. Rothbard, culminating in his *Ethics of Liberty*, originally published in 1982. Unfortunately, but not entirely surprisingly, however, his work was typically either completely ignored or else dismissed out of hand by the gatekeepers and high priests of academia. The anarchist conclusions ultimately arrived at by Rothbard in his works appeared simply outlandish in an ideological environment molded overwhelmingly by tax-funded intellectuals and steeped to the hip in statism or étatism. Among academic big shots, only Harvard philosopher Robert Nozick in his *Anarchy, State and Utopia* acknowledged his intellectual debt to Rothbard and seriously tried to refute his anarchist conclusions—but miserably failed.

借鉴自然法和自然权利理论这一悠久但在当今世界大多被遗忘或忽视的思想传统——其三大核心要素已在此简要勾勒——经济学家兼哲学家穆瑞·N·罗斯巴德于 20 世纪下半叶发展出了迄今为止最为精妙、系统、严谨且明晰的正义理论体系，这一理论成果最终凝结于其 1982 年首版问世的《自由的伦理》一书中。然而，令人扼腕却并非完全出人意料的是，他的著作通常要么被学术界的卫道士和大祭司们完全忽视，要么就被断然否定。罗斯巴德在其作品中最终得出的无政府主义结论，在这个由纳税人供养的知识分子塑造、且浸透着国家主义（étatisme）的意识形态环境中，显得格格不入、大逆不道。学术界的大人物中，只有哈佛大学哲学家罗伯特·诺齐克（Robert Nozick）在其《无政府、国家和乌托邦》（*Anarchy, State and Utopia*）中承认了罗斯巴德在思想上的贡献，并认真尝试反驳他的无政府主义结论——但却以惨败告终。

While Rothbard's work largely fell on deaf ears within academia, then, it exerted considerable influence outside of it, in the public at large. Indeed, through his work Rothbard became the founder of the modern libertarian movement, attracting a sizable popular following far exceeding that of any mainstream academic in numbers. As for the further development of a natural-law and -rights based theory of justice, however, this very success turned out to be a rather mixed blessing. On the one hand, the movement inspired by Rothbard likely helped dampen and slow down the popularity and growth of statism, but it manifestly failed in halting or even reversing the long-run historical trend toward ever increasing state power. On the other hand (and that may

well be one of the reasons for this failure), the larger the movement grew in numbers, the greater also the confusion and the number of intellectual errors spread and committed by its followers. The pure theory of justice as presented by Rothbard was increasingly watered down, misunderstood, misinterpreted or downright falsified, whether for short-run tactical gains, out of ignorance or plain cowardice. As well, all too often sight was lost of the fundamentally important distinction between the core, the foundational principles of a theory on the one hand and its application to various peripheral—often farfetched or merely fictional—practical problems on the other; and far too much effort and time, then, has been spent on debating peripheral issues the solution of which may well be arguable, but which is of minor importance in the larger scheme of things and helps distract public attention and concentration away from those questions and issues that truly matter and count.

虽然罗斯巴德的著作在学术界鲜有人问津，但在学术界之外的广大公众中却产生了显著的影响。事实上，罗斯巴德凭借其著作成为现代自由意志主义运动的奠基人，吸引了众多大众追随者，其数量远超任何主流学者。然而，对于以自然法和自然权利为基础的正义理论的进一步发展而言，这一成功却带来了喜忧参半的结果。

一方面，由罗斯巴德激发的运动或许有助于抑制和减缓国家主义的蔓延，但它显然未能阻止甚至逆转国家权力不断扩张的长期历史趋势。另一方面（这也可能是失败的原因之一），随着这场运动规模的扩大，其追随者传播和犯下的思想混乱和错误也随之增多。罗斯巴德提出的纯粹正义理论被越来越多地淡化、误解、曲解甚至直接篡改，无论是出于短期战术利益的考量，还是源于无知或单纯的懦弱。

同样，人们也常常忽视了理论的核心，即理论的基本原则与理论在各类次要问题（通常是牵强附会或纯属虚构的）上的应用之间的根本区别。因此，人们耗费了过多的精力和时间来讨论这些次要问题，尽管其解决方案可能存在争议，但在更大的框架中却并不重要，反而会分散公众的注意力，使其无法聚焦于那些真正关键的问题和议题。

In this situation, then, more than 40 years after the first publication of Rothbard's *Ethics of Liberty* and characterized by much practical disappointment and increasing theoretical confusion, the publication of Stephan Kinsella's present work must be considered a most welcome sign of renewed hope and new, refreshing intellectual

inspiration.

在此情行下，即在罗斯巴德的《自由的伦理》首次面世 40 余载之后，面对现实生活的屡屡挫败与理论界的日益纷乱，斯蒂芬·金塞拉这部新作的推出无疑成为了一抹极为可贵的曙光。它不仅为我们重新点燃了思想希望的星火，更注入了一股理论创新的鲜活力量。

Indeed, with this work, that has been in the making for more than two decades, Kinsella has produced no less than an intellectual landmark, establishing himself as the leading legal theorist and the foremost libertarian thinker of his generation. While following in Rothbard's footsteps, Kinsella's work does not merely rehash what has been said or written before. Rather, having absorbed as well all of the relevant literature that has appeared during the last few decades since Rothbard's passing, Kinsella in the following offers some fresh perspectives and an innovative approach to the age-old quest for justice, and he adds several highly significant refinements and improvements and some centrally important new insights to the theories of personhood, property and contract, most famously some radical criticism and rejection of the idea of "intellectual property" and "intellectual property rights."

确实，通过这部历时二十余载的著作，金塞拉树立了一座思想丰碑，确立了自己作为同代人中杰出的法律理论家与自由意志主义思想家的地位。尽管承袭了罗斯巴德的学术脉络，金塞拉的著作绝非对前人论述的简单复述。相反，在充分吸收罗斯巴德逝世后几十年来所有相关文献的基础上，他在后续章节中为古老的正义追求提供了新颖视角与创新方法，并对人格权、财产权与契约理论作出了若干重大完善与发展，贡献了若干核心新洞见——其中最著名的当属对"知识产权"与"知识产权权利"概念的彻底批判与否定。

Henceforth, then, all essential studies in the philosophy of law and the field of legal theory will have to take full account of the theories and criticisms expounded by Kinsella.

自此，法律哲学与法学理论领域的所有基础性研究，都必须充分考量金塞拉所阐述的理论与批判。

Hans-Hermann Hoppe Istanbul, May 2023

汉斯-赫尔曼·霍普 伊斯坦布尔，2023 年 5 月

前言

Preface

The issue of what property rights we have, or should have, what laws are just and proper, has long confronted mankind, and continues to be the subject of debate today. This book seeks to address these issues, with an approach that keeps in mind the nature and reality of human life—that we are purposeful human actors living in a world of scarcity and facing the possibility of interpersonal conflict—and the purpose of law and property norms: to enable us to live together, in society, peacefully and cooperatively. The goal is to vindicate the private law as developed in the decentralized systems of the Roman and common law, with an emphasis on consistency, principle, and the inviolable rights of the individual. In short, to argue for a private law system informed by libertarian principles.

我们拥有或应当拥有何种财产权？何种法律是公正且恰当的？这些问题自古以来一直困扰着人类，至今依然是论证的主题。本书旨在探讨这些议题，其研究方法始终立足于人类生活的本质与现实——我们是有目的的行动主体，生活在一个资源稀缺的世界中，并面临人际冲突的可能性——同时着眼于法律与财产规范的终极目标：使人类能够在社会中和平共处、协作共生。本书力图论证罗马法与普通法在去中心化体系中发展形成的私法体系，强调其内在一致性、原则性以及对个人不可侵犯权利的捍卫。简言之，本书旨在构建一个以自由意志主义原则为根基的私法体系。

Thus, in these pages, I try to explain what libertarianism is, why individual self-ownership and property rights are justified, how the law ought to deal with criminals and tortfeasors, how property rights should be understood so that errors such as intellectual property (IP), taxes, and the drug war can be exposed, and, finally why a consistent libertarianism implies that a stateless society, sometimes called anarchy, offers the best hope for a free and just social order. I explore the nature of law and legislation, and subject various aspects of positive law, as well as other theories of law, including that of others libertarians, to criticism and appraisal.

因此，在本书中，我试图阐释自由意志主义的本质，论证个人自我所有权与财产权的正当性，探讨法律应如何处置罪犯与侵权者，剖析财产权应如何界定以揭露知识

产权（IP）、税收与毒品战争等谬误，并最终阐明：唯有贯彻自由意志主义原则的无政府主义（或称“无国家社会”），才能为自由公正的社会秩序提供最佳可能。我将深入探究法律与立法的本质，并对实在法的各个层面以及其他法学理论（包括其他自由意志主义者的学说）展开批判性评析。

These arguments are premised on the thesis that just law is anchored in core principles of self-ownership plus ownership of external scarce resources as governed by principles of original appropriation, contractual title transfer, and rectification. The developed legal system of an advanced, free society is the detailed working out of the implications and applications of these basic principles to various practical and recurring situations in human interactions. This book looks from numerous angles at why these principles are important and how adhering to them consistently can help us achieve a freer society and adjudge the legitimacy of concrete laws and legal systems.

这些论点基于一个核心命题：公正的法律植根于自我所有权原则，以及对外部稀缺资源的占有权——后者受先占、契约权利转让和纠正等原则的制约。在发达的自由社会，成熟的法律体系正是将这些基本原则的内涵与应用，细致地落实到人类交往中各种实际且反复出现的情境当中。本书从多重视角探讨了为何这些原则至关重要，以及始终如一地遵循它们如何能帮助我们实现一个更加自由的社会，并评判具体法律及法律体系的正当性。

As to how this book came about: I've been intensely interested in—some might say obsessed with—libertarian ideas for over forty years, since high school. It has become a life passion and an avocation of sorts. A calling, though not a career.¹ After starting, as so many libertarians of my generation have, with the ideas of Ayn Rand,² I soon discovered the work of Austrian economists and anarcho-libertarians, such as Ludwig von Mises, Murray Rothbard, and Hans-Hermann Hoppe, whose ideas are my greatest influence.

关于本书的缘起：四十多年来，从高中时代起，我就对自由意志主义思想怀有浓厚兴趣——甚至可以说到了痴迷的程度。这已成为我毕生的热情所在，某种意义上的精神志业。虽非职业追求，却如同使命召唤。¹ 和同辈众多自由意志主义者一样，我

¹ See comments from Gary North about calling vs. career, mentioned in chapter 24. 参见第 24 章中提到的加里-诺斯关于召唤与职业评论。

的思想启蒙始于安·兰德，² 但很快便发现了奥地利经济学派和无政府自由意志主义者的著作——路德维希·冯·米塞斯、穆瑞·罗斯巴德和汉斯-赫尔曼·霍普等人的思想对我影响至深。

I started publishing on matters of libertarian theory in 1992, fresh out of law school.³ I tried to use my knowledge of the law—both the English common law and the Roman law, as embodied in the civil law of most European countries and my own home state, Louisiana—and Austrian economics and libertarian principles, to advance libertarian theory where I thought I could contribute. I first wrote on rights and punishment theory in the early 1990s (see chapters 5 and 22), and then on related areas like legislation (chapter 13), contract and inalienability theory (chapters 9 and 10), and so on. In 2001, I published “Against Intellectual Property,”⁴ which was controversial and influential, so I’ve become known by many libertarians primarily for my IP arguments. As the essays in the current volume illustrate, however, IP is not my sole area of interest. My interest in and passion for libertarian ideas has always been driven by my love of philosophy, truth, justice, logic, consistency, and economics. This book includes several chapters on IP but also covers other aspects of libertarian legal theory, such as rights theory and others noted above.

我于 1992 年刚从法学院毕业时，就开始发表有关自由意志主义理论的文章。²我试图利用我的法律知识——包括英国普通法和体现于大多数欧洲国家民法典中的罗马法（我的家乡路易斯安那州也采用大陆法系）——结合奥地利经济学派理论和自由意志主义原则，在我认为能有所贡献的领域推动自由意志主义理论发展。上世纪 90 年代初，我首先撰写了关于权利与惩罚理论的论文（见第 5 章和第 22 章），随后涉足立法（第 13 章）、契约与权利不可让渡理论（第 9 章和第 10 章）等相关领域。2001 年

² Jerome Tuccille, *It Usually Begins with Ayn Rand* (Stein and Day, 1971). See also chapters 1 and 25

杰罗姆·图西尔：《一切通常始于安·兰德》（斯坦和戴出版社，1971）。另见第 1 章和第二十五章

³ Stephan Kinsella, “Estoppel: A New Justification for Individual Rights,” *Reason Papers* No. 17 (Fall 1992): 61 – 74. See chapter 5.

金塞拉，“禁止反言：个人权利的新理由”，《理理论文》第 17 期（1992 年秋季）：61-74 页。参见第五章。

发表的《反对知识产权》⁴ 引发争议并产生广泛影响，这使得我在自由意志主义者群体中以知识产权主张而闻名。但正如本书各篇章所示，知识产权并非我唯一关注的领域。我对自由意志主义思想的兴趣与热忱，始终源于对哲学、真理、正义、逻辑一致性及经济学的热爱。本书虽包含多个关于知识产权的章节，同时也涵盖了自由意志主义法律理论的其他维度，诸如权利理论及前文提及的其他议题。

By 2010 or so, most of the theory-laden articles that became the chapters in this book had been published, so around that time I thought of collecting some of these articles in a single book, since they covered a large and complementary number of interrelated topics, such as rights and punishment theory, contract theory, causation and responsibility, intellectual property, anarchy, legislation, and so on. But I kept putting the project off. I felt I was missing some material that should be in such a book, such as a general overview of libertarianism itself, and an update of the intellectual property material I had initially published in 2001. I eventually wrote these articles (now chapters 2, 14, and 15), so I felt it was time to finally assemble and complete this book.

截至 2010 年左右，构成本书各章节的大部分理论性文章已陆续发表。彼时我萌生了将这些文章结集成书的念头，因为它们涵盖了大量相互关联且互为补充的主题，包括权利与惩罚理论、契约理论、因果关系与责任、知识产权、无政府主义、立法等诸多领域。但此计划一再搁置——我总觉得还缺少某些关键内容，比如对自由意志主义本身的系统性概述，以及对我 2001 年发表的知识产权论文的更新补充。最终我完成了这些文章（即本书的第 2、14、15 章），这才感到是时候正式汇编成书了。

The twenty-five chapters are based on articles published over an almost thirty-year period, from 1994 to 2022, with one chapter (15) being formally published for the first time here (2023). I decided to omit some articles I had published before, as they are a bit too focused on American-specific issues like the US Constitution, federalism, and so on, and also for space reasons.⁵ I also did not include any purely legal publications—

⁴ Kinsella, “Against Intellectual Property,” first published in the Journal of Libertarian Studies 15, no. 2 (Spring 2001): 1 – 53; later republished as a monograph by the Mises Institute in 2008 and in an edition by Laissez-Faire books in 2012 (AIP).

金塞拉，《反对知识产权》，首次发表于《自由意志主义研究杂志》第 15 期，第 2 期 (2001 春季):1-53;后来由米塞斯研究院于 2008 年作为专著重新出版，并于 2012 年由自由放任书籍出版(AIP)。

those related to my vocation, not my avocation—such as those found at my legal website www.KinsellaLaw.com. I included only writing having to do with libertarian issues.

这二十五章的内容基于 1994 年至 2022 年间近三十年发表的文章，其中第十五章系首次在此正式出版（2023 年）。我决定删去此前发表的部分文章，因其过度聚焦美国本土议题如宪法、联邦制等，同时也出于篇幅考量。同时也是出于篇幅的考量，⁵ 我亦未收录任何纯粹的法律出版物——那些与我的职业（而非志趣）相关的作品，例如发布在我的法律网站 www.KinsellaLaw.com 上的内容。本书仅收录与自由意志主义议题相关的著述。

Most of these articles were published in scholarly journals or in online publications. A few chapters are more conversational in tone, as they were based on interviews or transcripts of speeches (e.g. chapters 17 and 23–25). Even with these, I have added extensive references and cross-references where appropriate.

这些文章大多发表于学术期刊或网络出版物。少数章节采用更为对话式的口吻，

⁵ For example I considered including, but ultimately decided against, articles such as: Patrick Tinsley, Stephan Kinsella & Walter Block, “In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach,” *Southern U. L. Rev.* 32 no. 1 (2004): 63 – 80; Kinsella, “A Libertarian Defense of Kelo and Limited Federal Power,” *LewRockwell.com* (June 27, 2005); idem, “Supreme Confusion, Or, A Libertarian Defense of Affirmative Action,” *LewRockwell.com* (July 4, 2003); Walter Block, Stephan Kinsella & Hans-Hermann Hoppe, “The Second Paradox of Blackmail,” *Bus. Ethics Q.* 10, no. 3 (July 2000): 593 – 622; Walter Block, Roy Whitehead & N. Stephan Kinsella, “The Duty to Defend Advertising Injuries Caused by Junk Faxes: An Analysis of Privacy, Spam, Detection and Blackmail,” *Whittier L. Rev.* 27, no. 4 (2006): 925 – 49.

例如，我考虑收录，但最终决定不收录，Patrick Tinsley, Stephan Kinsella 和 Walter Block, “为证据辩护和反对排他规则：一种自由意志主义的方法”，*Southern ul Rev.* 32 no. 1 (2004): 63-80; Kinsella, “自由意志主义对基洛和有限联邦权力的辩护”，*LewRockwell.com*(2005 年 6 月 27 日); idem, “最高的困惑，或者，平权行动的自由意志主义辩护”，*LewRockwell.com*(2003 年 7 月 4 日); Walter Block, Stephan Kinsella & Hans-Hermann 霍普，《勒索的第二个悖论》，*Bus. 伦理问题* 10, no. 3(2000 年 7 月):593-622; Walter Block, Roy Whitehead 和 N. Stephan Kinsella, “保护垃圾邮件造成的广告伤害的责任：隐私、垃圾邮件、检测和勒索的分析”，《*惠 tier L. Rev.*》第 27 期。4(2006): 925-49。

因为它们基于访谈或演讲实录（如第 17 章和第 23-25 章）。即便如此，我也在适当处添加了大量参考文献和交叉引用。

I divided the book into six sections. Part I—Libertarianism covers my own introduction to libertarianism, an overview of libertarianism, and my take on anarchism. Part II—Rights concerns arguments for self-ownership, property rights, and punishment theory. Part III—Libertarian Legal Theory has chapters building on the theory in previous chapters to apply to various laws and libertarian issues, like causation and responsibility (chapter 8), contract and inalienability theory (chapters 9–11), and a long chapter on the pitfalls of legislation as a way of making law (chapter 13) (I probably should have turned this one into a PhD dissertation…).

我将本书分为六个部分。第一部分——自由意志主义涵盖了我本人对自由意志主义的介绍、自由意志主义概述以及我对无政府主义的看法。第二部分——权利，涉及对自我所有权、财产权和惩罚理论的论证。第三部分——自由意志主义法律理论有几章是在前几章理论的基础上应用于各种法律和自由意志主义问题，比如因果关系和责任（第 8 章）、和不可让渡理论（第 9-11 章），还有很长一章是关于立法作为制定法律的一种方式 的弊端（第 13 章）（我也许应该把这一章变成博士论文……）。

Part IV—Intellectual Property contains a chapter presenting the basic case against IP (chapter 14), basically a streamlined and somewhat updated version of AIP, followed by chapter 15, which summarizes other IP arguments and issues that I wrote and spoke on after AIP. I also include some of my discussion with, and commentary on the views of, my pro-IP libertarian friend, the late J. Neil Schulman, and a piece on the nature of scarce and nonscarce goods, which is relevant to the IP issue.

第四部分——知识产权，其中包含一章专门介绍了反对知识产权的基本理由（第 14 章）， 这章实际上是《反对知识产权》一书的精简版和更新版。紧随其后的第 15 章，总结了我在《反对知识产权》之后撰写和发表的其他知识产权相关论点和问题。此外，我还收录了与支持知识产权的自由意志主义朋友、已故的尼尔·舒尔曼（J. Neil Schulman）进行的一些讨论及对其观点的评论，以及一篇探讨与知识产权问题相关的稀缺与非稀缺财货性质的文章。

Part V—Reviews contains four book reviews or review essays providing libertarian commentary on various books on law or political philosophy. Finally, Part VI—Interviews & Speeches is less formal and contains two interviews and a speech assessing the last

five or six decades of the libertarian movement.

第五部分——评论，收录了四篇书评或评论文章，对各类法律及政治哲学书籍进行了自由意志主义的深入剖析。而第六部分——不那么正式的访谈与演讲，则包含了两篇访谈和一篇演讲，对过去五六十年间的自由意志主义运动进行了全面评估。

For those who want to skip the more extraneous material and focus on the core libertarian theory chapters, I recommend chapters 2–12, 14–15, and 18.

对于那些想跳过较多无关材料，专注于自由意志主义理论核心章节的人，我推荐第 2-12 章、第 14-15 章和第 18 章。

I have revised all the material in the book, which was required since many of the original articles used different citation formats and also because some of my thinking and terminology has changed over the years. Several chapters are significantly revised or expanded, which in a few cases led to very long footnotes, since it would have been too disruptive to rewrite the article to integrate the extra commentary into the text; in some cases I moved very long footnotes to an appendix.

我对书中的全部材料进行了修订，这一举措实属必要。原因在于，许多原始文章采用了不同的引用格式，加之我的一些观点和术语在多年间发生了演变。有几章做了大幅度的修改或扩充。在某些情况下，注释篇幅较长，这是为了将额外注释融入正文，避免重写文章造成过大干扰；而在另一些情况下，我将冗长的注释移至附录中。

Although the chapters were all written separately and at different times over three decades, many of them build on (or anticipated) others.

尽管这些章节是在三十年间的不同时间分别撰写的，但其中许多章节都是在其他章节的基础上发展或预期的。

For example, in chapter 10, originally published 1998–99, I outlined a sketch of a view of contracts, inalienability, and so on (note 48), and wrote “Elaboration of these ideas will have to await a subsequent article.” I did so in 2003, in the article which became chapter 9. Thus, I was able to piece together several articles in a fairly systematic form since they either built on or anticipated each other and were written to be consistent with each other and all flowing from the same core principles and reasoning.

例如，在最初发表于 1998 至 1999 年间的第 10 章中，我概述了关于契约、不可剥夺性等问题的观点（见注释 48），并写道“对这些观点的详细阐述将留待后续文章进行”。2003 年，我在后来作为第 9 章的文章中详细阐述了这些观点。因此，我得以以一种相当系统的形式将几篇文章整合在一起，因为这些文章或是相互奠基，或是彼此预见，且在写作过程中始终保持一致，均源于相同的核心原则和推理。

I have added extensive cross-references pointing to related discussion in other chapters. There is a bit of redundancy in some of the chapters since they were published independently. However, it is my view that the repetition that does exist in some articles can help reinforce a given argument or idea or show it from a different angle.

我增添了大量的交叉引用，指向其他章节中的相关讨论。鉴于这些文章是独立出版的，某些章节不可避免地存在一些重复内容。然而，我认为，尽管这些重复在部分文章中确实存在，但它们有助于强化特定的论点或观点，或者从不同角度进行深入阐述。

In one case I now disagree with something I originally wrote; I retained the original text and added an explanatory note (chapter 13, Part III.C). And in chapter 9 (Part III.C), I note that, regarding my earlier criticism of Rothbard's argument for inalienability: "I now think it is possible that his approach is more compatible with my own than I originally realized." But otherwise, I today still stand by most of the original content of those articles, in terms of substance. However, as noted several places in the text, I often now use terminology somewhat differently, e.g., the term state instead of government; rivalrous or "conflictible" instead of scarce; using the word property to refer to the relation between humans with respect to owned resources, instead of referring to the owned resource itself, and so on. I have in some cases updated the text to my current, preferred usage, but not always since it would have been too drastic and tedious.

在一个案例中，我目前不赞同我之前所写的内容；我保留了原文，并补充了相应的解释性说明（第 13 章，第 III.C 部分）。在第 9 章（第 III.C 部分）中，我指出，对于我之前对罗斯巴德不可让渡论证的批评：“我现在认为，他的方法与我自身观点的兼容性可能比我最初认识到的更高。”除此之外，就实质内容而言，我至今依然支持这些文章中的大部分观点。然而，正如文中多次提及的那样，我现在所使用的术语往往有所差异，例如，用“国家”代替“政府”；用“竞争性的”或“有冲突的”代替“稀缺性”；用“所有权”来指代人与所拥有资源之间的关系，而非指代所拥有的资源本身，等等。在某些

情况下，我将文本更新为我目前偏好的表述方式，但并非总是如此，因为这样的改动过于剧烈且繁琐。

I have also included a table of contents for some of the chapters where I thought it would be useful. And as noted above, in several chapters I moved very long footnotes to an appendix.

我还为一些我认为有用的章节添加了目录。如上文所述，在几章中，我将很长的注释移到了附录中。

I have tried to conform references to a more or less uniform citation style of my own preference (a modified version of Chicago style), although my main goal was to simply provide sufficient information for the reader to locate the cited work, not to conform to some arbitrary format (and also not to obsess over consistency). In this, I am influenced by the citation policy of the second incarnation of the legal journal *The Greenbag*: "Citations should be accurate, complete, and unobtrusive."

尽管我的主要目标是向读者提供充足的信息以便查找所引用的作品，而非拘泥于某种武断的格式（亦非执着于一致性），但我仍尽力使参考文献符合我自己偏好的一种相对统一的引用风格（即芝加哥风格的修改版）。在此过程中，我受到了法律期刊《*The Greenbag*》第二版引文政策的启发：“引用应准确、完整且自然。”

Familiar sources need no citation. Authors may use whatever citation form they prefer; we will make changes only to keep footnotes from looking like goulash.”⁶

熟悉的资料来源无需引用。作者可以采用其偏好的任何引文格式；我们进行修改仅旨在使注释显得更加整洁。⁶

I have also included hyperlinks for online versions of cited material where possible. If we lived in a copyright-free world, everything would be online and readers could easily find any cited work with a search. Alas. For my own work that I reference, since it is mostly available on my own website, I provide an initial hyperlink in the title but do not type out the URL in the text. Almost all of my work referenced in the text can be found

⁶ See Kinsella, “Cool Footnote Policy,” *StephanKinsella.com* (June 14, 2002). 见 金塞拉，《酷酷的注释政策》，*StephanKinsella.com*（2002 年 6 月 14 日）。

at www.StephanKinsella.com/publications, www.StephanKinsella.com/lffs, or www.c4sif.org. I have liberally used permalinks via www.perma.cc in cases where I suspected future possible linkrot or where the original URL is overlong.

在可能的情况下，我还提供了引用资料在线版本的超链接。若我们生活在一个无版权的世界，所有内容均可在线获取，读者只需简单搜索便能轻松找到任何引用的作品。然而，这实属可叹。对于我自己引用的作品，由于大部分可在我的个人网站上找到，我仅在标题中提供了一个初始超链接，而未在正文中插入具体的 URL。文中引用的几乎所有作品均可通过以下网址访问：www.StephanKinsella.com/publications、www.StephanKinsella.com/lffs 或 www.c4sif.org。在担心未来可能出现的链接失效或原始 URL 过长的情形下，我借助 www.perma.cc 自由地使用永久链接。

I debated various titles for this work. Titles like Freedom and the Law and Liberty and Law were already taken.⁷ I considered at one time calling this work The Ethics of Action, as an amalgamation and nod to similar titles by other authors⁸ and to evoke a recurring theme in my writing: an exploration of the ethics that guide action and of ethics implied by certain classes of action (see the argumentation ethics and estoppel theory of rights I advance in chapters 5 and 6). But in the end, this seemed too inscrutable and only applicable to a small part of this book's content, so for years I planned on using the title Law in a Libertarian World: Legal Foundations of a Free Society. In the end, some trusted colleagues urged me to drop the main title and use the subtitle instead. I have.

我为这部作品探讨了多种标题，诸如《自由与法律》（Freedom and the Law）和《自由与法律》（Liberty and Law）等书名已被使用。⁷我曾一度考虑将这部作品命名为《行动的伦理学》（The Ethics of Action），以此作为对其他作者⁸相似主题的融合

⁷ Bruno Leoni, Freedom and the Law (Indianapolis: Liberty Fund, expanded 3d. ed. 1991 [1961]; <https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>); Giovanni Sartori, Liberty and Law (Menlo Park, Ca.: Institute for Humane Studies, 1976).

布鲁诺·莱尼，《自由与法律》(印第安纳波利斯:自由基金，扩充第三版。1991 [1961];<https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>); 乔瓦尼·萨托利，《自由与法律》(加州门洛帕克:人文研究所，1976)。

⁸ Such as: Murray N. Rothbard, The Ethics of Liberty (New York: New York University Press, 1998); idem, The Logic of Action (Edward Elgar, 1997); Michael Polanyi, The Logic of Liberty (Chicago: University of Chicago Press, 1980); G.B. Madison, The Logic of

与致敬，同时也是为了突出我写作中反复探讨的一个核心议题：对指导行动的伦理学以及某些特定行动所蕴含伦理学的探究（参见我在第 5 章和第 6 章中提出的论证伦理学和权利的禁止反言理论）。然而，最终这一标题显得过于晦涩，且仅适用于本书的一小部分内容。因此，多年来我一直计划采用《自由意志主义世界中的法律：自由社会的法律根基》这一书名。最终，在几位值得信赖的同事建议下，我决定放弃主标题，改用副标题。我采纳了他们的建议。

The length of the book turned out to be larger than expected, but I have chosen to publish this book as one volume instead of breaking it into two. I think this will be easier for the reader, given the extensive cross-references between chapters, and should make for a lower cost. My goal was never sales. It was only to help advance libertarian theory by making these thoughts accessible to whoever might be interested now or in the future. Thus, in addition to print (both hard and softcover) and ebook versions for sale on major platforms, I am of course posting a free digital version online at www.StephanKinsella.com/lffs, and with a Creative Commons Zero license. Anyone is free to republish this work, or translate it, or make audio versions, without asking my permission.

本书的篇幅超出了预期，但我决定将其作为单卷出版，而非拆分为两卷。考虑到各章节之间存在大量交叉引用，我认为这种形式对读者更为便利，同时也能降低成本。我的初衷并非追求销售业绩，而是希望那些现在或未来可能对这些思想感兴趣的人能

Liberty (New York: Greenwood Press, 1986); and others such as James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*, vol. 7 in *The Collected Works of James M. Buchanan* (Indianapolis: Liberty Fund, 2000 [1975]). Interestingly, Jan Narveson's excellent *The Libertarian Idea* (Philadelphia: Temple University Press, 1988) is part of the "Ethics and Action" series edited by Tom Regan. I mention this in chapter 8, at n.11.

如：穆瑞·罗斯巴德，《自由的伦理》（纽约：纽约大学出版社，1998）；同事，《行动的逻辑》（Edward Elgar, 1997）；迈克尔·波兰尼，《自由的逻辑》（芝加哥：芝加哥大学出版社，1980年）；G.B.麦迪逊，《自由的逻辑》（纽约：格林伍德出版社，1986）；詹姆斯·M·布坎南，《自由的极限：在无政府和利维坦之间》，詹姆斯·M·布坎南文集第7卷（印第安纳波利斯：自由基金，2000[1975]）。有趣的是，Jan 纳尔维森的优秀的《自由意志主义思想》（费城：坦普尔大学出版社，1988）是 Tom Regan 编辑的《伦理与行动》系列的一部分。我在第八章第 11 页提到过。

够深入了解，进而推动自由意志主义理论的发展。因此，除了在主要平台销售印刷版（包括硬皮和软皮）及电子书外，我当然也会在 www.StephanKinsella.com/lffs 上提供免费的电子版，并采用知识共享零许可证（Creative Commons Zero license）。任何人无需获得我的许可，即可自由转载、翻译或制作音频版本。

I have published in the past with various publishing houses, such as the Mises Institute, Oceana Publications, Oxford University Press, and so on, but for this book I have decided to self publish, under my own imprint, Papinian Press (www.PapinianPress.com), for a variety of reasons. First, my own procrastination has delayed this project for over a decade, so I was reluctant to add yet another year to this project by engaging a normal publisher. Second, I saw no benefit to using a mainstream publisher. I do not need their delays or "helpful suggestions," which would no doubt urge me to water down my arguments or make them more mainstream. No, thank you. And I have no career or academic ambitions to burnish by using a prestigious press. Also, I wanted freedom to release this book totally open source, free of any copyright restrictions, and to post free online versions, which most publishers would balk at. I'm frankly tired of the dinosaur legacy publishing industry. Finally, I may use the Papinian Press imprint for future book projects, so am glad to use this book to kick it off.

我曾与多家出版社合作出版著作，包括米塞斯研究院、欧西安纳出版社（Oceana Publications）、牛津大学出版社等。但本书我决定以个人自创品牌——帕皮尼安出版社（Papinian Press，网址：www.PapinianPress.com）自行出版，原因如下：首先，因个人拖延症导致这个项目延误十余年，若再通过常规出版社出版恐将再耗费一年时间；其次，主流出版社无法提供我需要的价值——既不需要他们拖沓的流程，也不需要那些“建设性意见”，这些意见无疑会要求我淡化观点或迎合主流。但对此我敬谢不敏。况且我并无借知名出版社镀金的职业或学术野心。

此外，我希望完全以开源形式发布本书，不受版权限制，并提供免费网络版本，这是多数出版社难以接受的。坦率说，我已厌倦这个陈腐的传统出版行业。最后，未来可能继续借助帕皮尼安出版社品牌推出其他著作，很高兴能以本书作为开端。

The imprint, by the way, is named after the third-century Roman jurist Papinian (Aemilius Papinianus), who also adorned the advertisement for my 2011 Mises Academy course on libertarian legal theory.⁹ The reason I admire Papinian, in addition to his being a great jurist:

Papinian is said to have been put to death for refusing to compose a justification of Caracalla's murder of his brother and co-Emperor, Geta, declaring, so the story goes, that "it is easier to commit murder than to justify it."¹⁰

顺便提一下，这个出版品牌是以三世纪罗马法学家帕皮尼安 (Aemilius Papinianus) 命名的，他也曾出现在我 2011 年米塞斯学院自由意志主义法律理论课程的宣传广告上。⁹ 我之所以敬仰帕皮尼安的原因，除了他是一位伟大的法学家外：

据传帕皮尼安因拒绝为卡拉卡拉谋杀其兄弟兼共治皇帝盖塔的行为撰写辩护词而被处死，流传的说法是，他宣称 "实施谋杀比为谋杀辩护更容易 " ¹⁰

Papinian bravely chose death in the name of justice; and his formulation "it is easier to commit murder than to justify it" brilliantly encapsulates the distinction between committing an action and normatively justifying the action. It emphasizes the importance of justifying interpersonal violence, and the difference between description and prescription, between fact and value, between is and ought—insights which play a crucial role in my own defenses of rights (see chapters 5–7).

帕皮尼安以正义之名选择慷慨赴死；他那句“杀人易，辩理难”的精辟论断，生动诠释了实施行动与规范辩护之间的本质区别。这一论述不仅强调了人际暴力正当性辩护的重要性，更深刻揭示了描述性与规范性、事实判断与价值判断、“实然”与“应然”之间的分野——这些洞见在我为权利辩护的论述中（见第 5-7 章）具有关键意义。

Although this book is written in English, many of the articles from which it derives have been translated into other languages, and some have audio versions available. They are

⁹ See www.PapinianPress.com and Kinsella, "KOL018 | "Libertarian Legal Theory: Property, Conflict, and Society: Lecture 1: Libertarian Basics: Rights and Law" (Mises Academy, 2011)," Kinsella on Liberty Podcast (Feb. 20, 2013).

见 www.PapinianPress.com 和 金塞拉, "KOL018 | "自由意志主义法律理论：财产、冲突和社会：讲座 1：自由意志主义的基础：权利与法律" (米塞斯学院, 2011 年)，《金塞拉谈自由》播客 (2013 年 2 月 20 日)。

¹⁰ Barry Nicholas, *An Introduction to Roman Law*, rev. ed. (Oxford University Press, 1962), p. 30 n.2; see also chapter 5, n.1.

巴里-尼古拉斯, 《罗马法导论》，修订版 (牛津大学出版社, 1962 年)，第 30 页第二段；另见第 5 章 第一段。

online at www.StephanKinsella.com/translations and www.StephanKinsella.com/media.

尽管本书以英文撰写，但其源文章中的许多篇目已被翻译成其他语言，部分还配有音频版本。这些资源可通过网站 www.StephanKinsella.com/translations 和 www.StephanKinsella.com/media 在线获取。

I refer readers to www.StephanKinsella.com/lffs for errata, links to my own publications referenced in the book, and for supplementary material.

有关勘误、书中引用的我本人出版物的链接以及补充材料，请读者访问 www.StephanKinsella.com/lffs。

It is my hope that readers and future scholars will benefit from the arguments offered in these pages.

我衷心希望读者和未来的学者能从本书提出的论点中获益。

Stephan Kinsella Houston, June 2023

斯蒂芬·金塞拉 休斯顿，2023 年 6 月

致谢

Acknowledgments

As noted in the Preface, I've been intensely involved in libertarianism for over forty years and, for almost thirty years, with the Mises Institute. I've been fortunate to have learned from thinkers from the past such as Rothbard, Mises, Ayn Rand, Milton Friedman, Frederic Bastiat, and many others,¹ but also from countless friends, mentors, colleagues, co-authors, acquaintances, interlocutors, discussants, and so on over the last forty years. It would be impossible to try to thank them all by name. Nonetheless I would like to try to express my appreciation for some special people and groups that have meant so much to me. I apologize in advance for those I have inadvertently omitted.

正如序言所述，我投身自由意志主义事业已逾四十载，与米塞斯研究院结缘也近三十年。何其有幸，我得以师承罗斯巴德、米塞斯、安·兰德、米尔顿·弗里德曼、弗雷德里克·巴斯夏等先贤哲人，¹ 更在过去四十年间受益于无数友人、导师、同僚、合著者、相识者、对话者与研讨者的智慧。若要逐一列名致谢实难做到，但仍愿特别感谢那些对我影响至深个人与团体。若有疏漏，谨此致歉。

First and foremost, to my wife of thirty years, Cindy, and to all my close friends and family, for tolerating my libertarian obsessions and libertarian macho flashes for decades, and for listening to me argue, explain, and explore ideas.² To my son Ethan, to whom this book is dedicated, for inspiring me and enriching my life, and for also loving liberty and goodness. And to my trainer and friend, Stephanie Rakoczy, for letting me vent about all matters libertarian for many years now in between squats and pushups. I am grateful to my birth mother, Gail Doiron McGehee, for blessing me with

¹ Many of them included in the works listed in Stephan Kinsella, "The Greatest Libertarian Books," StephanKinsella.com (Aug. 7, 2006).

其中许多收录在斯蒂芬·金塞拉（Stephan Kinsella）《最伟大的自由意志主义书籍》（The Greatest Libertarian Books）所列作品中，StephanKinsella.com（2006 年 8 月 7 日）。

my adoptive parents; to my mom for taking me to the library as much as I wanted; to my dad for driving me to school so far away in another parish for so many years; and to Mrs. Reinhardt, a librarian at Catholic High School in Baton Rouge, for recommending that I read *The Fountainhead*.

首先要感谢与我共度三十年婚姻的妻子辛迪，以及我所有的亲朋好友，感激他们多年来对我对自由意志主义的执着追求和大男子主义脾气的包容。感谢他们聆听我的论证、解释和探索各种观点²。特别献给我的儿子伊森，感谢他的激励和陪伴，使我的生活更加丰富多彩，也感谢他对自由和善良的热爱。此外，我要感谢我的教练和朋友斯蒂芬妮·拉科奇（Stephanie Rakoczy），多年来她在我进行深蹲和俯卧撑的间隙，耐心倾听我关于自由意志主义的种种思考。我还要感谢我的生母盖尔·多伊隆·麦基希（Gail Doiron McGehee），感激她将我托付给养父母；感谢我的母亲，每当我渴望阅读时，她总是带我前往图书馆；感谢我的父亲，多年来不辞辛劳地开车送我到遥远的另一个教区上学；最后，感谢巴吞鲁日天主教高中的图书管理员莱因哈特夫人，感谢她推荐我阅读《源泉》。

This book would not be possible without the understanding of property rights I've arrived at, and this in turn would not be possible without the work of Hans-Hermann Hoppe, whom I have also been fortunate to call a close friend. His support, friendship, guidance, and example of personal and intellectual integrity over the years mean more to me than I can properly express. My life would not be the same, nor this book possible, without him.

如果没有我对财产权的深刻理解，这本书的完成将无从谈起；同样，如果没有汉斯-赫尔曼·霍普的辛勤付出，这本书也不可能问世。我有幸与他结为挚友。他多年来给予我的支持、深厚的友谊、悉心的指导，以及他在人格和学识上的正直典范，对我而言意义深远，难以用言语尽述。没有他，我的生活绝不会是现在的模样，这本书的

² See Michael Cloud, "The Late, Great Libertarian Macho Flash," benbachrach.com (1978; preserved at <https://perma.cc/KY9P-V7K7>). See also Jeff Wood, "The Triumphant Return of Libertarian Macho Flash," medium.com (March 8, 2017; <https://perma.cc/KE6W-WQK4>).

见迈克尔·克劳德，"已故的伟大自由意志主义 男子气概"，benbachrach.com（1978 年；保存在 <https://perma.cc/KY9P-V7K7>）。另见杰夫·伍德，"自由意志主义男子气概的胜利归来"，medium.com（2017 年 3 月 8 日；<https://perma.cc/KE6W-WQK4>）。

出版更是无从谈起。

I've had a host of libertarian friends and friend groups that I've learned and benefitted from, or had support from, over the years, including my longtime friend Jack Criss, Jr.; the "Las Vegas crew"— former students of Rothbard and Hoppe, and now my good friends: Doug French (and Deanna Forbush), Jeff Barr, Lee Iglody, Jim Yohe, Joe Becker; others such as Juan Fernando Carpio; Greg and Joy Morin; Konrad Graf, Michael Conaghan, Jacob Huebert, Gene Healy, Gary Chartier, Gerard Casey, Richard Storey, Tom Woods, Michael Malice, Bob Murphy, Roderick Long, Jan Narveson, Frank van Dun, Robert Bradley, Jr.; Gil Guillory, Paul Edwards, Jacob Lovell, Rob Wicks, Greg Rome, Brian Martinez, Dick Clark, Isaac Bergman, Daniel Coleman, Timo Virkkala, and many others in my "Libertarian Forum" crowd (you know who you are); James Cox and Daniel Rothschild; many friends and scholars from the Property and Freedom Society and from countless Mises Institute events and conferences since 1995, including Lew Rockwell, David Gordon, Tom DiLorenzo, Peter Klein, Jeff Herbener, Joe Salerno, Sean Gabb, and others; correspondents from years ago such as Johan Ridenfeldt and Chris Whitten; co-authors and friends such as Patrick Tinsley, Jeff Tucker, and Walter Block, the first two of whom co-authored chapters with me in this volume. Thanks also to Nelson Loftin, for nudging me over several years to complete this book.

多年来，我结识了许多自由意志主义的朋友和团体，从他们那里汲取了丰富的知识和经验，受益匪浅，并得到了他们的鼎力支持。其中包括我的老友小杰克·克里斯；“拉斯维加斯团队”——罗斯巴德和霍普的昔日门生，如今已成为我的挚友：道格·弗伦奇（及迪安娜·福布什）、杰夫·巴尔、李·伊格洛迪、吉姆·约赫、乔·贝克尔；以及其他友人，如胡安·费尔南多·卡皮奥、格雷格和乔伊·莫林、康拉德·格拉夫、迈克尔·康纳根、雅各布·休伯特、吉恩·希利、加里·查蒂尔、杰拉德·凯西、理查德·斯托里、汤姆·伍兹、迈克尔·马利斯、鲍勃·墨菲、罗德里克·朗、扬·纳维森、弗兰克·范·邓恩、小罗伯特·布拉德利；吉尔·吉洛里（Gil Guillory）、保罗·爱德华兹（Paul Edwards）、雅各布·洛弗尔（Jacob Lovell）、罗布·威克斯（Rob Wicks）、格雷格·罗马（Greg Rome）、布莱恩·马丁内斯（Brian Martinez）、迪克·克拉克（Dick Clark）、艾萨克·伯格曼（Isaac Bergman）、丹尼尔·科尔曼（Daniel Coleman）、蒂莫·维尔卡拉（Timo Virkkala），以及我在“自由意志主义论坛”上的众多其他朋友（你们心知肚明）；詹姆斯·考克斯（James Cox）和丹尼尔·罗斯柴尔德（Daniel Rothschild）；财产与自由协会及米塞斯

研究院自 1995 年以来举办的无数活动和会议中的诸多朋友和学者，包括卢·罗克韦尔（Lew Rockwell）、大卫·戈登（David Gordon）、汤姆·迪洛伦佐（Tom DiLorenzo）、彼得·克莱因（Peter Klein）、杰夫·赫伯纳（Jeff Herbener）、乔·萨勒诺（Joe Salerno）、肖恩·加布（Sean Gabb）等；多年前的通信作者，如约翰·里登费尔特（Johan Ridenfeldt）和克里斯·惠滕（Chris Whitten）；合著者和朋友，如帕特里克·廷斯利（Patrick Tinsley）、杰夫·塔克（Jeff Tucker）和沃尔特·布洛克（Walter Block），其中前两位与我共同撰写了本卷中的章节。此外，特别感谢纳尔逊·洛夫廷（Nelson Loftin），多年来他一直督促我完成本书。

My dear friend Guido Hülsmann, whom I met on a bus from the Atlanta airport to the Mises Institute in Auburn in 1995 when we were both going there to meet Hans-Hermann Hoppe, has been an important friend and influence, both personally and intellectually.

我的挚友吉多·许尔斯曼（Guido Hülsmann），是 1995 年我们在从亚特兰大机场前往奥本米塞斯研究院的巴士上相识的——当时我们正要去见汉斯-赫尔曼·霍普——他一直是重要的朋友，无论是个人生活还是学术思想，都对我产生了重要影响。

My friend Wendy McElroy has also been an inspiration and sounding board and helped me see the light on IP.

我的朋友温迪·麦克尔罗伊（Wendy McElroy）也一直是我的灵感来源和参谋，帮助我认清知识产权的本质。

The notes for various chapters in this book also thank various commentators.

本书各章节的注释部分也向多位评论人士表达了谢意。

I would also like to thank Randy Barnett, and several LSU law professors, such as Saúl Litvinoff, Glenn Morris, William Hawkland, Alain Levasseur, Robert Pascal, and John Devlin, for inspiration, support, and guidance in my earlier years in law school and in the beginning years of my legal practice and scholarly and educational endeavors (Litvinoff and Pascal were not my professors but they became friends and correspondents after law school). I learned a great deal at the LSE about international law and legal scholarship from professor and now Baroness Rosalyn Higgins, later President of the International Court of Justice; she inspired and informed much of my subsequent legal publications on international law.

我还要感谢兰迪-巴尼特 (Randy Barn 如 Saúl 利特维诺夫 (Saúl Litvinoff)、格伦·莫里斯 (Glenn Morris)、威廉·霍克兰 (William Hawkland)、阿兰·莱瓦瑟 (Alain Levasseur)、罗伯特·帕斯卡 (Robert Pascal) 和约翰·德夫林 (John Devlin)，他们在我早年就读于法学院以及开始从事法律实践、学术和教育工作的最初几年给予了我启发、支持和指导 (Litvinoff 和 Pascal 不是我的教授，但他们在法学院毕业后成了我的朋友和通信者)。在伦敦政治经济学院，我从教授、现任男爵夫人罗莎琳·希金斯 (Rosalyn Higgins，后任国际法院院长) 那里学到了很多关于国际法和法律学术的知识；她启发并指导了我后来关于国际法的许多法律出版物。

I am also grateful to my intellectual adversaries, who have forced me to hone, refine, and clarify my arguments to counter and explain the errors in theirs.

我还要感谢我思想上的对手们，是他们迫使我反复淬炼、完善和澄清我的论点，以反驳和解释他们论点中的错误。

P.J. Doland, a fellow libertarian and web-designer with [www. DancingMammoth.com](http://www.DancingMammoth.com), has graciously hosted and helped me run my own websites and others I manage over the years, all in the service of liberty, which were invaluable in collecting, publishing, and assembling material used in the preparation of this book. Since I haltingly started this book project about fifteen years ago, I've had the assistance of several people, including Lisa Eldridge and Rosemary Denshaw (transcriptions); Justina Clark, Harry David, Lauren Barlow, and Carly Catt (copyediting); Susi Clark, of www.creativeblueprintdesign.com, for cover design, typesetting and publishing assistance; and Susan Bruck (proofreading, indexing, and bibliography).

P.J. 多兰德 (P.J. Doland) 是一位自由意志主义者，同时也是 www.DancingMammoth.com 的网页设计师。多年来，他慷慨地主持并协助我运营自己的网站以及我所管理的其他网站，这一切均为无偿服务。这些网站在收集、出版和汇总本书编写过程中所需材料方面，发挥了极其宝贵的作用。自十五年前我犹豫不决地开始撰写本书以来，得到了众多人士的帮助，其中包括丽莎·埃尔德里奇 (Lisa Eldridge) 和罗斯玛丽·邓肖 (Rosemary Denshaw) 的誊写工作；贾斯蒂娜·克拉克 (Justina Clark)、哈里·戴维 (Harry David)、劳伦·巴洛 (Lauren Barlow) 和卡莉·卡特 (Carly Catt) 的校对工作；苏西·克拉克 (Susi Clark) 为 www.creativeblueprintdesign.com 提供的封面设计、排版及出版支持；以及苏珊·布鲁克 (Susan Bruck) 在校对、索引和书

目编制方面的贡献。

The image on the back cover of the book is based on a painting by my childhood friend John Wax, of www.JohnWaxArt.com, which itself was based on photographs of a statue by H.C. Andersen.³ To get permission and arrange a private photographer at the Anderson Musuem in Rome, I was fortunate to have the help of my Italian libertarian friend and scholar, Roberta Modugno, and my Italian-speaking Canadian libertarian attorney friend Daniel Roncari.

本书封底的图片灵感源自于我儿时挚友约翰·瓦克斯（JohnWax）在 www.JohnWaxArt.com 网站上的一幅画作，而这幅画作则是基于安徒生（H.C. Andersen）一尊雕像的照片进行创作的。³为获取相关许可并安排在罗马安德森博物馆进行私人摄影，我有幸得到了两位朋友的鼎力相助：一位是意大利的自由意志主义学者罗伯塔·莫杜格诺（Roberta Modugno），另一位是精通意大利语的加拿大自由意志主义律师丹尼尔·朗卡里（Daniel Roncari）。

To all these, and many others not mentioned, I am grateful.

对于所有这些人，以及许多其他未提及的人，我深表感激。

³ See Kinsella, “The Story of a Libertarian Book Cover,” StephanKinsella.com (March 4, 2011).
见金塞拉：《自由意志主义书籍封面的故事》，StephanKinsella.com（2011 年 3 月 4 日）。

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第一辑 自由意志主义

PART I LIBERTARIANISM

第一章 我如何成为一名自由意志主义者

How I Became a Libertarian

First published as part of the LewRockwell.com autobiography series initiated by Walter Block, as "How I Became A Libertarian," LewRockwell.com (December 18, 2002). Later included as "Being a Libertarian" in *I Chose Liberty: Autobiographies of Contemporary Libertarians* (compiled by Walter Block; Mises Institute 2010). Additional biographical pieces may be found at www.stephankinsella.com/publications/#biographical.

作为沃尔特·布洛克（Walter Block）所发起的 LewRockwell.com 自传系列的一部分，该文最初于 2002 年 12 月 18 日发表于 LewRockwell.com，题为《我如何成为一名自由意志主义者》。随后，文章更名为《作为一个自由意志主义者》，并被收入《我选择了自由：当代自由意志主义者的自传》一书（沃尔特·布洛克编著，米塞斯研究院 2010 年出版）。更多传记作品可访问 www.stephankinsella.com/publications/#biographical 查阅。

Unlike many libertarians who dally with socialism before seeing the light, I have never been attracted to leftism. Indeed, although I of course welcome former pinkos to our ranks, I'm always a bit suspicious of anyone who could ever be swayed by that bunk.

许多自由意志主义者在认清真相之前，往往会徘徊于社会主义的边缘，而我与他们有所不同，我从未被左翼思潮吸引。事实上，尽管我当然很欢迎那些曾经左倾的前粉红们加入我们的行列，但我始终对那些容易被这种左派话语所魅惑的人持有一定的怀疑态度。

Born in 1965, I was reared in a small town near Baton Rouge, Louisiana. My natural aversion to leftism stems from this upbringing. The milieu—if South Louisiana can be said to have one—was nominally Democratic, but relatively apolitical, culturally conservative, and Catholic. I can't recall ever meeting any open or hardcore leftists until college.

我于 1965 年出生，在路易斯安那州巴吞鲁日（Baton Rouge, Louisiana）附近的一个小镇度过了童年。我对左派的天然反感正是源于这种成长背景。那个地区的社会氛围——如果南路易斯安那州能被称作拥有某种社会氛围的话——虽然在名义上是民主党占主导，但实际上对政治并不热衷，文化上偏向保守，且普遍信奉天主教。在

步入大学校门前，我未曾遇见过任何公开或坚定的左派人士。

There were other contributing factors that made me ripe for libertarianism. For one, I have always been strongly individualistic and merit-oriented. This is probably because I was adopted and thus have always tended to cavalierly dismiss the importance of "blood ties" and any inherited or "unearned" group characteristics. This made me an ideal candidate to be enthralled by Ayn Rand's master-of-universe "I don't need anything from you or owe you anything" themes.

还有一些其他促成因素让我彻底接受了自由意志主义。首先，我一直是一个坚定的个人主义者和功利主义者。这可能源于我的被领养经历，使我总是不假思索地认为“血缘关系”以及任何继承的或“不劳而获”的群体特征都无关紧要。这使我成为了安·兰德（Ayn Rand）“我不需要你的任何东西，也不欠你任何东西”这一宇宙之主题的理信徒。

Another factor is my strong sense of outrage at injustice, which probably developed as a result of my hatred of bullies and bullying. I was frequently attacked by them as a kid, because I was small for my age, bookish, and a smartass. Not a good combination.

另一个因素是我对不正义行为的强烈愤慨，这或许源于我对恶霸和欺凌行为的深恶痛绝。小时候，我常常遭受他们的欺凌，因为我身材矮小、书呆子气十足，且喜欢卖弄聪明。这种特质组合显然并不讨喜。

I attended Catholic elementary and high school in Baton Rouge. I had a love-hate relationship with Mrs. Reinhardt, Catholic High School's librarian. When she was not expelling me and my cronies from the library for pulling pranks, she would recommend books to me, as she knew I was an avid reader of both fiction and nonfiction. One day she recommended Ayn Rand's *The Fountainhead* to me.¹ (I believe this was in 1982, when I was a junior in high school—the same year Rand died.) "Read this. You'll like it," she told me. *Ex nihilo*—something. Rand's ruthless logic of justice appealed to me. I was thrilled to see a more-or-less rigorous application of reason to fields outside the natural sciences. I think this helped me to avoid succumbing, in college, to the simplistic and naïve empiricism-scientism that most of my fellow engineering classmates naturally absorbed. Mises's dualistic epistemology and criticism of monism-positivism-empiricism, which I studied much later, also helped shield me from scientism.

我在巴吞鲁日就读于天主教小学和中学。对于天主教高中的图书管理员莱因哈特夫人 (Mrs. Reinhardt)，我的情感复杂，既爱又恨。她深知我对阅读小说和非小说类书籍的热爱，因此，当她不因我和小伙伴们恶作剧而将我逐出图书馆时，总会为我推荐书籍。某日，她向我推荐了安·兰德 (Ayn Rand) 的《源泉》 (The Fountainhead)¹——我想那是在 1982 年，正值我高三，而兰德也于同年辞世。“读读这本书吧，你会喜欢的，”她对我说。从无到有 (Ex nihilo—something)，兰德那冷酷无情的正义逻辑深深吸引了我。我欣喜地看到，理性在自然科学之外的领域也得到了严谨的应用。这使我在大学中避免陷入简单幼稚的经验主义-科学主义，而我的大多数工科同学却自然而然地接受了这种观念。米塞斯的二元论认识论及其对一元论-实证主义-经验主义的批判，进一步强化了我对科学主义的免疫力。

By my first year of college (1983), where I studied electrical engineering, I was a fairly avid “Objectivist” style libertarian. I had read Henry Hazlitt’s Economics in One Lesson² and some of Milton Friedman’s works, but I initially steered clear of “libertarian” writing. Since Rand was so right on so many things, I at first assumed she—and her disciples Peter Schwartz and Leonard Peikoff—must be right in denouncing libertarianism as the enemy of liberty.

我在大学一年级 (1983 年) 学习电子工程，那时我已经是一个相当狂热的 “客观主义” 风格的自由意志主义者。我读过亨利·哈兹利特 (Henry Hazlitt) 的《一课经济学》² 和米尔顿·弗里德曼 (Milton Friedman) 的一些作品，但我最初对 “自由意志主义” 的文章避而远之。由于兰德在很多事情上都是对的，我起初以为她——以及她的弟子彼得·施瓦茨 (Peter Schwartz) 以及伦纳德·佩科夫 (Leonard Peikoff) ——谴责

¹ Ayn Rand, *The Fountainhead* (New York: Signet, 1996). See also Jerome Tuccille, *It Usually Begins with Ayn Rand* (Stein and Day, 1971); and “Libertarianism After Fifty Years: What Have We Learned?” (ch. 25).

安·兰德，《源泉》(纽约:Signet 出版社，1996)。参见 Jerome Tuccille 的《一切通常始于安·兰德》(Stein and Day 出版社，1971);《50 年后的自由意志主义:我们学到了什么?》(第二十五章)。

² Henry Hazlitt, *Economics in One Lesson* (New York: Three Rivers Press, 1988; <https://fee.org/resources/economics-in-one-lesson>).

亨利·黑兹利特，《一课经济学》(纽约:三河出版社，1988 年;<https://fee.org/resources/economics-in-one-lesson>)。

自由意志主义是自由之敌——一定是正确的。

And yet in my reading I kept coming across libertarians, whose views seemed virtually identical to Rand's "capitalist" politics. Finally, out of exasperation at trying to reconcile Rand's denunciation of libertarians with their seemingly similar views, I read Rothbard's For a New Liberty,³ and then several other works, such as Nozick, the Tannehills, David Friedman, etc.⁴ Before long I realized Rand's minarchism was flawed. Individual rights entail anarcho-capitalism; a state, even a minarchist one, necessarily violates the individual rights that Rand so passionately championed. Rand made a lot of sense on a lot of issues, but her arguments in favor of government were strained.

然而，在阅读过程中，我不断遇到自由意志主义者，他们的观点似乎与兰德的“资本主义”政治主张几乎完全一致。为了调和兰德对自由意志主义的谴责与他们看似相似的观点之间的矛盾，我阅读了罗斯巴德的《为了新自由》³，随后又研读了诺齐克、坦尼希尔夫妇、大卫·弗里德曼⁴等人的著作。不久之后，我意识到兰德的小政府主义存在缺陷。个人权利的本质意味着无政府资本主义；即使是小政府主义的国家，也必然会侵犯兰德所极力拥护的个人权利。尽管兰德在许多问题上论述精辟，但她支持政府的论点却显得牵强附会。

I remember attending my only Objectivist conference, in Dallas, with my good friend Jack Criss (a libertarian radio talk show host from Jackson, Mississippi). Entitled "Meeting of the Minds," the conference showcased Objectivist stars David Kelley, John Ridpath, and Alan Gottself. This was in March 1989, I believe, before David Kelley had been purged from official Objectivist circles for daring to praise Barbara Branden's biography The Passion of Ayn Rand.⁵ I had corresponded with Kelley who was gracious enough to take time to reply (this was before email) to my questions. I have

³ Murray N. Rothbard, For a New Liberty, 2d ed. (Auburn, Ala.: Mises Institute, 2006; <https://mises.org/library/new-liberty-libertarian-manifesto>).

穆瑞·罗斯巴德，《为了新自由》（第2版（阿拉巴马州奥米塞斯研究院，2006；）<https://mises.org/library/new-liberty-libertarian-manifesto>）。

⁴And many of the works listed in Stephan Kinsella, "The Greatest Libertarian Books," StephanKinsella.com (Aug. 7, 2006).

以及斯蒂芬·金塞拉在《最伟大的自由意志主义书籍》"中列出的许多作品。StephanKinsella.com（2006年8月7日）。

always admired and respected Kelley.

我记得我唯一一次参加客观主义研讨会是在达拉斯，与我的挚友杰克·克里斯（来自密西西比州杰克逊市的自由意志主义电台脱口秀主持人）一同前往。那次研讨会的主题为“思想交锋”，会上亮相的客观主义大咖包括大卫·凯利（David Kelley）、约翰·里德帕斯（John Ridpath）和艾伦·高特夫（Alan Gotthelf）。我相信那是在 1989 年 3 月，当时大卫·凯利尚未因敢于称赞芭拉·布兰登的传记《安·兰德蒙难记》⁵而被逐出官方的客观主义圈子。我曾与凯利通信，他友善地抽出时间回复了我的问题（那时还未普及电子邮件）。我一直非常钦佩并尊敬凯利。

I had several stimulating conversations with him at the conference, mostly on epistemology and philosophy. But I remember at a reception one of the students telling how he had taken his copy of *The Passion of Ayn Rand* and burned it in a private ceremony in his mom's back yard when he realized how "evil" it was. I think he sought to gain points among his audience by relating this tale. I recall Jack and I looking at each other with cocked eyebrows. "Book burning." Yes. Well. That was the last and only Objectivist conference I ever attended.

在会议上，我与他进行了几次极具启发性的对话，主题主要集中在认识论和哲学领域。然而，我清晰地记得，在一次招待会上，一位学生向我讲述了他的一段经历：当他深刻意识到《安·兰德蒙难记》(the *Passion of Ayn Rand*)这本书的“邪恶”之处时，他竟在自己母亲的后院举行了一场私人仪式，将这本书付之一炬。显然，他希望通过这个故事来赢得听众的共鸣。那一刻，我与杰克眉头紧锁，面面相觑，心中不禁感叹：“焚书！”是的，这确实是我参加的最后一次，也是唯一一次客观主义会议。

In the late-80s I started publishing columns in the LSU student newspaper, *The Daily Reveille*, from an explicitly libertarian perspective. As my interests became more sharply political and philosophical, my girlfriend (later wife) and friends urged me to consider law school. I was by this time in engineering grad school. Unlike many attorneys, I was not one of those who had always wanted to be a lawyer. In fact it never occurred to me

⁵ Barbara Branden, *The Passion of Ayn Rand* (New York: Anchor, 1987).
芭芭拉·布兰登，《安·兰德蒙难记》(纽约:Anchor 出版社, 1987)。

until my girlfriend suggested it over dinner, when I was wondering what degree I could pursue next, so as to avoid having to enter the workforce. At the time I thought one had to have a pre-law degree and many prerequisite courses that engineers would lack; and I feared law school would be difficult. I remember my girlfriend's chemical engineer father laughing out loud at my concern that law school might be more difficult than engineering. In retrospect, I can say that law school is not easy, it is a lot of work—but it is not that conceptually difficult. Lots of morons graduate from law school.

上世纪 80 年代末，我开始在路易斯安那州立大学的学生报刊《笛声日报》上发表专栏文章，明确提出了自由意志主义的观点。随着我对政治和哲学的兴趣日益浓厚，我的女朋友（后来的妻子）和朋友们劝我考虑攻读法学院。当时，我正在攻读工程学研究生学位。与许多律师不同，我并非那种一直渴望成为律师的人。事实上，我从未想过要成为一名律师，直到某次晚餐时，我的女朋友建议我这样做。那时，我正在思考下一步可以攻读什么学位，以避免直接进入职场。

当时，我认为进入法学院需要法学预科学位和许多工程师所缺乏的先修课程，因此担心法学院会非常困难。我还记得，当我向女朋友的化学工程师父亲表达了对法学院可能比工程学院更难的担忧时，他笑得前仰后合。如今回想起来，我必须承认，法学院的学习确实不易，需要付出大量努力，但在概念上的掌握却并不复杂。然而，法学院毕业的庸才也不乏其人。

By 1988 I was in law school and becoming a more well-rounded libertarian, having read by this time Rothbard, Mises, Bastiat, the Tannehills, and a non-trivial portion of the books offered in the LaissezFaire Books catalog. In that year there were two significant events in my life, from a libertarian perspective. One was Hans-Hermann Hoppe's controversial and provocative article in Liberty, "The Ultimate Justification of the Private Property Ethic." 6 In this article Hoppe sets forth his "argumentation ethics," which holds that the libertarian private property ethic is implied in the very activity of argumentation— because those engaged in argumentation already presuppose the value of conflict-avoidance and the ability to control property and thus, those arguing in favor of socialism contradict themselves.

1988 年，我踏入法学院的大门，逐渐成长成为一名更为全面的自由意志主义者。此时，我已经深入阅读了罗斯巴德、米塞斯、巴斯夏、坦内希尔夫妇的著作，以及自由放任主义图书目录中的大部分书籍。那一年，从自由意志主义的视角来看，我的生活

中发生了两件重大事件。

第一件大事是汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）在《自由》（Liberty）杂志上发表了一篇极具争议和挑衅性的文章——《私产伦理的终极证成》（The Ultimate Justification of the Private Property Ethic）⁶。在这篇文章中，霍普提出了他的“论证伦理学”（argumentation ethics）理论。他认为，自由意志主义的私有财产伦理内嵌于论证活动之中——因为参与论证的人已经预设了避免冲突的价值和对财产的控制能力。因此，那些支持社会主义的论证者在逻辑上显得自相矛盾。

The second thing was that I encountered the legal principle of “estoppel” in my contracts class. This is the ubiquitous legal principle that precludes someone from asserting a legal claim or position that is inconsistent with earlier statements or behavior. I remember sitting in contracts class, as Professor Morris lectured on this topic, thinking “Eureka!” to myself, as I began to see that the concept of estoppel meshed perfectly with libertarian logic (and also with Hoppe’s argumentation ethics). The libertarian non-aggression principle holds that force may only be used in response to (initiated) force. There is a nice symmetry here. One may use force, if and only if it is in response to initiated force (aggression).⁷

第二件事是，我在课堂上接触到了“禁止反言”的法律原则。这一原则普遍存在于法律体系中，旨在禁止某人提出与其先前陈述或行为相悖的法律主张或立场。记得当时坐在教室里，莫里斯教授讲解这一话题时，我内心突然豁然开朗，因为我开始意识

⁶ Hans-Hermann Hoppe, “The Ultimate Justification of the Private Property Ethic,” Liberty 2, no. 1, September 1988), p. 20, republished as “On the Ultimate Justification of the Ethics of Private Property,” chap. 13 in The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp). See also Stephan Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” StephanKinsella.com (May 27, 2011), and other material available at www.StephanKinsella.com/lffs.

汉斯-赫尔曼·霍普，《私产伦理的终极证成》，《自由》第2期，第1号，1988年9月），第20页，以《论私产伦理的终极证成》为题，作为《私有财产的经济学与伦理学：政治经济学与哲学研究》的第13章重新发表（阿拉巴马州奥本：米塞斯研究院，2006年[1993]；www.hanshoppe.com/eepp）第13章。另见金塞拉，《论证伦理学与自由：简明指南》，StephanKinsella.com（2011年5月27日），以及可在www.StephanKinsella.com/lffs上查阅的其他资料。

到禁止反言的概念与自由意志主义的逻辑（也与霍普的论证伦理学）竟然如此完美契合。自由意志主义所倡导的“互不侵犯原则”主张，武力只能作为对主动发起的武力的回应。这其中蕴含着一种精妙的对称性：一个人只有在回应发起的武力（侵犯）时，才被允许使用武力。⁷

⁷ For more on this, see “A Libertarian Theory of Punishment and Rights” (ch. 5) and “Dialogical Arguments for Libertarian Rights (ch. 6); also Stephan Kinsella, “The Genesis of Estoppel: My Libertarian Rights Theory,” StephanKinsella.com (March 22, 2016). For more on argumentation ethics, see chaps. 5 and 6, as well as “Defending Argumentation Ethics” (ch. 7); “The Undeniable Morality of Capitalism” (ch. 22); Hans-Hermann Hoppe, “The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible,” chap. 7 in Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc); idem, “From the Economics of Laissez Faire to the Ethics of Libertarianism,” “The Justice of Economic Efficiency,” and “On the Ultimate Justification of the Ethics of Private Property,” chaps. 11 – 13 in *The Economics and Ethics of Private Property*; idem, “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); idem, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016),” *The Property and Freedom Podcast*, ep. 163 (June 30, 2022); Stephan Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” StephanKinsella.com (May 27, 2011); idem, “Hoppe’s Argumentation Ethics and Its Critics,” StephanKinsella.com (Aug. 11, 2015); Frank van Dun, “Argumentation Ethics and the Philosophy of Freedom,” *Libertarian Papers* 1, art. no. 19 (2009; www.libertarianpapers.org); Marian Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics,” *Libertarian Papers* 1, 20 (2009; www.libertarianpapers.org); Norbert Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” *Analiza i Egzystencja* 58 (2022), 35 – 64.

更多相关内容，请参阅《自由意志主义的惩罚与权利理论》（第五章）和《自由意志主义权利的对话论证》（第六章）；另见斯蒂芬·金塞拉：《禁止反言的起源：我的自由意志主义权利理论》，StephanKinsella.com（2016年3月22日）。关于论证伦理学的更多内容，请参见第5章和第6章，以及“论证伦理学”一文。关于论证伦理学的更多内容，请参见第5章和第6章，以及《捍卫论证伦理学》（第7章）；《资本主义不可否认的道德》（第22章）；汉斯-赫尔曼·霍普，《资本主义的伦理正当性和为什么社会主义在伦理上是站不住脚的》载于汉斯-赫尔曼·霍普，《社会主义与资本主义理论：经济学、政治学和伦理学》第7章。（阿拉巴马州奥本海默斯研究院，2010年 [1989]；www.hanshoppe.com/tsc）；同上，《从自由放任的经济学到自由意志主义的伦理学》、《经济效率的正义性》和《论私产伦理学的终极证成》，

I saw in class that day that the principle of estoppel could help explain and justify the non-aggression rule. Force was justified against an aggressor, because having used force himself he would be estopped from objecting to retaliation. For him to assert that force is wrong—which he must do in order to object to retaliation—would contradict the “force is permissible” maxim underlying his own act of aggression. He is “estopped” from asserting a claim inconsistent with that underlying his earlier behavior.

那天在课堂上，我发现禁止反言原则有助于解释和证明互不侵犯原则。对侵犯者使用武力是正当的，因为他首次使用了武力，因此无权反对报复。若他声称使用武力是错误的——为了反对报复，他必须如此主张——这将与他先前侵犯行为所依据的“武力是允许的”原则自相矛盾。他被“禁止”提出与其先前行为所依据的原则相悖的主张。

My estoppel theory complements and draws on Hoppe's argumentation ethics. For years I believed that I first came up with my estoppel theory and then read Hoppe's work and linked the two together. Now I am not so sure and think that I first read and absorbed Hoppe's argumentation ethic, which made me fixate on the similar logic of estoppel when I coincidentally studied it in law school shortly thereafter.

我的禁止反言理论补充和借鉴了霍普的论证伦理学。多年来，我一直以为自己是首次提出禁止反言理论之人，随后才接触到霍普的著作，并将两者相结合。然而，现在我对这一看法不再那么确信。我倾向于认为，我最初是阅读并吸收了霍普的论证伦理学，这激发了我对类似逻辑的兴趣，进而在法学院学习禁止反言理论时，这种兴趣

载于《私有财产的经济学与伦理学》，第 11-13 章；同上，《关于共有财产、公共财产和私有财产以及全面私有化的基本原理》，载于《伟大的小说：财产、经济、社会和衰落的政治》（第二扩展版，米塞斯研究院，2021 年）；www.hanshoppe.com/tg/f/；同上，“PFP163 | 汉斯-赫尔曼·霍普，《论证伦理学》（PFS 2016），”财产与自由播客，ep163（2022 年 6 月 30 日）；斯蒂芬·金塞拉，《论证伦理学与自由：简明指南》，StephanKinsella.com（2011 年 5 月 27 日）；同上，《霍普的论证伦理学及其批评者》，StephanKinsella.com（2015 年 8 月 11 日）；弗兰克·范·邓恩，《论证伦理学与自由的哲学》，《自由意志主义论文集》第 1 期，第 19 条（2009 年；www.libertarianpapers.org）；玛丽安·埃布拉斯《对霍普论证伦理学批判的回应》，《自由意志主义论文集》，2009；www.libertarianpapers.org）；《自由意志主义的论证伦理学、语言的先验语用学与冲突-自由原则》，《语言分析》58（2022），35-64。

得以延续。

I was at King's College London in 1991, pursuing a master's degree in law, when I produced the first draft of a paper arguing estoppel can help justify libertarian rights. Somewhat naïvely, I submitted it to King's College Law School's law review, whereupon it was summarily rejected. Not daunted, I submitted an improved draft to Tibor Machan for his journal Reason Papers. I had read many of Machan's works, including his Human Rights and Human Liberties⁸ and Individuals and Their Rights,⁹ and he had been kind enough to respond to several of my letters. I remember speaking with him one night, about the submission, from a students' pay telephone at King's College in London, and then getting drinks at a pub with friends, none of them knowing or able to appreciate that I had just spoken with a "famous" libertarian writer whose books I had read. "Estoppel: A New Justification for Individual Rights" was published in the Fall 1992 issue of Reason Papers.¹⁰

1991 年，我在伦敦国王学院（King's College London）攻读法学硕士学位期间，撰写了一篇论文初稿，旨在论证禁止反言原则如何有助于证明自由意志主义权利的正当性。当时，我满怀信心地将这篇初稿提交给了国王学院法学院的法律评论，却遗憾地遭到了立即驳回。尽管如此，我并未气馁，而是将改进后的稿件寄给了蒂博尔·马钱（Tibor Machan），希望能在《理性论文》（Reason Papers）杂志上发表。我深知马钱的大名，并拜读过他的多部著作，包括《人权与人类自由》⁸和《个人及其权利》⁹。幸运的是，他非常友好地回复了我的几封邮件。

记得有一天晚上，我在伦敦国王学院的学生付费电话上与马钱深入讨论了这篇论文。随后，我和朋友们一同前往酒吧畅饮，但他们却无从知晓，也无法理解我刚刚与一位“著名”的自由意志主义作家进行了对话，而这位作家的作品我早已熟读。《禁止反言：个人权利的新理由》最终发表于《理性论文》1992 年秋季号。¹⁰

⁸ Tibor R. Machan, Human Rights and Human Liberties: A Radical Reconsideration of the American Political Tradition (Chicago: Burnham Inc Pub, 1975).

蒂博尔·r·马钱，《人权与人类自由:对美国政治传统的激进反思》(芝加哥:Burnham Inc Pub, 1975)。

⁹ Tibor R. Machan, Individuals and Their Rights (Chicago: Open Court Publishing, 1989).

蒂博尔·r·马钱，《个人及其权利》(芝加哥:Open Court 出版社, 1989)。

¹⁰ See also Kinsella, "The Genesis of Estoppel: My Libertarian Rights Theory" and

Another shift in my libertarian life occurred in 1994, when I first met Lew Rockwell, Hans Hoppe, and Murray Rothbard. But let me back up. After finally completing my nine years of higher education, I had to earn a living. So in 1992 I started practicing law in Houston. When Hoppe's second English-language book, *The Economics and Ethics of Private Property*, came out in 1993,¹¹ I decided to do a review essay for a law review; the review was published in 1994 in the *St. Mary's Law Journal*.¹² I promptly sent it to Hoppe, who sent back a warm thank you note.

我的自由意志主义人生的另一次转变发生在 1994 年，那时我首次遇见了卢·罗克韦尔、汉斯·霍普和穆瑞·罗斯巴德。然而，让我回溯一下。在历经九年的高等教育后，我面临着谋生的现实。于是，在 1992 年，我开始在休斯顿从事法律工作。1993 年，霍普的第二本英文著作《私有财产的经济学与伦理学》问世，¹¹我决定为法律评论撰写一篇评论文章；这篇文章最终于 1994 年发表在《圣玛丽法律杂志》上。¹²我随即将其寄给了霍普，他回复了一封热情洋溢的感谢信。

By mid-1994 I had moved to Philadelphia (I was there for three years, until I returned to Houston in 1997, where I reside today), and resolved to attend the John Randolph Club meeting in October 1994, near Washington, D.C., which was a gathering of paleoconservatives from the Chronicles crowd and several libertarians associated with the Mises Institute, part of a short-lived attempt at yet another libertarian-conservative "fusionism."¹³ My primary goal was to meet Hoppe, Rothbard, and Rockwell. I was thrilled to meet them and other scholars associated with the Mises

chapters 5 – 7 in this volume. Tibor became a good friend. He passed away in 2016. See Kinsella, "Remembering Tibor Machan, Libertarian Mentor and Friend: Reflections on a Giant," *StephanKinsella.com* (April 19, 2016).

另见金塞拉，《禁止反言的起源：我的自由意志主义权利理论》以及本卷第 5-7 章。蒂博尔成了我的好朋友。他于 2016 年去世。见金塞拉，《缅怀蒂博尔-马钱，自由意志主义的导师和朋友：对巨人的反思》，" *StephanKinsella.com*（2016 年 4 月 19 日）。

¹¹ Hoppe, *The Economics and Ethics of Private Property*.

霍普，《私有财产的经济学与伦理学》。

¹² Stephan Kinsella, "The Undeniable Morality of Capitalism," *St. Mary's L.J.* 25, no. 4 (1994): 1419 – 47, included as chapter 22 in this volume.

斯蒂芬金塞拉，《资本主义不可否认的道德》，《圣玛丽法律杂志》25, no.4(1994): 1419-47，作为本卷第二十二章列入。

Institute, and was able to get Murray to autograph my copy of Man, Economy, and State,¹⁴ which he inscribed “To Stephan: For Man & Economy, and against the state –Best regards, Murray Rothbard.” Well, I know the nicer one-volume edition is out now, but just try to get me to part with my musty, tattered two-volume copy. Rothbard unfortunately passed away on January 1995, just two months later, but I was happy that I was able to meet him.

到 1994 年年中，我搬到了费城（我在那里生活了三年，直到 1997 年返回休斯顿，现定居于此），并决心参加 1994 年 10 月在华盛顿特区附近举行的约翰-伦道夫俱乐部会议。这是一个汇集了《编年史》的旧保守主义者和几位与米塞斯研究院有联系的自由意志主义者的聚会，标志着自由意志主义与保守主义“融合主义”的又一次短暂尝试。¹³我的首要目标是见到霍普、罗斯巴德和罗克韦尔。见到他们以及其他与米塞斯研究院相关的学者，我激动不已。此外，我还获得了穆瑞在我那本《人、经济与国家》¹⁴上的亲笔签名，他题词道：“致斯蒂芬：支持人与经济，反对国家——最诚挚的问候，穆瑞·罗斯巴德”。尽管我知道现在已有更优质的单行本，但你休想让我丢弃那本发霉且破旧的两卷本。遗憾的是，两个月后，罗斯巴德于 1995 年 1 月不幸去世，但我深感庆幸能与他有过一面之缘。

Since then I have attended many Mises Institute conferences, including every one of the annual Austrian Scholars Conferences, initiated, if I am not mistaken, in 1995. Over the years I gained more appreciation for Mises and Austrian economics, and for the unparalleled scope of Rothbard's scholarly contributions to economics and political philosophy, and related fields. I am now not only an anarcho-libertarian, but a Misesian-Austrian. I have gained an increasingly deeper respect for Lew Rockwell and

¹³ See references in Kinsella, “The Three Fusionisms: Old, New, and Cautious,” StephanKinsella.com (Jan. 16, 2022).
参见金塞拉的《三次融合:旧的、新的和谨慎的》。StephanKinsella.com(2022 年 1 月 16 日)

¹⁴ Murray N. Rothbard, Man, Economy, and State, with Power and Market, Scholars ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>).
穆瑞·罗斯巴德，《人、经济和国家，权力和市场》，学者编，第 2 版(阿拉巴马州奥本)。:米塞斯研究院，2009;<https://mises.org/library/man-economy-andstate-power-and-market>).

the singular achievement that is the Mises Institute. It has become my intellectual home.

自那时起，我积极参与了米塞斯研究院的众多会议，包括历届奥地利学者年会。若记忆无误，这些会议自 1995 年便已启动。多年来，我对米塞斯及其奥地利经济学理念的理解不断深化，对罗斯巴德在经济学、政治哲学及相关领域的卓越学术贡献也有了更深刻的体会。如今，我不仅坚定地秉持无政府自由意志主义理念，更成为了一名忠实的米塞斯主义的奥派追随者。对于卢·罗克韦尔及米塞斯研究院所取得的非凡成就，我怀有日益深厚的敬意。米塞斯研究院已然成为我思想家园。

第二章 何为自由意志主义

What Libertarianism Is

Originally published in Property, Freedom, and Society: Essays in Honor of Hans-Hermann Hoppe (Guido Hülsmann & Stephan Kinsella, eds., Mises Institute, 2009). The original author's note thanked "fellow Hoppe aficionados Juan Fernando Carpio, Paul Edwards, Gil Guillory, Manuel Lora, and Patrick Tinsley for helpful comments."

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财产、权利与自由

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.

自由意志主义者通常能在一系列广泛的政策和原则上达成共识。然而，要确定自由意志主义的决定性特征，或明确其与其他政治理论和制度的区别，却并非易事。

Various formulations abound. It is said that libertarianism is about: individual rights; property rights;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 And justice is just giving someone his due—which, again, depends on what his rights are.³

各种观点层出不穷。有人认为，自由意志主义者的核心理念包括：个人权利、财产权利¹、自由市场、资本主义、正义以及互不侵犯原则。然而，并非所有这些理念都完全适用。资本主义和自由市场描述了自由意志主义社会中产生或允许的催化条件，但并未涵盖自由意志主义的其他方面。至于个人权利、正义和侵犯，则可以归结为财产权。正如穆瑞·罗斯巴德 (Murray Rothbard) 所解释的，个人权利本质上就是财产权。

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 ToThink 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.

尽管“私有财产权”一词被广泛使用，但财产权在某种意义上必然是公开的，因为财产边界或界线必须是公开可见的，这样非所有者才能避免侵犯。关于财产边界这方面的更多信息，请参阅汉斯-赫尔曼·霍普 (Hans-Hermann Hoppe)：《社会主义与资本主义理论：经济学、政治学和伦理学》（阿拉巴马州奥本：米塞斯研究院，2010年；www.hanshoppe.com/tsc），第 167-168 页；《自由意志主义理论：所有权转让、有约束力的承诺和不可让渡性》（第 9 章），第 38 页；《自由意志主义理论：所有权转让、有约束力的承诺和不可让渡性》（第 9 章），第 38 页；“无国家社会中的法律和知识产权”（第 14 章），第二部分 C 节，注释 7 和随附文本，注释 24-25 处的文本，以及第三部分 B 节；斯蒂芬·金塞拉，《反对知识产权》（阿拉巴马州奥本：米塞斯研究院，2008 年），第 30-31 页，第 49 页；《并不意味着所有权，反之亦然：剖析》（第 11 章），正文第 24 节。另见同上，《如何思考财产权》(2019)”，StephanKinsella.com (2021 年 4 月 25 日)；以及 Randy E. Barnett，《的同意理论》，专栏 *L. Rev.* 86 (1986;www.randybarnett.com/pre2000): 269-321, at 291,303。

²而正义不过是赋予某人应有的权利——这也取决于他的权利究竟是什么。³

The nonaggression principle is also dependent on property rights, since what aggression 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

互不侵犯原则亦建立在财产权的基础之上，因为何谓侵犯行为，取决于我们对（财产）权利的定义。例如，若你对我施加暴力，这便构成侵犯，因为我对自己的身体享有财产权。同样，若我未经允许取走你拥有的苹果，此行为即为非法侵入，属于侵犯，其根本原因在于你对该苹果拥有所有权。若不默认受害者拥有相应的财产权，我们便无法明确界定侵犯行为。⁴

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.

穆瑞·罗斯巴德，“‘人权’即财产权”，载于《自由的伦理》，载于《The Ethics of Liberty》（纽约，纽约大学出版社，1998年；<https://mises.org/library/human-rights-property-rights>）；同上，《为了新自由》，第2版（奥本，阿拉巴马州：米塞斯研究院，2006；<https://mises.org/library/new-liberty-libertarian-manifesto>），第42页。另见《《反对知识产权》二十年后：回顾与展望》（第15章），第四部分B。

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).

“正义是一种永恒不变的愿望，要使每个人都得到应有的回报……法律的准则是：诚实地生活，不伤害任何人，给予每个人应得的。”J.A.C. 托马斯 编著，《查士丁尼学说：文本、翻译和评注》，J.A.C. 托马斯译，（阿姆斯特丹：北荷兰出版公司，1975）。

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/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).)

标准的自由意志主义陈词滥调是，互不侵犯原则（NAP；自由意志主义者有时也将其称为互不侵犯公理，这是“公理”一词的特异用法，无疑是受安-兰德对“公理”一词的特异用法的启发）禁止对他人的身体或财产使用武力——或威胁或欺诈发起武力。一些自由意志主义者或自由意志主义的批评者认为，非法侵入已占资源、欺诈和威胁并不完全符合 NAP，因为这些事情实际上并不是“侵犯”，而“侵犯”一词是可以被正确理解的。（参见詹姆斯-柴尔德和本杰明-弗格森对自由意志主义的批评，他们认为自由意志主义无法解释为什么欺诈可以被禁止，见《自由意志主义的契约理论》（第 9 章）第三部分 E 节。从字面上看，互不侵犯原则禁止在未经他人允许的情况下打人或使用他人的身体（“侵犯”），这意味着自我所有权或身体所有权。因此，互不侵犯原则意味着自我所有权，反之亦然。它们只是表达同一观点的不同方式：拥有自己的身体意味着不允许对其进行侵犯；禁止侵犯意味着自我/身体所有权。（另见《论自由意志主义法律理论、自我所有权与毒品法》（第 23 章））。

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).

然而，自由意志主义将身体所有权的基本原理扩展到对外部资源的类似财产权；同时

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 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 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 owner of the money.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.

因此，作为我们政治哲学的描述性术语，资本主义和自由市场显得过于狭隘。正义、个人权利和侵犯都被归结为财产权，或者说，都是通过财产权来定义的。那么，财产权的本质究竟是什么呢？难道自由意志主义与其他政治哲学的区别仅仅在于我们支持财产权，而其他哲学则不支持？显然，这种观点是站不住脚的。毕竟，财产权只是对稀缺资源——我常称之为冲突性资源——的排他性控制权。⁵财产权明确了哪些

也禁止威胁和欺诈。(同上)。因此，在我看来，“互不侵犯原则”一词是自由意志主义基本财产权原则——自我所有权加上基于先占的外部资源所有权，以及欺诈和威胁——的一个可接受的简称，只要记住，从字面上看，它指的是身体所有权，其他财产权是这一主要财产权的延伸和基础。另见金塞拉，《自由意志主义纲领中的侵犯与财产权板块》，StephanKinsella.com（2022年5月30日）；同上，“KOL259 | 《如何思考财产权问题》，2019年新罕布什尔自由论坛”，金塞拉自由播客（2019年2月9日）；《论自由意志主义法律理论、自我所有权与毒品法》（第二十三章）；《五十年后的自由意志主义：我们学到了什么？》金塞拉，“KOL229 | 《厄尼·汉考克秀：与艾伦·考文的知识产权论证》，《金塞拉谈自由》播客（2017年11月16日）；同上，“KOL161 | 《论证伦理学、禁止反言，自由意志主义权利：亚当·斯密论坛，莫斯科》（2014），《金塞拉谈自由》播客（2014年11月7日）。

⁵ In revising this chapter, this footnote grew to unmanageable length. I have placed the

人拥有——即有权控制——特定区域或管辖范围内的各种稀缺资源。

然而，每个人和每种政治理论都提出了某种形式的财产理论。各种社会主义并未否认财产权；每种社会主义都会为每种稀缺资源指定一个所有者。⁶如果国家将某个行业国有化，意味着国家对这些生产资料拥有所有权。如果国家向你征税，意味着国家对所征收的资金拥有所有权。如果我的土地被转让给了资金的所有者，同样体现了财产权的转移。⁷如果国家征召某人入伍，或将其监禁，作为对其拒绝服兵役、未纳税或使用非法毒品的惩罚，那么国家就声称对该人的身体拥有合法所有权。

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

relevant commentary in Appendix I, below.

在修订本章的过程中，这个注释变得越来越长，难以处理。我将相关评注放在下面的附录 I 中。

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.

关于从俄国式社会主义、社会民主主义式社会主义、保守主义的社会主义到社会工程的社会主义等各种形式的社会主义的系统分析，见霍普《社会主义和资本主义理论》，第三章——第六章。霍普认识到各种形式的社会主义的共同点及其与自由意志主义（资本主义）的区别，精辟地将社会主义定义为“对私有财产和私有财产主张的制度化干涉或侵犯”。同上，第 2 页。参见下文注释 14 中霍普的引文。

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.

即使是私人小偷，在拿走你的手表时，也暗含着他有权控制手表的准则——他是手表的主人。他并不否认财产权，只是在谁是所有者的问题上与自由意志主义者不同而已。事实上，正如亚当-斯密所说“如果说强盗和杀人犯之间还存在社会的话，那么根据老生常谈的观点，他们至少必须避免互相抢劫和谋杀”。亚当-斯密，《道德情操论》（印第安纳波利斯：自由基金，[1759] 1982 年），II.II.3。

owner of each contestable, conflictable resource, and how to determine this.

因此，保护和尊重财产权并非自由意志主义所独有。任何法律体系都会定义并执行相应的财产权制度。自由意志主义的独特之处在于其特定的财产归属规则——它明确认可谁是各类可争夺、具有冲突性资源的所有者，以及如何确定这一归属。

自由意志主义的财产权

LIBERTARIAN PROPERTY RIGHTS

A system of property rights assigns a particular owner to every scarce (conflictible) resource.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 Both human bodies and non-human scarce resources are desired for use as means by actors in the pursuit of various goals.¹⁰

财产权制度为每一种稀缺（或具有冲突性）资源指定了特定的所有者。⁸这些资源

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.”

正如霍普在前言中就“私有财产和先占”原则所指出的那样：从逻辑上讲，要避免作为行动手段（即财货）使用或可用的外部物质对象方面的所有冲突，所需要的是显而易见的：每种物品在任何时候都必须归私人所有，即由某个特定的人排他性控制”。Note also that it is only scarce (conflictible) 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-conflictible thing, cannot be owned; any law purporting to assign property rights in such things is just a disguised reassignment of property rights in existing conflictible resources (money, factories, printing presses, etc).

还要注意的，只有稀缺性（冲突性）的东西才能被占有，即成为财产权的主体。例如，正如《反对知识产权二十年》（第 15 章）中《作为消极地役权的知识产权》一节所指出的，信息或知识（一般而言是配方）作为一种非稀缺性、非冲突性的东西，是不能被占有的；任何旨在转让这类东西的财产权的法律，都只是对现有冲突

显然涵盖土地、树木果实等自然资源。然而，自然资源并非唯一的稀缺资源。每个行动人均拥有、控制、识别并与一个独特的人体相关联，这同样也是一种稀缺资源。⁹无论是人的身体还是其他非人类稀缺资源，皆为行动人实现各种目标的手段。¹⁰

性资源（金钱、工厂、印刷机等）财产权的变相再转让。

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.

正如霍普所观察到的，即使在一个物产极大丰富的天堂：

每个人的身体仍然是一种稀缺资源，因此仍然需要制定财产规则，即关于人们身体的规则。人们不习惯从稀缺物品的角度来思考自己的身体，但在想象伊甸园这一最理想的情境时，我们就有可能意识到，自己的身体确实是稀缺物品的原型，为了避免冲突，必须以某种方式确立使用这种物品的财产权，即排他性所有权。

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).

霍普：《社会主义与资本主义理论》，第 8-9 页。另见汉斯-赫尔曼·霍普：《关于共有财产、公共财产和私有财产以及全面私有化的理由》，载于《伟大的虚构：财产、经济、社会和衰落的政治》（第二扩展版，米塞斯研究院，2021 年；www.hanshoppe.com/tgf）；汉斯-赫尔曼·霍普，《论证伦理学》，《财产与自由》播客（第 163 集）；2016；www.PropertyAndFreedom.org）；《因果关系和侵犯》（第八章）（讨论使用他人的身体作为手段）。

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.

注：将行动人的“自我”或人格与他的肉体联系起来（而非等同起来），与某些（甚至是反自由意志主义的！）批评家混淆视听地宣称相反，并不是神秘主义或不连贯的，就像在概念上区分心灵与大脑并不是神秘主义一样。见《我们如何拥有自己》（第 4 章），第 1 节及以后。

¹⁰ See "Causation and Aggression" (ch. 8).

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

因此，任何政治或法律制度都必须赋予人的身体以及外部事物以所有权。

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 (conflictible resources), in accordance with principles of original appropriation, contractual title transfer, and rectification.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.

自由意志主义主张，个人权利——尤其是财产权——是基于几条简洁明了的原则进行分配的：对于人的身体而言，体现为自我所有权；对于先前无主的外部事物（即冲突性资源），则依据先占原则、所有权转让原则以及纠正原则进行分配。¹¹接下来，

见《因果关系与侵犯》（第8章）。

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.

我们将逐一探讨这些问题。需要注意的是，在本章中，我的核心目标是阐述自由意志主义的原则，而非必然要论证这些原则的合理性；后续章节将提供更为详尽的论据来支持这些原则。

身体财产

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

让我们首先探讨自由意志主义对于人体财产归属的规则，以及与之相关的人体侵犯概念。¹²

正如纳尔维森写道：

罗伯特·诺齐克将有关财产问题的原则划分为三类：(1) 初始获得，即外部事物的财产权从以前不属于任何人的状态获得；(2) 转移，即财产（即财产权）从一个权利人转移到另一个权利人；(3) 纠正，即当财产的正义分配被公认的不正义做法（如盗窃和欺诈）破坏时，恢复财产的正义分配。纳尔维森《自由意志主义思想》，再版(Broadview出版社，2001)，第 69 页。另见罗伯特·诺齐克，《无政府、国家和乌托邦》(纽约:Basic Books, 1974)，第七章，第一节；罗德里克·t·朗：《为什么自由意志主义者相信只有一种权利》，C4SS.org，2014 年 4 月 7 日；<https://c4ss.org/content/25648/>（“众所周知，自由意志主义的财产权是由先占的正义原则(将一个人的劳动与以前不属于自己的资源混合在一起)、转让的正义原则(双方同意)和纠正的正义原则(比如，赔偿加上损害赔偿)所支配的”)；Gary Chartier《无政府与法律秩序:无国家社会的法律与政治》(剑桥大学出版社，2013 年)，第 64-65 页，等，阐述了与先占和的所有权转让相对应的“基线占有规则”。关于为纠正而进行的转让，见同上，第五章《纠正损害》，特别是第 II.C.2，和《惩罚和权利的自由意志主义理论》(第五章)，第 IV.B 和 IV.G 部分。

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).

另见金塞拉：《自由意志主义的局限？一个不同的观点》，”StephanKinsella.com(2014 年 4 月 20 日)；同上，“KOL345|金塞拉的自由意志主义的“宪法”或:国家宪法与自由意志主义私法典(PorcFest 2021)，《金塞拉谈自由》播客(2021 年 6 月 26 日)。

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).

这个问题在《我们如何拥有自己》(第 4 章)中有更详细的论述；另见《自由意志主义的惩罚与权利理论》(第 5 章)。

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 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

自由意志主义者通常将互不侵犯原则（或称 NAP）视为他们的核心价值观。正如安·兰德（Ayn Rand）所言：“只要人们希望共同生活，任何人都不得主动——你听到了吗？任何人不得对他人主动使用武力。”¹³ 或者，如罗斯巴德所阐述：

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/aynrand-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.

安·兰德，《高尔特的演讲》，摘自《为了新知识》中的“物理力量”条目，《安·兰德词典：从 A 到 Z 的客观主义》，哈利·宾斯万格主编（纽约：新美国图书馆，1986；<https://perma.cc/L4YA-96CC>。）具有讽刺意味的是，客观主义者经常抨击自由意志主

自由意志主义的信条立足于一个核心公理：任何个人或群体均不得侵犯他人的人身与财产。这一公理可被称作“互不侵犯公理”。“侵犯”的定义是对他人的人身或财产施加或威胁施加有形武力。因此，“侵犯”与“入侵”在本质上

义者对侵犯的概念“缺乏语境”，也就是说，除非“侵犯”或“权利”这些概念被嵌入到客观主义的更大哲学框架中，否则这些概念就毫无意义，尽管高尔对侵犯的定义是直截了当的物理主义的定义，即对他人使用物理力量。例如，在《安-兰德词典》（<http://aynrandlexicon.com/ayn-rand-ideas/ari-q-and-a-on-libertarianism.html>）的“自由意志主义问答”中，安·兰德研究所的某个人写道：

在这种用法中，“自由意志主义者”剽窃了安-兰德的不使用武力原则，并将其转化为公理，否认哲学基本原理的必要性和相关性——不仅是基本的伦理，还有基本的形而上学和认识论……自由意志主义宣称，自由的价值和发动武力的罪恶是不言而喻的首要原则，不需要任何理由，甚至不需要解释——对“自由”、“武力”、“正义”、“善”和“恶”等关键概念不加定义。它宣称与形而上学、认识论和伦理学中的所有观点——甚至主观主义、神秘主义、怀疑主义、利他主义和虚无主义——兼容，以“憎恨国家”取代思想内容。

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/>).

另见彼得·施瓦茨，《自由意志主义:对自由的曲解》，见安·兰德的《理性之声:客观主义思想随笔集》(Meridian 出版社，1990)和《安·兰德词典》(<http://aynrandlexicon.com/>)中的“自由意志主义者”条目。

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.

但如上所述，兰德自己支持“互不侵犯原则”的表述——“任何人不得对他人使用武力——你听到了吗？任何人都不得开始对他人使用武力”——信赖于最基本的概念，如武力和武力的发起，这其实并不需要过多的解释；相反，她的理论建立在这些几乎无争议的概念之上。正如她的理论可以使用这些基本概念作为构件一样，自由意志主义也可以连贯地使用这些原则来阐述我们所反对的东西，而不会陷入主观主义、虚无主义等。毕竟，人们可以用语言进行交流，而无需全盘采用客观主义。另外参见沃尔特·布洛克对施瓦茨的回应：《自由意志主义 vs.客观主义:对彼得·施瓦茨的回应》，《理性论文》第26期(2003年夏季);<https://reasonpapers.com/archives/>): 39–62。

含义相同。¹⁴

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.

罗斯巴德《为了新自由》，第 23 页。另见同上，《财产与犯罪》，载于同上，《自由的伦理》中：“自由意志主义理论的基本公理是，每个人都必须是自我所有者，任何人都无权干涉这种自我所有权”（第 60 页），“.....侵犯性武力行为的含义是，一个人未经受害者同意而侵犯另一个人的财产。这种侵犯可能是针对一个人的身体财产（如人身攻击），也可能是针对他的有形财货的财产（如抢劫或非法侵入）”（第 45 页）。

霍普写道：

如果.....所采取的行动未经同意地侵犯或改变了他人身体的完整性，并将此身体用于不符合此人自身喜好的用途，那么这种行动.....就被称为侵犯.....。除了行动概念之外，财产是社会科学中最基本的范畴。事实上，本章将要介绍的所有其他概念——侵犯、、资本主义和社会主义——都可以用财产来定义：侵犯是对财产的侵犯，是财产所有者之间的非侵犯关系，社会主义是对财产侵犯的制度化政策，资本主义是承认财产和主义的制度化政策。

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

霍普，《社会主义与资本主义理论》，第 22、18 页。

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

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) 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 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

换句话说，自由意志主义主张，侵犯权利的唯一途径是使用武力，即实施侵犯。（自由意志主义还认为，尽管对他人身体使用武力是不被允许的，但为了应对侵犯而使用的武力——如防御性、恢复性或报复性/惩罚性武力——是正当的¹⁵。）现在，就身体而言，侵犯的定义是明确的：侵入他人身体的边界，通常称为殴打，或更广泛地说，未经他人同意使用其身体。¹⁶人与人之间的侵犯概念本身就预设了对身体的财产权

(<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.

在现代自由意志主义运动的早期（见《五十年后的自由意志主义：我们学到了什么》（第 25 章）；金塞拉，《前言》载于切斯-雷切尔斯，《自发秩序：无国家社会的资本主义案例》（2015；<https://archive.org/details/ASpontaneousOrder0>），大多数自由意志主义者现在所说的互不侵犯原则有时被称为互不侵犯公理，可能是因为兰德在她的哲学中对公理一词的使用有些特殊。参见“公理”条目：安·兰德词典（<http://aynrandlexicon.com/lexicon/axioms.html>）。最初深受兰德影响的罗斯巴德本人有时也会使用这一用语，从上面引用的段落中可以看出这一点。并非所有自由意志主义者都相信互不侵犯原则是兰德意义上的“公理”——一个不证自明的真命题，因为否认它就会导致矛盾——但所有前后一致的自由意志主义者，无论出于何种原因，都反对侵犯的合法性，因而赞成非侵犯原则（即自我所有权），至少在很大程度上是这样。

¹⁵ See “A Libertarian Theory of Punishment and Rights” (ch. 5).

见《自由意志主义的惩罚与权利理论》（第 5 章）。

¹⁶ The following terms and formulations may be considered as roughly synonymous, depending on context: aggression; initiation of force; trespass; invasion; unconsented

——更具体地讲，每个人至少在表面上都是自己身体的所有者。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 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”

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.

根据上下文，以下术语和表述可被视为大致同义：侵犯；使用武力；非法侵入；入侵；未经同意（或未经邀请）改变他人身体或财产的完整性（或使用、控制或占有）。另见金塞拉，《自由意志主义党纲中的侵犯与财产权要点》；同上，《霍普论物理完整性与关于价值的财产权》，StephanKinsella.com (2011 年 6 月 12 日)。关于如何界定“权利”概念的进一步讨论，见《自由意志主义权利的对话论证》（第 6 章），第 22 节及附文，等。

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.

“表面上”，因为在某些情况下，一个人对自己身体的某些权利可以说是被剥夺或丧失的，例如，当一个人犯罪时，从而授权受害者至少可以对侵犯者的身体使用防卫性武力（这意味着侵犯者在这种程度上不是其身体的所有者）。有关这方面的更多内容见《自由意志主义的契约理论》（第 9 章），第三部分 B；《不可让渡性和惩罚：对乔治·史密斯的答复》（第十章）；以及《知识、计算、冲突和法律》（第十九章），第 81 段及所附案文。

incarcerated for life or executed. Libertarians believe in self-ownership. Non-libertarians—statists—of all stripes advocate some form of slavery.¹⁹

非自由意志主义政治哲学持有多种不同观点。在这些体系中，每个人对自己的身体享有一些有限的权利，但并非完全或排他性的权利。社会或国家自认为是社会的代理人，对每个公民的身体也拥有一定程度的权利。这种部分奴役的现象隐含在税收、征兵和毒品禁令等国家行为和法律之中。¹⁸自由意志主义者主张，每个人都是其身体的完全所有者：他有权控制自己的身体，有权决定是否吸食毒品、参军、纳税等。然而，那些支持此类国家禁令的各种非自由意志主义人士必然认为，国家或社会至少是那些受此类法律约束的人的身体的部分所有者——如果是被终身监禁或被处决的被征召者或非侵犯性“罪犯”，甚至可能是完全的所有者。自由意志主义者坚信自我所有权，而非自由意志主义——包括各形各色的国家主义者——则主张某种形式的奴隶制。¹⁹

自我所有和避免冲突

SELF-OWNERSHIP AND CONFLICT AVOIDANCE

21

如果没有财产权，围绕可争夺资源的争议将始终存在冲突。通过为每项资源明确指定所有者，法律制度构建了非所有者必须尊重的公开、明确的边界，从而确保资源

¹⁸ See Robert W. McGee, “The Body as Property Doctrine,” in Christoph Lüdtke, ed., Handbook of the Philosophical Foundations of Business Ethics (Springer, 2013). 见 Robert W. McGee, 《身体作为财产的原则》，载于 Christoph Lüdtke 编辑的《商业伦理哲学基础手册》（施普林格出版社，2013 年）。

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. 同样，霍普认为：没有国家就没有社会主义，只要有国家就有社会主义。因此，国家正是将社会主义付诸行动的机构；由于社会主义信赖于针对无辜受害者的侵犯性武力行为，因此侵犯性武力行为是任何国家的本质。霍普《社会主义与资本主义理论》，第 177 页。

的使用免于冲突。然而，自由意志主义并不接受任何特定的财产分配规则。²⁰自由意志主义更倾向于主张自我所有权，而非他人所有权（如奴隶制）。²¹

The libertarian seeks property assignment rules because he values or accepts various grundnorms such as justice, peace, prosperity, cooperation, conflict-avoidance, civilization.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 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 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—hat constitutes the objective link sufficient to give that person a claim to his body superior to typical third party claimants.

自由意志主义追求财产归属规则，因为它重视或接受各种基本准则，如正义、和平、繁荣、合作、避免冲突和文明。²²自由意志主义认为，自我所有权是与这些基本规

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). 关于稀缺性概念和冲突的可能性对财产规则出现的重要性，见霍普，《社会主义与资本主义理论》，第 20-21 页、第 160 页等处；以及金塞拉，《关于后来者和拓殖概念的思考》；或者，《为什么‘所有权’这个概念本身就意涵着只有自由意志主义原则才是正当的》中的相关讨论，米塞斯经济学博客（2007 年 8 月 15 日）。

²¹ See also “How We Come to Own Ourselves” (ch. 4).

另见《我们如何拥有自己》(第四章)。

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,

范相容的唯一财产归属规则；它隐含于这些基本规范之中。正如霍普教授所指出的，若要真正实现避免冲突的财产规范，特定资源的所有权归属不能是随机的、任意的、特殊的或有偏见的。²³财产所有权必须在“所有权人与所主张的资源之间存在客观的、

which in turn imply libertarian norms.

“基本规范”(Grundnorm)是法律哲学家汉斯·凯尔森(Hans Kelsen)的术语，指的是假设的基本规范或规则，它们是法律体系合法性的基础或最终来源。参见汉斯·凯尔森：《法律与国家通论》，安德斯·韦德伯格译。(剑桥,质量：哈佛大学出版社，1949)。我用这个术语来指文明人预设的基本准则，例如在论证话语中，这反过来又意味着自由意志主义准则。

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).

霍普在其为自由意志主义权利辩护的“论证伦理学”中表明，自由意志主义的基本准则实际上是所有文明人在其文明程度上——即在论证理由期间——必然预设的。参见霍普《社会主义与资本主义理论》第七章；《自由意志主义权利的对话论证》(第六章)；和《捍卫论证伦理学》(第七章)。

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,” MisesEconomics Blog (Sept. 6, 2006). See also “A Libertarian Theory of Punishment and Rights” (ch. 5), text at notes 3 and 77:

关于为什么人们（在某种程度上）确实重视这些基本规范的讨论，见金塞拉，《劳动分工作为基本规范和权利的源泉》，米塞斯经济学博客（2009年4月24日），以及同上，《同理心和权利的源泉》，米塞斯经济学博客（2006年9月6日）。另见《自由意志主义的惩罚与权利理论》（第5章），正文注释3和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.

文明人也关注惩罚的正当性。他们想要惩罚，但也想知道这种惩罚是否合理。他们希望能够合法地进行惩罚——因此，人们对惩罚理论感兴趣……惩罚理论关注的是如何证明惩罚的正当性，为那些不愿做出不道德行为的正派人士提供一个可以惩罚他人的理由。当然，这是有用的，为有道德的人提供指导和保证，使他们能够妥善处理那些试图伤害他们的人。

²³ See Hoppe, A Theory of Socialism and Capitalism, pp. 157 – 65. See also “A

主体间可确定的联系"的基础上, 归属于相互竞争的权利主张人之一。²⁴就一个人自己的身体而言, 其与身体之间的独特关系——即直接和即时的控制, 以及至少在某种意义上, 身体与个体的不可分割性——这一事实构成了客观联系, 足以使此人对其身体的权利主张优于典型的第三方权利主张人。

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

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.

参见霍普《社会主义与资本主义理论》, 第 157-165 页。另见《自由意志主义的惩罚与权利理论》(第 5 章), 第 III.C 部分《惩罚侵权行为》和第 III.D 部分《侵犯者的潜在防御》;《捍卫论证伦理学》(第 7 章); 参见霍普《社会主义与资本主义理论》, 第 157-165 页。另见《自由意志主义的惩罚与权利理论》(第 5 章), 第 III.C 部分《惩罚侵权行为》和第 III.D 部分《侵犯者的潜在防御》;《捍卫论证伦理学》(第 7 章); 金塞拉《特殊伦理学的问题, 或者为什么每个人都必须承认普遍原则的有效性》, StephanKinsella.com (2011 年 11 月 10 日);《我们如何拥有自己》(第四章), 第 15 段; 和《自由意志主义权利的对话论证》(ch. 6), n.43 and accompany text. 和 "自由意志主义权利的对话论证"(第 6 章), 第 43 段及附文。

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.

霍普《社会主义与资本主义理论》, 第 23 页。另见《出售并不意味着所有权, 反之亦然: 一个剖析》(第 11 章)。为了进一步讨论客观财产规则的必要性, 这些规则可以确定现在可以使用哪些资源, 而不必等待后来者的允许, 请参阅《我们如何拥有自己》(第四章), 第 14 段及附文。

此外，任何声称拥有他人身体的局外人，都无法否认这种客观联系及其特殊地位。因为局外人在自身情况下也必然预设了这一点。究其原因，当其试图获取对他人的支配权，主张对他人身体的所有权时，必然要先承认自己对自己身体的所有权。这无疑表明，局外人确实赋予了这种联系某种意义，然而，他却忽略了他人与其身体之间的联系所蕴含的意义。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.

自由意志主义认为，自我所有权规则是唯一普遍适用的原则，且与追求和平、合作及避免冲突的目标高度契合。我们认识到，每个人在表面上都是自己身体的所有者，这是基于其与自身身体独特的联系和关联——即他对身体直接且即时的控制——使得他相较于其他人更有资格拥有自己的身体。

关于外部事物的财产权

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

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.

关于这一点的阐述，见《我们如何拥有自己》（第 4 章），“直接控制”和“总结”部分；《捍卫论证伦理学》（第 7 章）；《无国家社会中的法律与知识产权》（第 14 章）Part II.C；霍普《社会主义与资本主义理论》，第 1、2 和 7 章。另见《我们如何拥有自己》（第 4 章）第 7 节中奥伯龙-赫伯特的引文和罗斯巴德的相关引文。

before we can determine what constitutes aggression.

自由意志主义对其他稀缺资源——即世界上的外部物体——也采用了相似的推理逻辑。这些物体与身体存在差异，曾一度处于无主状态。对于身体而言，不允许侵犯的原则直接体现了自我所有权的概念。然而，针对外部物体，我们必须首先明确其所有者身份，然后才能界定何为侵犯行为。

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.

就像利用身体一样，人类需要借助外部物品作为手段来实现各种目标。由于这些物品稀缺，潜在的冲突也随之产生。与对待身体的原则相似，自由意志主义提倡确定财产权归属，以确保资源能够和平、无冲突且高效地被利用。因此，类似于身体的使用权，财产应归属于对某一稀缺资源拥有最合理权利主张或联系的人——“最合理权利主张”的标准旨在促进和平、无冲突的人际互动和资源使用。

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 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 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.

然而，与人的身体不同，外部物体并非个人身份的组成部分，也不受个人意志的直接控制——更为关键的是，它们最初处于无主状态。²⁶在此背景下，自由意志主义认

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): 关于身体和为权利目的而拓殖的事物之间的区别的进一步讨论，见《自由意志主义的契约理论》(第九章)，第 III.B 部分；以及《我们如何拥有自己》(第 4 章)。另见卡斯珀·利珀特-拉斯穆森 (Kasper Lippert-Rasmussen)，《反对自我所有权:对一个人的身体没有不顾事实的所有权》，《哲学与公共事务》36，第 1 期 (2008): 86-118, at 88-89(注释省略);

Rightand left-libertarians ... agree that:

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

左右两派自由意志主义者.....一致认为：

不对称命题：对外部资源的所有权在道德上与对自己身心的所有权本质上是不同的。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.

例如，每个人一入尘世即都拥有自己，但对外部资源的所有权是通过个人行使获得这种所有权的道德力量来获得的。

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.

诺齐克对不对称命题的认同，体现在他对一个人如何成为一个无主的外部事物的所有者的描述上，他的描述虽然相当粗略，但大体上是洛克式的，因为他没有对一个人如何成为他自己的——从道德上说——心灵和身体的所有者提供类似的描述。如果没有特殊情况，比如器官被盗，一个人就开始拥有自己。同样，大家 (Otsuka) 认为，对外部事物的所有权是有条件的，即必须满足平等主义的附带条件，要求福利机会均等；他假定，在这个意义上，对自己的所有权是没有条件的。

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

识到，相关的客观联系在于先占原则——即对先前无主资源的改造或圈占（*embordering*），类似于洛克式的拓殖，亦即对事物的首次使用或占有。²⁷ 依照这一

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.

引用罗伯特·诺齐克的《无政府、国家和乌托邦》(牛津:Basil Blackwell 出版社, 1974), 第 174-182 页和迈克尔·大冢 (Michael Otsuka) 的《没有不平等的自由意志主义》(牛津:牛津大学出版社, 2003), 第 22-29 页。另见 Olle Torpman, 《中间的自由意志主义和功利主义的附带条件》(《价值探究》季刊) (2021 年 9 月 2 日;

<https://philpapers.org/rec/TORMAT-4>), at § 1.1 (着重号为原文所加): 自由意志主义最突出的论点涉及完全的道德自我所有权, 根据这一论点, 每个人对任何算作自己的东西——包括她的身体部位、器官、血液、卵子、精子、干细胞、思想等——都拥有基本的道德权利。我们可以把这些称为人力资源。大多数版本的自由意志主义也允许人们获得对自然资源 (即非人力资源) 的道德所有权——如土地、矿产、水、空气等。我们可以称之为外部资源。我们对人力资源的权利是自然的, 因此无需获取, 而对外部资源 (自然资源) 的权利则必须以某种方式获取.....

引用埃里克·麦克, 《财产的自然权利》, 《社会哲学与政策》第 27 期, 第 1 期 (2010): 53-78, at 54, 和 Bas van der Vossen, 《何为先占?》《政治、哲学与经济》8, 第 4 期 (2009): 355-373, at 368。

²⁷ “Original appropriation” is the broader concept for the acquisition of previously unowned scarce (conflictible) 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, conflictible resource, whether movable or immovable.

“先占 (original appropriation)”是一个更宽泛的概念, 指的是获取先前无主的稀缺 (可引发冲突的) 资源, 包括土地或房地产 (不动产), 而 “拓殖 (homesteading)” 有时被用作先占 (original appropriation) 的一个子集, 涉及不动产 (土地), 如 “宅基地”。不过, 拓殖通常被更广泛地使用, 在本书中, 我经常将 “拓殖” 与先占同义, 指对任何类型的无主、冲突性资源的占有, 无论是动产还是不动产。

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 “Book 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:

关于无主稀缺资源的占有性质，见金塞拉在《关于迟到者和拓殖思想的思考》中的引用和讨论霍普和 de Jasay 的观点，以及下面注释 32。具体见霍普，《社会主义与资本主义理论》，第 24、160-162、169-171 页；以及安东尼·德·雅塞伊，《反对政治：论政府、无政府和秩序》（伦敦和纽约：劳特利奇出版社，1997），第 158 页等及后续页。各页，第 171 页等及后续页。各页。安东尼·德·雅塞关于《反对政治：论政府、无政府和秩序》的书评有进一步的讨论（第 20 章）。德·雅塞的论点预设了正义、效率和秩序的价值。鉴于这些目标，他提出了三个政治原则：

(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.

（1）如果有疑问，就不要采取政治行动（第 147 页及后续页。各页）；（2）可行的推定是自由的（第 158 页及后续页。各页）；（3）让排除站得住脚（第 171 页及后续页。各页）。关于原则（3）“让排除站得住脚”，德·雅塞就拓殖或占有无主物的性质提出了精辟的评论。德·雅塞将财产等同于所有者“排除”他人对其的使用，例如将不动产（土地）圈起来或用栅栏围起来，或寻找或创造（并保留）动产（有形的实物）。他的结论是，由于被侵占物没有其他所有者，因此，从表面上看，任何人都无权反对第一占有人主张所有权。因此，该原则的意思是“让所有权继续存在”，即对于从自然状态中占有的财产或通过追溯这种占有的所有权链而最终获得的财产，其所有权主张应得到尊重。这与霍普为财产的“自然”理论所做的辩护是一致的。霍普《社会主义与资本主义理论》，第 20-24 页，第七章。关于占有性质的进一步讨论，见许尔曼（Jörg Guido Hülsmann），《财产经济学的先验基础》，Q.J. Austrian Econ. 7, no. 4 (Winter 2004; <https://mises.org/library/priori-foundations-property-economics-0>): 第 51-57 页。

理念，对于某个先前的无主之物，第一个（在前的）使用者仅凭其更早的使用时间，便相较于第二个（在后的）权利主张者，拥有表面上更为合理的权利主张。

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 while possession is actual control—"the factual authority that a person exercises over a corporeal thing."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.

为什么占有是确定所有权的关键环节？首先，请牢记，对于这类稀缺资源，核心问题是：谁是资源的所有者？回顾一下，所有权是指控制、使用或占有的权利，²⁸而占有则意味着实际控制——“一个人对有形物行使的实际权利”。²⁹问题的关键不在于谁物理上占有，而在于谁拥有所有权。因此，要确定谁是资源的所有者，前提是要区分所有权和占有权——即区分控制权（或排除权）（所有权或财产权）与实际控制权（占有权；经济支配权）。答案必须考虑到先前无主物的特性：也就是说，它们必须在某

²⁸ See note 5 and accompanying text, above, and Appendix I.

见上文注 5 和所附文本，以及附录 I。

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.

A.N. Yiannopoulos, 路易斯安那州民法论著，财产(West Group, 2001 年第 4 版)，第 301 条(着重号为原文所加);另见路易斯安那州民法典(https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), art.3421(占有是指对有形物体（动产或不动产）的扣押或享用，由一个人自己持有或行使，或由另一个人以他的名义持有或行使"（黑体后加））。另见《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章），第 35 段及以后关于这一点的讨论。

个时刻被第一所有者所拥有。

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 Such a "system," far from avoiding conflict, makes conflict inevitable.³¹

答案必须充分考虑寻求该答案者的预设目标：即制定一套允许无冲突使用资源的规则。正因如此，答案不应简单归结为谁拥有资源或谁能够获取资源，谁就是资源的所有者。持此观点等同于采纳了一种“强权即公理”的制度，在这种制度下，由于缺乏明确的区分，所有权实际上退化为了占有权。³⁰这种“制度”不仅无法避免冲突，反而使冲突变得不可避免。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 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 The crucial importance of the prior-later distinction to libertarian theory is why Professor Hoppe repeatedly

³⁰ See, in this connection, the quote from Adam Smith in note 7, above.
这方面，参见上文注释 7 中亚当·斯密的引文。

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.
顺便提一下，这也是互助主义关于土地所有权的“占有”立场非自由意志主义的和不正义的原因。在修订本章的过程中，这个注释变得冗长不堪。我已将相关评注放在下面的附录 II 中。

emphasizes it in his writing.³⁴

与“强权即公理”的方法不同，从上述见解中可以清晰地看出，所有权的前提在于先后顺序的差异：任何特定方式确定谁为资源的所有者，谁就相较于后来者拥有更合理的权利主张。³²若非如此，他便不是真正的所有者，而仅仅是当前的使用者或占有者。在这个强权即公理的世界里，所谓的所有权根本不存在——这与探究本身的预设相悖。若第一位所有者并未比后来者拥有更合理的权利主张，那么他便不是所有者，而只是占有者，所谓的所有权亦不复存在。更广泛而言，后来者的权利主张不及先前的占有者或权利主张者，先来者要么是资源的拓殖者，要么其权利可追溯至拓殖者或先前的所有者。³³先来后到的区别对于自由意志主义理论至关重要，这也是霍普教授在其著作中反复强调这一区别的缘由。³⁴

³² See Kinsella, “Thoughts on the Latecomer and Homesteading Ideas.”

参见金塞拉，《关于后来者和拓殖观念的思考》。

³³ See Louisiana Code of Civil Procedure, art. 3653, providing:

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

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 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.

见《路易斯安那州民事诉讼法》第 3653 条。该条规定：

为获得承认其不动产所有权的判决.....，原告.....应：如果法院认定被告占有不动产，则原告应证明其已从先前的所有人处或通过占有时效获得所有权；或者，如果法院认定被告未占有不动产，则原告应证明其所有权优于被告。另见《路易斯安那民法典》第 526 条、第 531-532 条；Yiannopoulos, 《路易斯安那民法论文集》，《财产》，第 255-279 条和第 347 条等。

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.

例如，参见霍普《社会主义与资本主义理论》，第 168-171 页；同上，《私有财产的经济学和伦理学：政治经济学和哲学研究》（奥本，阿拉巴马州，米塞斯研究院，2006 [1993]；www.hanshoppe.com/eepp），第 327-330 页；另见金塞拉对这些问题及相关问题的讨论，《关于后来者与拓殖观念的思考》；《捍卫论证伦理学》（第 7 章），“客观联系：先用、口头主张和先后区别”一节。特别是，关于客观财产规则的必要性的进一步讨论，这些规则可以决定现在可以使用哪些资源，而不必等待后来者的批准，见《我们如何拥有自己》（第 4 章），第 14 节和附文。

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 “Book 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.

关于这一点，也可参看德·雅塞《反对政治》一书，金塞拉《关于后来者和拓殖观念的思考》以及《安东尼·德·雅塞《反对政治》书评》（第 20 章）对此作了进一步讨论和引述。另见德·雅塞的论点（注 27，上文），即由于被占有的东西没有其他所有

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 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

因此，自由意志主义在财产权问题上的立场是，为了确保稀缺资源能够无冲突且高效地被利用，特定资源的财产权应当归属给特定的所有者。然而，如前所述，财产权的归属不能是随机的、任意的或特定的；相反，财产权的归属必须基于“所有者与所要求的资源之间存在客观的、主体间可确定的联系”。³⁵从上述考量中可以看出，这种

Commented [X1]: 根据前文分析可知，这种关联性具体表现为两种形式：或是原始拓居者通过物理改造或划界行为实现对资源的实际控制，或是通过契约形成的产权链条可追溯至原始拓居者。

者，因此从表面上看，没有人有权反对第一个占有者主张所有权。德·雅塞的“让排他性地存在”观念，以及霍普强调的先来后到的区别，揭示了拓殖本身的性质。人们经常会提出这样的问题：哪类行动构成或足以构成拓殖（或霍普有时所说的“嵌入”（embordering）；哪类“劳动”必须与某物“混合”；拓殖扩展到哪些财产？什么“算”为“足够的”拓殖？我们可以看到，这些问题的答案与什么是争议物的问题有关。换句话说，如果B声称对A所拥有（或以前拥有）的物品拥有所有权，那么争议的框架本身就有有助于确定争议中的物品是什么，以及怎样才算拥有该物品。如果B声称对某一资源拥有所有权，那么他就希望获得在一定程度上根据其性质对其进行控制的权利。那么问题就变成了，是否有其他人根据“它”（有争议的事物）的性质在之前就控制了它；也就是说，是否有其他人已经对它进行拓殖，所以B只是后来者？这与德·雅塞的“让排他性地成立”原则相关联，该原则的基础是，如果某人确实能够控制某项资源，以至于其他人被排除在外，那么这种排他性就应该“成立”。当然，特定稀缺资源的物理性质和人类使用这种资源的方式将决定“控制”这种资源和排斥他人所需的行动的性质。参见穆瑞·罗斯巴德《经济学的论证》一书中《法律、财产权和空气污染》一文对“相关技术单位”的讨论，（奥本，阿拉巴马州，米塞斯研究院，2011年；<https://mises.org/library/economiccontroversies>）；也见B.K.马库斯，《频谱应该是私有财产：无线技术的经济、历史和未来》，《米塞斯日报》（2004年10月29日，<https://mises.org/library/spectrum-should-be-private-property-economics-historyand-future-wireless-technology>），以及同上，罗斯巴德《无线电自由》，《自由意志主义研究》，第20期。2（2006年春季；<https://mises.org/library/radio-free-rothbard>）：17-51。

³⁵ Hoppe, A Theory of Socialism and Capitalism, p. 23.

霍普，《社会主义和资本主义理论》，第23页

联系体现为原始拓殖者对资源的物理转变或圈占，或是通过可追溯的所有权链来确立。

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 indirectly, 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-

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>). 需要明确的是，这并不意味着只有当一个人的所有权可以追溯到 "亚当" 或第一个拓殖者时，所有权或财产权才能成立。参见上文注释 33 中提到的 "共同作者" 规则；金塞拉，《罗斯巴德论土地所有权中的 "原罪"：1969 vs. 1974》，StephanKinsella.com (2014 年 11 月 5 日)；同上，《米塞斯、罗斯巴德和霍普论财产权分配中的 "原罪"》，StephanKinsella.com (2014 年 10 月 7 日)；《五十年后的自由意志主义：我们学到了什么？》（第二十五章）。许多自由意志主义者都被这个问题绊住了。参见 R.W. 布拉德福德，《异象的对比》，《自由》第 10 期，第 4 期(1997 年 3 月; <https://perma.cc/7FDT-G7FD>): 57-63, 在 58.

《关于的所有权转让理论》，见《自由意志主义理论》（第 9 章）；威廉姆森·M·埃弗斯，， 《重建法》， 《自由意志主义研究》， 第 1 期。1977 年冬; <https://mises.org/library/toward-reformulation-law-contracts>): 3-13; 罗斯巴德，《自由的伦理》中《财产权和理论》， (<https://mises.org/library/property-rights-and-theory-contracts>)。

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).

霍普总结了基于先占原则的所有权转让中，外部资源的所有权和财产权问题：

然而，谁拥有哪些稀缺资源作为私有财产，谁又不拥有呢？首先，每个人都拥有自己的身体，只有本人而非他人能够直接控制（我只能通过直接控制我的身体来间接影响你的身体，反之亦然）。尤其在讨论和论证当前问题时，只有本人能直接控制自己的身体。否则，若将身体所有权分配给间接控制者，冲突将不可避免，因为直接控制者只要存活，就无法放弃对自己身体的直接控制。特别是，若非如此，作为财产纠纷中的论证者，任何两人都无法就谁的意志占上风进行论证和论证，因为论证和论证的前提是双方均对各自的身体拥有排他性控制权，从而在无冲突的互动中自行得出正确判断。

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

其次，对于仅能间接控制的稀缺资源（即必须通过我们自身自然赋予且未被他人占用的身体来占有的资源）：排他性控制权（财产）应由首先占有该资源的人，或通过自愿（无冲突）交换从其前所有者手中获得该资源的人获得，并归属于他。这是因为，只有资源的首位占有者（以及所有后续通过自愿交换链与其关联的所有者）能够在无冲突（即和平）的情况下获得并维持对资源的控制权。相反，若将排他性控制权赋予后来者，冲突将不可避

Commented [X2]: 其次，对于只能通过间接方式控制（即必须通过我们与生俱来、未被占有的身体进行占用）的稀缺资源：排他性控制权（即所有权）归属于首次占用该资源者，或通过自愿（无冲突）交换从前任所有者处取得者。因为只有资源的首位占用者（以及通过自愿交换链条与其相关联的后继所有者），才能以无冲突的方式——即和平地——获得并行使控制权。反之，若将排他性控制权赋予后来者，不仅无法避免冲突，反而从根本上违背规范设定的初衷，致使冲突变得不可避免且永久化。

免，这违背了规范旨在永久性避免冲突的核心目的。³⁷

一致性和原则性

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 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).

并非只有自由意志主义者才堪称文明人。事实上，大多数人都会对上述一些考虑因素给予适当的重视。在他们看来，一个人通常被视为自己身体的主人。一个拓殖者拥有他所占有的资源——除非国家“通过法律运作”从他手中剥夺。³⁸这正是自由意志主

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.

汉斯-赫尔曼·霍普，《一种现实的自由意志主义》，LewRockwell.com，2013 年 9 月 30 日);另见类似的论点，同上，《共有，公共和私有财产，以及全面私有化的基本原理》，第 85-87 页。

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.

义者与非自由意志主义者之间的主要区别：自由意志主义者始终反对侵犯，这种侵犯被定义为跨越财产边界。具体而言，如果是身体，财产权被理解为基于自我所有权进行归属；如果是其他物品，财产权则被理解为基于先前占有或拓殖以及契约性转让所有权的基础上进行归属（此外还包括为纠正目的而进行的转让）。

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 Thus, means are employed, according to the actor's understanding of causal laws, to achieve various ends—ultimately, the removal of some felt uneasiness.

这一权利框架源于自由意志主义对和平互动与合作——简言之，对文明行为——的一致性和原则性的重视。与米塞斯关于人的行动的观点相似的理论或许能为我们提供启示。根据米塞斯的观点，人的行动旨在减轻某种不安逸。³⁹ 因此，行动人基于对

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").

国家法律和宪法条款往往口头上承认各种人身权和财产权的存在，但随后又将其收回，承认只要 "依法 "或 "非任意"，国家就有权管理或侵犯该权利。例如，见《俄罗斯宪法》第 25 条 ("住宅不可侵犯。除联邦法律或法院判决规定的情况外，任何人无权违背居住者的意愿进入住宅") 和第 34 条 ("人人有权进入住宅")，以及第 34 条 ("人人有权自由利用自己的能力和财产从事企业活动或法律不禁止的任何其他经济活动")；《爱沙尼亚宪法》第 31 条 ("爱沙尼亚公民有权从事商业活动，成立营利性协会和联盟。法律可确定行使这一权利的条件和程序")；《世界人权宣言》第 17 条 ("人人有权享有自己的财产和自由")。第 17 条 ("人人有权单独拥有财产，也有权与他人共同拥有财产....，任何人的财产都不得被任意剥夺")；第 29(2)条 ("在任何情况下，人人有权单独地以及与他人合伙地拥有财产")；第 29 条第 2 款 ("人人在行使其权利及自由时，应仅受法律所规定的限制，其唯一目的在于保证对他人的权利和自由给予应有的承认和尊重，并适应民主社会中道德、公共秩序和普遍 福利的正当要求")。

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.

路德维希·冯·米塞斯，《人的行动》，学者版。（米塞斯研究院，

因果规律的理解，采取多种手段以实现不同目标，最终目的是消除某种不安逸。

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 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

文明人对与他人进行武力斗争的前景感到不安。一方面，出于某些实际原因，他希望控制某种特定的稀缺资源，并在必要时对他人使用武力，以实现控制的目的。另一方面，他也希望避免错误地使用武力。由于某种原因，文明人在与同伴发生武力冲突时会感到不情愿和不安逸。或许，他不愿与他人就某些物品发生武力冲突，是因为他对他人怀有同理心。⁴⁰也许，合作的本能是社会进化的结果。正如米塞斯所指出的，

有些人的唯一目的就是改善自身的状况。而另一些人，他们意识到同胞的困难所带来的不安逸，不亚于甚至超过了他们自身的需求。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

1998; <https://mises.org/library/human-action-0>), pp.13-14, et pass.

⁴⁰ For further discussion of the role of empathy in the adoption of libertarian grundnorms, see note 22, above.

关于同理心在采纳自由意志主义基本准则中的作用的进一步讨论，见上文注释 22。

⁴¹ Mises, *Human Action*, p. 14.

米塞斯《人的行动》第 14 页。

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 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.

无论出于何种原因，由于这种不安逸，当存在武力冲突的可能性时，文明人便会寻找理由以武力控制稀缺资源，他们渴望获取这些资源，然而其他人却持反对态度。同理心——或任何促使人类遵循自由意志主义基本准则的因素——引发了某种形式的不安逸，进而促成了伦理行动。文明人可以被定义为那些为使用人际武力寻找正当理由的人。当不可避免地需要使用武力来保卫生命或财产时，文明人便会寻求合理的依据。当然，由于寻求正当理由的人倾向于理性和和平（毕竟，论证是一种和平活动，必然发生在对话过程中），⁴² 他们所追求的是公平的、所有人都能接受的、基于事物本质的、普适性的、允许无冲突使用资源的规则。自由意志主义财产权原则是唯一符合这些标准的候选规则。因此，如果说文明人是为使用武力寻找正当理由的人，那么自由意志主义者则是严肃认真对待这一努力的人。他们对武力持有深刻的、原则性的、天生的反对态度，同时对和平与合作抱有同样深切的承诺。

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 It recognizes that the only rules that satisfy the civilized grundnorms are the self-ownership principle and the Lockean homesteading principle,

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.

正如霍普所解释的，“证明，猜想，反驳构成了证成过程，这种证成是论证性的。”霍普《私有财产的经济学与伦理学》，第 384 页；同上，第 413 页；以及霍普《社会主义与资本主义理论》，第 155 页等。

applied as consistently as possible.

基于上述原因，自由意志主义可被视为一种政治哲学，它一贯支持旨在促进和平、繁荣与合作的社会规则。⁴³自由意志主义认为，唯有尽可能一致适用的自我所有权原则和洛克式的拓殖原则，方能满足文明的基本准则。

And as I have argued elsewhere, because the state necessarily commits aggression, the consistent libertarian, in opposing aggression, is also an anarchist.⁴⁴

正如我在其他地方所论证的那样，由于国家必然实施侵犯，因此一贯反对侵犯的自由意志主义者也是无政府主义者。⁴⁴

附录 I “财产”——概念和术语

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.

如上所述，此处的材料原本打算放在上文注释 5 中。由于篇幅较长，我将其列在本文附录中。

“财产”的概念与定义

Concept and Definition of “Property”

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).

因此，亨利·黑兹利特为自由哲学提议的**合作主义**名称，至少对我有一定的吸引力。见金塞拉：《新自由意志主义：反资本主义和社会主义；或： 我更喜欢哈兹利特的'合作主义'》，StephanKinsella.com（2009 年 6 月 19 日）。

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>).

参见《无政府资本主义者意味着什么》(第三章);还有扬·纳尔维森，《无政府主义的案例》，《尊重理论与实践中的的人》(马里兰州兰哈姆:Rowman & Littlefield, 2002;<https://perma.cc/2P24-H4JL>)。

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.

正如扬诺普洛斯教授（Professor Yiannopoulos）所解释的那样：

财产是一个蕴含强烈感情色彩的词汇，其含义丰富多样，以至于人们难以为其提供一个全面而精确的定义。英文单词 "Property" 源自拉丁文 "*proprietas*", 是 "*proprius*" 的名词形式，意指“自己的”。在美国，“财产”一词常被泛化使用，既可指代权利的客体，也可表示人对物所拥有的权利。因此，土地、汽车和珠宝均被视为财产；同样，所有权、地役权和租赁权等权利也被称作财产。这种权利与客体之间的潜在混淆，源自罗马法文本，并在西方其他法律体系中亦有所体现。精确的分析应当将“财产”一词专用于指称人对物所拥有的权利。

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...

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财产可以被定义为对某种经济物品拥有排他性控制权的权利；它是一个概念性名词，指代支配人与有价值物品之间关系的权利与义务、特权和限制。无论何时何地，

人们都渴望拥有生存所必需或文化上认为有价值的物品，而这些物品因人们的需求而变得稀缺。有组织的社会通过法律来控制对这些稀缺物品的竞争，并确保人们对这些物品的合法享有。确保个人拥有属于自己的物品，即为财产……[财产权]赋予人们对某一事物的直接和即时的掌控力。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 so that people understand what I’m referring to).

在本书中，我尽量使用“财产”一词来指代人对某一特定物或资源所拥有的权利，

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).

扬诺普洛斯,《路易斯安那州民法论著, 财产》, 第 1、2 节(引文省略: 第一段的最后两个着重号为新加; 第二段的第一个着重号为原文所加, 其余着重号为新加; 第三段的着重号为新加)。另见《路易斯安那州民法典》第 477 条(“所有权是赋予一个人对某一物品的直接、即时和排他性权力的权利。物的所有人可以在法律规定的范围和条件下使用、享有和处置该物”)。另见《<反对知识产权>二十年后》(第 15 章), 第 31 节 及所附文本; J.W. 哈里斯,《财产与正义》(牛津大学出版社, 1996 年), 第 9、11-13 页等。(讨论了 “财产” 一词的不同用法); 以及 《自由意志主义的契约理论》(第 9 章), 第 1 节。另见 金塞拉,《与自由意志主义相符的人: 奴隶和克鲁索的自我所有权》; 以及扬诺普洛斯《论准确分析和‘财产’一词》; 米塞斯区分了‘所有权的法学范畴和经济范畴’, StephanKinsella.com (2021 年 4 月 3 日)。

而非指物本身。然而，有时（部分原因在于这些章节大多已超过 20 年，我不想全面重写），我会采用更通俗的用法，即“财产”指代所拥有的对象、资源或事物。为了便于交流，避免使用非标准语言带来的不便往往是必要的（正如我在讨论现代专利和版权法时使用“知识产权”这一术语，尽管我并不偏好该术语，⁴⁶但这样人们才能清楚我所指的内容）。

“物”

“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

正如扬诺普洛斯所指出的：

鉴于只有法律意义上的物才能成为财产权的客体，对物一词进行准确定义是不可或缺的....，在大多数法律制度中，包括普通法司法管辖区、路易斯安那州和法兰西家族的法律制度，物一词既适用于有形物体，也适用于无形物体[无形资产]。但在以《德国民法典》为范本的法律体系中，“物”一词仅适用于可被占有的有形物体。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.

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.

⁴⁷ Yiannopoulos, Louisiana Civil Law Treatise, Property, § 2 (emphasis added). 扬诺普洛斯，《路易斯安那州民法论著》，《财产》，第 2 条。（重点补充）。

因此，大陆法系中“物”的概念（罗马法中的 *res*；法国法中的 *bien*（好的）和 *choses*（有形之物）；德国法中的 *Sache*）表示法律中的某些权利客体。

Things are also divided into different types, such as common, public, and private; corporeals and incorporeals; and movables and immovables.⁴⁸ Things are divided into other types, as well, such as things in commerce and out of commerce, consumable and nonconsumable, and so on.⁴⁹

物也分为不同的类型，如共有的、公共的和私有的；有形和无形；动产和不动产。

⁴⁸ 物还分为其他类型，如财货和非财货，消费品和非消费品，等等。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 conflictible (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 “Conflictible 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

民法中物的概念，特别是私有物的概念，或多或少对应于经济财货的概念，即具有金钱价值、可被占有的对象，这一概念本身接近于本书使用的可引发冲突的（争议性的、竞争性的、稀缺性的）资源的概念相近——指那些能够成为产权客体、能够被拥有的物（参见下文“冲突性与稀缺性”一节）。这些物是可以被行动人用作行动手段

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).

《路易斯安那州民法典》第 448、453 条。另见 J.W. Harris, “财产的难以捉摸性”，Peter Wahlgren, 《法学视角：纪念 Jes Bjarup 的论文》（斯德哥尔摩的纳维亚法律研究所，2005；<https://perma.cc/SW6Z-FYTV>），第 128 页（讨论关于财产权是否只包括实在的、有形的事物或是否更广泛的不同观点）。

⁴⁹ See Yiannopoulos, *Louisiana Civil Law Treatise, Property*, § § 1 - 2, 12 - 16, 18 - 44.

参见扬诺普洛斯，《路易斯安那州民法论著》，《财产》，第 1-2、12-16、18-44 条。

使用——占有——的对象，在社会中则能够被拥有（产权）。⁵⁰

作为排他性权利的财产

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 I have explained elsewhere why property rights do not give the owner a right to control or use the resource.⁵² However, for our purposes in this chapter, this distinction is not particularly germane.

从技术层面来看，财产权并非是指控制某项资源的权利，而是指排除他人使用该资源的权利。颇具讽刺意味的是，这正是专利权的运作机制，尽管这一概念对大多数非专业人士而言并不容易理解；拥有发明专利并不意味着发明者有权制造或使用该发明，而仅能阻止他人⁵¹进行此类行为。我曾在其他场合阐述过，为何财产权并不授予所

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.

伊曼纽尔·马蒂内利，《我们是否拥有自己的想法》(2019 年稿); https://www.academia.edu/93535130/On_Whether_We_Own_What_We_Think), 第 6 页(“物被认为是‘任何可以使用的东西’”)。《论占有和所有权之间的区别》，请参见上面的《关于外部事物的财产权》一节。

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.*

所有者控制或使用资源的权利。⁵² 不过，就本章讨论而言，这一区别并非特别关键。

财产是人与人之间的一种权利

Property as a Right between People

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.”).

参见 35 U.S.C. § 271, <https://www.law.cornell.edu/uscode/text/35/271>; **康奈尔诉西尔斯, 罗巴克公司**, 722 F.2d 1542, 1547(联邦法院 1983 年编)(“**专利中承认的排他权只是财产概念的本质**”), 引用 *Schenck v. Nortron Corp.*, 713 F.2d 782(联邦法院 1983); Bitlaw, “根据美国专利法授予的权利”, <https://www.bitlaw.com/patent/rights.html>; 另见 Thomas W. Merrill, **《财产和排他权》**, *Neb. L. Rev.* 77 (1998):730-755, 第 749 页和第 10 条, 特别是有关文本:哈里斯:《财产与司法》;詹姆斯·斯特恩, **《物权法的基本结构》**, 密歇根州。L. Rev. 115, no. 7(2017 年 5 月): 1167-1212, p. 1171 n.15, 参考并比较 *Bloomer v. McQuewan*, 55 U.S. 539, 549(1852)(“专利授予的专有权, 完全包括在未经专利权人许可的情况下, 禁止任何人制造、使用或出售其专利物品的权利。这就是他通过专利所获得的一切。”), Robert Patrick Merges & John Fitzgerald Duffy, 《专利法与政策:案例与材料》(2013 年第 6 版), 第 49 页(“然而, 与其他形式的财产不同, 专利只包括排他权而不包括其他权利。(重点省略)和弗兰克·h·伊斯特布鲁克, **《知识产权仍然是财产》**, *Harv.J.L. & Pub. Pol’y* 13, no. 1(1990 年冬季):108-118, 第 112 页(“[A]知识产权的排他权在原则上与物质财产的排他权没有区别。”)。

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). 见《反知识产权二十年》(第 15 章), 第 62 段 和第四部分 H 等。另见金塞拉《作为行动限制而非财产权限制的互不侵犯原则》, StephanKinsella.com (2010 年 1 月 22 日) 和同上, 《作为财产权限制的知识产权与侵犯: 如何区别二者》, StephanKinsella.com (2010 年 1 月 22 日)。

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.

此外，正如我在《契约的自由意志主义理论》（第9章）注释1中所指出的，财产权不仅可被视为人与所有物之间的权利关系，更应理解为针对特定（被拥有的）资源的人与人之间的权利关系。

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."

正如亚历克斯·科津斯基法官写道：

然而，什么是财产？这并非一个易于回答的问题。我仍记得，在第一年财产学课程的第一天课堂上，教授便提出了一个基本问题：财产权究竟是什么？我毫不犹豫地举起手，甚至不等教授点名，便大声回答道：“财产权界定了人与财产之间的法律关系。”

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."

克里尔教授（Professor Krier）停下脚步，转过身来，久久地注视着我。最终，他开口说道：“这真是奇怪，科津斯基先生。你总是与无生命的物体建立联系吗？我所认识的大部分人，通常都是与其他人建立关系的。”

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

那当然不是我最后一次在课堂上说蠢话，但我确实从中吸取了教训。当然，财产权本质上是人与人之间的一种关系。它至少明确了个人在多大程度

上可以排除他人使用和享有其物品及服务……⁵³

冲突性与稀缺性

Conflictable vs. Scarce

As noted elsewhere, in recent years I tend to emphasize the rivalrous or “conflicttable” 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 conflicttable resources.⁵⁴

正如在其他地方提到的，近年来我倾向于强调可占有资源的竞争性或“冲突性”，以避免在使用“稀缺”一词时不可避免的含糊不清。当我在本书中提及稀缺资源时，应将其理解为可引发冲突的资源。⁵⁴

附录 II 互相占有

APPENDIX II MUTUALIST OCCUPANCY

As noted above, the material here was originally intended to appear in footnote 31,

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. 亚历克斯·科津斯基 (Alex Kozinski)，《关于挥霍、盗版和私有财产》，Harv. J.L. & Pub. Pol’y 13, no. 1 (1990 年冬季; <https://perma.cc/Z8AD-634V>): 17–21，第 19 页。详见《自由意志主义的契约理论》(第九章)，第 1 节。

⁵⁴ See “Against Intellectual Property After Twenty Years” (ch. 15), text at n.29. On the term “conflicttable,” see Kinsella, “On Conflictability and Conflicttable 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.

见《<反对知识产权>二十年后》(第 15 章)，正文第 29 节。关于“冲突性”一词，见金塞拉：《论冲突性与可引发冲突的资源》，StephanKinsella.com (2022 年 1 月 31 日)；另见《我们如何拥有自己》(第 4 章)，正文第 10 节；《自由意志主义的惩罚与权利理论》(第 5 章)，注 62；《自由意志主义权利的对话论证》(第 6 章)，注 6；《因果关系与侵犯》(第 8 章)，注 19。

above. Due to its length, I include this material in this appendix.

如上所述，此处的材料原本打算放在上文注释 31 中。由于篇幅较长，我将其列入本附录。

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.

正如上文所指出的，任何可行且正义的法律制度都须明确区分所有权与占有权，并承认先来者与后到者的差异。与“强权即公理”的蛮横做法不同，资源的所有者相较于后来者，拥有更为合理的权利主张。若其未能如此行事，则其并非真正的所有者，而仅仅是当前的使用者或占有者。在这个“强权即公理”的世界中，所谓的所有权根本无从谈起。据我观察，这也正是互助主义在土地所有权问题上所持的“占有即拥有”的立场显得不自由且不公平的原因所在。

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

互助主义者凯文·卡森（Kevin Carson）写道：

对于互助主义者而言，占有和使用是确立土地所有权的唯一合法依据，不论土地历经多少次易手。现有所有者可以通过出售或赠与的方式转让所有权；然而，新所有者必须通过自身的占有和使用来确立对土地的合法所有权。占有权的变更等同于所有权的转移。实际占有者被视作土地的合法所有者，任何自称“不在地主”并试图收取租金的行为，均被视为对占有者绝对财产权

的武力侵犯。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

因此，在互助主义理念中，“实际占有者”即为“所有者”，而“占有者”则享有财产权。若土地的拓殖者不再亲自使用或占有该土地，其所有权将随之丧失。卡森认为，这一观点与自由意志主义的主张相吻合：

所有财产权理论，包括洛克的理论，均对财产的逆权占有和推定放弃设有明确规定。这些理论在程度上存在差异，而非在种类上：在财产的“粘性”（stickiness）方面，无论是乔治主义（Georgist）、互助主义，还是附带条件或非附带条件的洛克主义，任何财产权制度在界定何为转让和放弃时，都包含着大量约定俗成的成分。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

换句话说，洛克主义、乔治主义和互助主义均属于自由意志主义的范畴，仅在程度上有所差异。卡森指出，逆权占有和放弃等问题的模糊地带为互助主义在维持土地

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).

凯文·A·卡森，《互助主义的政治经济学研究》（自费出版：阿肯色州费耶特维尔，2004；<http://mutualist.org/id47.html>），第五章，sec. A（重点补充）。

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).

凯文·A·卡森《卡森的反驳》*J. Libertarian Stud.* 20, no. 1 (2006 冬；<https://mises.org/library/carsons-rejoinders>): 97-136, 第 133 页(重点补充)。

所有权的“占有”要求方面提供了存在的空间。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

然而，逆权占有和放弃的概念并不能扩展至相互占有的要求。相互占有的观点本质上是一种使用或工作的要求，与逆权占有和放弃理论存在明显区别。实在法和自由意志主义理论中的放弃理论基于这样一种观点：通过有意占有先前无主之物而获得的所有权，可能会在所有者的所有权意图终止时丧失。所有权的获得是占有和拥有意图的结合。同理，当拥有意图终止时，所有权也随之消失——无论是放弃所有权还是将所有权转让给他人，均属于此类情况，这本质上是对财产“以有利于”某一特定新所有人的放弃。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

⁵⁷ For a critique of Georgism, see Rothbard, “The Single Tax: Economic and Moral Implications,” in *Economic Controversies*.

对乔治主义的批判，见罗斯巴德《单一税：经济和道德影响》，载于《经济学的论证》。

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). 见《自由意志主义的契约理论》(第九章)，第 III.A 部分；另见《路易斯安那州民法典》第 3418 条 (““当其所有者放弃占有并意图放弃所有权时，即为放弃”) 和第 3418 条 (“要获得占有权，必须有作为所有者的占有意图，并且必须对物品进行实际占有”；重点补充)。

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 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.

因此，法律制度必须确立判定财产何时被视为放弃的规则，包括在缺乏明确证据时适用的默认规则。取得时效基于一种隐含的假设，即若所有权人在合理期限内未对逆权占有人提出异议，则视为其放弃了财产主张。然而，此类规则仅适用于逆权占有人——那些有意占有财产并以足够公开的方式使所有权人知晓或应当知晓此意图的人。⁵⁹ “公开”要求指的是占有人以所有者身份公然占有财产，且其占有行为与所有权人的权利相对立——例如，承租人或雇员在获得所有权人许可后以所有者名义使用公寓或生产设施的情况，则不在此列。放弃和逆权占有规则作为默认规则，适用于所有权人因疏忽、冷漠、死亡、缺席或其他原因未能充分表明其意图的情形。

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)

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.

参见扬诺普洛斯《路易斯安那州民法论著》财产部分，第316条；另见 Louisiana Civil Code, 第 3424 条（“要获得占有权，必须有意图地作为所有人占有，并且必须对该物进行实际占有”；重点补充）和第 3476 条（通过取得时效取得所有权，“占有必须是持续的、不间断的、和平的、公开的和明确的”；着重号为原文所加）；另见第 3473 条。

owner temporarily maintains possession but has lost ownership, as when he gives or sells the thing to another party.⁶⁰

事实上，放弃的概念本质上建立在所有权与占有权的区分之上。财产不仅仅是简单的占有；它体现了一种占有权，这种权利源自所有者作为权利持有者的占有意图，并依赖于其持续维护。一旦所有者终止了拥有的意图，放弃便随之发生。即便所有者暂时仍保持对物品的占有，但若已丧失所有权，例如将物品赠予或出售给他人时，这种情况同样成立。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 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 There is no need for “default” rules here to resolve an ambiguous situation.⁶³

显然，默认放弃和逆权占有规则与工作使用的要求存在显著差异，后者规定在未使用的情况下所有权即告丧失。⁶¹然而，所有权并不会因不使用而丧失，有关放弃和逆

⁶⁰ As I argue in “A Libertarian Theory of Contract” (ch. 9), Part III.A at n.31 and accompanying text et seq.

正如我在《自由意志主义的契约理论》（第9章）第III.A部分第31节及所附文本等所论述的。

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”).

权占有的默认规则也不包含工作要求。例如，参见《路易斯安那州民法典》第 481 条（着重号为原文所加）：“物的所有权和占有权是截然不同的……所有权独立于对它的任何行使而存在，不得因不使用而丧失。当取得时效有利于逆权占有人时，所有权即丧失。”卡森暗示放弃和逆权占有规则可以妥协以维持所有权的工作（或使用或占有）要求，这种说法是错误的。事实上，这些都是不同的法律理论。因此，当工厂所有者允许工人使用工厂或房东允许租户居住在公寓中时，毫无疑问，所有者并不打算放弃财产，也就不存在逆权占有（如果存在逆权占有，所有者可以提起适当的诉讼，驱逐他们并重新获得占有权）。⁶²这里无需“默认”规则来解决模棱两可的情况。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

最后需要强调的是，我在此引用实在法并非作为权威论据，而是旨在说明，即便

例如，见《路易斯安那州矿产法典》第 27 条（<http://law.justia.com/louisiana/codes/21/87935.html>）（“矿产使用权因……十年未使用而时效终止”）。

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).

参见扬诺普洛斯，《路易斯安那州民法论著》，财产部分，第 255、261、263-66、332-33、335 段等；《路易斯安那州民事诉讼法》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=68&level=Parent），第 3651、3653 和 3655 条；《路易斯安那州民法典》第 526 和 531 条。526 & 531).

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.

关于对卡森的另一个批评，见罗德里克·T·朗，“内陆：对卡森财产权的批判”，《自由意志主义研究》月刊，第 20 期，no. 1(2006 年冬季;<https://mises.org/library/land-lockedcritic-carson-property-rights>): 87-95。

是实在法也细致地区分了占有权和所有权，并且明确区分了维持所有权所需的使用或工作要求，以及因放弃或逆权占有而丧失所有权的可能性。这有助于揭示卡森所持的“占有要求仅是逆权占有或默认放弃规则的一种变体”的观点存在不足。此外，所引用的民事法律规则源自历代以大体上去中心化方式演进的法律原则，因此对我们发展自由意志主义的具体应用，推动抽象自由意志主义原则的落实，具有积极意义。⁶⁴

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).

参见《自由社会中的立法与法律的发现》（第 13 章）；另见《知识、计算、冲突与法律》（第 19 章），“知识的三阶问题与普通法”一节，正文第 24 节及后续页。各节（讨论兰迪-巴尼特关于抽象法律权利与作为行动指南的更具体规则之间的区别的观点）。我还在《对互相占有的批判》StephanKinsella.com（2009 年 8 月 2 日）中讨论了其中一些问题。

第三章 无政府资本主义意味着什么？

What It Means To Be an Anarcho-Capitalist

Originally published at LewRockwell.com (Jan. 20, 2004; <https://perma.cc/QAJ6-KHKN>);
reprinted in Keith Knight, ed., The Voluntarist Handbook:

A Collection of Essays, Excerpts, and Quotes (2022; <https://perma.cc/N8UX-4PX4>).

See also Kinsella, "The Irrelevance of the Impossibility of Anarcho- Libertarianism,"
Mises Economics Blog (Aug. 20, 2009).

最初发表于 LewRockwell.com (2004 年 1 月 20 日; <https://perma.cc/QAJ6-KHKN>);
后收录于基思·奈特主编的《自愿主义手册：文选、摘录与引述集》（2022 年;
<https://perma.cc/N8UX-4PX4>）。另见金塞拉《无政府自由意志主义不可能性之无关紧要》，
米塞斯经济学博客（2009 年 8 月 20 日）。

Butler Shaffer's recent LRC article, "What is Anarchy?,"¹ prompted
discussion on the Reason blog and inspired me to set down a few ideas I've also had
along these lines.

巴特勒·谢弗（Butler Shaffer）最近在《自由意志主义研究评论》发表的文章《何
为无政府主义？》¹在 Reason 博客引发讨论，也促使我写下自己对此议题的一些思考。

Libertarian opponents of anarchy are attacking a straw man. Their arguments are
usually utilitarian in nature and amount to "but anarchy won't work" or "we need the
(things provided by the) state." But these attacks are confused at best, if not
disingenuous. To be an anarchist does not mean you think anarchy will "work"
(whatever that means), nor that you predict it will or "can" be achieved. It is possible
to be a pessimistic anarchist, after all. To be an anarchist only means that you believe
that aggression is not justified, and that states necessarily employ aggression. And,
therefore, that states, and the aggression they necessarily employ, are unjustified. It's

¹ Butler Shaffer, 《何为无政府主义？》，LewRockwell.com（2004 年 1 月 13 日）。

quite simple, really. It's an ethical view, so no surprise it confuses utilitarians.

自由意志主义-无政府主义的反对者正在攻击一个稻草人。他们的论点本质上都是功利主义的，无非是说“无政府主义行不通”或“我们需要国家（提供的服务）”。但即便不算虚伪，这些攻击充其量也只是混淆视听。成为无政府主义者并不意味着你认为无政府主义会“奏效”（无论这个词意味着什么），也不代表你预测它将会或“能够”实现。毕竟，悲观的无政府主义者也是可能存在的。成为无政府主义者仅仅意味着你相信侵权行为不具有正当性，而国家必然实施侵权行为。因此，国家及其必然实施的侵权行为都是不正当的。道理其实一目了然。这是一种伦理观点，因此功利主义者对此感到困惑也就不足为奇了。

Accordingly, anyone who is not an anarchist must maintain either:

(a) aggression is justified; or (b) states (in particular, minimal states) do not necessarily employ aggression.

Proposition (b) is plainly false. States always tax their citizens, which is a form of aggression. They always outlaw competing defense agencies, which also amounts to aggression. (Not to mention the countless victimless crime laws that they inevitably, and without a single exception in history, enforce on the populace. Why minarchists think minarchy is even possible boggles the mind.)

因此，任何非无政府主义者，必然持有以下两种观点之一：(a) 侵犯是正当的；或 (b) 国家（尤其是最小国家）不一定会采用侵犯手段。

然而，命题(b)显然是错误的。国家总是向其公民征税，这本身就是一种侵权行为。此外，它们总是取缔与之竞争的安保机构，这同样属于侵权行为。（更不用说它们不可避免地、历史上无一例外地对民众实施的无数无受害者犯罪法了。为何小政府主义者认为小政府主义是可行的，这实在令人匪夷所思。）

As for (a), well, socialists and criminals also feel aggression is justified. This does not make it so. Criminals, socialists, and anti-anarchists have yet to show how aggression—the initiation of force against innocent victims—is justified. No surprise; it is not possible² to show this.³ But criminals don't feel compelled to justify aggression; why should advocates of the state feel compelled to do so?

至于(a)，社会主义者和罪犯同样认为侵权行为是正当的。然而，事实并非如此。无论是罪犯、社会主义者还是反无政府主义者，都尚未能证明侵犯——即对无辜受害

者使用武力——的合理性。这一点并不令人意外，因为要证明²侵犯的正当性几乎是不可能的。³值得注意的是，罪犯并不认为有必要为他们的侵犯行为进行辩护，那么为何国家的拥护者们却觉得有必要为此提供正当理由呢？

Conservative and minarchist-libertarian criticism of anarchy on the grounds that it won't "work" or is not "practical" is just confused. Anarchists don't (necessarily) predict anarchy will be achieved—I for one don't think it will. But that does not mean states are justified.

保守主义者和主张小政府主义的自由意志主义者常以无政府主义“行不通”或“不切实际”为由对其进行批评，这种观点实则混淆视听。无政府主义者并不必然预测无政府主义会实现——我本人就是认为它不会实现的一员。然而，这并不意味着国家的存在就是正当的。

Consider an analogy. Conservatives and libertarians all agree that private crime (murder, robbery, rape) is unjustified, and “should” not occur. Yet no matter how good most men become, there will always be at least some small element who will resort to crime. Crime will always be with us. Yet we still condemn crime and work to reduce it.

打个比方。保守主义和自由意志主义均认同，私人犯罪（如谋杀、抢劫、强奸）是非法且不应发生的。然而，不论大多数人多么善良，总难免会有少数人走向犯罪。犯罪似乎将永远伴随人类社会。尽管如此，我们依然坚决谴责犯罪，并致力于减少其发生。

Is it logically possible that there could be no crime? Sure. Everyone could voluntarily choose to respect others' rights. Then there would be no crime. It's easy to imagine. But given our experience with human nature and interaction, it is safe to say that there will always be crime. Nevertheless, we still proclaim crime to be evil and unjustified, in the face of the inevitability of its recurrence. So to my claim that crime is immoral, it would just be stupid and/or insincere to reply, “but that's an impractical view” or “but that won't work,” “since there will always be crime.” The fact that there will always be

² “Defending Argumentation Ethics” (ch. 7). 《捍卫论证伦理学》（第 7 章）。

³ “Dialogical Arguments for Libertarian Rights” (ch. 6).
《自由意志主义权利的对话论证》（第 6 章）。

crime—that not everyone will voluntarily respect others’ rights—does not mean that it’s “impractical” to oppose it; nor does it mean that crime is justified. It does not mean there is some “flaw” in the proposition that crime is wrong.

从逻辑上讲，是否存在无犯罪的可能性？答案自然是肯定的。每个人都可以自主选择尊重他人的权利，若果真如此，犯罪便无从谈起。这一情景并不难想象。然而，基于我们对人性和人际互动的深刻理解，可以断言犯罪总是如影随形。尽管犯罪不可避免地反复出现，我们依然坚定地认为犯罪是邪恶且不正当的。因此，对于我提出的“犯罪是不道德的”观点，以“但这不切实际”或“但这行不通，因为犯罪永远存在”作为回应，显得既蠢不可及又虚伪透顶。犯罪固然普遍存在，也并非每个人都会自愿尊重他人权利，但这并不意味着反对犯罪是“不切实际”的，更不意味着犯罪具有正当性。这也不代表“犯罪是错误的”这一论断存在任何“缺陷”。

Likewise, to my claim that the state and its aggression is unjustified, it is disingenuous and/or confused to reply, “anarchy won’t work” or is “impractical” or “unlikely to ever occur.”⁴ The view that the state is unjustified is a normative or ethical position. The fact that not enough people are willing to respect their neighbors’ rights to allow anarchy to emerge, i.e., the fact that enough people (erroneously) support the legitimacy of the state to permit it to exist, does not mean that the state, and its aggression, are justified.⁵

同样地，对于我关于国家及其侵犯行为缺乏正当性的主张，若以“无政府主义行不通”、“不切实际”或“永远不可能实现”⁴作为回应，这种说辞要么是虚伪的，要么就是混淆了概念。认为国家缺乏正当性是一种规范性或伦理立场。事实上，并非足够多的人愿意尊重邻里的权利以促成无政府主义的出现——也就是说，有足够多的人（错误地）

⁴ Another point: In my view, we are about as likely to achieve minarchy as we are to achieve anarchy. I.e., both are remote possibilities. What is striking is that almost every criticism of “impracticality” that minarchists hurl at anarchy is also true of minarchy itself. Both are exceedingly unlikely. Both require massive changes in views among millions of people. Both rest on presumptions that most people simply don’t care much about.

还有一点：在我看来，我们实现最小政府和实现无政府的可能性是一样大的。也就是说，两者都是遥不可及的。令人震惊的是，几乎所有小政府主义者对无政府主义提出的“不切实际”的批评，对小政府主义本身来说同样适用。两者的可能性都微乎其微。两者都需要数百万人的观念发生巨变。两者都建立在大多数人根本不关心的假设之上。

支持国家合法性从而允许其存在——但这并不意味着国家及其侵权行为就具有正当性。⁵

Other utilitarian replies like “but we need a state” do not contradict the claim that states employ aggression and that aggression is unjustified. It simply means that the state-advocate does not mind the initiation of force against innocent victims—i.e., he

⁵ Though the case for anarchy does not depend on its likelihood or “feasibility,” any more than the case against private crime depends on there never being any acts of crime, anarchy is clearly possible. There is anarchy among nations, for example. There is also anarchy within government, as pointed out in a seminal and neglected JLS article by Alfred G. Cuzán, which argues that even the government itself is in anarchy, internally—the President does not literally force others in government to obey his commands, after all; they obey them voluntarily, due to a recognized, hierarchical structure. Government’s (political) anarchy is not a good anarchy, but it demonstrates anarchy is possible—indeed, that we never really get out of it. See Alfred G. Cuzán, “Do We Ever Really Get Out of Anarchy?,” J. Libertarian Stud. 3, no. 2 (Summer 1979; <https://mises.org/library/do-we-ever-really-get-out-of-anarchy>): 151 – 58. And Shaffer makes the insightful point that we are in “anarchy” with our neighbors. If most people did not already have the character to voluntarily respect most of their neighbors’ rights, society and civilization would be impossible. Most people are good enough to permit civilization to occur, despite the existence of some degree of public and private crime. It is conceivable that the degree of goodness could rise—due to education or more universal economic prosperity, say—sufficient to make support for the legitimacy of states evaporate. It’s just very unlikely.

虽然支持无政府主义的理由并不取决于其可能性或“可行性”，就像反对私人犯罪的理由并不取决于从未有过任何犯罪行为一样，但无政府显然是可能的。例如，国家之间就存在无政府主义。政府内部也存在无政府主义，正如阿尔弗雷德-库赞（Alfred G. Cuzán）在《联合早报》上发表的一篇被忽视的开创性文章所指出的那样，该文章认为，甚至政府本身在内部也处于无政府主义——毕竟，总统并没有从字面上强迫政府中的其他人服从他的命令；由于公认的等级结构，他们是自愿服从的。政府的（政治）无政府主义并不是好的无政府主义，但它证明了无政府主义是可能的——事实上，我们从未真正摆脱过无政府主义。见阿尔弗雷德-库赞（Alfred G. Cuzán）《我们真的能摆脱无政府主义吗？》，《自由意志主义研究》，第三期 3, no. 2（1979 夏天；<https://mises.org/library/do-we-ever-really-get-out-of-anarchy>）：151-158。谢弗（Shaffer）精辟地指出，我们与我们的邻居之间处于“无政府主义”。如果大多数人不具备自愿尊重邻居的大多数权利的品格，社会和文明就不可能存在。尽管存在一定程度的公共和私人犯罪，但大多数人都足够善良，允许文明的存在。可以想象，由于教育或更普遍的经济繁荣等原因，人们的善良程度可能会提高，足以使人们对国家合法性的支持烟消云散。只是这种可能性极其渺茫。

shares the criminal/socialist mentality. The private criminal thinks his own need is all that matters; he is willing to commit violence to satisfy his needs; to hell with what is right and wrong. The advocate of the state thinks that his opinion that “we” “need” things justifies committing or condoning violence against innocent individuals. It is as plain as that. Whatever this argument is, it is not libertarian. It is not opposed to aggression. It is in favor of something else—making sure certain public “needs” are met, despite the cost—but not peace and cooperation. The criminal, gangster, socialist, welfare-statist, and even minarchist all share this: they are willing to condone naked aggression, for some reason. The details vary, but the result is the same—innocent lives are trampled by physical assault. Some have the stomach for this; others are more civilized—libertarian, one might say—and prefer peace over violent struggle.

其他功利主义的回答，诸如“但我们需要一个国家”，并不与国家采用侵犯行为是不正当的说法相矛盾。这仅仅表明，国家的拥护者并不介意对无辜受害者使用武力，换言之，他们的心态与罪犯或社会主义者并无二致。私人罪犯认为自己的需求至高无上，不惜使用武力来满足自身需求，将是非曲直置之度外。国家的拥护者则认为，只要“我们”需要某些东西，就有正当理由对无辜个人实施或纵容武力。事情的本质就是这么简单。无论这种论调如何包装，它都不是自由意志主义。它不反对侵犯，反而支持其他目标——确保某些公共“需求”得到满足，哪怕代价巨大——而非和平与合作。罪犯、黑帮、社会主义者、福利国家主义者，甚至小政府主义者，都有一个共同点：出于某种原因，他们愿意容忍赤裸裸的侵犯。尽管细节各异，但结果一致——无辜的生命遭受人身攻击、被肆意践踏。有些自由意志主义者能够容忍这些；另一些则更为文明——可以说是真正的自由意志主义者——他们更倾向于和平，而非武力斗争。

As there are criminals and socialists among us, it is no surprise that there is a degree of criminal-mindedness in most people. After all, the state rests upon the tacit consent of the masses, who have erroneously accepted the notion that states are legitimate. But none of that means the criminal enterprises condoned by the masses are justified.

我们当中既有罪犯，也有社会主义者，因此，大多数人具有一定程度的犯罪心理也就不足为奇了。毕竟，国家的建立依赖于大众的默许，而大众错误地接受了国家合法性的观念。然而，这并不意味着大众所纵容的犯罪活动就是正当的。

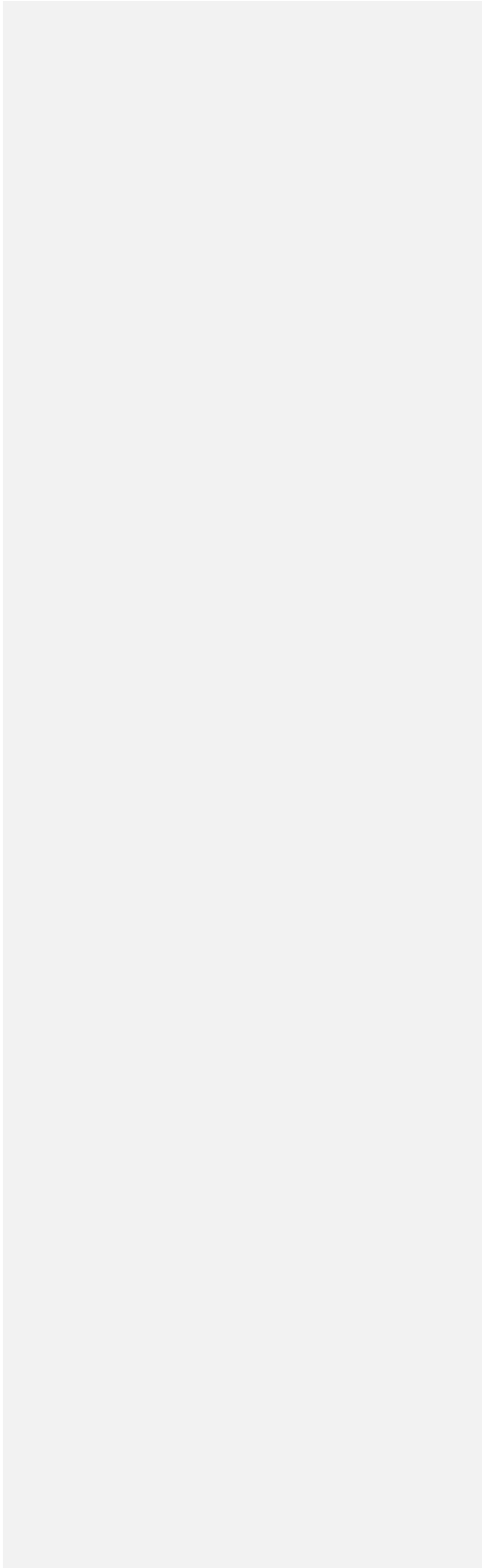
It's time for libertarians to take a stand. Are you for aggression, or against it?6

现在恰是自由意志主义者表明立场的好时机。你是支持侵犯还是反对侵犯？⁶

⁶ For discussion of other aspects of anarchist libertarian theory, see references in “Legislation and the Discovery of Law in a Free Society” (ch. 13), n.25, and others listed in Kinsella, “The Greatest Libertarian Books,” StephanKinsella.com (Aug. 7, 2006) and Hans-Hermann Hoppe, “Anarcho-Capitalism: An Annotated Bibliography,” LewRockwell.com (Dec. 31, 2001; <https://archive.lewrockwell.com/hoppe/hoppe5.html>). 关于无政府自由意志主义理论的其他方面的讨论，请参见《自由社会中的立法和法律的发现》(第十三章)，第 25 页，以及金塞拉，《最伟大的自由意志主义书籍》，StephanKinsella.com(2006 年 8 月 7 日)和 霍普，《无政府资本主义:一个带注释的参考书目》，LewRockwell.com(2001 年 12 月 31 日);<https://archive.lewrockwell.com/hoppe/hoppe5.html>。

第二辑 权利

PART II RIGHTS



第四章 我们如何拥有自己

How We Come to Own Ourselves

Originally published in Mises Daily (Sep. 7, 2006). The illustrating photo chosen by an editor at Mises.org for the original article inspired the image used on the back cover of this book. See my post “The Story of a Libertarian Book Cover,” StephanKinsella.com (March 4, 2011).

最初发表于米塞斯日报（2006 年 9 月 7 日）。米塞斯网站编辑为原文选用的配图启发了本书封底所使用的图像。详见我的博文《一本自由意志主义书籍封面的故事》，StephanKinsella.com（2011 年 3 月 4 日）。

The primary social evil of our time is lack of respect for self-ownership rights. It is what underlies both private crime and institutionalized crime perpetrated by the state. State laws, regulations, and actions are objectionable just because the state is claiming the legal right to control how someone’s body is to be used.¹

我们这个时代的主要社会弊病是对自我所有权缺乏尊重。这一观念既是私人犯罪的根源，也是国家实施制度化犯罪的根基。国家法律、法规和行为的可议之处，恰恰在于政府宣称拥有合法权利来控制他人身体的使用方式。¹

¹ As will become clear, by “self-ownership,” I am referring to a person’s ownership of his body, where the person (or actor or agent) is conceptually distinct from his body, just as one’s mind is conceptually distinct from one’s brain, even if a mind is not possible without a brain and a person cannot exist without a body. Other terms such as “self-body-ownership” might be used instead, but they are unwieldy. Some libertarians object to the concept of self-ownership or body-ownership, maintaining that it implies some mystical belief where the “person,” or perhaps his soul, is some spirit that owns and “inhabits” or “occupies” the body. For an example of a silly objection along these lines, Leland Yeager claims my advocacy of self-ownership involves some kind of mind-body dichotomy mistake. See Stephan Kinsella “Yeager and Other Letters Re Liberty article ‘Intellectual Property and Libertarianism,’ ” StephanKinsella.com (Jan. 23, 2010); idem, “Intellectual Property and Libertarianism,” Mises Daily (Nov. 17, 2009). This is nonsense. Self-ownership simply specifies that each

When the state drafts a man or threatens him with imprisonment if he violates its

person has the right to control his body; it is the opposite of otherownership, or domination and slavery. Nothing could be more libertarian. See “What Libertarianism Is” (ch. 2), text at notes 12 and 13; see also Stephan Kinsella, “ ‘Libertarians’ Who Object to ‘Self-Ownership,’ ” StephanKinsella.com (July 19, 2022); Roderick T. Long, “Getting Self-Ownership in View” (Paper presented to the PPE conference, March 2019, New Orleans; <https://perma.cc/U4AU-F996>); idem, “This Self Is Mine,” Austro-Athenian Empire Blog (July 8, 2014; <https://perma.cc/VKP7-9F4D>). See also Hans-Hermann Hoppe, “The Idea of a Private Law Society,” Mises Daily (July 28, 2006; <https://mises.org/library/idea-private-law-society>) (“Outside of the Garden of Eden, in the realm of all-around scarcity, the solution [to the problem of social order] is provided by four interrelated rules. . . . First, every person is the proper owner of his own physical body. Who else, if not Crusoe, should be the owner of Crusoe’ s body? Otherwise, would it not constitute a case of slavery, and is slavery not unjust as well as uneconomical?”); and idem, The Great Fiction: Property, Economy, Society, and the Politics of Decline (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf), chap. 11, Part II.

我所说的 “自我所有权 ”指的是一个人对自己身体的所有权，在这里，人（或行动人或代理人）在概念上不同于他的身体，就像一个人的思想在概念上不同于他的大脑一样，即使没有大脑就不可能有思想，没有身体人就不可能存在。也可以用 “自我——身体——所有者 ”等其他术语来代替，但这些术语都很拗口。一些自由意志主义者反对自我所有权或身体所有权的概念，认为这意味着某种神秘的信仰，在这种信仰中，“人”，或者说他的灵魂，是拥有和 “居住 ”或 “占据 ”身体的某种精神。利兰·耶格尔 (Leland Yeager)提出了一个愚蠢的反对意见，他声称我对自我所有权的主张涉及某种身心二分法的错误。见斯蒂芬·金塞拉， “耶格尔和其他关于自由文章《知识产权与自由意志主义》的来信”，Stephan Kinsella.com （2010 年 1 月 23 日）；同上，《知识产权与自由意志主义》，《米塞斯日报》（2009 年 11 月 17 日）。这纯属无稽之谈。自我所有权只是规定每个人都有权控制自己的身体；它与他者所有权、统治权和奴役权截然相反。没有比这更自由意志主义的了。见 《何为自由意志主义》（第二章），文本见注 12 和 13；另见金塞拉，“反对‘自我所有权’的‘自由意志主义者’”，StephanKinsella.com (2022 年 7 月 19 日)；Roderick T. Long, “Getting Self-Ownership in View” (PPE 会议论文，2019 年 3 月，新奥尔良；<https://perma.cc/U4AU-F996>)；同上，“This Self Is Mine”，Austro-Athenian Empire Blog （2014 年 7 月 8 日；<https://perma.cc/VKP7-9F4D>）。另见 霍普，《私法社会的理念》，《米塞斯日报》（2006 年 7 月 28 日；<https://mises.org/library/idea-private-law-society>）（“在伊甸园之外，在全面匮乏的领域，[社会秩序问题]的解决方法由四个相互关联的规则提供.... 第一，每个人都是自己身体的适当所有者。如果不是克鲁索，还有谁应该是克鲁索身体的主人？否则，这不是奴隶制吗？奴隶制是不是既不公平又不经济？”）；同上，《伟大的虚构：财产、经济、社会和衰败的政治》（第二增订版，米塞斯研究院，2021 年；www.hanshoppe.com/tgf ），第二辑第 11 章。

narcotics laws, for example, it is assuming partial control of his body, contrary to his self-ownership rights. Moreover, laws such as tax laws or fines for failure to comply with arbitrary state decrees (e.g., economic regulations, anti-discrimination rules) also violate self-ownership rights, to the extent they threaten to imprison or harm the body of the person, and in any case violate the person's derivative property rights in the expropriated resources.

当国家征召某人入伍，或威胁其若违反毒品法将面临监禁时，这实际上是对其身体实施了部分控制，违背了其自我所有权。此外，诸如税法或拒不遵守任意国家法令（例如经济法规、反歧视规则）处以罚款等法律，也在威胁监禁或伤害个人身体的程度上侵犯了自我所有权，并且在任何情况下都侵犯了个人对被征用资源的衍生财产权。

After all, although self-ownership is more fundamental than rights in external resources—one must own oneself, one's body, in order to own other things—self-ownership is rendered meaningless if the right to own private property in external resources is not also respected.² This is why Murray Rothbard insisted that all “human rights” are property rights: that is, ownership rights in scarce resources, whether self-ownership rights in one's body, or property rights in external objects.³

毕竟，尽管自我所有权相较于外部资源的权利更为重要——我们必须首先拥有自己，拥有自己的身体，才能进而拥有其他事物——但如果不对拥有外部资源的私有财产权予以尊重，自我所有权也将失去其意义。²这正是穆瑞·罗斯巴德 (Murray Rothbard)

² As Professor Hoppe explains, a person's body is “the very prototype of a scarce good.” Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp), p. 335; see also idem, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), pp. 19 & 21 et pass., pp. 158 – 60. Once property rights are established in one's body (self-ownership), the argument can then be extended to other, external, previously-unowned scarce resources. See generally Hoppe, *The Economics and Ethics of Private Property*, pp. 335 – 36, et pass. and idem, *A Theory of Socialism and Capitalism*, pp. 19 & 21 et pass., pp. 158 – 60 (re body rights) and p. 160 et seq. for property rights in external resources. The self-ownership or body-ownership rule can be formulated as “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.” Hoppe, A Theory of Socialism and Capitalism, p. 159. But “conflicts over bodies, for whose possible avoidance the nonaggression principle formulates a universally justifiable solution, make up only a small portion of all possible conflicts.” Ibid., at 159 - 60. For conflicts related to the use of other resources:

正如霍普教授所解释的，一个人的身体是“稀缺物品的原型”。汉斯-赫尔曼·霍普，《私有财产的经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年 [1993]；www.hanshoppe.com/eepp），第 335 页；另见同上，《社会主义与资本主义理论：经济，政治，和伦理》（阿拉巴马州奥本：米塞斯研究院，2010 [1989]；www.hanshoppe.com/tsc），第 19 和 21 页等。一旦一个人的身体确立了财产权（自我所有权），这一论点就可以延伸到其他外部的、先前无主的稀缺资源。参见霍普，《私有财产的经济学与伦理学》，第 335-336 页，以及同上《社会主义与资本主义理论》第 19、21 页等，第 158-160 页（关于身体权利）和第 160 页等对于外部资源的财产权。自我所有权或身体所有权规则可以表述为：“任何人都无权未经同意地侵犯任何其他人的身体，从而划定或限制任何人对自己身体的控制权”。霍普《社会主义和资本主义理论》，第 159 页。但是，“与身体有关的冲突（互不侵犯原则为避免这些冲突提出了一个普遍合理的解决方案）只占所有可能冲突的一小部分”。同上，第 159-160 页。关于与使用其他资源有关的冲突：

norms are needed, too, as it could come to conflicting evaluations regarding their use. But in fact, any other norm must be logically compatible with the nonaggression principle in order to be justified itself, and, mutatis mutandis, every norm that could be shown to be incompatible with this principle would have to be considered invalid. In addition, as the things with respect to which norms have to be formulated are scarce goods—just as a person’s body is a scarce good—and as it is only necessary to formulate norms at all because goods are scarce and not because they are particular kinds of scarce goods, 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.

规范也是需要的，因为对于规范的使用可能会产生相互冲突的评价。但事实上，任何其他规范都必须在逻辑上与互不侵犯原则相一致，才能使其本身具有正当性，而且，经适当变通后，凡是可以证明与这一原则不一致的规范都必须被视为无效。此外，由于必须制定规范的物品是稀缺物品——就像人的身体是稀缺物品一样——而且只有因为物品稀缺而不是因为它们特定种类的稀缺物品才有必要制定规范，因此，被视为涉及特定种类物品的特殊财产规范的互不侵犯原则的规范，实际上必须包含一般财产理论的规范。

Ibid., at 160. See also “A Libertarian Theory of Punishment and Rights” (ch. 5), Part III.F, “Property Rights” (extending the body or self-ownership rights established by the preceding estoppel analysis to external scarce resources).

同上，第 160 页。另见《自由意志主义的惩罚与权利理论》（第 5 章），第三辑 F 节，《财产权》（将前述禁止反言的分析所确立的身体所有权或自我所有权扩展至外部稀缺资源）。

For my attempt at a concise formulation of the libertarian view on self-ownership and

坚持认为，所有“人权”实质上都是财产权的原因：即对稀缺资源的所有权，无论是针对个人身体的自我所有权，还是对外部物品的财产权。³

Now as the examples above show, all political theories advocate some form of property rights, since they specify certain owners of various types of resources.⁴ State policies that tax, conscript, or imprison or fine individuals for failure to comply with various regulations in effect assign partial ownership in the subjects' bodies or other owned resources to the state. The state claims a partial ownership right in these resources.⁵ All political systems assign owners to resources according to some assignment rule. What sets libertarianism apart is its own unique property-assignment rule: the rule that specifies that individuals, not the state, are owners of their own bodies and other external scarce resources.

正如上述例子所示，所有政治理论均主张某种形式的财产权，因为它们明确了各类资源的特定所有者。⁴国家对不遵守各种管制的个人采取征税、征兵、监禁或罚款等政策，实际上是将臣民的身体及其拥有的其他资源的部分所有权赋予了国家。国家宣称对这些资源拥有部分所有权。⁵所有政治体系都依据某种分配规则为资源指

external property rights, see Stephan Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform,” StephanKinsella.com (May 30, 2022).

我试图简明扼要地表述自由意志主义关于自我所有权和外部财产权的观点，见斯蒂芬·金塞拉：《自由意志主义党纲中的侵犯与财产权要点》，StephanKinsella.com（2022年5月30日）。

³ Murray N. Rothbard, “‘Human Rights’ as Property Rights,” in *The Ethics of Liberty* (New York: New York University Press, 1998; <http://mises.org/rothbard/ethics/fifteen.asp>). See also Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform.”

穆瑞·罗斯巴德《财产权即‘人权’》载于《自由的伦理》（纽约：纽约大学出版社，1998年）：<http://mises.org/rothbard/ethics/fifteen.asp>。另见金塞拉《自由意志主义纲领中的侵犯和财产权板块》。

⁴ See “What Libertarianism Is” (ch. 2) for more on this.

详见《何为自由意志主义》（第2章）。

⁵ This is ultimately also the core injustice of intellectual property laws: they are non-consensual negative easements granted by the state. See “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), Part IV.B.

归根结底，这也是知识产权法的不正当的核心所在：它们是由国家授予的未经同意的消极地役权。见《《反对知识产权》二十年后：回顾与展望》（第15章），第四

定所有者。自由意志主义的独特之处在于其独特的财产归属规则：该规则明确规定，个人而非国家，是自己身体和其他外部稀缺资源的所有者。

无主资源的首次使用和拓殖

FIRST USE AND HOMESTEADING OF UNOWNED RESOURCES

It is, therefore, crucial that libertarian theory have a sound basis for property rights and for its unique property assignment rules.

因此，自由意志主义理论必须为财产权及其独特的财产归属规则奠定坚实基础，这一点至关重要。

Relying on some version of the Lockean notion of homesteading or original appropriation—an individual appropriating something unowned from the state of nature, thereby becoming the owner—libertarianism rightly focuses on the concept of first use of a previously unowned scarce resource as the key test for determining ownership of it.⁶

自由意志主义基于洛克式拓殖或先占概念——即个人从自然状态中占有无主之物从而成为所有者——正确地聚焦于“对先前无主稀缺资源的首次使用”这一核心标准，以此作为判定所有权归属的关键。⁶

辑 B。
⁶ For more on the importance of and reasons for first use being the touchstone of property ownership, see “Defending Argumentation Ethics” (ch. 7), especially the section “Objective Links: First Use, Verbal Claims, and the Prior-Later Distinction,” and the references in “A Libertarian Theory of Contract: Title Transfer, Binding Promises, Inalienability” (ch. 9) to various writings by Hans-Hermann Hoppe on this issue; also Stephan Kinsella, “The Essence of Libertarianism? ‘Finders Keepers,’ ‘Better Title,’ and Other Possibilities,” StephanKinsella.com (Aug. 31, 2005); idem, “Thoughts on Intellectual Property, Scarcity, Labor-Ownership, Metaphors, and Lockean Homesteading,” Mises Economic Blog (May 26, 2006); “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11); idem, “KOL259 | ‘How To Think About Property,’” New Hampshire Liberty Forum 2019,” Kinsella on Liberty Podcast (Feb. 9, 2019). Two subsidiary rules are contractual title transfer and transfer as a result of rectification for a tort. For more on this, see “What Libertarianism Is” (ch. 2), n.11 and accompanying text et pass.

One's initial impression might be that first use is the bedrock principle of libertarian property assignment, that is, that it decides questions of ownership of all scarce resources, both human bodies and external things. The owner of a plot of land is its first user (or his descendent in title), just as the first user of a body is its owner. This would mean that self-ownership rests on the first use principle, or homesteading.

既然首次使用原则是自由意志主义财产归属的根本准则，即它决定着所有稀缺资源（包括人体和外部事物）的所有权归属。正如土地的所有权归于首次使用者（或其权利继承者），人体的首次使用者也理应成为其所有者。那么，人们可能凭直觉认为，自我首次占有并使用自己的身体，自我所有权就符合了先占先得的原则。果真如此？

父母是第一所有人

PARENTS AS FIRST OWNERS

And what is wrong with relying on first use as the basis for self-ownership? To be sure, with respect to most claimants to one's body—a robber or state trying to conscript, say—one is indeed the “first user,” or a prior user, and thus has a better claim to the body than the outsider.⁷ But what about one's parents? Is one really the first user of one's body? Was one's body simply lying around unowned, in state of nature, waiting for some occupant to swoop down and appropriate it?

关于首次使用作为财产所有权试金石的重要性和原因，请参阅《捍卫论证伦理学》（第 7 章），特别是“客观联系”一节：首次使用、口头主张和先来-后到的区别”，以及《的自由意志主义理论：所有权转让、有约束力的承诺、不可让渡性》（第 9 章）中对汉斯-赫尔曼·霍普有关这一问题的各种著作的引用；另见斯蒂芬·金塞拉，《自由意志主义的精髓：“发现者，守护者”，“更好的所有权”和其他可能性》，StephanKinsella.com（2005 年 8 月 31 日）；同上，“关于知识产权、稀缺性、劳动所有权、比喻和洛克式拓殖的思考”，米塞斯经济博客（2006 年 5 月 26 日）；《出售并不意味着所有权，反之亦然：一个剖析》（第十一章）；同上，“KOL259 | 《如何思考财产》，2019 年新罕布什尔自由论坛（New Hampshire Liberty Forum），《金塞拉谈自由》播客上（2019 年 2 月 9 日）。两个附属规则是的所有权转让和因侵权行为的纠正而转让。欲了解更多信息，请参阅《何为自由意志主义》（第 2 章），注 11 和附文等。

那么，将“首次使用”作为自我所有权的基础又有何不妥呢？可以肯定的是，对于大多数对他人体提出权利要求的人——例如强盗或试图征兵的国家——而言，一个人确实是自身的“第一使用者”，或者说是优先的使用者，因此，他比外人更有资格对自己的身体提出权利要求。⁷然而，对于父母来说，情况又如何呢？一个人真的能被视

⁷ Writes Hoppe: “While I can cite in favor of my property claim regarding my body the objective fact that I was the body’s first occupant—its first user—anyone else who claims to have the right to control this body can cite nothing of the sort.” A Theory of Socialism and Capitalism, p. 23. See also Kinsella, “Intellectual Property and Libertarianism”:

霍普写道：“我可以引用一个客观事实来支持我对我身体的财产主张，那就是我是这个身体的第一个占有者——它的第一使用者——与此同时，任何声称有权控制这个身体的人都不能引用任何这样的事实。”《社会主义和资本主义理论》，第 23 页。另见金塞拉：《知识产权与自由意志主义》：

the libertarian property-assignment rule for bodies is that each person owns his own body. Implicit in the idea of self-ownership is the belief that each person has a better claim to the body that he or she directly controls and inhabits than do others. I have a better claim to the right to control my body than you do, because it is my body; I have a unique link and connection to my body that others do not, and that is prior to the claim of any other person.

自由意志主义关于身体的财产分配规则是，每个人都拥有自己的身体。自我所有权的理念隐含着这样一种信念，即每个人对自己直接控制和居住的身体都比他人有更好的权利主张。我比你更有权利控制我的身体，因为这是我的身体；我与我的身体之间有着独特的联系和纽带，这是其他人所没有的，而且这种联系和纽带先于其他人的权利要求。

Anyone other than the original occupant of a body is a latecomer with respect to the original occupant. Your claim to my body is inferior in part because I had it first. The person claiming your body can hardly object to the significance of what Hoppe calls the “prior-later” distinction, since he adopts this very rule with respect to his own body—he has to presuppose ownership of his own body in order to claim ownership of yours.

身体初始占有者以外的任何人，相对于初始占有者而言，均为后到者。你对我身体的主张之所以低我一等，部分原因是我先拥有了它。主张拥有你的身体的人很难反驳霍普所说的“先来-后到”区别的显著意义，因为他对自己的身体也采用了这一规则——他必须预先假定拥有自己的身体，然后才能主张拥有你的身体。

As for this latter point, Auberon Herbert writes: “If the entities do not belong to themselves, then we are reduced to the most absurd conclusion. A or B cannot own himself; but he can own, or part own, C or D.” Auberon Herbert, “Part XI,” in Auberon Herbert & J.H. Levy, Taxation and Anarchism: A Discussion between the Hon. Auberon Herbert and J.H. Levy (London: The Personal Rights Association, 1912; <https://perma.cc/LX8H-MZFH>), p. 37, quoted in Murray N. Rothbard, Man, Economy,

为自己身体的首位使用者吗？一个人的身体是否仅仅是无主地存在于自然状态中，等待着某个占有者俯冲而下将其据为己有？

No, obviously not. One's body was in the care of—and in a sense produced by—one's parents, in particular one's mother. So if we maintain that "first use" always determines the answer to the question "who owns this resource?," for any resource at all, then it would seem that parents do own their children. The mother owns the physical matter and bits of food and nourishment that assemble into the zygote, embryo, fetus, and then baby, just as the owner of an apple tree owns the apples that fall and the owner of a cow owns the calves it produces.

不，显然并非如此。一个人的身体是由其父母，尤其是母亲悉心照料的，并且在某种意义上是由他们所孕育的。因此，如果我们坚持认为，对于任何资源而言，“谁拥有这种资源？”这一问题的答案总是取决于“首次使用”的原则，那么父母似乎确实拥有他们的孩子。正如苹果树的主人拥有掉落的苹果，奶牛的主人拥有其产下的小牛一样，母亲拥有构成受精卵、胚胎、胎儿及婴儿所需的物质、食物和营养。

So, when does the child become a self-owner? Or does he? The libertarian seems to be faced with a dilemma.

那么，孩子究竟在何时才能成为自我所有者？他是否能够实现这一转变？自由意

and State, with Power and Market, Scholar' s ed., second ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 2, § 13, p. 185. See also "Law and Intellectual Property in a Stateless Society" (ch. 14), Part II.C. For more on the prior-later distinction, see references in note 6, above.

关于后一点，奥伯龙·赫伯特写道：“如果实体不属于自己，那么我们就得出最荒谬的结论。A 或 B 不能拥有自己；但他可以拥有或部分拥有 C 或 D”。奥伯龙·赫伯特，“第十一部分”，载于奥伯龙·赫伯特和 J.H. 利维，《税收与无政府主义》：税收与无政府主义：奥伯龙·赫伯特与 j·h·利维之间的讨论》（伦敦：个人权利协会，1912 年：<https://perma.cc/LX8H-MZFH>），第 37 页，引自穆瑞·罗斯巴德，《人、经济和国家，以及权力和市场》，学者编，第二版（奥本，阿拉巴马州，米塞斯研究院，2009；<https://mises.org/library/man-economy-and-state-power-and-market>）第二章，第 13 段，第 185 页。另见《无国家社会中的法律与知识产权》（第 14 章），第二部分 C。关于先来-后到的区别，见上文注释 6 中的参考文献。

志主义似乎正面临着一个难以抉择的两难境地。

两难问题的可能解决方案

POSSIBLE SOLUTIONS TO THE DILEMMA

Several possible arguments might be put forward to avoid the uncomfortable specter of children in bondage, slaves owned by their parents. First, it could be noted that the main political issue in society concerns third parties who want to dominate and control others. Slaveowning parents do not seem to pose the most pressing danger. For the typical case of conflict, the first-use principle suffices to prove self-ownership of one's body vis-à-vis the third party claimant. Still, this leaves open the possibility of parents owning their children.

我们可以提出几种可能的论据，以避免儿童被奴役、成为父母奴隶这一令人不安的幽灵。首先，我们可以指出，社会中的主要政治问题往往涉及那些企图支配和控制他人的第三方。相比之下，拥有奴隶权的父母似乎并不构成最紧迫的危险。在典型的冲突案例中，优先使用原则足以证明，相对于第三方要求者，本人应优先拥有身体的自我所有权。然而，这也为父母拥有子女的可能性留下了空间。

Second, it could be argued that even if the parent does own the child, in most cases a decent parent would voluntarily manumit the child at a suitable age. This is probably true, but the possibility of a brutal parent selling his son or daughter into slavery is still unsettling.

其次，可以说，尽管父母在某种意义上拥有孩子，但在大多数情况下，正直的父母会在孩子达到适当年龄时自愿给予其自由。这一情况在很大程度上是真实的，然而，残暴的父母将子女卖为奴隶的可能性依然令人深感不安。

Third, it is not difficult to envision a scenario in which most lines of descent, at some point, become permanently "liberated" or "manumitted" by the benevolent actions of a key ancestor. Great-great-great-Granddad manumits his child on the condition that he free his issue, and so on. In this way, eventually all or most lines of descent become freed by some distant act in the past of a benevolent ancestor. But still, this leaves open the possibility that some might not; and, in any event, it admits that at some points in time, child-slavery exists and is permissible.

第三，我们可以轻易设想这样一种情景：大多数世系和血统在某个特定时刻，会因某位重要祖先的仁慈之举而永久性地获得“自由”或“解放”。例如，曾曾曾曾祖父在其获得自由后，便解放了他的后代，依此类推。通过这种递进方式，最终所有或大多数世系和血统都将因一位仁慈祖先在遥远过去的某个行动而得以解脱。然而，这依然存在一种可能性，即部分人可能无法获得自由；同时，这也默认了在某些历史节点上，童奴现象确实存在，并且是被容许的。

Finally, and to me most decisive: it could be argued that the parent has various positive obligations to his or her children, such as the obligation to feed, shelter, educate, etc. The idea here is that libertarianism does not oppose “positive rights”; it simply insists that they be voluntarily incurred. One way to do this is by contract, or so some would argue;⁸ another is by trespassing against someone’s property. Now, if you pass by a drowning man in a lake you have no enforceable (legal) obligation to try to rescue him; but if you push someone in a lake you have a positive obligation to try to rescue him, to mitigate the harm resulting from your tort. If you don’t attempt the rescue, you could be liable for homicide.

最后，在我看来也是最具决定性的一点是：可以说，父母对其子女负有诸多积极义务，如抚养、庇护、教育等。这意味着，自由意志主义并不反对“积极权利”；它只是坚持认为，这些权利应基于自愿而产生。有人认为，实现这一点的一种方式是通过契约；⁸ 另一种方式是通过侵犯他人财产。例如，如果你从湖边经过一个溺水者，你并没有试图营救他的强制（法律）义务；但如果你将人推入湖中，你就负有试图营救他的积极义务，以减轻你的侵权行为造成的伤害。若不采取营救措施，你可能会被判犯有杀人罪。

Likewise, if your voluntary actions bring into being an infant with natural needs for shelter, food, care, and with human rights, it is akin to throwing someone into a lake. In

⁸ But see “A Libertarian Theory of Contract” (ch. 9), arguing that contracts do not give rise to binding obligations but only result in transfers of title to owned (alienable) resources. In which case a mere promise or “contract” could not, in and of itself, give rise to any positive obligations or corresponding positive rights.

但见《自由意志主义的契约理论》（第9章），认为并不产生有约束力的债务，而只是导致对拥有的（可让渡的）资源的所有权的转让。在这种情况下，单纯的承诺或“本身不可能产生任何积极债务或相应的积极权利。

both cases you create a situation where another human is in dire need of help and without which he will perish. By creating this situation of need you incur an obligation to provide for those needs. And surely this set of positive obligations to one's child would encompass the obligation to manumit the child at a certain point. This last argument is, to my mind, the most attractive, but it is also probably the least likely to be accepted by most libertarians, who generally seem opposed to positive obligations, even if they are incurred as the result of one's actions. Rothbard, for example, puts forward several objections to such an approach.⁹

同样，如果你的自愿行为导致一个婴儿出生，他自然而然地需要住所、食物和照顾，并享有基本人权，这情形就如同将一个人抛入湖中。在这两种情境下，你都使另一个人陷入急需援助的境地，若缺乏援助，他将面临灭亡的风险。在引发这种需求的情况下，你便承担了满足这些需求的义务。当然，对自己孩子的这一系列积极义务中也包括在适当时候解放孩子的责任。在我看来，这最后一个论点最具吸引力，但也可能最难以被大多数自由意志主义者所接受，因为他们通常反对“积极的义务”，即便这种义务是由他们自身行为所引发的。例如，罗斯巴德（Rothbard）就对此类观点提出了多项反对意见。⁹

客观联系：真正的试金石

OBJECTIVE LINK: THE REAL TOUCHSTONE

All this said, it turns out that these Herculean efforts are unnecessary. The dilemma arises only if it is assumed that “first use” determines ownership not only for homesteaded resources, but also for bodies.

其实，上述费力论证纯属多余。。只有当人们假定“首次使用”原则不仅适用于拓殖资源，还适用于人体时，这一困境才会出现。

⁹ See Murray N. Rothbard, “Children and Rights,” in *The Ethics of Liberty* (New York: New York University Press, 1998; <http://mises.org/rothbard/ethics/fourteen.asp>). See also Kinsella, “Objectivists on Positive Parental Obligations and Abortion,” *The Libertarian Standard* (Jan. 14, 2011).

参见穆瑞·罗斯巴德，《儿童与权利》，载于《自由的伦理》（纽约：纽约大学出版社，1998；<http://mises.org/rothbard/ethics/fourteen.asp>）。参见金塞拉《客观主义者论父母的积极义务和堕胎》，《自由意志主义标准》（2011年1月14日）。

However, the “first use” rule is merely the result of the application of the more general principle of objective link to the case of objects that may be homesteaded from an unowned state. Recall that the purpose of property rights is to permit conflicts over scarce (rivalrous, conflictible) resources to be avoided.¹⁰ To fulfill this purpose, property titles to particular resources are assigned to particular owners. The assignment must not, however, be random, arbitrary, or biased, if it is to actually be a property norm and possibly help conflict to be avoided. What this means is that title has to be assigned to one of the competing claimants based on “the existence of an objective, intersubjectively ascertainable link between owner and the” resource claimed.¹¹

然而，“首次使用”规则实质上是将“客观联系”这一更为普遍的原则应用于可从无主状态中拓殖的物品的具体体现。回顾财产权的初衷，其核心在于避免稀缺资源（具有竞争性和冲突性）引发的冲突。¹⁰为实现这一目标，特定资源的财产权被赋予特定的所有者。然而，要使这种分配真正成为有效的财产规范，并有效预防冲突，其归属过程就不能是随意的、武断的或带有偏见的。换言之，必须基于“所有者与所主张资源之间存在客观的、主体间可确定的联系”这一标准，将所有权合理地归属与竞争者之一。¹¹

Thus, it is the concept of objective link between claimants and a claimed resource that determines property ownership. First use is merely what constitutes the objective link in the case of previously unowned resources. In this case, the only objective link to the thing is that between the first user—the appropriator—and the thing. Any other supposed link is not objective, and is merely based on verbal decree, or on some type of formulation that violates the prior-later distinction. But the prior-later distinction is crucial if property rights are to actually establish rights and make conflict avoidable. Moreover, ownership claims cannot be based on mere verbal decree, as this also would not help to reduce conflict, since any number of people could simply decree their

¹⁰ On the term “conflictible,” see Kinsella, “On Conflictability and Conflictible Resources,” StephanKinsella.com (Jan. 31, 2022); also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.29; “What Libertarianism Is” (ch. 2), Appendix I.

¹¹ Hoppe, *A Theory of Socialism and Capitalism*, p. 23.
霍普《社会主义和资本主义理论》，第23页。

ownership of the thing.¹²

因此，决定财产所有权的核心在于权利主张人与权利主张资源之间的客观联系这一概念。在涉及先前无主资源的情况下，首次使用仅是构成这种客观联系的因素之一。在此情境下，与事物之间唯一的客观联系便是首次使用者——即占有者——与事物之间的联系。任何其他所谓的联系均非客观，而仅仅是基于口头声明或某种违背先来后到原则的表述。然而，若要真正确立财产权并有效避免冲突，先来后到的区分就显得至关重要。此外，所有权主张不能仅凭口头命令为依据，因为这种方式无助于减少冲突，毕竟任何数量的人都可以轻易宣称对该事物拥有所有权。¹²

So for homesteaded things—previously unowned resources—the objective link is first use. It has to be, by the nature of the situation.

因此，对于拓殖的事物——以前不属于自己的资源——客观联系就是首次使用。根据上述情势的性质，必须如此。

人的身体

Human Bodies

But for human bodies, matters are somewhat different. As noted above, one is not really the “first user” of one’s body in the same sense as one is the first user of a previously unowned thing that one appropriates. It’s not as if the body was just lying, unoccupied and unused, in the wild, waiting for an occupant to homestead it. And moreover, as noted above, the occupant is not exactly the first user of his body, with respect to his parents.

但对于人的身体而言，情况则有所不同。正如前文所述，一个人并非自己身体的真正“首位使用者”，并不能等同于对无主之物的“首次占有”。人体并非像荒野中闲置无主的物品，静候着拓殖者前来认领。更重要的是，正如前文所述，就父母与子女的关系而言，居住者（子女）并不能算作其身体的第一个使用者。

¹² Hoppe elaborates on these themes in chaps. 1, 2, and 7 of A Theory of Socialism and Capitalism. 霍普在《社会主义和资本主义理论》的第一章、第二章和第七章，详细阐述了这些主题。

Additionally, to homestead an unowned resource presupposes one already has a body, which one uses to act in the world and to homestead such unowned things. But this is not the case for “homesteading” one’s body. One has no body before one gains rights to it.¹³

此外，拓殖无主资源的前提是个人已拥有身体，凭借身体在世活动，并开发这些无主资源。然而，“拓殖”自己的身体则有所不同。在获得对身体权利之前，个人实际上是“没有身体”的。¹³

直接控制

Direct Control

If “first use” is not the ultimate test for the “objective link” in the case of body ownership, what is? It is the unique relationship between a person and “his” body—his direct and immediate control over the body, and the fact that, at least in some sense, a body is a given person and vice-versa (as it is impossible to imagine a person that does not have a body, without accepting groundless religious conceptions). This is what constitutes the objective link sufficient to give that person better title to his body than any third party claimant, even his parents.¹⁴ (This link is only a presumption, it is defeasible, as noted below, since it may be severed or forfeited by a person committing an act of aggression that gives the victim rights over the aggressor’s body, for purposes of self-defense, restitution, or retribution.)

如果“首次使用”并非检验身体所有权中“客观联系”的最终标准，那么什么才是呢？

¹³ For further discussion of the difference between bodies and previously unowned things, see “A Libertarian Theory of Contract” (ch. 9), Part III.B et pass. As Hoppe points out, “any indirect control of a good by a person presupposes the direct control of this person regarding his own body; thus, in order for a scarce good to become justifiably appropriated, the appropriation of one’s directly controlled ‘own’ body must already be presupposed as justified.” Quoted in text at note 17, below.

关于身体与先前无主之物之间区别的进一步讨论，见《自由意志主义的契约理论》（第9章），第III.B等部分。正如霍普所指出的，“一个人对物品的任何间接控制都以这个人对自己身体的直接控制为前提；因此，为了使稀缺物品被正当地占有，对一个人直接控制的‘自己的’身体的占有必须已经被预先假定为是正当的”。引自下文注17。

答案在于一个人与其身体之间的独特关系——即他对身体直接且即时的控制，以及在某种意义上，身体就是该个体的体现，反之亦然（因为如果不接受毫无根据的宗教观念，就无法设想一个没有身体的人）。这种关系构成了客观联系的基础，足以使个体对其身体的所有权优先于任何第三方权利主张者，甚至优先于其父母。¹⁴（然而，这种联系仅是一种假定，如下文所述，它可能被侵犯者切断或剥夺，从而使受害者出于自卫、索赔或报复的目的，对侵犯者的身体拥有权利。）

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. (Notice that if a victim seeks dominion over the body of his aggressor for purposes of self-defense or proportional punishment, his claim of ownership over the aggressor's body is not incompatible with a claim of self-ownership, since the cases are different. It is not inconsistent to claim that the special link between an innocent person and his body gives him the best claim over that body, and to also claim that this no longer holds for an aggressor because he has committed aggression. This distinction is neither arbitrary nor particularizable; it is grounded in the nature of things.)¹⁵

此外，任何声称拥有他人身体的局外人都无法否认这种客观联系及其特殊地位，因为局外人在反观自身时也必然预设了这一点。之所以如此，是因为在寻求对他人身体的支配权、主张对他人身体的所有权时，他必须预先假定自己对自己身体的所有权，这表明他确实对这种联系赋予了一定的意义，与此同时，他却忽视了他人与其身体联系的意义。（需要注意的是，如果受害者出于自我防卫或相称惩罚的目的而寻求对侵犯者身体的支配权，他对侵犯者身体的所有权主张与自我所有权主张并不冲突，因为情况不同。声称一个无辜的人与其身体之间的特殊联系使他对该身体享有最佳的所有权，同时又声称这一点对侵犯者不再适用，因为他实施了侵犯行为，这并不矛盾。这

¹⁴ In revising this chapter, this footnote grew to unmanageable length. I have placed the relevant commentary in the Appendix, below.
在修订本章时，这个注释变得冗长不堪。我将相关评注放在下面的附录中。

种区别既非武断，也非特殊化；它是以事件的性质为基础的。) ¹⁵

The basic point about the primacy of the “direct” link over an “indirect” link

¹⁵ For more on this, see especially the text following n.37 in chapter 7; also “A Libertarian Theory of Punishment and Rights” (ch. 5), Parts III.C “Punishing Aggressive Behavior” and III.D “Potential Defenses by the Aggressor”; Hoppe, A Theory of Socialism and Capitalism, pp. 157 – 65; “What Libertarianism Is” (ch. 2), the section “Self-ownership and Conflict Avoidance”; “Dialogical Arguments for Libertarian Rights” (ch. 6).n.43 and accompanying text; and Stephan Kinsella, “The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle,” StephanKinsella.com (Nov. 10, 2011). Although Hoppe has not directly addressed this issue, I believe this is compatible with his argumentation ethics. Note that in the quote in note 17 below, he states: “every attempt of an indirect control of my body by another person must, unless I have explicitly agreed to it, be regarded as unjust(ified)” (emphasis added). I believe the forfeiture of rights that results from voluntarily committing aggression can be subsumed under the “explicitly agreed to” provision; indeed, I have been reluctant to separate out rectification as a third principle of property rights allocation, in addition to original appropriation and contractual transfer, since rectification can be thought of as a special case of contractual transfer since aggression is a voluntary action that results in changes of ownership, just as normal contracts do. However, due to its special characteristics, it is worth calling it out as a third principle, if its relationship to the first two principles (homesteading and contract) is kept in mind. See, e.g., my formulation in Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform.”

有关这方面的更多信息，尤其见第 7 章第 37 段之后的文本；另见《自由意志主义的惩罚与权利理论》（第 5 章），第三部分 C《惩罚侵权行为》和第三部分 D《对侵犯者的潜在防御》；霍普《社会主义与资本主义理论》，第 157-165 页；《何为自由意志主义？》（第 2 章），“自我所有权与避免冲突”一节；《自由意志主义权利的对话论证》（第 6 章），注 43。和附文：金塞拉《特殊伦理学的问题，或者为什么每个人都必须承认普适性原则的有效性》，StephanKinsella.com (2011 年 11 月 10 日)。虽然霍普没有直接论及这个问题，但我认为这与他的论证伦理学是一致的。请注意，在下文注释 17 的引文中，他说“他人间接控制我身体的每一次尝试，除非我明确同意，否则都必须被视为不正当的”（重点补充）。我认为，因自愿实施侵犯而导致的权利丧失可以归入“明确同意”的规定中；事实上，我一直不愿意将纠正作为除先占和转让之外的第三个财产权分配原则单独提出来，因为纠正可以被视为转让的一个特例，因为侵犯是一种自愿行为，其结果是所有权的变更，就像正常的一样。不过，由于其特殊性，如果考虑到它与前两个原则（拓殖和）的关系，还是值得将其作为第三个原则提出来的。例如，参见我在金塞拉《自由意志主义党纲中的侵犯与财产权要点》中的表述。

(*ceterisparibus* — see the point above about punishment of criminals) was first suggested to me by Hoppe. As might be apparent to those familiar with Hoppe's argumentation ethics,¹⁶ the Hoppean theory implies the logical priority of direct versus indirect control over one's body. In fact, the argument made above (that any outsider who claims another's body cannot deny the objective link between person and body) is merely an application of Hoppe's argumentation ethics approach. It turns out Hoppe made a similar argument in a German publication in 1987:

关于“直接”联系优先于“间接”联系的基本观点（在其他条件相同的情况下——详见上文关于惩罚犯罪的观点），是由霍普首先向我提出的。熟悉霍普论证伦理学¹⁶的人可

¹⁶ For more on argumentation ethics, see “Dialogical Arguments for Libertarian Rights” (ch. 6); “Defending Argumentation Ethics” (ch. 7); “The Undeniable Morality of Capitalism” (ch. 22); Hoppe, “The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible,” chap. 7 in *A Theory of Socialism and Capitalism*; idem, “From the Economics of Laissez Faire to the Ethics of Libertarianism,” “The Justice of Economic Efficiency,” and “On the Ultimate Justification of the Ethics of Private Property,” chaps. 11 – 13 in *The Economics and Ethics of Private Property*; idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in *The Great Fiction*; idem, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016),” *The Property and Freedom Podcast*, ep. 163 (June 30, 2022); Stephan Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” *StephanKinsella.com* (May 27, 2011); idem, “Hoppe’s Argumentation Ethics and Its Critics,” *StephanKinsella.com* (Aug. 11, 2015); Frank van Dun, “Argumentation Ethics and the Philosophy of Freedom,” *Libertarian Papers* 1, art. no. 19 (2009; www.libertarianpapers.org); Marian Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics,” *Libertarian Papers* 1, art. no. 20 (2009; www.libertarianpapers.org); Norbert Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” *Analiza i Egzystencja* 58 (2022), 35 – 64.

关于论证伦理学的更多内容，请参阅《自由意志主义权利的对话论证》（第 6 章）；《捍卫论证伦理学》（第 7 章）；《资本主义不可否认的道德》（第 22 章）；霍普《资本主义的伦理正当性和为什么社会主义在道德上站不住脚》，载于《社会主义与资本主义理论》第 7 章；同上，《从自由放任的经济学到自由意志主义的伦理学》、《经济效率的正义性》和《论自由意志主义权利的对话论证》，载于《社会主义与资本主义理论》第 7 章。同上，《从自由放任的经济学到自由意志主义的伦理学》，《经济效率的正义性》，以及《私产伦理的终极证成》，第 11-13 章，载于《私有财产的经济学与伦理学》，同上，《关于共有财产、公共财产和私有财产以及全面私有化的基本原理》，载于《伟大的虚构》；同上，“PFP163 | 汉斯-赫尔曼·霍普，‘论证伦

能会发现，霍普的理论意味着对自己身体的直接控制相较于间接控制具有逻辑上的优先性。事实上，上文所提出的论点（任何声称拥有他人身体的局外人都无法否认人与身体之间的客观联系）仅仅是霍普论证伦理学方法的一个应用实例。值得一提的是，霍普曾在 1987 年的一份德国出版物中提出过类似的论点：

The answer to the question what makes my body “mine” lies in the obvious fact that this is not merely an assertion but that, for everyone to see, this is indeed the case. Why do we say “This is my body”? For this, a twofold requirement exists. On the one hand it must be the case that the body called “mine” must indeed (in an intersubjectively ascertainable way) express or “objectify” my will. Proof of this, as far as my body is concerned, is easy enough to demonstrate: When I announce that I will now lift my arm, turn my head, relax in my chair (or whatever else) and these announcements then become true (are fulfilled), then this shows that the body which does this has been indeed appropriated by my will.

是什么让我的身体成为“我的”？答案藏在一个显而易见的事实中，这不仅是一种断言，而是每个人都能直观感受到的现实。为何我们会说“这是我的身体”？这需要满足两个条件。首先，被称为“我的”身体必须确实（以主体间可确认的方式）表达或“具化”我的意志。就我的身体而言，这一点不难证明：当我宣布要抬起胳膊、转动头部、在椅子上放松（或其他动作），而这些宣布随后变为现实（得以实现），这就表明，执行这些动作的身体确实受我的意志支配。

If, to the contrary, my announcements showed no systematic relation to my body's actual behavior, then the proposition “this is my body” would have to be considered as an empty, objectively unfounded assertion; and likewise this proposition would be

理学’ (PFS 2016)”，《财产与自由播客》，第 163 集（2022 年 6 月 30 日）；斯蒂芬·金塞拉，《论证伦理学与自由：简明指南》，《财产与自由播客》，第 163 集（2022 年 6 月 30 日）。同上，《霍普的论证伦理学及其批评者》StephanKinsella.com（2015 年 8 月 11 日）；弗兰克-范·邓恩，《论证伦理学与自由的哲学》，《自由意志主义论文集》第 1 期，art. no. 19（2009; www.libertarianpapers.org）；玛丽安·埃布拉斯，《对霍普论证伦理学的当前批判的回应》，《自由意志主义论文集》第 1 期，art. no. 20（2009; www.libertarianpapers.org）；Norbert Slenzok，《自由意志主义的论证伦理学、语言的先验语用学与冲突-自由原则》，《语言分析》58(2022)，35-64。

rejected as incorrect if following my announcement not my arm would rise but always that of Müller, Meier, or Schulze (in which case one would more likely be inclined to consider Müller's, Meier's, or Schulze's body "mine"). On the other hand, apart from demonstrating that my will has been "objectified" in the body called "mine," it must be demonstrated that my appropriation has priority as compared to the possible appropriation of the same body by another person.

相反，若我的声明与我身体的实际行为缺乏系统的联系，那么“这是我的身体”这一命题便只能被视为空洞且客观上毫无依据的断言。同样，若在我宣布之后，并非我的手臂抬起，而是穆勒、迈尔或舒尔茨的手臂抬起（在这种情况下，人们更倾向于认为穆勒、迈尔或舒尔茨的身体是“我的”），那么这一命题便会因不正确而被否定。另一方面，除了需证明我的意志在被称为“我的”身体中得到“具化”之外，还必须证明我的占有相较于其他人对同一身体的可能占有具有优先权。

As far as bodies are concerned, it is also easy to prove this. We demonstrate it by showing that it is under my direct control, while every other person can objectify (express) itself in my body only indirectly, i.e., by means of their own bodies, and direct control must obviously have logicaltemporal priority (precedence) as compared to any indirect control. The latter simply follows from the fact that any indirect control of a good by a person presupposes the direct control of this person regarding his own body; thus, in order for a scarce good to become justifiably appropriated, the appropriation of one's directly controlled "own" body must already be presupposed as justified. It thus follows: If the justice of an appropriation by means of direct control must be presupposed by any further-reaching indirect appropriation, and if only I have direct control of my body, then no one except me can ever justifiably own my body (or, put differently, then property in/of my body cannot be transferred onto another person), and every attempt of an indirect control of my body by another person must, unless I have explicitly agreed to it, be regarded as unjust(ified).¹⁷

就身体而言，要证明这一点并不困难。我们可以通过证明它处于我的直接控制之下，而其他人只能间接地，即通过他们自己的身体，在我的身体中实现（表达）其影响来确立这一观点。相较于任何间接控制，直接控制显然在逻辑上具有时间优先权。这是因为，一个人对物品的任何间接控制都建立在他对自己身体的直接控制基础之上。因此，为了确保稀缺物品得到合理的占有，必须预先假定对一个人直接控制的“自己”的身体的占有是正当的。由此可见：如果必须以通过直接控制进行的占有的正当性作

为任何进一步的间接占有的前提，并且只有我才能直接控制我的身体，那么除我之外，任何人都无权正当拥有我的身体（或者换句话说，我身体的财产不能转让给他人）。除非我明确同意，否则他人对我身体的任何间接控制企图都必须被视为是不正当的。

¹⁷

¹⁷ Informal translation (by Hans-Hermann Hoppe) from, Eigentum, Anarchie und Staat (Manuscriptum Verlag, 2005; originally published in 1987; www.hanshoppe.com/eigentum), pp. 98 – 100. See also the similar, but later, quote in “Defending Argumentation Ethics” (ch. 7), at n.35; and idem, Economy, Society, and History (Auburn, Ala.: Mises Institute, 2021; <https://www.hanshoppe.com/esh/>), pp. 7 – 8 (discussing each human’s unique connection to his own body). See also Emanuele Martinelli, “On Whether We Own What We Think” (draft, 2019; https://www.academia.edu/93535130/On_Whether_We_Own_What_We_Think), p. 3: regarding Locke’s notion of self-ownership, “the basic intuition is that no one could metaphysically control another one’s body and mind.” See also Locke, Second Treatise on Civil Government, chap. 5, “Of Property”; and Richard A. Epstein, “Possession as the Root of Title,” Georgia L. Rev. 13 (1979; https://chicagounbound.uchicago.edu/journal_articles/1236/) 1221 – 43, p. 1227 (citation omitted; emphasis added):

非正式翻译(汉斯-赫尔曼·霍普著), 摘自《本质、无政府与国家》(Eigentum, Anarchie und Staat) (Manuscriptum Verlag, 2005 年; 原书出版于 1987 年; www.hanshoppe.com/eigentum), 第 98-100 页。另见《捍卫论证伦理学》(第 7 章)中类似但稍后的引文, 注 35; 以及同上, 《经济、社会与历史》(阿拉巴马州奥本: 米塞斯研究院, 2021 年; <https://www.hanshoppe.com/esh/>), 第 7-8 页(讨论每个人与自己身体的独特联系)。另见伊曼纽尔·马蒂内利, 《论我们是否拥有我们的思想》(草案, 2019; https://www.academia.edu/93535130/On_Whether_We_Own_What_We_Think), p.3: 关于洛克的自我所有权概念, “基本的直觉是, 没有人可以形而上学地控制他人的身体和思想”。另见洛克, 《政府论: 下》, 第五章, 《关于财产》; Richard A. Epstein, 《作为所有权根源的占有》, Georgia L. Rev. 13 (1979; https://chicagounbound.uchicago.edu/journal_articles/1236/) 1221-43, p. 1227 (引文省略; 重点补充):

Why does labor itself create any rights in a thing? The labor theory rests at least upon the belief that each person owns himself. Yet that claim, unless it be accepted as bedrock and unquestioningly, must be justified in some way... The obvious line for justification is that each person is in possession of himself, if not by choice or conscious act, then by a kind of natural necessity.

为什么劳动本身会对某物创造权利? 劳动理论至少建立在每个人都拥有自己的信念之上。然而, 除非这一主张被作为基石而不容置疑地接受, 否则就必须以某种方式来

And as Hoppe adds in the Foreword, “if body-ownership were assigned to some indirect body-controller, conflict would become unavoidable as the direct body-controller cannot give up the direct control over his body as long as he is alive” (emphasis added). In other words, direct control has logical-temporal priority as compared to any indirect control, since otherwise conflict is unavoidable, contrary to the very purpose of property norms.

霍普在前言中进一步指出：“如果将身体所有权赋予某个间接的身体控制者，冲突将变得不可避免，因为只要直接的身体控制者仍然在世，就无法放弃对其身体的直接掌控”（着重号为原文所加）。换言之，相较于任何形式的间接控制，直接控制在逻辑和时间层面均享有优先地位，否则冲突将难以避免，这显然与财产规范的根本宗旨相悖。

总结

Summary

Perhaps it is time to summarize the (interrelated) reasons why direct control is the relevant link for determining ownership of human bodies, and why self-ownership is thus justified:

- 1. First, it is intuitively obvious; it's the "natural" position. Who better to own my body than me? (See Hoppe's discussion of this in *A Theory of Socialism and Capitalism*, at p. 21 *et seq.*) As Locke wrote, "every man has a property in his own person: this no body has any right to but himself."¹⁸
- 2. The arguments made by both Rothard and Hoppe, in the Appendix, below, rejecting the only two possible alternatives to self-ownership: the "communist" alternative of Universal and Equal Other-ownership, which is unworkable and would lead to the death of the human race; and other-ownership (slavery, domination), which is not universalizable.
- 3. The prior-later distinction, noted above (see notes 6, 7): It is difficult to deny

证明其合理性…… 显然，如果不是因为选择或有意识的行为，那么就是因为一种自然的必然性，那就是每个人都拥有自己。

that a person has a claim to self-ownership based on his direct control of his body. This is the objective link *par excellence*. As Hoppe writes, "While I can cite in favor of my property claim regarding my body the objective fact that I was the body's first occupant—its first user—anyone else who claims to have the right to control this body can cite nothing of the sort." (note 7, above) Anyone claiming a right to enslave this person via indirect control always comes along later. Indirect control of a person is impossible unless he is a person. When he becomes a person, his direct control makes him the first owner of his body. The would-be enslaver is thus a latecomer, in violation of the prior-later distinction. Thus, a property norm assigning property rights in a latecoming indirect controller cannot be justifiable since it would, like any property norm violating the prior-later distinction, generate rather than reduce conflict.

4. Related to the universalizability points made in point 2 above: human actors who seek to own external resources presuppose they already own their own bodies. This right did not come from homesteading, but is based on some other reason (e.g., direct control). Thus, when the slaver attempts to dominate and own another person, he must claim self-ownership rights in himself—on *some* basis. Whatever the basis for the would-be enslaver's claim to self-ownership, he cannot deny that similarly situated other persons do not have this same right.
5. Perhaps most decisively, as Hoppe argues in previous work (quote at note 17, above), and as he emphasizes in a related comment in the Foreword: "if body-ownership were assigned to some indirect body-controller, *conflict would become unavoidable* as the direct body-controller cannot give up the direct control over his body as long as he is alive." As I discuss also in chapter 7 (note 35, text following note 36), what Hoppe is pointing out here is that assigning ownership over a person (the direct body-controller) to an enslaver (the indirect body-controller), *necessarily generates conflict* because the enslaved person maintains his direct control over his body—as Rothbard points out, his will remains "inalienable" (see chapter 9, Part III.C). In other words, direct control has priority as compared to any indirect control, since otherwise conflict is unavoidable, contrary to the *very purpose* of property norms. A norm that generates conflict cannot be considered a property norm aimed at reducing conflict, and thus cannot be justified. For this reason, direct control has logical-temporal precedence over indirect control, and the only justified property

norm is self-ownership.¹⁹

或许是时候总结一下相互关联的原因了，探讨为何直接控制是决定人体所有权的关键环节，以及为何自我所有权因此是正当的。

1. 首先，这在直觉上是显而易见的；这是“自然”的立场。谁能比我更合理地拥有我的身体？（参见霍普在《社会主义与资本主义的理论》一书中的论述，第 21 页及以下各页）。正如洛克所写：“每个人都对自己的人身拥有所有权：除了他自己，任何人都无权拥有这种所有权。”¹⁸

2. 在附录中，罗斯巴德和霍普提出的论点，否定了自我所有权之外仅有的两种可能的替代方案：普遍且平等的他者所有权的“共产主义”替代方案，这是不可行的，并且会导致人类的灭亡；以及他者所有权（奴役、统治），这是不具有普适性。

3. 上文提到的先来-后到的区别（见注 6、7）：很难否认，一个人对自己身体的直接控制权就是他的自我所有权。这是最佳的客观联系。霍普写道：“我可以引用一个客观事实来支持我对我身体的财产主张，那就是我是这个身体的第一个占有者——它的第一个使用者——与此同时，任何声称有权控制这个身体的人都不能引用任何这样的事实。”（注 7）任何声称有权通过间接控制奴役这个人的人总是后来才出现。除非他是一个人，否则间接控制一个人是不可能的。当一个人成为一个人时，他的直接控制使他成为其身体的第一所有者。因此，未来的奴役者是一个后到者，违反了先来-后到的区别。因此，将财产权分配给后到的间接控制者的财产规范是不正当的，原因在于，它与任何违反先来-后到区别的财产规范一样，会产生而不是减少冲突。

4. 与上文第 2 点中提出的普遍化观点相关：行动人寻求拥有外部资源的前提是他们已经拥有自己的身体。这种权利并非来自拓殖，而是基于其他原因（如直接控制）。因此，当奴隶主试图支配和拥有另一个人时，他必须在某种基础上主张对自己的自我所有权。无论可能成为奴隶主的人，其主张自我所有权的依据是什么，他都不能否认处境类似的其他人享有同样的权利。

5. 也许最有决定性的是，正如霍普在以前的著作中所论证的（引自上文注 17），

¹⁸ Locke, Second Treatise on Civil Government, § 25.
洛克《政府论：下》，第 25 页。

以及他在前言的相关评论中所强调的：“如果将身体所有权分配给某个间接的身体控制者，冲突将变得不可避免，因为直接的身体控制者只要活着，就无法放弃对其身体的直接控制。”正如我在第 7 章（注 35，注 36 后面的文字）中所讨论的那样，霍普在这里指出的是，将一个人（直接的身体控制者）的身体所有权分配给一个奴役者（间接的身体控制者），必然会产生冲突，因为被奴役者保持着他对自己身体的直接控制——正如罗斯巴德指出的，他的意志仍然是“不可让渡的”（见第 9 章，第三辑 C）。换言之，与任何间接控制相比，直接控制具有优先权，否则冲突将不可避免，这与财产规范的根本目的背道而驰。产生冲突的规范不能被视为旨在减少冲突的财产规范，因此也不能被证明是正当的。基于这个原因，直接控制在逻辑-时间上优先于间接控制，唯一合理的财产规范是自我所有权。¹⁹

回到孩子这个话题

So, who owns a child's body? We may say that initially, before the child has rights (say, as a very early stage fetus), the mother owns the growing fetus that is part of her body and that was produced by her body.²⁰ Once the child is recognized as having rights, the child owns his own body because of his direct control over it, but the parents serve as presumptive guardians who can make decisions on the child's behalf. (The presumption can be overcome if the parents are abusive, meaning some other adults would be selected as the guardians/parents.) When the child reaches a sufficient level of maturity, he or she becomes an adult, so to speak, and the parents' guardianship ends.²¹

那么，谁拥有孩子的身体呢？我们可以认为，最初，在儿童获得权利之前（例如，作为一个非常早期的胎儿），母亲拥有正在成长的胎儿，因为这是她身体的一部分，

¹⁹ I discuss this also in Kinsella, “On the Obligation to Negotiate, Compromise, and Arbitrate,” StephanKinsella.com (April 6, 2023). See also related discussion in “Defending Argumentation Ethics” (ch. 7), text following n.36; “Law and Intellectual Property in a Stateless Society” (ch. 14), Part II.C.

我在 StephanKinsella.com(2023 年 4 月 6 日)的文章《论谈判、妥协和仲裁的义务》中也讨论了这一点。另见《捍卫论证伦理学》(第七章)中的相关讨论，第 36 段之后的文字；《无国家社会中的法律和知识产权》(第十四章)，第二辑 C。

并且由她的身体孕育。²⁰一旦儿童被承认拥有权利，儿童便拥有自己的身体，因为他能够直接控制自己的身体。然而，父母作为默认的监护人，可以代表孩子做出决定。（如果父母存在虐待行为，这一默认设定可以被推翻，即可以选择其他成年人作为监护人。）当孩子达到足够成熟的阶段时，他或她便被视为成年人，父母的监护权也随之终止。

²¹

Hoppe recognized this basic conclusion in his 1989 treatise, where he wrote:

It is worth mentioning that the ownership right stemming from production finds its natural limitation only when, as in the case of children, the thing produced is itself another actor-producer. According to the natural theory of property, a child, once born, is just as much the owner of his own body as anyone else. Hence, not only can a child expect not to be physically aggressed against but as the owner of his body a child has the right, in particular, to abandon his parents once he is physically able to run away

²⁰ For those who believe human rights start from conception, the mother would never be seen as the owner of the fetus. But I do not believe this can be argued from purely rational principles.

对于那些认为人权始于受孕的人来说，母亲永远不会被视为胎儿的主人。但我认为这不能从纯粹的理性原则来论证。

²¹ To be clear, humans do not literally homestead or appropriate their bodies as they homestead or appropriate unowned external resources. In the original article upon which this chapter is based, I referred to the child at some point appropriating or “homesteading” his body, but this was meant only as an analogy. Before the child has rights, the body is owned by the mother as it is part of her. After the child is recognized as having rights, but before he or she has full capacity, the parents are the presumptive agents for and guardians of the child. For more on the distinction between self body-ownership and ownership of external resources, see “A Libertarian Theory of Contract” (ch. 9); “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11); idem, “Aggression and Property Rights Plank in the Libertarian Party Platform”; idem, “KOL259 | ‘How To Think About Property.’”

需要明确的是，人类并不像他们拓殖或占有无主的外部资源那样，真的拓殖或占有自己的身体。在本章所依据的原文中，我提到孩子在某一时刻先占或“拓殖”了自己的身体，但这只是一个比喻。在孩子拥有权利之前，身体属于母亲，因为身体是母亲的一部分。在孩子被承认拥有权利之后，但在他或她拥有完全行为能力之前，父母是孩子的推定代理人 and 监护人。关于自我或身体所有权与外部资源所有权之间的区别，详见《自由意志主义的契约理论》（第 9 章）；《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）；同上，《自由意志主义政纲中的侵犯与财产权板块》；同上，“KOL259 | 《如何理解财产》”。

from them and say “no” to their possible attempts to recapture him. Parents only have special rights regarding their child—stemming from their unique status as the child's producers—insofar as they (and no one else) can rightfully claim to be the child's trustee as long as the child is physically unable to run away and say “no.”²²

霍普在 1989 年的论文中承认了这一基本结论，他写道：

值得一提的是，只有当生产出的物品本身即为另一行动人-生产者，例如孩子的情况下，源于生产的所有权才会受到自然的限制。根据财产的自然理论，孩子一旦出生，便与其他人一样拥有自己的身体。因此，孩子不仅有权期望自己的身体不受侵犯，而且作为自身身体的所有者，一旦其身体能够逃离父母，并对父母可能试图重新抓住他的行为说“不”时，他便有权脱离父母。父母只有在孩子无力逃跑和说“不”的情况下，才对孩子拥有特殊的权利——这源于他们作为孩子生产者的独特地位——唯有他们（而非他人）可以正当宣称自己是孩子的受托人。²²

Here Hoppe adopts the Rothbardian approach, which uses the child's capacity to run away and say “no” as a sort of rule of thumb for indicating when a child fully appropriates his body.²³ But a more general conception of body-appropriation may be developed by considering the following. First, as Hoppe emphasizes, to appropriate means to bring under control.²⁴

在这里，霍普借鉴了罗斯巴德的方法，即将儿童逃跑和说“不”的能力视为一种经验法则，用以判断儿童何时完全掌控了自己的身体。²³然而，为了构建一个更普遍的身体占有概念，以下几点值得考虑。首先，正如霍普所强调的，占有本质上意味着控制。

²⁴

²² Hoppe, *A Theory of Socialism and Capitalism*, pp. 24 – 25, n.12 (emphasis added). 霍普《社会主义与资本主义理论》，第 24-25 页，注 12(重点补充)。

²³ Rothbard, “Children and Rights.” Again, this “appropriation” is not the same as a bodyowning actor homesteading or appropriating an unowned, external resource. See note 21, above.

罗斯巴德《孩子与权利》再次强调，这种“占有”与拥有身体的行动人拓殖或占有无主的外部资源是不同的。见上注 21。

²⁴ Hans-Hermann Hoppe, “Four Critical Replies,” in *The Economics and Ethics of Private Property*, p. 405.

汉斯-赫尔曼·霍普，《私有财产的经济学与伦理学》，第 405 页，“四个关键性的答

Hoppe also argues that rights are held by rational agents—those who are “capable of communicating, discussing, arguing, and in particular, [who are] able to engage in an argumentation of normative problems.”²⁵ This implies that a person reaches adulthood, or “appropriates” his body and gains full ownership rights to it, when he reaches the point where he is a rational agent in this sense. (The act of gaining full self-ownership rights may be regarded as a type of homesteading or appropriation of one’s body—reaching adulthood, so to speak—so long as it is kept in mind that it is a special type of homesteading: not homesteading by a body-owner of an unowned (non-agent) resource, but the establishment of an objective link constituted by direct and immediate control of the body by a rational agent. The child becomes a full self-owner or body-owner, when he reaches sufficient rational agency to be rights-bearing and independent, because he has direct control over his body. It is the union of these two characteristics that gives him a proprietary right over his body: rational agency + direct control. Animals also have direct control over their bodies but can be owned because they have no rational agency, that is, no rights. Both characteristics are needed for the young human to become a self-owning adult, so to speak.)

霍普还认为，权利属于理性主体——即那些“能够交流、探讨、论证，尤其是参与规范性问题论证的人”。²⁵ 这意味着，当一个人在此意义上成为理性主体时，他便步入了成年，或者说“占有”了自己的身体，从而获得了对身体的完全所有权。（获得完全自我所有权的行动可以视为一种拓殖或占有自己的身体——即成年，但需明确这是一种特殊类型的拓殖：并非身体所有者对无主（无代理人）资源的拓殖，而是由理性主体对身体的直接和即时控制所构成的客观联系。当孩子具备足够的理性能力，能够独立享有权利时，他便成为完全的自我所有者或身体所有者，因为他能够直接控制自己的身体。正是理性主体与直接控制这两个特征的结合，赋予了他对自己身体的所有权。动物虽也能直接控制自己的身体，但可以被人类拥有，因为它们并非理性主体，因而没有权利。可以说，这两个特征是年幼人类成长为拥有自我的成年人所必需的。）

Obviously, there are other issues that could be explored here: when and exactly how does a child homestead himself, or reach adulthood; and exceptions to the prima facie

复”。

²⁵ Hoppe, *A Theory of Socialism and Capitalism*, pp. 18 – 19, n.5.

霍普《社会主义和资本主义理论》第 18-19 页，注 5。

case, such as where a person commits a crime which in some sense severs his objective link or transfers it to his victim (creating a "superior" link on behalf of the victim), so that the victim has the right to retaliate. But it should be clear that what distinguishes libertarianism from all competing political theories is its scrupulous adherence— informed by sound, i.e., Austrian, economics— to the idea that property rights in scarce resources must be assigned to the person with the best objective link to the resource in question; and that, in the case of bodies, the link is the natural connection to and relationship between the occupant and the body, while for all other resources, the objective link is first use and contractual transfer.

显然，这里还可以探讨其他问题：孩子何时以及究竟如何拓殖自身，走向成年；以及表面证据确凿的例外情况，例如某人犯罪，这在某种意义上切断了其与身体的客观联系，或将这种联系转让给受害者（代表受害者拥有了“优先”联系），因此受害者有权进行报复。但应明确的是，自由意志主义与其他相互竞争的权力理论之区别在于，它严格遵循健全的（即奥派经济学的）理念，即稀缺资源的财产权必须分配给与该资源有最佳客观联系的人；就身体而言，这种联系是占有者与身体之间的自然联系和关系，而对于所有其他资源，客观联系则体现为首次使用和转让。

附录 直接控制和客观联系

APPENDIX DIRECT CONTROL AND OBJECTIVE LINKS

As noted above, the material here was originally intended to appear in footnote 14, above. Due to its length, I include this material in this appendix.

如上所述，此处的材料原本打算放在上文注释 14 中。由于篇幅较长，我将其列入本附录。

In the text above, I noted that "first use" is not the ultimate test for the "objective link" in the case of body ownership, but that rather it is a person's direct and immediate control over his body. See also, on this, Rothbard, who argues in favor of self-ownership because the only logical alternatives are "(1) the 'communist' one of Universal and Equal Other-ownership, or (2) Partial Ownership of One Group by Another—a system of rule by one class over another."²⁶ However, Alternative(2) cannot be universal, as it is partial and arbitrary; and Alternative (1) either breaks down in practice and

reduces to Alternative (2) , or, if actually implemented, would result in the death of the human race. As Rothbard writes:

我在上文中指出，在涉及身体所有权的情况下，“首次使用”并非检验“客观联系”的最终标准，而是指一个人对自己身体的直接和即时控制。关于这一点，也可参考罗斯巴德的观点，他主张自我所有权，因为唯一合乎逻辑的替代方案是：“（1）普遍平等的‘共产主义’的他者所有权，或（2）一个群体对另一个群体的部分所有权——即一个阶级对另一个阶级的统治制度”。²⁶然而，备选方案（2）不可能具有普遍性，因为它是片面的且武断的；而备选方案（1）要么在实践中崩溃，沦为备选方案（2），要么，如果真正实施，将导致人类的灭亡。罗斯巴德写道：

Can we picture a world in which no man is free to take any action whatsoever without prior approval by everyone else in society? Clearly no man would be able to do anything, and the human race would quickly perish. But if a world of zero or near-zero self-ownership spells death for the human race, then any steps in that direction also contravene the law of what is best for man and his life on earth.²⁷

我们能否设想这样一个世界：在这个世界中，任何人未经社会其他成员的事先批准，便无法自由采取任何行动？显然，在这种情况下，没有人能够有所作为，人类将迅速走向灭亡。然而，若一个几乎或完全摒弃自我所有权的世界会导致人类的消亡，那么朝着这一方向迈出的每一步，无疑都违背了最有利于人类及其在地球上生存的法则。²⁷

Hoppe also writes on this:

If a 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 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 else all persons, A and

²⁶ Murray N. Rothbard, “Interpersonal Relations: Ownership and Aggression,” in *The Ethics of Liberty* (<https://mises.org/library/crusoe-social-philosophy>), p. 45.

穆瑞·罗斯巴德，《人际关系：所有权与侵犯》《自由伦理》(<https://mises.org/library/crusoe-social-philosophy>)，第45页。

²⁷ Ibid., p. 46.

同上，第46页。

B, must be considered equal co-owners of all bodies, places and goods.

霍普继续写道：

若一个人 A 并非其自身身体、通过该身体先占及/或生产的场所与物品、以及自愿（通过契约）从其他前任所有者处获取的物品的所有者，那么仅存在两种可能性：要么必须承认另一个人 B 是 A 的身体以及 A 所占有、生产或获取的场所与物品的所有者；要么所有人 A 和 B 都必须被视为所有身体、场所与物品的平等共同所有者。

In the first case, A would be reduced to the rank of B's slave and object of exploitation... such a ruling must be discarded as a human ethic equally applicable to everyone qua human being (rational animal). From the very outset, any such ruling can be 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.

在第一种情况下，A 将沦为 B 的奴隶和被剥削的对象。这样的裁决必须被视为违背适用于所有人（理性动物）的人类伦理，从而被摒弃。从一开始，任何此类裁决都难以被普遍接受，因此不能声称其代表法律。一项规则若要成为法律——一项正义的规则，就必须平等且普遍地适用于每一个人。

Alternatively, in the second case of universal and equal co-ownership, the requirement of equal law for everyone is fulfilled. However, this alternative suffers from another even more severe deficiency, for if it were applied, all of mankind would instantly perish. (And since every human ethic must permit the survival of mankind, this alternative must be rejected.)

或者，在第二种普遍平等的共同所有权的情况下，人人平等的法律要求也得到了满足。然而，这种选择存在另一个更为严重的缺陷，因为如果适用这种选择，全人类都会立即灭亡。（由于每一种人类伦理都必须允许人类生存，因此必须摒弃这种选择）。

... This insight into the praxeological impossibility of "universal communism," as Rothbard referred to this proposal, brings us 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.²⁸

罗斯巴德对“普遍共产主义”（他本人称之为“普遍共产主义”）在行动学上不可能性

的深刻洞察，立即为我们提供了另一种论证方式：先占和私有财产观念才是社会秩序问题的唯一正确的解决方案。²⁸

And in another work, Hoppe adds:

What is wrong with this idea of dropping the prior-later distinction as morally irrelevant? First, if the late-comers, i.e., those who did not in fact do something with some scarce goods, had indeed as much of a right to them as the first-comers, i.e., those who did do something with the scarce goods, then literally no one would be allowed to do anything with anything, as one would have to have all of the late-comers' consent prior to doing whatever one wanted to do. Indeed, as posterity would include one's children's children—people, that is, who come so late that one could never possibly ask them—advocating a legal system that does not make use of the prior-later distinction as part of its underlying property theory is simply absurd in that it implies advocating death but must presuppose life to advocate anything. Neither we, our forefathers, nor our progeny could, do, or will survive and say or argue anything if one were to follow this rule. In order for any person—past, present, or future—to argue anything it must be possible to survive now. Nobody can wait and suspend acting until everyone of an indeterminate class of late-comers happens to appear and agree to what one wants to do. Rather, insofar as a person finds himself alone, he must be able to act, to use, produce, consume goods straightaway, prior to any agreement with people who are

²⁸ Hans-Hermann Hoppe, “Rothbardian Ethics,” in *The Economics and Ethics of Private Property*, pp. 383–84. See also similar comments in David Boaz, *The Libertarian Mind: A Manifesto for Freedom* (New York: Simon & Schuster, 2015), p. 140. See also related discussion in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.27 and “Defending Argumentation Ethics” (ch. 7), at n.31. See also R.W. Bradford's inane criticism of this reasoning in R.W. Bradford, “A Contrast of Visions,” *Liberty* 10, no.4 (March 1997; <https://perma.cc/7FDT-G7FD>): 57–63, at 57–58.

汉斯-赫尔曼·霍普《罗斯巴德伦理学》，载于《私有财产的经济学与伦理学》，第 383–384 页。另见 David Boaz 的相似评论，载于《自由意志主义思想：自由宣言》（纽约：西蒙与舒斯特出版社，2015 年），第 140 页。另见《无国家社会中的法律与知识产权》（第 14 章）第 27 节和《捍卫论证伦理学》（第 7 章）第 31 节中的相关讨论。另见 R.W. 布拉德福德对这种推理的愚蠢批评，见 R.W. 布拉德福德的《幻象的对比》，《自由》第 10 期，no.4 (1997 年 3 月; <https://perma.cc/7FDT-G7FD>): 57–63, at 57–58.

simply not around yet (and perhaps never will be).²⁹

在另一部著作中，霍普补充道：

将先后来到的区别视为与道德无关，这种观点存在什么问题呢？首先，如果后到者——即那些实际上并未对某些稀缺物品做出任何贡献的人——与先来者——即那些确实对稀缺物品有所作为的人——拥有同等的权利，那么实际上将无人能够对任何物品采取行动，因为每个人在行动之前都必须获得所有后到者的同意。事实上，由于子孙后代将包括一个人的孩子的孩子——即那些到来得太晚，以至于人们永远无法向他们提出要求的人——因此，倡导一种不将先后来到的区别作为其基本财产理论一部分的法律制度是荒谬的。这种制度意味着主张死亡，但主张的前提却是生命的存在。若遵循这一规则，无论是我们、我们的先辈还是后代，都不可能存活，更不用说进行任何言论或论证。为了让任何人——无论是过去、现在还是未来的人——能够进行论证，必须允许他们现在就有生存的可能。没有人可以等待和暂停行动，直到不确定的后到者中的每个人都恰好出现并同意其行动。相反，只要一个人发现自己独自一人，在与其他尚未出现（或许永远不会出现）的人达成任何协议之前，他就必须能够采取行动，直接使用、生产或消费物品。²⁹

Marxist philosopher G.A. Cohen acknowledges:

people can do (virtually) nothing without using parts of the external world. If, then, they require the leave of the community to use it, then, effectively..., they do not own themselves, since they can do nothing without communal authorization.³⁰

马克思主义哲学家 G.A. 科恩 (G.A. Cohen) 承认：

如果不利用外部世界的某些部分，人们（实际上）什么也做不了。那么，如果他们需要得到社区的许可才能使用，那么，实际上.....，他们并不拥有自己，因为没有社区的授权，他们什么也做不了。³⁰

²⁹ Hoppe, A Theory of Socialism and Capitalism, pp. 169 – 70 (emphasis added). See also idem, “The Ethics and Economics of Private Property,” in The Great Fiction, p. 17.

霍普：《社会主义与资本主义理论》，第 169-170 页（重点补充）。另见《伟大的虚构》中《私有财产的伦理学和经济学》一章第 17 页。

³⁰ G.A. Cohen, “Self-Ownership, World-Ownership, and Equality,” in Frank Lucash, ed., Justice and Equality, Here and Now (Ithaca, N.Y.: Cornell University Press, 1986), pp. 113 – 14; also in G.A. Cohen, Self-ownership, Freedom, and Equality (Cambridge

Regarding this remark by Cohen, libertarian philosopher Jan Narveson comments: "It is testimony to the strength of our position that even someone so ideologically opposed gives it clear recognition as an argument that must be confronted."³¹

对于科恩的这一观点，自由意志主义哲学家扬-纳尔维森（Jan Narveson）指出：即便是在意识形态上如此对立的人也明确承认这是一个不容忽视的论点，这恰恰彰显了我们立场的强大。³¹

John Locke also rejected the idea that people can only use unowned resources by getting the consent of everyone else as absurd:

By making an explicit consent of every commoner, necessary to any one's appropriating to himself any part of what is given in common, children or servants could not cut the meat, which their father or master had provided for them in common, without assigning to every one his peculiar part.³²

约翰-洛克还认为，人们只有征得其他人的同意，才能使用无主资源，这种观点是荒谬的：

每个人都必须明确表示同意，才能将共有资源的一部分据为己有。如果父亲或主人没有为孩子或仆人分配好每块肉的具体归属，那么后者就无权分割前者提供给他们的共有食物。³²

For a point related to those mentioned above, see Hoppe, in the Foreword:

[It is] clear what a human ethic or a theory of justice worth its salt must accomplish. It must give an answer to the question of what am I and what is every other person permitted (or not permitted) to do, right now and right here, wherever a person may

University Press, 1995), pp. 93 - 94.

G.A.科恩《自我所有权、世界所有权和平等》，载于弗兰克·卢卡什主编，《正义与平等，此时此地》（纽约州伊萨卡：康奈尔大学出版社，1986），第113-114页；也见G.A.科恩，《自我拥有、自由和平等》（剑桥大学出版社，1995年），第93-94页。

³¹ 扬·纳尔维森《自由意志主义思想》，再版（Broadview 出版社，2001），第74页。

³² John Locke, Second Treatise on Civil Government (1690; <https://www.johnlocke.net/2022/07/two-treatises-of-government.html>), § 29.

约翰·洛克《政府论：下》（1690年）；<https://www.johnlocke.net/2022/07/two-treatises-of-government.html>), § 29。

find himself and whatever his external surroundings of men and materials may be.

关于上述提及的要点，可参见霍普在前言中的论述：

[一个]有价值的人类伦理或正义理论必须达成什么目标，这一点很明确。
它必须回答以下问题：在此刻此地，无论一个人身处何方、无论其周围的人员与物质环境如何，我和其他每个人被允许（或不被允许）做什么。

第五章 自由意志主义的惩罚与权利理论

A Libertarian Theory of Punishment and Rights

I published my first article on libertarian theory, “Estoppel: A New Justification for Individual Rights,” in Reason Papers in 1992.* An expanded treatment was published in the Journal of Libertarian Studies in 1996 and a similar version in the Loyola of Los Angeles Law Review.† This chapter is based on the latter article, also incorporating some material from the JLS article. There I thanked “Professor Hans-Hermann Hoppe and Jack Criss for helpful comments on an earlier draft.”

我于 1992 年在《理性论文》（Reason Papers）上发表了关于自由意志主义理论的首篇文章《禁止反言：个人权利的新辩护》。^{*} 1996 年《自由意志主义研究期刊》（Journal of Libertarian Studies）刊载了该文的扩展版本，随后《洛杉矶洛约拉法律评论》[†]（Loyola of Los Angeles Law Review）也发表了类似版本。[†] 本章以前者为基础，同时融入了后者部分内容。文中曾致谢“汉斯-赫尔曼·霍普教授（Hans-Hermann Hoppe）和杰克·克里斯（Jack Criss）对初稿提出的宝贵意见”。

谋杀比为其辩护更容易¹

^{*} Stephan Kinsella, “Estoppel: A New Justification for Individual Rights,” Reason Papers No. 17 (Fall 1992): 61 – 74.

金塞拉《禁止反言：个人权利的新理由》，《理性论文》第 17 期（1992 年秋季）：61-74 页。

[†] Stephan Kinsella, “Punishment and Proportionality: The Estoppel Approach,” J. Libertarian Stud. 12, no. 1 (Spring 1996; <https://mises.org/library/punishment-and-proportionality-estoppel-approach-0>): 51 – 73 and idem, “A Libertarian Theory of Punishment and Rights,” Loy. L.A. L. Rev. 30, no. 2 (1997; <https://digitalcommons.lmu.edu/llr/vol30/iss2/>): 607 – 45.

¹ Barry Nicholas, An Introduction to Roman Law, rev. ed (Oxford: Oxford University Press, 1962), p. 30 n.2 (quoting Papinian (Aemilius Papinianus)). Papinian, a third-century Roman jurist, is considered by many to be the greatest of Roman jurists. “Papinian is said to have been put to death for refusing to compose a justification of Caracalla’s murder of his brother and co-Emperor, Geta, declaring, so the story goes,

[I]t is easier to commit murder than to justify it.1

I. 简介

Punishment serves many purposes. It can deter crime and prevent the offender from committing further crimes. It can even rehabilitate some criminals—except, of course, if it is capital punishment. It can satisfy a victim's longing for revenge or a relative's desire to avenge. Punishment can also be used as a lever to obtain restitution or rectification for some of the damage caused by the crime. For these reasons, the issue of punishment is and always has been a vital concern to civilized people. They want to know the effects of punishment and effective ways of carrying it out.2

惩罚具有多重目的。它能够震慑犯罪，防止罪犯再次作案。在某些情况下，惩罚甚至可以改造罪犯——当然，死刑除外。此外，惩罚能够满足受害者及其亲属的复仇愿望。它还可以作为一种手段，对犯罪造成的损失进行补偿或纠正。基于这些原因，惩罚问题始终是文明社会所关注的重要议题。人们渴望了解惩罚的实际效果以及实施惩罚的有效途径。²

Civilized people are also concerned about justifying punishment. They want to punish,

that “it is easier to commit murder than to justify it.” ‘ Ibid. For further references and discussion of this story, see Edward D. Re, “The Roman Contribution to the Common Law, ” Fordham L. Rev. 29, no. 3 (1960; <https://ir.lawnet.fordham.edu/flr/vol29/iss3/2/>): 447 – 94, at 452 n.21.

巴里·尼古拉斯所著《罗马法导论（修订版）》（牛津：牛津大学出版社，1962 年）第 30 页注释 2（引用帕皮尼安（艾米利乌斯·帕皮尼安努斯）的观点）。帕皮尼安是公元 3 世纪的罗马法学家，被许多人视为罗马最伟大的法学家。“据说，帕皮尼安因拒绝为卡拉卡拉谋杀其兄弟兼共治皇帝格塔的行为撰写辩护词而被处死。据传，他宣称‘杀人容易，为杀人辩护难’。”同上。关于这一故事的更多参考文献及讨论，可参见爱德华·D. 雷所著《罗马法对普通法的贡献》，载《福特汉姆法律评论》第 29 卷第 3 期（1960 年；网址：<https://ir.lawnet.fordham.edu/flr/vol29/iss3/2/>）：第 447 – 94 页，特别是第 452 页注释 21。

² See H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (Oxford: Oxford University Press, 1968), p. 73, discussing various reasons why people engage in punishment.

见 H.L.A. Hart, 《惩罚与责任：法哲学论文集》（牛津：牛津大学出版社，1968），第 73 页，其中讨论了人们从事惩罚的各种原因。

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.³ 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.⁴

文明人同样关注惩罚的正当性。他们不仅追求惩罚的实施，更希望了解这种惩罚是否具备合理性。他们期望惩罚能够在合法的框架内进行——这正是人们对惩罚理论产生浓厚兴趣的根源。³然而，正如穆瑞·罗斯巴德（Murray Rothbard）在其关于惩罚与相称性的简洁而深刻的论述中所揭示的，惩罚理论目前尚未得到充分的发展，即便是自由意志主义者也不例外。⁴

³ The distinction between the effects or utility of punishment and the reason we have a right to punish has long been recognized. See, e.g., William Blackstone, *Commentaries on the Laws of England* (Oxford Edition, Wilfrid Prest, General Editor, 2016), bk 4, chap. 1, at pp. *7-*13 (Oxford edition pp. 4-8); F.H. Bradley, *Ethical Studies*, 2d ed. (Oxford: Clarendon Press, 1927), pp. 26 - 27; Hart, *Punishment and Responsibility*, pp. 73 - 74. 惩罚的效果或效用与我们有权惩罚的原因之间的区别早已得到承认。参见 William Blackstone, 《英国法律评论》(牛津版, Wilfrid Prest, 总编, 2016), 第四卷, 第一章, 页*7-*13(牛津版第 4-8 页);F.H.布拉德利, 《伦理研究》, 第 2 版(牛津:克拉伦登出版社, 1927 年), 第 26-27 页;《惩罚与责任》, 第 73-74 页。

⁴ Murray N. Rothbard, “Punishment and Proportionality,” in *The Ethics of Liberty* (New York: New York University Press, 1998; <https://mises.org/library/punishment-and-proportionality-0>), at p. 85 (“Few aspects of libertarian political theory are in a less satisfactory state than the theory of punishment. . . . It must be noted, however, that all legal systems, whether libertarian or not, must work out some theory of punishment, and that existing systems are in at least as unsatisfactory a state as punishment in libertarian theory.”). This chapter appeared in substantially the same form in “Punishment and Proportionality,” in Randy E. Barnett & John Hagel III, eds., *Assessing the Criminal: Restitution, Retribution, And the Legal Process* (Cambridge, Mass.: Ballinger, 1977), chap. 11, pp. 259 - 70. See also Rothbard’ s article “King on Punishment: A Comment, ” *J. Libertarian Stud.*4, no.2 (Spring 1980; <https://mises.org/library/king-punishment-comment-1>): 167 - 72 (commenting on J Charles King, “A Rationale for Punishment,” *J. Libertarian Stud.* 4, no. 2 (Spring 1980; <https://mises.org/library/rationale-punishment-0>): 151 - 65). For additional discussion of various punishment-related theories, see Robert James Bidinotto, ed., *Criminal Justice? The Legal System Vs. Individual Responsibility* (Irvington-on-Hudson, New York:

In conventional theories of punishment, concepts of restitution, deterrence,⁵ retribution, and rehabilitation are often forwarded as justifications for punishment, even though they are really the effects or purposes of punishment.⁶ This reversal of logic is not surprising given the consequentialist, result-oriented type of thinking that is so prevalent nowadays. Nevertheless, the effects of punishment or the uses to which it might be put do not justify punishment.

在传统的惩罚理论中，赔偿、威慑、⁵报复和改造等概念常被提出作为惩罚的理由，尽管它们实际上只是惩罚的效果或目的。⁶鉴于当前盛行的结果主义和结果导向型思维，

Foundation for Economic Education, Inc., 1994; <https://perma.cc/KW2G-4JF5>); Gertrude Ezorsky, ed., *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972); Stanley E. Grupp, ed., *Theories of Punishment* (Bloomington: Indiana University Press, 1971); and Hart, *Punishment and Responsibility*.

穆瑞·罗斯巴德，《惩罚与相称性》，载于《自由的伦理》(纽约:纽约大学出版社，1998年);<https://mises.org/library/punishment-andproportional-0>)，第85页(“自由意志主义政治理论中很少有比惩罚理论更不令人满意的方面...，但必须指出的是，所有法律制度，无论是否是自由意志主义的，都必须研究出某种惩罚理论，而现有制度至少与自由意志主义理论中的惩罚一样处于不令人满意的状态。”)。本章以大致相同的形式出现在《惩罚与相称性》(Punishment and Proportionality)一文中，收录于兰迪-巴尼特和约翰-哈格尔三世编著的《评估罪犯：恢复、惩罚和法律程序》(Assessing the Criminal: Restitution, Retribution, And the Legal Process ((剑桥，马萨诸塞州，巴林杰出版社，1977)，第十一章，第259-270页。参见罗斯巴德的文章《惩罚之王：一个评论》，《自由意志主义研究》第4期，no.2(1980年春);<https://mises.org/library/king-punishment-comment-1>):167-172(评论J·查尔斯·金的《惩罚的基本原理》，《自由意志主义研究》，第4期，no.2(1980年春):151-165)。关于各种惩罚相关理论的更多讨论，见罗伯特-詹姆斯-比迪诺托编著的《刑事司法：法律制度与个人责任》(Irvington-on-Hudson, New York: 经济教育基金会，1994年; <https://perma.cc/KW2G-4JF5>)；格特鲁德·埃佐斯基(Gertrude Ezorsky)编著的《惩罚的哲学视角》(奥尔巴尼:纽约州立大学出版社，1972年)；斯坦利E.格鲁普(Stanley E. Grupp)编著的《惩罚理论》(布卢明顿:印第安纳大学出版社，1971年)；以及Hart著的《惩罚与责任》。

⁵ This includes both prevention and incapacitation.

这包括预防和使人丧失能力两方面。

⁶ Rehabilitation is also sometimes referred to as reform. For discussion of various punishment-related theories, see Barnett & Hagel III, eds., *Assessing the Criminal*; Robert James Bidinotto, “Crime and Moral Retribution,” in *Criminal Justice?*, pp. 181 – 86, discussing various utilitarian strategies of crime control and punishment; Hart, *Punishment and Responsibility*; Ezorsky, ed., *Philosophical Perspectives on Punishment*; Grupp, ed., *Theories of Punishment*; Matthew A. Pauley, “The Jurisprudence of Crime

这种逻辑上的颠倒并不令人意外。然而，惩罚的效果或用途并不能直接证明惩罚的正当性。

Take the analogous case of free speech rights as an example. Modernday liberals and other consequentialists typically seek to justify the First Amendment right to free speech on the grounds that free speech promotes political discourse.⁷ But, as libertarians—the most systematic and coherent school of modern political philosophy and the contemporary heirs of the classical liberal Founding Fathers—have explained, there is a right to free speech simply because it does not involve aggression against others, not because it “promotes political discussion.”⁸

以言论自由权为例进行类比说明。现代自由主义者和其他结果主义者通常以言论自由促进政治对话为由，为第一修正案规定的言论自由权辩护。⁷然而，正如自由意志

and Punishment from Plato to Hegel,” Am. J. Jurisprudence 39, no. 1 (1994); <https://scholarship.law.nd.edu/ajj/vol39/iss1/6/>): 97 – 152; and Ronald J. Rychlak, “Society’s Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment,” Tul. L. Rev. 65, no. 2 (1990): 299 – 338, at pp. 308 – 31.

改造有时也被称为改邪归正。关于各种惩罚相关理论的讨论，见巴尼特和哈格尔三世编著的《评估罪犯》；罗伯特·詹姆斯·比迪诺托（Robert James Bidinotto），《犯罪与道德报应》，《刑事司法》，第 181-86 页，讨论了控制和惩罚犯罪的各种功利主义策略；哈特（Hart），《惩罚与责任》；埃佐斯基（Ezorsky）编著，《惩罚的哲学视角》；格鲁普（Grupp）编著，《惩罚理论》；Matthew A. Pauley 著，《从柏拉图到黑格尔的犯罪与惩罚法理学》，Am. J. Jurisprudence 39, no. 1 (1994); <https://scholarship.law.nd.edu/ajj/vol39/iss1/6/>): 97 – 152; and Ronald J. Rychlak, 《社会的道德惩罚权：对惩罚的谴责理论的进一步探索》Tul. L. Rev. 65, no. 2 (1990): 299 – 338, at pp. 308 – 331.

⁷ See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966), p. 218: “[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs”; *Roth v. United States*, 354 U.S. 47 (1957), p. 484, stating that a purpose of the right to free speech is “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980), p. 112, stating that the “central function” of the First Amendment is to “assur[e] an open political dialogue and process”; see also Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 4, 2d ed. (St. Paul, Minn.: West Publishing, 1992), § § 20.6 & 20.30, discussing various defenses of freedom of speech and reasons for providing a lower standard of

主义——作为现代政治哲学中最系统、最连贯的流派，以及古典自由主义开国元勋的当代继承者——所阐释的那样，言论自由权存在的根本原因仅仅是因为它不涉及对他人的侵犯，而非因为它“促进了政治讨论”。⁸

constitutional protection to “commercial speech” than to normal speech. See also the entry “Case Categories: Commercial Speech,” The First Amendment Encyclopedia (<https://perma.cc/QY39-K9NP>).

例如，见 *Mills 诉阿拉巴马州*，384 U.S. 214 (1966)，第 218 页：“[第一]修正案的一个主要目的是保护对政府事务的自由讨论，这实际上是一个普遍的共识”；*Roth 诉美国案*，354 U.S. 47 (1957)，第 484 页，指出言论自由权的目的是“确保不受限制地交流思想，以实现人民所希望的政治和社会变革”；约翰·哈特·伊利（John Hart Ely），《民主与不信任：司法审查理论》（剑桥，马萨诸塞州：哈佛大学出版社，1980 年），第 112 页，指出第一修正案的“核心功能”是“确保公开的政治对话和进程”；see also Ronald D. Rotunda & John E. Nowak，《宪法论：实质与程序》，第四卷，第二版（圣保罗，明尼苏达州：West Publishing, 1992），§§ 20.6 & 20.30，讨论言论自由的各种辩护理由，以及为“商业言论”提供低于正常言论的宪法保护标准的理由。参见《第一修正案百科全书》(<https://perma.cc/QY39-K9NP>)条目“案例类别：商业言论”。

⁸ We do not even have a direct or independent right to free speech. The right to free speech is merely shorthand for one positive result of the right to own private property: If I am situated on property (resources) I have a right to be on, for example in my home, I am entitled to do anything on or with that resource (property) that does not invade others’ rights, whether it be skeet shooting, barbecuing, or communicating with others. Thus, the right to free speech is only indirect and does not in turn justify property rights, which are logically at the base of the right to free speech. See Rothbard, “‘Human Rights’ as Property Rights,” in *The Ethics of Liberty* (<https://mises.org/library/human-rights-property-rights>), pp. 113 – 17; Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto*, rev. ed. (New York: Libertarian Review Foundation, 1985; <https://mises.org/library/new-liberty-libertarian-manifesto>), pp. 42 – 44, discussing the relation between free speech rights and property rights. In like manner, if there is a right to punish, there is only indirectly a “right” to deter crime, and any indirect right to deter, rehabilitate, or retaliate, which is based on the right to punish, can hardly justify or limit the logically prior right to punish.

我们甚至没有直接或独立的言论自由权。言论自由权只是拥有私人财产权的一个积极结果的简称：如果我位于我有权拥有的财产（资源）上，例如在我的家中，我就有权在该资源（财产）上或利用该资源（财产）做任何不侵犯他人权利的事情，无论是射击、烧烤还是与他人交流。因此，言论自由权只是间接的，并不能反过来证明财产权的正当性，而财产权在逻辑上是言论自由权的基础。见罗斯巴德，《财产权即“人权”》，载于《自由的伦理》(<https://mises.org/library/human-rights-property-rights>)，第 113-117 页；穆瑞罗斯巴德：《为了新自由：自由意志主义宣言》，修订版（纽约：自由意志主义评论基金会，1985 年：<https://mises.org/library/new-libertarian-manifesto>）。

libertylibertarian-manifesto》，第 42-44 页，讨论了自由言论权与财产权之间的关系。同样，如果存在惩罚权，就只能间接地存在威慑犯罪的“权利”，而任何基于惩罚权的威慑、改造或报复的间接权利，都难以证明或限制逻辑上先行的惩罚权。

Technically speaking, a property right is not a right to control a resource but a right to exclude others from using the resource. But this distinction is not material here. See “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), n.62 and Part IV.H, et pass. See also Stephan 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); and “What Libertarianism Is” (ch. 2), at n.2 and accompanying text.

从技术上讲，财产权不是控制资源的权利，而是排除他人使用资源的权利。但这一区别在此并不重要。见《《反对知识产权》二十年后：回顾与展望》（第 15 章），注 62 段和第四辑 H 节等。另见斯蒂芬·金塞拉，《作为行动限制而非财产权限制的互不侵犯原则》，StephanKinsella.com（2010 年 1 月 22 日），以及同上，《作为财产权限制的知识产权与侵犯：如何区别二者》，StephanKinsella.com(2010 年 1 月 22 日);和《何为自由意志主义》(第二章)，注 2 及补充附文。

Regarding the use of the term “property” to refer to a resource, see “Against Intellectual Property After Twenty Years” (ch. 15), at n. 31 and accompanying text, cautioning against use of “property” to refer to the object of a property rights rather than the rights agents have with respect to owned things. This and some other chapters (originally authored years ago) sometimes use “property” in this colloquial sense, but it should be kept in mind that in such cases, it should be understood that the word “property” refers to the thing (resource) owned. The civil law has a broad understanding of the concept of a “thing,” which can be owned or the subject of legal rights; see Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), art. 448: “Division of things. Things are divided into common, public, and private; corporeals and incorporeals; and movables and immovables.” Incidentally this exhaustive classification schema implies that intellectual property rights are (private) “incorporeal movables.” See also Kinsella, “Are Ideas Movable or Immovable?”, C4SIF Blog (April 8, 2013).

关于使用“财产”一词指代资源，见《《反对知识产权》二十年后》（第 15 章），注 3 段及所附文字，告诫不要使用“财产”指代财产权的客体，而是代理人对所拥有的事物享有的权利。本章和其他一些章节（最初编写于多年前）有时会在这种口语意义上使用“财产”，但应记住，在这种情况下，“财产”一词应理解为所拥有的事物（资源）。民法对“物”的概念有广义的理解，可以是所有物，也可以是法定权利的标的物；参见《路易斯安那州民法典》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent）第 448 条：“物的划分。物分为共有物、公共物和私有物；有形物和无形物；动产和不动产”。顺便提一下，这种详尽

This analogy highlights the fact that the purpose to which a right holder might put the right is not necessarily what justifies the right in the first place. Turning back to punishment, if individuals have a right to punish, the purpose for which a person exercises this right— for example, for revenge, for restitution, or for deterrence—and the consequences that flow from it may well be irrelevant to the question of whether the right claimed can be justified.⁹

这一类比凸显了一个重要事实：权利人行使权利的目的并不必然证明该权利的正当性。反观惩罚问题，若个人拥有惩罚权，那么其行使该权利的目的——无论是出于复仇、赔偿还是威慑——以及由此产生的后果，很可能与所主张权利的正当性并无直接关联。⁹

In this chapter I will attempt to explain how and why 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. I will develop a

的分类模式意味着知识产权是（私人的）“无形的动产”。另见金塞拉：“思想是动产还是不动产？”，C4SIF 博客（2013 年 4 月 8 日）。

⁹ Others, of course, have recognized the distinction between the effects or utility of punishment and the justification of the right to punish. See, e.g., Blackstone, Commentaries on the Laws of England, bk 4, pp. *7 - *19, discussing in separate subsections (1) the right or power to punish; (2) the object or end of punishment, for example, rehabilitation, deterrence, or incapacitation; and (3) the degree, measure, or quantity of punishment; Bradley, Ethical Studies, pp. 26 - 27 (“Having once the right to punish, we may modify the punishment according to the useful and the pleasant.”); Hart, Punishment and Responsibility, p. 74 (“ [W]e must distinguish two questions commonly confused. They are, first ‘Why do men in fact punish?’ This is a question of fact to which there may be many different answers. ... The second question, to be carefully distinguished from the first, is ‘What justifies men in punishing? Why is it morally good or morally permissible for them to punish?’ ”).

当然，其他人也承认惩罚的效果或效用与惩罚权的正当性之间的区别。例如，见布莱克斯通，《英格兰法律评注》，第 4 册，第*7-*19 页，分节讨论了 (1) 惩罚的权利或权力；(2) 惩罚的目标或目的，例如改造、威慑或丧失能力；(3) 惩罚的程度、措施或数量；布拉德利（Bradley）《伦理学研究》，第 26-27 页（“一旦有了惩罚的权利，我们就可以根据有用和令人愉快的情况来修改惩罚”）；哈特，《惩罚与责任》，第 74 页（“我们必须区分两个通常被混淆的问题。第一个问题是‘人为什么要惩罚？’这是一个事实问题，可能有许多不同的答案...。第二个问题要与第一个问题仔细区分，即‘人惩罚的理由是什么？为什么惩罚在道德上是好的或者道德上允许的？’”）。

retributionist, or lex talionis, theory of punishment, including related principles of proportionality. This theory of punishment is largely consistent with the libertarian-based lex talionis approach of Murray Rothbard.¹⁰ I will not follow the approach of some theorists who derive principles of punishment from a theory of rights or from some other ethical or utilitarian theory. Instead, I will follow the opposite approach in which justifying punishment itself defines and justifies our rights.¹¹

在本章中，我将探讨惩罚的正当性及其背后的原因。本文所讨论的惩罚权不仅适用于财产犯罪，如盗窃和非法侵入，也同样适用于侵犯人身的犯罪，例如殴打、强奸和谋杀。我将构建一种报复主义（或称同态复仇法）的刑罚理论，包括与之相关的比例原则。该刑罚理论与穆瑞·罗斯巴德¹⁰提出的基于自由意志主义的同态复仇法路径高度契合。不同于某些学者从权利理论或其他伦理、功利主义理论推导惩罚原则的研究路径，我将采用相反的论证方式——通过惩罚本身的正当性来界定并证成我们的权利。

¹¹

¹⁰ Professors Barnett and Hagel state that Rothbard's punishment theory, "with its emphasis on the victim's rights, ... is a significant and provocative departure from traditional retribution theory which, perhaps, merits a new label." Randy E. Barnett & John Hagel III, "Introduction to 'Part II: Criminal Responsibility: Philosophical Issues,'" in Barnett & Hagel III, eds., *Assessing the Criminal*, at p. 179.

巴尼特教授和哈格尔教授指出，罗斯巴德的惩罚理论“强调受害者的权利，.....是对传统报复理论的一个重要的、挑衅性的背离，或许值得贴上一个新的标签”。兰迪·e·巴尼特和约翰·哈格尔三世，第二辑《刑事责任：哲学问题》的简介，在巴尼特和哈格尔三世，编辑，《评估罪犯》，第179页。

¹¹ What this means is that we determine the content of our rights, by determining when the use of force is justified, since rights are considered to be claims that are legitimately enforceable, instead of the opposite approach of defining rights first which then implies which use of force is justified. The central question that I seek to address is: when is the use of force justified; the contours of rights follows from the answer to this question.

这意味着，我们通过确定何时使用武力是正当的来确定我们权利的内容，因为权利被认为是可以合法执行的主张，而不是采取相反的方法，即首先界定权利，然后暗示何种方式使用武力是正当的。我试图解决的核心问题是：何时使用武力是正当的；权利的轮廓来自于对这一问题的回答。

II. 惩罚与许可

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 the person has done or has failed to do.¹² Thus, punishment comprises physical violence committed against a person’s body, against any property (resource) that a person legitimately owns, or against any rights that a person has.¹³ It is a use of someone’s body or owned resource without their currently-expressed consent, that is, over their expressed objection. Punishment is distinct from aggression, in that it is for, or in response to, some action, inaction, feature, or status of the person punished; otherwise, it is simply random violence or aggression, unconnected with some previous action or inaction of the one punished.¹⁴ Naked aggression against an innocent victim is not punishment; it is simply aggression. When we punish a person, it is because we consider that person to be a wrongdoer of some sort. We typically want to teach that person or others a lesson or exact vengeance or restitution for what that person has done.

惩罚意味着什么？词典中的定义固然容易查找，但对于我们这些有意实施惩罚的人来说，惩罚的真正含义是对某人施加有形的物理力量，以回应其所作或未作之事。¹²因此，惩罚涵盖了对个人身体、其合法拥有的任何财产（资源）或其享有的任何权利所实施的有形武力。¹³具体而言，惩罚是在未经当事人当前明确同意，甚至在其明确反

¹² See, e.g., American Heritage Dictionary, 3d ed. (Boston: Houghton Mifflin, 1992),p. 1469, defining “punishment” as a “penalty imposed for wrongdoing: ‘The severity of the punishment must ... be in keeping with the kind of obligation which has been violated’ (Simone Weil).”

例如，见《美国传统词典》第 3d 版（波士顿：Houghton Mifflin，1992 年）第 1469 页，将“惩罚”定义为“对不法行为施加的惩罚：‘惩罚的严厉程度必须……与所违反的责任种类相符’（西蒙娜·韦尔 Simone Weil）”。

¹³ See Black’s Law Dictionary, 6th ed. (St. Paul, Minn.: West Publishing, 1990), p. 1234, defining “punishment” as “[a]ny fine, penalty, or confinement inflicted upon a person.... [Or a] deprivation of property or some right.”

见《布莱克法律词典》第 6 版（明尼苏达州圣保罗市：West Publishing 出版社，1990

对的情况下，使用其身体或资源的行为。惩罚与侵犯的区别在于，惩罚是针对或回应被惩罚者的特定行为、不作为、特征或状态；若非如此，惩罚便沦为随意的武力或侵犯，与被惩罚者此前的行为或不作为无关。¹⁴对无辜者的无端侵犯并非惩罚，仅是侵犯而已。当我们惩罚某人时，是因为我们认为此人犯了某种过错。我们通常希望借此给当事人或他人一个教训，或是为那人的所作所为讨回公道或补偿。

If wrongdoers always consented to the infliction of punishment in response to the perpetration of a crime or tort, we would not need to justify punishment. It would be justified by the very consent of the purported wrongdoer. As the Roman jurist Ulpian summarized this commonsense insight centuries ago, "there is no affront [or injustice] where the victim consents."¹⁵ The need to justify punishment only arises when a person resists and refuses to consent to being punished. As philosopher John Hospers notes, the very thing that 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."¹⁶

如果不法行为人总是同意对犯罪或侵权行为实施惩罚，那么我们就不需要证明惩罚的正当性。所谓的不法行为人的同意本身就足以证明惩罚的正当性。正如罗马法学家乌尔皮安（Ulpian）在几个世纪前所总结的这一常识性见解：“只要受害者同意，就不存在侮辱或不正义。”¹⁵ “只有当一个人反抗并拒绝同意接受惩罚时，才需要为惩罚进

年）第 1234 页，将“惩罚”定义为“对个人施加的任何罚款、处罚或禁闭....[或]剥夺财产或某些权利”。

¹⁴ See *ibid.* “Punishment” is “inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law.”

见同上，“惩罚”是“因某人所犯的罪行或违法行为，或因其不履行法律所规定的义务，而由法律授权和法院的裁决和判刑对其施加的”。

¹⁵ Ulpian, “Edict 56,” in *The Digest of Justinian*, Vol. 4, 47.10.1.5 (p. 258) (in Latin: “nulla iniuria est, quae in uolentem fiat”). As Richard Epstein explains:

The case for the recognition of consent as a defense in case of the deliberate infliction of harm can also be made in simple and direct terms. The self-infliction of harm generates no cause of action, no matter why inflicted. There is no reason, then, why a person who may inflict harm upon himself should not, *prima facie*, be allowed to have someone else do it for him.

Richard A. Epstein, “Intentional Harms,” *J. Legal Stud.* 4 (1975): 391 – 442, at 411.

行辩护。正如哲学家约翰·霍普斯 (John Hospers) 所指出的, 惩罚的难题在于“在惩罚某人时, 我们违背了他的意愿, 强行将他所可能不同意的东西强加于他”。¹⁶

乌尔皮安, “第 56 号法令”, 见《查士丁尼文摘》, 第 4 卷, 47.10.15 (第 258 页) (拉丁文: “nulla iniuria est, quae in uolentem fiat”)。正如理查德-爱泼斯坦所解释的那样:

在蓄意造成伤害的情况下, 承认同意作为自卫的案例也可以简单而直接地提出。自己造成的伤害不会产生任何诉因, 无论为何造成伤害。那么, 就没有理由认为, 一个可能会对自己造成伤害的人, 表面上看, 不应该被允许让别人替他这样做。

理查德-爱泼斯坦, 《故意伤害》, 《法学研究》1975 年第四期: 第 391-442 页, 在第 411 页。

¹⁶ John Hospers, “Retribution: The Ethics of Punishment,” in Barnett & Hagel III, eds., *Assessing the Criminal*, p. 190. That said, we must be clear that the core of the libertarian ethic and the notion of aggression and rights does not center around the vague concept of “imposing cost,” contra the theory of J.C. Lester, in his *Escape from Leviathan: Liberty, Welfare and Anarchy Reconciled* (New York: St. Martin’s Press, 2000), or “causing harm,” as per T. Patrick Burke, *No Harm: Ethical Principles for a Free Market* (New York: Paragon House, 1994). On Lester, see Kinsella, “‘Aggression’ versus ‘Harm’ in Libertarianism,” *Mises Economics Blog* (Dec. 16, 2009) (criticizing Lester’s approach, his opposition to “justificationism,” and his focus on “imposed cost” instead of aggression as the key libertarian principle); see also David Gordon & Roberta A. Modugno, “Review of J.C. Lester’s *Escape from Leviathan: Liberty, Welfare, and Anarchy Reconciled*,” *J. Libertarian Stud.* 17, no. 4 (2003, <https://mises.org/library/review-jc-lesters-escape-leviathan-liberty-welfare-and-anarchy-reconciled-0>): 101 – 109. On Burke, see Kinsella, “Book Review,” *Reason Papers No. 20* (Fall 1995; <https://reasonpapers.com/archives/>), p. 135 – 46; idem, “‘Aggression’ versus ‘Harm’ in Libertarianism.” See also Kinsella, “Hoppe on Property Rights in Physical Integrity vs Value,” *StephanKinsella.com* (June 12, 2011). As Rothbard points out:

约翰·霍斯珀斯, 《报复: 惩罚的伦理》, 载于 Barnett & Hagel III 编著的《评估罪犯》, 第 190 页。尽管如此, 我们必须清楚, 自由意志主义伦理的核心以及侵犯与权利的概念并不是围绕着 “强加代价” 这一模糊的概念, 这与 J.C. Lester 的理论相悖, 他在其 《逃离利维坦: 自由、福利与无政府的调和》(纽约: 圣马丁出版社, 2000 年), 或 T. Patrick Burke 在 《《无伤害: 自由市场的伦理原则》》(New York: Paragon House, 1994) 中 所说的 “造成伤害”。关于莱斯特, 见金塞拉, “自由意志主义中的‘侵犯’与‘伤害’”, 米塞斯经济学博客 (2009 年 12 月 16 日) (批评莱斯特的方法、他对 “正当化主义” 的反对, 以及他对 “强加的成本” 而非侵犯作为自由意志主义关键原则的关注); 另见 David Gordon & Roberta A. Modugno, 对 J.C. Lester’s 《逃离利维坦: 自由、福利与无政府的调和》一文的评论, 《自由意志主义研究》第 17 期, no. 4 (2003, <https://mises.org/library/review-jc-lesters-escape-leviathan-liberty-welfare->

I will thus seek to justify punishment exactly where it needs to be justified: the point at

and-anarchy-reconciled-0): 101-109. 关于伯克, 见金塞拉《书评》, 《理性论文》第 20 期 (1995 年秋季; <https://reasonpapers.com/archives/>), 第 135-46 页; 同上, 《自由意志主义中的'侵犯'与'伤害'》。另见 Kinsella, 《霍普论于物理完整性 vs 价值的财产权》, StephanKinsella.com (2011 年 6 月 12 日)。正如罗斯巴德指出的: Legal and political theory have committed much mischief by failing to pinpoint physical invasion as the only human action that should be illegal and that justifies the use of physical violence to combat it. The vague concept of “harm” is substituted for the precise one of physical violence. Consider the following two examples. Jim is courting Susan and is just about to win her hand in marriage, when suddenly Bob appears on the scene and wins her away. Surely Bob has done great “harm” to Jim. Once a nonphysical-invasion sense of harm is adopted, almost any outlaw act might be justified. Should Jim be able to “enjoin” Bob’s very existence?

法律和政理论犯下了许多错误, 因为它们没有明确指出物理侵犯是唯一应该被视为非法的人类行为, 也是唯一有理由使用物理武力予以打击的行为。模糊的 “伤害” 概念取代了精确的物理武力概念。请看下面两个例子。吉姆正在追求苏珊, 眼看就要赢得她的芳心, 突然鲍勃出现并把她抢走了。毫无疑问, 鲍勃对吉姆造成了巨大的 “伤害”。一旦采用非物理入侵伤害的概念, 几乎任何不法行为都可能是正当的。吉姆是否应该 “禁止” 鲍勃的存在?

Murray N. Rothbard, “Law, Property Rights, and Air Pollution,” in *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>), p. 374 (footnotes omitted). Rothbard criticizes, in this regard, John Stuart Mill, F.A. Hayek, and Robert Nozick. See *ibid.*, p. 374 notes 13 & 14. See also *idem*, *Man, Economy, and State, with Power and Market*, Scholar’s ed., second ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 2, § 12, p. 183 (just law can only prohibit invasion of the physical person and property of others, not injury to “values” of property).

See also related discussion in “Dialogical Arguments for Libertarian Rights” (ch. 6), n.3.

穆瑞·罗斯巴德, 《法律、财产权和空气污染》, 《经济的论证》(奥本, 阿拉巴马州, 米塞斯研究院, 2011; <https://mises.org/library/economic-controversies>), 第 374 页(注释省略)。在这方面, 罗斯巴德批判了约翰·斯图亚特·密尔、F.A.哈耶克和罗伯特·诺齐克。同上, 第 374 页, 注释 13 和 14。另见 *idem*, 《人、经济和国家, 与权力和市场》, 学者编, 第二版。: 米塞斯研究院, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), 第二章, 第 12 段, 第 183 页(正义的法律只能禁止侵犯他人的人身和财产, 而不能禁止损害财产的 “价值”)。

另见 《自由意志主义权利的对话论证》(第 6 章)第 3 节中的相关讨论。

which we attempt to inflict punishment upon people who oppose it. In short, I will argue that society may justly punish those who have initiated force, in a manner proportionate to their initiation of force and to the consequences thereof, because they cannot coherently object to such punishment. In brief, it makes no sense for them to object to punishment because this requires that they maintain that the infliction of force is unjustified, which is contradictory because they intentionally initiated force themselves. Thus, they are dialogically estopped, to use related legal terminology, or precluded, from denying the legitimacy of their being punished and from withholding their consent.¹⁷ As argued below, this reasoning may be used to develop a theory of punishment and rights.

因此，我将在需要正当化惩罚的情境中，即在我们试图对反对惩罚的人实施惩罚的场合，探讨惩罚的正当性。简言之，我将论证，社会有权正义地惩罚那些主动使用武力的人，且惩罚方式应与其使用武力的行为及其后果相匹配。这是因为他们在逻辑上无法自洽地反对这种惩罚。换言之，他们反对惩罚的立场站不住脚，因为这要求他们坚持认为使用武力是不正当的，而这一立场与他们自己故意使用武力的行为自相矛盾。因此，用相关法律术语来说，他们在对话中被禁止反言，或被排除否认其受到惩罚的合法性，并不得拒绝认同。¹⁷正如下文所论证的，这一推理可应用于发展惩罚与权利理论。

III. 惩罚和禁止反言

PUNISHMENT AND ESTOPPEL

¹⁷ For an earlier presentation of the argument presented in this chapter, see Kinsella, “Estoppel: A New Justification for Individual Rights.” See also “How I Became a Libertarian” (ch. 1); Kinsella, “The Genesis of Estoppel: My Libertarian Rights Theory,” StephanKinsella. com (March 22, 2016); and “Dialogical Arguments for Libertarian Rights” (ch. 6).
关于本章中提出的论点，见金塞拉：《禁止反言：个人权利的新理由》。另见《我如何成为一名自由意志主义者》（第 1 章）；金塞拉，《禁止反言的起源：我的自由意志主义权利理论》，StephanKinsella.com(2016 年 3 月 22 日);和《自由意志主义权利的对话论证》(第六章)。

A. 法律上的禁止反言 Legal Estoppel

Estoppel is a well-known common law principle that prevents or precludes someone from making a legal claim that is inconsistent with prior conduct if some other person has changed position detrimentally in reliance on the prior conduct (referred to as “detrimental reliance”).¹⁸ Estoppel thus denies a party the ability to assert a fact or right that the party otherwise could. Estoppel is a widely applicable legal principle that has countless manifestations.¹⁹ Roman law and its modern heir, the civil law, contain the similar doctrine “venire contra proprium factum,” or “no one can contradict his own act.”²⁰ 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.”²¹ Estoppel may even be applied if a person’s silent acquiescence in the face of a duty to speak amounts to a representation.²² The principle behind estoppel can also be seen in common sayings such as “actions speak louder than words,” “practice what you preach,” and “put your money where your mouth is,” all of which embody the idea that actions and assertions should be consistent.²³ 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.”²⁴

禁止反言是一项广为人知的普通法原则，旨在阻止或排除某人提出与其先前行为不一致的法律主张，尤其是当其他人因依赖该先前行为而不利地改变立场时（此现象称为“不利依赖”）。¹⁸因此，禁止反言剥夺了一方当事人主张其原本可以主张的事实或权利的能力。这一原则在法律领域具有广泛适用性，并呈现出多种表现形式。¹⁹罗马

¹⁸ See, e.g., *Allen v. Hance*, 161 Cal. 189 (1911), p. 196; *Highway Trailer Co. v. Donna Motor Lines, Inc.*, 217 A.2d 617 (N.J. 1966), p. 621; *Black’s Law Dictionary*, p. 551.

例如，见 *Allen 诉 Hance*，161 Cal. 189 (1911)，p. 196；*Highway Trailer Co. v. Donna Motor Lines, Inc.*，217 A.2d 617 (N.J. 1966)，第 621 页；《布莱克法律词典》，第 551 页。

¹⁹ For example, there is estoppel by deed, equitable estoppel, promissory estoppel, and judicial estoppel. See “Estoppel and Waiver,” *American Jurisprudence*, 2d ed., vol. 28 (St. Paul, Minn.: West Publishing, 1966), § 1.

例如，有禁止反言、衡平法禁止反言、承诺禁止反言和司法禁止反言。见《禁止反言和放弃》，《美国法理学》，第 2d 版，第 28 卷（明尼苏达州圣保罗：West 出版社，

法及其现代继承者大陆法系均包含类似的原则，即“venire contra proprium factum”（拉丁文），意指“任何人不得否认自己的行为”。²⁰根据这一原则，“任何人不得忽视或否认自己的行为及其后果，并主张与这些行为或后果相对立的权利”。²¹若一个人在有义务发言的情况下保持沉默，这种默许可视为一种陈述，此时禁止反言原则同样适用。²²禁

1966 年），第 1 节。

²⁰ Vernon V. Palmer, “The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana,” Tul. L. Rev. 69, no. 1 (1994): 7 – 70, at 55. See also Ulpian, “Edict 3,” in The Digest of Justinian, translation edited by Alan Watson, Vol. I (Philadelphia: University of Pennsylvania Press, 1985), 2.2.1, p. 42 (Section title: “The Same Rule which Anyone Maintains against Another is to be Applied to Him”):

弗农·V·帕尔默，《混合司法中衡平法的多种表现形式：路易斯安那州衡平法的功能视角》，《杜兰法律评论》第 69 卷，第 1 期（1994 年）：770，第 55 页。另见乌尔比安，“法令 3”，载于《查士丁尼法典摘要》，阿兰·沃森编辑的译本，第一卷（费城：宾夕法尼亚大学出版社，1985 年），2.2.1，第 42 页（章节标题：“任何人针对他人所坚持的相同规则应适用于他”）：

This edict has the greatest equity without arousing the just indignation of anyone; for who will reject the application to himself of the same law which he has applied or caused to be applied to others? 1. “If one who holds a magistracy or authority establishes a new law against anyone, he himself ought to employ the same law whenever his adversary demands it. If anyone should obtain a new law from a person holding a magistracy or authority, whenever his adversary subsequently demands it, let judgment be given against him in accordance with the same law.” The reason, of course, is that what anyone believed to be fair, when applied to another, he should suffer to prevail in his own case.

这项法令最公平，却不会激起任何人的义愤；因为谁会拒绝将他已经应用或使之应用于他人的同样的法律应用于自己呢？ 1. “如果一个有官职或权力的人针对任何人制定了新的法律，那么只要他的对手提出要求，他自己也应该采用同样的法律。如果有人从一个拥有官职或权力的人那里获得了新的法律，只要他的对手随后提出要求，就应该按照同样的法律对他做出判决。”当然，理由是任何人认为公平的东西，在适用于他人时，他应该在自己的案件中同样承受。

²¹ Saúl Litvinoff, “Still Another Look at Cause,” La. L. Rev. 48, no. 1 (1987; <https://digitalcommons.law.lsu.edu/lalrev/vol48/iss1/5/>): 3 – 28, at 21.

索尔·利特维诺夫，《对原因的再度审视》，载于《路易斯安那法律评论》第 48 卷第 1 期（1987 年；<https://digitalcommons.law.lsu.edu/lalrev/vol48/iss1/5/>）：328，见第 21 页。

²² See, e.g., Duthu v. Allements’ Roberson Mach. Works, Inc., 393 So. 2d 184, 186-87 (La. Ct. App. 1980); Blofsen v. Cutaia, 333 A.2d 841, 843 – 44 (Pa. 1975).

例如，参见杜图诉阿莱门茨·罗伯逊机器工厂公司案，393 So. 2d 184, 186 -187（路易斯安那州上诉法院，1980 年）；布洛夫森诉库塔亚尔案，333 A.2d 841, 843 44（宾

止反言的核心理念还体现在诸如“行胜于言”、“言出必行”和“言行一致”等俗语中，这些俗语共同强调了行动与主张应保持一致的重要性。²³正如科克勋爵 (Lord Coke) 所言，

夕法尼亚州，1975 年）。

²³ See, e.g., *Duthu v. Allements’ Roberson Mach. Works, Inc.*, 393 So. 2d 184, 186-87 (La. Ct. App. 1980); *Blofsen v. Cutaia*, 333 A.2d 841, 843 – 44 (Pa. 1975). Recall also the saying “ ‘What you do speaks so loud I can’t hear what you are saying.’ ” Clarence B. Carson, *Free Enterprise: The Road to Prosperity* (New Rochelle: America’s Future, 1985; <https://fee.org/articles/free-enterprise-the-key-to-prosperity/>). For a recent example of a use of the basic logic behind this notion, see Cheyenne Ligon, Jack Schickler & Nikhilesh De, “Hodlonaut Wins Norwegian Lawsuit Against Self-Proclaimed ‘Satoshi’ Craig Wright,” *Coindesk.com* (Oct. 20, 2022; <https://perma.cc/QLV9-VSLM>), discussing a recent Norwegian case concerning a dispute over whether Craig S. Wright is really Satoshi Nakamoto, the pseudonymous creator of Bitcoin, and the claims of Magnus Granath, known on Twitter as “Hodlonaut,” that Wright is not Nakamoto and is instead a “fraud” and a “scammer.” The court ruled for Granath, employing, in part, estoppel-like reasoning:

“Wright has come out with a controversial claim, and must withstand criticism from dissenters,” [Judge Engebrigtsen] added, concluding that Granath’s statements were lawful, not defamatory.

Engebrigtsen also appeared to take up the idea that Twitter is a naturally rough-and-tumble environment where users should have a thick skin, after Granath’s lawyers noted that Wright had also tweeted strong words such as “cuck” and “soy boy.”

“Wright himself uses coarse slang and derogatory references, and so, in the court’s view, must accept that others use similar jargon against him,” the judgment said.

例如，参见杜图诉阿莱门茨·罗伯逊机器工厂公司案，393 So. 2d 184, 186-87（路易斯安那州上诉法院，1980 年）；布洛夫森诉库塔亚尔案，333 A.2d 841, 843-44（宾夕法尼亚州，1975 年）。还要回想一下这句话：“ ‘你的所作所为如此大声，以至于我听不到你在说什么。’ ” 克拉伦斯·B·卡森，《自由企业：通往繁荣之路》（新罗谢尔：美国的未来，1985 年；<https://fee.org/articles/free-enterprise-the-key-to-prosperity/>）。关于这一概念背后基本逻辑的近期应用实例，参见夏延·利贡、杰克·希克勒和尼基莱什·德，“霍德洛纳特在挪威对自称‘中本聪’的克雷格·赖特的诉讼中胜诉”，*Coindesk.com*（2022 年 10 月 20 日；<https://perma.cc/QLV9-VSLM>），该文讨论了近期一起挪威案件，涉及关于克雷格·S·赖特是否真的是比特币匿名创造者中本聪的争议，以及在推特上被称为“霍德洛纳特”的马格努斯·格拉纳特声称赖特不是中本聪，而是一个“骗子”和“诈骗犯”。法院做出了有利于格拉纳特的裁决，部分采用了类似于禁止反言的推理：

“[法官恩格布里格森]补充说：‘赖特提出了一个有争议的主张，必须承受异议者的批评。’他得出结论，格拉纳特的言论是合法的，并非诽谤性的。

在格拉纳特的律师指出赖特也在推特上发表了诸如‘胆小鬼’和‘娘娘腔’等强硬言

使用“禁止反言”一词的原因在于，“因为一个人自身的行为或接受的事实阻止或封闭了他主张或申辩真相的嘴”。²⁴

For legal estoppel to operate, there usually must have been detrimental reliance by the person seeking to estop another.²⁵ Proof 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, and thus, there is no reason to estop the actor from asserting the truth or from rejecting the prior conduct.²⁶

要使法律禁止反言原则生效，寻求禁止他人反言的一方通常必须证明存在不利信赖。²⁵之所以需要证明存在不利信赖，是因为只有当某人确实依赖了他方先前的行为或陈述时，该行为或陈述才造成实际损害，否则没有理由禁止行动人主张事实真相或否认先前行为。²⁶

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.²⁷ In this case, when the daughter was a senior in high school, the father promised to pay her tuition fees and related expenses if she attended a local college (Adelphi University). However, the promise was a “mere” promise, because it was not

论之后，恩格布里格森似乎也接受了推特是一个天然混乱的环境，用户应该有较强的心理承受能力这一观点。判决称：“赖特自己使用粗俗的俚语和贬损性的表述，因此，在法院看来，他必须接受其他人对他使用类似的行话。”

²⁴ “Estoppel and Waiver,” American Jurisprudence 28 (1966), § 1, quoting Lord Coke. In the remainder of this chapter, the expression “estoppel” or “dialogical estoppel” refers to the more general, philosophical estoppel theory developed herein, as opposed to the traditional theory of legal estoppel, which will be denoted “legal estoppel.”

“禁止反言与弃权”，《美国法理学》第 28 卷（1966 年），第 1 节，援引自科克勋爵。在本章的其余部分，“禁止反言”或“对话式禁止反言”这一表述指的是此处所阐述的更普遍的、哲学性的禁止反言理论，与之相对的是传统的法律禁止反言理论，后者将被称为“法律禁止反言”。

²⁵ See Bellsouth Adver. & Publ’g Corp. v. Gassenberger, 565 So.2d 1093 (La. Ct. App. 1990), p. 1095.

参见贝尔南方广告与出版公司诉加森伯格案，565 So.2d 1093（路易斯安那州上诉法院，1990 年），第 1095 页。

²⁶ See Dickerson v. Colegrove, 100 U.S. 578 (1879), p. 580.

参见迪克尔森诉科尔格罗夫案，100 U.S. 578（1879 年），第 580 页。

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 give 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.²⁸

例如，在最近的“齐默尔曼诉齐默尔曼”（Zimmerman v. Zimmerman）一案中，一名女儿对其父亲在其大学二年级和三年级期间所欠学费提起诉讼。²⁷在此案中，女儿读高三时，父亲承诺若她选择就读当地的阿德尔菲大学，将支付其学费及相关费用。然而，这一承诺仅为“单纯”的承诺，因缺乏必要的法律手续，如对价，故不构成具有正常约束力的协议。尽管如此，在她大学第一年，父亲仍依承诺支付了学费。然而，在第二年和第三年，父亲未履行支付义务，尽管期间他多次保证待经济状况改善后会补缴学费。这导致女儿因欠缴 6700 美元而对阿德尔菲大学产生法律债务。在本案中，尽管承诺本身因缺乏对价等法律要件而不具备强制执行力，但法院认为，父亲理应预见到女儿会依赖其承诺，且女儿确实基于此承诺采取了对其不利的实质行动（即欠下阿德尔菲大学的债务）。因此，女儿获得了一笔足以覆盖未付学费的赔偿金。实际上，这位父亲被禁止否认契约的有效性，尽管事实上该契约并未正式成立。²⁸

²⁷ Zimmerman v. Zimmerman, 447 N.Y.S.2d 675 (App. Div. 1982).

齐默尔曼诉齐默尔曼案，447 N.Y.S.2d 675（上诉庭，1982 年）。

²⁸ The concept of “detrimental reliance” actually involves circular reasoning, however, for reliance on performance is not “reasonable” or justifiable unless one already knows that the promise is enforceable, which begs the question. See “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), Part. I.E.

B. 对话式的禁止反言

Dialogical Estoppel

As can be seen, the heart of the idea behind legal estoppel is 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 and because of the consistency that must apply to aggressors trying to argue why they should not be punished.²⁹ The basic insight behind this theory of rights is that people who initiate force cannot consistently object to being punished. They are dialogically, so to speak, “estopped” from asserting the impropriety of the force used to punish them because of their own coercive behavior. This theory also establishes the validity of the libertarian conception of rights as being strictly negative rights against aggression.

可以看出，法律禁止反言的核心思想在于一致性。一个类似的概念——“对话式禁止反言”，可以为自由意志主义的权利概念提供正当性。这是因为自由意志主义的信条中蕴含着对等性原则，即武力只有在回应武力时才是合法的，且侵犯者在试图论证其不应受惩罚时，也必须遵循一致性原则。²⁹这一权利理论的基本观点是，主动使用武力的人无法自洽地反对受到惩罚。可以说，由于他们自身的强制行为，他们在对话中被“禁止”主张用于惩罚他们的武力是不恰当的。这一理论也确立了自由意志主义权利概

However, the legitimacy of the traditional legal concept of detrimental reliance is irrelevant here.

然而，“致害依赖”的概念实际上涉及循环论证，因为除非一个人已经知道承诺是可执行的，否则对履行的信赖就不是“合理的”或正当的，这就引出了一个问题。参见《自由意志主义的契约理论：所有权转让、有约束力的承诺和不可让渡性》（第九章），第 1.E 部分。然而，传统的致害依赖法律概念的合法性在这里是不相关的。

²⁹ As used herein, “[a]ggression” is defined as the initiation of the use or threat of physical violence against the person or property of anyone else.” Rothbard, For a New Liberty, p. 23, emphasis added. See also Kinsella, “What Libertarianism Is” (ch. 2), at n.9, et pass.; Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform,” StephanKinsella.com (May 30, 2022).

此处使用的“‘侵犯’被定义为对他人的人身或财产主动使用或威胁使用有形的武力”。罗斯巴德《为了新自由》，第 23 页，重点补充。另见金塞拉，《何为自由意志主义》（第 2 章），注 9 及随后部分；金塞拉，《自由意志主义党纲中的侵犯和财产权要点》，StephanKinsella.com（2022 年 5 月 30 日）。

念的正确性，即权利是严格意义上的消极权利，旨在反对侵犯。

The point at which punishment needs to be justified is when we attempt to inflict punishment upon a person who opposes it. 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 punishment. Under the principle of dialogical estoppel, or simply "estoppel," 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 possibly be right because they are contradictory. It is to recognize that his assertion is simply wrong because it is contradictory.

需要为惩罚行为提供正当性辩护的关键时刻，恰恰是我们试图对反抗者施加惩罚之际。因此，我将运用“对话式禁止反言”的哲学概括形式，通过证明侵犯者无权反对惩罚，在此情境下论证惩罚的正当性。根据对话式禁止反言原则（简称“禁止反言”），当某人在对话过程中提出自相矛盾的诉求时，即被禁止提出此类诉求。所谓“禁止某人提出特定诉求”，是指因其诉求自相矛盾，故该诉求无法正确成立。这实质是承认：因其主张存在矛盾，故该主张必然错误。

Applying estoppel in this manner perfectly complements the purpose of dialogue. Dialogue, discourse, or argument—terms that 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; otherwise, there is no dialogue occurring but mere babbling or even physical fighting. This cannot be denied. Any person arguing long enough to deny that truth is the goal of discourse contradicts this denial because that person is asserting or challenging the truth of a given proposition. Thus, asserting that something is true that cannot be true is incompatible with the purpose of discourse. Anything that clearly cannot be true is contrary to the truth-finding purpose of discourse and, consequently, is impermissible within the bounds of the discourse.

以这种方式应用禁止反言原则，完全契合对话的宗旨。对话、交谈或论证——这些术语在本文中交替使用——本质上是一种旨在揭示真理的活动。任何参与论证的人都必然在努力探寻某个特定主题的真相；否则，便不构成对话，而仅仅是胡言乱语，

甚至可能演变为肢体冲突。这一点毋庸置疑。任何长时间论证却否认真理为话语目标的人，其行为本身便与这一否认自相矛盾，因为此人实际上是在断言或质疑给定命题的真理性。因此，将显然不可能为真的事物断言为真，显然与对话的宗旨背道而驰。任何显然不可能为真的事物，都违背了对话探求真理的核心目的，因而在对话的范畴内是不被允许的。

Contradictions are certainly the archetype of propositions that cannot be true. A and not-A cannot both be true simultaneously and in the same respect.³⁰ This is why participants in discourse must be consistent. If an arguer does not need to 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—those engaged in discourse, dialogue, debate, discussion, or argumentation. Because discourse is a truth-finding activity, any such contradictory claims should be disregarded since they cannot possibly be true. Dialogical estoppel is thus a rule of discourse that rejects 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.³¹ The validity of this rule is undeniable because it is necessarily presupposed by any participant in discourse.

矛盾命题显然是“不可能为真”的典型范例。A 与非 A 不可能同时且在同一方面为真³⁰。这就是对话参与者必须前后一致的原因。如果论证者不需要保持一致性，真理的

³⁰ On the impossibility of denying the law of contradiction, see Aristotle, *Metaphysics*, Richard Hope, trans. (New York: Columbia University Press, 1952), p. 68 (“ ‘It is impossible for the same thing at the same time to belong and not to belong to the same thing and in the same respect.’ ”); Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Mises, 2010 [1989]; www.hanshoppe.com/tsc), p. 142 n.108; Tibor R. Machan, *Individuals and Their Rights* (Chicago: Open Court Publishing, 1989), p. 77; Douglas B. Rasmussen & Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, Ill.: Open Court, 1991), p. 50; Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), p.

探寻便无从谈起。正如传统法律理论中的禁止反言原则在法律语境中强制要求某种一致性，禁止反言的更广泛用法同样可以用来要求对话中的一致性。我提出的禁止反言理论，不过是将一致性要求应用于论证者——那些参与交谈、对话、论证、讨论或论证的人——的一种便捷方式。由于对话交流本质上是一种探求真理的活动，任何自相矛盾的主张都应被忽略，因为它们不可能为真。因此，“对话式禁止反言”作为一种话语规则，拒绝接受任何不一致的、相互矛盾的主张，因为它们违背了对话的根本目标。这一规则完全基于这样一种认识：对话交流旨在寻求真理，而矛盾命题必然非真，与对话的本质不相容，因而不应被允许。³¹这一规则的有效性是不可否认的，因为任何对

36; see also Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Plume, 1991), pp. 6 – 12, 118 – 21, explaining the law of identity and its relevance to knowledge; Ayn Rand, *Atlas Shrugged* (New York: Signet 1992), pp. 942 – 43, discussing identity, or “A is A,” and the law of contradiction.

关于否认矛盾律的不可能性，参见亚里士多德《形而上学》，理查德·霍普译（纽约：哥伦比亚大学出版社，1952 年），第 68 页（“‘同一事物在同一时间、同一方面不可能既属于又不属于同一事物。’”）；汉斯·赫尔曼·霍普，《社会主义与资本主义理论：经济、政治与伦理》（米塞斯，2010 年[1989 年]；www.hanshoppe.com/tsc），第 142 页注释 108；蒂博尔·R·马钱，《个人及其权利》（芝加哥：开放法院出版社，1989 年），第 77 页；道格拉斯·B·拉斯穆森和道格拉斯·J·登·尤尔，《自由与自然：对自由秩序的亚里士多德式辩护》（伊利诺伊州拉萨尔：开放法院，1991 年），第 50 页；路德维希·冯·米塞斯，《人的行动：经济学专著》，学者版（阿拉巴马州奥本：米塞斯研究院，1998 年；https://mises.org/library/human-action-0），第 36 页；另见伦纳德·佩科夫，《客观主义：安·兰德的哲学》（纽约：企鹅出版社，1991 年），第 6 12 页，第 118 121 页，解释了同一律及其与知识的相关性；安·兰德，《阿特拉斯耸耸肩》（纽约：西格内特 1992 年），第 942 943 页，讨论了同一性，即“A 就是 A”以及矛盾律。

³¹ Because discourse is a peaceful, cooperative, conflict-free activity, as well as an inquiry into truth, aggression itself is also incompatible with norms presupposed by all participants in discourse. Indeed, it is this realization that Professor Hoppe builds on in his brilliant “argumentation ethics” defense of individual rights. For more on argumentation ethics, see chaps. 5 – 7 and 19; Hans-Hermann Hoppe, “The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible,” chap. 7 in Hoppe, *A Theory of Socialism and Capitalism*; idem, “From the Economics of Laissez Faire to the Ethics of Libertarianism,” “The Justice of Economic Efficiency,” and “On the Ultimate Justification of the Ethics of Private Property,” chaps. 11 – 13 in *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Mises, 2006 [1993]; www.hanshoppe.com/eepp); idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in *The Great Fiction: Property, Economy,*

话交流的参与者都必然预设了这一规则。

There are various ways that contradictions can arise in discourse. First, 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 the person is incorrect. After all, as Ayn Rand repeatedly emphasized, A is A; the law of identity is indeed valid and unchallengeable.³² It is impossible for him³³ to coherently and intelligibly assert

Society, and the Politics of Decline (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf); idem, "PFP163 | Hans Hermann Hoppe, 'On The Ethics of Argumentation' (PFS 2016)," Property and Freedom Podcast, ep. 163 (June 30, 2022); Stephan Kinsella, "Argumentation Ethics and Liberty: A Concise Guide," StephanKinsella.com (May 27, 2011); idem, "Hoppe's Argumentation Ethics and Its Critics," StephanKinsella.com (Aug. 11, 2015); Frank van Dun, "Argumentation Ethics and the Philosophy of Freedom," [Libertarian Papers](http://LibertarianPapers.org) 1, 19 (2009; www.libertarianpapers.org); Marian Eabrasu, "A Reply to the Current Critiques Formulated Against Hoppe's Argumentation Ethics," [Libertarian Papers](http://LibertarianPapers.org) 1, 20 (2009; www.libertarianpapers.org); Norbert Slenzok, "The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle," Analiza i Egzystencja 58 (2022), 35 - 64.

因为对话是一种和平、合作、无冲突的活动，也是对真理的探究，所以侵犯本身也与对话的所有参与者所预设的规范不相容。事实上，霍普教授正是基于这一认识，在其著名的“论证伦理学”中为个人权利进行了辩护。关于论证伦理学的更多内容，请参见第 5 7 章和第 19 章；汉斯·赫尔曼·霍普，《资本主义的伦理正当性以及为何社会主义在道德上站不住脚》，载于霍普《社会主义与资本主义理论》第 7 章；同上，《从自由放任经济学到自由意志主义伦理学》、《经济效率的正义》和《论私产伦理的终极证成》，载于《私有财产的经济与伦理：政治经济与哲学研究》第 11 13 章，（米塞斯，2006 年[1993 年]；www.hanshoppe.com/eepp）；同上，《论共有、公有和私有财产以及全面私有化的基本原理》，载于《伟大的虚构：财产、经济、社会和政治衰败》（第二版扩充版，米塞斯研究院，2021 年；www.hanshoppe.com/tgf）；同上，“PFP163 | 汉斯-赫尔曼·霍普，《关于论证伦理学》（PFS 2016）”，“财产与自由播客”，第 163 集（2022 年 6 月 30 日）；斯蒂芬·金塞拉，《论证伦理学与自由：简明指南》，StephanKinsella.com（2011 年 5 月 27 日）；同上，《霍普的论证伦理学及其批评者》，StephanKinsella.com（2015 年 8 月 11 日）；弗兰克·范·邓恩，《论证伦理学与自由的哲学》，《自由意志主义论文》1 卷 19 期（2009 年；www.libertarianpapers.org）；玛丽安·埃布拉斯（Marian Eabrasu），《对当前针对霍普论证伦理学提出的批评的回应》，《自由意志主义论文》1 卷 20 期（2009 年；www.libertarianpapers.org）；诺伯特·斯伦佐克（Norbert Slenzok），《自由意志主义的论证伦理学、语言的先验语用学和无冲突的自由原则》，《分析与存在》58 期（2022 年），第 35 64 页。

that two contradictory statements are true; it is impossible for these claims to both be true. Thus, he is estopped from asserting them and is not heard to utter them because they cannot tend to establish the truth, which is the goal of all argumentation.³⁴As Wittgenstein noted, "What we cannot speak about we must pass over in silence."³⁵

对话中出现矛盾的方式多种多样。首先，论证者的立场可能存在显性自相矛盾。例如，若某人声称 A 为真，同时又主张非 A 亦为真，其错误显而易见。正如安·兰德反复强调的——A 即是 A；同一律确实有效，且不可挑战、不容质疑³²。他³³不可能逻辑一致地断言两个相互矛盾的说法都为真，因为这两种说法不可能同时成立。因此，他被禁止主张这两种说法，也不会有人听到他同时主张这两种说法，因为它们无法确立真理，而真理是一切论证的³⁴终极目标。正如维特根斯坦所指出的，

³² Ayn Rand, *Atlas Shrugged* (New York: Signet 1992), pp. 942 - 43.

安·兰德，《阿特拉斯耸耸肩》(纽约:希格内特 Signet 1992)，第 942-943 页。

³³ It is the general policy of the Loyola of Los Angeles Law Review to use gender-neutral language. The author, however, has chosen not to conform to this policy. [Note: this footnote was inserted by the journal after I refused to change my text. I left this footnote in as reminder of the political correctness and language battles that were already beginning to rear their heads back in 1997, when the original paper was published.]

《洛杉矶洛约拉法律评论》的总体政策是使用中性语言。然而，作者选择不遵守这一政策。[注：这一注释是在我拒绝修改文本后由期刊插入的。我留下这个注释是为了提醒大家，早在 1997 年发表原始论文时，政治正确和语言之争就已经开始抬头了。]

³⁴ More than once, I have had the frustrating and bewildering experience of having someone actually assert that consistency is not necessary for truth, that mutually contradictory ideas can be held by a person and be true at the same time. When faced with such a clearly incorrect opponent, one can do little more than try to point out the absurdity of the opponent's position. Beyond this, though, a stubborn opponent must be viewed as having renounced reason and logic and is thus simply unable or unwilling to engage in meaningful discourse. See Peikoff, *Objectivism: The Philosophy of Ayn Rand*, pp. 11 - 12, discussing when to abandon attempts to communicate with stubbornly irrational individuals. The mere fact that individuals can choose to disregard reason and logic does not contradict the estoppel theory any more than a criminal who chooses to murder another thereby "proves" that the victim had no right to life. As R.M. Hare stated:

Just as one cannot win a game of chess against an opponent who will not make any moves—and just as one cannot argue mathematically with a person who will not commit himself to any mathematical statements—so moral argument is impossible with a man who will make no moral judgements at all... Such a person is not entering the

“对于不可言说之物，我们必须保持沉默”。³⁵

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: he cannot possibly be right that explicit A and implicit not-A are both true. Now he might, in some cases, be able to remove the inconsistency by dropping one of the claims. For example, suppose he 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

arena of moral dispute, and therefore it is impossible to contest with him. He is compelled also—and this is important—to abjure the protection of morality for his own interests.

R.M. Hare, *Freedom and Reason* (New York: Oxford University Press, 1963), p. 101, emphasis added. For other, similar quotes, see Kinsella, “Quotes on the Logic of Liberty,” StephanKinsella.com (June 22, 2009), the Appendix, below, and the quote by Arendt in “Dialogical Arguments for Libertarian Rights” (ch. 6), n.19.

我不止一次有过这样令人沮丧和困惑的经历：有人居然断言，真理不需要一致性，一个人可以持有相互矛盾的观点，而且可以同时为真。面对这样一个明显不正确的对手，我们所能做的也仅仅只能试图指出对手立场的荒谬性。除此之外，顽固的对手必须被视为已放弃了理性和逻辑，因此根本无法或不愿参与有意义的对话。见 佩科夫 (Peikoff) 《客观主义：安·兰德的哲学》，第 11-12 页，讨论何时放弃与顽固非理性个体沟通的尝试。个人可以选择无视理性和逻辑，但这一事实与禁止反言理论之间的矛盾之处，正如罪犯选择谋杀他人从而“证明”受害者没有生命权一样。正如 R.M. Hare 所说：正如一个人不可能在棋局中战胜一个根本不动棋的对手一样——正如一个人不可能与一个不做出任何数学陈述的人进行数学论证一样——所以与一个根本不道德判断的人进行道德论证是不可能……，这样的人没有进入道德论证的领域，因此不可能与他论证。他还被迫——这一点很重要——为了自己的利益放弃对道德的保护。

R.M. Hare, 《自由与理性》（纽约：牛津大学出版社，1963 年），第 101 页，重点补充。其他类似引述，见金塞拉，《关于自由逻辑的引述》，StephanKinsella.com (2009 年 6 月 22 日)，下文附录，以及《自由意志主义权利的对话论证》(第 6 章)注 19 中阿伦特的引述。

³⁵ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, D.F. Pears & B.F. McGuinness, trans. (London: Routledge & Paul Kegan, 1961), p. 151.

路德维希·维特根斯坦：《逻辑哲学论》，D.F. 皮尔斯和 B.F. 麦吉尼斯译。（伦敦：Routledge & Paul Kegan 出版社，1961），第 151 页。

necessarily maintaining that the 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. However, since he is currently arguing, he must necessarily, at least implicitly, hold or recognize that he sometimes argues. We would not recognize the contradictory claims as permissible in the argument because contradictions are untrue. The speaker 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—that is, possibly true—position, he would have to renounce the first claim that he never argues.

论证者的立场可能存在隐性的矛盾。现实中，几乎没有人会直接断言 A 与非 A 同时为真。然而，若某人声称 A 为真，同时又不可避免地持有非 A 为真的立场，矛盾依然存在——该论证者将被禁止：既明言 A 为真，又暗中主张非 A 为真。原因同上：其不可能同时正确主张“显性 A”与“隐性非 A”皆真。

在某些情况下，论证者可以通过放弃某一主张来消除矛盾。例如：若其先断言国民生产总值概念有效，片刻后却主张完全相反的观点，则必须撤回前一陈述方能避免自相矛盾，此举必然意味着承认前论错误。

然而，若某项主张被论证者无可避免地预设真，则无法轻易放弃。试举一例：某人声称“我从不参与论证”，但其此刻正在论证的行为本身，必然使其至少隐性地持有“我有时参与论证”的立场。由于矛盾命题不可能为真，此类主张在论证中不被允许。该发言者将被禁止同时持有这两个矛盾主张（一显一隐），且无法放弃后者——“我有时参与论证”——因为此观点正是其当前行为必然蕴含的立场。为维持可论证性（即可能为真）的立场，其必须放弃“从不参与论证”的初始主张。

Alternatively, if this person was so incoherent as to argue that he somehow does not believe or recognize that arguing is possible, despite 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 actually admit it—it still cannot be the case that argumentation is impossible if someone is indeed arguing.

或者，即使此人的思维混乱至极：一方面在进行论证，另一方面却以某种方式宣

称自己不相信或否认论证的可能性——他依然将被禁止主张“论证不可能成立”。因为：当某人确实在进行论证时，无论其是否真正意识到论证的可能性（或者更常见的情况是：拒绝承认这一点），“论证不可能成立”的主张都绝无可能成立。

We know this to be true whether or not others admit or recognize this. Thus, if someone asserts that argumentation is impossible, this assertion contradicts the undeniable presupposition of argumentation—that argumentation is possible. This person's proposition is facially untrue. Again, the person would be estopped from asserting such a claim since it is not even possibly true; the assertion flies in the face of undeniably true facts of reality.

无论他人是否承认或意识到这一点，我们都深知这是不争的事实。因此，若有人声称论证是不可能的，那么这一断言便与论证无可否认的基本前提——即论证本身是可能的——产生了矛盾。该命题显而易见是站不住脚的。同理，此人亦被禁止提出此类主张，因其根本不具备真实性；这种断言与无可辩驳的现实真相完全相悖。

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, arguers are estopped from asserting one thing if (1) it contradicts something else that they necessarily maintain to be true; (2) it contradicts something that is necessarily true because it is a presupposition of discourse; or (3) it is necessarily true as an undeniable feature of reality or human existence. Further, 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 consistency.

因此，鉴于对话的本质在于探求真理，参与者将被禁止提出显性矛盾的主张——此类主张必然为假，会破坏追求真理的根本目标。基于同样的逻辑，当主张满足以下任一条件时，论证者即被禁止提出该主张：（1）与其必然持有的真命题相矛盾；（2）与话语活动必然预设的真命题相矛盾；（3）其本身作为现实或人类存在无可争议的特征必然为真。更进一步说，任何人若想反驳这些普遍结论而不陷入自相矛盾都是不可能的，因为任何对事物持异议者都是对话的参与者，因而必然重视真相的发现与逻辑的一致性。

C. 惩罚侵犯行为

Punishing Aggressive Behavior

The conduct of individuals can be divided into two types: (1) coercive or aggressive—that is, the initiation of force—and (2) noncoercive 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 as either aggressive or nonaggressive.³⁶ Thus, there are two types of behavior for which we might attempt to punish a person: aggressive and nonaggressive.³⁷ I will examine each in turn to show that punishment of aggressive behavior is legitimate while punishment of nonaggressive behavior is illegitimate.

个人行为可以划分为两大类：(1) 强制性或侵犯性——即主动使用武力的行为；(2) 非强制性或非侵犯性行为。这种分类纯粹是描述性的，并不预设侵犯行为必然无效、不道德或不正当的。该分类仅基于一个前提：至少部分人类行为能够被客观归类为攻击性或非攻击性。³⁶ 基于此，我们可以探讨对这两类行为的惩罚：侵犯性和非侵犯性。

³⁶ Other divisions could of course be proposed as well, but they do not result in interesting or useful results. For example, one could divide human conduct into jogging and not jogging, but to what end? Although such a division would be valid, it would produce uninteresting results, unlike the aggressive/nonaggressive division, which produces relevant results for a theory of punishment, which necessarily concerns the use of force. See Ludwig von Mises, *Epistemological Problems of Economics*, 3d ed., George Reisman, trans. (Auburn, Ala.: Mises Institute, 2003; <https://mises.org/library/epistemological-problems-economics>); idem, *Human Action*, pp. 65 – 66; idem, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>), explaining in all three works that experience can be referenced to develop interesting laws based on the fundamental axioms of praxeology, rather than irrelevant or uninteresting—though not invalid—laws). See also “Knowledge, Calculation, Conflict, and Law” (ch. 19), at n.65 and Kinsella, “Mises: Keep It Interesting,” *StephanKinsella.com* (Oct. 16, 2010).

In any event, it is clear that some actions can objectively be characterized as aggressive. See above, Part III.D.1.

当然，还可以提出其他的划分方法，但这些方法不会产生有趣或有用的结果。例如，我们可以把人的行为分为慢跑和不慢跑，但这样做的目的是什么呢？虽然这样的划分

³⁷我将依次分析这两种行为，以阐明对侵犯行为的惩罚是合法的，而对非侵犯行为的惩罚则是非法的。

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 B, or B's agent, C, attempts to punish a purported wrongdoer A.³⁸ Suppose that A murders B, and C convicts and imprisons A. In order for A to object to his punishment, A must claim that C should not and must not treat him this way; that he has a right³⁹ to not be punished or, at least, that the use of force is wrong so that C should, therefore, not punish him.⁴⁰ However, such a claim is blatantly inconsistent with what must be A's other position: because A murdered B, which is clearly an act of aggression, his actions have indicated that he also holds the view that "aggression is not wrong."

最明显且最严重的侵犯行为是谋杀，让我们以此为例进行探讨。在下文中，我将假设受害者 B 或其代理人 C 试图对所谓的违法者 A 进行惩罚。³⁸假设 A 谋杀了 B，C

是有效的，但它会产生无趣的结果，而攻击性/非攻击性的划分则不同，它产生的结果对于必然涉及武力使用的惩罚理论来说是相关的。参见路德维希·冯·米塞斯《经济学的认识论问题》第三版，乔治·赖斯曼译（阿拉巴马州奥本：米塞斯研究院，2003 年）；同上，《人的行动》，第 65-66 页；同上，《经济科学的终极基础：方法论专著》：（新泽西州普林斯顿：D.范·诺斯特兰德公司，1962 年），在这三部著作中都解释说，可以根据行动学的基本公理，参照经验来发展有趣的规律，而不是无关或无趣——尽管不是无效的规律）。另见《知识、计算、冲突与法律》（第 19 章），注释 65，以及金塞拉：《米塞斯：保持趣味性》，StephanKinsella.com（2010 年 10 月 16 日）。

无论如何，显然有些行为在客观上可以被定性为侵犯。见上文第三部分 D.1。

³⁷ To be more precise, if society attempts to punish a person, it is either for aggressive behavior or for not(aggressive behavior). Not(aggressive behavior) is a residual category that includes both nonaggressive behavior, such as speaking or writing, and also nonbehavioral categories such as status, race, age, nationality, skin color, and the like.

更确切地说，如果社会试图惩罚一个人，要么是因为他的侵犯行为，要么是因为他的非（侵犯行为）。非（侵犯行为）是一个剩余类别，既包括非侵犯行为，如说话或写作，也包括非行为类别，如地位、种族、年龄、国籍、肤色等。

³⁸ In principle, any right of a victim to punish the victimizer may be delegated to an heir or to a private agent such as a defense agency—or to the state, if government is valid, a question that does not concern us here.

原则上，受害者惩罚加害者的任何权利都可以委托给继承人或私人代理人（如辩护机构），或者委托给国家（如果政府有效的的话），这个问题在此与我们无关。

将 A 定罪并监禁。若 A 要反对对他的惩罚，就必须声称 C 不应该且绝不能如此对待他；他有权³⁹免受惩罚，或者至少认为使用武力是错误的，因此 C 不应惩罚他。⁴⁰然而，

³⁹ On this subject, Alan Gewirth has noted:

Now these strict “oughts” involve normative necessity; they state what, as of right, other persons must do. Such necessity is also involved in the frequently noted use of “due” and “entitlement” as synonyms or at least as components of the substantive use of “right.” A person’s rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others.

关于这个问题，艾伦·格维思（Alan Gewirth）指出：

现在，这些严格的“应该”涉及到规范的必然性；它们说明了作为权利，其他人必须做什么。人们经常注意到，“正当”和“权利”作为同义词或至少作为“权利”的实质性用法的组成部分，也涉及到这种必要性。一个人的权利是他应得的东西，是他有权享有的东西，因此也是他有权利向他人提出要求的東西。

Alan Gewirth, “The Basis and Content of Human Rights,” *Georgia L. Rev.* 13 (1979): 1150. For discussion of Alan Gewirth’s justification of rights and its relation to estoppel, see “Dialogical Arguments for Libertarian Rights” (ch. 5), the section “Pilon and Gewirth on the Principle of Generic Consistency,” esp. n.39 and accompanying text; also Kinsella, “Estoppel: A New Justification for Individual Rights,” p. 71 n.9; see also Hare, *Freedom and Reason*, § 2.5 (discussing usage of concepts “ought” and “wrong”).

艾伦·格维思，《人权的基础与内容》，《佐治亚法律评论》第 13 期（1979 年）：1150 页。对于艾伦·格维思对权利的正当性论证及其与禁止反言的关系的讨论，参见《自由意志主义权利的对话论证》（第 5 章）中“皮隆和格维思论通用一致性原则”这一部分，尤其是注释 39 及相关正文；还有金塞拉，《禁止反言：个人权利的新理由》，第 71 页注释 9；另见黑尔，《自由与理性》，第 2.5 节（讨论“应然”和“错误”概念的用法）。

⁴⁰ If a skeptic were to object to the use of moral concepts here—for example, wrong, should, etc.—it should be noted that it is the criminal, A, who introduces normative, rights-related terminology when A tries to object to A’s punishment. Randy Barnett makes a similar point in a different context. Professor Barnett argues that those who claim that the U.S. Constitution justifies certain government regulation of individuals are themselves making a normative claim, which may thus be examined or criticized from a moral point of view by others. See Randy E. Barnett, “Getting Normative: The Role of Natural Rights in Constitutional Adjudication,” *Constitutional Commentary* 12 (1995; www.randybarnett.com/pre-2000): 93 – 122, at 100 – 01; see also idem, “The Intersection of Natural Rights and Positive Constitutional Law,” *Connecticut L. Rev.* 25 (1993; <http://www.randybarnett.com/pre-2000>): 853 – 68, discussing the unavoidable connection between natural law and positive law in constitutional adjudication.

如果怀疑论者反对在此使用道德概念——例如错误、应该等——那么应该注意到，当

这样的主张显然与 A 的另一立场明显矛盾：因为 A 谋杀了 B，这无疑是一种侵权行为，他的行为已表明他持有“侵犯并无不当”的观点。

Thus, because of his earlier actions, A is estopped from claiming that aggression is wrong.⁴¹ He cannot assert contradictory claims and is estopped from doing so. The only way for A to maintain consistency is to drop one of his claims. If A retains only the claim “aggression is proper,” then he is failing to object to his imprisonment; thus, the question of justifying the punishment does not arise. By claiming that aggression is proper, A consents to his punishment. If, on the other hand, A drops his claim that “aggression is proper” and retains only his claim that “aggression is wrong,” he indeed could object to his imprisonment. As we shall see below, it is impossible for him to drop the claim that “aggression is proper” just as it would be impossible for him to avoid maintaining that he exists or that he can argue.

因此，鉴于 A 先前的行为，他无法声称侵权行为是错误的。⁴¹他既不能提出相互矛盾的主张，也被禁止这样做。对 A 而言，保持一致性的唯一途径是放弃其中一个主张。若 A 仅保留“侵犯是正当的”这一主张，那么他便不能反对对其监禁，从而消除了惩罚是否正当的问题。通过坚持侵犯是正当的，A 实际上认同了对他的惩罚。另一方面，如果 A 放弃“侵犯是正当的”这一主张，仅保留“侵犯是错误的”这一主张，那么他确实可以反对监禁。我们将在下文中探讨，A 不可能放弃“侵犯是正当的”这一主张，正如他不可能不坚持自己的存在或无法进行论证一样。

To restate, A cannot consistently claim that murder is wrong, for it contradicts his view

罪犯 A 试图反对对 A 的惩罚时，是罪犯 A 引入了规范性的、与权利相关的术语。兰迪-巴尼特（Randy Barnett）在不同的语境中提出了类似的观点。巴尼特教授认为，那些声称美国宪法证明政府对个人的某些监管是正当的人本身就是在提出规范性主张，因此其他人可以从道德角度对其进行审视或批评。见兰迪-E-巴尼特，《走向规范：自然权利在宪法裁决中的作用》，《宪法评论》第 12 期（1995 年；www.randybarnett.com/pre-2000）：93-122 页，第 100-101 页；也见同上，《自然权利与实在宪法法的交叉》，《康涅狄格法律评论》第 25 期（1993 年；http://www.randybarnett.com/pre-2000）：853-868 页，讨论了宪法裁决中自然法与实在法之间不可避免的联系。

⁴¹ If A cannot even claim that aggression—the initiation of force—is wrong, then, a fortiori, A cannot make the subsidiary claim that retaliatory or responsive force is wrong. 如果 A 甚至不能主张侵犯——使用武力——是错误的，那么，更不用说，A 也不能声称报复性或回应性武力也是错误的这一附带主张。

that murder is not wrong, evidenced by or made manifest in his previous act of murder. A is estopped from asserting such inconsistent claims. Therefore, if C attempts to kill A, A has no grounds for objecting since he cannot now say that such a killing by C is "wrong," "immoral," or "improper" or that it would violate his "rights." And if A cannot complain if C proposes to kill him, then, a fortiori, he surely cannot complain if C merely imprisons him.⁴² Thus, we can legitimately apply force to—punish—a murderer in response to the crime. (And of course, if an aggressor may be punished after the fact, force used in self-defense is, a fortiori, obviously justified.)⁴³

重述一下，A 无法逻辑一致地主张谋杀是错误的，因为这与他认为谋杀并非错误的观点相矛盾，他之前的谋杀行为已证明了这一点。A 被禁止提出这种自相矛盾的主张。因此，如果 C 企图杀害 A，A 没有理由反对，因为他现在不能称 C 的杀害行为是“错误的”、“不道德的”或“不正当的”，也不能说这侵犯了他的“权利”。如果 A 无法抱怨 C 提议杀害他，那么更不用说，如果 C 只是监禁他，他同样无法抱怨。⁴²因此，我们可

⁴² Although A may not complain that his imminent execution by C would violate his rights, this does not necessarily mean that C may legitimately execute him. It only means that A's complaint may not be heard and that A's rights are not violated by being executed. A third party T, however, may have another legitimate complaint about A's execution, one which does not assert A's rights but rather takes other factors, such as the special nature of the defense agency C, into account—especially if the defense agency is a government (a state). For example, T may argue that the state, as an inherently dangerous and powerful entity, should not be allowed to kill even murderers because giving such power to the state is so inherently dangerous and threatening to innocent, non-estopped people, like T, that it amounts to an aggression and a violation of T's rights. Further, if the state deems itself to be B's agent, B's heir may conceivably object to the state's execution of A, claiming the sole right to execute or otherwise punish A. For lesser crimes, such as assault, where the victim B remains alive, B himself may object to the state's administering punishment to the aggressor.

虽然 A 可以不申诉 C 即将对他执行的死刑会侵犯他的权利，但这并不一定意味着 C 可以合法地对他执行死刑。这只意味着 A 的申诉可能得不到审理，A 的权利不会因为被处决而受到侵犯。然而，第三方 T 可能会对 A 的处决提出另一种合法申诉，这种申诉并不主张 A 的权利，而是考虑到其他因素，例如辩护机构 C 的特殊性质——特别是如果辩护机构是一个政府（国家）。例如，T 可能会认为，国家作为一个固有的危险和强大的实体，即使是杀人犯也不应该允许被它杀死，因为赋予国家这样的权力对于像 T 这样无辜的、未被禁止的人来说具有如此根深蒂固的危险和威胁，以至于这相当于一种侵犯，侵犯了 T 的权利。此外，如果国家认为自己是 B 的代理人，那

以合法地对杀人犯使用武力——即惩罚他——以应对犯罪。（当然，如果侵犯者可以

么可以想象，B 的继承人可能会反对国家处决 A，声称自己拥有处决或以其他方式惩罚 A 的唯一权利。对于较轻的罪行，如攻击行为，受害者 B 仍然活着，B 本人可能会反对国家对攻击者实施惩罚。

Similarly, after applying estoppel solely to the relationship between the defense agency, C, and a defendant, A, the exclusionary rule—whereby a court may not use evidence if it is illegally obtained—would fall. If A actually committed the crime, it cannot violate his rights for the court to discover this fact, even if the evidence was illegally obtained; A would still be estopped from complaining about his punishment. However, a third party can conceivably argue that it is too dangerous for a defense agency, C, to have a system which gives it incentives to illegally search people and that the exclusionary rule is therefore a necessary procedural or prophylactic rule required in order to protect innocent people from C’s dangerousness—this is especially true if C is a governmental defense agency. In essence, the argument would be that prosecutions by the state or other defense agencies, without an exclusionary rule to temper the danger of such prosecutions, could amount to aggression or a standing threat against innocent third parties. For a related discussion, see Part III.D.3, and note 50, below. See also Patrick Tinsley, Stephan Kinsella & Walter Block, “In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach,” Southern U. L. Rev., 32 no. 1 (2004; www.walterblock.com/publications), pp. 63-80.

同样，将禁止反言仅适用于辩护机构 C 与被告 A 之间的关系后，排除规则——即如果证据是非法获得的，法院不得使用——就会失效。如果 A 确实实施了犯罪，那么即使证据是非法获得的，法院发现这一事实也不会侵犯 A 的权利；A 仍不得对他的处罚提出申诉。然而，第三者可以设想，如果辩护机构 C 有一个鼓励其非法搜身的制度，那就太危险了，因此排除性规则是一个必要的程序性或预防性规则，以保护无辜的人免受 C 的危害——如果 C 是一个政府辩护机构，情况尤其如此。从本质上讲，这种观点认为，如果没有排除性规则来缓和国家或其他防卫机构的起诉所带来的危险，就可能构成对无辜第三方的侵犯或长期威胁。对于相关讨论，见下文第三部分 D.3 和注释 50。另见帕特里克·廷斯利、斯蒂芬·金塞拉和沃尔特·布洛克的文章，《为证据辩护和反对排除规则：一种自由意志主义的方法》，《南方大学法律评论》，第 32 卷，第 1 期（2004 年；www.walterblock.com/publications），第 63-80 页。

Whether such arguments of third parties could be fully developed is a separate question beyond the scope of this chapter. I merely wish to point out that other complaints about certain government actions are not automatically barred just because the specific criminal cannot complain. Just because C’s imprisonment of A does not aggress against A does not necessarily show that such action does not aggress against others.

至于第三方的这些论点能否得到充分阐述，则是本章讨论范围之外的另一个问题。我只想指出，对某些政府行为的其他申诉并不因为特定罪犯不能申诉而自动被禁止。仅仅因为 C 对 A 的监禁没有侵犯 A，并不一定表明这种行为没有侵犯其他人。

在事后受到惩罚，那么在自卫时使用武力显然更是正当的。⁴³)

Because the essence of rights is their legitimate enforceability, this establishes a right to life—that is, 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.⁴⁴

因为权利的本质在于其可合法强制执行性，这就确立了一项生命权——即不被杀害的权利。不难看出，这一原则可延伸适用于程度较轻的侵害行为，例如殴打、非法

⁴³ See, e.g., Rothbard, “Self-Defense,” in *The Ethics of Liberty* (<https://mises.org/library/right-self-defense>); Thomas Aquinas, *Summa Theologica* (New Advent, <https://www.newadvent.org/summa>), *Secunda Secundæ Partis*, Question 64, art. 7: Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental... Accordingly the act of self-defense may have two effects, one is the saving of one’s life, the other is the slaying of the aggressor. Therefore this act, since one’s intention is to save one’s own life, is not unlawful, seeing that it is natural to everything to keep itself in “being,” as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful, because ... “it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense.” Nor is it necessary for salvation that a man omit the act of moderate self-defense in order to avoid killing the other man, since one is bound to take more care of one’s own life than of another’s.

例如，参见罗斯巴德，《自由的伦理》（<https://mises.org/library/right-self-defense>）中的“自卫”；托马斯·阿奎那，《神学大全》（新降临，<https://www.newadvent.org/summa>），第二部第二部分，问题 64，第 7 条：

没有什么能阻止一个行为产生两个效果，其中只有一个效果是有意图产生的，而另一个效果是非意图的。现在，道德行为的种类取决于意图，而不是取决于意图之外的东西，因为这是偶然的……因此，自卫行为可能有两种效果，一种是挽救自己的生命，另一种是杀死侵犯者。因此，既然一个人的意图是拯救自己的生命，那么这种行为就不是非法的，因为尽可能地保持自身的“存在”是万物的天性。然而，尽管行为的出发点是好的，但如果行为与目的不相称，也可能成为非法行为。因此，如果一个人在自卫时使用了超过必要的武力，那将是非法的；而如果他适度地击退武力，他的防卫将是合法的，因为……“以武力击退武力是合法的，只要不超过无过错防卫的限度”。为了救赎，一个人也没有必要为了避免杀死另一个人而省略适度的自卫行为，因为一个人对自己的生命比对他人的生命更有责任。

拘禁、绑架和强奸等。⁴⁴

D. 对侵犯的潜在防卫

Potential Defenses by the Aggressor

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

前述例子中的 A 可能会对整个程序提出若干反对意见。不过，这些反对意见都经不起推敲。

1. 侵犯的概念 The Concept of Aggression

First, A might claim that the classification of actions as either aggressive or not aggressive is invalid. We might be smuggling in a norm or value judgment just by 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, A must 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 imprisonment, 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, 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.

⁴⁴ For a recent book-length treatment of ideas related to Hoppe’s argumentation ethics and my estoppel approach advanced in this chapter, see Pavel Slutskiy, *Communication and Libertarianism* (Springer, 2021). In revising this chapter, this footnote grew to unmanageable length. I have placed the relevant commentary in the Appendix, below.

关于霍普的论证伦理学和我在本章中提出的禁止反言方法的相关观点的最近的一本书，可参阅帕维尔·斯卢茨基（Pavel Slutskiy），《交流与自由意志主义》（斯普林格出版社，2021 年）。在修订本章的过程中，这个注释变得冗长不堪。我已将相关评注放在了下文的附录中。

首先，A 可能会主张将行为划分为“侵犯性”或“非侵犯性”的分类方式本身就不成立。当我们把谋杀描述为“具有侵犯性”而非仅作价值无涉的客观描述时，可能已经暗中植入了某种规范或价值判断。这种被偷换进来的规范标准，表面上似乎为惩罚 A 的正当性提供了依据，实则使论证陷入循环逻辑的谬误。然而，A 若想反对我们对其施加惩罚，就必须先承认某些行为可被有效描述为强制行为——比如即将施加于他的惩罚。倘若他否认任何行为能被客观定义为强制手段，那么他连监禁措施都无从反对，因为他甚至无法确定什么构成惩罚行为，而我们仍可继续实施惩罚。当他试图反对这种强制力运用的瞬间，就不得不承认至少某些行为确实能被客观归类为涉及强制力。因此，他被禁止基于这类理由而提出反对观点。

2. 普适性 Universalizability

It could also be objected that the estoppel principle is being improperly applied and 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 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:

也有人可能会反驳，认为禁止反言原则的适用并不恰当，因为 A 实际上并未提出相互矛盾的主张。与其说 A 持有“侵犯是正当的”和“侵犯是不正当的”这两种相互矛盾的观点，不如说 A 坚持的是“我的侵犯是正当的”和“他人对我的侵犯是不正当的”这两种前后一致的立场。然而，我们必须铭记，A 反对 C 监禁他，是在进行论证。他是在论证 C 不应该——基于某种充分的理由——监禁他，因此他是在做出规范性断言。正如汉斯-赫尔曼·霍普教授所指出的：

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.⁴⁵

人们普遍认为，论证意味着某个命题主张应具有普遍的可接受性，或者换言之，若该命题属于规范建议，则其应具备“普遍适用性”。在规范建议的语境下，这一观点体现在伦理学的黄金法则或康德的绝对命令之中，即唯有那些能够被表述为对所有人都无一例外有效的一般性原则，才被视为是正当的规范。⁴⁵

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...”⁴⁶ Thus, universalizability is 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 normative propositions are consistent with the principle of universalizability necessarily presupposed by the arguer in entering the discourse. As Hare points out:

之所以如此，是因为论证过程中所提出的命题具备普遍可接受性。“论证中隐含的意味是，任何能够理解该论证的人，原则上都应当能被其说服，这完全归因于论证本身的论证力……”⁴⁶ 因此，普适性构成了规范性对话的基础前提，任何违反普适性原则的论证者，实际上都在坚持一种自相矛盾的立场——既认为普适性是必要的，又否认

⁴⁵ Hoppe, A Theory of Socialism and Capitalism, p. 157, footnote omitted; see also n. 119 et pass. For further discussion of universalizability, see Hare, Freedom and Reason, §§ 2.2, 2.7, 3.2, 6.2, 6.3, 6.8, 7.3, 11.6, et pass.; also Stephan Kinsella, “The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle,” StephanKinsella.com (Nov. 10, 2011); “Dialogical Arguments for Libertarian Rights” (ch. 6), notes 42 – 43 and accompanying text; “What Libertarianism Is” (ch. 2), the section “Self-ownership and Conflict Avoidance”; and “How We Come to Own Ourselves” (ch. 4), n.15.

霍普，《社会主义与资本主义理论》，第 157 页，注释省略；另见注释 119 及后续内容。关于普适性的进一步讨论，参见黑尔（Hare）《自由与理性》，第 2.2、2.7、3.2、6.2、6.3、6.8、7.3、11.6 节及后续内容；还有斯蒂芬·金塞拉，《特殊主义伦理的问题，或者为什么每个人都真的必须承认普适性原则的有效性》，StephanKinsella.com（2011 年 11 月 10 日）；《关于自由意志主义权利的对话论证》（第 6 章），注释 42 43 及相关文本；《何为自由意志主义》（第 2 章），“自我所有权与避免冲突”一节；以及《我们如何拥有自己》（第 4 章），注释 15。

⁴⁶ Hoppe, The Economics and Ethics of Private Property, p. 316.
霍普，《私有财产的经济学与伦理学》，第 316 页。

其必要性——因而这种行为是被禁止的。唯有那些能够具有普适性的规范性命题，才符合论证者在参与对话时所必然预设的普遍化原则。正如 Hare 所指出的：

Offenses against the thesis of universalizability are logical, not moral. If a person says 'I ought to act in a certain way, but nobody else ought to act in that way in relevantly similar circumstances', then ... he is abusing the word 'ought' he is implicitly contradicting himself[A]ll [the thesis of universalizability] does is to force people to choose between judgements which cannot both be asserted without self-contradiction.⁴⁷

违反普遍性命题的行为是逻辑性的，而非道德性的。如果某人声称“我应当以某种方式行事，但在本质上相似的境遇下其他任何人都不必如此行事”，那么.....他就是在滥用“应当”这个词——他实际上正在自我矛盾.....[普适性命题]的全部作用，就是迫使人们在那些一旦同时断言就会导致自相矛盾的判断之间作出选择。⁴⁷

The proper way, then, to select the norm that the arguer is asserting is to ensure that it is universalizable. The view that “aggression by me is proper” and “aggression by the state against me is improper” clearly does 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 otherwise inconsistent views with liberally sprinkled “for me only’s.”⁴⁸

因此，选择论证者所主张的规范的正确方法，是确保其具有普适性。认为“我的侵犯是正当的”和“国家对我的侵犯是不正当的”这类观点，显然未能通过这一检验。相较之下，“侵犯是或不是正当的”这一观点能够普遍适用，因而构成了规范的适当形式。论证者不能通过任意地将原本不一致的观点特殊化，并随意地以“只供我使用⁴⁸”为借口，

⁴⁷ Hare, *Freedom and Reason*, § 3.2, p. 32; see also *ibid.*, § 11.6, p. 216 (“It is part of the meanings of the moral words that we are logically prohibited from making different moral judgements about two cases when we cannot adduce any difference between the cases which is the ground for the difference in moral judgements.”).

参见黑尔（Hare）《自由与理性》，第 3.2 节，第 32 页；另见同上，第 11.6 节，第 216 页（“道德词语的含义之一是，当我们不能举出作为道德判断不同的理由的情况之间的任何差异时，我们在逻辑上被禁止对两种情况作出不同的道德判断。”）

⁴⁸ As Hoppe notes, particularistic rules, which specify different rights or obligations for different classes of people, have no

来逃避禁止反言原则的适用。

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

此外, 即使 A 否认普适性原则的有效性, 并坚持认为他可以将规范特殊化, 于是, 如果 C 也如此行事, 他亦不能反对。如果 A 承认规范可以特殊化, 那么 C 只需根据 "惩罚 A 是允许的" 这一特殊规范行事即可。

3. 时间 Time

A could also attempt to rebut this application of estoppel by claiming that he, in fact, does currently maintain that aggression is improper and that he has changed his mind since the time when B was murdered.

A 还可以尝试以另一种方式来反驳禁止反言原则的适用性, 他会说他谋杀 B 之前认为侵犯行为是正当的, 不过现在他改变了想法。

Thus, there is no inconsistency or contradiction because he does not simultaneously hold both contradictory ideas and is not estopped from objecting to imprisonment.⁴⁹

chance of being accepted as fair by every potential participant in an argumentation for simply formal reasons. Unless the distinction made between different classes of people happens to be such that it is acceptable to both sides as grounded in the nature of things, such rules would not be acceptable because they would imply that one group is awarded legal privileges at the expense of complementary discriminations against another group. Some people, either those who are allowed to do something or those who are not, therefore could not agree that these were fair rules.

Hoppe, A Theory of Socialism and Capitalism, pp. 164 - 65, footnote omitted.

正如霍普所指出的, 特殊性规则, 即规定不同类别的人享有不同权利或承担不同义务的规则, 由于形式上的原因, 不可能被论证的每一个潜在参与者接受为公平的规则。除非对不同类别的人所做的区分恰好是双方都能接受的, 是以事物的本质为基础的, 否则这种规则是不会被接受的, 因为它们意味着一个群体在获得法律特权的同时, 要以对另一个群体的补充性歧视为代价。因此, 有些人, 无论是被允许做某事的人还是不被允许做某事的人, 都不会同意这些规则是公平的。

霍普, 《社会主义与资本主义理论》, 第 164-165 页, 注释省略。

因此，他并没有在同一时间坚持相互矛盾的主张，所以他并不存在相互矛盾之处，因此也没有被禁止主张反对监禁。⁴⁹

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 needs to do is administer the punishment and afterwards assert that all is in the past and that C, like A, now condemns its prior action. Since the impermissible action 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. Therefore, the irrelevance of the mere passage of time cannot be denied by A,⁵⁰ for in order to effectively object to being punished, A must presume that the passage of time does not make a difference to imputing responsibility-incurring actions to individuals.⁵¹

但这个问题很容易解决。首先，A 实际上是在主张：在判定哪些行为应归责于他时，必须考虑时间的流逝。然而若此说成立，那么 C 只需执行惩罚，事后宣称一切都已成为过去，并像 A 现在所做的那样谴责自己先前的行为。既然不被允许的行为已"成为过去"，就不能再归责于 C。事实上，如果这种荒谬的同步性要求成立，那么在惩罚实施的每个连续瞬间，A 提出的任何异议或防御行为针对的都是刚刚过去的行为，因而会立即失效并沦为对过去的追溯。因此，A 无法否认单纯时间流逝的无关性⁵⁰——因

⁴⁹ See Hare, *Freedom and Reason*, § 6.9, p. 108, discussing the simultaneity requirement with respect to contradictory statements.

参见黑尔（Hare）《自由与理性》，第 6.9 节，第 108 页，讨论了与相互矛盾的陈述有关的同步性要求。

⁵⁰ This is not to say that the passage of time cannot be relevant for other reasons. Just as capital punishment does not violate the rights of the executed murderer, it can conceivably be objected to on the grounds of the danger posed by such a practice to innocent people. See note 42, above. So punishment after a long period of time does not violate the rights of actually guilty criminals but may arguably constitute a threat to innocent people—because of the relative unreliability of stale evidence, faded memories, etc. But these are procedural or structural, not substantive, concerns, the discussion of which is beyond the scope of this chapter. My focus here is the basic principles of rights that must underlie any general justification of punishment, even if other procedural or systemic features also need to be taken into account after a prima

为要有效反对惩罚，A 就必须假定时间流逝对于将引起责任的行为归咎于个人并无影响。⁵¹

facie right to punish is established. Thus, this chapter also does not consider such questions as the danger of being a judge in one’s own case, as these are separate concerns. For discussion of the risks of individuals acting as judge, jury, and executioner, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 54 – 146. On the danger of being a judge in one’s own case, see “The Theodosian Code,” in *The Theodosian Code and Novels and the Sirmondian Constitutions*, Clyde Pharr, trans. (Princeton, N.J.: Princeton University, 1952), § 2.2.1; John Locke, *Second Treatise on Civil Government* (1690; <https://www.johnlocke.net/2022/07/two-treatises-of-government.html>), § 13 (When men are “judges in their own cases,” it can be objected that “selflove will make men partial to themselves and their friends: and on the other side, ill nature, passion, and revenge will carry them too far in punishing others.”).

这并不是说时间的流逝在其他方面就无关紧要。正如死刑并不侵犯被处决的凶手的权利一样，可以想见，有人会以这种做法对无辜者构成的危险为由提出反对。见上文注释 42。因此，经过很长一段时间的惩罚并不侵犯实际有罪的罪犯的权利，但可以说对无辜者构成威胁——因为陈旧的证据相对不可靠、记忆模糊等等。但这些都是程序性或结构性的，而非实质性的问题，对此的讨论超出了本章的范围。我在这里关注的是任何惩罚的一般性正当理由所必须依据的基本权利原则，即使在初步确立惩罚权利之后还需要考虑其他程序性或系统性特征。因此，本章也不考虑诸如自己充当法官之类的危险等问题，因为这些是不同的关注点。关于个人充当法官、陪审团和执行者的风险的讨论，见罗伯特·诺齐克《无政府、国家和乌托邦》（纽约：基础图书，1974 年），第 54 146 页。关于自己充当法官的危险，见“狄奥多西法典”，载于《狄奥多西法典、新律和西尔蒙迪安宪法》，克莱德·法尔译（新泽西州普林斯顿：普林斯顿大学，1952 年），第 2.2.1 节；约翰·洛克，《政府论：下》（1690 年；<https://www.johnlocke.net/2022/07/two-treatises-of-government.html>），第 13 节（当人们“在自己的案件中充当法官”时，可以反对说“自爱会使人们偏袒自己和朋友；另一方面，恶劣的本性、激情和报复会使他们在惩罚他人时做得太过分。”）

⁵¹ For a similar argument by Hoppe regarding why any participant in argument contradicts himself if he denies the relevance of the passage of time in another context, specifically if he denies the validity of the “prior-later” distinction which distinguishes between prior homesteaders and later latecomers, see Hoppe, *A Theory of Socialism and Capitalism*, pp. 169 – 71. For a discussion of performative contradictions, see Roy A. Sorensen, *Blindspots* (New York: Oxford University Press, 1988).

霍普也提出了类似的论点，即任何论证的参与者如果否认时间流逝在另一语境中的相关性，特别是如果否认区分先来拓殖者和后到拓殖者的“先来-后到”区分的有效性，那么他为什么会自相矛盾，见霍普，《社会主义和资本主义理论》，第 169-171 页。关于“践言冲突”的讨论，参见罗伊·A. 索伦森的《盲点》（纽约：牛津大学出版社，1988 年）。

Second, in objecting to punishment in the present, A necessarily maintains that force must not and should not occur. Even if he really does no longer believe that murder is proper, by his own current view, the earlier murder was still improper. He necessarily denounces his earlier actions and is estopped from objecting to his punishment imposed on that murderer—namely, himself. To maintain that a murderer should not be punished is inconsistent with a claim that murder should not and must not occur.

其次，在反对当下惩罚时，A 必然主张武力绝不能也不该发生。即便他确实不再认为谋杀是正当的，根据他当前的立场，先前的谋杀行为依然是不正当的。他必然要谴责自己过去的行径，因而无权反对针对那个谋杀者——即他自己——施加的惩罚。主张谋杀者不应受惩，与声称谋杀不该且绝不能发生的立场自相矛盾。

Third, even if A argues that he never held the view that “murder is not wrong” and that he murdered despite holding it to be wrong,⁵² he still admits that murder is wrong and that he, in fact, did murder B and still ends up denouncing his earlier action. Thus, A is again estopped from objecting to the 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.⁵³ Thus, whether A currently holds both views, or only one of them, he is still estopped from objecting to the imprisonment.

第三，即使 A 辩称自己从未持有“谋杀无错”的观点，并承认自己是在明知有错的情况下实施了谋杀，⁵² 他依然认同谋杀是错误的，且事实上确实谋杀了 B，最终仍会谴责自己先前的行为。因此，如同其声称改变立场的情形，A 再次被禁止反对惩罚。最后，若 A 主张实施暴力的同时仍可认定该行为错误，那么 C 同样适用此逻辑。因此

⁵² Whether someone can genuinely believe something is impermissible and yet do it anyway is questionable. As Hare has pointed out, “If a man does what he says he ought not to, ... then there is something wrong with what he says, as well as with what he does.” Hare, *Freedom and Reason*, § 5.9.

一个人是否真的相信某些事情是不允许的，但他还是去做了，这是值得怀疑的。正如黑尔所指出的，“如果一个人做了他说不应该做的事，.....那么他说的和做的都有问题”。黑尔（Hare）《自由与理性》，第 5.9 节。

即便 C 被 A“惩罚 A 是错误”的论点说服，⁵³仍可能像 A 自称所做的那样，在意识到错误的情况下继续实施惩罚。由此可见，无论 A 当前同时持有两种观点，还是仅持其中之一，他均无权反对监禁判决。

Thus, we can see that applying the principle of estoppel would not hinder the prevention and punishment of violent crimes. The above murder analysis can be applied to any sort of coercive, violent crime. All the classical violent crimes would still be as preventable under the proposed scheme as they are today. All forms of aggression—rape, theft, murder, assault, trespass—would still be legitimately punishable crimes. A rapist, for example, could only complain about being imprisoned by saying that his rights are being violated by the aggressive imprisonment, but he would be estopped from saying that aggression is wrong. In general, any aggressive act—one involving the initiation of violence—would cause an inconsistency with the actor later claiming that he should not be imprisoned or punished in some manner.

⁵³ Any other similar argument of A's would also fail. For example, A could defend himself by asserting that there is no such thing as free will, so that he was determined to murder B, and thus cannot be blamed for doing so. However, note that the estoppel theory nowhere assumed the existence of free will, so such an argument is irrelevant. Moreover, if A is correct that there is no free will, then C is similarly predestined to do whatever he will, and if this includes punishing A, how can C be blamed? The logic of reciprocity is inescapable. R.P. Phillips has called such a type of axiom a “boomerang principle ... for even though we cast it away from us, it returns to us again.” R.P. Phillips, *Modern Thomistic Philosophy: An Explanation for Students*, vol. 2 (Westminster, Md.: The Newman Press, 1962 [1934 - 35]), p. 37, quoted in Murray N. Rothbard, “Beyond Is and Ought,” *Liberty* 2, no. 2 (Nov. 1988; <https://perma.cc/8LZR-DN6Y>; also <https://mises.org/library/beyond-and-ought>): 44 - 45, p. 45.

A 的任何其他类似论点也都会失败。例如，A 可能会为自己辩护说不存在自由意志这种东西，所以他注定要谋杀 B，因此不能因此而受到指责。然而，请注意，禁止反言理论在任何地方都没有假定自由意志的存在，所以这样的论点是不相关的。此外，如果 A 关于不存在自由意志的说法是正确的，那么 C 同样注定要做他想做的任何事情，如果这包括惩罚 A，C 又怎么能受到指责呢？这种互惠的逻辑是不可避免的。R.P. 菲利普斯将这种类型的公理称为“回旋镖原则……因为即使我们把它从我们身边抛开，它也会再次回到我们身边。”R.P. 菲利普斯，《现代托马斯主义哲学：给学生的解释》，第 2 卷（马里兰州威斯敏斯特：纽曼出版社，1962 年[1934 35]），第 37 页，引自穆瑞·N. 罗斯巴德，《超越实然与应然》，《自由》第 2 卷，第 2 期（1988 年 11 月；<https://perma.cc/8LZR-DN6Y>；也见 <https://mises.org/library/beyond-and-ought>）：44 45 页，第 45 页。

因此，我们可以明确看到，适用禁止反言原则并不会妨碍对暴力犯罪的预防和惩罚。上述关于谋杀的分析同样适用于任何类型的强制性暴力犯罪。在所提议的方案下，所有传统的暴力犯罪仍将像现在一样可以被有效预防。所有形式的侵犯行为——包括强奸、盗窃、谋杀、袭击、非法侵入——依然属于应受法律惩处的罪行。例如，强奸犯只能以声称其权利受到攻击性监禁的侵犯为由对被监禁提出异议，但他将被禁止主张侵犯行为本身是错误的。总的来说，任何涉及主动使用暴力的侵犯行为，都会使人陷入自相矛盾的境地：当其后续主张自己不应以某种方式被监禁或惩罚时，这一主张与其先前的行为直接冲突。

E. 惩罚非侵犯行为 Punishing Nonaggressive Behavior

As seen above, punishment of aggression can be justified because the use of force in response to force cannot sensibly be condemned as a violation of the rights of the original aggressor. 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 that person has initiated force. Otherwise, there is no inconsistency. Thus, nonaggressive force, consented-to force, and actions not involving force may not be punished.

如上所述，对侵犯行为施加惩罚具有正当性，因为以武力回应武力的行为不能被合理谴责为侵犯了原始侵犯者的权利。那么，对于非侵犯性行为实施惩罚是否具有正当性？若答案是否定的，则意味着权利只能是针对武力发动的消极权利。正如下文所论证的，此类惩罚永远不具备正当性，因为惩罚是施加武力的行为——除非某人率先使用武力，否则他完全有权对此提出异议。除此之外，并不存在逻辑矛盾。因此，非侵犯性武力、经同意的武力以及不涉及武力的行为都不应受到惩罚。

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 aggressor A, B is not estopped from objecting. There is nothing inconsistent or nonuniversalizable about maintaining both that (1) the use of retaliatory force in response to the initiation of force is proper—the implicit claim involved in retaliation against A—and (2) the use of force not in response to the initiation of force is improper—the basis for B's objection to his own punishment. In short, the initiation of force is different from retaliatory force;

retaliation is not aggression. 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.⁵⁴ 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, that is, initiated force, that estops a person from complaining about force used against that person.

首先，非侵犯性使用武力，例如对侵犯者进行报复，不应受到惩罚。若有人试图因 B 对侵犯者 A 进行报复而对 B 施加惩罚，B 并未被禁止反抗。同时，坚持以下两种观点并无矛盾或非普适性之处：（1）针对武力的发起者使用报复性武力是正当的——这是对 A 进行报复所隐含的主张；（2）不针对武力的发起者使用武力是不正当的——这是 B 反对自己受罚的依据。简言之，主动使用武力与报复性武力不同；报复并非侵犯。B 可以轻易证明，其行动准则“对侵犯者使用武力是合法的”并不违反“对非侵犯者使用武力是非法的”。与其说 B 的立场是难以通过普适性检验的特殊主张，不如说是基于其先前行动的实际性质而量身定制的。普适性原则只防止没有基于事物本质的任意、偏颇陈述。⁵⁴ 因此，仅仅使用武力不足以禁止某人因使用武力而抵制受到惩罚。只有主动使用武力侵犯他人之人，才会被禁止此人抵制对其使用报复性武力。

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.” For example, suppose that A slaps B after B has given consent. Is A estopped from objecting if B attempts to slap him back? Obviously, A is not estopped because he may consistently assert that “slapping someone is permissible if they have consented” and that “slapping someone is impermissible if they have not consented.” These are not inconsistent statements, and neither is 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. Thus, although

⁵⁴ See Part III.D.2, above. 见上文第 III.D.2 部分。

uninvited physical force estops the initiator thereof from complaining of punishment, invited or consented-to physical force does not.

同样，如果 A 在 B 同意的情况下对 B 使用武力，A 便不算作侵犯者，因而可能不会受到惩罚。A 可以逻辑一致地主张：“若某人同意，对其使用武力是允许的”，而“若某人不同意，对其使用武力则是不允许的”。例如，假设 A 在 B 同意后打了 B 一巴掌。若 B 试图回击 A 的耳光，A 是否无权反对？显然，A 并未违反反言原则，因为他可以始终如一地坚持：“若某人同意，扇他耳光是允许的”，而“若某人不同意，扇他耳光则是不允许的”。这两种主张并不矛盾，且均未被普遍性原则所禁止，因为该原则基于一个认知：经同意的行为本质与遭反对的行为不同。因此，尽管未经允许的肢体暴力会使施暴者丧失对惩罚的申诉权，但受邀或经同意的肢体暴力则不适用此规则。

Other actions do not involve force or aggression at all, so there is no ground for punishing this behavior either. Suppose publisher P publishes a patently pornographic magazine, and some entity, such as the state, punishes him for this by conviction and imprisonment. Clearly, the state has committed naked aggression against him. Following the analysis of Part III.C, unless P is estopped from complaining about the punishment, the state itself may be punished, demonstrating that it has violated his rights.⁵⁵

其他行为并未涉及武力或侵犯，因此也没有理由对这种行为进行惩罚。假设出版商 P 出版了一本明显色情的杂志，而某个实体（如国家）因此对他进行了定罪和监禁的惩罚。显然，国家对他实施了赤裸裸的侵犯。根据第 III.C 部分的分析，除非 P 被禁止对惩罚提出申诉，否则国家本身也可能受到惩罚，这表明国家侵犯了他的权利。

⁵⁵

P has only published pornography, which is not aggression; he has not engaged in any

⁵⁵ P will usually not be able, in practice, to successfully retaliate or defend himself against the state, but might and right are independent concepts. Thus, this fact of the state's greater might is irrelevant in the same way that B's murder does not "prove" that there is not a right to life. After all, there is a difference between may and can.

在实践中，P 通常无法成功地对国家进行报复或自卫，但强权和权利是独立的概念。因此，国家拥有更大的权力这一事实是无关紧要的，就像 B 的谋杀并不能“证明”不存在生命权一样。毕竟，“可能”与“可以”是有区别的。

activity nor necessarily made any claim that would be inconsistent with claiming that aggression is wrong. Thus, it is not inconsistent to simultaneously maintain that (1) it is legitimate to publish pornography and (2) it is illegitimate to aggress against a person. P is not estopped from complaining about his confinement.⁵⁶

P 仅出版了色情作品，这并不构成侵犯；他未曾从事任何侵犯行为，也从未提出过与侵权行为非法这一主张相悖的观点。因此，同时坚持 (1) 发表色情作品是合法的，(2) 侵犯他人是非法的，这两者之间并不存在矛盾。P 也并未因此被禁止就其被监禁一事提出申诉。⁵⁶

Unlike the case of retaliation against aggression, however, the state has not administered force in response to P's initiation of force and is estopped from objecting to the proposed use of force against it. The state's punishment of P is, therefore, not legitimate. Thus, it can be seen that punishment of any nonaggressive behavior is illegitimate and unjustified, as are laws prohibiting such behavior, since laws are themselves backed by and manifestations of force.⁵⁷

然而与报复侵权行为的情况不同，国家并非因 P 率先使用武力而实施反制力量，因此无权反对针对其拟议的武力使用。因此，国家对 P 的惩罚缺乏正当性。由此可见，对任何非侵权行为的惩罚都是不正当且无合理依据的，禁止此类行为的法律同样如此——因为法律本身正是以武力为后盾并以武力的存在形式体现。⁵⁷

⁵⁶ P could, perhaps, be dialogically estopped from complaining about other pornographers engaging in pornography, but here he is complaining about his being kidnapped by the state.

P 或许可以在对话中禁止投诉其他色情作者从事色情文学创作，但在这里，他投诉的是自己被国家绑架。

⁵⁷ Lawrence Crocker discusses a similar use of “moral estoppel” in preventing a criminal from asserting the unfairness of being punished in certain situations. Crocker, “The Upper Limit of Just Punishment,” p. 1067. Crocker’s theory, while interesting, is not developed along the same lines as the estoppel theory developed herein, nor does Crocker seem to realize the implications of estoppel for justifying only the libertarian conception of rights. Rather than focusing on the reciprocity between the force used in punishment and the force of an aggressive act by a wrongdoer, Crocker claims that a person who has “treated another person or the society at large in a fashion that the criminal law prohibits” is “morally estopped” from asserting that his punishment would be unfair. Ibid. However, Crocker’s use of estoppel is too vague

F. 财产权 Property Rights

So far, the right to punish actors who initiate invasions of victims' bodies has been established, which corresponds to 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 in this section. 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.⁵⁸

迄今为止，已明确了对侵犯受害者身体的行为者进行惩处的权利，这实质上等同于对身体权利或自我所有权的确认。尽管在此无法详尽论证对身体以外的稀缺资源——即财产权——的权利，但我将在本节中对其论证进行简要概述。鉴于对身体权利的既有确立，财产权可在此基础上进一步确立。为此，需指出，缺乏财产权的身体权利将显得空洞无物，反之亦然。⁵⁸

and imprecise, for just because one has violated a criminal law does not mean that one has committed the aggression which is necessary to estop him from complaining about punishment. The law must first be valid for Crocker's assumption to hold, but as the estoppel theory indicates, a law is valid only if it prohibits aggression. Thus, it is not the mere violating of a law that estops a lawbreaker from complaining about being punished—the law might be illegitimate—it is the initiation of force. Crocker is also discussed in “Dialogical Arguments for Libertarian Rights” (ch. 6).

劳伦斯-克罗克（Lawrence Crocker）讨论了“道德禁止反言”的类似用途，即防止罪犯在某些情况下声称受到惩罚是不公平的。克罗克，《正义惩罚的上限》，第 1067 页。克罗克的理论虽然有趣，但其发展思路与本文所发展的禁止反言理论并不相同，克罗克似乎也没有意识到禁止反言对于只证明自由意志主义权利概念的正当性的影响。克罗克并没有把重点放在惩罚所使用的武力与不法行为者侵犯行为的武力之间的对等关系上，而是声称一个人如果“以刑法所禁止的方式对待他人或整个社会”，那么他在“道德上就不得”声称对他的惩罚是不公平的。同上。然而，克罗克对禁止反言的使用过于模糊和不精确，因为一个人违反了刑法并不意味着他实施了侵犯行为，而这是禁止他申述惩罚的必要条件。法律必须首先有效，克罗克的假设才能成立，但正如禁止反言理论所指出的，法律只有在禁止侵犯时才有效。因此，并不是仅仅违反法律就能阻止违法者申述受到惩罚——法律可能是不合法的——而是主动使用武力。在《自由意志主义权利的对话论证》（第六章）中也讨论了克罗克。

⁵⁸ This has been recognized even by the U.S. Supreme Court. As the Court recognized: [t]he right to enjoy property without unlawful deprivation ... is in truth a “personal”

For example, imagine that a thief admits that there are rights to self-ownership but that there is no right to property. If this is true, we can easily punish him simply by depriving him of external property, namely food, air, or space in which to exist or move. Clearly, the denial of his 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 his hands until he dies—why not, if there are no property rights? Or it can be done somewhat more indirectly by infringing upon his ability to control and use the external world, which is essential to his survival. Such property deprivation could continue until his body is severely damaged—implying, since this is tantamount to physical retaliation in its effect on him, that physical retaliation in response to a property crime is permissible—or until he objected to such treatment, thereby granting the validity of property rights. Just as one can commit an act of aggression against another with one's body—for example, one's fist—or with external property—a club, gun, bomb, poison—so one's self-ownership rights can be aggressed against in a limitless variety of ways by affecting one's property and external environment.

例如，假设一个小偷承认拥有自我所有权，但却否认财产权。若此观点成立，我们只需剥夺他的外部财产，如食物、空气、生存空间或活动空间，便能轻易地对他进行惩罚。显然，通过武力剥夺其财产会对他的身体造成实质性伤害，这与直接侵犯他的身体边界并无二致。身体上的实质性伤害可以直接施加，例如，从他手中夺走每一

right. ... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. This point even got the recognition of the United States Supreme Court. The Court said: [享有财产而不被非法剥夺的权利.....实际上是一种 "个人 "权利...., 事实上, 个人自由权与个人财产权之间存在着根本的相互依存关系。二者缺一不可。财产权是基本的公民权利, 这一点早已得到承认。

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), p. 552. But see the famous (or infamous, to some of us) footnote 4 in United States v. Carolene Products Co., which implies that economic and property rights are less fundamental than personal rights. 304 U.S. 144 (1938), p. 152 n.4.

林奇诉家庭金融公司案, 405 U.S. 538 (1972), 第 552 页。。但请参阅美国诉卡罗琳产品公司一案中著名的 (或对我们中的一些人来说臭名昭著的) 注释 4, 其中暗示经济和财产权利不如人身权利那么基本。304 U.S. 144 (1938), 第 152 页注释 4。

块食物，直至他死亡——若财产权不存在，这种行为有何不可？或者，可以通过侵犯他控制和利用外部世界的能力（这对他的生存至关重要）来间接造成伤害。这种财产剥夺可以持续进行，直至他的身体受到严重损害——这意味着，由于这等同于对身体进行报复，对财产犯罪的身体报复似乎是被允许的——或者直到他反抗这种待遇，从而间接承认财产权的有效性。正如一个人可以用自己的身体——例如拳头——或借助外部财产——如棍棒、枪支、炸弹、毒药——对他人实施侵犯行为一样，一个人的自我所有权也可以通过影响其财产和外部环境，以多种多样的方式遭到侵犯。

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.⁵⁹ Anyone engaging in argumentation implicitly accepts the presupposed right of self-ownership of all listeners and even potential listeners. Otherwise, the listener would not be able to consider freely and accept or reject the proposed argument.

霍普教授在其为个人权利辩护的“论证伦理学”中亦指出，拓殖权实则隐含于自我所有权之中。首先，霍普通过聚焦于一般对话论证中无可否认的命题，来确立自我所有权⁵⁹的地位。任何参与论证的人都默认了所有听众，乃至潜在听众的自我所有权。否则，听众将无法自由地思考、接受或拒绝所提出的论点。

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—which is to say, undeniable—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 or 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 the property which no one else had ever done before, such as

⁵⁹ For further details see note 31, above.
详见上文注 31。

the mixing of labor or homesteading; or (2) by mere 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; thus, no one can deny the Lockean right to homestead unowned resources.

其次，由于论证的参与者不可避免地需要使用和控制世上的稀缺资源以维持生存，而稀缺资源的特性又使得争夺资源的冲突成为可能，因此必须确立规范以明确这些资源的正当所有者，从而避免冲突。对于参与论证的人来说，这种旨在避免稀缺资源使用冲突的规范的必要性是毋庸置疑的——也就是说，是不可否认的——因为任何一个活在此世并参与论证之人，都无法否认控制稀缺资源的价值，也无法否认避免这些资源冲突的价值。然而，获取无主财产的权利仅有两种基本途径：（1）通过对财产进行某些前人未有的行为，如混入劳动或拓殖；（2）仅凭口头声明或法令。第二种途径是武断的，无法有效避免冲突。唯有第一种途径，即洛克式拓殖，在特定个体与特定稀缺资源之间建立客观联系；因此，没有人能够否认通过拓殖无主资源而获得的洛克式财产权。

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."⁶⁰ 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."⁶¹ 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 are justified.

正如霍普所指出的，由于个体的身体本身即作为一种稀缺资源，它因而成为“稀缺物品的原型”。为了避免冲突，必须以某种方式确立对该物品使用的财产权，即排他性所有权⁶⁰。因此，拓殖外部稀缺资源权利隐含在自我所有权的事实之中，因为“互不侵

⁶⁰ 霍普，《社会主义和资本主义理论》，第19页。

犯原则被视为一种特殊的财产规范，涉及特定物品，实际上已包含在一般财产理论的内容之中”。⁶¹基于这些原因，无论自我所有权是基于霍普的论证伦理学还是禁止反言理论——这两种理论均强调对话交流的动态性——这些权利均指向洛克式的拓殖权。任何侵犯者都无法否认这种权利，正如其无法否认自我所有权的正当性一样。

I will, for the remainder of this chapter, place property rights and rights in one's body on the same level, both warranting punishment for their invasion. Thus, 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.

在本章的剩余部分，我将财产权与身体所有权置于同一层面，认为两者在遭受侵犯时均应受到相应的惩罚。基于禁止反言理论，侵犯他人身体或他人外部财产的行为人即为侵犯者，这一点明确无疑，应被视作侵犯者进行处理。

IV. 惩罚类型与举证责任

TYPES OF PUNISHMENTS AND THE BURDEN OF PROOF

A. 相称的惩罚

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 in response to a rude remark by B. 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

⁶¹ Ibid., p. 160. 同上，第 160 页。

it is legitimate to lightly slap others. By sanctioning slapping, A does not necessarily claim that killing is proper because usually—as in this example—there is nothing about slapping that rises to the level of killing.

仅仅因为可以合法地惩罚侵犯者，并不意味着所有关于相称性的关切都可以被抛弃。乍一看，如果我们只关注使用武力本身，受害者似乎可以提出一个初步证据确凿的理由，即既然侵犯者使用了武力——无论多么微不足道——受害者就有权对侵犯者使用武力，甚至包括处决侵犯者。假设 A 因 B 的一句粗鲁的话而不请自来地轻轻扇了 B 一巴掌。B 是否有权反过来处决 A？诚然，A 已经主动使用了武力，如果要对他使用武力，他怎么能申述呢？然而，A 并没有被禁止反对被杀。这本身与 A 认为轻扇他人耳光是合法的这一隐含观点并不矛盾。通过认可掌掴行为，A 并不必然主张杀戮是正当的，因为通常情况下——正如本例所示——掌掴行为根本不具备杀戮行为的严重性。

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.⁶² Aggressive action, by physically interfering with the victim's person, is undesirable because, among other reasons, it can (1) cause pain or injury; (2) interfere with the pursuit of goals in life; or (3) simply create a risky, dangerous situation in which pain, injury, or violence are more likely to result. Aggression interferes with one's physical control over one's life, that is, over one's own body and external property.

关于确定侵犯者在多大程度上受到禁止反言的限制，关注侵犯的后果是恰当的，因为人们反对侵犯或希望惩罚侵犯者的根本原因在于侵犯会产生某些后果。⁶² 侵犯行

⁶² Analogously, this is why scarcity (conflictability) is the defining characteristic of property. Taking another's good has the effect of depriving the owner of it because it is scarce; if goods were infinitely abundant then it would not be possible to "take" them because the taking would have no consequence at all, and thus, the concepts of property and scarcity would not arise. See Hoppe, "Of Common, Public, and Private Property and the Rationale for Total Privatization." On the term "conflictability," see Stephan Kinsella, "On Conflictability and Conflictable Resources," StephanKinsella.com (Jan. 31, 2022); also "Against Intellectual Property After Twenty Years" (ch. 15), Part III; "What Libertarianism Is" (ch. 2), n.5.

类似地，这就是为什么稀缺性（冲突性）是财产的决定性特征。拿走他人的财物会剥夺所有者对其的拥有，因为它是稀缺的；如果物品是无限丰富的，那么就不可能“拿走”，因为“拿走”根本不会产生任何后果，因此也就不会产生财产和稀缺性的概念。

为对受害者人身的实际干扰，是不被接受的。除此之外，原因还包括：(1) 可能导致痛苦或伤害；(2) 阻碍追求生活目标；或 (3) 仅制造一种危险情境，极有可能引发痛苦、伤害或使用武力。侵犯会干扰个体对自己生活的实际掌控，即对自己身体和外部财产的控制。

Killing someone obviously 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. 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 killing 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; this would be murder. These outside boundaries, at least, we know.

杀人显然会带来最严重的后果。相比之下，在正常情况下，仅仅扇人耳光却不会引发如此严重的后果。一个耳光的后果在各方面都相对轻微。因此，A 并不会因为扇了 B 一耳光就声称侵犯性杀人是正当的。普适性的要求并不妨碍他合理地缩小其隐含主张的范围，从较严重的“侵犯是不对的”缩小到较轻微的“轻微的侵犯，如扇人耳光，是不对的”。因此，B 有理由回扇 A 耳光，但没有理由杀死 A。我的意思并不是说，B 只有扇 A 耳光才是正当的，且不能扇更多的耳光，但可以肯定的是，B 至少扇 A 耳光是正当的，而杀死他则是不正当的，因为这属于谋杀。我们至少应当明确这些外在的界限。

In general, while the universalization principle prevents arbitrary particularization of claims—for example, 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

参见霍普：《论共有、公共和私有财产以及完全私有化的基本原理》。关于“冲突性”一词，见斯蒂芬·金塞拉，《论冲突性与冲突性资源》，StephanKinsella.com (2022 年 1 月 31 日)；另见《<反对知识产权>二十年后》(第 15 章)，第三部分；《何为自由意志主义》(第 2 章)，注 5。

it is true that A has slapped B, he has not attempted to take B's life; thus, he has never necessarily claimed that "murder is not wrong," so he is not estopped from asserting that murder is wrong.⁶³ 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.

一般而言，尽管普适性原则能够防止任意将主张特殊化——例如，添加“仅对我而言的”——但这并不排除根据侵犯的实际性质及其必然结果和影响，客观、合理地陈述侵犯者的隐含主张。例如，尽管 A 确实扇了 B 一个耳光，但他并未试图夺取 B 的生命；因此，他从未必然地主张“谋杀不是错的”，故而他并未被禁止声称谋杀是错的。⁶³ 由于仅因打了一耳光的人不会被禁止申述其即将被执行的死刑，因此他可以逻辑一致地反对被执行死刑，这意味着如果 B 要杀 A，那么 B 就会成为一名凶手。

In this way, we can see a requirement of proportionality—or, more properly, of reciprocity along the lines of the *lex talionis* or the law of retaliation⁶⁴—accompanies any legitimate punishment of an aggressor. “As the injury inflicted, so must be the injury suffered.”⁶⁵ 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 punishment. Consequently, a greater level of punishment

⁶³ This said, I do not mean to deny that something like the “eggshell skull rule” is compatible with the analysis offered herein. According to this legal rule, a tortfeasor is liable for all consequences of their tort, even if the victim has an unusual vulnerability. For example, if A lightly slaps B on the head in a way that would cause only minor damage to most people, but B’s thin skull causes him to die, then A is liable for the homicide even though he did not intend to kill B, since the battery was intentional (or negligent). See https://en.wikipedia.org/wiki/Eggshell_skull.

话虽如此，我并不是要否认类似于“蛋壳头骨规则”的东西与本文所提供的分析是兼容的。根据这一法律规则，侵权行为人要对其侵权行为的所有后果负责，即使受害者具有异常的脆弱性。例如，如果 A 以一种对大多数人只会造成轻微伤害的方式轻轻拍打 B 的头部，但 B 的头骨很薄导致他死亡，那么 A 要对这起杀人案负责，即使他无意杀死 B，因为殴打行为是故意的（或疏忽的）。见 https://en.wikipedia.org/wiki/Eggshell_skull。

may legitimately be applied.

通过这种方式，我们可以发现，对侵犯者的任何合法惩罚都伴随着相称性的要求——更准确地说，是遵循同态复仇（lex talionis）或报复法（the law of retaliation）⁶⁴所体现的对等性原则。“所施加的伤害有多大，所承受的伤害就必须有多大”。⁶⁵因此，受害者对侵犯者的惩罚程度是受限的，这一限制与侵犯者的侵害程度紧密相关，因为正是特定侵犯行为的性质决定了禁止反言对侵犯者起作用的程度。侵犯行为越严重，造成的后果越惨烈，侵犯者就越无权反对相应的惩罚。因此，在这种情况下，可以合法地实施更高一级的惩罚。

B. 受害者的选择 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. This chapter now presents a further consideration of the various types of punishment that can be justly administered.

至此，我们已经明确了对自身身体、通过拓殖或从拓殖者处获得的财产的基本权利，以及对惩罚相称性的基本要求的框架。接下来，本章将深入探讨可正义实施的各类惩罚。

As has been shown, a victim of aggression may inflict on the aggressor at least the same level or type of aggression previously inflicted by the aggressor. In determining the maximum amount and type of punishment that may be applied, the distinction between

⁶⁴ The classic formula of the lex talionis is “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.” Exodus 21: 23 – 25; see also Deuteronomy 19: 21 (calling for “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot”); Leviticus 24: 17 – 21 (calling for “broken limb for broken limb, eye for eye, tooth for tooth”).

“同态复仇法”的经典表述是“以命偿命，以眼还眼，以牙还牙，以手还手，以脚还脚，以烙还烙，以伤还伤，以鞭还鞭。”《出埃及记》21:23-25；另见《申命记》19:21（要求“以命偿命，以眼还眼，以牙还牙，以手还手，以脚还脚”）；《利未记》24:17-21（要求“断肢还断肢，以眼还眼，以牙还牙”）。

⁶⁵ Leviticus 24: 20. See also the Aquinas quote in note 43, above.
《利未记》24:20。另见上文注 43 中的阿奎那引言。

victim and victimizer must be kept in mind, and we must recognize that, for most victims—those who are not masochists or sadists—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 consequently loses 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.

正如已多次证明，侵犯行为的受害者可能会对侵犯者施加至少与侵犯者先前施加的同等程度或类型的报复。在确定适用的最大惩罚量和惩罚类型时，必须牢记受害者和加害者之间的区别。我们必须认识到，对于绝大多数受害者——即那些既非受虐狂亦非虐待狂的受害者——而言，惩罚不法行为者并不能真正使受害者获得补偿，即便能够获得补偿，受害者也不会因此直接受益太多。例如，一个被抢劫犯击中手臂并因此失去手臂的受害者，如果他愿意，显然有权要求截断抢劫犯的手臂。然而，这种做法并不能恢复受害者的手臂，也无法使其重获完整。完美的赔偿永远是一个遥不可及的目标，因为罪行的后果是无法彻底挽回的。

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's range of punishment options should not be artificially or easily restricted. This would further victimize him. The victim did not choose to be made a victim and 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.

这并不意味着惩罚权因此就毫无意义，但我们必须清醒地认识到，即使对不法行为者实施了报复，受害者依然是受害者。任何惩罚都无法弥补已经造成的伤害。因此，不应人为地或轻易地限制受害者的惩罚选择范围，这将使其进一步受到伤害。受害者并未主动选择成为受害者，也未选择被置于仅有一种惩罚选择的狭隘境地——即以牙还牙的报复。相反，造成这种局面的责任完全在于侵犯者，其行为对受害者造成了损

害。由于侵犯者将受害者置于一种不利的境地，限制在一种狭隘的赔偿方式可能比其他赔偿方式对受害者的补偿更少，因此，如果受害者在多种不同的惩罚方式中进行选择，侵犯者应被禁止提出申诉，但需符合相称性要求。

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. Or, if the victim believes he 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—for example, taking property of an aggressor who has beaten the victim—the aggressor is estopped from complaining about this as long as proportionality is satisfied.

在实践中，这意味着，例如，侵害和殴打行为的受害者不必局限于仅对侵犯者进行殴打——甚至将其杀死。受害者可能反感使用武力，如果其唯一的选择是殴打或惩罚侵犯者，他可能会选择放弃任何形式的惩罚。相反，受害者可能更倾向于从不法行为人的相关财产（无论是现有的还是未来的）中获得金钱赔偿。或者，如果受害者认为，以不同于侵犯者侵犯其权利的方式对侵犯者使用武力能带来更大的满足感——例如，剥夺殴打受害者之侵犯者的财产——只要这一行为符合相称性原则，侵犯者便无权对此提出申诉。

The nonequivalence of most violent crimes makes this conclusion clearer. Suppose that A, a man, rapes B, a woman. B would be entitled to rape A in retaliation 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 this alone would give her a right to insist on other forms of punishment. To limit her remedy to having A raped would 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.

大多数暴力犯罪的非等价性使这一结论更加明确。假设某男 A 强奸了某女 B。B 有权以强奸 A 作为报复，或者委托专业的私人惩罚公司对 A 实施强奸。然而，强奸受害者可能最不希望的就是再次卷入性暴力事件，仅凭这一点，她就有权坚持要求其他

形式的惩罚。将她的赔偿措施仅限于让 A 遭受强奸，可能会对她造成更大的伤害。B 永远不可能得到完美的补偿，但至少她认为的最佳补救办法——在众多不完善的补救方案中——不应被剥夺。她没有做出任何行为来证明拒绝给予她这种选择是合理的。

And in this case there simply is no equivalent. The only remotely similar equivalent is the forcible anal rape of A, but even this is vastly different from the 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 acts give rise to different consequences for the victim, a point that we need not belabor. 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 our conclusion must be either that (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 because there is no equivalent punishment. Furthermore, the absence 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 orwilling to offer.⁶⁶

在这种情况下，根本不存在等价物。唯一近似的等价物是对 A 的强行肛奸，但即便如此，这也与强奸妇女大相径庭。如果不出意外，妇女可能会合理地认为强奸比 "类似 "对待男子更严重，因为这些行为会给受害者带来不同的后果，这一点我们无需赘述。因此，如果不可能对特定的侵犯行为（如强奸）进行 "以牙还牙 "式的报复，那么我们的结论就必须是：（1）B 不得惩罚 A，或者（2）B 可以用另一种方式惩罚 A。显然，后一种选择才是正确的，因为强奸犯被禁止否认受害者惩罚他的权利，也被禁止要求获得利益，因为不存在同等的惩罚。此外，没有对等的惩罚是 A 侵犯行为的直接结果。如果 B 采取行动以减轻 A 对她造成的伤害——这不仅包括强奸，还包括将 B 置于她的赔偿措施都不充分、甚至不可能有同等惩罚的境地——A 被禁止提出异议。

因此，举例来说，B 可以选择切除 A 的阴茎甚至胳膊或腿。或者，B 可以选择将 A 公开鞭打、示众、监禁一段时间，甚至奴役一段时间，让 A 为 B 工作赚钱。或者，B 可以用她有权施加的最严厉的惩罚来威胁 A，并允许 A 用他所能提供或愿意提供的尽可能多的金钱来换取免受惩罚——或减轻惩罚的严厉程度。⁶⁶

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, the rapist, may even be a masochist and enjoy being beaten or sodomized, so a more or less equal amount of physical punishment of A would not really damage or truly punish A as badly as A has damaged B. Because A is a criminal, he is also likely accustomed 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. For these reasons, 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.⁶⁷ 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.⁶⁸

此外，尽管这种对男性的强奸在某种程度上可与对女性的强奸相提并论，但对无

⁶⁶ For a discussion of Jefferson's attempts at devising proportional punishments, see Walter Kaufman, “Retribution and the Ethics of Punishment,” in Barnett & Hagel III, eds., *Assessing the Criminal*, p. 223. For recent examples of judges' attempts at creative punishment to “fit the crime,” see Judy Farah, “Crime and Creative Punishment,” *Wall Street J.*, March 15, 1995, p. A15; Andrea Gerlin, “Quirky Sentences Make Bad Guys Squirm,” *Wall Street J.* (August 4, 1994), p. B1, B12; see also Richard A. Posner, “An Economic Theory of the Criminal Law,” *Colum. L. Rev.* 85 (1985): 1212, discussing different ways to vary the severity of punishment.

关于杰斐逊试图设计相称惩罚的讨论，见 沃尔特·考夫曼（Walter Kaufman），《报应与惩罚的伦理学》，载于巴尼特和哈格尔三世（Barnett & Hagel III）编的《评估罪犯》，第 223 页。关于法官为“罪罚相适”而尝试创造性惩罚的最新实例，见 朱迪·法拉（Judy Farah），《犯罪与创造性惩罚》，《华尔街日报》，1995 年 3 月 15 日，第 A15 页；安德里亚·格尔林（Andrea Gerlin），《怪异判决让坏人坐立不安》，《华尔街日报》（1994 年 8 月 4 日），第 B1、B12 页；另见理查德·a·波斯纳（Richard A. Posner），《刑法的经济学理论》，《哥伦比亚法律评论》第 85 卷（1985 年）：1212 页，讨论了改变惩罚严厉程度的不同方式。

辜者 B 的强奸通常比对罪犯 A 的类似侵犯要严重得多，因为后者显然对侵犯行为的厌恶程度较低。强奸犯 A 甚至可能是一个受虐狂，享受被殴打或鸡奸，因此，对 A 施加的同等程度的体罚，并不会像 A 对 B 造成的伤害那样对 A 产生真正的伤害或有效的惩罚。由于 A 是一名罪犯，他很可能已经习惯了频繁使用武力的生活方式，因此对 A 的“同等”惩罚对其造成的伤害远不及对 B 的伤害程度，因为 B 并不习惯这种暴力。基于这些原因，B 有权对 A 施加比 A 对 B 更严厉的惩罚，哪怕只是为了在一定程度上平衡实际造成的损害。⁶⁷因此，如果 A 永久性地损害了 B 的手臂，B 可能有权对 A 的两只

⁶⁷ Of course, values are subjective, so damage can never be exactly equated. On the subjective theory of value, see Rothbard, *Man, Economy, and State, with Power and Market*, chap. 1, § 5.A, pp. 17 – 21; Alexander H. Shand, *The Capitalist Alternative: An Introduction to Neo-Austrian Economics* (New York: New York University Press, 1984); Mises, *Epistemological Problems of Economics*, p. 89; Mises, *Human Action*, pp. 94 – 97, 200 – 206, 331 – 33. But again this is not the victim’s fault, and if her only option is to attempt to measure or balance a difficult-to-balance equation—for example, by trying to equate somewhat quantifiable physical aspects of force, such as the magnitude and type of force and the physical consequences thereof—she cannot be blamed and the aggressor may not complain. For an illustrative theory proposing to attribute fault and liability according to objective factors such as force and momentum in a situation such as an automobile collision, see the sections on causation and causal defenses, respectively, in Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformation of Tort Law* (San Francisco: Cato Institute, 1980; <https://perma.cc/PVV6-U3Y7>), pp. 15 – 49; Richard A. Epstein, “Defenses and Subsequent Pleas in a System of Strict Liability,” *J. Legal Stud.* 3 (1974), pp. 174 – 85. Further, if the aggressor A were seriously to maintain that force against A and force against B were wholly incommensurable, he could never meaningfully object to being punished—for to object to punishment, A must maintain that such force is unjust and that some level and type of force could be justly used to prevent his punishment. But this implies at least some commensurability. If A really maintains incommensurability, B may take him at his word and posit that B’s punishment of A justifies no retaliatory force on A’s part—which means that A is not effectively claiming that he has a right to not be punished because rights are legitimately enforceable.

当然，价值是主观的，因此损害永远不可能完全等同。关于价值的主观理论，见罗斯巴德：《人、经济和国家，以及权力和市场》，第 1 章，第 5.A 节，第 17-21 页；亚历山大·H·尚德的《资本主义的选择：新奥派经济学导论》（纽约：纽约大学出版社，1984 年）；米塞斯的《经济学的认识论问题》，第 89 页；米塞斯的《人的行动》，第 94 97 页、第 200 206 页、第 331 33 页。但这同样不是受害者的过错，如果她唯一的选择是试图衡量或平衡一个难以平衡的等式——例如，试图将武力的一些可量化的物理方面（如武力的大小和类型以及由此产生的物理后果）等同起来——那么她就不应受到指责，侵犯者也不允许申述。关于在汽车碰撞等情况下根据力和动量等客

手臂甚至所有肢体进行损害。⁶⁸

Alternatively, a victim is entitled to take by force a certain amount or portion of the aggressor's property if this type of response to aggression would better satisfy the victim or if the victim prefers this remedy for any reason at all, including greed, malice, or sadism—the victim's motivation is not the aggressor's rightful concern. Of course, a mixture would be permissible as well. A woman might, in response to being raped by a man, seize all of the ravisher's \$10,000 estate and 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.

或者，如果对侵犯者的这种回应能够更有效地满足受害者的需求，或者受害者由于某种原因（包括贪婪、恶意或虐待狂心态）偏好这种赔偿方式，受害者有权强行剥夺侵犯者一定数量或部分的财产——受害者的动机并非侵犯者所应正当关注的。当然，混合使用多种措施也是允许的。例如，一名妇女在被一名男子强奸后，可以没收强奸者的全部财产 1 万美元，并将其当众殴打和奴役若干年，直至他的强迫劳动为她赚取额外的 10 万美元——前提是这种惩罚的总体程度与强奸的严重性大致相当。

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

观因素归咎过错和责任的说明性理论，分别见理查德·A·爱泼斯坦的《严格责任理论：侵权法改革之路》（旧金山：卡托研究所，1980 年；<https://perma.cc/PVV6-U3Y7>）中关于因果关系和因果抗辩的章节，第 1549 页；理查德·A·爱泼斯坦的“严格责任体系中的抗辩和后续申辩”，《法律研究杂志》第 3 期（1974 年），第 174-185 页。此外，如果侵犯者 A 严肃主张，针对 A 的武力和针对 B 的武力是完全不可比拟的，那么他就不可能有意义地反对受到惩罚——要反对惩罚，A 就必须认为这种武力是不正义的，而且可以正义地使用某种程度和类型的武力来阻止对他的惩罚。但这至少意味着某种可通约性。如果 A 真的主张不可通约性，B 可能会相信他的话，并假定 B 对 A 的惩罚不允许 A 进行报复性武力——这意味着 A 并没有有效地主张他有权不被惩罚，因为权利是可以合法执行的。

⁶⁸ 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.G, below.

至于惩罚可能比原来的侵犯大多少，以及如何确定，将在下文第 IV.G 部分进一步详细讨论。

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.

同样，对于财产侵犯者，如小偷，存在多种处理方式。若条件允许，受害者可以选择仅通过侵犯者的财产来弥补自身损失，或者通过体罚侵犯者来达到心理满足，前提是这种方式能更有效地满足受害者——下文将对此进行详细探讨。总之，受害者在惩罚侵犯者时，可以忽略侵犯者的任何权利或权利组合——这表明侵犯者实际上并不拥有这些所谓的“权利”——只需在一般相称性界限内进行考量即可。

C. 因其他因素加重处罚

Enhancing Punishment Due to Other Factors

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 thief A, has not only stolen something from victim B, but 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.”⁶⁹ 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 they are caught? As Kant observed, “whoever steals anything makes the property of all insecure.”⁷⁰

在侵犯者最初造成的损害类型之外，还应考虑其他因素以增加对侵犯者的惩罚力度。正如上文在讨论强奸问题时所指出的，与针对侵犯者的同等行为相比，侵害无辜、和平的人可能会对受害者造成更为严重的精神创伤。此外，正如罗斯巴德所阐述的，一个罪犯，例如小偷 A，不仅窃取了受害者 B 的财物，还使 B 陷入了恐惧和不确定的状态，无法确定被剥夺的程度。然而，对 A 的处罚是固定的，事先确定的，因此 A 的

处境相较于其受害者 B 要好得多⁶⁹。罪犯还强加了其他损失，如利息，甚至是预防犯罪的一般成本——如果这些成本在罪犯被抓获后不归咎于罪犯，那么又该由谁来承担呢？正如康德所言，“无论谁偷窃任何东西，都会使所有人的财产安全⁷⁰受到威胁。”

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, which was capitally punished in the frontier West for the same reason.⁷¹ (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

⁶⁹ Rothbard, “Punishment and Proportionality,” pp. 85, 88, n.6 (and at pp. 259 – 70 in Rothbard’s chapter of the same name in Barnett & Hagel III, eds., *Assessing the Criminal*). See also Walter Block, “Toward a Libertarian Theory of Guilt and Punishment for the Crime of Statism,” *J. Libertarian Stud.* 22, no. 1 (2011; <https://mises.org/library/toward-libertarian-theory-guilt-and-punishment-crime-statism>): 665 – 75; idem, “Radical Libertarianism: Applying Libertarian Principles to Dealing With the Unjust Government, Part I,” *Reason Papers* No. 27 (Fall 2004; <https://reasonpapers.com>): 113 – 30; and idem, “Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government, Part II,” *Reason Papers* 28 (Spring 2006; <https://reasonpapers.com>): 117 – 33; and Rothbard, “King on Punishment,” p. 167. 罗斯巴德,《惩罚与相称性》,第 85、88 页,注释 6(以及在巴尼特和哈格尔三世编辑的《评估罪犯》中罗斯巴德同名章节的第 259 270 页)。另见沃尔特·布洛克,《迈向关于国家主义罪行的罪责与惩罚的自由意志主义理论》,《自由意志主义研究杂志》第 22 卷,第 1 期(2011 年: <https://mises.org/library/toward-libertarian-theory-guilt-and-punishment-crime-statism>): 665 675; 同上,《激进自由意志主义:将自由意志主义原则应用于处理不正义的政府》,第一部分,《理性论文》第 27 期(2004 年秋季: <https://reasonpapers.com>): 113 130; 同上,《激进自由意志主义:将自由意志主义原则应用于处理不正义的政府》,第二部分,《理性论文》第 28 期(2006 年春季: <https://reasonpapers.com>): 117 133; 以及罗斯巴德,《金论惩罚》,第 167 页。

⁷⁰ Immanuel Kant, *The Philosophy of Law*, W. Hastie, trans. (Edinburgh: T&T Clark, 1887), p. 197, quoted in Immanuel Kant, “Justice and Punishment,” in Ezorsky, ed., *Philosophical Perspectives on Punishment*, p. 105.

伊曼努尔·康德,《法哲学》,W·海斯特译。(爱丁堡: T&T 克拉克出版社, 1887), 第 197 页,引自伊曼努尔·康德的《正义与惩罚》,见埃佐斯基主编,《惩罚的哲学视角》,第 105 页。

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."72 For one could imagine rare situations where theft of bubble-gum could legitimately be punished by execution, if the theft somehow endangered the life of its owner.73)

如果考虑到侵犯对受害者造成的后果和潜在后果，也就满足了相称性的一般界限。因此，如果某些罪行的后果足够严重，就可以对其处以极刑——例如，当一个人的生存依赖于一匹马时，偷了他的马，出于同样的原因，在西部边疆地区也会受到极刑。⁷¹ (不过，在这一点上我不同意罗斯巴德的观点，他认为“很明显，根据自由意志主义法律，死刑必须严格限于谋杀罪。因为罪犯只有先剥夺了受害者的生命权，才会失去生命权。因此，如果一个商人的泡泡糖被偷了，那么他就不能处死被定罪的泡泡糖小偷。”⁷² 因为我们可以想象，在极少数情况下，如果偷窃泡泡糖在某种程度上危及了失主的生命，那么偷窃泡泡糖的人可以被合法地处以死刑。⁷³)

⁷¹ See People v. Borja, 22 Cal.Rptr.2d 307 (Ct. App. 1993), p. 309, superseded by 860 P.2d 1182, 24 Cal.Rptr.2d 236 (1993); Guido v. Koopman, 1 Cal.App.4th 837 (Ct. App. 1991), p. 842, discussing the critical importance of horses for transportation and survival in the old West. This brings to mind the reported exchange “many years ago between the Chief Justice of Texas and an Illinois lawyer visiting that state. ‘Why is it,’ the visiting lawyer asked, ‘that you routinely hang horse thieves in Texas but oftentimes let murderers go free?’ ‘Because,’ replied the Chief Justice, ‘there never was a horse that needed stealing!’ ” People v. Skiles, 450 N.E.2d 1212 (Ill. App. Ct. 1983), p. 1220.

见《人民诉博尔哈案》，22 卷《加利福尼亚州判例报道》第 2 辑 307 页（上诉法院，1993 年），第 309 页，被 860 P.2d 1182、24 卷《加利福尼亚州判例报道》第 2 辑 236 页（1993 年）所取代；《圭多诉库普曼案》，1 卷《加利福尼亚州应用法学》第 4 辑 837 页（上诉法院，1991 年），第 842 页，讨论了在旧西部马匹对于交通和生存的关键重要性。这让人想起所报道的多年前得克萨斯州首席大法官和一位访问该州的伊利诺伊州律师之间的交流。“为什么，”来访的律师问道，“在得克萨斯州你们通常绞死偷马贼，却常常让杀人犯逍遥法外？”“因为，”首席大法官回答，“从来没有一匹马是需要偷的！”《人民诉斯基尔斯案》，450 N.E.2d 1212（伊利诺伊州上诉法院，1983 年），第 1220 页。

⁷² Rothbard, “Punishment and Proportionality,” p. 85.
罗斯巴德，《惩罚与相称性》，第 85 页。

⁷³ However, it is a separate question (and beyond the scope of this chapter) whether

D. 惩罚等级 Graduated Scale of Punishment

Some would object to the use of the severe penalty of capital punishment for crimes other than the most serious or heinous, such as murder, mass-murder, or genocide. Many thus favor a scale of punishment having more severe punishments for the most serious crimes with capital punishment reserved for murderers or serial-killers and the like.⁷⁴ Perhaps some feel that a mass murderer, serial killer, child killer, or cop killer should be punished more harshly than a more typical murderer of one adult and that if capital punishment is “wasted” on more mundane murderers or criminals, there will be nothing more severe left to impose on the really bad guys; there will be no deterrent effect left to deter extra acts of aggression committed by those who have already placed themselves in the category of deserving the death penalty. Of course, even if such a scale with gradations of punishment would provide a “better” deterrent effect, this does not mean that one does not have the right to punish a given criminal in a certain way. Such utilitarian reasoning is beside the point. If we had to save the more severe punishments for, say, mass murderers, this in effect incorrectly attributes a right to life to other murderers who simply do not have such a right.

有些人反对将死刑这一严厉刑罚用于谋杀、大屠杀或种族灭绝等最严重或最令人发指的罪行之外的犯罪。因此，许多人主张对最严重的罪行施加更严厉的刑罚，而将死刑保留给谋杀犯或连环杀人犯等。⁷⁴或许有人认为，大屠杀凶手、连环杀手、儿童杀

the merchant would have a right to kill the bubble-gum thief who, caught in the act, refused to abandon his attempt at theft.

然而，商人是否有权杀死当场抓获并拒绝放弃盗窃企图的泡泡糖窃贼，则是另一个问题（也超出了本章的讨论范围）。

⁷⁴ See, e.g., Letter from Ayn Rand to John Hospers, April 29, 1961, in Ayn Rand, *Letters of Ayn Rand*, Michael S. Berliner, ed. (New York: Plume, 1995), pp. 544, 559, arguing for “a proportionately scaled series of punishments,” and that “the punishment deserved by armed robbery would depend on its place in the scale which begins with the lightest misdemeanor and ends with murder.”

参见1961年4月29日《安·兰德致约翰·霍斯珀斯的信》，载于《安·兰德书信集》，迈克尔·S·柏林纳主编（纽约：Plume出版社，1995年），第544、559页，其中主张“实施一系列相称性的惩罚”，“持械抢劫应受到的惩罚将取决于其在从最轻的轻刑罪到谋杀的等级中所处的位置”。

手或警察杀手应比杀害一个成年人的普通凶手受到更严厉的惩罚。如果死刑被“浪费”在更普通的杀人犯或罪犯身上，那么对于真正的恶人便无更严厉的惩罚可施；也就无法形成威慑，阻止那些自认为应被判处死刑的人犯下更多侵犯行为。当然，即使这种分等级的惩罚尺度能带来“更好”的威慑效果，也不意味着人们无权以某种方式惩罚特定罪犯。这种功利主义的推理并不重要。如果我们不得不将更严厉的惩罚留给例如大屠杀凶手，这实际上是错误地将生命权赋予了其他根本不具备这种权利的凶手。

Also, it should be realized that punishment of murderers is always an imperfect remedy since the victim remains murdered, so that whether the murderer remains underpunished even after being executed — like a regular murderer — or very underpunished—like a mass murderer—this is an unfortunate but simply irrelevant and inescapable fact. Furthermore, punishment actually can be made more and more severe, practically without limit, for greater and greater crimes. Death after torture is worse punishment than mere death, and a longer period or greater amount of physical pain being inflicted is more severe punishment than a shorter period or lesser amount. The severity of punishment can be varied, then, by varying the length of imprisonment, by inflicting more or less physical pain, and by many other methods. For example, for prison inmates, the severity of punishment can be adjusted by varying the size of the prison cell, temperature, and quality of food.⁷⁵

此外，必须认识到对杀人犯的惩罚始终是一种不完美的补救措施，因为受害者已然遇害。因此无论杀人犯在被处决后仍算惩罚不足——如普通杀人犯——或是惩罚远远不够——如大屠杀凶手——这虽令人遗憾，却只是个无关紧要且无法改变的事实。此外，针对日益严重的罪行，惩罚的严厉程度实际上可以不断升级，几乎不受任何限制。相较于单纯的死亡，酷刑之后的死亡无疑是更为严苛的惩罚；同样，较长时间或较大幅度的肉体折磨也比短暂或轻微的痛苦更为严厉。因此，通过调整监禁期限、施加不同程度肉体痛苦以及其他多种手段，可以灵活改变惩罚的严厉程度。例如，对于监狱中的囚犯，通过改变牢房的大小、温度以及食物质量等方式，即可实现对惩罚严厉程度的精准调控。⁷⁵

⁷⁵ See Posner, “An Economic Theory of the Criminal Law,” p. 1212, discussing different ways to vary the severity of punishment.
参见波斯纳，《刑法的经济学理论》，第 1212 页，讨论了改变惩罚轻重的不同方法。

E. 财产犯罪 Property Crimes

Aggression can also take 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 \$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.⁷⁶ This amount may also be enhanced to take into account other damages, such as interest, general costs of crime prevention, and compensation for putting the victim into a state of fear and uncertainty.⁷⁷ It may also be enhanced to account for the uncertainty as to 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 where the thief is penniless or the stolen property is spent or destroyed.

侵权行为也可能表现为财产犯罪的形式。例如，A 从 B 处窃取了 10,000 美元，B 有权追回这 10,000 美元的财产。然而，追回这笔钱并非对 A 的惩罚，而仅是 B 取回自身财产的正当行为。此外，B 还有权从 A 的财产中再扣除 10,000 美元，甚至更多，若这 10,000 美元对 B 的价值远超对 A 的价值——比如，A 比 B 有更高的时间偏好，或 A 的使用计划相对不那么重要（这种情况较为常见），或者 A 的经济状况优于 B（这种情况较为罕见）。⁷⁶ 在考虑其他损害赔偿，如利息、预防犯罪的普遍费用以及因受害

⁷⁶ However, where the thief is poorer than the victim, as is usually the case, this does not mean that the victim is not entitled to recoup the entire \$10,000. For example, if the \$10,000 stolen is only 1% of the victim's estate and the thief's estate is only \$10,000 total—after the victim has retaken his own \$10,000 from the thief—it is not the case that the victim is limited to 1% of \$10,000—\$100. Because it is the thief who caused the harm, the victim should have the option of selecting the higher of (a) the amount that was stolen, or (b) a higher amount that is equivalent in terms of damage done. For further suggestions along these lines, such as Stephen Schafer's view that punishment “should... be equally burdensome and just for all criminals, irrespective of their means, whether they be millionaires or labourers,” see Randy E. Barnett, “Restitution:

者的恐惧和不确定性所造成的损失时，这一数额还可进一步增加。⁷⁷同时，还需考虑报复或赔偿金额的不确定性，这种不确定性源于 A 的过错，而非 B 的责任。另外，根据受害者的选择，B 也可以选择实施体罚，而非仅追回 10,000 美元——实际上，如果小偷一贫如洗，或被盗财产已被挥霍或损毁，这或许是唯一可行的选项。

A New Paradigm of Criminal Justice,” in Barnett & Hagel III, eds., *Assessing the Criminal*, pp. 349, 363 – 64, quoting Stephen Schafer, *Compensation and Restitution to Victims of Crime*, 2d ed. (Montclair, N.J.: Patterson Smith, 1970), p. 127. It should be noted that Rothbard’s view of restitution and retribution is slightly different from the principles discussed above. See Rothbard, “Punishment and Proportionality,” at 86.

然而，如果小偷比受害者更穷（通常是这种情况），这并不意味着受害者无权取回全部的 10,000 美元。例如，如果被盗的 10,000 美元仅占受害者财产的 1%，而小偷的财产总额仅为 10,000 美元——在受害者从小偷那里夺回自己的 10,000 美元之后——那么受害者就不能仅限于获得 10,000 美元的 1%——100 美元。因为造成损害的是小偷，所以受害者应该可以选择(a)被盗金额或(b)与所受损害相当的更高金额中的较高者。关于这方面的进一步建议，比如斯蒂芬·谢弗（Stephen Schafer）的观点，即惩罚“‘应当……对所有罪犯一视同仁，不论其身份，无论是百万富翁还是工人’”，见兰迪·E·巴尼特的《赔偿：刑事司法的新范式》，载于巴尼特和哈格尔三世编辑的《评估罪犯》，第 349、363 364 页，引自斯蒂芬·谢弗的《对犯罪受害者的赔偿与补偿》，第二版（新泽西州蒙特克莱尔：帕特森·史密斯，1970 年），第 127 页。应当指出，罗斯巴德关于赔偿和报应的观点与上述讨论的原则略有不同。见罗斯巴德，《惩罚与相称性》，第 86 页。

Further, suppose that A, the victim, was about to use the \$10,000 to save his own or another’s life: for example, as a ransom for his daughter’s kidnapper or to pay for a medical procedure to save his daughter’s life. Theft of the \$10,000 from a sufficiently poor person, or at a crucial time, could very well lead to death—the kidnapper murders the daughter because he was not paid. In this case it is very possible that execution of the thief could be justified since the consequences of this theft were even more severe than normal, especially in the case where the thief was aware of the potentially life-endangering consequences of the theft. For the principle that a criminal or tortfeasor “takes his victim as he finds him,” see note 83, below, and accompanying text.

此外，假设受害者 A 正准备用这 10 000 美元来挽救自己或他人的生命：例如，作为赎金付给绑架他女儿的绑匪，或用于支付挽救他女儿生命的医疗费用。从一个足够贫穷的人那里或在关键时刻偷走这 1 万美元，很可能会导致死亡——绑匪会因为没有得到赎金而谋杀其女儿。在这种情况下，处决小偷是很可能是正当的，因为这次盗窃的后果比正常情况下更加严重，尤其是在小偷知道盗窃可能会危及生命的情况下。关于罪犯或侵权行动人“发现受害者就将其带走”的原则，见下文注释 83 及所附文本。

⁷⁷ See note 69, above, and accompanying text.
见下文注释 69 及所附文本。

F. 为什么攻击、威胁和企图都是侵犯

Why Assault, Threats, and Attempts Are Aggression

This method of analyzing whether a proposed punishment is proper also makes it clear just why the threat of violence or assault is properly treated as an aggressive crime. Assault is defined (in some legal systems) as putting someone in fear of receiving a battery—a physical beating— or an attempted battery.⁷⁸ 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 or 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 will inflict this harm—otherwise it is something like a joke or acting, and B is not actually in apprehension of being coerced. Now A was able to actually put B in a state of fear—of receiving a battery—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—or 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. Although A need not actually use force to assault B, because of the nature of retaliation, there is simply no way for B to assault A in return without actually having the right to use force against A. Because the very situation is caused by A's action, he is estopped from objecting to the necessity of B using force against him.⁷⁹ Likewise, if A attempts to harm B but fails, then B is entitled to "attempt" to harm A; for the attempt to be a real attempt, it must be possible for B to succeed. And so on.

用这种方法分析所提议的惩罚是否恰当，可以清晰地阐明为何武力威胁或殴打行为被合理地视为侵犯性犯罪。殴打罪在部分法律体系中定义为使他人恐惧遭受肉体殴打，或存在殴打未遂的行为。⁷⁸假设 A 攻击了 B，例如用枪指着 B 或威胁要打他。显

⁷⁸ See *Mason v. Cohn*, 438 N.Y.S.2d 462 (N.Y. Sup. Ct. 1981), p. 464; *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing, 1990), p. 114. The Louisiana

然，B 有权以相同方式回击——A 无权反对 B 正当防卫的合理性。但这究竟意味着什么？攻击需表现出造成伤害的意图，并将此意图传达给 B，使 B 确信 A 会实施伤害——否则仅是玩笑或表演，B 并不会真正感到受胁迫。现在，A 通过威胁 B，确实能使 B 处于恐惧状态。然而，基于攻击的性质，只有当 B 确有报复之意，并能让 A 相信这一事实时，B 才能使 A 真正害怕其报复行为。因此，B 必须或有意愿对 A 实施威胁性的胁迫，而非仅口头虚张声势，否则 A 会识破 B 只是在夸大其词。事实上，若仅为了让 A 相信，B 可以合法采取威胁行动。尽管 A 无需实际使用武力攻击 B，但基于报复的性质，B 若不具备对 A 使用武力的权利，便不可能真正反击 A。由于这一情况由 A 的行为引发，A 不得反对 B 对其使用武力的必要性。⁷⁹同理，若 A 试图伤害 B 但未遂，B

Criminal Code defines assault as “an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery.” Louisiana Revised Statutes Annotated, § 14:36 (https://legis.la.gov/legis/Laws_Toc.aspx?folder=75&level=Parent). A battery is defined as “the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.” Ibid., § 14:33. Assault can thus also include an attempted battery, which need not put the victim in a state of apprehension of receiving a battery—for example, the victim may be asleep and be unaware that another has just swung a club at his head, but missed. This second definition of assault is ignored for our present purposes. 见《梅森诉科恩案》，438 N.Y.S.2d 462（纽约州最高法院，1981 年），第 464 页；《布莱克法律词典》，第 6 版（明尼苏达州圣保罗：韦斯特出版公司，1990 年），第 114 页。《路易斯安那州刑法》将殴打定义为“试图实施殴打，或故意使他人有合理理由担心受到殴打”。《路易斯安那州修订法规注释》，第 14:36 条（https://legis.la.gov/legis/Laws_Toc.aspx?folder=75&level=Parent）。殴打被定义为“故意对他人身使用武力或武力；或故意向他人施用毒药或其他有害液体或物质”。同上，第 14:33 条。因此，殴打也可以包括未遂的殴打，这不一定使受害者处于担心受到殴打的状态——例如，受害者可能在睡觉，没有意识到另一个人刚刚朝他的头部挥动了棍棒，但没打中。就我们当前的目的而言，殴打的这第二种定义被忽略。For some of my thoughts on how negligence law might develop in a private-law society, see Stephan Kinsella, “The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld,” Mises Economics Blog (Sep. 1, 2009). 关于我对于在私法社会中过失法可能如何发展的一些想法，见斯蒂芬·金塞拉的《自由意志主义对待过失、侵权和严格责任的方法：赎罪金和部分赎罪金》，米塞斯经济学博客（2009 年 9 月 1 日）。

⁷⁹ See also Pavel Slutskiy, “Threats of the Use of Force: ‘Mere Speech’ or Rights Violation?,” in idem, Communication and Libertarianism. For a discussion of why fraud is a type of rights violation, see “A Libertarian Theory of Contract” (ch. 9), Part III.E. See also Rothbard’s argument for why threats (and fraud) count as types of aggression:

则有“试图”伤害 A 的权利；为使这种“试图”名副其实，B 必须具备成功的可能性。依此类推。

G. 举证责任 The Burden of Proof

As seen in the preceding discussion, 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 this section.

从先前的讨论中可以看出，暴力犯罪的受害者有权选择不同的惩罚组合与类型。本节将依据相称性原则及相关的举证责任原则，探讨可允许实施的惩罚的实际范围或严重程度。

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. 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

Defensive violence, therefore, must be confined to resisting invasive acts against person or property. But such invasion may include two corollaries to actual physical aggression: intimidation, or a direct threat of physical violence; and fraud, which involves the appropriation of someone else's property without his consent, and is therefore "implicit theft."

Rothbard, "Self-Defense," p. 77.

同时也可参考帕维尔·斯卢茨基 (Pavel Slutskiy) 的《使用武力的威胁：“仅仅是言论”还是权利侵犯？》，收录于他的《交流与自由意志主义》一书中。关于为何欺诈是一种权利侵犯类型的讨论，可参见“自由意志主义的契约理论”（第 9 章）第三部分 E 节。

另见罗斯巴德关于威胁（和欺诈）为何算作侵犯类型的论证：因此，防卫性武力必须仅限于抵抗对人身或财产的侵犯行为。但这种侵犯可能包括实际人身侵犯的两个必然结果：恐吓，或直接的人身武力威胁；欺诈，涉及未经他人同意侵占他人财产，因此属于“隐性盗窃”。

罗斯巴德，《自卫》，第 77 页。

on the aggressor to show why a proposed punishment of him is disproportionate or otherwise unjustified. The justice of this point is again implied by the logic of estoppel. The aggressor was not put in the position of justifying how much force he could use against the victim before he used such force; similarly, the victim should not be put in the position of justifying how much force is the appropriate level of retaliatory force to use against the aggressor before retaliating.

惩罚理论旨在为惩罚提供正当理由，为那些不愿采取不道德行为的正派人士提供一个可以惩罚他人的合理依据。当然，这一理论极具价值，因为它为有道德的人提供了指导和保障，使他们能够妥善应对那些试图伤害他们的人。迄今为止，我们已经初步论证了对于侵犯他人身体或合法财产的武力行为，我们有权对侵犯者实施相应的惩罚。然而，一旦确立这一责任，举证责任便应由侵犯者承担，说明为何对他的拟议惩罚不相称或缺乏其他正当性，这才是正义的体现。禁止反言的逻辑再次强调了这一点的正义性。侵犯者在向受害者施加武力之前，并未被要求证明其使用武力的合理性；同理，受害者在进行报复之前，也不应被要求证明对侵犯者使用武力的适当程度。

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.

如前所述，由于侵犯者将受害者置于救济手段有限的情境中，当受害者采用与侵犯者不同形式的武力反抗时，侵犯者便无权提出异议。因此，举证责任和论证义务应由侵犯者承担，需证明其侵犯行为为何不能为所提出的创新性惩罚措施提供正当性依据。否则，这将在已造成的伤害之外，给受害者附加额外负担。若受害者希望规避这

一额外负担，侵犯者不得反对——因为正是侵犯者最初将受害者置于需承担此负担的境地。若存在模糊地带，不应允许侵犯者以虚伪的困惑姿态逃避责任；相反，除非侵犯者能用令人信服的理论 and 论证进一步缩小灰色区域，否则界限的划定应当倾向于对受害者最有利的方向——毕竟，正是侵犯者一手制造了这种模糊性。

This is similar to 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, nonarmed, nonviolent theft does not.⁸⁰ Exceeding known appropriate levels of retaliation makes the retaliator an aggressor to the extent of the excess amount of force used. But there are indeed gray areas in which it is difficult, if not impossible, to precisely delimit the exact amount of maximum permissible punishment. However, 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—for example, 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.

这与相称性问题本身相似。尽管相称性或对等性是一般性要求，但如果惩罚的初步理由成立——无论何时使用武力均是如此——则举证责任落在侵犯者身上。侵犯者必须证明任何拟议的武力使用，包括处决、残害或奴役，均超出了相称性的界限。如前所述，在实践中有几个明确的领域：谋杀可以作为处决的理由；而轻微的、非武装的、非武力的偷窃则不能。⁸⁰一旦超过已知的适当报复程度，报复者便会在过度使用武力的范围内成为侵犯者。

然而，确实存在一些灰色地带，在这些地带，精确划定所允许的最大惩罚数额即便不是不可能，也极为困难。这种不确定的境况、这种灰色地带是由侵犯者造成的。

⁸⁰ See Part IV.A, above.

参见上文第 IV.A 部分。

受害者因此陷入两难境地：如果他必须证明自己可以使用多少武力，那么他可能会惩罚不足，或未能充分利用自己的惩罚权。或者，他可能不得不在时间或金钱方面投入额外资源——例如，聘请哲学家或律师来确切弄清应给予多少惩罚——这将不可避免地增加对受害者造成的总体伤害。

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.⁸¹ Unless the maximum permissible level of retaliation is clearly established or persuasively argued by the aggressor, there should be no limitations on the victim's right to retaliate. Further, suppose the aggressor is not able to show why the victim may not execute him, even for a nonkilling act of aggression, and thus the aggressor is executed. If the aggressor's heirs should later successfully show that the type of aggression perpetrated by the aggressor did not, in fact, warrant capital punishment, still the victim has committed no aggression. To so hold would be to require victims to err on the side of underpunishing in cases of doubt in order to avoid potential liability in the future if it turns out that the aggressor could have made a better defensive argument. For the fact that there is a doubtful question is the aggressor's fault, and if he does not resolve it—either because of laziness, incompetence, bad luck, or tactics designed to make the victim unsure of how much he may punish—the victim should not be further harmed by this fact, which he would be if he were forced to take the risk that he might underpunish when punishing in the gray area.

在许多情况下，确实难以界定相称性的界限。然而，有一点我们确信无疑：武力是针对受害者使用的，因此，通常情况下，可以对侵犯者施加武力。除了简单或明确的情况外，任何模糊不清或存在疑问的情形都必须倾向有利于受害者来处理，除非侵犯者主动承担起论证的责任，阐明为何拟议的惩罚超出了其最初的侵犯行为。⁸¹ 除非

⁸¹ Many crimes would have established or generally accepted levels or at least ranges of permissible punishment—for example, as worked out by a private justice system of a free society or by specialists writing treatises on the subject. For further discussion of the role of judges or other decentralized law-finding fora, and of legislatures, in the development of law, see “Legislation and the Discovery of Law in a Free Society” (ch.

明确规定了报复的最大限度，或侵犯者提出了具有说服力的理由，否则不应限制受害者的报复权。

此外，假设侵犯者无法说明为何受害者不能将其处决，即便是非致命性的侵害行为，侵犯者也可能因此被处决。如果侵犯者的继承人后来成功证明侵犯者所实施的侵害类型实际上不应处以极刑，那么受害者依然没有实施任何侵害行为。若持此观点，就等同于要求受害者在存疑的情况下倾向于轻判，以避免在将来侵犯者可能提出更合

13). No doubt litigants in court or equivalent forums, especially the defendant, would hire lawyers to present the best arguments possible in favor of punishment and its permissible bounds. In a society that respects the general libertarian theory of rights and punishment developed herein, one could even expect lawyers to specialize in arguing whether a defendant is estopped from asserting a particular defense, whether a given defense is capable of being made universal or particular when the burden of proof for each side has been satisfied, and the like.

许多罪行都会有既定的或普遍接受的惩罚程度或至少是可允许的惩罚范围——例如，由自由社会的私人司法系统或撰写相关论文的专家制定的惩罚程度或范围。关于法官或其他去中心化的法律调查论坛以及立法机构在法律发展中的作用的进一步讨论，见《自由社会中的立法与法律发现》（第 13 章）。毫无疑问，法庭或同等论坛上的诉讼当事人，尤其是被告，会聘请律师为惩罚及其允许的范围提出最好的论据。在一个尊重本文所阐释的权利与惩罚的一般自由意志主义理论的社会中，人们甚至可以预期律师会专门从事论证被告是否被禁止主张某项特殊的辩护，当双方的举证责任都已得到满足时，某项辩护是否能够成为普遍的或特殊的辩护等等。

With regard to the concept of making a prima facie case and switching the burden of proof from the plaintiff to the defendant, Richard Epstein has set forth a promising theory of pleadings and presumptions whereby one party who wishes to upset the initial balance must establish a prima facie case that may be countered by a defense, which may be met with a second round of prima facie arguments, and so on. See Richard A. Epstein, "Pleading and Presumptions," U. Chicago L. Rev. 40 (1973), p. 556. For its application to the fields of torts and intentional harms, see idem, A Theory of Strict Liability; idem, "Defenses and Subsequent Pleas in a System of Strict Liability"; and idem, "Intentional Harms."

关于建立初步证据确凿的案件以及将举证责任从原告转移到被告的概念，理查德·爱泼斯坦（Richard Epstein）阐述了一个有前景的诉答和推定理论，根据该理论，希望打破初始平衡的一方必须建立一个初步证据确凿的案件，这可能会被辩护所反驳，而该辩护可能会遇到第二轮的初步证据确凿的论点，依此类推。见理查德·A·爱泼斯坦，《诉答和推定》，《芝加哥大学法律评论》第 40 卷（1973 年），第 556 页。关于其在侵权行为和故意伤害领域的应用，见同上，《严格责任理论》；同上，《严格责任制度中的抗辩和后续抗辩》；同上，《故意伤害》。

理辩护理由时承担潜在责任。

由于存在疑问这一事实本身是侵犯者的过错，无论是因为其懒惰、无能、运气不佳，还是出于让受害者不确定可施加多大惩罚的策略，受害者都不应因此受到进一步的伤害。若受害者被迫承担在灰色地带进行惩罚时可能惩罚不足的风险，他实际上已经再次受到了伤害。

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.⁸² 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.

因此，在制定适当的惩罚时，应考虑多个因素。假设侵犯者绑架并砍断了受害者的手，受害者显然有权以同样的方式对待侵犯者。然而，如果受害者希望砍掉侵犯者的脚——出于某种原因——他表面上似乎也有权这样做。受害者甚至有权砍掉侵犯者的两只手，除非侵犯者能解释为何这种惩罚的胁迫程度比他自己的行为要高。⁸²仅仅砍掉侵犯者的一只手，实际上可能还不如侵犯者自己的行为极端。例如，如果受害者是一名画家，侵犯性武力行为的后果除了危及生命和造成痛苦外，还可能导致受害者遭

⁸² Admittedly, 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.

诚然，我们很难知道这种论证会如何进行，甚至很难知道怎样的论证才算得上是好的论证。但这种担忧是侵犯者的担忧，而不是受害者的担忧。要避免陷入这种境地，有一个简单的办法：不要对你的同胞使用武力。

受巨大的精神和经济损失。或许只有砍掉侵犯者的四肢，甚至斩首，才能造成与之相当的伤害。我们知道，对侵犯者使用武力是允许的，但允许多大的程度呢？让侵犯者来承担解决问题的责任吧。

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, the victim should not be penalized further by being forced to administer lex talionis. The aggressor must take his victim as he finds him⁸³ 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 nonreciprocal 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.

如前文关于强奸罪所述，受害者可能对暴力行为本身感到不适，因而对“以眼还眼”的理念产生抵触。若此乃受害者的天性，则不应通过强制实施同态复仇法来对其施加进一步惩罚。加害者必须接受受害者的本真状态，⁸³且因其将受害者置于唯有通过非对等惩罚才能满足特殊偏好的境地，故无权提出异议。因此，受害者可能会选择扣押侵犯者的一部分财产。确定与所造成损害“相等”的赔偿金额固然困难，但至少可以采用

⁸³ This is an ancient principle of justice. For example:

It is well settled in our jurisprudence that a defendant takes his victim as he finds him and is responsible for all natural and probable consequences of his tortious conduct. Where defendant's negligent action aggravates a preexisting injury or condition, he must compensate the victim for the full extent of his aggravation.

American Motorist Ins. Co. v. American Rent-All, Inc., 579 So.2d 429 (La. 1991), p. 433, emphasis added, citation omitted.

这是一条古老的正义原则。例如：

在我们的法理学中，有一个确定的原则，即被告要接受其侵害对象的既有状况，并对其侵权行为的所有自然和可能的后果负责。如果被告的过失行为加重了先前存在的伤害或状况，他就必须对加重的全部程度对受害者进行赔偿。

American Motorist Ins. Co. v. American Rent-All, Inc., 579 So.2d 429（路易斯安那州 1991 年），第 433 页，重点补充，引文省略。

当今侵权法和刑事司法体系中的类似原则。若损害赔偿金额难以确定或看似“过高”，必须明确的是：正是侵犯者本人制造了这种不确定性状态，因此他现在无权对此提出异议。

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.⁸⁴ 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.

另外，一个更客观的损害赔偿方案可以由受害者通过协商放弃对侵犯者施加体罚的权利，以换取侵犯者的部分或全部财产来决定。⁸⁴ 对于被一个非常富有的侵犯者伤害的人来说，这可能是一个特别有吸引力——或者最不具吸引力——的选择。通常情况下，砍掉某人手的既定赔偿金可能是 100 万美元。然而，这意味着亿万富翁可以肆无忌惮地犯下此类罪行。根据禁止反言的惩罚观点，受害者并非直接夺取侵犯者的 100 万美元，而是可以绑架侵犯者并威胁行使权利——例如缓慢且痛苦地砍掉侵犯者的双

⁸⁴ See also Kinsella, “Fraud, Restitution, and Retaliation: The Libertarian Approach,” StephanKinsella.com (Feb. 3, 2009). Admittedly, this presupposes that the victim has the primary right of retribution against the aggressor so that she may forgive him. This topic is ripe for further development, and in fact has been explored in a recent paper. See Łukasz Dominiak, Igor Wysocki & Stanisław Wójciewicz, “Dialogical Estoppel, Erga Omnes Rights, and the Libertarian Theory of Punishment and Self-Defense,” J. Libertarian Stud. 27, no. 1 (March, 2023; <https://perma.cc/RP8Z-VE3C>): 1 – 24. 另见 金塞拉，《欺诈、赔偿和报复：自由意志主义的方法》，StephanKinsella.com（2009 年 2 月 3 日）。诚然，这样做的前提是受害者对侵犯者拥有主要的报复权，这样她才有可能原谅侵犯者。这个话题的进一步发展时机已经成熟，事实上，最近的一篇论文已经对此进行了探讨。参见卢卡斯·多米尼亚克、伊戈尔·维索茨基和斯坦尼斯瓦夫·沃伊托维奇的《对话式的禁止反言、对世权以及自由意志主义的惩罚和自我理论》，《自由意志主义研究杂志》第 27 卷，第 1 期（2023 年 3 月；<https://perma.cc/RP8Z-VE3C>）：1 24 页。

臂。一位亿万富翁可能愿意用半数甚至全部财富来换取免除这种惩罚。

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.⁸⁵

对于贫困的侵犯者而言，由于缺乏财产作为赔偿手段，单纯让其承受痛苦可能无法满足部分受害者的诉求。受害者有权选择奴役侵犯者，或将其出售为奴隶，甚至用于医学实验，以期获得最大程度的补偿。⁸⁵

V. 结论

The ways in which punishment can be administered are rich and various, but all the typically-cited goals of punishment could be accommodated under the view of punishment set forth above. 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 proportionality, justice requires that the aggressor be held responsible for the dilemma he has created as well as for the aggression he has committed.

惩罚的实施方式丰富多样，但所有通常被提及的惩罚目标都可以纳入上述惩罚观点之中。根据受害者的选择，罪犯可以被剥夺能力、受到威慑，甚至可能得到改造。赔偿可以通过多种方式实现，或者如果受害者选择，也可以是报复或复仇。虽然难以

⁸⁵ But see Kinsella, “Fraud, Restitution, and Retaliation: The Libertarian Approach,” discussing practical problems with an actual institutionalized retributionist system and how the theoretical case for punitive rights could play a role in a restitution-based system. For a related commentary related to disputes in general, see Kinsella, “On the Obligation to Negotiate, Compromise, and Arbitrate,” StephanKinsella.com (April 6, 2023).

但参见金塞拉，《欺诈、赔偿和报应：自由意志主义的方法》，讨论了实际制度化的报应主义体系的实际问题，以及惩罚性权利的理论上的案例如何在以赔偿为基础的体系中发挥作用。有关一般纠纷争议的相关评论，请参阅金塞拉，《论谈判、妥协和仲裁的义务》，StephanKinsella.com（2023 年 4 月 6 日）。

精确界定比例原则的边界，但正义要求侵犯者既要为其制造的困境负责，也要为其犯下的侵犯行为承担责任。

附录：回应性武力的正义性

APPENDIX THE JUSTICE OF RESPONSIVE FORCE

In Part III.C above, I discussed the legitimacy of punishing aggressors, that is, the justice of responsive force—force that is in response to aggression, or initiated force. As noted above, the material here was originally intended to appear in footnote 44, above. Due to its length, I include this material in this appendix.

在上文 III.C 部分，我探讨了惩罚侵犯者的合法性，即回应性武力——无论是回应侵犯的武力还是主动使用的武力——的正义性问题。如前所述，这部分内容原本计划收录于上文注释 44 中。鉴于篇幅较长，我最终决定将其纳入本附录。

As noted in “Dialogical Arguments for Libertarian Rights” (ch. 6), “Defending Argumentation Ethics” (ch. 7), and “The Undeniable Morality of Capitalism” (ch. 22), Hans-Hermann Hoppe has defended the right to self-defense and retaliatory force in his argumentation ethics. For a recent book-length treatment of ideas related to Hoppe’s argumentation ethics and my estoppel approach advanced in this chapter, see Pavel Slutskiy, *Communication and Libertarianism* (Springer, 2021), and further references in these chapters.

正如在《自由意志主义权利的对话论证》（第 6 章）、《捍卫论证伦理学》（第 7 章）和《资本主义不可否认的道德性》（第 22 章）中所指出的，汉斯-赫尔曼·霍普在其论证伦理学中为自卫权和报复性武力提供了辩护。关于霍普的论证伦理学以及我在本章中提出的禁止反言方法的相关思想，可参阅帕维尔·斯卢茨基（Pavel Slutskiy）所著的《沟通与自由意志主义》（Springer, 2021），以及这些章节中提供的进一步参考文献。

Others have previously recognized the justice of using force against one who has used force. Law professor Lawrence Crocker writes:

Suppose ... that A and B are shipwrecked on a deserted island. A makes use of the only firearm salvaged from the wreck to force B to build him a shelter. If B gains control of the gun, it will not be unfair for B to use it to force A to return the favor.⁸⁶

以前也有人承认，以武力回应武力是正义的。法学教授劳伦斯-克罗克（Lawrence Crocker）写道：

假设……A 和 B 在一座荒岛上遭遇海难。A 利用从沉船中抢救出的唯一枪支强迫 B 为他搭建栖身之所。倘若 B 夺得了枪支控制权，那么 B 用武力胁迫 A，对之还以颜色，这并非不公平。⁸⁶

Libertarian philosopher John Hospers opined that when an aggressor initiates force, "the victim is entitled to respond according to the rule ('The use of force is permissible') that the aggressor himself has implicitly laid down."⁸⁷ According to Herbert Morris:

If I say the magic words "take the watch for a couple of days" or "go ahead and slap me," have I waived my right not to have my property taken or a right not to be struck or have I, rather, in saying what I have, simply stepped into a relation in which the rights no longer apply with respect to a specified other person? These observations find support in the following considerations. The right is that which gives rise, when infringed, to a legitimate claim against another person. What this suggests is that the right is that sphere interference with which entitles us to complain or gives us a right to complain. From this it seems to follow that a right to bodily security should be more precisely described as "a right that others not interfere without permission." And there is the corresponding duty not to interfere unless provided permission. Thus when we talk of waiving our rights or "giving up our rights" in such cases we are not waiving or giving up our right to property nor our right to bodily security, for we still, of course, possess the right not to have our watch taken without permission. We have rather placed ourselves in a position where we do not possess the capacity, sometimes called a right, to complain if the person takes the watch or slaps us.⁸⁸

自由意志主义哲学家约翰·霍普斯（John Hospers）认为，当侵犯者主动使用武力时，“受害者有权根据侵犯者自己默认的规则（‘使用武力是允许的’）作出反应⁸⁷”。赫伯

⁸⁶ Lawrence Crocker, "The Upper Limit of Just Punishment," Emory L. J. 41 (1992): 1059 - 1110, at 1068.

劳伦斯·克罗克（Lawrence Crocker）《正义惩罚的上限》（“The Upper Limit of Just Punishment”），（《埃穆瑞法律杂志》第 41 卷，1992 年：第 1059 - 1110 页，第 1068 页）。

⁸⁷ Hospers, "Retribution: The Ethics of Punishment," p. 191 (emphasis added).

特·莫里斯（Herbert Morris）指出：

若我说出"把表借我戴几天"或"来扇我耳光吧"这样的魔幻话语，是否意味着我放弃了财产不被侵占的权利或免受殴打的权利？抑或，当我说出这些话时，实际上只是进入了一种特殊关系——在这种关系中，这些权利对特定对象不再适用？以下因素支持这些观点。权利指的是在遭受侵犯时，可对他人提出的合法要求。这表明，权利赋予我们申述的权利，或是对干涉行为进行申述的权利。因此，人身安全权应更准确地被描述为“他人未经许可不得干涉的权利”。相应地，除非获得许可，否则我们无权干涉他人。由此可见，当我们在这种情境下谈论免除或“放弃”我们的权利时，我们实际上并未免除或放弃我们的财产权或人身安全权，因为我们显然仍保有不被擅自拿走手表的权利。这并非意味着我们已将自己置于一种境地：若有人拿走手表或打我们耳光，我们便失去了（有时称为权利的）抗议能力。⁸⁸

Or as Hegel wrote:

The injury [the penalty] which falls on the criminal is not merely implicitly just—as just, it is eo ipso his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right established within the criminal himself, i.e., in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right.⁸⁹

或如黑格尔所写：

落在罪犯身上的伤害[刑罚]不仅是隐含的正义——因为它本身就是正义的体现，也是他隐含意志的反映，是他自由和权利的彰显；相反，它同样在罪犯自身内部，即在他客观体现的意志中，在他行动中确立的权利。这是因

霍斯珀斯（Hospers）在《报复：惩罚的伦理》（“Retribution: The Ethics of Punishment”）一书中，第 191 页（着重号为原文所加部分已添加）。

⁸⁸ Herbert Morris, “Persons and Punishment,” in *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (Berkeley: University of California Press, 1976), p. 52 (emphasis added); see also pp. 31, 52, et pass., discussing the right to bodily integrity and the waiver of this right.

赫伯特·莫里斯（Herbert Morris）在《人与惩罚》（“Persons and Punishment”）一文中，收录于《论有罪与无罪：法律哲学与道德心理学论文集》（伯克利：加利福尼亚大学出版社，1976 年），第 52 页（重点补充）；另见第 31 页、第 52 页及其他相关内容，讨论了身体完整性的权利以及该权利的放弃。

为他的行为作为理性存在者的行为，具有普遍性，罪犯通过这一行为实际上制定了一条法律，并在其行为中明确承认了这条法律，因此，他理应被置于自身权利的约束之下。⁸⁹

Thus, under Hegel's philosophy, "when a criminal steals another person's property, he is not only denying that person's right to own that piece of property, he is denying the right to property in itself."⁹⁰

因此，在黑格尔的哲学体系下，“当罪犯窃取他人财物时，他不仅否定了该人对该财产的所有权，更从根本上否定了财产权本身。”⁹⁰

Charles King, discussing the moral acceptability of using force against force, states that when another initiates force,[w]ith him we are returned to the first-stage state of nature and may use force against him. In so doing we do not violate his rights or in any other way violate the principle of right, because he has broken the reciprocity required for us to view such a principle [of rights] as binding. In this we find the philosophic grounding for the moral legitimacy of the practice of punishment. Punishment is just that practice which raises the price of violation of the principle of right so as to give us all good reason to accept that principle.⁹¹

查尔斯·金（Charles King）在探讨以武力回应武力的道德可接受性时指出，当他人主动采取武力时，我们便回到了初始的自然状态，从而有权对其施加武力。此举并未

⁸⁹ G.W.F. Hegel, "Punishment as a Right," in Ezorsky, ed., *Philosophical Perspectives on Punishment*, at 107 (emphasis in last sentence added, brackets in original) (excerpted from G.W.F. Hegel, *The Philosophy of Right*, T.M. Knox, trans. (New York: St. Martin's Press, 1969), § 100).

G.W.F. 黑格尔 (G.W.F. Hegel) 在《作为一种权利的惩罚》(“Punishment as a Right”)一文中，收录于埃佐斯基 (Ezorsky) 编辑的《关于惩罚的哲学视角》，第 107 页（最后一句中的强调是添加的，括号为原文所带）（节选自 G.W.F. 黑格尔的《法哲学原理》，T.M. 诺克斯 译（纽约：圣马丁出版社，1969 年），第 100 节）

⁹⁰ Pauley, "The Jurisprudence of Crime and Punishment from Plato to Hegel," pp. 140 - 41, citing Peter J. Steinberger, "Hegel on Crime and Punishment," *Am. Pol. Science Rev.* 77, no. 4 (Dec. 1983): 858 - 70, p. 860.

保利在《从柏拉图到黑格尔的犯罪与惩罚的法理学》中，第 140 至 141 页，引用了彼得·J·斯坦伯格的《黑格尔论犯罪与惩罚》，载于《美国政治科学评论》第 77 卷第 4 期（1983 年 12 月）：第 858 至 870 页，第 860 页。

侵犯其权利，也未以任何形式违背权利原则，因为对方破坏了我们认为该原则具有约束力所依赖的对等性基础。由此，我们找到了惩罚行为道德合法性的哲学根基。惩罚本质上是一种手段，它提升了违反权利原则的成本，为我们接受这一原则提供了充分的理由。⁹¹

Or as Locke writes:

In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity ... and so he becomes dangerous to mankind, ... every man ... by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that law, as may make him repent the doing of it. [A] criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts, with whom men can have no society nor security.⁹²

或者如洛克所述：

在违反自然法则时，犯罪者宣称自己遵循理性和普遍公平之外的另一套规则生活……因此，他对人类构成了威胁，……每个人……基于其保护全人类的权利，有权限制或在必要时消灭对人类有害的存在。因此，可以对任何违反自然法则的人施加惩罚，使其深感悔恨。一名罪犯，放弃了理性，背弃了上帝赋予人类的共同规则和尺度，他对个人施加的不义暴力和屠杀，等同于向全人类宣战。因此，他可以被视作狮子或老虎般消灭，成为那些野蛮野兽中的一员，人们既无法与之共存，也难以获得安全感。⁹²

Other quotes can be listed briefly here:

Tibor Machan: "[I]f someone attacks another, that act carries with it, as a matter of the logic of aggression, the implication that from a rational moral standpoint the victim may, and often should retaliate." ⁹³

其他引文可在此简要列出：

⁹¹ King,金，《惩罚的基本原理》，第 154 页（重点补充）。
⁹² Locke, Second Treatise on Civil Government, § 11. 洛克《政府论：下》，第 11 页。

蒂博尔·马钱 (Tibor Machan) : "[如果]某人攻击他人, 根据侵犯行为的逻辑, 这一行为本身就意味着从理性的道德角度来看, 受害者可以——而且往往应当——进行报复。" ⁹³

Jan Narveson: "[T]hose who do not want peace, or want it only for others in relation to themselves rather than vice versa, are on their own and may in principle be dealt with by any degree of violence we like."⁹⁴ Rasmussen & Den Uyl, "[W]hen someone is punished for having violated others' rights, it is not the case that the criminal has alienated or otherwise lost his rights; rather, it is the case that the criminal's choice to live in a rights-violating way is being respected."⁹⁵

扬·纳尔维森 (Jan Narveson) 指出: "那些不想要和平的人, 或者只希望他人对自己保持和平而非反之的人, 只能自求多福, 原则上我们可以用任何程度的暴力来对付他们。"⁹⁴ 拉斯穆森与登·尤尔 (Rasmussen & Den Uyl) 则认为: "当某人因侵犯他人权利而受到惩罚时, 并不意味着罪犯已经放弃或丧失了自身权利; 恰恰相反, 这正表明罪犯选择以侵犯权利的方式生活的意愿得到了尊重。"⁹⁵

Randy Barnett: "It has been noted that one who wishes to extinguish or convey an inalienable right may do so by committing the appropriate wrongful act and thereby forfeiting it."⁹⁶

兰迪·巴尼特 (Randy Barnett) : "有人指出, 一个人如果想取消或转让一项不可让渡的权利, 可以通过实施适当的不法行为来实现, 从而丧失该权利 "。⁹⁶

⁹³ Machan, *Individuals and Their Rights*, p. 176. 马钱, 《个人及其权利》, 第 176 页。

⁹⁴ 扬·纳尔维森 (Jan Narveson), 《自由意志主义理念》, 第 230 页, 再版 (布罗德维尤出版社, 2001 年)。另见第 159 页, 标题为 "能够申述" 的小节。

⁹⁵ Rasmussen & Den Uyl, 《自由与自然》, 第 85 页。

⁹⁶ Randy E. Barnett, "Contract Remedies and Inalienable Rights," *Social Policy & Philosophy* 4, no. 1 (Autumn 1986; <https://perma.cc/2RTU-L7EQ>): 179 – 202, p. 186 (citing Diana T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia University Press, 1985), p. 14). For more on forfeiture, see references in *Knowledge, Calculation, Conflict, and Law* (ch. 19), n.81 and *A Libertarian Theory of Punishment and Rights* (ch. 5), n.88.

兰迪·E·巴尼特, 《赔偿与不可让渡的权利》, 《社会政策与哲学》第 4 卷第 1 期 (1986 年秋季; <https://perma.cc/2RTU-L7EQ>): 179 202 页, 第 186 页 (引用戴安娜·T·迈耶斯《不可让渡的权利: 自卫》(纽约: 哥伦比亚大学出版社, 1985 年),

Others are collected at Kinsella, "Quotes on the Logic of Liberty."

其他语录收录于金塞拉的 《自由逻辑的引语》。

第 14 页)。关于没收的更多内容，见《知识、计算、冲突与法律》（第 19 章），
注释 81 和《自由意志主义的惩罚与权利理论》（第 5 章），注释 88 。

第六章 自由意志主义权利的对话论证

Dialogical Arguments for Libertarian Rights

After publishing articles on my estoppel-based theory of rights* and Hans-Hermann Hoppe's "argumentation ethics" defense of libertarian rights † between 1992 and 1996, I published an article surveying estoppel, argumentation ethics, and similar theories in the Journal of Libertarian Studies in 1996, entitled "New Rationalist Directions in Libertarian Rights Theory." ‡ An updated version of this article was published as "Dialogical Arguments for Libertarian Rights" in The Dialectics of Liberty in 2019.§ This chapter is based on the latter piece, and is updated still further.**

在 1992 年至 1996 年间，我发表了关于以禁止反言为基础的权利理论¹，以及汉斯-赫尔曼·霍普为自由意志主义权利辩护的论证伦理学²的文章。随后，于 1996 年，我在《自由意志主义研究杂志》上发表了一篇题为《自由意志主义权利理论的新理性主义方向》³的文章，对禁止反言、论证伦理学及类似理论进行了系统梳理。该文的更新版以“自由意志主义权利的对话论证”为题，发表于 2019 年的《自由辩证法》。⁴本章

¹ 斯蒂芬·金塞拉，《禁止反言：个人权利的新理由》，《理性论文》第 17 期（1992 年秋季）：61-74 以及构成《自由意志主义的惩罚与权利理论》（第 5 章）基础的两篇文章。另见《我如何成为一名自由主义者》（第 1 章）和斯蒂芬·金塞拉，《禁止反言的起源：我的自由主义权利理论》，StephanKinsella.com（2016 年 3 月 22 日）。

² 见《资本主义不可否认的道德性》（第 22 章）和斯蒂芬·金塞拉，“书评：汉斯·赫尔曼·霍普的《私有财产的经济学与伦理学：政治经济学与哲学研究》”，《自由人：关于自由的理念》（1994 年 11 月）（均评论汉斯·赫尔曼·霍普的《私有财产的经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年[1993 年]；www.hanshoppe.com/eepp）），以及《自由意志主义的惩罚与权利理论》（第 5 章）。另见《捍卫论证伦理学》（第 7 章）。关于论证伦理学的更多内容，请参阅《我们如何拥有自己》（第 4 章）注释 15 中的参考文献。

³ 斯蒂芬·金塞拉，《自由意志主义权利理论的新理性主义方向》，《自由意志主义研究杂志》第 12 卷第 2 期（1996 年秋季）：313-326 页。关于本章所讨论的一些论点的最新书籍篇幅的探索，见帕维尔·斯卢茨基，《交流与自由意志主义》（施普林格出版社，2021 年）。

⁴ 斯蒂芬·金塞拉：《自由意志主义权利的对话论证》，收录于罗杰·比塞尔、克里斯-斯基亚巴拉与埃德-尤金斯编著的《自由的辩证法》（列克星敦出版社，2019 年）。

内容基于后一篇文章，并进行了进一步的更新。⁵

Classical liberals and libertarians believe that individuals have rights, even if there is debate about just why we have them or how this can be proved. Robert Nozick opened his book *Anarchy, State, and Utopia* with the assertion: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."

1 Yet, he did not offer a proof of this assertion, for which he has drawn criticism. It is commonly assumed that Nozick's argument is not complete until a proof of rights is offered.² Other theorists have offered, over the years, various reasons—utilitarian, natural law, pragmatic, and the like—why we should respect others' rights, why we should recognize that individuals have certain rights.³

古典自由主义者和自由意志主义者认为个体拥有权利，尽管关于权利来源及其论证方式仍存争议。罗伯特·诺齐克在其著作《无政府、国家与乌托邦》开篇即宣称："个人拥有权利，有些事情任何个人或群体都不应对他们做（否则就会侵犯这些权利）。"¹ 然而他并未对此论断提供证明，因而招致批评。学界普遍认为，诺齐克的论证必须补充权利证明才算完整。² 多年来，其他理论家从功利主义、自然法、实用主义等不

⁵ 我标题中的 "对话" 一词指的是交流或对话，这在本文讨论的许多理论中都有体现，包括霍普的对话伦理学或论证伦理学以及本章提到的许多其他理论。正如《捍卫论证伦理学》（第 7 章）和《资本主义不可否认的道德性》（第 22 章）所指出的，霍普的对话伦理学受到了霍普的博士导师尤尔根·哈贝马斯（Jürgen Habermas）和卡尔·奥托·阿佩尔（Karl-Otto Apel）的对话伦理学的影响。有趣的是，尽管罗尔斯在谈到自己的 "原初立场" 时说，"与哈贝马斯的理想话语情境一样，它是一种对话；实际上，是一种无所不包的对话，……哈贝马斯有时会说，原初立场是独白式的，而不是对式话的；这是因为所有各方实际上都有相同的理由，因此他们选择了相同的原则"。约翰·罗尔斯，《政治自由主义》扩充版（纽约：哥伦比亚大学出版社，2005 年），第 383 页。就我们的目的而言，我认为 "对话" 或 "对话式" 这个词就足够了。

¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. ix. 罗伯特·诺齐克:《无政府、国家与乌托邦》(纽约:Basic Books 出版社, 1974), 第 ix 页。

² See e.g., Thomas Nagel, "Libertarianism Without Foundations," *Yale L. J.* 85 (1975; <https://perma.cc/SZP3-XPBM>): 136 – 49 (reviewing Nozick, *Anarchy, State, and Utopia*). See also Tibor R. Machan, *Individuals and Their Rights* (La Salle, Ill.: Open Court, 1989), p. xiii ("In a way this book is a response to Thomas Nagel's criticism of [Nozick], a criticism often endorsed by others, to wit, that libertarianism lacks moral foundations."); Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), p. 9, who says that Nozick declines "to offer any systematic rationale for the vaguely specified collection of rights he takes to be basic" (footnote omitted).

同角度，提出了为何应尊重他人权利、为何应承认个体拥有特定权利的诸多理据。³

例如，参见托马斯·内格尔（Thomas Nagel）的《无基础的自由意志主义》，《耶鲁法学杂志》85 卷（1975 年；<https://perma.cc/SZP3-XPBM>）：136 149 页（评论诺齐克的《无政府、国家与乌托邦》）。另见蒂博尔·R·马钱（Tibor R. Machan）的《个人及其权利》（伊利诺伊州拉萨尔：开放法院，1989 年），第 xiii 页（“在某种程度上，这本书是对托马斯·内格尔对[诺齐克]批评的回应，这种批评经常得到其他人的赞同，即自由意志主义缺乏道德基础。”）；洛伦·E·洛马斯基（Loren E. Lomasky）的《个人、权利与道德共同体》（纽约：牛津大学出版社，1987 年），第 9 页，他说诺齐克拒绝“为他所认为的基本的、模糊指定的一系列权利提供任何系统的理论基础”（注释省略）。

³ See, e.g., Ludwig von Mises, *Liberalism: In the Classical Tradition*, 3d ed., Ralph Raico, trans. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1985; <https://mises.org/library/liberalism-classical-tradition>); Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982); idem, *For A New Liberty: The Libertarian Manifesto*, rev'd ed. (New York: Libertarian Review Foundation, 1985; <https://mises.org/library/new-liberty-libertarian-manifesto>); Ayn Rand, *Capitalism: The Unknown Ideal* (New York: Signet, 1967); idem, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964); Machan, *Individuals and Their Rights*; Jan Narveson, *The Libertarian Idea*, reissue ed. (Broadview Press, 2001); Lomasky, *Persons, Rights, and the Moral Community*; Douglas B. Rasmussen & Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, Ill.: Open Court, 1991).

例如，参见路德维希·冯·米塞斯（Ludwig von Mises）的《自由主义：古典传统》第三版，拉尔夫·雷科（Ralph Raico）译（纽约州欧文顿-哈德逊：经济教育基金会，1985 年）；穆瑞·N·罗斯巴德（Murray N. Rothbard）的《自由的伦理》（新泽西州大西洋高地：人文出版社，1982 年）；同上，《为了新自由：自由意志主义宣言》修订版（纽约：自由意志主义评论基金会，1985 年）；安·兰德（Ayn Rand）的《资本主义：未知的理想》（纽约：西格内特，1967 年）；同上，《自私的美德：利己主义的新概念》（纽约：西格内特，1964 年）；马钱（Machan）的《个人及其权利》；扬·纳尔维森（Jan Narveson）的《自由意志主义理念》再版（布罗德维尤出版社，2001 年）；洛马斯基（Lomasky）的《个人、权利与道德共同体》；道格拉斯·B·拉斯穆森（Douglas B. Rasmussen）和道格拉斯·J·登·尤尔（Douglas J. Den Uyl）的《自由与自然：对自由秩序的亚里士多德式辩护》（伊利诺伊州拉萨尔：开放法院，1991 年）。

Randy Barnett contends that consequentialist arguments for rights need not be utilitarian. See Randy E. Barnett, “Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses,” *Harv. J. L. & Pub. Pol’y* 12 (1989; www.randybarnett.com/pre-2000): 611 – 36, and idem, “Introduction: Liberty vs. License,” in *The Structure of Liberty: Justice and the Rule of Law*, 2d ed. (Oxford, 2014). Some libertarian theorists provide arguments other than traditional deontological, principled, or natural rights, and utilitarian, empirical, or consequentialist, approaches.

For example, Michael Huemer argues for a type of intuitionism in his *Ethical Intuitionism* (Palgrave Macmillan, 2007). In his *Escape from Leviathan: Liberty, Welfare and Anarchy Reconciled* (New York: St. Martin's Press, 2000), J.C. Lester opposes "justificationist" arguments for liberty and advances a critical-rationalist, "conjecturalist" approach influenced by Karl Popper's empiricist-positivist views. Patrick Burke proposes "causing harm" as the main linchpin of libertarian justice. See T. Patrick Burke, *No Harm: Ethical Principles for a Free Market* (New York: Paragon House, 1994). On Lester, see David Gordon & Roberta A. Modugno, "Review of J.C. Lester's *Escape from Leviathan: Liberty, Welfare, and Anarchy Reconciled*," *J. Libertarian Stud.* 17, no. 4 (2003), <https://mises.org/library/review-jc-lesters-escape-leviathan-liberty-welfare-and-anarchy-reconciled-0>: 101 – 109; and Kinsella, "'Aggression' versus 'Harm' in Libertarianism," *Mises Economics Blog* (Dec. 16, 2009) (criticizing Lester's approach, his opposition to "justificationism," and his focus on "imposing costs" instead of aggression as the key libertarian principle). On Burke, see Kinsella "Book Review," *Reason Papers* No. 20 (Fall 1995; <https://reasonpapers.com/archives/>), p. 135 – 46, and idem, "'Aggression' versus 'Harm' in Libertarianism." See also Kinsella, "Hoppe on Property Rights in Physical Integrity vs Value," *StephanKinsella.com* (June 12, 2011). See also "A Libertarian Theory of Punishment and Rights" (ch. 5), n.16, including the quote by Rothbard criticizing the "harm" approach and Mill, Hayek, and Nozick.

兰迪·巴尼特 (Randy Barnett) 认为, 关于权利的结果主义论证不一定是功利主义的。参见兰迪·E·巴尼特 (Randy E. Barnett) 的《鸡与蛋——道德权利与结果分析的兼容性》,《哈佛法律与公共政策杂志》12 卷(1989 年; www.randybarnett.com/pre-2000): 611 636 页, 以及同上,《自由的结构: 正义与法治》第二版(牛津, 2014 年)中的“导论: 自由与许可”。一些自由意志主义理论家提供了除传统的道义论、原则论或自然权利论, 以及功利主义、经验主义或结果主义方法之外的论证。例如, 迈克尔·休默 (Michael Huemer) 在他的《伦理直觉主义》(Palgrave Macmillan, 2007 年)中主张一种直觉主义类型。在他的《逃离利维坦: 自由、福利与无政府主义的调和》(纽约: 圣马丁出版社, 2000 年)中, J.C.莱斯特 (J.C. Lester) 反对为自由进行“辩护主义”论证, 并提出了一种受卡尔·波普尔 (Karl Popper) 的经验主义-实证主义观点影响的批判性理性主义、“猜想主义”方法。帕特里克·伯克 (Patrick Burke) 提出“造成伤害”作为自由意志主义正义的主要关键。参见 T.帕特里克·伯克 (T. Patrick Burke) 的《无害: 自由市场的伦理原则》(纽约: Paragon House, 1994 年)。关于莱斯特, 参见大卫·戈登 (David Gordon) 和罗伯塔·A·莫杜格诺 (Roberta A. Modugno) 的《评 J.C.莱斯特的〈逃离利维坦: 自由、福利与无政府主义的调和〉》,《自由意志主义研究杂志》17 卷第 4 期(2003 年): 101 109 页; 以及金塞拉 (Kinsella) 的《自由意志主义中的“侵犯”与“伤害”》, 米塞斯经济学博客(2009 年 12 月 16 日)(批评莱斯特的方法、他对“辩护主义”的反对, 以及他将重点放在“强加成本”而非侵犯作为自由意志主义的关键原则)。关于伯克, 参见金塞拉的《书评》,《理性论文》第 20 期(1995 年秋季; <https://reasonpapers.com/archives/>), 第 135 146 页, 以及同上,《自由意志主义中的“侵犯”与“伤害”》。另见金塞拉的《霍普关于身体完整性与价值中的财财产权》, *StephanKinsella.com* (2011 年 6 月 12 日)。

For instance, an economic case can be made for respecting the liberty of others. Given that you are a decent person and generally value your fellow man and wish everyone to live a satisfying life, you will tend to be in favor of the free market and liberty, at least if you understand basic economic principles.⁴ But the success of arguments such as these depends on other people accepting particular premises, such as valuing the general well-being of others, without which the argument is incomplete. Skeptics can always deny the validity of the premises even if they cannot refute free-market economics.

例如，尊重他人的自由在经济层面是合乎逻辑的。作为一个正直的人，若你普遍珍视同胞，期望每个人都拥有满意的生活，你便会倾向于支持自由市场和自由，前提是你理解基本的经济原理。⁴然而，此类论证的成功与否，取决于他人是否认同特定的前提，例如普遍重视他人的福祉。若非如此，论证便显得不完整。即使怀疑论者无法驳斥自由市场经济，他们仍可质疑这些前提的有效性。

There can be no doubt that a rigorous argument for individual rights would be useful. In recent years, interest has been increasing in rationalist, dialectical, or dialogical 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. Several such arguments are surveyed below.

毫无疑问，对个人权利进行严谨的论证是大有裨益的。近年来，人们对理性主义、辩证法以及对话式权利理论等的相关理论兴趣日益浓厚，其中一些理论有望为个人权利提供卓有成效且无可置疑的辩护。这些论点通常探究行动或对话所必然预设的隐含

另见《自由意志主义的惩罚与权利理论》（第 5 章），注释 16，包括罗斯巴德批评“伤害”方法以及密尔、哈耶克和诺齐克的引述。

⁴ 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).

参见金塞拉（Kinsella）的《作为基本规范和权利来源的劳动分工》，米塞斯经济学博客（2009 年 4 月 24 日），以及同上，《共情与权利的来源》，米塞斯经济学博客（2006 年 9 月 6 日）。

主张。随后，这些论证从这些核心前提或公理出发，通过演绎或约定俗成的方式，推导出符合逻辑的真实结论。下文将对几种此类论证进行详细考察。

一、论证伦理学

ARGUMENTATION ETHICS

Let us first discuss Hans-Hermann Hoppe's pathbreaking "argumentation ethics" defense of libertarian rights.⁵ Hoppe shows that basic rights are implied in the activity of argumentation itself, so that anyone asserting any claim about anything necessarily presupposes the validity of rights. Hoppe first notes that any truth at all (including norms such as individual rights to life, liberty, and property) that one would wish to discuss, deny, or affirm will be brought up in the course of an argumentation, that is to say, will be brought up in dialogue. If participants in argumentation necessarily accept particular truths, including norms, in order to engage in argumentation, they could never challenge these norms in an argument without thereby engaging in a performative contradiction. This would establish these norms as literally incontestable truths.

让我们首先探讨汉斯-赫尔曼·霍普在为自由意志主义权利辩护方面所提出的开创性"论证伦理学"⁵。霍普证明基本权利蕴含在论证活动本身之中，因此任何人在主张任何观点时都必然预设了权利的正当性。霍普首先指出，人们想要讨论、否认或确认的任何真理（包括生命权、自由权和财产权等个人权利规范）都将在论证过程中提出，

⁵ See Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), ch. 7; idem, "From the Economics of Laissez Faire to the Ethics of Libertarianism," "The Justice of Economic Efficiency," and "On the Ultimate Justification of the Ethics of Private Property," chaps. 11 – 13 in The Economics and Ethics of Private Property, esp. pp. 314 – 22. See also "Defending Argumentation Ethics" (ch. 7) and other references in note 15, below.

参见汉斯·赫尔曼·霍普（Hans-Hermann Hoppe）的《社会主义与资本主义理论：经济、政治与伦理》（阿拉巴马州奥本：米塞斯研究院，2010 年[1989 年]；www.hanshoppe.com/tsc），第 7 章；同上，《从自由放任经济学到自由意志主义伦理学》《经济效率的正义》以及《私有财产伦理的终极证成》，《私有财产的经济学与伦理学》第 11-13 章，尤其是第 314-322 页。另见《捍卫论证伦理学》（第 7 章）以及下文注释 15 中的其他参考文献。

也就是说，都将在对话中被提及。如果论证参与者为了进行论证必须接受某些特定真理（包括规范），那么他们就永远无法在论证中质疑这些规范，否则就会陷入践言冲突。这将使这些规范成为真正无可争议的真理。

Hoppe establishes self-ownership by pointing out that argumentation, as a form of action, implies the use of the scarce resources of one's body. One must have control over, or own, this scarce resource in order to engage in meaningful discourse. This is because argumentation is, by its very nature, a conflict-free way of interacting, since it is an attempt to find what the truth is, to establish truth, to persuade or be persuaded by the force of words alone. If one is threatened into accepting the statements or truth-claims of another, this does not tend to get at the truth, which is undeniably a goal of argumentation or discourse. Thus, anyone engaging in argumentation implicitly presupposes the right of self-ownership of other participants in the argument, for otherwise the other would not be able to consider freely and accept or reject the proposed argument. Only as long as there is at least an implicit recognition of each individual's property right in his or her own body can true argumentation take place. When this right is not recognized, the activity is no longer argumentation, but threat, mere naked aggression, or plain physical fighting. Thus, anyone who denies that rights exist contradicts himself since, by his very engaging in the cooperative and conflict-free activity of argumentation, he necessarily recognizes the right of his listener to be free to listen, think, and decide. That is, any participant in discourse presupposes the non-aggression principle, the libertarian view that one may not initiate force against others. Thus, according to Hoppe, anyone who would ever deny the ethics underlying the free market is already, by his very engaging in the civilized activity of discourse, presupposing the very ethic that he is challenging. This is a powerful argument because, instead of seeking to persuade someone to accept a new position, it points out to him a position that he already maintains, a position that he necessarily maintains. Opponents of liberty undercut their own position as soon as they begin to state it.

霍普指出，论证作为一种行动形式，意味着利用个体的身体这一稀缺资源，从而确立了自我所有权的概念。个体必须控制或拥有这一稀缺资源，方能展开有意义的对话论证。这是因为，从本质上讲，论证是一种无冲突的互动方式，它旨在通过语言的力量探寻真理、确立真理，并试图说服他人或被他人说服。若个体在威胁之下被迫接

受他人的陈述或真理主张，这往往无法触及真理，而真理无疑是论证或对话的终极目标。因此，任何参与论证的人都隐含地预设了其他论证参与者的自我所有权，否则他人便无法自由地思考、接受或拒绝所提出的论点。唯有至少隐含地承认每个人对自己身体的财产权，真正的论证才得以进行。当这种权利不被承认时，该活动便不再是论证，而是演变为威胁、赤裸裸的侵犯，或是肢体冲突。因此，任何否认权利存在的人都是自相矛盾的，因为他在参与协同且无冲突的论证活动时，必然承认听众拥有自由倾听、思考和决定的权利。换言之，所有对话参与者都以“互不侵犯原则”为前提，这是自由意志主义中关于禁止对他人使用武力的核心理念。因此，霍普认为，任何否认自由市场伦理的人，在参与文明的对话交流活动时，已然预设了其所不赞同的伦理。这一论证颇具说服力，因为它并非试图说服某人接受新立场，而是揭示出对方已然坚持的立场，一个他必然坚持的立场。自由的反对者，在其开口之际，便已动摇了自己的立论基础。

Hoppe then extends his case for self-ownership to external resources, to show that property rights in external scarce resources, in addition to self-ownership rights, are also presupposed by discourse. As he argues, “one’s body is indeed the prototype of a scarce good for the use of which property rights, that is, rights of exclusive ownership, somehow have to be established, in order to avoid clashes.”⁶ As Hoppe explains,

*The compatibility of this principle with that of nonaggression can be demonstrated by means of an argumentum a contrario. First, it should be noted that if no one had the right to acquire and control anything except his own body ... then we would all cease to exist and the problem of the justification of normative statements ... simply would not exist. The existence of this problem is only possible because we are alive, and our existence is due to the fact that we do not, indeed cannot, accept a norm outlawing property in other scarce goods next and in addition to that of one’s physical body. Hence, the right to acquire such goods must be assumed to exist.*⁷

霍普随后将自我所有权的论证扩展至外部资源，阐明除了自我所有权之外，外部稀缺资源的财产权同样以对话为前提。正如他所论述的：“一个人的身体无疑是稀缺物品的原型，为避免冲突，必须以某种方式确立其使用的财产权，即排他性所有权。”⁶

⁶ Hoppe, A Theory of Socialism and Capitalism, at 19. In recent years I have tried to emphasize that **scarce** in this technical economic sense does not mean merely **rare** but rivalrous, or **not-superabundant**, and have sometimes employed the term

正如霍普所解释的，

这一原则与互不侵犯原则的兼容性可以通过反证法来证明。首先，需要指出的是，如果除了自己的身体之外，任何人都无权获取和控制任何东西，那么我们都将不复存在，规范性声明的正当性问题也就无从谈起。这个问题之所以可能存在，正是因为我们还活着。而我们之所以存在，是因为我们不接受，事实上也无法接受这样一种规范，即除了个人身体之外，其他稀缺物品的财产权也是非法的。因此，必须假定获取这些物品的权利是存在的。⁷

Next, Hoppe argues that the only ownership rule that is compatible with self-ownership and the presuppositions of discourse is the Lockean original-appropriation rule.⁸ Hoppe's basic point here is that self-ownership rights are established just because one's body is itself a scarce (conflictible) resource, so other scarce resources must be similarly ownable.⁹

接下来，霍普认为，唯一与自我所有权和对话预设相容的所有权规则是洛克式的先占规则。⁸ 霍普在此提出的基本观点是，自我所有权的成立，仅仅因为一个人的身体本身就是一种稀缺（冲突）资源，因此其他稀缺资源也必须同样可以被拥有。⁹

Looked at from another angle, participants in argumentation indisputably need to use and control the scarce resources in the world to survive; otherwise, they would perish. But because their scarcity makes conflict over the uses of resources possible, only norms

“conflictability” to avoid confusion and to forestall equivocation. See Stephan Kinsella, “On Conflictability and Conflictible Resources,” StephanKinsella.com (Jan. 31, 2022); also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), text at n.29; “What Libertarianism Is” (ch. 2), n.5.

霍普，《社会主义与资本主义理论》，第 19 页。近年来，我一直试图强调，这种技术经济学意义上的“稀缺”并不仅仅指“稀少”，而是指竞争性，或“并非供大于求”，有时我也使用“冲突性”一词，以避免混淆和模棱两可。见斯蒂芬·金塞拉，《论冲突性与可引发冲突的资源》，StephanKinsella.com（2022 年 1 月 31 日）；另见《<反对知识产权>二十年后：回顾与展望》（第 15 章），正文见注释 29；《何为自由意志主义》，（第 2 章），注释 5。

⁷ Ibid., at 161. 同上，第 161 页

⁸ Ibid., at 160–69. 同上，第 160–169 页

⁹ See note 21, below, for one view of the U.S. Supreme Court regarding the connection between property and other rights.

关于美国最高法院对财产权与其他权利之间联系的看法，见下文注释 21。

that determine the proper ownership can avoid conflict over these scarce goods. That such norms are valuable cannot be denied, 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 (i.e., conflictible) resources.

从另一个角度来看，论证的参与者无疑需要利用和控制稀缺的存世资源以维持生存；否则，他们将面临灭亡。然而，资源的稀缺性使得人们在资源使用过程中可能产生冲突。因此，唯有确立合理的所有权规范，方能避免在稀缺物品上的冲突。我们无法否认这种规范的重要性，因为任何生活在这个世界并参与论证实践的人，都无法否认掌控稀缺资源的价值，以及避免在这些稀缺资源（即易引发冲突的资源）上发生冲突的必要性。

So no one could ever deny that norms for determining the ownership of scarce goods are useful for allowing conflict-free exploitation of such resources. But, as Hoppe points out, 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, that is, the Lockean concept of mixing of labor, or homesteading; or (2) simply by verbal declaration or decree. However, a rule that allows property to be owned by mere verbal declaration cannot serve to avoid conflicts, since any number of people could at any time assert conflicting claims of ownership over any particular scarce resource. Only the first alternative, that of Lockean homesteading, establishes an objective (or, as Hoppe sometimes calls it, intersubjectively ascertainable) link between a particular person and a particular scarce resource, and thus no one can deny the Lockean right to homestead unowned resources.

因此，无人能否认，确立稀缺物品所有权的规范有助于在无冲突的情况下有效利用这些资源。然而，正如霍普所指出的，获取无主财产的权利仅有两种基本途径：(1) 通过对之前无人涉足的事物进行某种形式的劳动投入，即洛克式的劳动混合概念，或称之为拓殖；(2) 仅凭口头声明或法令。然而，单凭口头声明便拥有财产的规则并不能避免冲突，因为任何数量的人都有可能在任何时刻对某一特定稀缺资源提出相互矛盾的所有权主张。唯有第一种途径，即洛克式的拓殖，能够在特定个体与特定稀缺资源之间建立客观的（或如霍普有时所言，主体间可确定的）联系，从而无人能够否认洛克式对无主资源的拓殖权。

二、论证伦理学和自然权利

Argumentation Ethics and Natural Rights

Before closing this section let me emphasize that Hoppe offered his theory as an improvement on traditional natural rights arguments. For one, by focusing on argumentation instead of action,¹⁰ he seeks to avoid one weakness of previous arguments:

It has been a common quarrel with the natural rights position, even on the part of sympathetic readers, that the concept of human nature is far "too diffuse and varied to provide a determinate set of contents of natural law."¹¹

在结束本节之前，请允许我强调，霍普提出他的理论是对传统自然权利论证的一种改进。首先，他将重点放在论证而非行动上，¹⁰ 他试图避免以往论证的一个不足：

针对自然权利立场的常见批评（甚至来自持同情态度的读者）在于：人性概念过于“模糊多变，无法为自然法提供一套确定的内容体系”。¹¹

¹⁰ See text at note 46, below. 见下文注释 46。

¹¹ Hoppe, *A Theory of Socialism and Capitalism*, p. 156 n.118, quoting Alan Gewirth, "Law, Action, and Morality," in *Georgetown Symposium on Ethics: Essays in Honor of Henry B. Veatch*, R. Porreco, ed. (New York: University Press of America, 1984), p. 73); see also "The Undeniable Morality of Capitalism" (ch. 22), at n. 31. This point should not be confused with:

H.L.A. Hart's notion of the minimum content of the natural law [which Hart] introduces to show that the constraints on the nature of law imposed by the human condition are very weak indeed, whereas Barnett invokes Hart's notion in support of what, at first blush, might seem to be the opposite conclusion, i.e., that fundamental problems of human nature impose very strong constraints on the content of the law. This seeming opposition is dissolved once we appreciate that Hart introduced his idea to show that nature imposes very weak constraints on the concept of law, that is, on what can count as a "law," from the point of view of philosophical analysis... Barnett uses Hart's terminology for the very different purpose of showing that nature imposes very strong constraints on what laws can be justified... Barnett would not claim that his argument establishes that compliance with his liberal conception of justice is required for a norm to count as a law.

Lawrence B. Solum, "The Foundations of Liberty" [review of the first edition of Barnett's

Hoppe is also critical of classical natural rights reasoning insofar as it violates the is-ought gap. As he writes: “[O]ne can readily subscribe to the almost generally accepted view that the gulf between ‘ought’ and ‘is’ is logically unbridgeable.”¹² Argumentation ethics attempts to sidestep this issue by remaining in the realm of is-statements:

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—a priori true is-statement; (b) argumentation presupposes property in one’s body and the homesteading principle—a priori true is-statement; and (c) then, no deviation from this ethic can be

s The Structure of Liberty], Mich. L. Rev. 97, no. 6 (May 1999); <https://repository.law.umich.edu/mlr/vol97/iss6/26/>: 1780 – 1812, p. 1782 n.4 (citations omitted). See also H.L.A. Hart, The Concept of Law 3d ed. (Oxford: Oxford University Press, 2012 [1961]), chap. IX, § 2, “The Minimum Content of Natural Law”; Barnett, The Structure of Liberty: Justice and the Rule of Law, pp. 11 – 12 (discussing this aspect of Hart’s work) and 332 – 34 (discussing Solum’s criticism of Barnett in this regard).

霍普，《社会主义与资本主义理论》，第 156 页注释 118，引用艾伦·格维希《法律、行动与道德》，载于《乔治城伦理学研讨会：纪念亨利·B·维奇的论文集》，R.波雷科编辑（纽约：美国大学出版社，1984 年），第 73 页；另见《资本主义不可否认的道德》（第二十二章），注释 31。这一点不应与以下观点混淆：

H.L.A.哈特的自然法最低内容的概念[哈特]引入该概念是为了表明人类状况对法律性质的限制实际上非常微弱，而巴尼特援引哈特的概念来支持乍一看似乎是相反的结论，即人性的基本问题对法律内容施加了非常强大的限制。一旦我们意识到哈特引入他的想法是为了表明自然对法律概念施加的限制非常微弱，也就是说，从哲学分析的角度来看，什么可以算作“法律”，这种表面上的对立就会化解……巴尼特使用哈特的术语是为了非常不同的目的，即表明自然对什么法律可以被证明是合理的施加了非常强大的限制……巴尼特不会声称他的论点确立了遵守他的自由主义正义概念是一项规范算作法律的必要条件。

劳伦斯·B·索卢姆，《自由的基础》[对巴尼特《自由的结构》第一版的评论]，《密歇根法律评论》第 97 卷，第 6 期（1999 年 5 月）：1780 1812，第 1782 页注释 4（引用省略）。另见 H.L.A.哈特，《法律的概念》第 3 版（牛津：牛津大学出版社，2012[1961]），第九章，第 2 节，“自然法的最低内容”；巴尼特，《自由的结构：正义与法治》，第 11 12 页（讨论哈特作品的这一方面）和第 332 334 页（讨论索卢姆在这方面对巴尼特的批评）。

argumentatively justified—a priori true is-statement.¹²

霍普对古典自然权利推理同样持批判态度，认为其无法跨越“实然-应然”鸿沟。正如他所写：“人们很容易认同这个几乎被普遍接受的观点——‘应然’与‘实然’之间的鸿沟在逻辑上是不可逾越的。”¹² 论证伦理学试图通过停留在实然陈述的领域来规避这个问题：

在这里，自由意志主义的行动学论证的优势在于为私有财产提供了一个价值无涉的理由。这一论证完全属于“实然”命题的范畴，避免了从“实然”推导出“应然”的企图。论证的结构如下：(a) 论证基于命题性论证——即先验正确的“实然”命题；(b) 论证的前提涉及个人的身体财产和拓殖原则——同样是先验正确的“实然”命题；(c) 因此，任何偏离这一伦理的行为都无法被论证为正当——依然属于先验正确的“实然”命题。¹³

Thus, as Hoppe writes:

The relationship between our approach and a “natural rights” approach can now be described in some detail, too. The natural law or natural rights tradition of philosophic thought holds that universally valid norms can be discerned by means of reason as grounded in the very nature of man. It has been a common quarrel with this position, even on the part of sympathetic readers, that the concept of human nature is far “too diffuse and varied to provide a determinate set of contents of natural law.” ... Furthermore, its description of rationality is equally ambiguous in that it does not seem to distinguish between the role of reason in establishing empirical laws of nature on the one hand, and normative laws of human conduct on the other. ...

因此，霍普写道：

我们采用的方法与“自然权利”方法之间的关系现在也可以得到更详细的

¹² Hoppe, *A Theory of Socialism and Capitalism*, p. 163 (citing W.D. Hudson, ed., *The Is-Ought Question* (London: Macmillan, 1969)).

霍普，《社会主义和资本主义理论》，第 163 页(引自 W.D. 哈德森主编的《实然-应然问题》(伦敦:麦克米伦出版社，1969 年))。

¹³ Hoppe, *The Economics and Ethics of Private Property*, p. 345. See also “The Undeniable Morality of Capitalism” (ch. 22), at n. 31.

霍普《私有财产的经济学和伦理学》，第 345 页。另见《资本主义不可否认的道德》(第二十二章)，注释 31。

阐述。自然法或自然权利的哲学思想传统认为，普遍有效的规范可以通过植根于人类本质的理性来辨识。对这一立场常见的质疑（甚至来自同情态度的读者）是：人性概念“过于模糊多变，难以提供一套确定的自然法内容”……此外，该传统对理性的描述同样模棱两可，因为它似乎未能区分理性在确立自然经验法则与人类行为规范法则方面的不同作用……

In recognizing the narrower concept of argumentation (instead of the wider one of human nature) as the necessary starting point in deriving an ethic, and in assigning to moral reasoning the status of a priori reasoning, clearly to be distinguished from the role of reason performed in empirical research, our approach not only claims to avoid these difficulties from the outset, but claims thereby to be at once more straightforward and rigorous. Still, to thus dissociate myself from the natural rights tradition is not to say that I could not agree with its critical assessment of most of contemporary ethical theory; indeed I do agree with H. Veatch's complementary refutation of all desire (teleological, utilitarian) ethics as well as all duty (deontological) ethics... Nor do I claim that it is impossible to interpret my approach as falling in a "rightly conceived" natural rights tradition after all. What I claim, though, is that the following approach is clearly out of line with what the natural rights approach has actually come to be, and that it owes nothing to this tradition as it stands.¹⁴

我们的方法认可狭义的论证概念（而非广义的人性概念）作为推导伦理的必要起点，并赋予道德推理以先验推理的地位。这明显区别于理性在经验研究中的作用。我们的方法不仅要求从一开始就避免这些困难，还进一步要求更加直接和严谨。尽管如此，我这样与自然权利传统划清界限，并不意味着我不同意它对大多数当代伦理学理论的批判性评价。事实上，我确实赞同维奇（H. Veatch）对所有欲望（目的论、功利主义）伦理学以及所有责任（义务论）伦理学的补充性驳斥。我也不认为我的方法完全不可能被解读为属于“正确理解”的自然权利传统。然而我要声明的是，下文所述的方法显然与自然权利理论的实际发展轨迹相悖，且就现状而言，它并未从这一传统中汲取任何养分。¹⁴

¹⁴ Hoppe, A Theory of Socialism and Capitalism, pp. 156 - 57, n.118 (citations omitted). It should be noted that other thinkers have glimpsed the idea that the requirements of human reason and reasoning/discourse itself can help to inform which norms can be justified, but none of them recognize the crucial importance of scarcity and praxeological action as Hoppe does, so their arguments only go so far or end in error

And this, perhaps, part of the reason why Rothbard gave a wholehearted endorsement to Hoppe's argumentation ethics:

In a dazzling breakthrough for political philosophy in general and for libertarianism in particular, he [Hoppe] 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 hard-core manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison.¹⁵

而这，或许正是罗斯巴德对霍普的论证伦理学给予全力支持的部分原因：

对于一般政治哲学，特别是自由意志主义而言，这无疑是一个引人注目的突破。霍普成功地超越了自经院哲学时代以来一直困扰哲学体系的著名“实然-应然”、“事实-价值”二分法，这种二分法曾使现代自由意志主义陷入令人乏味的僵局。不仅如此，汉斯-霍普以一种前所未有的硬核方式为无政府资本主义和洛克式权利奠定了坚实论据，相较之下，我的自然法/自然权利立场几乎显得微不足道。¹⁵

(e.g. supporting welfare rights). See, e.g., Solum, “The Foundations of Liberty,” p. 1809 (“The justification for a conception of justice can be limited to the resources of public reason, the common reason of all the rational and reasonable members of a community.”); Rawls, Political Liberalism, Lectures IV and VI, and Part Four; Barnett, The Structure of Liberty: Justice and the Rule of Law, pp. 332 – 34.

See also Hoppe’ s criticism of Gewirth’ s argument for rights in the section “Pilon and Gewirth on the Principle of Generic Consistency,” below.

霍普《社会主义与资本主义理论》，第 156-57 页，注释 118(引用省略)。需要指出的是，其他思想家也瞥见了人类理性和推理/对话本身的要求有助于告知哪些规范可以被正当化的观点，但他们都没有像霍普那样认识到稀缺性和行动学的行动的至关重要性，因此他们的论证只能到此为止或以错误告终（如支持福利权）。参见，例如，索卢姆，《自由的基础》，第 1809 页（“正义概念的正当性可以局限于公共理性的资源，即一个社群中所有理性和理性成员的共同理性”）；罗尔斯：《政治自由主义》第四、六讲及第四部分；巴尼特《自由的结构：正义与法治》，第 332-334 页。

另见在下文“皮隆 和 格维希 关于一般一致性原则”一节中霍普对格维希权利论证的批评。

¹⁵ Murray N. Rothbard, “Beyond Is and Ought,” Liberty 2, no. 2 (Nov. 1988; <https://perma.cc/A5UU-P64A>): 44 – 45, at 44. The late Leland Yeager claimed that Rothbard,

who died in January 1995, had changed his mind before his death regarding the validity of Hoppe's argument, even after endorsing it in 1988. Leland B. Yeager, "Book Review," Rev. Austrian Econ. 9, no. 1 (1996; <https://perma.cc/UDC3-UQ3Z>): 181 – 88 (reviewing Murray N. Rothbard, *Economic Thought Before Adam Smith and Classical Economics*, vols. 1 and 2 of *An Austrian Perspective on the History of Economic Thought* (Aldershot, England and Brookfield, Vt.: Edward Elgar, 1995; <https://perma.cc/3ABN-9FD2>)). Yeager asserts that, based on language in this posthumously-published treatise: Rothbard no longer endorses Hans-Hermann Hoppe's claim to derive libertarian policy positions purely from the circumstances of discussion itself, without any appeal to value judgments.... On the contrary, and as he had done earlier, Rothbard now correctly observes that policy recommendations and decisions presuppose value judgments as well as positive analysis. (p. 185)

穆瑞·N·罗斯巴德,《超越实然与应然》,《自由》第2卷,第2期(1988年11月):44-45,第44页。已故的利兰·耶格尔声称,1995年1月去世的罗斯巴德在去世前改变了对霍普论点有效性的看法,即使他在1988年表示支持。利兰·B·耶格尔,“书评”,《奥地利经济学评论》第9卷,第1期(1996年;<https://perma.cc/UDC3-UQ3Z>):181-188(评论穆瑞·N·罗斯巴德的《亚当·斯密之前的经济思想与古典经济学,奥地利学派视角下的经济思想史第1卷和第2卷》(奥尔德肖特,英格兰和布鲁克菲尔德,佛蒙特州:爱德华·埃尔加,1995年;<https://perma.cc/3ABN-9FD2>))。

耶格尔断言,基于这部死后出版的论文中的语言:

罗斯巴德不再支持汉斯·赫尔曼·霍普声称纯粹从讨论本身的情况推导出自由意志主义政策立场,而不诉诸任何价值判断的观点.....相反,正如他早些时候所做的那样,罗斯巴德现在正确地指出,政策建议和决策预设了价值判断以及实证分析。(第185页)

There is no doubt that Yeager himself sees no merit in Hoppe's argumentation ethics. See Leland B. Yeager, "Raw Assertions," Liberty 2, no. 2 (Nov. 1988; <https://perma.cc/A5UU-P64A>): 45 – 46. However, Yeager provides no evidence for his contention about Rothbard's change of mind. It is undoubtedly wrong.

毫无疑问,耶格尔本人认为霍普的论证伦理学毫无价值。见利兰·B·耶格尔,《原始断言》,《自由》第2卷,第2期(1988年11月):45-46页。然而,耶格尔对于他有关罗斯巴德改变想法的论点并没有提供证据。这无疑是错误的。

Hoppe's argumentation ethics has drawn a number of critics and defenders since its debut in the mid-1980s, and continues to attract attention. See generally Stephan Kinsella, "Argumentation Ethics and Liberty: A Concise Guide," StephanKinsella.com (May 27, 2011); and idem, "Hoppe's Argumentation Ethics and Its Critics," StephanKinsella.com (Aug. 11, 2015). See also Chris Matthew Sciabarra, *Total Freedom: Toward a Dialectical Libertarianism* (Penn State University Press, 2000), pp. 367 – 69 (discussing Hoppe's argumentation ethics as well as my own estoppel views and other dialectical approaches); and Bissell, Sciabarra & Younkins, "Introduction," in Bissell, Sciabarra & Younkins, eds., *The Dialectics of Liberty* (discussing the estoppel theory). Several scholars have responded to Bob Murphy &

Gene Callahan, “Hans-Hermann Hoppe’s Argumentation Ethic: A Critique,” Anti-state.com (Sept. 19, 2002), republished in substantially similar form as “Hans-Hermann Hoppe’s Argumentation Ethic: A Critique,” J. Libertarian Stud. 20, no. 2 (2006; <https://mises.org/library/hans-hermann-hoppes-argumentation-ethic-critique>): 53 – 64, including: “Defending Argumentation Ethics” (ch. 7); Frank van Dun, “Argumentation Ethics and the Philosophy of Freedom,” Libertarian Papers 1, art. no. 19 (2009; www.libertarianpapers.org); Marian Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics,” Libertarian Papers 1, art. no. 20 (2009; www.libertarianpapers.org); Walter Block, “Rejoinder to Murphy and Callahan on Hoppe’s Argumentation Ethics,” J. Libertarian Stud. 22, no. 1 (2011; www.walterblock.com); and Norbert Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” Analiza i Egzystencja 58 (2022), 35 – 64.

自 20 世纪 80 年代中期首次问世以来，霍普的论证伦理学吸引了众多批评者和捍卫者，并持续受到关注。总体而言，参见斯蒂芬·金塞拉的《论证伦理学与自由：简明指南》，StephanKinsella.com（2011 年 5 月 27 日）；以及同上的《霍普的论证伦理及其批评者》，StephanKinsella.com（2015 年 8 月 11 日）。另见克里斯·马修·夏巴拉的《完全自由：走向辩证的自由意志主义》（宾夕法尼亚州立大学出版社，2000 年），第 367-369 页（讨论了霍普的论证伦理以及我自己的禁止反言观点和其他辩证方法）；以及比塞尔、夏巴拉和扬金斯的《导论》，收录于比塞尔、夏巴拉和扬金斯编辑的《自由的辩证法》（讨论了禁止反言理论）。有几位学者回应了鲍勃·墨菲和吉恩·卡拉汉的《汉斯·赫尔曼·霍普的论证伦理学：一篇批评》，Anti-state.com（2002 年 9 月 19 日），该文以基本相似的形式重新发表为《**汉斯·赫尔曼·霍普的论证伦理：一篇批评**》，《自由意志主义研究杂志》第 20 卷，第 2 期（2006 年）：53-64 页，包括《捍卫论证伦理学》（第 7 章）；弗兰克·范·邓恩的《论证伦理学与自由的哲学》，《自由意志主义论文》第 1 卷，第 19 号（2009 年；www.libertarianpapers.org）；玛丽安·埃布拉斯的《**对当前针对霍普论证伦理学的批评的回应**》，《自由意志主义论文》第 1 卷，第 20 号（2009 年）；沃尔特·布洛克的《就霍普的论证伦理学对墨菲和卡拉汉的反驳》，《自由意志主义研究杂志》第 22 卷，第 1 期（2011 年；www.walterblock.com）；以及诺伯特·斯伦佐克的《自由意志主义论证伦理学、语言的先验语用学和无冲突自由原则》，《分析与存在》第 58 期（2022 年），35-64 页。

Hoppe re-presented his argument and responded to a variety of critics in his 2016 speech, at “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016),” The Property and Freedom Podcast, ep. 163 (June 30, 2022), stating:

Some later critics, in particular Robert Murphy and Gene Callahan, who apparently accepted my libertarian conclusion but rejected my way of deriving it (without, however, proposing any alternative reason for their own libertarian “beliefs”), were argumentatively demolished by Stephan Kinsella, Frank van Dun and also Marian

三、禁止反言

Another rationalist-oriented justification of rights is an argument I developed based on the common-law concept of estoppel.¹⁶ As one legal treatise explains:

The word estoppel means "not permitted to deny." If A makes a statement of fact that B relies on in some substantial way, A will not be permitted to deny it (that is, A will be estopped), if the effect of A's denial would be to injure the party who relies on it.¹⁷

另一种基于理性主义视角的权利正当性论证，是我借鉴普通法中的禁止反言原则¹⁶所提出的理论。正如某部法律论著所阐释的那样：

"禁止反言"一词的含义为"不允许否认"。若 A 作出某项事实陈述，而 B 在重要事项上依赖该陈述，则当 A 的否认行为将损害依赖方利益时，A 将被禁止否认该事实（换言之，A 将被禁止反言）。¹⁷

Thus, under the traditional legal principle of estoppel, a person may be prevented, or estopped, from maintaining something (for example in court) inconsistent with his previous conduct or statements. For instance, if a father promises his daughter that he will pay her college tuition for her, and the daughter relies on this promise to her detriment, for example by enrolling in college and becoming obligated to the college for her tuition, then she may be able to recover some of her expenses from her father, even if his original promise is not enforceable as a normal contract (for example,

Eabrasu.
霍普在他 2016 年的演讲中再次阐述了他的论点，并回应了各色批评者，在“PFP163 | 汉斯-赫尔曼·霍普，《关于论证伦理学》（PFS 2016）”，《财产与自由播客》，第 163 期（2022 年 6 月 30 日）中说道：
“一些后来的批评者，特别是罗伯特·墨菲和吉恩·卡拉汉，他们显然接受了我的自由意志主义结论，但拒绝了我推导它的方式（然而，没有为他们自己的自由意志主义‘信念’提出任何替代理由），在论证上被斯蒂芬·金塞拉、弗兰克·范·邓恩以及玛丽安·埃布拉斯击败了。”
¹⁶ See references at note *, above. 见上文注释 * 中的参考资料。
¹⁷ 伯纳德·F·卡塔尔多等人，《法律及法律程序导论》，第 3 版（纽约：约翰·威利父子公司，1980 年），第 479 页。另见美国法学会，《法重述（第二版）》（明尼苏达州圣保罗：美国法学会出版社，1981 年），第 90 条；《路易斯安那民法典》，第 1967 条。另见《自由意志主义的惩罚与权利理论》（第 5 章）第三部分 A 中的参考文献。

because there was no consideration).¹⁸ The father would be estopped from denying that a contract was formed, even though, technically, one was not.

因此，依据禁止反言的传统法律原则，可以阻止或禁止某人坚持（例如在法庭上）与其先前行为或陈述相悖的主张。例如，若父亲向女儿承诺支付其大学学费，且女儿基于此承诺而采取行动并遭受损失，如进入大学并开始承担学费，即便他最初的承诺无法作为普通契约强制执行（例如，因缺乏对价），女儿仍有权向父亲追讨部分费用。

¹⁸ 在此情况下，这位父亲将被禁止否认契约成立，尽管严格来说契约并未形成。

Drawing on this legal terminology and concept, the approach I advance may be termed “dialogical” estoppel, or simply estoppel. 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.

借鉴这一法律术语及其概念，我所提出的方法可称为“对话式禁止反言”，或简称为“禁止反言”。禁止反言原则指出，若侵犯者反对他人行使其权利，则会陷入自相矛盾的境地。因此，与霍普的论证伦理学方法不同——后者侧重于一般的对话预设，并阐明任何对话参与者若否认这些预设便会自相矛盾——禁止反言理论则聚焦于侵犯者与其受害者之间关于对侵犯者惩罚的对话，旨在揭示侵犯者若反对对其施加的惩罚，便会陷入自我矛盾的状态。

What would it mean to have a right? Whatever else rights might be, certainly it is the case that rights are legitimately enforceable; that is, one who is physically able to

¹⁸ See, for example, *Zimmerman v. Zimmerman*, 447 N.Y.S.2d 675 (App. Div. 1982), from which this example was derived. For another recent example concerning a Bitcoin-related defamation lawsuit, see “A Libertarian Theory of Punishment and Rights” (ch. 5), at n.23.

例如，参见 *Zimmerman v. Zimmerman*, 447 N.Y.S.2d 675 (App. Div. 1982)，此示例即源自该案。关于另一个近期与比特币相关的诽谤诉讼的例子，见《自由意志主义的惩罚与权利理论》（第 5 章）注释 23。

enforce his right may not be prevented from doing so. In short, having a right allows one to legitimately punish the violator of the right or to legitimately use force to prevent another from violating the right. The only way one could be said not to have a right would be if the attempt to punish a violator of the right is for some reason unjustifiable. But clearly this problem itself can arise only when the alleged criminal objects to being punished, for if criminals consented to punishment, we would not face the problem of justifying punishing them.¹⁹

拥有权利意味着什么？无论权利的性质如何，权利无疑是能够合法行使的。换言之，只要一个人具备行使自身权利的能力，他人便无权阻止。简而言之，拥有一项权利，即意味着可以合法地惩处侵犯该权利的行为，或合法地动用武力防止他人侵犯该权利。唯一能断言某人无权的情况是，试图惩处侵犯权利者的行为因某种原因显得不正当。然而，显而易见的是，这一问题仅在受指控的罪犯反对接受惩罚时才会凸显，因为若罪犯自愿接受惩罚，我们便不会面临惩罚是否正当的疑问。¹⁹

¹⁹ Of course, an accused criminal need not engage in discourse with his accuser at all. But if the criminal is to put forward an objection to his punishment, he must engage in argumentation and thus be subject to the rules of argumentation. As Hare noted in a similar context:

Just as one cannot win a game of chess against an opponent who will not make any moves—and just as one cannot argue mathematically with a person who will not commit himself to any mathematical statements—so moral argument is impossible with a man who will make no moral judgments at all.... Such a person is not entering the arena of moral dispute, and therefore it is impossible to contest with him. He is compelled also—and this is important—to abjure the protection of morality for his own interests.

当然，被指控的罪犯根本无需与指控者进行对话。但如果罪犯要对其惩罚提出异议，他就必须参与论证，从而受到论证规则的约束。正如黑尔在类似的情境中所指出的：正如一个人无法与一个根本不采取任何行动的对手赢得一场国际象棋比赛——正如一个人无法与一个根本不作出任何数学陈述的人进行数学论证——所以与一个根本不作任何道德判断的人进行道德论证是不可能的……这样的人没有进入道德争议的舞台，因此不可能与他论证。而且重要的是，他还被迫放弃了自身利益而寻求道德的保护。

R.M. Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963), § 6.6 (emphasis added). See also Hannah Arendt’s justification of the execution of Adolf Eichmann:

[]Just as you [Eichmann] supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should

The estoppel argument contends that we have rights just because no aggressor could ever meaningfully object to being punished. Thus, if the only potential obstacle to having a legitimately enforceable right is the unconsenting criminal, and if he is estopped from objecting to his punishment, then the right may be said to exist, or be justified, since, in effect, the criminal cannot deny this.

禁止反言的论点主张，我们之所以拥有权利，仅仅是因为没有任何侵犯者能够实质性地反对受到惩罚。因此，如果拥有一项可合法行使的权利的唯一潜在障碍是持反对意见的罪犯，并且该罪犯被禁止对所受惩罚提出异议，那么这项权利就可以被视为存在的或正当的，因为实际上罪犯无法对此进行否认。

So why is this the case? Why is a criminal estopped in this manner? Consider: if B is a violent aggressor, such as a murderer or rapist, how could he not consent to any punishment that A, the victim (or the victim's agent), attempts to inflict? To object to his punishment, B must engage in discourse with A; he must at least temporarily adopt the stance of a peaceful, civilized person trying to persuade A, through the use of reason and consistent, universalizable principles, to provide reasons as to why A should not punish him. But to do this, B must in essence claim that A should not use force against him (B), and to do this, B must claim that it is wrong, or unjustifiable, to use

not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.

Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin, 2006), p. 279.

For other, similar quotes, see Kinsella, “Quotes on the Logic of Liberty,” StephanKinsella.com (June 22, 2009).

R.M. 黑尔，《自由与理性》（牛津：克拉伦登出版社，1963 年），第 6.6 节（重点补充）。另见汉娜·阿伦特对阿道夫·艾希曼被处决的正当理由：

“[就像]你[艾希曼]支持并执行了一种不想与犹太人民和其他一些民族的人民共享地球的政策——似乎你和你的上级有任何权利决定谁应该和谁不应该居住在这个世界上——我们发现，没有人，也就是说，没有任何人类成员，能够被期望与你共享地球。这就是原因，而且是唯一的原因，你必须被绞死。”

汉娜·阿伦特，《艾希曼在耶路撒冷：关于平庸之恶的报告》（企鹅出版社，2006 年），第 279 页。

如需其他类似引述，请见金塞拉的《关于自由逻辑的引述》，StephanKinsella.com（2009 年 6 月 22 日）。

force. But since he has initiated force, he has admitted that (he believes that) it is proper to use force, and B would contradict himself if he were to claim the opposite. Since contradictions are always false²⁰ and since an undeniable goal of discourse is to establish truth, such contradictions are ruled out of bounds in discourse, since they cannot tend to establish truth. Thus, B is estopped from making this contradictory assertion, and is therefore unable to object to his punishment.

那么为何会出现这种情况？为何要以这种方式阻止罪犯抗辩？试想：若 B 是暴力侵害者（如杀人犯或强奸犯），他如何才能反对受害者 A（或其代理人）对其施加的任何惩罚呢？要反对惩罚，B 必须与 A 进行对话；他至少需要暂时扮演一个试图通过理性与普适性原则说服 A 的文明的和平者，提供 A 不应惩罚他的理由。但这样做时，B 本质上是在主张 A 不应对其使用暴力——而这就等于宣称使用暴力是错误的、不正当的。由于 B 自身已率先使用暴力，相当于承认（其认为）使用暴力具有正当性，此时若主张相反立场则显然自相矛盾。鉴于矛盾命题必然为假，²⁰ 且对话的根本目的在于确立真理，这种自相矛盾的论述在对话中自然被排除——因其无助于真相的建立。因此，B 被禁止提出这种矛盾主张，从而无法反对对其施加的惩罚。

Under the estoppel theory, then, we may enforce our rights against violent aggressors, since they cannot object to the enforcement of rights without self-contradiction.²¹

那么，根据禁止反言理论，我们可以对武力侵犯者实施我们的权利，因为他们无法在不自相矛盾的情况下反对权利的实施。²¹

²⁰ See “A Libertarian Theory of Punishment and Rights” (ch. 5), n.29 and accompanying text.

见《自由意志主义的惩罚与权利理论》（第 5 章），注释 29 及附文。

²¹ As Hoppe’s argumentation ethics approach grounds self-ownership rights and then is extended to cover property rights, so the estoppel argument may also be extended to cover property rights and the Lockean homesteading principle, essentially by showing that self-ownership rights presuppose the right to homestead, because one is meaningless without the other. See “A Libertarian Theory of Punishment and Rights” (ch. 5), Part III.F. As the U.S. Supreme Court has recognized, “The right to enjoy property without lawful deprivation ... is in truth a ‘personal’ right.... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (emphasis added). But see the famous (infamous, to

四、权利怀疑主义

RIGHTS-SKEPTICISM

A third type of rights argument concerns the very nature of rights themselves and shows how any rights-skeptic contradicts himself whenever he denies that rights exist. It is similar to the estoppel approach outlined above, although the discourse under examination need not involve an aggressor. Instead, this argument focuses on rights-skeptics who deny the existence of rights, rather than on actual criminals who object to being punished in particular instances for a given crime.

第三种权利论证聚焦于权利的本质，揭示权利怀疑论者在否定权利存在时如何陷入自相矛盾。此论证与上文提到的禁止反言方法相仿，但所探讨的对话不必涉及侵权者。相反，该论证主要针对否认权利存在的权利怀疑论者，而非那些在特定情况下因特定罪行应受惩罚的实际罪犯。

If any right at all exists, it is a right of A to have or do X without B's preventing it; and, therefore, A can legitimately use force against B to enforce the right.²² A is concerned with the enforceability of his right to X, and this enforceability is all that A requires in order to be secure in his right to X. For a rights-skeptic meaningfully to challenge A's asserted right, the skeptic must challenge the enforceability of the right, instead of merely challenging the existence of the right. Nothing less will do. If the skeptic does

some of us) footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (implying that economic and property rights are less fundamental than personal rights).

正如霍普的论证伦理方法奠定了自我所有权的权利基础，然后扩展到涵盖财产权，禁止反言的论点也可以扩展到涵盖财产权和洛克式的先占原则，本质上是通过表明自我所有权预设了先占的权利，因为两者缺一不可。见《自由意志主义的惩罚与权利理论》（第 5 章），第三部分 F 节。正如美国最高法院所承认的，“在没有合法剥夺的情况下享有财产的权利……实际上是一种‘个人’权利……事实上，个人的自由权利和个人的财产权利之间存在着基本的相互依存关系。没有对方，任何一方都没有意义。财产权是基本的公民权利这一点早已得到认可。” *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972)（重点补充）。但请参见美国诉卡罗琳产品公司案（*United States v. Carolene Products Co.*）中著名（对我们中的一些人来说是声名狼藉）的注释 4，304 U.S. 144, 152 n.4 (1938)（暗示经济和财产权利不如个人权利基本）。

not deny that A's proposed enforcement of his purported right is legitimate, then the skeptic has not denied A's right to X, because what it means to have a right is to be able to legitimately enforce it. If the skeptic maintains, then, that A has no right to X, indeed, no rights at all since there are no rights, the skeptic must also maintain that A's enforcement of his purported right to X is not justified.

如果存在任何权利，那么这项权利就是 A 拥有或实施 X 而不受 B 阻止的权利；因此，A 可以合法地对 B 使用武力来强制执行这项权利。²² A 关注的是其对 X 权利的可

²² Many definitions of the concept “rights” have been offered. See, e.g., Antony Flew, *A Dictionary of Philosophy*, rev’d 2d ed. (New York: St. Martin’s Press, 1984), p. 306 (defining “rights”); idem, “What is a ‘Right’?”, *Georgia L. Rev.* 13 (1979): 1117 – 41; Alan Gewirth, “The Basis and Content of Human Rights,” *Georgia L. Rev.* 13 (1979): 1143 – 70, at 1148; Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cook, ed. (New Haven, Conn.: Yale University Press, 1946), p. 30 et passim (discussing four senses of “rights” and explaining that a right is a three-term relation between a right-holder, a type of action, and one or more other persons); Albert Kocourek, *Jural Relations* (Indianapolis: Bobbs-Merrill, 1927), p. 7; Lomasky, *Persons, Rights, and the Moral Community*, p. 101; Machan, *Individuals and Their Rights*, pp. 1 – 2; Narveson, *The Libertarian Idea*, chap. 5; Nozick, *Anarchy, State, and Utopia*, pp. 29 – 30; Ayn Rand, “Man’s Rights,” in Rand, *The Virtue of Selfishness*, pp. 29 – 30; Rasmussen and Den Uyl, *Liberty and Nature*, p. 111. One of the clearest, non-tautological definitions of rights of which I am aware is Sadowsky’s: When we say that one has the right to do certain things we mean this and only this, that it would be immoral for another, alone or in combination, to stop him from doing this by the use of physical force or the threat thereof. We do not mean that any use a man makes of his property within the limits set forth is necessarily a moral use. 关于“权利”这一概念，已经有很多定义。例如，参见安东尼·弗卢，《哲学词典》，修订第 2 版（纽约：圣马丁出版社，1984 年），第 306 页（对“权利”的定义）；同上，“什么是‘权利’？”，《佐治亚法律评论》第 13 卷（1979 年）：1117 1141 页；艾伦·格维思，“人权的基础和内容”，《佐治亚法律评论》第 13 卷（1979 年）：1143 1170 页，第 1148 页；韦斯利·N·霍菲尔德，《应用于司法推理的基本法律概念》，W.W. 库克编辑（康涅狄格州纽黑文：耶鲁大学出版社，1946 年），第 30 页及后续页（讨论了“权利”的四种含义，并解释说权利是权利所有者、行动类型和一个或多个其他人之间的三项关系）；阿尔伯特·科库雷克，《法律关系》（印第安纳波利斯：鲍勃斯 梅里尔，1927 年），第 7 页；洛马斯克，《人、权利和道德共同体》，第 101 页；马钱，《个人及其权利》，第 12 页；纳夫森，《自由主义理念》，第 5 章；诺齐克，《无政府、国家与乌托邦》，第 29 30 页；安·兰德，“人的权利”，载于兰德，《自私的美德》，第 29 30 页；拉斯穆森和登·尤尔，《自由与自然》，第 111 页。我所知道的最清晰、非同义反复的权利定义之一是萨多斯基的：

执行性，而这种可执行性就是 A 为确保其对 X 的权利所需要的一切。对于一个权利怀疑论者来说，要有意义地质疑 A 所主张的权利，怀疑论者必须质疑该权利的可执行性，

当我们说某人有权做某些事情时，我们的意思仅此而已，即另一个人单独或联合他人通过使用有形的武力或武力威胁阻止他这样做是不道德的。我们并不是说一个人在规定的范围内对其财产的任何使用必然是道德的使用。

James A. Sadowsky, “Private Property and Collective Ownership,” in *The Libertarian Alternative*, Tibor R. Machan, ed. (Chicago: Nelson-Hall Co., 1974), pp. 120 – 21. Whatever the definition, however, it seems clear that the concept of rights and the concept of enforceability are mutually dependent in the sense discussed in the text.

Note: I now am of the view that rights are best viewed as metanorms that direct us as to which laws are just, not directly to personal behavior. Most libertarians would view rights as a subset of morality; not everything that is immoral should be illegal, but every rights violation is necessarily immoral. I believe the sets are intersecting sets only. Just as some immoral actions are not rights violations, some rights violations might be morally mandatory (breaking into a cabin to feed your baby in the middle of a storm). I do believe most rights violations are immoral, though libertarianism itself cannot make this determination. For more on rights as metanorms, see Douglas B. Rasmussen & Douglas J. Den Uyl, “Why Individual Rights? Rights as Metanormative Principles,” in *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics* (Pennsylvania State University Press, 2005):

An individual’s right to liberty is thus not in essence a normative principle. Rather, it is a metanormative principle. In other words, it is concerned with the creation, interpretation, and justification of a political/legal context in which the possibility of the pursuit of flourishing is secured.

詹姆斯·A·萨多斯基，《私有财产与集体所有权》，载于《自由意志主义的选择》，蒂博尔·R·马钱编辑（芝加哥：尼尔森 霍尔公司，1974 年），第 120 121 页。然而，无论定义如何，在文中所讨论的意义上，权利的概念和可执行性的概念似乎显然是相互依存的。

注：我现在认为，权利最好被视为元规范，指导我们哪些法律是正义的，而不是直接针对个人行为。大多数自由主义者会将权利视为道德的一个子集；并非所有不道德的事情都应该是非法的，但每一次侵犯权利必然是不道德的。我认为这两个集合只是相交的集合。正如一些不道德的行为不是侵犯权利，一些侵犯权利的行为可能在道德上是强制性的（在暴风雨中闯入小屋为你的婴儿喂食）。不过，我确实相信大多数侵犯权利的行为都是不道德的，尽管自由意志主义本身无法做出这种确定。关于权利作为元规范的更多内容，参见道格拉斯·B·拉斯穆森和道格拉斯·J·登·尤尔，《为什么是个人权利？作为元规范原则的权利》，载于《自由的规范：非完美主义政治的完美主义基础》（宾夕法尼亚州立大学出版社，2005 年）：

因此，个人的自由权利本质上不是一个规范原则。相反，它是一个元规范原则。换句话说，它关注的是创建、解释和证明一个政治/法律背景，在其中确保追求繁荣的可能性。

而不仅仅是质疑该权利的存在。仅此而已。如果怀疑论者不否认 A 对其声称权利所提出的强制执行是合法的，那么怀疑论者就没有否认 A 对 X 的权利，因为拥有权利的意义在于能够合法地强制执行它。如果怀疑论者坚持认为 A 对 X 没有权利，事实上，由于权利根本不存在，A 没有任何权利，那么怀疑论者还必须坚持认为 A 对其声称的 X 权利的强制执行是不正当的。

But the problem faced by the skeptic here is that he assumes that enforcement—that is, the use of force—requires justification. A, however, cares not that the rights-skeptic merely challenges A's use of force against B. The rights-skeptic must do more than express his preference that A not enforce his right against B, for such an expression does not attack the legitimacy of A's enforcing his right against B. The only way for the skeptic meaningfully to challenge A's enforcement action is to acknowledge that B may use force to prevent A's (illegitimate) enforcement action. And here the rights-skeptic (perversely) undercuts his own position, because by recognizing the legitimacy of B's use of force against A, the rights-skeptic effectively attributes rights to B himself, the right not to have unjustifiable force used against him. In short, for anyone to meaningfully maintain that A has no rights against B on the grounds that no rights exist, he must effectively attribute rights to B so that B may defend himself against A's purportedly unwarranted enforcement action.

然而，怀疑论者在此面临一个难题：他们假定执行行动——即使用武力——需要正当理由。但是，A 并不关心权利怀疑论者仅仅质疑其对 B 使用武力的行为。权利怀疑论者必须做的远不止表达希望 A 不要对 B 行使权利，因为这种表达并未触及 A 对 B 行使权利的合法性。怀疑论者要质疑 A 的强制行动，唯一途径是承认 B 有权使用武力来阻止 A 的（非法）强制行为。在此过程中，权利怀疑论者（反常地）削弱了自己的立场，因为通过承认 B 对 A 使用武力的合法性，他们实际上赋予了 B 本身一项权利——即不被不正当武力对待的权利。简言之，任何人若要以“不存在权利”为由，有意义地坚持认为 A 对 B 没有权利，就必须有效地将权利赋予 B，以便 B 能够针对 A 的所谓不正当的强制行动进行自卫。

More common-sensically, this demonstration points out the inconsistency on the part of a rights-skeptic who engages in discourse about the propriety of rights at all. If there are no rights, then there is no such thing as the justifiable or legitimate use of force, but neither is there such a thing as the unjust use of force. But if there is no unjust use of force, what is it, exactly, that a rights-skeptic is concerned about? If individuals delude

themselves into thinking that they have natural rights, and, acting on this assumption, go about enforcing these rights as if they are true, the skeptic has no grounds to complain. To the extent the skeptic complains about people enforcing these illusory rights, he begins to attribute rights to those having force used against them. Any rights-skeptic can only shut up, because he contradicts himself the moment he objects to others' acting as if they have rights.²³

更通俗地讲，这一论证揭示了权利怀疑论者在探讨权利正当性时的自相矛盾之处。若否认权利的存在，那么既不存在正当或合法使用武力的问题，也同样不存在不正当使用武力的问题。然而，若真的不存在不正当使用武力的情况，权利怀疑论者所关注的焦点又是什么呢？如果人们误以为自己拥有自然权利，并基于这种假设行事，仿佛这些权利真实存在般去维护它们，那么怀疑论者便无理由提出异议。当怀疑论者指责人们维护这些虚幻权利时，他实际上已经开始承认那些遭受武力者的权利。任何权利怀疑论者都只能保持沉默，因为一旦他反对他人以拥有权利的方式行事，就立即陷入了自相矛盾的境地。²³

²³ Indeed, another way to respond to a rights-skeptic would be to propose to physically harm him. If there are no rights, as he maintains, then he cannot object to being harmed. So, presumably, any rights-skeptic would change his position and admit there were rights (if only so as to be able to object to being harmed)—or there would soon be no more rights-skeptics left alive to give rights-advocates any guff. See also Murray Rothbard, “On The Duty Of Natural Outlaws To Shut Up,” *New Libertarian* (April 1985; <https://mises.org/library/duty-natural-outlaws-shut>):

The nihilists remind me of the classic bore at college bull sessions: “Nyah, nyah, prove to me that this chair exists!” Trying desperately for “proof” accomplishes nothing, of course, to wipe the mocking smile off the face of the Outlaw. In a deep sense, and on many levels, the proper riposte is to hit the Outlaw over the head with the chair. For one thing, the purpose of philosophic discourse is, or should be, to arrive mutually at the truth, not to engage in parlor games or verbal fencing. To engage in such games, to be a bravura pest for pest’s sake, is to put oneself outside the realm of rational discourse. (But this, of course, is a moral as well as factual statement!)

事实上，回应权利怀疑论者的另一种方式是提议对他进行身体伤害。如果像他所坚持的那样不存在权利，那么他就不能反对受到伤害。所以，大概任何权利怀疑论者都会改变立场并承认存在权利（哪怕只是为了能够反对受到伤害）——否则很快就不会有活着的权利怀疑论者来给权利倡导者找麻烦了。另见穆瑞·罗斯巴德，《论自然法外者闭嘴的义务》，《新自由意志主义者》（1985年4月；<https://mises.org/library/duty-natural-outlaws-shut>）：

这些虚无主义者让我想起大学里闲聊时的那种令人厌烦的经典人物：“哎呀，哎呀，证明给我看这把椅子存在！”拼命寻求“证明”当然无法消除这个法外者脸上嘲弄的笑容。从深层意义上说，在很多层面上，恰当的回应是用这把椅子砸这个法外者的头。一方面，哲学讨论的目的是，或者应该是，相互达成真理，而不是参与客厅游戏或言语上的剑术。参与这样的游戏，为了捣乱而捣乱，就是把自己置于理性讨论的范围之外。（但这当然既是道德陈述也是事实陈述！）

See also Hans-Hermann Hoppe, “In Defense of Extreme Rationalism,” in *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf), p. 310:

Why should we follow [McCloskey’s] advice of paying attention to talk and not resorting to violence, particularly in view of the fact that what is advocated here is talk of the sort where anything goes and where everything said is just as good a candidate for one’s attention as anything else? It certainly is not evident that one should pay much attention to talk if that is what talk is all about! Moreover, it would be downright fatal to follow this ethic. For any viable human ethic must evidently allow people to do things other than talk, if only to have a single human survivor who could possibly have any ethical questions; McCloskey’s talk-ethic, however, gives us precisely such deadly advice of never to stop talking or stop listening to others talk. In addition, McCloskey himself and his fellow hermeneuticians must admit that they can have no objective ground for proposing their ethic anyway. For if there are no objective standards of truth, then it must also be the case that one’s ethical proposals cannot claim to be objectively justifiable either. But what is wrong, then, with not being persuaded by all of this and, rather than listening further, hitting McCloskey on the head straightaway rather than waiting until he perishes from following his own prescription of endless talk? Clearly, if McCloskey were right, nothing could be said to be objectively wrong with this.

The arguments directed here against rights-skeptics also apply, *mutatis mutandis*, to radical pacifists—that is, to those who claim not just that pacifism is preferred morally or tactically, but that victims of aggression are not entitled to use force in self-defense or that victims somehow violate the rights of their aggressors.

另见汉斯·赫尔曼·霍普，《捍卫极致理性主义》，载于《伟大的虚构：财产、经济、社会与衰落的政治》（第二版扩充版，米塞斯研究院，2021年；www.hanshoppe.com/tgf），第310页：

为什么我们要遵循[麦克洛斯基]的建议，关注谈话而不诉诸武力，特别是考虑到这里所倡导的是那种随心所欲、所说的一切都与其他任何东西一样值得关注的谈话？如果谈话就是这样，那么一个人应该非常关注谈话，这一点当然不明显！此外，遵循这种伦理将是彻头彻尾的致命的。因为任何可行的人类伦理显然都必须允许人们做除了谈话之外的事情，哪怕只是为了有一个可能有任何伦理问题的人类幸存者；然而，麦克洛斯基的谈话伦理恰恰给了我们这样致命的建议，即永远不要停止谈话或停止倾听他人谈话。此外，麦克洛斯基本人和他的解释学同仁们必须承认，他们无论如何都没有提出他们的伦理的客观依据。因为如果没有客观的真理标准，那么也一定是这样的情况，即一个人的伦理提议也不能声称在客观上是合理的。但是，如果麦克洛斯基是对的，那么对于不被这一切所说服，而不是进一步倾听，直接打麦克洛斯基的头而不是等到

五、其他与理性主义相关的理论

OTHER RATIONALIST-RELATED THEORIES

In addition to the three approaches discussed above, other arguments, which also point out the inherent presuppositions of discourse or action, are briefly discussed below.

除上述三种方法外，下文还将简要讨论其他论点，这些论点也指出了对话或行动的内在预设。

G.B. 麦迪逊以及论证伦理学相关的理论家们

G.B. Madison and Argumentation Ethics-Related Theorists

One approach that is similar to Hoppe's argumentation ethics is that of philosopher G.B. Madison. Madison argues that

the various values defended by liberalism are not arbitrary, a matter of mere personal preference, nor do they derive from some natural law.⋯ Rather, they are nothing less and nothing more than what could be called the operative presuppositions or intrinsic features and demands of communicative rationality itself. In other words, they are values that are implicitly recognized and affirmed by everyone by the very fact of their engaging in communicative reason. This amounts to saying that no one can rationally deny them without at the same time denying reason, without self-contradiction, without in fact abandoning all attempts to persuade the other and to reach agreement.²⁴

哲学家麦迪逊（G.B. Madison）的方法与霍普的论证伦理学相似。麦迪逊认为

自由主义所捍卫的各种价值并非任意武断，也非纯粹个人偏好的问题，更非源自某种自然法则……这些价值恰恰可被称为交往理性本身的运作前提或内在特征与要求。换言之，凡是参与交往理性活动的人，都已在事实上隐

他因遵循自己无休止谈话的处方而死亡，有什么错呢？显然，如果麦克洛斯基是对的，那么对此没有什么可以说是客观上错误的。

这里针对权利怀疑论者的论点，经必要修改后，也适用于激进的和平主义者——也就是说，适用于那些不仅声称和平主义在道德上或策略上更可取，而且声称侵犯的受害者无权使用武力自卫，或者受害者在某种程度上侵犯了侵犯者权利的人。

性地承认并肯定了这些价值。这意味着：任何人若想理性地否定这些价值，就必然同时否定理性本身，陷入自我矛盾，实质上放弃所有说服他人与达成共识的尝试。²⁴

These implicitly recognized values include a renunciation of the legitimacy of violence. Thus, “it is absolutely impossible for anyone who claims to be rational, which is to say human, outrightly to defend violence.”²⁵

这些隐含的公认价值观包括对暴力合法性的摒弃。因此，“任何自称理性之人，也就是人类，绝对不可能公然为暴力辩护”。²⁵

²⁴ G.B. Madison, *The Logic of Liberty* (New York: Greenwood Press, 1986), p. 266.

G.B. 麦迪逊，《自由的逻辑》（纽约：格林伍德出版社，1986 年），第 266 页。

²⁵ Ibid., p. 267. See also Kinsella, “Quotes on the Logic of Liberty,” and n. 19, above. Madison and Hoppe both draw on the “discourse ethics” of Jürgen Habermas and Karl-Otto Apel. See, e.g., Jürgen Habermas, “Discourse Ethics: Notes on a Program of Philosophical Justification,” and Karl-Otto Apel, “Is the Ethics of the Ideal Communication Community a Utopia? On the Relationship between Ethics, Utopia, and the Critique of Utopia,” both in Seyla Benhabib & Fred Dallmayr, eds., *The Communicative Ethics Controversy* (Cambridge, Mass.: MIT Press, 1990). Douglas Rasmussen has criticized both Habermas’ s discourse ethics and Hoppe’ s argumentation ethics. See Douglas B. Rasmussen, “Political Legitimacy and Discourse Ethics,” *International Philosophical Quarterly* 32 (1992; <https://perma.cc/MK59-QEVV>): 17 – 34 (on Habermas) and idem, “Arguing and Y-ing,” *Liberty* 2, no. 2 (Nov. 1988; <https://perma.cc/A5UU-P64A>): 50 (on Hoppe). The latter article was part of a symposium, “Breakthrough or Buncombe” (pp. 44 – 53), containing discussion of Hoppe’ s argumentation ethics by several libertarian theorists, and Hoppe’ s reply, “Utilitarians and Randians vs Reason” (53 – 54). This reply and replies to other critics are included in “Appendix: Four Critical Replies” in Hoppe, *The Economics and Ethics of Private Property*; see also subsequent response to critics in idem, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016).”

同上，第 267 页。另见金塞拉的《关于自由逻辑的引述》以及上文注释 19。麦迪逊和霍普都借鉴了尤尔根·哈贝马斯和卡尔·奥托·阿佩尔的“对话伦理学”。例如，参见尤尔根·哈贝马斯的《对话伦理学：关于哲学论证程序的笔记》和卡尔·奥托·阿佩尔的《理想交流共同体的伦理学是乌托邦吗？论伦理学、乌托邦和对乌托邦的批判之间的关系》，均收录于塞拉·本哈比和弗雷德·达尔迈尔编辑的《交流伦理学的争议》（马萨诸塞州剑桥：麻省理工学院出版社，1990 年）。道格拉斯·拉斯穆森对哈贝马斯的对话伦理学和霍普的论证伦理学都提出了批评。参见道格拉斯·B·拉斯穆森的《政治合法性与对话伦理学》，《国际哲学季刊》第 32 卷（1992 年；<https://perma.cc/MK59-QEVV>）：17 34 页（关于哈贝马斯）以及同上的《论证与 Y

Madison continues:

[Paul] Ricoeur writes: "... violence is the opposite of discourse. ... Violence is always the interruption of discourse: discourse is always the interruption of violence." That violence is the opposite of discourse means that it can never justify itself—and is therefore not justifiable—for only through discourse can anything be justified. As the theory of rational argumentation and discussion, liberalism amounts, therefore, to a rejection of power politics.²⁶

麦迪逊继续说道：

保罗·利科尔写道：“.....暴力是对话的反面.....，暴力总是意味着对话的中断：对话亦是暴力的中断。”暴力作为对话的对立面，意味着它永远无法自证其合理性，因而也是不正当的。因为唯有通过对话，任何事物才能被证明为正当。因此，作为理性论证和讨论的理论基础，自由主义本质上等同于对强权政治的否定。²⁶

理论》，《自由》第 2 卷，第 2 期（1988 年 11 月；<https://perma.cc/A5UU-P64A>）：50 页（关于霍普）。后一篇文章是一个专题讨论会《突破还是胡言乱语》（第 44-53 页）的一部分，其中包含几位自由意志主义理论家对霍普论证伦理学的讨论，以及霍普的回应《功利主义者和兰德主义者与理性》（53-54 页）。这一回应以及对其他批评者的回应包含在霍普的《私有财产的经济学与伦理学》的“附录：四则批判性回应”中；另见同上的“PFP163 | 汉斯-赫尔曼·霍普，《关于论证伦理学》（PFS 2016）”中对批评者的后续回应。

²⁶ Madison, *The Logic of Liberty*, pp. 267 & 274, n. 37 (quoting Paul Ricoeur, *Main Trends in Philosophy* (New York: Holmes and Meier, 1979), pp. 226 - 76). Madison also notes that Frank Knight made a similar point. Madison quotes Knight's statement, in his book *Freedom and Reform* (Indianapolis: Liberty Press, 1982), pp. 473 - 74, that: The only “proof” that can be offered for the validity of the liberal position is that we are discussing it and its acceptance is a presupposition of discussion, since discussion is the essence of the position itself. From this point of view, the core of liberalism is a faith in the ultimate potential equality of men as the basis of democracy. See also Frank H. Knight, *On the History and Method of Economics* (Chicago: University of Chicago Press, 1956), p. 268; Kinsella, “Quotes on the Logic of Liberty.”

麦迪逊，《自由的逻辑》，第 267 和 274 页，注释 37（引用保罗·里科尔，《哲学的主要趋势》（纽约：霍姆斯与迈耶出版社，1979 年），第 226-276 页）。麦迪逊还指出，弗兰克·奈特也提出了类似的观点。麦迪逊在他的著作《自由与改革》（印第安纳波利斯：自由出版社，1982 年）第 473-474 页中引用了奈特的陈述：

“能为自由主义立场的有效性提供的唯一‘证明’是，我们正在讨论它，而它的被接

Madison, like Hoppe, argues that the fact-value gap can be bridged by an appeal to the nature of discourse:

the notion of universal human rights and liberties is not an ... arbitrary value, a matter of mere personal preference. ... On the contrary, it is nothing less and nothing more than the operative presupposition or intrinsic feature and demand of communicative rationality itself.²⁷

In a sense, notes Madison, Thomas Jefferson was not so far off in calling our rights "self-evident."

麦迪逊与霍普一样，认为可以通过诉诸对话的本质来弥合事实-价值之间的鸿沟：

普世人权和自由的概念不是.....任意武断的价值判断，也非仅仅是个人的偏好....，恰恰相反，它是交流理性本身的有效前提或内在特征与要求。²⁷

麦迪逊指出，从某种意义上说，托马斯-杰斐逊称我们的权利为 "不证自明的 "并非全无道理。

The general thrust of Madison's argument seems sound, although it is not as consistent or fully developed as Hoppe's argumentation ethics. While Hoppe shows that the nonaggression principle (i.e., self-ownership plus the right to homestead external resources) itself is directly implied by any discourse or argumentation, Madison's train of logic seems more muddled. For instance, he argues that, because discourse has "priority" over violence, this validates the Kantian claim that people ought to be treated as ends rather than means, which is the principle of human dignity. The principle of freedom from coercion then follows from the principle of human dignity. Madison does not specify in any more detail than this the libertarian principles that can be derived from such an approach,²⁸ although, to be fair, Madison stresses that his remarks are intended only "to indicate the way in which liberalism must seek to" defend the values

受是讨论的一个预设条件，因为讨论是该立场本身的本质。从这个观点来看，自由主义的核心是对作为民主基础的人类最终潜在平等的信念。”

另见弗兰克·H·奈特，《论经济学的历史与方法》（芝加哥：芝加哥大学出版社，1956年），第 268 页；金塞拉，《关于自由逻辑的引述》。

²⁷ Madison, The Logic of Liberty, p. 269.

麦迪逊，《自由的逻辑》，第 269 页。

it advocates.²⁹

麦迪逊的论证主旨总体看来是合理的，尽管其并未像霍普的论证伦理学那样连贯一致或充分展开。霍普指出，任何对话或论证都直接隐含着互不侵犯原则（即自我所有权加上拓殖外部资源的权利），而麦迪逊的逻辑思路则显得有些混乱。例如，他认为，由于对话“优先于”武力，这就佐证了康德关于人应被视为目的而非手段的主张，即人的尊严原则。由此，从人的尊严原则中引申出了免于强制的原则。尽管麦迪逊并未更详细地阐述从这种方法中可以得出的自由意志主义原则，²⁸ 不过公允地说，他强调自己的论述仅旨在“指明自由主义必须寻求捍卫其倡导价值的方式”。²⁹

Frank van Dun similarly suggests that part of “the ethics of dialogue” is that we ought to respect the “dialogical rights of others—their right to speak or not to speak, to listen or not to listen, to use their own judgment.”³⁰ Van Dun argues that “principles of private property and uncoerced exchange” are also presupposed by participants in discourse and later defended Hoppe’s argumentation ethics.³¹ Jeremy Shearmur also proposes³² that a Habermasian argument may be developed to justify individual property rights and other classical liberal principles, although this argument is different in approach from that of Hoppe, Madison, and Van Dun, and is, in my view, much weaker than Hoppe’s approach.³³

弗兰克·范·邓恩 (Frank van Dun) 同样认为，“对话伦理”的一部分在于我们应尊重“他人对话的权利——包括他们选择说话或不说话、倾听或不倾听，以及运用自身判断的权利”。³⁰ 范·邓恩还指出，“私有财产和无胁迫交换原则”是对话参与者不可或缺的前

²⁸ Madison does maintain that the supreme “ought” or demand of liberalism is “that conflicts of interest and differences of opinion should be resolved through free, open, peaceful discussion aimed at consensus and not by recourse to force.” Ibid., p. 266. 麦迪逊确实主张，自由主义的最高“应当”或要求是“利益冲突和意见分歧应通过自由、公开、和平的讨论来解决，以达成共识，而不是诉诸武力”。同上，第 266 页。

²⁹ Ibid., pp. 269 – 70.

同上，第 269—270 页。

³⁰ Frank van Dun, “Economics and the Limits of Value-Free Science,” Reason Papers 11 (Spring 1986): 24; see also idem, “On the Philosophy of Argument and the Logic of Common Morality,” in Argumentation: Approaches to Theory Formation, E.M. Barth & J.L. Martens, eds. (Amsterdam: John Benjamins, 1982), p. 281; idem, “Argumentation Ethics and The Philosophy of Freedom.”

提，并在此基础之上为霍普的论证伦理学进行辩护。³¹此外，杰里米·希尔默（Jeremy Shearmur）也提出，³²可以通过哈贝马斯式的论证来确立个人财产权和其他经典自由主义原则的合理性。尽管这种论证方法与霍普、麦迪逊和范·邓恩的论证存在差异，且在我看来，其说服力远不及霍普的论证方式。³³

Other theories that are briefly worth mentioning here include Paul Chevigny's theory that the nature of discourse may be used to defend the right to free speech³⁴ and Tibor Machan's view that discourse in general and political dialogue in particular rest on individualist prerequisites or presuppositions.³⁵

在此值得简要提及的其他理论包括保罗·切维尼（Paul Chevigny）的理论，即对话的性质可用于捍卫言论自由权³⁴，以及蒂博尔·马钱（Tibor Machan）的观点，即一般的

弗兰克·范·邓恩（Frank van Dun），《经济学与价值无涉科学的界限》，《理性论文》第 11 期（1986 年春季刊）第 24 页；另见同上，《关于论证的哲学与共同道德的逻辑》，收录于 E.M. 巴特与 J.L. 马滕斯编辑的《论证：理论形成的方法》（阿姆斯特丹：约翰·本杰明出版社，1982 年），第 281 页；同上，《论证伦理学与自由的哲学》。

³¹ Van Dun, "Economics and the Limits of Value-Free Science," p. 28; idem, "Argumentation Ethics and The Philosophy of Freedom."

范·邓恩（Frank van Dun），《经济学与价值无涉科学的界限》，第 28 页；同上，《论证伦理学与自由的哲学》。

³² Jeremy Shearmur, "Habermas: A Critical Approach," Critical Review 2 (1988): 39 – 50, at 47; see also idem, "From Dialogue Rights to Property Rights: Foundations for Hayek's Legal Theory," Critical Review 4 (1990): 106 – 32.

杰里米·希尔默，《哈贝马斯：一种批判性方法》，《批判性评论》第 2 期（1988 年）：第 39 50 页，第 47 页；另见同上，《从对话权利到财产权利：哈耶克法律理论的基础》，《批判性评论》第 4 期（1990 年）：第 106 132 页。

³³ See also Shearmur, "From Dialogue Rights to Property Rights," pp. 106 – 32.

另见希尔默《从对话权利到财产权利》，第 106 132 页。

³⁴ See Paul G. Chevigny, "Philosophy of Language and Free Expression," N.Y. U. L. Rev. 55 (1980): 157 – 94; Michael Martin, "On a New Argument for Freedom of Speech," N.Y. U. L. Rev. 57 (1982): 906 – 19; Paul G. Chevigny, "The Dialogic Right of Free Expression: A Reply to Michael Martin," N.Y. U. L. Rev. 57 (1982): 920 – 31. See also Rodney J. Blackman, "There is There There: Defending the Defenseless with Procedural Natural Law," Ariz. L. Rev. 37 (1995): 285 – 353, which defends a procedural natural-law position on the grounds that, as we normally use language and define "law," "law" has a procedural component that, if adhered to, limits a government's arbitrary

对话，尤其是政治对话，都建立在个人主义的前提或预设之上。³⁵

and irrational use of power. Blackman contends that language users implicitly accept this normative, procedural aspect of what is described as law; they use a definition of law that also limits what state power can be classified as law. Of course, H.L.A. Hart argues that some types of rules or arbitrary commands enforced by a given regime are too unlawful to be considered even positive law. See Hart, *The Concept of Law*, chap. II, § 2; chap. IX, § 3. A somewhat similar argument may be found in Randy E. Barnett, “Getting Normative, the Role of Natural Rights in Constitutional Adjudication,” *Constitutional Commentary* 12 (1995; www.randybarnett.com/pre-2000): 93 - 122, where Barnett argues that those who claim that the U.S. Constitution justifies certain government regulation of individuals are themselves introducing normative claims into discourse, and thus cannot object, on positivist or wertfrei grounds, to a moral or normative criticism of their position. See also idem, “The Intersection of Natural Rights and Positive Constitutional Law,” *Connecticut L. Rev.* 25 (1993; www.randybarnett.com/pre-2000): 853 - 68.

见保罗·G·谢维尼 (Paul G. Chevigny), 《语言哲学与言论自由》, 《纽约大学法律评论》第 55 卷 (1980 年): 157 194 页; 迈克尔·马丁 (Michael Martin), 《关于言论自由的新论点》, 《纽约大学法律评论》第 57 卷 (1982 年): 906 919 页; 保罗·G·谢维尼 (Paul G. Chevigny), 《言论自由的对话权: 对迈克尔·马丁的回应》, 《纽约大学法律评论》第 57 卷 (1982 年): 920 931 页。另见罗德尼·J·布莱克曼 (Rodney J. Blackman), 《那里有那里: 用程序性自然法为无助者辩护》, 《亚利桑那法律评论》第 37 卷 (1995 年): 285 353 页, 该文基于我们通常使用语言和定义“法律”的方式, 为程序性自然法立场进行辩护, 理由是“法律”具有程序性成分, 如果遵循该成分, 将限制政府任意和非理性地使用权力。布莱克曼认为, 语言使用者暗中接受了被描述为法律的这种规范性、程序性方面; 他们对法律的定义也限制了哪些国家权力可以被归类为法律。当然, H.L.A. 哈特 (H.L.A. Hart) 认为, 特定政权强制执行的某些类型的规则或任意命令太不像法律, 甚至不能被视为实在法。见哈特, 《法律的概念》, 第二章, 第 2 节; 第九章, 第 3 节。在兰迪·E·巴尼特 (Randy E. Barnett) 的《走向规范, 自然权利在宪法裁决中的作用》, 《宪法评论》12 卷 (1995 年; www.randybarnett.com/pre-2000): 93 122 中可以找到一个有些类似的论点, 巴尼特认为, 那些声称美国宪法证明某些政府对个人的监管是合理的人, 他们自己在论述中引入了规范性主张, 因此, 不能基于实证主义或价值无涉的理由反对对其立场进行道德或规范性批评。另见同上, 《自然权利与实证宪法法的交集》, 《康涅狄格法律评论》25 卷 (1993 年; www.randybarnett.com/pre-2000): 853 868 。

³⁵ Tibor R. Machan, “Individualism and Political Dialogue,” *Poznan Studies in the Philosophy of Science and the Humanities* 46 (June 1996; https://www.stephankinsella.com/wp-content/uploads/texts/machan_dialogue.pdf): 45 - 55. Several other related theories are mentioned in “The Undeniable Morality of Capitalism” (ch. 22), n.29, e.g. Lawrence B. Solum, “Freedom of Communicative Action:

Murray Rothbard, who was very enthusiastic about Hoppe's argumentation ethics, was also hopeful that Hoppe's argumentation ethics or axiomatic approach could be further extended. As Rothbard stated:

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.³⁶

穆瑞·罗斯巴德 (Murray Rothbard) 对霍普的论证伦理学赞赏有加, 他也希望霍普的论证伦理学或公理化方法能够得到进一步的扩展。正如罗斯巴德所说:

霍普及其他自由意志主义哲学家的未来研究计划将聚焦于以下两方面:
(a) 探讨公理论在多大程度上能够拓展至伦理学的其他领域, 或 (b) 研究这种公理论是否及如何能够与标准的自然法方法相融合。³⁶

A Theory of the First Amendment Freedom of Speech,” Northwestern U. L. Rev. 83 (1989; <https://scholarship.law.georgetown.edu/facpub/1954/>): 54 - 135.

蒂博尔·R·马钱 (Tibor R. Machan), 《个人主义与政治对话》, 《波兹南科学与人文哲学研究》46 卷 (1996 年 6 月; https://www.stephankinsella.com/wp-content/uploads/texts/machan_dialogue.pdf): 45-55 页。在《资本主义不可否认的道德》(第 22 章, 注释 29) 中提到了其他几个相关理论, 例如劳伦斯·B·索卢姆 (Lawrence B. Solum), 《交流行为的自由: 第一修正案言论自由的理论》, 《西北大学法律评论》83 卷 (1989 年; <https://scholarship.law.georgetown.edu/facpub/1954/>): 54-135 页。

³⁶ Rothbard, “Beyond Is and Ought,” p. 45. For some efforts in this direction, see Konrad Graf, “Action-Based Jurisprudence: Praxeological Legal Theory in Relation to Economic Theory, Ethics, and Legal Practice,” Libertarian Papers 3, art. no. 19 (2011; <http://libertarianpapers.org/19-action-based-jurisprudence-praxeological-legal-theory-relation-economic-theory-ethics-legal-practice/>). See also Kinsella, “Extreme Praxeology,” StephanKinsella.com (Jan. 19, 2007). Van Dun also seems to have a somewhat broader conception of the normative or moral implications of discourse ethics than Hoppe explores in his argumentation ethics. See Van Dun, “Argumentation Ethics and the Philosophy of Freedom.”

罗斯巴德, 《超越实然与应然》, 第 45 页。在这个方向上的一些努力, 可参见康拉德·格拉夫, 《基于行动的法理学: 与经济理论、伦理学和法律实践相关的行动学法律理论》, 《自由意志主义论文》第 3 卷, 第 19 号文章 (2011 年)。也可参考斯蒂芬·金塞拉, 《极端行动学》, StephanKinsella.com (2007 年 1 月 19 日)。范·邓恩似乎也有比霍普在其论证伦理学中所探讨的更广泛的关于对话伦理学的规范性或道德含义的概念。参见范·邓恩, 《论证伦理学与自由的哲学》。

The various perspectives of Hoppe, Madison, Van Dun, and others on a similar theme indicate that Rothbard may indeed be correct that this type of rationalist thinking can be further extended in libertarian or ethical theory.³⁷

霍普、麦迪逊、范·邓恩等人针对类似主题所提出的多样化观点，进一步佐证了罗斯巴德可能确实无误的论断。这种理性主义思维方式，有望在自由意志主义或伦理学理论中得到更为深入的拓展。³⁷

³⁷ Madison notes that “it should be possible to derive in a strictly systematic fashion all of the ... universal values” necessary to defend liberalism. Madison, *The Logic of Liberty*, p.268. Concerning extending Hoppe's discourse ethics to natural law, it should be pointed out that both Hoppe and Madison appear skeptical of the validity of classic natural law theory. Madison states that rights are not “a requirement of some natural law existing independently of the reasoning process and discernible only by metaphysical insight into the ‘nature of things’ ” (p. 269); Hoppe states, as noted in text at note 11, above: “It has been a common quarrel with the natural rights position, even on the part of sympathetic readers, that the concept of human nature is far ‘too diffuse and varied to provide a determinate set of contents of natural law’ ”; see also notes 10 – 14, above, and accompanying text; and “The Undeniable Morality of Capitalism” (ch. 22). However, Machan, accepting the validity of action-based ethical theories (similar to Pilon's and Gewirth's approach, discussed below), but not purely-argumentation-based theories, also maintains that “human action needs to be understood by reference to human nature.” Machan, “Individualism and Political Dialogue,” p. 46. See also more of the quote by Machan in note 46 below.

麦迪逊指出，“应当有可能以一种严格系统的方式推导出所有……捍卫自由主义所必需的普遍价值”。麦迪逊，《自由的逻辑》，第 268 页。关于将霍普的对话伦理学扩展到自然法，应当指出，霍普和麦迪逊似乎都对经典自然法理论的有效性表示怀疑。麦迪逊指出，权利并非“某种独立于推理过程而存在的自然法的要求，并且只能通过‘事物的本质’进行形而上学的洞察才能辨别”（第 269 页）；霍普指出，正如上文注释 11 中所提到的：“即使是富有同情心的读者，也普遍对自然权利立场提出质疑，认为人性的概念‘过于分散和多样，无法提供一套确定的自然法内容’”；另见上文注释 10 14 及相关文本；以及《资本主义不可否认的道德》（第 22 章）。然而，马钱接受基于行动的伦理理论（类似于下文讨论的皮隆和格维希的方法）的有效性，但不接受纯粹基于论证的理论，他还坚持认为“人类行为需要参照人性来理解”。马钱，《个人主义与政治对话》，第 46 页。另见下文注释 46 中马钱的更多引述。

克罗克的道德禁止反言理论

Crocker's Moral Estoppel Theory

In a theory bearing some resemblance to the estoppel theory discussed above, law professor Lawrence Crocker proposes the use of “moral estoppel” in preventing a criminal from asserting the unfairness of being punished in certain situations. Crocker’s theory, while interesting, is not rigorous, and Crocker does not seem to realize the implications of estoppel for justifying only the libertarian conception of rights. Rather than focusing on the reciprocity between the force used in punishment and the force of an aggressive act by a wrongdoer, Crocker claims that a person who has “treated another person or the society at large in a fashion that the criminal law prohibits” is “morally estopped” from asserting that his punishment would be unfair.³⁸ However, Crocker’s use of estoppel is too vague and imprecise, and relies on a legal positivist conception of law, for just because one has violated a criminal law does not mean that one has committed the aggression that is necessary to estop him from complaining about punishment. A breached law must first be legitimate (just) for Crocker’s assumption to hold, but as the estoppel theory indicates, a law is legitimate only if it prohibits aggression. Crocker’s theory seems to assume that any law is valid, even those that do not prohibit the initiation of force.

法学教授劳伦斯·克罗克（Lawrence Crocker）的理论与上文讨论的禁止反言理论存在一定的相似之处。他提出使用“道德禁止反言”来阻止罪犯在某些情况下主张受到惩罚的不公平。尽管克罗克的理论颇具趣味，但其严谨性不足。克罗克似乎并未意识到禁止反言最适合证明自由意志主义权利概念的正当性。他并未将重点放在惩罚所使用的武力与不法行为者侵犯行为的武力之间的对等关系上，而是声称一个“以刑法禁止的方式对待他人或整个社会”的人“在道德上被禁止”声称对他的惩罚是不公平的。³⁸

然而，克罗克对禁止反言的运用显得过于模糊和不精确，且依赖于法律实证主义的法律概念。因为一个人违反了刑法，并不意味着他实施了禁止反言对惩罚提出申诉

³⁸ Lawrence Crocker, “The Upper Limit of Just Punishment,” Emory L. J. 41 (1992): 1059 – 1110, at 1067.
劳伦斯·克罗克（Lawrence Crocker），《正义惩罚的上限》，《埃穆瑞法律杂志》41卷（1992 年）：1059 – 1110 页，见 1067 页。

所必需的侵害行为。被违反的法律必须首先是合法的（正义的），克罗克的假设才能成立。但正如禁止反言理论所指出的，法律只有在禁止侵犯时才是合法的。克罗克的理论似乎假定任何法律都是有效的，即便是那些不禁止使用武力的法律。

皮隆和格维尔斯论通用一致性原则

Pilon and Gewirth on the Principle of Generic Consistency

Another rights theory that bears mention here is that of Roger Pilon. Pilon has developed a libertarian version of the theory propounded by his teacher Alan Gewirth.³⁹ Although he disagrees with the non-libertarian conclusions that Gewirth draws from his own rights theory, Pilon builds “upon much of the justificatory groundwork he [Gewirth] has established, for I believe he has located, drawn together, and solved some of the most basic problems in the theory of rights.”⁴⁰

另一个值得关注的权利理论是罗杰·皮隆（Roger Pilon）的理论。皮隆对其导师阿兰·格维尔斯（Alan Gewirth）提出的理论进行了自由意志主义的拓展。³⁹ 尽管皮隆不认同格维尔斯从其权利理论中得出的非自由意志主义结论，但他基于“格维尔斯所构建的诸多合理性基础，因为我相信他已经发现、整合并解决了权利理论中的一些最根本问题”。⁴⁰

³⁹ See Roger A. Pilon, “Ordering Rights Consistently: Or What We Do and Do Not Have Rights To,” *Georgia L. Rev.* 13 (1979; <https://perma.cc/FYX4-CFNH>): 1171 – 96; idem, *A Theory of Rights: Toward Limited Government* (Ph.D. dissertation, University of Chicago, 1979; <https://perma.cc/DGS3-W4UA>). See also Alan Gewirth, *Moral Rationality* (The Lindley Lecture, Univ. of Kansas, 1972; <https://core.ac.uk/download/pdf/213402925.pdf>); also idem, “The Basis and Content of Human Rights,” and idem, *Reason and Morality* (Chicago: University of Chicago Press, 1978).

见罗杰·A·皮隆（Roger A. Pilon），《一致地安排权利：或者我们有和没有权利做什么》，《佐治亚法律评论》13 卷（1979 年；<https://perma.cc/FYX4-CFNH>）：1171 1196 页；同上，《权利理论：走向有限政府》（博士论文，芝加哥大学，1979 年；<https://perma.cc/DGS3-W4UA>）。另见艾伦·格维尔斯（Alan Gewirth），《道德理性》（堪萨斯大学林德利讲座，1972 年；<https://core.ac.uk/download/pdf/213402925.pdf>）；还有同上，《人权的基础和内容》，以及同上，《理性与道德》（芝加哥：芝加哥大学出版社，1978 年）。

⁴⁰ Pilon, “Ordering Rights Consistently,” p. 1173.

To determine what rights we have, Pilon (following Gewirth) focuses on "what it is we necessarily claim about ourselves, if only implicitly, when we act."⁴¹ Pilon argues that all action is conative, that is, an agent acts voluntarily and for purposes which seem good to him. Pilon argues that the prerequisites of successful action are "voluntariness and purposiveness," the so-called generic features that characterize all action. Thus, an agent cannot help valuing these generic features and even making a rights-claim to them, according to Pilon/Gewirth. From this conclusion, it is argued that all agents also necessarily claim rights against coercion and harm. And since it would be inconsistent to maintain that one has rights for these reasons without also admitting that others have these rights too (since the reasoning concerning the nature of action applies equally to all purposive actors), such rights-claims must be universalizable.⁴² As Gewirth writes, the

voluntariness and purposiveness which every agent necessarily has in acting, and which he necessarily claims as rights for himself on the ground that he is a prospective agent who wants to fulfill his purposes, he must also, on pain of self-contradiction, admit to be rights of his recipient.⁴³

为了确定我们拥有哪些权利，皮隆（继格维思之后）将焦点放在“当我们行动时，我们必然对自己提出主张，哪怕只是隐含的主张”。⁴¹皮隆主张所有行为都是意动的，即行为主体出于自愿，并为了在他看来是善的目的而行动。皮隆指出，成功行动的先决条件是“自愿性和目的性”，这是所有行动的普遍特征。因此，根据皮隆和格维思的观点，行动人不得不重视这些普遍特征，甚至对其提出权利主张。由此推论，我们可以认为，所有行动主体也必然会主张免受胁迫和伤害的权利。既然基于这些理由主张自身权利的同时，否认他人同等权利将导致逻辑矛盾（因为关于行动本质的推理同样适用于所有有目的的行动人），那么这类权利主张必须具有普遍适用性。⁴²正如格维思所言，

每个行动人在行动时必然具有自愿性和目的性，以及他作为一个想要实

皮隆，《一致地安排权利》，第 1173 页。

⁴¹ Ibid., p. 1177.

同上，第 1177 页。

⁴² Ibid., p. 1179.

同上，第 1179 页。

现其目的的有预期的行动人而必然主张的权利，他也必须承认是其接受者的权利，否则就会自相矛盾。⁴³

Thus, an agent in any action makes a rights-claim to be free from coercion and harm, since such rights are necessary to provide for the generic features of action, which an agent also necessarily values, and the agent also necessarily grants these rights to others because of the universalizability requirement.

因此，行动人在任何行动中都提出了免受胁迫和伤害的权利主张，因为这种权利是行动的一般特征所必需的，而行动人也必然重视这些特征，而且由于普适性的要求，行动人也必然将这些权利赋予他人。

From this point, Pilon/Gewirth develops a sort of modern categorical imperative, which is called the "Principle of Generic Consistency" (PGC). The PGC is: "Act in accord with the generic rights of your recipients as well as of yourself," and "Recipients are those who stand opposite agents, who are 'affected by' or 'recipients of ' their actions."⁴⁴ Under Pilon's libertarian working of the PGC:

⁴³ Gewirth, *Moral Rationality*, p. 20. On universalizability, see also Kinsella, "The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle," *StephanKinsella.com* (Nov. 10, 2011); Hoppe, *A Theory of Socialism and Capitalism*, p. 157 and n. 119 et pass.; Hare, *Freedom and Reason*, § 11.6 ("It is part of the meanings of ... moral words that we are logically prohibited from making different moral judgements about two cases, when we cannot adduce any difference between the cases which is the ground for the difference in moral judgements"). See also "What Libertarianism Is" (ch. 2), the section "Self-ownership and Conflict Avoidance"; "How We Come to Own Ourselves" (ch. 4), n.15; and "A Libertarian Theory of Punishment and Rights" (ch. 5), Part III.D.2.

格维思，《道德理性》，第 20 页。关于普适性原则，还可参见金塞拉的《特殊主义伦理学的问题，或者说为什么每个人实际上都不得不承认普适性原则的有效性》，*StephanKinsella.com*（2011 年 11 月 10 日）；霍普，《社会主义与资本主义理论》，第 157 页及注释 119 等；黑尔，《自由与理性》，第 11.6 节（“……从逻辑上讲，道德词汇的含义中有一部分规定，当我们无法举出作为不同道德判断依据的案例之间的任何差异时，我们被禁止对两个案例做出不同的道德判断”）。还可参见《何为自由意志主义》（第 2 章）中的“自我所有权与避免冲突”部分；《我们如何拥有自己》（第 4 章），注释 15；以及《自由意志主义的惩罚与权利理论》（第 5 章），第三部分 D.2。

[T]he PGC does not require anyone to do anything. It is addressed to agents, but it does not require anyone to be an agent who has recipients. An individual can “do nothing” if he chooses, spending his life in idle contemplation. Provided there are no recipients of this behavior, he is at perfect liberty to perform it. And if there are recipients, the PGC requires only that he act in accord with the generic rights of those recipients, i.e., that he not coerce or harm them.⁴⁵

从这一点出发，皮隆/格维斯提出了一种现代的绝对命令，即“通用一致性原则”（PGC）。该原则表述为：“你的行为应与接受方及你自己的一般权利相一致”，并且“接受方指的是那些与行动人相对立的人，他们是其行动的‘受影响者’或‘接受者’”。⁴⁴根据皮隆对 PGC 的自由意志主义解释：

通用一致性原则（PGC）并不强制任何人履行特定行为。该原则面向行动人，但并不要求任何人必须成为有接受者的行动主体。个人若愿意，可以选择“无所作为”，在沉思冥想中度过一生。只要这种行为并未涉及接受者，他完全有权自由选择。然而，一旦涉及接受者，PGC 则要求其行为须符合接受者的一般权利，即不得对其施加胁迫或造成伤害。⁴⁵

Pilon extends his reasoning and works the PGC to flesh out more fully just what (primarily libertarian) rights we do have.

皮隆进一步扩展了他的推理，并通过 PGC 更为全面地阐述了我们实际拥有的各项权利，尤其是那些属于自由意志主义范畴的权利。

All this is well done, except for one crucial error. As Hoppe points out, it is argumentation, not action, that is the appropriate starting point for such an analysis, because:

[F]rom the correctly stated fact that in action an agent must, by necessity, presuppose the existence of certain values or goods, it does not follow that such goods then are universalizable and hence should be respected by others as the agent's goods by right. . . . Rather, the idea of truth, or of universalizable rights or goods only emerges with argumentation as a special subclass of actions, but not with action as such, as is clearly revealed by the fact that Gewirth, too, is not engaged simply in action, but more

⁴⁴ Ibid., p. 1184. 同上，第 1184 页。
⁴⁵ Ibid. 同上。

specifically in argumentation when he wants to convince us of the necessary truth of his ethical system.⁴⁶

所有这一切都做得很好，除了一个关键的错误。正如霍普所指出的，这种分析的适当出发点是论证，而不是行动，因为：

行动人在行动过程中不可避免地会预设某些价值观或财产的存在，这一事实无疑是正确的。然而，这并不表明这些价值观和财产具有普适性，因而理应作为行动人的财产而受到他人的尊重。相反，真理的概念，或是普适性的权利和财产概念，只有在作为行动的一个特定子集——论证中才会显现，而非在行动本身中直接出现。这一点从格维思（Gewirth）试图说服我们相信其伦理体系为必然真理时，他不仅是在行动，更确切地说是在进行论证这一事实中，便清晰地展现了出来。⁴⁶

⁴⁶ Hoppe, *The Economics and Ethics of Private Property*, pp. 315 – 16, n. 18. For further criticism and discussion of the Gewirthian argument, see Machan, *Individuals and Their Rights*, pp. 197 – 99; Alisdair MacIntyre, *After Virtue* (Notre Dame, Ind.: University of Notre Dame Press, 1981), pp. 64 – 65; Henry Veatch, *Human Rights: Fact or Fancy?* (Baton Rouge: Louisiana State University Press, 1985), pp. 159 – 60; and Jan Narveson, “Gewirth’s Reason and Morality: A Study in the Hazards of Universalizability in Ethics,” *Dialogue* 19 (1980): 651 – 74. Perhaps somewhat ironically, given his criticisms of Gewirth, Machan seems to agree with Gewirth/Pilon on this issue rather than Hoppe, claiming that

[D]iscourse is not primary. Instead, it is human action itself that is primary, with discourse being only one form of human action. It is the presuppositions of human action that require certain political principles to be respected and protected. And human action needs to be understood by reference to human nature.

Machan, “Individualism and Political Dialogue,” p. 45. In my view, Hoppe’s criticisms of Pilon/Gewirth, as well as his criticism of classical natural rights arguments (see note 37, above), applies also to Machan.

霍普，《私有财产的经济学与伦理学》，第 315 316 页，注释 18。关于对格维思论点的进一步批评和讨论，参见马钱，《个人及其权利》，第 197 199 页；阿拉斯代尔·麦金太尔，《追寻美德》（印第安纳州诺特丹：圣母大学出版社，1981 年），第 64 65 页；亨利·维奇，《人权：事实还是幻想？》（巴吞鲁日：路易斯安那州立大学出版社，1985 年），第 159 160 页；以及扬·纳尔维森，《格维思的理性与道德：伦理学中普适性的危险研究》，《对话》19（1980 年）：651 674。也许有点讽刺的是，鉴于他对格维思的批评，马钱在这个问题上似乎同意格维思/皮隆而不是霍普，主张：[D]对话不是首要的。相反，人的行动本身才是首要的，对话只是人的行动的一种形式。正是人的行动的前提需要某些政治原则得到尊重和保护。而且人的行动需要参照人性

It is possible that, despite this error, much of Pilon's work is salvageable by, in effect, moving it to an argumentation context, such as is done in the estoppel approach where an aggressor must engage in argumentation to object to his punishment and is therefore subject to the unique constraints of argumentation. In other words, the weak link in Pilon's PGC chain may be able to be repaired by considering claims made about prior actions when the agent later objects to punishment, for an objection to being punished requires the agent to enter into the special subclass action of argumentation, to which criteria such as universalizability do apply.

尽管存在这一错误，皮隆的许多研究成果仍具有弥补的可能性。具体方法便是将其置于论证语境之中，类似于禁止反言方法中的操作，即侵犯者必须参与论证才能对所受惩罚提出异议，从而受到论证特有的限制。换句话说，皮隆的 PGC 链条中的薄弱环节或许可以通过考虑行为主体后续对惩罚提出异议时、就其先前行动所提出的主张来修复——因为对惩罚提出异议要求行为主体必须进入论证这一特殊的行动子集，而普适性等标准恰恰适用于此类行动。

六、结论

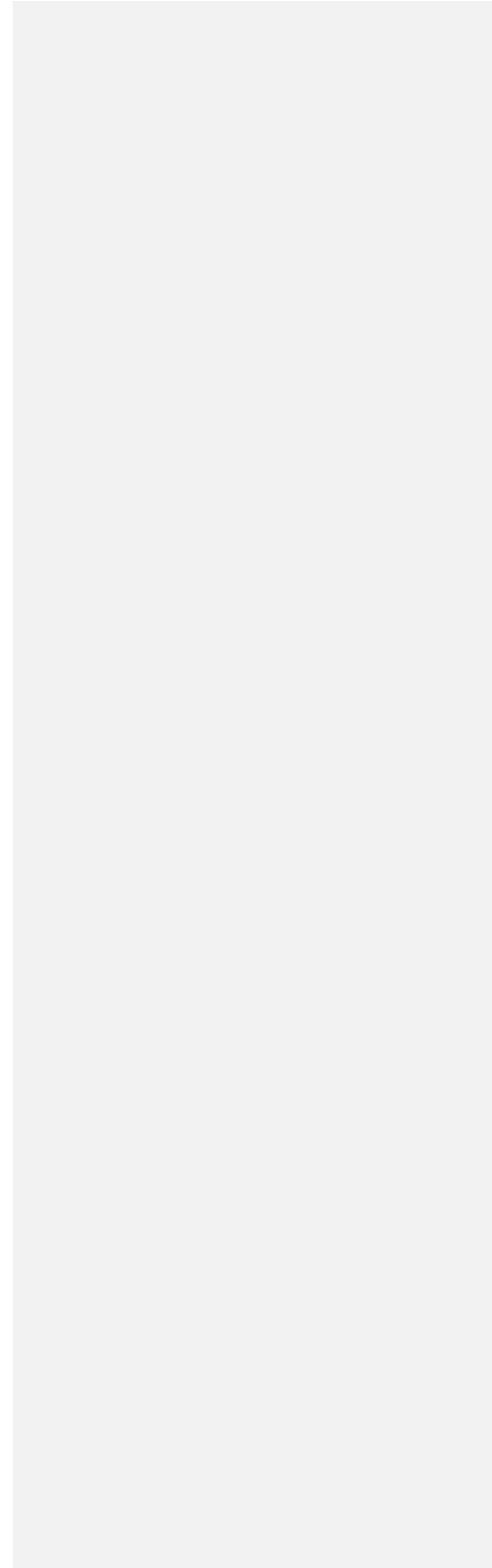
Under the three theories outlined above—argumentation ethics, estoppel theory, and the self-contradictions of rights-skeptics—we can see that the relevant participant in discourse cannot deny the validity of individual rights. These rationalist-oriented theories offer very good defenses of individual rights, defenses that are more powerful than many other approaches, because they show that the opponent of individual rights, whether criminal, skeptic, or socialist, presupposes that they are true. Critics must enter the cathedral of libertarianism even to deny that it exists. This makes criticism of libertarian beliefs hollow: for if someone asks why we believe in individual rights, we can tell them to look in the mirror and find the answer there.

在上述三大理论框架下——论证伦理、禁止反言理论以及权利怀疑论者的自我矛盾——我们可以发现，对话的相关参与者无法否认个体权利的有效性。这些以理性主义为导向的理论为个体权利提供了极佳的辩护，其辩护力度远超其他许多理论路径，

来理解。
马钱，《个人主义与政治对话》，第 45 页。在我看来，霍普对皮隆/格维斯的批评，以及他对古典自然权利论点的批评（见上文注释 37），也适用于马钱。

因为它们揭示出：无论是罪犯、怀疑论者还是社会主义者，个体权利的反对者在提出质疑时，其实都已预设了这些权利的真实性。批评者若要否认自由意志主义的存在，须先登其堂奥，探其理路。这必使其对自由意志主义信念的批判流于空疏：若有人质疑我们为何崇奉个体权利，我们只需让其揽镜自照，答案自现其中。

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第七章 捍卫论证伦理学

Defending Argumentation Ethics

This chapter is based on an article originally published in 2002 on the now-defunct site Anti-state.com, as a response to an article by Robert P. Murphy and Gene Callahan (hereinafter, MC), on the same forum, which was critical of Hoppe's argumentation ethics.*

本章基于 2002 年发表在现已关闭的网站 Anti-state.com 上的一篇文章，旨在回应罗伯特·墨菲（Robert P. Murphy）和吉恩·卡拉汉（Gene Callahan，以下简称 MC）在同一论坛上发表的一篇批评霍普论证伦理学的文章。

I intend here to provide a short guide to the relevant literature followed by a limited response to MC's critique of Hans-Hermann Hoppe's argumentation ethics.

我计划在此提供一份相关文献的简要指南，随后对 MC 针对汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）论证伦理学的批评进行有限的回应。

* My article was "Defending Argumentation Ethics: Reply to Murphy & Callahan," Anti-state.com (Sept. 19, 2002), which is thesis of this chapter. It was a response to Robert P. Murphy & Gene Callahan, "Hans-Hermann Hoppe's Argumentation Ethic: A Critique," Anti-state.com (Sept. 19, 2002; archived at <https://tinyurl.com/5n62x6zc> and <https://perma.cc/D395-3JSW>). The original links for both our pieces are bad (as this was a libertarian publication, 'natch) but MC later published a substantially similar version of their article as "Hans-Hermann Hoppe's Argumentation Ethic: A Critique," J. Libertarian Stud. 20, no. 2 (Spring 2006; <https://mises.org/library/hans-hermann-hoppes-argumentation-ethic-critique>): 53–64. In the later version of their paper they did not respond to my critique. As their earlier paper is no longer online, in this chapter I will reference the later article for quotes and page citations, and sometimes with inline citations.

我的文章《捍卫论证伦理学：回应墨菲和卡拉汉》发表于 Anti-state.com 网站（2002 年 9 月 19 日），构成了本章的核心议题。该文是对罗伯特·P·墨菲和吉恩·卡拉汉所著《汉斯-赫尔曼·霍普的论证伦理学：一篇评论》的回应，同样发布于 Anti-state.com 网站（2002 年 9 月 19 日；存档链接：<https://tinyurl.com/5n62x6zc> 和

<https://perma.cc/D395-3JSW>）。遗憾的是，我们两篇文章的原始链接均已失效（鉴于这是一份自由意志主义的出版物，这在预料之中）。不过，MC 随后在《自由意志主义研究杂志》第 20 卷第 2 期（2006 年春季；链接：<https://mises.org/library/hans-hermann-hoppes-argumentation-ethic-critique>）发表了他们文章的一个基本相似的版本，题为《汉斯-赫尔曼·霍普的论证伦理学：一篇评论》，页码为 53 至 64。在其后期版本中，他们并未对我的批评作出回应。鉴于早期文章已无法在线查阅，本章将引用后期版本进行引用和页码标注，并在必要时采用行内引用。

I later debated my longtime friend Bob Murphy, whose work I greatly respect and admire, on this topic. See Kinsella, "KOL278 | Bob Murphy Show: Debating Hans Hoppe's 'Argumentation Ethics,'" Kinsella on Liberty Podcast (Nov. 24, 2019).

后来，我就这一话题与我的老朋友鲍勃·墨菲展开论证，我对他及其工作怀有深厚的尊重与钦佩之情。详见金塞拉的《KOL278 | 鲍勃·墨菲秀：论证汉斯·霍普的‘论证伦理学’》，收录于金塞拉自由播客（2019 年 11 月 24 日）。

See also various responses to MC and other criticisms of Hoppe, cited in "Dialogical Arguments for Libertarian Rights" (ch. 6), n.15, including Frank van Dun, "Argumentation Ethics and the Philosophy of Freedom," Libertarian Papers 1, art. no. 19 (2009; www.libertarianpapers.org); Marian Eabrasu, "A Reply to the Current Critiques Formulated Against Hoppe's Argumentation Ethics," Libertarian Papers 1, art. no. 20 (2009; www.libertarianpapers.org); Walter Block, "Rejoinder to Murphy and Callahan on Hoppe's Argumentation Ethics," J. Libertarian Stud. 22, no. 1 (2011; <https://mises.org/library/rejoinder-murphy-and-callahan-hoppes-argumentation-ethics>): 631–39; and Norbert Slenzok, "The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle," Analiza i Egzystencja 58 (2022), 35–64. Hoppe re-presented his argument and responded to a variety of critics in his 2016 speech, at "PFP163 | Hans Hermann Hoppe, 'On The Ethics of Argumentation' (PFS 2016)," The Property and Freedom Podcast, ep. 163 (June 30, 2022) (which includes a transcript).

还可参考对 MC 及其他针对霍普批评的各类回应，这些内容在《自由意志主义权利的对话论证》（第 6 章）的注释 15 中有所提及。具体包括：

1. 弗兰克·范·邓恩的《论证伦理学与自由哲学》，发表于《自由意志主义论文》第 1 卷第 19 号文章（2009 年；www.libertarianpapers.org）；

2. 玛丽安·埃布拉苏 (Marian Eabrasu) 的《对当前针对霍普论证伦理学所提出批评的回应》，发表于《自由意志主义论文》第 1 卷第 20 号文章 (2009 年；www.libertarianpapers.org)；

3. 沃尔特·布洛克的《对墨菲和卡拉汉针对霍普论证伦理学的回应》，发表于《自由意志主义研究杂志》第 22 卷第 1 期 (2011 年；<https://mises.org/library/rejoinder-murphy-and-callahan-hoppes-argumentation-ethics>)，第 631-639 页；

4. 诺伯特·斯伦佐克的《自由意志主义论证伦理学、语言的先验语用学和无冲突的自由原则》，发表于《分析与存在》第 58 期 (2022 年)，第 35-64 页。

此外，霍普在 2016 年的演讲中重新阐述了他的论点，并回应了众多批评者的意见。该演讲题为“PFP163 | 汉斯-赫尔曼·霍普，‘关于论证伦理学’ (PFS 2016)”，收录于《财产与自由播客》第 163 期 (2022 年 6 月 30 日发布，并附有文字记录)。

背景

BACKGROUND

Hoppe published several pieces expounding his “argumentation ethics” defense of libertarian rights, including “The Ultimate Justification of the Private Property Ethic” in Liberty magazine in 1988,¹ which resulted in a large number of commentaries from several libertarian thinkers.² Over the next few years, Hoppe's theory was intensely debated and commented on by several libertarians. Several replies and reviews, for example, were published in Liberty and elsewhere, by libertarians such as Murray Rothbard, David Gordon, Tibor Machan, David Friedman, Loren Lomasky, David Osterfeld, Sheldon Richman, Leland Yeager, David Ramsay Steele, Douglas Rasmussen, David Conway, and others. Hoppe responded to many of these pieces at length.³

霍普发表了几篇文章，阐述了他为自由意志主义权利辩护的“论证伦理学”，其中包括 1988 年在《自由》杂志上发表的《私产伦理的终极证成》¹，引起了几位自由意

¹ See Hans-Hermann Hoppe, “The Ultimate Justification of the Private Property Ethic,” Liberty 2, no. 1 (Sept. 1988; <https://perma.cc/6TYM-BJRZ>): 20 – 22, republished as “On the Ultimate Justification of the Ethics of Private Property,” ch. 13 in Hoppe, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy

志主义思想家的广泛关注和评论²。例如，穆瑞·罗斯巴德 (Murray Rothbard)、大卫·戈登 (David Gordon)、蒂博尔·马钱 (Tibor Machan)、大卫·弗里德曼 (David Friedman)、洛伦·洛马斯基 (Loren Lomasky)、大卫·奥斯特菲尔德 (David Osterfeld)、谢尔顿·里奇曼 (Sheldon Richman)、利兰·耶格尔 (Leland Yeager)、大卫·拉姆齐·斯蒂尔 (David Ramsay Steele)、道格拉斯·拉斯穆森 (Douglas Rasmussen)、大卫·康威 (David Conway) 等自由意志主义学者在《自由》等刊物上发表了多篇回应和评论。霍普对其中许多文

(Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp). See also Hoppe, “From the Economics of Laissez Faire to the Libertarianism” and “The Justice of Economic Efficiency,” chaps. 11 – 12 in *The Economics and Ethics of Private Property*; idem, “The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible,” in *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc); and later pieces such as idem, “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). I discuss argumentation ethics in “Dialogical Arguments for Libertarian Rights” (ch. 6); “The Undeniable Morality of Capitalism” (ch. 22); Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” StephanKinsella.com (May 27, 2011); and idem, “Hoppe’s Argumentation Ethics and Its Critics,” StephanKinsella.com (Aug. 11, 2015). 参见汉斯·赫尔曼·霍普，《私产伦理的终极证成》，《自由》2 卷 1 期 (1988 年 9 月; <https://perma.cc/6TYM-BJRZ>)：20 22，再版为《论私产伦理的终极证成》，载于霍普《私有财产的经济学与伦理学：政治经济学与哲学研究》第 13 章 (阿拉巴马州奥本：米塞斯研究院，2006 年 [1993 年]; www.hanshoppe.com/eepp)。也可参见霍普，《从自由放任经济学到自由意志主义》和《经济效率的正义性》，载于《私有财产的经济学与伦理学》第 11 12 章；同上，《资本主义的伦理正当性以及社会主义为何在道德上站不住脚》，载于《社会主义与资本主义理论：经济、政治与伦理》 (阿拉巴马州奥本：米塞斯研究院，2010 年 [1989 年]; www.hanshoppe.com/tsc)；以及后来的作品，如同上，《论共有、公有和私有财产以及全面私有化的基本原理》，载于《伟大的虚构：财产、经济、社会与衰落的政治》 (第二版扩充版，米塞斯研究院，2021 年; www.hanshoppe.com/tgf)。我在《自由意志主义权利的对话论证》 (第 6 章)；《资本主义不可否认的道德》 (第 22 章)；金塞拉，《论证伦理学与自由：简明指南》，StephanKinsella.com (2011 年 5 月 27 日)；以及同上，《霍普的论证伦理学及其批评者》，StephanKinsella.com (2015 年 8 月 11 日) 中皆讨论了论证伦理学。

² See the symposium “Breakthrough or Buncombe,” *Liberty* 2, no. 2 (Nov. 1988; <https://perma.cc/A5UU-P64A>): 44 – 53.

参见专题研讨会《突破还是胡言乱语》，《自由》2 卷 2 期 (1988 年 11 月; <https://perma.cc/A5UU-P64A>)：44 53。

章进行了详尽的回复。³

Several of the replies to Hoppe were unusually nasty and unfair. Some were shocked anyone would argue for “untrammelled anarchism” and others were turned off by the idea that libertarian rights could be rigorously proved.⁴ Others badly misconstrued Hoppe’s argument. Still others, like Rothbard, recognized that Hoppe’s theory was a revolutionary advance in libertarian theory, as have a growing number of adherents over the years. As Rothbard wrote:

In a dazzling breakthrough for political philosophy in general and for libertarianism in particular, he [Hoppe] 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 hard-core manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison.⁵

对霍普的一些回复显得异常尖刻且不公。部分人士对“不受约束的无政府主义”主张感到震惊，而另一些人则对自由意志主义权利能够得到严格证明的观点表示反感。

⁴ 更有甚者，严重曲解了霍普的论点。然而，也有人如罗斯巴德，意识到霍普的理论

³ See Hoppe, “Appendix: Four Critical Replies,” in *The Economics and Ethics of Private Property*; see also idem, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016).” See also references in note *, above.

参见霍普《私有财产的经济与伦理学》中的“附录：四条批判性回复”；也可参见同上“PFP163 | 汉斯-赫尔曼·霍普，《论论证的伦理学》（PFS 2016）”。另请参见上文注释*中的参考文献。

⁴ See, e.g., Loren Lomasky, “The Argument from Mere Argument,” *Liberty* 3, no. 1 (Sept. 1989; <https://perma.cc/38XS-ZDEL>): 55 – 57; Hoppe’s reply, “Intimidation by Argument— Once Again,” *Liberty* 3, no. 2 (Nov. 1989; <https://perma.cc/4382-RKSQ>): 37 – 39, republished as “Intimidation by Argument” section III in “Appendix: Four Critical Replies” (to Lomasky’s complaint that Hoppe’s treatise is “no less than a manifesto for untrammelled anarchism,” Hoppe responds, “Only someone advocating the trammeling of private property rights would take offense”); and Rothbard’s response to Lomasky, “Hoppephobia,” originally published in *Liberty* 3, no. 4 (March 1990; <https://perma.cc/JT7K-YTUU>): 11 – 12, reprinted at [LewRockwell.com](https://perma.cc/5HH6-2P78) (Oct. 4, 2014; <https://perma.cc/5HH6-2P78>):

是自由意志主义理论的革命性突破，并且多年来，越来越多的追随者也开始认同这一点。罗斯巴德曾写道：

对于一般政治哲学，特别是自由意志主义而言，这无疑是一个引人注目的突破。霍普成功地超越了自经院哲学时代以来一直困扰哲学体系的著名“实然-应然”、“事实-价值”二分法，这种二分法曾使现代自由意志主义陷入令人乏味的僵局。不仅如此，汉斯-霍普以一种前所未有的硬核方式为无政府资本主义和洛克式权利奠定了坚实论据，相较之下，我的自然法/自然权利立场几乎显得微不足道。⁵

[Lomasky] is shocked and stunned that Hoppe is not simply a defender of existing capitalism; his book is “no less than a manifesto for untrammelled anarchism.” Well, heavens to Betsy! Anarchism! One wonders where Lomasky has been for the last 20 years! Perhaps the knowledge has not yet penetrated to the fastnesses of Minnesota, but anarchism has been a vibrant part of the libertarian dialogue for a long time, as most readers of Liberty well know.

例如，参见洛伦·洛马斯基（Loren Lomasky）的《仅靠论证的论点》，发表于《自由》第3卷第1期（1989年9月；<https://perma.cc/38XS-ZDEL>）：第55-57页；霍普的回应《再次论证的威胁》，发表于《自由》第3卷第2期（1989年11月；<https://perma.cc/4382-RKSQ>）：第37-39页，该文重新发表于《附录：四条批判性回复》中的《论论证的威胁》第三节（针对洛马斯基抱怨霍普的论文“不亚于一份为无约束的无政府主义的宣言”，霍普回应道，“只有主张限制私有财产权的人才会感到被冒犯”）；以及罗斯巴德（Rothbard）对洛马斯基的回应《霍普恐惧症》，最初发表于《自由》第3卷第4期（1990年3月；<https://perma.cc/JT7K-YTUJ>）：第11-12页，转载于LewRockwell.com（2014年10月4日；<https://perma.cc/5HH6-2P78>）。

[洛马斯基]感到震惊和目瞪口呆，因为霍普不仅仅是现有资本主义的捍卫者；他的书“不亚于一份为无约束的无政府主义的宣言”。哎呀，我的天哪！无政府主义！人们不禁要问，在过去的20年里洛马斯基都在哪里！也许这个认知还没有渗透到明尼苏达州的偏远地区，但正如《自由》的大多数读者所熟知的那样，无政府主义长期以来一直是自由意志主义对话中充满活力的一部分。

⁵ Murray N. Rothbard, “Beyond Is and Ought,” Liberty 2, no. 2 (Nov. 1988; <https://perma.cc/8LZR-DN6Y>; also <https://mises.org/library/beyond-and-ought>): 44 – 45, 44. The hapless Leland Yeager later dishonestly tried to claim that Rothbard disavowed his earlier support for Hoppe’s argumentation ethics before his death. See “Dialogical Arguments for Libertarian Rights” (ch. 6), n.15. Yeager was also confused about about self-ownership and knowledge and the calculation problem. On the former, see “How We Come to Own Ourselves” (ch. 4), n.1; regarding the latter issue, see “Legislation and the Discovery of Law in a Free Society” (ch. 13), at n.66. See also “The Undeniable Morality of Capitalism” (ch. 22), n.2, criticizing Yeager.

穆瑞·N. 罗斯巴德，《超越实然与应然》，《自由》2卷2期（1988年11月；<https://>

Since the original article upon which this chapter is based was published, there have been many more contributions expanding on and defending Hoppe's argumentation ethics. In the years since Hoppe's theory was first published, several scholars have worked to defend, clarify and extend it.⁶ I have also commented and built on Hoppe's work in my own writing.⁷

自本章所依据的原始文章发表以来，诸多文献对霍普的论证伦理学进行了深入的扩展与有力的辩护。自霍普的理论首次面世，多位学者已对其进行了全面的辩护、细致的澄清及广泛的扩展。⁶ 我也在自己的著作中评论并拓展了霍普的研究成果。⁷

To fully appreciate Hoppe's argument and to fairly evaluate MC's critique, I suggest reading Hoppe's own work⁸ and various secondary sources.⁹

为了充分理解霍普的论点并公正地评价 MC 的批评，我建议阅读霍普本人的著

perma.cc/8LZR-DN6Y；也见于 <https://mises.org/library/beyond-and-ought>）：44-45，44 页。倒霉的利兰·耶格尔（Leland Yeager）后来不诚实地试图声称，罗斯巴德在去世前否认了他早期对霍普论证伦理学的支持。见《自由意志主义权利的对话论证》（第 6 章），注释 15。耶格尔在自我所有权以及知识和计算问题上也感到困惑。关于前者，见《我们如何拥有自己》（第 4 章），注释 1；关于后者，见《自由社会中的立法与法律发现》（第 13 章），注释 66。另见《资本主义不可否认的道德》（第 22 章），注释 2，对耶格尔的批评。

⁶ Since the original article upon which this chapter is based was published, there have been many more contributions expanding on and defending Hoppe's argumentation ethics. See Kinsella, "Argumentation Ethics and Liberty: A Concise Guide."

自从作为本章基础的原始文章发表以来，有更多的作品进一步阐述和捍卫了霍普的论证伦理学。参见金塞拉的《论证伦理学与自由：简明指南》。

⁷ See, e.g., "Dialogical Arguments for Libertarian Rights" (ch. 6); "The Undeniable Morality of Capitalism" (ch. 22); "A Libertarian Theory of Punishment and Rights" (ch. 5); also Kinsella, "Argumentation Ethics and Liberty: A Concise Guide."

例如，参见《自由意志主义权利的对话论证》（第 6 章）；《资本主义不可否认的道德》（第 22 章）；《自由意志主义的惩罚与权利理论》（第 5 章）；还有金塞拉的《论证伦理学与自由：简明指南》。

作⁸和各种二手资料。⁹

自由意志主义的权利

LIBERTARIAN RIGHTS

The central question here is: does Hoppe's theory establish that there are libertarian rights?

这里的核心问题是:霍普的理论是否确立了自由意志主义权利的存在?

Scarce (conflictible) resources are those things over which there can be conflict; two or more individuals may want to use or control a given scarce resource at the same time, but only one of them can, because use by one excludes use by the other. Thus, as

⁸ A good starting point would be: chapters 1 and 2 of A Theory of Socialism and Capitalism (discussing notions of scarcity, aggression, property, norms, and justification); chap. 7 of A Theory of Socialism and Capitalism, “The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible” (esp. pp. 154 – 71); “Appendix: Four Critical Replies” ; and “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016).” See also related material in Kinsella, “Argumentation Ethics and Liberty: A Concise Guide.”

一个不错的起点是:《社会主义与资本主义理论》的第 1 章和第 2 章(讨论稀缺、侵犯、财产、规范和正当性的概念);《社会主义与资本主义理论》的第 7 章《资本主义的伦理正当性以及社会主义为何在道德上站不住脚》(特别是第 154 171 页);“附录:四条批判性回复”;以及“PFP163| 汉斯-赫尔曼·霍普,《论论证的伦理学》(PFS 2016)” 。也可参见金塞拉《论证伦理学与自由:简明指南》中的相关材料。

⁹ In particular, some of the works cited in “Dialogical Arguments for Libertarian Rights” (ch. 6), n.15, including Van Dun, “Argumentation Ethics and the Philosophy of Freedom” ; Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’ s Argumentation Ethics” ; Block, “Rejoinder to Murphy and Callahan on Hoppe’ s Argumentation Ethics” ; and Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle.” See also Kinsella, “Hoppe’ s Argumentation Ethics and Its Critics.”

特别是,在《自由意志主义权利的对话论证》(第 6 章)注释 15 中引用的一些作品,包括范·邓恩(Van Dun)的《论证伦理与哲学自由》;埃布拉斯(Eabrasu)的《对当前针对霍普论证伦理学的批评的回应》;布洛克(Block)的《就霍普的论证伦理学对墨菲和卡拉汉的反驳》;以及斯伦佐克(Slenzok)的《自由意志主义论证伦理、语言的先验语用学和无冲突的自由原则》。也可参见金塞拉的《霍普的论证伦理学及其批评者》。

Hoppe explains, a theory of interpersonal ethics must be a theory of property rights, "a theory of the assignment of rights of exclusive control over scarce means."¹⁰ The purpose of rights is to specify which individual has the right to control a given scarce resource, so that conflicts may be avoided. The person who has the right to control a given scarce resource—its owner—is the person who is justified in using the resource, in excluding others, and in enforcing this exclusion against non-owners who would act in disregard of the owner's property rights.

稀缺（冲突性）资源指的是那些可能引发冲突的事物；当两个或更多人希望同时使用或控制某一稀缺资源时，只有其中一人能够使用，因为一人的使用会排斥他人的使用。正如霍普所阐述的，人际伦理学理论必须建立在财产权理论之上，即“一种关于稀缺资源排他性控制权分配的理论”。¹⁰ 权利的核心在于明确界定谁有权控制特定的稀缺资源，从而预防冲突的发生。拥有特定稀缺资源控制权的人——即资源所有者——拥有正当理由使用该资源、排除他人使用，并对无视其财产权的非所有者执行这种排除。

Everyone has at least an implicit view of rights. An aggressor—or at least one who would try to justify his aggression—maintains that he is entitled to a given scarce resource “because” he is strong enough to take it. Others, such as socialists, believe that the state is entitled to the means of production “because”—well, because they are the state, “because” capitalists “exploit” workers, and so on. Mainstream liberal-democratic types believe that, for example, the poor are entitled to property formerly owned by the not-poor, “because” the property is transferred from the latter to the

¹⁰ Hoppe, *A Theory of Socialism and Capitalism*, p. 158 n.120; also p. 18 et pass. See also Kinsella, “On Conflictability and Conflictable Resources,” *StephanKinsella.com* (Jan. 31, 2022); Hoppe, “Of Common, Public, and Private Property and the Rationale for Total Privatization.” See also Kinsella, “KOL259 | “How To Think About Property”, New Hampshire Liberty Forum 2019,” *Kinsella on Liberty Podcast* (Feb. 9, 2019), and “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11).

霍普，《社会主义与资本主义理论》，第 158 页注释 120；也见第 18 页及以后。另见金塞拉，《论冲突性与冲突性资源》，*StephanKinsella.com*（2022 年 1 月 31 日）；霍普，《论共有、公有和私有财产以及全面私有化的基本原理》。另见金塞拉，“KOL259 | 《如何思考财产》，2019 年新罕布什尔自由论坛”，金塞拉自由播客（2019 年 2 月 9 日），以及《销售并不意味着拥有，反之亦然：一个剖析》（第 11 章）。

former by means of a democratic process, which is "legitimate." Everyone assigns each disputed scarce resource to some owner—whether to a thief, the state, or a relatively-poor "needy" person—for some reason.

每个人至少都有一种隐含的权利观。一个侵犯者——至少是一个试图为自己的侵害行为辩护的人——主张他有权获得某种稀缺资源，"因为"他足够强大，可以夺取它。其他人，比如社会主义者，认为国家有权获得生产资料，"因为"——嗯，因为他们是国家，"因为"资本家"剥削"工人，等等。主流的自由民主派则认为，例如，穷人有权获得以前由非穷人拥有的财产，"因为"这些财产是通过民主程序从后者转让给前者的，而民主程序是"合法的"。每个人都会出于某种原因，将每种有争议的稀缺资源分配给某个所有者——无论是小偷、国家，还是相对贫穷的"需要帮助"的人。

The libertarian view is that each person presumptively owns his own body, and for other, previously-unowned resources, the owner is determined in accordance with the principles of original appropriation and contractual title transfer. Thus, under libertarianism, an individual has (a) a right to the exclusive control of the scarce resource of his body, sometimes called "self-ownership"; and (b) a right to the exclusive control of other, previously-unowned scarce resources that are originally appropriated by the individual or by his ancestor-in-title.¹¹

自由意志主义认为，每个人都假定拥有自己的身体，而对于其他先前的无主资源，则根据先占原则和的所有权转让原则确定所有人。因此，根据自由意志主义，个人拥有（a）对其身体这一稀缺资源的排他性控制权，有时称为"自我所有权"；（b）对其他先前无主的稀缺资源的排他性控制权，这些资源是由个人或其权属祖先所先占的。¹¹

So the question is, does Hoppe's theory establish that the libertarian view of rights, as

¹¹For more on this, see "What Libertarianism Is" (ch. 2), at n.4 et pass. For my attempt at a concise formulation of the libertarian view on self-ownership and external property rights, see Stephan Kinsella, "Aggression and Property Rights Plank in the Libertarian Party Platform," StephanKinsella.com (May 30, 2022). See also references in "How We Come To Own Ourselves" (ch. 4), n.6.

关于更多这方面的内容，见《何为自由意志主义》（第2章），注释4及以后。关于我对自由意志主义在自我所有权和外部财产权方面观点的简明表述的尝试，见斯蒂芬·金塞拉，《自由意志主义党纲中的侵犯和财产权要点》，StephanKinsella.com（2022年5月30日）。另见《我们如何拥有自己》（第4章）注释6中的参考文献。

opposed to competing views, is the correct one?

那么问题来了，霍普的理论是否确立了自由意志主义的权利观，而不是与之相对的观点，才是正确的呢？

霍普的理论：让我们再试一次

HOPPE'S THEORY: LET'S TRY AGAIN

I do not intend here to restate Hoppe's entire argument, as I believe it has been adequately explicated and defended already by Hoppe in the literature referenced above. And he has already replied to numerous criticisms, including arguments similar to those leveled by MC.¹² Instead, I will try to show, as simply as possible, why Hoppe succeeds. I'll then address, in view of this, a few of MC's concrete critiques, but it should be clear by this point why I think their criticism is off base.

我不打算在这里重述霍普的全部论点，因为我相信霍普已经在上文提到的文献中对其进行了充分的阐释和辩护。而且，他已经回答了许多批评意见，包括类似于 MC 所提出的论点。¹²相反，我将尽可能简单地说明霍普为什么成功。有鉴于此，我接下来会会谈 MC 的一些具体批评，但到此为止，应该已经很清楚，为什么我认为他们的批评是不正确的了。

Hoppe starts by noting that if any proposed theory of rights is going to be justified, it has to be justified in the course of an argument (discourse). As Hoppe writes:

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 must accept this first proposition,

¹² See Hoppe, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016)” ; idem, “Appendix: Four Critical Replies.” See also references in note *, above.

见霍普，“PFP163 | 汉斯-赫尔曼·霍普，《论论证伦理学》（PFS 2016）”；同上，“附录：四个批判性回复”。另见上文注释*中的参考文献。

which has been referred to as the a priori of argumentation.¹³

霍普首先指出，任何提议的权利理论若要证明其合理性，就必须在论证（对话）过程中证明其合理性。霍普写道：

人是否具有权利，如果有，是哪些权利，只能在论证（命题交换）过程中决定。证明、猜测、反驳构成了论证过程，这种证成是论证性的。任何否认这一命题的人都会陷入践言冲突，因为他的否认本身就构成了论证。即使是伦理相对主义者也必须接受此第一个命题，它被称为论证的先验性。¹³

I fail to see how MC can disagree with this without falling into contradiction. It follows that if any norms, ethics, facts, or rules of discourse are necessarily presupposed by participants in argumentation simply by virtue of arguing, then no theory that

¹³ Hoppe, The Economics and Ethics of Private Property, p. 384. See also idem, A Theory of Socialism and Capitalism, pp. 154 – 55:

[I]t must be presupposed of any intellectual position, that it is meaningful and can be argued with regard to its cognitive value, simply because it is presented in a language and communicated. To argue otherwise would already implicitly admit its validity. One is forced, then, to accept a rationalist approach towards ethics for the very same reason that one was forced to adopt a rationalist instead of an empiricist epistemology:...

The above argument shows us that any truth claim—the claim connected with any proposition that it is true, objective, or valid (all terms used synonymously here)—is and must be raised and decided upon in the course of an argumentation. And since it cannot be disputed that this is so (one cannot communicate and argue that one cannot communicate and argue), and it must be assumed that everyone knows what it means to claim something to be true (one cannot deny this statement without claiming its negation to be true), this has been aptly called “the a priori of communication and argumentation.”

霍普，《私有财产的经济学与伦理学》，第 384 页。另见同上，《社会主义与资本主义理论》，第 154 155 页：

[任何一种思想立场，都必须预设它是有意义的，并且就其认知价值而言是可以论证的，仅仅因为它是一种语言进行表达与沟通。否则进行论证就已经在隐舍地承认其有效性。那么，出于同样的原因，人们被迫接受一种伦理学的理性主义方法，正如人们被迫采用理性主义而非经验主义的认识论一样……

上述论证向我们表明，任何真理主张——与任何声称其为真、客观或有效的命题相关的主张（这里所有术语都作为同义词使用）——都是而且必须在论证过程中提出并决定。既然无可争议的是这样（一个人不能传达和论证说自己不能传达和论证），而且必须假定每个人都知道声称某事为真意味着什么（一个人不能否认这一陈述而不主张其否定为真），这被恰当地称为“交流与论证的先验性”。

contradicts these presupposed facts or norms could ever be justified. By contrast, any proposed theory that is consistent with, indeed implied by, these presuppositions, would have to be seen as irrefutably justified. This type of reasoning is called the "apriori of communication and argumentation," and was pioneered by German philosophers Jürgen Habermas (Hoppe's PhD advisor) and Karl-Otto Apel, although, unlike Hoppe's approach, this method was applied by them to reach non-libertarian (social-democratic) results.

我看不出 MC 如何能在不陷入矛盾的情况下反对这一点。由此可见，如果论证的参与者仅仅因为论证而必然预设了某些规范、伦理、事实或对话规则，那么任何与这些预设的事实或规范相矛盾的理论都不可能是正当的。与此相反，任何与这些预设相一致，甚至是由这些预设所暗示的拟议理论，都必须被视为无可辩驳的正当性理论。这种推理方法被称为“交流与论证的先验论”，由德国哲学家尤尔根·哈贝马斯（霍普的博士生导师）和卡尔·奥托·阿佩尔首创，但与霍普的方法不同的是，他们运用这种方法得出的是非自由意志主义（社会民主主义）的结果。

And there certainly are norms presupposed by argumentative justification as such. As Hoppe writes,

[A]rguing never just consists of free-floating propositions claiming to be true. Rather, argumentation is always an activity, too. But given that truthclaims are raised and decided upon in argumentation and that argumentation, aside from whatever is said in its course, is a practical affair, 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.

当然，论证性的证成其本身必然预设了一些规范。正如霍普所写：

论证绝不仅仅是自称为真的自由浮动的命题构成。相反，论证始终都是一种行动。但是，鉴于真理的主张是在论证中提出和决定的，而论证，除了在其过程中所说的任何内容之外，是一种实践活动，因此，必然存在着主体间有意义的规范——正是那些使某种行动成为论证的规范——它们具有特殊的认知地位，因为它们是客观性和真理的实践前提。

Hence, one reaches the conclusion that 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. 14

因此，我们得出的结论是，规范必须被假定为是正当的、有效的。否则根本无法论证，因为这样的论证能力实际上预设了这些规范的有效性，而这些规范正是任何论证的基础。¹⁴

Again, I fail to see how MC can disagree with any of this, in general. Rather, the disagreement is over what norms are actually implicit in the activity of argumentation—that is, over what participants in discourse must presuppose to be true in order to participate in argumentation. Whatever these presuppositions are, they rule out of court any proposed norms inconsistent with them. And, any such normative presuppositions, or norms deduced from these presuppositions, would have to be considered to be ultimately and irrefutably justified, as their validity could never be coherently denied.

同样，总的来说，我也看不出 MC 如何会不同意这一点。相反，分歧在于论证活动中实际上隐含着哪些规范——也就是说，对话的参与者必须预设哪些规范为真才能参与论证。无论这些预设是什么，它们都将任何与之不符的拟议规范排除在外。而且，任何此类规范性预设，或从这些预设中推导出的规范，都必须被认为是最终且无可辩驳地合理正当的，因为它们的有效性永远不可能被逻辑一致地否认。

普适性

UNIVERSALIZABILITY

So let’s see what Hoppe contends. First, any norm proposed in argumentation is presumed to be universalizable. Writes Hoppe:

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

¹⁴ Hoppe, A Theory of Socialism and Capitalism, p. 155.
霍普，《社会主义和资本主义理论》，第 155 页。

can be justified that can be formulated as general principles which are valid for everyone without exception.¹⁵

让我们来看看霍普的论点。首先，在论证中提出的任何规范都被假定具有普适性。霍普写道：

人们通常认为，论证意味着一个命题主张具有普遍可接受性，或者说，如果它是一个规范建议，它是“具有普适性”。应用于规范建议，这就是在伦理学的黄金法则或康德的绝对命令中提出的观点，即只有那些可以被表述为对每个人都无一例外有效的一般原则的规范才是正当的。¹⁵

In other words, any proposed norm—that is, an attempted justification for a given action—is not justified if it is not universalizable. This rule is presupposed by the very attempt to argumentatively justify something, because “argumentation implies that everyone who can understand an argument must in principle be able to be convinced of it simply because of its argumentative force.” Because the universalizability principle is an inherent feature of argumentation in general, “the universalization principle of ethics can now be understood and explained as grounded in the wider ‘apriori of communication and argumentation.’”¹⁶ I.e., no one can deny that only universalizable norms can be justified.¹⁷

换句话说，任何拟议的规范，即试图为某一行为辩护的理由，如果不能普遍化，就不具有正当性。这一规则是由试图论证某事正当性的尝试本身所预设的，因为“论证意味着，每个能够理解论证的人原则上都必须能够仅仅因为其论证力而被说服”。由于普适性原则是一般论证的固有特征，“伦理学的普适性原则现在可以被理解和解释为立足于更广泛的‘交流和论证的先验’”。¹⁶也就是说，没有人能否认只有具有普适性的规范才是正当的。¹⁷

¹⁵ Ibid., p. 157.

同上，第 157 页。

¹⁶ Ibid. 同上。

¹⁷ See also Kinsella, “The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle,” StephanKinsella.com (Nov. 10, 2011); “What Libertarianism Is” (ch. 2), the section “Self-ownership and Conflict Avoidance”; “How We Come to Own Ourselves” (ch. 4), n.15; “A Libertarian Theory of Punishment and Rights” (ch. 5), Part III.D.2; and “Dialogical Arguments for

So, we have our first presupposition: that only universalizable ethics can be possible candidates for being justified.¹⁸ By the same token, so-called “particularizable” norms are not justifiable. However:

因此，我们有了第一个预设前提：只有具有普适性的伦理才有可能成为正当化的候选项。¹⁸ 同样道理，所谓的**特殊化**规范也是不可证明为正当的。然而：

Libertarian Rights” (ch. 6), n.43 and accompanying text.

另见金塞拉，《特殊主义伦理学的问题，或者为什么每个人都确实必须承认普适性原则的有效性》，StephanKinsella.com（2011 年 11 月 10 日）；《何为自由意志主义》（第 2 章）中“自我所有权与避免冲突”部分；《我们如何拥有自己》（第 4 章）注释 15；《自由意志主义的惩罚与权利理论》（第 5 章），第三部分 D.2；以及《自由意志主义权利的对话论证》（第 6 章），注释 43 及相关内容。

¹⁸ Murphy appears to concede this point that universalizability is an undeniable requirement for normative justification; he simply thinks it isn’t useful. In the informal discussion on Anti-state.com following my original response article, there was this exchange:

Kinsella: “No one, that I can see, has been denying that fundamental moral principles should be universalizable.”

Murphy: “Right. All I (and I think Gene) have argued is that ‘universalizability’ doesn’t really help much in deciding between concrete systems. At a formal level, socialism doesn’t imply ‘I have the right to hit you but you don’t have the right to hit me’ anymore than capitalism does. Socialism really says, ‘I have the right to hit you if the elected government [or whatever] says it’s legitimate,’ and capitalism really says, ‘I have the right to hit you in defense of my property rights.’ So the issue boils down to whether socialism and capitalism can be justified on other grounds. I.e., the universalization principle doesn’t give us any help in picking between the two.

墨菲似乎承认了这一点，即普适性是规范论证不可否认的必要条件；他只是认为这没什么用处。在我最初的回应文章之后，在 Anti-state.com 上的非正式讨论中，有这样的交流：

金塞拉：“据我所见，没有人否认基本的道德原则应该具有普适性。”

墨菲：“对。我（我想吉恩也是）所主张的只是，‘普适性’在决定具体制度之间并没有太大帮助。在形式层面上，社会主义并不比资本主义更意味着‘我有权打你但你无权打我’。社会主义实际上是说，‘如果民选政府[或其他什么]说打你是合法的，我就有权打你’，而资本主义实际上是说，‘为了捍卫我的财财产权，我有权打你’。所以问题归结为社会主义和资本主义能否基于其他理由得到证明。也就是说，普适性原则在我们在两者之间做出选择时没有给我们任何帮助。

Archived at <https://tinyurl.com/54rzjcnp> and <https://perma.cc/UU8S-2APB> (emphasis added).

Callahan, by contrast, does not appear to even grant the universalizability requirement.

From our exchange at the same page:

lee_mccracken: “does this ‘universalizability’ principle imply that there can’t be special moral duties (say, the duties of parents to children or vice versa)? Hoppe says that such principles could be found to be universally acceptable if they are ‘grounded in the nature of things’, but I’m not quite sure what this means. Can anyone explain that further?”

Callahan: “My cynical view: ‘the nature of things’ means whatever you want it to in order to get to the conclusion you want anyway.”

Kinsella: “Right. As [] I suspected, you do not seem to accept the validity of the universalizability principle. Which, as I indicated, leads to skepticism, which of course goes hand in hand with cynicism.” Gene, I’d ask you to confirm or deny that you reject the universalizability principle—but I won’t hold out hope that you will do this. But if you would confirm it, I’d say—you are subject to this criticism (about the nature of things) yourself. And if you deny it, I’d ask you—do you really realize the implications of such a denial?”

Callahan did not to respond to this direct question.

存档于 <https://tinyurl.com/54rzjcnp> 和 <https://perma.cc/UU8S-2APB>（重点补充）。相比之下，卡拉汉似乎甚至不承认普适性这个必要条件。从我们在同一页面的交流中可以看出：

lee_mccracken: “这种‘普适性’原则是否意味着不存在特殊的道德义务（比如，父母对子女或反之的义务）？霍普说，如果这些原则‘基于事物的本质’，就可能被发现是普遍可接受的，但我不太确定这意味着什么。有人能进一步解释一下吗？”

卡拉汉：“我对此表示怀疑：‘事物的本质’意味着无论你想要它是什么，都是为了得出你想要的结论。”

金塞拉：“对。正如[]我所怀疑的，你似乎不接受普适性原则的有效性。正如我所指出的，这会导致怀疑主义，而怀疑主义当然与愤世嫉俗是相伴而生的……吉恩，我想请你确认或否认你拒绝普适性原则——但我不抱希望你这样做。但如果你确认，我会说——你自己也会受到这种（关于事物本质的）批评。如果你否认，我会问你——你真的意识到这种否认的影响吗？”

卡拉汉没有回应这个直接的问题。

Murphy is correct that some socialist norms can be universalized, as Hoppe himself explicitly notes (see text at note 19). However, as Hoppe points out, this does not mean that all invalid norms can be reformulated to avoid violating universalizability, and can serve as a first-level “filter” for eliminating some particularizable norms; nor that the universalizability criterion is useless for, if one is forced to reformulate an apparently particularized (and thus facially invalid) norm to avoid this problem, it exposes the nature of the claimed norm more clearly so that it can be compared to other, more substantive, norms necessarily presupposed by any participants in argumentative justification. See text at note 20 below, et pass. See also Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics,” p. 11 et pass.

[T]he universalization principle only provides a purely formal criterion for morality. To be sure, 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, but could instead be accepted as founded in the nature of things again by everyone. But while some norms might not pass the test of universalization, if enough attention were paid to their formulation, the most ridiculous norms, and what is of course even more relevant, even openly incompatible norms could easily and equally well pass it. For example, "everybody must get drunk on Sundays or be fined" or "anyone who drinks alcohol will be punished" are both rules that do not allow discrimination among groups of people and thus could both claim to satisfy the condition of universalization.

普适性原则只是为道德提供了一个纯粹的形式标准。可以肯定的是，根据这一标准，所有为不同阶级的人制定不同规则的有效规范提案，都可以被证明不具有作为公平规范而被普遍接受的合法主张，除非不同阶级的人之间的区别是这样的：它并不意味着歧视，可以认为是建立在事物本质之上的区别而又一次被每个人接受。不过，尽管有些规范可能无法通过普适性的检验，但如果对其制定给予足够的重视，那么最荒谬的规范，当然还有更相关的，甚至是公开不相容的规范，都可以很容易地、同样很好地通过普适性的检验。例如，"每个人在星期天都必须喝醉，否则将被罚款"或"任何饮酒的人都将受到惩罚"，这两条规则都不允许对不同人群进行歧视，因此都可以声称符合普适性的条件。

Clearly then, the universalization principle alone would not provide one with any positive set of norms that could be demonstrated to be justified.¹⁹

因此，仅凭普适性原则显然无法为我们提供任何一套可以被证明是正当的实证规范。

墨菲认为某些社会主义规范可以普适化，这是正确的，正如霍普本人明确指出的（见注释 19 中的文本）。然而，正如霍普所指出的，这并不意味着所有无效的规范都可以重新表述以避免违反普适性，并且可以作为消除某些特殊化规范的一级“过滤器”；也不意味着普适性标准毫无用处，因为如果被迫重新表述一个明显特殊化（因此表面上无效）的规范以避免这个问题，它会更清楚地揭示所主张的规范的性质，以便与任何论证性证成的参与者必然预设的其他更实质性的规范进行比较。见下面注释 20 中的文本及以后。另见埃布拉斯（Eabrasu），《对当前针对霍普论证伦理学提出的批评的回应》，第 11 页及以后。

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But even though universalizability is merely a formal requirement, it does eliminate many proposed norms, such as those underlying most versions of socialism which amount to "I can hit you but you cannot hit me" particularizable rules.

不过，尽管普适性只是一种形式上的要求，但它确实剔除了许多拟议中的规范，例如大多数社会主义版本的基本规范，这些规范相当于“我可以打你，但你不能打我”的特殊性规则。

[T]he property theory implicit in socialism does not normally pass even the first decisive test (the necessary if not sufficient condition) required of rules of human conduct which claim to be morally justified or justifiable. This test, as formulated in the so-called golden rule or, similarly, in the Kantian categorical imperative, requires that in order to be just, a rule must be a general one applicable to every single person in the same way. The rule cannot specify different rights or obligations for different categories of people (one for the red-headed, and one for others, or one for women and a different one for men), as such a "particularistic" rule, naturally, could never, not even in principle, be accepted as a fair rule by everyone. Particularistic rules, however, of the type "I can hit you, but you are not allowed to hit me," are ... at the very base of all practiced forms of socialism.²⁰

[社会主义所隐含的财产理论通常甚至无法通过人类行为规则所要求的第一个决定性检验（必要条件，如果不是充分条件的话），而这些规则声称在道德上是合理的或正当的。正如所谓的“黄金法则”或康德的“绝对命令”所阐述的那样，这一检验要求规则必须是以同样方式适用于每一个人的普遍规则，这样才是正义的。规则不能为不同类别的人规定不同的权利或义务（一种是红头发的，一种是其他人的，或者一种是女人的，一种是男人的），因为这样的**特殊主义**规则自然永远不会，甚至原则上也不可能被所有人接受为公平的规则。然而，“我可以打你，但你不可以打我”这种特殊规则……恰恰是所有社会主义实践形式的根本。²⁰

¹⁹ Hoppe, A Theory of Socialism and Capitalism, pp. 157 - 58 (emphasis added).

霍普，《社会主义与资本主义理论》，第 157 158 页（重点补充）

²⁰ Ibid., p. 14. 同上，第 14 页。

Thus universalizability acts as a first-level “filter” that weeds out all particularistic 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.

因此，普适性就像一个第一级“过滤器”，剔除了所有特殊性规范。这减少了可能正当的规范性主张的范围，但并没有完成这项工作，因为许多不相容和不道德的规范可以用普适性的方式重新措辞。

It is for this reason that Hoppe next examines other, more substantive, presuppositions inherent in argument itself. These are then used in a second filtering process to reject additional proposed norms, those that are universalizable but incompatible with the other presuppositions of discourse. And, because some of these presuppositions turn out to be presupposed norms, Hoppe then shows that the libertarian conception of rights can be deduced from these presupposed norms and facts.

正是出于这个原因，霍普接下来考察了论证本身所固有的其他更实质性的预设前提。然后，这些预设第二个过滤过程中被用来拒绝其他拟议的规范，即那些可普遍化但与对话的其他预设前提不相容的规范。而且，由于其中一些预设前提变成了预设规范，霍普随后表明，自由意志主义的权利概念可以从这些预设规范和事实中推导出来。

论证中预设的实质性事实和规范

SUBSTANTIVE FACTS AND NORMS PRESUPPOSED IN ARGUMENTATION

The universalization principle filters out many possible norms, but many possible, mutually incompatible, and nonlibertarian candidates remain (“anyone who drinks alcohol will be punished”).

普适性原则过滤掉了许多可能的规范，但仍有许多可能的、互不相容的、非自由意志主义的候选规范（“任何饮酒者都将受到惩罚”）。

However, there are other positive norms implied in argumentation aside from the universalization principle. In order to recognize them, it is only necessary to call three interrelated facts to attention. First, that argumentation is not only a cognitive but also a practical affair. Second, that argumentation, as a form of action, implies the use of the scarce resource of one’s body. And third, that argumentation is a conflict-free way of

interacting.²¹

然而，除了普适性原则之外，论证中还隐含着其他实证的规范。为了认识它们，只需提请注意三个相互关联的事实。第一，论证不仅是一种认知活动，也是一种实践活动。其次，论证作为一种行动形式，意味着使用身体这一稀缺资源。第三，论证是一种无冲突的互动方式。²¹

Participants in discourse cannot deny the existence of scarcity (discourse is a form of action, after all, and action implies scarce resources, in one's body and in external objects or means of action) nor the possibility of conflict over these scarce resources. They also value the ability to participate in argument (they are engaging in it, after all) and thus its practical preconditions, namely the ability to actually use scarce resources in order to survive (for argumentation is not possible without survival). And because argumentation/discourse is a cooperative, civilized, peaceful activity, and because "justifying means justifying without having to rely on coercion,"²² participants in discourse necessarily value being able to use scarce resources in a conflict-free way. One adopting a civilized, peaceful stance and trying to justify a norm cannot coherently advocate non-peaceful norms. In fact, the very attempt to justify a resource allocation norm is an attempt to settle conflicts with regard to the use of that resource. Thus, a participant in discourse could never justify the proposition that there is no value to being able to use resources, or that conflict should not be avoided, or that cooperation and peacefulness are bad things. Valuing the avoidance of conflicts also presupposes the value of attempting to find rules that make conflict avoidance possible. I.e., property rules.

对话的参与者既不能否认稀缺性的存在（毕竟对话是一种行动的形式，而行动意味着使用稀缺资源，包括个人身体和外部对象或行动的手段），也不能否认争夺这些稀缺资源而发生冲突的可能性。他们还重视参与论证的能力（毕竟他们是在参与论证），因此也重视论证的实践前提，即为了生存而实际使用稀缺资源的能力（因为没有生存就不可能有论证）。由于论证/对话是一种合作、文明、和平的活动，又由于“论证意味着论证而无需依靠强制胁迫”，²² 参与对话的人必然重视能否以无冲突的方式使用稀

²¹ Ibid., p. 158 (emphasis added). 同上，第 158 页（重点补充）

²² Ibid., p. 159. 同上，第 159 页。

缺资源。一个人如果采取文明、和平的立场，试图为一项规范辩护，就不可能连贯一致地倡导非和平的规范。事实上，为一项资源界定规范论证辩护的企图本身就是企图解决有关使用该资源的冲突。因此，对话参与者永远不可能证明以下命题是正当的：能够使用资源没有价值，或者不应该避免冲突，或者合作与和平是坏事。珍视避免冲突的价值也预设了着试图找到使避免冲突成为可能的规则的价值，即财产规则。

Accordingly, participants in discourse, in particular those seeking to justify proposed norms, implicitly recognize the value and legitimacy of assigning specified property owners to specified scarce resources—for reasons that are universalizable and that make conflict-avoidance possible. However, property rights make conflict avoidance possible by establishing perceivable boundaries to resources indicating the resource's borders and who the owner is, and by basing the assignment on universalizable rules that could be accepted as fair by all potential participants in discourse, in argumentative justification. For this reason, the assignment of property rights has to be based on some objective link between the claimant and a particular resource.²³

因此，对话的参与者，尤其是那些试图证明所拟议规范的正当性的人，隐含承认了特定的财产所有者赋予特定稀缺资源的价值与合法性——出于普适性且能够避免冲突的原因。然而，财产权通过为资源划定可感知的界限，指明资源的边界和所有者是谁，并将分配建立在可被所有潜在的对话参与者、证成性的论证的参与者都能公平接受的普适性的规则基础之上，从而使避免冲突成为可能。因此，财产权的分配必须基于权利主张者与特定资源之间的某种客观联系。²³

What all this means is that anyone ever attempting to (argumentatively) justify any norm

²³ See, on this, “How We Come To Own Ourselves” (ch. 4), references in n.6; also Kinsella, “KOL259 | “How To Think About Property”, New Hampshire Liberty Forum 2019”; “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11); idem, “Aggression and Property Rights Plank in the Libertarian Party Platform”; also Hoppe, “Of Common, Public, and Private Property and the Rationale for Total Privatization.” See also “What Libertarianism Is” (ch. 2).
关于这一点，见《我们如何拥有自己》（第 4 章）注释 6 中的参考文献；还有金塞拉的“KOL259 | 《如何思考财产》，2019 年新罕布什尔自由论坛”；《销售并不意味着拥有，反之亦然：一个剖析》（第 11 章）；同上，《自由意志主义党纲中的侵犯和财产权要点》；还有霍普的《论共有、公有和私有财产以及全面私有化的基本原理》。另见《何为自由意志主义》（第 2 章）。

is already presupposing a host of norms and argumentative rules. The substantive presupposed norms rule out many proposed norms, even if they are universalizable. For example, a rule such as "no one should ever be able to use any scarce resource" could never be justified. It is incompatible with the speaker's evident value for the ability to use scarce resources, because he has to (be able to) use the scarce resource of his body in order to engage in any activity, including argumentation. And he, or someone, had to be able to use other scarce resources such as food, shelter, etc., so that the arguers are alive and able to argue (remember, discourse is a practical affair, and requires the speakers to be alive, to have control of their bodies and their standing room, etc.).

这一切意味着，任何试图（论证性地）证明任何规范合理性的人，都已经预设了一系列规范和论证规则。这些实质性的预设规范排除了许多拟议的规范，即使它们是具有普适性的。例如，"任何人都应该使用任何稀缺资源"这样的规则就永远无法成立。它不符合说话者对使用稀缺资源能力的明显价值，因为他必须（能够）使用身体这一稀缺资源才能从事任何活动，包括论证。而且，他或某个人还必须能够使用其他稀缺资源，如食物、住所等。只有这样，论证者才能活着，才能进行论证（请记住，对话论证是一件实际的事情，需要论证者活着，才能控制自己的身体和站立的空间等）。

In addition, a rule specifying that all resources, or even some resources, should have no owner at all, simply does not allocate ownership in the scarce resources at issue, i.e., it does not fulfill its function of conflict-avoidance. Unless property rights are allocated to someone, conflict over each scarce resource is possible; that is the nature of scarcity. (As a practical matter, most such rules also imply that if a given resource should not be "owned," then some person or agency is authorized to prevent others from using the thing. In which case the rule is, in reality, assigning ownership to the agency with control and would need to be justified. For example, the public forests are said (by some libertarians) to be "unowned," but the federal government prevents homesteaders from moving in. Clearly here the federal government is asserting ownership. The necessity of justifying this cannot be avoided by the fiction that the property is not owned.)

此外，规定所有资源，甚至某些资源都不应该有所有者的规则，根本没有对所讨论的稀缺资源分配所有权，也就是说，它没有履行其避免冲突的功能。除非将财产权分配

给某个人，否则每种稀缺资源都有可能发生冲突；这就是稀缺性的本质。(实际上，大多数此类规则还意味着，如果某项资源不应被“拥有”，那么某些人或机构就有权阻止他人使用该资源。在这种情况下，该规则实际上是将所有权赋予了拥有控制权的机构，因此需要说明其正当性。例如，（一些自由意志主义者）说公共森林是“无主的”，但联邦政府却阻止拓殖者迁入。很明显，联邦政府在这里主张所有权。证明这一点的必要性不能用“财产是无主”的虚构来避免）。

There is no way any norm can be justified that does not seek to assign ownership of every scarce resource to particular owners, based on an objective link between the owner and the owned resource. No rule could ever be justified if it refrains from deciding who owns a particular resource or if it specifies that no one owns a resource. And any justification offered has to be universalizable. The reasons for all these requirements should be clear by now, as discussed above. Particular owners must be assigned to each and every scarce resource—this is what any theory of property—any ethic—has to do. There must be an objective link between the owner and the resource, so that conflicts can be avoided, and also to comply with universalizability. “Every” scarce resource must be owned by someone, for conflict-avoidance and other reasons given above.

任何规范，如果不是试图根据所有者与所拥有资源之间的客观联系，将每种稀缺资源的所有权分配给特定的所有者，都是不正当的。如果一项规则不决定谁拥有某项资源，或者规定没有人拥有某项资源，那么它就不可能是正当的。而且提出的任何理由都必须具有普适性。如上文所述，所有这些要求的理由现在应该很清楚了。必须为每一种稀缺资源指定特定的所有者——这是任何财产理论——任何伦理——都必须做到的。所有者与资源之间必须存在客观联系，这样才能避免冲突，同时也符合普适性原则。出于避免冲突和上述其他原因，“每一种”稀缺资源都必须由某个人所有。

To this point the case is fairly general, and only establishes the framework for examining various competing norms. The libertarian insistence on objective links between resources and owners, and its particular view of what constitutes such objective links, is what completes the case.

在这一点上，理由是相当笼统的，只是为研究各种相互竞争的规范建立了框架。自由意志主义坚持资源与所有者之间的客观联系，以及它对构成这种客观联系的特殊观点，才使理由更加完整。

客观联系：首次使用、口头主张与先来后到的区别

OBJECTIVE LINKS: FIRST USE, VERBAL CLAIMS, AND THE PRIOR-LATER DISTINCTION

So now we come to libertarianism. It turns out that libertarianism is the only theory of rights that satisfies the presuppositions of discourse, because only it advocates assigning ownership by means of objective links between the owner and the resource in question.

因此，我们现在来谈谈自由意志主义。事实证明，自由意志主义是唯一满足对话预设的权利理论，因为只有它主张通过所有者与相关资源之间的客观联系来分配所有权。

Hoppe first establishes property rights in bodies. As noted above,²⁴ argumentation is a conflict-free way of interacting, and justifying means justifying without having to rely on coercion. In other words, the nonaggression principle is presupposed in argumentation. Thus, in the case of one's own body, the rule of "self-ownership" is implied, since saying that a participant in discourse is not permitted to aggress against the body of other participants is tantamount to recognizing a property right in each participant's body. The nonaggression principle and self(body-) ownership are just different ways of expressing the same idea. The objective link here is each person's control over and identification with his own body.²⁵

霍普首先确立了身体的财产权。如上所述，²⁴ 论证是一种无冲突的互动方式，而论证意味着无需依靠强制胁迫就能进行论证。换言之，互不侵犯原则是论证的前提。因此，就一个人自己的身体而言，“自我所有权”规则是隐含的，因为说不允许对话论证的参与者侵犯其他参与者的身体，就等于承认每个参与者的身体都有财产权。互不侵犯原则和自我（身体）所有权只是表达同一观点的不同方式。这里的客观联系是每个人对自己身体的控制和认同。²⁵

As for previously-unowned, external scarce resources, the objective link that is relevant to property rights is first use, or original appropriation. Only the norm assigning

²⁴ See text at notes 21 – 22, above. 见上文注释 21-22 中的内容。

²⁵ 另见 《我们如何拥有自己》以及《何为自由意志主义》（第 2 章）。

ownership in a thing to its first user, or his transferee in title, could fulfill this requirement, or the other presuppositions of argumentation.

至于先前无主的外部稀缺资源，与财产权相关的客观联系是首次使用或先占。只有将一物的所有权赋予其首次使用者或其所有权受让人的规范才能满足这一要求，或满足论证的其他预设前提。

There is clearly an objective link between the person who first begins to use something, and emborders it, and all others in the world. Everyone can see this. No goods are ever subject to conflict unless they are first acquired by someone. The first user and possessor of a good is either its owner or he is not. If he is not, then who is? The person who takes it from him by force? If forcefully taking possession from a prior owner entitles the new possessor to the thing, then there is no such thing as ownership, but only mere possession.²⁶ But such a rule—that a later user may acquire something by taking it from the previous owner—does not avoid conflicts, it rather authorizes them. It is nothing more than might-makes-right writ large. This is not what peaceful, cooperative, conflict-free argumentative justification is about.

显然，在第一个开始使用某物并对其加以限制的人与世界上所有其他人之间存在客观联系。每个人都能看到这一点。任何物品，除非首先被某人获得，否则就不会发生冲突。物品的第一个使用者和拥有者要么是物品的所有者，要么不是。如果他不是，那么谁是谁呢？用武力从他手中夺走物品的那人吗？如果强行从先前的所有者手中夺走物品，新的所有者就有权拥有该物品，那么就不存在所谓的所有权，而只是单纯的占有。²⁶但这样一条规则，即后来的使用者可以通过从先前的所有者手中夺取某物而获得该物，并不能避免冲突，反而会授权冲突的发生。这不过是“强权即公理”的放大版。这不是和平、合作、无冲突的论证性的证成。

What about the person who verbally declares that he owns the good that another has appropriated? Again, this rule is not justifiable because it does not avoid conflicts—because everyone in the world can simultaneously decree that they own any thing. With

²⁶ On the distinction between possession and ownership, see “What Libertarianism Is” (ch. 2), at notes 22 – 24 and accompanying text, et pass. 关于占有和所有权之间的区别，见《何为自由意志主义》（第 2 章），注释 22 24 及相关内容，等等。

multiple claimants for a piece of property, each having an “equally good” verbal decree, there is no way to avoid conflict by allocating ownership to a particular person.

那么，口头宣称自己拥有他人占有的物品的人呢？同样，这条规则也是不能被证明为正当的，因为它无法避免冲突——因为世界上每个人都可以同时宣布自己拥有任何一件物品。如果一件财产有多个权利主张者，每个人都有“同等有效”的口头声明，那么就无法通过将所有权分配给某个特定的人来避免冲突。

No way, other than an objective link, that is, which again shows why there must be an objective link between the claimant and the resource.

没有其它方式，除了客观联系，也就是说，这再次说明了为什么主张者和资源之间必须存在客观的联系。

As Hoppe states:

Hence, the right to acquire such goods must be assumed to exist. Now, if this is so, and if one does not have the right to acquire such rights of exclusive control over unused, nature-given things through one's own work, i.e., by doing something with things with which no one else had ever done anything before, and if other people had the right to disregard one's ownership claim with respect to such things which they had not worked on or put to some particular use before, then this would only be possible if one could acquire property titles not through labor, i.e., by establishing some objective, intersubjectively controllable link between a particular person and a particular scarce resource, but simply by verbal declaration; by decree. ... The separation is based on the observation that some particular scarce resource had in fact—for everyone to see and verify, as objective indicators for this would exist—been made an expression or materialization of one's own will, or, as the case may be, of someone else's will.²⁷

正如霍普所指出的：

因此，必须假定获得这些物品的权利是存在的。现在，如果情况确实如此，如果一个人无权通过自己的劳动，即通过对别人从未做过任何事情的东西进行操作处理，来获得对未使用过的、自然赋予的东西的这种排他性控制权，而且如果其他人有权无视一个人对这些他们以前未曾操作过或未曾用于某种特定用途的东西的所有权要求，那么，只有当一个人不是通过劳动，即不是通过在特定的人与特定的稀缺资源之间建立某种客观的、主体间可控的联系，

而是仅仅通过口头主张，通过法令来获得财产所有权时，这种情况才有可能发生……这种分离是基于这样的观察：某些特定的稀缺资源实际上——每个人都能看到并核实，因为会有这方面的客观指标——已经成为某人自己意志的表达或具象化，或者，视情况而定，成为其他人意志的表达或具象化。²⁷

As Hoppe notes, assigning ownership based on verbal decree would be incompatible with the “nonaggression principle regarding bodies,” which is presupposed due to the cooperative, peaceful, conflict-free nature of argumentative justification. Moreover, it would not address the problem of conflict avoidance, as explained above.

如霍普所指出的那样，根据口头命令分配所有权将与“关于身体的互不侵犯原则”不相容，而该原则是论证性证成的合作性、和平性和无冲突性所预设的。此外，如上所述，这也无法解决避免冲突的问题。

Thus, Hoppe is correct, when he writes:

Hence, one is forced to conclude that the socialist ethic is a complete failure. In all of its practical versions, it is no better than a rule such as “I can hit you, but you cannot hit me,” which even fails to pass the universalization test. And if it did adopt universalizable rules, which would basically amount to saying “everybody can hit everybody else,” such rulings could not conceivably be said to be universally acceptable on account of their very material specification. Simply to say and argue so must presuppose a person’s property right over his own body. Thus, only the first-come-first-own ethic of capitalism can be defended effectively as it is implied in argumentation. And no other ethic could be so justified, as justifying something in the

²⁷ Hoppe, A Theory of Socialism and Capitalism, pp. 161 – 62; see also pp. 169 – 71. See also Hoppe, “Appendix: Four Critical Replies,” in The Economics and Ethics of Private Property, p. 412:

if actors were not entitled to own physical resources other than their bodies, and if they as moral agents ... were to follow this prescription, they would be dead and no problem whatsoever would exist. For ethical problems to exist, then, ownership in other things must be justified.

霍普，《社会主义与资本主义理论》，第 161 162 页；另见第 169 171 页。另见霍普，《私有财产的经济学与伦理学》第 412 页“附录：四个批判性回复”：

如果行动人无权拥有其身体以外的物质资源，并且如果他们作为道德主体……遵循这一规定，他们将会死亡，也就不会存在任何问题。因此，伦理问题必定存在，对其他事物的所有权就必须得到论证。

course of argumentation implies presupposing the validity of precisely this ethic of the natural theory of property.²⁸

因此，霍普是正确的，他写道：

因此，我们不得不得出这样的结论：社会主义伦理是一个彻底的失败。在其所有的实践版本中，它并不比“我可以打你，但你不能打我”这样的规则好多少，甚至都无法通过普适性的检验。而且，如果它确实采用了普适性的规则，基本上等同于说“每个人都可以打别人”，那么这种规则由于其非常具体的规定而不能被说成是普遍接受的。这样说和这样论证的预设前提必须是一个人对自身身体的财产权。因此，只有先到先得的资本主义伦理才能得到有效的辩护，因为它隐含在论证中。没有任何其他伦理能够被证明是正当的，因为在论证过程中为某一主张辩护意味着预设了这种自然财产权理论的有效性。

²⁸

In other words, cognition and truth-seeking as such have a normative foundation, and the normative foundation on which cognition and truth rest is the recognition of private property rights.²⁹

换句话说，认知和寻求真理本身都有一个规范基础，而认知和寻求真理所依赖的规范基础就是对私有财产权的承认。²⁹

墨菲和卡拉汉的评论

MURPHY'S & CALLAHAN'S CRITIQUE

I am really at a loss as to where MC would part company with this theory. Do they deny, for example, that there is scarcity in the world or that conflicts are possible? I doubt it. Do they deny that universalizability is a requirement for justified norms? I doubt it, unless they are also ethical skeptics, in which case I wonder why they consider themselves libertarians.³⁰ Do they deny that rights have to be justified, and that justification has to occur during argument? Such a denial would be a neat trick, as it would itself be an argument. Do they maintain that participants in discourse do not

²⁸ Ibid., p. 171. 同上，第 171 页。

²⁹ Hoppe, The Economics and Ethics of Private Property, p. 345.
霍普，《私有财产权的经济学和伦理学》，第 345 页。

presuppose any truths?—or do they just say that none of these are normative? Or do they think that argumentation is not a conflict-free way of interacting?—in which case they would seem to think bashing someone over the head or stealing their wallet is also a form of peaceful, cooperative discourse.

我真的不知道 MC 是在何处与这一理论分道扬镳。比如说，他们否认世界上存在稀缺或冲突的可能性吗？我对此表示怀疑。他们否认普适性是正当性规范的必要条件吗？我对此表示怀疑，除非他们也是伦理怀疑论者，假如是这种情况，我想知道他们为何以自由意志主义者自诩。³⁰ 他们是在否认权利必须是正当的而且其正当性必须在论证过程中发生？这种否认只不过是一种拙劣的伎俩，因为它本身就是一种论证。他们是否认为对话的参与者不预设任何真理？——或者，他们只不过认为这些都不是规范？或者，他们认为论证并不是一种无冲突的互动方式？——如果是这样的话，他们似乎认为敲打别人的脑袋或偷别人的钱包也是一种和平、合作的对话形式。

Or, do they think it is coherent for a participant in the peaceful, cooperative activity of discourse, while searching with the other for a universalizable, conflict-avoiding property allocation rule, to advocate socialism, or any other non-libertarian approach? If they are libertarians surely there must be some advantage to libertarian rights that would factor in to such a generalized argumentative justification context. Or, would MC seriously maintain that a norm could be argumentatively justified, if the norm, if followed, would render human life, and thus argumentative justification itself, impossible?³¹

或者说，他们是否认为，一个和平、合作的对话活动的参与者，在与其他人一起寻求一种普适性的、避免冲突的财产分配规则时，与鼓吹社会主义或任何其他非自由意志主义的方法是一致的？如果他们确实是自由意志主义者，那么自由意志主义的权利肯定会有一些优势，会在这种普遍的论证性证成的背景中起作用。如果一种规范被遵循，会导致人类生活因此也是论证过程的证成本（argumentative justification）身彻底不可

³⁰ As noted above (note 18), Murphy seems to acknowledge the universalizability principle, and is a libertarian, while Callahan appears to reject it and apparently, as far as I am aware, no longer considers himself a libertarian (or Austrian).

如上所述（注释 18），墨菲似乎承认普适性原则，而且是自由意志主义者，而卡拉汉似乎拒绝接受普适性原则，而且据我所知，他显然不再认为自己是自由意志主义者（或奥地利主义者）。

能，那么 MC 会严肃地主张这种规范可以被证成吗？³¹

³¹ See also Rothbard's criticism of the "communist" rule of universal equal and otherownership:

Can we picture a world in which no man is free to take any action whatsoever without prior approval by everyone else in society? Clearly no man would be able to do anything, and the human race would quickly perish. But if a world of zero or near-zero self-ownership spells death for the human race, then any steps in that direction also contravene the law of what is best for man and his life on earth.

Murray N. Rothbard, "Interpersonal Relations: Ownership and Aggression," in *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 45 – 46, at 46, reproduced in substantially similar form in idem, "A Crusoe Social Philosophy," *Mises Daily* (December 7, 2021; <https://mises.org/library/crusoe-social-philosophy>). See also related discussion in "How We Come to Own Ourselves" (ch. 4), n.14 and "Law and Intellectual Property in a Stateless Society" (ch. 14), n.27.

另见罗斯巴德对“共产主义”普遍平等和共同所有权规则的批评：

我们能否想象一个世界，在这个世界里，任何人在没有得到社会中其他所有人的事先批准之前都不能自由地采取任何行动？显然，没有人能够做任何事情，人类将很快灭亡。但是，如果一个自我所有权为零或接近零的世界意味着人类的灭亡，那么朝这个方向迈出的任何步骤也都违反了对人类及其在地球上的生活最有利的法则。

穆瑞·N. 罗斯巴德，《人际关系：所有权与侵犯》，收录于《自由的伦理》（纽约：纽约大学出版社，1998 年），第 45 46 页，第 46 页，以基本相似的形式重印于同上，《克鲁索社会哲学》，米塞斯日报（2021 年 12 月 7 日）。另见《我们如何拥有自己》（第 4 章）注释 14 和《无政府社会中的法律与知识产权》（第 14 章）注释 27 中的相关讨论。

For a related insight regarding the importance of the prior-later distinction and the necessity that property rights be able to answer the question of who can use what resource now, rather than waiting for some future information, otherwise people would not be able to survive because they could not use resources to produce and consume in the present, see Hoppe, "From the Economics of Laissez Faire to the Ethics of Libertarianism," in *The Economics and Ethics of Private Property*, pp. 328 – 30; Hoppe, "On the Ultimate Justification of the Ethics of Private Property," in *The Economics and Ethics of Private Property*, p. 345 ("Nobody advocating a wait-for-the-outcome ethic would be around to say anything if he took his own advice seriously. Also, to the extent that utilitarian proponents are still around, they demonstrate through their actions that their consequentialist doctrine is and must be regarded as false. Acting and proposition-making require private property rights now and cannot wait for them to be assigned only later."); Hoppe, "Appendix: Four Critical Replies," in *The Economics and Ethics of Private Property*, p. 407; idem, "The Ethics and Economics of Private Property," in *The Great Fiction*, at section III, "Misconceptions and Clarifications."

See also Rothbard, “Beyond Is and Ought” (emphasis added):

In the modern libertarian movement, only the natural-rights libertarians have come to satisfyingly absolute libertarian conclusions. The different wings of “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.

对于有关先来后到的区别的重要性以及财产权必须能够回答谁现在可以使用何种资源的问题（而不是等待未来的某些信息，否则人们将无法生存，因为他们无法在当下使用资源进行生产和消费）的相关见解，见霍普，《从自由放任经济学到自由意志主义伦理学》，收录于《私有财产的经济学与伦理学》，第 328 330 页；霍普，《论私有财产伦理的终极证成》，收录于《私有财产的经济学与伦理学》，第 345 页（“如果任何倡导等待结果伦理的人认真对待自己的建议，他就不会有机会发表任何言论。而且，功利主义支持者只要还存在，他们的行动就表明他们的结果[▲]学说是错误的，而且必须被视为错误的。行动和提出主张现在就需要私有财产权，不能等到以后才分配。”）；霍普，“附录：四个批判性回复”，收录于《私有财产的经济学与伦理学》，第 407 页；同上，《私有财产的伦理学与经济学》，收录于《伟大的虚构》，在第三辑《误解与澄清》。另见罗斯巴德，《超越实然与应然》（重点补充）：在现代自由意志主义运动中，只有自然权利的自由意志主义者得出了令人满意的绝对自由意志主义的结论。“结果[▲]者”的不同派别——无论是情感主义者、功利主义者、施蒂纳主义者，还是其他什么——往往在关键时刻屈服。毕竟，如果一个人必须等待后果才能做出坚定的决定，那么在任何可以想象的情况下，他都很难采取一贯强硬的自由和私有财产立场。

See also Hoppe, “The Justice of Economic Efficiency,” in The Economics and Ethics of Private Property, at 337:

While every person can have control over whether or not his actions cause the physical integrity of something to change, control over whether or not one’s actions affect the value of someone’s property to change rests with other people and their evaluations. One would have to interrogate and come to an agreement with the entire world population to make sure that one’s planned actions would not change another person’s evaluations regarding his property. Everyone would be long dead before this could ever be accomplished.

For more on the prior-later distinction, see “What Libertarianism Is” (ch. 2), at notes 32 – 36 and accompanying text, et pass.

另见霍普，《经济效率的正义性》，收录于《私有财产的经济学与伦理学》，第 337 页：

虽然每个人都可以控制自己的行为是否导致某物的物理完整性发生变化，但控制自己的行为是否导致某人财产的价值发生变化取决于其他人及其评价。一个人必须询问并与全世界所有人达成一致，以确保自己计划的行动不会改变另一个人对其财产的评价。在这能够实现之前，每个人早就死了。

关于先来后到的区别的更多内容，见《何为自由意志主义》（第 2 章），注释 32 36 及相关内容，等等。

MC do not do attempt to debunk argumentation ethics in general, or, alternatively, to show just what ethics are implied in argumentation (and why these are not the ones that Hoppe proposes). Do they believe any norms are implied in argumentation? If not, they would seem to reject the entire edifice of work in this regard, including work by Jürgen Habermas, Karl-Otto Apel, Frank van Dun, G.B. Madison, Alan Gewirth, Roger Pilon, Tibor Machan, and others discussed in "Dialogical Arguments for Libertarian Rights" (ch. 6).

MC 并没有试图从总体上驳斥论证伦理学。或者，也没有试图说明论证中隐含着哪些伦理（以及为什么这些伦理不是霍普所提出的伦理）。他们认为论证中隐含着某些规范吗？如果不是，他们似乎就拒绝了这方面的全部努力，包括尤尔根-哈贝马斯（Jürgen Habermas）、卡尔-奥托-阿佩尔（Karl-Otto Apel）、弗兰克-范-邓恩（Frank van Dun）、G.B. 麦迪逊（G.B. Madison）、艾伦-格维思（Alan Gewirth）、罗杰-皮隆（Roger Pilon）、蒂博尔-马钱（Tibor Machan）以及《自由意志主义权利的对话论证》（第 6 章）中讨论的其他人的努力。

On the other hand, if they accept that argumentation implies some norms, which are they? Do these norms support libertarianism? Socialism? Or are they only non-rights-related interpersonal norms, like "be nice" or "don't lie"?³² Are these argumentatively-presupposed norms at least consistent with libertarianism? MC write:

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. [54]

另一方面，如果他们承认论证意味着某些规范，那么这些规范是什么？这些规范是否支持自由意志主义？还是社会主义？抑或它们只是与权利无关的人际关系的规范，如“与人为善”或“不撒谎”？³² 这些论证所预设的前提规范是否至少与自由意志主义相

³² Van Dun does seem to have a somewhat broader conception of the scope of discourse ethics type reasoning than Hoppe or myself. See Van Dun, "Argumentation Ethics and the Philosophy of Freedom," p. 32 n.73, regarding the "right to lie." 范·邓恩似乎确实对对话伦理学式推理的范围有着比霍普或我本人更广泛的概念。见

一致？MC 写道：

霍普接下来援引了哈贝马斯和阿佩尔提出的“论证伦理学”……哈贝马斯和阿佩尔主张，每当人们参与论证时，他们就默认了一套规范，例如，他们在努力说服其他参与者接受自己的观点时，将仅限于采用和平手段。[54]

It is not clear whether MC are merely paraphrasing this basic insight or whether they agree with it. If they do, are there no implications to be drawn from this? Does it place no constraints whatsoever on the legitimacy of norms propositionally advanced in the course of (peaceful!) argument? After all, later they say “Hoppe has shown that bashing someone on the head is an illogical form of argumentation.” (p. 58) Does this concede that argumentation does presuppose some norms? It's not clear.

不清楚 MC 只是在转述这一基本观点，还是同意这一观点。如果他们同意，难道没有从中悟出任何蕴含吗？难道它对在（和平的！）论证过程中提出的命题规范的合法性没有任何限制吗？毕竟，他们后来说：“霍普已经证明，敲打别人的脑袋是一种不合逻辑的论证方式。”（第 58 页）这是否承认论证确实以某些规范为前提？目前还不清楚。

It seems to me that if MC accept any form of argumentation ethics as valid—that is, if there are some norms implied in discourse—then, as libertarians who believe libertarian norms are (somehow) justified, they would have to believe that the argumentative norms are at least compatible with, if not the grounding for, libertarian rights. That is, if you accept that there are some norms presupposed by argumentative justification, and if you yourself accept libertarian norms, you must believe that the norms of argumentation ethics are at least compatible with, and possibly relevant to, the greater set of libertarian norms.

在我看来，如果 MC 承认论证伦理学的形式是有效的——也就是说，如果有一些规范隐含在对话中——那么，作为相信自由意志主义规范（在某种程度上）是正当的自由意志主义者，他们就必须相信论证规范即使不是自由意志主义权利的基础，也至少与之相容。也就是说，如果你接受论证性的证成预设了一些规范，如果你自己也接受自由意志主义规范，你就必须相信论证伦理学的规范至少与更大的自由意志主义的规范是相容的，并且也可能是相关的。

范·邓恩《论证伦理学与自由哲学》第 32 页注释 73，关于“说谎的权利”。

普适性

Universalizability

What about universalizability? I am not sure if MC really reject the universalizability requirement—but if they do, I fail to see how they can themselves adhere to any notion of rights; rejecting universalizability means that any norm whatsoever can be proposed by simply making up a particularistic reason for it. Without the universalizability principle, literally “anything goes,” which of course leads to ethical relativism and/or skepticism. I will assume that MC are not ethical relativists or skeptics and thus do not reject universalizability. But I am not sure they fully appreciate this principle.

普适性又如何呢？我不确定 MC 是否真的拒绝普适性这个必要条件——但如果是这样的话，我就不明白他们自己如何能够坚持任何权利概念；拒绝普适性意味着，只要编造一个特殊的理由，就可以提出任何规范。如果没有普适性原则，字面意思就是“什么都可以提出”，这当然会导致伦理相对主义和/或怀疑主义。我假定 MC 不是伦理相对主义者或怀疑论者，因此不拒绝普适性。但我不确定他们是否完全理解这一原则。

Consider this comment by MC:

To simply declare that ownership rights must be “universalizable” is no help, either; after all, communists could cite the same principle to “prove” that everyone should have equal shares to all property. [59 n.3]

请看 MC 的评论：

简单地宣称所有权必须具有“普适性”也无济于事；毕竟，共产主义者可以引用同样的原则来“证明”每个人都应平等地分享所有财产。[59 n.3]

MC write here as if they are totally unaware that Hoppe has explicitly stated that “the universalization principle only provides a purely formal criterion for morality.”³³ Of course, even if socialism’s principles were reformulated in a completely universalizable way, it will still be inconsistent with other norms presupposed in argumentation, as noted above.

MC 在这里写道，他们似乎完全没有意识到霍普曾明确指出，“普适性原则只是为道德

提供了一个纯粹的形式标准”。³³ 当然，即使以完全可普适性的方式重新表述社会主义的原则，如上所述，它仍然会与论证中预设的其他规范不一致。

And regarding universalizability, MC also state:

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... Aristotle need only contend [that] barbarians [] are not as rational as Greeks. [58, 59]

而关于普适性，MC 也指出：

我们在本节的最后一点是要指出，即使撇开上述所有难点不谈，霍普仍然只是为论证中的个人证明了自我所有权。这是因为，即使根据霍普自己的理由，否认自由意志主义伦理的人如果试图向其“受害者”证明他所偏爱的学说的正当性，那也只是在自相矛盾。

例如，只要亚里士多德只是与其他希腊人论证蛮族的劣等和他们作为奴隶的自然地位，那么他就不会陷入践言冲突。他可以始终如一地赋予他的希腊论证对手以自我所有权，而同时剥夺那些他认为天生低人一等的人的自我所有权……亚里士多德只需主张[说]野蛮人[]不如希腊人理性。[58, 59]

Do MC think that merely “deeming” or “contending” something to be so is automatically compatible with universalizability? I believe they are simply misapplying the universalizability principle here (or, rather, failing to apply it). For Aristotle to grant rights to himself and Greeks, but not to other individuals, would simply be particularistic. He would have to show that there is some reason, objectively grounded in the nature

³³ Hoppe, A Theory of Socialism and Capitalism, p. 157 (emphasis added).
霍普，《社会主义与资本主义理论》，第 157 页（重点补充）

of things, that justifies rights in Greeks but not in other people identical to Greeks in all respects except for their Greekness. Again, either the universalizability requirement is taken seriously, or it is not. If not, the door to ethical skepticism is opened wide.³⁴

MC 是否认为，仅仅“认为”或“主张”某事如此，就自动符合普适性？我认为他们只是在这里错误地运用了普适性原则（或者更确切地说，没有运用这一原则）。亚里士多德只赋予自己和希腊人权利，而不赋予其他个人权利，这根本就是一种特殊主义。他必须证明，有某种客观存在于事物本质中的理由可以证明希腊人享有权利是正当的，而其他与希腊人在除希腊性之外的所有方面都相同的人却不享有权利也是正当的。同样，要么认真对待普适性要求，要么不认真对待。否则，伦理怀疑主义的大门就会敞开。³⁴

Moreover, I would assume MC themselves do not agree that one can mount a viable argument that Greeks have rights (for some reason) but other humans do not. So why would they think it's "consistent" to make such an argument, when even they would (presumably) disagree with such an argument?

此外，我想 MC 自己也不同意可以提出如下可行的论点，即希腊人有权利（出于某种原因），而其他人没有。那么，即使是在他们（大概）也不同意这样的论点情况下，为什么他们却会认为提出这样的论点是“一致的”呢？

整个身体与部分身体

Entire Body vs. Parts of the Body

³⁴ See also, on this “Greek” issue, Van Dun, “Argumentation Ethics and the Philosophy of Freedom,” pp. 24 – 25. See also Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics,” pp. 17 – 23; Block, “Rejoinder to Murphy and Callahan on Hoppe’s Argumentation Ethics,” p. 635 – 36; Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” p. 55 et pass.

另外，关于这个“希腊人”问题，还可参见范·邓恩的《论证伦理学与自由哲学》，第 24 25 页。还可参考埃布拉斯的《对当前针对霍普的论辩伦理学提出的批评的回应》，第 17 23 页；布洛克的《就霍普的论证伦理学对墨菲和卡拉汉的反驳》，第 635 636 页；斯伦佐克的《自由意志主义论证伦理学、语言的先验语用学和无冲突原则》，第 55 页及以后。

One criticism MC make is the argument that Hoppe has not succeeded in arguing for ownership of one's entire body, but, at best, only parts of it:

At best, all Hoppe has proven is that it would be a performative contradiction for someone 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 someone 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. [60]

MC 提出的一个批评是，霍普并没有成功地论证一个人对整个身体的所有权，充其量只是论证了身体的一部分：

霍普充其量只是证明了，如果有人在论证中否认他的论证对手（或许还有同“类”的对手）在论证期间拥有论证所需的身体部分（如眼睛、大脑和肺），这将是一个践言冲突。这与表明某人否认自由意志主义的理由是自相矛盾的，相去甚远。特别是，集体主义者可以辩称，如果人们的行动有助于社会的其他成员，那么就可以理所当然地强迫他们放弃肾脏或参战。[60]

Hoppe has subsequently responded to this type of argument:

Some critics have argued that this does not demonstrate a person's ownership of his entire body, but at best only of parts of it. Why? Because to argue it is not necessary to use all body parts. And true enough, you do not need two kidneys, two eyes or an appendix to argue. Indeed, you also do not need your body hair or even arms and legs to argue. And hence, according to such critics, you cannot claim to be the lawful owner of your two kidneys or eyes, your legs and arms. Yet this objection does not only appear silly on its face—after all, it implies the recognition of these "un-necessary" parts as natural parts of one unitary body rather than as separate, stand-alone entities. More importantly, it involves, philosophically speaking, a category mistake. The critics simply confuse the physiology of argumentation and action with the logic of argumentation and action. And this confusion is particularly surprising coming from economists, and even more so from economists familiar also with praxeology. For the fundamental distinction made in economics between "labor" and "land" as the two originary means of production, which corresponds exactly to the distinction made here between

"body" and "external world," is also not a physiological or physicalistic distinction, but a praxeological one.

霍普随后对这类论点做出了回应：

一些评论家认为，这并不能证明一个人拥有整个身体的所有权，充其量只能证明他拥有部分身体的所有权。为什么呢？因为论证并不需要使用身体的所有部分。的确，你不需要两个肾脏、两只眼睛或一个阑尾就可以进行论证。事实上，你也不需要你的体毛甚至胳膊和腿来论证。因此，根据这些批评者的观点，你不能声称自己是两个肾脏或两只眼睛、双腿和双臂的合法所有者。然而，这种反对意见仅仅是表面上显得愚蠢——毕竟，它意味着承认这些“非必要”的部分是一个整体的自然部分，而不是独立的个体。更重要的是，从哲学角度看，这涉及到一个范畴错误。批评者只是混淆了论证和行动的生理学与论证和行动的逻辑学。这种混淆出自经济学家之口，更出自熟悉行动学的经济学家之口，尤其令人惊讶。因为经济学对作为两种原始生产资料的“劳动”和“土地”所作的基本区分，与这里对“身体”和“外部世界”所作的区分完全一致，也不是生理学或物理学的区分，而是行动学的区分。

The question to be answered is not: which body parts are physiologically necessary requirements for one person arguing with another person. Rather, the question is: which parts of my body and which parts of your body can I or you argumentatively justify as my or your lawful possessions. And to this a clear and unambiguous answer exists. I am the lawful owner of my nature-given body with everything naturally in it and attached to it, and you are the lawful owner of your entire nature-given body. Any argument to the contrary would land its proponent in a performative or dialectic contradiction. For me to say, for instance, in an argumentation with you, that you do not rightfully own all of your nature-given body is contradicted by the fact that in so arguing, not fighting, with you, I must recognize and treat you as another person with a separate body and recognizably separate physical boundaries and borders from me and my body. To argue that you do not lawfully own your entire natural body, which you actually possess and have peacefully taken into possession before I could have possibly done so indirectly by means of my natural body, is to advocate conflict and bodily clash and hence contrary to the purpose of argumentation: of peacefully resolving a present conflict and avoiding future conflict.³⁵

要回答的问题不是：一个人与另一个人论证时，哪些身体部位是生理上的必要条

件。相反，问题是：我身体的哪些部分和你身体的哪些部分，我或你可以论证为我或你的合法财产。对此，我们有一个清晰明确的答案。我是我与生俱来的身体的合法拥有者，我的身体以及自然附着于它的一切，而你是你与生俱来的整个身体的合法拥有者。任何与此相反的论点都会使其支持者践言冲突或辩证的矛盾之中。例如，在与你论证时，如果我说你并不合法地拥有你的自然赋予的全部身体，那么与此相矛盾的是，在与你论证（而不是争斗）时，我必须承认并将你视为另一个拥有独立的身体的人，与我和我的身体有着可识别的独立物理界限和边界。在我可能通过我的自然身体间接占有你的自然身体之前，你就已经和平地占有并实际拥有了你的整个自然身体，如果说你不能合法地拥有你的自然身体，那就是鼓吹冲突和身体冲撞，从而违背了论证的目的：和平解决当前的冲突并避免未来的冲突。³⁵

与你的奴隶论证 *Arguing With Your Slave*

MC introduce supposed “counterexamples” of God and slavery. Take the slavery case. They recognize 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

³⁵ Hoppe, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016).” See also a similar quote in “How We Come to Own Ourselves” (ch. 4), at n.17.

See also Van Dun, “Argumentation Ethics and the Philosophy of Freedom,” p.20 n.46, p.23 n.55, and accompanying text, et pass.; Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics,” pp. 13 – 15; Block, “Rejoinder to Murphy and Callahan on Hoppe’s Argumentation Ethics,” p. 633; Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” pp. 55 – 56 et pass.

霍普，“PFP163 | 汉斯-赫尔曼·霍普，《论论证伦理学》（PFS 2016）”。另见《我们如何拥有自己》（第 4 章）中的类似引述，注释 17。

另可参考范·邓恩的《论证伦理学与自由哲学》，第 20 页注释 46、第 23 页注释 55 及相关内容，等等；埃布拉斯的《对当前针对霍普的论证伦理学提出的批判的回应》，第 13 至 15 页；布洛克的《对墨菲和卡拉汉论霍普论证伦理学的回应》，第 633 页；斯伦佐克的《自由意志主义的论证伦理学、语言的先验语用学和无冲突原则》，第 55 至 56 页及之后的内容。

off their debts to victims (or their heirs). [62]

MC 介绍了上帝和奴隶制的所谓 "反例"。以奴隶制为例。他们承认

霍普和罗斯巴德式的自由意志主义一般不相信普遍的自我所有权。特别是，他们认为罪犯可以被合法地奴役，以偿还他们欠受害者（或其继承人）的债务。[62]

Well, of course! Hoppe is a libertarian. To advocate self-ownership means that a person has the right to control his body, as a default or prima facie matter. But if someone commits aggression, of course the victim now is a partial "owner" of the aggressor's body, because he has a right to use force against it. So consider a man who now "owns" an aggressor who, say, murdered the man's wife. Of course, the owner could engage in debate with the slave, but only by granting the slave the right to use his body for purposes of argument. But how does this change the fact that no one can argumentatively deny the normative presuppositions that imply libertarianism? Let's assume the owner is libertarian. He believes in the need for property rules and conflict-avoidance. He believes any norms have to be universalizable. If he advocated socialism, his argument would be incompatible with necessary argumentative presuppositions of peace, prosperity, and conflict-avoiding prosperity— because socialist rules are either not universalizable or are not based on objective links between owner and resource.

当然了，霍普是一个自由意志主义者。主张自我所有权意味着一个人有权控制自己的身体，作为默认或初步的问题。但如果有人实施侵犯，受害者现在当然就是侵犯者身体的部分 "所有者"，因为他有权对侵犯者的身体使用武力。因此，请考虑一个人现在 "拥有" 一个侵犯者，比方说，这个侵犯者谋杀了这个人的妻子。当然，主人可以与奴隶进行论证，但前提是赋予奴隶使用其身体进行论证的权利。但是，这又如何改变没有人能从论证上否认蕴含自由意志主义的规范性预设这一事实呢？让我们假设所有者是自由意志主义者。他相信财产规则和避免冲突的必要性。他认为任何规范都必须具有普适性。如果他主张社会主义，那么他的论证就不符合和平、繁荣和避免冲突的论证的必要的预设前提——因为社会主义规则要么不具有普适性，要么不是基于所有者和资源之间的客观联系。

But his claim that he has a right to wield force against the slave is perfectly justified. It is universalizable, because the different treatment of the slave-aggressor and the master-victim is not arbitrary but is grounded in the objective fact of the act of

aggression. It is compatible with objectively assigning property rights, because it is a way of enforcing objectively assigned property rights that are violated.³⁶

但是，他主张自己有权对奴隶使用武力是完全正当的。这一主张具有普适性，因为奴隶侵犯者和主人受害者的不同待遇不是任意的、武断的，而是基于侵害行为的客观事实。它与客观分配的财产权是一致的，因为它是一种强制执行被侵犯的客观分配的财产权的方式。³⁶

³⁶ See “A Libertarian Theory of Punishment and Rights” (ch. 5) and “Dialogical Arguments for Libertarian Rights” (ch. 6). See also Hoppe’s rejection of a similar “slavery” argument in Hoppe, “Appendix: Four Critical Replies,” in *The Economics and Ethics of Private Property*, section II, “Utilitarians and Randians vs. Reason,” pp. 404 et seq. and also in Hoppe, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016)” :

[M]atters are quite different when it comes to an argumentation between slave master and slave about the subject of slavery, i.e., the conditions under which their argumentation takes place. In this case, if the slave master would say to the slave “let’s not fight but argue about the justification of slavery,” and he would thereby recognize the slave as another, separate and independent person with his own mind and body, he would have to let the slave go free and leave. And if he would say instead “so what, I have recognized you momentarily as another independent person with your own mind and body, but now, at the end of our dispute, I deny you ownership of the means necessary to argue with me and prevent you from leaving anyway,” then he would be involved in a performative or dialectic contradiction.

见《自由意志主义的惩罚与权利理论》(第 5 章)和《自由意志主义权利的对话论证》(第 6 章)。另见霍普在《私有财产的经济与伦理学》“附录：四个批判性回复”中对类似“奴隶制”论点的反驳，在“功利主义者与兰德主义者对理性”部分，第 II 节，第 404 页及后续页，以及在霍普的“PFP163 | 汉斯-赫尔曼·霍普，《论论证伦理学》(PFS 2016)”中：

[当涉及到奴隶主和奴隶之间关于奴隶制这个主题的论证，即他们进行论证时的条件，情况就完全不同了。在这种情况下，如果奴隶主对奴隶说“我们不要打架，而是就奴隶制的正当性进行论证”，并且他由此将奴隶视为另一个、独立的拥有自己思想和身体的人，他就必须让奴隶获得自由并离开。而如果他反而说“那又怎样，我暂时承认你是另一个拥有自己思想和身体独立的人，但现在，在我们的论证结束时，我否认你在与我论证所需的手段的所有权，并无论如何都阻止你离开”，那么他就会陷入践言冲突或辩证的矛盾。]

See also Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” p. 57 et pass.

Of course, as I noted in the text above, if the slave had committed aggression against the master-owner, then the owner would not be involved in contradiction by treating

the slave differently than himself. See also, on this issue, Van Dun, “Argumentation Ethics and the Philosophy of Freedom,” pp. 26 – 27; also p. 24 (emphasis added): [Hoppe’ s] 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.

And *ibid.*, p. 16 n.34 (emphasis added):

[MC] assert “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” (M&C, p.58). True, they may try to convince me that they ought to have the right to punish me for my crimes, if I have committed any. There is a good chance that they will succeed. But how on earth do they hope to convince me by means of logical arguments that they should have the right to club me, regardless of what I may have done or will do? If the (unqualified) statement “We have a right to club you” were justifiable then clubbing a person would be a justifiable action also in an argumentation.

See also *ibid.*, p. 26 n.62:

Obviously, as noted before, there may be cases where the use of force to deprive another of his freedom is justified, for example to make him pay for his crimes, or to stop him from completing the crime he is in the process of committing. One may be justified in using uninvited force against such persons. However, these are not paradigmatic cases of the sort of slavery to which Friedman or Murphy and Callahan refer.

另可参见斯伦佐克的《自由意志主义论证伦理学、语言的先验语用学和无冲突原则》，第 57 页及之后的内容。

当然，正如我在上面的文中所指出的，如果奴隶对奴隶主主人实施了侵犯，那么主人对奴隶区别对待就不会陷入矛盾。关于这个问题，也可参见范·邓恩的《论证伦理学与自由哲学》，第 26 27 页；还有第 24 页（重点已添加）：

[霍普的]论点是，当 A 和 B 进行论证时，他们都是在理性、无罪推定和自我所有权这些辩证有效的推定下进行的——这些推定在有证据表明应当撤回之前一直有效。

以及同上，第 16 页注释 34（重点补充）：

[MC]声称“我们不能通过棍棒来让你信服，但我们可以相当合乎逻辑地试图让你相信我们应该有权用棍棒打你”（M&C，第 58 页）。没错，如果我犯了罪，他们可能试图让我相信他们应当有权因我的罪行惩罚我。他们很有可能成功。但他们到底怎么期望通过逻辑论证让我相信他们无论我做了什么或将要做什么都应该有权用棍棒打我呢？如果（无限制的）“我们有权用棍棒打你”这一陈述是合理的，那么在论证中用棍棒打人也会是一种正当的行为。

另见同上，第 26 页注释 62：

显然，如前所述，可能存在有理由使用武力剥夺他人自由的情况，例如让他为自己的罪行付出代价，或者阻止他完成正在实施的犯罪。对这类人使用未经邀请的武力可能是正当的。然而，这些都不是弗里德曼或墨菲和卡拉汉所指的那种典型的奴隶制案例。

And another way to look at this issue is this. As pointed out in chapter 4 (n.17), and as alluded to by Hoppe in the quote at note 35, above, and also his comments in the Foreword, the reasons for the self-ownership norm is that a person's direct control over his own body has logical-temporal priority over the control by another person which must be indirect. Since the person always maintains direct control, another person attempting to control the person's body by indirect control (basically, coercion) will always, necessarily, generate conflict. But the purpose of property norms is to reduce conflict or allow conflict to be avoided. So one of the reasons the slavery-norm cannot be accepted as justified is that it generates conflict. (There are other, interrelated reasons as well, such as: someone claiming ownership of another by indirect control claims ownership of his own body due to direct control; so it is contradictory to deny the same right to the other person.)

我们还可以从另一个角度来看待这个问题。正如第 4 章（注 17）所指出的，霍普在上文注 35 的引文中以及他在前言中的评论所提到的，自我所有权规范的理由是，一个人对自己身体的直接控制在逻辑上-时间上优先于他人的控制，而后者必定是间接的。由于人始终保持着直接控制，另一个人试图通过间接控制（基本上是胁迫）来控制人的身体，总是必然会产生冲突。但财产规范的目的是减少冲突或避免冲突。因此，奴隶制规范不能被接受为是正当的原因之一就是它产生了冲突。（还有其他一些相互关联的原因，例如：某人通过间接控制对他人主张所有权，并通过直接控制对自己的身体主张所有权；因此，否认他人同样的权利是自相矛盾的）。

Now when the victim of a crime seeks to enslave the criminal, it is true that this will be a conflict: the indirect control of the victim will clash with the direct control of the criminal over his own body. Yet it is too late to avoid conflict; the criminal's criminal act was already an act of conflict. So now we do not have two peaceful people seeking a conflict-reducing norm to allow them to live peacefully together. Now we have a victim of aggression and conflict who seeks to obtain some kind of rectification from the aggressor, even if that involves violently coercing or dominating the aggressor, overwhelming his direct control with indirect control via coercion. So there is no contradiction in Hoppe's theory in opposing the slavery-norm as being contradictory and granting the legitimacy of a type of slavery in limited situations. In the first case, Hoppe is observing that a property norm aimed at reducing conflict cannot be justified if it sets up conflict. In the second case, conflict has already happened and now the

victim is not seeking to avoid conflict but is instead seeking restitution.³⁷

现在，当犯罪的受害者试图奴役罪犯时，这确实将会产生一种冲突：受害者的间接控制将与罪犯对自己身体的直接控制发生冲突。然而，要避免冲突为时已晚；罪犯的犯罪行为已经是一种冲突行为。因此，我们现在看到的不是两个和平的人在寻求一种减少冲突的规范，使他们能够和平共处。现在，我们看到的是一个侵犯和冲突的受害者，他试图从侵犯者那里获得某种补偿，即使这涉及到武力胁迫或支配侵犯者，通过胁迫的间接控制来压倒他的直接控制。因此，在霍普的理论中，赞成奴隶制规范是自相矛盾的，而在有限的情况下承认一种奴隶制的合法性，这两者并不矛盾。在第一种情况下，霍普是在指出，如果一种旨在减少冲突的财产规范导致了冲突，那么它就不可能是正当的。在第二种情况下，冲突已经发生，现在受害者并不寻求避免冲突，而是寻求报复赔偿。³⁷

作为奴隶主的上帝 *God as Slaveowner*

As for God—you can't just posit that God owns everyone and "therefore" we are not self-owners. Moreover, even if God does own us, then this would be because God has some objective link that gives him a better claim or title to a person's body than this person has—some kind of logical-temporal priority that takes precedence over the person's own claims to own his body because of his direct control of his body. If we are positing this kind of magic, then God himself might have a sort of "super" direct control over our bodies that gives him a better claim. For example, as Hoppe points out (note the text I have italicized):

The answer to the question what makes my body "mine" lies in the obvious fact that this is not merely an assertion but that, for everyone to see, this is indeed the case. Why do we say "this is my body"? For this a twofold requirement exists. On the one hand it must be the case that the body called "mine" must indeed (in an intersubjectively

³⁷ See further discussion of this matter at "How We Come To Own Ourselves" (ch. 4), the sections "Direct Control" and "Summary"; "Law and Intellectual Property in a Stateless Society" (ch. 14), Part II.C.

关于此事的进一步讨论，见《我们如何拥有自己》（第 4 章）中“直接控制”和“总结”部分；《无政府社会中的法律与知识产权》（第 14 章），第二部分 C 节。

ascertainable way) express or "objectify" my will. Proof of this, as far as my body is concerned, is easy enough to demonstrate: When I announce that I will now lift my arm, turn my head, relax in my chair (or whatever else) and these announcements then become true (are fulfilled), then this shows that the body which does this has been indeed appropriated by my will. If, to the contrary, my announcements showed no systematic relation to my body's actual behavior, then the proposition "this is my body" would have to be considered as an empty, objectively unfounded assertion; and likewise this proposition would be rejected as incorrect if following my announcement not my arm would rise but always that of Müller, Meier, or Schulze (in which case one would more likely be inclined to consider Müller's, Meier's, or Schulze's body "mine").³⁸

至于上帝，你不能假设上帝拥有每个人，"因此 "我们不是自我拥有者。此外，即使上帝确实拥有我们，那也是因为上帝拥有某种客观联系，使他对一个人的身体拥有比这个人更合理的要求权或所有权——某种逻辑上-时间上的优先权，这种优先权优先于这个人自己对自己身体的主张，因为他直接控制着自己的身体。如果我们假定存在这种魔力，那么上帝本身就可能对我们的身体拥有某种 "超级 "直接控制权，从而使他拥有更合理的权利主张。例如，正如霍普所指出的（注意我斜体标注的文字）：

是什么让我的身体成为 "我的"？这个问题的答案就在于一个显而易见的事实：这不仅仅是一个断言，而且对于每个人来说，这的确是事实。我们为什么要说 "这是我的身体"？这需要两方面的条件。一方面，被称作 "我的 "身体必须确实（以主体间可确定的方式）表达或 "客观化 "我的意志。就我的身体而言，这一点很容易证明：当我宣布我现在要抬起胳膊、转过头、在椅子上放松（或其他什么），而这些宣布随后变成了事实（得到了实现），那么这就表明，做出这些动作的身体确实被我的意志所占有。相反，如果我的宣布与我身体的实际行为没有系统的联系，那么 "这是我的身体 "这个命题就必须被视为一个空洞的、客观上毫无根据的断言；同样，如果在我宣布之后，不是我的手臂抬起来，而是穆勒、迈尔或舒尔茨的手臂抬起来（在这种情况下，人们更可能倾向于认为穆勒、迈尔或舒尔茨的身体是 "我的"），那么这个命题就会被视为不正确而遭到否定。³⁸

Now Hoppe's italicized example here is not intended to be realistic, anymore than the

³⁸ Quoted in "How We Come to Own Ourselves" (ch. 4), at n.17.
引自《我们如何拥有自己》（第 4 章），注释 17。

hypothetical construct of the “evenly rotating economy,” or ERE, employed by Mises and Rothbard; or the magical world of the Garden of Eden or the Land of Cockaigne (or Schlaraffenland), in which there is no scarcity or conflict possible, but in which human action is also virtually inconceivable.³⁹ (This is unlike Robinsonades, which analyze the economic implications of the actions of Crusoe alone on his island, which is not unrealistic at all, just highly simplified.)⁴⁰

现在，霍普在这里用斜体标出的例子并不打算写实，就像米塞斯和罗斯巴德所使用的“均匀轮转经济”（ERE）的假构一样；或者是伊甸园或科克加涅国（或施拉拉芬国）的魔幻世界，在那里不可能存在稀缺或冲突，但在那里人的行动也几乎是不可想象的³⁹。（这与《鲁滨逊漂流记》不同，后者分析的是克鲁索一个人在孤岛上的行动对经济的影响，这并非完全不现实，只是被高度简化了而已）⁴⁰。

³⁹ See the criticism of the ERE in Jörg Guido Hülsmann, “A Realist Approach to Equilibrium Analysis,” Q.J. Austrian Econ. 3, no. 4 (Winter 2000; <https://mises.org/library/realist-approach-equilibrium-analysis>): 3 – 51. On the Schlaraffenland construct, see Hoppe, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in *The Great Fiction*, p. 86; Hoppe, *A Theory of Socialism and Capitalism*, p. 219. See also the Wikipedia entry for “Cockaigne,” <https://en.wikipedia.org/wiki/Cockaigne>. These are both discussed in “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23), at notes 16 – 17.

参见约格·吉多·许尔曼的《均衡分析的现实主义方法》，《奥地利经济学季刊》第 3 卷第 4 期（2000 年冬季；<https://mises.org/library/realist-approach-equilibrium-analysis>）：3 51 页，其中对 ERE 的批评。关于“安乐乡”构想，见霍普的《论共有、公有和私有财产以及全面私有化的基本原理》，载于《伟大的虚构》，第 86 页；霍普的《社会主义与资本主义理论》，第 219 页。另可查看维基百科“安乐乡”词条，<https://en.wikipedia.org/wiki/Cockaigne>。这些在《论自由意志主义法律理论、自我所有权与毒品法》（第 23 章）的注释 16 17 中均有讨论。

⁴⁰ See Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>), p. 41; idem, *Epistemological Problems of Economics*, 3d ed., George Reisman, trans. (Auburn, Ala.: Mises Institute, 2003), pp. 14 – 16, 30 – 31, 87 – 88; idem, *Human Action: A Treatise on Economics*, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), p. 64 et seq. See also Hoppe, *A Theory of Socialism and Capitalism*, p. 142, as quoted in “Causation and Aggression” (ch. 8), n.4. See also related discussion in “Knowledge, Calculation, Conflict, and Law” (ch.

It was merely a way to emphasize the crucial centrality of direct control with a somewhat unrealistic and whimsical hypothetical. Likewise, until someone can prove there is a God, and that he owns us, I fail to see the relevance of this example. In any case, as Locke argues, God “gave” self-ownership to each person, “manumitting” them in a sense.⁴¹ Notes Van Dun in this regard:

*Assume that Murphy and Callahan refer to a theist in the Judeo-Christian tradition: Would God claim justifiable possession or control of a creature that He put out of his Garden when He discovered that it was capable of reason and free will? What does all the biblical talk about Covenants mean if we are asked to consider a covenant between an owner and his property?*⁴²

这只是用一个有点不切实际、异想天开的假设来强调直接控制的关键核心地位。同样，在有人能够证明存在上帝并且他拥有我们之前，我看不出这个例子有什么意义。无论如何，正如洛克所言，上帝“赋予”了每个人自我所有权，在某种意义上说是“解放”了他们⁴¹。范·邓恩（Van Dun）在这方面指出：

假设墨菲和卡拉汉指的是犹太-基督教传统中的有神论者：当上帝发现某种生物具有理性和自由意志时，他是否会主张对其进行正当的占有或控制？如果我们被要求考虑一个所有者与其财产之间的契约，那么《圣经》中关于盟约的所有论述又意味着什么

19), at n.65, and “A Libertarian Theory of Punishment and Rights” (ch. 5), n.36. 参见路德维希·冯·米塞斯的《经济科学的最终基础：方法论文》（普林斯顿，新泽西：D.范诺斯特兰德公司，1962 年；<https://mises.org/library/ultimate-foundation-economic-science>），第 41 页；同上，《经济学的认识论问题》，第三版，乔治·赖斯曼译（奥本，阿拉巴马：米塞斯研究院，2003 年），第 14 16 页、30 31 页、87 88 页；同上，《人的行动：经济学专论》，学者版（奥本，阿拉巴马：米塞斯研究院，1998 年；<https://mises.org/library/human-action-0>），第 64 页及后续页。另见霍普《社会主义与资本主义理论》第 142 页，如在《因果关系与侵犯》（第 8 章）注释 4 中所引用。另见《知识、计算、冲突与法律》（第 19 章）注释 65 以及《自由意志主义的惩罚与权利理论》（第 5 章）注释 36 中的相关讨论。

⁴¹ See John Locke, Second Treatise on Civil Government (1690; <https://www.johnlocke.net/2022/07/two-treatises-of-government.html>), § 25: “every man has a property in his own person: this no body has any right to but himself.”

参见约翰·洛克的《政府论：下》（1690 年；<https://www.johnlocke.net/2022/07/two-treatises-of-government.html>），第 25 节：“每个人对他自己的人身享有一种所有权：除他自己以外，任何人都没有这种权利。”

呢?⁴²

Van Dun also observes that MC

*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.*⁴³

范·邓恩还指出，MC

*没有注意到关于上帝的论证和与上帝论证之间的区别。上帝的所有权问题必须在与上帝的论证中决定，而不是与任何自称为上帝代表的人论证，因为无论如何他都很难证明自己的资格——以至于他是否有机会讨论上帝的所有权问题本身都是个问题。这同样适用于关于社会或人民对我们的身体或其他事物拥有最终所有权的讨论。*⁴³

Moreover, the purpose of property rights and human law is to govern interpersonal behavior among human beings, here on earth. Even if there is a God out there that has some kind of super-ownership claim over us, as his subjects or creations, within the human realm and among other humans, we are still self-owners vis-à-vis each other. As Walter Block observes, "libertarianism is a theory that concerns the relationship between man and man, not between man and God."⁴⁴

此外，财产权和人类法律的目的是规范地球上人类之间的人际行为。即使有上帝在那里，对作为他的臣民或创造物的我们有某种超级所有权主张，在人类领域和其他人类之间，我们仍然是彼此的自我所有者。正如沃尔特·布洛克所言，“自由意志主义是一种涉及人与人之间关系的理论，而非人与神之间的理论”⁴⁴。

⁴² Van Dun, "Argumentation Ethics and the Philosophy of Freedom," p. 21 n.50.

范·邓恩的《论证伦理学与自由哲学》，第 21 页，注释 50。

⁴³ Ibid., p. 21. 同上，第 21 页。

⁴⁴ Block, "Rejoinder to Murphy and Callahan on Hoppe's Argumentation Ethics," p. 636.

布洛克，《就霍普的论证伦理学对墨菲和卡拉汉的反驳》，第 636 页。

Thus, the positing of a hypothetical God in no way refutes the conclusion that only the libertarian norms, including especially self-ownership, can be argumentatively justified amongst fellow humans.

因此，假想上帝的存在丝毫不能反驳这样一个结论，即只有自由意志主义准则，尤其包括自我所有权，才能在人类同胞中被论证性的证成。

仅在论证时提出的主张 Claims Made During Argumentation Only

MC try to make much of their notion that propositions advanced “during” argument are not subject to the presuppositions of argument if the rule is designed to be applied in a non-argumentative context. But propositions can only be justified during argumentation. A participant in discourse cannot deny that conflict-avoidance is good. When he seeks to justify something, it is always some action he seeks to justify. The justification takes place at one time; the action to be justified, at another. So what? Are MC saying that no action can ever be justified, other than argument itself? Consider an act of theft, or property acquisition, or rape: all non-argumentative actions. Obviously, these actions are not justifying-actions, because they are not arguments. The only time they could possibly be justified, or criticized, is at another time, during argument. In any event, this critique seems to miss the point. As Hoppe notes: “In the same way as the validity of a mathematical proof is not restricted to the moment of proving it, so is the validity of the libertarian property theory not limited to instances of argumentation. If correct, the argument demonstrates its universal justification.”⁴⁵

MC 试图充分发展他们的理念，即如果该规则旨在应用于非论证语境，那么“在”论证过程中提出的命题就不受论证前提的限制。但是，命题只能在论证过程中得到正当的论证。对话的参与者不能否认避免冲突是好的。当他试图证明某事正当的时候，他试图证明的总是某种行为。关于正当性的论证发生在某一时刻，需被正当化的行动则发生在另一时刻。所以呢？MC 是说除了论证本身，没有任何行动是需要正当的吗？考虑一下偷窃行为、财产获取行为或强奸行为：所有这些行为都是非论证行动。显然，这些行为都不是论证行为，因为它们不是论证。他们唯一可能被正当化或批评的时候，是在另一个时候，在论证中。无论如何，这种批评似乎没有抓住重点。霍普指出“正如数学证明的有效性并不局限于证明它的时刻一样，自由意志主义财产理论的有效性

也不局限于论证的实例。如果是正确的，论证就证明了它的普遍正当性⁴⁵。

Thus, if two people seek to agree upon a fair, universalizable rule for assigning property rights in scarce resources to individuals in a way that would allow conflict to be avoided and the resources to be used—of course the rule they are considering will be applicable to future property disputes. I am baffled at how they could think otherwise.⁴⁶

因此，如果两个人试图商定一个公平的、普适性的规则，将稀缺资源的财产权分配给个人，从而避免冲突并使用资源——他们正在考虑的规则当然将适用于未来的财产纠纷。我不明白他们怎么会不这么想。⁴⁶

⁴⁵ Hoppe, *The Economics and Ethics of Private Property*, p. 406.

霍普，《私有财产权的经济学和伦理学》，第406页。

⁴⁶ See also Hoppe, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016)” :

Another **objection** to my argument from argumentation, advanced repeatedly and by several opponents in a seemingly most serious manner, actually better qualifies as a joke. It boils down to the claim that, even if true, my argument is irrelevant and inconsequential. Why? Because the ethics of argumentation is valid and binding only at the moment and for the duration of argumentation itself and even then only for those actually participating in it. Curiously, these critics do not notice that this thesis, if it were true, would have to apply to itself, too, and hence, render their own criticism irrelevant and inconsequential also. Their criticism itself then would be just talk for the sake of talking, without any consequence outside of talking. For, according to their own thesis, what they say about argumentation is true only when and while they are saying it and has no relevance outside the context of argumentation; and moreover, that what they say to be true is true only for the parties actually involved in argumentation or even only for them alone, if and insofar as there is no actual opponent and they say what they say in an internal dialog only to themselves. But why, then, should anyone waste his time and pay attention to such private “truths” ?

For others' criticism of this “duration” part of MC's argument, see Van Dun, “Argumentation Ethics and the Philosophy of Freedom,” p. 7 n.20, p. 19 n.43, and accompanying text, et pass.; Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe's Argumentation Ethics,” pp. 15 – 17; Block, “Rejoinder to Murphy and Callahan on Hoppe's Argumentation Ethics,” p. 633 – 34; Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” p. 55.

另见霍普的“PFP163 | 汉斯-赫尔曼·霍普，《论论证伦理学》（PFS 2016）”：

我的论证中另一个“反对意见”被反复提出，且一些反对者似乎是以极其严肃的态度

提出的，实际上更像是一个笑话。它归结为这样一种主张：即使我的论证是正确的，它也是无关紧要 and 没有后果的。为什么呢？因为论证伦理学仅在论证的时刻和持续期间是有效且有约束力的，即便如此，也仅对实际参与论证的人有效。奇怪的是，这些批评者没有意识到，如果这个论点是正确的，那么它也必须适用于自身，从而使他们自己的批评变得无关紧要 and 没有后果。他们的批评本身就只是为了说而说，在说话之外没有任何影响。因为根据他们自己的论点，他们关于论证所说的只有在他们说的时候以及在他们说的过程中才是真实的，在论证的语境之外没有相关性；而且，他们所说的真实的东西只有在实际参与论证的各方中才是真实的，或者甚至只有在他们自己进行内部对话且没有实际对手时才是真实的。但是，那么为什么任何人都要浪费时间去关注这样的私人“真理”呢？

关于其他人对 MC 论证的这个“持续期间”部分的批评，见范邓恩的《论证伦理学与自由哲学》，第 7 页注释 20、第 19 页注释 43 及相关文本等；埃布拉斯的《对当前针对霍普论证伦理学的批评的回应》，第 15-17 页；布洛克的《就霍普的论证伦理学对墨菲和卡拉汉的反驳》，第 633-634 页；斯伦佐克的《自由意志主义论证伦理学、语言的先验语用学和无冲突原则》，第 55 页。

第三辑 自由意志主义的法律理论

PART III LIBERTARIAN LEGAL THEORY

第八章 因果关系与侵犯

Causation and Aggression

In 2001, I presented a paper entitled “Reinach and the Property Libertarians on Causality in the Law” at a Mises Institute symposium on Adolf Reinach and Murray Rothbard.* I later collaborated with Patrick Tinsley on an article based on this paper, published in 2004 in a related symposium issue in The Quarterly Journal of Austrian Economics.† This chapter is a substantially revised version of that article.††

2001 年，我在米塞斯研究院关于阿道夫·赖纳赫和穆瑞·罗斯巴德的研讨会上提交了一篇题为《赖纳赫和财产自由意志主义论法律中的因果关系》的论文*。后来，我与帕特里克·廷斯利 (Patrick Tinsley) 合作，在这篇论文的基础上撰写了一篇文章，并于 2004 年发表在《奥地利经济学季刊》(The Quarterly Journal of Austrian Economics) 的相关研讨会刊物上。† 本章是那篇文章的实质性修订版本。††

* “Reinach and Rothbard: An International Symposium,” Ludwig von Mises Institute, Auburn, Ala. (March 29–30, 2001; <https://perma.cc/396W-HJEL>). The other presenters were Walter Block, Guido Hülsmann (also the director), Hans-Hermann Hoppe, Larry J. Sechrest, and Barry Smith.

《赖纳赫和罗斯巴德：国际研讨会》，路德维希·冯·米塞斯研究院，阿拉巴马州奥本市 (2001 年 3 月 29-30 日；<https://perma.cc/396W-HJEL>)。其他发言人包括 沃尔特·布洛克、吉多·许尔斯曼(也是研究院院子)、汉斯-赫尔曼·霍普、拉里·塞克雷斯特和巴里·史密斯。

† Stephan Kinsella & Patrick Tinsley, “Causation and Aggression,” Q. J. Austrian Econ. 7, no. 4 (Winter 2004): 97–112. Then a law student, and a former student of Walter Block’s at Holy Cross, Tinsley is now a practicing attorney at Fletcher Tilton, PC (<https://perma.cc/8LS5-AGN4>). This article was included in a symposium issue (vol. 7, no. 4, Winter 2004), on “Austrian Law and Economics: The Contributions of Reinach and Rothbard,” which contained contributions based mainly on the papers presented at the 2001 symposium. For other articles in that issue, see note 66, below—I’ve moved them to the end to avoid awkward formatting issues. Also: when “we” is used in this chapter, it is retained from the original article.

斯蒂芬·金塞拉 (Stephan Kinsella) 和帕特里克·廷斯利 (Patrick Tinsley), 《因果关系与侵犯》, 《奥地利经济学季刊》第 7 卷第 4 期 (2004 年冬季): 97-112 页。当时还是法律系学生、曾是沃尔特·布洛克 (Walter Block) 在圣十字学院的学生的廷斯利, 现在是 Fletcher Tilton, PC 的执业律师 (<https://perma.cc/8LS5-AGN4>)。这篇文章被收录在一个专题期刊 (第 7 卷第 4 期, 2004 年冬季) 中, 主题是《奥派法律与经济学: 赖纳赫和罗斯巴德的贡献》, 其中包含的文稿主要基于 2001 年专题研讨会上提交的论文。关于该期的其他文章, 请参见下文注释 66——我已将它们移至末尾以避免格式问题。另外: 在本章中使用“我们”时, 是保留自原文。

†† My co-author Tinsley has reviewed the changes made in this chapter and fully agrees with them.

For an application of the causation ideas in this chapter to related issues, see Kinsella, “Corporate Personhood, Limited Liability, and Double Taxation,” *The Libertarian Standard* (Oct. 18, 2011); Kinsella, “KOL100 | The Role of the Corporation and Limited Liability In a Free Society” (PFS 2013); also Kinsella, “KOL382 | FreeTalkLive at PorcFest: Corporations, Limited Liability, and the Reno Reset,” *Kinsella on Liberty Podcast* (June 23, 2022); *idem*, “KOL354 | CDA §230, Being “Part of the State,” Co-ownership, Causation, Defamation, with Nick Sinard,” *Kinsella on Liberty Podcast* (Aug. 3, 2021).

For other related material published after the original article, see *idem*, “Intellectual Property and the Structure of Human Action,” *StephanKinsella.com* (Jan. 6, 2010); *idem*, “KOL021 | ‘Libertarian Legal Theory: Property, Conflict, and Society, Lecture 4: Causation, Aggression, Responsibility’ (Mises Academy, 2011),” *Kinsella On Liberty Podcast* (Feb. 21, 2013 [Feb. 21, 2011]).

††我的合著者廷斯利已经审查了本章所做的修改, 并完全同意这些修改。

关于本章中的因果关系理念在相关问题上的应用, 请参阅金塞拉的《公司人格、有限责任和双重征税》, 《自由意志主义标准》(2011 年 10 月 18 日); 金塞拉的《KOL100 | 公司和有限责任在自由社会中的作用》(PFS 2013); 还有金塞拉的《KOL382 | 在 PorcFest 上的 FreeTalkLive: 公司、有限责任和里诺重置》, 金塞拉自由播客 (2022 年 6 月 23 日); 同上, 《KOL354 | CDA§230, “作为国家的一部分”、共同所有权、因果关系、诽谤, 与尼克·西纳德》, 金塞拉自由播客 (2021 年 8 月 3 日)。

关于原始文章发表后出版的其他相关材料, 请参阅同上的《知识产权与人的行动结构》。

StephanKinsella.com (2010 年 1 月 6 日)；同上，《KOL021|“自由意志主义法律理论：财产、冲突与社会，讲座 4：因果关系、侵犯、责任”（米塞斯学院，2011 年）》，金塞拉自由播客（2013 年 2 月 21 日[2011 年 2 月 21 日]）。

行动学与法律分析：行动 VS. 行为

PRAXEOLOGY AND LEGAL ANALYSIS: ACTION VS. BEHAVIOR

For libertarians, the purpose of a legal system is to establish and enforce rules that facilitate and support peaceful, conflict-free interaction between individuals, i.e., property rights. In short, the law should prohibit aggression—the unconsented-to use of someone's owned resources, or “property”—by identifying and protecting private property rights.¹ Because aggression is a particular kind of human action—action that intentionally violates or threatens to violate the physical integrity of another person or another person's property without that person's consent² —it can be successfully prohibited only if the law is based on a sound understanding of the nature of human action more generally.³

在自由意志主义看来，法律制度的目的是建立和执行规则，促进和支持个人之间和平、无冲突的互动，此规则即为财产权。简而言之，法律应通过确认和保护私有财产权来禁止侵权行为——未经同意使用他人拥有的资源或“财产”⁴⁷。由于侵犯是一种特殊的人的行动——在未经他人同意的情况下故意侵犯或威胁侵犯他人人身安全或他人财

⁴⁷ See generally “What Libertarianism Is” (ch. 2) and Kinsella, “How To Think About Property (2019),” StephanKinsella.com (April 25, 2021); and Hans-Hermann Hoppe, *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; <https://www.hanshoppe.com/esh/>), pp. 2, 10 – 12, et pass. See also “What Libertarianism Is” (ch. 2), Appendix I (regarding the use of the term property to refer to the rights actors have with regard to resources, instead of the resources themselves, and also regarding the nature of a property right as a right to exclude, not a right to use).

一般可参见《何为自由意志主义》（第 2 章）以及金塞拉的《如何思考财产（2019 年）》，StephanKinsella.com（2021 年 4 月 25 日）；还有汉斯-赫尔曼·霍普的《经济、社会与历史》（阿拉巴马州奥本：米塞斯研究院，2021 年；<https://www.hanshoppe.com/esh/>），第 2 页、第 10-12 页及其他各处。另可参见《何为自由意志主义》（第 2 章）附录 I（关于使用“财产”一词来指代行动人对资源所拥有的权利，而非资源本身，以及关于财产权的性质是排他权，而非使用权）。

产的行为⁴⁸——只有当法律建立在对人的行动本质更普遍的正确理解的基础上，才能成功地禁止侵犯。⁴⁹

Praxeology, the general theory of human action, studies the universal features of human action and draws out the logical implications of the undeniable fact that humans act.⁴ Praxeology is central to Austrian economics, the “hitherto best elaborated part” of the science of praxeology.⁵ However, other disciplines can benefit from the insights of praxeology. Hans-Hermann Hoppe has already extended praxeology to the field of

⁴⁸ For discussion of the distinction between an action’s intentionality or purposiveness (thus distinguishing it from mere behavior, such as a reflexive or involuntary response), which factors into responsibility and liability, and its motive or actual purpose, which factors into the appropriate punishment, see Kinsella, “Hate Crime—Intentional Action and Motivations,” StephanKinsella.com (July 9, 2009). See also text at note 8, below. 关于行动的意图性或目的性（从而区别于单纯的行为，如反射性或非意图的反应）与动机或实际目的之间的区别的讨论，前者是责任和义务的因素，后者是适当惩罚的因素，见 Kinsella, 《仇恨犯罪——有意的行动和动机》，StephanKinsella.com（2009 年 7 月 9 日）。另见下文注 8 中的文本。

⁴⁹ As described elsewhere in this book, aggression means nonconsensual use of another’s owned resources, so is dependent upon the prior and more fundamental concept of property rights. In other words, to determine what actions constitute aggression, one must first know who owns what. See “What Libertarianism Is” (ch. 2), at notes 6, 9, 11, and accompanying text et pass.; also Kinsella, “How To Think About Property (2019)” ; idem, “Aggression and Property Rights Plank in the Libertarian Party Platform,” StephanKinsella.com (May 30, 2022). In any case, aggression is always an action, and thus in order to identify and analyze property rights violations, an analysis of action is necessary. See idem, “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).

正如本书其他章节所述，侵犯意味着未经同意使用他人拥有的资源，因此取决于先前的、更基本的财产权概念。换句话说，要确定哪些行动构成侵犯，首先必须知道谁拥有什么。见《何为自由意志主义》（第 2 章），注释 6、9、11，及所附文字等；另见金塞拉，《如何思考财产》（2019 年）；同上，《自由意志主义党纲中的侵犯与财产权要点》，StephanKinsella.com（2022 年 5 月 30 日）。无论如何，侵犯总归是一种行动，因此，为了识别和分析财产权侵犯，有必要对行动进行分析。见同上，《互不侵犯原则是对行动的限制，而非对财产权的限制》，StephanKinsella.com（2010 年 1 月 22 日）和同上，《作为财产权限制的知识产权与侵犯：如何区别二者》，StephanKinsella.com（2010 年 1 月 22 日）。

political ethics.⁶ The related discipline of legal theory, which also concerns ethical implications of human action, can also benefit from the insights of praxeology.⁷

行动学是关于人的行动的一般理论，它研究人的行动的普遍特征，并从人的行动这一不可否认的事实中得出逻辑推论。⁵⁰ 行动学是奥派经济学的核心，经济学是行动学这

⁵⁰ As Hoppe writes:

Essentially, economic analysis consists of: (1) an understanding of the categories of action and an understanding of the meaning of a change in values, costs, technological knowledge, etc.; (2) a description of a situation in which these categories assume concrete meaning, where definite people are identified as actors with definite objects specified as their means of action, with definite goals identified as values and definite things specified as costs; and (3) a deduction of the consequences that result from the performance of some specified action in this situation, or of the consequences that result for an actor if this situation is changed in a specified way. And this deduction must yield a priori-valid conclusions, provided there is no flaw in the very process of deduction and the situation and the change introduced into it being given, and a priori-valid conclusions about reality if the situation and situation-change, as described, can themselves be identified as real, because then their validity would ultimately go back to the indisputable validity of the categories of action.

Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), p. 142. See also 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. 3, 15 – 16, 480; idem, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>); and Hans-Hermann Hoppe, *Economic Science and the Austrian Method* (Auburn, Ala.: Mises Institute, 1995; www.hanshoppe.com/esam).

See also “A Libertarian Theory of Punishment and Rights” (ch. 5), n.36 and “Knowledge, Calculation, Conflict, and Law” (ch. 19), at n.65, regarding the need to select relevant facts and assumptions when applying such reasoning to result in interesting and useful results.

正如霍普所写：

从本质上讲，经济分析包括 (1) 对行动范畴的理解，以及对价值、成本、技术知识等变化的意义的理解；(2) 对情况的描述，在这种描述中，这些范畴具有具体的意义，确定的人被认定为行动人，确定的对象被明确为行动手段，确定的目标被认定为价值，确定的事物被认定为成本；以及 (3) 对在这种情况下某些特定行动的执行所产生的后果的推导，或者对行动人在这种情况以特定方式改变时所产生的后果的推导。并且这种推导必定得出先验有效的结论，前提是推导过程本身没有缺陷，给定所描述的情况和引入其中的变化，并且如果所描述的情况和情况变化本身可以被确定为真实的，那

门科学“迄今为止阐述得最好的部分”。⁵¹当然，其他学科也可以从行动学的见解中获益。汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）已将行动学扩展到政治伦理学领域。⁵²与之相关的法律理论学科也涉及人的行动的伦理意义，也可以从行动学的见解中获益。⁵³

In the context of legal analysis, one important praxeological doctrine is the distinction between action and mere behavior. The difference between action and behavior boils down to intent. Action is an individual's intentional intervention in the physical world, via certain selected means, with the purpose of attaining a state of affairs that is preferable to the conditions that would prevail in the absence of the action. Mere behavior, by contrast, is a person's physical movements that are not undertaken intentionally and that do not manifest any purpose, plan, or design. Mere behavior

么得出关于现实的先验有效结论，因为它们的有效性最终将追溯到行动范畴无可争议的有效性。

汉斯-赫尔曼·霍普，《社会主义与资本主义理论：经济、政治与伦理》（阿拉巴马州奥本：米塞斯研究院，2010年[1989年]；www.hanshoppe.com/tsc），第142页。另见路德维希·冯·米塞斯，《人的行动：经济学专论》，学者版（阿拉巴马州奥本：米塞斯研究院，1998年；<https://mises.org/library/human-action-0>），第3、15-16、480页；同上，《经济科学的最终基础：方法论文》（新泽西州普林斯顿：D.范诺斯特兰德公司，1962年；<https://mises.org/library/ultimate-foundation-economic-science>）；以及汉斯-赫尔曼·霍普，《经济科学与奥地利学派方法论》（阿拉巴马州奥本：米塞斯研究院，1995年；www.hanshoppe.com/esam）。

另见《自由意志主义的惩罚与权利理论》（第5章），注释36和《知识、计算、冲突与法律》（第19章），注释65，关于在应用此类推理以得出有趣和有用的结果时需要选择相关事实和假设。

⁵¹ Mises, *Human Action*, p. 3.

米塞斯《人的行动》，第三页。

⁵² See Hoppe, *A Theory of Socialism and Capitalism*, chap. 7 and, generally, “Dialogical Arguments for Libertarian Rights” (ch. 6) and “Defending Argumentation Ethics” (ch. 7).

参见霍普，《社会主义与资本主义理论》第七章，以及《自由意志主义权利的对话论证》（第六章）和《捍卫论证伦理学》（第七章）。

⁵³ See also Kinsella, “The Other Fields of Praxeology: War, Games, Voting... and Ethics?,” StephanKinsella.com (Aug. 5, 2006).

参见金塞拉，《行动学的其他领域：战争、游戏、投票和伦理学？》，StephanKinsella.com (2006年8月5日)。

cannot be aggression; aggression must be deliberate, it must be an action.⁸

在法律分析中，一个重要的行动学原则是区分行动和单纯的行为。行动与行为的区别归根结底在于意图。行动是一个人通过某些选定的手段对物质世界进行的有意干预，其目的是达到一种优于没有行动时的状态。与此相反，单纯的行为是指一个人的肢体动作，这些动作并非有意为之，也不体现任何目的、计划或意图。单纯的行为不可能是侵犯；侵犯必须是蓄意的，必须是一个行动。⁵⁴

In order to better understand this distinction between action and behavior, we may focus on the role of causality in explaining each. Human action involves two-fold causality. On the one hand, human action requires that time-invariant causal relations govern the physical world. Otherwise, a given means could not be said to achieve a desired result. "As no action could be devised and ventured upon without definite ideas about the relation of cause and effect, teleology presupposes causality."⁹

为了更好地理解行动与行为之间的这种区别，我们可以重点讨论因果关系在解释两者时所起的作用。人的行动涉及两方面的因果关系。一方面，人的行动要求非时变的因果关系支配的物理世界。否则，就不能说特定的手段能够达到预期的结果。"如果没有关于因果关系的明确观念，就不可能设计和冒险采取任何行动，因此目的论以因果关系为前提"。⁵⁵

⁵⁴ See, on this, note 2, above, and accompanying text.

关于这一点，请参阅上面的注释 2 和随附的文本。

⁵⁵ Mises, *The Ultimate Foundation of Economic Science*, p. 8. See also Kirzner on the employment by human actors of scarce means to achieve ends:

In a market system each member of the society is free to act, within very wide limits, as he sees fit. Moreover, the system operates within a framework of law which recognizes individual rights to private property. This means that each individual is free at each moment to employ the means available to him for the purpose of furthering his own ends, providing only that this should not invade the property rights of others.

Israel M. Kirzner, *Market Theory and the Price System* (Princeton, N.J.: D. Van Nostrand Co., Inc., 1963; <https://mises.org/library/market-theory-and-price-system-0>), p. 13.

米塞斯，《经济科学的终极基础》，第 8 页。参见柯兹纳关于行动人利用稀缺手段达到目的的论述：

在市场体系中，社会的每一个成员都可以在非常广泛的范围内，按照他认为合适的方式自由行动。此外，该制度在承认个人私有财产权利的法律框架内运作。这意味着每个人在任何时候都可以自由地使用他所拥有的手段来达到他自己的目的，只要这种手段不侵犯他人的财产权。

And on the other hand, human action requires that those time-invariant causal relations can be understood and exploited by an individual whose actions are not themselves subject to time-invariant causal relations. Otherwise, there would be nothing to distinguish human action from blind natural forces. In such a world, laws and norms would be pointless, because no one could be considered responsible for his actions—human beings would not be actors but passive conduits for mechanical processes.¹⁰

而另一方面，人的行动又要求这些非时变的因果关系能够被个人理解和利用，而个人的行动本身并不受非时变因果关系的制约。否则，人的行动与盲目的自然力量就没有什么区别了。在这样的世界里，法律和规范将毫无意义，因为没有人会被视为对自己的行动负有责任——人不是行动人，只不过是机械过程的被动管道。⁵⁶

To some extent, of course, human beings are just that. Not everything we do is intentional; we also exhibit what is mere (i.e., non-purposeful) behavior. Our hearts beat, our eyes blink, and we fall asleep—all without any intention on our part. In these cases, we can understand the behavior in terms of time-invariant physical causes. There is no need to apply the concept of an actor deliberately choosing and employing means for the purpose of attaining a desired end. We can understand human behavior exactly the same way we can understand any nonhuman natural (i.e., nonteleological) process. But unlike most natural processes, human beings are capable of more than mere behavior;

伊斯雷尔·M·柯兹纳 (Israel M. Kirzner)，《市场理论与价格体系》（新泽西州普林斯顿：D. 范诺斯特兰德公司，1963 年；<https://mises.org/library/market-theory-and-price-system-0>），第 13 页。

⁵⁶ On the impossibility of explaining human action in terms of time-invariant causal relations, see Hoppe, “In Defense of Extreme Rationalism,” in *The Great Fiction*, pp. 330 – 31; Hoppe, *A Theory of Socialism and Capitalism*, pp. 134 – 36; and Jörg Guido Hülsmann, “Facts and Counterfactuals in Economic Law,” *J. Libertarian Stud.* 17, no. 1 (2003; <https://mises.org/library/facts-and-counterfactuals-economic-law-1>): 61 – 64.

关于无法从非时变的因果关系来解释人的行动，见霍普《为极致理性主义辩护》，载于《伟大的虚构》，第 330-331 页；霍普《社会主义与资本主义理论》，第 134-136 页；以及约尔格·吉多·许尔曼《经济法中的事实与反事实》，《自由意志主义研究杂志》第 17 卷第 1 期（2003 年；<https://mises.org/library/facts-and-counterfactuals-economic-law-1>）：61-64 页。

they are capable also of action, of purposeful behavior.

当然，在某种程度上，人类就是这样。我们所做的一切并非都是有意为之，我们也会表现出一些单纯的（即非目的性的）行为。我们的心脏跳动、眼睛眨动、入睡——所有这些都没有任何意图。在这些情况下，我们可以从非时变的物理原因的角度来理解这些行为。没有必要适用行动人故意选择和使用手段以达到预期目的的概念。我们理解人类行为的方式与理解任何非人类自然过程（即非耳学过程）的方式完全相同。但与大多数自然过程不同的是，人的行为不仅仅是单纯的行为，他们还能够行动，有目的的行为。

As legal theorists, therefore, we cannot accept an entirely mechanistic picture of the world. Legal theorizing is concerned with the ethical or normative implications of action.¹¹ It asks whether an actor should be held responsible for the consequences of his actions and what rights to respond his actions give rise to on the part of the recipients of his action. And to hold someone responsible for the consequences of his actions is implicitly to invoke the two-fold concept of causality expressed above. For there even to be consequences in the first place, the physical world must be governed by time-invariant causal relations. And to hold an actor responsible for those consequences, we must determine that they can be traced back to his own deliberate use of means to achieve a desired result: his “action” cannot itself be a merely mechanical response to physical stimuli; he is the author, or “cause,” of the results achieved.¹² In other words, like Austrian economics, legal theory must presuppose both time-invariant causation (an actor could not employ means to attain his goal otherwise) and agent-causation in which the actor himself is the cause of results that he intended to achieve by the use of certain means (the actor is not acting otherwise).

因此，作为法律理论家，我们不能接受完全机械化的世界图景。法律理论研究关注的是行动的伦理或规范意义。⁵⁷它询问行动人是否应对其行动的后果负责，以及他的行动

⁵⁷ In fact, as noted in the Preface, at one point I considered entitling this book *The Ethics of Action*—a title and meaning distinct from, but inspired by, similar titles such as Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998) and idem, *The Logic of Action* (Edward Elgar, 1997, later republished as *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>)); also Michael Polanyi, *The Logic of Liberty* (Routledge, 1951); G.B. Madison, *The Logic of Liberty* (New York: Greenwood Press, 1986); and James M.

会给予其行动的接受者带来哪些回应的权利。让某人对其行动的后果负责，就是暗中援引上文所述的因果关系的双重概念。首先，物理世界必定受非时变的因果关系的支配，才能产生后果。而要让行动人对这些后果负责，我们必须确定这些后果可以追溯到他为达到预期结果而故意使用的手段：他的“行动”本身不能仅仅是对物理刺激的机械反应；他才是所取得结果的始作俑者或“原因”。⁵⁸换句话说，与奥派经济学一样，法律理论必须同时预设非时变的因果关系（否则行动人不可能使用手段达到目的）和代理因果关系，在代理因果关系中，行动人本身就是他使用某些手段意图达到的结果的原因（否则行动人就不是在行动）。

The law, therefore, in prohibiting aggression, is concerned with prohibiting aggressive action—nonconsensual violations of property boundaries that are the product of deliberate action. Analyzing action in view of its praxeological structure is essential.

因此，法律在禁止侵犯时，关注的是禁止侵犯行动——未经同意地侵犯财产边界，这是蓄意行动的产物。从行动学结构的角度分析行动是必不可少的。

Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*, vol. 7 in *The Collected Works of James M. Buchanan* (Indianapolis: Liberty Fund, 2000 [1975]).

事实上，正如在序言中所提到的，我曾一度考虑将这本书命名为《行动的伦理学》——这个标题和含义有别于但受到了类似标题的启发，比如穆瑞·N·罗斯巴德的《自由的伦理学》（纽约：纽约大学出版社，1998 年）以及同一作者的《行动的逻辑》（爱德华·埃尔加，1997 年，后再版为《经济学的争议》（阿拉巴马州奥本：米塞斯研究院，2011 年））；还有迈克尔·波兰尼的《自由的逻辑》（劳特利奇，1951 年）；G.B.麦迪逊的《自由的逻辑》（纽约：格林伍德出版社，1986 年）；以及詹姆斯·M·布坎南的《自由的界限：在无政府与利维坦之间》，詹姆斯·M·布坎南文集第 7 卷（印第安纳波利斯：自由基金，2000 年[1975 年]）。

⁵⁸ As Mises wrote, “Action is purposive conduct. It is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and guided by ideas concerning the suitability or unsuitability of definite means.” Mises, *The Ultimate Foundation of Economic Science*, p. 34 (emphasis added). See also the quote by Holmes in note 14, below.

正如米塞斯所写：“行动是有目的的行为。它不仅仅是行为，而是由价值判断所产生的行为，旨在实现一个明确的目标，并受到关于某些特定手段是否合适的观念的引导。”米塞斯，《经济科学的终极基础》，第 34 页（重点补充）。另见下文注释 14 中霍姆斯的引述。

侵犯与隐含的因果概念

AGGRESSION AND THE IMPLICIT CONCEPT OF CAUSALITY

Hitting someone without permission is an example of the kind of aggression libertarians oppose. If it is illegal to hit someone, however, this means that it is illegal to cause another person to be hit; that is to say, it is illegal to use physical objects, including one's fist, in a way that will cause unwanted physical contact with another person. Therefore, if A does intentionally (and uninvitedly) hit B, he can be held responsible for the action—the aggression can be imputed to him and he can be lawfully punished for it—because A's decision to hit his victim was not itself conditioned by strictly physical laws. It was volitional. A—not some impersonal force of nature, and not some other person—was the cause of the aggression against B. A's aggression is an action.¹³

未经许可打人就是自由意志主义所反对的那种侵犯行动的一个例子。然而，如果打人是违法的，这就意味着导致他人被打也是违法的；也就是说，使用有形物体（包括拳头）造成他人不必要的身体接触也是违法的。因此，如果 A 真的故意（不请自来）打了 B，他必须对这一行动负责——侵犯可以归咎于他，他也可以因此受到合法的惩罚——因为 A 打他的受害者的决定本身并不受严格的物理法则的制约。它是自愿的。A——而不是某种非个人的自然力，也不是其他人——是侵犯 B 的原因。A 的侵犯是一个行动。⁵⁹

⁵⁹ In my view, one need not take a stand on the interminable (and somewhat pointless and intractable) free will debate to hold these views. It does not matter if humans “really” have “genuine” free will in the causal realm in order to usefully characterize their actions teleologically. We conscious and self-aware humans are aware of the external world via our senses and reason, but also aware of an internal perspective by which we characterize our own actions as involving choice and goals. In order to understand, interact with, and predict the behavior or conduct of other humans, it is reasonable and useful for us to assume they have a similar internal perspective, since they are biologically similar to us, and thus, to interpret their motions as actions in pursuit of goals, as opposed to mere causal behavior. To the extent we adopt a teleological perspective to characterize other humans' actions, categories of choice, opportunity cost, time preference, and so on are unavoidable. Though I do not consider it relevant to the arguments made in this chapter (or this book), I view my perspective on free will and determinism/causality as a type of compatibilism, but a unique one

The general question facing libertarians, then, is whether a particular actor, by his action, intentionally caused the prohibited result—an uninvited border-crossing. Implicitly, the libertarian prohibition on the initiation of force is a prohibition on willfully causing an unwanted intrusion.

因此，自由意志主义者面临的普遍问题是，某个行动人的行动是否故意造成了被禁止的结果——不请自来的越境。毫不客气地讲，自由意志主义对使用武力的禁止就是对故意造成不受欢迎的入侵的禁止。

Where A's action—not mere behavior—is the cause of aggression against B, we might simply say that “A killed B.” But if we unpack this statement, we will usually find that A did not directly kill B; some intermediate means was employed to achieve that end (hence the causal aspect of action). Action is not just intentional; it is the intentional use of means to attain a desired end. For example, A deliberately loaded his gun, deliberately pointed the gun at B and then deliberately squeezed the trigger, causing a bullet to discharge into B's heart. Why say that A killed B? Why not say that the bullet killed B, whereas A merely squeezed a trigger? Why connect A's action of squeezing a trigger with the resulting harm to B? In some contexts, of course, A's action would be irrelevant. To a medical examiner conducting an autopsy, for instance, the bullet is the cause of B's death, and who fired it and why is beside the point. But that does not

informed by Misesian dualism. It is no more spooky to refer to an actor's “choice” than it is to conceptually distinguish the mind from the brain or the person from his body, as it is undeniably a conceptually useful, and probably unavoidable, way to characterize what other humans do.

在我看来，人们不必在无休止（且有点无意义和棘手）的自由意志论证中表明立场来持有这些观点。为了从目的论的角度有效地描述人的行动，人类在因果领域“真正”是否拥有“真正的”自由意志并不重要。我们有意识和自我意识的人类通过我们的感官和理性意识到外部世界，但也通过一种内部视角意识到我们将自己的行动描述为涉及选择和目标。为了理解、与其他人类互动并预测他们的行动或举动，我们假设他们有类似的内部视角是合理和有用的，因为他们在生物学上与我们相似，因此，将他们的动作解释为追求目标的行动，而不是单纯的因果行为。在我们采用目的论视角来描述其他人的行动的程度，选择、机会成本、时间偏好等范畴是不可避免的。尽管我认为这与本章（或本书）中的论点无关，但我认为我对自由意志和决定论/因果关系的看法是一种兼容论，但它是一种受米塞斯二元论启发的独特观点。提及行动人的“选择”并不比从概念上区分心灵与大脑或人与其身体更神秘，因为不可否认，这是一种在概念上实用且可能不可避免的描述其他人的行动的方式。

change the fact that in a legal and normative context we trace the chain of causation back to A's intentional action of squeezing the trigger. There is, after all, a causal connection between the immediate action and the means employed on the one hand, and the harmful consequence on the other hand.¹⁴

如果 A 的行动——而不仅仅是行为——是侵犯 B 的原因，我们可以简单地说 “A 杀死了 B”。但是，如果我们把这句话拆开来，通常会发现 A 并没有直接杀死 B，而是采用了某种中间手段来达到目的（因此行动具有因果的一面）。行动不仅仅是有意为之，而是有意使用手段来达到预期目的。例如，A 故意将枪上膛，故意将枪口对准 B，然后故意扣动扳机，导致子弹射入 B 的心脏。为什么说 A 杀了 B？为什么不说是子弹杀死了 B，而 A 只是扣动了扳机？为什么要把 A 扣动扳机的行动与 B 因此受到的伤害联系起来呢？当然，在某些情况下，A 的行动是无关紧要的。例如，对于进行尸检的法医来说，子弹是导致 B 死亡的原因，至于是谁开的枪，为什么开的枪，都无关紧要。但这并不能改变一个事实，即在法律和规范的语境中，我们将因果关系的链条追溯到 A 扣动扳机的故意行动。毕竟，一方面是立即行动与使用的手段，另一方面是有害的后果，这二者之间存在因果关系。⁶⁰

⁶⁰ See also Frank van Dun, “Against Libertarian Legalism: A Comment on Kinsella and Block,” J. Libertarian Stud. 17, no. 3 (2003; <https://mises.org/library/against-libertarian-legalism-comment-kinsella-and-block-0>): 63 – 90, p. 78 (“Few are likely to believe a progressive lawyer who argues that, while his client admittedly did aim his gun at the victim and pulled the trigger, it was the bullet that killed the victim.”).

As Justice Oliver Wendell Holmes noted:

An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff ’ s harm is no part of it, and very generally a long train of such sequences intervenes. ... When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way, but it is the delight of elementary writers to point out what a vast series of physical changes must take place before the harm is done.

Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), p. 91.

For further discussion of causation in the law, see Richard A. Epstein, “An Analysis of Causation,” in *A Theory of Strict Liability: Toward a Reformation of Tort Law* (San Francisco: Cato Institute, 1980; <https://perma.cc/PVV6-U3Y7>); Tony Honor é , “Causation in the Law,” *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta, ed. (2001; <https://perma.cc/3JJ6-VD29>); H.L.A. Hart & Tony Honor é , *Causation in the Law*, 2d ed. (Oxford: Clarendon Press, 1985).

In praxeological terms, we can say that A's goal or end was to kill B; he selected a means—the gun—calculated and designed, according to known laws of cause and effect in the physical world (the causal realm), to achieve that goal. A's action was intended to cause B's death, and the action employed means that did, in fact, result in B's death. As shorthand we say that A killed B, but implicit in this account is that A undertook an intentional action employing means and exploiting causal laws (causal realm) to achieve his desired result (teleological realm).¹⁵

用行动学的术语来说，我们可以说，A 的目标或目的是杀死 B；他选择了一种手段——枪——根据物理世界（因果领域）中已知的因果法则进行计算和设计，以实现这一目标。A 的行动旨在造成 B 的死亡，而该行动所使用的手段事实上确实造成了 B 的死亡。简言之，我们说 A 杀死了 B，但这一说法中隐含的意思是，A 采取了一项有意的行动，运用各种手段并利用因果律（因果领域）来实现他所期望的结果（目的论领域）。⁶¹

另见弗兰克·范·邓恩，《反对自由意志主义的法律主义：对金塞拉和布洛克的评论》，《自由意志主义研究杂志》第 17 卷，第 3 期（2003 年；<https://mises.org/library/against-libertarian-legalism-comment-kinsella-and-block-0>）：63-90 页，第 78 页（“很少有人会相信一位进步律师的论点，即虽然他的客户诚然将枪对准受害者并扣动了扳机，但杀死受害者的是子弹。”）。

正如奥利弗·温德尔·霍姆斯大法官所指出的：

一个行动始终是自愿的肌肉收缩，仅此而已。它引发或导向对原告造成伤害的物理序列链不是它的一部分，而且通常会有一长串这样的序列介入。……当一个人用手枪进行袭击和殴打时，他唯一的行为是以某种方式收缩手臂和食指的肌肉，但初级作家们乐于指出在造成伤害之前必须发生多么巨大的一系列物理变化。

奥利弗·温德尔·霍姆斯，《普通法》（波士顿：利特尔·布朗，1881 年），第 91 页。

有关法律中的因果关系的进一步讨论，请参阅理查德·A·爱波斯坦的《因果关系分析》，载于《严格责任理论：侵权法改革之路》（旧金山：卡托研究所，1980 年；<https://perma.cc/PVV6-U3Y7>）；托尼·霍诺雷，《法律中的因果关系》，《斯坦福哲学百科全书》，爱德华·N·扎尔塔编辑（2001 年；<https://perma.cc/3JJ6-VD29>）；H.L.A.哈特和托尼·霍诺雷，《法律中的因果关系》，第 2 版（牛津：克拉伦登出版社，1985 年）。

⁶¹ The causal aspect of a prohibited act of aggression is sometimes made explicit and is sometimes simply implicit. As an example of the former, see New York Penal Law § 105.05: “Conspiracy in the fifth degree,” which provides:

A person is guilty of conspiracy in the fifth degree when, with intent that conduct

At this point, we might want to revisit the issue of intent. Why should we concern ourselves with A's intent? If we objectively determine that A's actions caused the death of B, what should it matter what A intended to do—or whether A intended to do anything at all?

此时此刻，我们不妨重新审视一下意图问题。我们为什么要关心 A 的意图呢？如果我们客观地认定 A 的行动造成了 B 的死亡，那么 A 打算做什么——或者 A 是否打算做什么事情——又有什么关系呢？

Intent matters because without intent there is no action and without action there is no actor to whom we may impute legal responsibility. If A did not intend to do anything at all, then we cannot determine that A's actions caused the death of B—because A took no action. Intent is a necessary ingredient in human action; if there is no intent, then there is no action, only behavior: involuntary physical movements guided by

constituting:

- 1,a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct; or
- 2,a crime be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

New York Penal Law § 105.05 (<https://perma.cc/FEV5-KBK3>; emphasis added).

In the case of torts, the mandate is: do not unreasonably act so as to cause harm to another. In crimes such as rape, theft, and burglary, the causal aspect may only be implied. But theft occurs, for example, when the actor’s voluntary act causes movement (asportation) of the goods stolen. Rape includes the crime of causing another’s penis to be inserted into victim, and so on.

被禁止的侵犯的因果方面有时是明确的，有时则只是隐含的。作为前者的一个例子，见《纽约刑法》第 105.05 条：“五级共谋罪”，其中规定：

当某人的意图构成以下行为时，即属五级串谋罪：

- 1,在执行重罪时，他同意一人或多人参与或促成行为;这种行为的表现;或
- 2,在实施犯罪时，他已年满十八岁，并同意一个或多个不满十六岁的人实施或导致实施该等行动。

纽约刑法第 105.05 条(<https://perma.cc/FEV5-KBK3>;重点补充)。

在侵权案件中，授权是:不要采取不合理的行动，以免对他人造成损害。在强奸、盗窃和入室盗窃等犯罪中，因果关系可能只是隐含的。但是，当行动人的自愿行动引起被偷物品的移动(运输)时，就发生了盗窃。强奸包括使另一个人的阴茎插入受害者的罪行，等等。

deterministic (or perhaps random) causal relations.

意图之所以重要，是因为没有意图就没有行动，没有行动就没有我们可以归咎其法律责任的行动人。如果 A 根本没有打算做任何事情，那么我们就不能确定 A 的行动造成了 B 的死亡——因为 A 没有采取任何行动。意图是人的行动的必要组成部分；如果没有意图，那么就没有行动，而只有行为：在确定性（或许是随机的）因果关系主导下的不自主的身体运动。

The role of law in a free society is to protect the rights of nonaggressors and, where those rights are violated, to compensate the victims and punish the aggressors. But aggression must be intentional—otherwise, there is no reason to attribute it to a particular human actor instead of an impersonal natural force. For person A to be the cause of B's death, B must have died as the result of a series of events initiated by A's willful action. If, on the other hand, B dies as the result of a thoroughly deterministic process unconnected with any willful action, then there is no one to punish; no one caused B's death. To punish A's unintentional bodily movement would be like punishing lightning for destruction of property or punishing a flood for assault. A can murder B, whereas lightning (or a flood, or a cougar, or an involuntary human reflex) cannot.

在自由社会中，法律的作用是保护非侵犯者的权利，并在这些权利受到侵害时，赔偿受害者并惩罚侵犯者。但是，侵犯必须是有意的——否则，就没有理由将其归咎于特定的人的行动人，而不是非人的自然力量。如果 A 人是 B 死亡的原因，那么 B 的死亡必定是由 A 的有意的行动引发的一系列事件的结果。另一方面，如果 B 的死亡是一个完全确定的过程的结果，与任何有意的行动无关，那么就没有人需要受到惩罚；没有人造成了 B 的死亡。惩罚 A 的非自主的身体运动就好比惩罚闪电破坏财产或惩罚洪水袭击。A 能够谋杀 B，而闪电（或洪水，或美洲狮，或人的非自主的条件反射）却不能。

惩罚侵犯 PUNISHING AGGRESSION

There is another, closely related reason why intent matters for the assessment of criminal guilt. A guilty criminal—that is, an aggressor—may be lawfully punished. Or, to put it another way, an aggressor cannot meaningfully object when his aggression is met with physical force in response. After all, his aggressive actions conclusively

demonstrate that he does not find nonconsensual physical force objectionable. In common law terms, we may say that by virtue of his own violence against others, an aggressor is “estopped” from objecting to (proportional) violence against himself.¹⁶ But to punish someone is to engage in an intentional act. As an intentional act, punishment is only justified in response to an intentional act of violence; this is the elegant symmetry of libertarian ethics. Neither an unintentional movement, nor an intentional act of nonaggression, can justify the use of force. We may punish A if he intentionally strikes B, but not if B is struck by lightning; and we may punish A if he intentionally shoots B with a gun, but not if he shoots B with a camera. If we do punish A for nonaggression, we become aggressors ourselves—because nonaggressive action cannot estop A from mounting a coherent objection to the use of violence against him. Thus we can say that when an aggressor intentionally and uninvitedly attempts to (or does) impair the physical integrity of another’s person or property, he gives his victim the right to punish him, because he can no longer withhold his consent to physical force in response to his initiatory force.¹⁷

另一个与此密切相关的原因是，为什么意图对于刑事犯罪的评估非常重要。有罪的罪犯——即侵犯者——可能会受到合法的惩罚。或者换一种说法，当一个侵犯者的侵害行为遭到武力回应时，他就不能提出有意义的反对。毕竟，他的侵犯行动确凿无疑地表明，他并不认为未经同意的身体武力是应该反对的。用普通法的术语来说，我们可以说，由于侵犯者自己对他人使用武力，他“被禁止”反对对自己使用（相称的）武力。⁶²但是，惩罚某人是一种有意的行动。作为一种有意的行动，惩罚只有在回应有意武力行动时才是正当的；这就是自由意志主义伦理学精妙的对称性。无论是无意的动作，还是有意的非侵犯行动，都不能成为使用武力的正当理由。如果 A 故意殴打 B，我们可以惩罚 A，但如果 B 被雷击中，我们就不能惩罚 A；如果 A 故意用枪射击 B，我们可以惩罚 A，但如果 A 用照相机射击 B，我们就不能惩罚 A。如果我们真的因

⁶² For a libertarian theory of punishment grounded in the insight that an aggressor may be punished because and insofar as his own use of violence deprives him of the ability to mount a coherent objection, see “A Libertarian Theory of Punishment and Rights” (ch. 5) and “Dialogical Arguments for Libertarian Rights” (ch. 6).

自由意志主义的惩罚理论基于这样一种见解，即侵犯者可能会受到惩罚，因为他自己使用暴力剥夺了他提出连贯一致的反对意见的能力，参见《自由意志主义的惩罚理论》(第五章)和《自由意志主义权利的对话论证》(第六章)。

为 A 的非侵犯行动而对 A 进行惩罚，我们自己就成了侵犯者——因为非侵犯行动不能禁止 A 对使用武力侵害他的行动提出连贯一致的反对意见。因此，我们可以说，当侵犯者有意且不清自来地试图（或确实）损害他人人身或财产的完整性时，他就赋予了受害者惩罚他的权利，因为侵犯者不能再拒绝同意使用武力来回应他发起的武力。⁶³

自由意志主义的反对意见

LIBERTARIAN OBJECTIONS

Virtually no one has a quarrel with the notion that an actor is the “cause” of a result if he employs nonhuman means to attain this result. However, as indicated above, some,

⁶³ In other words, initiatory force, or aggression, is unjust; but responsive force is justifiable. For further discussion of how to characterize the nature of aggression—as trespass, or invasion of borders, or unconsented use or altering the physical integrity, of owned resources, see “What Libertarianism Is” (ch. 2), notes 9 & 11 and accompanying text; also Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform.” See also Hoppe, *A Theory of Socialism and Capitalism*, p. 23 n.11 & 165–68; also Hans-Hermann & Walter Block, “Property and Exploitation,” *Int’l J. Value-Based Mgt* 15, no. 3 (2002; <https://perma.cc/UQ8U-UM35>): 225–36; Rothbard, “Law, Property Rights, and Air Pollution,” in *Economic Controversies*, p. 375; idem, *Man, Economy, and State, with Power and Market*, Scholar’s ed., second ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 2, § 12, p. 183; Kinsella, “Hoppe on Property Rights in Physical Integrity vs Value,” *StephanKinsella.com* (June 12, 2011).

换句话说，主动使用武力或侵犯是不正当的；但回应性的武力是正当的。关于如何描述侵犯的本质的进一步讨论，如非法侵入，或入侵边界，或未经同意使用或改变已被占资源的物理完整性，见《何为自由意志主义》(第二章)，注释 9 和 11 及随附文本；参见金塞拉，还有金塞拉的《自由意志主义党纲中的侵犯与财产权要点》。另见霍普的《社会主义与资本主义理论》，第 23 页注释 11 及 165-168 页；还有汉斯-赫尔曼和沃尔特·布洛克的《财产与剥削》，《基于价值管理的国际期刊》第 15 卷，第 3 期（2002 年；<https://perma.cc/UQ8U-UM35>）：225-236 页；罗斯巴德的《法律、财产权与空气污染》，收录于《经济争议》，第 375 页；同上，《人、经济与国家，以及权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；<https://mises.org/library/man-economy-and-state-power-and-market>），第 2 章，第 12 节，第 183 页；金塞拉的《霍普论物理完整性与关于价值的财产权》，*StephanKinsella.com*（2011 年 6 月 12 日）。

including some libertarians, assume that if another person is employed as the means, somehow the “chain” of causation is “broken.” For example, A somehow persuades C to plant a bomb under B’s car, which kills B. Some libertarians maintain that, while C is responsible for B’s murder, A is not, because C’s actions were undertaken with “free will,” thereby “breaking the chain of causation.” They argue that what C did was commit murder, while A committed a mere speech act, which does not in and of itself aggress against anyone’s person or property. Similar arguments are made for someone inciting a mob to lynch someone—“mere incitement” is not, according to this view, and never can be, a crime. You are not responsible for what a mob does, even if they act on your instructions, since its members have free will.

几乎没有人反对这样的观点，即如果行动人使用非人类的手段来达到某一结果，那么他就是该结果的“原因”。然而，如上所述，包括一些自由意志主义者在内的一些人认为，如果另一个人被用作手段，那么因果关系的“链条”就会“断裂”。例如，A 以某种方式说服 C 在 B 的车下放置炸弹，导致 B 死亡。一些自由意志主义者认为，虽然 C 要对 B 的谋杀负责，但 A 却不需要，因为 C 的行动是以“自由意志”进行的，从而“打破了因果关系链”。他们认为，C 所做的是谋杀，而 A 所做的只是言论行动，其本身并没有侵犯任何人的的人身或财产。类似的论点也适用于煽动暴徒对某人施以私刑的人——根据这种观点，“单纯的煽动”不是犯罪，也永远不可能是犯罪。即使暴徒按照你的指示行事，你也不必对他们的所作所为负责，因为他们的成员有自由意志。

Consider, for example, Walter Block’s approach to these issues.²⁸ Block follows Rothbard in maintaining categorically that “inciting” others to commit a crime (such as a riot) is simply not a crime. Rather, as Rothbard maintains, “Inciting to riot’ … is a pure exercise of a man’s right to speak without being thereby implicated in a crime.”²⁹ Block points out that the rioters have “free will”³⁰—unlike an inanimate object such as a bullet—and therefore the inciter is not responsible for the riot. This reasoning can be extended to absolve various mob bosses, political leaders, and the like, who merely instruct underlings or intermediaries to engage in aggressive acts. Hence the libertarian joke that Hitler’s defense to war crimes would be, “I just gave orders.”³¹

例如，考虑一下沃尔特·布洛克处理这些问题的方法。⁶⁴布洛克追随罗斯巴德，断然认

⁶⁴ See, e.g., Walter Block, “Reply to ‘Against Libertarian Legalism’ by Frank van

为“煽动”他人犯罪（如暴乱）根本就不是犯罪。更确切的说，正如罗斯巴德所坚持的那样，“煽动暴乱”……纯粹是行使一个人的言论权利，而不会因此牵连到犯罪”。⁶⁵布洛克指出，暴乱者有“自由意志”⁶⁶——与子弹等无生命的物体不同——因此煽动者不应
对暴乱负责。这一推理可以延伸到为各种暴徒头目、政治领袖等开脱责任，因为他们只是指示下属或中间人从事侵犯行为。因此，自由意志主义开玩笑说，希特勒为战争罪辩护时会说：“我只是下达了命令”。⁶⁷

Dun,” J. Libertarian Stud. 18, no. 2 (2004; <https://mises.org/library/reply-against-libertarian-legalism-frank-van-dun>): 1 – 30, at pp. 3 – 16.

例如，参见沃尔特·布洛克的《对弗兰克·范·邓恩〈反对自由意志主义的法律主义〉的回应》，《自由意志主义研究杂志》第 18 卷，第 2 期（2004 年；<https://mises.org/library/reply-against-libertarian-legalism-frank-van-dun>）：1-30 页，第 3-16 页。

⁶⁵ Murray N. Rothbard, “Self-Defense,” in *The Ethics of Liberty* (New York: New York University Press, 1998; <https://mises.org/library/right-self-defense>): p. 81; see also idem, “‘Human Rights’ As Property Rights,” in *ibid.* (<https://mises.org/library/human-rights-property-rights>), pp. 113 – 15.

穆瑞·N·罗斯巴德，《自卫》，收录于《自由的伦理学》（纽约：纽约大学出版社，1998 年；<https://mises.org/library/right-self-defense>）：第 81 页；另见同上，《财产权即“人权”》，同上（<https://mises.org/library/human-rights-property-rights>），第 113-115 页。

⁶⁶ Block, “Reply to ‘Against Libertarian Legalism,’” p. 16.

布洛克，《对〈反对自由意志主义的法律主义〉的回应》，第 16 页。

⁶⁷ Libertarian, or “voluntaryist,” Jack Lloyd:

[I]f we assume that Hitler did not murder anyone and, on top of that, we assume for the sake of argument that Hitler had no other partaking in initiations of force whether it was receipt of stolen goods or rape, could Hitler be held to account for the murders that took place under his watch?

In this Steel-Man-case scenario, Hitler would not be culpable for an initiation of force. Rather, the people who did the actual initiations and threats of force would be culpable, whether it was just pointing guns to threaten people into railcars or using physical violence to massacre people in concentration camps.

Jack Lloyd, “Justice and Voluntaryism,” *Voluntaryist Association* (Dec. 7, 2022; <https://perma.cc/2FZJ-U4EX>).

The perversity of the joke noted in the text illustrates why this reasoning is flawed. Imagine a Jewish woman conscripted to be Hitler’s cleaning lady at the height of World War II, with her family being imprisoned in a concentration camp. If one night she is cleaning Hitler’s office while he is there alone and has the chance to kill him, some

Rothbard and Block are assuming here that the rioter cannot be the means of the inciter, because the rioter has free will; they assume that having another human in the chain of causation breaks the chain. But as explained above, there is no reason other humans cannot serve as means for one's action.

罗斯巴德和布洛克在这里假定，暴乱者不可能成为煽动者的手段，因为暴乱者有自由意志；他们假定，因果链中有另一个人，因果链就中断了。但正如上文所解释的，其他人没有理由不能作为一个人行动的手段。

情况变得复杂：因果关系、合作和人的手段

COMPLICATING THE PICTURE: CAUSATION, COOPERATION, AND HUMAN MEANS

libertarians literally argue this action would be murder since Hitler is not himself an aggressor (!). I trust the absurdity and perverseness of this position is apparent to most readers. Of course the enslaved Jewish woman, in the hypothetical above, has a right to kill Hitler, in self-defense and defense of others, implying Hitler must be an aggressor, even though he “only gives orders.” Thus, not all speech-acts are nonaggressive. See also the related discussion in Kinsella, “KOL149 | IP And Beyond With Stephan Kinsella—Non-Aggression Podcast,” Kinsella on Liberty Podcast (Aug. 30, 2014).

自由意志主义者或“自愿主义者”杰克·劳埃德：
[如果我们假设希特勒没有谋杀任何人，而且，为了论证起见，我们假设希特勒没有参与任何其他的主动使用武力行为，无论是接收赃物还是强奸，那么希特勒是否要为他执政期间发生的谋杀负责？]

在这种“强化论证”的情景中，希特勒不会因为主动使用武力而有罪责。相反，实际进行主动使用武力和武力威胁的人会有罪责，无论是用枪指着人们威胁他们上火车还是在集中营中使用暴力屠杀人们。

杰克·劳埃德，《正义与自愿主义》，自愿主义者协会（2022 年 12 月 7 日；<https://perma.cc/2FZJ-U4EX>）。

文中提到的这个笑话的反常之处说明了这种推理的缺陷。想象一下，在第二次世界大战高峰期，一名犹太妇女被征为希特勒的清洁女工，而她的家人被关押在集中营。如果有一天晚上，她在希特勒独自在办公室时为其打扫卫生，并有机会杀死他，一些自由意志主义者居然认为这一行为会是谋杀，因为希特勒本人不是侵犯者（！）。我相信大多数读者都能看出这种观点的荒谬和反常。当然，在上文的假设中，被奴役的犹太妇女有权杀死希特勒，这是出于自卫和保护他人，这意味着希特勒一定是侵犯者，即使他“只是下达命令”。因此，并非所有的言语行为都是非侵犯性的。

另见金塞拉的相关讨论，《KOL149 | 与斯蒂芬·金塞拉探讨知识产权及其他——非侵犯播客》，《金塞拉谈自由》播客（2014 年 8 月 30 日）。

Compared to many real-world cases of murder, the above example in which A deliberately shoots B is simple and straightforward. After all, A's chosen means of carrying out his aggression against B was a gun—an inanimate object enmeshed in a web of causal relations but incapable of initiating a causal sequence on its own. As the well-known slogan goes, guns don't kill people, people kill people. There is little difficulty in laying the moral and legal responsibility for the murder on A, therefore, because only A engaged in an action. Only A made a choice to which moral and legal blame could attach. The means that A employed—the gun and its ammunition—were physical objects completely bound by causal laws.

与现实世界中的许多谋杀案相比，上述例子中 A 故意射杀 B 的情节简单明了。毕竟，A 选择的对 B 实施侵犯的手段是一把枪——一个被卷入因果关系网中却无法独立启动因果序列的无生命之物。正如一句众所周知的口号：枪不杀人，人杀人。因此，将谋杀的道德和法律责任归咎于 A 并不困难，因为只有 A 参与了行动。只有 A 做出了道德和法律责任可以归咎的选择。A 所使用的手段——枪支及其弹药——是完全受因果法则约束的物理对象。

What about actions that involve other humans? As Mises observed:

*A means is what serves to the attainment of any end, goal, or aim. Means are not in the given universe; in this universe there exist only things. A thing becomes a means when human reason plans to employ it for the attainment of some end and human action really employs it for this purpose. Thinking man sees the serviceableness of things, i.e., their ability to minister to his ends, and acting man makes them means. ... It is human meaning and action which transform them into means.*¹⁸

那么涉及其他人的行动呢？正如米塞斯所言：

手段是实现目的、目标或意图的方式。手段不存在于既定的宇宙中；在这个宇宙中只存在事物。当人的理性计划利用某一事物来达到某种目的，而人的行动也确实利用这一事物来达到这一目的时，该事物就成为手段。会思考的人看到了事物的有用性，即它们为他的目的服务的能力，而会行动的人则使它们成为手段……是人的意图和行动将

它们变成了手段。⁶⁸

Now in these comments Mises is primarily concerned with the use of nonhuman scarce resources as the things employed as means. But there is no reason that other humans cannot also be one's means, in a sense. What else does it mean to "employ" a worker, or to cooperate with others to produce wealth? In fact, as Mises commented in Socialism:

[I]n the means of production men serve as means, not as ends. For liberal social theory proves that each single man sees in all others, first of all, only means to the realization of his purposes, while he himself is to all others a means to the realization of their purposes; that finally, by this reciprocal action, in which each is simultaneously means and end, the highest aim of social life is attained—the achievement of a better existence for everyone.¹⁹

在这些评论中，米塞斯主要关注的是使用非人类的稀缺资源作为手段。但从某种意义上说，其他人没有理由不能成为自己的手段。“雇用”工人或与他人合作生产财富还意味着什么？事实上，正如米塞斯在《社会主义》一书中所评论的那样：

[在生产资料中，人是作为手段而不是目的而存在的。因为自由主义的社会理论证明，每个人首先在其他人身上看到的只是实现其目的的手段，而他自己对其他人来说也是实现其目的的手段；最后，通过这种互惠的行动（在这种行动中，每个人既是手段又是目的），社会生活的最高目标就达到了——为每个人实现更好的生存。⁶⁹

⁶⁸ Mises, Human Action, p. 92. See also Hoppe, Economy, Society, and History, p. 8 et seq.

米塞斯，《人的行动》，第92页。另见霍普，《经济、社会和历史》，第8页及以后。

⁶⁹ Ludwig von Mises, Socialism: An Economic and Sociological Analysis, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; <https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis>), chap. 30, § 1, p. 390 (emphasis added).

To be clear, there is a distinction between the nonhuman scarce means of action employed by actors, and other humans employed to help achieve one's ends. Only the former are ownable things. (See "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9) and "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).) Because of confusion and often equivocation surrounding the term scarce, e.g., in the intellectual property context ("good ideas are

There is no doubt that cooperative, productive action is possible, in which case multiple actors cooperate with each other and, in a sense, employ each other as means to achieve mutual and/or separate goals. But not all cooperative action is productive and peaceful. It is also possible for multiple actors to collaborate or conspire together to trespass against others' property rights.

毫无疑问，合作性的生产性行动是可能的，在这种情况下，多个行动人相互合作，并在某种意义上相互利用，作为实现共同和(或)单独目标的手段。但并非所有的合作行动都是生产性的且和平的。多个行动人也可能串通或合谋侵犯他人的财产权。

In analyzing action through the lens of the praxeological means-ends structure to determine if it amounts to aggression, we ask if the actor employed means to achieve the end of invading the borders of another's property or body—in other words, we ask if he caused the border invasion or trespass. The means employed can be inanimate or nonhuman means governed solely by causal laws (a gun), or it can include other humans who are employed (used) as means to achieve the illicit end desired. The latter category includes both innocent humans that one employs to cause a border invasion as well as culpable humans that one conspires (cooperates) with to achieve the illicit

pretty scarce, so IP must be legitimate”), in recent years I have tried to emphasize the rivalrous or “conflictible” nature of the types of resources, things, or entities that may be subject to property rights. See Kinsella, “On Conflictability and Conflictible Resources,” StephanKinsella.com (Jan. 31, 2022); also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n. 29; “What Libertarianism Is” (ch. 2), Appendix I.

路德维希·冯·米塞斯，《社会主义：经济与社会学分析》，J. 卡哈内译（印第安纳波利斯，印第安纳州：自由基金，1981年），第30章，第1节，第390页（重点补充）。

需要明确的是，行动人使用的非人类稀缺的行动手段与使用其他人来帮助实现自己的目的之间是有区别的。只有前者才是可拥有的东西。(参见《自由意志主义的契约理论：所有权转让、有约束力的承诺和不可让渡性》(第九章)和《并不意味着所有权，反之亦然：一个解剖》(第十一章)。)由于“稀缺”一词的混淆和含糊其词，例如，在知识产权语境中(“好想法非常稀缺，所以IP必须是合法的”)，近年来我一直试图强调可能受财产权约束的资源、事物或实体类型的竞争或“冲突”性质。参见 Kinsella, 《论冲突性和冲突资源》，StephanKinsella.com(2022年1月31日); 又还有《反对知识产权>二十年后：回顾与展望》(第十五章)，注释29；《何为自由意志主义》(第二章)，附录I。

end.

在通过行动学手段-目的结构的视角来分析行动以确定其是否构成侵犯时，我们会问，行动人是否运用了手段以达到侵犯他人财产或身体边界的目的——换句话说，我们会问，他是否造成了对边界的侵犯或入侵。所使用的手段可以是无生命的或完全受因果法则支配的非人类手段（枪支），也可以包括其他人，他们被雇佣(使用)作为实现非法目的的手段。后一类既包括被人利用来造成边界入侵的无辜的人，也包括为达到非法目的而与人共谋（合作）的有罪的人。

Consider the following case in which an aggressor employs an innocent human as one of his means. A terrorist builds a letter-bomb and mails it to his intended victim via courier. The courier has no idea that the package he is delivering contains a lethal device. When the addressee dies in an explosion after he opens the package, whom should we hold responsible? The obvious answer is: the terrorist. Why not the courier? Or the victim himself ? After all, the courier is causally connected to the killing, as is the victim. The courier delivered the package; the victim opened it. But because he did not know he was carrying a bomb, the courier did not have the intent to aggress against the victim. Instead, he was connected to the killing only as a means. When the bomb exploded, it was the terrorist's action, not the courier's, that was completed. The courier simply handed over a package. The terrorist, by contrast, intentionally used means—the bomb materials, but also the unwitting courier—to cause his victim's death. It is no different than if the terrorist used a nonhuman robot or drone to deliver the bomb. This case would be similar to the gun example, but not significantly different from the case in which a human courier was employed. From the point of view of both the victim, and the terrorist, whether the means employed was an innocent human or a nonhuman mechanistic delivery mechanism is irrelevant. The victim opposes being harmed in both cases; and the terrorist achieves his end, in both cases.²⁰

请看以下案例，侵犯者利用无辜者作为其手段之一。一名恐怖分子制造了一个邮件炸弹，并通过快递寄给他的目标受害者。快递员并不知道他所递送的包裹中装有致命装置。当收件人打开包裹后死于爆炸时，我们应该追究谁的责任？答案显而易见：恐怖分子。为什么不是快递员？还是受害者本人？毕竟，快递员和受害者一样，都与谋杀事件有因果关系。快递员送来了包裹，受害者打开了包裹。但由于快递员不知道自己携带的是炸弹，所以他并没有侵犯受害者的意图。相反，他只是作为一种手段与谋杀有关。当炸弹爆炸时，完成的是恐怖分子的行动，而不是快递员的行动。快递员只是

投递了一个包裹。相比之下，恐怖分子有意地使用各种手段——炸弹材料，还有不知情的快递员——造成受害者死亡。这与恐怖分子使用非人类机器人或无人机运送炸弹并无不同。这种情况类似于枪支的例子，但与雇佣人类快递员的情况并无明显区别。从受害者和恐怖分子的角度来看，所使用的手段是无辜的人类还是非人类的机械运送装置并不重要。在这两种情况下，受害者都反对受到伤害；而恐怖分子在这两种情况下都达到了目的。⁷⁰

In fact, the victim's own actions play a role in this scenario—after all, he opens the package, “causing” it to explode. We would not hesitate to say that the terrorist killed the victim, even though there is a significant time lag between the terrorist's initial actions and the ensuing result, and even though the victim's own volitional actions were part of the chain of events. So why not blame the victim? After all, he is the one who set off the bomb by opening the package. But this is obviously absurd. The victim did not intend to kill himself!

事实上，受害者自己的行动在这一情景中也起了作用——毕竟，他打开了包裹，“导致”包裹爆炸。我们会毫不犹豫地说，是恐怖分子杀死了受害者，尽管恐怖分子最初的行动与随后的结果之间存在着明显的时间差，尽管受害者自己的自愿行动也是事件链条的一部分。那么，为什么不责怪受害者呢？毕竟是他打开了包裹，引爆了炸弹。但这显然是荒谬的。受害者并没有自杀的意图！

It is true that the positive law has long recognized that one accused of a crime or tort is not responsible if the damage was really caused by an “intervening act” that breaks the chain of causal connection” between the actions of the accused and the damage that occurred.²¹ The idea is that the intervening act is the true cause of the harm caused. But this is the case only if the event is superseding cause—that is, an unforeseeable intervening cause. In other words, an intervening force only breaks the chain of causal connection when it is unforeseeable. As the Restatement (Second) of Torts provides, “The intervention of a force which is a normal consequence of a situation created by the actor's ... conduct is not a superseding cause of harm which

⁷⁰ See also the “evil midget” example in the text at note 26, below.
另请参见下文注释 26 中的“邪恶侏儒”示例。

such conduct has been a substantial factor in bringing about.” 22

诚然，实在法早已承认，如果损害确实是由“介入行动”造成的，而该“介入行动”打破了“被告的行动与所发生的损害之间的因果联系链，则被控犯罪或侵权的人无需承担责任。⁷¹ 这种观点认为，介入行动是造成损害的真正原因。但只有当该事件是替代原因——也就是说，一个不可预见的介入原因时——情况才会如此。换句话说，介入力量只有在不可预见的情况下才会打破因果联系链。正如《侵权法重述（第二版）》所规定的那样，“对于由行动人……的行动所造成的情形所导致的一种正常力量的介入，不是行动人该行动在造成伤害方面起了实质性作用的替代原因。”⁷²

But it is simply not the case that when an actor (whom we may in general refer to as a “boss” or “inciter”) induces another human to aggress against a victim, that the act of aggression is “unforeseeable” merely because the intermediary has free will.²³ When a terrorist uses a courier to deliver a letter bomb, it is not unforeseeable that the victim will receive it; and it is not unforeseeable that the victim will open it. If I hire a hit-man to kill someone, I am doing so because I hope and expect the victim to be killed. If I send my underling to rob a bank, I am doing it to have the bank robbed. If a woman persuades her lover to murder her husband, and he does, she gets the result she wanted; can we really say the outcome was “unforeseeable”?²⁴ Thus, the fact that there are other humans with free will who are part of the chain of events does not excuse the instigator. This is, admittedly, how the positive law reasons, but I think this is reasonable and compatible with libertarian-based principles of rights, causation, and responsibility.

但是，当一个行动人（我们可以笼统地称其为“头目”或“教唆者”）诱使另一个人侵犯受害者时，仅仅因为中间人有自由意志，侵犯行为就“不可预见”，这是不可能的。

⁷³ 当恐怖分子利用快递员递送邮件炸弹时，受害者收到邮件炸弹并非不可预见；受害

⁷¹ I trust my readers can google, but see e.g. https://en.wikipedia.org/wiki/Intervening_cause.

我相信我的读者们可以自行谷歌，但例如可以查看 https://en.wikipedia.org/wiki/Intervening_cause。

⁷² Restatement (Second) of Torts, § 443 (1965).

《侵权法重述（第二次）》，第 443 条（1965 年）

⁷³ In this chapter I will use various terms, such as “instigator,” inciter, boss, and the like, to refer to the person who attempts to persuade or induce another human, whom

者打开邮件炸弹也并非不可预见。如果我雇佣杀手杀人，我这样做是因为我希望并预料到受害者会被杀害。如果我派我的下属去抢银行，我这样做是为了让银行被抢。如果一个女人劝说她的情人谋杀她的丈夫，而她的情人也真的杀了她的丈夫，她得到了她想要的结果；我们真的能说这个结果是“不可预见的”吗？⁷⁴因此，即使有其他具有自由意志的人参与到事件链中，也不能成为教唆者的借口。诚然，这就是实在法的推理方式，但我认为这是合理的，也符合基于自由意志主义的权利、因果关系和责任原则。

We submit that the case of an intentional border-crossing being carried out in part through human actors as opposed to through exclusively inanimate or nonhuman means poses no special praxeological problems. Whether the terrorist handed the

I will often refer to as an intermediary, underling, henchman and so on, to directly commit an act of aggression against some innocent victim.

在本章中，我将使用各种术语，例如“煽动者”“教唆者”“头目”等等，来指代试图说服或诱导另一个人（我通常将其称为中间人、下属、党羽等等）直接对某个无辜受害者实施侵犯行动的人。

⁷⁴ The example given on Wikipedia is as follows:

An intervening cause will generally absolve the tortfeasor of liability for the victim's injury only if the event is deemed a superseding cause. A superseding cause is an unforeseeable intervening cause. By contrast, a foreseeable intervening cause typically does not break the chain of causality, meaning that the tortfeasor is still responsible for the victim's injury—unless the event leads to an unforeseeable result.

For example..., if a defendant had carelessly spilled gasoline near a pile of cigarette butts in an alley behind a bar, the fact that a bar patron later carelessly threw a cigarette butt into the gasoline would be deemed a foreseeable intervening cause, and would not absolve the defendant of tort liability. However, if the bar patron intentionally threw the cigarette butt into the gasoline because he wanted to see it ignite, this intentional act would likely be deemed unforeseeable, and therefore superseding.

https://en.wikipedia.org/wiki/Intervening_cause.

维基百科上给出的例子如下：

介入原因通常只有在该事件被视为替代原因时，才会使侵权人对受害者的伤害免责。替代原因是不可预见的介入原因。相比之下，可预见的介入原因通常不会打破因果链，这意味着侵权人仍要对受害者的伤害负责——除非该事件导致不可预见的结果。

例如……如果被告不小心在酒吧后面的小巷里一堆烟头附近洒了汽油，后来酒吧的一位顾客不小心将烟头扔进汽油里，这一事实将被视为可预见的介入原因，不会使被告免除侵权责任。然而，如果酒吧顾客故意将烟头扔进汽油里，因为他想看到它点燃，这种故意行为很可能被视为不可预见的，因此是替代原因。

https://en.wikipedia.org/wiki/Intervening_cause

bomb to his victim directly or through an innocent third party, the legal analysis remains the same. We look to see who intentionally employed means to cause an unwanted invasion against another. The means can be nonhuman or inanimate means, or another human, whether innocent or acting in coordination with the actor. In this case, the (innocent) courier was the terrorist's means of killing the victim. It is simply confused to claim, as some do, that the terrorist in this case is not a cause of the killing because the chain of causation is "broken" by the "intervening" acts of another human (the courier) with free will. The acts of the courier do not absolve the terrorist; to the contrary, they implicate him, since he used the courier and his actions to cause damage to the victim.

我们认为，部分通过行动人而非完全通过无生命或非人类手段实施的蓄意越境行为并不构成特殊的行动学问题。无论恐怖分子是直接还是通过无辜的第三方将炸弹交给受害者，法律分析都是一样的。我们要看的是，是谁故意使用手段对他人造成了不想要的侵犯。手段可以是非人或无生命的手段，也可以是另一个人，无论是无辜的还是与行动人协同行动的。在本案中，（无辜的）快递员就是恐怖分子杀害受害者的手段。如果像某些人所说的那样，在这种情况下，恐怖分子不是杀害的原因，因为因果关系链被另一个有自由意志的人（快递员）的“介入”行动“打断”了，这简直是混淆视听。快递员的行动并不能免除恐怖分子的责任；相反，这些行动都与恐怖分子有牵连，因为他利用快递员及其行动对受害者造成了伤害。

In the cases mentioned above, only innocent parties—the courier, or the victim himself—are employed as the malfeasant's means of committing aggression. Although here we find the terrorist alone responsible for the killing, it will not always be the case that an act of aggression "belongs" to just one person. For example, consider a bank heist in which there are several participants. One of them drives the getaway car; another handles crowd control; a third directs the action by walkie-talkie; and a fourth actually steals the money. The one who takes by force money that does not belong to him is clearly guilty of robbery. But most libertarians would agree that his companions are no less guilty. Most libertarians would recognize this as a "simultaneous" criminal conspiracy that renders all of its participants independently and jointly responsible. And that is our conclusion as well. But how can we justify that conclusion, inasmuch as only one person actually took possession of the stolen money?

在上述案例中，只有无辜者——快递员或受害者本人——被不法分子利用作为实施侵犯的手段。虽然在这里我们发现只有恐怖分子要对杀人负责，但侵犯行动并不总是“只

属于"一个人。例如，考虑一下有几个人参与的银行抢劫案。其中一个人开车逃跑；另一个人负责控制人群；第三个人通过对讲机指挥行动；第四个人实际上在偷钱。用武力抢走不属于自己的钱的人显然犯了抢劫罪。但大多数自由意志主义者都会同意，他的同伴们也同样有罪。大多数自由意志主义者都会认为这是一个"同时发生"的犯罪阴谋，所有参与者都要独立和共同承担责任。这也是我们的结论。但是，既然只有一个人实际占有了赃款，我们又如何证明这一结论是正确的呢？

The key is causation. Each of these actors had the goal that the bank's and customers' property be seized and each intentionally used means—including one another—to attain this goal. In other words, each bank robber that was part of the conspiracy was a cause of the robbery. Each had intent to achieve, and employed means to attain, the illicit end.²⁵

关键在于因果关系。这些行动人中的每个人都有抢夺银行和客户财产的目标，并且每个人都有意地使用包括彼此在内的手段来实现这一目标。换句话说，每个参与共谋的银行劫匪都是抢劫案的起因。每个人都有达到非法目的的意图，并使用了达到非法目的的手段。⁷⁵

Consider the following example: A purchases a remote-controlled tank. With the remote control he can steer the tank and fire its cannon. He directs the tank to blow down the walls of a neighbor's house, destroying the house and killing the neighbor. No one would deny that A is the cause of the killing and is guilty of murder and trespass. However, after the rampage, a hatch opens in the tank, and an evil midget jumps out. It turns out, you see, that the midget could see on a screen which buttons were pressed on the remote control, and he would operate the tank accordingly. We submit that A is equally liable in both cases. From his point of view, the tank was a "black box" that he used to attain his end, regardless of whether there was a human will somewhere in the chain of causation. No one can plausibly argue that we cannot determine A's liability

⁷⁵ Frank van Dun's discussion of "social causation" is also relevant here. See Van Dun, "Against Libertarian Legalism," pp. 64, 79. It is discussed in further detail in the text below.

弗兰克·范·邓恩关于"社会因果关系"的讨论在这里也相关。见范·邓恩《反对自由意志主义的法律主义》，第 64、79 页。下文将对其进行更详细的讨论。

until we know whether there was a midget, or mere machinery, in the tank. (Of course, the evil midget, if there is one, is also liable.)²⁶ In general, one can be liable for acts committed by another, if one is employing them as means to commit aggression. As Frank van Dun argues,

*Hitler, Churchill, Roosevelt, Stalin, and their likes were not innocent practitioners of free speech at a time when a lot of their compatriots were blowing up towns and villages and people. The general who, in his search of scapegoats for a defeat, sends a handful of privates to the firing-squad is not exonerated by the fact that some other privates actually fired the shots that killed their convicted colleagues.*²⁷

请看下面的例子：A 购买了一辆遥控坦克。通过遥控器，他可以操纵坦克并发射大炮。他指挥坦克炸毁了邻居家的墙壁，摧毁了房子并杀死了邻居。没有人会否认 A 是杀人的罪魁祸首，他犯有谋杀罪和非法侵入罪。然而，肆虐过后，坦克上的舱门打开了，一个邪恶的侏儒跳了出来。原来，侏儒可以从屏幕上看到按下了遥控器上的哪个按钮，并据此操作坦克。我们认为，在这两种情况下，A 都负有同样的责任。从他的角度来看，坦克是一个“黑盒子”，他用它来达到自己的目的，而不管在因果链的某个环节上是否存在人的意志。没有人可以振振有词地说，在我们知道坦克里是有一个侏儒，或仅仅是一个机械之前，我们无法确定 A 的责任。(当然，如果有邪恶的侏儒，他也要承担责任。) ⁷⁶ 一般来说，如果一个人利用他人的行动作为实施侵犯的手段，他可以对他人的行动承担责任。正如弗兰克·范·邓恩所说，

希特勒、丘吉尔、罗斯福、斯大林以及他们的同类，在他们的许多同胞正在炸毁城镇、村庄和人民的时候，并不是言论自由的无辜实践者。一位将军在为战败寻找替罪羊时，把少数几个二等兵送进了行刑队，但其他一些二等兵开枪打死了他们被定罪的同事，这并不能为他开脱罪责。⁷⁷

⁷⁶ For a critique of our reasoning here, see Matt Mortellaro, “Causation and Responsibility: A New Direction,” Libertarian Papers 1, art. no. 24 (2009; <https://mises.org/library/causation-and-responsibility-new-direction>), p. 11 et seq. This paper also criticizes other aspects of the reasoning in our original article.

对于我们这里的推理的批评，见马特·莫泰拉罗的《因果关系与责任：新方向》，《自由意志主义论文》第 1 卷，第 24 号文章（2009 年；<https://mises.org/library/causation-and-responsibility-new-direction>），第 11 页及以后。这篇论文还批评了我们原始文章中推理的其他方面。

⁷⁷ Van Dun, “Against Libertarian Legalism,” p. 78.

范·邓恩，《反对自由意志主义的法律主义》，第 78 页。

In other words, the simple fact that a person's actions are mediated through other persons does not mean he should not be held liable for them. The driver of the getaway car is responsible for the robbery because he is intentionally engaged in a "simultaneous" criminal conspiracy to commit the heist. The mob boss who orders a crime is liable for his underling's actions. The political leader who orders military actions is responsible for them. People can conspire—collaborate, cooperate—to commit crimes.

换句话说，一个人的行动是通过其他人作为中介的这一简单事实，并不意味着他不应该为这些行动负责。逃跑车辆的司机要对抢劫负责，因为他有意参与了“同时”实施抢劫的犯罪共谋。下令犯罪的黑帮头目要对其下属的行动负责。下令采取军事行动的政治领导人要对军事行动负责。人们可以共谋——协作、配合——犯罪。

Moreover, the conspiracy or joint action need not even be simultaneous. In the terrorist example, the bomb did not detonate until long after the terrorist had handed it over to the courier. Nevertheless, he used the courier as an unwitting "partner" in a temporal "conspiracy" to kill the intended victim. In situations such as these, other human actors (including the victim) can be means to an end. It should be emphasized, of course, that this is a general rule; the analysis in each situation must be case-specific and take relevant facts and context into account. Whether a given person is considered to be "in" or "out" of the conspiracy—an intentional actor or an unwitting dupe—will depend on the circumstances surrounding the particular case.

此外，共谋或联合行动甚至不必是同时进行的。在恐怖分子例子中，炸弹是在恐怖分子将其交给快递员很久之后才引爆的。然而，他利用快递员作为一个不知情的“伙伴”，在时序上“共谋”杀害预定的受害者。在这种情况下，其他行动人（包括受害者）可能是达到目的的手段。当然，应当强调的是，这只是一般规则；对每种情况的分析都必须针对具体案件，并考虑到相关事实和背景。某个人被认为是“参与”或“不参与”共谋——是蓄意的行动人还是不知情的受骗者——将取决于特定案件的具体情况。

Generally, however, the libertarian position is that what is impermissible—and properly punishable—is action that is aggression. This means action characterized by the following structure: the actor intentionally employs some means (which can be mere objects but could also include other actors, whether innocent or not) calculated to cause

an invasion of the physical borders of a nonaggressor's person or property.

不过，一般而言，自由意志主义的立场是，不允许的——而且应受到适当惩罚的——是侵犯行动。这是指具有以下结构特征的行动：行动人故意使用某种手段（可以是单纯的物体，也可以包括其他行动人，无论其是否无辜），以造成对非侵犯者的人身或财产的实际边界的侵犯。

特别例外

Ad Hoc Exceptions

Understandably, libertarians who advance such views are uncomfortable with the implications—with the idea that presidents and political leaders, mob bosses, people who hire hit men, and so on, are not liable. To avoid these difficulties, they advance various ad hoc exceptions to their “incitement is never a crime, it’s just free speech” or “the free will of the intermediary breaks the chain of causation” arguments.³² Walter Block, for example, argues that the “instigator” of actions directly committed by an intermediary can be liable if (a) he threatens or coerces the intermediary to commit the crime,³³ (b) he contractually pays the intermediary money to commit the crime,³⁴ (c) he “orders” the intermediary to commit the crime,³⁵ or (d) he is “in” a “criminal conspiracy with” the other person, whatever that means.³⁶ So if you coerce someone, or pay them, or “order” them, or “conspire with” them, you are liable for the intermediary’s crimes. With so many exceptions to the rule that one is simply not responsible for the actions of others, the rule itself is questionable. Moreover, there is no clear reason given for any of these exceptions; they are all apparently supposed to be intuitively obvious cases, but there is no unifying theme between them. These exceptions are ad hoc and not based on any general theory.³⁷

可以理解的是，提出这种观点的自由意志主义者对其中的含义——总统和政治领袖、黑帮头目、雇佣杀手的人等等都不负有责任——感到不舒服。为了避免这些困难，他们在“煽动从来不是犯罪，只是言论自由”或“中间人的自由意志打破了因果关系链”的论点之外，提出了各种特别例外。⁷⁸ 例如，沃尔特·布洛克（Walter Block）认为，

⁷⁸ Somewhat similarly, Rothbard also tried to ameliorate the unacceptable consequences of some of his contract views in *The Ethics of Liberty*. He first argues

通过中间人直接实施行动的“教唆者”在以下情况下可能要承担责任：(a) 他威胁或胁迫中间人实施犯罪，⁷⁹ (b) 他通过向中间人支付钱财以实施犯罪，⁸⁰ (c) 他“命令”中

(correctly, to my mind; see “A Libertarian Theory of Contract” (ch. 9)) that voluntary slavery contracts are invalid because the human body or will is inalienable. (See *ibid.*, Part III.C.) Yet he also then argues that failure to repay a debt is “implicit theft” and that, therefore, in principle, debtor’s prison is justified. (Rothbard is in error here, as I discuss in *ibid.*) If someone may be imprisoned for failing to pay a contractual debt (on the basis of the “implicit theft” characterization), this is just another way one can, in fact, alienate one’s body by contract. In other words, the positions “the body is inalienable” and “debtor’s prison is justified” are contradictory. Perhaps sensing this, Rothbard tries to minimize the latter view by simply asserting that imprisoning an “implicit thief” — the debtor — is somehow necessarily disproportionate and “excessive” punishment. See *ibid.*, Part III.D.

Lloyd, quoted in note 31, above, also tries to minimize the implications of absolving a Hitler from liability. He writes:

But that Hitler may escape a direct consequence over physical initiations of force does not mean, “no justice.” ... Justice is brought by holding the order-followers accountable for their harms and by exposing Hitler’s role. ... The social and economic ramifications are themselves a toll on him and his ability live and should not be discounted in the calculation.

For some of us, probably most of us, this is pretty thin gruel.

类似地，罗斯巴德在《自由的伦理》中也试图改善他的一些观点所带来的不可接受的后果。他首先（在我看来是正确的；见《自由意志主义的契约理论》（第9章））认为自愿为奴的是无效的，因为人的身体或意志是不可让渡的。（见同上，第三部分C节）然而，他随后又认为不偿还债务是“隐性盗窃”，因此，原则上，债务人入狱是正当的。（罗斯巴德在这里是错误的，正如我在同上中所讨论的）如果某人可能因为未能支付债务而被监禁（基于“隐性盗窃”的特征），这实际上是另一种通过让渡自己身体的方式。换句话说，“身体是不可让渡的”和“债务人入狱是合理的”这两个立场是相互矛盾的。也许意识到了这一点，罗斯巴德试图通过简单地断言监禁一个“隐性小偷”——债务人——在某种程度上必然是不相称的和“过度”的惩罚来最小化后一种观点。见同上，第三部分D节。

上文注释31中引用的劳埃德也试图最小化免除希特勒责任的影响。他写道：

但是，希特勒可能逃脱主动使用武力的直接后果，并不意味着“没有正义”……通过让命令执行者对他们的伤害负责，并揭露希特勒的角色，正义得以实现……社会和经济后果本身对他和他的生活能力是一种损害，在计算中不应被低估。

对我们中的一些人，可能对我们大多数人来说，这是相当微不足道的。

⁷⁹ Block, “Reply to ‘Against Libertarian Legalism,’” p. 15.

布洛克，《对〈反对自由意志主义的法律主义〉的答复》，第15页。

⁸⁰ *Ibid.*, p. 17.

同上，第17页。

间人实施犯罪，⁸¹ 或 (d)他 或者 “他人 “共谋犯罪”，不管这意味着什么。⁸²因此，如

⁸¹ Ibid., p. 15 (footnotes omitted):

According to Van Dun’ s interpretation of my viewpoint, they [Hitler, Stalin, et al] would therefore be “guilty” of no more than exercising their free speech rights, and should be considered innocent of all wrongdoing.

However, Van Dun reckons in the absence of threats. To reiterate, the libertarian legal code proscribes not only invasive acts, but also intimidation. Hitler, Stalin, et al. were not merely engaging in their free speech rights. Rather, they were issuing orders to their subordinates to maim and kill innocent people. Implicit in these commands was the threat that if they were not obeyed, those who failed to carry out these orders would be summarily dealt with.

Here Block seems to imply that “orders” necessarily include a threat. In this case, the “orders” exception noted above seems to collapse into the first exception, where the instigator threatens of coerces the intermediary. But see Walter Block, “Reply to Frank van Dun’ s ‘Natural Law and the Jurisprudence of Freedom,’ ” J. Libertarian Stud. 18, no. 2 (Spring 2004; [https:// mises.org/library/reply-frank-van-duns-natural-law-and-jurisprudence-freedom](https://mises.org/library/reply-frank-van-duns-natural-law-and-jurisprudence-freedom)): 65 – 72,

p. 67, which seems to distinguish orders from threats, with the conjunction “or,” although it is somewhat ambiguous: “A gang leader does not merely incite his followers to criminal behavior, he orders them to do it, or threatens that if they do not, they will be visited with physical sanctions.”

同上，第 15 页（注释省略）：

根据范·邓恩对我观点的解释，他们[希特勒、斯大林等人]因此“有罪”的程度不超过行使他们的言论自由权利，并且应该被认为没有任何过错。

然而，范·邓恩是在没有威胁的情况下进行估计的。需要重申的是，自由意志主义的法律准则不仅禁止侵犯行为，还禁止恐吓。希特勒、斯大林等人不仅仅是在行使他们的言论自由权利。相反，他们向他们的下属下达命令去残害和杀害无辜的人。这些命令中隐含着威胁，如果不被服从，那些未能执行这些命令的人将被立即处理。

在这里，布洛克似乎暗示“命令”必然包含威胁。在这种情况下，上面提到的“命令”例外似乎就归入了第一个例外，即煽动者威胁或胁迫中间人。但见沃尔特·布洛克的《对弗兰克·范·邓恩的“自然法与自由的法理学”的回复》，《自由意志主义研究杂志》第 18 卷，第 2 期(2004 年春季; <https://mises.org/library/reply-frank-van-duns-natural-law-and-jurisprudence-freedom>)：65-72 页，第 67 页，这似乎用“或”这个连词将命令与威胁区分开来，尽管有些模糊：“一个黑帮头目不仅仅煽动他的追随者进行犯罪行为，他命令他们这样做，或者威胁说如果他们不这样做，他们将受到身体上的制裁。”

⁸² See Walter Block, “Were Manson, Hitler, Criminals? Yes.”, LewRockwell.com (Feb. 1, 2017; <https://www.lewrockwell.com/lrc-blog/manson-hitler-criminals-yes/>) (“Were Manson, Hitler merely inciting? No, they were ‘involved in a plan or conspiracy with others to commit various crimes.’ ”); Łukasz Dominiak & Walter E. Block, “Libertarian Theory of Bribery and Incitement: A Reformulation,” MEST Journal 5 no. 2 (July 15,

果你胁迫某人，或付钱给他，或“命令”他“他”，或与他“共谋”，你就要为中间人的罪行负责。由于“不对他人的行动负责”这一规则有如此多的例外，该规则本身就值得商榷。此外，这些例外情况都没有给出明确的理由；它们显然都应该是直观上显而易见的情况，但它们之间并没有统一的主题。这些例外都是特例，没有任何一般理论作

2017; <http://www.walterblock.com/wp-content/uploads/2017-bribery-and-incitement.pdf>); 95-101, p. 98 (emphasis added):

From Rothbard's point of view, inciting to crime “is a pure exercise of a man’s right to speak without being thereby implicated in the crime. On the other hand, it is obvious that if Green happened to be involved in a plan or conspiracy with others to commit various crimes, and that then Green told them to proceed, he would then be just as implicated in the crimes as are the others—more so, if he were the mastermind who headed the criminal gang.”

Mortellaro also seems to advance a view which would absolve a mafia boss or a Hitler in some cases, but then tries to make an exception in cases of conspiracy or collaboration. See Mortellaro, “Causation and Responsibility,” p. 16:

With regard to the necessity of the inciter, it would seem that the hitman has the ability and means to engage in the crime without the help of the inciter. Indeed, unless the inciter plays some other role—if he helps hide the hitman from the authorities, drives the getaway car, picks the lock on the target’s door, or something actually involved in the crime itself, then and only then would he have been necessary for the hitman to carry out the crime.

见沃尔特·布洛克的《曼森、希特勒是罪犯吗？是》，LewRockwell.com（2017年2月1日：<https://www.lewrockwell.com/lrc-blog/manson-hitler-criminals-yes/>）（“曼森、希特勒仅仅是在煽动吗？不，他们‘参与了与他人一起实施各种犯罪的计划或阴谋’。”）；卢卡斯·多米尼亚克和沃尔特·E·布洛克，《自由意志主义的贿赂与煽动理论：重新表述》，《MEST杂志》第5卷第2期（2017年7月15日：<http://www.walterblock.com/wp-content/uploads/2017-bribery-and-incitement.pdf>）：95-101页，第98页（重点补充）：

从罗斯巴德的观点来看，煽动犯罪“是一个人言论权利的纯粹行使，不会因此卷入犯罪。另一方面，很明显，如果格林碰巧参与了与他人一起实施各种犯罪的计划或阴谋，然后格林告诉他们继续，那么他就会和其他人一样卷入犯罪——如果他是领导犯罪团伙的策划者，情况更是如此。”

莫泰拉罗似乎也提出了一种观点，在某些情况下会为黑手党头目或希特勒开脱，但在阴谋或合作的情况下会试图做出例外规定。见莫泰拉罗的《因果关系与责任》，第16页：

关于煽动者的必要性，似乎杀手有能力和手段在没有煽动者帮助的情况下实施犯罪。的确，除非煽动者扮演了其他角色——比如帮助杀手躲避当局、驾驶逃跑车辆、撬开锁着目标房间的锁，或者实际上参与了犯罪本身，只有在这种情况下，他对于杀手实施犯罪才是必要的。

为依据。⁸³

For example, if an instigator is usually off the hook for actions committed by an intermediary, because the intermediary has free will, why does coercion or monetary payment make a difference? If you coerce someone, or pay him, he still has free will. Whether the instigator threatens, or merely persuades, the intermediary, he still does not “determine” the intermediary’s actions, since in both cases, he has free will.³⁸ In fact, legal systems do not absolve someone from liability for crime just because they are coerced, in recognition of the fact that even coerced agents have choice and culpability.

例如，如果煽动者通常对中间人的行动免责，因为中间人有自由意志，那么胁迫或金钱支付为何会产生差异？如果你胁迫某人，或付钱给他，他仍然有自由意志。无论煽动者是威胁还是仅仅劝说中间人，他仍然没有“决定”中间人的行动，因为在这两种情况下，中间人都有自由意志。⁸⁴事实上，法律制度不会仅仅因为某人受到胁迫就免除

⁸³ See also Mortellaro, “Causation and Responsibility,” p. 14 (footnote omitted): Kinsella goes on in his paper to criticize the inconsistency of some of the defenders of the Rothbardian position for making ad hoc exceptions to the theories which they support. This will be discussed in greater detail below, but suffice to say for now that I am entirely in agreement with Kinsella on this point and can bring no substantive objection to his criticisms.

另见莫泰拉罗的《因果关系与责任》，第 14 页（注释省略）：金塞拉在他的论文中继续批评罗斯巴德立场的一些捍卫者的一致之处，他们为自己支持的理论随意做出例外规定。这将在下面更详细地讨论，但现在只需要说，在这一点上我完全同意金塞拉，并且对他的批评提不出实质性的反对意见。

⁸⁴ As Mortellaro notes:

[W]hy should we assume that the hitman’s actions are determined? Why should we assume that by the mere act of offering money the inciter is able to take control of the hitman’s body and make him do the dirty work? The same argument which underpins the Blockian and Rothbardian support for the right to incite-by-words can be used to bolster the right to incite-by-monetary-payment.

Mortellaro, “Causation and Responsibility,” p. 16. See also Van Dun, “Against Libertarian Legalism,” p. 64 n.3 (“there is such a thing as one person causing another to do something without actually using compulsion or force to make him do it and without having him agree to a contractual obligation to do it.”). Moreover, as noted in the text, under the Rothbardian title-transfer theory of contracts advocated in these pages, contracts do not give rise to obligations anyway, but only cause title to owned resources to be transferred.

其犯罪责任，因为人们认识到即使是受胁迫的行动人也有选择和罪责。

Furthermore, why is contractual, monetary payment some special exception? What about other types of contract, such as a contract for services, or other forms of inducement, such as the promise of sex or getting in the instigator's good graces? We cannot understand why paying someone to murder a victim makes the payer responsible, while there is categorically no responsibility for inducing or persuading someone to commit the murder. Focusing on monetary payment as a special exception seems contrary to the Rothbardian view of contracts as mere title transfers (in which money is just one type of thing that can contractually be transferred), and also contrary to the Austrian view of the subjective nature of value (because people can be motivated by things other than title transfers; the end of action need not be obtaining ownership of something).

此外，为什么性的金钱支付属于特殊例外？其他类型的，如服务，或其他形式的引诱，如性承诺或获得教唆者的好感，又该如何呢？我们无法理解，为什么付钱给某人谋杀受害者，付钱人就要承担责任，而诱导或说服某人实施谋杀却完全没有责任。把金钱支付作为一个特殊的例外，似乎有悖于罗斯巴德关于仅仅是所有权转让的观点（其中金钱只是可以通过转让的一种物品），也有悖于奥派关于价值主观性的观点（因为人们的动机可以是所有权转让以外的东西；行动的目的不一定是获得某物的所有权）。

As for the former point: a contract is simply alienation to property: it is simply a property title transfer. It is not a "binding obligation."³⁹ Yet Block does seem to rely on the conventional view of contracts as "binding obligations" or promises, instead of as mere transfers of title to alienable owned resources (Rothbard's view, which Block elsewhere

正如莫泰拉罗所指出的：

[为什么我们要假设杀手的行动是被决定的？为什么我们要假设仅仅通过提供金钱的行动，煽动者就能控制杀手的身体并让他做肮脏的工作？支撑布洛克和罗斯巴德支持言语煽动权利的相同论点，可以用来支持被金钱煽动的权利。]

莫泰拉罗，《因果关系与责任》，第 16 页。另见范·邓恩的《反对自由意志主义的法律主义》，第 64 页注释 3（“存在这样一种情况，即一个人导致另一个人做某事，而实际上既没有使用强制或武力让他去做，也没有让他同意承担做这件事的责任。”）。此外，正如文中所指出的，在这些文本中所倡导的罗斯巴德的所有权转让理论中，无论如何都不会产生责任，而只是导致有主资源的所有权转让。

seems to support), to support his ad hoc “incitement-by-monetarypayment” exception. As he writes:

*However, if Van Dun paid me for this information, e.g., the hikers paid and therefore contractually obligated the local yokel to tell the truth, then we would have entirely a different matter. Then he would be guilty of a contract violation that resulted in death, a very serious matter indeed.*⁴⁰

至于前一点：只是财产的让渡：它只是财产所有权的转让。它不是“有约束力的义务”⁸⁵。然而，布洛克似乎确实依赖于将视为“有约束力的义务”或承诺的传统观点，而不仅仅是对可让渡的拥有资源的所有权转让（罗斯巴德的观点，布洛克在其他地方似乎也支持这种观点），来支持他特设的“货币支付煽动”例外。他写道：

*然而，如果范·邓恩为此信息向我付费，例如，徒步旅行者付费了，因此根据有义务让当地土著说实话，那么我们就面临完全不同的情况。那么他就会因违反导致死亡的而有罪，这确实是一件非常严重的事情。*⁸⁶

Block's use of the language “contractually obligated” indicates he is not here viewing a contract as a mere transfer of ownership of a resource, but rather as some kind of promise giving rise to a legally-enforceable or binding obligation—contrary to the Rothbard-Evers title-transfer theory of contract.

布洛克使用了“义务”这一措辞，这表明他在这里并不是将仅仅视为资源所有权的转让，而是将其视为某种承诺，这种承诺会产生一种可依法强制执行或具有约束力的义务——这与罗斯巴德-埃弗斯（Rothbard-Evers）的——所有权转让理论恰恰相反。

As for the latter point: paying someone is simply one means of inducing them to do something—to obtain money that they subjectively value. They could be induced or persuaded by giving them other things they value, such as gratitude, or a service. Whether a woman pays a hitman money to kill her husband or persuades him to do so for sexual favors should not make a difference. To focus on the payment of money, or

⁸⁵ See “A Libertarian Theory of Contract” (ch. 9).

见《自由意志主义的契约理论》（第九章）。

⁸⁶ Block, “Reply to Frank van Dun’s ‘Natural Law and the Jurisprudence of Freedom,’ ” p. 66.

对弗兰克·范·邓恩的《自然法与自由的法理学》的答复，第 66 页。

coercion, as exceptions, is simply ad hoc and also ignores the Rothbardian view of contracts, as well as the Austrian view of the subjective nature of value.⁴¹

至于后一点：付钱只是诱使某人做某事的一种手段——获得他们主观上看重的金钱。诱导或说服他们的方式还可以是给予他们其他他们看重的东西，比如感激或服务。一个女人是给杀手钱去杀她的丈夫，还是为了性利益而说服他去杀她的丈夫，这两者并没有什么区别。把支付金钱或胁迫作为例外情况，简直是临时起意，也忽视了罗斯巴德的观，以及奥派关于价值主观性的观点。⁸⁷

As for Block's view that an instigator can be liable for the intermediaries actions if he "orders" him, it is not clear what the rationale is, although Block's comments suggest he means here an order coupled with a threat, in which case this exception collapses into the first.⁴² Why can't the person who incites the mob be characterized as "ordering" them to lynch someone, if ordering does not require threats? If ordering does not require threats, then why would this reasoning not apply to an inciter?

至于布洛克认为，如果煽动者“命令”中间人行动，他就可以对中间人的行动承担责任，其理由是什么并不清楚，尽管布洛克的评论表明他在这里指的是命令加上威胁，在这种情况下，这种例外情况就会与第一种例外情况相抵触。⁸⁸如果命令不需要威胁，为什么不能把煽动暴徒的人定性为“命令”他们对某人施以私刑？如果命令不需要威胁，那么为什么这个推理不适用于煽动者呢？

As for the final exception—liability in the case of being part of a criminal conspiracy—there is no definition provided and no clear explanation of why this makes one

⁸⁷ See also Mortellaro, "Causation and Responsibility," p. 16, criticizing Rothbard and Block for the ad hoc exception of "incitement-by-monetary-payment" as being inconsistent with their objection to "incitement-by-words" and also as being "in tension with the Austrian theory of value, namely, that it is entirely subjective ... we have no reason to condemn money payments while turning a blind eye to psychic value." 另见莫泰拉罗《因果关系与责任》，第 16 页，批评罗斯巴德和布洛克将“通过货币支付进行煽动”作为特别例外，这与他们反对“通过言论进行煽动”不一致，而且“与奥地利的价值理论相矛盾，即价值完全是主观的……我们没有理由谴责货币支付，而对精神价值视而不见”。

⁸⁸ See note 35, above. 见上文注释 35。

culpable.⁴³ No reason is given as to why we can't characterize the person inciting a lynch mob as being part of a criminal conspiracy with the lynchers.

至于最后的例外——作为犯罪共谋一部分的责任——没有给出定义，也没有清楚解释为什么这会使人有罪。⁸⁹ 也没有给出任何理由说明为什么我们不能将煽动私刑暴徒的人与私刑执行者描述为犯罪共谋的一部分。

As noted above with the Hitler example, even with these exceptions, many “instigators” would not technically be culpable for actions taken by their subordinates.⁴⁴ Block attempts to find a way out of absolving a Hitler or other political leader, or mob boss, army general, and the like from liability for actions of their subordinates by simply assuming or positing that they are always, necessarily, threatening their subordinates, so that the first exception applies. As he writes:

[T]he libertarian legal code proscribes not only invasive acts, but also intimidation. Hitler, Stalin, et al. were not merely engaging in their free speech rights. Rather, they were issuing orders to their subordinates to maim and kill innocent people. Implicit in these commands was the threat that if they were not obeyed, those who failed to carry out

⁸⁹ Block attempts to clarify the principle in Walter Block, “Rejoinder to Kinsella and Tinsley on Incitement, Causation, Aggression and Praxeology,” J. Libertarian Stud. 22, no. 1 (2011): <https://mises.org/library/rejoinder-kinsella-and-tinsley-incitement-causation-aggression-and-praxeology>: 641 – 64, p. 652, but he simply restates his rule in other terms, without any basis or justification. He writes:

There are no exceptions here. The arm’s length rule of cooperation, collusion, aiding and abetting, is exceptionless. Of course, it is sometimes a delicate matter to determine where on the arm’s length continuum any particular case lies.

But what are the criteria for “colluding” or “cooperation”? Why are these even the criteria? Why isn’t the inciter who whips a mob into a lynching frenzy “colluding” with them?

布洛克试图在沃尔特·布洛克的《对金塞拉和廷斯利关于煽动、因果关系、侵犯和行动学的回应》中阐明这一原则，《自由意志主义研究杂志》第 22 卷第 1 期（2011 年）：<https://mises.org/library/rejoinder-kinsella-and-tinsley-incitement-causation-aggression-and-praxeology>）：641-664 页，第 652 页，但他只是用其他术语重述了他的规则，没有任何依据或正当理由。他写道：

这里没有例外。合作、共谋、协助和教唆的规则没有例外。当然，有时要确定任何特定情况在公平连续体上的位置是一个微妙的问题。

但是，“共谋”或“合作”的标准是什么？为什么存在这些标准？为什么煽动暴民私刑狂欢的煽动者不是在与他们“共谋”？

*these orders would be summarily dealt with.*⁴⁵

如上文希特勒的例子所述，即便有这些例外情况，许多“煽动者”在技术层面上也不应为其下属所采取的行动负责。⁹⁰布洛克试图通过简单地假设或断定希特勒或其他政治领袖、黑帮头目、军队将领之类的人总是必然地威胁其下属，从而使第一个例外情况适用，来为他们免除对下属行为的责任寻找出路。正如他所写：

*“自由意志主义的法律规范不仅禁止侵犯行为，还禁止恐吓行为。希特勒、斯大林等人不仅仅是在行使他们的言论自由权利。相反，他们向其下属下达残害和杀害无辜民众的命令。这些命令中暗含着一种威胁，即如果不服从命令，那些未能执行这些命令的人将被立即处置。”*⁹¹

But this is simply a convenient, yet false, assumption. First, not every underling is literally threatened with physical punishment if he does not obey orders. Second, even if the underling is threatened, the threat does not necessarily come from the boss, but rather from others in the hierarchy or organization. Did Hitler literally, personally threaten any of his generals or subordinates himself? Did President Truman threaten his generals or, indirectly, the airmen who dropped nuclear bombs on Japan? Simply assuming every leader or boss is necessarily “threatening” the underlings is unrealistic and just too convenient of an assumption to let one wriggle out of the uncomfortable consequences of this ad hoc theorizing. (And, again, even when the underling is threatened, this still does not mean his actions were “determined”; he still has the same free will that a non-coerced intermediary has.) We would argue that the leaders in these social or institutional hierarchies are responsible for the crimes committed by subordinates, even if they don’t threaten them.

但这仅仅是一个方便却错误的假设。首先，并非每个下属在不服从命令时都会受到体罚的切实威胁。其次，即便下属受到威胁，这威胁也不一定来自上司，而可能来自层级或组织中的其他人。希特勒真的亲自威胁过他的将军或下属吗？杜鲁门总统威胁过他的将军，或者间接地威胁过向日本投放原子弹的飞行员吗？简单地假设每个领导或

⁹⁰ See note 31 and accompanying text, above, et pass.

见上文注 31 及所附文字，等。

⁹¹ See note 35, above.

见上文注 35。

头目必然“威胁”下属是不切实际的，而且这只是一个过于方便的假设，让人能够逃避这种临时理论带来的令人不安的后果。（而且，再次强调，即便下属受到威胁，这并不意味着他的行动是“被决定的”；他仍然拥有和未受胁迫的中间人相同的自由意志。）我们会认为，在这些社会或制度层级中的领导者应对下属所犯罪行负责，即便他们没有威胁下属。

In sum, it is a mistake to conclude that someone can be responsible for the actions of others only in the cases of the exceptions of coercion, monetary payment, orders + threats, or criminal conspiracy. It makes more sense to scrutinize actions in terms of the more generalizable praxeological means-end framework set forth above. This framework easily justifies all the “exceptions” noted above, and more. In each case, the malfeator (wrongdoer) had a prohibited end in mind (some type of property invasion), and employs means that attain this end. The fact that the means in these examples were other people simply does not prevent the action from being classified as aggression.

总之，得出只有在胁迫、金钱支付、命令+威胁或犯罪共谋等例外情况下，某人才能对他人的行动负责的结论是错误的。从上述更具普遍性的人类行动学的手段-目的框架来审视行为更有意义。这个框架很容易为上述所有“例外”以及更多情况提供正当理由。在每种情况下，违法者（作恶者）心中都有一个被禁止的目的（某种类型的财产侵犯），并采用了实现这一目的的手段。在这些例子中，手段是其他人这一事实并不能阻止该行动归类为侵犯行动。

责任的固定份额与连带责任

Fixed Pie of Responsibility and Joint and Several Liability

The reluctance to attribute responsibility to the instigator of a crime, unless one of the exceptions is met, may be due to confusion about the nature of responsibility for torts or crimes. First, as noted above, some believe that the intermediary or underling’s free will breaks the chain of causation so that the instigator is not liable. But since cooperative action (for good or evil) is possible, and humans can employ other humans as means to accomplish ends, this is not a tenable objection.

除非符合其中一种例外情况，否则不愿意将犯罪煽动者归责，这可能是由于对侵权或犯罪责任的性质存在混淆。首先，如上所述，有些人认为中间者或下属的自由意志会打破因果链，从而使煽动者无需承担责任。但由于合作行动（无论好坏）是可能的，

并且人类可以利用其他人作为实现目的的手段，这并不是一个站得住脚的反对理由。

In addition, some libertarians seem to believe that holding the instigator or inciter liable would relieve the underling or henchman of responsibility, which they understandably oppose. We may refer to this as the “fixed pie of responsibility” fallacy. For example, libertarian author Jack Lloyd seems to implicitly adopt such reasoning; note the use of the word “rather” here: “In this Steel-Man-case scenario, Hitler would not be culpable for an initiation of force. Rather, the people who did the actual initiations and threats of force would be culpable...”⁴⁶ The word “rather” implies it has to be either Hitler, or his underlings, that is responsible. But why can't it be both?

此外，一些自由意志主义者似乎认为，让煽动者或教唆者承担责任会减轻下属或走狗帮凶的责任，他们这种反对是可以理解地。我们可以将此称为“责任固定份额”的谬误。例如，自由意志主义作家杰克·劳埃德（Jack Lloyd）似乎含蓄地采用了这种推理；请注意这里使用的“而是”一词：“在这个强化后的情景中，希特勒对于武力的发起不应承担罪责。而是，实际发起武力和进行武力威胁的人应承担罪责。……”⁹² “而是”这个词暗示要么是希特勒，要么是他的下属负责。但为什么不能两者都负有责任呢？

Block also seems to implicitly accept such an approach. He writes:

Van Dun tries to make an analogy between the triggerman and the bullet, on the one hand, and the inciter and the rioter, on the other. He argues that the gunman is really responsible for the murder, not the bullet that actually kills, because the former came first in the causal chain, and so was responsible for the effect of the latter. This conclusion is true enough. But then he maintains that precisely the same relationship obtains between the inciter and the rioter who murders. To do so, however, he would have to say that, after all, the inciter, too, is responsible for the murder, not the rioter who actually kills, because the former came first in the causal chain, and was thus responsible for the effect of the latter.

When put in this way, the problems with the analogy are apparent. First, no one in his right mind would hold the bullet guilty of anything. It is an inanimate object, for all of

⁹² See Lloyd, “Justice and Voluntaryism,” quoted in note 31, above (emphasis added). 见劳埃德的《正义与自愿主义》，上文注释 31 中所引用（重点补充）。

*its destructive power. Yet, it would be the rare analyst, even one as intent upon incarcerating the inciter as is Van Dun, who would allow the rioter off scot-free, as he would the bullet. That is, no one would even think to "punish" the bullet for its evil deed.*⁴⁷

布洛克似乎也隐性地接受了这样一种方法。他写道：

范·邓恩试图在一方面将枪手和子弹进行类比，另一方面将煽动者和暴徒进行类比。他认为，枪手实际上要对谋杀负责，而不是实际杀人的子弹，因为前者在因果链中处于首位，所以要对后者的效果负责。这个结论足够正确。但随后他坚称，煽动者和实施谋杀的暴徒之间恰恰存在着相同的关系。然而，要这样说的话，他就不得不说，毕竟，煽动者也要对谋杀负责，而不是实际杀人的暴徒，因为前者在因果链中处于首位，因此要对后者的效果负责。

以这种方式来看，这种类比的问题就很明显了。首先，头脑正常的人都不会认为子弹有任何罪过。尽管它具有破坏力，但它是一个无生命的物体。然而，即使是像范·邓恩那样一心想要监禁煽动者的罕见分析家，也不会像放过子弹那样让暴徒逍遥法外。也就是说，甚至没有人会想到要因为子弹的恶行而“惩罚”它。⁹³

Note the language "he would have to say that, after all, the inciter, too, is responsible for the murder, not the rioter who actually kills" (emphasis added) and the criticism that by holding the inciter responsible, the rioter would have to be let off "scot-free." But there is no basis for this contention. Just because the inciter or instigator is culpable does not mean the rioter or underling is off the hook. It is perfectly possible to hold them both fully liable; this is what joint and several liability means.⁴⁸

请注意“他就不得不说，毕竟，煽动者也要对谋杀负责，而不是实际杀人的暴徒”（着重号为原文所加）这样的表述，以及那种认为让煽动者负责，暴徒就必须被无罪释放的批评。但这种论点没有依据。仅仅因为煽动者或教唆者有罪，并不意味着暴徒或下属就可以脱身。完全有可能让他们双方都承担全部责任；这就是连带责任的含义。⁹⁴

⁹³ Block, "Reply to 'Against Libertarian Legalism,'" p. 16.
布洛克，《对〈反对自由意志主义的法律主义〉的答复》，第 16 页。

⁹⁴ Block adds:
Second, and not unrelated, the rioter is a human being, presumably with free will; no one could say the same of a piece of lead. Third, there are many cases in which an

inciter incites until his lungs give out, and no subsequent riot takes place, further attesting to the distinction between free will and inanimate objects that mars Van Dun's analogy. But, apart from a misfire, bullets always discharge when fired. According to Van Dun, the inciter "fires off" the rioter in much the same way as the shooter does to the bullet. This is not at all the case. To be logically consistent, Van Dun would have to hold the inciter guilty of a crime even when no subsequent riot ensued.

Ibid., p. 16 (footnote omitted). I have already argued above that the "free will" of the rioter does not mean the inciter is innocent; after all, in other cases in which Block does believe the instigator is liable, such as coercion or monetary payment, the intermediary still has free will. But consider here Block's final sentence, criticizing Van Dun because someone who attempts to incite a riot that does not happen, under Van Dun's approach, would presumably still be guilty of a crime. Block points this out as if this conclusion is obviously wrong or unjust. But why is it wrong? If you try to shoot someone but miss, you can still be guilty of attempted murder, a lesser crime than actual murder, perhaps, but a punishable offense nonetheless. The libertarian view of rights and aggression prohibits not only trespass, battery, and so on, but also assault (which is attempted battery, or putting someone in fear of receiving a battery), threats, and the like. See "A Libertarian Theory of Punishment and Rights" (ch. 5), Part IV.F, "Why Assault, Threats, and Attempts Are Aggression"; and Kinsella, "Stalking and Threats as Aggression," StephanKinsella.com (Jan. 10, 2021). So, yes, someone who tries to whip a mob up into lynching someone, even if he fails, might be guilty of attempted aggression.

布洛克补充道：

其次，与此不无关系的是，暴徒是人，想必具有自由意志；没有人能够对一块铅说同样的话。第三，在许多情况下，煽动者一直煽动到精疲力竭，随后也没有发生暴乱，这进一步证明了自由意志与无生命物体之间的区别，而范·邓恩的类比则是有缺陷的。但是，除了哑火，子弹一旦发射总是会射出。按照范·邓恩的说法，煽动者“发射”暴徒的方式与射手发射子弹的方式大致相同。事实并非如此。为了在逻辑上保持一致，范·邓恩将不得不认定即使随后没有发生骚乱，煽动者也犯了罪。

同上，第 16 页（注释省略）。我在上面已经论述过，暴徒的“自由意志”并不意味着煽动者是无辜的；毕竟，在布洛克确实认为煽动者应负责的其他情况下，如胁迫或金钱支付，中间人仍然有自由意志。但在这里考虑一下布洛克的最后一句话，批评范·邓恩，因为按照范·邓恩的方法，试图煽动但没有发生骚乱的人，大概仍然会被判有罪。布洛克指出这一点，好像这个结论显然是错误或不正当的。但为什么它是错的呢？如果你试图射杀某人但没射中，你仍然可能犯有谋杀未遂罪，也许这是比实际谋杀罪轻的罪行，但仍然是应受惩罚的罪行。自由意志主义的权利和侵犯观不仅禁止非法侵入、殴打等行为，还禁止攻击（这是殴打未遂，或使某人害怕受到殴打）、威胁等。见《惩罚和权利的自由意志主义理论》（第 5 章），第四部分 F，“为什么攻击、威胁和未遂行动都是侵犯”；以及金塞拉的《跟踪和威胁是侵犯》，StephanKinsella.com（2021 年 1 月 10 日）。所以，是的，试图煽动暴民对某人处以私刑的人，即使他失败了，也可能犯有侵犯未遂罪。

With this “fixed pie of liability” assumption, some might object that each malfeasor is responsible only for his pro-rata “part” of the crime. Maybe the instigator is 60% responsible and the underling 40% responsible. And so on. These critics mistakenly assume that there is some fixed 100 percent bucket of liability for a crime, which cannot be shared jointly by multiple parties. They thus are leery of attributing some responsibility to the boss because they think that this would reduce the liability of the underling. But there is no conceptual problem with having multiple parties each fully liable for the same act of aggression, under the notion of joint and several liability. It is not clear why my opponents here do not realize that this doctrine can play a useful role as part of the analysis of collective action. As an example, suppose A and B jointly borrow money from C. If A is unable to pay his share later, it is not as if C can only pursue B for half the amount owed; he can pursue each debtor for 100% of the amount owed (barring contractual terms to the contrary).⁴⁹

基于这种“固定责任份额”的假设，有些人可能会反对说，每个违法者只对其按比例的比例的犯罪“部分”负责。也许煽动者承担 60% 的责任，下属承担 40% 的责任，等等。这些批评者错误地认为，对于一项犯罪存在某种固定的 100% 的责任份额，不能由多方共同分担。因此，他们对将部分责任归于上司持谨慎态度，因为他们认为这会减轻下属的责任。但是，在连带责任的概念下，让多方对同一侵犯行动各自承担全部责任在概念上没有问题。不清楚为什么我的对手在这里没有意识到这一原则可以作为集体行动分析的一部分发挥有用的作用。例如，假设 A 和 B 共同向 C 借钱。如果 A 后来无法支付其份额，并不是说 C 只能向 B 追讨欠款的一半；他可以向每个债务人追讨欠款的 100%（除非条款另有规定）。⁹⁵

⁹⁵ See, e.g., Saúl Litvinoff, *The Law of Obligations: Part I: Obligations in General*, 2d ed. (St. Paul, Minn.: West Publishing Company, 2001), § 7.13 (citing 2 Williston, *A Treatise on the Law of Contracts*, 3d ed. (1959), pp. 316, 320 and Restatement (Second) of Contracts (1981), § 289), and § 7.26 et seq. See also the similar concept of “solidary obligation” in the civil law. See Litvinoff, *The Law of Obligations*, § 7.61; Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), art. 1794 (“An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.”); Alain A. Levasseur, *Louisiana Law of Obligations in General: A Précis*, 3d ed. (LexisNexis, 2009), chap. 3, in particular §§ 3.2.1, 3.2.2, 3.3.1; and idem, *Louisiana Law of Obligations in General: A Comparative*

Likewise, just as one criminal can harm multiple victims and be unable to be punished by, or render full restitution to, each victim—so multiple criminals can each be fully—jointly and severally—liable for the damage done to the victim. There is simply no reason to maintain that there is a finite “pie” of “criminal harm” that has to be distributed piecemeal to multiple criminals who collaborate to harm someone. It is the victim's rights that matter most, not that of individual criminals.⁵⁰ Suppose two criminals cooperate to rob someone of \$10,000 worth of property and then they spend the money. Suppose they are later apprehended; the first is penniless and the second has assets. The second should be forced to pay the victim the full \$10,000 owed,⁵¹ not only half on the grounds that his partner owes the other \$5,000 to the victim. Why should the victim, as opposed to the bankrupt criminal's partner in crime, be left holding the bag? Thus it is just to hold both the mob boss, and his henchman, fully liable and responsible for a murder committed by the henchman but ordered by the boss.

同样，正如一名罪犯可以伤害多名受害者，但却无法受到每名受害者的惩罚或向每名受害者提供全额赔偿一样，多名罪犯也可以各自对受害者受到的伤害承担全部连带责任。根本没有理由坚持认为存在一个有限的“犯罪伤害”的“份额”，必须零散地分配给多个合伙伤害他人的罪犯。最重要的是受害者的权利，而不是个别罪犯的权利。⁹⁶

Civil Law Perspective, A Treatise (Durham, NC: Carolina Academic Press, 2020), chap. 3, ¶ 117 et seq.

例如，参见索尔·利特维诺夫的《债务法：第一部分：一般债务》，第二版（明尼苏达州圣保罗：West Publishing Company, 2001 年），第 7.13 节（引用了 2 威利斯頓的《法论》，第三版（1959 年），第 316、320 页和《法重述（第二次）》（1981 年），第 289 节），以及第 7.26 节及后续章节。另见大陆法中类似的“连带债务”概念。参见利特维诺夫的《债务法》，第 7.61 节；《路易斯安那民法典》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent），第 1794 条（“当每个债务人对整个履行负责时，对于债务人而言，债务是连带的。连带债务人之一的履行解除了其他债务人对债权人的责任。”）；阿兰·A·勒瓦瑟的《路易斯安那州一般债务法概要》，第三版（LexisNexis, 2009 年），第 3 章，特别是第 3.2.1、3.2.2、3.3.1 节；以及同上，《路易斯安那州一般债务法：比较大陆法视角，专论》（北卡罗来纳州达勒姆：卡罗莱纳学术出版社，2020 年），第 3 章，第 117 段及后续段落。

⁹⁶ For more on this approach, see “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.B, “The Victim’s Options,” et pass.

关于这种方法的更多内容，见《自由意志主义的惩罚与权利理论》（第 5 章），第

假设两名罪犯合作抢劫了某人价值 1 万美元的财物，然后他们花掉了这笔钱。假设他们后来被抓获；前者身无分文，后者拥有财产。第二个人应该被强迫向受害者全额支付所欠的 10 000 美元，⁹⁷而不是仅仅支付一半，理由是他的同伙欠受害者另外 5 000 美元。为什么要让受害者而不是破产罪犯的同伙来承担债务呢？因此，对于小喽啰所犯但由老大下令的谋杀案，让黑帮老大和他的小喽啰都承担全部责任是正义的。

“单纯的”言论和因果关系“Mere” Speech and Causation

Related to the above-noted arguments is the notion that “mere” speech cannot be aggression since it does not actually invade others’ property borders. It is true that a speech act per se is not an act of aggression: it does not intentionally cause the person or property of another to be physically and nonconsensually infringed upon.⁵²(Shooting a gun, or swinging your fist, is also not per se an act of aggression!) But some speech acts can be classified as acts of aggression in the context in which they occur because they constitute the speaker’s use of means calculated to inflict intentional harm, and because of the social and institutional hierarchies involved. One clear example of this is threats of force. The threat to stab someone does not actually pierce the victim’s skin; it is a “mere” speech-act, but it is still regarded as aggression. Offering to pay money to someone to assassinate someone would be another example. But these are not mere ad hoc exceptions; they are the result of the application of the more general means-end analysis.⁵³

与上述论点相关的观点是，“单纯的”言论不能构成侵犯，因为它没有实际侵犯他人的财产边界。诚然，言论行动本身并不是侵犯行动：它并没有蓄意导致他人的人身或财产受到物理和非自愿的侵犯。⁹⁸（开枪或挥舞你的拳头本身也不是侵犯行为！）。但是，

四部分 B 节，“受害者的选择”等。

⁹⁷ Of course, more than \$10,000 would arguably be owed, but this is not relevant here. (For more on this issue, see “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.C, “Enhancing Punishment Due to Other Factors.”)

当然，可以说欠款超过了 10 000 美元，但这与本案无关。（关于这个问题的更多内容，请参见《自由意志主义的惩罚与权利理论》（第 5 章），第四部分 C，“因其他因素而加重惩罚”）。

⁹⁸ For a discussion of how this doctrine works itself out in the context of voluntary slave contracts, see “A Libertarian Theory of Contract” (ch. 9) and “Inalienability and

有些言论行动在其发生的语境中可以被归类为侵犯行动，因为它们构成了说话者使用蓄意伤害的手段，而且还涉及社会和制度等级。武力威胁就是一个明显的例子。威胁刺伤某人实际上并没有刺破受害者的皮肤；这只是一种“单纯的”言论行动，但它仍被视为侵犯。另一个例子是付钱给某人去暗杀某人。但这些并非只是特殊的例外情况；它们是应用更一般的手段-目的分析的结果。⁹⁹

In other cases, the act of speaking—communicating—and the other people with whom the speaker communicates serve as one's means to achieve a certain end. The firing squad commander who yells “Fire!” is as responsible for the ensuing execution as the riflemen themselves.⁵⁴ This is not because his spoken word was physically the cause of the victim's death. His voice did not propel the bullets forward—and it did not have to. Instead, the firing squad commander is responsible for the execution because of what the command “Fire!” signifies in the context and social hierarchy in which it was uttered; it signifies that the commander intends for the victim to die and is choosing to employ efficacious means— his firing squad—calculated to achieve that goal. The firing squad commander isn't “merely” speaking; he is intentionally colluding with the

Punishment: A Reply to George Smith” (ch. 10), the section “Inalienability.” It is ironic that Block generally opposes the notion that speech acts (such as incitement) can give rise to liability, except for the ad hoc exceptions of monetary payment and coercion, yet in his view of voluntary slavery, the uttering of the words “I hereby promise to be your slave” justify the “master’s” use of force against the purported “slave” — as if his words had committed a type of aggression against the “master” that justifies the use of (responsive) force against the promisor.

关于这一学说如何在自愿为奴中发挥作用的讨论，见“《自由意志主义的契约理论》（第 9 章）和《不可让渡性与惩罚：对乔治·史密斯的答复》（第 10 章）”，“不可让渡性”一节。具有讽刺意味的是，布洛克一般反对言语行动（如煽动）可以引起责任的观点，除了金钱给付和胁迫这两种特殊例外，然而在他关于自愿奴隶制的观点中，说出“我特此承诺做你的奴隶”这句话就成了“主人”对所谓的“奴隶”使用武力的正当的理由——就好像他的话对“主人”实施了一种侵犯，从而使对承诺人使用（回应性的）武力成为正当的理由。

⁹⁹ See “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.F, “Why Assault, Threats, and Attempts Are Aggression”; Kinsella, “Stalking and Threats as Aggression.”

见《自由意志主义的惩罚与权利理论》（第 5 章），第四部分 F 节，“为什么攻击、威胁和企图都是侵犯”；金塞拉，《作为侵犯的跟踪和威胁》。

shooters for the purpose of killing the victim. Likewise the American president who orders a bomb be dropped is causing the bombing; he is employing the pilot and other underlings as his means. By being part of a certain organization or hierarchy and having certain relationships with other people, as a practical matter he is in a position to use other people to achieve his ends.⁵⁵

在其他情况下，言论行动——交流——以及说话者与之交流的其他人，都是一个人达到某种目的的手段。行刑队指挥官大喊一声“开枪！”，与步枪手本身一样要对随后的处决负责。¹⁰⁰这并不是因为他所说的话是造成受害者死亡的实际原因。他的声音并没

¹⁰⁰ This argument should not be conflated with Justice Oliver Wendell Holmes’ s famous (and flawed) example of liability for shouting “Fire” in a crowded theater, which he used to argue that First Amendment free speech rights are not absolute. As Rothbard notes:
[C]onfusing the analysis in terms of a “right to free speech” instead of property rights leads to confusion and the weakening of the very concept of rights. The most famous example is Justice Holmes’ s contention that no one has the right to shout “Fire” falsely in a crowded theater, and therefore that the right to freedom of speech cannot be absolute, but must be weakened and tempered by considerations of “public policy.” And yet, if we analyze the problem in terms of property rights we will see that no weakening of the absoluteness of rights is necessary.
For, logically, the shouter is either a patron or the theater owner. If he is the theater owner, he is violating the property rights of the patrons in quiet enjoyment of the performance, for which he took their money in the first place. If he is another patron, then he is violating both the property right of the patrons to watching the performance and the property right of the owner, for he is violating the terms of his being there. For those terms surely include not violating the owner’ s property by disrupting the performance he is putting on. In either case, he may be prosecuted as a violator of property rights; therefore, when we concentrate on the property rights involved, we see that the Holmes case implies no need for the law to weaken the absolute nature of rights.
Rothbard, “ ‘Human Rights’ As Property Rights,” p. 114 (references omitted).
这一论点不应与奥利弗-温德尔-霍姆斯（Oliver Wendell Holmes）大法官著名的（也是有缺陷的）在拥挤的剧院中高喊“着火了”而应承担责任的例子混为一谈，他曾这个例子论证，第一修正案的言论自由权利不是绝对的。正如罗斯巴德指出的那样[用“自由言论权”而不是财产权来分析会导致混淆，削弱权利的概念本身。最有名的例子就是霍姆斯大法官的论点：没有人有权在拥挤的剧院里虚假地高喊“着火了”，因此言论自由权不能是绝对的，而必须受到“公共政策”考虑的削弱和节制。然而，如果我们从财产权的角度来分析这个问题，就会发现没有必要削弱权利的绝对性。因为，从逻辑上讲，喊叫者要么是观众，要么是剧院老板。如果他是剧场老板，那么

有推动子弹向前——其实也不必如此。相反，行刑队指挥官要对行刑负责，因为“开枪！”的命令在当时的语境和社会等级中是有含义的；它意味着指挥官打算让受害者死亡，并选择使用有效的手段——他的行刑队——来实现这一目标。行刑队指挥官并不“仅仅”是在说话，他是有意与枪手勾结，以达到杀死受害者的目的。同样，下令投掷炸弹的美国总统也是造成爆炸的原因；他雇用飞行员和其他下属作为他的手段。由于他是某个组织或等级制度的一部分，与其他人有一定的关系，因此实际上他可以利用其他人来达到自己的目的。¹⁰¹

他就侵犯了观众安静欣赏演出的财财产权，而他当初正是为了这些才收了他们的钱。如果他是另一位观众，那么他既侵犯了观众观看演出的财财产权，也侵犯了剧场老板的财财产权，因为他违反了自己在那里的条款。因为这些条款肯定包括不得扰乱剧场正在进行的表演，从而侵犯了老板的财产。在任何一种情况下，都可以以侵犯财财产权的罪名起诉他；因此，当我们把注意力集中在所涉及的财财产权上时，我们就会发现霍姆斯案并不意味着法律需要削弱权利的绝对性。

罗斯巴德，《财产权即“人权”》，第 114 页（参考文献省略）。

¹⁰¹ In this regard, see also Frank van Dun’s discussion of “social causation.” Van Dun, “Against Libertarian Legalism,” pp. 64, 79. Block, in responding to some of Van Dun’s criticisms, writes:

The essence of Van Dun’s criticism of my article is that while all physically invasive acts must be characterized as unjustified aggression and prohibited by law, there is a second type of aggression, call it for want of a better term “mental aggression,” which should also, in addition to physical aggression, be considered legally illicit. Examples of this, as we shall analyze below, include libel, lying, making false accusations to the police, blackmail, “hate” speech, and negative “social causation” such as incitement to riot, gang leaders or dictators ordering their henchmen to commit crimes (of physical invasion), etc....

Further instances of “mental aggression” might include shunning, boycotting, cutting “dead,” refusing to deal with, buy from, sell to, etc. It is difficult to see how any libertarian could favor the outlawry of such behavior, but this would seem to be the implication of Van Dun’s theory.

Block, “Reply to ‘Against Libertarian Legalism,’ ” p. 3 and n.7 (footnote omitted). I agree with Block’s criticism of Van Dun here, except for the social causation part, where I agree with Van Dun.

在这方面，请参见弗兰克·范·邓恩对“社会因果关系”的讨论。范·邓恩，《反对自由意志主义的法律主义》，第 64、79 页。布洛克在回应范·邓恩的一些批评时写道：范·邓恩对我的文章的批评的实质是，尽管所有身体侵犯行动都必须被定性为无正当的侵犯并为法律所禁止，但还有第二种侵犯行为，为方便起见，称之为“精神侵犯”，除了身体侵犯外，它也应被视为法律上的非法行为。正如我们将在下文分析的那样，

Consider the car-bomb scenario discussed above. When A persuades C to plant the bomb, his words do not physically cause B's car to explode. And they do not even physically cause C to plant the bomb—C voluntarily chooses to do so. The fact that C's action was voluntary, however, does not mean that A's action—persuading someone to plant a car-bomb—cannot itself be considered aggression. To the contrary, A is an aggressor because his actions demonstrated the intent to kill B and the use of means calculated to do just that. So what if his chosen means included another person and his intervening will?

请看上文讨论的汽车炸弹情景。当 A 说服 C 安放炸弹时，他的话并没有实际导致 B 的汽车爆炸。而且，这些话甚至也没有实际导致 C 安放炸弹——C 是自愿选择这么做的。然而，C 的行动是自愿的这一事实并不意味着 A 的行动——劝说他人安装汽车炸弹——本身不能被视为侵犯。恰恰相反，A 是一个侵犯者，因为他的行动表明他有杀害 B 的意图，并使用了蓄谋已久的手段。那么，如果他选择的手段包括另一个人和他的介入意愿呢？

Let us return to the incitement example. In order to determine whether the inciter is responsible, we ask whether the inciter used the mob as his means to attain the violent acts committed by the rioting mob. For the inciter's action to be considered aggression, he would have to intend the prohibited result; and he would have to have chosen means that resulted in the rioting. We do not maintain that the inciter is necessarily responsible in every case; the question turns on many specific facts and the context. What we maintain is that the inciter is not off the hook merely because the rioters had free will. The question to be answered is: was the mob the means of the inciter? Was the inciter a cause of the mob rioting, or of their ensuing havoc?

让我们回到煽动的例子。为了确定煽动者是否负有责任，我们要问煽动者是否利用暴徒作为他的手段，以达到暴徒实施暴力行动的目的。要将煽动者的行动视为侵犯，他

这方面的例子包括诽谤、撒谎、向警方诬告、勒索、“仇恨”言论，以及负面的“社会因果关系”，如煽动暴乱、帮派头目或独裁者命令其党羽实施犯罪（人身侵犯），等等……。更多的“精神侵犯”事例可能包括回避、抵制、砍“死”、拒绝打交道、拒买、拒卖等。很难想象自由意志主义者会赞成取缔这种行为，但这似乎就是范·邓恩理论的含义。布洛克，《对〈反对自由意志主义的法律主义〉的答复》，第 3 页和注 7（注释省略）。我同意布洛克在这里对范·邓恩的批评，除了社会因果关系部分，我同意范·邓恩的观点。

就必须有意造成被禁止的结果；而且他必须选择导致暴乱的手段。我们并不认为煽动者在任何情况下都必须承担责任；这个问题取决于许多具体的事实和背景。我们主张，煽动者不能仅仅因为暴乱者有自由意志而不承担责任。需要回答的问题是：暴徒是煽动者的手段吗？煽动者是暴徒暴动的原因，还是他们随后的破坏的原因？

As Van Dun keenly observes:

Who should take credit for the poem: the blind poet, or his girlfriend who lovingly typed the manuscript (which she could have refused to do)? And if the blind poet really is the author of the poem, why should the rabble-rousing demagogue not be the author of the riots he incites?

Why should we require libertarian judges to turn a blind eye to real processes of "social causation" when we know that advertisers, educators, politicians, and agitators are very much aware of them—and willing to use them for their purposes? It is not just in a libertarian world that each person is responsible for his own acts; it is true in every world. However, we should not take that as an excuse for disregarding the complex causal processes that go on in the real world, whatever legal code is in force. A libertarian judge has to confront the facts. Reality does not yield to theory. It is all right for a judge to remind a man charged with participating in a violent mob that he is responsible for his own actions, but only after he has determined what the man's own actions—not merely his bodily movements—really were. If the man was forced (coerced, compelled) by another to participate, we have one sort of case. If he got paid to smash windows, we have another sort of case. If he was manipulated in any other way, surely we cannot just pretend that then everything was the same as if he was not manipulated in any way—and treat the manipulator as if he was just an innocent bystander.⁵⁶

正如范·邓恩敏锐地观察到的：

这首诗应该归功于谁：是盲人诗人，她很有爱心地打印了这首诗的手稿(她本可以拒绝这么做)？如果盲诗人真的是这首诗的作者，那么为什么煽动暴乱的蛊惑者就不是他所煽动的暴乱的始作俑者呢？

既然我们知道广告商、教育家、政客和煽动者都非常清楚“社会因果关系”的真实过程，而且愿意利用这些过程达到自己的目的，为什么我们还要要求自由意志主义的法官对这些过程视而不见呢？不只是在自由意志主义的世界里，每个人都都要为自己的

行动负责；在任何世界里都是如此。然而，我们不应以此为借口，无视现实世界中复杂的因果过程，无论现行法律规范如何。自由意志主义的法官必须直面事实。现实不会屈服于理论。法官可以提醒一名被控参与暴徒的暴力行动的人，他要为自己的行动负责，但前提是他必须确定该男子自己的行动——而不仅仅是他的身体动作——到底是什么。如果这个人是被他人强迫（胁迫、强制）参与的，这是一种情况。如果他拿了报酬之后砸窗，那就是另一种情况。如果他被人以其他方式操纵，我们当然不能假装一切都是同样的，好像他没有被任何方式操纵，把操纵者当作一个无辜的旁观者。

¹⁰²

The same question is asked in a variety of situations: did the general kill people, using his troops as means to this end? Did the manager use his employee as a means to attain some end? Did the wife kill her husband by using her lover (or a hired hit-man) as the means to attain this goal? If someone votes in favor of socialism (or speaks out in favor of it), are they a cause of the ensuing acts of aggression by state agents? If a witness lies on the witness stand, resulting in a criminal defendant wrongly being imprisoned, has he caused harm to the defendant, through means of jurors, jailers, and the judicial system?⁵⁷ In other words, was the first party a cause of the result that was actually committed by an intermediate person?

在各种情况下都会提出同样的问题：将军是否利用他的部队作为手段达到杀人的目的？经理是否利用他的雇员作为达到某种目的的手段？妻子是否利用情人（或雇佣的杀手）作为手段达到杀害他的丈夫这一目的？如果有人投票支持社会主义（或发表支持社会主义的言论），他们是否是随之而来的国家机构实施侵犯行动的原因？如果证人在证人席上撒谎，导致刑事被告被错误监禁，那么他是否通过陪审员、狱卒和司法系统作为手段对被告造成了伤害？¹⁰³换句话说，第一方当事人是否是中间人实际造成结果

¹⁰² Van Dun, “Against Libertarian Legalism,” p. 79. For a recent real-world example, see Ellen Moynihan & Larry McShane, “Bronx mom charged with luring ex-boyfriend to his shooting death by current beau,” New York Daily News (Mar 15, 2023; <https://perma.cc/79Z8-UV8L>).

范·邓恩，《反对自由意志主义的法律主义》，第 79 页。关于近期现实世界中的一个例子，参见艾伦·莫伊尼汉和拉里·麦克沙恩，“布朗克斯的一位母亲被指控引诱前男友致其遭现任男友枪杀”，《纽约每日新闻》（2023 年 3 月 15 日；<https://perma.cc/79Z8-UV8L>）。

¹⁰³ See Thomas Aquinas, Summa Theologica (New Advent; <https://www.newadvent.org/summa/>), Secunda Secundæ Partis, Question 64, art. 6,

的原因？

Although there will be easy cases, we do not suggest that merely formulating the issue in this manner makes the correct answer easy to find in every situation. Such questions must take into account relevant facts and the context, custom, social hierarchies and realities, and depend on the sense of justice of the judge or jury—of the community. Looking at actions from the praxeological point of view, however, helps us look in the right place and ask the right questions. No doubt, in cases where the intermediate actor is coerced, or paid, by the first party, it is easier to see that the first party is the cause of the threatened or remunerated action.⁵⁸ But it is simply arbitrary to restrict cause to cases where the intermediate actor is threatened, or paid cash.

尽管会有一些简单的案例，但我们并不是说，仅仅以这种方式提出问题，就能在任何情况下都很容易找到正确的答案。这类问题必须考虑到相关事实和背景、习俗、社会等级和现实，并取决于法官或陪审团的正义感——社会的正义感。然而，从行动学的角度来审视行动，有助于我们找对地方，提出正确的问题。毫无疑问，在中间行动人受到第一方胁迫或被第一方付钱的情况下，更容易看出第一方是中间行动人受威胁或有偿行动的原因。¹⁰⁴ 但将原因仅仅局限于中间行动人受到威胁或获得现金报酬的情况，

Reply to Objection 3 (emphasis added):

If the judge knows that man who has been convicted by false witnesses, is innocent he must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent: but if he cannot do this he should remit him for judgment by a higher tribunal. If even this is impossible, he does not sin if he pronounce sentence in accordance with the evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty.

见托马斯·阿奎那的《神学大全》（新约：<https://www.newadvent.org/summa>），《神学大全》第二部第二卷，第 64 个问题，第 6 条，对反驳意见 3 的答复（重点补充）：如果法官知道被伪证人定罪的人是无辜的，他必须像但以理一样，非常仔细地审查证人，以便找到为无辜者开脱的理由；但如果他做不到这一点，他应该将其提交给更高一级的法庭进行审判。如果连这也不可能，他根据证据作出判决也不犯罪，因为不是他将无辜者处死，而是那些声称他有罪的人。

¹⁰⁴ In cases where the victim's own actions, or those of an innocent intermediate party like the courier (as in the letter-bomb case) are part of the chain of causation, the instigator is solely liable. In cases where someone collaborates with other malefactors to commit an act of aggression, as in a bank robbery, the co-conspirators each have joint and several liability.

这无疑是在武断的。

事实原因、近因和行动 CAUSE-IN-FACT, PROXIMATE CAUSE,
AND ACTION

Before turning to Reinach's views on causation, a brief discussion of the contrast between conventional legal theories and that laid out here is in order. In general, in the common law, to be responsible, an actor needs to be both the cause-in-fact (or "but-for" cause) of a prohibited result, and also the "proximate" (or "legal") cause (referred to as "culpability" in continental legal systems).⁵⁹ Both need to be satisfied. One is a cause-in-fact of a result if "but for" the person's actions, the result would not have occurred. There are various tests for proximate cause, but basically the idea is that the results had to be intended, or somewhat foreseeable to the actor, and not too "remote" (hence "proximate," meaning near or close) from the person's action. It is sometimes said that the result had to follow as a natural, direct, and immediate consequence of the action, with no "intervening cause" breaking the connection between the action and the result. For example, a murderer's mother is a cause-in-fact of the murders he commits, for without her actions (giving birth to him) the murders would not have been committed. Yet she is not a proximate cause of the murders and therefore not responsible.

在讨论赖纳赫（Reinach）关于因果关系的观点之前，有必要简要讨论一下传统法律理论与本文所阐述的法律理论之间的对比。一般来说，在普通法中，要承担责任，行动人既要成为被禁止结果的事实原因（或“若非”原因），又要成为“近因”（或“法定”原因）（在大陆法系中称为“罪责”）。¹⁰⁵ 此两个条件皆需满足。如果“若非”某人

如果受害者自己的行动，或无辜中间人如快递员的行动（如邮件炸弹案）是因果关系链的一部分，则教唆者应单独承担责任。如果某人与其他犯罪分子合作实施侵犯，如银行抢劫案，则共谋者各自承担连带责任。

¹⁰⁵ As Francis Bacon wrote in his treatise *Maxims of the Law*, regarding *causa proxima*, or proximate cause: “‘In jure non remota causa, sed proxima spectatur’” (In law not the remote, but the proximate cause is looked at).” Patrick J. Kelley, “Proximate Cause in Negligence Law: History, Theory and the Present Darkness,” *Washington U. L. Q.*

69, no. 1 (Jan. 1991; https://openscholarship.wustl.edu/law_lawreview/vol69/iss1/6/); 49 – 105, at 54. See also International Risk Management Institute, “The History of Proximate Causation ” ([https:// www.irmi.com/articles/expert-commentary/the-history-of-proximate-causation](https://www.irmi.com/articles/expert-commentary/the-history-of-proximate-causation)).

The Model Penal Code (1985), § 2.03 (https://archive.org/details/ModelPenalCode_ALLI), which codifies a dominant test for causation in the law, provides:

Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result.

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’ s liability or on the gravity of his offense.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’ s liability or on the gravity of his offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor’ s conduct.

正如弗朗西斯·培根在其论著《法律格言》中就近因 (causa proxima) 或直接原因所写: “ ‘In jure non remota causa, sed proxima spectatur’ (在法律中, 关注的不是间接原因, 而是直接原因)。” 帕特里克·J·凯利, 《过失法中的近因: 历史、理论与当前的黑暗》, 《华盛顿大学法律季刊》第 69 卷第 1 期 (1991 年 1 月:

的行动，结果就不会发生，那么该人就是结果的事实原因。关于近因的检验标准有多种，但基本的观点是，结果必须是行动人有意为之或在某种程度上可以预见的，并且与行动人的行动不太“遥远”（因此是“近因”，意为靠近或接近）。有时也有人说，结果必须是行动的自然、直接和即时的后果，没有介入原因打破行动与结果之间的联系。例如，杀人犯的母亲是他所犯谋杀罪的事实原因，因为如果没有她的行动（生下他），谋杀就不会发生。然而，她并不是谋杀的近因，因此不承担责任。

In our case, when we ask if someone was the cause of a certain aggression, we are asking whether the actor did choose and employ means to attain the prohibited result. For there to be “cause” in this sense, obviously there has to be cause-in-fact or “but-for” causation— this is implied by the notion of the means employed “attaining” or

https://openscholarship.wustl.edu/law_lawreview/vol69/iss1/6/）：49-105 页，第 54 页。另见国际风险管理研究所，《近因的历史》（<https://www.irmi.com/articles/expert-commentary/the-history-of-proximate-causation>）。

《模 范 刑 法 典 》（ 1985 年 ）， 第 2.03 条（https://archive.org/details/ModelPenalCode_ALI），该法典为法律中的因果关系规定了一个主要的检验标准，其规定：

第 2.03 条. 行为与结果之间的因果关系；预期或设想的结果与实际结果之间的差异，或可能结果与实际结果之间的差异。

（1）当出现以下情况时，行为是结果的原因：

（a）它是一个前提，若没有该前提，所讨论的结果就不会发生；并且

（b）行为与结果之间的关系满足本法典或定义犯罪的法律所施加的任何其他因果要求。

（2）当故意或明知导致特定结果是犯罪的一个要素时，如果实际结果不在行动人的目的或预期之内，则该要素不成立，除非：

（a）实际结果与设计或预期的结果不同，只是在不同的人或不同的财产受到伤害或影响，或者设计或预期的伤害或损害比实际造成的更严重或更广泛；或者

（b）实际结果涉及与设计或预期相同类型的伤害或损害，并且其发生并非过于遥远或偶然，以至于对行动人的责任或其犯罪的严重程度有[正义的]影响。

（3）当鲁莽或疏忽导致特定结果是犯罪的一个要素时，如果实际结果不在行动人意识到的风险范围内，或者在疏忽的情况下，不在其应当意识到的风险范围内，则该要素不成立，除非：

（a）实际结果与可能的结果不同，只是在不同的人或不同的财产受到伤害或影响，或者可能的伤害或损害比实际造成的更严重或更广泛；或者

（b）实际结果涉及与可能结果相同类型的伤害或损害，并且其发生并非过于遥远或偶然，以至于对行动人的责任或其犯罪的严重程度有[正义的]影响。

（4）当导致特定结果是法律规定绝对责任的犯罪的一个实质性要素时，除非实际结果是行动人行为的可能后果，否则该要素不成立。

resulting in the actor's end. Intentionality is also a factor, because action has to be intentional to be an action (the means is chosen and employed intentionally; the actor intends to achieve a given end).⁶⁰

在我们的案例中，当我们问某人是否是某种侵犯的原因时，我们是在问行动人是否确实选择和使用手段来达到被禁止的结果。显然，要有这种意义上的“原因”，就必须有事实上的原因或“若非”的因果关系——所使用的手段“达到”或导致行动人的目的这一概念就隐含了这一点。意图也是一个因素，因为行动必须是有意图的才是行动（手段是有意地选择和使用的；行动人意图达到特定目的）。¹⁰⁶

¹⁰⁶ Notice that this analysis helps to explain why damages or punishment is greater for intentional crimes than for negligent torts that result in similar damage. Keep in mind that punishment is an action, and a fully intentional one; it is not negligent, or “partially intentional.” Punishment is an intentional action that aims at punishing the body of the aggressor or tortfeasor. In punishing a criminal, the punishment is justified because the criminal himself intentionally violated the borders of the victim; the punishment is therefore symmetrical (see “A Libertarian Theory of Punishment and Rights” (ch. 5)). However, in punishing a mere tortfeasor, the punishment is fully intentional, but the negligent action being punished is only “partially” intentional, so to speak. In order to make the punishment or response to a tortfeasor proportionate, since the tort was only partly intentional but the punishment will be fully intentional, therefore, the damages (intentionally) inflicted (or extracted) have to be reduced to some degree to make the punishment more proportionate overall. As an example, if a criminally intentionally murders someone, it would (in principle) be symmetrical for the victim's heirs to have him killed. But if a tortfeasor accidentally kills someone, the punishment inflicted on him would have to be an order of magnitude lower since his action was not fully intentional while that of the punisher would be. Walter Block argues that if it were technologically feasible to “suck the life out of” a criminal, or even a negligent tortfeasor, to bring the victim back to life, this would be justified. See Roy Whitehead & Walter Block, “Taking the Assets of Criminals to Compensate Victims of Violence: A Legal and Philosophical Approach,” *J. Law in Society* 5 (2003; <http://www.walterblock.com/publications/>): 229 – 253, p. 249 et seq. Since this is so far-fetched and probably would never be possible, I state no opinion on this argument but do not find it relevant.

For some of my thoughts on how negligence law might develop in a private-law society, see Kinsella, “The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld,” *Mises Economics Blog* (Sep. 1, 2009).

请注意，这一分析有助于解释为什么对故意犯罪的损害赔偿或惩罚大于对造成类似损

赖纳赫与因果关系

REINACH AND CAUSATION

Reinach provides a framework for the analysis of legal causation which, although it employs different terminology, is largely compatible with the Austrian-praxeological view presented above.⁶¹ Reinach states:

Every action which is a condition for an outcome is, in relation to the intentional crime, a cause of this outcome in the sense of the criminal law. ... Disregarding exceptional cases of the law, the characterized principle is fully valid. It is then also to be said: if the action is a sound [zurechnungsfähigen] condition of an unlawful outcome, and if an intention is also given in relation to this outcome, then the agent is customarily punished. ... That an outcome is brought about means that it is brought about by an action which sets a condition for the outcome; to bring about intentionally means to bring about via an action that sets a condition. The latter condition brings about the outcome. Intention is a striving for an outcome via an action, or mediated by an action. This outcome itself can of course be a means to another outcome. The death of a

害的过失侵权行为的损害赔偿或惩罚。请记住，惩罚是一种行动，而且是一种完全故意的行动；它不是过失，也不是“部分故意”。惩罚是一种故意行动，目的在于惩罚侵权者或侵权者的身体。在惩罚罪犯时，惩罚是正当的，因为罪犯本身有意地侵犯了受害者的边界；因此惩罚是对称的（见《自由意志主义的惩罚与权利理论》（第 5 章））。然而，在惩罚单纯的侵权者时，惩罚是完全有意的，但被惩罚的过失行为可以说只是“部分”有意的。为了使对侵权人的惩罚或反应相称，由于侵权行为只是部分故意，但惩罚将是完全故意的，因此，必须在一定程度上减少（故意）造成（或提取）的损害，以使惩罚在整体上更加相称。举例来说，如果一个罪犯故意杀人，那么（原则上）受害者的继承人将其杀害是对称的。但是，如果侵权者不小心杀了人，那么对他的惩罚就必须低一个数量级，因为他的行为不是完全故意的，而惩罚者的行为则是故意的。沃尔特·布洛克认为，如果在技术上可行，将罪犯甚至是过失侵权者的“生命吸干”，以使受害者复活，这将是合理的。见罗伊·怀特黑德和沃尔特·布洛克，《没收罪犯的资产以补偿暴力受害者：一种法律和哲学方法》，《社会中的法律》杂志 5 期（2003 年；<http://www.walterblock.com/publications/>）：229-253 页，第 249 页及后续页。由于这太牵强了，而且可能永远不可能实现，我对这一论点不发表意见，也认为它不相关。

关于我对过失法在私法社会中可能如何发展的一些想法，见金塞拉，《自由意志主义对过失、侵权和严格责任的方法：赎罪金和部分赎罪金》，米塞斯经济学博客（2009 年 9 月 1 日）。

human being can be striven for in order to obtain the things left behind which the murderer subsequently is entitled to. But the outcome is "striven" for, also when it is not a final goal, but in that case is "striven" for as a means towards a final goal. There are however several kinds of strivings: one can hope for, desire [ersehen], or fear for [befürchten] a result. These are all "strivings" for a result, but not a striving in our sense. It is a striving "in relation to that to which it is applied"; for us it is a matter of striving for an outcome with the awareness that something can be contributed [such as to control] to its occurrence. Such a striving is called an act of will [Wollen]. To cause something intentionally means to set a condition for an outcome through a voluntary action such that this condition of course in combination with other conditions brings about the outcome. ... Intention is to will an outcome.⁶²

赖纳赫提供了一个分析法律因果关系的框架，虽然使用了不同的术语，但在很大程度上与上文介绍的奥派行动学的观点是一致的。¹⁰⁷ 赖纳赫指出：

每一个行动作为结果的条件，就故意犯罪而言，都是刑法意义上导致结果的原因。……撇开法律的例外情况不谈，定性原则是完全有效的。因此，也可以说：如果行动是非法结果的合理[zurechnungsfähigen]条件，如果也有与这一结果有关的意图，那么行动人通常会受到惩罚。……结果的产生是指通过为结果设定条件的行动而产生；有意的产生是指通过设定条件的行动而产生。后一个条件带来了结果。意图是通过行动或以行动为中介来争取一种结果。当然，这种结果本身可以是实现另一种结果的手段。一个人的死亡可能是为了获得凶手随后有权获得的遗留物。但是，当结果不是最终目标

¹⁰⁷ See Hans-Hermann Hoppe, "Property, Causality, and Liability," Q. J. Austrian Econ. 7, no. 4 (Winter 2004; <https://mises.org/library/property-causality-and-liability-1>): 87–95, also included in Hoppe, *The Great Fiction: Property, Economy, Society, and the Politics of Decline*, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; <https://www.hanshoppe.com/tgf/>), for an excellent discussion of Reinach's views on causation.

见汉斯-赫曼·霍普的《财产、因果关系和责任》，《奥地利经济学季刊》第7卷第4期（2004年冬季；<https://mises.org/library/property-causality-and-liability-1>）：87-95页，该文也收录于霍普的《伟大的虚构：财产、经济、社会和衰落的政治》第二版增订版（阿拉巴马州奥本：米塞斯研究院，2021年；<https://www.hanshoppe.com/tgf/>），其中对赖纳赫关于因果关系的观点进行了精彩的讨论。

时，它也是“努力争取”到的，但在这种情况下，它是作为实现最终目标的手段而“努力争取”到的。不过，“努力争取”也有几种：人们可以希望、渴望[ersehen]或担心[befürchten]某个结果。这些都是对结果的“努力争取”，但不是我们意义上的努力。它是一种“与它所适用的事物相关”的努力；对我们来说，它是一种努力争取结果的行动，同时意识到可以为结果的发生做出一些贡献[如控制]。这种努力被称为意志行动[沃伦]。有意造成某事是指通过自愿行动为结果设定条件，使这一条件当然与其他条件相结合，从而带来结果……，意图就是对结果的意愿。¹⁰⁸

This analysis is strikingly compatible with the Austrian understanding of action. Reinach's use of “cause” and “condition” is similar to the proximate cause and “cause-in-fact” test discussed above. Reinach maintains that an action that intends the outcome to occur (i.e., desires a given end or goal), and “causes” this outcome to occur by an action (i.e., employs a means to attain this goal), then the actor should be punished for the action, which is a crime.

¹⁰⁸ Adolf Reinach, “On the Concept of Causality in the Criminal Law,” *Libertarian Papers* 1, art. no. 35 (2009 [1905]; <http://libertarianpapers.org/35-concept-causality-criminal-law/>), pp. 27–28. In our original article, Tinsley and I relied on the then-unpublished translation of Reinach's article. I subsequently published a revised version of the translation in *Libertarian Papers*. I have updated the references in this chapter as well as the quoted passages to conform to the published version of the translation. Another important work by Reinach not discussed in this chapter is Adolf Reinach, “The A Priori Foundations of the Civil Law,” in *Aletheia* 3 (1983; <https://philarchive.org/rec/REITAP-9>): 1–142, which volume also includes other important commentary on Reinach, e.g. by Husserl and others. See also Kevin Mulligan, ed., *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1987). 阿道夫·赖纳赫，《论刑法中的因果关系概念》，《自由意志主义论文》第1卷，第35期文章（2009年[1905年]；<http://libertarianpapers.org/35-concept-causality-criminal-law/>），第27-28页。在我们最初的文章中，廷斯利和我信赖于当时未发表的赖纳赫文章的译文。后来我在《自由意志主义论文》中发表了该译文的修订版。我在这一章中更新了参考文献以及所引用的段落，以符合已发表的译文版本。赖纳赫的另一篇在本章中未讨论的重要文章是阿道夫·赖纳赫的《民法的先验基础》，发表于《Aletheia》第3期（1983年；<https://philarchive.org/rec/REITAP-9>）：1-142页，该卷还包括了关于赖纳赫的其他重要评论，例如胡塞尔等人的评论。另见凯文·穆里根编辑的《言语行动与事实：赖纳赫与现实主义现象学的基础》（多德雷赫特/波士顿/兰开斯特：马丁努斯·尼霍夫出版社，1987年）。

这一分析与奥派对行动的理解惊人地一致。赖纳赫对“原因”和“条件”的使用类似于上文讨论的近因和“事实原因”检验。赖纳赫主张，一个行动如果意图发生结果（即渴望达到某一特定的目的或目标），并通过行动“造成”了这一结果的发生（即采用某种手段达到这一目标），那么行动人就应该因这一行动而受到惩罚，这一行动就是犯罪。

Using Reinach's causal analysis, one would, as in the analysis presented above, not necessarily absolve someone of responsibility simply because another human is used to help “cause” the unlawful end. Reinach's paper is full of interesting and illuminating examples and applications of causation framework. In one colorful example, A sends B into a forest in the hopes that he will be struck by lightning.⁶³ Reinach contrasts this case with one in which A is able to calculate precisely where and when a tree will be struck by lightning, and, with malicious intent, sends B to be at the fateful place where lightning strikes. In both cases, Reinach argues, A is the “cause” (our “cause-in-fact”) of B's death, since B's death would not have occurred but for A's having sent him into the forest. Nevertheless, Reinach concludes that A may be punished only in the second case and not in the first. The difference hinges upon A's intent. In the first case, A hoped for B to die, but it was simply wishful thinking: he had no control over the lightning, and no knowledge of any objective likelihood that it would strike where it did.

使用赖纳赫的因果分析法，人们就会像上述分析一样，并非仅仅因为利用了另一人帮助“造成”了非法结局，就可以免除某人的责任。赖纳赫的论文中充满了有趣而富有启发性的例子，以及因果关系框架的应用。有一个生动的例子，A将B送入森林，希望他被闪电击中。¹⁰⁹赖纳赫将这一案例与以下案例进行了对比：A能够精确计算出何时何地一棵树会被闪电击中，并怀着恶意将B送到会被闪电击中的致命地点。赖纳赫认为，在这两种情况下，A都是B死亡的“原因”（我们的“事实原因”），因为如果不是A派B进入森林，B就不会死亡。然而，赖纳赫的结论是，只有在第二种情况下，A才应该受到惩罚，而在第一种情况下则不应该。区别在于A的意图。在第一种情况下，A希望B去死，但这只是他一厢情愿的想法：他无法控制闪电，也不知道闪电击中目标的客观可能性。

¹⁰⁹ Ibid., pp. 11, 27, 31 - 33.

同上，第 11、27、31-33 页。

In praxeological terms, A's action in the first case cannot be construed as "killing" B, because he did not really intend B to die and did not employ any means expected to attain such a goal, any more than a rain dance causes it to rain or sticking pins in a voodoo doll harms the "victim." A's action is not calculated to cause harm to B; in fact, A does not expect and has no reason to expect that B will die as a result of going into the forest. As Reinach puts it, "the intention fails if the outcome is only hoped for, but the intention is present if it is expected with certainty."⁶⁴ Thus the praxeological view and Reinach's framework are consistent in this case.

从行动学的角度来看，A 在第一种情况下的行动不能被解释为 "杀死 "B，因为他并没有真正想要 B 死，也没有采用任何预期达到这一目的的手段，就像祈雨舞会导致下雨或在巫毒娃娃上插针会伤害 "受害者 "一样。A 的行动并不是蓄意要对 B 造成伤害；事实上，A 并不指望也没有理由指望 B 会因为进入森林而死亡。正如赖纳赫所说，"如果结果只是希望的，那么意图就失败了，但如果结果是确定预期的，那么意图就存在"。¹¹⁰ 因此，在这个案例中，行动学的观点和赖纳赫的框架是一致的。

In the second case, A has more than an empty wish: he has certain knowledge that sending B into the forest will result in B's being struck by lightning. Here Reinach finds A to have the intent necessary to be held responsible for B's death. Likewise, praxeologically, A's action now becomes more than simply "dispatching B into the forest." With the knowledge that sending B into the forest will cause his death, A's action rises to the level of "intentionally killing B." This is because, if A knows for certain that sending B into the forest will result in B's death by lightning, then A has the requisite intent to attain the goal of B's death, and his action employs means (namely, sending B into the forest) that do attain this goal.

在第二种情况下，A 不仅仅是空想：他肯定知道把 B 送进森林会导致 B 被闪电击中。在这里，赖纳赫认为 A 具有对 B 的死亡负责的必要意图。同样，行动学认为，A 的行动现在已不仅仅是 "将 B 送入森林 "那么简单了。在知道将 B 送入森林会导致其死亡的情况下，A 的行动上升到了 "有意地杀害 B "的程度。这是因为，如果 A 确知将 B 送入森林会导致 B 被雷电击毙，那么 A 就具有实现 B 死亡这一目标的必要意图，而

¹¹⁰ Ibid., p. 28.
同上，第 28 页。

他的行动所采用的手段（即将 B 送入森林）也确实达到了这一目标。

This example can be a useful tool for separating criminal aggressors from their noncriminal sympathizers. Earlier we pointed out that the rule that allows one person to be responsible for another person's aggressive actions is a general one that must be applied cautiously and on a case-by-case basis, taking context and circumstances into account. The lightning example can help clarify our intuitions about which actions are aggressive and which are not. It is aggression when one person intentionally uses another as a means to cause an unwanted property violation; it is not aggression when one person merely hopes for a property violation to occur but does not intentionally use means to accomplish it. The Israeli government, for example, recently assassinated Hamas founder Sheik Ahmed Yassin.⁶⁵

这个例子可以成为有用的工具将犯罪侵犯者与其非犯罪同情者区分开来。前面我们指出，考虑一个人为另一个人的侵犯行动负责的规则是一个一般性的规则，必须根据个案的具体情况，结合背景和环境谨慎适用。闪电的例子可以帮助我们澄清直觉，哪些行动是侵犯性的，而哪些行动不是。如果一个人有意地利用另一个人作为手段，造成不必要的财产侵占，这就是侵犯；如果一个人只是希望发生财产侵占，却并未有意地使用手段来达到目的，这就不是侵犯。例如，以色列政府最近暗杀了哈马斯创始人谢赫-艾哈迈德-亚辛（Sheik Ahmed Yassin）。¹¹¹

Putting aside the question of whether Yassin was an innocent victim or a deserving target, we can surely acknowledge that there are many people—especially in the United States and Israel—who wanted to see Yassin killed. But only a very small number of these people intended to kill Yassin themselves or to assist his killers in any way. The lesson of Reinach's lightning example is that the people who simply hoped that Yassin would die, or who rejoiced when he was killed, are not responsible for his killing. They gave his killers silent support and sympathy, but they did not intentionally act with the purpose of killing him. The team of assassins themselves, and the Israeli government that sponsored them, are responsible for the killing, but not the citizens who opinion

¹¹¹ See https://en.wikipedia.org/wiki/Ahmed_Yassin.
见 https://en.wikipedia.org/wiki/Ahmed_Yassin.

polls show approve of the assassination.

姑且不论亚辛是无辜的受害者还是理应成为攻击目标，我们无疑可以承认，有许多人——尤其是在美国和以色列——希望看到亚辛被杀。但这些人中只有极少数人打算亲手杀死亚辛或以任何方式协助凶手。赖纳赫所举闪电的事例给我们的启示是，那些只是希望亚辛死，或者在他被杀时欢欣鼓舞的人，并不应对亚辛被杀负责。他们给予了凶手无声的支持和同情，但他们并为杀害亚辛这个目的采取有意的行动。暗杀小组本身以及支持他们的以色列政府要对这起杀人事件负责，而不是那些民意调查显示赞成暗杀的公民。

This result is compatible with the framework advocated herein. The subtle insights, analysis, and examples provided in Reinach's century-old paper are clearly still useful in constructing a praxeologically sound theory of legal causation today.⁶⁶

这一结果与本文所倡导的框架是一致的。赖纳赫这篇百年前的论文中所提供的精妙见解、分析和例子，对于今天构建一个行动学上健全的法律因果关系理论明显依然有用。

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¹¹² As pointed out in note [†], above, our paper “Causation and Aggression” was published in a symposium issue on “Austrian Law and Economics: The Contributions of Reinach and Rothbard,” in Quarterly J. Austrian Econ. 7, no. 4 (Winter 2004). In addition to our paper, the symposium issue included the following (plus two additional papers not presented at the original in-person symposium): Jörg Guido H ü Ismann, “Editorial,” <https://mises.org/library/editorial-special-symposium-issue-austrian-law-and-economics-0>, pp. 3 – 6; Laurent Carnis, “Pitfalls of the Classical School of Crime,” <https://mises.org/library/pitfalls-classical-school-crime-0>, pp. 7 – 18 (this paper does not deal with Reinach); Larry J. Sechrest, “Praxeology, Economics, and Law: Issues and Implications,” <https://mises.org/library/praxeology-economics-and-law-issues-and-implications-0>, pp. 19 – 40; Jörg Guido H ü Ismann, “The A Priori Foundations of Property Economics,” https://cdn.mises.org/qjae7_4_4.pdf, pp. 41 – 68; Walter Block, “Austrian Law and Economics: The Contributions of Adolf Reinach and Murray Rothbard,” <https://mises.org/library/austrian-law-and-economics-contributions-adolf-reinach-and-murray-rothbard-law-economics-and>, pp. 69 – 85; Hoppe, “Property, Causality, and Liability”; and Leo Zailbert, “Toward Meta-Politics,” <https://mises.org/library/toward-meta-politics-0>, pp. 113 – 28.

Barry Smith’s original paper presented at the in-person symposium, “The A Priori Ontology of Social Reality,” was never published. In private correspondence with Smith (Nov. 25, 2022), he stated that although he has lost track of the original symposium

piece he presented, one of his subsequent papers contains many of the pertinent elements of the argument of that presentation: Barry Smith, “An Essay on Material Necessity,” Philip Hanson & Bruce Hunter, eds., Return of the A Priori (Canadian J. Philosophy, Supplementary Volume 18, 1993; <https://philpapers.org/archive/SMIAEO-2.pdf>): 301 – 322; and that a much later paper concerning these issues is Barry Smith & Wojciech Żelaniec, “Laws of Essence or Constitutive Rules? Reinach vs. Searle on the Ontology of Social Entities,” in Francesca De Vecchi, ed., Eidetica del Diritto e Ontologia Sociale. Il Realismo di Adolf Reinach (Milan: Mimesis, 2012; <https://perma.cc/LR2P-NLXW>): 83 – 108.

如上文注释[†]所指出的，我们的论文《因果关系与侵犯》发表在《奥地利经济学季刊》第 7 卷第 4 期(2004 年冬季)关于《奥派法律与经济学：赖纳赫和罗斯巴德的贡献》的研讨专刊中。除了我们的论文，该研讨专刊还包括以下内容（加上另外两篇未在最初的现场研讨会上发表的论文）：约尔格·吉多·许尔斯曼，“**编辑按语**”，第 3-6 页；洛朗·卡尼斯，《**古典犯罪学派的陷阱**》，第 7-18 页（本文未涉及赖纳赫）；拉里·J·塞克雷斯特，《行动学、经济学和法律：问题与影响》，<https://mises.org/library/praxeology-economics-and-law-issues-and-implications-0>，第 19-40 页；约尔格·吉多·许尔斯曼，《**财产权经济学的先验基础**》，第 41-68 页；沃尔特·布洛克，《**奥派法律与经济学：阿道夫·赖纳赫和穆瑞·罗斯巴德的贡献**》，第 69-85 页；霍普，《财产、因果关系和责任》；以及利奥·扎伊伯特，《**走向无政治**》，第 113-128 页。

巴里·史密斯在现场研讨会上提交的原始论文《社会现实的先验本体论》从未发表。在与史密斯的私人通信(2022 年 11 月 25 日)中，他表示，虽然他已经找不到他当时提交的研讨会论文原件，但他后来的一篇论文包含了该演讲论点的许多相关元素：巴里·史密斯，《物质必然性论文》，菲利普·汉森和布鲁斯·亨特编辑，《**先验的回归**》（《**加拿大哲学杂志**》，增刊第 18 卷，1993 年）：301-322；还有一篇更晚的关于这些问题的论文是巴里·史密斯和沃伊切赫·热拉涅茨，《本质法则还是构成规则？赖纳赫与塞尔关于社会实体的本体论》，收录于弗朗西斯卡·德·维奇编辑的《**法律的本质与社会本体论**》。II 阿道夫·赖纳赫的现实主义》（米兰：米梅西斯，2012 年；<https://perma.cc/LR2P-NLXW>）：83-108。

第九章 自由意志主义的契约理论：所有权转让、具有约束力的承诺和不可让渡性

A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability

While in law school in Louisiana (the only civil law state in the US), I was introduced to the Roman and civil law* and also to contract law and theory.

It was during my first-year contracts class, in 1988, that I conceived of my “estoppel” based theory of rights.† I also became interested in the Rothbard-Evers title-transfer theory of contract.‡ I presented a paper on this topic in 1999, integrating the views of Rothbard and Evers with various concepts from the civil law and the common law.§ I later published an article on this in the Journal of Libertarian Studies, upon which this chapter is based.**

在路易斯安那州（美国唯一的大陆法系州）就读法学院期间，我开始接触罗马法和大陆法，以及契约法和契约理论。¹¹³

正是在 1988 年的第一年法的课堂上，我构想了基于 “禁止反言” 的权利理论。¹¹⁴ 我还对罗斯巴德-埃弗斯 (Rothbard-Evers) 的所有权转让理论产生了兴趣。¹¹⁵ 1999 年，我就这一主题发表了一篇文章，将罗斯巴德和埃弗斯的观点与大陆法和普通法的各种概念融为一体。¹¹⁶ 后来，我在《自由意志主义研究期刊》上发表了一篇文章，而本章

¹¹³ 在《自由社会中的立法与法律发现》（第 13 章）中讨论。

¹¹⁴ 见《我如何成为一名自由意志主义者》（第 1 章），注释 6 及相关文本；《自由意志主义的惩罚与权利理论》（第 5 章）

¹¹⁵ 见穆瑞·N·罗斯巴德 (Murray N. Rothbard)，《财产权与理论》，收录于《自由的伦理》（纽约：纽约大学出版社，1998 年；<https://mises.org/library/property-rights-and-the-theory-contracts>）；以及威廉姆森·M·埃弗斯 (Williamson M. Evers)，《重建法》，《自由意志主义研究杂志》第 1 卷，第 1 期（1977 年冬季；<https://mises.org/library/toward-reformulation-law-contracts>）：3-13 页。另见金塞拉 (Kinsella)，《正义与财产权：罗斯巴德论稀缺、财产、……》，《自由意志主义标准》（2010 年 11 月 19 日），讨论了罗斯巴德-埃弗斯理论的起源。

¹¹⁶ 斯蒂芬·金塞拉 (Stephan Kinsella)，《自由意志主义的契约理论》，奥地利学派学者会议，米塞斯研究院，阿拉巴马州奥本（1999 年 4 月 17 日）；以及同上，《理论》，罗斯巴德研究生研讨会，米塞斯研究院，阿拉巴马州奥本（2002 年 7 月 28 日）

就是在此基础上所撰写。¹¹⁷

I. 简介 INTRODUCTION

A. 财产和契约

Property and Contract

A system of property rights specifies how to determine which individuals own—have the right to control—particular scarce resources. By having a just, objective rule for allocating control of scarce resources to particular owners, resource use conflicts may be reduced. Nonowners can simply refrain from invading the borders of the owned resources—that is, avoid using the thing without the owner's consent.¹ Using a property rights scheme, it is at least possible for conflict to be avoided or reduced. This is the very purpose and function of property rights: to respond to the practical problem of conflict in a world of multiple actors.²

财产权制度规定了如何确定哪些人拥有——有权控制——特定的稀缺资源。通过一个正义、客观的规则，将稀缺资源的控制权归属于特定的所有者，可以减少资源使用方面的冲突。非所有者只需避免侵犯有主资源的边界，即避免在未经所有者同意的情况下使用资源。¹¹⁸ 利用财产权制度，至少有可能避免或减少冲突。这正是财产权的目

至 8 月 2 日；<https://perma.cc/RQ5Z-S2GE>）。

¹¹⁷ 斯蒂芬·金塞拉 (Stephan Kinsella)，《自由意志主义的契约理论：所有权转让、有约束力的承诺和不可让渡性》，《自由意志主义研究杂志》第 17 卷，第 2 期 (2003 年春季)：11-37 页。原始文章发表后的相关文章或讨论包括《并不意味着所有权，反之亦然：一个剖析》(第 11 章)；以及各种金塞拉的自由播客剧集，例如：“KOL225 | 对理论的思考 (PFS 2017)” (2017 年 9 月 17 日)；“KOL197 | 汤姆·伍兹秀：我忽视的罗斯巴德的核心贡献，以及其重要性：罗斯巴德-埃弗斯的所有权转让理论” (2015 年 12 月 3 日)；“KOL146 | 对威廉姆森·埃弗斯关于所有权转让理论的访谈” (2014 年 8 月 5 日)；“KOL020 | “自由意志主义的法律理论：财产、冲突和社会：讲座 3：应用 I：法律制度、欺诈” (米塞斯学院，2011 年)” (2013 年 2 月 21 日)。

¹¹⁸ As noted previously, technically speaking, property rights are best viewed as rights to exclude others from using a resource rather than a right to use; and the term property, to be precise, should be used to refer to the (ownership) relationship between a human

owner and an object (scarce, conflictable resource), not to the owned material object itself. Thus, your car is not your “property” ; you have a property right in your car. On all this, and on the use of terms like conflictable or rivalrous to refer to ownable scarce resources, see Kinsella, “ On Conflictability and Conflictable Resources, ” StephanKinsella.com (Jan. 31, 2022); “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.62; and “What Libertarianism Is” (ch. 2), at n.5.

如前所述，从技术上讲，财产权最好被视为排除他人使用资源的权利，而不是使用权；准确地说，财产一词应指人类所有者与物品（稀缺的、可引发冲突的资源）之间的（所有权）关系，而不是所拥有的物质物品本身。因此，你的汽车不是你的“财产”；你对你的汽车拥有财产权。关于这一切，以及使用冲突性或竞争性等术语来指称可拥有的稀缺资源，见金塞拉：《论冲突性与冲突性资源》，StephanKinsella.com（2022年1月31日）；《《反对知识产权》二十年后：回顾与展望》（第15章），第62页；以及《何为自由意志主义》（第2章），第5页。

Even more precisely still, property rights can be conceived of as rights between human actors, but with respect to particular resources, although this distinction makes little difference for our present purposes. On this point see, e.g., 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 (“Property is a relation between a person and a thing.”);Svetovar Pejovich, “Towards an Economic Theory of the Creation and Specification of Property Rights,” in Henry G. Manne, ed., *Economics of Legal Relationships* (West Group, 1975), p. 40 (emphasis in original) (“[P]roperty rights are defined not as relations between men and things but, rather as the behavioural relations among men that arise from the existence of things and pertain to their use.”); quoted in Boudewijn Bouckaert, “What is Property?”, *Harv. J.L. & Pub. Pol’y* 13, no. 3 (Summer 1990): 775 – 816, at 795); Andrew Koppelman, *Burning Down the House* (St. Martin’ s Press, 2022), p. 79 (“It’ s sometimes said that property is a relation between a person and a thing, but that’ s confused. Property rights are relations between people. If I legitimately own something (rather than merely possessing it, as might be true of stolen goods), everyone else on the planet has an obligation to keep their hands off it. If that’ s going to be true, then there has to be some reasonable basis for thinking that they have that obligation.”); and 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: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.”

更确切地说，财产权可以被视为行动人之间的权利，但涉及特定资源，尽管这种区别对于我们目前的目的影响不大。关于这一点，例如，参见伊曼纽尔·马蒂内利（Emanuele Martinelli）的《论我们是否拥有我们的思想》（草稿，2019年；

的和功能所在：在一个存在多个行动人的世界中解决冲突这一实际问题。¹¹⁹

Under the libertarian approach, people are self-owners, that is, they own their bodies.

https://www.academia.edu/93535130/On_Whether_We_Own_What_We_Think），第 6 页（“财产权是人与物之间的一种关系。”）；斯韦托瓦尔·佩约维奇（Svetovar Pejovich）的《迈向财产权创造和界定的经济理论》，收录于亨利·G·曼恩（Henry G. Manne）编辑的《法律关系经济学》（West Group, 1975 年），第 40 页（原文强调）（“[财产权]不是被定义为人与物之间的关系，而是因物的存在而产生的人与人之间的行为关系，且与物的使用有关。”；引自布德维因·布卡特（Boudewijn Bouckaert）的《什么是财产权？》，《哈佛法律与公共政策杂志》第 13 卷，第 3 期（1990 年夏季）：775-816，第 795 页）；安德鲁·科普佩尔曼（Andrew Koppelman）的《烧毁房子》（St. Martin’s Press, 2022 年），第 79 页（“有时人们说财产权是人与物之间的关系，但这是混淆的。财产权是人与人之间的关系。如果我合法拥有某物（而不仅仅是占有它，就像被盗物品可能的情况），地球上的其他每个人都有义务不碰它。如果这要成立，那么必须有一些合理的依据认为他们有这种义务。”）；以及亚历克斯·科津斯基（Alex Kozinski）的《论挥霍、盗版和私有财产》，《哈佛法律与公共政策杂志》第 13 卷，第 1 期（1990 年冬季）：<https://perma.cc/Z8AD-634V>）：17-21，第 19 页：但什么是财产权？这不是一个容易回答的问题。我记得在第一年财产法课程的第一天，当教授……提出这个基本问题：什么是财产权？……我举起手，甚至不等被叫就喊了出来，“财产权界定了人与他们的财产之间的关系。”

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...

See also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.62; and “What Libertarianism Is” (ch. 2), at n.5 and Appendix I.

克里尔教授停住脚步，转过身来，看了我很久。最后他说：“这很奇怪，科津斯基先生 你总是和没有生命的物体发生关系吗？我认识的大多数人都是和其他人发生关系的”。这当然不是我最后一次在课堂上说蠢话，但我并没有忘记这个教训。财产权当然是人与人之间关系的一种。至少，它们界定了个人可以在多大程度上排除其他人使用和享有其物品和服务....。

另见 《《反对知识产权》二十年后：回顾与展望》（第 15 章），注释 62；以及《何为自由意志主义》（第 2 章），注释 5 和附录 I。

¹¹⁹ See “What Libertarianism Is” (ch. 2); and other references in note 4, below.

参见《何为自由意志主义》（第 2 章），以及下文注 4 中的其他参考资料。

As for external resources, that is, previously-unowned conflictible resources, the first to use an unowned scarce resource— the homesteader—becomes its owner.³ This is called original appropriation or, sometimes, usually in the case of real (immovable) property, homesteading. The first possessor has better title in the resource than any possible challenger, who is always, with respect to him, a latecomer.⁴

根据自由意志主义的观点，人们是自我所有者，即他们拥有自己的身体。至于外部资源，即先前无主的冲突性资源，首次使用无主的稀缺资源的人——拓殖者——成为其所有者。¹²⁰ 这就是所谓的先占，有时，通常是指不动产（不可移动的财产）的拓殖。与任何可能的挑战者相比，第一个占有者对资源拥有更合理的所有权，而挑战者对他来说总是一个后来者。¹²¹

¹²⁰ See John Locke, Second Treatise on Civil Government (1690; <https://www.johnlocke.net/2022/07/two-treatises-of-government.html>), chap. 5, “Of Property”; “What Libertarianism Is” (ch. 2); “How We Come to Own Ourselves” (ch. 4); “A Libertarian Theory of Punishment and Rights” (ch. 5); Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform,” [StephanKinsella.com](https://stephankinsella.com) (May 30, 2022). 见约翰·洛克（John Locke）的《政府论：下（下篇）》（1690年；<https://www.johnlocke.net/2022/07/two-treatises-of-government.html>），第5章，《论财产》；《何为自由意志主义》（第2章）；《我们如何拥有自己》（第4章）；《惩罚和权利的自由意志主义理论》（第5章）；金塞拉（Kinsella）的《自由意志主义党纲中的侵犯与财产权要点》，[StephanKinsella.com](https://stephankinsella.com)（2022年5月30日）。

¹²¹ The owner of a given resource is said to have a title to the resource, i.e., is entitled to use it. It is a property right since it becomes an extension of the owner’s ability to interact with the world, i.e., one of his attributes or “properties”; he is the proprietor or has a proprietary interest in the thing. As Bouckaert writes: [T]he definition of property is simultaneously simple and complex. It is simple because we can distinguish a generally accepted common-sense notion of property; that is, something that belongs to somebody in a legitimate way, something that is “proper” to somebody. Boudewijn Bouckaert, “What is Property?”, *Harv. J.L. & Pub. Pol’y* 13, no. 3 (Summer 1990): 775 – 816, at 775.

特定资源的所有者被称为拥有该资源的所有权，即有权使用该资源。这是一种财产权，因为它成为所有者与世界互动能力的延伸，即所有者的性质或“属性”之一；所有者是该事物的所有者，或对该事物拥有所有权利益。布卡尔特（Bouckaert）写道：[“财产权的定义既简单又复杂。它简单是因为我们可以区分出一个普遍被接受的常识性的财产权概念；也就是说，以合法方式属于某人的东西，对某人来说是‘恰当’的东西。”布德维因·布卡特，《什么是财产权？》，《哈佛法律与公共政策杂志》第13卷，

But property rights are not only acquired; they may be lost or transferred to others. For example, the owner may abandon the thing so that it once more becomes unowned and available for appropriation by a new homesteader. Likewise, the owner may give or sell the resource to another. The owner might also commit a crime or tort, thereby forfeiting his rights to the resource, in favor of the victim.⁵

但财产权不仅是获得的，也可能丧失或转让给他人。例如，所有者可以放弃该物，使其再次成为无主物，供新的拓殖者占有。同样，所有者也可以将资源赠与或出售给他人。所有者也可能实施犯罪或侵权行为，从而丧失对资源的权利，让受害者受益。¹²²

第 3 期（1990 年夏季）：775-816，第 775 页。

On the function of property rights, see generally Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010; www.hanshoppe.com/tsc), chaps. 1, 2, and 7, esp. pp. 13 – 15 & 18 – 30, discussing notions of scarcity, aggression, norms, property, and justification; idem, “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). See also the discussion of Hoppe’s work on this topic in “Defending Argumentation Ethics” (ch. 7). On the prior-later distinction, see “What Libertarianism Is” (ch. 2), at notes 32 – 36 and accompanying text, et pass.; “Defending Argumentation Ethics” (ch. 7), the section “Objective Links: First Use, Verbal Claims, and the Prior-Later Distinction.”

关于财产权的功能，一般可参见汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）的《社会主义与资本主义理论：经济、政治与伦理》（Auburn, Ala.: 米塞斯研究院，2010 年；www.hanshoppe.com/tsc），第 1、2 和 7 章，特别是第 13-15 页和 18-30 页，讨论了稀缺性、侵犯、规范、财产权和正当性的概念；同上，《论共有、公有和私有财产以及全面私有化的基本原理》，收录于《伟大的虚构：财产、经济、社会和衰落的政治》（第二版扩充版，米塞斯研究院，2021 年；www.hanshoppe.com/tgf）。还可参见《捍卫论证伦理学》（第 7 章）中关于霍普在这个主题上的作品的讨论。关于先来后到之分，参见《何为自由意志主义》（第 2 章），注释 32-36 及相关内容等等；《捍卫论证伦理学》（第 7 章），“客观联系：首次使用、口头主张和先来后到之分”部分。

¹²² For more on the issue of abandonment and a criticism of the Mutualist-libertarian position on it, see “What Libertarianism Is” (ch. 2), n.31 and accompanying text and Appendix II. For further discussion of the issue of “forfeiting” or waiving rights, see “Knowledge, Calculation, Conflict, and Law” (ch. 19), n.81 and “A Libertarian Theory of Punishment and Rights” (ch. 5), n.88 and Appendix: The Justice of Responsive Force. 关于放弃问题的更多论述以及对互助主义-自由意志主义在此问题上的立场的批评，

Property theory concerns not only the initial acquisition of propertyrights in conflicttable resources, but also their loss and transfer. Tort and punishment theory, as subsets of general property theory, describe how acts of aggression or negligence change ownership rights to scarce resources.⁶ Contract theory specifies how rights are transferred as the result of voluntary agreement between the owner and others. While some voluntary agreements are said to be “enforceable,” others are not. The question for libertarians concerns when and why agreements are legally enforceable. In other words, how are (property) rights voluntarily (consensually) transferred?

财产理论不仅涉及冲突性资源财产权的初始获取，还涉及财产权的丧失和转让。侵权理论和惩罚理论作为一般财产理论的子集，描述了侵犯或疏忽行为如何改变稀缺资源的所有权。¹²³ 理论说明了权利是如何在所有者与他人自愿协议的基础上发生转让的。虽然有些自愿协议被认为是“可执行的”，但其它的则不能。自由意志主义的问题在于，

见《何为自由意志主义》（第 2 章），注释 31 及相关内容和附录 II。关于“丧失”或放弃权利问题的进一步讨论，请参见《知识、计算、冲突与法律》（第 19 章），注释 81 以及《惩罚和权利的自由意志主义理论》（第 5 章），注释 88 及附录：回应性力量的正义。

¹²³ Invasions of the borders—uninvited use—of others’ owned resources by a tortfeasor or aggressor results in a transfer of rights from the wrongdoer to the victim. By attacking someone, the aggressor transfers some rights in his body and/or property to the victim, for purposes of defense, punishment, and/or restitution. See “Inalienability and Punishment:

A Reply to George Smith” (ch. 10); “Defending Argumentation Ethics” (ch. 7); and “A Libertarian Theory of Punishment and Rights” (ch. 5). In causing damage to another’ s property through negligence (the commission of a tort), the tortfeasor becomes liable to the victim. In both cases, the wrongdoer loses rights, not because of any voluntary agreement, but by virtue of his action. Re negligence, see Kinsella, “The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld,” Mises Economics Blog (Sep. 1, 2009).

侵权者或侵犯者侵犯他人拥有资源的边界——未经同意的使用——导致权利从不法行动人转移到受害者。侵犯者通过攻击他人，将其身体和/或财产中的某些权利转移给受害者，为了达到防卫、惩罚和/或赔偿的目的。参见《不可让渡性与惩罚：对乔治·史密斯的回复》（第 10 章）；《捍卫论证伦理学》（第 7 章）；以及《惩罚和权利的自由意志主义理论》（第 5 章）。因过失造成他人财产损失（实施侵权行为）时，侵权行为人应对受害者负责。在这两种情况下，不法行动人都会丧失权利，不是因为任何自愿协议，而是因为他的行动。关于过失，见 金塞拉，《自由意志主义对过失、侵权和严格责任的处理方法：赔偿金和部分赔偿金》米塞斯经济学博客（2009 年 9 月 1 日）。

协议何时以及为何可依法强制执行。换句话说，（财产）权利是如何自愿（一致同意地）转让的？

B. 契约概述 Overview of Contract

Contracts are used in exchange—from simple barter to complex exchanges such as loans and employment contracts. In economics, exchange has to do with the motivations of the actor and his view of opportunity costs. In the positive law, in both the common law and civil law, a contract is seen a relation between two or more parties which includes legally enforceable obligations between them.

用于交换——从简单的以物易物到复杂的交换，如贷款和雇佣。在经济学中，交换与行动人的动机及其对机会成本的看法有关。在实在法中，无论是普通法还是大陆法，都被视为两个或两个以上当事人之间的关系，其中包括他们之间在法律上可强制执行的义务。

Contracts result from agreement or promises between the parties, e.g., one party promises to another to do (or not do) something, or to give some (owned or ownable) thing to the other party. The promise may be made in exchange for things given or promised by the second party. The promises may be future-oriented and based on certain conditions. Agreements may be simple or complex; contemporaneous or future-oriented; unilateral donations or bilateral and reciprocal.

源于当事人之间的协议或承诺，例如，一方向另一方承诺做（或不做）某事，或给予另一方某些（拥有或可拥有的）东西。承诺可能是为了换取第二方给予或承诺的东西。承诺可能是面向未来的，并基于某些条件。协议可以是简单的，也可以是复杂的；可以是当时的，也可以是未来的；可以是单边捐赠，也可以是双边互惠的。

Not all agreements or promises result in a binding contract or legally enforceable obligations. Only those meeting certain criteria are, depending on the legal system.⁷ For example, in the common law, there must be consideration; in the civil law, there must be cause. The parties must have capacity. And so on. If the promises or agreement made results in a contract, the force of law can be brought to bear to enforce the contract—the agreement may be “enforced.” In modern legal systems, when one party breaches the contract (fails to render the agreed-upon performance),

the other party may sue to have appropriate “remedies” awarded. The remedies usually include an award of money, called damages.

并非所有的协议或承诺都会形成具有约束力的或可依法强制执行的义务。根据不同的法律体系，只有符合特定标准的协议或承诺才具有约束力。¹²⁴例如，在普通法中，必须有对价；在大陆法系中，必须有原因。当事人必须具备行为能力。等等。如果做出的承诺或达成的协议形成了，就可以利用法律的力量来强制执行——协议可以“强制执行”。在现代法律体系中，当一方违约（未能履行约定的义务）时，另一方可以提起诉讼，要求给予适当的“补救”。补救措施通常包括金钱赔偿，即损害赔偿。

Under the positive law, contractual obligations may be classified as obligations to do, not to do, or to give.⁸ An obligation to give may be viewed as a transfer of title to

¹²⁴ Agreement is a broader term than contract, because not all agreements are enforceable, and a given agreement might lack an essential element of a contract. See, e.g., also Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), art. 1906: “A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.” See also *ibid.*, art. 1757: “Obligations arise from contracts and other declarations of will.” Thus, “A contract is, therefore, a juridical act because by their ‘agreement,’ or exchange of wills, the parties to it create, modify or extinguish obligations.” Alain A. Levasseur, *Louisiana Law of Conventional Obligations: A Précis* (LexisNexis, 2010), “Introduction”; see also *idem*, *Louisiana Law of Obligations in General: A Comparative Civil Law Perspective, A Treatise* (Durham, NC: Carolina Academic Press, 2020), chap. 1, ¶ 17 et pass. For useful definitions of various legal terms used in this chapter, see Dictionary.law.com and the latest edition of Black’s Law Dictionary; also Gregory Rome & Stephan Kinsella, *Louisiana Civil Law Dictionary* (New Orleans, La.: Quid Pro Books, 2011).

协议是一个比更广泛的术语，因为并非所有协议都是可执行的，并且给定的协议可能缺乏的一个基本要素。例如，也可参见《路易斯安那民法典》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent），第 1906 条：“是两个或多个当事人之间的协议，据此产生、修改或消灭义务。”另见同上，第 1757 条：“义务产生于和其他意志声明。”因此，“因此是一种法律行为，因为通过他们的‘协议’或意志的交换，当事人创造、修改或消灭义务。”阿兰·A·勒瓦瑟（Alain A. Levasseur），《路易斯安那州传统债务法：概要》（LexisNexis，2010 年），“引言”；另见同上，《路易斯安那州一般债务法：比较民法视角，论著》（Durham, NC: Carolina Academic Press，2020 年），第 1 章，第 17 段及后续页。。关于本章中使用的各种法律术语的有用定义，请参见 Dictionary.law.com 和最新版的《布莱克法律词典》；还有格雷戈里·罗姆（Gregory Rome）和斯蒂芬·金塞拉（Stephan Kinsella）的《路易斯安那州民法词典》（New Orleans, La.: Quid Pro Books，2011 年）。

property, as it is an obligation to give ownership of a thing to another. An obligation to do is an obligation to perform a specific action, such as an obligation to sing at a wedding or paint someone's house. It is significant for our purposes that courts usually will not order specific performance (forcing the breaching or unwilling party to perform the contract), on the grounds that the plaintiff can usually be adequately compensated with money damages.⁹ Further, money damages do not impose a heavy burden on the court to supervise performance, while specific performance would. Specific performance would often be counterproductive. Consider a singer who refuses to perform a promised contract, for example. If ordered to perform, the singer might well give a shabby performance. For these and other reasons, in such cases, the singer would be ordered to pay monetary damages to the other party instead of ordered to sing.

根据实在法，义务可分为“做”的义务、“不做”的义务或“给予”的义务。¹²⁵ 给予义

¹²⁵ See Louisiana Civil Code, arts. 1756 and 1986, describing obligations to do (an act) and obligations to give; also Levasseur, Louisiana Law of Conventional Obligations: A Précis, chap. 3, art. 3; chap. 6 (preamble); chap. 8 (preamble); Saúl Litvinoff, The Law of Obligations: Part I: Obligations in General, 2d ed. (St. Paul, Minn.: West Publishing Company, 2001), § 1.4; Randy E. Barnett, “Contract Remedies and Inalienable Rights,” Social Policy and Philosophy 4, no. 1 (Autumn 1986; <https://tinyurl.com/44adafte>): 179–202, at p. 189; idem, “Rights and Remedies in a Consent Theory of Contract,” in R.G. Frey & C. Morris, eds., Liability: New Essays in Legal Philosophy (Cambridge University Press, 1991), p. 158; and, more generally, Alain A. Levasseur, Louisiana Law of Obligations in General: A Précis, 3rd ed. (LexisNexis, 2009); idem, Louisiana Law of Obligations in General: A Comparative Civil Law Perspective, A Treatise; and Saúl Litvinoff, Obligations, vol. 1 (St. Paul, Minn.: West Publishing Company, 1969).

参见《路易斯安那民法典》第 1756 条和第 1986 条，描述了作为（行动）的义务和给予的义务；还有莱瓦瑟尔（Levasseur）的《路易斯安那州约定债务法：概要》第 3 章第 3 条；第 6 章（序言）；第 8 章（序言）；索尔·利特维诺夫（Saul Litvinoff）的《债务法：第一部分：一般债务》第二版（明尼苏达州圣保罗：西出版社，2001 年），第 1.4 条；兰迪·E·巴尼特（Randy E. Barnett）的《赔偿和不可让渡的权利》，《社会政策与哲学》第 4 卷，第 1 期（1986 年秋季；<https://tinyurl.com/44adafte>）：179–202，第 189 页；同上，《同意理论下的权利和赔偿》，载于 R.G.弗雷和 C.莫里斯编辑的《责任：法律哲学新论文》（剑桥大学出版社，1991 年），第 158 页；更广泛地说，阿兰·A·莱瓦瑟尔（Alain A. Levasseur）的《路易斯安那州一般债务法：概要》第三版（LexisNexis，2009 年）；同上，《路易斯安那州一般债务法：比较民法视角，专论》；以及索尔·利特维诺夫（Saul Litvinoff）的《债务》第 1 卷（明尼

务可被视为财产所有权的转让，因为它是将某物的所有权给予他人的义务。履行义务是指履行特定行动的义务，如在婚礼上唱歌或粉刷某人房屋的义务。对于我们的目的来说，重要的是法院通常不会命令具体履行（强迫违约方或不愿意履行的一方），理由是原告通常可以通过金钱赔偿得到充分补偿。¹²⁶此外，金钱赔偿不会给法院带来监督履约的沉重负担，而具体履约则会。具体履约往往会适得其反。例如，一位歌手拒绝履行承诺的。如果命令其履行，该歌手的表演很可能会很拙劣。由于这些原因和其他原因，在这种情况下，该歌手将被勒令向另一方支付金钱赔偿，而不是被勒令演唱。

Even an agreement to sell a piece of property, such as a barrel of apples or a car, will usually not be enforced with specific performance; instead, the court would order the promisor (obligor) to pay the promisee (obligee) a sum of money.

即使是出售一项财产（如一桶苹果或一辆汽车）的协议，通常也不会通过具体履行来执行；相反，法院会命令承诺人（债务人）向被承诺人（债权人）支付一笔钱。

So-called “specific performance” is typically granted only in the case of unique property, such as a particular portrait, or in the case of real estate, because each parcel of land is unique. But note that, even in this case, specific performance results in the transfer of title to the unique property from the owner to the other party, which supports the Rothbard-Evers title-transfer theory of contract advocated below.

所谓的“具体履行”通常只适用于独特的财产，如一幅特定的肖像画，或者适用于不动产，因为每块土地都是独一无二的。但要注意的是，即使在这种情况下，具体履行的结果也是独特财产的所有权从所有者转让到了另一方，这就支持了下文所主张的罗斯巴德-埃弗斯的所有权转让理论。

Thus, in modern positive law, “breach of contract”—failing to render the contractual obligations—results in a transfer of property—sometimes unique goods such as real

苏达州圣保罗：西出版社，1969 年）。

¹²⁶ Barnett, “Contract Remedies and Inalienable Rights,” pp. 180 – 82; idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 154 – 55. On the availability of specific performance in civil-law systems, see Louisiana Civil Code, art. 1986; and Litvinoff, Obligations, vol. 2, pp. 301 – 302.

巴尼特，《赔偿和不可让渡的权利》，第 180-182 页；同上，《同意理论下的中的权利和赔偿》，第 154-155 页。关于大陆法系中实际履行的可用性，参见《路易斯安那民法典》第 1986 条；以及利特维诺夫，《债务》第 2 卷，第 301-302 页。

property, but usually money—from the breaching party to the promisee. Contracts are enforced today not by forcing a party to perform the promised action but by threatening to transfer some of the promisor's owned resources to the promisee if the promisor does not perform. For an agreement to be enforceable under modern legal systems means that some of one party's owned resources (whether money or some other owned good, usually a unique good such as land or a painting) can be forcibly transferred to the other party.

因此，在现代实在法中，“违约”——未能履行义务——导致财产——有时是独特的物品，如不动产，但通常是金钱——从违约方转让到受许诺方。如今，的强制执行不是通过强迫一方履行承诺的行动，而是通过威胁如果承诺人不履行义务，就将承诺人拥有的部分资源转让给被承诺人。在现代法律制度下，协议的强制执行意味着一方拥有的部分资源（无论是金钱还是其他物品，通常是独特的物品，如土地或绘画）可以被强制转让给另一方。

What this means is that, in reality, in modern contract law, there are really no contractual obligations “to do” anything. It also means contract breach is really impossible, as contracts are not enforceable obligations to do things. There are only obligations to transfer title to resources, either directly (agreement to pay a sum of money) or as a consequence of failure to perform a promised action (a conditional obligation to pay a sum of money if the promised performance does not occur).

这意味着，在现代合同法中，实际上并不存在所谓的“必须履行”的契约义务。这也意味着违约实际上是不可能的，因为并不是可强制执行的做事义务。只有直接转让资源所有权的义务（同意支付一笔钱），或者因未履行承诺行动而产生的义务（（若承诺履行未发生，则需支付一定金额的条件性义务））。

It should be noted that, despite the lack of a legal compulsion to perform a contract, the institution of contract is alive and well. The legal threat of transfer of some of the promisor's resources (commonly called “property”) in the event of default, combined with reputation effects, is apparently sufficient to render contracting a useful institution.

应该指出的是，尽管法律上没有强制履行的规定，但制度依然存在且运行良好。一旦违约，承诺人的部分资源（俗称“财产”）就会被转让，这种法律威胁加上声誉影响，

显然足以使成为一种有用的制度。

At a minimum, contract theory purports to justify the transfer of title to the property of parties to a contract. And in the case of specific performance, debtors' prison, and voluntary slavery, contract theory must justify the use of force against the parties. Not surprisingly, then, a variety of arguments have been set forth attempting to explain why agreements may be enforced.¹⁰

理论至少要证明当事人财产所有权的转让是正当的。而在具体履行、债务人监禁和自愿为奴的情况下，理论必须证明对当事人使用武力是正当的。因此，人们提出了各种各样的论点，试图解释为什么协议可以强制执行，这也就不足为奇了。¹²⁷

¹²⁷ Randy E. Barnett, “A Consent Theory of Contract,” Colum. L. Rev. 86 (1986; www.randybarnett.com): 269 – 321 (as well as the version thereof incorporated into idem, “Rights and Remedies in a Consent Theory of Contract”) provides a useful discussion of the multitude of contract theories which have been proposed. For a recent work discussing contract theory, see Harry N. Scheiber, ed., The State and Freedom of Contract (Stanford, Calif.: Stanford University Press, 1999). See also Richard Craswell, “Contract Law: General Theories,” section 4000 in Encyclopedia of Law & Economics (Cambridge: Cambridge University Press, 2000); Morris R. Cohen, “The Basis of Contract,” Harv. L. Rev. 46 (1933): 573; Charles Fried, Contract as Promise (Cambridge, Mass: Harvard University Press, 1982); and Charles J. Goetz & Robert E. Scott, “Enforcing Promises: An Examination of the Basis of Contract,” Yale L. J. 89, no. 7 (June 1980; https://scholarship.law.columbia.edu/faculty_scholarship/249/): 1261 – 1322.

兰迪·E·巴尼特 (Randy E. Barnett) 的《的同意理论》，《哥伦比亚法律评论》86 期 (1986 年; www.randybarnett.com) : 269-321 页 (以及纳入同上的《同意理论下的中的权利和赔偿》的版本) 对已提出的众多理论进行了有益的讨论。关于讨论理论的近期作品，见哈里·N·谢伯 (Harry N. Scheiber) 编辑的《国家与自由》 (加利福尼亚州斯坦福: 斯坦福大学出版社, 1999 年)。还可参见理查德·克拉斯韦尔 (Richard Craswell) 的《法: 一般理论》，《法律与经济学百科全书》第 4000 节 (剑桥: 剑桥大学出版社, 2000 年); 莫里斯·R·科恩 (Morris R. Cohen) 的《的基础》，《哈佛法律评论》46 期 (1933 年): 573 页; 查尔斯·弗里德 (Charles Fried) 的《作为承诺的》 (马萨诸塞州剑桥: 哈佛大学出版社, 1982 年); 以及查尔斯·J·戈茨 (Charles J. Goetz) 和罗伯特·E·斯科特 (Robert E. Scott) 的《履行承诺: 对基础的审查》，《耶鲁法律杂志》第 89 卷, 第 7 期 (1980 年 6 月): 1261-1322 页。

C. 言论、承诺与自由意志主义

Speech, Promises, and Libertarianism

The question especially interests libertarians. By endorsing a given theory of contract, we are, in effect, supporting the transfer of property rights from the owner to others, in certain circumstances.

自由意志主义者对这个问题尤其感兴趣。我们赞同某种理论，实际上就是支持在某些情况下将财产权从所有者手中转让到他人手中。

Why does making a promise or agreeing or “committing” to do something result in a transfer of rights from the promisor to the promisee? To many—even to many libertarians—it seems to be elementary and obvious: if you promise to do something, you may be forced to do it. Some libertarians and laymen assume that an individual has some power or ability to legally “bind” or obligate himself by simply promising to do something. However, this assumption is groundless. Not all promises are enforceable, nor should they be.

为什么许诺、同意或“承诺”做某事会导致权利从承诺人转让到被承诺人？对许多人来说——甚至对许多自由意志主义者来说——这似乎是基本的且显而易见的：如果你承诺做某事，你就可能被迫去做。一些自由意志主义者和外行人假定，一个人只要承诺做某事，就有某种权力或能力对自己进行法律上的“约束”或使自己承担义务。然而，这种假设是毫无根据的。并非所有承诺都可以强制执行，也不应该强制执行。

As a general matter, libertarians hold that the use of force is permissible only in response to initiated force. Or, more generally, an owner of a resource is entitled to use force to defend his ownership rights in his body and in resources he or she owns. Ownership of an external resource means that the owner can withhold consent (exclude) others or invite them to use the resource.

一般而言，自由意志主义认为，只有在回应主动施加的武力时才允许使用武力。或者，更一般地说，资源的所有者有权使用武力来捍卫其对自身身体以及其所拥有资源的所有权。对外部资源的所有权意味着所有者可以不同意（排除）他人或邀请他人使用该资源。

In other words, viewed in property terms, a resource may be used only with the consent of its owner. Unprovoked aggression against another is a use of his resource (or his body) without his consent and is therefore prohibited. As a result of the act of aggression, the victim becomes entitled to use the aggressor's property (or body) for, e.g., purposes of punishment. That is, by committing aggression—using a victim's property without consent—some or all of the aggressor's property rights are transferred to the victim. Because the aggressor used the victim's property as if it were his own (although it is not), the victim may use the aggressor's property as if it is his own.¹¹ This is why initiated force (aggression) is impermissible, while responsive force—force in response to aggression—is not.

换句话说，从财产的角度来看，资源只有在其所有者同意的情况下才能使用。无端侵犯他人是未经其同意而使用其资源（或身体），因此是被禁止的。由于实施了侵害行动，受害者有权为惩罚等目的使用侵犯者的财产（或身体）。也就是说，通过实施侵害——未经同意使用受害者的财产——侵犯者的部分或全部财产权被转让给了受害者。由于侵犯者将受害者的财产当作自己的财产使用（尽管并非如此），因此受害者可以将侵犯者的财产当作自己的财产使用。¹²⁸ 这就是为什么主动使用武力（侵犯）是不允许的，而回应性武力——对侵犯做出回应的武力——则是允许的。

It is impermissible to use force in response to non-invasive actions, since this would be itself initiated force. Speech is (generally) nonaggressive, for example, because it does not invade others' property borders, so it does not justify the use of responsive force.¹² Libertarians oppose censorship and recognize a free-speech right because speech, per se, does not aggress (usually). The recipient of noxious or unwanted speech is free to ignore it and go about his business. The boundaries of his body and property are not invaded by speech, and his actions are not physically restrained by the mere words of others.

¹²⁸ See “A Libertarian Theory of Punishment and Rights” (ch. 5), “Dialogical Arguments for Libertarian Rights” (ch. 6), “Inalienability and Punishment” (ch. 10), and “Defending Argumentation Ethics” (ch. 7).

参见《自由意志主义的惩罚与权利理论》（第 5 章）、《自由意志主义权利的对话论证》（第 6 章）、《不可让渡性与惩罚》（第 10 章）和《捍卫论证伦理学》（第 7 章）。

对非侵犯性行动使用武力是不允许的，因为这本身就是主动使用武力。例如，言论（一般来说）是非侵犯性的，因为它没有侵犯他人的财产边界，所以使用回应性武力是不正当的。¹²⁹ 自由意志主义反对审查制度，承认言论自由权，因为言论本身（通常）不侵犯他人。恶毒或不受欢迎的言论的接受者可以置之不理，桥归桥、路归路。他的身体和财产界限不受言论的侵犯，他的行动也不会因他人的只言片语而受到人身限制。

The same holds true of promises, at least at first glance. As even mainstream contract theorists have pointed out, a “mere promise” is not sufficient to create a binding contractual obligation.¹³⁰

至少初步来看，承诺也是如此。甚至主流理论家也指出，“单纯的承诺”不足以产生具有约束力的义务。¹³⁰

For example, consider a budding singer who asks his famous actor friend to attend the singer’s concert. The famous actor says, “I’ll be there.” The singer is pleased, hoping that the actor’s fame will add publicity to the event. To the singer’s disappointment, though, the actor fails to show up. Did the actor violate any of the singer’s rights? Of course not. What if the actor had said, “I promise to attend your concert”? The actor

¹²⁹ I say “generally” because speech acts can certainly be one means by which a person causes aggression. For example, a crime lord ordering an underling to murder someone is complicit in murder, as is the captain of a firing squad murdering an innocent man when he states, “Ready, aim, fire!” In general, however, speech does not cause invasion of others’ property. These issues are discussed in further detail in “Causation and Aggression” (ch. 8).

我说“一般”，是因为言论行动当然可以是一个人造成侵犯的一种手段。例如，犯罪头目命令下属谋杀某人，他就是谋杀的同谋，而行刑队队长说：“准备，瞄准，开枪！”则是谋杀无辜者的同谋。不过，一般来说，言论不会造成对他人财产的侵犯。这些问题将在《因果关系与侵犯》（第8章）中有更详细的讨论。

¹³⁰ See, e.g., Shael Herman, “Detrimental Reliance in Louisiana Law—Past, Present, and Future (?): The Code Drafter’s Perspective,” Tul. L. Rev. 58 (1984): 707–57, p. 711 (“No legal system supposes that all promises should be enforced. Identifying which promises deserve judicial enforcement is crucial to any system of laws.”).

例如，参见谢尔·赫尔曼（Shael Herman）的《路易斯安那州法律中的致害依赖——过去、现在和未来（？）：法典起草者的视角》，《杜兰法律评论》58期（1984年）：707-757页，第711页（“没有任何法律体系假定所有的承诺都应当被强制执行。确定哪些承诺应当得到司法执行对于任何法律体系都至关重要。”）

told,or promised, the singer that he would go to the concert, but he did not by these speech-acts aggress against the singer or his property.

例如，设想一位新晋歌手邀请他的著名演员朋友参加他的演唱会。这位知名演员说：“我会去的。歌手很高兴，希望演员的名气能为演唱会增光添彩。然而，令歌手失望的是，该演员没有到场。演员是否侵犯了歌手的任何权利？当然没有。如果该演员说“我保证参加你的演唱会”呢？演员告诉或承诺歌手他会去听音乐会，但他并没有通过这些言语行动侵犯歌手或其财产。

A promise, then, would seem to be unenforceable unless it somehow gives rise to or involves an act of aggression, that is, it somehow causes an uninvited use—invasion of the borders—of another's property. But a promise seems to be merely a speech-act; it does not appear to aggress against anyone.

那么，一个承诺似乎是不可强制执行的，除非它以某种方式引起或涉及侵犯行动，也就是说，它以某种方式导致未经邀请地使用——侵犯——他人的财产。但一个承诺似乎仅仅是一种言语行动；它似乎并不侵犯任何人。

If promises are not aggression, then the only other way that promises could be enforceable is if the promise resulted in a transfer of property rights from the promisor to the promisee. Then the promisee could “enforce” the contract by simply using the (former) property of the promisor, title to which has transferred to the promisee.

如果承诺不是侵犯行动，那么承诺能够被强制执行的唯一其他方式是，如果承诺导致财产权从承诺者转让到受诺者。然后，受诺者可以通过简单地使用承诺者的（以前的）财产来“执行”，因为该财产的所有权已经转让给了受诺者。

However, to state that promises transfer property title begs the question that contract theory asks: Why does a promise serve to transfer title?

然而，如果说承诺转让了财产所有权，那就引出了理论提出的问题：为什么承诺具有转让所有权的作用？

D. 对价 Consideration

Many theories have been set forth in an attempt to explain or justify why the law enforces contracts, and why it makes some promises “binding” or enforceable. It is

only a special type of promise, or a promise plus something else, that results in a legally binding contract under today's legal systems.

人们提出了许多理论，试图解释或说明为什么法律强制执行，以及为什么法律使某些承诺具有“约束力”或可强制执行。在当今的法律体系下，只有特殊类型的承诺，或者承诺加上其他东西，才会形成具有法律约束力的。

Under the common-law doctrine of bargained-for consideration, (an enforceable) contract requires a promise and consideration—something of value received in exchange for the promise.¹⁴ This is why a dollar, or ten dollars, is often given (or stated to be given) by one party who is receiving something from another party. The consideration may be another promise or something else of value. For example, in a bilateral contract, the parties obligate themselves reciprocally so that each one's promised obligation serves as the consideration for the other's promise.¹⁵ The value of the consideration given need not match the value of the thing received. In fact, even consideration as small as a “peppercorn” will suffice.¹⁶

根据普通法的约因原则，（可执行的）需要有承诺和对价——为换取承诺而收到的某种有价值的东西。¹³¹ 这就是为什么一方从另一方收到某种东西时，往往会给出（或声明给出）一美元或十美元。对价可以是另一个承诺或其他有价值的东西。例如，在双边中，双方对等地承担义务，因此每一方承诺的义务都是另一方承诺的对价。¹³² 所给

¹³¹ Saúl Litvinoff, “Still Another Look at Cause,” La. L. Rev. 48, no. 1 (Sep. 1987); <https://digitalcommons.law.lsu.edu/lalrev/vol48/iss1/5/>: 3 - 28, pp. 18 - 19; Restatement of the Law Second, Contracts 2d (St. Paul, Minn.: American Law Institute Publishers, 1981), § 71; Barnett, “A Consent Theory of Contract,” pp. 287 - 91; idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 148 - 49, et pass.

索尔·利特维诺夫（Saul Litvinoff），《再看原因》，《路易斯安那法律评论》48 卷第 1 期（1987 年 9 月；<https://digitalcommons.law.lsu.edu/lalrev/vol48/iss1/5/>）：3-28 页，第 18-19 页；《法律重述（第二次），法》（明尼苏达州圣保罗：美国法律协会出版社，1981 年），第 71 条；巴尼特，《的同意理论》，第 287-291 页；同上，《同意理论下的权利和赔偿》，第 148-149 页等。

¹³² See Louisiana Civil Code, arts. 1908 - 1909, describing unilateral and bilateral obligations. In civil law systems, “consideration” is not required, but there must be a lawful “cause” which is “the reason why” a party obligates himself. See Louisiana Civil Code, arts. 1966 & 1967; Litvinoff, “Still Another Look at Cause”; Herman,

对价的价值不必与所收物品的价值相匹配。事实上，即使是小到“胡椒粒”的对价也足够了。¹³³

Yet the antiquated doctrine of consideration has long been criticized.¹⁷ It would prevent a contract from being formed in some situations that it seems they should be, such as gratuitous (gift) promises and even some commercial promises.¹⁸ Further, if a mere promise (naked promise, or nudum pactum) is not enforceable, why does it become enforceable just because the promisee gives something small in return? Given that only a token amount of consideration—a “mere peppercorn”—is sufficient to make a promise enforceable, doesn't the doctrine of consideration elevate form over substance? Why can we not dispense with the formality and make mere promises, or at least promises with some kind of sufficient formality, enforceable? Further, under Austrian value theory, how can we say the thing given in return “has a value” to the recipient?¹⁹ Maybe he accepts it only as a formality to satisfy the courts.

“Detrimental Reliance in Louisiana Law,” p. 718; Malcolm S. Mason, “The Utility of Consideration—A Comparative View,” *Columbia L. Rev.* 41 (1941): 825–48; Jon C. Adcock, Note, “Detrimental Reliance,” *La. L. Rev.* 45, no. 3 (Jan. 1985); <https://digitalcommons.law.lsu.edu/lalrev/vol45/iss3/5/>: 753–70. For a discussion of further differences between common law and civil law legal systems, see “Legislation and the Discovery of Law in a Free Society” (ch. 13); and Rome & Kinsella, *Louisiana Civil Law Dictionary*.

参见《路易斯安那民法典》第 1908-1909 条，对单边和双边义务的描述。在大陆法系中，不需要“对价”，但必须有合法的“原因”，即一方使自己承担义务的“原因”。参见《路易斯安那民法典》第 1966 和 1967 条；利特维诺夫的“再看原因”；赫尔曼的“路易斯安那州法律中的致害依赖”，第 718 页；马尔科姆·S. 梅森的《对价的效用——比较视角》，《哥伦比亚法律评论》41 卷（1941 年）：825-848 页；乔恩·C. 阿德科克的注释“致害依赖”，《路易斯安那法律评论》45 卷第 3 期（1985 年 1 月）；<https://digitalcommons.law.lsu.edu/lalrev/vol45/iss3/5/>：753-770 页。关于普通法和大陆法法律体系之间进一步差异的讨论，参见《自由社会中的立法与法律发现》（第 13 章）；以及罗姆和金塞拉的《路易斯安那民法词典》。

¹³³ King County v. Taxpayers of King County, 133 Wash. 2d 584; 949 P.2d 1260 (Wa.S.Ct. 1997), at n.3. Yet as noted above, with inflation, people often nowadays use \$10 instead of \$1 in some attempt to satisfy the gods.

King County v. Taxpayers of King County, 133 Wash. 2d 584; 949 P.2d 1260（华盛顿州最高法院，1997 年），注释 3。然而，如上所述，由于通货膨胀，如今人们在某些情况下常常使用 10 美元而非 1 美元来试图满足神灵的要求。

然而，古老的对价原则长期以来一直受到批评。¹³⁴它将使在某些似乎应该成立的情况下无法成立，例如无偿（赠与）承诺，甚至某些商业承诺。¹³⁵此外，如果单纯的承诺（赤裸裸的承诺，或 无约因的）不能强制执行，那么为什么仅仅因为被承诺人给予了一些小的回报，承诺就变得可以强制执行了呢？鉴于只有象征性的对价——“一粒胡椒籽”——就足以使一个承诺可执行，对价学说难道不是形式重于实质吗？为什么我们不能摒弃形式，使单纯的承诺，或至少具有某种足够形式的承诺具有可执行性呢？此外，根据奥派价值理论，我们怎么能说作为回报给予的东西对接受者“有价值”呢？¹³⁶也许他接受它只是作为一种满足法院要求的形式。

From the libertarian point of view, receiving consideration for a promise does not turn the promise into an act of aggression, nor is it clear how it causes the promise to effectuate a transfer of title any better than a naked promise would.

从自由意志主义的观点来看，因承诺而收到对价并不会使该承诺变成侵犯行动，也不清楚它如何能比裸诺更好地使该承诺实现所有权的转让。

¹³⁴ See Barnett, “A Consent Theory of Contract,” pp. 287 – 91, and idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 148 – 49, et pass., for discussion and criticism of the bargain theory of consideration. See also Mason, “The Utility of Consideration.”

参见巴尼特的《同意理论》第 287-291 页，以及同上作者的《同意理论下的权利和赔偿》第 148-149 页等，以获取对约因的交易理论的讨论和批评。也可参见梅森的《对价的效用》。

¹³⁵ See Mason, “The Utility of Consideration,” pp. 832 – 42.

参见梅森的《对价的效用》，第 832-842 页。

¹³⁶ See Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar’ s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), 94 – 96 and 102 – 103; Murray N. Rothbard, “Toward a Reconstruction of Utility and Welfare Economics,” in idem, *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>).

参见路德维希·冯·米塞斯的《人的行动：关于经济学的专论》，学者版（阿拉巴马州奥本：米塞斯研究院，1998 年；<https://mises.org/library/human-action-0>），第 94-96 页和第 102-103 页；穆瑞·N. 罗斯巴德的《重建效用与福利经济学》，收录于同上，《经济学的争议》（阿拉巴马州奥本：米塞斯研究院，2011 年；<https://mises.org/library/economic-controversies>）。

E. 承诺禁止反言和致害依赖

Promissory Estoppel and Detrimental Reliance

The requirement of consideration can sometimes lead to seemingly harsh results, because some promises will be unenforceable if there is no consideration, but they will be relied upon by the promisee. A classic example is the grandfather who promises his granddaughter he will pay her tuition if she goes to college. However, in exchange, she gives nothing of legally recognized value, so there is no consideration and, thus, no binding contract. Halfway through her college career, the old man may change his mind and stop paying. What is the granddaughter to do? Can she sue to enforce the promise to pay for her tuition? Under the standard theory of contract, she cannot prevail, because consideration is missing.

对价要求有时会导致看似苛刻的结果，因为如果没有对价，有些承诺将无法执行，但被承诺人却会依赖这些承诺。一个典型的例子是，祖父承诺如果孙女上大学，他将为她支付学费。然而，作为交换，她并没有提供任何法律认可的价值，因此不存在对价，也就不存在有约束力的。孙女的大学生涯进行到一半时，老人可能会改变主意，停止支付学费。孙女该怎么办？她可以起诉要求履行支付学费的承诺吗？根据标准的理论，她无法胜诉，因为缺少对价。

The equitable doctrine of promissory estoppel is used in common law systems to form an alternative basis for enforcement of contracts.²⁰ This doctrine seeks to protect the “expectations” or “reliance interest” of the promisee.²¹ The Restatement (Second) of Contracts, for example, provides:

*A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.*²²

在普通法体系中，承诺禁止反言的衡平法理论是执行的另一种依据。¹³⁷这一理论旨在

¹³⁷ Barnett, “A Consent Theory of Contract,” p. 276 n.25 discusses the role of detrimental reliance in enforcing promises that would otherwise be unenforceable for lack of consideration. Herman, “Detrimental Reliance in Louisiana Law,” p. 713 n.19,

保护被承诺人的“期望”或“依赖利益”。¹³⁸例如，《法重述（第二版）》规定：

*“承诺人应合理预期会促使被承诺人或第三人采取 行动或作出克制的承诺，如果只有通过执行该承诺才能避免不正义，则该承诺具有约束力，而且该承诺确实会促使被承诺人或第三人采取这种行动或作出这种克制。对于违反承诺的赔偿，可视为正义的需要而加以限制。”*¹³⁹

discusses the use of promissory estoppel in common law jurisdictions as a substitute for consideration. See also Litvinoff, “Still Another Look at Cause,” p. 19. Thomas P. Egan, “Equitable Doctrines Operating Against the Express Provisions of a Written Contract (or When Black and White Equals Gray),” DePaul Bus. L. J. 5 (1993): 261 – 312, at pp. 263 – 69 & 305 – 10, discusses the historical and philosophical basis of contract law and the development of the doctrine of promissory estoppel. For additional discussion of promissory estoppel and detrimental reliance, see Randy E. Barnett & Mary E. Becker, “Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations,” Hofstra L. Rev. 15 (1987; www.randybarnett.com/pre-2000): 443 – 97; Adcock, “Detrimental Reliance”; and Christian Larroumet, “Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law,” Tul. L. Rev. 60, no. 6 (1986): 1209 – 30.

巴尼特的《的同意理论》，第 276 页注释 25 讨论了致害依赖在执行因缺乏对价而原本无法执行的承诺中的作用。赫尔曼(Herman)的《路易斯安那州法律中的致害依赖》，第 713 页注释 19，讨论了普通法辖区中承诺禁止反言作为对价替代品的使用。另见利特维诺夫的《再看原因》，第 19 页。托马斯·P. 伊根的《违背书面明确条款的衡平原则（或当黑白等于灰色时）》，《德保罗商业法律期刊》5 期（1993 年）：261-312 页，第 263-269 页和 305-310 页，讨论了法的历史和哲学基础以及承诺禁止反言原则的发展。关于承诺禁止反言和致害依赖的更多讨论，参见兰迪·E. 巴尼特和玛丽·E. 贝克尔的《超越信赖：承诺禁止反言、形式和虚假陈述》，《霍夫斯特拉法律评论》15 期（1987 年：www.randybarnett.com/pre-2000）：443-497 页；阿德科克的《致害依赖》；以及克里斯蒂安·拉鲁梅的《路易斯安那州和比较法中作为原因的致害依赖和承诺禁止反言》，《杜兰法律评论》60 卷第 6 期（1986 年）：1209-1230 页。

¹³⁸ See Evers, “Toward a Reformulation of the Law of Contracts”; and Rothbard, “Property Rights and the Theory of Contracts,” p. 133.

参见埃弗斯《迈向法的重新表述》；罗斯巴德《财产权与理论》，第 133 页。

¹³⁹ American Law Institute, Restatement (Second) of Contracts § 90(1) (1979). Civil law systems provide similar grounds for enforcement of promises. The idea of detrimental reliance can be found in Roman law and in the Latin maxim venire contra proprium factum (no one can contradict his own act). Herman, “Detrimental Reliance in Louisiana Law,” p. 714.

Similarly, the Louisiana Civil Code provides:

*A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise.*²³

同样，《路易斯安那民法典》规定：

*当一方知道或应当知道其承诺会导致另一方依赖该承诺而使其遭受损害，且另一方的依赖是合理的，该方可能因该承诺而承担义务。赔偿可能仅限于因受诺人对该承诺的依赖而产生的费用或遭受的损害。*¹⁴⁰

If there is “detrimental reliance,” promissory estoppel can be invoked to enforce the promise. Even though there is technically not a valid contract, because, for example, the promisee gave no consideration, the promisor is “estopped” to deny this because this would work a hardship on the promisee.²⁴ In the case of the granddaughter, she can prevail in court under this theory. In this way, detrimental reliance is used as an alternative ground for contract enforcement. The idea of protecting the expectations or reliance interests of promisees is also sometimes seen as the primary justification for enforcing contracts.

如果存在 “致害依赖”，则可以援引承诺禁止反言来强制执行承诺。即使技术上不存在有效，例如因为被承诺人没有给予对价，承诺人也被“禁止”否认这一点，因为这会接受承诺人造成困难。¹⁴¹ 在孙女的案例中，根据这一理论，她可以在法庭上胜诉。通过

美国法学会，《重述（第二版）》第 90(1)条（1979 年）。大陆法体系为承诺的执行提供了类似的理由。损害性信赖的概念可在罗马法和拉丁格言 venire contra proprium factum（任何人不得违背自己的行为）中找到。赫尔曼，《路易斯安那州法律中的致害依赖》，第 714 页。

¹⁴⁰ Louisiana Civil Code, art. 1967. See also Litvinoff, “Still Another Look at Cause,” pp. 18 – 28.

《路易斯安那民法典》第 1967 条。另见利特维诺夫的《再看原因》，第 18-28 页。

¹⁴¹ See Litvinoff, “Still Another Look at Cause,” pp. 23 – 24. For further discussion of promissory estoppel, see “A Libertarian Theory of Punishment and Rights” (ch. 5), Part. III.A, “Legal Estoppel.”

参见利特维诺夫的《再看原因》，第 23-24 页。关于承诺禁止反言的进一步讨论，请参见《自由意志主义的惩罚与权利理论》（第 5 章），第三部分 A，“法律禁止反言”。

这种方式，致害依赖被用作执行的替代依据。保护被承诺人的期望或依赖利益的理念有时也被视为执行的主要理由。

The theory of detrimental reliance rests on the notion that a promise sets up an "expectation" of performance in the mind of the promisee which induces him to act because he "reasonably relies" on this expectation. But this is confused. Every time someone acts, he is "relying" on some understanding of reality. This reliance might be quite ridiculous or unreasonable. Thus, all detrimental reliance theories and doctrines inevitably qualify the theory by saying that a promise is enforceable only if the promisee reasonably or justifiably relied on the promise.²⁵ If the reliance is not reasonable, it is not really the promisor's "fault" that the promisee relied. The promisor could not have anticipated outlandish reliance.

致害依赖理论基于这样一种观念，一项承诺在被承诺人的心目中树立了一种对履行承诺的“期望”，这种期望诱使他采取行动，因为他“合理地依赖”这种期望。但这种说法是混乱的。每当一个人采取行动时，他都在“依赖”对现实的某种理解。这种依赖有可能是非常荒谬或不合理的。因此，所有致害依赖理论和原则都不可避免地对该理论加以限定，即只有当被承诺人合理或正当地依赖于承诺时，该承诺才可强制执行。

¹⁴²如果信赖并非合理，则被承诺人信赖该承诺并非真的是承诺人的过错。承诺人不可能预料到会有如此离奇的依赖。

One major problem with this doctrine, however, is its circularity. In deciding whether to rely on a given promise, a reasonable person would take into account whether promises, in a given legal system, are enforceable. If promises without consideration are known to be unenforceable, for example, it would be unreasonable to rely on them because it is known that the promisor is not obligated to keep his promise. Thus, reliance depends on enforceability. Yet, the detrimental reliance doctrine makes enforceability itself depend on reliance, hence the circularity.²⁶ As such, conventional theories of contract enforcement are defective.

然而，这一原则的一个主要问题是其循环性。一个通情达理的人在决定是否依赖某项

¹⁴² Barnett, "A Consent Theory of Contract," p. 275.
巴尼特，《的同意理论》，第 275 页。

承诺时，会考虑到在特定的法律体系中，承诺是否可以执行。例如，如果众所周知没有对价的承诺是不可执行的，那么依赖这些承诺就是不合理的，因为众所周知承诺人没有义务信守承诺。因此，依赖取决于可执行性。然而，致害依赖理论使可执行性本身取决于依赖，因此出现了循环论证。¹⁴³ 正因如此，传统的执行理论是有缺陷的。

For the libertarian, another problem with detrimental reliance is that it is not explained why a person's **reliance** on the statements or representations of another gives the relying person a right to rely on them. Why can a person be forced to perform or liable for failure to perform a promise just because it is **relied on** by another? The default assumption for the libertarian is that you rely on the statements of others at your own risk.

对自由意志主义者来说，致害依赖的另一个问题是，它没有解释为什么一个人对另一个人的陈述或表述的“依赖”赋予了依赖者依赖它们的权利。为什么一个人可以仅仅因为被他人“依赖”而被迫履行承诺或为不履行承诺承担责任呢？自由意志主义的默认假设是，你依赖他人的陈述，风险自担。

As we see, then, the mainstream theories proposed to date that are purported to justify and explain the institution of contract have been, by and large, inconsistent and unsatisfying.

因此，我们看到，迄今为止提出的旨在证明和解释制度的主流理论，总的来说，是不一致的也是无法令人满意的。

II. 所有权转让的理论

THE TITLE-TRANSFER THEORY OF CONTRACT

¹⁴³ For discussions of the circularity of reliance theories of promising, see F.H. Buckley, “Paradox Lost,” Minn. L. Rev. 72 (1988; <https://scholarship.law.umn.edu/mlr/1293/>): 775 – 827, at p. 804; Barnett, “A Consent Theory of Contract,” pp. 274 – 75, 315 – 316; and Barnett & Becker, “Beyond Reliance,” pp. 446 – 47, 452. 关于承诺信赖理论的循环性论证，参见 F.H. 巴克利的《悖论的消失》，《明尼苏达法律评论》72 期（1988 年；<https://scholarship.law.umn.edu/mlr/1293/>）：775-827 页，第 804 页；巴尼特的《的同意理论》，第 274-275 页、315-316 页；以及巴尼特和贝克尔的《超越信赖》，第 446-447 页、452 页。

A 埃弗斯-罗斯巴德所有权转让理论

Evers-Rothbard Title-Transfer Theory

A much better grounding for contract law is found in the writings of libertarian theorists Murray Rothbard and Williamson Evers, who advocate a title-transfer theory of contract.²⁷ As Rothbard and Evers point out, a binding contract should be considered as one or more transfers of title to (alienable) property, usually title transfers exchanged for each other. A contract should have nothing to do with promises, which at most serve as evidence of a transfer of title. A contract is nothing more than a way to give something you own to another.

自由意志主义理论家穆瑞·罗斯巴德 (Murray Rothbard) 和威廉姆森·埃弗斯 (Williamson Evers) 的著作作为法提供了更合理的依据，他们主张的所有权转让理论。

¹⁴⁴正如罗斯巴德和埃弗斯所指出的，有约束力的应被视为（可转让）财产所有权的一次或多次转让，通常是相互交换的所有权转让。应与承诺无关，承诺最多只能作为财产权转让的证据。不过是将自己拥有的东西给予他人的一种方式。

¹⁴⁴ The theory discussed in this section is largely based on that developed by Rothbard, “Property Rights and the Theory of Contracts,” and Evers, “Toward a Reformulation of the Law of Contracts,” although I suggest some additions and changes. I also discuss the origin of the Rothbard-Evers contract theory in my post “Justice and Property Rights.” Randy Barnett has also contributed important insights to the theory of contracts. See Barnett, “A Consent Theory of Contract”; idem, “Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud,” Harv. J. L. & Pub. Pol’y 15 (1992; www.randybarnett.com/pre-2000): 783 – 803; and idem, “The Sound of Silence: Default Rules and Contractual Consent,” Va. L. Rev. 78 (1992; www.randybarnett.com/ pre-2000): 821 – 911.

本节讨论的理论主要基于罗斯巴德《财产权与理论》和埃弗斯《走向法的重新表述》所提出的理论，不过我提出了一些补充和修改建议。我在我的文章《正义与财产权》中也讨论了罗斯巴德-埃弗斯理论的起源。兰迪·巴尼特也为理论贡献了重要的见解。参见巴尼特的《的同意理论》；同上，《理性谈判理论与：默认规则、假设同意、披露义务与欺诈》，《哈佛法律与公共政策杂志》15 期（1992 年；www.randybarnett.com/pre-2000）：783-803；以及同上，《沉默之声：默认规则与同意》，《弗吉尼亚法律评论》78 期（1992 年；www.randybarnett.com/pre-2000）：821-911。

Title may be conveyed without ever promising anything. I can, for example, manually give you a dollar in payment for a soda. No words need be exchanged. Or I can simply state my intention to give you something I own: “I hereby give you my car,” or even “I hereby give you my car in three days.” There need be no “promise” involved. In general, title is transferred by manifesting one’s intent to transfer ownership or title to another.²⁸ A promise can be one way of doing this, but it is not necessary. Rothbard and Evers seem to have a fixation on the word “promise” and do not agree that a promise can convey title. They appear to think that because a promise is not enforceable, it therefore cannot serve to transfer title to property.²⁹ However, a promise can be intended and understood to convey title, and thus can operate to do so. In certain contexts, the making of a promise can be one way to manifest one’s intent to transfer title. Contracts always involve communication and some type of language, when the owner of a resource communicates his consent to allow someone else to use or have his resource. Language is always contextual. There is no reason that use of the word “promise” cannot be intended to signify an intent to give contractual permission or consent.

所有权可以在不做任何承诺的情况下转让。例如，我可以亲手给你一美元，作为一杯汽水的报酬。无需言语交流。或者，我可以简单地表明我打算把我拥有的东西给你：“我在此将我的车给你”，甚至“我在此三天后把我的车给你”。无需涉及“承诺”。一般来说，所有权的转让是通过表明自己有意将所有权或财产权转让给他人来实现的。¹⁴⁵ 承诺可以是一种方式，但并非必要。罗斯巴德和埃弗斯似乎对“承诺”一词情有独钟，

¹⁴⁵ Evers, “Toward a Reformulation of the Law of Contracts,” p. 12 n.20, endorses making “objectively observable conduct symbolizing consent the standard for determining whether consent has been given.” See also Barnett, “A Consent Theory of Contract,” p. 303: “Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function.” And, on p. 305, emphasis in the original: “The consent that is required [to transfer rights to alienable property] is a manifestation of an intention to alienate rights.” 埃弗斯在《迈向法的重新表述》第 12 页注释 20 中，赞同将“象征同意的客观可观察行为作为确定是否已给予同意的标准”。另见巴尼特的《的同意理论》第 303 页：“只有普遍依赖于客观可确定的断言行为，才能使权利体系履行其被赋予的界定边界的功能。”并且，在第 305 页（着重号为原文所加）：“[转让可转让财产的权利]所需的同意是转让权利意图的表现”。

不同意承诺可以转让所有权。他们似乎认为，由于承诺是不可强制执行的，因此它不能起到转让财产所有权的作用。¹⁴⁶ 但是，承诺可以有意图并被理解为转让所有权，因此可以起到转让所有权的作用。在某些情况下，作出承诺是表明转让所有权意图的一种方式。当资源所有者表示同意他人使用或拥有其资源时，总是涉及沟通和某种类型的语言。语言总是有上下文的。使用“承诺”一词没有理由不表示授予许可或同意的意图。

¹⁴⁶ Rothbard, “Property Rights and the Theory of Contracts,” p. 141; and Evers, “Toward a Reformulation of the Law of Contracts,” p. 6. But see also Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholar’s ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), p. 177:

Contract must be considered as an agreed-upon exchange between two persons of two goods, present or future.... Failure to fulfill contracts must be considered as theft of other’s property. Thus, when a debtor purchases a good in exchange for a promise of future payment, the good cannot be considered his property until the agreed contract has been fulfilled and payment is made.... An important consideration here is that contract not be enforced because a promise has been made that is not kept. It is not the business of the enforcing agency or agencies in the free market to enforce promises merely because they are promises; its business is to enforce against theft of property, and contracts are enforced because of the implicit theft involved. Evidence of a promise to pay property is an enforceable claim, because the possessor of this claim is, in effect, the owner of the property involved, and failure to redeem the claim is equivalent to theft of the property.

See also *ibid.*, pp. 176 – 80; and Rothbard, “Property Rights and the Theory of Contracts,” pp. 137 – 38.

罗斯巴德，《财产权与理论》，第 141 页；以及埃弗斯，《迈向法的重新表述》，第 6 页。但也可参见穆瑞·N·罗斯巴德，《人、经济与国家，权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；<https://mises.org/library/man-economy-and-state-power-and-market>），第 177 页：

必须被视为两个人之间就两种财货（现在的或未来的....）进行的约定交换。不履行必须被视为盗窃他人财产。因此，当债务人购买货物以换取未来付款的承诺时，在履行约定的并付款之前，该货物不能被视为他的财产....。这里的一个重要考虑因素是，不能因为做出的承诺没有兑现而强制执行。在自由市场中，执行机构或代理机构的职责不是仅仅因为承诺而执行承诺；其职责是防止财产被盗，而之所以被执行，是因为其中隐含着盗窃行为。承诺支付财产的证据是一种可执行的债权，因为这种债权的拥有者实际上是所涉财产的所有者，不赎回债权就等同于盗窃财产。

另见同上，第 176-180 页；以及罗斯巴德，《财产权与理论》，第 137-138 页。

Ultimately, contracts are enforceable simply by recognizing that the transferee, instead of the previous owner, is the current owner of the property. If the previous owner refuses to turn over the property transferred, he is committing an act of aggression (trespass, use of the property of another without permission) against which force may legitimately be used.

归根结底，只要承认受让人而非前所有者是财产的现任所有者，就可以执行。如果前所有者拒绝交出转让的财产，他就是在实施侵犯行动（非法侵入，未经许可使用他人财产），可以合法地对其使用武力。

B 有条件的所有权转让 Conditional Transfers of Title

The simplest title transfers are contemporaneous and manual. For example I hand a beanie baby to my niece as a gift. However, most transfers are not so simple, and are conditional. Any future-oriented title transfer in particular is necessarily conditional, since the future is uncertain. For example, before dinner, I tell my niece that she gets the beanie baby after dinner if she behaves during dinner. The transfer of title is future-oriented and conditional upon certain events taking place. If my niece behaves, then she acquires title to the beanie baby. Future transfers of title are usually expressly conditioned upon the occurrence of some future event or condition.

最简单的所有权转让是当时的手动转让。例如，我把一个豆豆宝宝作为礼物送给我的侄女。然而，大多数转让并不那么简单，而是有条件的。尤其是任何面向未来的所有权转让都必须是有条件的，因为未来是不确定的。例如，晚饭前，我告诉侄女，如果她在吃饭时表现好，晚饭后她就能得到小豆豆。所有权转让是面向未来的，以某些事件的发生为条件。如果我的侄女表现好，那么她就获得了小豆豆的所有权。所有权的未来转让通常明确以某些未来事件或条件的发生为条件。

In addition, because the future is not certain,³⁰ all future-oriented title transfers are necessarily conditioned upon the item to be transferred existing at the designated time of transfer. Title to something that does not exist cannot be transferred. Consider the situation where I own no hamster but tell my niece, "Here, I give this hamster to you." In this case, "this hamster" has no referent so no title is transferred. Likewise, the future beanie baby transfer is conditional not only on the expressly stated condition—the niece performing the specified action (behaving)—but also on the unstated condition

that the beanie baby exists at the designated future transfer time. During dinner, the cat might destroy it, or it might be lost, or consumed by fire. In this case, even if the niece behaves, there is no beanie baby left for her to acquire. In effect, when agreeing to a future title transfer, the transfer is inescapably accompanied by a condition: "I transfer a thing to you at a certain time in the future—if, of course, the thing exists."

此外，由于未来是不确定的，¹⁴⁷ 所有面向未来的所有权转让必然取决于待转让的物品在指定的转让时间存在。不存在的东西的所有权是不能转让的。考虑这样一种情况：我并不拥有仓鼠，但我告诉我的侄女：“来，我把这只仓鼠给你”。在这种情况下，“这只仓鼠”没有参照物，因此所有权没有转让。同样，未来的豆豆宝宝的转让不仅取决于明确的条件——侄女履行指定的行动（表现良好）——而且取决于未说明的条件，即豆豆宝宝在指定的未来转让时间存在。在晚餐时，猫可能会毁坏它，也可能会丢失或被火烧掉。在这种情况下，即使侄女乖巧听话，也没有豆豆宝宝留给她了。实际上，在同意未来所有权转让时，转让不可避免地附带了一个条件：“我在未来某个时间将某物转让给你——当然，前提是该物存在”。

Like future title transfers, title exchanges are also necessarily conditional. This is true even of a simple, contemporaneous exchange. I hand you my dollar and you hand me your chocolate bar. Because it is an exchange rather than two unrelated transfers, the title transfers are each conditional. I give my dollar to you only on the condition that you give your chocolate bar to me, and vice-versa. Exchange contracts quite often involve at least one future title transfer which is given in exchange for either a contemporaneous or future title transfer by the other party. In this case, each title transfer is conditional upon the other title transfer being made. Also, any future title transfers are conditional upon the future existence of the thing to be transferred.

与未来的所有权转让一样，所有权交换也必然是有条件的。即使是简单的即时交换也是如此。我把我一美元递给你，你把你的巧克力棒递给我。因为这是一次交换，而非两次无关的转让，所以每次的财产权转让都是有条件的。我把美元给你的条件是你

¹⁴⁷ See Hans-Hermann Hoppe, “On Certainty and Uncertainty, Or: How Rational Can Our Expectations Be?” , in *The Great Fiction*.

见汉斯-赫尔曼·霍普的《论确定性与不确定性，或：我们的期望能有多理性？》，载于《伟大的虚构》。

把巧克力棒给我，反之亦然。交换通常至少涉及一项未来的财产权转让，以换取另一方同时或未来的财产权转让。在这种情况下，每一次财产权转让都以另一次财产权转让为条件。此外，任何未来的财产权转让都以被转让物的未来存在为条件。

Many types of contracts can be formed by imposing various conditions on the title transfers involved. For example, suppose that we make the following wager: If the horse Starbucks finishes first, then I transfer to you \$100; otherwise, the \$10 you gave me remains mine to keep. In this case, you transferred title to \$10 to me at the moment of the wager, conditioned on my agreeing, at the moment of the wager, to a future, conditional transfer of \$100 to you. I transferred title to \$100 to you in the future, on two conditions: the explicit condition that Starbucks wins, and the implied condition that I have title to \$100 at the designated future payment time (and that we both exist!).

通过对相关所有权转让施加各种条件，可以形成许多类型的。例如，假设我们下了如下赌注：如果赛马“星巴克”获得第一名，那么我将 100 美元转让给你；否则，你给我的 10 美元仍归我所有。在这种情况下，你在下注时将 10 美元的所有权转让给我，条件是我在下注时同意将来有条件地将 100 美元转让给你。我在未来将 100 美元的所有权转让给你，取决于两个条件：明确的条件是“星巴克”获胜，隐含的条件是在未来指定的付款时间我拥有 100 美元的所有权（而且我们都存在！）。

In a loan contract, the creditor conveys title to money (the principal) to the debtor in exchange for a present agreement to a future transfer of money (principal plus interest) from the debtor to the creditor. For example, Jim borrows \$1000 now from Bank to be repaid in a year with \$100 interest. Analyzed in terms of title transfers, Bank transfers title to \$1000 of its money to Jim in the present in exchange for (conditioned on) Jim contemporaneously agreeing to a title transfer to future property; and Jim's future title transfer is executed in exchange for the contemporaneous \$1000 title transfer.³¹

在贷款中，债权人向债务人转让金钱（本金）的所有权，以换取债务人向债权人转让金钱（本金加利息）的现时协议。例如，吉姆现在向银行借款 1000 美元，一年后连本带利偿还 1100 美元。从财产权转让的角度分析，银行在当前将其 1000 美元资金的财产权转让给吉姆，以换取（基于）吉姆同时同意未来财产的所有权转让；而吉姆

未来所有权转让的执行是以同时进行的 1000 美元所有权转让为交换条件的。¹⁴⁸

A contract in which payment is to be made for the performance of a service, such as an employment arrangement, is not an exchange of titles, because the employee does not transfer any title. Although it may be referred to as an exchange of title for services, such a contract is better viewed as a conditional, future transfer of title to the monetary payment, conditioned upon the specified services being performed. That is, if you mow

¹⁴⁸ One problem with using US dollars as an example is that the USD system is a fiat currency, and it is not clear anymore what exactly is “owned” by people holding dollar bills of various denominations or federal-government insured bank-accounts with fiat dollars. The reader can substitute owned gold coins instead of fiat for conceptual clarity. As I have argued, even bitcoins are not properly ownable, and the status of ownership of state-created fiat money is even murkier. See Kinsella, “Nobody Owns Bitcoin,” StephanKinsella.com (April 21, 2021). But we assume here \$1000 represents title to a certain amount of something ownable, like gold.

As for so-called “conveyances,” it is interesting to note one difference in the common law and the civil law is that, in the civil law, “Land is not ‘conveyed’ by deed but is sold.” Patrick H. Martin & J. Lanier Yeates, “Louisiana and Texas Oil & Gas Law: An Overview of the Differences,” *La. L. Rev.* 52, no. 4 (March 1992); <https://digitalcommons.law.lsu.edu/lalrev/vol52/iss4/3/>: 769 – 860, at 787. See also “Legislation and the Discovery of Law in a Free Society” (ch. 13), Part V.B, discussing the relative superiority of the civil law in its more streamlined conception of real property rights. See also *ibid*, Part III.C.4, re Hoppe’s comments about the relative merits of the civil law system over the common law system.

以美元为例存在一个问题，即美元体系是法定货币，持有各种面额的美元钞票或拥有联邦政府担保的以法定货币计价的银行账户的人们究竟“拥有”什么，已不再明确。为了概念清晰，读者可以用拥有的金币代替法定货币。正如我所主张的，甚至比特币也不能被恰当地拥有，而国家创造的法定货币的所有权状况则更加模糊。见金塞拉的《无人拥有比特币》，StephanKinsella.com（2021 年 4 月 21 日）。但我们在此假设 1000 美元代表对一定数量可拥有之物（如黄金）的所有权。

至于所谓的“转让”，有趣的是要注意到普通法系和大陆法系的一个区别在于，在大陆法系中，“土地不是通过‘转让’的，而是出售的。” Patrick H. Martin & J. Lanier Yeates, 《路易斯安那州和得克萨斯州的石油和天然气法：差异概述》，《路易斯安那法律评论》第 52 卷，第 4 期（1992 年 3 月；<https://digitalcommons.law.lsu.edu/lalrev/vol52/iss4/3/>）：769-860，第 787 页。另见《自由社会中的立法与法律发现》（第 13 章），第五部分 B，讨论大陆法系在其更简化的不动产权利概念方面的相对优越性。另见同上，第三部分 C.4，关于霍普对大陆法体系相对于普通法体系相对优点的评论。

my lawn, then title to this gold coin transfers to you. Again, the transfer of title in this case is both expressly conditional and future-oriented. Title to the coin transfers only if the lawn is mowed, and if I still own the coin.³²

为提供服务而付款的，如雇用安排，不是所有权交换，因为雇员没有转让任何所有权。虽然它可以被称为服务所有权交换，但这种最好被视为有条件的、未来的货币支付所有权转让，以履行指定的服务为条件。也就是说，如果你帮我修剪草坪，那么这枚金币的所有权就会转让给你。同样，这种情况下的所有权转让既是明确有条件的，也是面向未来的。只有在草坪修剪完毕且我仍然拥有这枚金币的情况下，金币的所有权才会转让。¹⁴⁹

Also, as evident in the beanie baby example above, the title-transfer theory of contract permits gift contracts (donations) as well as exchanges. The common law is reluctant to enforce gift contracts because of the lack of consideration. Under the rubric of “hard cases make bad law” (such as the grandfather promising to pay his granddaughter’s tuition), such systems use the circular theory of promissory estoppel to enforce such

¹⁴⁹ Part of the confusion here stems from conflating the economic-descriptive-wertfrei realm and the normative realm of law and rights. In human action—in praxeological terms—there is employment of means, which requires control of resources. Every action requires choice among possible ends and this requires losing the next-highest valued end, which is reflected in the economic concept of opportunity cost. This could be viewed as a primordial type of exchange, that even Crusoe could engage in: he “exchanges” the chance to spend a night in leisure for the opportunity to catch more fish in the future (by spending his Friday night, no pun intended, to make a fishing net). In society, A might exchange something he controls with B; each benefits ex ante. When there are property rights and a developed legal system, then sales, exchange, and so on have a legal aspect and exchange refers to legal owners transferring their ownership over ownable, scarce resources to someone else, usually reciprocally and conditionally. 这里的部分困惑源于将经济描述性的“价值无涉”领域与法律和权利的规范领域相混淆。在人的行动中——从行动学的角度来看——存在对手段的运用，这需要对资源的控制。每一个行动都需要在可能的目的中进行选择，这就需要放弃次优价值的目的，这反映在经济概念中的机会成本上。这可以被视为一种原始类型的交换，甚至鲁宾逊·克鲁索也能参与其中：他“交换”了休闲度过一晚的机会，以换取未来捕捉更多鱼的机会（通过在周五晚上（没有双关的意思）制作渔网）。在社会中，A 可能会与 B 交换他所控制的东西；每个人都预先会受益。当存在财产权和发达的法律体系时，那么销售、交换等等就具有法律的一面，交换指的是合法所有者将他们拥有的稀缺资源的所有权转让给其他人，通常是相互的且有条件的。

contracts.

另外，正如上文豆豆宝宝的例子所示，所有权转让的理论允许赠与（捐赠）以及交换。普通法系不赞成执行赠与，因为缺乏对价。在“难案造就恶法”（如祖父承诺支付孙女的学费）的名义下，此类系统使用承诺禁止反言的循环理论来执行此类。

The title-transfer theory of contract, on the other hand (like the civil law), does not discriminate between gratuitous and onerous contracts¹⁵⁰—between donations (gifts) and mutual exchanges. The owner of property may convey title to another, for any reason, whether pecuniary, charitable, or arbitrary, by manifesting and communicating his intent to do so. Gifts of property or title exchanges are all operative and, thus, enforceable.

另一方面，所有权转让的理论（与大陆法一样）并不区分无偿和有偿¹⁵⁰——捐赠（赠与）和相互交换。财产所有者可以出于任何原因，无论是金钱、慈善或任意原因，通过表明和传达其意图，将所有权转让给他人。财产的赠予或所有权的交换都是有效的，因此也是可执行的。

C 履行承诺 Enforcement of Promises

Although a variety of contractual arrangements can be constructed using conditional transfers of title, there would seem to be no way to compel someone to perform an agreed-upon action, such as a service— the promise “to do” or “not to do” as opposed to the promise “to give.” The only way to actually enforce a promise to perform a given action is to have the right to inflict, well, physical force, as either punishment or inducement to perform, on the defaulting party’s body. A promise to paint a house or sing at a party, for example, can be enforced only by threatening to use force against the promisor to force him to perform, or by punishing him afterwards for failing to perform.

虽然可以利用有条件的所有权转让来构建各种安排，但似乎没有办法迫使某人履行约

¹⁵⁰ See Louisiana Civil Code, arts. 1909 & 1910, describing gratuitous and onerous contracts.

参见《路易斯安那州民法典》第 1909 和 第 1910 条，描述了无偿和有偿。

定的行动，例如服务——即“去做”或“不做”的承诺，而非“授予”的承诺。要想真正强制某人履行某一指定行动的承诺，唯一的办法就是有权对违约方的身体施以暴力，无论是作为惩罚还是作为履行承诺的诱因。例如，要履行粉刷房子或在晚会上唱歌的承诺，只能通过威胁对承诺人使用武力迫使他履行，或事后惩罚他不履行。

However, under libertarian theory, there are only three ways that it is permissible to use force against the body of another: if he consents to the force, if he is committing or has committed aggression, or if his body is owned by someone else.

然而，根据自由意志主义理论，只有在三种情况下才允许对他人的身体使用武力：假如他同意使用武力，假如他正在或已经实施侵犯，或者假如他的身体为他人所有。

As noted above, the making of a promise is not the commission of aggression. At most, promises are evidence of an intent to transfer title. Therefore, there is no aggression to justify the enforcement option. Assuming the promisor does not consent to being punished, the second option is likewise unavailable. The third option assumes that the promisor has, in effect, transferred his rights in his body to the promisee, i.e., sold himself into slavery. However, although one may be considered to be a self-owner, one's body is inalienable.³⁴

如上所述，作出承诺并不是实施侵犯。承诺充其量只能证明转让所有权的意图。因此，不存在能证明强制手段是正当的侵犯。假设承诺者不同意接受惩罚，那么第二种选择同样不可行。第三种选择假定承诺人实际上已将自己身体的权利转让给了被承诺人，即把自己卖为奴隶。然而，尽管一个人可以被视为自我所有者，但他的身体是不可让渡的。¹⁵¹

Therefore, contracts involve only conditional transfers of title to scarce resources external to the body. Promises cannot actually be enforced. The inability of the title-transfer theory to enforce promises might be seen, by some, as a defect of the theory. These critics predict chaos and the loss of the ability to have binding commitments. However, as noted above, even in modern legal systems, there is almost never enforcement of contractual obligations “to do” things. The primary enforcement mechanism utilized is to order the party in breach of contract to pay money damages

¹⁵¹ See Part III below.
见下文第 III 部分。

to the other party, not to perform the promised service. The inability to “enforce” promises in today’s legal system has not resulted in the death of contract. The same result can be obtained under the title-transfer theory of contract by using conditional title-transfers to provide for “damages” to “enforce” promises to perform. When a contract to do something is to be formed and the parties want there to be an incentive for the specified action to be performed, the parties agree to a conditional transfer of title to a specified or determinable sum of monetary damages, where the transfer is conditional upon the promisor’s failure to perform.³⁵

因此，只涉及身体之外的稀缺资源所有权的有条件转让。承诺实际上无法强制执行。所有权理论无法强制执行承诺，可能会被一些人视为该理论的缺陷。这些批评者预言会出现混乱，并失去作出有约束力承诺的能力。然而，如上所述，即使在现代法律体系中，也几乎从未强制执行过“做事情”的义务。所利用的主要强制执行机制是命令违约方向对方支付金钱赔偿，而不是履行承诺的服务。在当今的法律体系中，无法“执行”承诺并没有导致的死亡。在所有权转让的理论下，利用有条件的所有权转让规定“损害赔偿”来“强制”履行承诺，也可以得到同样的结果。当要订立做某事的时，当事人希望有一种激励机制来促使指定的行动得到履行，双方就会同意有条件地转让所有权，以获得一笔指定的或可确定金额的货币损害赔偿，而转让的条件是承诺人不履行义务。¹⁵²

This provides a result similar to today’s system where the party who fails to perform owes monetary damages to the other party.

这提供了一种类似于当今制度的结果，即未能履约的一方应向另一方支付金钱损害赔偿

¹⁵² See Rothbard, “Property Rights and the Theory of Contracts,” pp. 138 – 141; Evers, “Toward a Reformulation of the Law of Contracts,” p. 9; Barnett, “A Consent Theory of Contract,” p. 304 n. 143; idem, Barnett, “Contract Remedies and Inalienable Rights,” pp. 190 – 91, 197; and idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 145, 170, discussing similar performance-enforcing schemes through title-transfers to “money damages,” which Rothbard and Evers refer to as a performance bond. 见罗斯巴德的《财产权与理论》，第 138-141 页；埃弗斯的《迈向法的重新表述》，第 9 页；巴尼特的《的同意理论》，第 304 页注释 143；同上，巴尼特的《赔偿与不可让渡的权利》，第 190-191、197 页；以及同上，《同意理论下的中的权利与赔偿》，第 145、170 页，讨论了通过“金钱损害赔偿”的所有权转让的类似履行强制执行方案，罗斯巴德和埃弗斯将其称为履约保证金。

偿。

For example, if Karen wants to “hire” Ethan to paint her house, she agrees to pay Ethan \$3,000 on a specified future day X if he has painted her house by that day. In other words, Karen makes the following conditional conveyance of title: “I hereby transfer title to \$3,000 to Ethan on day X if he has painted my house (and if I own \$3,000).” But such a unilateral arrangement only obligates Karen. She may want to give Ethan an extra incentive to perform (in addition to the prospect of payment and his promise-keeping reputation). For example, she may be planning an important business-related poolside party at her house, for which it is important that various promisors perform certain actions, such as mowing the lawn, cleaning the house and the pool, and showing up to serve as waiters and chefs. She would like to be able to obtain damages from Ethan in the event of nonperformance, and can, thus, contract with him so that he agrees to pay a specified or determinable sum of money in the event that he does not perform.

例如，如果凯伦想 “雇用” 伊森粉刷她的房子，她同意在未来特定的 X 日付给伊森 3 000 美元，条件是伊森在这一天之前粉刷完她的房子。换句话说，凯伦做出了如下有条件的所有权转让：“如果伊森粉刷了我的房子，我特此在 X 日将 3000 美元的所有权转让给他（如果我拥有 3000 美元）”。但这种单方面的安排只对凯伦有约束力。她可能希望给伊森一个额外的激励来促使他履行义务（除了付款前景和他信守承诺的声誉之外）。例如，她可能正在她的房子里计划一个重要的与业务相关的池畔派对，对于这个派对，各种承诺者履行某些行动很重要，比如修剪草坪、打扫房子和泳池，以及到场充当服务员和厨师。她希望在伊森不履行的情况下能够从他那里获得损害赔偿，因此可以与他订立，让他同意在未履行时支付一笔规定的或可确定的金额。

In sum, conditional title transfers can be used to provide for damages payable upon nonperformance of a promised service. This provides for almost the same type of enforcement mechanism used in modern legal systems today, in which contracts are widely used and relied upon. Indeed, although this approach to contracts seems odd to those used to the conventional “binding promises” view of contract, it is not really new. As Randy Barnett observes:

Viewing contract law as part of a more general theory of individual entitlements that specifies how resources may be rightly acquired (property law), used (tort law), and

*transferred (contract law) is not new.*³⁶

总之，有条件的所有权转让可以用来规定不履行承诺服务时的损害赔偿金。这就提供了与当今现代法律制度中使用的几乎相同的执行机制，在现代法律制度中，被广泛使用和依赖。事实上，虽然这种方法对于那些习惯于传统的“有约束力的承诺”观的人来说似乎有些奇怪，但它其实并不新鲜。正如兰迪·巴尼特（Randy Barnett）所言：

将法视为更普遍的个人权利理论的一部分，该理论规定了如何正确地获取资源（财产法）、使用资源（侵权法）和转让资源（法），这并不是什么新的观点。¹⁵³

¹⁵³ Barnett, “A Consent Theory of Contract,” p. 292, and idem, “Rights and Remedies in a Consent Theory of Contract,” p. 137. See also Morton J. Horwitz, *The Transformation of American Law, 1780 – 1860* (Harvard University Press, 1977), p. 162: [A]s late as the eighteenth century contract law was still dominated by a title theory of exchange...

To modern eyes, the most distinctive feature of eighteenth century contract law is the subordination of contract to the law of property. In Blackstone’s Commentaries contract appears for the first time in Book II, which is devoted entirely to the law of property. Contract is classified among such subjects as descent, purchase, and occupancy as one of the many modes of transferring title to a specific thing...

巴尼特，《同意理论》，第 292 页，以及同上，《同意理论下的权利与赔偿》，第 137 页。另见莫顿·J·霍维茨，《1780-1860 年美国法律的转型》（哈佛大学出版社，1977 年），第 162 页：

“直到 18 世纪，法仍由交换的所有权理论主导……”

在现代人看来，18 世纪法最显著的特征是从属于财产法。在布莱克斯通的《评注》中，首次出现在第二卷，这一卷完全致力于财产法。与诸如继承、购买和占有等主题一起被归类为转让特定事物所有权的众多方式之一……

As a result of the subordination of contract to property, eighteenth century jurists endorsed a title theory of contractual exchange according to which a contract functioned to transfer title to the specific thing contracted for. Thus, Blackstone wrote that where a seller fails to deliver goods on an executory contract, “the vendee may seize the goods, or have an action against the vendor for detaining them.” Similarly, in the first English treatise on contract, Powell wrote of the remedy for failure to deliver stock on an executory contract as being one for specific performance.

See also Evers, “Toward a Reformulation of the Law of Contracts,” p. 7: “[Lysander] Spooner and other legal philosophers like Immanuel Kant have constructed theories of the law of contracts based on property titles rather than on promise.” Referring to Lysander Spooner, *Poverty: Its Illegal Causes, and Legal Cure*, Part 1 (1846;

III. 澄清与应用

CLARIFICATIONS AND APPLICATIONS

A. 拓殖资源的所有权转让

Transfer of Title to Homesteaded Resources

The title-transfer theory of contract assumes that the property owner can transfer title in the property to others, by manifesting his intent to do so. The theory takes for granted that ownership of homesteaded property is alienable by the will of the owner. Writes Rothbard: "The right of property implies the right to make contracts about that property: to give it away or to exchange titles of ownership for the property of another person."³⁷

所有权转让的理论假定，财产所有人可以通过表明自己的意图，将财产所有权转让给他人。该理论当然地认为，拓殖财产的所有权可以按照拥有人的意愿进行转让。罗斯巴德写道 "财产权意味着有权就该财产订立：将其赠与他人或以所有权交换他人的财产 "。¹⁵⁴

Yet, we must ask, why does manifesting one's intent to transfer title actually do it? Why does the owner have the power or capacity to do this? This power is implied by several

http://www.lysanderspooner.org/ works), pp. 100 – 101; and Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right (Edinburgh: T.&T. Clark, 1887; https://oll.libertyfund.org/title/hastie-the-philosophy-of-law), p. 101.

由于从属于财产，十八世纪的法学家赞同交换的所有权理论，根据这一理论，的功能是转让对所约定的具体物品的所有权。因此，布莱克斯通写道，如果卖方未能按照执行交付货物，"买方可以扣押货物，或对卖方扣押货物的行动提起诉讼"。同样，在英国第一部关于的论文中，鲍威尔写道，对未按执行交付存货的补救办法是具体履行。

另见埃弗斯的《迈向法的重新表述》，第 7 页：“[莱桑德]斯普纳和伊曼努尔·康德等其他法律哲学家基于财产所有权而非承诺构建了法理论。” 参考莱桑德·斯普纳的《贫困：其非法成因及合法解决办法，第 1 部分》（1846 年），第 100-101 页；以及伊曼努尔·康德的《法律哲学：作为权利科学的法学基本原理阐述》（爱丁堡：T.&T. 克拉克，1887 年），第 101 页。

¹⁵⁴ Rothbard, “Property Rights and the Theory of Contracts,” p. 133, emphasis added. 罗斯巴德，《财产权与理论》，第 133 页，重点补充。

interrelated aspects of the ownership of homesteaded property. First, note that the owner, who has the sole right to control the resource, can permit others to use it. For example, he can lend his car or hammer to his neighbor. This highlights the distinction between ownership and possession. The owner has rights to a thing even if he does not possess it. Note also that "permitting" others to use one's property is done by manifesting (communicating) one's consent to the borrower. The manifested consent of the owner of a good to permit its use by others is what distinguishes a licit use (such as a loan) from an illicit act (such as theft); it is what distinguishes invited guests from trespassers. In short, because the owner of property has the right to control it, he can, through a sufficiently objective manifestation or communication of his consent, permit others to possess the thing while he maintains ownership. In this way, "contract" is just a consequence or application of ownership rights; the owner has the right to exclude or deny permission to others to use the owned resource, or he can consent to it. This must somehow be communicated by language.

然而，我们必须问，为什么表明转让所有权的意图就能真正实现转让呢？为什么所有者有这种权力或能力这么做？这种权力隐含在拓殖财产所有权的几个相互关联的方面。首先要注意的是，拥有资源唯一控制权的所有者可以允许他人使用资源。例如，他可以把他的汽车或锤子借给邻居使用。这突出了所有权和占有之间的区别。所有者即使不占有某物，也拥有该物的权利。还要注意，"允许"他人使用自己的财产是通过向借用人表示（传达）自己的同意来实现的。物品所有者明确表示同意允许他人使用物品，是合法使用（如借用）与非法行为（如盗窃）的区别所在；也是受邀客人与非法侵入者的区别所在。简言之，由于财产所有人有权控制财产，因此他可以通过充分客观地表明或传达他的同意，允许他人在他保持所有权的同时占有该物。这样，""只是所有权的结果或应用；所有者有权排除或拒绝允许他人使用所拥有的资源，或者他可以同意他人使用。这在某种程度上必须通过语言来传达。

Second, homesteaded property was at one time acquired. It can, therefore, also be abandoned. One is not stuck with something forever just because one once homesteaded it. But acquiring and abandoning both involve a manifestation of the owner's intent. Recall that the very purpose of property rights in scarce resources is to prevent conflicts over the use of resources. Thus, property rights have an unmistakably public aspect: the property claimed has boundaries visible (manifested) to others.³⁸

One essential aspect of property is that it publicly demarcates one's bounds of ownership so others can avoid using it. If the bounds are secret or unknowable, conflicts cannot be avoided. To know that a thing is owned by another and to avoid uninvited use of the other's property, the property's borders must be publicly known.

其次，拓殖财产曾被一度获得。因此，它也可以被放弃。一个人不会因为曾经拓殖过某物就永远与之纠缠不清。但是，获取和放弃都涉及所有者意图的体现。回想一下，稀缺资源财产权的目的就在于防止资源使用上发生冲突。因此，财产权具有明确无误的总所周知的一方：所主张的财产的边界对他人而言是可见的（表明的）。¹⁵⁵ 财产的一个重要方面是它公开划定了一个人的所有权边界，这样他人就可以避免使用它。如果界限是秘密的或不可知的，就无法避免冲突。要知道某物为他人所有，并避免他人擅自使用其财产，财产的边界必须公开可知的。

In fact, one reason that the first possessor of a scarce resource acquires title to it is the need for borders to be objective and public. The result of using a thing—either by transforming the thing in an apparent way up to certain borders or by setting up a publicly discernible border around the property—can be objectively apparent to others. This is why Hoppe refers to acts of original appropriation as “embordering” or “produc[ing] borderlines for things.”³⁹

事实上，稀缺资源的首位占有人获得所有权的一个理由是，需要边界是客观的和公开

¹⁵⁵ In this sense all property is “public,” not “private.” See also “What Libertarianism Is” (ch. 2), n.1. On the objective function of property rules, see Hoppe, *A Theory of Socialism and Capitalism* and idem, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006, www.hanshoppe.com/eepp); also Barnett, “A Consent Theory of Contract,” p. 303: “Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function”; for similar comments, see idem, “Rights and Remedies in a Consent Theory of Contract,” p. 144. 在这个意义上，所有的财产都是“公共的”，而非“私人的”。另见《何为自由意志主义》（第 2 章），注释 1。关于财产规则的客观功能，见霍普的《社会主义和资本主义理论》以及霍普的《私有财产的经济学和伦理学：政治经济学和哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年，www.hanshoppe.com/eepp）；也见巴尼特的《同意理论》，第 303 页：“只有普遍依赖于客观可确定的断言行为，才能使权利体系发挥其分配的界定边界的功能”；类似的评论，见同上，《同意理论下的中的权利与赔偿》，第 144 页。

的。使用某物的结果——无论是以明显的方式改变该物直至达到某些边界，还是在该财产周围设置一个公众可辨别的边界——都可以客观地为他人所知晓。这就是为什么霍普将先占称为“划定边界”或“为事物划定边界线”。¹⁵⁶

Acquiring is an action by which one manifests intent to own the thing by setting up public borders.⁴⁰ Likewise, property is abandoned, and title thereto is lost, when the owner manifests an intent to abandon and, thereby, to relinquish ownership. This intention is not manifested merely by suspending possession or transferring it to another, since possession can be suspended without losing ownership. Thus, a farmer who leaves his homesteaded farm for a week to buy supplies in a far away city does not thereby lose ownership, nor has he manifested any intent to abandon his farm. For these reasons, an owner of acquired property does not abandon property merely by not-possessing it, but he does have the power and the right to abandon it by manifesting his intent to do so.

获取是一种行动，通过这种行动，一个人通过设置公共边界来表明拥有该物的意图。¹⁵⁷同样，当所有者表明放弃的意图并因此放弃所有权时，财产被放弃，其所有权也随之丧失。这种意图不仅仅通过暂停占有或将其转让给他人来表明，因为占有可以暂停而不失去所有权。因此，一个农民离开他拓殖的农场一周，去一个遥远的城市购买生活用品，并不因此丧失所有权，他也没有表现出放弃农场的意图。基于这些原因，既

¹⁵⁶ Hoppe, A Theory of Socialism and Capitalism, p. 24, also pp. 167 – 68.

霍普《社会主义和资本主义理论》，第 24 页，另见第 167-68 页。

¹⁵⁷ This insight calls to mind Rosalyn Higgins' s observation that “Law, far from being authority battling against power, is the interlocking of authority with power.” Rosalyn Higgins, Problems and Process: International Law and How We Use It (Clarendon Press; Reprint edition, 1995), p. 4 (quoted in Kinsella, “Book Review of Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994),” Reason Papers No. 20 (Fall 1995): 147 – 53, at 149). Likewise, ownership of a resource involves both the intent to own (“authority”) and the initial possession and/or bordering (“power”). 这一见解让人想起罗莎琳·希金斯的观察：“法律，远非权威与权力的对抗，而是权威与权力的相互交织。”罗莎琳·希金斯，《问题与过程：国际法以及我们如何运用它》（克拉伦登出版社；再版，1995 年），第 4 页（引自金斯莱，“罗莎琳·希金斯《问题与过程：国际法以及我们如何运用它（1994 年）》书评”，《理性论文》第 20 期（1995 年秋季）：147-153，第 149 页）。同样，对一种资源的所有权既涉及拥有的意图（“权威”），也涉及最初的占有和/或划定边界（“权力”）。

得财产的所有人不会仅仅因为不占有财产而放弃财产，但他确实有权力和权利通过表明放弃财产的意图而放弃财产。

Ownership of acquired property includes the right to use the property, to permit (license) others to use it (maintain ownership while giving possession to another), and to abandon ownership by manifesting the intent to do so. Combining these aspects of ownership, it is clear that an owner of property can transfer title to another by “abandoning” the good in favor of a designated new owner. If one can abandon title to property to the world in general, then a fortiori one can do “less” and simply abandon it “in favor” of a given person.⁴¹

对已获得财产的所有权包括使用该财产的权利、允许（许可）他人使用该财产的权利（在将占有权交给他人的同时保持所有权）以及通过表明放弃所有权的意图而放弃所有权的权利。结合所有权的这些方面，很明显，财产所有者可以通过“放弃”该物品而支持指定的新所有者来将所有权转让给他人。如果一个人可以将财产所有权普遍地放弃给世界，那么更不用说，一个人可以“做得更少”一点，直接将其放弃给“指定的”某个特定的人。¹⁵⁸

¹⁵⁸ The theory for transferring property advocated herein bears a conceptual resemblance to the common-law practice of “quitclaiming” and also to the Roman law doctrine of “traditio.” Traditio was a legal mechanism used to transfer ownership of certain types of things (res nec Mancipi) by physically transferring possession or control of the thing, coupled with intent to transfer. See, e.g., W.W. Buckland, *A Text Book of Roman Law from Augustus to Justinian*, 3d ed. rev’d by Peter Stein, reprint with corrections (Cambridge University Press, 1975), at LXXXIII, pp. 226 – 27; also Gaius, *Institutes of Roman Law*, with a translation and commentary by Edward Poste, 4th ed., revised and enlarged by E.A. Whittuck (Oxford: 1904; <https://oll.libertyfund.org/title/gaius-institutes-of-roman-law>), Book II, § 19 (p. 133), §§ 24 – 26 (pp. 136 – 39), §§ 40 – 41 (p. 153), § 65 (p. 164), and § 95 (p. 174); and Alan Watson, *Failures of the Legal Imagination* (University of Pennsylvania Press, 1988; <https://archive.org/details/failuresoflegali0000wats>), p. 90 et pass. (For a brief discussion of the concept of “thing” in the civil and Roman law, see “What Libertarianism Is” (ch. 2), Appendix I.)

As for quitclaim deeds: conventional conveyances of property operate by a deed, but a quitclaim deed operates by way of a release, similar to abandonment. It is intended to pass any title or right owned by the transferor to the transferee, without warranting that anything is, in fact, owned. See Gregory Michael Anding, Comment, “Does This Piece Fit?: A Look at the Importation of the Common-Law Quitclaim Deed and After-

Acquired Title Doctrine into Louisiana’ s Civil Code,” La. L. Rev. 55, no. 1 (Summer 1994; <https://digitalcommons.law.lsu.edu/lalrev/vol55/iss1/8/>): 159 – 77; and Black’ s Law Dictionary, defining “quitclaim.” The quitclaim is a type of abandonment “in favor” of another, which effectively functions as a conveyance or transfer of the title. See also Louisiana Civil Code, art. 2502:

Art. 2502. Transfer of rights to a thing

A person may transfer to another whatever rights to a thing he may then have, without warranting the existence of any such rights. In such a case the transferor does not owe restitution of the price to the transferee in case of eviction, nor may that transfer be rescinded for lesion.

Such a transfer does not give rise to a presumption of bad faith on the part of the transferee and is a just title for the purposes of acquisitive prescription.

If the transferor acquires ownership of the thing after having transferred his rights to it, the after-acquired title of the transferor does not inure to the benefit of the transferee.

本文所主张的财产转让理论在概念上类似于普通法中的“放弃权利声明”实践，也类似于罗马法中的“交付”原则。“交付”是一种法律机制，用于通过实际转移对某些类型物品（非要式转移物）的占有或控制，并结合转让的意图来转让所有权。例如，参见 W.W. 巴克兰的《从奥古斯都到查士丁尼的罗马法教科书》，第三版，彼得·斯坦修订，修订版重印（剑桥大学出版社，1975 年），第 LXXXIII 页，第 226-227 页；还有盖尤斯的《罗马法原理》，爱德华·波斯特翻译并评注，第四版，E.A. 惠特克修订并扩充（牛津：1904 年；<https://oll.libertyfund.org/title/gaius-institutes-of-roman-law>），第二卷，§ 19（第 133 页），§ § 24-26（第 136-139 页），§ § 40-41（第 153 页），§ 65（第 164 页），和 § 95（第 174 页）；以及艾伦·沃森的《法律想象力的失败》（宾夕法尼亚大学出版社，1988 年；<https://archive.org/details/failuresoflegali0000wats>），第 90 页及以后（关于民法和罗马法中“物”的概念的简要讨论，见《何为自由意志主义》（第 2 章），附录 I）。至于放弃权利声明：传统的财产转让通过进行，但放弃权利声明通过解除的方式进行，类似于放弃。其目的是将转让人所拥有的任何所有权或权利转让给受让人，而不保证实际上拥有任何东西。参见格雷戈里·迈克尔·安迪的评论，《这块合适吗？：审视普通法中的放弃权利声明和事后取得所有权原则引入路易斯安那州民法典》，《路易斯安那法律评论》第 55 卷，第 1 期（1994 年夏季；<https://digitalcommons.law.lsu.edu/lalrev/vol55/iss1/8/>): 159-177；以及《布莱克法律词典》对“放弃权利声明”的定义。放弃权利声明是一种“支持”他人的放弃类型，实际上起到了所有权的转让或转移的作用。另见《路易斯安那民法典》第 2502 条：第 2502 条. 对物的权利的转让

一个人可以将他当时对一物所拥有的任何权利转让给另一个人，而不保证任何此类权利的存在。在这种情况下，如果被驱逐，转让人不欠受让人价款的返还，该转让也不得因损害而撤销。

这种转让不会引起受让人恶意的推定，并且是取得时效的正当权利。

如果转让人在转让其权利后获得该物的所有权，转让人的事后取得所有权不惠及受让

Consider the case where the owner abandons the property outright. In this case, it once more becomes unowned and available for appropriation by a new homesteader, i.e., the next person to possess it. For example, suppose one lends his car or hammer to a neighbor and then abandons the item. In this case, the neighbor at first has possession, but not title, to the object. When the owner abandons it, the car, or hammer, becomes unowned again. As an unowned resource, it is now subject to re-appropriation by the next possessor, who happens to be the neighbor who is already in possession.⁴² By combining the power to permit others to use property with the power to abandon—both rights or powers of owners—it is possible to transfer title to a particular transferee.

考虑所有权人彻底放弃财产的情况。在这种情况下，它再次成为无主物，可被新的拓殖者（即下一个拥有它的人）占有。例如，假设一个人把自己的汽车或锤子借给了邻居，然后放弃了该物品。在这种情况下，邻居起初对物品拥有占有权，但没有所有权。当物主将其放弃时，汽车或锤子又变成了无主物。作为一种无主资源，它现在可以被下一个占有人重新占有，而这个人恰好就是已经占有该物品的邻居。¹⁵⁹ 通过将允许他人使用财产的权力与放弃财产的权力——所有人的两种权利或权力——结合起来，就有可能将所有权转让给特定的受让人。

Another way to look at it is to consider the general rule that the first possessor has better title in the property than other challengers who are, compared to the first possessor, latecomers. If property is abandoned conditionally in favor of a particular transferee, then the transferee has “better title” because, as between these parties, the previous owner has abandoned it, and, thus, does not have better title. And as between the transferee and any third party, the transferee benefits from the prior title of the previous owner because, from the point of view of the third parties, the transferee is a licensee of the prior owner and/or an earlier possessor than the third parties.⁴³

另一种看待它的方式是考虑一般规则，即第一个占有者在该财产上比其他挑战者拥有

人。
¹⁵⁹ The owner need not wait until the owner-to-be has possession to make the transfer. For example, the owner could make his abandonment conditional upon the desired recipient possessing the property.
所有人不必等到未来的所有人占有该财产才进行转让。例如，所有人可以使他的放弃以期望的受让人占有该财产为条件。

更合理的所有权，与第一个占有者相比，其他挑战者是后来者。如果财产有条件地被放弃以支持特定的受让人，那么受让人拥有“更合理的所有权”，因为在这些当事人之间，先前的所有者已经放弃了它，因此，不再拥有更合理的所有权。并且在受让人与任何第三方之间，受让人受益于先前所有者的先前所有权，因为从第三方的角度来看，受让人是先前所有者的被许可人，并且/或者比第三方更早占有。¹⁶⁰

As an analogy, consider a person sitting in a tree with his loaf of bread. Below him, others occasionally pass. He can eat the bread if he wishes, or hold onto it, or, if he wants, he can just drop it, abandoning it to whichever passerby seeks to pick it up. This would be analogous to outright abandonment. Or he can toss it to a particular friend in the crowd, thus abandoning it and “guiding it” to a desired recipient at the same time, who can then re-homestead it.

打个比方，一个人拿着面包坐在树上。在他下面，偶尔会有其他人经过。如果他愿意，他可以吃掉面包，也可以拿着面包不放，或者，如果他愿意， he 可以把面包扔掉，任由路人捡起。这类似于直接放弃。或者，他也可以把它扔给人群中的某位朋友，这样，在放弃它的同时，也把它“引导”给了心仪的接受者，而后者则可以重新拓殖它。

This is the reason why an owner can transfer title to others: scarce unowned resources are acquired and can be abandoned. Property that can be abandoned by manifesting one's consent to undo or cease a previous acquisition can be given to particular others.

这就是所有人可以将所有权转让给他人的原因：稀缺的无主资源被获得并可以被放弃。通过表示同意撤销或停止先前的获取而可以被放弃的财产可以转让给特定的其他人。

B 身体财产 Property in the Body

Under libertarian principles, an individual has the sole right to control his body as well as scarce resources originally appropriated by the individual or by his ancestor in title. Since ownership means the right to control (to exclude), an individual may be said to own his body and homesteaded resources he has acquired. He is a “self-owner” as

¹⁶⁰ See also “What Libertarianism Is” (ch. 2), notes 33 and 36, for more on this issue. 关于这个问题的更多内容，也可参见《何为自由意志主义》（第 2 章）的注释 33 和 36。

well as an owner of acquired resources.

根据自由意志主义原则，个人对自己的身体以及由个人或其先辈先占的稀缺资源拥有唯一的控制权。由于所有权意味着控制权（排除权），因此可以说个人拥有自己的身体和他所获取的拓殖资源。他是“自我所有者”，也是所获资源的所有者。

Now, in the case of acquired resources, the rights of ownership include the right to transfer title to others because one can abandon, by manifested intent, a previously unowned resource that was acquired by manifested intent. In other words, rights in acquired resources may be alienated at will because of the way in which they come to be owned.

现在，就所获取的资源而言，所有权的权利包括将所有权转让给他人的权利，因为一个人可以通过明示的意图放弃之前通过明示的意图获得的无主资源。换句话说，由于所获取资源的获取方式，对这些已获取资源的权利可以随意转让。

By contrast, although one may be said to own—rightfully control— one's body, the same reasoning regarding acquisition, abandonment, and alienability does not apply. The act of acquisition presupposes that there is an individual doing the acquiring and an unowned thing acquired by possessing it. But how can someone “acquire” his body? One's body is part of one's very identity. The body is not some unowned resource that is acquired by the intentional embordering action of some external, already existing acquirer. Or as Professor Hoppe points out, “any indirect control of a good by a person presupposes the direct control of this person regarding his own body; thus, in order for a scarce good to become justifiably appropriated, the appropriation of one's directly controlled ‘own’ body must already be presupposed as justified.”⁴⁴

相比之下，虽然可以说一个人拥有——理所当然地控制——自己的身体，但关于获取、放弃和可让渡性的相同推理并不适用。获取行动的前提是有一个进行获取的个人和一个通过占有而获取的无主物。但一个人如何“获取”自己的身体呢？一个人的身体是其身份的一部分。身体不是某种无主的资源，它是通过某个外部的、已经存在的获取者的有意的嵌入行动而获取的。或者正如霍普教授所指出的，“一个人对物品的任何间接控制都以这个人对自己身体的直接控制为前提；因此，为了使稀缺物品能够被正当的

占有，对一个人直接控制自己的身体的占有必须已经被预先假定为是正当的”。¹⁶¹

Because the body is not some unowned resource that an already existing individual chooses to acquire, it makes little sense to say that it can be abandoned by its owner. And since alienation of property derives from the power to abandon it, the body is inalienable. A manifestation of intent to “sell” the body is without effect because a person cannot, merely by an act of will, abandon his or her body. Title to one's body is inalienable, and it is not subject to transfer by contract.

因为身体并非某种无主资源，不是已存在的个体选择去获取的，所以说它能被其所有者放弃是没有意义的。既然财产的让渡源于放弃财产的权力，那么身体就是不可让渡的。表明“出售”身体的意图是无效的，因为一个人不能仅凭意志行动就放弃自己的身体。一个人的身体所有权是不可让渡的，它不能通过转让。

C 罗斯巴德论不可让渡性¹⁶²

Rothbard on Inalienability⁴⁵

Rothbard, viewing contracts as transfers of title to alienable property, rejected the enforceable-promises view of contracts, with mere promises being unenforceable. He

¹⁶¹ See the Hoppe quote in “How We Come to Own Ourselves” (ch. 4), at n.17 (emphasis added). For further discussion of these issues, see “What Libertarianism Is” (ch. 2), the sections “Property in Bodies” and “Property in External Things,” and, in particular, n.26; and “How We Come to Own Ourselves” (ch. 4).

参见《我们如何拥有自己》（第 4 章）注释 17 中的霍普引言（重点补充）。关于这些问题的进一步讨论，请参见《何为自由意志主义》（第 2 章）中“身体财产”和“外部事物财产”部分，特别是注释 26；以及《我们如何拥有自己》（第 4 章）。

¹⁶² Note: In my original article, first presented in 1999 and published in 2003, in the above section, I criticized some aspects of Rothbard’s argument for inalienability. I now think it is possible that his approach is more compatible with my own than I originally realized. I retain in this chapter most of the original critique in this section (revised and updated), and follow it with an addendum, below (Part III.C.1), explaining my current view.

注：在我最初于 1999 年发表、2003 年出版的文章中，在上述部分，我批评了罗斯巴德关于不可让渡性论证的某些方面。我现在认为，他的方法可能比我最初意识到的更符合我的观点。在本章中，我保留了这一节原有批评的大部分内容（经过修订和更新），并在下面（第 III.C.1 部分）的附录中解释了我目前的观点。

also maintained that rights to control—i.e., one's ownership of, or title to—one's body were inalienable.

罗斯巴德将视为可让渡财产所有权的转让，他反对可执行承诺的观，认为单纯的承诺是不可执行的。他还认为，控制权——即一个人对自己身体的拥有权或所有权——是不可让渡的。

These views are not unrelated. In fact, promises being unenforceable necessarily implies the inalienability of the body, and vice versa. If promises were enforceable, then one could be punished or coerced into performing the action that had been promised, implying some rights in the body had been alienated merely by making the promise. Likewise, if one could alienate title to one's body by an act of will, this would mean that promises could be enforceable. For example, one could make a conditional transfer of title to one's body if one does not perform a specified service. This would justify punishment or coercion against the promisor's body, which is now owned by the promisee. Thus, alienability of the body and the enforceable promises view of contract go hand in hand. One implies the other.

这些观点并非毫无关联。事实上，承诺不可强制执行必然意味着身体的不可让渡性，反之亦然。如果承诺可以强制执行，那么一个人就可能受到惩罚或被胁迫去执行所承诺的行动，这就意味着仅仅通过做出承诺，身体的某些权利就已经被转让了。同样，如果一个人可以通过意志行动让渡自己身体的所有权，这就意味着承诺可以强制执行。例如，如果一个人未履行特定的服务，就可以有条件地转让自己身体的所有权。这将成为对承诺人的身体进行惩罚或胁迫的正当的理由，因为身体现在归被承诺人所有。因此，身体的可让渡性与可强制执行的观点是相辅相成的。二者缺一不可。

So Rothbard, in rejecting the enforceable-promises theory of contract, has to also reject body alienability. As he does. However, this conclusion is apparently inconsistent with other strands of his rights theory. Rothbard wrote that "[t]he right of property implies the right to make contracts about that property."⁴⁶ Since he also views individuals as "self-owners," meaning that one owns one's body, then one has "the right to make contracts about that property," according to his earlier pronouncement. (This is, in fact, Walter Block's view.)⁴⁷ To avoid accepting body alienability, Rothbard must find a reason why the body, although owned, is not alienable—even though the owner of property "can make contracts about it."

因此，罗斯巴德在否定的可执行承诺理论时，也必须否定身体的可让渡性。正如他所做的那样。然而，这一结论显然与他的权利理论的其他方面不一致。罗斯巴德写道：“财产权意味着就该财产订立的权利。”¹⁶³ 既然他也将个人视为“自我所有者”，即一个人拥有自己的身体，那么根据他早先的表述，一个人就有“就该财产订立的权利”。（事实上，这也是沃尔特-布洛克的观点。）¹⁶⁴ 为了避免承认身体的可让渡性，罗斯巴德

¹⁶³ Rothbard, “Property Rights and the Theory of Contracts,” p. 133, emphasis added. But other passages indicate he did not think this applied to bodies:

The basic reason is that the only valid transfer of title of ownership in the free society is the case where the property is, in fact and in the nature of man, alienable by man. All physical property owned by a person is alienable, i.e., in natural fact it can be given or transferred to the ownership and control of another party. I can give away or sell to another person my shoes, my house, my car, my money, etc. But there are certain vital things which, in natural fact and in the nature of man, are inalienable, i.e., they cannot in fact be alienated, even voluntarily. Specifically, a person cannot alienate his will, more particularly his control over his own mind and body. Each man has control over his own mind and body. Each man has control over his own will and person, and he is, if you wish, “stuck” with that inherent and “inalienable ownership. Since his will and control over his own person are inalienable, then so also are his rights to control that person and will. That is the ground for the famous position of the Declaration of Independence that man’s natural rights are inalienable; that is, they cannot be surrendered, even if the person wishes to do so.

Ibid., pp. 134-35.

罗斯巴德，《财产权与理论》，第 133 页，重点补充。但其他段落表明，他并不认为这适用于身体：

根本原因在于，在自由社会中，所有权的唯一有效转让情况是，事实上且就人的本质而言，财产是可由人让渡的。一个人所拥有的所有真实财产都是可以让渡的，也就是说，在自然事实中，它可以让渡或转让给另一方拥有和控制。我可以把我的鞋子、房子、汽车、金钱等送给或卖给别人。但有些重要的东西，就自然事实和人的本质而言，是不可让渡的，即事实上不可让渡，即使是自愿让渡。具体来说，一个人不能转让他的意志，尤其是他对自己身心的控制权。每个人都可以控制自己的身心。每个人都能控制自己的意志和身体，而且，如果你愿意的话，他是“固守”着这种与生俱来的、“不可让渡的所有权”的。既然他的意志和对自己人身的控制是不可让渡的，那么他控制人身和意志的权利也是不可让渡的。这就是《独立宣言》的著名立场的基础，即人的天赋权利是不可让渡的；也就是说，即使这个人希望这样做，也无法放弃。

同上，第 134-35 页。

¹⁶⁴ See various references in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11); see also Kinsella, “Thoughts on Walter Block on Voluntary Slavery, Alienability vs. Inalienability, Property and Contract, Rothbard and Evers,” StephanKinsella.com (Jan. 9, 2022).

必须找到一个理由，说明为什么身体虽然被拥有，却不可让渡——即使财产所有者“可以就身体订立”。

What argument does he produce to show that our bodies are not alienable? Like other libertarians, Rothbard, in essence, argues that slavery or other personal service contracts are not enforceable because there is some sort of logical impossibility involved in voluntarily alienating one's rights to one's body.⁴⁸ He reasons that it is literally impossible to transfer one's actual will to another, so a promise to do so is null and void; title thereto cannot be transferred. It is like contracting to sell the sun to someone. Such a contract, having an impossible object, would be null and void from the outset.

他提出了什么论据来证明我们的身体是不可让渡的呢？与其他自由意志主义学者一样，罗斯巴德实质上认为，奴役或其他个人服务是不可执行的，因为自愿让渡自己对身体的权利在逻辑上是不可能的。¹⁶⁵ 他的理由是，将一个人的实际意志转让给另一

参见《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）中的各种参考文献；另见金塞拉《沃尔特·布洛克关于自愿为奴、让渡性与不可让渡性、财产与、罗斯巴德与埃弗斯的思考》，StephanKinsella.com（2022 年 1 月 9 日）。

¹⁶⁵ Murray N. Rothbard, “Interpersonal Relations: Ownership and Aggression,” in *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 40 – 41, reproduced in idem, “A Crusoe Social Philosophy,” *Mises Daily* (December 7, 2021; <https://mises.org/library/crusoe-social-philosophy>); Rothbard, “Property Rights and the Theory of Contracts,” pp. 134 – 36. See also Randy E. Barnett, *The Structure of Liberty: Justice and The Rule of Law*, 2d ed. (Oxford University Press, 2014), pp. 78 – 82; idem, “Contract Remedies and Inalienable Rights,” pp. 186 – 95; idem, “Rights and Remedies in a Consent Theory of Contract,” pp. 156 et seq.; Tibor R. Machan, *Human Rights and Human Liberties* (Chicago: Nelson Hall, 1975), pp. 116–17; George H. Smith, “A Killer’s Right to Life,” *Liberty* 10, no. 2 (Nov. 1996; <https://perma.cc/8U8C-ZTAR>): 49 – 54 & 68 – 69, at 68; idem, “Inalienable Rights?” *Liberty* 10, no. 6 (July 1997; <https://perma.cc/4CUE-KG7G>): 51 – 56.

穆瑞·N·罗斯巴德，《人际关系：所有权与侵犯》，载于《自由的伦理》（纽约：纽约大学出版社，1998 年），第 40–41 页，重印于同作者的《克鲁索社会哲学》，米塞斯日报（2021 年 12 月 7 日；<https://mises.org/library/crusoe-social-philosophy>）；罗斯巴德，《财产权与理论》，第 134–136 页。另见兰迪·E·巴尼特，《自由的结构：正义与法治》，第二版（牛津大学出版社，2014 年），第 78–82 页；同作者，《赔偿与不可让渡的权利》，第 186–195 页；同作者，《同意理论中的权利与赔偿》，第 156 页及后续页；蒂博尔·R·马钱，《人权与人类自由》（芝加哥：纳尔逊霍尔出版社，1975 年），第 116–117 页；乔治·H·史密斯，《凶手的生命权》，《自由》第 10 卷，第 2 期（1996 年 11 月；<https://perma.cc/8U8C-ZTAR>）：49–54 页

个人实际上是不可能的，因此这样做的承诺是无效的，其所有权不能转让。这就好比签订将太阳卖给某人。这样一个有着不可能目标的从一开始就是空洞无效的。

The problem with this view is that it assumes that a person's will has to be transferred in order for him to become a slave, or for others to have the right to control his body. But this is not necessary. Rather, the slave owner need only have the right to use force against the recalcitrant slave. It is true that one cannot alienate direct control of his body; one person can only have indirect control of another's body. Yet, we own animals, even though the animals retain direct control over their actions. The owner exerts indirect control over the animal's actions, e.g., by coercing or otherwise manipulating the animal to get the animal to do what the owner desires.

这种观点的问题在于，它假定一个人的意志必须转让，他才能成为奴隶，或者他人才能有权控制他的身体。但这是不必要的。相反，奴隶主只需有权对顽抗的奴隶使用武力。的确，一个人不能转让对自己身体的直接控制权；一个人只能间接控制他人的身体。然而，我们拥有动物，尽管动物保留了对其自身行为的直接控制。主人对动物的行为实施间接控制，例如，通过胁迫或以其他方式操纵动物，让动物按照主人的意愿行事。

Likewise, aggressors may be jailed or punished—in short, “enslaved”—by the victim or his agent or heirs.⁴⁹ In effect, the aggressor's body is owned by his victim. This is despite the fact that the jailed aggressor still retains a will and direct control of his body; the jailer can only exert indirect control over him. The “impossibility” of an aggressor alienating his will does not prevent him from alienating title to his body—giving someone else the right to exert (admittedly indirect) control over his body—by committing an act of aggression.

同样，侵犯者也可能被受害者或其代理人或继承人监禁或惩罚，简而言之，即被“奴役”。¹⁶⁶实际上，侵犯者的身体归受害者所有。尽管被囚禁的侵犯者仍保留着意志和

和 68-69 页，第 68 页；同作者，《不可让渡的权利？》，《自由》第 10 卷，第 6 期（1997 年 7 月；<https://perma.cc/4CUE-KG7G>）：51-56 页。

¹⁶⁶ For further discussion of the theory of inalienability and the legitimacy of punishment, see “Inalienability and Punishment” (ch. 10) and “A Libertarian Theory of Punishment and Rights” (ch. 5).

关于不可让渡的理论和惩罚的合法性的进一步讨论，见《不可让渡性与惩罚》（第

对其身体的直接控制，狱卒只能对其进行间接控制。侵犯者“不可能”让渡其意志，但这并不妨碍他通过实施侵害行为让渡其身体的所有权——赋予他人对其身体实施（诚然是间接的）控制的权利。

It would seem, therefore, that the impossibility of alienating one's will does not prevent a person from being owned by others, or others from having rights to control the person's body. Thus, the impossibility of alienating the will should not be a barrier to making contracts regarding the right to control one's body.

因此，无法让渡自己的意愿似乎并不妨碍一个人被他人拥有，也不妨碍他人有权控制这个人的身体。因此，无法让渡意志不应成为就控制自己身体的权利订立的障碍。

Rothbard's error was to presume that ownership implies the power to transfer the property's title: the owning-implies-selling fallacy. This necessitated the convoluted and flawed impossibility-of-the-will argument in favor of body-inalienability. The modified title-transfer theory proposed here recognizes that the body is "owned" only in the sense that a person has the sole right to control the body and repel invasions of its borders. But the body is not homesteaded and acquired, and cannot be abandoned by intent in the same way that homesteaded property can.

罗斯巴德的错误在于假定所有权意味着转让财产所有权的权力：拥有蕴含出售的谬误。这就需要提出迂回曲折、漏洞百出的“不可让渡的意志”论证，以支持身体的不可让渡性。这里提出的修改后的所有权转让理论承认，只有当一个人拥有控制身体和抵御身体边界入侵的唯一权利时，身体才被“拥有”。但身体并不是拓殖获取的，不能像拓殖财产那样通过意图而遗弃。

1. 补遗：罗斯巴德的错误？Addendum: Rothbard's Mistake?

As pointed out in note 45, above, in the years since I published the original article upon which this chapter is based, I have rethought some of my criticism of Rothbard's take on inalienability. In this chapter, I have retained my original criticism, above, from the original article, and will now try to explain my current perspective.⁵⁰

正如上文注释 45 所指出的，在我发表本章所依据的原文之后的几年里，我重新思考

10 章）和《自由意志主义的惩罚与权利理论》（第 5 章）。

了我对罗斯巴德不可让渡的观点的一些批评。在本章中，我保留了我在原文中提出的上述批评，现在我将试图解释我目前的观点。¹⁶⁷

In other chapters I argued that rights in our bodies stem from the fact of our direct control of our bodies, drawing on Hoppe's arguments, while property rights in external, previously unowned resources arise from original appropriation or title transfer from a previous owner by contract or for purposes of rectification.⁵¹ I have a better claim to my body than others since I have direct control over it, which gives me a more objective link to the resource of my body than to anyone else, who compared to me can at best have only indirect control of my body. Now when someone commits an act of aggression, he therefore, in effect, gives irrevocable permission to the victim to use force against the aggressor's body for purposes of self-defense or proportionate retaliation or rectification.

在其他章节中，我借鉴霍普的论点，认为对我们身体的权利源于我们对自己身体的直接控制，而对外部的、先前无主的资源的财产权则源于先占或通过或出于纠正的目的从先前的所有者那里转让的所有权。¹⁶⁸与其他人相比，我对自己的身体有更优的权利主张，因为我可以直接控制自己的身体，这使我与自己身体这一资源的联系比其他

¹⁶⁷ I discuss this also in "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11), the section "Fallacy 1: You Can Sell What You Own," and in Kinsella, "Thoughts on Walter Block on Voluntary Slavery, Alienability vs. Inalienability, Property and Contract, Rothbard and Evers."

我还在《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）中的“谬误 1：你可以出售你所拥有的东西”一节，以及金塞拉的《关于沃尔特·布洛克关于自愿为奴、让渡性与不可让渡性、财产与、罗斯巴德与埃弗斯的思考》中讨论了这个问题。

¹⁶⁸ See "How We Come to Own Ourselves" (ch. 4) and "Goods, Scarce and Nonscarce" (ch. 18). See also Hoppe's pithy summary of these basic rules, in "A Realistic Libertarianism," LewRockwell.com (Sept. 30, 2013; <https://www.hanshoppe.com/2014/10/a-realistic-libertarianism/>) and in idem, "Of Common, Public, and Private Property and the Rationale for Total Privatization," pp. 85–87.

见《我们如何拥有自己》（第 4 章）和《稀缺与非稀缺财货》（第 18 章）。另见霍普在《现实主义的自由意志主义》（LewRockwell.com，2013 年 9 月 30 日；<https://www.hanshoppe.com/2014/10/a-realistic-libertarianism/>）以及在同作者的《论共有、公有和私有财产以及全面私有化的基本原理》（第 85–87 页）中对这些基本规则的精辟总结。

任何人都更客观，因为与我相比，其他人最多只能对我的身体进行间接控制。因此，当某人实施侵犯行动时，他实际上不可撤销地允许受害者出于自卫或相称的报复或纠正的目的，对侵犯者的身体使用武力。

But in the case of an attempted voluntary slavery contract, the promisor, by saying, "I promise to be your slave," or "I give my body to you" does not commit an act of aggression. It does not create any victim who has a right to retaliate against him. So if the would-be slave decides to renege on his promise and run off, the would-be master has no right to use force to stop him. It is always current consent that matters. If a girl promises a kiss at the end of the date and the boyfriend an hour later kisses her, she cannot claim it was nonconsensual. In effect, she communicated her consent, she set up a standing presumption that is reasonable to rely on—until and unless she changes her mind. If at the end of the date she announces she no longer wants a kiss, it is that consent that matters. It is always the most recent consent that matters since this is the best evidence for what was consented to. There is nothing in libertarianism that says people cannot change their minds. To simply state that you can make an irrevocable, binding promise is just question-begging since it is just another way of sneaking in the assumption that our bodies are alienable, even though our rights to our body do not stem from homesteading or acquisition but rather from our direct control of them.

但是，在试图签订自愿为奴的情况下，承诺人说“我答应做你的奴隶”或“我把身体给你”，并不构成侵犯行为。它并没有造成任何有权对他进行报复的受害者。因此，如果想成为奴隶的人决定背弃诺言逃跑，想成为主人的人无权使用武力阻止他。重要的永远是当前的同意。如果一个女孩答应在约会结束时亲吻，而男朋友在一小时后亲吻了她，她不能声称这是非自愿的。实际上，她已经表达了自己的同意，并建立了一个可依赖的合理推定——直到且除非她改变主意。如果在约会结束时，她宣布她不再想要接吻，那么她的同意才是最重要的。重要的永远是最新的同意，因为这是对同意内容的最佳证明。自由意志主义并没有说人们不能改变主意。简单地说你可以做出一个不可撤销的、有约束力的承诺，这只是在诱导问题，因为这只是以另一种方式偷偷地引入我们的身体是可以让渡的这一假设，尽管我们对身体的权利并不是源于拓殖或获取，而是源于我们对它们的直接控制。

In other words, the fundamental argument against the enforceability of voluntary slavery contracts is that ownership of bodies is based on the person's direct control over their body. But this is similar to the "will" that Rothbard relies on in his opposition

to voluntary slavery. So, as noted in the section above, when Rothbard says voluntary slavery contracts are illegitimate since it is impossible to alienate one's will—he is basically right. Without committing an act of aggression, that is. And promising to be a slave is not an act of aggression.⁵²

换句话说，反对自愿为奴的可执行性的基本论点是，身体的所有权是基于人对自己身体的直接控制。但这与罗斯巴德反对自愿为奴所依赖的“意志”类似。因此，正如上文所述，当罗斯巴德说自愿为奴是不合法的，因为不可能让渡一个人的意志——他基本上是对的。也就是说，在不实施侵犯行动的情况下。而承诺为奴并不是一种侵犯行动。¹⁶⁹

D. 盗窃与监禁债务人 Theft and Debtors' Prison

Although he rejects the enforceability of voluntary slavery contracts, Rothbard inconsistently views failure to pay a debt or other agreed upon future title transfer as "implicit theft." Writes Rothbard:

*The debtor who refuses to pay his debt has stolen the property of the creditor. If the debtor is able to pay but conceals his assets, then his clear act of theft is compounded by fraud. But even if the defaulting debtor is not able to pay, he has still stolen the property of the creditor by not making his agreed-upon delivery of the creditor's property.*⁵³

尽管罗斯巴德反对自愿为奴的可执行性，但他却前后矛盾地将不偿还债务或其他约定

¹⁶⁹ I suspect Rothbard would have come around on this issue had he lived longer. After all, he accepted Hoppe's argumentation-ethics defense of rights as an improvement on his natural law-based defense. I believe he also would have come around on intellectual property. Alas.

I respond further to disagreements with Walter Block on this subject in "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).

我猜想，如果罗斯巴德活得更长一些，他一定会在这个问题上有所转变。毕竟，他接受了霍普从论证伦理学角度对权利的辩护，认为这是对他基于自然法的辩护的改进。我相信他在知识产权问题上的看法也会改变。为之扼腕叹息。

我在《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）中进一步回应了与沃尔特-布洛克在这个问题上的分歧。

的未来所有权转让视为“隐性盗窃”。罗斯巴德写道：

拒绝偿还债务的债务人盗窃了债权人的财产。如果债务人有能力偿还债务，但却隐瞒了自己的财产，那么他的明显盗窃行动就会因欺诈而变得更加严重。但是，即使债务人没有能力偿还债务，他不按约定交付债权人的财产，仍然是盗窃了债权人的财产。¹⁷⁰

Rothbard is partly correct here. If, on the due date, the debtor is able to pay, then refusal to pay is theft. This is because the title to some of the money held by the debtor transferred to the creditor on the due date. At that moment, the debtor is in possession of the creditor's property. Failure to turn it over is tantamount to theft or trespass—it is a use of the creditor's property without his permission.

罗斯巴德在这里说得部分正确。如果在到期日，债务人有能力支付，那么拒绝支付就是盗窃。这是因为债务人持有的部分金钱的所有权在到期日转让给了债权人。在那一刻，债务人占有了债权人的财产。不交出这些钱就等同于盗窃或非法侵入——这是在未经债权人允许的情况下使用其财产。

But Rothbard's view that it is theft “even if the defaulting debtor is not able to pay” is confused. Rothbard senses that this could justify debtors' prison, which is tantamount

¹⁷⁰ Rothbard, “Property Rights and the Theory of Contracts,” p. 144; also see pp. 137–38. Evers has a similar view: “Once the money falls due, the debtor who does not pay up is defrauding the creditor and is unjustly detaining his property… even if the debtor does not have the funds on hand to pay the creditor.” Evers, “Toward a Reformulation of the Law of Contracts,” p. 11 n. 5 (emphasis added). This analysis is confused. What “property” is “detained” if the debtor has no funds? And where is the “fraud”? David Boaz, *The Libertarian Mind: A Manifesto for Freedom* (Simon & Schuster, 2015), chap. 3, the section “Freedom of Contract,” mirrors Rothbardian contractual analysis, as well as the Rothbardian error that it is implicit theft for a debtor to fail to pay a debt on the due date. See also Rothbard, *Man, Economy and State*, pp. 176–80.

罗斯巴德《财产权和理论》，第 144 页。见同上第 137-138 页。埃弗斯也有类似的观点：“一旦款项到期，不付款的债务人就是在欺诈债权人，并且不正当地扣留了他的财产……即使债务人手头没有资金来偿还债权人。”埃弗斯，《迈向法的重新表述》，第 11 页注释 5（重点补充）。这种分析是混乱的。如果债务人没有资金，被“扣留”的是什么“财产”？“欺诈”又在哪里？大卫·博阿兹的《自由意志主义思想：自由宣言》（西蒙与舒斯特出版社，2015 年），第 3 章“自由”一节，反映了罗斯巴德式的分析，以及罗斯巴德式的错误，即债务人在到期日未能偿还债务是隐性盗窃。另见罗斯巴德的《人、经济与国家》，第 176-180 页。

to voluntary slavery, which he has already rejected. So he tries to avoid this result by arguing that imprisoning a defaulting debtor goes "far beyond proportional punishment" and, thus, is "excessive."¹⁷¹ But why? If failure to pay a debt is "implicit theft," why can't the "thief" be treated as such and punished?

但罗斯巴德认为，"即使拖欠债务者无力偿还"也是盗窃，这种观点令人困惑。罗斯巴德意识到，这可能会为监禁债务人提供正当理由，而监禁债务人无异于自愿为奴，这是他已经反对的观点。因此，他试图避免这种结果，辩称监禁债务人"远远超出了相称的惩罚"，因而是"过度的"54。如果欠债不还还是"隐性盗窃"，为什么不能将"小偷"视为"隐性盗窃"并加以惩罚呢？

One reason Rothbard has to come up with a convoluted argument to avoid the voluntary slavery implicit in debtor's prison is that he didn't follow his own contract theory to its logical conclusion. He writes:

*[W]hen a debtor purchases a good in exchange for a promise of future payment, the good cannot be considered his property until the agreed contract has been fulfilled and payment made. Until then, it remains the creditor's property, and nonpayment would be equivalent to theft of the creditor's property.*⁵⁵

罗斯巴德之所以要想出一个复杂的论点来避免监禁债务人所隐含的自愿为奴，原因之一就是他没有按照自己的理论得出合乎逻辑的结论。他写道：

*[当债务人以交换未来付款的承诺购买财货时，在约定的得到履行并付款之前，该财货不能被视为他的财产。在此之前，货物仍然是债权人的财产，不付款就等于盗窃债权人的财产。]*¹⁷²

This is the mistake that leads him to also classify failure to repay a debt as "implicit theft." Suppose creditor-lender A loans \$1000 to debtor-borrower B in exchange for B paying \$1100 (principal plus interest) to A in a year. Now the very purpose of loaning money is to enable the borrower to spend it on some project. For example, B needs to

¹⁷¹ Rothbard, "Property Rights and the Theory of Contracts," p. 144.
罗斯巴德《财产权和理论》，第144页。

¹⁷² Rothbard, Man, Economy, and State, with Power and Market, p. 177.
罗斯巴德《人、经济与国家，权力与市场》，第177页。

pay C for supplies to start his snow-cone stand business. The hope is that the business is successful, B makes a profit, and is able pay A \$1100. But for B to use or spend the money, to pay C, he has to fully own the money, unconditionally. In this bilateral and mutual arrangement, there are two title transfers: a present, unconditional transfer of \$1000 now; a future, uncertain, and conditional payment of \$1100 in the future. [Why is the second transfer unconditional?](#) Because the future is uncertain. Future things don't yet exist. They might never come to exist. B's business may fail. He may be dead. He may be bankrupt. A is well aware of this and, in fact, this is one reason he charges interest.

正是由于这个错误，他也把不偿还债务归类为“隐性盗窃”。假设债权贷款人 A 借给债务借款人 B 1000 美元，条件是 B 在一年内向 A 支付 1100 美元（本金加利息）。现在，贷款的目的正是让借款人能够将其用于某个项目。例如，B 需要向 C 支付开办雪糕摊生意所需的物资款。期望的是生意成功，B 赚取利润，并能向 A 支付 1100 美元。但是，B 要使用或花费这笔钱来支付 C，就必须无条件地完全拥有这笔钱。在这种双边互惠的安排中，存在着两次所有权转让：一次是现在的、无条件的 1000 美元转让；一次是将来的、不确定的、有条件的 1100 美元支付。[为什么第二次转让是有条件的？](#)因为未来是不确定的。未来的事情还不存在。它们可能永远不会存在。B 的生意可能会失败。他可能会死。他可能会破产。A 非常清楚这一点，事实上，这也是他收取利息的原因之一。

Rothbard has lost sight here of the necessity that any property rights schema be able to answer the question of who can use what resource now, rather than waiting for some future information, otherwise people would not be able to survive because they could not use resources to produce and consume in the present.⁵⁶ So the idea of implicit theft leads Rothbard to assume that debtor's prison is in principle justifiable, which then forces him to wriggle out of it by simply declaring it to be disproportionate punishment. The entire concept of "implicit theft" must be rejected as hopelessly muddled and incompatible with libertarian principles of property rights and justice.

罗斯巴德在这里忽略了一个必要条件，那就是任何财产权模式都必须能够回答谁现在就可以使用什么资源的问题，而不是等待未来的某些信息，否则人们就无法生存，因

为他们无法使用资源在当下进行生产和消费。¹⁷³ 因此,“隐性盗窃”的概念导致罗斯巴德假定监禁债务人在原则上是正当的,这就迫使他通过简单地宣称监禁是不相称的惩罚来摆脱这一困境。整个“隐性盗窃”的概念必须被摒弃,因为它无可救药地混淆视听,与自由意志主义的财产权和正义原则格格不入。

Fortunately, we do not need such a convoluted argument to condemn debtor's prison. The real reason the defaulting debtor may not be punished is that he is simply not a thief at all. If the debtor is bankrupt, there is no property to steal. The debtor is not “refusing” to turn over “the” money owed. There is no money to be turned over. How can there be theft of a non-existent thing? As discussed above, all future title transfers are necessarily conditioned on the thing's existing at the specified transfer time. Failure to transfer something that does not exist cannot be theft; rather, one of the conditions for the title transfer has simply not been satisfied.⁵⁷

幸运的是,我们不需要这样一个如此复杂的论证来谴责监禁债务人。拖欠债务者可能不会受到惩罚的真正原因是,他根本就不是小偷。如果债务人破产,就没有财产可偷。债务人并不是“拒绝”交出所欠的“那笔”的钱。根本就没有钱可交。不存在的东西怎么会被盗呢?如上所述,所有未来的所有权转让都必然以该物在指定的转让时间存在为条件。未转让不存在的东西不可能是盗窃;相反,只是所有权转让的条件之一根本没有得到满足。¹⁷⁴

¹⁷³ See, on this, the comments by Hoppe and others in “How We Come to Own Ourselves” (ch. 4), n.14 and “Defending Argumentation Ethics” (ch. 7), n.31.

关于这一点,可参见霍普等人在《我们如何拥有自己》(第4章)注释14以及《捍卫论证伦理学》(第7章)注释31中的评论。

¹⁷⁴ For similar reasons, Rothbard is also incorrect that a prospective employee who receives advance payment for future performance is necessarily a thief if he does not return the money. Only if the prospective employee still possesses the money and then refuses to pay it is he a thief. Similarly, I believe Rothbard is incorrect in assuming that failure to meet a performance bond (monetary damages payable in the event of non-performance) is “implicit theft” from the promisee. Ibid., pp. 137 – 38. See also the quote from Evers in note 53, above, misusing the concept of fraud.

出于类似的原因,罗斯巴德认为,预收未来工作报酬的未来雇员如果不归还钱款就一定小偷的说法也是不正确的。只有当未来雇员仍然拥有这笔钱,然后拒绝支付时,他才是小偷。同样,我认为罗斯巴德假定未能履行履约保证金(在不履约的情况下应支付的金钱赔偿)就是对被承诺人的“隐性盗窃”,这也是不正确的。同上,第137-

Of course, contracts would normally contain default or explicitly spelled out ancillary title transfers to address the unavoidable possibility of future default. For instance, a default title transfer that is ancillary to the main title transfers might be that the debtor also transfers title to \$1100 plus accrued interest at any time after the original due date if he is unable to repay on the due date, if and when he gets a paycheck or otherwise comes into money. Such ancillary provisions can be explicit in written contracts or be assumed as default provisions in accordance with custom and context.

当然，通常会包含违约条款或明文规定的附属所有权转让条款，以应对未来不可避免的违约可能。例如，附属于主所有权转让的违约所有权转让可能是：如果债务人在到期日无法偿还，在他拿到工资或以其他方式进钱时，债务人也会在原到期日之后的任何时间转让 1100 美元及应计利息的所有权。这类附属条款可以在书面中明确规定，也可以根据习惯和上下文假定为默认条款。

E 欺诈 Fraud

As noted earlier,⁵⁸ libertarians often claim to believe in the nonaggression principle, or NAP, and that the NAP prohibits not only the initiation of force against the person of someone else (self-ownership) but also prohibits the use of force against the property of someone else—or threats thereof, or fraud.⁵⁹ But including owned resources under the NAP rubric is somewhat awkward, since aggression would seem to literally refer to physically attacking another’s body. And then threats and fraud are just tacked on. As I previously noted, using the NAP as a shorthand for this cluster of relative rights is fine as long it is kept in mind that the justifications for these are different. I argued in chapters 2, 4, and elsewhere that self-ownership rights (and thus the prohibition on aggression) stem from each person’s direct control of his body; but that actors also acquire property rights in external, previously-unowned resources by original appropriation or contractual acquisition from a previous owner. I argued in chapter 5 (section IV.F) why threats are also types of aggression under libertarian principles.

38 页。另见上文注释 53 中对埃弗斯滥用欺诈概念的引述。

如前所述，¹⁷⁵ 自由意志主义者经常声称自己信奉互不侵犯原则（NAP），认为 NAP 不仅禁止对他人的身体使用武力（自我所有权），而且禁止对他人的财产使用武力——或以武力相威胁，或欺诈。¹⁷⁶ 但将拥有的资源纳入互不侵犯原则的范畴有些突兀，因为从字面上看，侵犯似乎是指对他人身体的物理攻击。而威胁和欺诈则是附加的。正如我之前所指出的，只要记住这些权利的正当性是不同的，将 NAP 用作这一系列相对权利的简称是可以的。我在第 2 章、第 4 章和其他章节中论证过，自我所有权（从而禁止侵犯）源于每个人对自己身体的直接控制；但行动人也可以通过先占或通过从先前的所有者那里获得外部的、先前无主的资源的财产权。我在第五章（第四 F 节）中论证了为什么威胁也是自由意志主义原则下的侵犯类型。

The theory of contract espoused here demonstrates that fraud is properly viewed as a type of theft, if defined properly. The problem is that even some libertarians use the term loosely, which leads to error. Sometimes it is just used to mean dishonesty; other times in support of the idea of "implicit theft," a concept I have criticized above.⁶⁰ But because of the sloppy use of the term, failure to provide clear definitions, and lack of appreciation of Rothbard's and Evers's groundbreaking title-transfer theory of

¹⁷⁵ See "What Libertarianism Is" (ch. 2), n.4; also "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11) and "On Libertarian Legal Theory, Self-Ownership and Drug Laws" (ch. 23).

参见《何为自由意志主义》（第 2 章）注释 4；还有《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）以及《论自由意志主义法律理论、自我所有权和毒品法》（第 23 章）。

¹⁷⁶ Writes Rothbard:

Defensive violence, therefore, must be confined to resisting invasive acts against person or property. But such invasion may include two corollaries to actual physical aggression: intimidation, or a direct threat of physical violence; and fraud, which involves the appropriation of someone else's property without his consent, and is therefore "implicit theft."

Rothbard, "Self-Defense," in *The Ethics of Liberty* (<https://mises.org/library/right-self-defense>), at p. 77.

罗斯巴德写道：

因此，防卫性暴力必须仅限于抵抗对人身或财产的侵犯行为。但这种侵犯可能包括实际人身侵犯的两个推论：恐吓，或直接的人身暴力威胁；欺诈，涉及未经他人同意侵占他人财产，因此属于“隐性盗窃”。

罗斯巴德，《自由的伦理》中的“自卫”(<https://mises.org/library/right-self-defense>)，第 77 页。

contract elaborated, refined, and extended in this chapter, libertarian theory is left vulnerable to criticism, such as that of James Child and others, discussed below.

这里所信奉的理论表明，如果定义得当，欺诈被正确地视为盗窃的一种。问题是，即使是一些自由意志主义者也不严格地使用这一术语，从而导致错误。有时它只是用来指不诚实；有时则用来支持“隐性盗窃”的观点，我在上文对这一概念进行了批评。¹⁷⁷但是，由于对该术语的草率使用，未能提供明确的定义，以及缺乏对罗斯巴德和埃弗斯在本章中阐述、完善和扩展的开创性的所有权转让理论的理解，自由意志主义理论很容易受到批评，例如下文将讨论的詹姆斯-柴尔德（James Child）等人的批评。

The only type of “fraud” that can count as a violation of libertarian principles, is when it amounts to a type of theft. The Rothbard-Evers title-transfer of contract (after being pruned of its confused “implicit theft” branches) can help to make this clear. Suppose Karen buys a bucket of apples from Ethan for \$20.61. Ethan represents the things in the bucket as being apples, in fact, as apples of a certain nature, that is, as being fit for their normal purpose of being eaten. Karen conditions the transfer of title to her \$20 on Ethan's not knowingly engaging in “fraudulent” type activities, like pawning off rotten apples. (Good faith is also a default background interpretative condition to the contractual title transfers.)⁶² If the apples are indeed rotten and Ethan knows this, then he knows that he does not receive ownership of or permission to use the \$20, because the condition “no fraud” is not satisfied. He is knowingly in possession of Karen's \$20 without her consent, and is, therefore, a thief.

唯一可以算作违反自由意志主义原则的“欺诈”，是当它构成一种盗窃时。罗斯巴德-埃弗斯（Rothbard-Evers）的所有权转让（在删去其混乱的“隐性盗窃”分支之后）可以帮助我们明确这一点。假设凯伦以 20 美元的价格从伊森那里买了一桶苹果。¹⁷⁸伊森表示桶里的东西是苹果，事实上，是具有某种性质的苹果，也就是说，是适合于正

¹⁷⁷ See, e.g., the quote from Evers in note 53, above.

例如，参见上文注释 53 中对埃弗斯的引述。

¹⁷⁸ Let's put aside for now the problem with owning fiat money (see note 31, above); let's assume \$20 represents something ownable, like some amount of gold.

我们暂且不谈拥有法定货币的问题（见上文注 31）；我们假设 20 美元代表某种可拥有的东西，比如一定重量的黄金。

常食用目的的苹果。凯伦将其 20 美元的所有权转让给伊森的条件是，伊森不得故意从事“欺诈”类活动，如出售烂苹果。（诚信也是所有权转让的默认背景解释条件。）

¹⁷⁹ 如果苹果确实是烂的，而且伊桑知道这一点，那么他就没有获得 20 美元的所有权或使用许可，因为“无欺诈”的条件没有得到满足。他在未经凯伦同意的情况下明知故犯地占有了凯伦的 20 美元，因此他是一个小偷。

This is akin to the legal notion of larceny by trick:

*Under common law, larceny is the trespassory taking and carrying away of the personal property of another with the intent to steal. Larceny by trick is distinguishable in that a defendant who commits larceny by trick obtains only possession of the personal property of another, not title of that property. Also, the defendant who commits larceny by trick obtains possession of the property by intentionally making a false statement to the victim.*⁶³

这类似于法律上“欺诈盗窃”的概念：

根据普通法，“盗窃罪”是指以偷窃为目的，非法占有并携带他人个人财产的行为。欺诈盗窃的区别在于，实施欺诈盗窃的被告仅获取了他人个人财产的占有权，而非该财产的所有权。此外，实施欺诈盗窃的被告是通过故意向受害者作出虚假陈述来获取财产的占有权。¹⁸⁰

¹⁷⁹ On good faith as it pertains to contractual matters, see Louisiana Civil Code, art. 1759: “Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation” and art. 1983: “Contracts must be performed in good faith.” See also Levasseur, Louisiana Law of Obligations in General: A Comparative Civil Law Perspective, A Treatise, ¶¶ 39 – 43; idem, Louisiana Law of Conventional Obligations: A Précis, § 8.1.2; Litvinoff, The Law of Obligations, § 1.8.

关于与事项有关的诚信，参见《路易斯安那民法典》第 1759 条：“诚信应规范债务人与债权人在与债务有关的任何方面的行为”，以及第 1983 条：“必须诚信履行。”另见莱瓦瑟尔的《路易斯安那州一般债务法：比较民法视角，专论》第 39-43 段；同上，《路易斯安那州约定债务法：概要》第 8.1.2 节；利特维诺夫的《债务法》第 1.8 节。

¹⁸⁰ “Larceny by trick,” Legal Information Institute (Cornell Law School; www.law.cornell.edu/wex/larceny_by_trick) (emphasis added). See also “Larceny: Larceny by Trick” (Wikipedia; https://en.wikipedia.org/wiki/Larceny#Larceny_by_trick). For a somewhat similar approach to fraud as the one I advance here, see Gary Chartier, Anarchy and

This libertarian take on fraud is also more or less compatible with conventional legal doctrines: "In law, fraud is intentional deception to secure unfair or unlawful gain, or to deprive a victim of a legal right."⁶⁴

这种关于欺诈的自由意志主义观点或多或少也传统的法律原则相兼容：“在法律上，欺诈是故意欺骗以获取不公平或非法的利益，或者剥夺受害者的合法权利。”¹⁸¹

The reason this conception of fraud follows from libertarian property rights principles and the title-transfer theory of contract is that ownership of a resource (including one's body) gives one the right to exclude others from using the resource. The owner can grant permission or deny permission by communicating his consent to others. In the case of alienable, owned things, the owner can allow someone to use the thing temporarily (loaning my car to a friend for a day), give it outright (a gift), or agree to give up title to it in exchange for some act or other title transfer from the other party. This is what contracting is: the exercise of property rights by the owner communicating his consent about who can use the property and under what conditions. If I loan you my car, you are the temporary possessor, not the owner. Possession and ownership are distinct. I can transfer ownership but not possession, or vice-versa; or both; or neither. In the example above, when Ethan takes possession of Karen's \$20, he only has possession, not ownership, since Karen made the transfer of title to the money conditional upon the apples being genuine.⁶⁵

这种欺诈概念之所以源于自由意志主义的财产权原则和所有权转让的理论，是因为对资源（包括自己的身体）的所有权赋予了一个人排除他人使用该资源权利。所有者可以通过向他人表示同意来授予许可或拒绝许可。就可让渡的所有物而言，所有者可

Legal Order: Law and Politics for a Stateless Society (Cambridge University Press, 2013), chap. 2, § IV.E.3 (p. 73) and chap. 5, § II.C.2.vi (p. 278 - 79).

“ 欺诈 盗窃 ”，法律信息研究所（康奈尔大学法学院；www.law.cornell.edu/wex/larceny_by_trick）（重点补充）。另见《盗窃：欺诈盗窃》（维基百科；https://en.wikipedia.org/wiki/Larceny#Larceny_by_trick）。对于与我在此提出的类似的欺诈处理方法，见加里·查蒂埃的《无政府与法律秩序：无国家社会的法律与政治》（剑桥大学出版社，2013 年），第 2 章，第 IV.E.3 节（第 73 页）和第 5 章，第 II.C.2.vi 节（第 278-279 页）。

¹⁸¹ “Fraud” (Wikipedia; <https://en.wikipedia.org/wiki/Fraud>).

欺诈（维基百科；<https://en.wikipedia.org/wiki/Fraud>）。

以允许他人临时使用该物（把我的车借给朋友一天）、直接赠送（礼物），或者同意放弃该物的所有权，以换取对方的某种行动或其他所有权转让。这就是：所有者行使财产权，就谁可以使用财产以及在什么条件下使用财产传达他的同意。如果我把车借给你，你是临时占有人，而不是所有者。占有权和所有权是不同的。我可以转让所有权，但不能转让占有权，反之亦然；或者两者都转让；或者两者都不转让。在上面的例子中，当伊森占有凯伦的 20 美元时，他只有占有权而没有所有权，因为凯伦转让这笔钱的所有权取决于苹果是真的。¹⁸²

Once understood this way, the criticisms of libertarianism for being unable to justify fraud law can be seen as confused and flawed. James W. Child, for example, is wrong in asserting that “the basic moral principles of libertarianism do not support a prohibition of fraud.”⁶⁶ Benjamin Ferguson argues that Child is correct that libertarianism does not prohibit fraud, but that we can oppose fraud by “appealing to an external theory of moral permissibility.”⁶⁷ Ferguson is also incorrect, like Child, in his first point, so the second part of his thesis is unnecessary; libertarianism already prohibits fraud and does not need patching with external theories.

一旦以这种方式理解，那些认为自由意志主义无法为欺诈法提供正当理由的批评就可

¹⁸² See also the discussion of trademarks and fraud in “Reply to Van Dun: Non-Aggression and Title Transfer” (ch. 12). For further discussion of the law of fraud, see Barnett, “Rational Bargaining Theory and Contract”; idem, “The Sound of Silence: Default Rules and Contractual Consent”; and Rothbard, “Property Rights and the Theory of Contracts,” p. 143. For further commentary on the points made in this section, see Kinsella, “KOL044| ‘Correcting some Common Libertarian Misconceptions’ (PFS 2011),” Kinsella on Liberty Podcast (May 2, 2013); idem, “Fraud, Restitution, and Retaliation: The Libertarian Approach,” StephanKinsella.com (Feb. 3, 2009); and idem, “The Problem with ‘Fraud’: Fraud, Threat, and Contract Breach as Types of Aggression,” Mises Economics Blog (July 17, 2006).

另见《对范·邓恩的回复：互不侵犯与财产权转让》（第 12 章）中关于商标和欺诈的讨论。关于欺诈法的进一步讨论，见巴尼特的《理性谈判理论与》；同上，《沉默之声：默认规则与同意》；以及罗斯巴德的《财产权与理论》，第 143 页。关于本节所提出观点的进一步评论，见金塞拉的《KOL044| “纠正一些常见的自由意志主义误解”（PFS 2011）》，《金塞拉谈自由》播客（2013 年 5 月 2 日）；同上，《欺诈、赔偿与报复：自由意志主义的方法》，StephanKinsella.com（2009 年 2 月 3 日）；以及同上，《“欺诈”的问题：欺诈、威胁以及作为侵犯类型的违约》，米塞斯经济学博客（2006 年 7 月 17 日）。

以被视为混乱和有缺陷的。例如，詹姆斯·W·柴尔德声称“自由意志主义的基本道德原则不支持禁止欺诈”是错误的。¹⁸³ 本杰明·弗格森认为柴尔德关于自由意志主义不禁止欺诈的观点是正确的，但我们可以通过“诉诸外部的道德许可理论”来反对欺诈。¹⁸⁴ 弗格森和蔡尔德一样，在他的第一点上也是错误的，所以他论文的第二部分是不必要的；自由意志主义已经禁止欺诈，不需要用外部理论来修补。

IV. 结论 CONCLUSION

The title-transfer theory of contract avoids the problems of detrimental reliance and consideration-based defenses of contract. It permits gratuitous contracts without inventing arcane doctrines or burdensome formalities and provides a conceptually elegant theory of contract that can provide damages for breach of promises to perform, similar to modern legal systems.

所有权转让的理论避免了致害依赖和基于对价的抗辩问题。它允许无偿，而无需创造晦涩难明的理论或繁琐的形式，并提供了一种概念上优雅的理论，可为违反履行承诺提供损害赔偿，与现代法律制度类似。

This view of contract also solves the problems of voluntary slavery contracts and debtors' prison and avoids convoluted arguments for inalienability. Finally, the framework presented herein provides a justification for outlawing fraud.

这种观还解决了自愿为奴和监禁债务人问题，避免了不可让渡性的复杂论证。最后，

¹⁸³ James W. Child, “Can Libertarianism Sustain a Fraud Standard?”, *Ethics* 104, no. 4 (July 1994): 722 – 38, at 722.

詹姆斯·W·柴尔德，《自由意志主义是否能确认欺诈标准？》，《伦理学》第 104 卷，第 4 期（1994 年 7 月）：722-738 页，第 722 页。

¹⁸⁴ Benjamin Ferguson, “Can Libertarians Get Away With Fraud?”, *Economics and Philosophy* 34 (2018; <https://perma.cc/HL4Z-S2KC>; pdf: <https://perma.cc/799P-Y8SP>): 165 – 84. Will Wilkinson also argues that standard libertarian principles can’t prohibit fraud. See the discussion in Bryan Caplan, “Fraud and Punishment,” *EconLog* (Feb. 1, 2009; <https://perma.cc/67YF-XMEZ>).

本杰明·弗格森，《自由意志主义者能逃脱欺诈吗？》，《经济学与哲学》34 卷（2018 年；<https://perma.cc/HL4Z-S2KC>；pdf: <https://perma.cc/799P-Y8SP>）：165-184 页。

威尔·威尔金森也认为标准的自由意志主义原则无法禁止欺诈。见布莱恩·卡普兰的《欺诈与惩罚》中的讨论，*EconLog*（2009 年 2 月 1 日；<https://perma.cc/67YF-XMEZ>）。

本文提出的框架将欺诈定为非法提供了正当理由。

第十章 不可让渡性与惩罚：对乔治·史密斯的回应

Inalienability and Punishment: A Reply to George Smith

George H. Smith published "A Killer's Right to Life" in Liberty magazine in 1996, making various arguments and claims about inalienability.* I responded in the Journal of Libertarian Studies,† in a piece which complements and supplements my previous articles on the inalienability and punishment issues, now chapters 5 and 9 in the present volume. Despite my disagreements with Smith on this issue, I respect and have learned from his work, such as his great essay "Justice Entrepreneurship in a Free Market."‡

乔治·H·史密斯 1996 年在《自由》杂志上发表了 "一个凶手的生命权" 一文，对不可让渡性提出了各种论点和主张。* 我在《自由意志主义研究杂志》† 上发表了一篇文章，对我以前关于不可让渡性和惩罚问题的文章（即本书的第 5 章和第 9 章）进行了补充和完善。尽管在这个问题上我与史密斯有分歧，但我尊重他的工作，并从他的工作中学习，诸如他的名篇《自由市场中的正义的企业家精神》‡。

* George H. Smith, "A Killer's Right to Life," Liberty 10, no. 2 (Nov. 1996; <https://perma.cc/8U8C-ZTAR>): 49–54 & 68–69.

* 乔治·H·史密斯，《凶手的生命权》，《自由》第 10 卷，第 2 期（1996 年 11 月；<https://perma.cc/8U8C-ZTAR>）：49-54 页及 68-69 页。

† Stephan Kinsella, "Inalienability and Punishment: A Reply to George Smith," J. Libertarian Stud. 14, no. 1 (Winter 1998–99): 79–93. Smith's article was also criticized in the May 1997 issue of Liberty. See John C. Goodman, "Do Inalienable Rights Outlaw Punishment?," Liberty 10, no. 5 (May 1997; <https://perma.cc/4TMF-2S5R>): 47–49; Timothy Virkkala, "The Hollow Ring of Inalienability," Liberty 10, no. 5 (May 1997; <https://perma.cc/4TMF-2S5R>): 49–50. Smith's response was "Inalienable Rights?," Liberty 10, no. 6 (July 1997; <https://perma.cc/48NM-UAPK>): 51–56; Virkkala's response was "The Stilted Logic of Natural Rights," Liberty 10, no. 6 (July 1997; <https://perma.cc/48NM-UAPK>): 56.

† 斯蒂芬·金塞拉，《不可让渡性与惩罚：对乔治·史密斯的回应》，《自由意志主义研究杂志》第 14 卷，第 1 期（1998-1999 年冬季）：79-93 页。史密斯的文章在 1997

年 5 月的《自由》杂志上也受到了批评。见约翰·C·古德曼,《不可让渡的权利是否将惩罚视为非法?》,《自由》第 10 卷,第 5 期(1997 年 5 月;<https://perma.cc/4TMF-2S5R>): 47-49 页;蒂莫西·维尔卡拉,《不可让渡性的空洞之环》,《自由》第 10 卷,第 5 期(1997 年 5 月;<https://perma.cc/4TMF-2S5R>): 49-50 页。史密斯的回应是《不可让渡的权利?》,《自由》第 10 卷,第 6 期(1997 年 7 月;<https://perma.cc/48NM-UAPK>): 51-56 页;维尔卡拉的回应是《自然权利的生硬逻辑》,《自由》第 10 卷,第 6 期(1997 年 7 月;<https://perma.cc/48NM-UAPK>): 56 页。

† George H. Smith, "Justice Entrepreneurship in a Free Market," in *Atheism, Ayn Rand, and Other Heresies* (Buffalo, N.Y.: Prometheus Books, 1991). Smith, who passed away in 2022, was a thoughtful and provocative libertarian theorist. See, for example, *idem*, *Atheism: The Case Against God* (Buffalo, N.Y.: Prometheus Books, 1979); *idem*, *Atheism, Ayn Rand, and Other Heresies*.

† 乔治·H·史密斯,《自由市场中的正义的企业家精神》,收录于《无神论、安·兰德及其他异端邪说》(纽约州布法罗:普罗米修斯图书,1991 年)。史密斯于 2022 年去世,他是一位深思熟虑且具有启发性的自由意志主义理论家。例如,可参见他的《无神论:反对上帝的理由》(纽约州布法罗:普罗米修斯图书,1979 年);同上,《无神论、安·兰德及其他异端邪说》。

It can reasonably be argued that capital punishment is immoral or problematic because of the danger of executing an innocent person by mistake.¹ George Smith, in a recent *Liberty* magazine article in which he argues against capital punishment, does not take this approach. Instead, Smith states that capital punishment is never permissible, even where "reasonable doubt is impossible and where the crimes have been especially heinous."² In other words, even if we know beyond all doubt that someone has committed murder, it is impermissible to execute him (and also, presumably, to inflict less severe punishment). Smith bases his argument on the concept of "inalienable rights," rights that "cannot be transferred, surrendered, or forfeited."³ The argument runs roughly as follows. Libertarians must adopt one of two positions: (1) everyone has inalienable rights, in which case even a (known) murderer may not be executed; or (2) certain crimes may be punished with death, in which case the theory of inalienable rights must be abandoned. In Smith's opinion,

position (2) “would be catastrophic, for we cannot construct a libertarian theory of justice except on a foundation of inalienable rights.” 4

可以合理地认为，死刑是不道德或存在问题的，因为存在误杀无辜者的危险。乔治-史密斯（George Smith）在《自由》杂志最近发表的一篇反对死刑的文章中并没有采取这种观点。¹⁸⁵相反，史密斯指出，死刑是绝对不允许的，即使是在“合理怀疑不可能存在，且罪行极其恶劣的情况下”。¹⁸⁶换句话说，即使我们毫无疑问地知道某人犯下了谋杀罪，也不允许对他执行死刑（大概也不允许处以较轻的刑罚。史密斯的论点基于“不可让渡的权利”这一概念，即“不可转让、交出或放弃的权利”。¹⁸⁷论证大致如下。自由意志主义必须采取两种立场中的一种：（1）每个人都有不可让渡的权利，在这种情况下，即使是（已知的）杀人犯也不可被处死；或者（2）某些罪行可以处以死刑，在这种情况下，不可让渡的权利理论必须被放弃。在史密斯看来，立场（2）“将是灾难性的，因为除非建立在不可让渡的权利的基础上，否则我们无法构建自由意志主义的正义理论”。¹⁸⁸

Smith's entire argument, then, rests on the notion that libertarianism and justice require inalienable rights. There are either “inalienable” rights, or there are no rights at all. Yet Smith's arguments for why libertarianism requires that rights be inalienable are unpersuasive.

因此，史密斯的整个论证都建立在这样一个概念之上，即自由意志主义和正义需要不

¹⁸⁵ See “A Libertarian Theory of Punishment and Rights” (ch. 5), n.84 and Kinsella, “Fraud, Restitution, and Retaliation: The Libertarian Approach,” StephanKinsella.com (Feb. 3, 2009). For a related commentary related to disputes in general, see Kinsella, “On the Obligation to Negotiate, Compromise, and Arbitrate,” StephanKinsella.com (April 6, 2023).

见《自由意志主义的惩罚与权利理论》（第 5 章），注释 84 以及金塞拉的《欺诈、赔偿与报复：自由意志主义的方法》，StephanKinsella.com（2009 年 2 月 3 日）。关于一般争议的相关评论，见金塞拉的《关于谈判、妥协和仲裁的义务》，StephanKinsella.com（2023 年 4 月 6 日）。

¹⁸⁶ Smith, “A Killer’s Right to Life,” p. 46 (emphasis added).

史密斯，《凶手的生命权》，第 46 页（重点补充）。

¹⁸⁷ Ibid.

同上。

¹⁸⁸ Ibid., p. 48.

同上，第 46 页。

可让渡的权利。要么有 "不可让渡的 "权利，要么根本没有权利。然而，史密斯关于为什么自由意志主义要求权利不可让渡的论证是没有说服力的。

长期威胁 STANDING THREATS

One of Smith's approaches is to provide an argument for capital punishment based on the notion of self-defense and then to attack this argument as insufficient. Smith writes:

*Some years ago during a summer conference, Randy Barnett and I sat down to see whether we could manufacture a defense of capital punishment. The best we could come up with was the notion of a "standing threat." This is based on John Locke's treatment of reparation and restraining, which "are the only reasons, why one Man may lawfully do harm to another, which is that we call punishment."*⁵

史密斯的方法之一是根据自卫的概念为死刑提供论据，然后攻击这一论据不足。史密斯写道：

几年前，在一次夏季会议上，兰迪-巴尼特和我坐下来研究我们能否为死刑辩护。我们所能想到的最好的办法就是 "长期威胁 "的概念。这是基于约翰-洛克对赔偿和限制的处理，"这是一个人可以合法地伤害另一个人的唯一理由，也就是我们所说的惩罚 "。¹⁸⁹

Thus, according to Locke, we may kill an aggressor in self-defense, since he has placed the victim and aggressor in a "state of war." Similarly, a case could be made that a convicted aggressor may be executed, on the grounds that he is a "standing threat" to others.

因此，根据洛克的观点，我们可以出于自卫杀死侵犯者，因为他使受害者和侵犯者处于 "战争状态"。同样，我们也可以以侵犯者对他人构成 "长期威胁 "为由，将被定罪的侵犯者处死。

Rejecting this argument, Smith notes:

To kill someone as a "standing threat" in the name of self-defense may amount to little more than a surreptitious effort to smuggle capital punishment in through the

¹⁸⁹ Ibid., p. 68. 同上，第 68 页。

*back door of libertarian theory, having denied it entrance through the front.*⁶

史密斯在驳斥这一论点时指出：

以自卫的名义将某人作为 “长期威胁 ”加以杀害，可能只不过是拒绝死刑从前
门进入之后，偷偷地从自由意志主义理论的后门将其偷运进来而已。¹⁹⁰

Smith is correct here: it is not for reasons of self-defense that a victim has a right to punish an aggressor.⁷ However, this does not mean punishment (retribution or retaliation) is impermissible, only that self-defense is not sufficient to justify punishment.

史密斯在这里是正确的：受害者有权惩罚侵犯者并不是出于自卫。¹⁹¹ 然而，这并不意味着惩罚（报应或报复）是不允许的，只是说自卫不足以成为惩罚的正当理由。

巴尼特论惩罚 BARNETT ON PUNISHMENT

Let me briefly note the following. Smith states:

For years [Barnett] has brilliantly elaborated on the pure theory of restitution as the only acceptable model of libertarian punishment, and he recognizes that the death penalty cannot be incorporated within this model.”⁸

请允许我简要说明如下。史密斯说：

多年来，[巴尼特]出色地阐述了纯粹的赔偿理论，将其作为唯一可接受的自由
意志主义惩罚模式，并且他认识到死刑不能纳入这一模式 ”。¹⁹²

¹⁹⁰ Ibid., p. 69.

同上，第 69 页。

¹⁹¹ That said, I do agree that in certain cases someone who is a standing threat to others may be dealt with appropriately, in which case self-defense principles come into play. See “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.F. But not everyone who has committed an act of aggression is necessarily a standing threat.

尽管如此，我同意在某些情况下，可以适当处理对他人构成长期威胁的人，在这种情况下，自卫原则就会发挥作用。见 《自由意志主义的惩罚与权利理论》（第 5 章），第四部分 F 节。但并不是每个实施了侵犯行为的人都一定是长期威胁。

¹⁹² Smith, “A Killer’ s Right to Life,” p. 68.

Admittedly, Barnett does appear to believe that even guilty aggressors have a right against punishment. But he does not claim to have justified such a right in his writings on restitution. In his published works on this issue, Barnett opposes a punishment-based system because he believes it may deter crime less than would a restitution-based system, and also because the unavoidable possibility of error can lead to "infliction of harm on the innocent."⁹ He does not, however, provide a strong argument that punishing an actual aggressor violates his rights. Indeed, in his book *The Structure of Liberty*, Barnett states: "this analysis cannot conclusively prove that no combination of compensation or punishment can ever address effectively the compliance problem."¹⁰ And further: "I do not claim to have completely demonstrated this proposition [that justice requires restitution, not punishment] either in my earlier writings, or in this book."¹¹

诚然，巴尼特似乎确实认为，即使有罪的侵犯者也有不受惩罚的权利。但他并没有主张自己在有关赔偿的著作中证明了这种权利的正当性。在已出版的有关著作中，巴尼特反对以惩罚为基础的制度，因为他认为这种制度对犯罪的威慑力可能小于以赔偿为基础的制度，还因为不可避免的错误可能导致“对无辜者造成伤害”。¹⁹³然而，他并未提供有力的证据来证明惩罚侵犯者是侵犯了侵犯者的权利。事实上，巴尼特在其《自由的结构》一书中指出：“这一分析并不能最终证明，任何补偿或惩罚的组合都不能有效地解决合规问题。”¹⁹⁴¹⁰而且，“无论是在我早期的作品中，还是在本书中，我都没有声称已经完全证明了这一命题[正义需要补偿，而不是惩罚]”。¹⁹⁵

史密斯《凶手的生命权》，第 68 页。

¹⁹³ Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, 2d ed. (Oxford, 2014), p. 228 (emphasis added).

兰迪·E·巴尼特，《自由的结构：正义与法治》，第 2 版（牛津，2014 年），第 228 页（重点补充）。

¹⁹⁴ Ibid., p. 237 (emphasis added).

同上，第 237 页（重点补充）

¹⁹⁵ Ibid., p. 186 n. 36. See also p. 321: "If men were gods, then perhaps imposing rewards and punishments on the basis of desert would be a workable theory." Also: "It has been noted that one who wishes to extinguish or convey an inalienable right may do so by committing the appropriate wrongful act and thereby forfeiting it." Idem, "Contract Remedies and Inalienable Rights," *Social Policy & Phil.* 4, no. 1 (Autumn 1986; <https://tinyurl.com/44adafte>): 179 - 202, p. 186, and idem, "Rights and

Thus, although Barnett opposes punishment for a variety of reasons,¹² those that are given to buttress his case in favor of restitution do not rest on viewing rights as inalienable and, in my view, Barnett has never demonstrated that rights are inalienable in the sense used by Smith.¹³

因此，尽管巴尼特由于各种原因反对惩罚，¹⁹⁶ 但为支持他赞成赔偿的观点所给出的那些理由并非基于将权利视为不可让渡的观点，而且在我看来，巴尼特从未证明权利在史密斯所使用的意义上是不可让渡的。¹⁹⁷

Remedies in a Consent Theory of Contract,” in Frey & Morris, eds., *Liability: New Essays in Legal Philosophy*, pp. 156 – 57, both citing Diana T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia University Press, 1985), p. 14. But if a criminal has forfeited his rights (to not be punished, say), then it does not violate his rights to punish him.

同上，第 186 页注释 36。另见第 321 页：“如果是神，那么也许根据应得进行奖惩会是一个可行的理论。” 还有：“有人指出，一个希望消除或转让不可让渡权利的人，可以通过实施适当的不法行动从而丧失该权利。” 同上，《赔偿与不可让渡的权利》，《社会政策与哲学》第 4 卷，第 1 期(1986 年秋季;https://tinyurl.com/44adafte): 179-202，第 186 页，以及同上，《同意理论下的中的权利和赔偿》，载于弗雷和莫里斯编，《责任：法律哲学新论》，第 156-157 页，均引用戴安娜·T·迈尔斯的《不可让渡的权利：一种辩护》（纽约：哥伦比亚大学出版社，1985 年），第 14 页。但是，如果一个罪犯丧失了他的权利（比如说不受惩罚的权利），那么惩罚他就不会侵犯他的权利。

¹⁹⁶ As pointed out in note 33, below, I also oppose institutionalized punishment for many of the pragmatic reasons given by Barnett, though it is not because rights are inalienable, and it is not because (proportional) punishment would violate the rights of actually guilty criminals.

正如下面注释 33 所指出的，出于巴尼特给出的许多实用主义的原因，我也反对制度化的惩罚，不过这不是因为权利是不可让渡的，也不是因为（相称的）惩罚会侵犯确实有罪的罪犯的权利。

¹⁹⁷ A second, less significant point, relates to Smith’ s doubts about the propriety of killing or imprisoning someone who has shown himself to be a “standing threat” to others. Smith notes: “Objective standards and procedures seem problematic in this case, to say the least. (Perhaps I am lacking in imagination; if so, I have little doubt that more imaginative libertarians will come to my aid with ingenious solutions.)” Smith, “A Killer’ s Right to Life,” p. 69. Barnett seems to have done just this. Barnett argues that the principle of “extended self-defense” justifies imprisoning (sometimes for life) those who have made a sufficiently unambiguous communication of a threat to another. Barnett, *The Structure of Liberty*, pp. 188 – 193. On pp. 213 – 14, Barnett points out that because of problems of enforcement abuse and rule of law considerations, however,

自卫、赔偿和不可让渡性

DEFENSE, RESTITUTION, AND INALIENABILITY

Another problem with Smith's assertion that rights are inalienable is just that: it is merely an assertion. Simply labeling rights over and over again with the modifier "inalienable" does not make it so.¹⁴ Libertarians do not typically view rights as "inalienable" in Smith's sense, or put much weight on this concept. In fact, viewing rights as alienable is perfectly consistent with—indeed, implied by—the libertarian non-aggression principle.¹⁵

史密斯关于权利是不可让渡的论断的另一个问题在于：这仅仅只是一个论断。一遍又一遍地用“不可让渡的”这个修饰词来描述权利，并不能使其成为事实。¹⁹⁸ 自由意志主

this remedy should be limited to those persons who have communicated a threat to others by their past criminal behavior (i.e., those who have been convicted, perhaps multiple times, of a crime), and only if the previous crimes had been proven beyond a reasonable doubt. See also Randy E. Barnett, "Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction," Boston U. L. Rev. 76 (February/April 1996); www.randybarnett.com/pre-2000): 157 – 68. I believe this limitation on the principle of extended self-defense is unduly restrictive, but that is neither here nor there. See, e.g., my post "Stalking and Threats as Aggression," StephanKinsella.com (Jan. 10, 2021). 第二点不太重要，史密斯怀疑杀死或监禁一个对他人构成“长期威胁”的人是否妥当。史密斯指出“客观标准和程序在这种情况下至少可以说是是有问题的。(也许是我缺乏想象力；如果是这样的话，我毫不怀疑更有想象力的自由意志主义者会来帮助我提出巧妙的解决方案)”。史密斯，《凶手的生命权》，第 69 页。巴尼特似乎就是这样做的。巴尼特认为，“延伸自卫”原则为监禁（有时是终身监禁）那些向他人发出足够明确的威胁信息的人提供了正当理由。巴尼特，《自由的结构》，第 188-193 页。在第 213-14 页中，巴尼特指出，由于执法滥用的问题和法治方面的考虑，这种补救措施应仅限于那些因其过去的犯罪行为而向他人发出威胁的人（即那些被判定有罪的人，也许是多次被判定有罪的人），而且只有在以前的罪行已被证明排除合理怀疑的情况下才能使用。另见兰迪·E·巴尼特，《扯平：赔偿、预防性拘留和侵权/犯罪区别》，《波士顿大学法律评论》76 期（1996 年 2 月/4 月；www.randybarnett.com/pre-2000）：157-168 页。我认为对扩展自卫原则的这种限制过于严格，但这与此无关。例如，见我的帖子《作为侵犯的跟踪和威胁》，StephanKinsella.com（2021 年 1 月 10 日）。¹⁹⁸ Smith says Jeremy Bentham held the theory of “inalienable rights” to be “nonsense upon stilts,” and thus wonders if anyone who rejects inalienable rights must follow Bentham to his anti-libertarian conclusions. Smith, “Inalienable Rights?” ,

义通常不认为权利是史密斯意义上的“不可让渡的”，也不重视这一概念。事实上，将权利视为可让渡的，与自由意志主义的“互不侵犯”原则是完全一致的，也是被原则所隐含的。¹⁹⁹

p. 51. Yet Bentham said that rights were nonsense, and that natural rights were nonsense upon stilts. He did not use the modifier “inalienable” that Smith subtly puts in his mouth (though he does use the adjective “imprescriptible”). Jeremy Bentham, “Anarchical Fallacies,” in Human Rights, A.I. Melden, ed. (Belmont, Calif.: Wadsworth Publishing, 1970), p. 28. Bentham opposed natural rights on the grounds that they were anterior to government, and thus his criticism is applicable to both alienable and inalienable natural rights. Thus, one can oppose Bentham’s rights-skepticism by being in favor of alienable natural rights, which means that rejecting inalienability does not mean following Bentham down a non-libertarian path, as long as one advocates natural rights.

史密斯说杰里米·边沁认为“不可让渡的权利”理论是“高跷上的胡言乱语”，因此想知道任何拒绝不可让渡权利的人是否都必须跟随边沁得出他的反自由意志主义的结论。史密斯，《不可让渡的权利？》，第 51 页。然而，边沁说权利是无稽之谈，自然权利是高跷上的无稽之谈。他并没有使用史密斯巧妙地塞进他嘴里的“不可让渡的”这个修饰词（尽管他确实使用了“不可让渡的”这个形容词）。杰里米·边沁，《无政府主义的谬论》，载于《人权》，A.I. 梅尔登编（加利福尼亚州贝尔蒙特：沃兹沃思出版社，1970 年），第 28 页。边沁反对自然权利，理由是它们先于政府存在，因此他的批评适用于可让渡的和不可让渡的自然权利。因此，一个人可以通过支持可让渡的自然权利来反对边沁的权利怀疑主义，这意味着拒绝不可让渡性并不意味着跟随边沁走上非自由意志主义的道路，只要一个人主张自然权利。

¹⁹⁹ Many, probably most, libertarians maintain that rights are strictly “alienable,” i.e., some actions are sufficient to alienate rights (although they usually also maintain that rights are “inalienable” sometimes, e.g., promising to be another’s slave, as opposed to the commission of an act of aggression, does not serve to alienate rights; see section “Inalienability,” and note 34, below. In fact, any libertarian who advocates the right to punish (or, really, even the right to self-defense) at least implicitly endorses that rights can be alienated, to some extent. See, e.g., Murray N. Rothbard, “Self-Defense,” in The Ethics of Liberty (New York: New York University Press, 1998; <https://mises.org/library/right-self-defense>), p. 81, where he says “the criminal ... loses his right to the extent that he has deprived another man of his” (emphasis in original); Barnett, “Contract Remedies and Inalienable Rights,” p. 186 (quoted in note 11 above); Roger Pilon, “Criminal Remedies: Restitution, Retribution, or Both?,” Ethics 88, no. 4 (July 1978): 348 – 57, 353 (“The criminal act has created rights in the victim; in the criminal it has both alienated rights and created obligations correlative to the newly created rights of the victim.”); John Locke, Second Treatise on Civil Government (1690; <https://www.johnlocke.net/2022/07/two-treatises-of-government.html>), §

172 (power over one man’ s life “is the effect only of forfeiture which the aggressor makes of his own life when he puts himself into the state of war with another”); Auberon Herbert, “Part XI,” in Auberon Herbert & J. H. Levy, *Taxation and Anarchism: A Discussion between the Hon. Auberon Herbert and J.H. Levy* (London: The Personal Rights Association, 1912; <https://perma.cc/LX8H-MZFH>), p. 38 (“Am I right in saying that a man has forfeited his own rights (to the extent of the aggression he has committed) in attacking the rights of others? ... It may be very difficult to translate into concrete terms the amount of aggression, and of resulting restraint; but all just law seems to be the effort to do this. We punish a man in a certain way if he has inflicted an injury which lays me up for a day; in another way if he takes my life.... [T]he punishment or redress ... should be measured by the amount of aggression; in other words that the aggressor—after a rough fashion—loses as much liberty as that of which he has deprived others.”), also *ibid.*, pp. 39 - 40; also other sources quoted in “A Libertarian Theory of Punishment and Rights” (ch. 5), n.43; also Kinsella, “Quotes on the Logic of Liberty,” StephanKinsella.com (June 22, 2009).

许多，可能是大多数的自由意志主义者认为权利严格来说是“可让渡的”，即某些行动足以让渡权利（尽管他们通常也认为权利在某些时候是“不可让渡的”，例如，承诺成为他人的奴隶，与实施侵犯行动不同，并不能让渡权利；见“不可让渡性”部分，以及下面的注释 34。事实上，任何主张惩罚权利（或者，实际上，甚至是自卫权利）的自由意志主义者至少在某种程度上含蓄地认可权利是可以被让渡的。例如，穆瑞·N·罗斯巴德在《自由的伦理》（纽约：纽约大学出版社，1998 年；<https://mises.org/library/right-self-defense>）中的“自卫”一文，第 81 页，他说“罪犯……在他剥夺了另一个人的权利的范围内失去了他的权利”（原文重点）；巴尼特，《赔偿与不可让渡的权利》，第 186 页（上面注释 11 中引用）；罗杰·皮隆，《刑事赔偿：赔偿、报复还是两者兼而有之？》，《伦理学》第 88 卷，第 4 期（1978 年 7 月）：348-357 页，353 页（“犯罪行为在受害者身上创造了权利：在罪犯身上，它既让渡了权利，又创造了与受害者新创造的权利相对应的义务。”）；约翰·洛克，《政府论：下（下篇）》（1690 年；<https://www.johnlocke.net/2022/07/two-treatises-of-government.html>），第 172 节（对一个人的生命的权力“只是侵犯者在与另一个人处于战争状态时对自己生命的丧失”）；奥伯龙·赫伯特，《第十一部分》，载于奥伯龙·赫伯特和 J.H.利维，《税收与无政府主义：尊敬的奥伯龙·赫伯特和 J.H.利维之间的讨论》（伦敦：个人权利协会，1912 年；<https://perma.cc/LX8H-MZFH>），第 38 页（“我这样说对吗，一个人在侵犯他人权利时已经丧失了自己的权利（在他所实施的侵犯范围内）？……将侵犯的程度和由此产生的限制转化为具体条款可能非常困难；但所有正义的法律似乎都在努力做到这一点。如果一个人造成的伤害让我卧床一天，我们就以某种方式惩罚他；如果他夺走了我的生命，我们就以另一种方式惩罚他……[T]惩罚或赔偿……应该根据侵犯的程度来衡量；换句话说，侵犯者——大致上——失去了与他剥夺他人的同样多的自由。”），同样在同上，第 39-40 页；还有《自由意志主义的惩罚与权利理论》（第 5 章），注释 43 中引用的其他来源；还有金塞拉，《关于自由逻辑的引述》，StephanKinsella.com（2009 年 6 月 22 日）。

Under this principle, only the initiation of force is prohibited; defensive, restitutive, or retaliatory force—more generally, “responsive” force—is not. One does alienate or forfeit certain rights by committing acts of aggression.¹⁶ This is exactly why it is permissible to use force to defend against or punish aggression, or to obtain restitution. One has a natural, not inalienable, right to be free from aggression.

根据这一原则，只有首次使用武力是被禁止的；防御性的、赔偿性的或报复性的武力——更广泛地说，“回应性的”武力——则不是。一个人通过实施侵犯行动确实会放弃或丧失某些权利。²⁰⁰这正是为什么使用武力来抵御或惩罚侵犯，或获得赔偿是被允许的。一个人拥有不受侵犯的自然权利，而非不可让渡的权利。

Both defensive and restitutive force, like punitive (retributive or retaliatory) force, imply some alienation of rights. This is just why defensive or restitutive force is considered to be permissible: because the aggressor has alienated his right to be free of such force. If one is opposed to punishment on inalienability grounds, how can one then endorse defensive or restitutive force? As John Goodman correctly notes, Smith's argument against the death penalty is an argument against punishment as such, and even against defensive or restitutive force.¹⁷ Thus, to be consistent, Smith has to either object to any use of force against an aggressor, including even self-defense, or admit that rights are not truly inalienable.¹⁸

防卫性武力和赔偿性武力与惩罚性（报应性或报复性）武力一样，都意味着某种权利的让渡。这正是防卫性武力或赔偿性武力被认为是允许的原因：因为侵犯者已经让渡了不受这种武力侵害的权利。如果一个人以不可让渡的理由反对惩罚，那么他又怎么

²⁰⁰ For more on forfeiture or alienation of rights, see “Knowledge, Calculation, Conflict, and Law” (ch. 19), n.81 and “A Libertarian Theory of Punishment and Rights” (ch. 5), n.88 and Appendix: The Justice of Responsive Force; also “What Libertarianism Is” (ch. 2), n.17; “How We Come to Own Ourselves” (ch. 4), n.15; also, in general, “A Libertarian Theory of Punishment and Rights” (ch. 5) and “Dialogical Arguments for Libertarian Rights” (ch. 6).
关于权利的丧失或让渡的更多内容，参见《知识、计算、冲突与法律》（第 19 章），注释 81 以及《自由意志主义的惩罚与权利理论》（第 5 章），注释 88 和附录：《回应性武力的正当性》；还有《何为自由意志主义》（第 2 章），注释 17；《我们如何拥有自己》（第 4 章），注释 15；总的来说，还有《自由意志主义的惩罚与权利理论》（第 5 章）和《自由意志主义权利的对话式论证》（第 6 章）。

能赞同防卫性或赔偿性武力呢？正如约翰·古德曼正确指出的那样，史密斯反对死刑的论点是反对惩罚本身的论点，甚至是反对防卫性或赔偿性武力的论点。²⁰¹ 17 因此，为了保持一致，史密斯要么反对对侵犯者使用任何武力，甚至包括自卫，要么承认权利并非真正不可让渡的。²⁰²

²⁰¹ Goodman, “Do Inalienable Rights Outlaw Punishment?”, p. 47.

古德曼，《不可让渡的权利是否禁止惩罚？》，第 47 页。

²⁰² The following thought-experiment, from the ever-fertile libertarian mind of Walter Block (as relayed to me by Joe Salerno), illustrates why a proponent of restitution must, in principle, be willing to support capital punishment as well. Block asks, what if it were possible to actually provide true restitution to a murder victim—to restore his life—by connecting a “life-sucking” machine to the murderer and transferring his life essence to the dead victim? This would bring the dead victim back at the cost of the killer’s life. Surely, a restitutionist would have to be in favor of this, as it is simply a type of force used to enforce restitution, and the purpose of restitution is to “restore” the victim. But what is the difference, in principle, between killing the aggressor to “restore” the victim and killing the aggressor as punishment? In both cases, the aggressor is intentionally killed, against his will, in response to his earlier aggression. It would seem that in this case, the restitutionist, like the retributionist, supports executing murderers, and thus cannot claim that a murderer has, in principle, an inalienable right to life. See Walter Block & Roy Whitehead, “Taking the Assets of Criminals to Compensate Victims of Violence: A Legal and Philosophical Approach,” Wayne State U. L. Sch. J. Law Soc. 5 (2003, www.walterblock.com/publications): 229 – 53, pp. 249 – 51; Walter E. Block, “The Death Penalty,” LewRockwell.com (November 11, 2003; www.lewrockwell.com/2003/11/walter-e-block/the-death-penalty).

以下这个思想实验出自沃尔特·布洛克（Walter Block）这位思想永远丰富的自由意志主义者（由乔·萨勒诺[Joe Salerno]转述给我），它说明了为何赔偿原则的支持者原则上也必须支持死刑。布洛克问道，如果有可能通过将一台“吸生命”的机器连接到凶手身上，并将其生命精华转移给已死的受害者，从而为被谋杀的受害者提供真正的赔偿——让他起死回生，那会怎样？这将以凶手的生命为代价让死者复活。当然，赔偿主义者肯定会赞成这样做，因为这只是一种用于强制赔偿的武力类型，而赔偿的目的是“恢复”受害者。但是，从原则上讲，为“恢复”受害者而杀死侵犯者与将杀死侵犯者作为惩罚有什么区别？在这两种情况下，侵犯者都是因其先前的侵害行为而违背其意愿被故意杀害。在这种情况下，赔偿主义者似乎和报应主义者一样，支持处决凶手，因此不能声称凶手原则上拥有不可让渡的生命权。参见沃尔特·布洛克（Walter Block）和罗伊·怀特黑德（Roy Whitehead），《用罪犯的资产补偿暴力受害者：一种法律和哲学方法》，韦恩州立大学法学院《法律与社会》杂志 5 期（2003 年，www.walterblock.com/publications）：229-253 页，第 249-251 页；沃尔特·E·布洛克（Walter E. Block），《死刑》，LewRockwell.com（2003 年 11 月 11 日；

So which is it? Is Smith inconsistent, or does he consistently object to all force? Smith has apparently flip-flopped on this issue. At first, he seems to acknowledge that rights are not really inalienable: “I agree with Locke that reparation (restitution) and restraint (self-defense) are the only justified uses of violence in a free society.”¹⁹ But a justified use of violence implies some alienation of rights. Yet later, Smith appears to change his mind:

*Goodman argues that my case against capital punishment, if consistently applied, would militate against all forms of punishment, such as fines and imprisonment. I freely concede that this is a major problem for the libertarian theory of restitution. ... Can we imprison someone and compel him to work off his debt? ... These and other questions have not been adequately examined, much less answered, by libertarians, and I remain uncertain about how to deal with them.*²⁰

那么到底是哪种情况？史密斯是前后不一致，还是他一贯反对所有武力？史密斯在这个问题上显然态度反复。起初，他似乎承认权利并非真正不可让渡：“我同意洛克的观点，即补偿（赔偿）和约束（自卫）是自由社会中使用暴力的唯一正当合理的方式。”²⁰³ 但正当合理地使用暴力意味着一定程度的权利让渡。然而后来，史密斯似乎改变了想法：

古德曼认为，如果一贯适用，我反对死刑的观点会对所有形式的惩罚，如罚款和监禁产生不利影响。我欣然承认这对自由意志主义的赔偿理论来说是一个重大问题……我们能监禁某人并强迫他工作以偿还债务吗？……这些以及其他问题自由意志主义者尚未进行充分研究，更不用说回答了，我亦仍然不确定如何处理它们。²⁰⁴

www.lewrockwell.com/2003/11/walter-e-block/the-death-penalty)。
²⁰³ Smith, “A Killer’s Right to Life,” p. 69
史密斯《凶手的生命权》，第 69 页。
²⁰⁴ Smith, “Inalienable Rights?,” p. 55 (emphasis added). Note that Smith here confusingly refers to “fines and imprisonment”—presumably forms of restitution—as “punishment,” even though a supposed advantage of restitution is that it is not punitive.

Smith's view of the inalienability of rights has clearly led him down a dead end. If he is consistent, he must condemn all uses of force, even defensive and restitutive. (Such a position might be referred to as "stupid," or, perhaps, "Darwinian," pacifism.)²¹ If, however, he admits that defensive and restitutive force are permissible, he has admitted rights are not inalienable, and thus, he cannot oppose punishment on grounds of inalienability.

史密斯关于权利不可让渡的观点显然使他陷入了死胡同。如果他始终如一，他就必须谴责所有武力的使用，甚至包括自卫和赔偿性的武力。（这样的立场可称之为“愚蠢的”，或者也许是“达尔文式的”和平主义。）²⁰⁵ 然而，如果他承认防御性和赔偿性的武力是允许的，他就承认了权利并非不可剥夺的，因此，他不能基于不可让渡性来反对惩罚。

相称惩罚的权利

THE RIGHT OF PROPORTIONAL PUNISHMENT

As I have argued at greater length elsewhere,²² an individual has a right to use force against an aggressor in response to aggression. This right to use force can be utilized for a variety of purposes: for self-defense during or before the act of aggression, for revenge, to obtain restitution (or rectification), to prevent the aggressor from committing further crimes, or to deter others from committing crimes. What the victim wants to use the right for is his business. But the reason why a victim has a right to retaliate or defend against an aggressor is that the aggressor cannot coherently withhold his consent to retaliatory, defensive, or restitutive force (these may be considered different types of responsive force, that is, non-initiated force, force which

史密斯，《不可让渡的权利？》，第 55 页（重点补充）。请注意，史密斯在这里令人困惑地将“罚款和监禁”——大概是赔偿的形式——称为“惩罚”，尽管赔偿的一个假定优势是它不是惩罚性的。

²⁰⁵ Libertarian Robert LeFevre has been accused of holding such views. But his pacifism was perhaps a bit more nuanced. In revising this chapter, this footnote grew to unmanageable length. I have placed the relevant commentary in the Appendix, below. 自由意志主义者罗伯特·勒菲弗（Robert LeFevre）曾被指责持有此类观点。但他的和平主义或许更微妙一些。在修订这一章时，这个注释变得冗长到难以处理。我已将相关评论放在下面的附录中。

is in response to initiated force). To use related legal terminology, the aggressor is “estopped,” or precluded, from denying the victim’s right to use (proportional) responsive force, since such a denial would contradict the aggressor’s view that the use of force is permissible (the view ineluctably demonstrated by the act of aggression).²³

正如我在其他地方详细论述的那样，²⁰⁶ 个人有权对侵犯者使用武力，以应对侵害。这种使用武力的权利可用于多种目的：在侵犯行为期间或之前进行自卫、复仇、获得赔偿（或纠正）、防止侵犯者进一步犯罪或阻止他人犯罪。至于受害者想利用这项权利做什么，那是他自己的事。但是，受害者之所以有权对侵犯者进行报复或防卫，是因为侵犯者不能前后一致地拒绝同意报复性、防卫性或赔偿性武力（这些可被视为不同类型的回应性武力，即非主动性武力，是对主动性武力的回应）。使用相关的法律术语，侵犯者被“禁止反言”或被排除否认受害者使用（相称的）回应性武力的权利，因为这种否认将与侵犯者允许使用武力的观点相矛盾（侵害行动不可避免地证明了这一观点）。²⁰⁷

Thus, eye-for-an-eye type proportional punishments are legitimate in response to aggression. A murderer, therefore, is estopped from objecting to his own capital punishment. He can no longer claim a right to be free from such treatment. Since he previously had such a right, the right that he previously had must have evaporated. We may say, then, that his right to not have force used against him has been alienated (or forfeited, waived, abandoned, relinquished, surrendered, or lost; the terminology is not important).²⁴

因此，以眼还眼的相称惩罚对于回应侵犯是合法的。因此，一个杀人犯不能反对对自己执行死刑。他不能再主张免受这种处罚的权利。尽管他之前拥有这样的权利，但他之前拥有的权利如今必然已经消失。那么，我们可以说，他不被使用武力对待的

²⁰⁶ See “A Libertarian Theory of Punishment and Rights” (ch. 5) and “Dialogical Arguments for Libertarian Rights” (ch. 6).

见《自由意志主义的惩罚和权利理论》，（第五章），以及《自由意志主义权利的对话论证》，（第六章）。

²⁰⁷ For a discussion of proportionality, see “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.A

关于相称性的讨论，请参见《自由意志主义的惩罚和权利理论》，（第 5 章），第四部分 A 节。

权利已经被剥夺或丧失、放弃、抛弃、让渡、交出或失去；术语并不重要）。²⁰⁸

²⁰⁸ Another error lies in the very title of Smith’s article: “A Killer’s Right to Life.” Under libertarianism, one has a right against the initiation of force—against aggression. But punishment is not initiatory force; it is force in response to initiated force. Part of Smith’s confusion here lies in thinking that libertarianism upholds some actual right to life. There is no right to life. There is no right to “free speech.” The ability to enjoy your life or engage in speech is a consequence of a system where your property rights are respected. As I wrote previously:

If I own ∞ 100 acres of land, I can prance around naked on it, not because the land is imbued with some “right-to-prance-naked,” but because I own the land and it does not (necessarily) violate the property rights of others for me to use my property in this fashion.

Kinsella, *Against Intellectual Property* (Auburn, Ala.: Mises Institute, 2008), p. 53. See also Rothbard’s criticism of the “right to free speech” in Murray N. Rothbard, “Human Rights as Property Rights,” in *The Ethics of Liberty* (<https://mises.org/library/human-rights-propertyrights>).

Likewise, there is no abstract “right to life.” There is a right against aggression, that is, to not have one’s property rights violated. That is why libertarians advocate the non-aggression axiom or principle, not the “life axiom.” An innocent person can use his right against aggression to protect his life, if he so chooses; or he may commit suicide or waste his life in other ways. Thus, an innocent person may be said to have a right to life, if it is kept in mind that the so-called “right to life” is merely derivative of—a consequence of—the primary right against aggression, just as the right to free speech is derivative of the right to own private property and the right against aggression. An aggressor, on the other hand, no longer has a right against the imposition of force, and thus his life is in peril. The aggressor, therefore, no longer has a “right to his life,” such that it was.

史密斯文章的标题“凶手的生命权”本身就存在另一个错误。在自由意志主义的框架下，一个人拥有反对首次使用武力——即反对侵犯的权利。但惩罚并非首次使用武力，而是对首次使用武力做出的回应。史密斯在这里的部分困惑在于，他认为自由意志主义维护了某种实际的生命权。其实不存在生命权，也不存在“言论自由权”。能够享受生活或进行言论表达，是在财产权受到尊重的体系下所产生的结果。正如我之前所写：

如果我拥有……100 英亩的土地，我可以在上面裸奔，不是因为这片土地被赋予了某种“裸奔的权利”，而是因为我拥有这片土地，并且我以这种方式使用我的财产（不一定）不会侵犯他人的财产权。

金塞拉，《反对知识产权》（阿拉巴马州奥本：米塞斯研究院，2008 年），第 53 页。也可参见罗斯巴德对“言论自由权”的批评，见穆瑞·N·罗斯巴德，《人权即财产权》，载于《自由的伦理》（<https://mises.org/library/human-rights-propertyrights>）。

惩罚的效用 THE UTILITY OF PUNISHMENT

There are further errors in Smith’s article. Consider, for example, Smith’s view that restitution is superior to punishment as a basis for criminal justice. Smith argues that punishing an aggressor “does not restore or equalize rights; it simply wipes out another set of rights,” and that allowing retaliation only provides, at most, “a sense of emotional balance” to the victim. Several responses to this argument can be made. First, Smith here begs the question of whether rights are inalienable by assuming that the aggressor has a set of rights to be violated. If the aggressor’s rights were alienated, proportionally punishing him does not “wipe out his rights,” as he had none left to wipe out.

史密斯的文章中还有其他错误。例如，史密斯认为，作为刑事司法的基础，赔偿优于惩罚。史密斯认为，惩罚侵犯者 “并不能恢复或均衡权利；它只是抹杀了另一套权利”，允许报复最多只能给受害者提供 “一种情感上的平衡感”。对这一论点可以做出几种回应。首先，史密斯在此提出了权利是否不可让渡的问题，他假定侵犯者有一套权利要被侵犯。如果侵犯者的权利被让渡了，那么对他进行相称的惩罚并不能 “消灭他的权利”，因为他已经没有权利可以消灭了。

Second, just because punishment does not restore rights, it is not clear why restitution is automatically superior, since restitution does not restore rights either. It is true that the consequences and fact of an act of aggression can never be undone. The indignity will always have been suffered. Any response by a victim, including restitution and retribution, will always be an imperfect remedy. Indeed, this is one reason why aggression is impermissible: because the harm done thereby is literally undoable, incalculable, and not subject to an adequate remedy.²⁵ A victim will always remain,

同样，也不存在抽象的“生命权”。存在的是反对侵犯的权利，即不被侵犯个人财产的权利。这就是为什么自由意志主义者倡导互不侵犯公理或原则，而不是“生命公理”。一个无辜的人，如果他愿意，可以利用其反对侵犯的权利来保护自己的生命；或者他也可能自杀或以其他方式浪费生命。因此，如果牢记所谓的“生命权”仅仅是反对侵犯这一主要权利的衍生结果——就像言论自由权是拥有私有财产权和反对侵犯权的衍生结果一样，那么可以说一个无辜的人拥有生命权。另一方面，侵犯者不再拥有反对施加武力的权利，因此他的生命处于危险之中。因此，侵犯者不再拥有“其生命的权利”，至少不再是之前那样的权利。

to some extent, a victim.

其次，仅仅因为惩罚不能恢复权利，不清楚为什么赔偿就自动具有优越性，因为赔偿也不能恢复权利。诚然，侵犯行为的后果和事实永远无法挽回。侮辱伤害永远都会存在。受害者的任何反应，包括赔偿和报复，永远都是不完美的补救措施。事实上，这也是不允许侵犯的原因之一：因为侵犯造成的伤害实际上是无法弥补、无法估量的，也没有适当的补救办法。²⁰⁹受害者在某种程度上永远都会是受害者。

This does not, however, dictate that the victim should be artificially restricted in choosing among various imperfect remedies. Admittedly, both inflicting punishment on an aggressor (retribution) and extracting monetary damages from him (restitution) are imperfect remedies. But why not let the victim decide which one, or which combination of these, he prefers?²²⁶ After all, the victim did not ask to be made a victim. He did not ask to be put in the position of having only two imperfect possible remedies available to him. If a victim prefers to torture his torturer, who is Smith to say that the victim's preference is not rational? Unlike Smith, I am not so unwilling to allow victims to attempt to attain "a sense of emotional balance," if that is all that is possible to them. (Like Barnett, however, I am concerned about the unavoidable possibility of mistakenly punishing the innocent, and thus admit the appeal of a restitution-based system in order to avoid punishing innocents, but not for reasons of inalienability.)²⁷

然而，这并不意味着受害者在选择各种不完善的补救办法时受到人为的限制。诚然，对侵犯者实施惩罚（报复）和向其索取金钱损害赔偿（赔偿）都是不完善的补救办法。但是，为什么不让受害者决定他更喜欢哪一种或哪一种的组合呢？²¹⁰毕竟，受害者并

²⁰⁹ Barnett, an advocate of restitution and opponent of punishment, recognizes this, and for this reason emphasizes the importance of crime prevention. See Barnett, *Structure of Liberty*, pp. 185 - 92. As does LeFevre, as discussed in the Appendix.

巴尼特是赔偿的倡导者和惩罚的反对者，他认识到了这一点，并因此强调了预防犯罪的重要性。参见巴尼特的《自由的结构》，第 185-192 页。正如附录中所讨论的勒菲弗一样。

²¹⁰ On giving victims the option of what type of punishment to apply or whether to seek restitution or some blend of punishment and restitution, see "A Libertarian Theory of Punishment and Rights" (ch. 5), Part IV.B; Pilon, "Criminal Remedies," p. 356; Barnett, *Structure of Liberty*, p. 184 n.32; Joseph Ellin, "Restitutionism Defended," *J. Value Inquiry* 34, no. 2 (Sept. 2000): 299 - 317.

没有要求成为受害者。他并没有要求被置于只有两种不完美的可能补救办法可供他选择的境地。如果受害者宁愿折磨折磨他的人，史密斯有什么资格说受害者的选择不理性呢？与史密斯不同的是，我并不那么不愿意让受害者试图获得“一种情感的平衡感”，如果这对他们来说是唯一可能的话。（然而，与巴尼特一样，我也担心不可避免地会错误地惩罚无辜者，因此承认以赔偿为基础的制度的吸引力，以避免惩罚无辜者，但不是出于不可让渡的原因）。²¹¹

The right to inflict (proportional) punishment on one's aggressor can be useful in other ways as well. Most significantly, perhaps, it may be utilized to reach a more objective determination of the proper amount of restitution. For example, the victim may trade all or part of his right to retaliate for a payment ("ransom") or other service by the aggressor, i.e., the aggressor buys his way out of punishment.²⁸ A serious aggression leads to the right to inflict more severe punishment on the aggressor, which would thus tend to be traded for a higher average amount of ransom or restitution than for comparatively minor crimes. Further, a victim especially offended or traumatized by aggression (and thus subjectively "damaged" more severely) will tend to bargain for a higher ransom. Also, richer aggressors will tend to be willing to pay more ransom to avoid the punishment the victim has a right to inflict.²⁹ Thus, allowing punishment to be traded for damages solves the so-called millionaire or billionaire problem faced under a pure restitution system, where a rich man may commit crimes with impunity, since he can simply pay easily-affordable restitution after committing the crime.

对侵犯者实施（相称的）惩罚的权利在其他方面也是有用的。最重要的也许是，它可以用来更客观地确定适当的赔偿数额。例如，受害者可以用其全部或部分报复权来换取侵犯者的付款（“赎金”）或其他服务，即侵犯者用自己的方式摆脱惩罚。²¹² 严重的

关于让受害者选择适用何种类型的惩罚，或者是否寻求赔偿，或者是惩罚与赔偿的某种结合，参见《自由意志主义的惩罚与权利理论》（第 5 章），第四部分 B 节；皮隆的《刑事救济》，第 356 页；巴尼特的《自由的结构》，第 184 页注释 32；约瑟夫·埃林的《为赔偿主义辩护》，《价值探究杂志》第 34 卷，第 2 期（2000 年 9 月）：299-317 页。

²¹¹ See note 33, below.

见下面注释 33。

²¹² For previous suggestions of the possibility of criminals buying their way out of punishment, see Rothbard, "Punishment and Proportionality," in *The Ethics of Liberty*, pp. 86, 89; Pilon, "Criminal Remedies," p. 356.

侵害导致侵犯者有权受到更严厉的惩罚，因此，与相对较轻的犯罪相比，受害者往往会用更高的平均赎金或赔偿金额来交换。此外，如果受害者受到侵犯或创伤特别严重（因此主观上“受损”更严重），则会倾向于讨价还价，以换取更高的赎金。另外，更富有的侵犯者往往愿意支付更多的赎金，以避免受害者有权施加的惩罚。²¹³ 因此，允许以惩罚换取损害赔偿，就解决了在纯粹的赔偿制度下所面临的所谓百万富翁或亿万富翁问题，在这种制度下，富人可能犯罪而不受惩罚，因为他只需在犯罪后支付容易负担得起的赔偿金即可。

For these reasons, allowing the option of punishment can help arrive at a more objective measure of restitution damages.³⁰ And even if punishment is banned and is not an actual option—because of the possibility of mistakenly punishing innocents, say—an award of restitution can be based on the model of punishment. E.g., a jury could be

先前关于罪犯通过花钱摆脱惩罚这种可能性的建议，参见罗斯巴德的《自由的伦理》中的《惩罚与相称性》，第 86、89 页；皮隆的《刑事救济》，第 356 页。

²¹³ See “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.G. See also Randy E. Barnett, “Restitution: A New Paradigm of Criminal Justice,” *Ethics* 87, no. 4 (July 1977; <https://scholarship.law.georgetown.edu/facpub/1558/>): 279 – 301, pp. 297 – 98, reprinted in *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, Randy E. Barnett & John Hagel III, eds. (Cambridge, Mass.: Ballinger, 1977), pp. 379 – 380; Roger Pilon, “Criminal Remedies,” p. 351. For a “law-and-economics” discussion of this issue, see David D. Friedman, “What Is ‘Fair Compensation’ for Death or Injury?,” *Int’l Rev. L. & Econ.* 2 (1982; <https://perma.cc/W5BU-K6PL>): 81 – 93; idem, “Reflections on Optimal Punishment, or: Should the Rich Pay Higher Fines?,” *Research in L. & Econ.* 3 (1981): 185 – 205; idem, “Why Not Hang Them All: The Virtues of Inefficient Punishment,” *J. Pol. Econ.* 107, no. S6 (December 1999; <https://perma.cc/3M2H-68N2>), pp. S259 – S269.

参见《自由意志主义的惩罚与权利理论》（第 5 章），第四部分 G 节。另见兰迪·E·巴尼特的《赔偿：刑事司法的新范式》，《伦理学》第 87 卷第 4 期（1977 年 7 月；<https://scholarship.law.georgetown.edu/facpub/1558/>）：279-301 页，第 297-298 页，重印于兰迪·E·巴尼特和约翰·哈格尔三世编辑的《评估罪犯：赔偿、报应和法律程序》（马萨诸塞州剑桥：巴林格，1977 年），第 379-380 页；罗杰·皮隆的《刑事救济》，第 351 页。关于这个问题的“法律与经济”讨论，参见大卫·D·弗里德曼的《死亡或伤害的“公平赔偿”是什么？》，《国际法律与经济评论》第 2 期（1982 年；<https://perma.cc/W5BU-K6PL>）：81-93 页；同上，《关于最优惩罚的思考，或者：富人应该支付更高的罚款吗？》，《法律与经济研究》第 3 期（1981 年）：185-205 页；同上，《为什么不把他们都绞死：低效惩罚的优点》，《政治经济学杂志》第 107 卷 S6 期（1999 年 12 月；<https://perma.cc/3M2H-68N2>），第 S259-S269 页。

instructed to award the victim an amount of money it believes he could bargain for, given all the circumstances, if he could threaten to punish the aggressor. This can lead to more just and objective restitution awards than would result if the jury is simply told to award the amount of damages it “feels” is “fair.”³¹

出于这些原因，允许选择惩罚有助于达成更客观的赔偿损害衡量标准。²¹⁴ 而且，即使惩罚被禁止并且它不是一个实际的选项——例如，因为存在会错误地惩罚无辜者的可能性——赔偿裁决也可以基于惩罚模式。例如，可以指示陪审团向受害者判给一笔金额，如果考虑到所有情况，陪审团认为在受害者能够威胁惩罚侵犯者的情况下，受害者能够协商得到这笔金额。这能够带来比仅仅告知陪审团判给其“感觉”“公平”的损害金额更为正义和客观的赔偿裁定。²¹⁵

The right to retaliate could also be used to justify “enslaving” the aggressor and

²¹⁴ On the issue of determination of the proper amount of damages, see Bruce L. Benson, “Restitution in Theory and Practice,” J. Libertarian Stud. 12, no. 1 (Spring 1996; <https://mises.org/library/restitution-theory-and-practice>): 79 – 83; Rothbard, “Punishment and Proportionality,” pp. 88 – 89. See also references in the preceding note.

关于确定适当损害赔偿金额的问题，参见布鲁斯·L·本森的《理论与实践中的赔偿》，《自由意志主义研究杂志》第12卷第1期（1996年春季；<https://mises.org/library/restitution-theory-and-practice>）：79-83页；罗斯巴德的《惩罚与相称性》，第88-89页。也可参见前一条注释中的参考文献。

²¹⁵ I believe this latter approach is consistent with and supplements Barnett’s theory of a restitution-based justice system, since Barnett nowhere specifies any objective standards or criteria by which a judge or jury is to determine the amount of restitution a victim is to receive for a non-economic crime like murder, rape, and the like. He specifies only that the aggressor must “compensate” the victim for the “harm caused,” to “restore” the victim. Barnett, *Structure of Liberty*, pp. 161, 187. Of course, how much compensation is needed to compensate for various violent crimes is a difficult question, and, of course, no amount of restitution can ever “restore” a murdered victim, nor can it “undo” other types of battery.

我认为后一种方法与巴尼特基于赔偿的司法系统理论相一致并对其有所补充，因为巴尼特在任何地方都没有明确规定法官或陪审团用以确定受害者因谋杀、强奸等非经济犯罪应获得的赔偿金额的任何客观标准或准则。他只是规定，侵犯者必须为“造成的伤害”向受害者“赔偿”，以“恢复”受害者的权益。巴尼特，《自由的结构》，第161、187页。当然，对于各种暴力犯罪需要多少赔偿是一个难题，而且，当然，再多的赔偿也无法“恢复”被谋杀的受害者，也无法“消除”其他类型的殴打行为造成的后果。

putting him to work for a time to generate income for the victim (restitutionists like Barnett support this use of force against the aggressor, but do not consider it to be punitive, but rather necessary to enforce restitution).³² Or suppose an aggressor is very poor and otherwise unable to pay monetary damages to the victim. In this case, the threat of inflicting severe punishment on the aggressor may induce the aggressor's relatives or friends to pay off the victim to spare the aggressor from being punished. The victim would thereby be compensated even though the aggressor is penniless, whereas the victim would be totally uncompensated if no threat of punishment were available to motivate the aggressor's relatives to chip in. (In a restitution-based system, a poor aggressor who is imprisoned in a work-facility designed to generate income payable to the victim may also find friends and relatives to pay off part of his debt to have him released earlier. However, as the aggressor in this case faces only a limited and usually temporary form of "slavery" and not more severe punishment, the motivation for others to bail him out would probably be reduced.)³³

报复权也可以用来证明 "奴役" 侵犯者并让他工作一段时间为受害者创收是合理的 (像巴尼特这样的赔偿主义真支持对侵犯者使用武力, 但并不认为这是惩罚, 而是执行赔偿所必需的)。²¹⁶ 或者假设侵犯者非常贫穷, 没有能力向受害者支付金钱赔偿。在这种情况下, 对侵犯者施以严厉惩罚的威胁可能会诱使侵犯者的亲戚或朋友赔偿受害者, 使侵犯者免受惩罚。这样, 即使侵犯者身无分文, 受害者也会得到补偿, 而如果没有惩罚的威胁促使侵犯者的亲属出钱, 受害者则完全得不到补偿。(在一个以赔偿为基础的制度中, 一个贫穷的侵犯者如果被关在一个旨在为受害者创造收入的工作场所, 他也可以找到朋友和亲戚来偿还他的部分债务, 使他早日获释。不过, 由于在这种情况下侵犯者面临的只是有限的、通常是暂时的 "奴役", 而不是更严厉的惩罚, 其他人保释他的积极性可能会降低。²¹⁷

²¹⁶ Barnett, *Structure of Liberty*, pp. 176 - 86.

巴尼特, 《自由的结构》, 第 176-186 页。

²¹⁷ Note: although I still believe Smith is wrong about this aspect of inalienability of rights, and that it does not violate the rights of an aggressor for the victim or his agents/heirs to proportionately punish him for his crime (for more on this, see "Defending Argumentation Ethics" (ch. 7), text at notes 35 - 36), I nonetheless sympathize with the idea of a restitution-based system being preferable and even likely in any free

不可让渡性 INALIENABILITY

The theory of inalienability has been plagued by confusion, vagueness, and inconsistency. The concept is typically applied to the issue of whether a non-aggressor can alienate his rights by a mere contract or promise, i.e., by a peaceful action. For example, may one sell oneself into slavery or enter into a binding, enforceable contract to perform services? Libertarians come down on both sides of this question, but tend to say that rights are “inalienable,” i.e., one may not sell oneself into slavery.³⁴ Most libertarians hold this view of inalienability, which I will refer to as the standard or “limited” view of inalienability, since adherents of this view usually also maintain that acts of aggression do alienate rights.³⁵ In this view, only violent actions serve to alienate rights. Smith has used the label “inalienability” in an idiosyncratic way to mean that even aggressive actions do not alienate rights.

不可让渡性的理论一直受到混乱、模糊和不一致的困扰。这个概念通常适用于非侵犯者是否可以仅仅通过或承诺，即通过和平行动来让渡其权利的问题。例如，一个人是否可以自卖为奴或签订有约束力、可强制执行的服务？自由意志主义者在这个问题上有不同的看法，但倾向于说权利是“不可让渡的”，即一个人无法自卖为奴。²¹⁸大多数自

society, as noted in “A Libertarian Theory of Punishment and Rights” (ch. 5), n.85, and Kinsella, “Fraud, Restitution, and Retaliation: The Libertarian Approach.” For related discussion about disputes in general, see Kinsella, “On the Obligation to Negotiate, Compromise, and Arbitrate.”

注意：尽管我仍然认为史密斯在权利不可让渡性的这一方面是错误的，而且受害者或其代理人/继承人对侵犯者因其罪行进行相称的惩罚并不侵犯侵犯者的权利（更多相关内容，见《捍卫论证伦理学》（第 7 章），注释 35-36 中的文本），但我仍然赞同在任何自由社会中基于赔偿的制度更可取，甚至可能存在的观点，正如在《自由意志主义的惩罚与权利理论》（第 5 章）注释 85 以及金塞拉的《欺诈、赔偿与报复：自由意志主义的方法》中所指出的。关于一般纠纷的相关讨论，参见金塞拉的《关于谈判、妥协和仲裁的义务》。

²¹⁸ See, e.g., Barnett, *Structure of Liberty*, pp. 78 – 83; idem, “Contract Remedies and Inalienable Rights,” pp. 186 – 95; Rothbard, “Interpersonal Relations: Voluntary Exchange,” in *The Ethics of Liberty*, pp. 40 – 41 (<https://mises.org/library/crusoe-social-philosophy>) and “Property Rights and the Theory of Contracts,” 134 – 136 (<https://mises.org/library/property-rights-and-theory-contracts>); Tibor R. Machan, *Human Rights and Human Liberties* (Chicago: Nelson Hall, 1975), pp. 116 – 17; Smith, “A Killer’s Right to Life,” p. 49; idem, “Inalienable Rights?,” p. 54.

由意志主义者持有这种不可让渡性的观点，我将其称为不可让渡性的标准或“有限”观点，因为这种观点的拥护者通常也认为侵害行动会让渡权利。²¹⁹在这种观点中，只有暴力行动会导致权利的让渡。史密斯以一种特殊的方式使用“不可让渡性”这个标签，意思是即使是侵犯行动也不会让渡权利。

What, then, is the correct, libertarian view of inalienability and rights? Consent is the crucial element to focus on here. If a person consents to an action that would otherwise violate his rights, there is no rights violation. Boxers in a ring, or duelers dueling, do not have their rights violated when struck by fist or bullet. This is because they consented to these exchanges of force.³⁶ To alienate one's right means that one is unable to withhold consent to some action that would otherwise infringe the right if there were no consent. Thus, a right is alienated by somehow rendering it impossible to object to the action that the alienated right would otherwise prohibit. One does something now that prevents one from withholding consent in the future, thereby effectively alienating the relevant right. To alienate a right, then, is to irrevocably grant the relevant consent to another.

那么，什么才是正确的、自由意志主义的不可让渡性和权利观呢？同意是这里需要关注的关键因素。如果一个人同意一项本来会侵犯其权利的行动，那么他的权利就不会受到侵犯。拳击场上的拳击手或决斗者决斗时，如果被拳头或子弹击中，他们的权利不会受到侵犯。这是因为他们同意这些武力交换。²²⁰让渡权利是指一个人无法不同意

例如，参见巴尼特的《自由的结构》，第 78-83 页；同上，《救济与不可让渡的权利》，第 186-195 页；罗斯巴德的《人际关系：自愿交换》，载于《自由的伦理》，第 40-41 页（<https://mises.org/library/crusoe-social-philosophy>）以及《财产权与理论》，第 134-136 页（<https://mises.org/library/property-rights-and-theory-contracts>）；蒂博尔·R·马钱的《人权与人的自由》（芝加哥：纳尔逊霍尔，1975 年），第 116-117 页；史密斯的《凶手的生命权》，第 49 页；同上，《不可让渡的权利？》，第 54 页。

²¹⁹ See note 15 above.

见上面注释 15。

²²⁰ As Richard Epstein explains,

The case for the recognition of consent as a defense in case of the deliberate infliction of harm can also be made in simple and direct terms. The self-infliction of harm generates no cause of action, no matter why inflicted. There is no reason, then, why a person who may inflict harm upon himself should not, *prima facie*, be allowed to have someone else do it for him.

某些行动，而如果不同意，这些行动就会侵犯权利。因此，权利的让渡是指以某种方式使人无法反对被让渡权利本应禁止的行动。一个人现在做了一些事情，使他将来无法拒绝同意，从而有效地让渡了相关的权利。因此，让渡权利就是不可撤销地将相关同意权授予他人。

Is it possible to irrevocably grant consent? Smith, an advocate of what may be called the “strong” view of inalienability, would say it is not possible under any circumstances (except, perhaps, for defensive or restitutive force). Proponents of the limited view of inalienability, by contrast, hold that it is possible to do this by aggressing, but not by merely making an agreement or promise. (Those rare libertarians, like Walter Block, who believe rights may be alienated even by a non-violent action like agreement, hold what may be viewed as a “weak” view of inalienability.)³⁷

是否有可能不可撤销地授予同意？史密斯是不可让渡性“强”观点的倡导者，他会说，

Richard A. Epstein, “Intentional Harms,” J. Legal Stud. 4 (1975): 391 – 442, p.411. See also “A Libertarian Theory of Punishment and Rights” (ch. 5), Part II. For an unorthodox libertarian view that duelers do not actually “consent” since a duel is only engaged in due to the “threat of disgrace,” see T. Patrick Burke, No Harm: Ethical Principles for a Free Market (New York: Paragon House, 1994), pp. 192, 268 n.15, which I criticize in my “Book Review,” Reason Papers No. 20 (Fall 1995; <https://reasonpapers.com/archives/>): 135 – 46, and Kinsella, “‘Aggression’ versus ‘Harm’ in Libertarianism,” Mises Economics Blog (Dec. 16, 2009). See related comments in “A Libertarian Theory of Punishment and Rights” (ch. 5), n.16 and “Dialogical Arguments for Libertarian Rights” (ch. 6), n.3.

正如理查德·爱泼斯坦所解释的：

“在故意造成伤害的情况下，将同意作为一种辩护的理由也可以用简单直接的方式来阐述。自我造成的伤害不会产生诉讼理由，无论其原因如何。那么，一个可能对自己造成伤害的人，初步看来，没有理由不被允许让别人为他这样做。”

理查德·A·爱泼斯坦，《故意的伤害》，《法律研究杂志》第4期（1975年）：391-442页，第411页。另见《自由意志主义的惩罚与权利理论》（第5章），第二部分。对于一种非正统的自由意志主义观点，即决斗者实际上并非“同意”，因为决斗只是由于“名誉受损的威胁”而进行的，见T.帕特里克·伯克的《无害：自由市场的伦理原则》（纽约：帕拉贡出版社，1994年），第192页，268页注释15，我在我的《书评》（《理性论文》第20期（1995年秋季；<https://reasonpapers.com/archives/>）：135-146页）和金塞拉的《自由意志主义中的“侵犯”与“伤害”》（米塞斯经济学博客，2009年12月16日）中对此进行了批评。见《自由意志主义的惩罚与权利理论》（第5章）注释16和《自由意志主义权利的对话论证》（第6章）注释3中的相关评论。

在任何情况下都不可让渡的（也许，防卫性或赔偿性武力除外）。相反，有限不可让渡观的支持者则认为，通过侵犯是可以做到这一点的，但仅仅通过协议或承诺是不行的。（那些极少数的自由意志主义者，如沃尔特·布洛克，认为即使通过协议这样的非暴力行动，权利也可能被让渡，他们所持的不可让渡性观点可被视为“弱”观点。²²¹

Let us examine the three ways that consent possibly could be irrevocably granted: by physical means, by aggression, and by voluntary agreement. The physical, or physiological, means refers to a person voluntarily undergoing some process that literally places him under the power of another (e.g., drugs, surgery, technology).³⁸ This is akin to committing an act of suicide or “zombicide,” and is not of particular interest, since after the zombicide is complete, the zombie presumably does not even try to run away or withhold consent from his master.

让我们研究一下同意可能被不可撤销地授予的三种方式：物理手段、侵犯方式和自愿同意。物理或生理手段是指一个人自愿接受某种程序，将其置于他人的权力之下（如药物、手术、技术）。²²²这类似于自杀或“弑尸”行为，并不特别引人关注，因为在

²²¹ I critique Block’s views in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11).

我在《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）中对布洛克的观点进行了批评。

²²² See, e.g., discussions of this in Smith, “Inalienable Rights?,” p. 54:

Moral agency is inalienable, and so must be the right to exercise that agency. . . . This does not mean, however, that moral agency cannot be extinguished, which brings us to another kind of slavery contract. Suppose that Murphy agrees to have a computer chip implanted in his brain, which will enable me to control him with a joystick, moving him around like a robot. (Perhaps in exchange for this dubious privilege, I have agreed to pay one million dollars to his destitute family.) Here, Murphy has voluntarily extinguished his moral agency, not transferred it to me. What he has transferred is physical control over his body, which becomes my property after he has taken leave of it. Therefore, since the body, like all physical objects, is transferable, I regard this kind of slavery contract as possible and valid.

例如，可参见史密斯在《不可让渡的权利？》第 54 页对此的讨论：

道德能动性是不可让渡的，因此行使这种能动性的权利也必然是不可让渡的……然而，这并不意味着道德能动性不能被消除，这就引出了另一种奴隶制。假设墨菲同意在他的大脑中植入一个计算机芯片，这将使我能够用操纵杆控制他，像控制机器人一样移动他。（也许作为这种可疑特权的交换，我已同意向他贫困的家庭支付一百万美元。）在这里，墨菲自愿熄灭了他的道德能动性，而不是将其转让给我。他转让的是对他身

"弑尸"行为完成后,大概这个"僵尸"甚至不会试图逃跑或拒绝其主人。

Committing an act of aggression is a clear-cut means for alienating (some of) one's rights. As explained above,³⁹ an aggressor is estopped from withholding consent to the victim's proposed use of (proportional) retaliatory force, since such a denial would contradict the aggressor's view that the use of force is permissible. An act of aggression is a way of irrevocably granting consent to punishment. This is exactly why an act of aggression serves to alienate rights: because the act of aggression conclusively demonstrates the aggressor's view that aggression is proper, thus precluding him from consistently objecting to the victim's use of (proportional) retaliatory force. The strong view of inalienability (Smith's view) is, for this reason, untenable.⁴⁰ So which view is

体的物理控制权,在他离开身体后,这身体就成为我的财产。因此,由于身体像所有实物一样是可转让的,我认为这种奴隶制是可能且有效的。

See also Barnett, Structure of Liberty, 78 & n. 39, who writes:

Suppose that Ann consented to transfer partial or complete control of her body to Ben. Absent some physiological change in Ann (caused, perhaps, by voluntarily and knowingly ingesting some special drug or undergoing psycho-surgery) there is no way for such a commitment to be carried out.... Arthur Kuflik offers these examples to undercut this type of argument for inalienability. See Arthur Kuflik, "The Inalienability of Autonomy," Philosophy and Public Affairs 13, no. 4 (1984): 271-98, p. 281: "This suggests that the impropriety of an autonomy-abdicating agreement has more to do with the impropriety of autonomy-abdication itself than with some general fact that we have no right to make commitments we know we will be unable to keep." But arguments based on impropriety and one based on the impossibility of such agreements are not mutually exclusive. Kuflik's examples only show that this reason for inalienability is limited to those commitments to alienate the future control over one's person which are not made possible by mind-altering drugs, brainwashing techniques, or psychosurgery.

还可参见巴尼特在《自由的结构》第 78 页及注释 39 中写道:

假设安同意将对她身体的部分或全部控制权转让给本。在安没有发生某些生理变化(可能是由于自愿且明知地摄入某些特殊药物或接受精神外科手术)的情况下,这种承诺无法得以执行.....亚瑟·库弗利克提供了这些例子来削弱这种关于不可让渡性的论点。参见亚瑟·库弗利克的《自主性的不可让渡性》,《哲学与公共事务》第 13 卷第 4 期(1984 年): 271-298 页,第 281 页:"这表明,放弃自主性的协议的不当之处更多地与放弃自主性本身的不当之处有关,而不是与我们无权做出我们知道无法遵守的承诺这一普遍事实有关。"但是基于不当性的论点和基于此类协议不可能的论点并非相互排斥。库弗利克的例子仅表明,这种不可让渡性的理由仅限于那些放弃对自己未来控制权的承诺,而这些承诺无法通过改变思维的药物、洗脑技术或精神外科手术来实现。

correct, the limited view or the weak view?

实施侵犯行动是让渡(部分)个人权利的明确手段。如上文所述,²²³ 39 侵犯者被禁止拒绝同意受害者使用(相称的)报复性武力的提议,因为这种拒绝将与侵犯者认为可以使用武力的观点相矛盾。侵犯行动是一种不可撤销地同意惩罚的方式。这正是侵犯行动导致权利让渡的原因:因为侵犯行动确凿无疑地表明了侵犯者认为侵犯是正当的,从而使他无法始终如一地反对受害者使用(相称的)报复性武力。因此,不可让渡的强势观点(史密斯的观点)是站不住脚的。²²⁴ 那么,有限观点和弱势观点哪个正确呢?

This depends on the answer to the following question: Can one irrevocably grant consent by voluntary agreement, such as a promise or contract to be another's slave? Barnett recognizes the importance of consent here:

The crucial question ... is whether Ann's current consensual choices can limit her right to revoke her consent in the future. Having consented to let Ben touch her or to enter the [boxing] ring with him, may she be forced to carry through with her commitment after she has changed her mind?"⁴¹

这取决于对以下问题的回答:一个人能否通过自愿协议(例如承诺或签订成为他人的奴隶)不可撤销地授予同意?巴尼特认识到这里同意的重要性:

“关键问题……是安当前基于同意的选择能否限制她未来撤销同意的权利。在同意让本触碰她,或与他一起进入(拳击)场之后,如果她改变了主意,她是否会被迫履行承诺?”²²⁵

²²³ See note 22 above, and accompanying text.

见上文注释 22 以及相关文本。

²²⁴ See notes 11 and 15 above.

见上文注释 11 和 15。

²²⁵ Barnett, *Structure of Liberty*, p. 81. Rothbard also realizes the importance of being able to change one's mind. In a discussion about voluntary slave contracts, he writes: "The problem comes when, at some later date, Smith changes his mind and decides to leave. Shall he be held to his former voluntary promise?" Rothbard, "Property Rights and the Theory of Contracts," p. 136 (emphasis added).

巴尼特,《自由的结构》,第 81 页。罗斯巴德也意识到能够改变主意的重要性。在关于自愿为奴的讨论中,他写道:“问题在于,在日后的某个时候,史密斯改变了主意并决定离开。他是否应该遵守他之前的自愿承诺?”罗斯巴德,《财产权与理论》,

This is a difficult and complicated question. Some argue that a contract is a contract, and may be enforced.⁴² This view is based on the theory that one is a self-owner, entitled to full control of all of one's property, including one's body, and that this control comprises the ability to sell one's body.⁴³ Most libertarians, however, seem to hold the limited view of inalienability, whereby aggression does alienate rights, but promising to be someone's slave does not. Advocates of this view typically argue that such contracts are not enforceable because there is some sort of logical impossibility involved in voluntarily alienating all of one's rights in this manner.⁴⁴ For example, some argue that it is literally impossible to transfer one's actual will to another, and thus a promise to do so is null and void; title thereto cannot be transferred. It is like contracting to sell the sun to someone. Such a contract, having an impossible object, would be null and void from the outset.

这是一个困难且复杂的问题。有人认为，就是，可以强制执行。²²⁶这种观点的理论基础是，一个人是自我所有者，有权完全控制自己的所有财产，包括自己的身体，而这种控制包括出售自己身体的能力。²²⁷然而，大多数自由意志主义人士似乎都持有不可让渡的有限观点，即侵犯确实会让渡权利，但承诺成为某人的奴隶却不会。这种观点的支持者通常认为，这种是不可执行的，因为以这种方式自愿让渡自己的所有权利在逻辑上是不可能的。²²⁸例如，有些人认为，将一个人的实际意愿转让给另一个人实际上是不可能的，因此这样做的承诺是无效的；其所有权不能转让。这就好比签订将太阳卖给某人。这样一份目标无法实现的从一开始就是无效的。

My view is that the impossibility reasoning typically given to argue that consent cannot be irrevocably granted is fallacious and has helped to muddle the issue of inalienability. For example, if the "impossibility" of literally alienating one's will means that it is

第 136 页（着重号为原文所加）。

²²⁶ But see, of course, the dissenting view expressed in chapter 9

当然，请注意第九章中表达反对意见。

²²⁷ A view I criticize in "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).

我在《出售并不意味着所有权，反之亦然：一个剖析》(第十一章)中批评了这种观点。

²²⁸ See note 34 above; also "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability" (ch. 9), Part III.C.

见上文注释 34；还有《自由意志主义的契约理论：财产权转让、有约束力的承诺和不可让渡性》（第 9 章），第三部分 C 节。

impossible to be bound by contract to act as someone's slave, why is it not "impossible" to imprison an aggressor to enforce restitution? After all, even a convicted aggressor still has a will. Why is it not "impossible" to defend oneself with force? And yet it is not impossible for consent to be irrevocably granted, as we have seen; this condition exists for a justly imprisoned aggressor. Recipients of defensive, restitutive, or retaliatory force all retain a will, which is overwhelmed with some type of responsive force.

我的观点是，通常为论证同意不可能是不可让渡的而给出的“不可能”推理是谬误的，而且助长了对不可让渡问题的混淆。例如，如果字面上让渡个人意志的“不可能性”意味着不可能受约束充当某人的奴隶，那么为什么监禁侵犯者以强制恢复原状就不是“不可能”的呢？毕竟，即使是被定罪的侵犯者也还是有意志的。为什么用武力自卫不是“不可能”的呢？然而，正如我们所看到的那样，不可撤销地授予同意并非不可能；对于被正义监禁的侵犯者来说，这一条件是存在的。防卫性武力、赔偿性武力或报复性武力的接受者都保留着意志，而这种意志会被某种反应性武力所压倒。

The key here is to focus on force and consent, for to keep someone as a slave, it is not necessary that the will be physically alienated. Rather, in order to enslave someone, the slave-owner must be entitled to use (justified in using) force against the slave if the slave disobeys or tries to run away. The impossibility of actually alienating one's faculty of volition is irrelevant. It is the legitimacy of using force that matters, and this depends on consent.

这里的关键在于武力和同意，因为要使某人成为奴隶，并不一定要从肉体上剥夺其意志。相反，为了奴役一个人，奴隶主必须有权在奴隶不服从或试图逃跑时对其使用（有理由使用）武力。不可能真正剥夺一个人的意志力是无关紧要的。重要的是使用武力的合法性，而这取决于同意。

Putting the issue this way, however, provides a different argument why consent cannot irrevocably be granted by mere agreement or promise— why the prospective slave may change his mind in the future and withdraw his consent. If A promises (or contracts, or agrees; the terminology is not important) to be B's slave, this is no doubt an attempt to consent now to force inflicted in the future. If A later changes his mind and tries to run away, may B at that point use force against A?

然而，以这种方式来讨论这个问题，提供了一个不同的论点，为什么同意不能通过单

纯的协议或承诺而不可撤销地授予——为什么未来的奴隶可能会在未来改变主意并撤回他的同意。如果 A 承诺(或, 或同意; 术语并不重要)成为 B 的奴隶, 这无疑是一种现在同意在未来施加强迫的尝试。如果 A 后来改变主意, 试图逃跑, 彼时 B 是否可以对 A 使用武力?

This is the crucial question. If the answer is yes, this means that A has no right to object and has effectively alienated his rights. I would say no, however, simply because there is no reason why A cannot withdraw his consent. Libertarianism does not say one cannot change one's mind. When we ask about consent, it is the most recent expression of consent that is most relevant. Unlike the case of aggression, where the aggressor's prior aggression estops him from objecting to the use of retaliatory force, A has not committed aggression against B. Thus it is not inconsistent for A to later object to the use of force. All A did previously was utter words to B such as "I agree to be your slave." But this does not aggress against B at all, any more than does uttering the insult, "You are ugly." Words per se do not aggress, which is one reason there is a (derivative, not independent) "right" to free speech. In a nutshell, a would-be slave-owner must be entitled to use force against the would-be slave in order for the slavery agreement to be enforceable and for rights to be alienated in this manner; but the would-be slave has simply not initiated force against the would-be slave-owner. The would-be slave-owner is thus not entitled to use force against the slave; hence no rights were alienated.⁴⁵

这是关键问题。如果答案是肯定的, 这意味着 A 无权反对, 并且实际上已经让渡了他的权利。然而, 我会说不, 仅仅是因为 A 没有理由不能撤回他的同意。自由意志主义并不意味着一个人不能改变主意。当我们谈及同意时, 最相关的是最近表达的同意。与侵犯的情况不同, 在侵犯中, 侵犯者之前的侵犯行动使其被禁止反对使用报复性力量, A 并没有侵犯 B。因此, A 后来反对使用武力并不矛盾。A 之前所做的只是对 B 说了诸如“我同意做你的奴隶”之类的话, 但这根本没有侵犯 B, 就像说“你很丑”这样的侮辱性话语一样。言语本身并不构成侵犯, 这也是存在(衍生的、非独立的)“言论自由”权利的一个原因。简而言之, 要使奴隶制协议可执行并且以这种方式让渡权利, 未来的奴隶主必须有权对未来的奴隶使用武力; 但未来的奴隶根本没有对未来的奴隶主发起

武力。因此，未来的奴隶主无权对奴隶使用武力；所以没有权利被让渡。²²⁹

Thus, I conclude that a slavery agreement is not enforceable. Rights are not completely inalienable, as Smith contends, for aggression can alienate rights. We must reject the strong view of inalienability. However, rights are inalienable in the limited (and more conventional) sense that one cannot irrevocably grant consent to aggression in the future by way of a mere promise or agreement. This is not because of any impossibility in alienating one's will, but because a promisor has not committed aggression. One retains the right to change one's mind, absent special circumstances.⁴⁶ The limited view of inalienability seems to be the most sensible.

因此，我得出结论，奴隶制协议无法执行。权利并非如史密斯所主张的那样完全不可让渡，因为侵犯可以让渡权利。我们必须拒绝不可让渡性的强观点。然而，权利在有限（且更传统）的意义上是不可让渡的，即一个人不能仅仅通过承诺或协议就不可撤销地授权同意未来的侵犯。这并非是因为让渡个人意志存在任何不可能性，而是因为作出承诺的人并未实施侵犯。在没有特殊情况的前提下，一个人保留改变主意的权利。²³⁰不可让渡性的有限观点似乎是最明智的。

²²⁹ Proponents of the weak view of inalienability, like Walter Block, on the other hand, would argue that the sale of one's body confers ownership of it to another person and that subsequent violence against the sold body by the new owner is no more aggression than is self-mutilation. I remain to be convinced by this line of argument, primarily because there seems to be a relevant difference between the rights related to one's body and rights in homesteaded resources, due to the different justifications for and nature of these rights. For more on this, see "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).

另一方面，不可让渡性弱观点的支持者，如沃尔特·布洛克，会辩称，出售自己的身体将其所有权转让给了另一个人，新主人随后对出售的身体施加的暴力，并不比自残更具侵犯性。我仍然无法被这种论点说服，主要是因为由于这些权利的不同的正当理由和性质，与自身身体相关的权利和拓殖资源的权利之间似乎存在相关差异。关于这一点的更多内容，请参见《出售并不意味着拥有，反之亦然：一个剖析》（第 11 章）。

²³⁰ E.g., an airplane pilot may be forcibly restrained by passengers from parachuting out in mid-flight. See Barnett, *Structure of Liberty*, p. 81; also idem, "Rights and Remedies in a Consent Theory of Contract," in R.G. Frey & Christopher W. Morris, eds., *Liability: New Essays in Legal Philosophy* (Cambridge University Press, 1991), p. 163 n.52. The reason the parachuting is arguably aggression is that this action can be considered to be the cause of the physical harm that will befall the passengers, much like one who

The right to alienate external resources is not limited, however, because of crucial differences between rights pertaining to one's body and rights of ownership in previously-unowned, homesteaded resources. The right to appropriate external resources is derivative of and distinct from the basic right against non-aggression (self-ownership). External scarce resources are appropriated and acquired, and held by intention (it is this that distinguishes ownership from possession),⁴⁷ and thus can be abandoned or alienated by a sufficient expression of intention, e.g., a contract or act of abandonment. For this reason, under the libertarian title-transfer theory of contract, one can alienate particular property titles, i.e., titles to external (homesteadable) scarce resources. In this sense there is a distinction between title to property, which is alienable by mere contract; and rights related to one's body, which are not alienable by promise or contract (speech act) but are alienable by acts of aggression.⁴⁸

然而，让渡外部资源的权利是不受限制的，这是因为与自身身体相关的权利和对先前无主、拓殖获取的资源的所有权之间存在关键差异。占有外部资源的权利是由基本的互不侵犯的权利（自我所有权）衍生而来并且与之不同。外部稀缺资源是通过意图占

shoots a gun or drops a bomb is an aggressor. Alternatively, in the airplane example, it could be argued that the ownership of the airplane is contractually granted in common to the passengers for the duration of the flight, and they could thus use force to stop the pilot from opening the door since they “own” it and do not grant him permission to use it for this purpose.

For more on causation, see “Causation and Aggression” (ch. 8). Arguments could be constructed for other special cases, such as agreeing to donate an organ which causes the recipient to rely on this, or enlisting in a volunteer army at a time of peril. I do think there is room for more development of ideas related to such issues by future scholars. 例如，在飞行途中，飞机驾驶员可能会被乘客强行阻止跳伞。参见巴尼特的《自由的结构》，第 81 页；还有他的《同意理论中的权利与救济》，收录于 R.G.弗雷和克里斯托弗·W.莫里斯主编的《责任：法律哲学新论》（剑桥大学出版社，1991 年），第 163 页注释 52。跳伞之所以可以说是侵犯，是因为这一行动可以被认为导致乘客遭受人身伤害的原因，就像开枪或投掷炸弹的人是侵犯者一样。另外，在飞机的例子中，可以说飞机的所有权是根据在飞行期间共同授予乘客的，因此他们可以使用武力阻止飞行员打开舱门，因为他们“拥有”舱门，并没有授予飞行员为此目的使用舱门的许可。

关于因果关系的更多内容，请参见《因果关系与侵犯》（第 8 章）。我们还可以为其他特殊情况提出论据，比如同意捐赠器官会导致接受者依赖器官，或者在危险时刻加入志愿军。我确实认为，未来的学者在这些问题上会有更多的发展空间。

有、获取和持有（正是这一点将所有权与占有区分开来），²³¹因此可以通过充分表达意图，例如或放弃行动来放弃或让渡。出于这个原因，在自由意志主义的财产权转让的理论下，人们可以让渡特定的财产权，即对外部（拓殖的）稀缺资源的权利。从这个意义上说，财产权（可以通过单纯的让渡）和与自身身体相关的权利[不能通过承诺或（言语行动）让渡，但可以因侵犯行动而让渡]之间存在区别。²³²

²³¹ See “A Libertarian Theory of Contract” (ch. 9), at n.40 and accompanying text. 见《自由意志主义的契约理论》(第九章)，注释 40 和附文。

²³² See also Barnett, *Structure of Liberty*, p. 82. There has been great confusion in the area of contract theory, which has perhaps contributed to the confusion in inalienability reasoning. For example, the “impossibility” reasoning seems to be based on the groundless assumption that contracts are based on the concept of “binding promises” or on an improper analogy between homesteadable scarce resources, which can be acquired or abandoned, and rights against aggression, which relate to one’s body. However, contracts need have nothing to do with promises, and there is a difference between rights to acquired external resources and rights to one’s body. For more on the libertarian theory of contracts, see Randy E. Barnett, “A Consent Theory of Contract,” *Colum. L. Rev.* 86 (1986; www.randybarnett.com/pre-2000): 269; Rothbard, “Property Rights and the Theory of Contracts”; 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. Thus, the framework for rights, punishment, and consent put forward herein also has implications for other aspects of libertarian theory, which cannot be addressed in detail here. For example, the view of the unenforceability of slavery contracts also applies to contracts for personal services, and, indeed, to all promises in general, and thus to the theory of contracts. The theory of detrimental reliance is also relevant here. In my view, promises per se are not enforceable, and contracts are not best viewed as enforceable promises but as exchanges or alienations of titles to acquired tangible property external to one’s body. Some promises may be enforceable, due to detrimental reliance, but only in cases where the reliance is not circular, and thus plays a causal role in harming another, and such enforceable promises are something different from contract itself. This view of contracts, inalienability, and rights presented herein also has implications for the distinction between the alienability of homesteadable property versus the (limited) inalienability of rights related to one’s body. Elaboration of these ideas will have to await a subsequent article.

另见 Barnett, 《自由的结构》，第 82 页。理论领域一直存在着很大的混乱，这或许是不可让渡性推理混乱的原因之一。例如，“不可能性”推理似乎是基于一种毫无根据的假设，即基于“有约束力的承诺”这一概念，或者是基于对可拓殖的稀缺资源（可获取或放弃）与免受侵犯的权利（与人的身体有关）之间的不恰当类比。然而，无需

To summarize, then, one may object to certain acts of aggression; or one may grant consent to allow the otherwise-prohibited action to take place. The right against aggression may be alienated, but only by irrevocably granting consent, which may be done only by committing an act of aggression. A non-violent action such as a promise or agreement to do something with one's body, on the other hand, does not alienate rights, because the consent may be withdrawn at any time in the future, with certain exceptions. This is because a promise now to consent in the future to violence does not commit aggression against the promisee, and because a future change of mind revokes the consent.

因此，概括地说，人们可以反对某些侵犯行动；也可以表示同意，允许采取本应禁止的行动。反对侵犯的权利可以让渡，但只有通过不可撤销地授予同意才能让渡，即只有通过实施侵犯行动才能让渡。而非暴力行动，如承诺或同意用自己的身体做某事，则不会让渡权利，因为除某些例外情况外，同意可以在将来的任何时候撤回。这是因

与承诺有任何关系，对已获得的外部资源的权利与对自己身体的权利是有区别的。关于自由主义的理论的更多内容，参见兰迪·E·巴尼特的《同意的理论》，《哥伦比亚法律评论》86 卷（1986 年；www.randybarnett.com/pre-2000）：269；罗斯巴德的《财产权与理论》；威廉姆森·M·埃弗斯的《迈向法的重新表述》，《自由主义研究杂志》1 卷 1 期（1977 年冬季；<https://mises.org/library/toward-reformulation-law-contracts>）：3 - 13。因此，本文提出的权利、惩罚和同意的框架对自由意志主义理论的其他方面也有影响，在此无法详述。例如，奴役不可强制执行的观点也适用于个人服务，实际上也适用于一般意义上的所有承诺，因而也适用于理论。致害依赖理论也与此有关。在我看来，承诺本身是不可强制执行的，最好不要被视为可强制执行的承诺，而应被视为对已获得的外在于个人身体的真实财产所有权的交换或让渡。由于致害依赖，有些承诺可能是可执行的，但只有在依赖不是循环的情况下，从而对损害他人起到因果作用，这种可执行的承诺是不同于本身的东西。本文提出的这种关于、不可让渡性和权利的观点还对可拓殖财产的可让渡性与与自己身体有关的权利（有限的）不可让渡性之间的区别产生了影响。对这些观点的阐述将留待以后的文章。Author's note (2023): I have chosen to retain the above note instead of updating it. The original article was written in 1998 - 99, when I anticipated I would need to elaborate on these ideas subsequently. This is what I did. The next year, in 1999, I started developing the ideas noted above, which ultimately became "A Libertarian Theory of Contract (ch. 9). 作者注（2023 年）：我选择保留上述注释，而不是对其进行更新。原文写于 1998-1999 年，当时我预计随后需要对这些想法进行详细阐述。我确实这么做了。次年，即 1999 年，我开始发展上述提到的想法，最终形成了《自由意志主义的契约理论》（第 9 章）。

为现在承诺将来同意使用暴力并不侵犯被承诺者，而且将来改变主意也会撤销同意。

结论

CONCLUSION

If Smith is right that even a murderer has a right to not be killed, then it is wrongful aggression to kill the aggressor, just as it is wrongful aggression for a murderer to kill the victim. Then it is no longer the initiation of force that is impermissible; it is force in general, even retaliatory, defensive, or restitutive force. Without a right to respond to aggression, the non-aggression principle goes out the window, as does the distinction between aggressor and victim. Smith's defense of the strong version of inalienable rights thus undermines what is surely the heart of libertarianism, the non-aggression principle.

如果史密斯的观点是正确的，即使是杀人犯也有不被杀的权利，那么杀死侵犯者就是不法侵犯，就像杀人犯杀死受害者是不发侵犯一样。那么，不允许的就不再是发动武力，而是一般的武力，甚至是报复性、防御性或赔偿性的武力。如果没有对侵犯作出回应的权利，互不侵犯原则就不复存在，侵犯者与受害者之间的区别也不复存在。因此，史密斯对不可让渡的权利的强版本的辩护破坏了自由意志主义的核心——互不可侵犯原则。

附录：勒菲弗尔的和平主义

APPENDIX: LEFEVRE'S PACIFISM

As noted above, the material here was originally intended to appear in footnote 21, above. Due to its length, I include this material in this appendix.

如上所述，此处的材料原本打算放在上文注释 21 中。由于篇幅较长，我将其列入本附录。

As noted in the text, the consistent pacifist must condemn all uses of force, even defensive and restitutive, and that libertarian Robert LeFevre has been accused of holding such views. However, as alluded to above, it is not clear that LeFevre took his pacifism so far. As LeFevre writes:

正如文中所指出的，一贯的和平主义者必须谴责一切使用武力的行为，即使是防卫性的和赔偿性的，自由意志主义的罗伯特·勒菲弗尔（Robert LeFevre）就曾被指责持有这样的观点。然而，正如上文所提到的，并不清楚勒菲弗尔是否将他的和平主义奉为主臬。正如勒菲弗尔写道：

Protection is what we do prior to the commission of a criminal act which does, in fact, prevent such an act from occurring....

Protection, because of the fact that it prevents a trespass from occurring, is always moral....

Defense, on the other hand, is what we do during an attack by someone else. It is what takes place in what is called the "hot encounter." You are walking down the street and a man comes up to you, sticks a gun in your face, and demands your money. Now you are face to face with an attacker. You cannot protect yourself (i.e., prevent the attack); it is too late for that. Now you must defend yourself (i.e., ward off the attack).

As long as your actions are for the sole purpose of warding off the attack, you would not be guilty of an immoral act yourself. But if your actions serve the purpose of attacking the criminal, you are guilty of a trespass even though the other man initiated the attack....

Suppose, in the situation outlined above, the other man takes a swing at you. Clearly, you can raise your arm to ward off his blow. This is defense. If, however, you then bring your arm down upon his head and begin attacking him, you are no longer defending yourself, but attacking the other man. This would be immoral, as it is a trespass upon the other person.⁴⁹

保护是我们在实施犯罪行为之前所做的事情，它实际上防止了犯罪行为的发生....

保护，因为它阻止了侵犯的发生，所以始终是道德的....

另一方面，防卫是我们在受到他人攻击时所采取的行动。它发生在所谓的“激烈

冲突"中。你走在大街上，一个男人走过来，用枪指着你的脸，向你索要钱财。现在，你正与一名攻击者面对面。你无法保护自己（即阻止攻击），因为为时已晚。现在你必须自卫（即抵御攻击）。

只要你的行动只是为了抵御攻击，你自己就不会犯下不道德的行为。但是，如果你的行动是为了攻击罪犯，那么即使是对方主动进攻，你也犯有侵犯罪....。

假设在上述情况下，对方向你挥拳。显然，你可以举起手臂抵挡他的攻击。这就是防御。但是，如果你将手臂伸向他的头部并开始攻击他，你就不再是在自卫，而是在攻击对方。这将是道德的，因为这是对他人侵犯。²³³

Although I disagree with this pacifist view, it seems some libertarians mischaracterize LeFevre as opposing violence in self-defense. E.g., writes Rothbard:

*If every man has the absolute right to his justly-held property it then follows that he has the right to keep that property—to defend it by violence against violent invasion. Absolute pacifists who also assert their belief in property rights—such as Mr. Robert LeFevre—are caught in an inescapable inner contradiction: for if a man owns property and yet is denied the right to defend it against attack, then it is clear that a very important aspect of that ownership is being denied to him. To say that someone has the absolute right to a certain property but lacks the right to defend it against attack or invasion is also to say that he does not have total right to that property.*⁵⁰

虽然我不同意这种和平主义观点，但似乎有些自由意志主义者把勒菲弗尔错误地描述

²³³ Robert LeFevre, *Fundamentals of Liberty* (Santa Ana, California: Rampart Institute, 1988; <https://archive.org/details/LeFevre-TheFundamentalsOfLiberty>), pp. 354 – 55. 罗伯特·勒菲弗尔，《自由的基础》（加利福尼亚州圣安娜：壁垒研究所，1988年；<https://archive.org/details/LeFevre-TheFundamentalsOfLiberty>），第 354-355 页。

为反对自卫时使用暴力。例如，罗斯巴德写道：

如果每个人都对其正当持有的财产拥有绝对的权利，那么他就有权保有该财产——以暴力抵御暴力入侵。绝对和平主义者如果也坚持他们对财产权的信仰——比如罗伯特·勒菲弗尔先生——就会陷入一个无法回避的内在矛盾：因为如果一个人拥有财产，却被剥夺了保卫财产不受侵犯的权利，那么很明显，他的所有权的一个非常重要的方面被剥夺了。如果说某人拥有对某一财产的绝对权利，但却没有保护财产不受攻击或侵犯的权利，这也就意味着他对该财产没有完全的权利。²³⁴

This implies LeFevre opposes the right to self-defense, to “defend … against attack.” See also the comments of Todd Lewis:

*While most libertarians view the right to use lethal force to defend one’s body and physical property as naturally flowing from a strict reading of the Non-Aggression Principle, there is at least one little-known libertarian, the late great Robert LeFevre, who took an even more radical position on violence. Not only did he eschew the initiation of violence; he also eschewed the use of violence in one’s own self-defense.*⁵¹

这意味着勒菲弗尔反对自卫的权利，反对“抵御……攻击”。也可参见托德·刘易斯的评论：

虽然大多数自由意志主义者认为，根据对互不侵犯原则的严格解读，使用致命武力来保卫自己的身体和真实财产的权利是自然而然的，但至少有一位鲜为人知的自由意志主义者，已故的伟大的罗伯特·勒菲弗尔，对暴力采取了更为激进的立场。他不仅避免发起暴力；他还避免在自卫中使用暴力。²³⁵

Neither Rothbard nor Lewis provide any citations to LeFevre to back up this characterization of his views on violence used in self-defense.⁵² Thus, in the absence of any further writing by LeFevre on this subject (which may well exist), I have to conclude that the accusations of him adopting such an extreme pacifist view are unfounded.

罗斯巴德和刘易斯都没有提供勒菲弗尔的任何引文来支持他们对勒菲弗尔关于自卫

²³⁴ Rothbard, “Self-Defense,” p. 77.

罗斯巴德，《自卫》，第 77 页。

²³⁵ 托德·刘易斯，《保护、自卫、报复和自我所有权》，自由意志主义基督教研究所（2021 年 7 月 11 日；<https://perma.cc/9SB2-XJC7>）

中使用暴力的观点的这种描述。²³⁶ 因此，在没有勒菲弗尔关于这个主题的任何进一步著作（可能确实存在）的情况下，我不得不得出结论，对他采取这种极端和平主义观点的指责是没有根据的。

²³⁶ 刘易斯没有回复我发给他的电子邮件，邮件中我请求他对针对勒菲弗尔的指责做进一步的澄清或提供支持。

第十一章 出售并不意味着所有权，反之亦然：一个剖析

Selling Does Not Imply Ownership, and Vice-Versa: A Dissection

I delivered this speech at the Property and Freedom Society's 16th Annual Meeting, in Bodrum, Turkey, in 2022.* It takes aim, in part, at some of my friend Walter Block's views on voluntary slavery and body-alienability, a topic we've disagreed about for a long time.† The transcript was lightly edited for clarity and to add some headings, references, and links, but the colloquial and informal tone has largely been preserved. I published it on my old, mostly defunct site The Libertarian Standard, to which Walter responded in due course.‡ This chapter is a lightly-edited version of that article.§

2022 年，我在土耳其博德鲁姆举行的财产与自由协会第 16 届年会上发表了这篇演讲。*它部分针对的是我的朋友沃尔特·布洛克（Walter Block）关于自愿为奴和身体可让渡性的一些观点，这是我们长期存在分歧的一个话题。†为了清晰起见，对演讲稿进行了轻微编辑，并添加了一些标题、参考文献和链接，但口语化和非正式的语气在很大程度上得以保留。我将其发表在我那大多已停用的旧网站“自由意志主义标准”（The Libertarian Standard）上，沃尔特随后也做出了回应。‡ 本章是该文章的略微编辑版本。§

* Kinsella, "KOL395 | Selling Does Not Imply Ownership, and Vice-Versa: A Dissection (PFS 2022)," Kinsella on Liberty Podcast (Sept. 17, 2022).

* 金塞拉，"KOL395 | 出售并不意味着拥有所有权，反之亦然：一个剖析（2022 年财产与自由协会）"，《金塞拉谈自由》播客（2022 年 9 月 17 日）。

† See Kinsella, "KOL004 | Interview with Walter Block on Voluntary Slavery and Inalienability," Kinsella on Liberty Podcast (Jan. 27, 2013).

† 参见金塞拉，"KOL004 | 与沃尔特·布洛克关于自愿为奴和不可让渡性的访谈"，《金塞拉谈自由》播客（2013 年 1 月 27 日）。

‡ Kinsella, "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection," The Libertarian Standard (Oct. 25, 2022). Walter's response: "Rejoinder to Kinsella on Ownership and the Voluntary Slave Contract," Management Education Science

Technology Journal (MESTE) 11, no. 1 (Jan. 2023; <https://perma.cc/H3AL-WBQJ>): 1-8. See also idem, "Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Bar- nett, Gordon, Smith, Kinsella and Epstein," J. Libertarian Stud. 17, no. 2 (Spring 2003; <https://perma.cc/79AC-34BZ>): 39-85.

廿 金塞拉,《出售并不意味着拥有所有权,反之亦然:一个剖析》,《自由意志主义标准》(2022 年 10 月 25 日)。沃尔特的回应:《对金塞拉关于所有权和自愿为奴的反驳》,《管理教育科学技术杂志》(MESTE)第 11 卷第 1 期(2023 年 1 月;<https://perma.cc/H3AL-WBQJ>): 1-8 页。另见同上,《迈向不可让渡性的自由意志主义理论:对罗斯巴德、巴尼特、戈登、史密斯、金塞拉和爱泼斯坦的批判》,《自由意志主义研究杂志》第 17 卷第 2 期(2003 年春季;<https://perma.cc/79AC-34BZ>): 39-85 页。

§ Some of this material is also discussed in "Against Intellectual Property After Twenty Years: Looking Back and Looking Forward" (ch. 15), Part IV.G.

§ 其中一些内容也在《二十年后反对知识产权后:回顾与展望》(第 15 章), Part IV.G 中有所讨论。

两个相关的谬论

TWO RELATED FALLACIES

I want to explore two related beliefs, which I think are fallacious, and they stem from confusions about core libertarian principles and confusions introduced by the sloppy use of language and overuse of metaphorical thinking. And, by the way, I did touch on this topic in less detail at the PFS [Property and Freedom Society] here in 2011, when I talked about a bunch of libertarian misconceptions, and also in a "Libertarian Controversies" lecture from Mises Academy about 10 years ago.¹

我想探讨两个相关的信念,我认为它们都是谬误,它们源于对自由意志主义核心原则的混淆,以及对语言的草率使用和过度使用比喻思维所带来的混淆。顺便说一句,2011 年我在这里,在 PFS [财产与自由学会]上曾经较详细地谈到过这个话题,当时我谈了一堆自由意志主义的误解,大约 10 年前,我还在米塞斯学院的一次"自由意志主义

争议 "讲座中谈到过这个话题。²³⁷

So, the first fallacy: Ownership implies selling. Walter Block uses this a lot. In fact, I heard him say it explicitly last week again in Nashville at the Libertarian Scholars Conference. So the idea is this: if you own yourself—that is, you own your body—you should be able to sell it. So, a voluntary slavery contract should be enforceable. And if the legal system does not permit voluntary slavery, then it means you really don't own yourself. So the implicit assumption behind this argument is that one inherent aspect of ownership is the right or ability to sell.² In other words, it is assumed that "ownership" necessarily includes the ancillary "right to sell." It's taken for granted that "if you own something, you can sell it." This is a mistaken assumption, as I shall explain presently.

那么，第一个谬误：拥有意味着出售。沃尔特·布洛克经常使用这个观点。事实上，上周在纳什维尔的自由意志主义学者研讨会上，我又听到他明确地这么说。这个观点是这样的：如果你拥有自己——也就是你拥有自己的身体——你应该能够出售它。所以，自愿为奴的应该是可执行的。如果法律制度不允许自愿为奴，那就意味着你实际上并不拥有自己。所以这个论点背后的隐含假设是，所有权的一个固有方面是出售的权利或能力。²³⁸ 换句话说，它假定"所有权"必然包括辅助的"出售权"。人们想当然地认为

²³⁷ See Kinsella, "KOL044 | 'Correcting some Common Libertarian Misconceptions' (PFS 2011)," Kinsella on Liberty Podcast (May 2, 2013), at slide 7 and idem, "KOL049 | 'Libertarian Controversies Lecture 5' (Mises Academy, 2011)," Kinsella on Liberty Podcast (May 4, 2013), at slide 15. See also idem, "KOL092 | Triple-V: Voluntary Virtues Vodcast, with Michael Shanklin: Can You Trade Something You Don't Own?," Kinsella on Liberty Podcast (Oct. 30, 2013); idem, "The 'If you own something, that implies that you can sell it; if you sell something, that implies you must own it first' Fallacies," StephanKinsella.com (June 1, 2018); idem, "On the Danger of Metaphors in Scientific Discourse," StephanKinsella.com (June 12, 2011).

参见金塞拉，"KOL044 | '纠正一些常见的自由意志主义的误解'（2011 年财产与自由协会）"，《金塞拉谈自由》播客（2013 年 5 月 2 日），第 7 页；以及同上，"KOL049 | '自由意志主义争议讲座 5'（米塞斯学院，2011 年）"，《金塞拉谈自由》播客（2013 年 5 月 4 日），第 15 页。另见同上，"KOL092 | 三重 V：自愿美德视频播客，与迈克尔·尚克林：你能交易你不拥有的东西吗？"，《金塞拉谈自由》播客（2013 年 10 月 30 日）；同上，"如果你拥有某物，这意味着你可以出售它；如果你出售某物，这意味着你必须首先拥有它'的谬误"，StephanKinsella.com（2018 年 6 月 1 日）；同上，"论科学论述中比喻的危险"，StephanKinsella.com（2011 年 6 月 12 日）。

²³⁸ See Kinsella, "KOL004 | Interview with Walter Block on Voluntary Slavery and

"如果你拥有某物，你就可以出售它"。这是一个错误的假设，我马上就会解释。

Fallacy two: Selling implies ownership. So, some contracts that we're used to are exchanges of owned things. Consider some simple ones: an apple for an orange, 10 chickens for a pig, 1 ounce of gold for a horse, or \$3 for a cup of coffee. Now, we also have labor contracts, where it's considered to be a sale of a service, which implies that you "own your labor" because, after all, you "sold" it. And also there's the sale of knowledge, information, or know-how—like teachers who get paid to give information, publishers, speakers, contracts for transfer of knowhow, and so on. And this argument is also used to argue for intellectual property. People say, "Well, if you can sell your idea, you must have owned it, so intellectual property is a legitimate concept." Similarly with Bitcoin: people say that Bitcoin can be possessed, and sold, so Bitcoins must be owned and ownable things.³

谬误二：出售意味着所有权。所以，我们习以为常的一些是对所拥有之物的交换。考虑一些简单的例子：一个苹果换一个橙子，十只鸡换一头猪，一盎司黄金换一匹马，或者 3 美元买一杯咖啡。现在，我们还有劳动，它被认为是一种服务的出售，这意味着你“拥有你的劳动力”，因为毕竟你“出售”了它。还有知识、信息或技术诀窍的出售——比如教师因提供信息而获得报酬、出版商、演讲者、技术诀窍转让等等。这种论点也被用于论证知识产权。人们说：“好吧，如果你能出售你的想法，那你一定拥有它，所以知识产权是一个合理的概念。”比特币也是如此：人们说比特币可以被拥有和出售，所以比特币一定是可拥有和能被拥有的东西。²³⁹

Inalienability” and idem, “Thoughts on Walter Block on Voluntary Slavery, Alienability vs. Inalienability, Property and Contract, Rothbard and Evers,” StephanKinsella.com (Jan. 9, 2022).

参见金塞拉的“KOL004 | 与沃尔特·布洛克关于自愿为奴和不可让渡性的访谈”以及同上的“关于沃尔特·布洛克论自愿为奴、可让渡性与不可让渡性、财产和、罗斯巴德和埃弗斯的思考”，StephanKinsella.com（2022 年 1 月 9 日）。

²³⁹ See Kinsella, “KOL274 | Nobody Owns Bitcoin (PFS 2019),” Kinsella on Liberty Podcast (Sept. 19, 2019).

参见金塞拉的“KOL274 | 无人拥有比特币(2019 年财产与自由协会)”，《金塞拉谈自由》播客(2019 年 9 月 19 日)。

稀缺性和财产权 SCARCITY AND PROPERTY RIGHTS

Now, let’s revisit some elementary categories of libertarian thought. So first of all, action is when humans in the world employ means or scarce resources as tools to help achieve their ends or goals. When there’s society—other human actors—there’s a possibility of conflict in the use of these resources. Now, it’s good that we live in society, because we have the division and specialization of labor, trade, and intercourse with other people. But there can also be conflict among human actors in the use of these scarce resources, including our bodies, because of the nature of these resources.

现在，让我们重新审视一些自由意志主义思想的基本范畴。首先，行动是指人类在世界上使用手段或稀缺资源作为工具来帮助实现其目的或目标。当存在社会——其他人类行动人——在使用这些资源时就有可能产生冲突。现在，我们生活在社会中是好的，因为我们有劳动分工与专业化、贸易以及与其他人的往来。但由于这些资源的性质，在使用包括我们的身体在内的这些稀缺资源时，人类行动人之间也可能产生冲突。

So what this means is the scarce resources, which we employ as human actors in a purely economic sense, are precisely things over which there can be conflicts. So sometimes, to avoid confusion, I will refer to these things as rivalrous, or contestable or conflictible resources.⁴ They are the types of things over which there can be conflict. I find I sometimes need to emphasize this aspect and avoid the term “scarce resources” because, quite often, an intellectual property proponent will say something like, well, “I don’t know about you, but good ideas is pretty scarce.” They can’t easily say that good ideas are conflictible (or rivalrous), though. The point is information is not the type of thing that can be subject to property rights or ownership.⁵

因此，这意味着我们作为行动人所使用的纯经济意义上的稀缺资源，恰恰是可能发生冲突的东西。因此，有时为了避免混淆，我会把这些东西称为具有竞争性、争议性或冲突性资源。²⁴⁰它们是可能发生冲突的事物类型。我发现，我有时需要强调这一方面，

²⁴⁰ See “Against Intellectual Property After Twenty Years” (ch. 15), Part III. On the term “conflictible,” see Kinsella, “On Conflictability and Conflictible 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 and accompanying text; “Dialogical Arguments for Libertarian Rights” (ch. 6), at n.6

避免使用 "稀缺资源" 一词，因为知识产权的支持者常常会说，"我不知道你怎么想，但好点子是非常稀缺的"。不过，他们不会轻易说好点子是可引发冲突的(或竞争性的)。问题的关键在于，信息并不是可以归属于财产权或所有权的那一类事物。²⁴¹

财产权 *Property Rights*

Now, in civilized society, property or ownership rights are assigned to reduce this conflict.⁶ So what are property rights? All rights are human rights, and all human rights just are property rights,⁷ because the very purpose of property rights is to avoid conflict over scarce (rivalrous, conflictable) resources. So ownership means property rights. To own a thing is to have a property right in the thing. So it's actually better to refer to property as the relationship between a person and a thing, although, over time, we sometimes are careless with language, and we will refer to the thing itself as property. Like we'll say, "That car is my property." But precise language would be, "I have a property right in that thing, in that car," or "I own that car."⁸

现在，在文明社会中，财产权或所有权的分配是为了减少这种冲突。²⁴²那么，何为财

and accompanying text; "Causation and Aggression" (ch. 8), n.19 and accompanying text.

参见《《反对知识产权》二十年后》(第 15 章)，第三部分。关于“冲突性”一词，参见金塞拉的《论冲突性和冲突性资源》，StephanKinsella.com(2022 年 1 月 31 日)；另见《我们如何拥有自己》(第 4 章)，注释 10 处的文本；《自由意志主义的惩罚和权利理论》(第 5 章)，注释 62 及相关文本；《自由意志主义权利的对话式论证》(第 6 章)，注释 6 及相关文本；《因果关系与侵犯》(第 8 章)，注释 19 及相关文本。

²⁴¹ See Kinsella, *Against Intellectual Property* (Auburn, Ala.: Mises Institute, 2008); "Against Intellectual Property After Twenty Years" (ch. 15). To avoid any doubt: I think patent and copyright law should be abolished. In about 20 years. Daddy's got to put food on the table. Just kidding. "Do it now." I don't think they are listening to me anyway.

参见金塞拉的《反对知识产权》(阿拉巴马州奥本: 米塞斯研究院, 2008 年)；《《反对知识产权》二十年后》(第 15 章)。为避免任何疑问: 我认为专利法和版权法应当废除。大约在 20 年后。爸爸得养家糊口。开玩笑的。“现在就做。”反正我觉得他们也没在听我说话。

²⁴² See Hoppe, "Of Common, Public, and Private Property and the Rationale for Total Privatization," in *The Great Fiction: Property, Economy, Society, and the Politics of*

产权？所有的权利都是人权，所有的人权都是财产权，²⁴³7 因为财产权的根本目的是避免稀缺资源（竞争性、冲突性）的冲突。因此，所有权就意味着财产权。拥有一件东西就是对这件东西拥有财产权。因此，把财产说成是人与物之间的关系其实更好，不过，随着时间的推移，我们有时会不小心用词不当，把物本身说成是财产。比如我们会说“那辆车是我的财产”但准确的说法应该是：“我对那件东西、那辆车拥有财产权”或“我拥有那辆车”。²⁴⁴

All right: so, ownership and property rights. A property right in a thing gives the owner the right to use it. This is what property rights are. Now, to be more precise, which is—this precision is not necessary for today's discussion, but—owning a thing actually does not literally give you the right to use it, but it gives you the right to prevent others from using it. It's an exclusionary right.⁹ As a practical matter, that usually gives you the ability to use the thing. So, for example, if you own a gun, that means you can prevent anyone else from using the gun. But it doesn't mean you have the unlimited right to use the gun, because other people have property rights, and their property rights proscribe your actions. So I can't use the gun to shoot someone.

好的：那么，所有权和财产权。对一件东西的财产权赋予所有者使用它的权利。这就是财产权的含义。现在，更准确地说——这种精确性对于今天的讨论并非必要，但是——拥有一件东西实际上并非字面上赋予你使用它的权利，而是赋予你阻止他人使用

Decline, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf).

见霍普《论共有，公有和私有财产以及全面私有化的基本原理》，载于《伟大的虚构：财产，经济，社会和衰落的政治》，第二版扩充版（阿拉巴马州奥本：米塞斯研究院，2021 年；www.hanshoppe.com/tgf）

²⁴³ See Rothbard, “‘Human Rights’ as Property Rights,” in *The Ethics of Liberty* (New York: New York University Press, 1998, <http://mises.org/rothbard/ethics/fifteen.asp>); see also Kinsella, “KOL259 | ‘How To Think About Property’”, New Hampshire Liberty Forum 2019,” Kinsella on Liberty Podcast (Feb. 9, 2019).

参见罗斯巴德的《“人权”即财产权》，载于《自由的伦理》（纽约：纽约大学出版社，1998 年，<http://mises.org/rothbard/ethics/fifteen.asp>）；另见金塞拉的《KOL259 | “如何思考财产”，2019 年新罕布什尔自由论坛》，《金塞拉谈自由》播客（2019 年 2 月 9 日）。

²⁴⁴ See “What Libertarianism Is” (ch. 2), n.5; and text accompanying note 39, below. 参见《何为自由意志主义》（第 2 章），注释 5；以及下文注释 39 所附的文本。

它的权利。这是一种排他性权利。²⁴⁵ 实际上，这通常使你能够使用这件东西。例如，如果你拥有一把枪，这意味着你可以阻止任何人使用这把枪。但这并不意味着你拥有无限制使用这把枪的权利，因为其他人也有财产权，他们的财产权限制了你的行动。所以我不能用这把枪射击某人。

财产权作为行动的限制 *Property Rights as Limits on Action*

Now, most people make the mistake of saying, well, this shows that property rights are limited. But this is actually incorrect. The reason I can't shoot the gun at my neighbor is because he has a property right in his own body. His property rights are a limitation on what actions I can perform. They are not a limitation on my property rights in my gun. In fact, if I had a stolen gun, which I didn't own, I still couldn't shoot my neighbor. Ownership of the gun—the means employed— has nothing to do with why am prohibited from shooting him. So the ownership of the gun is not limited by property rights. I can't shoot an innocent person with a gun that I own or with a stolen gun. The innocent person's property rights in his body limit what actions I can perform, with whatever causally efficacious scarce means, whether it's a resource I own or not. It's a limit on my actions, not on property rights. Because the essence of a property right is the right to exclude others, not the right to use.

现在，大多数人都会错误地说，这说明财产权是有限的。但这其实是不正确的。我之所以不能向邻居开枪，是因为他对自己的身体拥有财产权。他的财产权是对我可以采

²⁴⁵ See “Against Intellectual Property After Twenty Years” (ch. 15), n.62 and Part IV.H n.74. Ironically (and as noted in “What Libertarianism Is” (ch. 2), n.5), this is how the patent system works (having a patent on an invention doesn't give you the right to make, use, sell, or practice it, but only to stop others from doing those things), although almost no one except patent specialists really grok this. We patent lawyers like that it's arcane and no one but us gets it. Keeps us employed.

参见《《反对知识产权》二十年后》（第 15 章），注释 62 以及第四部分 H 注释 74。具有讽刺意味的是（正如在《何为自由意志主义》（第 2 章），注释 5 中所指出的），专利制度就是这样运作的（拥有一项发明的专利并不是赋予你制造、使用、销售或实践它的权利，而只是阻止他人做这些事情），尽管除了专利专家之外几乎没有人真正理解这一点。我们这些专利律师喜欢它的神秘性，除了我们没人懂。这让我们有工作可做。

取的行动的限制。他的财产权并不限制我对枪支的财产权。事实上，如果我有一把偷来的枪，而我并不拥有这把枪，我仍然不能向我的邻居开枪。枪的所有权——使用的手段——与我为什么被禁止向他开枪毫无关系。因此，枪的所有权不受财产权的限制。我不能用自己的枪或偷来的枪射杀无辜的人。无辜者对其身体的财产权限制了我可以用任何具有因果效力的稀缺手段实施的行动，无论这是否是我所拥有的资源。这是对我行动的限制，而不是对财产权的限制。因为财产权的本质是排除他人的权利，而不是使用权。

This mistake is used also to argue for intellectual property because people will say—well, I'll point out that intellectual property rights restrict other property rights, so they're actually an infringement of property rights because they're effectively a nonconsensual negative servitude because, if I have a patent, I can prevent you from using your factory to make iPhones. So that's a limitation on your use of your property.¹⁰

这种错误也被用来为知识产权辩护，因为人们会说——好吧，我指出知识产权限制了其他财产权，所以它们实际上是对财产权的侵犯，因为它们实际上是一种未经同意的消极地役权，因为，如果我拥有一项专利，我就可以阻止你用你的工厂生产苹果手机。因此，这是对你使用自己财产的限制。²⁴⁶

And the response will be, "Well, all property rights limit other people's property rights." The implicit argument here is that just because patents limit property rights, that's no problem to patents being genuine property rights, because all property rights limit other property rights.¹¹ But that's not true. Property rights limit only actions. And the owner of a factory making iPhones is not committing any action that invades the borders of anyone else's property. So that's why that's another fallacy. It's a related fallacy but not the one I'm addressing directly today.

对此的回应会是：“好吧，所有的财产权都会限制他人的财产权。”这里暗含的论点是，仅仅因为专利限制了财产权，这对于专利成为真正的财产权来说不是问题，因为所有

²⁴⁶ See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.B and note 39, below.
见《《反对知识产权》二十年后》（第 15 章），下文第四部分 B 节和注 39。

的财产权都会限制其他财产权。²⁴⁷但这不是真的。财产权仅限制行动。而生产苹果手机的工厂所有者并没有采取任何侵犯他人财产边界的行动。所以这就是另一个谬论。这是一个相关的谬论，但不是我今天直接要讨论的那个。

So: libertarianism and property rights. The purpose of property rights is to permit conflicts over the use of scarce resources to be avoided. So they assign these exclusive rights so that others can avoid the conflict.

所以：自由意志主义和财产权。财产权的目的是避免在稀缺资源的使用上产生冲突。所以他们确定这些排他性权利，以使其他人能够避免冲突。

财产权和客观联系 *Property Rights and Objective Link*

So how does this work? The property rights are assigned in accordance with whichever actor has the best link or connection to the resource.¹² This is the only way you can have a workable system of property rights, because any system of property rights has to be voluntarily respected, and for it to be voluntarily respected, it has to be seen as objectively fair, which means it can't be based upon arbitrary differences like "I have the right to rule you, and you don't have the right to rule me because I'm me, and you're you." That's a particularistic rule.¹³ Or "I have the right to your land because I'm stronger."

那么，这是如何运作的呢？财产权被确定给与资源有最佳联系或关系的行动人。²⁴⁸这

²⁴⁷ Imagine a woman being assaulted and complaining that this violates her property rights in her body. "Don't complain," the aggressor says, "after all, all property rights are limited by others' property rights, and I'm asserting an ownership claim in your body." See also "Against Intellectual Property After Twenty Years" (ch. 15), Part IV.H.

试想，一名妇女遭到侵犯，并抱怨这侵犯了她对自己身体的财产权。"别抱怨了，"侵犯者说，"毕竟，所有的财产权都受到他人财产权的限制，我这是在主张对你身体的所有权。"另见《《反对知识产权》二十年后》（第15章），第四部分H。

²⁴⁸ In this sense, all property rules are relative: the owner is the person who has a better claim than all other possible claimants. See, on this, "What Libertarianism Is" (ch. 2), at notes 33, 36; and "Law and Intellectual Property in a Stateless Society" (ch. 14), at

是建立可行的财产权制度的唯一途径，因为任何财产权制度都必须得到自愿尊重，而要得到自愿尊重，就必须被视为客观公平，这意味着它不能建立在“我有权统治你，你无权统治我，因为我是我，你是你”这样的武断差异之上。这是一种特殊主义的规则。²⁴⁹或者“我有权占有你的土地，因为我更强大”。

n.41 et pass. This is why “taints” or original sin in the history of land in the distant past do not render current property rights insecure. See also “Libertarianism After Fifty Years: What Have We Learned?” (ch. 25); and “What Libertarianism Is” (ch. 2), at n.36.

In a recent talk, one legal scholar claims that Rothbard, in *Ethics of Liberty*, propounded a view of “absolute” property titles, as contrasted with the “relative” property titles of the common law. See Wanjiru Njoya, “Defending Private Property: Principles of Justice” (YouTube, March 27, 2023; https://youtu.be/jzamN_8l77k). However, I believe the best reading of Rothbard is that the position he supports is basically the relative property title system indicated above. See Kinsella, “Rothbard on the ‘Original Sin’ in Land Titles: 1969 vs. 1974,” [StephanKinsella.com](https://stephankinsella.com) (Nov. 5, 2014); idem, “Mises, Rothbard, and Hoppe on the ‘Original Sin’ in the Distribution of Property Rights,” [StephanKinsella.com](https://stephankinsella.com) (Oct. 7, 2014). See also Jeff Deist’s breakdown of Rothbard’s approach to such property issues in “A Libertarian Approach to Disputed Land Titles,” *Mises Wire* (June 3, 2021; <https://mises.org/wire/libertarian-approach-disputed-land-titles>).

在这个意义上，所有的财产规则都是相对的：所有者是比所有其他可能的主张者拥有更佳的主张权的人。关于这一点，请参见《何为自由意志主义》（第 2 章），注释 33、36；以及《无政府社会中的法律和知识产权》（第 14 章），注释 41 及其他。这就是为什么在遥远过去的土地历史中的“污点”或原罪不会使当前的财产权不安全。另请参见《自由意志主义五十年：我们学到了什么？》（第 25 章）；以及《何为自由意志主义》（第 2 章），注释 36。

在最近的一次演讲中，一位法律学者声称，罗斯巴德在《自由的伦理》中提出了一种“绝对”财产所有权的观点，与普通法的“相对”财产所有权形成对比。参见万吉鲁·恩乔亚，《捍卫私有财产：正义原则》(YouTube, 2023 年 3 月 27 日, https://youtu.be/jzamN_8l77k)。然而，我认为对罗斯巴德的最佳解读是，他所支持的立场基本上是上述提到的相对财产所有权制度。参见金塞拉，《罗斯巴德论土地所有权中的“原罪”：1969 年与 1974 年》，[StephanKinsella.com](https://stephankinsella.com)(2014 年 11 月 5 日)，同上，《米塞斯、罗斯巴德和霍普论财产权归属中的“原罪”》，[StephanKinsella.com](https://stephankinsella.com)(2014 年 10 月 7 日)。另请参见杰夫·戴斯特在《解决有争议的土地所有权的自由意志主义方法》中对罗斯巴德处理此类财产问题的方法的分析，米塞斯连线(2021 年 6 月 3 日; <https://mises.org/wire/libertarian-approach-disputed-land-titles>)

²⁴⁹ See, on this, “What Libertarianism Is” (ch. 2), n.23 and accompanying text; “How We Come to Own Ourselves” (ch. 4), n.15; “A Libertarian Theory of Punishment and Rights” (ch. 5), n.45 and accompanying text; and “Dialogical Arguments for Libertarian

Those types of arguments and reasons are not justifications. There has to be an objective best link.¹⁴ So how does that work out? In Western private law and in libertarianism, which is a far more consistent working out of this, there are basically two types of links—the type of link applied to your body, which is a unique scarce resource; and the type of link applied to external resources in the world, which were previously unowned scarce resources. For the body, the link is a self-ownership link. You own your body, and the reason is because of your direct control over it, which I will get to in a minute.

这些论点和理由都不是理由。必须有一个客观的最佳联系。²⁵⁰那么，如何实现这一点呢？在西方私法和自由意志主义中，基本上有两类联系（后者对此有更为一贯的推导）——一类是与你的身体的联系，你的身体是独一无二的稀缺资源；另一类是与世界上的外部资源的联系，这些资源以前是无主的稀缺资源。对于身体来说，这种联系是一种自我所有权的联系。你拥有自己的身体，原因在于你对它的直接控制，这一点我稍后会讲到。

And then for scarce resources in the world, they're always owned first by someone first using them from their unowned state. That's called homesteading or original appropriation. And then ownership can be transferred for two reasons: contractually—that's a voluntary transfer of your ownership title of the resource to someone else, either by sale or by gift; or for purposes of rectification, which can be seen as a subset of contract because it's also a transfer of title from an owner to someone, but it's because the owner committed a tort against the victim and thus gave him a right to recover some of the aggressor's property as damages.

然后对于世界上的稀缺资源，它们总是首先由某人从无主状态通过首次使用而被拥有。这就是所谓的拓殖或先占。所有权的转让有两种原因：一是——即通过出售或赠与的

Rights” (ch. 6), n.43 and accompanying text.

关于这一点，请参见《何为自由意志主义》（第 2 章），注释 23 及相关文本；《我们如何拥有自己》（第 4 章），注释 15；《自由意志主义的惩罚和权利理论》（第 5 章），注释 45 及相关文本；以及《自由意志主义权利的对话论证》（第 6 章），注释 43 及相关文本。

²⁵⁰ See “How We Come to Own Ourselves” (ch. 4).

参见《我们如何拥有自己》（第四章）

方式，自愿将资源的所有权转让给他人；二是出于纠正的目的，这可以看作是一个子集，因为这也是所有权从所有者向他人的转让，但这是因为所有者对受害者实施了侵权行为，从而使其有权收回侵犯者的部分财产作为损害赔偿。

So original appropriation, contract, and rectification are basically the only three principles to determine ownership of external resources in case of a dispute. So these four principles—body-ownership due to direct control, with an exception made for forfeiture of this right due to committing aggression,¹⁵ plus the three principles for external resources—are how we determine the best link, and this is the core of all property rights, and of all just law. A developed body of private law, to be just, has to be based on these core principles, and just entails working out the details as the law develops.¹⁶ And every socialist system, and every law not based on these core principles, including IP law, always ends up deviating from these core private property law principles in one way or another.

因此，先占、和纠正基本上是在发生争议时确定外部资源所有权的仅有的三项原则。因此，这四项原则——因直接控制而产生的身体所有权，以及因实施侵犯而丧失这一权利的例外情况，²⁵¹加上外部资源的三项原则——就是我们确定最佳联系的方式，这是所有财产权的核心，也是所有正义法律的核心。一套完善的私法要想实现正义，就必须以这些核心原则为基础，而正义则需要法律发展的过程中不断完善细节。²⁵²每

²⁵¹ See “Inalienability and Punishment: A Reply to George Smith” (ch. 10) and note 18, below. See also the Libertarian Party Platform language quoted in note 27, below. 见《不可让渡性与惩罚：对乔治·史密斯的回应》（第十章），以及下文注 18，另见下文注 27 引述的自由意志主义党纲的论述。

²⁵² See “Legislation and the Discovery of Law in a Free Society” (ch. 13), in general, and “Knowledge, Calculation, Conflict, and Law” (ch. 19), the section “Abstract Rights and Legal Precepts.” See also Hoppe’s pithy summary of these basic rules, in “A Realistic Libertarianism,” LewRockwell.com (Sept. 30, 2013; <https://www.hanshoppe.com/2014/10/a-realistic-libertarianism/>) and in “Of Common, Public, and Private Property and the Rationale for Total Privatization,” at pp. 85–87, and the LP Platform language mentioned in note 27, below. As Hoppe writes in “A Realistic Libertarianism”:

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 indirectly, by first directly controlling my body, and vice versa) and that only he directly controls also in particular when discussing and arguing the

一种社会主义制度，每一种不以这些核心原则为基础的法律，包括知识产权法，最终都会以这样或那样的方式偏离私有财产法的核心原则。

自我所有权 Self-Ownership

Now, so we commonly use the term "self-ownership." This is another phrase that can be misleading because you can have people object to it and say, well, how can you own yourself, because that's a religious view because it implies that your "self" is different than your body or something like that, and they'll criticize it that way.¹⁷

现在，我们通常使用“自我拥有”这个词。这是另一个可能会引起误解的短语，因为可能会有人反对它，说，你怎么能拥有自己，因为这是一种宗教观点，因为它暗示你的“自我”不同于你的身体或类似的东西，他们会这样批评它。²⁵³

question at hand.... [A]s 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.

参见《自由社会中的立法与法律发现》（第十三章）的总论，以及《知识、计算、冲突与法律》（第十九章）的“抽象权利与法律规范”一节。另见霍普在《一种现实的自由意志主义》（A Realistic Libertarianism, LewRockwell.com, 2013 年 9 月 30 日；<https://www.hanshoppe.com/2014/10/a-realistic-libertarianism/>）中对这些基本规则的精辟总结，以及《论共有、共有和私有财产以及完全私有化的原理》（Of Common, Public, and Private Property and the Rationale for Total Privatization）第 85-87 页，以及下文注释 27 中提到的自由党纲领的论述。正如霍普在《一种现实的自由意志主义》中写道：

但是，谁拥有作为私有财产的稀缺资源，谁不拥有呢？首先：每个人都拥有自己的身体，只有他自己而没有其他人可以直接控制（我只能间接控制你的身体，首先要直接控制我的身体，反之亦然），只有他自己可以直接控制，尤其是在讨论和论证手头的问题时....[至于只能间接控制的稀缺资源（必须用我们天生的、即未被占有的身体来获取）：排他性控制（财产）被并应被确定给首先占有该资源的人，或者通过与前任所有者的自愿（无冲突）交换获得它的人。因为只有资源的第一个占有者（以及通过一连串自愿交换与第一个占有者相关的所有后来的所有者）才有可能在无冲突，即和平的情况下获得并控制它。

²⁵³ See “How We Come to Own Ourselves” (ch. 4), n.1.

So to be precise, self-ownership is just a shorthand for body ownership, because your body is a scarce resource. Your “self ” is not a scarce resource. The notion of “self ” is bound up with the concept of personality and the person that you are, your identity as a person in the world, as an actor, as an agent. So every person is the presumptive owner of his body. That's the basic libertarian rule. We don't need to get into controversial metaphysics to understand this basic norm or rule.

所以准确地说，自我所有权只是身体所有权的一种简略表述，因为你的身体是一种稀缺资源。你的“自我”不是稀缺资源。“自我”的概念与人格以及你这个人的概念、你在世界上作为一个人的身份、作为一个行动人、作为一个主体的身份紧密相连。所以每个人都假定为其身体的所有者。这是基本的自由意志主义规则。我们无需陷入有争议的形而上学来理解这一基本规范或规则。

Now, by the way, I say “presumptive” because it's not absolute; it's defeasible. The self-ownership right can be lost by committing aggression, because the victim has the right to defend himself during a crime or to retaliate after.¹⁸ And when they do that, they're using the body of the aggressor without his consent.¹⁹ So he's, in a sense, lost ownership of his body to the extent that the victim needs to be able to use force against him to obtain justice.

顺便说一句，我之所以说“假定的”，原因在于这不是绝对的，而是可以被推翻的。自我所有权会通过实施侵犯行动而丧失，因为受害者有权在犯罪过程中自卫或在犯罪后报复。²⁵⁴而当他们这样做时，他们是在未经侵犯者同意的情况下使用他的身体。²⁵⁵因此，从某种意义上说，侵犯者在受害者为了获得正义而需要对其使用武力的范围内，丧失了对自己身体的所有权。

见《我们如何拥有自己》（第四章），注释 1。

²⁵⁴ See “Inalienability and Punishment: A Reply to George Smith” (ch. 10), n. 11 et pass.

参见《不可让渡性与惩罚：对乔治·史密斯的回应》（第 10 章），注释 11 及后续页。。

²⁵⁵ Alternatively, it could be said that his prior act of aggression was an irrevocable grant of consent to the victim to retaliate; the aggression is a substitute for manifested consent later.

或者，也可以说他之前的侵犯行动是对受害者进行报复的不可撤销的同意授权；这种侵犯替代了之后明确表示的同意。

So the basis here of self-ownership, or body-ownership, is not homesteading, but it's the direct control over your body. This is the best link between the given actor and the resource of his human body. And actually, I think the first person who explicitly recognized this was Professor Hoppe in a German publication in 1987.²⁰ You actually weren't explicit about this in your later English book, but it's implicit in there.²¹ And if you remember, you told me about that passage, and you translated it for me for my article.

所以，这里的自我所有权，或者说身体所有权的基础不是拓殖，而是对自己身体的直接控制。这是特定行动人与其人体资源之间的最佳纽带。实际上，我认为第一个明确意识到这一点的人是霍普教授，他于 1987 年在德国的一份出版物上发表了这一观点。

²⁵⁶ 在你后来的英文著作中，你实际上并没有明确提出这一点，但其中隐含了这一点。

²⁵⁷ 如果你还记得，你告诉过我这段话，并为我的文章翻译了它。

And so Hoppe's argument is that you own your body because you directly control it. So this gives each person or actor logical-temporal priority or precedence as compared to anyone's indirect control. What that means is, if you were to enslave someone or claim to own their body, the only way to control that body is by coercion, by directing threats of force to get them to act the way you want them to act. But in that case, they're the ones still directly controlling it, and that always has precedence, and it's a better link than the indirect control I can exert over you by coercion. Not to mention that the coercer himself would be in contradiction because he claims ownership of his body for the purpose of being the one who can punish you or threaten you.

因此，霍普的论点是，你拥有自己的身体，因为你直接控制着它。因此，与任何人的间接控制相比，这赋予了每个人或行动人逻辑-时间上的优先性或优先权。这意味着，如果你要奴役一个人或声称拥有他的身体，控制他身体的唯一方式就是胁迫，通过武力威胁让他按照你希望的方式行事。但在这种情况下，他们仍然是直接控制自己身体

²⁵⁶ See "How We Come to Own Ourselves" (ch. 4).

见《我们如何拥有自己》（第四章）。

²⁵⁷ Professor Hoppe was in the audience, and I briefly addressed my comments to him, so have left the text unchanged here.

霍普教授当时在听众席，我简要地向他发表了我的评论，所以这里的文本未作改动。

的人，这一点始终具有优先权，而且这是比我通过胁迫对你施加间接控制更佳的联系。更不用说，胁迫者本人也会自相矛盾，因为他声称对自己的身体拥有所有权，目的是成为可以惩罚你或威胁你的人。

So this is what the best link means here. It's not homesteading, although people think it's homesteading. It can't be homesteading because to homestead means you're an actor in the world, already a self-owner, or body-owner, and you find an unowned resource, and you appropriate it to yourself. But this presupposes there's already a person with a body, so it's impossible to imagine that you homestead your body unless you have some religious view where the soul goes down there and grabs it. But that's not the domain of science as I think Guido [Hülsmann] and Mises would agree.²² We could make an analogy. We could say that when a child "wakes up" at the moment when he becomes sapient enough to be said to have rights, he homesteads himself. But it's really a loose analogy. It just means that's the point in time in which he's a person with rights. It's not like his body was unowned, and he just homesteaded it.

所以这就是此处“最佳联系”的含义。这不是拓殖，尽管人们认为这是拓殖。之所以不可能是拓殖，原因在于拓殖意味着你是世界上的一个行动人，已经是一个自我所有者或身体所有者，然后你发现一个无主资源，并将其占有。但这预先假定已经存在一个拥有身体的人，所以无法想象你拓殖自己的身体，除非你有某种宗教观点，认为灵魂降落到那里并抓住它。这不是科学的范畴，但我认为吉多[许尔曼]和米塞斯会同意。

²⁵⁸我们可以做一个类比。我们可以说，当一个孩子在变得足够明智以至于可以说拥有

²⁵⁸ Here I am referring to the talk given earlier on the day of my talk, Jörg Guido Hülsmann, “The Ultimate Foundation of Economic Science,” YouTube (Sept. 17, 2022; <https://youtu.be/C3Oglpv47Fg>) which itself discussed the book by Mises of the same title (Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundationeconomic-science>)), which happens to also be my own favorite book by Mises.

在此,我指的是在我发言当天早些时候约尔格·吉多·许尔曼(Jörg Guido Hülsmann)所做的演讲《经济科学的终极基础》, YouTube(2022年9月17日, <https://youtu.be/C3Oglpv47Fg>), 该演讲本身讨论了米塞斯的名著(路德维希·冯·米塞斯,《经济科学的终极基础:方法论论文》(新泽西州普林斯顿:D.范诺斯特兰德公司,1962年; <https://mises.org/library/ultimate-foundationeconomic-science>)),这

权利的那一刻“醒来”，他就拓殖了自己。但这实际上是一个不严谨的类比。这只是意味着那是他成为拥有权利的人的时间点。并不是说他的身体之前是无主的，然后他只是拓殖了它。

外部资源

External Resources

Now, as for external resources, these are things that were previously unowned. This is a key point, and they're external to the human body, so they're not part of people's bodies. So in this case, as I said earlier, the best link is determined by the three principles. First, we have original appropriation or homesteading. What this means is you possess something, which is an economic category. It means to be able to use or manipulate. Mises—I'll get to this later, but Mises calls it catallactic or sociological ownership, but what he really means is possession, which is—and this is important—an economic category. So mere possession, like Crusoe on an island—in a Robinsonade—he can never “own” anything because there's no society to have norms with respect to. He controls, and he uses things. He possesses these things as means, he exercises “factual authority” over these things—but he doesn't own them.²⁵⁹

现在，至于外部资源，这些都是之前无主的东西。这是一个关键点，它们是人体的外部资源，因此不是人们身体的一部分。因此，在这种情况下，正如我之前所说，最佳联系由三项原则决定。首先，我们先占或拓殖。这意味着你拥有某样东西，这是一个经济学范畴。它意味着能够使用或操纵。米塞斯——我稍后会讲到这一点，但米塞斯称之为交换学或社会学的所有权（catallactic or sociological ownership），但他真正的意思是“占有”（possession），这很重要——是一个经济学范畴。因此，单纯的占有，就像荒岛上的克鲁索——在鲁滨逊式的情境中——他永远不能“拥有”任何东西，因为没有社会来制定相关规范。他控制并使用东西。他把这些东西当作手段占有，对这些东西行使“实际的权力”——但他并不拥有它们。²⁵⁹

恰好也是我个人最喜欢的米塞斯的著作。

²⁵⁹ See note 36 and related text, below.

见下文注释 36 及相关文本

In society, where there are property rights norms, you can also do the same thing. You can just possess something and not intend to own it—you pick up a stick and throw it away. Or you can possess it with the intent to own, and you take certain steps to transform it or to put a barrier up around it, or to, as Hoppe calls it, emborder it, which basically means to put up a visible public link between you and the thing demonstrating to everyone that this thing is no longer unowned, to say, "I'm claiming ownership of it."

24

在存在财产权规范的社会中，你也可以做同样的事情。你可以仅仅占有某物而无意拥有它——你捡起一根棍子然后扔掉。或者你可以怀着拥有的意图占有它，并且你采取某些步骤来改造它或者在它周围设置障碍，或者像霍普所说的那样，为它划定边界，这基本上意味着在你和该物品之间建立一个可见的公开联系，向所有人表明此物不再是无主的，即表示：“我宣称对它拥有所有权。”²⁶⁰

This requires the merger or the combination of actual possession or transformation or embordering—with then intent to own.²⁵ So those two things are essential to owning a thing that was previously unowned. And then, once you own a thing, you can contractually transfer it to someone by your intent, your consent, and I'll get to the mechanics of that in a moment. And then, again, there can also be a transfer as rectification—if you have to transfer something to someone to compensate them for damages you caused them by a tort (an uninvited use of their property).

这需要将实际占有、改造或划定界限与拥有的意图相结合。²⁶¹ 因此，这两点对于拥有

²⁶⁰ See Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc), chaps. 1 – 2.

参见汉斯-赫尔曼·霍普《社会主义与资本主义理论:经济、政治与伦理》(阿拉巴马州奥本:米塞斯研究院, 2010年(1989年), www.hanshoppe.com/tsc),第1-2章。

²⁶¹ For a related notion, see my Book Review of Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), Reason Papers No. 20 (Fall 1995): 147 – 53, p. 147: “Law, far from being authority battling against power, is the interlocking of authority with power.” Similarly, ownership stems from the interlocking of possession and intent. See also, on this, “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), n.40.

关于相关概念, 参见我对罗莎琳·希金斯《问题与过程: 国际法及我们如何运用它》(1994年)的书评, 《理性论文》第20期(1995年秋季): 147-153页, 第147

一个先前无主的东西至关重要。然后，一旦你拥有了一件东西，你就可以通过你的意图、你的同意，以的形式将其转让给他人，我稍后会讲到其中的机制。同样，也可以以纠正的方式进行转让——如果你必须将某物转让给他人，以补偿你因侵权行为（未经许可使用他人财产）给他人造成的损失。

Okay. Oh, and by the way, this formulation of rights that I just went through, this way of looking at the best link and the breakdown between the body, I'm happy that I was able to help the Mises Caucus in the US get this basic formulation put into the Libertarian Party Platform²⁶ last May at the "Reno Reset," as we call it. Up until this time, there was no definition of aggression in the Libertarian Party platform. It was just implied.²⁷

好的。哦，顺便说一下，我刚才所讲的这种权利的表述，这种看待身体之间的最佳联系和分解的方式，我很高兴我能够帮助美国的米塞斯核心小组在去年五月的里诺重启（Reno Reset，我们称之为里诺重启）上将这一基本表述写入自由意志主义党纲。²⁶²在此之前，自由意志主义党纲中没有关于侵犯的定义。仅仅只是有过暗示。²⁶³

页："法律，远非权威与权力的对抗，而是权威与权力的交错。同样，所有权也源于占有与意图的交错。关于这一点，另见《自由意志主义的契约理论：所有权转让、有约束力的承诺和不可让渡的权利》（第9章），第40页。

²⁶² See Libertarian Party Platform, at <https://www.lp.org/platform/>, and <https://perma.cc/GF6J-GPWV>.

见《自由意志主义党纲》，网址：<https://www.lp.org/platform/>，以及 <https://perma.cc/GF6J-GPWV>。

²⁶³ See Kinsella, "Aggression and Property Rights Plank in the Libertarian Party Platform,"

StephanKinsella.com (May 30, 2022). Modified Plank 2.1 reads, in part:

2.1 Aggression, Property and Contract

Aggression is the use, trespass against, or invasion of the borders of another person's owned resource (property) without the owner's consent; or the threat thereof. We oppose all acts of aggression as illegitimate and unjust, whether committed by private actors or the state.

Each person is the presumptive owner of his or her own body (self-ownership), which right may be forfeited only as a consequence of committing an act of aggression. Property rights in external, scarce resources are determined in accordance with the principles of original appropriation or homesteading (whereby a person becomes an owner of an unowned resource by first use and transformation), contract (whereby the

契约、出售和所有权：外部的稀缺资源

Contract, Selling and Ownership: External Scarce Resources

Getting back to the problem of confusing selling and ownership, of thinking there's a necessary relationship between them. How do we sell an external resource that we own, like the contractual title transfer we talked about early? So: when you own a resource, because the ownership requires the merger of possession and the intent to own, you can lose ownership by losing the intent to own, by making it clear you no longer intend to own the resource. This is abandonment. So if you acquire a thing, you can “unacquire” it, so to speak. And because of this, it gives you the ability to sell because you can basically abandon it “in favor” of someone else.²⁸

回到混淆出售与所有权的问题，即认为它们之间存在必然联系的问题。我们如何出售我们所拥有的外部资源，比如我们之前谈到的式所有权转让？所以：当你拥有一种资源时，由于所有权需要占有和拥有意图的结合，你可能会因为失去拥有意图而失去所有权，即明确表示你不再打算拥有该资源。这就是放弃。所以，如果你获得了一件东西，可以说你也能够“放弃获得”它。正因如此，这赋予了你出售的能力，因为你基本上可以为了他人而放弃它。²⁶⁴

owner consensually transfers ownership to another person), and rectification (whereby an owner’s property rights in certain resources are transferred to a victim of the owner’s tort, trespass, or aggression to compensate the victim).

见 金塞拉《自由意志主义党纲中的侵犯与财产权要点》，StephanKinsella.com（2022 年 5 月 30 日）。修改后的板块 2.1 部分内容如下：

2.1 侵犯、财产和

侵犯是指未经所有者同意，使用、侵犯或侵入他人所有的资源（财产）的边界；或威胁使用、侵犯或侵入他人所有的资源（财产）的边界。我们反对一切侵犯行动，认为这些行为都是非法和不正义的，无论是私人行动还是国家行动。

每个人都被假定为自己身体的所有者（自我所有权），只有在实施侵犯的情况下，此项权利才可能被剥夺。对外部稀缺资源的财产权是根据先占或拓殖（即一个人通过首次使用和改造无主资源成为其所有者）、（即所有者同意将所有权转让给他人）和纠正（即所有者对某些资源的财产权转让给被所有者侵权、侵入或侵犯的受害者，以此补偿受害者）等原则确定的。

²⁶⁴ But see my posts “Inability to Abandon Property in the Civil Law,” StephanKinsella.com (Aug. 3 2009) and “Homesteading, Abandonment, and Unowned Land in the Civil Law,” StephanKinsella.com (Aug. 28, 2021). The positive law ignores

Imagine you're in a tree, and you have an apple, and there's people walking by, below you. You can kind of toss the apple to whoever you want. You can drop it so that whoever you want will catch it. You can direct this—you can direct the re-homesteading, in effect. So if I have an apple and I give it to you to hold temporarily, you're the possessor, but you're not the owner. I'm the owner, but I'm not the possessor. So ownership and possession are distinct concepts and statuses. But if you're holding my apple, and if I then abandon it, now you're holding an unowned apple, and you can just re-homestead it right away. So that's the mechanics, the juristic or legal mechanics, of why and how you can sell things.²⁹ So the way that we come to own unowned resources is the reason why they can be sold. So it's not an incident or aspect of ownership per se. It's an aspect of the way external things come to be owned.

想象一下，你在一棵树上，手里有一个苹果，树下有人走过。你可以把苹果扔给任何你想给的人。你可以把它扔下去，让任何你想给的人接住。实际上，你可以引导这一过程——你可以引导重新拓殖。所以，如果我有一个苹果，我让你暂时拿着，你是占有者，但你不是所有者。我是所有者，但我不是占有者。所以所有权和占有是不同的概念和状态。但是如果你拿着我的苹果，如果我随后放弃它，现在你拿着的就是一个无主的苹果，你可以马上重新拓殖占有它。这就是为什么以及如何能够出售物品的机制，是法理学或法律上的机制。²⁶⁵所以我们获得无主资源的方式，也是它们能够被出售的原因。所以这本身不是所有权的附带特权或方面。这是外部事物如何被拥有的一个方面。

the very possibility of unowned or abandoned land. I am not aware of any deep scholarly exploration of this curious feature of modern law, but suspect it stems from a combination of statism and legal positivism, or do I repeat myself. I may explore this issue in further legal scholarship at some point.

但请查看我的帖子《大陆法中无法放弃财产》,StephanKinsella.com(2009年8月3日)和《大陆法中的的拓殖, 遗弃和无主的土地》,StephanKinsella.com(2021年8月28日)。实在法忽略了无主或被遗弃土地的可能性。我不知道对现代法这一奇特特征有任何深入的学术探讨,但怀疑它源于国家主义和法律实证主义的结合,或者我是不是在重复自己的话。我可能会在未来的法律学术研究中进一步探讨这个问题。

²⁶⁵ See “A Libertarian Theory of Contract” (ch. 9).

见《自由意志主义的契约理论》(第九章)。

谬论 1: 你可以出售你的拥有物 *Fallacy 1: You Can Sell What You Own*

Now, what about selling yourself, your "self," i.e., your body, like Walter Block thinks we can do? Keep in mind: external things can be sold because they were previously unowned and acquired by an actor-owner who is already a self-owner, and he can abandon it. But your body rights don't arise by homesteading or by your intent to own yourself. They arise because of the best link based upon your direct control.

现在，像沃尔特·布洛克认为我们可以做的那样，卖掉你自己，你的“自我”，即你的身体，又如何呢？请记住：外部事物之所以可以出售，是因为它们之前是无主的，由已经是自我所有者的行动主体获得，他可以放弃它。但你的身体权并不是因为拓殖或你意图拥有自己而产生的。它们产生的原因是基于你直接控制的最佳联系。

So if I try to make a contract, "I promise to sell" or "I promise to be your slave forever," those words do not change the fact that I still have the best link to my body. And because my words are not an act of aggression—which is the only way to come to own someone else's body, by them forfeiting their rights by committing a crime—then promising to be someone's slave is simply not enforceable because it doesn't transfer any title to anything. You still own your body because you still have direct control and thus the better link. You can always change your mind, in other words.

因此，如果我试图订立，“我承诺出售”或“我承诺永远做你的奴隶”，这些话并不能改变我仍然与我的身体有着最佳联系的事实。而且由于我的这些话语并不是一种侵权行为——通过他人犯罪而丧失权利从而获得他人身体的所有权，这是唯一途径——所以承诺成为他人的奴隶根本无法执行，因为它并没有转让任何所有权。换句话说，你仍然拥有自己的身体，因为你仍然能直接控制它，从而保持着更好的联系。换句话说，你可以随时改变主意。

So Rothbard seems to notice this in his kind of convoluted arguments in his contract theory. But it's implied, perhaps unknowingly, and later clarified by Hoppe. In any case, Rothbard wrote:

It is true that man, being what he is, cannot absolutely guarantee lifelong service to another under a voluntary arrangement. Thus, Jackson, at present, might agree to labor under Crusoe's direction for life, in return for food, clothing, etc., but he cannot

*guarantee that he will not change his mind at some point in the future and decide to leave. In this sense, a man's own person and will is "inalienable," i.e., cannot be given up to someone else for any future period.*³⁰

所以罗斯巴德在他的理论中那种迂回曲折的论证中似乎注意到了这一点。但这或许是在不知不觉中暗示的，后来霍普对此进行了澄清。。无论如何，罗斯巴德写道：

诚然，人的本性决定了他无法绝对保证在自愿安排下为他人终身服务。因此，杰
克逊目前可能同意终身都在克鲁索的指挥下劳动，以换取食物、衣服等，但他不能保
证自己不会在将来的某个时候改变主意，决定离开。从这个意义上说，一个人自身和
意志是 "不可让渡的"，即不能在未来的任何时期让渡给他人。²⁶⁶

So I think the reason he focuses on the fact that the will is inalienable is that Rothbard senses that that's the reason you own your body, although he never quite says it explicitly, but he gets really close. I mean, what's the relevance of the fact that your will is inalienable to the legitimacy or enforceability of a voluntary slavery contract? The only relevance could be that your direct control, or your will, is the reason you own your body.³¹

因此，我认为他之所以把重点放在 "不可让渡的意志" 这一事实上，是因为罗斯巴德感觉到，这就是你拥有自己身体的原因，尽管他从未明确说过，但他已经非常接近。我的意思是，你的意志不可让渡的事实与自愿为奴的合法性或可执行性有什么关系？唯一的关联可能在于，你的直接控制，或者说你的意志，是你拥有自己身体的原因。

²⁶⁶ Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholars ed., second ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), p. 82 n.2. As noted previously, this was later expanded on and clarified by Hoppe. See note 2, above.

穆瑞·N.罗斯巴德，《人、经济与国家，权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；<https://mises.org/library/man-economy-and-state-power-and-market>），第 82 页注释 2。如前所述，这一点后来由霍普进行了扩展和澄清。见上文注释 2。

Okay, so again, after you promise to be a slave, you still have direct control, so you're still the owner, and you have not committed aggression, so you can always change your mind (in contrast to an aggressor who, as noted above, has irrevocably granted consent, since he cannot undo the historical fact of the aggression).

好的，所以再次强调，在你承诺成为奴隶之后，你仍然拥有直接控制权，所以你仍然是所有者，而且你没有实施侵犯行动，所以你总是可以改变主意（这与上述的侵犯者形成对比，因为侵犯者不可撤销地授权了同意，因为他无法改变侵犯行动这一历史事实）。

谬论 2：你拥有你的出售物 *Fallacy 2: You Own What You Sell*

Okay, now what about the other fallacy—owning what you sell? In a simple exchange, for two material resources that are both owned by two different people like an apple for an orange or an apple for a silver coin, the sellers do own what they sell. There are two title transfers: The orange changes ownership, and the apple changes ownership.

好的，那么另一个谬论——拥有你所出售的东西呢？在一个简单的交换中，对于两个不同的人所拥有的两种物质资源，比如一个苹果换一个橙子或者一个苹果换一枚银币，卖家确实拥有他们所出售的东西。这里存在两个所有权的转让：橙子的所有权发生了变更，苹果的所有权也发生了变更。

But in a “sale” of service, labor, or information, the contract in legal terms³² only involves one title transfer. This is in legal terms—whatever is “paid” to the person performing the service. So if I give you a chicken to pay you for giving me a haircut, the title to the chicken transfers to you. But you don't transfer title to any labor to me. It's not like there's a bucket of labor, which I'm handing over to you. So these are actions, not things that can be owned.³³ So labor or services or actions are what we do with things that we own like our bodies or other owned resources. They're not themselves owned resources. So you don't really sell labor, in a legal sense. So why do we describe

²⁶⁷ For elaboration, see “A Libertarian Theory of Contract” (ch. 9), Part III.C. 详见 《自由意志主义的契约理论》（第 9 章），第三部分 C。

it this way?

但在服务、劳务或信息的“销售”中，从法律术语²⁶⁸上讲，只涉及一次所有权转让。这在法律上是指“支付”给提供服务者的任何东西。因此，如果我给你一只鸡，以支付你给我理发的费用，这只鸡的所有权就转让了给你。但你并没有把任何劳动的所有权转让给我。这不像有一桶劳动，我从你那里接过来。所以这些是行动，不是可以拥有的东西。²⁶⁹ 因此，劳动、服务或行动是我们利用我们所拥有的东西，比如我们的身体或其他拥有的资源所做的事情。它们本身并不是被拥有的资源。因此，从法律意义上讲，你并不能真正出售劳动。那么，我们为什么要这样描述劳动呢？

经济分析领域与规范分析领域：所有权与占有

Economic vs. Normative Realms of Analysis: Ownership vs. Possession

Now, here's what I think is the reason for the confusion. There are different modes of understanding for different realms of phenomena and different conceptual frameworks. So, for example, in the teleological versus causal realms, we have human action and purposive behavior on the one hand versus causal laws of nature on the other. We have praxeology versus the empirical method, the scientific method. We have apodictic or a priori versus tentative or contingent knowledge. We also have normative or juristic, legal, types or realms of understanding versus factual. And human laws and norms

²⁶⁸ I am referring to libertarian law here, not to modern positive law, which views contracts as enforceable, binding obligations. For more on this see “A Libertarian Theory of Contract” (ch. 9).

我这里指的是自由主义意志法学，而非现代实证法学，后者将视为可执行的、有约束力的义务。关于这一点的更多内容，请参阅《自由意志主义的契约理论》（第 9 章）。

²⁶⁹ See “A Libertarian Theory of Contract” (ch. 9) and Kinsella, “Cordato and Kirzner on Intellectual Property,” C4SIF Blog (April 21, 2011). As Kirzner writes: “Laboring, Day contends, is an activity, ‘and although activities can be engaged in, performed or done, they cannot be owned.’” See also “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.D.

参见《自由意志主义的契约理论》（第 9 章）和金塞拉的《科达托和柯兹纳论知识产权》，C4SIF 博客（2011 年 4 月 21 日）。正如柯兹纳所写：“戴伊认为，劳动是一种活动，‘尽管活动可以参与、履行或完成，但它们不能被拥有。’”另请参见《反对知识产权》二十年后》（第 15 章），第四部分 D 节。

versus empirical facts.

现在，以下是我认为造成困惑的原因。对于不同领域的现象和不同的概念框架，有不同的理解模式。例如，在目的论和因果论的领域中，一方面是人的行动和有目的的行为，另一方面是自然的因果法则。我们有行动学和经验方法，科学方法。我们有绝对的或先验的知识和尝试性的或偶然的知识。我们也有规范的或法学的，法律的，理解的类型或理解的领域与事实性的。人类的法律和规范与经验事实。

I'm getting to the point. So, now, Mises was careful to distinguish the juristic or the legal or the should from the factual, but he used the word "ownership" in both, which is potentially confusing. So he said: "Regarded as a sociological category"—this was in Socialism in 1922, he changed the word to catallactic later, probably because he hadn't come up with the term catallactics yet. I don't know. But he calls it the sociological or economic category of ownership, which is the power to use a good. Now, that's possession. That's what we would call possession or control.³⁴ The "factual authority" mentioned previously.

我就要说到重点了。现在，米塞斯小心翼翼地做了区分，一方面是法理的、法律的、应然的，另一方面是实然的，但他在两者中都使用了“所有权”一词，这可能会造成混淆。所以他说：“被视为一个社会学范畴”——这是在1922年的《社会主义》中说的，他后来把社会学一词改成了交换学，可能是因为当时他还没有想出交换学这个术语。我不知道。但他称之为所有权的社会学或经济学范畴，即使用物品的权力。这就是占有。这就是我们所说的占有或控制。²⁷⁰也就是前面提到的“事实权力”。

²⁷⁰ For more on this, see “What Libertarianism Is” (ch. 2), notes 28 – 29 and accompanying text, et pass.; and “Law and Intellectual Property in a Stateless Society” (ch. 14), n.36. Economists often muddle this issue by either reducing ownership to possession or conflating the terms. See, on this, Geoffrey M. Hodgson, “Much of the ‘economics of property rights’ devalues property and legal rights,” J. Inst. Econ. 11, no. 4 (2015; <https://perma.cc/9VV3-8DX3>): 683 – 709; and Boudewijn Bouckaert, “From Property Rights to Property Order,” Encyclopedia of Law and Economics (Springer, forthcoming 2023), the section “Reduction to Mere Possession.”

关于这一点，更多内容请参见《何为自由意志主义》（第2章），注释28-29及相关文本等；以及《无政府社会中的法律与知识产权》（第14章），注释36。经济学家经常混淆这个问题，要么将所有权简化为占有，要么混淆这两个术语。关于这一点，参见杰弗里·M·霍奇森的《‘财产权经济学’的大部分内容贬低了财产和法律权利》，

And then he says the sociological and juristic (by which he means legal or normative) concepts of ownership are different. "Ownership" (really: possession) from the sociological (economic; descriptive) point of view is the having of a good. It's just what Crusoe could do. So that's natural or original "ownership," and it's a purely physical relationship of man to goods. But the legal is the "should have." Who should have it? Who has a right to it? This is where property rights and law come in. And later in Human Action, he goes on in a similar vein.³⁵

然后他说社会学和法学（他指的是法律或规范）的所有权概念是不同的。从社会学（经济；描述性）的角度来看，“所有权”（实际上是占有）是对一件物品的拥有。这正是克鲁索能够做的。所以这是自然或原始的“所有权”，它是人与物品之间纯粹的物理关系。但从法律角度来说，是“应当拥有”。谁应当拥有？谁有拥有的权利？这就是财产权和法律的介入之处。后来在《人的行为》中，他以类似的思路继续阐述。²⁷¹

《制度经济学杂志》第 11 卷，第 4 期（2015 年：<https://perma.cc/9VV3-8DX3>）：683-709；以及布德维因·布卡特的《从财产权到财产秩序》，《法律与经济学百科全书》（施普林格，即将出版 2023 年），“简化为单纯占有”一节。

²⁷¹ As Mises observed:

Regarded as a sociological category ownership appears as the power to use economic goods. An owner is he who disposes of an economic good.

Thus the sociological and juristic concepts of ownership are different. This, of course, is natural, and one can only be surprised that the fact is still sometimes overlooked. From the sociological and economic point of view, ownership is the having of the goods which the economic aims of men require. This having may be called the natural or original ownership, as it is purely a physical relationship of man to the goods, independent of social relations between men or of a legal order. The significance of the legal concept of property lies just in this—that it differentiates between the physical has and the legal should have. The Law recognizes owners and possessors who lack this natural having, owners who do not have, but ought to have. In the eyes of the Law “he from whom has been stolen” remains owner, while the thief can never acquire ownership. Economically, however, the natural having alone is relevant, and the economic significance of the legal should have lies only in the support it lends to the acquisition, the maintenance, and the regaining of the natural having.

See also related discussion in “What Libertarianism Is” (ch. 2), n.29 and n.45, and similar distinctions made in Eugen von Böhm-Bawerk, “Whether Legal Rights and Relationships Are Economic Goods,” George D. Huncke, trans., in Eugen von Böhm-Bawerk, *Shorter Classics of Eugen von Böhm-Bawerk* (South Holland, Ill.: Libertarian

Press, 1962 [1881]), p. 57 et pass., discussed in Gael J. Campan, “Does Justice Qualify as an Economic Good?: A Böhm-Bawerkian Perspective,” Q. J. Austrian Econ. 2, no. 1 (Spring 1999; <https://perma.cc/G3CK-B8WB>): 21 – 33, p. 24.

Ludwig von Mises, *Socialism: An Economic and Sociological Analysis*, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; <https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis>), chapter 1, § 1. See also idem, *Ludwig von Mises, Human Action: A Treatise on Economics*, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), chap. XXIV, § 4:

Ownership means full control of the services that can be derived from a good. This catallactic notion of ownership and property rights is not to be confused with the legal definition of ownership and property rights as stated in the laws of various countries. It was the idea of legislators and courts to define the legal concept of property in such a way as to give to the proprietor full protection by the governmental apparatus of coercion and compulsion, and to prevent anybody from encroaching upon his rights. As far as this purpose was adequately realized, the legal concept of property rights corresponded to the catallactic concept.

正如米塞斯所说：

从社会学范畴来看，所有权表现为使用经济物品的权力。所有者就是支配经济物品的人。

因此，社会学和法学的所有权概念是不同的。这无疑是自然的，人们有时仍然会忽略这一事实，这才令人惊讶。从社会学和经济学的角度来看，所有权是拥有人们经济目标所需要的物品。这种拥有可以被称为自然或原始的所有权，因为它纯粹是人对物品的物理关系，独立于人与人之间的社会关系或法律秩序。财产的法律概念的意义就在于——它区分了实际的拥有和法律上的应当拥有。法律承认那些缺乏这种自然拥有的所有者和占有者，即那些没有但应当拥有的所有者。在法律眼中，“被盗窃者”仍然是所有者，而小偷永远不能获得所有权。然而，从经济角度来看，只有自然的拥有才是相关的，法律上的应当拥有的经济意义仅在于它为获得、维持和重新获得自然的拥有提供了支持。

另见《何为自由意志主义》(第 2 章)中的相关讨论, 注释 29 和 45, 以及欧根·冯·庞巴维克在《法律权利和关系是否是经济物品》中的类似区分, 乔治·D·亨克译, 收录于欧根·冯·庞巴维克《欧根·冯·庞巴维克短篇经典》(伊利诺伊州南荷兰: 自由意志主义出版社, 1962 年[1881 年]), 第 57 页及以后, 在盖尔·J·坎潘的《正义是否有资格成为经济物品? 庞巴维克的视角》,《奥地利经济学季刊》第 2 卷第 1 期(1999 年春季; <https://perma.cc/G3CK-B8WB>): 21-33, 第 24 页中有讨论。

路德维希·冯·米塞斯,《社会主义: 经济与社会学分析》, J. 卡哈内译(印第安纳波利斯, 印第安纳州: 自由基金, 1981 年; <https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis>), 第 1 章, 第 1 节。另见同上, 路德维希·冯·米塞斯,《人的行动: 经济学专论》, 学者版(阿拉巴马州奥本: 米塞斯研究院, 1998 年; <https://mises.org/library/human-action-0>), 第 24 章, 第 4 节:

所有权意味着对可从一件物品中获得的服务的完全控制。这种交换学意义上的所有权

So as I said earlier, it's better to distinguish ownership and possession, to use those words rather than two senses of the word ownership, because it could be potentially confusing because people say they own Bitcoins, but what they really mean is they possess Bitcoins. People say they own their minds, but your mind is just an epiphenomenon of your physical brain—you own your brain; you can change your mind, but you can't change your brain. They're different concepts. A dead body has a brain, but it doesn't have a mind. The brain weighs three pounds; the mind doesn't weigh anything.

因此，正如我之前所说，最好区分所有权和占有权，使用这两个词，而不是所有权这个词的两种含义，因为这有可能造成混淆，因为人们说他们拥有比特币，但他们真正的意思是他们占有比特币。人们说他们拥有自己的思想，但你的思想只是你物理大脑的附带现象——你拥有你的大脑；你可以改变你的思想，但你不能改变你的大脑。它们是不同的概念。一具尸体有大脑，但没有思想。大脑有三磅重，思想却没有任何重量。

There's a well-known Roman law, civil law scholar who passed away a couple years ago, from Greece, but he was a Louisiana law professor, A.N. Yiannopolous. And he defines, and the Louisiana Civil Code also defines, possession as actual control or the "factual authority" a person has over a corporeal or a material thing.³⁶ I like these phraseologies. And again, calling Bitcoin possession "ownership" is one reason for the confused idea that it's ownable. So if you say I possess a Bitcoin, that's fine. But it doesn't imply that you own it. Plus, Bitcoins can be sold, and so people think if you sell something, you must own it, so that's why they make that mistake. But they are referring to the economic description of the actions—saying I "sold" a bitcoin is a way of describing why the buyer gave me money: to obtain possession of "my" bitcoin—not to the juristic nature of the transaction, which is a one-way title transfer (of the money).³⁷

和财产权概念不应与各国法律中所述的所有权和财产权的法律定义相混淆。立法者和法院的想法是以这样一种方式定义财产的法律概念，即通过政府的强制和强迫手段为所有者提供充分保护，并防止任何人侵犯其权利。只要这个目的得到充分实现，财产权的法律概念就与交换学概念相对应。

有一位著名的罗马法、大陆法学者几年前去世了，他来自希腊，但曾是路易斯安那州的法学教授，大名叫 A.N. 扬诺普洛斯。他对占有进行了定义，路易斯安那州民法典也有定义，占有指的是实际控制或一个人对有形或物质事物所拥有的“实际权力”。²⁷²我喜欢这些表述。再说一遍，将比特币的占有称为“所有权”是造成比特币可被拥有这一混乱观点的原因之一。所以，如果你说“我占有一个比特币”，这很好。但这并不意味着你拥有它。另外，比特币是可以出售的，所以人们认为如果你出售了某样东西，你就一定拥有它，这就是他们之所以犯错的原因。但他们指的是对行动的经济描述——说我“卖出”了一个比特币，是在描述买方给我钱的原因：获得“我的”比特币的占有权——而不是指交易的法律性质，这是单向的所有权转让（货币）。²⁷³

²⁷² Possession is “the factual authority that a person exercises over a corporeal thing.” 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). For further discussion of these matters, see “What Libertarianism Is” (ch. 2), text at notes 28 – 29 et pass.

占有是“一个人对有形事物行使的实际权力。” A.N. 扬诺普洛斯，《路易斯安那州民法论著：财产》（西部集团，第 4 版，2001 年），第 301 节（着重号为原文所加）；另见《路易斯安那州民法典》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent），第 3421 条（“占有是对一个人持有或行使的有形的、动产或不动产的扣留或享用，无论是其本人持有或行使，还是由其名义持有或行使的其他人的持有或行使”；着重号为原文所加）。关于这些问题的进一步讨论，请参阅《何为自由意志主义》（第 2 章），注释 28-29 及相关文本等。

²⁷³ Using possessives like “my” is just descriptive; it does not imply ownership. Likewise, Robert LeFevre observed:

It is quite common for one or both spouses in a marriage contract to presume that their opposite number is actually a possession of theirs. Our language gives credence to this supposition for it is usual to hear a man refer to his partner as “my wife.” She is not his in a property sense.

Robert LeFevre, The Philosophy of Ownership (1966; <https://mises.org/library/philosophy-ownership>).

使用像“我的”这样的所有格只是描述性的；它并不意味着所有权。同样，罗伯特·勒菲弗尔（Robert LeFevre）注意到：

在婚姻中，夫妻一方或双方通常会认为对方实际上是自己的所有物。我们的语言使这种假设看起来可信，因为经常听到一个男人称他的伴侣为“我的妻子”。但从财产意义上讲，她不是他的。罗伯特·勒菲弗尔，《所有权哲学》（1966 年；

Yiannopolous also points out something I mentioned earlier—that the accurate use of the word property should be the designation of rights people have with respect to things. In other words, property is not the thing itself. It's the relationship between you and the thing.³⁸ I have a property right in the thing. I'm the owner of the thing.³⁹ (And by thing I mean an ownable, conflictable resource.)

扬诺普洛斯还指出了我之前提到的一点——“财产”一词的准确用法应当是指人们对事物所拥有的权利的确定。换句话说，财产不是事物本身。而是你与事物之间的关系。

²⁷⁴ 我对该事物拥有财产权。我是该事物的所有者。²⁷⁵（这里所说的事物，指的是可拥有的、会引发冲突的资源。）

So: why do we refer to a sale of labor or information when, as I already pointed out,

<https://mises.org/library/philosophy-ownership>)

²⁷⁴ Technically speaking a property right is not a right to control a resource but a right to exclude others from using the resource; and it is not exactly a relationship between owner and thing, but between owner and other people, with respect to the thing owned. But these nuances are not pertinent here. See “What Libertarianism Is” (ch. 2), n.4; “A Libertarian Theory of Contract” (ch. 9), n.1.

从技术上讲，财产权不是控制一种资源的权利，而是排除他人使用该资源的权利；并且确切地说，它不是所有者与物之间的关系，而是所有者与其他人之间关于所拥有之物的关系。但这些细微差别在此并不相关。参见《何为自由意志主义》（第 2 章），注释 4；《自由意志主义的契约理论》（第 9 章），注释 1。

²⁷⁵ See references and quotes in “What Libertarianism Is” (ch. 2), n.5. As discussed there, the civil law has a broad understanding of the concept of a “thing,” which can be owned or the subject of legal rights; see Louisiana Civil Code, art. 448: “Division of things. Things are divided into common, public, and private; corporeals and incorporeals; and movables and immovables.” Incidentally this exhaustive classification schema implies that intellectual property rights are (private) “incorporeal movables.” See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.B, and Kinsella, “Are Ideas Movable or Immovable?” , C4SIF Blog (April 8, 2013).

请参见《何为自由意志主义》（第 2 章），注释 5 中的参考文献和引述。正如那里所讨论的，大陆法对“物”的概念有广泛的理解，它可以被拥有或成为法律权利的主体；参见《路易斯安那州民法典》第 448 条：“物的分类。物分为共有物、公有物和私有物；有形物和无形物；动产和不动产。”顺便说一下，这种详尽的分类模式意味着知识产权是（私人的）“无形动产”。请参见《反对知识产权》二十年后》（第 15 章），第四部分 B 节，以及金塞拉的《观念是动产还是不动产？》，C4SIF 博客（2013 年 4 月 8 日）。

there's only a one-way title transfer of the payment made to the labor performer? Why do we call it that? What happens is, just like in the way the word ownership is used in both senses sometimes to mean possession or economic "ownership," or juristic ownership or real ownership, we use the word sale in that way too. Sometimes we use it as economists to describe the structure of a given human action; and sometimes we use it as lawyers to describe the rights that are transferred.⁴⁰

那么：正如我已经指出的，向劳动付出者支付的报酬只有单向的所有权转让，为什么我们要称之为劳动力或信息的出售呢？我们为什么要这样称呼它呢？就像“所有权”一词有时在两种意义上都被用来指占有或经济上的“所有权”，或法律上的所有权或实际所有权一样，我们也以这种方式使用“出售”一词。有时我们作为经济学家用它来描述特定的人的活动的结构；有时我们作为律师用它来描述转让的权利。²⁷⁶

²⁷⁶ For example, in Israel M. Kirzner, “Producer, Entrepreneur, and the Right to Property,” Reason Papers No. 1 (Fall 1974; <https://reasonpapers.com/archives/>): 1 – 17, p. 6, Kirzner uses the term “own” in the economic sense: Day is sharply critical of Locke, denying that one can talk significantly of owning labor (in the sense of “working”). Laboring, Day contends, is an activity, “and although activities can be engaged in, performed or done, they cannot be owned.” However, economists will find Locke’s use of terms quite familiar and acceptable. Economists speak of agents of production (in the sense of stocks), and of the “services” of agents of production (in the flow sense). A man who “owns” an agent of production is considered by economists to own, by that token, also the services flowing from that agent. Again, by hiring the services of a productive agent, a producer is considered by economists to have acquired ownership of the service flow, by purchase from the previous owner of that flow (i.e. the owner of the agent “itself”). In speaking of owning the services of an employee, therefore, the economist does not in fact have in mind the ownership of the activity of working, nor the ownership of that which the activity of working produces, nor even the ownership of the capacity for working. Rather the economist is perceiving the employee as a stock of human capital, capable of generating a flow of services. [citations omitted]

例如，在伊斯雷尔·M·柯兹纳（Israel M. Kirzner）的《生产者、企业家与财产权》（Reason Papers 第 1 期（1974 年秋季；<https://reasonpapers.com/archives/>）：1-17，第 6 页）中，柯兹纳在经济意义上使用了“拥有”一词：

戴伊（Day）对洛克（Locke）提出了尖锐的批评，否认人们可以有意义地谈论拥有劳动（在“工作”的意义上）。戴伊认为，劳动是一种活动，“尽管活动可以参与、进行或完成，但它们不能被拥有。”然而，经济学家会发现洛克对术语的使用相当熟悉和可以接受。经济学家谈到生产要素（在存量的意义上），以及生产要素的“服务”

So in (libertarian) law, "sell" refers to transferring title to an owned thing. So you don't literally sell your labor. You just perform your labor. You perform some action. But in economics, it can be used to describe or characterize an action. So all action from an economic point of view involves an actor using scarce means to pursue some goal or purpose. So when we try to describe what someone does, we try to discern their goals and purposes, and also the means that they're using.⁴¹ So that's what history does as well, right, which Guido was mentioning earlier.⁴² We try to understand or characterize the actions of people within a means-ends (praxeological) framework.

所以在（自由意志主义的）法律中，“出售”指的是将所拥有之物的所有权转让。所以严格来说，你并没有出售你的劳动。你只是付出劳动。你执行了某些行动。但在经济学中，它可以被用来描述或刻画一种行动。所以从经济角度来看，所有行动都涉及行动人使用稀缺手段来追求某个目标或目的。因此，当我们试图描述某人的所作所为时，我们会尝试辨别他们的目标和目的，以及他们所使用的手段。²⁷⁷这也是历史所做的，对吧，就像吉多之前提到的。²⁷⁸我们试图在手段-目的（行动学）框架内理解或描述人们的行动。

So when we say as an economist, "A sold his labor to B," this is just a concise way of explaining the praxeological nature of that action. We're explaining why A performed the action, his labor. Well, he performed it to get money from B. So we're describing his goal. His goal was to get money from B. That's why he engaged in the means of

（在流量的意义上）。一个“拥有”生产要素的人，经济学家认为，因此也拥有从该要素流出的服务。同样，通过雇用生产要素的服务，经济学家认为生产者通过从该流量的前所有者（即要素“本身”的所有者）购买，获得了服务流的所有权。因此，在谈到拥有员工的服务时，经济学家实际上想到的不是工作活动的所有权，也不是工作活动所产生的东西的所有权，甚至不是工作能力的所有权。相反，经济学家将员工视为人力资本的存量，能够产生服务流。[引文省略]

²⁷⁷ See, on this, Hans-Hermann Hoppe, "A Note on Preference and Indifference in Economic Analysis" and "Further Notes on Preference and Indifference: Rejoinder to Block," both in *The Great Fiction*.

关于这一点，参见汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）的《关于经济分析中的偏好与无差异的一则说明》和《关于偏好与无差异的进一步的说明：对布洛克的回应》，这两篇文章都收录于《伟大的虚构》。

²⁷⁸ H. Ü. Ismann, "The Ultimate Foundation of Economic Science." 许尔斯曼，《经济科学的终极基础》。

using his body to perform an action, which he knew would satisfy B. And why did B transfer ownership of his money to A—he actually did legally sell his money to A because he transfers title to the money to A—to induce him to perform an action. So there's only one title transfer.

因此，当我们以经济学家的身份说：“A 把他的劳动力卖给了 B”时，这只是解释该行动的行动学性质的一种简明方式。我们要解释的是，A 为什么要做这个行动，付出他的劳动。他这样做是为了从 B 那里得到钱，所以我们在描述他的目标。他的目标就是从 B 那里得到钱。这就是为什么他要用自己的身体来完成一个行动，他知道这个行动会让 B 满意。而为什么 B 要把他的钱的所有权转让给 A——他实际上是合法地把他的钱卖给了 A，因为他把钱的所有权转让给了 A，以诱使他完成一个行动。所以这里只有一次所有权的转让。

So in this case, the economic and the juristic uses of the word “sell” are different because, in legal terms, B transfers money to A conditional on him performing an action. There's only one title transfer—the money that was transferred. But in economic terms, A sells his labor to B “in exchange” for money, and B sells his money to A “in exchange” for A's action. So we can use selling (or exchange) in an economic sense, but we should be careful. Otherwise, you might end up justifying intellectual property.⁴³

Thank you very much.

因此，在这种情况下，“出售”一词的经济学用法和法学用法是不同的，因为从法律上讲，B 把钱转让给 A 是以他执行一项行动为条件的。只有一次所有权转让——被转让的钱。但在经济术语中，A 将他的劳动“出售”给 B，以换取金钱；B 将他的金钱“出售”给 A，以换取 A 的行动。因此，我们可以在经济学意义上使用“出售”（或“交换”），但我们应该谨慎小心。否则，你最终可能会为知识产权辩护。²⁷⁹

²⁷⁹ In *International News Service v. Associated Press*, 248 U.S. 215, 246 (1918; <https://supreme.justia.com/cases/federal/us/248/215/>), the Supreme Court recognized a quasiproperty right in the fruits of one's labor, what is sometimes called the “sweat of the brow” doctrine (a doctrine later rejected in the copyright context in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991; <https://supreme.justia.com/cases/federal/us/499/340/>)). In dissent, Justice Holmes recognized in passing that “Property, a creation of law, does not arise from value, although exchangeable—a matter of fact.” *Ibid.*, p. 246. In other words, just because

非常感谢。

something can be exchanged, a matter of “fact” —i.e., a matter of description and economics—does not imply that the thing sold is property, or owned.

在“国际新闻服务公司诉美联社”案（248 U.S. 215, 246 (1918; <https://supreme.justia.com/cases/federal/us/248/215/>)）中，美国最高法院承认了个人劳动成果中的准财产权，有时被称为“额头的汗水”原则（该原则后来在“菲斯特出版公司诉农村电话服务公司”案（499 U.S. 340 (1991; <https://supreme.justia.com/cases/federal/us/499/340/>)）的版权背景下被否决）。在异议中，霍姆斯大法官承认“财产是法律的产物，并非源于价值，尽管它是可交换的——这是一个事实问题。”同上，第 246 页。换句话说，仅仅因为某物可以交换，这是一个“事实”问题——即，一个描述性和经济学的问题——并不意味着所出售的东西就是财产或被拥有。

第十二章 对范·邓恩的回复：互不侵犯和所有权转让*

Reply to Van Dun: Non-Aggression and Title Transfer*

In a recent issue of The Journal of Libertarian Studies, Fran van Dun commented on my views on intellectual property and Walter Block's views on blackmail.¹ In this reply, I will concentrate on two aspects of Van Dun's comments: the non-aggression principle and libertarianism, and trademark and contract.

在最近一期的《自由意志主义研究杂志》上，弗兰克·范·邓恩（Fran van Dun）对我关于知识产权的观点以及沃尔特·布洛克（Walter Block）关于敲诈勒索的观点发表了评论。²⁸⁰ 在这篇回复中，我将集中讨论范·邓恩评论的两个方面：互不侵犯原则和自由意

²⁸⁰ Frank van Dun, "Against Libertarian Legalism: A Comment on Kinsella and Block," J. Libertarian Stud. 17, no. 3 (Summer 2003; <https://mises.org/library/against-libertarian-legalism-comment-kinsella-and-block-0>): 63 - 90, commenting on Kinsella, "Against Intellectual Property," J. Libertarian Stud. 15, no. 2 (Spring 2001): 1 - 53 and Walter Block, "Toward a Libertarian Theory of Blackmail," J. Libertarian Stud. 15, no. 2 (Spring 2001; <https://mises.org/library/toward-libertarian-theory-blackmail>): 55 - 88. Block's reply is Walter Block, "Reply to 'Against Libertarian Legalism' by Frank van Dun," J. Libertarian Stud. 18, no. 2 (Spring 2004; <https://mises.org/library/reply-against-libertarian-legalism-frank-van-dun>): 1 - 30. In this chapter I focus on Van Dun's criticism of my views. However, I agree with Block's blackmail views and with his response to Van Dun and, in fact, have co-authored with Block on the blackmail topic. See Walter Block, Stephan Kinsella & Hans-Hermann Hoppe, "The Second Paradox of Blackmail," Business Ethics Q. 10, 3 (July 2000): 593 - 622.

Van Dun is a longtime friend whom I greatly respect. This is a friendly disagreement. We agree on other issues, such as argumentation ethics. See, e.g., Frank van Dun, "Argumentation Ethics and the Philosophy of Freedom," Libertarian Papers 1, art. no. 19 (2009; www.libertarianpapers.org), and "Dialogical Arguments for Libertarian Rights" (ch. 6), "Defending Argumentation Ethics" (ch. 7), and "The Undeniable Morality of Capitalism" (ch. 22). I have also disagreed with another article of Van Dun's, "Freedom and Property: Where They Conflict," in Property, Freedom, and Society: Essays in Honor of Hans-Hermann Hoppe, Jörg Guido Hülsmann & Stephan Kinsella, eds. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/property-freedom-and-society-essays-honor-hans-hermann-hoppe>); see Kinsella, "Van Dun on

志主义，以及商标和契约。

* Originally published as Kinsella, "Reply to Van Dun: Non-Aggression and Title Transfer," J. Libertarian Stud. 18, no. 2 (Spring 2004): 55-64.

* 最初以金塞拉的《对范·邓恩的回复：互不侵犯原则与所有权转让》发表于《自由意志主义研究杂志》第 18 卷第 2 期（2004 年春季）：55-64 页。

互不侵犯原则和自由意志主义

THE NON-AGGRESSION PRINCIPLE AND LIBERTARIANISM

Van Dun criticizes Block and me for using "the so-called Rothbardian non-aggression

Freedom versus Property and Hostile Encirclement," StephanKinsella.com (Aug. 3, 2009). 弗兰克·范·邓恩 (Frank van Dun)，《反对自由意志主义的法律主义：对金塞拉和布洛克的评论》，《自由意志主义研究杂志》第 17 卷第 3 期（2003 年夏季；<https://mises.org/library/against-libertarian-legalism-comment-kinsella-and-block-0>）：63-90，对金塞拉的《反对知识产权》，《自由意志主义研究杂志》第 15 卷第 2 期（2001 年春季）：1-53，以及沃尔特·布洛克的《迈向自由意志主义的敲诈勒索理论》，《自由意志主义研究杂志》第 15 卷第 2 期（2001 年春季；<https://mises.org/library/toward-libertarian-theory-blackmail>）：55-88 进行了评论。布洛克的回复是沃尔特·布洛克，《对弗兰克·范·邓恩的“反对自由意志主义的法律主义”的回复》，《自由意志主义研究杂志》第 18 卷第 2 期（2004 年春季；<https://mises.org/library/reply-against-libertarian-legalism-frank-van-dun>）：1-30。在这一章中，我着重号为原文所加范·邓恩对我观点的批评。然而，我同意布洛克关于敲诈勒索的观点以及他对范·邓恩的回应，事实上，我与布洛克就敲诈勒索这一主题共同撰写过文章。参见沃尔特·布洛克、斯蒂芬·金塞拉和汉斯-赫尔曼·霍普，《敲诈勒索的第二个悖论》，《商业伦理季刊》第 10 卷第 3 期（2000 年 7 月）：593-622。

范·邓恩是我非常尊敬的老朋友。这是一次友好的论证。我们在其他问题上意见一致，比如论证伦理学。例如，参见弗兰克·范·邓恩，《论证伦理与自由哲学》，《自由意志主义论文》第 1 卷，第 19 号（2009 年；www.libertarianpapers.org），以及《关于自由意志主义权利的对话论证》（第 6 章）、《捍卫论证伦理学》（第 7 章）和《资本主义不可否认的道德》（第 22 章）。我也不同意范·邓恩的另一篇文章《自由与财产：它们的冲突之处》，收录于《财产、自由与社会：向汉斯-赫尔曼·霍普致敬的论文集》，约尔格·吉多·许尔斯曼和斯蒂芬·金塞拉编（阿拉巴马州奥本：米塞斯研究院，2009 年；<https://mises.org/library/property-freedom-and-society-essays-honor-hans-hermann-hoppe>）；参见金塞拉，《范·邓恩论自由与财产及敌对包围》，StephanKinsella.com（2009 年 8 月 3 日）。

rule as the foundation or axiom for libertarian jurisprudence." For although "[n]on-aggression is an important and valid rule of libertarian jurisprudence," it is "inadequate from a libertarian point of view." Rather than being the foundation of libertarian theory, Van Dun argues, it is only an implication of the libertarian philosophy of law.²

范·邓恩批评布洛克和我把 "所谓的罗斯巴德式的互不侵犯规则作为自由意志主义法学的基础或公理"。因为尽管 "互不侵犯是自由意志主义法学的一条重要而有效的规则", 但 "从自由意志主义的观点来看, 它是不充分的"。范·邓恩认为, 与其说它是自由意志主义理论的基础, 不如说它只是自由意志主义哲学的一个可能的推论。²⁸¹

After such a claim, one might expect Van Dun to provide a critique or denial of the principle of non-aggression followed by an explanation of the contours of the proper theory of law. However, Van Dun seems to accept the non-aggression rule. He uses the concept of "aggression in the traditional sense of a physically invasive, non-defensive use of force (violence) against another person or his property,"³ just as Rothbardians do. He writes:

I have no problem with the thesis that, in a libertarian legal order, no individual or group—least of all those who are engaged in the administration of justice—should aggress against any person or any person's property. Aggression, in the libertarian sense of the word, is the physical invasion of another person's domain without that person's consent and without lawful justification. As such, aggression is unlawful and should therefore be illegal in a libertarian legal order (because such an order is intended to be as true to law as is humanly possible). Nor do I have a problem with the thesis that violent border crossings are lawful and therefore legally permissible if and only if they are committed in self-defence, to bring a criminal to justice, or to exact restitution or compensation for an unlawfully inflicted harm. They are permissible to the extent that they are themselves compatible with the requirements of justice.⁴

在提出这样的主张之后, 人们可能会期待范·邓恩对互不侵犯原则进行批判或否定, 然后解释正确的法律理论的轮廓。然而, 范·邓恩似乎接受了互不侵犯原则。他使用了 "传统意义上的侵犯概念, 即对他人或其财产使用武力(暴力), 而非防御性的人身侵

²⁸¹ Van Dun, "Against Libertarian Legalism," pp. 63 – 64.
范·邓恩, 《反对自由意志主义的法律主义》, 第 63-64 页。

犯”，²⁸² 正如罗斯巴德主义者所做的那样。他写道：

在自由意志主义的法律秩序中，任何个人或团体——尤其是那些从事司法管理的人——都不得侵犯任何人或任何人的财产，我对这一论点没有异议。从自由意志主义的含义上讲，侵犯是指未经他人同意，在没有合法理由的情况下，对他人领域的物理入侵。因此，侵犯是非法的，因此在自由意志主义的法律秩序中应该是违法的（因为这种秩序的目的在于尽可能地忠实于法律）。我也不反对这样的论点，即暴力越境行动是合法的，因此在法律上是允许的，但前提是也只有是，它们是为了自卫、将罪犯绳之以法或对非法造成的伤害进行补偿或赔偿。只要暴力越境本身符合正义的要求，就是允许的。²⁸³

However:

It does not follow from those theses that defensive use of force is justified or lawful only in response to aggressive violent invasions of persons or property. It does not follow that only aggression against another person or his property is unlawful. There may be unlawful acts that are not invasions of a person's physical domain, yet justify the defensive use of force to prevent, stop, or exact compensation for such acts.⁵

然而：

从这些论点并不能得出这样的结论：只有在对人员或财产的侵犯性暴力的入侵做出回应时，使用武力进行防御才是正当的或合法的。也不能得出只有对他人或其财产的侵犯才是非法的结论。可能存在并非对一个人的物理领域入侵的非法行动，但为了防止、制止此类行动或为此类行动索取赔偿而使用武力进行自卫是正当的。²⁸⁴

Van Dun goes on to state even more explicitly his view of the relation between aggression and what is properly regarded as “unlawful”:

Block and Kinsella proceed with their arguments on the supposition that such acts are

²⁸² Ibid., p. 65 n. 4

同上，第 65 页注释 4。

²⁸³ Ibid., p. 65.

同上，第 65 页。

²⁸⁴ Ibid.

同上。

*not unlawful because they are not aggressions. Accordingly, they also suppose that the use of force in retaliation against such acts must itself be an aggression, and therefore unlawful. In their system of thought, the dichotomy of aggression and non-aggression coincides with the logical opposition between unlawful and lawful acts.*⁶

范·邓恩继续更明确地阐述他对于侵犯和被恰当地视为“非法”之间关系的观点：

布洛克和金塞拉在他们的论证中基于这样的假设，即这些行动不是非法的，因为它们不是侵犯。因此，他们还假设，针对这些行动进行报复性地使用武力本身一定是一种侵犯，因此是非法的。在他们的思想体系中，侵犯与非侵犯的二分法与非法和合法行动之间的逻辑对立是一致的。²⁸⁵

As Van Dun explains in a brief outline at the end of the paper, in his view, libertarian theory tells us what should be unlawful, by which term he seems to mean a rights violation or against natural law.⁷ For Van Dun, “unlawful” means the type of conduct that should be made illegal (against positive law). As he writes, “aggression is unlawful and should therefore be illegal in a libertarian legal order.”⁸ Thus, libertarianism is concerned with what is lawful and unlawful, or with what should be made illegal.

正如范·邓恩在论文末尾的一个简短提纲中所解释的那样，在他看来，自由意志主义理论告诉我们什么应该是非法的，他似乎用这个术语来表示权利侵犯权或者违反自然法。²⁸⁶对范·邓恩来说，“非法”意味着那种应该被制定为违法（违反实在法）的行为类型。正如他所写的，“侵犯是非法的，因此在自由意志主义的法律秩序中应该是违法的。”²⁸⁷因此，自由意志主义关注的是合法与非法，或者是应该被视为违法的东西。

Van Dun states that while physical aggression is one type of unlawfulness, it is not true “that only physical invasions of another’s person or property are unlawful.”⁹ Because aggression is only one type of unlawfulness, he writes, other unlawful things may also

²⁸⁵ Ibid., pp. 65 – 66, emphasis added.
同上，第 65-66 页，着重号为原文所加。

²⁸⁶ Ibid., pp. 83 – 89.
同上，第 83-89 页。

²⁸⁷ Ibid., p. 65, emphasis added.
同上，第 65 页，着重号为原文所加。

be made illegal. Such things include trademark infringement, libel, or blackmail.

范·邓恩指出，虽然身体上的侵犯是一种非法类型，但“只有对他人身或财产的物理侵犯才是非法的”这种说法并不正确。²⁸⁸因为侵犯只是非法的一种类型，他写道，其他非法的事情也可能被制定为违法。这些事情包括商标侵权、诽谤或敲诈勒索。

I hope that I have accurately summarized this aspect of Van Dun's thought. Now I do not deny that the non-aggression principle might not be an "axiom" in the Randian sense and that it might be the result of, or dependent on, more basic truths or reasons.¹⁰ But a given theory of law either is or is not compatible with the rule. It seems that Van Dun wants to have it both ways. He is quite correct that, as Block and I see it, "the dichotomy of aggression and non-aggression coincides with the logical opposition between unlawful and lawful acts."¹¹ The reason for this is that to declare something "unlawful" means it should be made illegal, meaning that force may be used to oppose the unlawful action. The libertarian believes, I submit, that the only case in which force is justified is if it is in response to an initiated act of force. Otherwise, the outlawing of the conduct is itself an initiation of force.

我希望我已经准确地概括了范·邓恩思想的这一方面。现在，我并不否认，互不侵犯原则可能并不是兰德意义上的“公理”，它可能是更基本的真理或理由的结果，或依赖于更基本的真理或理由。²⁸⁹但是，特定的法律理论要么与该规则相容，要么不相容。范·邓恩似乎想两全其美。他说得很对，在布洛克和我看来，“侵犯和不侵犯的二分法与非法行动和合法行动的逻辑对立是一致的”。²⁹⁰究其原因，宣布某事“非法”就意味着应将其定为违法，意味着可以使用武力来反对非法行动。我认为，自由意志主义相信，武

²⁸⁸ Ibid., p. 73, emphasis in original.

同上，第 73 页，重点为原文所加。

²⁸⁹ In other chapters I have pointed out that the non-aggression principle, or NAP, is merely a concise shorthand for the libertarian conception of property rights, namely self-ownership and property rights in scarce resources acquired by original appropriation or contract. See e.g. "What Libertarianism Is" (ch. 2).

在其他章节中，我已经指出，互不侵犯原则(NAP)仅仅是自由意志主义财产权概念的简明概括，即自我所有权和通过先占或获得的稀缺资源的财产权。参见《何为自由意志主义》(第二章)。

²⁹⁰ Van Dun, "Against Libertarian Legalism," p. 66.

范·邓恩，《反对自由意志主义的法律主义》，第 66 页。

力唯一正当的理由是，它是对主动的武力行动的回答。否则，将该行动定为非法本身就是一种武力的主动使用。

Van Dun, though, says that the category of unlawful conduct is broader than aggression. This means conduct other than aggression may be—nay, should be—outlawed. Which means that violence should be wielded against innocent people who have not engaged in aggression. However, since it is not in response to aggression, this is initiated force. For this reason, I fail to see how one can admit that aggression should be unlawful but maintain that things other than aggression are also unlawful. If aggression is unlawful, then nothing else can be, because outlawing non-aggression is itself aggression.

然而，范·邓恩表示，非法行动的类别比侵犯更广泛。这意味着除了侵犯之外的行为可能——不，应该——被定为非法。这意味着应该对没有进行侵犯的无辜人员使用暴力。但是，由于这不是对侵犯的回答，这就是主动使用武力。出于这个原因，我不明白怎么能承认侵犯应该是非法的，却又主张认为除了侵犯之外的其他事情也是非法的。如果侵犯是非法的，那么其他任何事情都不可能是非法的，因为将非侵犯定为非法本身就是侵犯。

In my view, Van Dun cannot really agree with the non-aggression principle if he is going to adhere to his “broader” view of unlawfulness. Rather, to follow this line of reasoning, it would be more consistent to state that many, even most, acts of aggression are unlawful, but that some types of aggression are not unlawful—namely, the violent suppression of some types of non-aggressive conduct (e.g., libel). But then it would be plain that this theory supports, at least in some cases, the infliction of violent force against those who have not themselves initiated force. This does not seem very libertarian.

在我看来，如果范·邓恩要坚持他对非法性的“更广泛”的观点，他就不可能真正认同非侵犯原则。相反，按照这种推理思路，更一致的说法应该是，许多甚至大多数侵犯行动是非法的，但某些类型的侵犯确不是非法的——即对某些非侵犯性行为（例如诽谤）的暴力压制。但那样的话，很明显这个理论至少在某些情况下支持对那些自身没有主动使用武力的人施加暴力。这看起来不太像自由意志主义。

Before I turn to Van Dun's critique of some of my intellectual property views, a brief digression. Van Dun states:

A libertarian legal theory must be founded on a sound philosophy of law if it is to have any chance of holding its ground in serious intellectual debate. Block and Kinsella do not provide such a philosophy. They assume instead that it can be found in Rothbard's writings.¹²

在我开始讨论范·邓恩对我的一些知识产权观点的批评之前，有一个简短的题外话。范·邓恩说：

如果自由意志主义的法律理论要在严肃的知识论证中有立足之地，它必须建立在健全的法律哲学基础之上。布洛克和金塞拉没有提供这样的哲学。他们反而假定可以在罗斯巴德的著作中找到。²⁹¹

However, Van Dun continues, "Rothbard explicitly warned his readers that he himself was merely presupposing the validity of the theory of natural law and would not attempt 'a full-scale defense of that theory.'"13 Now, just as Van Dun cannot set forth his entire legal theory in his article, so I did not in mine, but I did not and do not rely only on Rothbard. To the contrary, I cited my own work and that of Hans-Hermann Hoppe, which elsewhere set forth a defense of the non-aggression principle.¹⁴ Hoppe's argumentation or discourse ethics approach, in particular, is a powerful defense of the standard non-aggression-based libertarian view. And it is one Van Dun and I both agree with.

然而，范·邓恩接着说："罗斯巴德明确警告他的读者，他本人只是预设了自然法理论的有效性，而不会试图为该理论进行全面辩护"。²⁹²现在，正如范·邓恩在他的文章中无法阐述他的整个法律理论一样，我在我的文章中也没有，但我过去没有、现在也不只是依赖罗斯巴德。相反，我引用了我自己的作品和汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）的著作，后者在其他地方为互不侵犯原则作了辩护。²⁹³尤其是霍普的论证或

²⁹¹ Ibid., p. 83.

同上，第 83 页。

²⁹² Ibid.

同上。

²⁹³ See, e.g., "Dialogical Arguments for Libertarian Rights" (ch. 6); "Defending Argumentation Ethics" (ch. 7); "The Undeniable Morality of Capitalism" (ch. 22); Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc); idem, *The*

对话伦理学方法，是对以互不侵犯为基础的标准自由主义观点的有力辩护。而且这是范·邓恩和我都同意的一点。

If I am right, Van Dun must reject the non-aggression principle in favor of his view that unlawfulness is not based on or equated with aggression, so that not only aggression may be outlawed. But what I find a bit puzzling is that Van Dun himself employs discourse ethics, in a way similar to Hoppe, to show that “principles of private property and uncoerced exchange” are also presupposed by participants in discourse.¹⁵ In other words, as Hoppe argues, the non-aggression principle does have a justification in the nature of peaceful discourse; it is not simply an arbitrary “axiom.” Therefore, it is unclear to me why Van Dun refuses to embrace the non-aggression principle and opposes building a foundation on it. It seems that his own “dialogue ethics” theory, like that of Hoppe, also shows that the non-aggression rule is, in fact, justified and correct.

如果我是对的，范·邓恩就必须摒弃互不侵犯原则，转而支持他的观点，即非法性并非基于或等同于侵犯，这样一来，不仅仅是侵犯行为可能被视为非法。但让我感到有点困惑的是，范·邓恩自己以一种类似于霍普的方式运用对话伦理学，以表明“私有财产和非强制交换的原则”也被话语参与者预先假定。²⁹⁴换句话说，正如霍普所主张的，互不侵犯原则在和平话语的本质中确实有其合理性；它并非仅仅是一个任意的“公理”。因此，我不清楚为什么范·邓恩拒绝接受互不侵犯原则并反对在此基础上建立理论。似乎他自己的“对话伦理学”理论，像霍普的一样，也表明互不侵犯规则实际上是合理和正确的。

Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp).

例如，参见《自由意志主义权利的对话论证》（第 6 章）；《捍卫证伦理学》（第 7 章）；《资本主义不可否认的道德》（第 22 章）；汉斯-赫尔曼·霍普，《社会主义和资本主义理论：经济、政治和伦理》（阿拉巴马州奥本：米塞斯研究院，2010 年[1989 年]，www.hanshoppe.com/tsc）；同上，《私有财产的经济学与伦理学：政治经济学和哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年[1993 年]；www.hanshoppe.com/eepp）。

²⁹⁴ See “Dialogical Arguments for Libertarian Rights” (ch. 6), text at n.31, discussing Van Dun.

参见《自由意志主义权利的对话论证》（第 6 章），注释 31 对范·邓恩的讨论。

商标和 TRADEMARK AND CONTRACT

Van Dun seems to agree with the main portion of my paper on intellectual property, that patent and copyright laws are unlibertarian. However, he takes issue with my comments with respect to trademark, the relevant portions of which are provided here:

Suppose some Lachmannian changes the name on his failing hamburger chain from LachmannBurgers to RothbardBurgers, which is already the name of another hamburger chain. I, as a consumer, am hungry for a RothbardBurger. I see one of the fake RothbardBurger joints run by the stealthy Lachmannian, and I buy a burger. Under current law, Rothbard, the "owner" of the RothbardBurgers trademark, can prevent the Lachmannian from using the mark RothbardBurgers to sell burgers because it is "confusingly similar" to his own trademark. That is, it is likely to mislead consumers as to the true source of the goods purchased. The law, then, gives a right to the trademark holder against the trademark infringer.

In my view, it is the consumers whose rights are violated, not the trademark holder's. In the foregoing example, I (the consumer) thought I was buying a RothbardBurger, but instead got a crummy LachmannBurger with its weird kaleidoscopic sauce. I should have a right to sue the Lachmannian for fraud and breach of contract (not to mention intentional infliction of emotional distress and misrepresentation of praxeological truths). However, it is difficult to see how this act of fraud, perpetrated by the Lachmannian on me, violates Rothbard's rights. The Lachmannian's actions do not physically invade Rothbard's property. He does not even convince others to do this; at most, he may be said to convince third parties to take an action within their rights, namely, to buy a burger from the Lachmannian instead of Rothbard. Thus, it would appear that, under libertarianism, trademark law should give consumers, not trademark users, the right to sue trademark pirates.¹⁶

范·邓恩似乎同意我的论文中关于知识产权的主要部分，即专利法和版权法是非自由意志主义的。不过，他对我关于商标的评论有异议，相关部分在此提供：

假设某个拉赫曼主义者把他失败的汉堡连锁店的名字从 "拉赫曼汉堡"

(LachmannBurgers) 改为 "罗斯巴德汉堡" (RothbardBurgers) , 而这已经是另一家汉堡连锁店的名字了。作为消费者, 我渴望吃到"罗斯巴德汉堡"。我看到由隐蔽的拉赫曼人经营的假冒"罗斯巴德汉堡"店, 就买了一个汉堡。根据现行法律, "罗斯巴德汉堡"商标的 "所有者 "罗斯巴德可以阻止拉赫曼人使用"罗斯巴德汉堡"商标销售汉堡, 因为该商标与他自己的商标 "混淆性相似"。也就是说, 该商标有可能在所购财货的真正来源方面误导消费者。因此, 法律赋予了商标持有人针对商标侵权者的权利。

在我看来, 被侵权的是消费者, 而不是商标持有人。在上述例子中, 我 (消费者) 以为自己买到的是"罗斯巴德汉堡", 但买到的却是带着怪异万花筒酱汁的难吃的拉赫曼汉堡。我应该有权起诉拉赫曼人欺诈和违约 (更不用说故意造成精神痛苦和歪曲行动学的真理了)。然而, 很难说拉赫曼人对我实施的这一欺诈行动如何侵犯了罗斯巴德的权利。拉赫曼人的行为并没有实际侵犯罗斯巴德的财产。他甚至没有说服其他人这样做; 充其量, 他可以说是说服了第三方采取其权利范围内的行动, 即从拉赫曼人那里而不是从罗斯巴德那里购买汉堡。因此, 根据自由意志主义, 商标法似乎应赋予消费者而非商标使用者起诉商标盗版者的权利。²⁹⁵

Van Dun maintains that "it is ... difficult to see how trademark piracy could violate the consumer's rights if it was not a violation of the trademark holder's right."¹⁷ Van Dun mounts an escalating series of criticisms of the alleged implications of my trademark views. Most seem to rest on his conclusion that, under my theory, one cannot say that

²⁹⁵ Kinsella, "Against Intellectual Property," pp. 43 - 44.
金塞拉《反对知识产权》, 第 43-44 页。

the consumer has a fraud or breach of contract claim. He reasons:

According to Kinsella, the consumer supposedly is defrauded because the L-Burger chain misrepresented itself to the consumer. The latter therefore should have a right to sue the L-Burger chain for "fraud and breach of contract." That is a strange conclusion, for it is not at all clear what contract L-Burger breached. The consumer presumably got what he paid for: a burger. If L-Burger acted within its legal rights under the Kinsella Code in using the R-Burger trademark, the consumer should know that a trademark carries no legally relevant information. Kinsella's argument—the consumer thought he bought an R-Burger, but instead got a crummy L-Burger—is simply irrelevant. The consumer's expectations would have been equally frustrated if he had bought at R-Burger when, unbeknownst to him, that chain had hired another chef with the same tastes as his counterpart at L-Burger or had changed its production processes or suppliers. Should any of these things also constitute a violation of the consumer's rights?¹⁸

范·邓恩认为, ".....如果商标盗用不是对商标持有人权利的侵犯, 那么很难理解商标盗用怎么会侵犯消费者的权利。"²⁹⁶ 范·邓恩对我的商标观点的所谓影响提出了一系列不断升级的批评。大多数批评似乎都基于他的结论, 即根据我的理论, 不能说消费者有欺诈或违约索赔权。他的理由是:

根据金塞拉的观点, 消费者之所以受到欺诈, 是因为 L-汉堡连锁店误导了消费者。

因此, 消费者有权以 "欺诈和违约" 为由起诉 L-汉堡连锁店。这是一个奇怪的结论,

因为根本不清楚 L-汉堡违反了什么。消费者大概得到了他所支付的东西: 一个汉堡。

如果 L-汉堡根据《金赛拉法典》在其合法权利范围内使用 R-汉堡商标, 那么消费者

就应该知道商标不包含任何法律相关信息。金塞拉的论点——消费者以为他买的是

²⁹⁶ Van Dun, "Against Libertarian Legalism," p. 68.

范·邓恩, 《反对自由意志主义的法律主义》, 第 68 页。

R-汉堡，但得到的却是一个糟糕的 L-汉堡——是完全不相关的。如果消费者在 R-汉堡购买了汉堡，而他并不知道这家连锁店雇用了另一名厨师，其口味与 L-汉堡的厨师相同，或者这家连锁店改变了生产工艺或供应商，那么消费者的期望同样会落空。这些情况是否也构成对消费者权利的侵犯？²⁹⁷

I acknowledge the reasoning was somewhat compressed. In a 53-page paper devoted primarily to patent and copyright, I devoted only three paragraphs to the issue of whether trademark law can be justified. My view that the consumer has a fraud or breach of contract claim is obviously based on a theory of contract contained in an article published after the intellectual property article.¹⁹¹ I believe Van Dun is incorrect that my non-aggression-principle-compatible legal theory cannot support a fraud or breach of contract claim in the context noted above.

我承认推理过程有些简略。在一篇长达 53 页的主要论述专利和版权的论文中，我只用了 3 个段落来论述商标法是否正当的问题。我认为消费者可以提出欺诈或违约索赔的观点显然是基于在知识产权文章之后发表的一篇文章中所包含的理论。²⁹⁸我认为范·邓恩说我的互不侵犯原则兼容法律理论不能支持上述语境下的欺诈或违约索赔是不正确的。

As explained more fully in my contract theory chapter, libertarianism maintains that the owner of a scarce resource has the right to use the resource and to dispose of it. The owner is the first possessor (homesteader) or someone who legitimately acquired the property from the first possessor (contract). Having the right to use property implies one may choose to exclude others from it, permit them to use or borrow it, give or sell title to another, or abandon it. If you own something, you can use it, hoard it, share it,

²⁹⁷ Ibid., p. 68.

同上，第 68 页。

²⁹⁸ “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), in particular Part III.E.

《自由意志主义的契约理论：所有权转让、有约束力的承诺和不可让渡性》（第 9 章），特别是第 III.E 部分。

destroy it (abuse), sell it (alienate) or give or lend it to another, or abandon it. One's choice whether to sell something or lend it, for example, obviously must be manifested in some way. Clearly, social interaction and property exchanges presuppose the ability of the parties to communicate with each other.

正如我在理论一章中更全面地解释的那样，自由意志主义主张稀缺资源的所有者有权使用和处置该资源。所有者是指第一个占有者（拓殖者）或从第一个占有者那里合法获得财产的人（）。拥有财产使用权意味着可以选择将他人排除在外、允许他人使用或借用、将所有权转让或出售给他人，或者放弃该财产。如果你拥有某样东西，你可以使用它、囤积它、分享它、毁坏它（滥用）、出售它（让渡）或将它给予或借给他人，或者放弃它。例如，一个人选择出售还是借出某样东西，显然必须以某种方式表现出来。显然，社会交往和财产交换的前提是双方能够相互沟通。

It is the owner's consent that distinguishes permitted use from trespass. If my neighbor walks to my front door to borrow a cup of sugar, she has implied permission to use my sidewalk and doorknocker for this purpose because of default rules in the community that can be relied on if not contradicted. This is how language and communication work. But if I tell her she is not welcome on my property, then she is a trespasser if she steps on it. Clearly, the manifested or communicated consent of the owner is relevant as to whether the use of property is permissible—whether it is a form of trespass or theft.

正是所有者的同意将被允许的使用与非法侵入区分开来。如果我的邻居走到我家门口借一杯糖，她就默示允许为此目的使用我的人行道和门把手，因为社区有默认的规则，如果没有被反驳的话，这些规则是可以信赖的。这就是语言和交流的作用。但是，如果我告诉她我的地盘不欢迎她，那么她如果踏上这方土地，那就是非法侵入。很明显，所有者明示或传达的同意与对财产的使用是否被允许息息相关——即这是否是一种非法侵入亦或是盗窃。

This is also true for loans and exchanges of title. If I lend my car to someone, the permission must be communicated to him somehow. For example, I can lend my car to my brother. His use is not trespass since I consented to it. If a random stranger takes my car and uses it, we call that theft because I did not consent to it.

贷款和财产权交换也是如此。如果我把车借给别人，必须以某种方式将许可传达给他。例如，我可以把车借给我弟弟。他的使用不属于非法侵入，因为我同意了。如果一个

陌生人随意拿走并使用我的车，我们称之为盗窃，因为我并未同意。

But since consent is communicated and can be withheld, it need not be all or nothing—a loan need not be a permanent gift. The consent given to others to use one's property can be conditional. For example, it can be limited in time or in other ways. If I lend my car to my brother to go to lunch and he drives off to Canada in it for a month-long vacation, he is now using my car without my consent, and he knows this. At this point, he is identical to the thief or other trespasser. The question to be asked is always: Did the owner consent to the other's use of the property? If so, it is permissible and rightful, since an owner can allow others to use his property. But if not, it is a type of theft or trespass. And clearly, determining whether consent was granted presupposes the possibility of communication.

但是，既然同意是可以传达的，也可以保留的，那么同意就不一定是全部或全无——借用不一定是永久性的赠与。同意他人使用自己的财产可以是有条件的。例如，可以在时间上或以其他方式加以限制。如果我把车借给弟弟去吃午饭，而他开着车去加拿大度假一个月，那么他现在就是在未经我同意的情况下使用我的车，而且他也知道这一点。在这一点上，他和小偷或其他非法侵入者是一样的。要问的问题始终是 车主是否同意他人使用财产？如果同意，则是允许的、合法的，因为所有者可以允许他人使用他的财产。但如果没有，则属于盗窃或非法侵入。显然，确定是否同意的前提是有可能进行交流。

Now, when someone sells or buys an item, the sale or purchase can be, and usually is, conditional. For example, if I buy a candy bar for a shilling from a vendor, I transfer title to my shilling to the vendor, and he transfers title to the candy to me. Other customary assumptions are viewed as implied conditions on the title transfers, but they can also be made explicit or they can contradict default assumptions (sometimes called suppletive law). I might state that the title to my coin transfers only if the candy bar has such-and-such property (e.g., it is unopened or fresh, or not laced with poison; although these would probably be default or implied conditions anyway). Therefore, the vendor receives my consent to use and take title to the coin only if these conditions are met.If the vendor knowingly sells me a five-year-old piece of chocolate, then the condition for transferring title to the coin to him has simply not been met, and he is aware of this. So the vendor would be aware that he does not have the right to use or keep the coin—just as, in the example above, my brother knows he may use my car to

go to lunch, but that he has no right to use it to drive to Canada.

现在，当某人出售或购买一件物品时，买卖可以是有条件的，通常也是有条件的。例如，如果我花一先令从小贩那里买了一块糖果，我就把我的先令的所有权转让给了小贩，而小贩则把糖果的所有权转让给了我。其他习惯假设被视为所有权转让的默示条件，但也可以明示，或者与默认假设相矛盾（有时称为补充法）。我可能会声明，只有当糖果具有这样或那样的属性（例如，糖果未开封或新鲜，或未掺有毒药；尽管这些可能是默认或默示条件）时，我的硬币的所有权才会转移。因此，只有在这些条件得到满足的情况下，小贩才能得到我的同意，使用并取得硬币的所有权。如果小贩明知故犯地卖给我一块五年前的巧克力，那么将硬币的所有权转让给他的条件就根本没有得到满足，而且他也知道这一点。因此，小贩知道他无权使用或保留这枚硬币——就像在上面的例子中，我哥哥知道他可以开我的车去吃午饭，但他无权用它开去加拿大一样。

Likewise, in the R-Burger/L-Burger example I gave, I assumed a hypothetical situation in which the customer wanted an R-Burger. That is, he wanted a burger having certain characteristics—it is fresh, has meat and bread, and was made by a certain, identifiable company (the R-Burger chain). When he paid for the fake R-Burger, then title to his coin transfers to the vendor only if the conditions are met. They are not met, because the burger was not made by the R-Burger chain, and that was one of the customer's conditions. Therefore, the L-Burger chain is taking and using his coin without his consent. It is for this reason that he should have a claim against them for trespass (which may be couched in fraud, breach of contract, or theft terms).²⁰

同样，在我举的 R-Burger/L-Burger 的例子中，我假定顾客想要的是 R-Burger。也就是说，他想要的汉堡具有某些特征——新鲜、有肉、有面包，而且是由某家可识别的公司（R-汉堡连锁店）生产的。当他为假冒的 R-Burger 付账时，只有在满足这些条件的情况下，他的硬币所有权才会转移给供应商。但条件并未满足，因为汉堡并非由 R-Burger 连锁店生产，而这正是顾客的条件之一。因此，L-汉堡连锁店是在未经他同意的情况下拿走并使用了他的硬币。因此，他应该以非法侵入为由向他们索赔（可以用欺诈、违反或盗窃的措辞）²⁰。同样，在我举的 R-Burger/L-Burger 的例子中，我假定顾客想要的是 R-Burger。也就是说，他想要的汉堡具有某些特征——新鲜、有肉、有面包，而且是由某家可识别的公司（R-汉堡连锁店）生产的。当他为假冒的 R-Burger 付账时，只有在满足这些条件的情况下，他的硬币所有权才会转移给供应商。但条件

并未满足，因为汉堡并非由 R-Burger 连锁店生产，而这正是顾客的条件之一。因此，L-汉堡连锁店是在未经他同意的情况下拿走并使用了他的硬币。因此，他应该以非法侵入为由向他们索赔（可以用欺诈、违反或盗窃的措辞）。²⁹⁹

Van Dun might argue that it is not possible to identify the R-Burger chain if it does not have a trademark right and that the L-Burger chain can just rename itself “R-Burgers” too, so that when the customer asks for an R-Burger (i.e., conditions the title transfer to the money on it being made and sold by R-Burger), he is actually getting one. He is just getting it from the second R-Burger company, not the first R-Burger company.

范·邓恩可能会说，如果 R-汉堡连锁店没有商标权，就不可能识别出它的身份，而 L-汉堡连锁店也可以把自己改名为“R-汉堡”，这样，当顾客要求购买 R-汉堡时（即，将货币所有权转让的条件设定为它由 R 汉堡制作和销售），他实际上买到的就是 R-汉堡。他只是从第二家 R-Burger 公司而不是第一家 R-Burger 公司买到了汉堡。

However, this response would be easy to overcome. It need only be possible for the customer to adequately identify what the condition is. Language is not infinitely malleable, and communication is (undeniably) possible. If pressed, the customer could specify that the purchase is conditioned on the current store he is in being owned by the same R-Burger company first started at such and such date and address, and so on. There is no reason it would be impossible to identify a given vendor without traditional trade mark law, just as it is not impossible to identify fellow humans, despite the fact that we do not usually have trademarks on our names (in fact, humans often have identical names, e.g., John Smith).

不过，这种反应很容易被驳倒。顾客只需要能够充分明确条件是什么即可。语言并不是无限可塑的，沟通交流（不可否认）是可能的。如果有必要，顾客可以明确指出，购买的条件是，他现在所在的商店是由在某年某月某日某地址首次开业的同一家 R-Burger 公司所有，等等。没有理由在没有传统商标法的情况下无法识别某个特定的供应商，就像识别其他人并非不可能一样，尽管我们的名字通常没有商标（事实上，人

²⁹⁹ Such as “larceny by trick.” See “A Libertarian Theory of Contract” (ch. 9), Part III.E and, in particular, text accompanying n.63, et pass. 如“欺诈盗窃”。见《自由意志主义理论的理论》（第 9 章），第三部分 E 节，尤其是注释 63 及其他相关部分的文本。

类的名字通常是相同的，如约翰-史密斯）。

Van Dun's implicit assumption here is really that communication and identification of individuals or entities is literally impossible in the absence of trademark rights. I believe this is one of his central mistakes here. Van Dun seems to be so accustomed to the positive law's trademark framework being relied on by modern businesses and consumers that he seems to believe accurate communication is impossible without it. This is obviously absurd.²¹

范·邓恩在这里隐含的假设实际上是，如果没有商标权，个人或实体的交流和识别实际上是不可能的。我认为这是他的核心错误之一。范·邓恩似乎已经习惯了现代企业和消费者所依赖的实在法商标框架，以至于他似乎认为没有这个框架就不可能进行准确的交流。这显然是荒谬的。³⁰⁰

³⁰⁰ To the contrary. Not only is trademark law not necessary for humans to be able to communicate with each other, but trademark law, like copyright, impedes the ability to communicate. See, e.g., Wendy J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property," Yale L. J. 102, no. 7 (1993); https://scholarship.law.bu.edu/faculty_scholarship/1981/: 1533 - 1610, at 1585, discussing the U.S. Olympic Committee's attempt to use trademark law to prevent an organization from calling its games the "Gay Olympics." As Gordon writes: When the courts have to choose between depriving the trademark owners of some of the "fruits of their labor," on the one hand, or depriving the public and competing manufacturers of the ability to communicate simply and accurately on the other, the courts opt to sacrifice the creators' reward in favor of securing the public's liberty of communication. Thus, if the word "Olympic" is a generic communicative term, it would not be protectable as a trademark.

Ibid. (emphasis added; citations omitted).

恰恰相反。商标法不仅对于人类能够相互交流不是必要的，而且像版权法一样，商标法阻碍了交流的能力。例如，参见温迪·J·戈登的《自我表达的财产权：知识产权自然法中的平等与个人主义》，《耶鲁法学杂志》第 102 卷，第 7 期（1993 年；https://scholarship.law.bu.edu/faculty_scholarship/1981/）：1533-1610 页，第 1585 页，讨论了美国奥林匹克委员会试图利用商标法阻止一个组织将其比赛称为“同性恋奥林匹克运动会”。正如戈登所写：

当法院必须在一方面剥夺商标所有者的“劳动成果”，另一方面剥夺公众和竞争制造简单准确交流的能力之间做出选择时，法院选择牺牲创造者的回报，以确保公众的交流自由。因此，如果“奥林匹克”这个词是一个通用的交流术语，它就不能作为商标受到保护。

Accordingly, I submit that Van Dun is incorrect. Under libertarian principles, property owners are free to condition the transfer of title to their property. In a typical exchange, there are many implied conditions, and others may be expressly added or changed. These conditions specify when the other party has the right to take and use the property to be transferred, just as when one lends property or invites a guest to one's home, the manifested consent of the owner governs which uses by the invitee are permissible and which are tantamount to trespass. From here, it is easy to see how selling an item to a customer with a falsely-labeled characteristic can result in title to the monetary payment not passing due to failure of one of the conditions. If title does not pass, then the vendor does not have a right to take, use, or spend the money; it is still the property of the customer.

因此，我认为范盾的观点是错误的。根据自由意志主义原则，财产所有人可以自由地对其财产所有权的转让附加条件。在典型的交换中，有许多默示条件，其他条件也可以明确添加或更改。这些条件规定了另一方何时有权取得和使用将要转让的财产，就像一个人借出财产或邀请客人到家中做客一样，财产所有者的明示同意决定了被邀请者的哪些使用是允许的，哪些使用等同于非法侵入。从这里我们不难看出，向顾客出售带有虚假标签特征的物品，会导致货币付款的所有权因不符合其中一个条件而无法转移。如果所有权没有转移，那么卖方就无权获取、使用或花费这笔钱；它仍然是顾客的财产。

同上（着重号为原文所加；引文省略）。

第十三章 自由社会中的立法与法律发现

Legislation and the Discovery of Law in a Free Society

Originally published in the Journal of Libertarian Studies in 1995, this was one of my earliest scholarly publications and my first in that journal, written just a year after I had met Hans-Hermann Hoppe and Murray Rothbard; Hoppe was then the new editor of the JLS after Rothbard's passing in January 1995.*

此文最初发表于 1995 年的《自由意志主义研究杂志》，是我最早的学术出版物之一，也是我在该杂志上发表的第一篇文章，写于我认识汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）和穆瑞·罗斯巴德（Murray Rothbard）仅仅一年之后；罗斯巴德于 1995 年 1 月去世后，霍普成了《自由意志主义研究杂志》的新编辑。*

I had become fascinated with the Roman/civil law (the law of Louisiana and continental Europe) and the English common law and its possible connections to libertarian political and legal philosophy. I conceived of this project in law school (1988–91) at LSU, a civil-law law school, when I was still more under the thrall of Ayn Rand and her type of rationalism. At first I thought the more “rationalist” civil law was more compatible with a reasonand deductivist-based approach to politics and law than was the common law. One of my law professors, John Devlin, suggested I read Oliver Wendell Holmes's The Common Law to counterbalance some of these views. This helped me gain an appreciation of the English common law and decentralized legal systems in general. I ended up concluding that decentralized legal systems—the original Roman law, and its offspring, European civil law and the later English common law—were more compatible with natural principles of justice favored by libertarianism than legislated law.

我对罗马法/大陆法（路易斯安那州和欧洲大陆的法律）和英国普通法及其与自由意志主义政治和法律哲学的可能联系非常着迷。我是在路易斯安那州立大学法学院（1988-91 年）（一所大陆法系法学院）学习时构思这个项目的，当时我还更多地受安-兰德（Ayn Rand）及其理性主义的影响。起初，我认为更加“理性主义”的大陆法比普通法更符合以理性和演绎法为基础的政治和法律方法。我的一位法学教授约翰-德夫林（John Devlin）建议我阅读奥利弗-温德尔-霍姆斯（Oliver Wendell Holmes）的《普通法》（The Common Law），以平衡我的一些观点。这让我对英国普通法和一般的

分权法律体系有了更深的了解。我最终得出结论，去中心化的法律体系——最初的罗马法及其产物欧洲大陆法和后来的英国普通法——比立法法更符合自由意志主义所主张的自然正义原则。

This article was an attempt to highlight what is good in these ancient systems of law and what we can draw on and use in our libertarian theorizing.†

本文试图强调这些古老法律体系中的优点，以及我们在自由意志主义理论研究中可以借鉴和使用的内容。†

* Stephan Kinsella, "Legislation and the Discovery of Law in a Free Society," J. Libertarian Stud. 11, no. 2 (Summer 1995): 132–81. See "How I Became a Libertarian" (ch. 1) for further details.

* 斯蒂芬·金塞拉，《自由社会中的立法与法律发现》，《自由主义研究杂志》第 11 卷，第 2 期（1995 年夏季）：132-181 页。详见《我如何成为一名自由意志主义者》（第 1 章）。

† I later studied and wrote about international law and have also written and spoken about aspects of international law of interest to libertarians. See, e.g., Noah D. Rubins, Thomas N. Papanastasiou & Stephan Kinsella, International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide, Second Edition (Oxford University Press, 2020); Kinsella, "KOL250 | International Law Through a Libertarian Lens (PFS 2018)," Kinsella on Liberty Podcast (Sep. 26, 2018); idem, "International Law, Libertarian Principles, and the Russia-Ukraine War," StephanKinsella.com (April 18, 2022).

† 后来，我研究并撰写了有关国际法文章，也撰写并讲述了自由意志主义者感兴趣的国际法方面的问题。例如，参见诺亚·D·鲁宾斯（Noah D. Rubins）、托马斯·N·帕帕纳斯塔西乌（Thomas N. Papanastasiou）和斯蒂芬·金塞拉，《国际投资、政治风险和争议解决：从业者指南（第二版）》（牛津大学出版社，2020 年）；金塞拉，"KOL250 | 从自由意志主义视角看国际法（PFS 2018）"，《金塞拉谈自由》播客（2018 年 9 月 26 日）；同上，《国际法、自由意志主义原则和俄乌战争》，StephanKinsella.com（2022 年 4 月 18 日）。

For a condensed version of this chapter, see "Legislation and Law in a Free Society," Mises Daily (Feb. 25, 2010). For later talks based on the content of this chapter, see "KOL001 | "The (State's) Corruption of (Private) Law" (PFS 2012)," Kinsella on Liberty

Podcast (Jan. 11, 2013), "KOL221 | Mises Brasil: State Legislation Versus Law and Liberty," Kinsella on Liberty Podcast (May 17, 2017), and "KOL020 | "Libertarian Legal Theory: Property, Conflict, and Society: Lecture 3: Applications I: Legal Systems, Contract, Fraud" (Mises Academy, 2011)," Kinsella on Liberty Podcast (Feb. 21, 2013).

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关于本章的精简版，请参见《自由社会中的立法与法律》，《米塞斯日报》（2010 年 2 月 25 日）。有关本章内容的后续讲座，请参阅 "KOL001 | "（国家）对（私）法的腐蚀"（PFS 2012），"《金塞拉谈自由》播客（2013 年 1 月 11 日），"KOL221 | 米塞斯巴西：国家立法 Versus Law and Liberty》，Kinsella on Liberty Podcast（2017 年 5 月 17 日），以及 "KOL020 | "自由意志主义的法律理论：财产、冲突与社会：第 3 讲：应用 I：法律制度、欺诈"（米塞斯学院，2011 年），"《金塞拉谈自由》播客（2013 年 2 月 21 日）。

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Justice must stand quite still, or else the scales will waver and a just verdict will
become impossible.
—Franz Kafka¹

正义必须稳如泰山，否则天平就会摇摆不定，正义的裁决也就无从谈起。
——弗朗茨·卡夫卡³⁰¹

1 简介 INTRODUCTION

Libertarians' devotion to individual rights, and to laws in support of those rights, is

³⁰¹ Kafka, *The Trial* (New York: Schocken Books, Definitive ed. 1984, Willa and Edwin Muir, trans. 1956), at 146.
卡夫卡，《审判》（纽约：朔肯图书，权威版 1984 年，威拉和埃德温·缪尔译，1956 年），第 146 页。

unquestionable. Most of the laws favored by libertarians can be shown to be consistent with our individual rights—unlike the blatantly illegitimate laws advocated by socialists. Despite this, however, many libertarians overlook important procedural or structural requirements that must accompany any legal system in which substantively justifiable law can develop and last.

自由意志主义对个人权利以及支持这些权利的法律的虔诚是毋庸置疑的。自由意志主义所支持的大多数法律都可以证明与我们的个人权利是一致的——不像社会主义者所主张的那些公然违法的法律。然而，尽管如此，许多自由意志主义者却忽视了重要的程序性或结构性要求，而这些要求是任何法律体系都必须具备的，只有在这样的法律体系中，实质正当的法律才能得以发展和延续。

In particular, the danger and futility of making law by legislation is too often ignored, even by libertarians (other than anarcho-capitalists, who oppose the existence of any government on principle, including its legislature).² Libertarians often, for example, advocate that the legislature enact this or that law, or they at least support many statutes that are already in force, such as statutes prohibiting murder. The concept of separation of governmental powers into the legislative, executive, and judicial branches, which many libertarians support, implies that legislation can be a valid function of a libertarian government. But as Italian legal theorist Bruno Leoni noted in 1961:

*It is ... paradoxical that the very economists who support the free market at the present time do not seem to care to consider whether a free market could really last within a legal system centered on legislation.*³

Leoni argued that legislation as such is incompatible with freedom. If this is correct, then even statutes that seem to embody libertarian principles simultaneously subvert those principles.

尤其是，通过立法制定法律的危险和徒劳常常被忽视，即使是自由意志主义者（无政府资本主义者除外，他们原则上反对任何政府的存在，包括其立法机构）也是如此。

³⁰²例如，自由意志主义者常常主张立法机构制定这样或那样的法律，或者他们至少支

³⁰² In this book, I sometimes use the term government to refer to what should more precisely be referred to as the state, although, as I have argued elsewhere, to be precise, government (or the institutions of governance) is conceptually distinct from the state.

The state commandeers various natural and private institutions in society, such as communication, transportation, defense, education, healthcare, and law and order (institutions of governance), and over time the populace associates these institutions with the state. But just as libertarians are only against state-provided roads and education, but not against roads and education, we are not against “government,” meaning institutions or law and order. We are against the state. We anarchist libertarians are not for chaos and do not think law is impossible without the state; indeed, we think true, just law is only really possible without the state. Thus we anarchist libertarians do not oppose law and order, or even “government,” properly understood. Nonetheless, I sometimes use “government” in this book in the conventional sense to more or less mean the state, to avoid tedium. See, on this, “Libertarianism After Fifty Years: What Have We Learned?” (ch. 25); Kinsella, “The Nature of the State and Why Libertarians Hate It,” StephanKinsella.com (May 3, 2010); idem, “The State is not the government; we don’t own property; scarcity doesn’t mean rare; coercion is not aggression,” StephanKinsella.com (Dec. 19, 2022);

在本书中，我有时会使用政府一词来指代更准确地说应该是国家，尽管正如我在其他地方所论述的，准确地说，政府（或治理机构）在概念上有别于国家。国家征用社会中的各种自然和私人机构，如通信、交通、国防、教育、医疗、法律和秩序（治理机构），久而久之，民众就会将这些机构与国家联系在一起。但正如自由意志主义只反对国家提供的道路和教育，却不反对道路和教育一样，我们反对的也不是“政府”，即机构或法律和秩序。我们反对的是国家。我们无政府自由意志主义者不赞成混乱，并不认为没有国家就不可能有法律；事实上，我们认为唯有不存在国家，才会真的可能存在真正的、正义的法律。因此，我们无政府自由意志主义者不反对法律和秩序，甚至不反对正确理解的“政府”（government）。尽管如此，为了避免乏味，我有时会在本书中使用传统意义上的“政府”，或多或少地指代国家。关于这一点，请参阅《自由意志主义五十年：我们学到了什么？》（第二十五章）；金塞拉：《国家的性质和为何自由意志主义厌恶它》，StephanKinsella.com（2010年5月3日）；同上，《国家不是政府；我们不拥有财产；稀缺不代表稀少；强制不是侵犯》，StephanKinsella.com（2022年12月19日）；

Likewise, in this book I try to avoid or minimize using “property” to refer to the object of property rights (the scarce resource owned) (see “What Libertarianism Is” (ch. 2), n.5) and using “coercion” as a synonym for aggression (Kinsella, “The Problem with ‘Coercion,’ ” StephanKinsella.com (Aug. 7, 2009) and “The State is not the government; we don’t own property; scarcity doesn’t mean rare; coercion is not aggression”), but sometimes retain the less-precise usage due to the older usage employed in the source material and to avoid tedium.

同样，在本书中，我尽量避免或减少使用“财产”来指财产权的客体（所拥有的稀缺资源）（见《何为自由意志主义》（第2章），注释5），并使用“强制胁迫”来指代侵犯）（金塞拉，《“强制胁迫”的问题》，StephanKinsella.com（2009年8月7日）和“国家不是政府；我们不拥有财产；稀缺并不意味着稀少；胁迫不是侵犯”），

持许多已经生效的法规，如禁止谋杀的法规。许多自由意志主义者支持政府权力分为立法、行政和司法三个部门的理念，这意味着立法可以成为自由意志主义政府的一项有效职能。但正如意大利法律理论家布鲁诺·莱奥尼在 1961 年指出的那样：

“……吊诡之处在于，那些目前支持自由市场的经济学家似乎并不愿意思考，在一个以立法为中心的法律体系中，自由市场是否真的能够持久存在。”³⁰³

There is another way of forming law, however—in which law is “found” or discovered, rather than “made”—which does not depend on legislation or legislators. This is the way of decentralized legal systems such as customary law, Roman law, and the English common law.

然而，还有另一种形成法律的方式——法律是“发现”或揭示的，而不是“制定”的——它不依赖于立法或立法者。这就是习惯法、罗马法和英国普通法等去中心化的法律体系的形成方式。

In this chapter I will examine the two ways of forming law—centralized (i.e., legislation-based) and decentralized—and will argue that only the latter is compatible with libertarian principles. I will also examine the proper role for legal codification in light of this conclusion.

在本章中，我将探讨法律形成的两种方式——中心化方式（即基于立法的）和去中心化方式——并将论证只有后者才符合自由意志主义原则。根据这一结论，我还将探讨法律编纂的适当作用。

但有时会保留不那么精确的用法，这是因为原始材料中使用了较早的用法，也是为了避免乏味。

³⁰³ Bruno Leoni, *Freedom and the Law* (Indianapolis: Liberty Fund, expanded 3d. ed. 1991 [1961]; <https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>), at 23; see also p. 89.

布鲁诺·莱奥尼，《自由与法律》（印第安纳波利斯：自由基金，1991 年扩展第 3 版 [1961 年]；<https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>），第 23 页；另见第 89 页。

2 中心化和去中心化的法律体系

CENTRALIZED AND DECENTRALIZED LEGAL SYSTEMS

大陆法和普通法

Civil Law and Common Law

In modern times the two dominant legal systems in the world are the common law and the continental civil law. Based on the body of English case law that developed gradually over the centuries, the common law spread to English colonies and commonwealths like America, Canada, Australia, New Zealand, and India. Modern civil law systems are based in part on Roman law, which, like the common law, developed many of its important legal principles in the accumulated decisions of jurists in thousands of cases over centuries (and which predates the common law by centuries).⁴ Virtually all of Europe and many other jurisdictions, including Louisiana, Puerto Rico, Quebec, Scotland, and Latin America, have a civil-law system. The civil law systems are usually based on civil codes, such as in Japan. The earliest of these codes was the French Napoleonic Code of 1804.

在现代，世界上两大主流法律体系是普通法和大陆法系。普通法以英国几个世纪以来逐渐发展起来的判例法为基础，传播到英国的殖民地和英联邦国家，如美国、加拿大、澳大利亚、新西兰和印度。现代民法体系部分以罗马法为基础，与普通法一样，罗马法的许多重要法律原则也是在法学家几个世纪以来对成千上万案件的裁决中积累形成的（比普通法早几个世纪）。³⁰⁴几乎所有欧洲国家和许多其他司法管辖区，包括路易斯安那、波多黎各、魁北克、苏格兰和拉丁美洲，都实行大陆法系。大陆法体系通常以民法典为基础，如日本。最早的民法典是 1804 年的《法国拿破仑法典》。

In the common law and Roman law, there eventually evolved very sophisticated bodies of legal principles, concepts, methodology, and precedents. Because the classical common law and Roman law developed the large bulk of their legal principles through

³⁰⁴ See notes 37 and 81, below, and accompanying text.
见下文注释 37 和 81 及所附文本。

the decision and discussion of cases, they serve as rough examples of decentralized systems of “judge-found” law, as do largely private customary law systems like the Law Merchant.⁵

在普通法和罗马法中，最终演变形成了非常复杂的法律原则、概念、方法和先例体系。由于古典普通法和罗马法的大部分法律原则是通过案件的裁决和讨论发展而来的，它们大致可作为“法官发现”法的去中心化法律体系的粗略例子，就像很大程度上的私人的习惯法体系，如商法一样。³⁰⁵

Unlike Roman law and the common law, however, modern civil law principles are embodied in a statute called a Civil Code, and the civil law enshrines legislation as the primary source of law. ⁶ In these systems, legal scientists elegantly codify the preceding body of legal principles developed mostly in a decentralized fashion (via the Roman law) and customary European law, but then the legislature enacts this code as a statute and makes legislation the primary source of law. The modern civil law is thus a good example of an explicitly centralized legal system, even though much of the substantive provisions of civil codes are based on legal principles discovered in decentralized fashion in Rome many centuries ago. Roman law thus has more in common with the common law and customary law than with the Roman law's offspring, modern civil law, since the former were decentralized law-finding systems, while the latter are centralized, legislation-based law-making systems.⁷ Today's common law, while based on the classical and mostly decentralized Anglo-American common law, is also coming to be more and more dominated by legislation and, to that extent, is gradually being

³⁰⁵ The expression “judge-found” will be used throughout this chapter, rather than the more popular and positivistic phrase “judge-made.” I will use the generic phrase “judges” often to refer to the relevant expert decision maker, whether judge, jurist, or private arbitrator, in situations where the relevant discussion applies to decentralized legal systems such as the common law, Roman law, and private law. Although Roman and common law were not based solely on the decisions of judges, for illustrative purposes I will focus on this characteristic as their primary way of finding law. 本章将通篇使用“法官发现”这一表述，而不是更流行的实证主义用语“法官制定”。在讨论普通法、罗马法和私法等去中心化型法律体系时，我将经常使用“法官”这一通用短语来指相关的专家决策者，无论是法官、法学家还是私人仲裁员。尽管罗马法和普通法并非仅仅基于法官的裁决，但为了说明目的，我将着重号为原文所加这一特征，将其作为他们发现法律的主要方式。

centralized as well.

然而，与罗马法和普通法不同，现代民法原则体现在称为《民法典》的法规中，民法将立法奉为法律的主要来源。³⁰⁶ 在这些体系中，法律学家优雅地编纂了之前主要以去中心化的方式（通过罗马法）发展起来的法律原则体系和欧洲习惯法，但随后立法机关将此法典颁布为成文法，并将立法作为法律的主要渊源。因此，现代民法是明确的中心化法律体系的一个很好的例子，尽管《民法典》的许多实质性条款都是基于许多世纪前罗马以去中心化的方式发现的法律原则。因此，罗马法与普通法和习惯法的共同点比与罗马法的后裔——现代民法——更多，因为前者是去中心化的分散式的法律发现体系，而后者是中心化的、基于立法的法律制定体系。³⁰⁷ 如今的普通法，虽然基于古典且大多分散的英美普通法，但也越来越多地受到立法的主导，在这种程度上，也逐渐走向了中心化。

Thus, previously, law was thought of as a body of true principles ripe for discovery by judges, not as whatever the legislator decreed. Nowadays, however, legislation has become such a ubiquitous way of making law that “the very idea that the law might not be identical with legislation seems odd both to students of law and to laymen.”⁸ And, one might add, to many libertarians. As discussed below, however, a legislative system is incompatible with libertarian principles and destroys true Law. This holds true for all legislation-based legal systems, even civil law systems, which typically embody fairly libertarian principles, much as the original body of common law does. Although the civil codes of civil law systems codify, in elegant form, principles developed in the relatively decentralized Roman legal system, civil codes are still merely statutes in a system in which legislation is the primary source of law. Thus even civil codes, the most

³⁰⁶ In revising this chapter, this footnote grew to unmanageable length. I have placed the relevant commentary in the Appendix, below.

在修订本章时，这个注释变得冗长不堪。我将相关评注放在下面的附录中。

³⁰⁷ For more discussion of the gradual method of developing law in the Roman and common law and of these systems’ relative similarity, see Stein, “Roman Law, Common Law, and Civil Law,” p. 1592; Buckland & McNair, *Roman Law and Common Law*, at xiv.

关于罗马法和普通法中法律逐渐发展的方法以及这些体系相对相似性的更多讨论，参见斯坦因，《罗马法、普通法和大陆法》，第 1592 页；巴克兰德和麦克奈尔，《罗马法与普通法》，第 xiv 页。

elegant and liberal exemplars of centralized legislation, are subject to the general criticism of legislation presented in this chapter.

因此，以前人们认为法律是由法官发现的真正原则，而不是立法者颁布的任何法令。但如今，立法已成为一种无处不在的制定法律的方式，以至于“法律可能与立法不一致这一观点，无论是对法律学生还是外行人来说，都显得很奇怪”。³⁰⁸而且，我们还可以补充说，对许多自由意志主义者来说也是如此。然而，正如下文所讨论的，立法体系与自由意志主义原则格格不入，并破坏了真正的法律。这一点适用于所有以立法为基础的法律体系，即使是大陆法系也不例外，因为大陆法系通常体现了相当的自由意志主义原则，就像最初的普通法体系一样。尽管大陆法系的《民法典》以优雅的形式编纂了在相对去中心化的罗马法律体系中形成的原则，但在一个以立法为主要法律来源的体系中，《民法典》仍然只是法规。因此，即使是《民法典》这种最优雅、最自由的中心化的立法典范，也受到本章对立法的一般性批评。

大陆法，理性主义和自由意志主义

Civil Law, Rationalism, and Libertarianism

Before concluding this section and proceeding to general criticisms of legislated law, I want to briefly note the tendency of civilians to regard the civil law as a great “rationalist” system.⁹ Civilians consider modern civil law to be “rational” or even “rationalistic” for various reasons, including the views that civil law: is rationally and systematically codified,¹⁰ rather than “unscientifically” developed in an uncoordinated fashion by decentralized judges; is “certain” and clear because the rules are written;¹¹ and is proclaimed by the legislator. Civil law systems such as the Louisiana and French systems are also praised as being drafted “in the spirit of the Enlightenment,”¹² and as resting on an ideological commitment to democracy,¹³ economic liberalism,¹⁴ private property,¹⁵ freedom of contract,¹⁶ individualism,¹⁷ natural law,¹⁸ and justice.¹⁹

在结束本节并开始对立法法进行一般性批评之前，我想简要地指出民法学者将民法视为一个伟大的“理性主义”体系的倾向。³⁰⁹民法学者认为现代民法是“理性的”甚至是

³⁰⁸ Leoni, Freedom and the Law, p. 6.
莱奥尼，《自由与法律》，第6页。
³⁰⁹ Rationalism has been defined as:

“理性主义的”，原因有很多，其中包括这样一些观点：民法是理性地、系统地编纂成法典的，³¹⁰ 而不是由去中心化的法官以不协调的方式 “不科学地” 发展出来的；民法是

[T]he doctrines of a group of philosophers of the 17th and 18th centuries, whose most important representatives are Descartes, Spinoza, and Leibniz. The characteristics of this kind of rationalism are: (a) the belief that it is possible to obtain by reason alone a knowledge of the nature of what exists; (b) the view that knowledge forms a single system, which (c) is deductive in character; and (d) the belief that everything is explicable, that is, that everything can in principle be brought under the single system.

Antony Flew, *A Dictionary of Philosophy*, 298 – 99 (New York: St. Martin’s Press, rev’d 2d ed., 1984). See also Hans-Hermann Hoppe, “In Defense of Extreme Rationalism,” in *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf). See also note 6, above.

理性主义被定义为：

[17、18 世纪一批哲学家的学说，其中最重要的代表人物是笛卡尔、斯宾诺莎和莱布尼兹。这种理性主义的特点是 (a) 相信仅凭理性就有可能获得关于存在事物本质的知识；(b) 认为知识形成了一个单一的体系，而这个体系(c) 具有演绎的性质；(d) 相信一切都是可以解释的，也就是说，原则上一切事物都可以归入这个单一的体系。

安东尼·弗卢，《哲学词典》，第 298-299 页（纽约：圣马丁出版社，修订第二版，1984 年）。另见汉斯-赫尔曼·霍普，《捍卫极端理性主义》，载于《伟大的虚构：财产、经济、社会 and 衰落的政治》（第二版扩充版，米塞斯研究院，2021 年；www.hanshoppe.com/tgf ）。另见上文注释 6 。

³¹⁰ See, e.g., Shael Herman, *The Louisiana Civil Code: A European Legacy for the United States* (Louisiana Bar Foundation, 1993), pp. 11 – 16; Shael Herman & David Hoskins, “Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations,” *Tul. L. Rev.* 54 (1980): 987 – 1051, p. 996 et seq. (discussing in Part III “The Contribution of the Enlightenment: A Drive to Systematization”); Stein, “Roman Law, Common Law, and Civil Law,” pp. 1594 – 95; and Julio C. Cueto-Rua, “The Future of the Civil Law,” *La. L. Rev.* 37, no. 3 (1976 – 77); <https://digitalcommons.law.lsu.edu/lalrev/vol37/iss3/2/>: 645 – 79, pp. 646, 652. See also Giovanni Sartori, *Democratic Theory* (Westport, Connecticut: Greenwood Press, 1962), pp. 231 – 37, 245 – 56 (discussing the political rationalism of the continental legal system).

例如，参见谢尔·赫尔曼，《路易斯安那州民法典：美国的欧洲遗产》（路易斯安那州律师基金会，1993 年），第 11-16 页；谢尔·赫尔曼和大卫·霍斯金斯，《法典结构的视角：历史经验、现代格式和政策考量》，《杜兰法律评论》54（1980 年）：987-1051，第 996 页及后续页（在第三部分“启蒙运动的贡献：走向系统化”中进行讨论）；斯坦因，“罗马法、普通法和大陆法”，第 1594-1595 页；以及胡利奥·C·库埃托-鲁阿，《大陆法的未来》，《路易斯安那法律评论》37，第 3 期（1976-1977

"确定的"、清晰的，因为规则是成文的；³¹¹ 并且是由立法者颁布的。路易斯安那州和法国等地的民法体系也被赞誉是 "本着启蒙精神"³¹² 起草的，建立在对民主、³¹³ 经济自由主义、³¹⁴ 私有财产、³¹⁵ 自由、³¹⁶ 个人主义、³¹⁷ 自然法³¹⁸ 和正义³¹⁹ 的意识形态承诺之上。

Most libertarians would agree that such virtues are genuinely justifiable and thus ought to be supported by any legitimate legal system. Moreover, civilians are also correct that these liberal principles are consistent with rationalism, because libertarian principles can also be justified with rationalist arguments.²⁰

年；<https://digitalcommons.law.lsu.edu/lalrev/vol37/iss3/2/>) : 645-79 , 第 646 、652 页。另见乔瓦尼·萨托利,《民主理论》(康涅狄格州韦斯特波特:格林伍德出版社,1962 年),第 231-237、245-256 页(讨论大陆法律体系的政治理性主义)。

³¹¹ See Part III.B, below. 见下面 Part III.B

³¹² See, e.g., Herman, The Louisiana Civil Code: A European Legacy for the United States, p. 12.

例如,参见赫尔曼,《路易斯安那州民法典:美国的欧洲遗产》,第 12 页。

³¹³ See, e.g., *ibid.* p. 12. However, “democracy” is nothing more than majoritarianism—i.e., mob rule—which does not deserve unqualified praise and thus does not belong in the same class as the other virtues listed above. See notes 22 and 86, below, and accompanying text (discussing some deficiencies of democracy).

例如,参见同上,第 12 页。然而,“民主”不过是多数主义——即暴民统治——不值得无条件的赞扬,因此与上面列出的其他美德不属于同一类别。参见下面的注释 22 和 86 以及附文(讨论民主的一些缺陷)。

³¹⁴ See, e.g., *ibid.* p. 12. 例如,参见同上,第 12 页。

³¹⁵ See, e.g., *ibid.* p. 15. 例如,参见同上,第 15 页。

³¹⁶ See, e.g., *ibid.* p. 15. 例如,参见同上,第 15 页。

³¹⁷ See, e.g., Cueto-Rua, “The Future of the Civil Law,” p. 652.

例如,参见库埃托-鲁阿,《民法的未来》,第 652 页。

³¹⁸ See, e.g., Alan Watson, *The Making of the Civil Law* 68 (Cambridge, Massachusetts and London: Harvard University Press, 1981); Cueto-Rua, “The Future of the Civil Law,” p. 652.

例如,参见艾伦·沃森,《民法的形成》第 68 页(马萨诸塞州剑桥市和伦敦:哈佛大学出版社,1981 年);库埃托-鲁阿,《民法的未来》,第 652 页。

³¹⁹ See, e.g., Cueto-Rua, “The Future of the Civil Law,” p. 677. I call these generally praiseworthy things, values, and conditions “virtues” for lack of a more generic description.

例如,参见库埃托-鲁阿,《民法的未来》,第 677 页。由于没有更通用的描述,我将这些通常值得称赞的事物、价值和条件称为“美德”。

大多数自由意志主义者都会同意，这些美德是真正合理的，因此应该得到任何合法法律制度的支持。此外，民法学者认为这些自由意志主义原则符合理性主义也是正确的，因为自由意志主义的原则也可以用理性主义的论据来证明。³²⁰

Under the libertarian conception of individual rights, the virtues typically cited in favor of the civil law are certainly necessary requirements of a just legal system. The virtues of economic liberalism, private property, freedom of contract, individualism, natural law, and justice are really only secondary derivations of the basic individual rights to person and property. Natural law is nothing more than the objective truth that each individual has certain rights—i.e., to own himself and to homestead unowned property or acquire it by contractual transfer. Justice is nothing more than giving a person his due, but what a person's "due" is depends upon what his rights are.²¹ Individualism has meaning and validity, because it is individuals that have rights. Economic liberalism, private property, and freedom of contract are only the playing out of the fact that individuals have a right to own, and thus trade, private property, and indeed have a right to do anything that is not aggression. Economic liberalism is only a consequence of the government's lack of authority to hamper free trade and association between individuals.²²

在自由意志主义的个人权利概念下，通常被引用来支持民法的美德当然是正义的法律制度的必要条件。经济自由主义、私有财产、自由、个人主义、自然法和正义等美德实际上只是基本的个人人身权和财产权的次级衍生。自然法无非是每个人都有某些权

³²⁰ See, e.g., Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc), chap. 7, and *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993], www.hanshoppe.com/eepp), chap. 13; "A Libertarian Theory of Punishment and Rights" (ch. 5); "Dialogical Arguments for Libertarian Rights" (ch. 6).

例如，参见汉斯-赫尔曼·霍普，《社会主义和资本主义理论：经济、政治和伦理》（阿拉巴马州奥本：米塞斯研究院，2010年[1989年]，www.hanshoppe.com/tsc），第7章，以及《私有财产的经济学与伦理学：政治经济与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006年[1993年]，www.hanshoppe.com/eepp），第13章；《自由意志主义的惩罚和权利理论》（第5章）；《自由意志主义权利的对话论证》（第6章）。

利的客观事实，即拥有自己的权利和拓殖无主财产或通过转让获得财产的权利。正义不过是给予一个人他应得的东西，但一个人的“应得”是什么，取决于他的权利是什么。³²¹个人主义具有意义和有效性，因为拥有权利的是个人。经济自由主义、私有财产和自由只是个人有权拥有并因此交易私有财产这一事实的体现，事实上，个人有权做任何非侵犯性的事情。经济自由主义只是政府无权阻碍个人之间自由贸易和结社的结果。³²²

Any system of law must be compatible with the rights that individual humans have, and, to that extent, law should be “certain”—that is, we should be certain that law will protect our rights and will not infringe them. The more general goal of “certainty” in

³²¹ “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., trans., *The Institutes of Justinian: Text, Translation, and Commentary* (Amsterdam: North-Holland Publishing Company, 1975).

“正义是始终如一且永恒不变地希望给予每个人应得之物……法律的箴言是：诚实地生活，不伤害任何人，给予每个人应得之物。” J.A.C. 托马斯编著并翻译，《查士丁尼法学阶梯：文本、翻译与评注》（阿姆斯特丹：北荷兰出版公司，1975 年）。

³²² Almost all of the virtues acclaimed by civilians—as understood here as necessarily compatible with and supportive of individual rights—are genuine, objectively valid virtues or standards that the civil law must be judged by. However, the concept of “democracy” is not in the same class as the other alleged virtues of the civil law. Although the term “democracy” is widely misused today to represent things such as self-determination, economic liberties, or civil liberties, it actually denotes a type of polity whereby certain rules are made by majority vote. Under democracy, nothing prevents a majority from voting for whatever sort of tyrant or tyrannical laws that they like. There is no guarantee, or even likelihood, that laws enacted by a majority or their elected representatives will tend to be just—in fact, it is unlikely, as argued below. See Part III.C.3, below and Hans-Hermann Hoppe, *Democracy: The God That Failed* (Transaction, 2001; www.hanshoppe.com/democracy).

几乎所有民法学者所推崇的美德——在此被理解为必然符合并支持个人权利——都是真正的、客观有效的美德或标准，民法必须据此进行评判。然而，“民主”这一概念与其他所谓的民法美德并不属于同一类。尽管“民主”一词如今被广泛滥用于代表自决、经济自由或公民自由等事物，但它实际上指的是一种政体，在这种政体中，某些规则由多数人投票决定。在民主制度下，没有什么能阻止多数人投票支持他们喜欢的暴君或专制法律。没有保证，甚至不太可能，多数人或其选出的代表制定的法律会趋向于正义——事实上，正如下面所论证的，这不太可能。参见下面第三部分 C.3 以及汉斯-赫尔曼·霍普，《民主：失败的上帝》（Transaction，2001 年；www.hanshoppe.com/democracy）。

the law is merely an aspect of the rule of law, which is necessary for any civilization to survive. Without certainty and the rule of law, individuals are not able to predict the results of their actions and are thus unable to rationally plan for the future.

任何法律体系都必须与人类个体所拥有的权利相一致，在这种程度上，法律应当是“确定的”——也就是说，我们应当确信法律将保护我们的权利，并且不会侵犯这些权利。法律的“确定性”这一更为普遍的目标只是法治的一个方面，而法治是任何文明存续的必要条件。没有确定性和法治，个人就无法预测其行动的结果，从而也无法理性地规划未来。

In Part III, below, I argue that centralized legal systems like the civil law and, increasingly, the legislation-dominated common law systems are antithetical to the values of justice, natural law, individual rights, and certainty. Civilians generally support these values, yet they also support the idea of the primacy of legislation which will tend to destroy these values. But how can the civil law be the great system of reason and rationalism, how can it support economic liberalism and individualism, if the civil law is based on legislation, which undercuts these things? Although worshipers of legislation claim to be rationalists, only a naive sort of rationalism, the same naivety that is behind the desire of socialists to “scientifically” plan market activity, can underlie such claims.³²³

在下文第三部分中，我将论证中心化的法律体系，如大陆法系，以及越来越多的以立法为主导的普通法系，是与正义、自然法、个人权利和确定性等价值观背道而驰的。民法学者普遍支持这些价值观，然而他们也支持立法至上的理念，而立法至上将倾向于摧毁这些价值观。但是，如果民法以立法为基础，而立法又削弱了这些东西，那么民法又怎么能成为理性和理性主义的伟大体系，又怎么能支持经济自由主义和个人主义呢？尽管立法的崇拜者自称是理性主义者，但只有一种天真的理性主义，与社会主义者希望“科学地”规划市场活动背后的那种天真相同，才是这种主张的基础。³²³

Civilians are correct that reason and even rationalism justify the tenets of individualism, individual rights, economic liberalism, private property, and natural law. Contrary to claims of civilians, however, it is a completely private, decentralized law-finding system

³²³ See Part IV, below.

见下文第 IV 部分。

that is compatible with and that fosters such virtues and principles. Therefore, as will be shown, it is non-legislative, decentralized law-finding systems that are imbued with the spirit of reason and true rationalism. Legislation-based systems are not compatible with either libertarianism or rationalism, or with our natural human rights.

民法学家正确地认为，理性甚至理性主义证明了个人主义、个人权利、经济自由主义、私有财产和自然法等信条的正当性。然而，与民法学家的说法相反，与这些美德和原则相适应并能促进这些美德和原则的是一种完全私人的、去中性化的法律发现体系。因此，正如将要证明的那样，非立法、去中性化的法律发现体系才是充满理性精神和真正的理性主义。以立法为基础的制度既不符合自由意志主义，也不符合理性主义，更不符合我们的天赋人权。

3 法，立法和自由

LAW, LEGISLATION, AND LIBERTY

In this Part, I explain the various reasons why legislation is incompatible with individual rights and the related standards that any valid legal order must uphold. Each criticism of legislation applies equally to the civil law, because the civil law is a centralized (i.e., legislative) law-making system, and also applies to modern common law systems to the extent that legislation has supplanted (decentralized) case law as the primary source of law.

在本部分，我将解释立法与个人权利不相容的各种原因，以及任何有效的法律秩序必须坚持的相关标准。对立法的每一种批评都同样适用于大陆法系，因为大陆法系是一个中心化的（即立法）立法体系，而且也适用于现代普通法系，因为立法已经取代（去中性化的）判例法成为法律的主要来源。

A 无政府资本主义 Anarcho-Capitalism

In the opinion of many libertarians, a principled and consistent application of libertarian principles invalidates not only most of today's (legislated) laws, but also the state itself, since government is an agency of institutionalized aggression.²⁴ The state, by its mere existence, rests on aggression and necessarily initiates violence against innocent individuals (e.g., taxation; monopolizing law). The state cannot exist without aggression, and if aggression is illegitimate, then so is the state.²⁵

许多自由意志主义者认为，原则性地、始终如一地适用自由意志主义原则，不仅会使当今大多数（立法）法律无效，而且会使国家本身无效，因为政府是一个制度化的侵犯机构。³²⁴国家的存在本身就依赖于侵犯，必然会对无辜的个人施加暴力（例如征税；垄断法律）。没有侵犯，国家就无法存在，如果侵犯是非法的，那么国家也是非法的。

³²⁵

³²⁴ See “What It Means to Be an Anarcho-Capitalist” (ch. 3) and “What Libertarianism Is” (ch. 2).

见《无政府资本主义意味着什么》（第三章）和《何为自由意志主义》（第二章）。

³²⁵ Regarding the possibility of a system of anarchy that is ordered, not chaotic, see Hans-Hermann Hoppe, “The Private Production of Defense,” in *The Great Fiction*; Randy E. Barnett, “Imagining a Polycentric Constitutional Order: A Short Fable,” in *The Structure of Liberty: Justice and the Rule of Law*, 2d ed. (Oxford, 2014); Robert P. Murphy, *Chaos Theory: Two Essays on Market Anarchy*, Second Edition (Auburn, Ala.: Mises Institute, 2010; <https://mises.org/library/chaos-theory-two-essays-market-anarchy-0>); Gerard Casey, *Libertarian Anarchy: Against the State* (Continuum International Publishing Group, 2012); Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco, Ca.: Pacific Research Institute for Public Policy, 1990); David Friedman, *The Machinery of Freedom: Guide to A Radical Capitalism*, 3d ed. (2014); Morris & Linda Tannehill, *The Market for Liberty* (Auburn, Ala.: Mises Institute, 2007 [1970]; <https://mises.org/library/market-liberty-1>); Murray N. Rothbard, *For a New Liberty*, second ed. (Auburn, Ala.: Mises Institute, 2006; <https://mises.org/library/new-liberty-libertarian-manifesto>), esp. chap. 12; George H. Smith, “Justice Entrepreneurship in a Free Market,” in *Atheism, Ayn Rand, and Other Heresies* (Buffalo, N.Y.: Prometheus Books, 1991); Jeffrey Rogers Hummel, “National Goods Versus Public Goods: Defense, Disarmament, and Free Riders,” *Rev. Austrian Econ.* 4 (1990; <https://mises.org/library/national-goods-versus-public-goods-defense-disarmament-and-free-riders>): 88–122; and Terry Anderson & P.J. Hill, “An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West,” *J. Libertarian Stud.* 3, no. 1 (1979; <https://mises.org/library/american-experiment-anarcho-capitalism-not-so-wild-wild-west>): 9–29. Additional references are listed in Kinsella, “The Greatest Libertarian Books,” *StephanKinsella.com* (Aug. 7, 2006) and Hans-Hermann Hoppe, “Anarcho-Capitalism: An Annotated Bibliography,” *LewRockwell.com* (Dec. 31, 2001; <https://archive.lewrockwell.com/hoppe/hoppe5.html>).

关于有序而非混乱的无政府主义系统的可能性，可以参考汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）的《防卫的私人生产》，收录于《伟大的虚构》；兰迪·E·巴尼特（Randy E. Barnett）的《想象一个多中心的宪法秩序：一则简短的寓言》，收录于《自由的结构：正义与法治》第二版（牛津，2014年）；罗伯特·P·墨菲（Robert P. Murphy）的《混沌理论：关于市场无政府主义的两篇论文，第二版》（阿拉巴马州奥本：米塞

As most libertarians are aware, this view is known as “anarcho-capitalism” or anarchist libertarianism, since this form of anarchism follows from a respect for individual rights that are also a feature of laissez faire capitalism. It almost goes without saying that, if government may not exist, neither may legislation, because only a governmental legislature can enact statutes. There is simply no room for government and legislation in the moral universe. This does not mean, however, that there would be no law if there were no government. Certainly law can develop in a decentralized court system, whether a government-based common-law system or a private system. As Rothbard explains:

[I]t is perfectly possible, in theory and historically,[26] to have efficient and courteous police, competent and learned judges, and a body of systematic and socially accepted law—and none of these things being furnished by a coercive government.[27]

斯研究院，2010 年；<https://mises.org/library/chaos-theory-two-essays-market-anarchy-0>）；杰拉德·凯西（Gerard Casey）的《自由意志主义的无政府主义：反对国家》（Continuum International Publishing Group, 2012 年）；布鲁斯·L·本森（Bruce L. Benson）的《法律事业：没有国家的正义》（旧金山，加利福尼亚州：太平洋公共政策研究所，1990 年）；大卫·弗里德曼（David Friedman）的《自由的机制：激进资本主义指南》第三版（2014 年）；莫里斯和琳达·坦内希尔（Morris & Linda Tannehill）的《自由市场》（阿拉巴马州奥本：米塞斯研究院，2007 年[1970 年]；<https://mises.org/library/market-liberty-1>）；穆瑞·N·罗斯巴德（Murray N. Rothbard）的《为了新自由》第二版（阿拉巴马州奥本：米塞斯研究院，2006 年；<https://mises.org/library/new-liberty-libertarian-manifesto>），特别是第 12 章；乔治·H·史密斯（George H. Smith）的《自由市场中的正义的企业家精神》，收录于《无神论、安·兰德和其他异端》（纽约州水牛城：普罗米修斯图书，1991 年）；杰弗里·罗杰斯·赫梅尔（Jeffrey Rogers Hummel）的《国家物品与公共物品：国防、裁军和搭便车者》，《奥地利经济学评论》4 卷（1990 年；<https://mises.org/library/national-goods-versus-public-goods-defense-disarmament-and-free-riders>）：88-122；以及特里·安德森和 P.J. 希尔（Terry Anderson & P.J. Hill）的《美国无政府资本主义实验：并非那么狂野的西部》，《自由意志主义研究杂志》3 卷 1 期（1979 年；<https://mises.org/library/american-experiment-anarcho-capitalism-not-so-wild-wild-west>）：9-29。更多参考文献列于金塞拉的《最伟大的自由意志主义书籍》，StephanKinsella.com（2006 年 8 月 7 日）和汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）的《无政府资本主义：带注释的参考书目》，LewRockwell.com（2001 年 12 月 31 日；<https://archive.lewrockwell.com/hoppe/hoppe5.html>）。

正如大多数自由意志主义者所了解的，这种观点被称为“无政府资本主义”或无政府主义的自由意志主义，因为这种形式的无政府主义源于对个人权利的尊重，这也是自由放任资本主义的一个特征。几乎不用说，如果政府有可能不存在，那么立法也就不可能存在，因为只有政府立法机构才能制定法规。在道德世界中根本没有政府和立法的空间。然而，这并不意味着如果没有政府就没有法律。当然，法律可以在去中心化的法院系统中发展，无论是基于政府的普通法系统还是私人系统。正如罗斯巴德所解释的：

“在理论上和历史上，³²⁶拥有高效且有礼貌的警察、能干且博学的法官以及一套系统且社会认可的法律是完全可能的——而这些都不是由强制政府提供的。”³²⁷

The remainder of this Part is devoted to additional critiques of legislation that do not depend on anarcho-capitalism but only on the general rights and principles accepted by libertarians in general. In other words, one does not need to be an anarchist libertarian to oppose legislation as a means of making, developing, or identifying law.

这一部分的其余内容致力于对立法的其他批评，这些批评不依赖于无政府资本主义，而仅仅基于自由意志主义者普遍接受的一般权利和原则。换句话说，一个人不必是无政府主义的自由意志主义者，就可以反对将立法作为制定、发展或确定法律的手段。

³²⁶ See Rothbard, *For A New Liberty*, pp. 286 – 89, discussing the largely successful, anarchic system that lasted for roughly 1,000 years in ancient Celtic Ireland. See also Benson, *The Enterprise of Law*, discussing historical examples and theoretical bases for privately-produced justice; Friedman, *The Machinery of Freedom*, chap. 45 (discussing anarchy in ancient Iceland); and Casey, *Libertarian Anarchy*, chap. 5 (discussing anarchy in ancient Ireland and other societies).

参见罗斯巴德的《为了新自由》，第 286-289 页，讨论了在古代凯尔特爱尔兰持续了大约 1000 年的、在很大程度上成功的无政府体系。也可参见本森的《法律事业》，其中讨论了私人提供正义的历史实例和理论基础；弗里德曼的《自由的机制》，第 45 章（讨论了古代冰岛的无政府主义）；以及凯西的《自由意志主义的无政府主义》，第 5 章（讨论了古代爱尔兰和其他社会的无政府主义）。

³²⁷ Rothbard, *For A New Liberty*, p. 290.

罗斯巴德，《为了新自由》，第 290 页。

B. 确定性 Certainty

确定性，法治和立法 Certainty, the Rule of Law, and Legislation

Certainty, which includes clarity and stability in the law, is a necessary feature of any just legal order, as it is a crucial component of the rule of law itself. "The rule of law" is a phrase that is used with varying meanings:

*(1) the absence of arbitrary power on the part of the government to punish citizens or to commit acts against life or property; (2) the subjection of every man, whatever his rank or condition, to the ordinary law of the realm and to the jurisdiction of the ordinary tribunals; and (3) a predominance of the legal spirit in English institutions...*²⁸

The rule of law is necessary because a government with arbitrary power to inflict violence on its subjects is a standing threat to individual liberty. And if laws are not equally applicable to all men and women, some individual rights will not be respected, because all men and women have certain inalienable, natural rights by their very nature as humans. Clearly, then, the rule of law must be maintained by any just legal system. But the rule of law "cannot be maintained without actually securing the certainty of the law, conceived of as the possibility of long-run planning on the part of individuals in regard to their behavior in private life and business."²⁹ Thus, a direct implication of rationalism is that the law should be certain.

确定性，包括法律的清晰性和稳定性，是任何正义法律秩序的必要特征，因为它是法治本身的关键组成部分。“法治”这个短语的使用含义各不相同：

*(1) 政府方面不存在任意惩罚公民或对生命或财产实施行为的权力； (2) 无论地位或状况如何，每个人都服从王国的普通法律和普通法庭的管辖权； (3) 法律精神在英国制度中占主导地位……*³²⁸

法治是必要的，因为拥有对其臣民施加暴力的任意权力的政府对个人自由是一种持续

³²⁸ Leoni, Freedom and the Law, p. 61.
莱奥尼，《自由与法律》，第 61 页。

的威胁。而且，如果法律并非对所有男女平等适用，一些个人权利将得不到尊重，因为所有男女因其作为人的本质而拥有某些不可剥夺的自然权利。显然，任何正义的法律制度都必须维护法治。但是，“如果不能实际确保法律的确定性，即个人在私人生活和商业中对其行为进行长期规划的可能性，就无法维持法治。”但是，“如果不能实际确保法律的确定性，即个人在私人生活和商业中对其行为进行长期规划的可能性，就无法维持法治。”³²⁹因此，理性主义的一个直接含义是法律应该是确定的。

Even those favoring legislation recognize the importance of certainty; indeed, certainty is one of the purported hallmarks of the civil law. In the words of Professor Vernon Palmer:

*What enduring objectives underlie the relentless drive toward codification in the twentieth century? In my view, this may be explained in three words—certainty, justice, and modernity.... An unchanging purpose of codification and recodification is to overcome an existing fragmentation of law and legal sources in order to create the conditions necessary for legal certainty.*³⁰

即使是那些赞成立法的人也承认确定性的重要性；事实上，确定性是大陆法系所谓的标志之一。用弗农·帕尔默教授的话说：

“二十世纪对法典编纂的不懈追求是基于什么持久的目标呢？在我看来，这可以用三个词来解释——确定性、正义和现代性……编纂和重新编纂法典的一个永恒不变的目标是克服现有法律和法律渊源的支离破碎 状况，以便为法律的确定性创造必要条件。”³³⁰

³²⁹ Ibid., p. 95.

同上，第 95 页。

³³⁰ Vernon Palmer, “Celebrating the Qu é bec Codification Achievement: A Louisiana Perspective,” Loy. L. Rev. 38 (1992; <https://perma.cc/JK8T-HX4J>): 311 – 27, p. 315 (emphasis added). See also Herman & Hoskins, “Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations,” pp. 1001 – 1002;

Yet, as Leoni points out, there is much more certainty in a decentralized legal system, than in a centralized legislative system. When the legislature has the ability to change the law from day to day, we can never be sure what rules will apply tomorrow.³¹ As Leoni observes, in a system of legislative supremacy:

[N]obody can tell whether a rule may be only one year or one month or one day old when it will be abrogated by a new rule. All these rules are precisely worded in written formulae that readers or interpreters cannot change at their will. Nevertheless, all of them may go as soon and as abruptly as they came. The result is that, if we leave out of the picture the ambiguities of the text, we are always "certain" as far as the literal content of each rule is concerned at any given moment, but we are never certain that tomorrow we shall still have the rules we have today.³²

然而，正如莱奥尼所指出的，去中性化的法律体系比中心化的立法体系更具有确定性。当立法机构有能力逐日修改法律时，我们永远无法确定明天将适用什么规则。³³¹ 正如

Herman, *The Louisiana Civil Code: A European Legacy for the United States*, p. 11; idem, “Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century,” *Tul. Civ. L. Forum* 8 (1993): 63 – 80, p. 65 (“Civilians presuppose as a fundamental tenet that the fountainhead of stability is their legislation.”); and Leoni, *Freedom and the Law*, pp. 73, 142 – 43 (a desire for certainty in the law, in the sense of verbal precision, was one of the chief reasons for the continental codification efforts).

弗农·帕尔默，《庆祝魁北克法典编纂成就：路易斯安那州视角》，《洛约拉法律评论》38 卷（1992 年；<https://perma.cc/JK8T-HX4J>）：311 – 27，第 315 页（着重号为原文所加）。另见赫尔曼和霍斯金斯，《关于法典结构的观点：历史经验、现代格式和政策考量》，第 1001 – 1002 页；赫尔曼，《路易斯安那州民法典：美国的欧洲遗产》，第 11 页；同上，《小风险与大回报：二十一世纪前夕北美民法典编纂》，《塔尔萨民法论坛》8 卷（1993 年）：63 – 80，第 65 页（“民法学者假定作为基本原则，稳定性的源泉是他们的立法。”）；以及莱奥尼，《自由与法律》，第 73、142 – 43 页（从语言精确性的意义上讲，对法律确定性的渴望是大陆法典编纂努力的主要原因之一）。

³³¹ As the not-quite-trite bumper sticker or plaque reads, “No man’s life, liberty or property is safe while the legislature is in session.” (Attribution: Gideon J. Tucker; Wikipedia, <https://perma.cc/PB8G-DP4J>.)

正如那个不太陈腐的汽车保险杠贴纸或标语牌上所写的那样：“当立法机构开会时，任何人的生命、自由或财产都不安全。”（出处：吉迪恩·J·塔克；维基百科，<https://perma.cc/PB8G-DP4J>。）

莱奥尼所言，在立法至上的制度中：

“没有人能够知道，当一项规则被新规则废除时，它的历史可能只有一年、一个月或一天。所有这些规则都以书面公式的形式精确表述，读者或解释者不能随意更改。然而，所有这些规则都有可能像它们来时一样迅速，然后突然消失。其结果是，如果我们撇开文本中的含糊之处不谈，我们在任何时候都能“确定”每条规则的字面内容，但我们永远不能确定明天我们是否还能拥有今天的规则。”³³²

Thus:

*[A] legal system centered on legislation, while involving the possibility that other people (the legislators) may interfere with our actions every day, also involves the possibility that they may change their way of interfering every day. As a result, people are prevented not only from freely deciding what to do, but from foreseeing the legal effects of their daily behavior.*³³

We may have, then, either rule by legislators or the rule of law, but not both.³⁴ In the words of the Italian scholar Giovanni Sartori, “Mass fabrication of laws ends by jeopardizing the other fundamental requisite of law—certainty.”³⁵

因此：

“一个以立法为中心的法律体系，在涉及其他人（立法者）每天都可能干涉我们行动的同时，也涉及他们每天都可能改变干涉方式的可能性。因此，人们不仅无法自由

³³² Leoni, *Freedom and the Law*, p. 75.
莱奥尼，《自由与法律》，第 75 页。

决定做什么，也无法预见其日常行为的法律后果。³³³

那么，我们可能要么有立法者的统治，要么有法治，但不可能两者兼得。³³⁴ 用意大利学者乔瓦尼·萨托利（Giovanni Sartori）的话说，“大量制定法律的结果是最终损害了法律的另一个基本的必要条件——确定性”。³³⁵

³³³ Ibid., p. 10.

同上，第 10 页。

³³⁴ See Giovanni Sartori, *Liberty and Law* (Menlo Park, Ca.: Institute for Humane Studies, 1976), at 15 – 16 et pass. The “other” fundamental requisite of law is that law be based on rules of general application, a requisite that special statutes tend to undermine. I am grateful to Leonard Liggio for calling Sartori’s works to my attention. But having statutory, artificial law be predictable, known ahead of time, and of “general applicability” is not sufficient for law to be just. If this is your only criteria, you can support all manner of statist laws, as Hayek does. See Walter E. Block, “Hayek’s Road to Serfdom,” *J. Libertarian Stud.* 12, no. 2 (Fall 1996; <https://mises.org/library/hayeks-road-serfdom>), pp. 327 – 50.

参见乔瓦尼·萨托利（Giovanni Sartori）的《自由与法律》（Menlo Park, Ca.: Institute for Humane Studies, 1976），第 15-16 页及其他各处。法律的“其他”基本要求是法律应基于普遍适用的规则，而特别成文法往往会破坏这一要求。我很感激伦纳德·利吉奥（Leonard Liggio）让我注意到萨托利的作品。但是，成文的、人为的法律具有可预测性、能够提前知晓并且具有“普遍适用性”，对于法律的正义性来说是不够的。如果这是你唯一的标准，你就可以像哈耶克那样支持各种国家主义法律。参见沃尔特·E·布洛克（Walter E. Block）的《哈耶克的〈通往奴役之路〉》，《自由意志主义研究杂志》12 卷第 2 期（1996 年秋季；<https://mises.org/library/hayeks-road-serfdom>），第 327-350 页。

³³⁵ Ibid. at 38. See also Ridgway K. Foley, Jr., “Invasive Government and the Destruction of Certainty,” *The Freeman* (Jan. 1988; <https://fee.org/articles/invasive-government-and-the-destruction-of-certainty/>); Peter H. Aranson, “Bruno Leoni in Retrospect,” *Harv. J. L. & Pub. Pol’y* 11 (1988): 661 – 711, pp. 672 – 73 & 681 – 82; Leonard P. Liggio & Tom G. Palmer, “Freedom and the Law: A Comment on Professor Aranson’s Article,” *Harv. J. L. & Pub. Pol’y* 11 (1988; <http://tomgpalmer.com/selected-publications/>): 713 – 25.

同上，第 38 页。另见小里奇韦·K·福利（Ridgway K. Foley, Jr.），《侵入性政府与确定性的破坏》，《自由人》（1988 年 1 月；<https://fee.org/articles/invasive-government-and-the-destruction-of-certainty/>）；彼得·H·阿兰森（Peter H. Aranson），《回顾布鲁诺·莱奥尼》，《哈佛法律与公共政策杂志》11 卷（1988 年）：661-711，第 672-673 页和 681-682 页；伦纳德·P·利吉奥（Leonard P. Liggio）和汤姆·G·帕默（Tom G. Palmer），《自由与法律：对阿兰森教授文章的评论》，《哈佛法律与

去中性化的法律发现系统 Decentralized law-finding systems

a. 法院裁决的限制：管辖权、裁决范围和先例 *Limits of Courts' Decisions: Jurisdiction, Scope of Decision, and Precedent*

By contrast, judicial decisions—whether by private arbitrators in an anarcho-capitalist society or by judges in a government-established common-law system—are much less able to cause legal uncertainty than is legislation. This is because, as Leoni explains, the position of common-law or decentralized judges “is fundamentally different from that of legislators, at least in three very important respects.”³³⁶ First, judges can only make decisions when asked to do so by the parties concerned. Second, the judge’s decision is less far-reaching than legislation because it primarily affects the parties to the dispute, and only occasionally affects third parties or others with no connection to the parties involved.³³⁷

相比之下，司法判决——无论是无政府资本主义社会中的私人仲裁员，还是政府建立的普通法体系中的法官——造成法律不确定性的可能性要比立法小得多。这是因为，正如莱奥尼所解释的，普通法或去中性化的法官的地位“至少在三个非常重要的方面，与立法者有根本的不同。”³³⁶ 首先，法官只能在当事人要求时才能做出决定。其次，法官的裁决不如立法那样影响深远，因为它主要影响争议的当事人，只是偶尔影响到第三方或与涉案方无关的其他人。³³⁷

公共政策杂志》11 卷（1988 年；<http://tomgpalmer.com/selected-publications/>）：713-725。

³³⁶ Leoni, *Freedom and the Law*, p. 22. See also Aranson, “Bruno Leoni in Retrospect,” pp. 669 – 71 and Rothbard, *For a New Liberty*, pp. 283 et seq. (discussing Leoni’s views with respect to these issues).

莱奥尼，《自由与法律》，第 22 页。另见阿兰森，《回顾布鲁诺·莱奥尼》，第 669-71 页，以及罗斯巴德，《为了新自由》，第 283 页及后续内容（讨论了莱奥尼在这些问题上的观点）。

³³⁷ As Professor Benson explains, without legislative interference by non-judges, the common law would grow gradually. It would grow and develop in the same way that all customary law grows and develops, particularly as a consequence of the mutual consent of parties entering into reciprocal arrangements. For example, two parties may enter into a contract, but something then occurs that the contract did not clearly

Regarding this second point, let me point out that this is true only for the plaintiff, however, in systems where a verdict may be enforced against a defendant regardless of his consent to the court's jurisdiction— i.e., where courts have compulsory jurisdiction over certain individuals. But even this power is of a drastically lesser scope than the ability of legislators to enact statutes at any time, without being requested by anyone, and that affect everyone, not just plaintiffs and defendants. Further, in a totally private court system, courts do not necessarily have to have the ability to assert jurisdiction over unwilling defendants.³⁸ And even in a government court system such as the common law, it is not absolutely necessary that the courts have compulsory jurisdiction over unwilling participants. By contrast, legislation by its nature arrogates to itself jurisdiction over all the government's subjects.

关于第二点，请允许我指出，这只适用于原告，但在无论被告是否同意法院的管辖权都可对其执行判决的制度中，即法院对某些个人具有强制管辖权的制度中。但即使是这种权力，其范围也远远小于立法者无需任何人请求即可随时制定法规的能力，而且这种能力影响的是所有人，而不仅仅是原告和被告。此外，在一个完全私人的法院系统中，法院不一定有能力对不情愿的被告行使管辖权。³³⁸而且，即使在像普通法这样的政府法院体系中，法院对不情愿的当事人拥有强制管辖权也并非绝对必要。相比之

account for. The parties agree to call upon an arbitrator or mediator to help lead them to a solution. The solution affects only those parties in the dispute, but if it turns out to be effective and the same potential conflict arises again, it may be voluntarily adopted by others. In this way, the solution becomes part of customary law.

Benson, *The Enterprise of Law*, p. 283 (endnote omitted).

正如本森教授所解释的那样，如果没有非法官的立法干预，普通法将逐渐发展。它将与所有习惯法一样的方式成长和发展，特别是作为各方达成互惠安排的相互同意的结果。例如，双方可能签订了一份，但随后发生了中没有明确说明的事情。双方同意请仲裁员或调解员帮助他们找到解决办法。该解决方案只影响争端各方，但如果结果证明是有效的，并且再次出现同样的潜在冲突，则可能被其他各方自愿采用。这样，解决方案就成为习惯法的一部分。

本森，《法律事业》，第 283 页(尾注省略)。

³³⁸ See Benson, *The Enterprise of Law*, p. 33 et pass.; Tannehill & Tannehill, *The Market for Liberty*, p. 66 et seq; Bruce L. Benson, “Customary Law as a Social Contract: International Commercial Law,” *Constitutional Political Economy* 3 (1992): 1 – 27, p. 9. 参见本森，《法律事业》，第 33 页及后续页；坦尼希尔和坦尼希尔，《自由市场》，第 66 页及后续页；布鲁斯·L·本森，《作为社会的习惯法：国际商法》，《宪法政治经济学》3 卷（1992 年）：1-27，第 9 页。

下，立法本质上擅自将管辖权扩展到政府的所有臣民身上。

Third, a judge's discretion is further limited by the necessity of referring to similar precedents.³⁹ This does not necessarily mean that a judge is automatically bound by a prior judicial decision on similar facts, but that at least such precedents are influential. When law is viewed as being found rather than made, it makes sense that one court would refer to principles already discovered and developed over the centuries by other judges. Because individuals crave certainty and predictability, they will tend to prefer decisions of courts that respect the wisdom of established custom and precedent, where possible. Thus, even a government court will feel a necessity to refer to similar precedents, so that its judgments and reasoning will be respected. A private court will have even more incentive to respect relevant precedents so as to gain and retain customers.

第三，法官的自由裁量权因必须参考类似先例而受到进一步限制。³³⁹这并不一定意味着法官自动受先前关于类似事实的司法判决的约束，但至少这些先例是有影响力的。当法律被视为被发现而非被制定时，一个法院参考其他法官几个世纪以来已经发现和发展的原则是合情合理的。由于个人渴望确定性和可预见性，他们会倾向于选择尽可能尊重既定习惯和先例智慧的法院判决。因此，即使是政府法院也会觉得有必要参考类似的先例，以便其判决和推理得到尊重。私人法院则更有动力尊重相关先例，以争取和留住客户。

But a court's essential job is to issue a just decision rather than automatically following precedents through blind obedience. Indeed, under the Roman law, and under the common law as it existed at the time of Blackstone, an individual decision was not absolutely binding on future courts.⁴⁰ Even the great common-law advocate "Blackstone was not a slavish adherent of the principle of stare decisis (decision according to precedent)—a prior decision could be overruled if 'contrary to reason'...."⁴¹ But Blackstone did favor stare decisis as a means of subordinating judges to law and for stability in the law:

³³⁹ See Benson, *The Enterprise of Law*, pp. 17 & 364.

参见本森，《法律事业》，第 17 页和第 364 页。

*For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments...*⁴²

但法院的基本职责是做出正义的判决，而不是盲目服从先例。实际上，在罗马法下，以及在布莱克斯通时代存在的普通法下，个体的裁决对未来的法院并非绝对具有约束力。³⁴⁰即使是伟大的普通法倡导者“布莱克斯通也不是遵循先例原则（根据先例做出裁决）的盲目追随者——如果‘违背理性’，先前的裁决可以被推翻……”。³⁴¹但布莱克斯通确实赞成‘遵循先例’原则，将其作为一种使法官服从法律并使法律保持稳定的手段：

“遵循以前的先例是一个既定的规则，当相同的问题再次在诉讼中出现时：既要保持司法的天平平衡稳定，不受每一位新法官意见的影响而动摇；也是因为在那种情况下，法律已被郑重宣布和确定，以前不确定、也许无关紧要的东西，现在变成了一个永久性的规则，任何后续法官都不能根据其个人情感进行更改或变动……”³⁴²

In this sense, the civilian concept of jurisprudence constante is more likely to be adhered

³⁴⁰ Gordon Tullock, “Courts as Legislators,” in Robert L. Cunningham, ed., *Liberty and the Rule of Law* (College Station, Texas: Texas A&M University Press, 1979), chap. 5, p. 142.

戈登·塔洛克，《作为立法者的法院》，收录于罗伯特·L·坎宁安编，《自由与法治》（德克萨斯州大学城：德克萨斯 A&M 大学出版社，1979 年），第 5 章，第 142 页。

³⁴¹ Richard A. Posner, “Blackstone and Bentham,” *J. Law & Econ.* 19 (1976): 569 – 606, p. 584 (citing 1 William Blackstone, *Commentaries on the Laws of England* § 83, at *70).

理查德·A·波斯纳，《布莱克斯通和边沁》，《法律与经济杂志》19 卷（1976 年）：569-606，第 584 页（引用 1 威廉·布莱克斯通，《英国法释义》§ 83，第 *70 页）。

³⁴² 1 Blackstone, *Commentaries on the Laws of England* § 83, at *69, also quoted in Posner, “Blackstone and Bentham,” at 582.

1 布莱克斯通，《英国法释义》§ 83，第 *69 页，也在波斯纳的《布莱克斯通和边沁》中被引用，第 582 页。

to by private courts than stare decisis. (Stare decisis contemplates adherence by a court to a principle of law announced and applied in a single occasion in the past. Under the doctrine of jurisprudence constante, the rule of law upon which repeated decisions in a long line of cases is based is entitled to great weight in subsequent decisions.⁴³) In any event, it is very likely that judges will always attempt to distinguish or at least criticize similar precedents even if they choose not to follow them.⁴⁴ As mentioned above, this will tend to limit the judge's discretion to "make" law.

从这个意义上说，大陆法系的“恒定法学”概念比遵循先例更有可能被私人法院所遵循。

（遵循先例意味着法院遵守在过去单个场合宣布和适用的法律原则。在恒定法学的原则下，在一系列长期案件中基于其作出重复裁决的法律规则在后续裁决中具有很大的权重。³⁴³）无论如何，即使法官选择不遵循类似的先例，他们也很可能总是试图区分或至少批评这些先例。³⁴⁴如上所述，这往往会限制法官“制定”法律的自由裁量权。

b. 政府法院：市场外权力与变相立法 Government Courts: Extra-Market Powers and Disguised Legislation

Thus, decentralized law-finding systems offer more certainty than centralized law-making systems. As the discussion above shows, however, in a government-backed common-law type of decentralized system (as opposed to a wholly private court system), the common law itself can develop legislative characteristics that tend to undermine certainty just as legislation does. This is because common-law courts are government courts and thus have extra-market powers, such as the power to subpoena, the power of compulsory jurisdiction over defendants, and the power of judicial review.

因此，去中心化的法律发现系统比中心化的立法系统提供了更多的确定性。然而，正如上述讨论所示，在政府支持的普通法类型的去中心化的系统中（与完全私人的法院系统相反），普通法本身可能会发展出与立法类似的、倾向于破坏确定性的立法特征。

³⁴³ See *Johnson v. St. Paul Mercury Ins. Co.*, 236 So.2d 216, 218 (La. 1970).

参见 *Johnson 诉 St. Paul Mercury 保险公司案*，236 So.2d 216, 218 (路易斯安那州，1970 年)。

³⁴⁴ See Rothbard, *For a New Liberty*, at 282 et seq.

参见罗斯巴德，《为了新自由》，第 282 页及后续文本。

这是因为普通法院是政府法院，因此拥有市场外的权力，如传唤权、对被告的强制管辖权和司法审查权。

Supreme courts, for example, may engage in what is really disguised legislation. The United States Supreme Court does this all the time.⁴⁵ However, this is not a problem of decentralized law itself, but of involving government in the court system. Under anarcho-capitalism, with a system of totally private courts and judges, these problems would be minimized as much as is possible in the real world. And, as Leoni points out:

*[E]ven supreme courts are not at all in the same practical position as legislators. After all, not only the inferior courts, but also the supreme courts, may issue decisions only if asked to do so by the parties concerned; and although supreme courts are in this respect in a different position from inferior courts, they are still bound to “interpret” the law instead of promulgating it... [Further,] under a system of “binding” precedent, supreme courts too may be bound ... by their own precedents... [T]his makes for a considerable difference between judges of supreme courts and legislators as far as the unwelcome imposition of their respective wills on a possibly great number of other dissenting people is concerned.*⁴⁶

例如，最高法院可能会进行实际上是变相的立法。³⁴⁵然而，这并不是去中性化的法律本身的问题，而是政府参与法院系统的问题。在无政府资本主义下，有了完全私人的法院和法官制度，这些问题将在现实世界中尽可能地减少。而且，正如莱奥尼指出的那样：

³⁴⁵ See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990); Henry Mark Holzer, *Sweet Land of Liberty: The Supreme Court and Individual Rights* (Costa Mesa, Calif.: Common Sense Press, 1983); Bernard H. Siegen, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980); and James A. Dorn & Henry G. Manne, eds., *Economic Liberties and the Judiciary* (Fairfax, Va.: George Mason University Press, 1987).
例如，参见罗伯特·H·博克，《美国的诱惑：法律的政治诱惑》（纽约：自由出版社，1990年）；亨利·马克·霍尔泽，《自由的甜蜜之地：最高法院与个人权利》（加利福尼亚州科斯塔梅萨：常识出版社，1983年）；伯纳德·H·西根，《经济自由与宪法》（芝加哥：芝加哥大学出版社，1980年）；以及詹姆斯·A·多恩和亨利·G·曼恩编，《经济自由与司法》（弗吉尼亚州费尔法克斯：乔治梅森大学出版社，1987年）。

[最高法院的实际地位与立法者完全不同。毕竟，不仅是下级法院，最高法院也只有在当事人提出要求的情况下才能做出判决；虽然最高法院在这方面的地位与下级法院不同，但它们仍然必须“解释”法律，而不是颁布法律……。[此外，]在“具有约束力”的先例制度下，最高法院也可能受到……自己的先例的约束……。[这使得最高法院的法官与立法者之间存在着相当大的差异，因为他们可能会将各自的意愿强加给其他大量持不同意见的人，而这是不受欢迎的。³⁴⁶

Thus, even under a government-based decentralized legal system such as the common law, judges' ability to "legislate" is radically different from that of legislators. The possibility of judges acting like legislators is not necessarily implied in the nature of decentralized law-finding systems, but "is rather a deviation from it and a somewhat contradictory introduction of the legislative process under the deceptive label of lawyers' or judiciary law at its highest stage."⁴⁷

因此，即使是在普通法这种以政府为基础的去中性化的法律体系下，法官的“立法”能力也与立法者截然不同。法官像立法者一样行事的可能性并不一定隐含在去中性化的法律制定体系的本质中，而是“偏离了它，在律师法或司法法的最高阶段，在欺骗性的标签下引入了立法程序，这有点自相矛盾”。³⁴⁷

Although law developed in a decentralized legal order is an “unplanned,” spontaneous order, it results in certainty, while a centralized legal system tends to destroy certainty. In a decentralized legal system:

Law develops in a case by case manner during which judges fit and adapt existing law to circumstances so as to produce an overall order which, although it may not be “efficient” in a technical, rationalistic sense, ... is more stable than that created by statute...: [S]tatute law is in fact much more capricious [than common law] precisely because, in the modern world especially, statutes change frequently according to the whims of legislatures...: A structure of law which is not the result of will and cannot be

³⁴⁶ Leoni, *Freedom and the Law*, p. 181.

莱奥尼《自由与法律》，第 181 页。

³⁴⁷ Ibid., at 24.

同上，第 24 页。

*known in its entirety, paradoxically, displays more regularities than a written code.*⁴⁸

尽管在去中性化的法律秩序中发展起来的法律是一种 “无计划 ”的、自发的秩序，但它的结果是确定性，而中心化的法律制度往往会破坏确定性。在去中性化的法律体系中：

法律以个案的方式发展，法官在此过程中根据具体情况对现有法律进行调整，从而产生一种整体秩序，尽管这种秩序在技术和理性的意义上可能并不 是“高效的”，但.....它比成文法所创造的秩序更加稳定....。[成文法实际上[比普通法]更反复无常，这正是因为现代社会，尤其是在现代社会，成文法经常根据立法机构的一时兴起而改变.....法律结构不是意志的结果，也不可能完全为人所知，但矛盾的是，它比成文法典显示出更多的规律性。³⁴⁸

³⁴⁸ Norman Barry, “The Tradition of Spontaneous Order,” Literature of Liberty 5, no. 2 (Summer 1982; <https://perma.cc/Y7X3-S8WY>): 7 – 58, p. 44 (emphasis added), quoted in Aranson, “Bruno Leoni in Retrospect,” p. 723, n.40.

诺曼·巴里，《自发秩序的传统》，《自由文学》第 5 卷，第 2 期（1982 年夏季；<https://perma.cc/Y7X3-S8WY>）：7-58，第 44 页（着重号为原文所加），在阿兰森的《回顾布鲁诺·莱奥尼》中被引用，第 723 页，注释 40。

Note: if writing this now, I would avoid the term “spontaneous” since it is problematic and intermixed with some of Hayek’s views that I now disagree with on the knowledge problem and how the market functions. See the “Introductory Note” to Part III.C, below. I have left the term “spontaneous” in the text since it was in the original. I believe the term “spontaneous” as used by Hayekians can be confusing and misleading.

注意：如果现在写这部分内容，我会避免使用“自发”这个词，因为它存在问题，并且与哈耶克的一些观点相混杂，而对于他在知识问题以及市场如何运作方面的观点，我现在并不认同。见下文第三部分 c 节的“介绍性说明”。由于这个词在原文中就有，所以我在文本中保留了“自发”这个词。我认为哈耶克主义者所使用的“自发”一词可能会造成混淆和误导。

《民法典》 Civil Codes

a. 民法典的“特殊”地位 *The “Special” Status of a Civil Code*

Can legislation be made more stable so that it does not engender uncertainty? Written constitutions such as the United States Constitution are, after all, difficult to explicitly amend,³⁴⁹ although the Supreme Court has amended the Constitution de facto hundreds of times.⁵⁰ The more stable a written statute is, however, the less it resembles legislation, and vice-versa. Civilians contend that the civil law's core is the civil code, which is not meant to change on a daily basis. Rather, a code is more like a constitution, which changes only rarely, in response to greater urgency. The code is not a normal sort of legislation; it is more stable than legislation, and therefore is not subject to the criticism that it engenders uncertainty in the same way as does a mere legislative system.

*[C]odification has for its object the creation of a permanent framework and direction of the evolution of the law. It has a prospective life, and it is not limited to a short-lived or cyclical legislation... [C]odification is to be contrasted with simple legislation tailored to the circumstances.*⁵¹

能否使立法更加稳定，从而避免产生不确定性？像美国宪法这样的成文宪法毕竟难以明确修改，³⁴⁹ 尽管最高法院已对宪法进行了数百次事实上的修改。³⁵⁰ 然而，成文法规越稳定，就越不像立法，反之亦然。民法学家认为，民法的核心是民法典，而民法典并不意味着每天都要改变。相反，民法典更像是一部宪法，它只在紧急情况下进行极少的修改。民法典不是一般意义上的立法；它比立法更加稳定，因此不会像单纯的立法制度那样受到关于它导致不确定性的批评。³⁵¹

³⁴⁹ In over 200 years, the U.S. Constitution has been amended only 27 times. 在两百多年里，美国宪法仅被修订了 27 次。

³⁵⁰ See note 45, above, and references cited therein. 见上文注释 45 及其中引用的参考文献。

³⁵¹ Jean Louis Bergel, “Principal Features and Methods of Codification,” *La. L. Rev.* 48, no. 5 (May 1988; <https://digitalcommons.law.lsu.edu/lalrev/vol48/iss5/3/>): 1073 – 1097, at 1079.

让·路易·贝尔热尔，《法典编纂的主要特征与方法》，《路易斯安那法律评论》第

[法典编纂的目的是为法律的演变建立一个永久性的框架和方向。它具有前瞻性的生命，并不局限于短暂的或周期性的立法……[法典编纂]与针对具体情况的简单立法形成对比。

A civil code is more like a constitution than mere legislation:

*It is a commonplace that a civil code enjoys a more exalted status than an ordinary statute. The higher dignity accorded to a code is traditional in the civil law world. This respect is due originally to the special qualities of the legislation—its relative permanence, imposing structure, and inner coherence. Statutes may be ad hoc, scattered, and temporary, but the civil code in our tradition has attained something close to the stature enjoyed by a constitution or a Magna Carta in the common-law world.*⁵²

民法典相较于单纯的立法更类似于宪法：

民法典比普通成文法享有更崇高的地位，这已是司空见惯的事。赋予法典更高的尊严是大陆法世界的传统。这种尊重最初是由于立法的特殊性——其相对的永久性、宏大的结构和内在的一致性。成文法可能是临时的、分散的和暂时的，但在我们的传统中，民法典所享有的地位接近于英美法系世界中的宪法或大宪章。³⁵²

48 卷 第 5 期 (1988 年 5 月 ;
<https://digitalcommons.law.lsu.edu/lalrev/vol48/iss5/3/>): 1073-1097 页, 第 1079 页。
³⁵² Vernon Palmer, “The Death of a Code—The Birth of a Digest,” Tul. L. Rev. 63, no. 2 (December 1988): 221–64, at 235. Although it must be admitted that even a written constitution, such as that of the United States, is nothing but a statute, albeit a special form of statute and often not as problematic as is normal legislation, as it is more abstract and tends to be partly a codification of earlier customary and private law norms. 弗农·帕尔默, 《一部法典的消亡——一部摘要的诞生》, 《杜兰法律评论》第 63 卷第 2 期 (1988 年 12 月): 221-264 页, 第 235 页。尽管必须承认, 即使是像美

However, such flattery cannot change the fact that the civil code itself provides that legislation is the primary source of law. It does not provide that codal legislation, which conforms to certain code-like requirements (e.g., generality, natural law, and the like), is the only source of law. It does not abolish mere statutes and does not take precedence over any subsequently-enacted conflicting statutes, as the U.S. Constitution does; and neither does it provide for a supermajority requirement for its amendment. From a legislator's point of view, the civil code and more mundane legislation are on the exact same horizontal level. (Moreover, even a higher piece of legislation like the U.S. Constitution is still just legislation: written decrees announced by a government committee and enforced by the state, whether just or not.)

然而，这种恭维并不能改变民法典本身规定立法是法律的主要渊源这一事实。它并没有规定符合某些类似法典要求（如一般性、自然法等）的法典立法是法律的唯一渊源。它不像美国宪法那样废除单纯的法规，也不像美国宪法那样优先于任何随后颁布的与之冲突的法规；它也没有规定对其进行修正需要超级多数。从立法者的角度来看，民法典和更普通的立法处于完全相同的水平线上。（此外，即使是像美国宪法这样的高级立法也仍然只是立法：由政府委员会宣布并由国家执行的书面法令，无论其是否正义）。

Thus the code itself is subject to continual revision and, indeed, is continually revised. It may not in practice be revised as drastically or as often as the other statutes, but the legislature retains the ability to change the code from day to day. For, "a code is a special kind of statute, but a statute nevertheless."⁵³

因此，法典本身是需要不断修订的，事实上也是不断修订的。在实践中，法典的修订可能不会像其他法规那样剧烈或频繁，但立法机构保留了随时修改法典的能力。因为，“法典是一种特殊的法规，但终归是法规”。³⁵³

国宪法这样的成文宪法，也只不过是一部成文法，尽管是一种特殊形式的成文法，而且往往不像普通立法那样存在问题，因为它更抽象，往往在一定程度上是对早期习惯法和私法规范的编纂。

³⁵³ Julio C. Cueto-Rua, "The Civil Code of Louisiana Is Alive and Well," Tul. L. Rev. 64, no. 1 (1989): 147 - 76, 158.

胡利奥·C·奎托-鲁阿，《路易斯安那州的民法典生机勃勃》，《杜兰法律评论》第64卷第1期（1989年）：147-176页，158页。

b. 特别法规的稀释效应 *Diluting Effect of Special Statutes*

What is worse, even if the civil code itself were to be immutably etched in stone—and civil codes are, admittedly, amended much less frequently in some regimes than are “normal” statutes—it would tend to be swamped by subsequent special statutes. Civilians do not disagree with this point. Once a code has been produced and the laws codified, as Professor Palmer recognizes:

*Fragmentation continues inexorably. Special legislation lying outside of the code piles up on all sides, as caselaw and jurisprudence create a thicker and thicker gloss upon the code texts...[T]his inflation of redundant and overlapping laws ... is the true enemy of a scientific codification and the true nemesis of legal certainty.*⁵⁴

更糟糕的是，即使民法典本身被永远地刻在石头上——诚然，在某些制度中，民法典的修订频率远低于“普通”法规——它也往往会被后续的特别法规所淹没。民法学者并不否认这一点。一旦制定了法典并将法律编纂成册，正如帕尔默教授所认识到的那样：

分裂不可逆转地继续着。法典之外的特别立法在各个方面堆积如山，案例法和法学理论给法典文本增添了越来越厚的注释……[这种]冗余和重叠法律的膨胀……是科学的法典编纂的真正敌人，也是法律确定性的宿敌。³⁵⁴

The inexorable production of specialized legislation thus dilutes any stabilizing effect of

³⁵⁴ Palmer, “Celebrating the Qu é bec Codification Achievement” at 316 (emphasis added). See also *ibid.* at 317 (discussing the phenomenal growth of special laws in Louisiana since 1825); Leoni, *Freedom and the Law*, p. 6 (discussing the submersion of continental civil codes in thousands of specialized statutes); Merryman & Pérez-Perdomo, *The Civil Law Tradition*, chap. XX (same). See also Kinsella, “The Mountain of IP Legislation,” C4SIF Blog (Nov. 24, 2010).
帕尔默，《庆祝魁北克法典编纂的成就》第 316 页（重点补充）。另见同上，第 317 页（讨论自 1825 年以来路易斯安那州特别法律的显著增长）；莱奥尼，《自由与法律》，第 6 页（讨论大陆民法典被成千上万的专门法规所淹没）；梅里曼和佩雷斯-佩尔多莫，《民法传统》，第 XX 章（相同）。另见金塞拉，《知识产权立法之山》，C4SIF 博客（2010 年 11 月 24 日）。

a civil code and makes the code less relevant. Given the unwieldy hodge-podge of arcane, special-interest statutes that we are faced with today, is it any wonder that uncertainty—both in what the law is today and in what it might be tomorrow—is engendered? Yet we would not have reached such a chaotic state if not for the legislature's ability to enact its will into law.

因此，专门化立法的难以阻挡的产生削弱了民法典的任何稳定作用，并使法典的相关性降低。考虑到我们今天所面临的晦涩难懂的特殊利益法规的大杂烩，不确定性——无论是源于今天的法律还是明天的法律——产生了，这有何奇怪？然而，如果不是立法机关有能力将其意志付诸法律，我们就不会陷入如此混乱的状态。

不确定性的负面影响 Negative Effects of Uncertainty

a. 的神圣性 Sanctity of Contract

As discussed above,⁵⁵ without certainty of the law, individuals are less able to make long-range plans. The uncertainty resulting from legislative supremacy also has the negative side effect of weakening the sanctity of contract. Legislation:

...destroy[s] established rules and [nullifies] existing conventions and agreements that have hitherto been voluntarily accepted and kept. Even more disruptive is the fact that the very possibility of nullifying agreements and conventions through supervening legislation tends in the long run to induce people to fail to rely on any existing conventions or to keep any accepted agreements.⁵⁶

如上文所述，³⁵⁵没有法律的确定性，个人就较难制定长远计划。立法至上带来的不确定性也会产生负面影响，削弱的神圣性。立法：

.....破坏既定规则，[废除]迄今为止自愿接受和遵守的现有惯例和协议。更具破坏性的是，从长远来看，通过后续立法使协议和惯例无效的可能性往往会导致人们不再

³⁵⁵ See Part III.B.1, above.
见上文 Part III.B.1。

依赖任何现有的惯例或遵守任何已接受的协议。³⁵⁶

When legislation becomes supreme and statutes are fruitful and multiply, our very conception of what the law is changes. Unlike in the past, “we are used to having our rights modified by the sovereign decisions of legislators. A landlord no longer feels surprised at being compelled to keep a tenant; an employer is no less used to having to raise the wages of his employees in virtue of the decrees of Power. Nowadays it is understood that our subjective rights are precarious and at the good pleasure of authority.”⁵⁷

当立法占据至高无上的地位，当法规层出不穷时，我们对法律的概念也随之改变。与过去不同的是，“我们已经习惯于自己的权利被立法者的主权决定所改变。房东不再对被迫留住租户感到惊讶；雇主也同样习惯于依据权力的法令来提高员工的工资。如今，人们都明白，我们的个人权利岌岌可危，只能听命于权力机构”。³⁵⁷

When contractual reliance becomes more risky, “contractual exchanges requiring temporally separated future performance become less attractive, leading the parties to develop costly alternatives, such as contractual hostages (if that is possible at all under the statute), otherwise unwarranted vertical integration of production processes, or the foregoing of such exchanges entirely.”⁵⁸ Such alternatives impoverish us all by imposing unnecessary costs on production and exchange.

当依赖的风险增大时，“要求在时间上分离的未来履行的交换就变得不那么有吸引力了，从而导致各方研制开发代价高昂的替代办法，如人质（如果法规允许的话）、生产流程不必要的纵向一体化或完全放弃这种交换”。³⁵⁸这些替代方案给生产和交换带

³⁵⁶ Leoni, Freedom and the Law, p. 18.

莱奥尼《自由与法律》，第 18 页。

³⁵⁷ Bertrand de Jouvenel, Sovereignty: An Inquiry into the Political Good (Chicago: University of Chicago Press, 1957), at 189. See also Leoni, Freedom and the Law, pp. 145 – 46.

贝特朗-德-儒弗内尔，《主权：对政治善的探究》（芝加哥：芝加哥大学出版社，1957 年），第 189 页。另见莱奥尼，《自由与法律》，第 145-146 页。

³⁵⁸ Aranson, “Bruno Leoni in Retrospect,” pp. 681 – 82 (footnote omitted).

阿兰森，《回顾布鲁诺·莱奥尼》，第 681-682 页（注释省略）。

来了不必要的成本，使我们所有人都陷入贫困。

a. 时间偏好与生产结构 Time Preference and the Structure of Production

Another extremely pernicious but subtle effect of the increased uncertainty of legislative systems is the increase of man's time preference. Individuals invariably demonstrate a preference for earlier goods over later goods, all things being equal. This is the phenomenon of time preference.³⁵⁹ Time preference explains the advent of interest payments, payments made to someone who loans money. When a loan of money is made, the lender gives up (more-valued) present dollars and receives (less-valued) future dollars, and thus the loan will go forward only if the lender is compensated with interest.

立法制度的不确定性增加所产生的另一个极为有害但却微妙的影响是，人类的时间偏好增加了。在所有条件都相同的情况下，个人总是表现出对更早财货的偏好，而不是对更晚财货的偏好。这就是时间偏好现象。³⁵⁹时间偏好解释了利息支付的出现，即向

³⁵⁹ Hans-Hermann Hoppe, "Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy," *J. des Economistes et des Etudes Humaines* 5, no. 2/3 (June/September 1994; <https://www.hanshoppe.com/publications/>): 319–49, at 319–21 (also included in *Democracy: The God That Failed* and in John Denson, ed., *The Costs of War: America's Pyrrhic Victories* (New Brunswick: Transaction Publishers, 1997; <https://mises.org/library/costs-war-americas-pyrrhic-victories>)). See also Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar's ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), chaps. 18–19; Murray N. Rothbard, *Man, Economy, and State*, in *Man, Economy, and State, with Power and Market*, Scholar's ed., second ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 1, § 4 and chap. 6, § 3. 汉斯-赫尔曼·霍普，《时间偏好、政府和去文明化进程——从君主制到民主制》，《经济学家和人文研究杂志》第5卷，第2/3期（1994年6月/9月；<https://www.hanshoppe.com/publications/>）：319–349，第319–321页（也收录于《民主：失败的上帝》和约翰·丹森编辑的《战争的代价：美国得不偿失的胜利》（新不伦瑞克：交易出版社，1997年；<https://mises.org/library/costs-war-americas-pyrrhic-victories>））。另见路德维希·冯·米塞斯，《人的行动：经济学专论》，学者版（阿拉巴马州奥本：米塞斯研究院，1998年；<https://mises.org/library/human-action-0>），第18–19章；穆瑞·N. 罗斯巴德，《人、经济与国家》，收录于《人、经济与国家

借出钱的人支付利息。借钱时，贷方放弃（价值较高）现在的美元而获得（价值较低）未来的美元，因此，只有在贷方得到利息补偿的情况下，贷款才会继续。

Men prosper materially when time preferences are lower, since when this is the case, they are more willing to forego immediate benefits such as consumption and invest their time and capital in more indirect (i.e., more roundabout, lengthier) production processes, which yield more and/or better goods for consumption or for further production.⁶⁰ We forego picking bananas to eat them now (consumption) and devote some of our present time to the building of fishing nets (capital) so we can catch more fish in the future, which can feed more people for the same amount of work as it took to search for bananas.

当时间偏好较低时，人们在物质上会更加繁荣，因为在这种情况下，他们更愿意放弃即时的利益，比如消费，而将时间和资本投入到更间接（即更迂回、更漫长）的生产过程中，这将为消费或进一步生产带来更多和/或更好的财货。³⁶⁰ 我们放弃现在采摘香蕉来食用（消费），而是将我们当下的一些时间用于制作渔网（资本），这样我们将来就能捕到更多的鱼，对于寻找香蕉所付出的相同工作量，能养活更多的人。

Any artificial raising of the general time preference rate tends to impoverish society by pushing us away from production, long-term investments, and roundabout production processes and towards consumption and more short-term investments which produce fewer and/ or worse quality goods. In other words, instead of foregoing picking bananas to eat them now and instead of spending time building fishing nets to produce goods in the future, we tend to eat more bananas now and live only for the moment, and reduce our investment in the future. Clearly, when the general time preference rate is artificially raised, the populace becomes materially poorer and worse off.

任何人为提高一般时间偏好率的做法都会使社会陷入贫困，因为这会使我们从生产、长期投资和迂回的生产过程中脱离出来，转向消费和更多的短期投资，从而生产出更

及权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；<https://mises.org/library/man-economy-and-state-power-and-market>），第 1 章，第 4 节和第 6 章，第 3 节。

³⁶⁰ Hoppe, “Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy,” pp. 320 – 21.

霍普，《时间偏好、政府和去文明化进程——从君主制到民主制》，第 320-321 页。

少和/或质量更差的财货。换句话说，我们不是放弃采摘香蕉以便现在就吃，也不是花时间建造渔网以便将来生产财货，而是倾向于现在多吃香蕉，只为当下而活，减少对未来的投资。显然，当一般时间偏好率被人为提高时，人们的物质生活会变得更加贫穷和糟糕。

Yet increased uncertainty causes an increase in time preference rates. With the very possibility of legislation, the future is made more unpredictable than it would be without the possibility of legislation. Future goods are always less desirable to individuals than present goods. But if the future becomes more unpredictable, future actions and goods become less certain to occur, and thus future goods become relatively even less desirable, and present goods therefore become relatively more desirable. As explained by Hoppe:

[T]he mere fact of legislation—of democratic law-making—increases the degree of uncertainty. Rather than being immutable and hence predictable, law becomes increasingly flexible and unpredictable. What is right and wrong today may not be so tomorrow. The future is thus rendered more haphazard. Consequently, all around time preferences degrees will rise, consumption and short-term orientation will be stimulated, and at the same time the respect for all laws will be systematically undermined and crime promoted (for if there is no immutable standard of “right,” then there is also no firm definition of “crime”).⁶¹

然而，不确定性的增加会导致时间偏好率的上升。由于存在立法的可能性，未来就变得比没有立法的可能性时更加不可预测。对个人而言，未来财货总是不如现在财货更可取。但如果未来变得更难以预测，未来的行动和财货就更不确定是否会发生，因此未来的财货相对来说就更不受欢迎，而当下的财货因此就相对更受欢迎。正如霍普所解释的：

“[民主]立法这一单纯的事实增加了不确定性的程度。法律不再是不变的从而可预测的，而是变得越来越灵活和不可预测。今天的对与错，明天可能就不是这样了。因此，未来变得更加随意。结果，到处的时间偏好程度都会上升，消费和短期取向将受到刺激，同时对所有法律的尊重将被系统性地削弱，犯罪也会增加（因为如果没有不

变的‘正确’标准，那么也就没有对‘犯罪’的明确定义)。”³⁶¹

Leoni anticipated a similar effect of legislation. Leoni called the illusory certainty generated by written legislation the short-run certainty of the law, as opposed to genuine, long-run legal certainty. The desire for shortrun certainty over long-run certainty corresponds to an immature desire for immediate gratification. Leoni writes:

I am reminded of a conversation I had with an old man who grew plants in my country. I asked him to sell me a big tree for my private garden. He replied, "Everybody now wants big trees. People want them immediately; they do not bother about the fact that trees grow slowly and that it takes a great deal of time and trouble to grow them. Everybody today is always in a hurry," he sadly concluded, "and I do not know why."
62

莱奥尼也预见到了立法的类似效果。莱奥尼将书面立法产生的虚幻确定性称为法律的短期确定性，而不是真正的、长期的法律确定性。对短期确定性而非长期确定性的渴望，对应着一种不成熟的即时满足欲望。莱奥尼写道：

我想起了与一位在我国种植植物的老人的谈话。我请他卖给我一棵大树，供我在私人花园里种植。他回答说：“现在人人都想要大树。人们都想立刻拥有大树，而不去考虑大树生长缓慢，种植大树需要花费大量的时间和精力。现在的每个人都 very 匆忙，”他悲伤地总结道，“我不知道为什么。”³⁶²

The answer is, in part, because an increased climate of uncertainty increases the general time preference rate.

答案是，部分原因是不确定性增加会提高一般时间偏好率。

³⁶¹ Ibid., at 340.

同上，第 340 页。

³⁶² Leoni, Freedom and the Law, p. 80.

莱奥尼，《自由与法律》，第 80 页。

b. 时间偏好与犯罪 Time Preference and Crime

There is also a fascinating relationship, as Hoppe above alludes to, between higher time preference and increased crime. This is because earning a market income requires more patience than does the immediate gratification that criminals seek: "one must first work for a while before one gets paid. In contrast, specific criminal activities such as murder, assault, rape, robbery, theft, and burglary require no such discipline: the reward for the aggressor is tangible and immediate whereas the sacrifice—possible punishment—lies in the future and is uncertain."⁶³ As a person becomes more present-oriented, immediate (criminal) gratifications become relatively more attractive, and future, uncertain punishment becomes less of a disincentive. Thus many people on the margin—those who are just deterred from committing crimes by the threat of possible future punishment under normal time-preference conditions in a free society—will not be deterred from committing crimes in a society with legislation and its concomitant increase in time preference. In other words, there are individuals today who are committing violent crimes solely because of the increased uncertainty in society caused by the existence of legislation.⁶⁴ Further, when the increased uncertainty tends to impoverish us by shortening the structure of production, more people are poor and impoverished, which also tends to increase the amount of crime in society.

正如霍普在上文提到的，时间偏好越高，犯罪率越高，这两者之间也存在着一种奇妙的关系：这是因为赚取市场收入比犯罪分子所追求的即时满足需要更多的耐心：“一个人必须先工作一段时间才能得到报酬。相比之下，谋杀、袭击、强奸、抢劫、偷窃和入室盗窃等具体犯罪活动则不需要这样的纪律：侵犯者得到的回报是有形的、直接的，而牺牲——可能的惩罚——则是未来的、不确定的。”³⁶³ 随着一个人变得更注重当

³⁶³ Hoppe, "Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy," at 340 n.31. On the relationship between time preference and crime, Hoppe cites J.Q. Wilson & R.J. Herrnstein, *Crime and Human Nature* (1985), pp. 49–56, 416–22; E.C. Banfield, *The Unheavenly City Revisited* (Boston: Little, Brown, 1974); and idem, "Present-Orientedness and Crime," in Randy E. Barnett & J. Hagel, eds., *Assessing the Criminal, Restitution, Retribution, and the Legal Process* (Cambridge: Ballinger, 1977).

霍普，《时间偏好、政府和去文明化进程——从君主制到民主制》，第 340 页注释 31。

下，即时（犯罪）满足变得相对更有吸引力，而未来不确定的惩罚则变得不那么具有威慑力。因此，在自由社会中，在正常时间偏好条件下，仅仅因可能的未来惩罚威胁而未犯罪的边缘人群——在一个有立法及其随之而来的时间偏好增加的社会中，将不再因犯罪而受到威慑。换句话说，如今有很多人实施暴力犯罪仅仅是因为立法的存在及其导致的社会不确定性的增加。³⁶⁴此外，当不确定性增加通过缩短生产结构使我们变得贫困时，更多的人会变得贫穷和贫困，这也往往会增加社会中的犯罪数量。

When law is based on legislation, uncertainty is increased, not decreased, even in the supposedly "certain" civil law systems. This hampers the ability of individuals to engage in private calculation, i.e., in planning for the future and in knowing the legal consequences of their future actions. It makes contractual reliance more risky and thus imposes further costs on otherwise-beneficial economic transactions. And the unavoidable uncertainty caused by legislation also raises our time preference rate, which "necessarily exerts a push away from more highly capitalized, and hence more productive production processes, and into the direction of a hand-to-mouth existence,"
65 and thus tends to impoverish us all.

当法律以立法为基础时，不确定性就会增加，而不是减少，即使在所谓 "确定的 "大

关于时间偏好与犯罪之间的关系，霍普引用了 J.Q. 威尔逊和 R.J. 赫恩斯坦的《犯罪与人性》（1985 年），第 49-56 页、第 416-422 页；E.C. 班菲尔德的《重访罪恶之都》（波士顿：利特尔&布朗出版社，1974 年）；以及同上，《当下取向与犯罪》，收录于兰迪·E. 巴尼特和 J. 哈格尔编辑的《评估罪犯、赔偿、惩罚与法律程序》（剑桥：巴林格出版社，1977 年）。

³⁶⁴ Regarding "the increase in criminal activity brought about by the operation of democratic republicanism in the course of the last hundred years as a consequence of steadily increased legislation and an ever expanding range of 'social,' as opposed to private, responsibilities" (Hoppe, "Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy," n.31), Hoppe cites R.D. McGrath, *Gunfighters, Highwaymen, and Vigilantes: Violence on the Frontier* (Berkeley: University of California Press, 1984), esp. chap. 13, and idem, "Treat Them to a Good Dose of Lead," *Chronicles* (January 1994), pp. 17 - 18.

关于 "在过去的一百年中，民主共和制的运作导致犯罪活动的增加，这是立法不断加强和'社会'（而非私人）责任范围不断扩大的结果"（霍普，《时间偏好、政府和去文明化进程——从君主制到民主制》，注释 31），霍普引用了 R.D. 麦格拉思的《枪手、强盗和治安维持者：边境上的暴力》（伯克利：加利福尼亚大学出版社，1984 年），特别是第 13 章，以及同上，《给他们一梭子铅弹》，《纪事》（1994 年 1 月），第 17-18 页。

陆法系中也是如此。这阻碍了个人进行私人计算的能力，即规划未来和了解其未来行动的法律后果的能力。这使得依赖的风险更大，从而给原本有益的经济交易带来更多成本。而立法造成的不可避免的不确定性也会提高我们的时间偏好率，这“必然促使我们远离资本密集度更高、因而生产力更高的生产过程，转向勉强糊口的生存方式”，³⁶⁵从而使我们陷入贫困。

C. 中央计划和经济计算

Central Planning and Economic Calculation

Introductory Note: In this section (Part III.C), I relied heavily on Bruno Leoni's interpretation of Mises's and Hayek's views on the economic calculation problem and his related criticism of legislation by analogy to central economic planning. Subsequently, I gained a deeper understanding of the difference between Mises's and Hayek's approach to this issue, after Joseph Salerno initiated the "dehomogenization" debate.⁶⁶ At the time I wrote the original article, I did not appreciate this distinction and thus too-uncritically accepted Leoni's arguments, many of which are summarized or relied on in this section, even though Austrian economist Jeffrey Herbener had sent me helpful comments on an early manuscript, pointing this out.⁶⁷ I did not at the time (1995) fully appreciate his criticisms. I now believe there are many flaws in Leoni's reliance on Hayek to criticize legislation, when he analogizes the problems of legislation to the economic calculation problem faced by a central economic planner, because Hayek's own approach to the calculation problem and his focus on "knowledge" is flawed. By the time I wrote the article which would become chapter 17 of this volume, in 1999, I had realized my error, and discussed the flaws with the Hayekian approach in the section "Knowledge vs. Calculation." In sum, as several Misesian Austrians have pointed out:

Rothbard: "the entire Hayekian emphasis on 'knowledge' is misplaced and

³⁶⁵ Hans-Hermann Hoppe, "The Economics and Sociology of Taxation," in Hoppe, *Economics and Ethics of Private Property*, at 34.

汉斯-赫尔曼·霍普，《税收的经济学与社会学》，收录于霍普《私有财产的经济学与伦理学》，第 34 页。

misconceived”

Hülsmann: discussing “the irrelevance of knowledge problems”

Salerno: “[t]he price system is not—and praxeologically cannot be—a mechanism for economizing and communicating the knowledge relevant to production plans. The realized prices of history are an accessory of appraisalment”

Hoppe: “Hayek’s contribution to the socialism debate must be thrown out as false, confusing, and irrelevant.”⁶⁸

引言：在本节（第三部分 C）中，我在很大程度上依赖于布鲁诺·莱奥尼对米塞斯和哈耶克关于经济计算问题的观点的解释，以及他通过类比中央经济计划对立法的相关批评。后来，在约瑟夫·萨勒诺（Joseph Salerno）发起“去同质化”论证之后，我对米塞斯和哈耶克在这一问题上的分歧有了更深入的理解。³⁶⁶在我撰写最初的文章时，我

³⁶⁶ See Joseph T. Salerno, “Postscript” [1990], in Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, S. Adler, trans. (Auburn, Ala.: Mises Institute, 1990 [1920]; <https://mises.org/library/economic-calculation-socialist-commonwealth>); idem, “Ludwig von Mises as Social Rationalist,” *Rev. Austrian Econ.* 4 (1990; <https://mises.org/library/ludwig-von-mises-social-rationalist>): 26 – 64; Joseph T. Salerno, “Ludwig von Mises as Social Rationalist,” *Rev. Austrian Econ.* 4 (1990; <https://mises.org/library/ludwig-von-mises-social-rationalist>): 26 – 64, at 31 (also published in Jeffrey M. Herbener, ed., *The Meaning of Ludwig von Mises: Contributions in Economics, Sociology, Epistemology, and Political Philosophy* (Norwell, Mass.: Kluwer Academic Publishers, 1993; <https://mises.org/library/meaning-ludwig-von-mises>)); and especially idem, “Mises and Hayek Dehomogenized,” *Rev. Austrian Econ.* 6, no. 2 (1993; <https://mises.org/library/mises-and-hayek-dehomogenized>): 113 – 46; and other material collected at Kinsella, “The Great Mises-Hayek Dehomogenization/Economic Calculation Debate,” StephanKinsella.com (Feb. 8, 2016). 见约瑟夫·T·萨勒诺，“后记”[1990]，收录于路德维希·冯·米塞斯《社会主义国家的经济计算》，S. 阿德勒译（阿拉巴马州奥本：米塞斯研究院，1990 年[1920 年]；<https://mises.org/library/economic-calculation-socialist-commonwealth>）；同上，《作为社会理性主义者的路德维希·冯·米塞斯》，《奥地利经济学评论》4（1990 年；<https://mises.org/library/ludwig-von-mises-social-rationalist>）：26-64 约瑟夫·T·萨勒诺，“作为社会理性主义者的路德维希·冯·米塞斯”，《奥地利经济学评论》4（1990 年；<https://mises.org/library/ludwig-von-mises-social-rationalist>）：26-64，第 31 页（也发表于杰弗里·M·赫伯纳编辑的《路德维希·冯·米塞斯的意义：对经济学、社会学、认识论和政治哲学的贡献》（马萨诸塞州诺威尔：克卢弗学术出版社，1993 年；<https://mises.org/library/meaning-ludwig-von-mises>））；尤其是同上，《米塞斯

并不了解这种区别，因此过于不加批判地接受了莱奥尼的论点，本节中总结或引用了其中的许多论点，尽管奥派经济学家杰弗里·赫伯纳（Jeffrey Herbener）曾就我早期的手稿向我提出了有益的意见，指出了这一点。³⁶⁷我当时（1995 年）并没有完全理解他的批评。我现在认为，当莱奥尼将立法问题类比为中央经济规划者面临的经济计算问题，并依赖哈耶克来批评立法时，存在许多缺陷，因为哈耶克自己对计算问题的方法以及他对“知识”的关注是有缺陷的。当我在 1999 年撰写这篇文章（即本卷第 17 章）时，我已经意识到了自己的错误，并在“知识与计算”一节中讨论了哈耶克方法的缺陷。总之，正如几位米塞斯主义的奥派经济学家所指出的那样：

罗斯巴德：“哈耶克对‘知识’的整个强调都是不得要领的和误解的”。

许尔斯曼：讨论“知识问题的无关性”。

萨勒诺：“价格体系不是——行动学上也不可能是——一种节约和传播与生产计划相关的知识的机制。历史上实现的价格是评估的附属品”。

霍普：“哈耶克对社会主义论证的贡献必须被视为错误、混乱和无关紧要而抛弃之”。

³⁶⁸

和哈耶克的去同质化》，《奥地利经济学评论》6 卷 2 期（1993 年：<https://mises.org/library/mises-and-hayek-dehomogenized>）：113-146；以及金塞拉收集的其他资料，《伟大的米塞斯——哈耶克去同质化/经济计算论证》，StephanKinsella.com（2016 年 2 月 8 日）。

³⁶⁷ Herbener’s letter is available at Kinsella, “Legislation and the Discovery of Law in a Free Society,” StephanKinsella.com (Jan. 8, 2021).

赫伯纳的信见金塞拉：《自由社会中的立法与法律发现》，StephanKinsella.com（2021 年 1 月 8 日）。

³⁶⁸ See Murray N. Rothbard, “The End of Socialism and the Calculation Debate Revisited,” Rev. Austrian Econ. 5, no. 2 (1991; <https://mises.org/library/end-socialism-and-calculation-debate-revisited-0>): 51 - 76, at 66; Jörg Guido H ü lsmann, “Knowledge, Judgment, and the Use of Property,” Rev. Austrian Econ. 10, no. 1 (1997; <https://mises.org/library/knowledge-judgment-and-use-property>): 23 - 48, at 39; Salerno, “Ludwig von Mises as Social Rationalist,” at 44; Hans-Hermann Hoppe, “Socialism: A Property or Knowledge Problem?,” Rev. Austrian Econ. 9, no. 1 (1996; <https://mises.org/library/socialism-property-or-knowledge-problem>): 143 - 49, at 146. See also Kinsella, “Knowledge vs. Calculation,” Mises Economics Blog (July 11, 2006). See also related discussion in “Knowledge, Calculation, Conflict, and Law” (ch. 19),

In this chapter I have retained the following section from the original article since it still contains some useful insights and also is a good summary of Leoni's position on this matter.

在这一章中，我保留了原文中的以下部分，因为它仍然包含一些有用的见解，并且也是莱奥尼关于这个问题的立场的一个很好的总结。

Besides the fact that the possibility of legislation breeds uncertainty and is thus harmful for this reason alone, legislators face a problem that central economic planners also face. It is an information problem, and this unavoidable problem makes it unlikely that any body of legislation will develop substantively legitimate law—i.e., a body of law consistent with principles such as justice, individualism, and economic liberalism. For the same reason that central economic planning is impossible, centrally-planned laws cannot hope to be truly based on the true interests or needs or situation of the populace. I first discuss the reason why central planning—i.e., socialism—is impossible, before analogizing socialism to legislation.

除了立法的可能性会滋生不确定性并因此有害之外，立法者还面临着一个中央经济规划者同样面临的问题。这是一个信息问题，而这个不可避免的问题使得任何一部法律都不太可能发展出实质上合法的法律——即，一套符合正义、个人主义和经济自由主义等原则的法律。与中央经济计划不可能实现的原因相同，中央计划的法律也不可能真正基于民众的真实利益、需求或状况。在将社会主义与立法类比之前，我先讨论一

at n.34, and idem, “Second Thoughts on Leoni, Hayek, Legislation, and Economic Calculation,” *The Libertarian Standard* (May 9, 2014).

见穆瑞·N·罗斯巴德，“社会主义的终结与重新审视计算论证”，《奥地利经济学评论》第5卷第2期（1991年；<https://mises.org/library/end-socialism-and-calculation-debate-revisited-0>）：51-76，第66页；约尔格·吉多·许尔斯曼，“知识、判断与财产的使用”，《奥地利经济学评论》第10卷第1期（1997年；<https://mises.org/library/knowledge-judgment-and-use-property>）：23-48，第39页；萨勒诺，《作为社会理性主义者的路德维希·冯·米塞斯》，第44页；汉斯-赫尔曼·霍普，《社会主义：是财产问题还是知识问题？》，《奥地利经济学评论》第9卷第1期（1996年；<https://mises.org/library/socialism-property-or-knowledge-problem>）：143-149，第146页。另见金斯莱拉，《知识与计算》，米塞斯经济学博客（2006年7月11日）。另见《知识、计算、冲突与法律》（第19章）注释34及相关讨论，以及同上，《对莱奥尼、哈耶克、立法和经济计算的再思考》，《自由意志主义标准》（2014年5月9日）。

下中央计划——即社会主义——为何不可能的原因。

中央计划和社会主义的不可能性

Central Planning and the Impossibility of Socialism

With the collapse of communism/socialism, mainstream opinion is finally starting to realize that socialism, in addition to being incredibly immoral and wasteful of human life, simply does not work. But this comes as no revelation and no surprise to the Austrian school of economics following in the footsteps of Ludwig von Mises. As far back as 1920, Mises explained why socialism is impossible. Although Mises's amazingly prescient ideas were arrogantly and unfortunately ignored for decades by establishment thinkers, Mises has finally been vindicated by the universally (if belatedly) acknowledged failure of socialism,³⁶⁹ and I will not re-argue the obvious here, especially in a libertarian journal.

随着共产主义/社会主义的崩溃，主流观点终于开始意识到，社会主义不仅极其不道德，还浪费了大量的人力生命，而且根本就行不通。但对于追随路德维希·冯·米塞斯脚步的奥地利经济学派来说，这并非什么惊人的发现或意外。早在 1920 年，米塞斯就解释了为什么社会主义是不可能的。尽管米塞斯极具先见之明的观点几十年来一直被主流思想家傲慢且不幸地忽视，但社会主义的普遍（尽管姗姗来迟）失败最终证明了米塞斯是正确的，³⁶⁹ 在此，尤其是在一本自由主义的杂志中，我不会再次论证这一显而易见的事实。

However, Mises's explanation of why socialist central planning is doomed to failure has, as pointed out by Leoni, important ramifications for legislation as well. Thus, in this

³⁶⁹ See Gertrude E. Schroeder, “The Dismal Fate of Soviet-Type Economies: Mises Was Right,” *Cato J.* 11 no. 1 (Spring/Summer 1991; <https://www.cato.org/cato-journal/spring/summer-1991>): 13–25; Mark Skousen, “‘Just Because Socialism Has Lost Does Not Mean That Capitalism Has Won’: An Interview with Robert L. Heilbroner,” *Forbes* (May 27, 1991): 130–35.

见格特鲁德·E·施罗德，《苏联式经济的悲惨命运：米塞斯是正确的》，《卡托杂志》11 卷 1 期（1991 年春/夏）：<https://www.cato.org/cato-journal/spring/summer-1991>：13-25；马克·斯库森，《“社会主义失败并不意味着资本主义胜利”：对罗伯特·L·海尔布隆纳的访谈》，《福布斯》（1991 年 5 月 27 日）：130-135。

subsection I briefly discuss the so-called “economic calculation debate” before exploring its implications for legislation.

然而，正如莱奥尼所指出的，米塞斯对社会主义中央计划注定失败的原因的解释对立法也有重要影响。因此，在本小节中，我将简要讨论所谓的“经济计算大论证”，然后再探讨其对立法的影响。

In 1920 Mises published his devastating critique of socialism, “Economic Calculation in the Socialist Commonwealth.”⁷⁰ Mises showed that, besides the incentive problem of socialism (e.g., “Who will take out the garbage?”),⁷¹ the central planner cannot know what products or how much of them to order to be produced without the information provided by prices on a free market. In a free market, in which there is by definition private ownership of property, the free exchange of goods by individual human actors in accordance with their subjective utilities establishes relative prices, in terms of money (which historically was gold and other precious metals). These money prices are the indispensable tool of calculation for rational coordination of scarce resources, since “monetary economic calculation is the intellectual basis of the market economy.”⁷² Without market prices, how can a central planning board know what or how many products to produce, with which techniques and raw materials, and in which location? These and a practically infinite number of questions are simply unanswerable without the information provided by monetary prices. As Rothbard explains:

Mises demonstrated that, in any economy more complex than the Crusoe or primitive family level, the socialist planning board would simply not know what to do, or how to answer any of these vital questions. Developing the momentous concept of calculation, Mises pointed out that the planning board could not answer these questions because socialism would lack the indispensable tool that private entrepreneurs use to appraise and calculate: the existence of a market in the means of production, a market that brings about money prices based on genuine profit-seeking exchanges by private owners of these means of production. Since the very essence of socialism is collective ownership of the means of production, the planning board would not be able to plan, or to make any sort of rational economic decisions. Its decisions would necessarily be completely arbitrary and chaotic, and therefore the existence of a socialist planned economy is literally “impossible” (to use a term long ridiculed by Mises’s critics).⁷³

1920 年，米塞斯发表了他对社会主义的毁灭性批判的著作，《社会主义国家的经济计算》。³⁷⁰米塞斯指出，除了社会主义的激励问题（如“谁来倒垃圾？”）之外，³⁷¹如果没有自由市场价格提供的信息，中央计划者就无法知道要订购什么产品或生产多少产品。在自由市场中，财产所有权顾名思义是私有的，个体行动人根据自己的主观效用自由交换财货，以货币（历史上是黄金和其他贵金属）为单位确定相对价格。这些货币价格是合理协调稀缺资源不可或缺的计算工具，因为“货币经济计算是市场经济的智识基础”。³⁷²没有市场价格，中央计划局如何知道生产什么或生产多少，采用何种技术与原材料，以及在何处生产？如果没有货币价格提供的信息，这些问题以及实际上无穷无尽的问题根本无法解答。正如罗斯巴德所解释的：

米塞斯证明，在任何比克鲁索或原始家庭更复杂的经济中，社会主义计划委员会根本不知道该做什么，也不知道如何回答这些重要问题。米塞斯表明，在任何比鲁宾逊或原始家庭更复杂的经济中，社会主义计划委员会根本不知道该做什么，也不知道如何回答这些至关重要的问题。米塞斯提出了具有重大意义的计算概念，他指出计划

³⁷⁰ Mises, *Economic Calculation in the Socialist Commonwealth*; idem, *Socialism: An Economic and Sociological Analysis*, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; <https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis>), at 95 - 130; Mises, *Human Action*, at 200 - 31, 695 - 715; Murray N. Rothbard, “The End of Socialism and the Calculation Debate Revisited,” in *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>).

米塞斯，《社会主义国家的经济计算》；同上，《社会主义：经济学与社会学分析》，J. 卡哈内译（印第安纳波利斯，印第安纳州：自由基金，1981 年；<https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis>），第 95-130 页；米塞斯，《人的行动》，第 200-31 页、第 695-715 页；穆瑞·N. 罗斯巴德，《社会主义的终结与重新审视经济计算大论证》，收录于《经济学的论证》（阿拉巴马州奥本：米塞斯研究院，2011 年；<https://mises.org/library/economic-controversies>）。

³⁷¹ Rothbard, “The End of Socialism and the Calculation Debate Revisited,” at 828. 罗斯巴德，《社会主义的终结与重新审视经济计算大论证》，第 828 页。

³⁷² Mises, *Human Action*, at 259.

米塞斯，《人的行动》，第 259 页。

委员会无法回答这些问题，因为社会主义缺乏私人企业家用来评估和计算的不可或缺的工具：生产资料市场的存在，一个由这些生产资料的私人所有者基于真正的逐利交换而形成货币价格的市场。由于社会主义的本质是生产资料的集体所有制，计划委员会将无法进行规划，也无法做出任何合理的经济决策。其决策必然是完全任意和混乱的，因此社会主义计划经济的存在实际上是“不可能的”（使用一个长期被米塞斯的批评者嘲笑的术语）。³⁷³

Defenders of socialism often countered with the bare fact of the Soviet Union's existence and "success" as disproof of the contention that socialism is impossible. However, as Rothbard points out, Soviet GNP and other production figures relied upon as evidence of the USSR's success were wholly inaccurate and deceitful—as the final collapse of socialism has made manifest. Further, the Soviet Union and other socialist countries have never enjoyed complete socialism, for despite their best efforts to stamp out individual initiative, free trade, and private property, the existence of black (i.e., free) markets and bribery is widespread, which prevent socialism from completely controlling and thus strangling the economy.

社会主义的捍卫者们经常以苏联的存在及其所谓的“成功”这一赤裸裸的事实来反驳社会主义不可能这一论点。然而，正如罗斯巴德所指出的，被当作苏联成功证据的苏联国民生产总值和其他生产数据完全不准确且具有欺骗性——社会主义的最终崩溃已经表明了这一点。此外，苏联和其他社会主义国家从未实现过完全的社会主义，因为尽管他们竭尽全力打压个人主动性、自由贸易和私有财产，但黑市（即自由市场）和贿赂现象仍广泛存在，这使得社会主义无法完全控制从而扼杀经济。

Also, these socialist economies existed in a world containing many (relatively) capitalist markets, such as that in the United States. Thus, the socialist planners were able to parasitically copy the prices of the West as a crude guideline for pricing and allocating

³⁷³ Rothbard, “The End of Socialism and the Calculation Debate Revisited,” at 829. 罗斯巴德，《社会主义的终结与重新审视经济计算大论证》，第 829 页。

their own capital resources.⁷⁴ To the extent true socialism was able to be imposed on the populace, economic calculation thereunder was impossible and the people suffered accordingly.

此外，这些社会主义经济体存在于一个有许多（相对）资本主义市场的世界中，比如美国的市场。因此，社会主义的规划者们能够寄生性地抄袭西方的价格，作为其为自身资本资源定价和分配的粗略指导方针。³⁷⁴ 只要能够将真正的社会主义强加给人民，就不可能在此基础上进行经济计算，人民也会因此遭受苦难。

In the words of Mises, "Where there is no market there is no price system, and where there is no price system there can be no economic calculation."⁷⁵ The paradox of 'planning' is that it cannot plan, because of the absence of economic calculation. What is called a planned economy is no economy at all."⁷⁶

用米塞斯的话说，“没有市场就没有价格体系，没有价格体系就没有经济计算。”³⁷⁵“计划的悖论在于它无法进行计划，因为缺乏经济计算。所谓的计划经济根本不是经济。”

³⁷⁶

立法和中央计划

Legislation as Central Planning

One of Bruno Leoni's greatest achievements was to teach us that Mises's criticism applies not only to a central planning board of a socialist economy, but also to a legislature attempting to "centrally plan" the laws of a society. Leoni notes that several economists in the early '20s, but especially Mises, demonstrated "that a centralized economy run by a committee of directors suppressing market prices and proceeding

³⁷⁴ Ibid., pp. 854. See also Mises, *Human Action*, at 702 (discussing the use of western price systems by socialist governments).

同上，第 854 页。另见米塞斯《人的行动》第 702 页（讨论社会主义政府对西方价格体系的使用）。

³⁷⁵ Mises, *Socialism*, at 113 (p. 131 of the 1936 J. Kahane translation).

米塞斯，《社会主义》，第 113 页（1936 年 J. 卡哈内译本的第 131 页）。

³⁷⁶ Mises, *Human Action*, at 700.

米塞斯，《人的行动》，第 700 页。

without them does not work because the directors cannot know, without the continuous revelation of the market, what the demand or the supply would be....”⁷⁷ Leoni recognized that:

*...this demonstration may be deemed the most important and lasting contribution made by the economists to the cause of individual freedom in our time. However, its conclusions may be considered only as a special case of a more general realization that no legislator would be able to establish by himself, without some kind of continuous collaboration on the part of all the people concerned, the rules governing the actual behavior of everybody in the endless relationships that each has with everybody else. No public opinion polls, no referenda, no consultations would really put the legislators in a position to determine these rules, any more than a similar procedure could put the directors of a planned economy in a position to discover the total demand and supply of all commodities and services.*⁷⁸

布鲁诺·莱奥尼最伟大的成就之一就是告诉我们，米塞斯的批评不仅适用于社会主义经济的中央计划委员会，也适用于试图“中央计划”社会法律的立法机构。莱奥尼指出，20 世纪 20 年代初的几位经济学家，尤其是米塞斯，证明了“由压制市场价格且在没有市场价格的情况下运作的委员会管理的中央集权经济是行不通的，因为在没有市场的持续披露的情况下，委员会无法知道需求或供应会是什么……。”³⁷⁷ 莱奥尼认识到：

.....这一论证可被视为经济学家在当代对个人自由事业做出的最重要、最持久的贡献。然而，它的结论只能被视为一种更普遍认识的特例，即如果没有所有相关人员的某种持续合作，任何立法者都无法独自制定在每个人与其他人的无尽关系中指导每个人实际行为的规则。任何民意测验、全民公决和协商都无法真正让立法者确定这些规则，就像类似的程序无法让计划经济的管理者发现所有财货和服务的总需求和总供给一样。³⁷⁸

What does this mean? Leoni is pointing out that legislators, even if they wanted to enact

³⁷⁷ Leoni, *Freedom and the Law*, p. 19.

莱奥尼，《自由与法律》，第 19 页。

³⁷⁸ Ibid. at 19 – 20 (emphasis in original). See also ibid. at 89; Aranson, “Bruno Leoni in Retrospect,” p. 676.

同上，第 19-20 页（原文重点）。另见同上，第 89 页；阿兰森，《回顾布鲁诺·莱奥尼》，第 676 页。

rules that truly take into account the actual situation, customs, expectations, and practices of individuals, simply can never collect enough information about the near-infinite variety of human interactions. The legislator, like a communist central planner, can only grope in the dark. And unlike a blind man who literally has to grope in the dark but at least knows when he has finally run into a wall or found the door, the legislator (or central planner) has no reliable guide for knowing whether they have constructed the “right” law (or economic allocation) or not. Further, not only can legislators not know the actual situation of the individuals they intend to cast their legislative net over, but they cannot predict the often far-reaching effects of legislation. Legislation routinely has unintended consequences, a fact that cannot be gotten around since it is necessitated by the systematic ignorance that legislators face.⁷⁹

这意味着什么呢？莱奥尼指出，立法者即使想制定真正考虑到个人实际情况、习俗、期望和习惯做法的规则，也根本无法收集到足够的关于人类近乎无限的互动信息。立法者就像共产主义的中央计划者一样，只能在黑暗中摸索。与盲人只能在黑暗中摸索但至少知道自己是撞到了墙还是找到了门不同，立法者（或中央计划者）没有可靠的指南来判断他们是否制定了“正确的”法律（或经济分配）。此外，立法者不仅无法了解他们打算撒下立法大网的个人的实际情况，也无法预测立法通常会产生的深远影响。立法通常会产生意想不到的后果，由于立法者面临的系统性无知，这一事实无法避免。

³⁷⁹

The ultimate reason that the legislator and central planner are both ultimately doomed to failure is that “there is more than an analogy between the market economy and a judiciary or lawyers’ law, just as there is much more than an analogy between a planned economy and legislation.”⁸⁰ There is “more” than an analogy because legislation and central planning are really the same thing: coercively-backed commands emanating from the government that order individuals to act in certain ways that the government

³⁷⁹ On the unintended consequences that flow from various governmental programs and laws, see William C. Mitchell & Randy T. Simmons, *Beyond Politics: Markets, Welfare, and the Failure of Bureaucracy* (Boulder: Westview Press, 1994).

关于各种政府计划和法律所产生的意外后果，参见威廉·C·米切尔（William C. Mitchell）和兰迪·T·西蒙斯（Randy T. Simmons）所著的《超越政治：市场、福利与官僚体制的失败》（Boulder: Westview Press, 1994）。

prefers.

立法者和中央计划者最终都注定要失败，其根本原因在于“市场经济与司法或律师的法律之间的类比关系远不止于此，正如计划经济与立法之间的类比关系也远不止于此”。³⁸⁰之所以说“不止”是类比，是因为立法和中央计划实际上是一回事：都是来自政府的、以强制力为后盾的命令，要求个人以政府偏好的某些方式行事。

In a common-law process, law develops spontaneously, much as prices arise spontaneously on a free market. Mises showed that only when individuals remain free to trade and own private property can genuine prices be discovered. Similarly, true law is discovered in a process that “can be described as sort of a vast, continuous, and chiefly spontaneous collaboration between the judges and the judged in order to discover what the people’s will is in a series of definite instances—a collaboration that in many respects may be compared to that existing among all the participants in a free market.”⁸¹ True law cannot be designed or imposed top-down on society. The form of a legal system, like a price structure or like a language, must evolve naturally, from the bottom up. This is why the artificial language Esperanto failed to take hold.⁸² The naive belief that Law can be discovered by means of government employees’ dictates is reminiscent of the joke about the new English public school, in which the headmaster announced to the students one day, “from now on, it will be a tradition at the School to wear hats on Fridays.” Legislation is artificial law and is no substitute for evolved law.

在普通法产生过程中，法律是自发形成的，就像自由市场上的价格是自发产生的一样。米塞斯指出，只有当个人保持交易自由并拥有私有财产时，才能发现真正的价格。同样，真正的法律也是在这样一个过程中被发现的，“这个过程可以被描述为法官与审判者之间的一种广泛的、持续的、主要是自发的合作，目的是在一系列明确的实例中发现人民的意愿是什么——这种合作在许多方面可以与自由市场中所有参与者之间存在的合作相提并论”。³⁸¹ 真正的法律不是自上而下设计或强加给社会的。法律体系

³⁸⁰ Leoni, Freedom and the Law, p. 23 (emphasis in original).
莱奥尼，《自由与法律》，第 23 页（原文重点）。
³⁸¹ Ibid. at 22; see also p. 104; Aranson, “Bruno Leoni in Retrospect,” pp. 668 – 69; and note 37, above, and accompanying text.
同上，第 22 页；另见第 104 页；阿兰森，《回顾布鲁诺·莱奥尼》，第 668-669 页；以及上文注释 37 及相关内容。

的形式就像价格结构或语言一样，必须自下而上地自然演变。这也是人造语言世界语未能流行起来的原因。³⁸² 天真地认为法律可以通过政府雇员的指令来发现，这不禁让人想起一个关于英国新公立学校的笑话：一天，校长向学生们宣布，“从现在起，星期五戴帽子将成为学校的传统”。立法是人为的法律，不能代替演化而来的法律。

A crucial reason for the systematic ignorance of central planners and legislators alike is “the decentralized, fragmentary character of knowledge.”⁸³ This makes central planners and central law-makers systematically unable to ever have enough knowledge to make informed decisions that affect entire economic or legal systems. Moreover, not only is a central planner “unable” to gather information only present in a dynamic price structure, but the attempt to plan actually destroys the price structure because the private property system at the base of a price structure is outlawed. Similarly, not only does a legislator face a severe ignorance problem—he could never hope to have a comprehensive and continually updated view of all the interactions, rules, relationships, and customs that exist among the people—he also subverts the very spontaneous legal order that would form in the absence of legislative interference. Customs change, for example, because of the uncertainty introduced, because people become more suspicious and rely less on contracts, and because their time preference increases, as discussed above.⁸⁴ As Professor Aranson puts it, “Legislation saps the social order of spontaneity.”⁸⁵

造成中央计划者和立法者系统性无知的一个重要原因是“知识的分散性和碎片化”。³⁸³ 这就使得中央计划者和中央立法者始终无法掌握足够的知识来做出影响整个经济或法律体系的明智决策。此外，中央计划者不仅“无法”收集只存在于动态价格结构中的信息，而且计划的尝试实际上破坏了价格结构，因为价格结构基础上的私有财产制度被取缔了。同样，立法者不仅面临着严重的无知问题——他永远不可能对存在于人们之间的所有互动、规则、关系和习俗有一个全面且不断更新的认识——他还颠覆了在没有立法干预的情况下自发形成的法律秩序。例如，由于引入了不确定性，由于

³⁸² See Leoni, *Freedom and the Law*, p. 218 (discussing similarities between evolved systems like language and law).

见莱奥尼《自由与法律》，第 218 页（讨论语言和法律等演变系统之间的相似性）。

³⁸³ Aranson, “Bruno Leoni in Retrospect,” p. 675.

阿兰森，《回顾布鲁诺·莱奥尼》，第 675 页

人们变得更加多疑和减少对依赖，也由于人们的时间偏好增加（如上文所述），习俗会发生变化。³⁸⁴正如阿兰森教授所说，“立法削弱了社会秩序的自发性”。³⁸⁵

³⁸⁴ See Part III.B.4, subsections b. and c.

见第 III.B.4 部分，b 和 c 子小节。

³⁸⁵ Aranson, “Bruno Leoni in Retrospect,” p. 675. See also Lawrence M. Friedman, A History of American Law (New York: Simon & Schuster, Inc., 2d ed. 1985), p. 404 (discussing James Carter’s view that legislated “[c]odes impaired the orderly development of the law; they froze the law into semipermanent form; this prevented natural evolution… A statute drafted by a group of so-called experts was bound to be an inferior product, compared to what centuries of evolution, of self-correcting growth, could achieve… [T]he social and economic legislation of the late 19th century … were doomed to failure; they were hasty intrusions, and they contradicted the deeper genius of the law.”); and Benson, The Enterprise of Law, p. 282 (“public production of law undermines the private property arrangements that support a free market system”). An interesting discussion of, inter alia, the debate on whether to legislatively codify the common law is found in Mark D. Rosen, “What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development,” 1994 Wisc. L. Rev. (1994): 1119 – 1286. For more on James Carter’s opposition to Field’s attempt to legislatively codify the common law of New York, see Kinsella, “Another Problem with Legislation: James Carter v. the Field Codes,” Mises Economics Blog (Oct. 14, 2009).

阿兰森，《回顾布鲁诺·莱奥尼》，第 675 页。另见劳伦斯·M·弗里德曼，《美国法律史》（纽约：西蒙与舒斯特公司，第二版，1985 年），第 404 页（讨论詹姆斯·卡特的观点，即立法的“[法典]损害了法律的有序发展；它们将法律固化为半永久性形式；这阻碍了自然演化……由一群所谓的专家起草的法规必然是劣等产品，与几个世纪的演进、自我修正的增长所能实现的相比……[19 世纪后期的社会和经济立法……注定要失败；它们是仓促的介入，与法律更深层的天赋相矛盾。”）；以及本森，《法律事业》，第 282 页（“公共法律生产破坏了支持自由市场体系的私有财产安排”）。马克·D·罗森的《普通法发生了什么？——近期美国的法典编纂及其对司法实践和法律后续发展的影响》，1994 年威斯康星法律评论（1994 年）：1119-1286，其中特别有关于是否对普通法进行立法编纂的论证的有趣讨论。关于詹姆斯·卡特反对菲尔德对纽约普通法进行立法编纂的尝试的更多内容，见金塞拉，《立法的另一个问题：詹姆斯·卡特诉菲尔德法典》，米塞斯经济学博客（2009 年 10 月 14 日）。

For further discussion of Leoni’s ideas in this regard and related issues, see Gottfried Dietze, “The Necessity of State Law,” in Cunningham, ed., Liberty and the Rule of Law (chap. 3, p. 74); Tullock, “Courts as Legislators”; Sartori, Liberty and Law, and idem, Democratic Theory, chap. 13; Leonard P. Liggio, “Law and Legislation in Hayek’s Legal Philosophy,” Southwestern U. L. Rev. 23 (1994); <https://perma.cc/5GHM-T8KU>; 507 – 29; Murray N. Rothbard, “On Freedom and the Law,” New Individualist Review

Just as a decentralized, free market economy is essential to the coordination of resources and the production of wealth, so a decentralized law-finding system is a prerequisite to allowing true law to develop. This does not guarantee that the law will be just—there are no guarantees— but at least it is possible in a decentralized law-finding system, while in a legislated system it is not.

正如一个去中心化的自由市场经济对于资源的协调和财富的生产至关重要一样，一个去中心化的法律发现系统也是让真正的法律得以发展的必要条件。这并不能保证法律是正义的——不存在任何保证——但至少在去中心化的法律发现体系中是有可能的，而在立法体系中则不可能的。

特殊利益与立法的非代表性

Special Interests and the Unrepresentative Character of Legislation

A problem of a legislative system that is related to the central planning problem is its unrepresentative character. Although democracy is not without problems,⁸⁶ a representative democracy is better than one that is not. Because of the information problem faced by centralized law-makers, they cannot know the people's wishes with any accuracy or detail. "[A] legal system centered on legislation resembles ... a centralized economy in which all the relevant decisions are made by a handful of directors, whose knowledge of the whole situation is fatally limited and

(Winter 1962, vol. 1, no. 4) 37, reprinted in New Individualist Review omnibus volume at 163 (1982; <https://oll.libertyfund.org/title/friedman-new-individualist-review>) (reviewing Leoni, Freedom and the Law).

关于莱奥尼在这方面的想法和相关问题的进一步讨论，见戈特弗里德·迪策，《国家法律的必要性》，收录于坎宁安编辑的《自由与法治》（第3章，第74页）；塔洛克，《法院作为立法者》；萨托利，《自由与法律》和同上，《民主理论》，第13章；伦纳德·P·利吉奥，《哈耶克法律哲学中的法律与立法》，西南大学法律评论 23 卷（1994 年；<https://perma.cc/5GHM-T8KU>）：507-529；穆瑞·N·罗斯巴德，《论自由与法律》，《新个人主义评论》（1962 年冬季，第1卷，第4期）37 页，重印于《新个人主义评论选集》第 163 页（1982 年；<https://oll.libertyfund.org/title/friedman-new-individualist-review>）（评论莱奥尼的《自由与法律》）。

whose respect, if any, for the people's wishes is subject to that limitation."³⁸⁷

立法制度与中央计划问题相关的一个问题是其不具有代表性。虽然民主并非没有问题，³⁸⁶但代议制民主比非代议制民主要好。由于中央集权的法律制定者面临信息问题，他们无法准确或详细地了解人民的意愿。

“[一个]以立法为中心的法律制度类似于……一个中央集权的经济，其中所有相关决策都由少数几个管理者做出，他们对整体情况的了解极其有限，他们对人民意愿的尊重（如果有的话）也受到这种限制。”³⁸⁷

Italian legal scholar Giovanni Sartori puts the point forcefully:

*[W]e make the inference that when a person who allegedly represents some tens of thousands contributes ... to the lawmaking process, then he is making the thousands of people whom he is representing free, because the represented thereby obey norms that they have freely chosen... How absurd! ... In empirical terms, from the premise that I know how to swim it may follow that I can cross a river, but not that I can cross the ocean.*⁸⁸

意大利法律学者乔瓦尼·萨托利（Giovanni Sartori）有力地阐述了这一观点：

[我们的推论是，当一个据称代表成千上万的人.....为法律制定过程做出贡献时，他就使他所代表的成千上万人获得了自由，因为被代表者因此遵守了他们自由选择的规范.....多么荒谬！.....就经验而言，从“我会游泳”这一前提可以得出，我可以渡河，

³⁸⁶ For a discussion of some problematic tendencies of democracies, see Hoppe, “Time Preference, Government, and the Process of De-Civilization — From Monarchy to Democracy” and “On Free Immigration and Forced Integration,” in *Democracy: The God That Failed*.

关于民主的一些有问题的倾向的讨论，见霍普在《民主：失败上帝》中的《时间偏好、政府和去文明化的进程——从君主制到民主制》以及《论自由移民和强制一体化》。

³⁸⁷ Leoni, *Freedom and the Law*, p. 22 (emphasis in original). See also *ibid.* at 89; Aranson, “Bruno Leoni in Retrospect,” p. 675.

莱奥尼，《自由与法律》，第 22 页（原文重点）。另见同上，第 89 页；阿兰森，《回顾布鲁诺·莱奥尼》，第 675 页。

但不能渡海。³⁸⁸

Similarly, even if citizen involvement and participation in a small community can produce liberty, "we cannot draw the conclusion that the same amount of participation will produce the same result in a large community; for in the latter an equally intense participation will entail diminishing consequences."⁸⁹ Leoni argues that "the more numerous the people are whom one tries to 'represent' through the legislative process and the more numerous the matters in which one tries to represent them, the less the word 'representation' has a meaning referable to the actual will of actual people other than that of the persons named as their 'representatives.'"⁹⁰

同样，即使公民在小社区的介入和参与能够产生自由，“我们也不能得出结论说，同样程度的参与将在大社区产生同样的结果；因为在后者，同样强度的参与将导致后果递减”。³⁸⁹ 莱奥尼认为，“通过立法过程试图‘代表’的人数越多，试图代表他们的事务越多，‘代表’这个词就越没有意义，无法指代除了被称为他们‘代表’的人之外的实际人的实际意愿。”³⁹⁰

Legislators cannot discover the will of their constituents, and, as explained above,⁹¹ cannot know very much at all about the actual interactions and circumstances of those who they seek to regulate. At best, then, a legislator will produce rather neutral, if bumbling, intrusive, and ineffectual, laws. But we all know about lobbyists and special interest groups, and their existence ensures that legislators will not be merely ignorant idiots. Instead, they will actively seek to enact invidious statutes that benefit a select few at the expense of others and, in the long run, at the expense of all of society.

³⁸⁸ Sartori, *Liberty and Law*, at 31 – 32.

萨托利，《自由与法律》，第 31-32 页。

³⁸⁹ Ibid. at 32.

同上，第 32 页。

³⁹⁰ Leoni, *Freedom and the Law*, p. 19. See also Aranson, “Bruno Leoni in Retrospect,” pp. 676 – 77.

莱奥尼，《自由与法律》，第 19 页。另见阿兰森，《回顾布鲁诺·莱奥尼》，第 676-677 页。

立法者不可能发现选民的意愿，而且如上所述³⁹¹，立法者也不可能对他们试图监管的对象的实际互动和情况了如指掌。因此，立法者充其量只能制定出比较中性的法律，甚至是笨拙的、干涉性的、无效的法律。但是，我们都知道说客和特殊利益集团，他们的存在确保了立法者不会只是无知的白痴。相反，他们会积极寻求制定不公平的法规，以牺牲他人作为代价让选中的少数人受益，从长远来看，是以整个社会为代价。

In the political process, statutes are enacted that reflect the will of a contingent majority of legislators. This provides an opportunity for various groups to demand special treatment, such as protectionism or blatant wealth transfers. Those with a vested interest in a given piece of legislation are willing to invest much time, effort, and money (e.g. for bribes) to persuade legislators to enact the legislation. Each individual in the large group outside the special interest group feels the pain of the legislation much less than the special interest group will benefit, so that there is relatively little incentive for many people to oppose the special group's lobbying efforts, or even to educate themselves as to which lobbying efforts are taking place. Escalating efforts at forming special interest groups to lobby for specialized statutes results in "nothing less than a potential legal war of all against all, carried on by way of legislation and representation."

92 Any legislative system in a large, modern society is doomed to succumb, to a large extent, to special interest groups rather than representing the general will of the populace.

在政治进程中，法规的颁布反映了偶然多数的立法者的意愿。这就为各种群体提供了要求特殊待遇的机会，如贸易保护主义或公然的财富转移。那些在某项立法中拥有既得利益的人愿意投入大量的时间、精力和金钱（如贿赂）来说服立法者颁布法律。在特殊利益集团之外的大群体中，每个人从立法中感受到的痛苦远远小于特殊利益集团所能获得的利益，因此许多人反对特殊利益集团游说的动力相对较小，甚至不会去了解哪些游说活动正在进行。组建特殊利益集团为专门法规进行游说的努力不断升级，导致其结果“无异于一场潜在的所有人对所有人的法律战争，通过立法和代表的方式进行”。³⁹²在一个庞大的现代社会中，任何立法体系都注定会在很大程度上屈服于特殊

³⁹¹ See Part III.C.2, above.
见上文第 III.C.2 部分。

³⁹² Leoni, *Freedom and the Law*, pp. 21, 158. See also Aranson, “Bruno Leoni in Retrospect,” pp. 677 – 79; Mitchell & Simmons, *Beyond Politics* (discussing the large

利益集团，而不是代表民众的普遍意愿。

去中性化的法律发现系统

Decentralized Law-Finding Systems

As discussed above, legislative systems such as the civil law are centralized law-making systems and face many of the problems faced by central planners in general. Decentralized law-finding systems like the common law, on the other hand, are analogous to free markets in that a spontaneous order arises in both.⁹³ Unlike a legislator imposing his will on society, when a judge decides a case he attempts "to discover and make explicit the rule that is implicit in the practices, customs, and institutions of the people... Law then develops through the application of the rule to new situations."⁹⁴ But as Liggio and Palmer note:

This process reveals another analogy with the decentralized market process, for the decision of a judge in a particular case is subject to review by other participants in the legal process. One judge cannot impose his personal will or idiosyncratic interpretation of the law on the entire legal system; similarly, innovations in the market process arise through the decentralized activities of entrepreneurs and firms and are then subject to the review of consumers, investors, and other market participants. In both the market process and the common law process there is little danger of having "all your eggs in one basket," as is the case with both socialism and legislation.⁹⁵

如上所述，大陆法等立法体系是中心化的法律制定体系，通常面临着中央计划者所面临的许多问题。另一方面，像普通法这样的去中心化的法律发现系统类似于自由市场，

number of special interest groups that accompany big government), and Frederic Bastiat, *The Law* (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, Dean Russell trans. 1950 [1850]; <https://fee.org/resources/the-law>), pp. 17 - 18 (discussing ever-escalating conflicts among disparate special interest groups).

莱奥尼，《自由与法律》，第 21、158 页。另见阿兰森，“回顾布鲁诺·莱奥尼”，第 677-679 页；米切尔和西蒙斯，《超越政治》（讨论了伴随大政府的大量特殊利益集团），以及弗雷德里克·巴斯夏，《法律》（纽约州欧文顿-哈得逊：经济教育基金会，迪安·拉塞尔译，1950 年[1850 年]；<https://fee.org/resources/the-law>），第 17-18 页（讨论了不同特殊利益集团之间不断升级的冲突）。

因为两者都会产生一种自发的秩序。³⁹³与将自己的意志强加于社会的立法者不同，当法官裁决一个案件时，他试图“发现并阐明隐含于人民的实践、习俗和制度中的规则……然后通过将规则应用于新的情况来发展法律”。³⁹⁴但正如利吉奥和帕尔默所指出的：

这一过程揭示了与去中心化的市场过程的另一个类比，因为法官在某一案件中的裁决要接受法律程序中其他参与者的审查。一名法官不能将其个人意志或对法律的特殊性解释强加于整个法律体系；同样，市场过程中的创新也是通过企业家和公司去中心化的活动产生的，然后接受消费者、投资者和其他市场参与者的审查。在市场过程和普通法过程中，几乎没有“把所有鸡蛋都放在一个篮子里”的危险，而社会主义和立法则都对出现这种情况。³⁹⁵

Judges in a decentralized law-finding system are also less likely to be influenced by special interests than are legislators. Professor Epstein argues:

*that structural features limit what the manipulation of common law rules can achieve. The more focused and sustained methods of legislation and regulation are apt to have more dramatic effects than does alteration of common law rules and thus will attract the primary efforts of those trying to use the law to promote their own interests.*⁹⁶

与立法者相比，去中心化的法律制定体系中的法官也不太可能受到特殊利益的影响。爱泼斯坦教授认为：

³⁹³ See notes 37 and 81, above, and accompanying text.
见上文注释 37 和 81 以及附文。

³⁹⁴ Liggio & Palmer, “Freedom and the Law: A Comment on Professor Aranson’s Article,” at 720–21.
利吉奥和帕尔默，《自由与法律：对阿兰森教授文章的评论》，第 720-721 页。

³⁹⁵ Ibid. at 721, n.30.
同上，第 721 页注释 30。

结构性特征限制了对普通法规则的操纵所能达到的效果。与改变普通法规则相比,更集中、更持久的立法和监管方法可能会产生更显著的效果,因此会吸引那些试图利用法律来促进自身利益的人的主要努力。³⁹⁶

To the extent a court-based legal system displays legislative characteristics, which often occurs in government-based court systems,⁹⁷ it faces the same central planning problems as does legislation.⁹⁸ For example, judges that attempt in their decisions to “maximize society’s wealth”⁹⁹ face the same information problems as a central economic planner.¹⁰⁰

在以法院为基础的法律体系展现出立法特征的范围内（这种情况经常出现在政府主导的法院系统中）³⁹⁷，它面临着与立法相同的中央计划问题。³⁹⁸例如，试图在其裁决中“使社会财富最大化”³⁹⁹的法官面临着与中央经济规划者相同的信息问题。⁴⁰⁰

³⁹⁶ Richard A. Epstein, “The Social Consequences of Common Law Rules,” 95, no. 8 Harv. L. Rev. (June 1982; https://chicagounbound.uchicago.edu/journal_articles/1276/): 1717–51, pp. 1718–19.

理查德·A·爱泼斯坦，《普通法规则的社会后果》，《哈佛法律评论》第95卷第8期（1982年6月；https://chicagounbound.uchicago.edu/journal_articles/1276/）：1717-1751页，第1718-1719页。

³⁹⁷ See Part III.B.2, above.

见上文 Part III.B.2

³⁹⁸ Aranson, “Bruno Leoni in Retrospect,” p. 697; Peter H. Aranson, “The Common Law as Central Economic Planning,” Const. Pol. Econ. 3 (1992): 289–320, pp. 297–99 et pass.

阿兰森，《回顾布鲁诺·莱奥尼》，第697页；彼得·H·阿兰森，《作为中央经济计划的普通法》，《宪政政治经济学》3（1992年）：289-320页，第297-299页及其他。

³⁹⁹ Aranson, “Bruno Leoni in Retrospect,” p. 692.

阿兰森，《回顾布鲁诺·莱奥尼》，第692页。

⁴⁰⁰ Ibid. at 697–98 (emphasis added) (footnotes omitted). See also Aranson, “The Common Law as Central Economic Planning,” p. 314.

同上，第697-698页（重点添加）（注释省略）。另见阿兰森，《作为中央经济计划的普通法》，第314页。

Judges, then, especially government-employed judges, can run into the legislator's ignorance problem when they act like legislators and pretend they are omniscient.

那么，法官，尤其是受政府雇用的法官，当他们表现得像立法者并假装自己无所不知时，就会遇到立法者的无知问题。

D. 法律的泛滥 The Proliferation of Laws

Legislation is nothing more than controls, and it is evident that controls breed yet more controls. And invariably, because of government propaganda combined with public ignorance, the inevitable failures of the nostrum of legislation are blamed, not on the interventionist government, but on freedom and unregulated human conduct. Thus even more controls are imposed to solve problems caused by controls in the first place, and the process accelerates. For example, the well-known boom-bust business cycle, with its recurrent depressions and recessions (such as the Great Depression and recent recessions), is caused not by capitalism but by government manipulation of the money supply (which is, of course, only possible with legislatively-created institutions such as the Federal Reserve).¹⁰¹ When such government-caused calamities strike, the current Roosevelt or Clinton milks the disaster as an excuse for more government intervention and power.¹⁰² Thus, legislation has a ratcheting effect whereby statutes tend to lead to further statutes, and the government sphere expands outward as these statutes cascade down from generation to generation.

立法不过是控制，而控制显然会滋生更多的控制。而且由于政府的宣传加上公众的无知，立法这一权宜之计不可避免的失败，往往不是归咎于干预主义政府，而是归咎于自由和不受监管的人类行为。因此，为了解决一开始就由管制造成的问题，人们实施了更多的管制，而这一过程也在加速。例如，众所周知的繁荣-萧条商业周期，以及反复出现的萧条和衰退（如大萧条和最近的经济衰退），都不是由资本主义造成的，而是由政府操纵货币供应造成的（当然，只有像美联储这样通过立法设立的机构才有可能操纵货币供应）。⁴⁰¹当这种由政府造成的灾难发生时，现任罗斯福或克林顿就会以

⁴⁰¹ See Murray N. Rothbard, *America's Great Depression* (New York: New York University Press, revised ed. 1975); idem, *Man, Economy, and State*, chap. 12, § 11.B; idem, *For a New Liberty*, at chap. 9; Mises, *Human Action*, chap. XX, esp. p. 561.
见穆瑞·N·罗斯巴德，《美国大萧条》（纽约：纽约大学出版社，修订版 1975 年）；

灾难为借口进行更多的政府干预和权力扩张。⁴⁰²因此，立法具有一种递增效应，即法规往往会导致更多的法规，而随着这些法规代代相传，政府的领域也在不断向外扩展。

Such a continual outpouring of laws has many insidious effects. As has wisely been said, "The more corrupt the Republic, the more the laws."¹⁰³ But the reverse is also true. As special interest groups become successful, others become necessary for self-defense, and soon a legal war of all against all begins to emerge, as already discussed.¹⁰⁴ The ability of legislators to change laws reduces legal certainty, which makes contractual reliance more risky and hampers useful economic transactions. Uncertainty also increases the general time preference rate, which shortens the structure of production, thereby impoverishing society. The ensuing higher time preference also increases the prevalence of criminal activity.¹⁰⁵

这种法律的不断涌现产生了许多潜在的影响。正如有人明智地指出：“国家越腐败，法律就越多”。⁴⁰³反之亦然。随着特殊利益集团的成功，其他特殊利益集团也有必要进行自卫，很快就会出现一场所有人反对所有人的法律战争，这一点已经讨论过。⁴⁰⁴立法者修改法律的能力降低了法律的确定性，这使得依赖的风险更大，阻碍了有用的经济交易。不确定性还抬高了一般时间偏好率，缩短了生产结构，从而使社会贫困化。随之而来的较高时间偏好也增加了犯罪活动的发生率。⁴⁰⁵

同上，《人、经济与国家》，第 12 章，第 11 节 B；同上，《为了新自由》，第 9 章；米塞斯，《人的行动》，第 20 章，特别是第 561 页。

⁴⁰² See Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987).

见罗伯特·希格斯，《危机与利维坦：美国政府增长中的关键事件》（纽约：牛津大学出版社，1987 年）。

⁴⁰³ Tacitus, *Annals*, III, 27, quoted in Sartori, *Liberty and Law*, at 3. For example, in the case of legislation related to intellectual property law, see Kinsella, “The Mountain of IP Legislation,” *Mises Economics Blog* (Nov. 24, 2010).

塔西佗，《编年史》，III，27，引自萨托利的《自由与法律》，第 3 页。例如，关于与知识产权法相关的立法案例，见金塞拉的《知识产权立法之山》，米塞斯经济学博客（2010 年 11 月 24 日）。

⁴⁰⁴ See note 92, above, and accompanying text.

见上文注释 92 及相关文本。

⁴⁰⁵ See Part III.B.4, subsections b. and c.

见 Part III.B.4，子小节 b 和 c。

Additionally, when so many laws exist, and with such arcane, vague, complex language, it becomes almost impossible for each citizen to avoid being a law-breaker, especially when we have the perverse rule that “ignorance of the law is no excuse.” Even government officials cannot seem to obey federal tax laws regarding household help. Almost everyone has violated a tax law, securities regulation, “racketeering” law, drug law, handgun law, alcohol law, customs regulation, anti-sodomy law, or at least traffic ordinance.¹⁰⁶ But when we are all law-breakers the law is discredited¹⁰⁷ and, what is worse, the government can selectively and arbitrarily enforce whatever law is convenient against whichever “trouble-maker” it wishes.

此外，当存在如此多的法律，并且语言如此晦涩、模糊、复杂时，每个公民几乎都不可能避免成为违法者，尤其是当我们有“不懂法不是借口”的反常规则时。甚至政府官员似乎也无法遵守有关家庭雇工的联邦税法。几乎每个人都违反过税法、证券法规、“敲诈勒索”法、毒品法、枪械法、酒精法、关税法、反鸡奸法或至少是交通法规。⁴⁰⁶但是，当我们都是违法者时，法律就失去了信誉，⁴⁰⁷更糟糕的是，政府可以有选择性地任意对“麻烦制造者”执行它认为方便的法律。

Furthermore, “the legislative conception of law accustoms those to whom the norms are addressed to accept any and all commands of the State, that is, to accept any iussum as ius.”¹⁰⁸ People become more accustomed to following orders, and thus become more docile, servile, and less independent. Once people become docile and lose their rebellious spirit, “[t]he road is cleared for the legal suppression of constitutional legality. Whoever has had the experience of observing, for example, how

⁴⁰⁶ In the case of copyright, for example, see Kinsella, “We are all copyright criminals: John Tehranian’s ‘Infringement Nation,’” Mises Economics Blog (Aug. 22, 2011). 例如在版权方面，见金塞拉的《我们都是版权罪犯：约翰·德黑兰尼安的“侵权之国”》，米塞斯经济学博客（2011年8月22日）。

⁴⁰⁷ Professor Benson notes that such a proliferation of laws “leads to selective enforcement, corruption, and open tolerance of illegal acts. Clearly a negative externality is created as respect for and fidelity to all law is harmed when large numbers of such largely unenforceable laws are openly defied.” Benson, *The Enterprise of Law*, p. 286.

本森教授指出，这样的法律泛滥“导致选择性执法、腐败和对非法行为的公开容忍。显然，当大量此类基本上无法执行的法律被公然违抗时，对所有法律的尊重和忠诚都会受到损害，从而产生负面的外部性。”本森，《法律事业》，第286页。

fascism established itself in power knows how easily the existing juridical order can be manipulated to serve the ends of a dictatorship without the country's being really aware of the break."¹⁰⁹

此外，“法律的立法概念使规范所针对的人习惯于接受国家的任何以及所有命令，也就是说，将任何命令都视为法律。”⁴⁰⁸人们变得更加习惯于服从命令，从而变得更温顺、奴性更足和更不独立。一旦人们变得温顺，失去反抗精神，“就为从法律上压制宪法的合法性扫清了道路。举例来说，任何有过观察法西斯主义如何掌权经验的人都知道，现有的法律秩序很容易被操纵，以服务于独裁统治的目的，而国家却并未真正意识到这种破坏。”⁴⁰⁹

Legal inflation cheapens and dilutes law, just as money inflation by the Federal Reserve dilutes dollars and causes price inflation. True law becomes smothered by legislation.

立法膨胀使法律变得廉价和被稀释、削弱，正如美联储的货币膨胀稀释了美元并导致价格膨胀一样。真正的法律被立法所扼杀。

4 朴素的理性主义与立法至上

NAIVE RATIONALISM AND THE PRIMACY OF LEGISLATION

If the arguments made herein are correct, no centralized legal system can be a rationalist system, because legislation undermines the rationalist, libertarian virtues of individualism, individual liberty, and the rule of law. Why, then, is the civil law proclaimed as the great rationalist legal system, even though it sets up legislation as the primary source of law? Why are legislation and codification hailed as superior, scientific, and

⁴⁰⁸ Sartori, *Liberty and Law*, at 38 – 39.
萨托利，《自由与法律》，第 38-39 页。

⁴⁰⁹ Ibid. at 39. See also Benson, *The Enterprise of Law*, p. 282 (“it appears that the increasing centralization of law-making has been associated with increasing transfers of property rights from private individuals to government or perhaps, more accurately, to interest groups.”) (endnote omitted).
同上，第 39 页。另见本森，《法律事业》，第 282 页（“似乎法律制定的日益中心化与财产权从私人向政府的转移增加有关，或者更准确地说，是向利益集团的转移。”）（尾注省略）。

rational? Why, for that matter, is legislation so popular today even in common-law regimes, as well as in our federal system? It seems somewhat strange that those who support individual liberty, justice, and the rule of law would also support the very thing that opposes and erodes these things.

如果本文的论点是正确的，那么任何中心化的法律体系都不可能是理性主义体系，因为立法破坏了个人主义、个人自由和法治等理性主义、自由意志主义的美德。那么，为什么大陆法系被宣称为伟大的理性主义法律体系，尽管它将立法设定为法律的主要来源？为什么立法和法典编纂被誉为优越、科学和理性？为什么今天即使在普通法制度中，以及在我们的联邦制度中，立法也如此受欢迎？那些支持个人自由、正义和法治的人竟然也支持与之对立并侵蚀这些东西的事物，这似乎有点奇怪。

In Hayek's view, there are two types of rationalism: evolutionary rationalism (or, in Karl Popper's terminology, critical rationalism) and constructivist rationalism (Popper's naive rationalism).¹¹⁰ Each of these two variants of rationalism is associated with a unique view of liberty. Critical rationalism, i.e., true rationalism, relates to a "British" theory of liberty that derives from thinkers such as Locke, Hume, Smith, Burke, Montesquieu, de Tocqueville, and Lord Acton, while the "French" version of rationalism, i.e., naive rationalism, derives from Rousseau, Condorcet, Hobbes, and Descartes.¹¹¹ Hayek believed that "all modern socialism, planning and totalitarianism derive" from the naive rationalism of the French tradition.¹¹²

哈耶克认为，理性主义有两种类型：进化理性主义（或用卡尔·波普尔的术语，批判理性主义）和建构主义理性主义（波普尔的朴素理性主义）。⁴¹⁰这两种理性主义的变体

⁴¹⁰ F.A. Hayek, *I. Law, Legislation and Liberty: Rules and Order* (Chicago: University of Chicago Press, 1973), pp. 5 – 6; see also pp. 72, 118; idem, *The Fatal Conceit: The Errors of Socialism*, vol. I of *The Collected Works of F.A. Hayek* (Chicago: University of Chicago Press, W.W. Bartley, III, ed., 1989); idem, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), p. 38 et seq.; Eugene F. Miller, "The Cognitive Basis of Hayek's Political Thought," in Cunningham, ed., *Liberty and the Rule of Law*, chap. 11, pp. 242, 245 (discussing the two kinds of rationalism and their political consequences); John Gray, *Hayek on Liberty* (Oxford: Basil Blackwell, 1984), p. 10; Sartori, *Democratic Theory*, at chap. 11 (discussing rationalism vs. empiricism).

F.A. 哈耶克，《法律、立法与自由：规则与秩序》（芝加哥：芝加哥大学出版社，1973年），第 5-6 页；另见第 72、118 页；同上，《致命的自负：社会主义的谬误》，F.A. 哈耶克文集第一卷（芝加哥：芝加哥大学出版社，W.W. 巴特利三世编辑，1989

各自与一种独特的自由观相关联。批判性理性主义，即真正的理性主义，与一种源自洛克、休谟、斯密、柏克、孟德斯鸠、托克维尔和阿克顿勋爵等思想家的“英国”自由理论相关，而“法国”版的理性主义，即朴素理性主义，则源自卢梭、孔多塞、霍布斯和笛卡尔。⁴¹¹哈耶克认为，“所有现代社会主义、计划和极权主义都源于“法国传统的朴素的理性主义。⁴¹²

Like the socialists who naively believe that the delicate order of the market, coordinated by millions of individual interactions, can be replaced by the brute force of a central planning board, naive rationalists have an almost superstitious faith in the ability of reason to impose law on society.

就像社会主义者天真地认为，由千百万个个体互动协调的精妙的市场秩序可以被中央计划委员会的蛮力所取代一样，朴素理性主义者对理性将法律强加于社会的能力有着近乎迷信般的信仰。

In Hayek's view, the decisive influence on the French Enlightenment political theory was the philosophy of Descartes, with its extravagant assumptions about the powers of human reason. Cartesian [i.e., naive] rationalism lead to the belief that everything which men achieve, including liberty, is the direct result of reason and therefore should be subject to its control. It traced all order to deliberate human design and expressed contempt for institutions that were not consciously designed or not intelligible to reason.¹¹³

哈耶克认为，对法国启蒙运动政治理论产生决定性影响的是笛卡尔哲学，它对人类理性的力量有着盲目的假设。笛卡尔（即朴素）理性主义导致了这样一种信念，即人类所取得的一切，包括自由，都是理性的直接结果，因此应

年）；同上，《自由宪章》（芝加哥：芝加哥大学出版社，1960年），第38页及后续页。；尤金·F. 米勒，《哈耶克政治思想的认知基础》，载坎宁安编，《自由与法治》，第11章，第242、245页（讨论两种理性主义及其政治后果）；约翰·格雷，《哈耶克论自由》（牛津：巴兹尔·布莱克韦尔，1984年），第10页；萨托利，《民主理论》，第11章（讨论理性主义与经验主义）。

⁴¹¹ Miller, “The Cognitive Basis of Hayek’s Political Thought,” at 245.

米勒，《哈耶克政治思想的认知基础》，同上第245页。

⁴¹² Ibid. at 246.

同上，第246页。

当受其控制。它将所有秩序都追溯到人类深思熟虑的设计，并对那些并非有意识设计或理性无法理解的制度表示蔑视。⁴¹³

But naive rationalists fail to appreciate the true role of spontaneous order in human society. Because they did not understand, for example, that resources are allocated rationally only in a decentralized free market, a free market appears chaotic and unruly, as something that should be tamed and replaced with “scientific” central planning.

但是，朴素的理性主义者却不懂得自发秩序在人类社会中的真正作用。例如，由于他们不了解资源只有在去中心化的自由市场中才能得到合理配置，因此自由市场显得混乱而无序，似乎应该被驯服，并用“科学的”中央计划取而代之。

The belief of civilians and other proponents of centralized lawmaking that true law ever could be made by a legislature stems from a naive rationalism because it assigns too broad a role to deductive reason. This is not surprising, given the French influence on the development of modern civil law. Reason is our only means of knowledge, but we would not attempt, for example, to take a sick person's temperature by closing our eyes and deducing it. Instead, we would measure it, if we realized that a pure exercise of deductive thinking cannot hope to give us this information.¹¹⁴ This would be naive.¹¹⁵

平民和其他中央集权立法的支持者认为真正的法律可以由立法机构制定，这种观点源于一种朴素的理性主义，因为它赋予了演绎理性太广泛的作用。鉴于法国对现代大陆法发展的影响，这并不奇怪。理性是我们获取知识的唯一手段，但我们不会试图通过闭眼推断来测量病人的体温。相反，如果我们意识到纯粹的演绎思维无法为我们提供这一信息，我们就会测量体温。⁴¹⁴ 这未免太过天真了。⁴¹⁵

⁴¹³ Ibid. at 246 – 47 (footnote omitted).
同上，第 26-247 页，（注释省略）。

⁴¹⁴ See Hayek, I. Law, Legislation and Liberty: Rules and Order, at 29 (“to make reason as effective as possible requires an insight into the limitations of the powers of conscious reason… [O]ne of the tasks of reason is to decide how far it is to extend its control or how far it ought to rely on other forces which it cannot wholly control.”).
见哈耶克，《法律、立法与自由：规则与秩序》，第 29 页（“要使理性尽可能有效，需要洞察有意识的理性力量的局限性……[理性的]任务之一是决定其应在多大程度上扩展其控制，或者在多大程度上应当依靠它无法完全控制的其他力量。”）

⁴¹⁵ Hayek himself has been criticized for assigning too little role to reason on the part

A genuine market order can only be generated from the bottom up by the free interaction of private property owners. Given this fact, it is rational not to destroy this order by the top-down commands issued by a sovereign central planner. A detailed body of law, while based on fundamental norms established by and compatible with true rationalism, can only be discovered and established in a decentralized fashion; and it is clear that centralized legislative commands can only disrupt and distort the spontaneous and rational development of Law. The championing of legislation, not to mention central economic planning, thus irrationally ignores the reality that Law is compatible only with a decentralized law-finding system, and it ignores the inevitable negative effects of attempting to legislate (i.e., uncertainty, proliferation of the laws, special interest wars, unintended effects). The civil law worships legislation because of a desire to impose "order" on a field where there is already spontaneous order. This naive rationalism is not really rationalism at all: it is anti-rationalism or irrationalism.

真正的市场秩序只能由私有财产所有者的自由互动自下而上地产生。鉴于这一事实，理性的做法是不通过主权的中央计划者发布的自上而下的命令来破坏这一秩序。一套详细的法律体系，虽然是基于真正的理性主义所确立并与之相容的基本准则，但只能以去中心化的方式来发现和确立；显然，中央集权的立法命令只能破坏和扭曲法律的自发和理性发展。因此，对立法的推崇，更不用说对中央经济计划的推崇，非理性地忽视了法律只能与去中心化的法律发现体系相容这一现实，也忽视了试图立法所不可

of individuals within a spontaneous free market order. See Hans-Hermann Hoppe, "F.A. Hayek on Government and Social Evolution: A Critique," in *The Great Fiction*. Hayek's teacher Mises, as opposed to Hayek, viewed laws, morals, market customs, and the price system as products of individual, rational, human action. "While these institutions were not created out of whole cloth by a single mind, political fiat or 'social contract,' they are indeed the products of rational and intentional planning by human beings, whose thoughts and actions continually reaffirm and reshape them in the course of history." Salerno, "Ludwig von Mises as Social Rationalist," at 31.

哈耶克本人也因在自发的自由市场秩序中赋予个人的理性作用过小而受到批评。见汉斯-赫尔曼·霍普，《F.A. 哈耶克论政府与社会进化：一种批判》，载于《伟大的虚构》。与哈耶克相反，哈耶克的老师米塞斯将法律、道德、市场习俗和价格体系视为个人理性人类行为的产物。“虽然这些制度并非由单个头脑、政治法或‘社会’全盘创造，但它们确实是人类理性和有意规划的产物，人类的思想 and 行为在历史进程中不断对其进行确认和重塑。”萨勒诺，“路德维希·冯·米塞斯作为社会理性主义者”，第 31 页。

避免的负面影响（即不确定性、法律泛滥、特殊利益战争、意外影响）。大陆法之所以崇拜立法，是因为它希望将“秩序”强加给一个已经存在自发秩序的领域。这种天真朴素的理性主义根本不是真正的理性主义：它是反理性主义或非理性主义。

The desire to plan, to impose order—whether economic or legal— on others, is dangerous because, in the name of reason and freedom, individual freedom is smothered. As Thomas Sowell writes:

*At its most extreme, [rationalism] exalts the most trivial or tendentious “study” by “experts” into policy, forcibly overriding the preferences and convictions of millions of people. While rationalism at the individual level is a plea for more personal autonomy from cultural norms, at the social level it is often a claim—or arrogation—of power to stifle the autonomy of others, on the basis of superior virtuosity with words.*⁴¹⁶

计划的愿望，将秩序——无论是经济秩序还是法律秩序——强加于他人的欲望是危险的，因为在理性和自由的名义下，个人自由被扼杀了。托马斯·索维尔写道：

在最极端的情况下，[理性主义]将“专家”最微不足道或最有倾向性的“研究”推崇为政策，强行凌驾于数百万人的偏好和信念之上。虽然在个人层面上的理性主义是要求从文化规范中获得更多个人自主权，但在社会层面上，它往往是基于对文字技巧的高超运用，扼杀他人的自主权来主张或篡夺权力。⁴¹⁶

Bentham is a good example of the dangerous arrogance of naive rationalism. Bentham longed to (legislatively) codify his utilitarian “greatest happiness principle” and, thus, to use legislation as necessary to sweep aside any common law in his way. He:

...evinced no misgivings about the power of reason—in particular Bentham’s reason—to decide any questions of policy de novo, without benefit of authority, consensus, precedent, etc... Bentham is not a little the fanatic whose willingness to sweep aside the obstacles to implementation of his proposals draws sustenance from a boundless

⁴¹⁶ Thomas Sowell, Knowledge and Decisions (New York: Basic Books, Inc., 1980), pp. 102 – 03.
托马斯·索维尔，《知识与决策》（纽约：基础图书公司，1980 年），第 102-103 页。

confidence in his own reasoning powers”: Bentham’s blind spot about the problem of social order is of a piece with his enthusiasm for social planning. He worried about all monopolies except the most dangerous, the monopoly of political power.¹¹⁷

边沁是朴素理性主义危险傲慢的一个很好的例子。边沁渴望（通过立法）将他的功利主义“最大幸福原则”编纂成法律，从而利用必要的立法来扫除任何阻碍他的普通法。他：

“……对权力或理性——特别是边沁自己的理性——毫无疑问，能够从头开始决定任何政策问题，无需权威、共识、先例等的帮助……边沁在某种程度上是个狂热分子，他愿意扫除实施其提议的障碍，这种意愿源自他对自己推理能力的无限自信……边沁对社会秩序问题的盲点与他对社会规划的热情是一致的。他担心所有的垄断，除了最危险的——政治权力的垄断。”⁴¹⁷

Because the civil law and, indeed, all modern law, gives license to legislators, it is irrationalistic, and does not promote, but hinders, individual liberty and the true development of Law.

由于大陆法乃至所有现代法律都向立法者提供许可，因此它是非理性的，不仅不会促进，反而会阻碍个人自由和法律的真正发展。

⁴¹⁷ Posner, “Blackstone and Bentham,” at 594, 603 – 606. For a discussion of Bentham and David Dudley Field, another proponent of common-law codification, and of anti-codifiers such as James C. Carter, see Friedman, *A History of American Law*, at 391 – 92, 403 – 406; and Kinsella, “Another Problem with Legislation: James Carter v. the Field Codes.”

波斯纳，《布莱克斯通与边沁》，第 594、603-606 页。关于边沁和另一位普通法典编纂的支持者大卫·达德利·菲尔德，以及像詹姆斯·C·卡特这样的反编纂者的讨论，见弗里德曼，《美国法律史》，第 391-392、403-406 页；以及金塞拉，“立法的另一个问题：詹姆斯·卡特诉菲尔德法典”。

5 立法和法典编纂的作用

THE ROLE OF LEGISLATION AND CODIFICATION

A 立法的作用 The Role of Legislation

1) 立法的次要作用 The Secondary Role of Legislation

Does all this mean that there is absolutely no room for legislation? If anarcho-capitalism is accepted, of course there may be no legislation because there may be no government. Relaxing this assumption, if there is a government, then even if it is a minimalist one, it seems that there must effectively be some legislation, if only to determine the structure and function of the government itself. In this case, the points made in this paper militate against any legislation at all other than that strictly necessary to govern the government itself (e.g., a written constitution).

这一切是否意味着绝对没有立法的余地？如果接受无政府资本主义，当然可能没有立法，因为可能没有政府。放宽这一假设，如果有政府，那么即使它是一个最小化的政府，似乎也必须有效地进行一些立法，哪怕只是为了确定政府本身的结构和职能。在这种情况下，本文提出的观点表明，除了管理政府本身所严格需要的立法（如成文宪法）之外，根本不需要任何立法。

Even if there is a state, the body of law in society should be fashioned by a decentralized court system. The courts should be part of a private system of courts to the extent possible, for example, a competing system of arbitral tribunals rather than government-backed common-law courts. But whether law-finding fora are government courts or private courts, the legislature should have no ability to enact "laws" that have any effect on the decisions that courts make.¹¹⁸

即使存在国家，社会中的法律体系也应由去中心化的法院系统来制定。法院应尽可能成为私人法院系统的一部分，例如，一个相互竞争的仲裁法庭系统，而不是政府支持的普通法法院。但无论法律裁决场所是政府法院还是私人法院，立法机关都不应有能

力颁布对法院裁决有任何影响的“法律”。⁴¹⁸

If we relax the anarchist/minimal state assumption once more, and admit that a legislature should in some special cases be able to enact statutes to override court decisions, clearly legislation should never be seen as even a primary source of law, much less the primary source of law, lest all the law-destroying features described herein arise.

如果我们再次放宽无政府主义者/最小国家的假设，承认立法机构在某些特殊情况下应该能够制定法规来推翻法院的判决，那么立法显然永远都不应该被视为法律的主要来源，更不用说是法律的首要来源，否则就会出现本文所述的所有破坏法律的特征。

As the renowned legal scholar Alan Watson has pointed out, in previous eras, legislation was not widely used to alter the private law or to impose some imagined social order on society, but rather to make the law clearer or more accessible.¹¹⁹

正如知名法律学者艾伦·沃森（Alan Watson）所指出的，在以前的时代，立法并不广泛用于改变私法或向社会强加某种想象中的社会秩序，而是为了使法律更清晰或更易于理解。⁴¹⁹

Even Leoni was not a complete anarchist and believed in the necessity of at least some legislation.¹²⁰ According to Leoni, the role of legislation should be kept very small and applied very carefully:

⁴¹⁸ This is not, however, to say that the judicial branch of a government should have the power of judicial review with respect to other branches of the government. Ideally, the legislative, judicial, and executive branches each have an equal and independent power to interpret the constitution. See William J. Quirk & R. Randall Bridwell, “Angels to Govern Us,” *Chronicles* (March 1995), p. 12 and idem, *Judicial Dictatorship* (New Brunswick, N.J.: Transaction Publishers, 1995).

然而，这并不是说政府的司法部门应该有权对政府的其他部门进行司法审查。理想情况下，立法、司法和行政部门各自拥有平等且独立的权力来解释宪法。见威廉·J. 奎克和 R. 兰德尔·布里德韦尔，《天使来统治我们》，《纪事》（1995 年 3 月），第 12 页以及同上，《司法独裁》（新泽西州新不伦瑞克：交易出版社，1995 年）。

⁴¹⁹ Alan Watson, *Failures of the Legal Imagination* (University of Pennsylvania Press, 1988; <https://archive.org/details/failuresoflegali0000wats>), pp. 47 et seq.

艾伦·沃森，《法律想象的失败》（宾夕法尼亚大学出版社，1988 年；<https://archive.org/details/failuresoflegali0000wats>），第 47 页及后续页。

Substituting legislation for the spontaneous application of nonlegislated rules of behavior is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system. 121

甚至莱奥尼也不是一个完全的无政府主义者，他认为至少有必要进行一些立法。⁴²⁰ 莱奥尼 认为，立法的作用应该被控制的非常小，并且应该非常谨慎地应用：

用立法来取代自发应用非立法的行为规则是站不住脚的，除非能够证明后者是不确定的或不充分的，或者它们会产生一些立法可以避免的弊端，同时又能保持原有制度的优点。⁴²¹

Not much, if any, of today's legislation could survive this test. Thus, legislation must be restricted to a strictly secondary role, at most, for a system based on the primacy of legislation will inevitably subvert the spontaneous order and substitute pernicious and chaotic rules in its stead.

今天的立法没有多少（如果有的话）能够经受住这一考验。因此，立法必须严格限制在次要地位，因为一个基于立法至上的制度将不可避免地颠覆自发秩序，并用有害的混乱规则取而代之。

2) 所谓的去中性化法律发现系统的缺陷

Alleged Deficiencies of Decentralized Law-Finding Systems

Hayek, another advocate of the spontaneous order of decentralized systems, also believed that legislation is called for in certain situations.¹²² Hayek maintained that the fact that a "grown" system of law has some desirable characteristics that legislation usually:

⁴²⁰ Leoni, Freedom and the Law, pp. 10 and 129 - 31.
莱奥尼，《自由与法律》，第 10 页和第 129-31 页。
⁴²¹ Ibid. at 14; see also p. 178 ("Whatever is not positively proved worthy of legislation should be left to the common-law area.").
同上，第 14 页；另见第 178 页（“任何未被绝对证明值得立法的事项都应留给普通法领域。”）

...does not mean that in other respects such law may not develop in very undesirable directions, and that when this happens correction by deliberate legislation may not be the only practicable way out. For a variety of reasons the spontaneous process of growth may lead into an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation.¹²³

哈耶克是另一位去中心体系的自发秩序的倡导者，他也认为在某些情况下需要立法。

⁴²²哈耶克认为，“生长出来的”法律体系具有立法通常具有的某些理想特征，但这一事实：

……并不意味着这种法律在其他方面不会朝着非常不可取的方向发展，而且当这种情况发生时，通过深思熟虑的立法进行纠正可能不是唯一可行的出路。由于种种原因，自发的发展过程可能会陷入僵局，无法靠自身的力量摆脱困境，或者至少无法迅速纠正。判例法的发展在某些方面是一种单行道：当判例法已经朝一个方向发展了相当长的一段距离后，当人们发现先前判决的某些影响明显不可取时，判例法往往就不能再走回头路了。以这种方式演变的法律具有某些可取的特性，但这一事实并不能证明它将永远是好的法律，甚至不能证明它的某些规则可能并不十分糟糕。因此，这并不意味着我们可以完全放弃立法。⁴²³

Hayek also maintained that the judicial, evolutionary growth of law may be “too slow” to bring about the “desirable” rapid adaptation of the law to wholly new circumstances. Further, according to Hayek, a judge would have to upset “reasonable expectations

⁴²² Hayek, I. Law, Legislation and Liberty: Rules and Order, at 88, subsection entitled “Why grown law requires correction by legislation.”

哈耶克，《法律、立法与自由：规则与秩序》，第 88 页，标题为“为何生长出来的法律需要立法来纠正”的小节。

⁴²³ Ibid. at 88 (also citing Leoni, Freedom and the Law).

同上，第 88 页（还引用了 Leoni，《自由与法律》）。

created by his earlier decisions” to overturn an erroneous line of cases, whereas a legislator can promulgate a new rule which is to be effective only in the future.¹²⁴

哈耶克还认为，法律的司法演化发展可能 “过于缓慢”，无法使法律 “理想地” 迅速适应全新的环境。此外，哈耶克认为，法官要推翻一系列错误的案件，就必须打破 “由其先前的判决所产生的合理预期”，而立法者则可以颁布一项新的规则，该规则只在未来有效。⁴²⁴

Objectivists are also in favor of legislation if it is the only way to have intellectual property rights. For example, Objectivist attorney Murray Franck writes (in response to my criticism that intellectual property rights cannot arise on the common law, or organically, and require legislation):

[J]ust as the common law evolved to recognize “trespass by barbecue smoke,” it would have evolved to recognize property in the airwaves and in intellectual creations. But even if it could be established somehow that the common law would never have recognized intellectual property rights, this would not be an argument against such rights. The common law often requires legislation to correct it (for example, in recognizing the rights of women). Indeed it is a myth that the common law evolves to reflect, and that legislation always is in conflict with, the requirements of human nature. The same minds that employ induction and deduction to decide a particular case, making common law, can employ those methods to legislate universal laws.¹²⁵

如果立法是拥有知识产权的唯一途径，那么客观主义者也赞成立法。例如，客观主义律师穆瑞·弗兰克（Murray Franck）写道（针对我关于知识产权无法在普通法中产生或自然形成，而需要立法的批评）：

[正如普通法发展到承认 “烧烤烟雾造成的侵犯” 一样，它也会发展到承认电波和智力创作中的财产。但是，即使能够以某种方式确定普通法永远不会承认知识产权，这也不能成为反对知识产权的论据。普通法往往需要立法来纠正（例如，在承认妇女

⁴²⁴ Ibid. at 88 – 89.
同上，第 88-89 页

权利方面)。实际上,认为普通法的演变反映了人性的要求,而立法总是与人性相冲突,这是无稽之谈。那些运用归纳和演绎来裁决特定案件、制定普通法的头脑,也可以运用这些方法来制定普遍的法律。⁴²⁵

Richard Epstein, a brilliant proponent of the common law, also feels that legislation is sometimes desirable, for example, when courts cannot come up with a number, such as a statute of limitations, which might be very desirable.¹²⁶ Without legislation, courts would likely bar lawsuits after some length of time. But it is possible that different courts would have different limitations periods, and some judges may decide each case on its own merits. According to Epstein, without a statute of limitations, no court would develop a hard and fast, arbitrary number.¹²⁷ Rather, in a pure court system, individuals could only estimate the probability of being able to sue (or to be sued) after a given number of years. By contrast, the number is certain under a statute of limitations. Because certainty is desirable, and because people are risk-averse, “A single number stated in advance truncates the risk [by] making it clear that some actions cannot be brought.”¹²⁸

理查德·爱泼斯坦 (Richard Epstein) 是普通法的杰出支持者,他也认为立法有时是可取的,例如,当法院不能提出一个数字时,如诉讼时效,这可能是非常可取的。⁴²⁶ 如果没有立法,法院可能会在一定时间后禁止诉讼。但不同的法院可能会有不同的诉讼时效期限,一些法官可能会根据每个案件的具体情况作出裁决。爱泼斯坦认为,如果

⁴²⁵ See references in Kinsella, “Letter on Intellectual Property Rights,” IOS Journal (June 1995),” C4SIF Blog (Aug. 31, 2022). Talk about naive rationalism.

见金塞拉《关于知识产权的信件》,IOS 期刊(1995 年 6 月),C4SIF 博客(2022 年 8 月 31 日)中的参考文献。谈谈天真朴素的理性主义。

⁴²⁶ Richard A. Epstein, “Past and Future: The Temporal Dimension in the Law of Property,” Wash. U. L. Q. 64, no. 3 (1986); https://openscholarship.wustl.edu/law_lawreview/vol64/iss3/3/: 667 - 722, at 680 - 81. 理查德·A. 爱泼斯坦,《过去与未来:财产法中的时间维度》,《华盛顿大学法律评论》第 64 卷,第 3 期(1986 年); https://openscholarship.wustl.edu/law_lawreview/vol64/iss3/3/: 667-722, 第 680-681 页。

没有诉讼时效法规，任何法院都不会制定一个硬性的、任意的数字。⁴²⁷相反，在纯粹的法院系统中，个人只能估计在一定年限内能够起诉（或被起诉）的概率。相比之下，诉讼时效法规下的数字是确定的。因为确定性是可取的，也因为人们是风险厌恶的，“提前规定的一个数字通过明确某些诉讼不能提起而截断了风险。”⁴²⁸

Even Blackstone was not “an uncritical opponent of statutory law”. Blackstone assigned a limited role to statutory law: its proper office was to resolve conflicts between common law precedents and otherwise to supplement and patch common law doctrine.” 129

即使布莱克斯通也并非 “不加批判地反对成文法……布莱克斯通赋予成文法的作用是有限的：成文法的正当职责是解决普通法先例之间的冲突，并以其他方式补充和修补普通法理论”。⁴²⁹

But is the common-law’s development “too slow,” at least on occasion, as Hayek claimed? The U.S. Supreme Court has praised the common law’s “flexibility and capacity for growth and adaptation” as “the peculiar boast and excellence of the common law.”¹³⁰ For example, as Blackstone points out, judges under the common law were able to reform the system of feudal land law without legislation. ¹³¹

但普通法的发展是否如哈耶克所说 “过于缓慢”，至少有时是如此？美国最高法院称赞普通法的 “灵活性以及发展和适应能力 ”是 “普通法特有的骄傲和卓越之处”。⁴³⁰例如，

⁴²⁷ Ibid. at 680.

同上，第 680 页。

⁴²⁸ Ibid. at 681.

同上，第 181 页。

⁴²⁹ Posner, “Blackstone and Bentham,” at 585 (citing 3 Blackstone, Commentaries on the Laws of England, at *328, and 1 Blackstone, Commentaries on the Laws of England, § 432, *365).

波斯纳，《布莱克斯通与边沁》，第 585 页（引用 3 布莱克斯通，《英格兰法律评论》，第 *328 页，以及 1 布莱克斯通，《英格兰法律评论》，第 432 节，*365 页）。

⁴³⁰ Hurtado v. People of California, 110 U.S. 516, 530 (1884). However, a private court system is an unadulterated decentralized system, unlike the common law, which is backed by government force. See Part III.B.2, above. Therefore, it will adapt more efficiently and more quickly to change than a common-law system would. See also Benson, “Customary Law as a Social Contract,” at 17, discussing the superior ability of the (private) Law Merchant, compared to the common law, to adapt and change in

布莱克斯通指出，普通法下的法官能够在不立法的情况下改革封建土地法制度。⁴³¹

It would seem, then, that decentralized systems are able to adapt to new situations when it is called for.¹³² Additionally, it is not always desirable that basic rules (such as that contracts should be fulfilled) should change just because societal conditions change. Professor Epstein has explained that:

*Social circumstances continually change, but it is wrong to suppose that the substantive principles of the legal system should change in response to new social conditions. The law should not be a mirror of social organization. In private law matters, it can best perform its essential function only if it remains constant.*¹³³

这样看来，在需要时，去中心化的系统能够适应新的形势。⁴³²此外，仅仅因为社会条件的变化而改变基本规则（如应得到履行）并不总是可取的。爱泼斯坦教授解释说：

社会环境不断变化，但认为法律制度的实质性原则应根据新的社会条件而改变是错误的。法律不应成为社会组织的一面镜子。在私法事务中，只有保持不变，法律才能最好地发挥其基本功能。⁴³³

Further, one wonders how any external observer, such as Hayek or any legislature, could

response to rapid changes in the commercial system.

赫塔多诉加利福尼亚州人民案，110 U.S. 516, 530 (1884)。然而，私人法院系统是纯粹的去中心化系统，不像普通法，后者有政府力量的支持。见上文第三部分 B.2。因此，与普通法系统相比，它能更高效、更迅速地适应变化。另见本森，《作为社会的习惯法》，第 17 页，论述了（私人）商法相对于普通法在适应和改变以应对商业系统的快速变化方面的优越能力。

⁴³¹ 3 Blackstone, Commentaries on the Laws of England, at *268.

3 布莱克斯通，《英格兰法律评论》，第 *268 页。

⁴³² See also Benson, The Enterprise of Law, p. 283, n.42, and works cited therein.

另见本森，《法律事业》，第 283 页，注释 42，以及其中引用的作品。

⁴³³ Richard A. Epstein, “The Static Conception of the Common Law,” J. Legal Stud. 9, no. 2 (March 1980): 253 – 89, at 254.

理查德·A. 爱泼斯坦，“普通法的静态概念”，《法律研究杂志》第 9 卷，第 2 期（1980 年 3 月）：253-289，第 254 页。

ever know what rate of legal change is “too slow,” or even what change is “desirable,” any more than a central planning board can know what is the “right” price to charge for a gallon of milk. Indeed, Hayek’s own insights into the virtues of spontaneous order and the problems of central economic planning demonstrate the ignorance of any central planner in this regard.

此外，人们不禁要问，任何外部观察者，如哈耶克或任何立法机构，怎么可能知道什么速度的法律变革是“太慢”，甚至什么变革是“可取的”，就像中央计划委员会怎么可能知道一加仑牛奶的价格是“合适的”一样。事实上，哈耶克本人对自发秩序的优点和中央经济计划的问题的见解表明，任何中央计划者在这方面都是无知的。

I admit that, in some circumstances, a decentralized body of law can err and seem to need “patching”; and indeed, all things being equal, a statute of limitations might be better than none at all. Unfortunately, however, all things are not equal, because of the problems that inevitably accompany legislation. The choice is between a fallible system of decentralized law with no legislature and an even more fallible and dangerous legislative means of making law. To “patch” common law by legislation, you have to first empower a legislature. As Mises wisely put it:

*No socialist author ever gave a thought to the possibility that the abstract entity which he wants to vest with unlimited power—whether it is called humanity, society, nation, state, or government—could act in a way of which he himself disapproves.*¹³⁴

我承认，在某些情况下，去中心化的法律体系可能会出错，似乎需要“打补丁”；事实上，在所有条件都相同的情况下，有诉讼时效可能总比没有好。然而，不幸的是，由于立法不可避免地伴随着各种问题，所有情况都不尽相同。我们需要在一个没有立法机构的易错的去中心化的法律体系和一个更易出错、更危险的立法制定法律的手段之间做出选择。要通过立法对普通法进行“修补”，就必须首先赋予立法机构权力。正如米塞斯所言：

“没有一个社会主义作者曾想过他想要赋予无限权力的那个抽象实体——无论是

称为人类、社会、民族、国家还是政府——可能会以他自己不赞成的方式行事。⁴³⁴

As Mises here warns, a legislature will not be content to merely fix one bad law. Rather, legislation will eventually overwhelm and suffocate the naturally-developed body of law and engender uncertainty; special interest warfare and quick fix laws will proliferate; and the government will eventually abuse its sovereign position by engaging in economic and human planning.

正如米塞斯在此警告的那样，立法机构不会满足于仅仅修正一项不良法律。相反，立法最终将压倒并扼杀自然发展的法律体系并产生不确定性；特殊利益的争斗和权宜之计的法律将激增；政府最终将通过参与经济和人类规划滥用其主权地位。

Epstein may well be correct that not having a definite period for liberative prescription may inject uncertainty into the legal process. Unfortunately, the attempt to cure this by empowering a legislature also increases the general uncertainty in society. Which uncertainty is greater? And what about the liberty of individuals who have their right to sue artificially limited by a statute of limitations? How can we know that the benefit to them (or even to others) is greater than the harm done to them? Because values are subjective to the individual, and because of the economic calculation problem, no central governmental legislature can know whether the benefits of a statute of limitations are worth the cost of such legislation.¹³⁵ Furthermore, why is it justifiable to harm one individual to benefit another?

爱泼斯坦可能是对的，没有一个对自由时效的明确期限可能会给法律程序带来不确定性。不幸的是，试图通过赋予立法机构权力来解决这一问题，也会增加社会的普遍不确定性。哪种不确定性更大？如果诉讼时效人为地限制了个人的起诉权，那么他们的自由又如何呢？我们怎么能知道对他们（甚至对其他人）的好处大于对他们造成的伤害呢？由于价值是个人的主观感受，也由于经济计算问题，任何中央政府集权的立法机构都不可能知道时效法规的好处是否值得为这种立法付出代价。⁴³⁵此外，为什么

⁴³⁴ Mises, *Human Action*, at 692 (emphasis added).

米塞斯，《人类行动》，第 692 页（着重号为原文所加）。

⁴³⁵ On the subjective theory of value, see Mises, *Human Action*, at 94 – 97, 200 – 206, 331 – 33 et passim; Rothbard, *Man, Economy, and State*, chap. 1, § 5.A; and

损害一个人而使另一个人受益是正当的呢？

Another problem with urging legislation as a solution to common law gone astray is that this assumes that the legislature can be convinced to make the correct legal reform. First, this is a very dubious assumption, especially given the special interest lobbying that legislators face, and also given the fact that legislators tend to be people who are interested in power rather than philosopher-kings who want to do the right thing.¹³⁶ Second, if a proponent of legislation assumes that reasonable and humane legislators can see the light of reason and correctly reform the law, why is it not at least as likely that judges can be persuaded as well?

将立法作为解决偏离正轨的普通法的解决方案的另一个问题是，这假定立法机构能够被说服进行正确的法律改革。首先，这是一个非常可疑的假设，尤其是考虑到立法者面临着特殊利益集团的游说，以及立法者往往是对权力感兴趣而非想要做正确事情的哲人王这一事实。⁴³⁶其次，如果立法的支持者假设理性和人道的立法者能够看到理性之光并正确地改革法律，为什么法官至少同样不太可能被说服呢？

Especially in an anarcho-capitalistic system—i.e., in a free society— in which all courts are private and compete for business by selling and producing “justice,” the courts at least have an incentive to continually refine the rules in a just direction. If Epstein and legislators can see the value of a fixed time limit to instituting a lawsuit, so can the public, which would create a demand for such a rule. Private court systems that offered such rules to cater to consumer demand would tend to draw more customers and lawsuits than relatively unjust competitor-courts. Thus there is a natural incentive for courts, at least competing courts in a free society, to search for justice and to strive to adopt it,

Alexander H. Shand, *The Capitalist Alternative: An Introduction to Neo-Austrian Economics* (New York: New York University Press, 1984), chap. 4, esp. § 2.

关于主观价值理论，参见米塞斯《人的行动》第 94-97 页、200-206 页、331-33 页及各处；罗斯巴德《人、经济与国家》第 1 章，第 5.A 节；以及亚历山大·H. 尚德《资本主义的选择：新奥地利经济学导论》（纽约：纽约大学出版社，1984 年），第 4 章，特别是第 2 节。

⁴³⁶ For a related discussion, see Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), at chap. 10, “Why the Worst Get on Top.”

有关的相关讨论，请参阅弗里德里希·A. 哈耶克《通往奴役之路》（芝加哥：芝加哥大学出版社，1944 年），第 10 章，“为什么最坏的人居高位”。

so as to cater to a justice-seeking consumer base.

尤其是在无政府资本主义体系中——即在一个自由社会中——所有的法院都是私有的，并通过出售和提供“正义”来竞争业务，法院至少有动力不断朝着正义的方向完善规则。如果爱泼斯坦和立法者能够看到确立诉讼的固定时限的价值，那么公众也能看到，这就会产生对这种规则的需求。与相对不正义的竞争对手法院相比，提供此类规则以迎合消费者需求的私人法院系统往往会吸引更多的客户和诉讼。因此，对于法院，至少是自由社会中相互竞争的法院，存在一种自然的激励，去寻求正义并努力采纳它，以迎合追求正义的消费者群体。

3) 限制立法的结构性保障措施

Structural Safeguards to Limit Legislation

For all these reasons, I do not believe that legislation is a legitimate or practical means of creating law, or even of patching it. If a legislature can be convinced to recognize and respect the right law, so can a decentralized court system, especially one competing with other courts for customers. Courts do not face the same pernicious and systematic incentives that legislators do to make bad laws, and many of them. And courts, if they go bad, at least have a more limited effect on society; whereas when legislatures go bad, there is no end to the evil that they can perpetrate.⁴³⁷

基于所有这些原因，我不认为立法是制定法律，甚至是修补法律的合法或实用的手段。如果立法机构可以被说服承认并尊重正确的法律，那么去中心化的法院系统也可以，尤其是与其他法院争夺客户的法院系统。法院不像立法者那样面临着同样有害且系统性的制定恶法的激励，而且是大量恶法。并且，如果法院出了问题，它们对社会的影响至少是更有限的；而当立法机构出问题时，它们可能造成的恶果则没有尽头。⁴³⁷

⁴³⁷ Government power is always subject to abuse. The greater government’s role in society, the greater the chance for serious abuse. As Professor Epstein notes, “The smaller downside of a small government is perhaps its greatest virtue.” Richard A. Epstein, *Simple Rules for a Complex World* (Cambridge, Mass.: Harvard University Press, 1995), p. 316.

政府权力总是容易被滥用。政府在社会中的作用越大，严重滥用权力的可能性就越大。正如爱泼斯坦教授所指出的：“小政府的较小负面影响或许是其最大的优点。”理查德

If legislation can be considered valid at all (given a governmental system), it can only be occasional or spurious legislation that modifies the body of law which is primarily developed by a court-based, decentralized law-finding system—or legislation that controls how the state itself is limited and organized. If we must have legislation, several constitutional safeguards should accompany its exercise, to attempt to restrict legislation to a purely secondary role in the formation of law. Certainly, a supermajority,¹³⁸ and maybe a referendum, should be required in order to enact any statutes whatever, except perhaps for statutes that repeal prior statutes or that limit governmental power.

如果立法可以被认为是有效的（在政府体制下），那么它只能是偶尔的或虚假的立法，用来修改主要由以法院为基础的、去中心化的法律发现系统发展而来的法律体系——或者是控制国家自身如何受到限制和组织的立法。如果我们必须要有立法，那么在行使立法权的同时，还应该有一些宪法保障措施，以试图将立法限制在法律形成过程中纯粹次要的角色。当然，除了废除先前法规或限制政府权力的法规之外，任何法规的制定都必须获得超级多数⁴³⁸的支持，或许还需要全民公决。

In addition to a supermajority requirement, another reform that might be considered would be for all legislation to be limited to replacing the opinion of a given court decision with a new decision, which would have purely prospective effect. Then, if a given case or line of cases were issued that had particularly egregious reasoning or results, a supermajority could form in the legislature that would rewrite the unfortunate opinion in purportedly better form and enact this into law, as if the court had first issued the rewritten decision. The rewritten opinion would then assume the status of a judicial precedent, at least for that court.

除了超级多数这一必要条件之外，另一项可以考虑的改革是，所有立法仅限于用新的判决取代特定法院判决的意见，这将具有纯粹的前瞻性效力。这样，如果出现了一个

德·A. 爱泼斯坦，《复杂世界的简单规则》（马萨诸塞州剑桥：哈佛大学出版社，1995年），第 316 页。

⁴³⁸ See Leoni, *Freedom and the Law*, p. 178 n.5 (discussing a supermajority requirement as a way to tame legislators).

见莱奥尼《自由与法律》，第 178 页注释 5（讨论了超级多数作为驯服立法者的必要条件）。

特定的案件或一系列案件，其推理或结果特别恶劣，立法机构中可以形成超级多数来以据称更好的形式重写这个不幸的意见并将其制定为法律，就好像法院首先发布了重写后的裁决一样。然后，重写后的意见将至少在该法院中具有司法先例的地位。

The benefit of this limitation is that it would prevent legislatures from enacting huge legislative schemes out of whole cloth. There would simply be no way for the legislature to enact an Americans with Disabilities Act, since any statute would really be a rewritten judicial opinion, and to the extent the legislated substitute opinion strayed from the facts of the particular case, it would be merely dicta. If a judge in a battery case, for example, ruled that the spotted owl or the intelligent socialist was now an endangered species, such language would be completely irrelevant, since it is beyond a judge's power to enact an Endangered Species Act in any judicial opinion. Such a mechanism for legislation would allow very bad case law developments to be overcome, but would also severely restrict the ability of legislatures to radically restructure the law, and thus would reduce the incidence of vote-buying and special interest lobbying, the amount of uncertainty, the proliferation of statutes, and the amount of social planning and other mischief that a legislature might otherwise be inclined to engage in.

这种限制的好处是可以防止立法机构凭空制定庞大的立法计划。立法机构根本无法制定《美国残疾人法案》这样的法案，因为任何法规实际上都只是重写的司法意见，并且在立法替代意见偏离特定案件事实的程度上，它仅仅是附带意见。例如，如果在一个殴打案件中，法官裁定斑点猫头鹰或聪明的社会主义者现在是濒危物种，这样的表述将完全不相关，因为在任何司法意见中，法官都没有权力制定《濒危物种法案》。这种立法机制可以克服非常糟糕的判例法发展，但也会严重限制立法机构从根本上重塑法律的能力，从而减少贿选和特殊利益游说的发生，减少不确定性，减少法规的激增，以及减少立法机构可能倾向于参与的社会规划和其他不良行为的数量。

Other provisions that could help to limit the dangerous effects of having a legislature include a line-item veto by the executive branch and sunset provisions that automatically repeal legislation unless re-enacted after a given number of years. Another useful prophylactic measure would be an absolute right to jury trials in all cases, civil or criminal (so that government could not escape the jury requirement by calling truly criminal sanctions "civil"), in which the application of a statute is involved. This should be combined with a requirement that the jury be made aware of their right to

judge the law's validity as well as the defendant's liability or guilt.¹³⁹

其他有助于限制立法机构危险影响的条款包括行政部门的单项否决权和日落条款，这些条款规定，除非在一定年限后重新颁布，否则立法将自动废止。另一项有用的预防措施是，在所有涉及法规适用的案件中，无论是民事案件还是刑事案件（这样政府就不能通过将真正的刑事制裁称为“民事”来逃避陪审团审判的要求），都有绝对的陪审团审判权。同时还应要求陪审团了解他们有权判断法律的有效性以及被告的责任或罪行。⁴³⁹

The right of law-abiding citizens to own weapons of any sort, without any registration requirement, is also essential so that an armed public can stand as a last bulwark against a tyrannical government. Even with such safeguards, the power of a government armed with the power to legislate, the power to create and rewrite “law,” is awesome, and fearsome, to behold.

⁴³⁹ The latter concept is advocated by many libertarians, and is often called the FullyInformed Jury Amendment, or FIJA. See Don Doig, “New Hope for Freedom: Fully Informed Juries,” pamphlet published by the International Society for International Liberty. For discussion of the historical and natural right of jurors to judge the law’s validity, see also Comment, “The Changing Role of the Jury in the Nineteenth Century,” Yale L.J. 74 (1964; <https://perma.cc/72RE-WDSK>): 170 – 92; and Lysander Spooner, “An Essay on Trial by Jury,” in The Lysander Spooner Reader (San Francisco: Fox & Wilkes, 1992; version available online at <http://www.lysanderspooner.org/works>), at 122. For other suggestions, see “Taking the Ninth Amendment Seriously” (ch. 21); Kinsella, “Constitutional Structures in Defense of Freedom (ASC 1998),” StephanKinsella.com (June 25, 2021); and idem, “Structural Safeguards to Limit Legislation and State Power,” StephanKinsella.com (Jan. 23, 2015).

后一种概念得到了许多自由意志主义者的倡导，通常被称为“充分知情陪审团修正案”（Fully Informed Jury Amendment，简称 FIJA）。见唐·多伊格《自由的新希望：充分知情陪审团》，国际自由协会出版的小册子。关于陪审员判断法律有效性的历史和自然权利的讨论，也可参见评论文章《19 世纪陪审团角色的变化》，《耶鲁法学杂志》74 卷（1964 年；<https://perma.cc/72RE-WDSK>）：170-192；以及莱桑德·斯兹纳《论陪审团审判》，收录于《莱桑德·斯兹纳读本》（旧金山：福克斯与威尔克斯出版社，1992 年；在线版本可在 <http://www.lysanderspooner.org/works> 上获取），第 122 页。关于其他建议，可参见“严肃对待第九修正案”（第 21 章）；斯蒂芬·金塞拉《“为自由辩护的宪法结构 (ASC 1998)”》，StephanKinsella.com（2021 年 6 月 25 日）；以及同上，《限制立法和国家权力的结构性保障》，StephanKinsella.com（2015 年 1 月 23 日）。

遵纪守法的公民有权拥有任何种类的武器，无需任何登记要求，这一点也是至关重要的，这样武装起来的公众才能成为抵御专制政府的最后堡垒。即使有了这些保障措施，一个拥有立法权、制定和改写“法律”权力的政府的力量也是惊人且可怕的。

B 评论法学派和法典的作用

The Role of Commentators and Codes

The criticisms of legislation apply even to civil codes, the most impressive component of modern civil law. Admittedly, the civil law, at least as embodied in a civil code, is superior to the common law in many ways. The civilian system of property rights, not mired in feudalistic form as is the British common law, is much cleaner and conceptually more sound than common law real property.¹⁴⁰ Common-law real property concepts are almost painful to the mind. As another example, the irrational common-law requirement of “consideration” to create a binding obligation¹⁴¹ is replaced in the civil law with the more sensible prerequisite of “cause.”¹⁴² However, these superior qualities of the civil law are not due to its legislated character but to the superior legal concepts that evolved in the Roman law.

对立法的批评甚至适用于民法典，它是现代大陆法系中最令人瞩目的组成部分。诚然，大陆法系，至少体现在民法典中，在很多方面优于普通法。大陆法系的财产权制度不像英国普通法那样陷入封建形式，比普通法的不动产更加清晰，在概念上也更合理。

⁴⁴⁰ 普通法的不动产概念几乎让人大伤脑筋。再举个例子，普通法中创建有约束力的义

⁴⁴⁰ See also Herman, *The Louisiana Civil Code: A European Legacy for the United States*, pp. 46 – 47 (discussing the civil code’s “highly stylized, streamlined system of ownership”). Jacques du Plessis writes:

[T]he civil law of property, which does have an internal logic ... does not easily correspond to anything known in the complex common law of property, with its “veritable jungle of concepts, many of which seemed to be merely the doubles of other concepts.”

Jacques du Plessis, “Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems,” *Tul. L. Rev.* 78, nos. 1 & 2 (December 2003): 219 – 56, at 249 – 50 (quoting F.H. Lawson, *The Rational Strength of the English Law* (1951), at 75, and also citing Ben Beinart, “The English Legal Contribution in South Africa: The Interaction of Civil and Common Law,” *Acta Juridica* 1981 (1981): 7 – 64,

务所要求的不合理的“对价”⁴⁴¹，在大陆法系中被更合理的“原因”这一先决条件所取代。⁴⁴²然而，大陆法系的这些优越品质并非源于其立法特征，而是源于罗马法中演变而来的更优越的法律概念。

But the civil code also contains many illiberal and thus illegitimate provisions, which are a problem only because the code is legislated into law. If the civil code were a private, unlegislated codification, judges could simply ignore its illiberal provisions. A particularly egregious example of an unjust law is Louisiana's forced heirship regime,¹⁴³ which limits individuals' ability to dispose of their own property as they wish upon death. Also, in the civil law, certain sales may be annulled if “too low” a price was paid by the buyer,¹⁴⁴ which violates the rights of property owners to dispose of their

at 30 - 31).

另见赫尔曼《路易斯安那州民法典：美国的欧洲遗产》，第 46-47 页（讨论民法典的“高度程式化、精简的所有权制度”）。雅克·杜·普莱西斯写道：

“大陆法系的财产法确实有其内在逻辑……但并不容易与复杂的普通法财产制度中的任何内容相对应，普通法财产制度是‘名副其实的概念丛林，其中许多概念似乎只是其他概念的重复’。”

雅克·杜·普莱西斯，《普通法对一些混合法律体系中的法和不当得利法的影响》，《杜兰法学评论》第 78 卷第 1 和 2 期（2003 年 12 月）：219-256，第 249-250 页（引用 F.H. 劳森《英国法律的理性力量》（1951 年），第 75 页，并且还引用了本·贝纳特，《英国法律在南非的贡献：大陆法与普通法的相互作用》，《法学报》1981 年（1981 年）：7-64，第 30-31 页）。

⁴⁴¹ See Randy E. Barnett, “A Consent Theory of Contract,” Colum. L. Rev. 86 (1986); <http://www.randybarnett.com/pre-2000>: 269 - 321, at 287 - 91 (1986) (discussing problems with the theory of consideration).

见兰迪·E·巴尼特，《同意理论》，《哥伦比亚法律评论》86 卷（1986 年）；<http://www.randybarnett.com/pre-2000>：269-321，第 287-291 页（1986 年）（讨论对价理论的问题）。

⁴⁴² Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), art. 1967. For a discussion of the differences between cause and consideration, see Christian Larroumet, “Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law,” Tul. L. Rev. 60, no. 6 (1986): 1209 - 30.

《路易斯安那州民法典》(https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent)，第 1967 条。关于“原因”和“对价”之间差异的讨论，参见克里斯蒂安·拉鲁梅的《致害信赖与允诺禁反言作为路易斯安那州和比较法中的原因》，《杜兰法学评论》第 60 卷第 6 期（1986 年）：1209-1230 页。

property, and which also foolishly assumes that the government knows better than the seller and buyer what the right price is for an item.¹⁴⁵

但是，民法典中也有许多不自由的、因而也是不合法的条款，这些条款之所以成为问题，仅仅是因为民法典是通过立法成为法律的。如果民法典是一部未经立法的私人法典，那么法官就可以无视其中的不自由条款。路易斯安那州的强制继承制度⁴⁴³ 就是不正义法律的一个特别明显的例子，它限制了个人在死后按照自己的意愿处置自己财产的能力。此外，在民法中，如果买方支付的价格“过低”，某些销售可能会被取消⁴⁴⁴，这侵犯了财产所有人处置其财产的权利，而且还愚蠢地假定政府比卖方和买方更了解物品的合适价格⁴⁴⁵。

Ignoring relatively minor problems such as these, the civil code in and of itself is largely commendable, especially insofar as it embodies and systematizes a naturally grown body of law.¹⁴⁶ But the civil law is more than the civil code: it is legislation made paramount. Legislation is considered the primary source of law—indeed, the civil code itself is legislated—and thus all the problems of legislation discussed above apply to the civil law. When the civil code is enacted as a statute, it is no wonder that proponents of the civil code would naturally view legislation as supreme and tend to view legislation as the primary source of law. And then even the civil code itself tends to develop

⁴⁴³ Louisiana Civil Code, art. 1493.

《路易斯安那州民法典》，第 1493 条。

⁴⁴⁴ Louisiana Civil Code, art. 2589: “Rescission for lesion beyond moiety: The sale of an immovable may be rescinded for lesion when the price is less than one half of the fair market value of the immovable.”

《路易斯安那民法典》，第 2589 条：“因超过一半的损失而撤销：当不动产的售价低于该不动产公平市场价值的一半时，可以因损失而撤销不动产的出售。”

⁴⁴⁵ Another egregious provision in blatant contradiction to the individual right to absolute ownership of property is contained in articles 2626 - 27, which provide for expropriation of private property “wherever it becomes necessary for the general use.” Louisiana Civil Code, art. 2626. Of course, the United States Constitution suffers from the same defect.

U.S. Const. Vth Amendment.

《路易斯安那民法典》第 2626-27 条中包含另一项公然与个人对财产的绝对所有权相矛盾的恶劣条款，该条款规定在“任何对公共用途有必要的情况下”可以征用私人财产。《路易斯安那民法典》，第 2626 条。当然，美国宪法也有同样的缺陷。

《美国宪法》第五修正案。

legislative characteristics, such as code articles enacted at the behest of special interests; illiberal provisions such as those cited above; and specialized, detailed articles out of place in a generalized code.

忽略诸如此类相对较小的问题，民法典本身在很大程度上是值得称赞的，尤其是因为它体现并系统化了一个自然生长的法律体系。⁴⁴⁶但民法不仅仅是民法典：它是被置于至高无上地位的立法。立法被认为是法律的主要来源——实际上，民法典本身就是立法的产物——因此，上述讨论的所有立法问题都适用于民法。当民法典作为一部法规颁布时，不出所料，民法典的支持者自然会将立法视为至高无上的，并倾向于将立法视为法律的主要来源。然后，甚至民法典本身也倾向于发展出立法特征，例如应特殊利益集团的要求制定的法典条款；像上面提到的那些不自由的规定；以及在一部通用法典中显得不恰当的专业化、详细的条款。

The civil law would be much improved if the civil code were more like a constitution, in that its provisions would prevail over any contrary statute, and in that some sort of supermajority requirement would be needed to amend it. But we already have constitutions, both state and federal. I do believe that the basic libertarian principles specified herein— the individual rights to self-ownership and to own property, as embodied in the libertarian non-aggression axiom—should be followed by any judge, but this does not necessarily mean there must be a statute or constitution specifying these principles. It is only important that judges recognize them and, in the long run, this can only happen if a consensus in society recognizes the validity of such principles in the first place. Our task is always education. If the public were ever to become libertarian enough to adopt a libertarian constitution, one would probably not be needed, since private justice supplied on the market, or even in government-based

⁴⁴⁶ See Thomas W. Tucker, “Sources of Louisiana’s Law of Persons: Blackstone, Domat, and the French Codes,” Tul. L. Rev. 44 (1970): 264 – 95; Rodolfo Batiza, “Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law,” Tul. L. Rev. 56 (1982): 477 – 601, at 585 et seq. (discussing Blackstone’s influence on Louisiana’s civil code).

参见托马斯·W·塔克所著的《路易斯安那州属人法的渊源：布莱克斯通、多马与法国法典》，《杜兰法律评论》第 44 卷（1970 年）：第 264-295 页；鲁道夫·巴蒂萨所著的《现代民法法典编纂的起源：法国的经验及其对路易斯安那州法律的影响》，《杜兰法律评论》第 56 卷（1982 年）：第 477-601 页，第 585 页及后续页（讨论了布莱克斯通对路易斯安那州民法典的影响）。

common-law courts, would veer in a libertarian direction in response to the people's sense of justice.

如果民法典更像一部宪法，民法将会有很大的改进，即其条款将优先于任何相反的法
规，并且修改它需要某种绝对多数的要求。但是我们已经有了州宪法和联邦宪法。我
确实认为，这里所规定的基本的自由意志主义原则——个人对自身的所有权和对财产
的所有权，正如体现在自由意志主义的不侵犯公理中那样——应该被任何法官遵循，
但这并不一定意味着必须有一部法规或宪法来具体规定这些原则。重要的只是法官们
要认识到这些原则，从长远来看，只有当社会共识首先认识到这些原则的有效性时，
才会发生。我们的任务始终是教育。如果公众变得足够自由意志主义，以至于要通
过一部自由意志主义的宪法，那么可能就不需要这样一部宪法了，因为市场上提供的
私人司法，甚至是基于政府的普通法院，会根据人们的正义感朝着自由意志主义的
方向转变。

But if a libertarian constitution or code were in place, it would be relatively sparse. It
would specify as first principles that the initiation of force is illegitimate and that the
individual rights to own one's own body and any property one homesteads or acquires
voluntarily from other owners are absolute and inviolable. As deductions therefrom, it
could specify that rape, murder, theft, assault, battery, and trespass are also rights-
violations. As Rothbard states:

The Law Code of a purely free society would simply enshrine the libertarian axiom: prohibition of any violence against the person or property of another (except in defense of someone's person or property), property to be defined as self-ownership plus the ownership of resources that one has found, transformed, or bought or received after such transformation. The task of the Code would be to spell out the implications of this axiom (e.g., the libertarian sections of the law merchant or common law would be co-opted, while the statist accretions would be discarded). The Code would then be applied to specific cases by the free-market judges, who would all pledge themselves to follow it.¹⁴⁷

但是，如果有一部自由意志主义宪法或法典，它会相对简洁。它将把以下内容作为首
要原则加以明确：首先，主动使用暴力是不合法的；其次，个人拥有自己身体的权利
以及个人通过拓殖或从其他所有者处自愿获得的任何财产的所有权是绝对且不可侵

犯的。由此可以推断出，强奸、谋杀、盗窃、袭击、殴打和非法侵入也都是侵犯权利的行为。正如罗斯巴德所指出的：

一个完全自由的社会的法典将无非体现自由意志主义公理：禁止对他人的人身或财产实施任何暴力（除非是为了保护某人的 人身或财产），财产被定义为自我所有权加上一个人所发现、改造或在改造后购买或得到的资源的所有权。这部法典的任务将是阐明这一公理的含义（例如，将商法或普通法中的自由意志主义部分吸收进来，而摒弃国家主义的附加内容）。然后，自由市场的法官们将把这部法典应用于具体案件，他们都将承诺遵守这部法典。⁴⁴⁷

⁴⁴⁷ Rothbard, Power and Market, in Man, Economy, and State, with Power and Market, p. 1053 n.4. See also idem, The Ethics of Liberty (New York: New York University Press, 1998), at xlviii – xlix (“While the book establishes the general outlines of a system of libertarian law, however, it is only an outline, a prolegomenon to what I hope will be a fully developed libertarian law code of the future. Hopefully libertarian jurists and legal theorists will arise to hammer out the system of libertarian law in detail, for such a law code will be necessary to the truly successful functioning of what we may hope will be the libertarian society of the future.”); idem, For a New Liberty, second ed. (Auburn, Ala.: Mises Institute, 2006; <https://mises.org/library/new-liberty-libertarian-manifesto>), at 282. On the limits of armchair theorizing, see Kinsella, “The Limits of Armchair Theorizing: The Case of Threats,” Mises Economics Blog (Jul. 27, 2006); also “Knowledge, Calculation, Conflict, and Law” (ch. 19), the section “Abstract Rights and Legal Precepts” and the following section; and “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23). See also See Kinsella, “Roman Law and Hypothetical Cases,” StephanKinsella.com (Dec. 19, 2022) and “Knowledge, Calculation, Conflict, and Law” (ch. 19), at n.64, discussing the practice of Roman jurists developing the Roman law by exploring and answering hypothetical cases. 罗斯巴德在《人、经济与国家，及权力与市场》一书中的《权力与市场》部分第 1053 页注释 4 提到了这点。另外，在他的《自由的伦理》（纽约：纽约大学出版社，1998 年）第 xlviii-xlix 页也有提及（“虽然这本书确立了自由意志主义法律体系的大致轮廓，但它仅仅是一个轮廓，是对我所希望的未来完全发展的自由意志主义法典的一个序言。希望自由意志主义法学家和法律理论家能够出现，详细地制定出自由意志主义法律体

(I would add that the “libertarian” sections of Roman law, e.g., as embodied in modern civil codes, could be adopted in developing Rothbard’s libertarian Law Code, or at least could be referred to by private courts in fashioning legal rules to handle actual disputes.)

（我要补充的是，罗马法中的“自由意志主义”部分，例如体现在现代民法典中的那些部分，可以在制定罗斯巴德的自由意志主义法典时被采用，或者至少可以被私人法庭在制定处理实际纠纷的法律规则时作为参考。）

But because of the near-infinite variety of ways in which humans can interact, such a code could never be made all-comprehensive. Any codifier who attempted to do this would face the information problems discussed herein. At some point judges need to consider the particular facts of a controversy and, keeping principles of justice in mind, eke out the applicable rule. Judges will sometimes make mistakes, but, then, the fact that individuals are fallible can never be escaped, so this criticism is moot.

但是，由于人类互动的方式几乎无穷无尽，这样的法典永远不可能做到面面俱到。任何试图这样做的编纂者都将面临本文讨论的信息问题。在某种程度上，法官需要考虑争议的特定事实，并在牢记正义原则的情况下，制定适用的规则。法官有时会犯错误，但是，是人就会犯错，此事实无法避免，所以这种批评没有意义。

It is true that a decentralized, gradually-developed body of case law can become unwieldy and difficult to research. But it is not more so than the modern morass of statutes. I cannot see how either a lawyer or the average layman would have an easier time discerning what law applies to him in a given situation under today’s statute-ridden laws, as opposed to in a decentralized legal system, having a body of judge-

系，因为这样一部法典对于我们所希望的未来自由意志主义社会的真正成功运行是必要的。”）；在他的《为了新自由》第二版（阿拉巴马州奥本：米塞斯研究院，2006年；<https://mises.org/library/new-liberty-libertarian-manifesto>）第 282 页也有提及。关于纸上谈兵式理论的局限性，可参考斯蒂芬·金塞拉的《纸上谈兵的局限性：以威胁为例》，发表于米塞斯经济学博客（2006 年 7 月 27 日）；还有《知识、计算、冲突与法律》（第 19 章）中“抽象权利与法律规范”部分及随后的部分；以及《论自由意志主义法律理论、自我所有权与毒品法》（第 23 章）。另外，也可参考金塞拉的《罗马法与假设案例》，发表于斯蒂芬·金塞拉网站（2022 年 12 月 19 日）以及《知识、计算、冲突与法律》（第 19 章）注释 64，其中讨论了罗马法学家通过探索和回答假设案例来发展罗马法的做法。

discovered principles. Surely in both cases laymen may resort to specialists such as attorneys and explanatory treatises to tell them what the law is. At least in a decentralized system the law is less likely to change from day to day, so that when a person knows what the law is today he is more certain it will be the law tomorrow. And there are likely to be far fewer laws regulating far fewer aspects of our daily lives in a judge-based system, which should make it easier to determine what the relevant law is concerning a given situation.

的确，一个去中心化的、逐步发展起来的判例法体系可能会变得笨拙且难以研究。但它并不比现代混乱的成文法体系更难。我看不出在当今充数着成文法的法律体系下，律师或一般的门外汉在确定特定情况下适用于自己的法律时，会比在去中心化的法律体系下、拥有一套由法官发现的原则时更容易。当然，在这两种情况下，外行都可以求助于律师等专业人士和解释性论著来了解法律是什么。至少在去中心化的体系中，法律不太可能每天都发生变化，所以当一个人知道今天的法律是什么时，他更有把握明天它依然是法律。而且在一个以法官为基础的制度体系中，规范我们日常生活的法律可能会少得多，这应该会更容易确定与特定情况相关的法律是什么。

There is, for these reasons, a significant role for codification in a free society, but only for private, not legislative, codification. To the extent such private codes are systematic and rational, they can both influence the rational development of the law and present or systematize it in concise form for lawyers and laymen alike. We already have treatises such as the American Law Institute's Restatements of the law, Texas Jurisprudence Third, American Jurisprudence Second, and Corpus Juris Secundum. These treatises would be far more rational and systematic, and shorter, if they did not have to take an unwieldy and interfering body of legislation into account; if they could focus primarily on common-law developments. Legal scholars who currently draft civil code articles for consideration and enactment by a legislature could surely dedicate their energies to privately codifying and systematizing the body of case law that has been developed.

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由于这些原因，在自由社会中，法典编纂有重要作用，但仅指私人编纂而非立法编纂。在一定程度上，这些私人法典如果是系统且合理的，它们既可以影响法律的合理发展，又可以以简洁的形式呈现或系统化法律，供律师和外行人士使用。我们已经有了诸如《美国法学会的法律重述》、《得克萨斯法学第三版》、《美国法学第二版》和《美国法律大全第二版》等论著。如果这些论著不必考虑笨拙而具干扰性的立法体系，而

能够主要专注于普通法的发展，那么它们会更加合理、系统且篇幅更短。目前为立法机构起草民法典条款以供审议和颁布的法律学者，肯定可以将他们的精力投入到对已发展的判例法体系进行私人编纂和系统化中。⁴⁴⁸

Even a true codification of existing case law can make mistakes. If the code is private, judges can ignore the lapses in the commentator's reasoning. Of course, this has the extra benefit of giving an incentive to private codifiers not to engage in dishonest reasoning or meddlesome social planning. If a codifier wants his work to be used and acknowledged, he will attempt to accurately describe the existing body of law when he organizes and presents it, and will likely be explicit when recommending that judges adopt certain changes in future decisions.

即使是对现有判例法的真正编纂也可能会出错。如果法典是私有的，法官可以忽略注释者推理中的失误。当然，这还有一个额外的好处，即激励私人编纂者不要进行不诚实的推理或进行多管闲事的社会规划。如果一个编纂者希望自己的工作得到使用和认可，那么在组织和呈现现有法律体系时，他将努力准确地描述它，并且在建议法官在未来的裁决中采用某些变革时，很可能会明确表达出来。

Law codes should thus be strictly private. We have long seen the wisdom of keeping church and state separate. Theorists like Mises, and the collapse of socialism, teach the

⁴⁴⁸ Lawrence Friedman, *A History of American Law*, at 406, states that the Field “codes are the spiritual parents of the Restatements of the Law—black letter codes of the 20th century, sponsored by the American Law Institute, but meant for persuasion of judges, rather than enactment into law.” See also 3 Blackstone, *Commentaries on the Laws of England* at *267 (discussing problems that arise when a new system of law is legislatively codified rather than built upon the evolved wisdom of courts). For a fascinating discussion of the significance of both private and legislated codes for the development of law, see Alan Watson, “The Importance of ‘Nutshells,’” *Am. J. Comp. L.* 42, no. 1 (Winter 1994); https://digitalcommons.law.uga.edu/fac_artchop/668): 1–23.

劳伦斯·弗里德曼在《美国法律史》第 406 页指出，菲尔德“法典是《法律重述》的精神之父——20 世纪的黑体字法典，由美国法学会发起，但旨在说服法官，而非制定成法律”。另见布莱克斯通《英国法释义》第三卷第 267 页（讨论了新的法律体系通过立法编纂而非建立在法院逐渐积累的智慧之上时所产生的问题）。关于私人法典和立法法典对法律发展的重要性的精彩讨论，见艾伦·沃森的《“简编”的重要性》，《美国比较法杂志》第 42 卷第 1 期（1994 年冬季；https://digitalcommons.law.uga.edu/fac_artchop/668）：1-23。

virtues of the separation of economy and state. True advocates of a libertarian social and legal order should favor the separation of law and state.¹⁴⁹

因此，法律法典应该严格地私人化。我们早就看到了政教分离的智慧。像米塞斯这样的理论家以及社会主义的崩溃，教导了经济与国家分离的优点。真正的自由意志主义社会和法律秩序的倡导者应该赞成法律与国家的分离。⁴⁴⁹

C 普通法和大陆法

Common Law vs. Civil Law

While in this chapter I argue for the superiority of decentralized law discovery systems such as the Roman law and common law over modern legislation-dominant systems, many libertarians in the past have tended to favor the English common law over competing systems, including modern civil law, even though the civil codes, although legislated, are elegant codifications of private law principles that themselves evolved in the decentralized Roman Law legal system. The fact that modern civil codes are enacted as statutes and enshrine legal or legislative positivism is indeed a negative.¹⁵⁰ This does not detract from the value of having an elegant written summary of the law prepared by legal scholars distilling and summarizing the body of private law developed in more or less decentralized systems over the ages.

虽然在这一章中，我主张像罗马法和普通法这样的去中心化的法律发现系统优于现代以立法为主导的系统，但过去许多自由意志主义者倾向于支持英国普通法而非其他竞争系统，包括现代大陆法系，尽管民法典虽然是通过立法制定的，但它们是私法原则的优雅编纂，而这些私法原则本身是在去中心化的罗马法法律体系中演变而来的。现代民法典作为法规颁布并体现法律实证主义或立法实证主义这一事实确实是一个负面因素。⁴⁵⁰然而，这并不减损由法律学者准备的优雅的法律书面总结的价值，这些总结提炼和概括了在或多或少去中心化的制度中历经岁月发展而来的私法体系。

⁴⁴⁹ See Rothbard, For a New Liberty, p. 282 et seq. (discussing the separation of law and state).

见罗斯巴德的《为了新自由》，第 282 页及后续内容（讨论了法律与国家的分离）。

⁴⁵⁰ See note 6, above, and accompanying text.
见上文注释 6 及相关内容。

Moreover, the common law itself, as noted, has been increasingly submerged in a sea of legislation, ever since the rise of the administrative state and democratic law-making in the 20th century. And as noted above, Alan Watson has pointed out that in the past, legislation was used mainly to make the law clearer or more accessible, not to make drastic change or impose a new social order.¹⁵¹ This is in contrast to modern democratic law-making—legislation—that has increasingly become the dominant source of law and is used for widespread social engineering.

此外，如前所述，自 20 世纪行政国家和民主立法兴起以来，普通法本身已日益淹没在立法的海洋中。并且如上文所述，艾伦·沃森指出，在过去，立法主要用于使法律更清晰或更容易理解，而不是进行剧烈变革或强加一个新的社会秩序。⁴⁵¹ 这与现代民主立法——作为法律的主要来源且越来越多地被用于广泛的社会工程——形成了对比。

Hans-Hermann Hoppe has also commented on the relative merits of the English common law versus the European continental and Romanesque civil law:

This is the structure that the initial founding cantons in Switzerland had, where all free men swore an oath that they would come to mutually assist each other in case of an attack against them. And these cities frequently had written law codes, that is, Magdeburg Law or Hamburg Law or Hanover Law or Lübeck Law, etc., so that people who moved to these cities knew what law code would apply to them, and when new cities were founded, the normal thing to do was to adopt one of the already existing law codes and maybe make a few amendments to it. That is, some law codes became the law codes, not just of one city, but of many, many cities, who adopted the initial example of a place that first took the initiative to write these laws down.

In this connection, let me make a little side remark. In English-speaking countries, America and England, there is a certain amount of pride in having the so-called common law, which is, in a way, noncodified law, or case law. The Continental tradition,

⁴⁵¹ Watson, Failures of the Legal Imagination, p. 47 et seq. See also Watson, “The Importance of ‘Nutshells,’ ” on the significance of both private and legislated codes for the development of law.

沃森，《法律想象力的失败》，第 47 页及后续内容。另见沃森的《“简编”的重要性》，关于私人法典和立法法典对法律发展的重要性。

as you know, has been for a long time different. There, we have had codified law taken from the Romans, especially from the East Romans who had codified this law for the first time in an extensive manner and then, of course, in modern times, the Napoleonic Code, which has been taken over by most Continental European states in one form or another with some modifications. And, as I said, Anglo-Saxons looked down on codified law and hailed their own noncodified common law. I want to just remark that, for instance, Max Weber has a very interesting observation regarding this. He sees the reason for the noncodification of the common law in the self-interest of the lawyers to make the law difficult to understand for the layman and thus make a lot of money. He emphasizes that codified law makes it possible for the layman on the street who can read to study the law book himself and go to court himself and point out, here, that this law is written down. So, maybe this excessive pride that the Anglo-Saxons have in their common law might be a little bit overdrawn.¹⁵²

汉斯-赫尔曼·霍普也评论了英国普通法与欧洲大陆和罗马式民法的相对优点：

这是瑞士最初成立的州所具有的结构，在那里所有自由人都宣誓，如果他们受到攻击，他们将相互协助。这些城市经常有书面的法律法典，即马格德堡法、汉堡法、汉诺威法或吕贝克法等，所以搬到这些城市的人知道什么法律法典将适用于他们，当新的城市成立时，通常的做法是采用一个已经存在的法律法典，并可能对其进行一些修订。也就是说，一些法律法典不仅成为一个城市的法律法典，而且成为许许多多城市的法律法典，这些城市效仿了一个地方的最初例子，这个地方首先主动将这些法律写下来。

在这方面，让我做一个小小的补充说明。在英语国家，美国和英国，人们对拥有所谓的普通法有一定的自豪感，普通法在某种程度上是未编纂的法律，或者说是判例法。如你所知，大陆法系的传统长期以来一直不同。在那里，我们有从罗马人那里继

承来的编纂法，特别是从东罗马人那里，他们首次以广泛的方式编纂了这部法律，然后，当然，在现代，有拿破仑法典，大多数欧洲大陆国家以这样或那样的形式并做了一些修改后采用了它。而且，正如我所说，盎格鲁-撒克逊人瞧不起编纂法，而赞扬他们自己未编纂的普通法。我只想说，例如，马克斯·韦伯对此有一个非常有趣的观察。他认为普通法未编纂的原因在于律师的自身利益，即让法律对门外汉来说难以理解，从而赚取大量钱财。他强调，编纂法使街上会阅读的门外汉能够自己研究法律书籍，自己上法庭，并指出，这里，这部法律是有书面记载的。所以，也许盎格鲁-撒克逊人对他们的普通法的过度自豪可能有点夸张。⁴⁵²

⁴⁵² Hans-Hermann Hoppe, *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/esh), p. 111 (based on his lecture “The Production of Law and Order: Natural Order, Feudalism, and Federalism” (2004; <https://mises.org/library/6-production-law-and-order-natural-order-feudalism-and-federalism>), starting at 1:07:30). See also the quote from Hadley in note 153, below. On the Weber reference, see generally, Max Weber, *Max Weber on Law in Economy and Society*, edited with introduction and annotations by Max Rheinstein, trans. from Max Weber, *Wirtschaft und Gesellschaft*, 2d ed. (1924), by Edward Shils & Max Rheinstein (Clarion, 1967); in particular, see Rheinstein, “Introduction,” and chaps. VII and IX. See also note 30, above, regarding one goal of codification efforts being legal certainty. Moreover, as noted above, the differences between the modern common law and civil law systems are sometimes exaggerated. As one legal scholar notes: “As common law systems become more systematized and civil law systems more focused on jurisprudence as an authoritative source of law, the two systems are coming together more closely than one might guess.” Andrea B. Carroll, “Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception,” *Tul. L. Rev.*, 80 (2006; <https://perma.cc/CEP2-Z2BC>): 901 – 45, at 942, citing, re the systematization of the common law, William D. Hawkland, “The Uniform Commercial Code and the Civil Codes,” *La. L. Rev.*, 56, no. 1 (1995; <https://digitalcommons.law.lsu.edu/lalrev/vol56/iss1/6/>): 231 – 47, and, re the increasing focus of the civil law on jurisprudence, Vernon Valentine Palmer, “The French Connection

I tend to agree with this. What is admirable about the common law is that it is decentralized. But so was the Roman law. Today's world is dominated by legislation and legal positivism, so the common view is that the civil law and common law are distinct. But this fails to recognize that the civil law, although legislated as a statute, is still a codification of a body of private law principles developed largely in the decentralized Roman law system, plus European custom that developed in intervening centuries—and that the common law of today is being overwhelmed with a growing body of statutory law (as are the continental civil codes).

我倾向于同意这一观点。普通法令人钦佩的地方在于它是去中心化的。但罗马法也曾如此。如今的世界由立法和法律实证主义主导，所以普遍的观点是大陆法和普通法是不同的。但这没有认识到，大陆法虽然作为法规被立法，但它仍然是主要在去中心化的罗马法体系中发展起来的一套私法原则的编纂，再加上几个世纪以来发展起来的欧洲习俗——而且如今的普通法正被越来越多的成文法所淹没（大陆法系的民法典也是

and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law, ” La. L. Rev. 63, no.4 (2003; <https://digitalcommons.law.lsu.edu/lalrev/vol63/iss4/11/>): 1067 – 1126, at 1118 n.148. 汉斯-赫尔曼·霍普，《经济、社会与历史》（阿拉巴马州奥本：米塞斯研究院，2021年；www.hanshoppe.com/esh），第 111 页（基于他 2004 年的讲座《法律与秩序的产生：自然秩序、封建主义与联邦主义》（<https://mises.org/library/6-production-law-and-order-natural-order-feudalism-and-federalism>），从 1:07:30 开始）。另见下文注释 153 中的哈德利语录。关于韦伯的参考，一般可参见马克斯·韦伯的《马克斯·韦伯论经济与社会中的法律》，由马克斯·莱茵斯坦编辑并作序和注释，爱德华·希尔斯和马克斯·莱茵斯坦从马克斯·韦伯的《经济与社会》第二版（1924 年）翻译而来（克拉里昂，1967 年）；尤其可参见莱茵斯坦的“导论”以及第七章和第九章。另见上文注释 30，关于编纂工作的一个目标是法律确定性。

此外，如前所述，现代普通法和大陆法系之间的差异有时被夸大了。正如一位法律学者所指出的：“随着普通法体系变得更加系统化，大陆法系更加注重法理学作为法律的权威来源，这两个体系比人们想象的更加紧密地融合在一起。”安德里亚·B·卡罗尔，《审视一个比较法神话：两百年的河岸误解》，《杜兰法学评论》，80（2006 年；<https://perma.cc/CEP2-Z2BC>）：901-945，第 942 页，关于普通法的系统化，引用了威廉·D·霍克兰的《统一商法典与民法典》，《路易斯安那法律评论》，56，第 1 期（1995 年；<https://digitalcommons.law.lsu.edu/lalrev/vol56/iss1/6/>）：231-247，关于大陆法系对法理学的日益关注，引用了弗农·瓦伦丁·帕尔默的《法国联系与西班牙认知：法国对路易斯安那州民法影响的历史论证与当代评价》，《路易斯安那法律评论》，63，第 4 期（2003 年；<https://digitalcommons.law.lsu.edu/lalrev/vol63/iss4/11/>）：1067-1126，第 1118 页注释 148。

如此)。

It is not so clear that the substance of the English common law is significantly better or more libertarian than the substance of the Roman law as embodied in the modern continental civil codes. In fact, as noted in this chapter, in many respects the Roman legal concepts are arguably superior to common law principles (for example, the Roman law has a more conceptually elegant and streamlined system of property rights, as opposed to the cluttered common law system, which is mired in feudalistic concepts; and the Roman law's concept of contract is in some ways superior, since it does not have the unnecessary and formalistic doctrine of consideration).¹⁵³

目前尚不清楚英国普通法的实质内容是否明显优于或比现代大陆法系民法典所体现的罗马法更具自由意志主义色彩。事实上，正如本章所指出的，在许多方面，罗马法的法律概念可以说优于普通法原则（例如，罗马法有一个在概念上更优雅、更精简的财产权制度，而普通法体系则杂乱无章，深陷封建主义概念之中；罗马法的概念在某些方面更优越，因为它没有不必要的、形式主义的对价原则）。⁴⁵³

What we should be wary of is legal and legislative positivism, of relying on legislation as a dominant means of making law. And while we can appreciate the civil codes, along with private “codifications” of the law or treatises such as the ALI’s Restatements of the law, and older treatises such as those by Blackstone and Coke, we should oppose efforts to codify the common law in various jurisdictions and enact them as positive legislation,

⁴⁵³ On property law, see note 140, above, and accompanying text; on consideration, see notes 141 – 142, above, and accompanying text. See also James Hadley, Introduction to Roman Law (Littleton, Colo.: Fred Rothman, 1996; <https://archive.org/details/introductiontoro029387mbp>), p. 66 (“A recent able lecturer on ancient law, Mr. Maine, finds in this fact an explanation of the more thorough scientific development which distinguishes the Roman law from the English.”); and “Knowledge, Calculation, Conflict, and Law” (ch. 19), at n.64.

关于财产法，见上文注释 140 及相关内容；关于对价，见上文注释 141-142 及相关内容。另见詹姆斯·哈德利《罗马法导论》（科罗拉多州利特尔顿：弗雷德·罗思曼，1996 年；<https://archive.org/details/introductiontoro029387mbp>），第 66 页（“一位近期有能力的古代法讲师，梅因先生，在这一事实中找到了罗马法与英国法不同的更彻底的科学发展的解释。”）；以及《知识、计算、冲突与法律》（第 19 章），注释 64。

such as David Dudley Field's attempt to (legislatively) codify New York's common law in the late 1800s. This was vigorously fought by New York lawyer James C. Carter. Carter opposed replacing case law with centralized legislation. He notes that caselaw precedents are flexible and allow the judge to do justice, while statutes are applied literally, even where injustice is done or the legislator did not contemplate the result. Thus, Carter argues, one of the worst effects of legislatively codifying law—replacing organically developed law with artificial statutes—is that it changes the role of courts and judges from one in which the judge searches for justice into mere squabbles over definitions of words found in statutes. As Carter wrote:

*At present, when any doubt arises in any particular case as to what the true rule of the unwritten [i.e., judge-found, common-law developed] law is, it is at once assumed that the rule most in accordance with justice and sound policy is the one which must be declared to be the law. The search is for that rule. The appeal is squarely made to the highest considerations of morality and justice. These are the rallying points of the struggle. The contention is ennobling and beneficial to the advocates, to the judges, to the parties, to the auditors, and so indirectly to the whole community. The decision then made records another step in the advance of human reason towards that perfection after which it forever aspires. But when the law is conceded to be written down in a statute, and the only question is what the statute means, a contention unspeakably inferior is substituted. The dispute is about words. The question of what is right or wrong, just or unjust, is irrelevant and out of place. The only question is what has been written. What a wretched exchange for the manly encounter upon the elevated plane of principle!*¹⁵⁴

我们应该警惕的是法律实证主义和立法实证主义，警惕将立法作为制定法律的主要手段。虽然我们可以欣赏民法典，以及法律的私人“编纂”或专著，如美国法律协会的《法律重述》(Restatements of the law)，以及布莱克斯通(Blackstone)和柯克(Coke)等较早的专著，但我们应该反对在不同司法管辖区编纂普通法并将其作为实证立法颁布的努力，比如大卫·达德利·菲尔德在 19 世纪后期试图(通过立法)编纂纽约的普通法。这一行为遭到了纽约律师詹姆斯·C·卡特的强烈反对。卡特反对用中心化的立法取代判例法。他指出，判例法先例是灵活的，允许法官实现正义，而法规是逐字适用的，即使在造成不正义的情况下或者立法者没有预料到结果的情况下也是如此。因此，卡特认为，立法编纂法律——用人造的法规取代有机发展的法律——最糟糕的影响之一是，

它将法院和法官的角色从寻找正义转变为仅仅是对法规中词语定义的论证。正如卡特所写：

目前，当在任何特定案件中对不成文法（即由法官发现、普通法发展而来的法律）的真正规则产生任何疑问时，人们会立即假定最符合正义和合理政策的规则就是必须被宣布为法律的规则。人们会去寻找那个规则。人们直接向道德和正义的最高考量提出诉求。这些是斗争的集结点。这种论证对律师、法官、当事人、旁听者以及间接地对整个社会都是高尚且有益的。然后，所做出的裁决记录了人类理性朝着其永远渴望的完美迈进的又一步。但是，当法律被认为已被写进法规中，而唯一的问题是法规的含义是什么时，就会被一种不可言喻的低等论证所取代。争议围绕着文字。什么是对或错、正义或不正义的问题是不相关且不适当的。唯一的问题是写了什么。对于在原则的高尚层面上进行的勇敢交锋来说，这是多么可悲的交换啊！⁴⁵⁴

⁴⁵⁴ James C. Carter, The Proposed Codification of Our Common Law: A Paper Prepared at the Request of The Committee of the Bar Association of the City of New York, Appointed to Oppose the Measure (1884), pp. 85 – 86; text available at Kinsella, “Another Problem with Legislation: James Carter v. the Field Codes.” When the job of judges is primarily to interpret statutes—as is the case for most federal judges interpreting federal law and the written Constitution, since there is no federal common law (see *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938; https://en.wikipedia.org/wiki/Erie_Railroad_Co._v._Tompkins)—then they are acting as mere functionaries interpreting words, not doing justice, since there is no reason to expect a document written by a government committee (legislation, the Constitution) to have anything to do with justice or natural rights. Thus, I have pointed out before that in this sense, and to this extent, these “judges” are really fake judges, not real judges.

See also the comments of Samuel Read on legal positivism, quoted in Kinsella, “Samuel Read on Legal Positivism and Capitalism in 1829,” StephanKinsella.com (Nov. 4, 2011): “... we observe every day men, and even legislators, pretending to reason concerning political justice and the general principles of law, as if there were no such distinction as that which has been here pointed out, and who seem to have scarcely the most distant comprehension that there is a natural code discoverable by the light of reason, to which alone reference ought to be had when any law ... is brought into question either for the purpose of enactment or repeal. Instead of reasoning like legislators, such persons merely contend as lawyers; they but inquire what is, or what has been, not what ought to be; and, provided they can find a precedent, think they have no need to trouble themselves with any farther investigation as to right or wrong. They pronounce the two cabalistic words, “vested right,” and think themselves at once entrenched behind an

6 结论 CONCLUSION

Virtues such as individual liberty and legal certainty, understood as aspects of a just, libertarian polity, are indeed objectively valid standards that any legal system must uphold. Centralized legal systems—even those that attempt to embody libertarian virtues, such as the civil law— undercut individual rights, because in them legislation is made supreme and valid; because law-finding is replaced with law-making.

诸如个人自由和法律确定性等美德，被理解为正义的自由意志主义政体的各个方面，确实是任何法律体系都必须维护的客观有效的标准。中心化的法律体系——即使是那些试图体现自由意志主义美德的法律体系，如大陆法系——也会削弱个人权利，因为在这些体系中，立法被置于至高无上且有效的地位；因为法律发现被法律制定所取代。

Both the Roman law and common law have been corrupted into today’s inferior legislation-dominated systems. The primacy of legislation should be abandoned, and we should return to a system of judge-made law—a private system, ideally, but in the direction of systems like the old common law and Roman law, at least. Scholars who

impregnable fortress, without considering it as at all incumbent upon them to show that the investiture is consistent with real and natural right.

154 詹姆斯·C·卡特，《我们普通法的拟议编纂：应纽约市律师协会委员会的要求编写的一篇论文，该委员会被指定反对该措施》（1884 年），第 85-86 页；文本可金塞拉的《立法的另一个问题：詹姆斯·卡特与菲尔德法典》中找到。当法官的工作主要是解释法规时——就像大多数解释联邦法律和成文宪法的联邦法官的情况一样，因为不存在联邦普通法（见《伊利铁路公司诉汤普金斯案》，304 U.S. 64（1938 年；https://en.wikipedia.org/wiki/Erie_Railroad_Co._v._Tompkins））——那么他们只是作为解释文字的公务员在行事，而不是在实现正义，因为没有理由期望由政府委员会编写的文件（立法、宪法）与正义或自然权利有任何关系。因此，我之前曾指出，在这个意义上，并且在这个程度上，这些“法官”实际上是假法官，而不是真正的法官。另见塞缪尔·里德关于法律实证主义的评论，引自金塞拉的《1829 年塞缪尔·里德论法律实证主义与资本主义》，StephanKinsella.com（2011 年 11 月 4 日）：

……我们每天都看到人们，甚至立法者，假装就政治正义和法律的一般原则进行推理，就好像这里没有所指出那种区别一样，而且他们似乎几乎没有最深远的理解，即有一个可通过理性之光发现的自然法典，当任何法律……为了制定或废除的目的而受到质疑时，应当只参考这个自然法典。这些人不是像立法者那样推理，而只是像律师那样论证；他们只是询问什么是，或者曾经是什么，而不是什么应该是；并且，只要他们能找到一个先例，就认为他们没有必要再费力去进一步研究对与错。他们说“既得权利”这两个神秘的词，就认为自己立刻躲在一座坚不可摧的堡垒后面，而没有考虑到他们有责任表明这种既得权利与真正的自然权利是一致的。

codify naturallyevolved law have a vital function to serve, but they should not ask for governmental imprimatur on their scholarly efforts.

罗马法和普通法都已被腐蚀成如今以立法为主导的次等体系。立法的首要地位应该被摒弃，我们应该回归到法官制定法律的体系——理想情况下是一个私人体系，但至少朝着旧的普通法和罗马法那样的体系方向发展。编纂自然演化的法律的学者们有着至关重要的作用要发挥，但他们不应该要求政府对他们的学术努力给予认可。

Ultimately, the form of a legal system does not guarantee that just laws will be adopted. We must always be vigilant and urge that individual freedom be respected, whether by legislator or judge.

最终，法律体系的形式并不能保证正义的法律会被采纳。我们必须始终保持警惕，并敦促无论是立法者还是法官都要尊重个人自由。

附录:《民法典》中的立法至上

APPENDIX: LEGISLATIVE SUPREMACY IN THE CIVIL CODE

As noted above, the material here was originally intended to appear in footnote 6, above. Due to its length, I include this material in this appendix.

如上文所述，这里的内容原本是打算出现在上文注释 6 中的。由于篇幅较长，我将此内容放在了这个附录中。

Legislative supremacy is announced in the very first articles of the Louisiana Civil Code. Article 1 provides that "The sources of law are legislation and custom," but article 3 makes it clear that legislation is dominant and supreme: "Custom may not abrogate legislation."¹⁵⁵

立法至上在《路易斯安那州民法典》的开篇条款中就被宣告。第 1 条规定"法律的渊源是立法和习惯"，但第 3 条明确表明立法是占主导地位且至高无上的："习惯不得废止立法。"⁴⁵⁵

⁴⁵⁵ See also Herman, The Louisiana Civil Code: A European Legacy for the United States,p. 17; John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition:

Yet some scholars note that the Louisiana code is not quite as “rationalistic” or legal positivistic as the French code, since it also admits custom as a source of law and, importantly, also provides: “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”¹⁵⁶

然而，一些学者指出，《路易斯安那民法典》并不像《法国民法典》那样“理性主义”或法律实证主义，因为它也承认习惯是法律的一个来源，并且重要的是，它还规定：“当立法或习惯不能为特定情况提供规则时，法院必须根据衡平法进行裁决。为了正义地

An Introduction to the Legal Systems of Western Europe and Latin America, 4th ed. (Stanford, California: Stanford University Press, 2018), discussing legislative supremacy in the civil law. N.b.: Louisiana’s civil law is derived in large part from Spanish and Roman sources, though using the French code’s style, organization, and sometimes text as the means to codify this Spanish-Roman law. This, by the way, is a controversial and complicated issue among Louisiana legal scholars; I tend to agree with Pascal and Levasseur, and disagree with Batiza and Herman, as a legal matter, despite disagreeing normatively with Pascal’s opposition to individualism and economic liberalism and despite agreeing with Herman’s more liberal and individualist inclinations. See Robert A. Pascal, “The Louisiana Civil Code: A European Legacy for the United States. By Shael Herman,” La. L. Rev. 54, no. 3 (Jan. 1994); <https://digitalcommons.law.lsu.edu/lalrev/vol54/iss3/17/>: 827 - 32; and Alain A. Levasseur, “Grandeur or Mockery?” , Loy. L. Rev. 42, no. 4 (Winter 1997); https://digitalcommons.law.lsu.edu/faculty_scholarship/321/: 647 - 725.)

另见赫尔曼的《路易斯安那州民法典：美国的欧洲遗产》，第 17 页；约翰·亨利·梅里曼和罗赫略·佩雷斯-佩尔多莫的《大陆法传统：西欧和拉丁美洲法律体系导论》第四版（加利福尼亚州斯坦福：斯坦福大学出版社，2018 年），其中讨论了大陆法中的立法至上。注意：路易斯安那州的民法在很大程度上源自西班牙和罗马的法律渊源，尽管使用法国法典的风格、组织以及有时的文本作为编纂这种西班牙-罗马法的手段。顺便说一下，这在路易斯安那州的法律学者中是一个有争议且复杂的问题；作为一个法律问题，我倾向于同意帕斯卡尔和勒瓦瑟尔的观点，而不同意巴蒂萨和赫尔曼的观点，尽管在规范上我不同意帕斯卡尔对个人主义和经济自由主义的反对，并且尽管我同意赫尔曼更自由和个人主义的倾向。见罗伯特·A·帕斯卡尔的《路易斯安那州民法典：美国的欧洲遗产。作者：沙尔·赫尔曼》，《路易斯安那法律评论》第 54 卷第 3 期（1994 年 1 月；<https://digitalcommons.law.lsu.edu/lalrev/vol54/iss3/17/>）：827-832 页；以及阿兰·A·勒瓦瑟尔的《伟大还是嘲弄？》，《洛约拉法律评论》第 42 卷第 4 期（1997 年冬季；https://digitalcommons.law.lsu.edu/faculty_scholarship/321/）：647-725 页。

裁决，应求助于正义、理性和普遍的惯例。⁴⁵⁶

For discussion of the Louisiana Civil Code, its history, and related issues, see various works by Herman, Yiannopoulos, et al.¹⁵⁷ Differences in terminology between Louisiana's civil-law system and common-law legal systems are detailed in Rome & Kinsella, Louisiana Civil Law Dictionary.¹⁵⁸ A general comparison of civil and common law is found in Buckland & McNair, Roman Law and Common Law: A Comparison in Outline.¹⁵⁹

关于《路易斯安那州民法典》、其历史及相关问题的讨论，可参考赫尔曼、扬诺普洛斯等人的各种著作。⁴⁵⁷ 路易斯安那民法体系与普通法法律体系之间的术语差异在罗马

⁴⁵⁶ Louisiana Civil Code, art. 4 (emphasis added). See also commentary on this issue by Yiannopoulos and Pascal: A.N. Yiannopoulos, “The Civil Codes of Louisiana,” Civil Law Commentaries 1, no. 1 (Winter 2008; <https://perma.cc/59DZ-KGSE>): 0 – 23 (also included in idem, Civil Law System: Louisiana and Comparative Law: A Coursebook: Texts, Cases and Materials, 3d ed. (Baton Rouge, La.: Claitor’s Publishing Division, 2000)); and Pascal’s review of Herman cited previously, both as quoted in Kinsella, “Legislative Positivism and Rationalism in the Louisiana and French Civil Codes,” StephanKinsella.com (April 4, 2023). See also idem, “Logical and Legal Positivism,” StephanKinsella.com (June 23, 2010). Re rationalism, see also note 9, above. The 1804 French Civil Code, in English, may be found at Code Napoleon: or, The French Civil Code (London: William Benning, 1827; <https://perma.cc/7CEZ-Q2D5>).

《路易斯安那民法典》第 4 条（着重号为原文所加）。另见扬诺普洛斯和帕斯卡尔对这个问题的评论：A.N.扬诺普洛斯，《路易斯安那州的民法典》，《民法评论》第 1 卷第 1 期（2008 年冬季；<https://perma.cc/59DZ-KGSE>）：0-23（也收录在同一作者的《民法体系：路易斯安那州与比较法：一本教科书：文本、案例和材料》第三版（路易斯安那州巴吞鲁日：克莱托出版社，2000 年））；以及前面引用的帕斯卡尔对赫尔曼的评论，两者都引自金塞拉的《路易斯安那州和法国民法典中的立法实证主义和理性主义》，StephanKinsella.com（2023 年 4 月 4 日）。另见同一作者的《逻辑实证主义和法律实证主义》，StephanKinsella.com（2010 年 6 月 23 日）。关于理性主义，也见上文注释 9。1804 年的《法国民法典》英文版可在《拿破仑法典：或法国民法典》（伦敦：威廉·本宁，1827 年；<https://perma.cc/7CEZ-Q2D5>）中找到。

⁴⁵⁷ Herman, The Louisiana Civil Code: A European Legacy for the United States; Alain A. Levasseur “The Major Periods of Louisiana Legal History,” Loy. L. Rev. 41, no. 4 (Winter 1996; <https://perma.cc/XB9F-WQYX>): 585 – 628; Yiannopoulos, “The Civil Codes of Louisiana” ; Richard Holcombe Kilbourne, Jr., A History of the Louisiana Civil Code: The Formative Years, 1803 – 1839 (Baton Rouge, La.: Center for Civil Law Studies, Louisiana State University, 1987). See also Merryman & Pérez-Perdomo, The Civil Law Tradition

与金塞拉《路易斯安那州民法词典》中有详细说明。⁴⁵⁸ 对大陆法和普通法的一般性比较可见于巴克兰与麦克奈尔《罗马法与普通法：概要比较》。⁴⁵⁹

and Peter G. Stein, “Roman Law, Common Law, and Civil Law,” Tul. L. Rev., 66, no. 6 (1991 – 92): 1591 – 1604.

赫尔曼的《路易斯安那民法典：美国的欧洲遗产》；阿兰·A·勒瓦瑟尔的**《路易斯安那州法律历史的主要时期》**，《洛约拉法律评论》第 41 卷第 4 期（1996 年冬季）：585-628；扬诺普洛斯的《路易斯安那州的民法典》；小理查德·霍尔科姆·基尔伯恩的《路易斯安那州民法典的历史：形成时期，1803-1839》（路易斯安那州巴吞鲁日：路易斯安那州立大学民法研究中心，1987 年）。另见梅里曼和佩雷斯-佩尔多英的《大陆法传统》以及彼得·G·斯坦的《罗马法、普通法和大陆法》，《杜兰法律评论》第 66 卷第 6 期（1991-1992 年）：1591-1604。

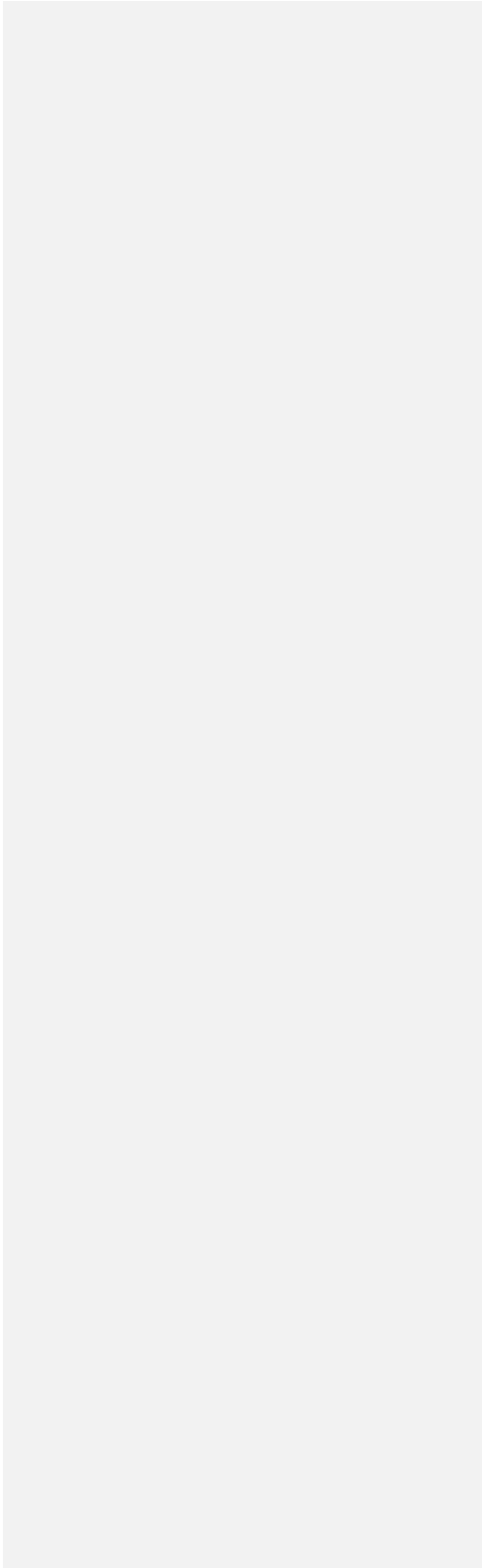
⁴⁵⁸ 格雷戈里·罗姆和斯蒂芬·金斯莱，《路易斯安那州民法词典》（路易斯安那州新奥尔良：Quid Pro Books，2011 年）。

⁴⁵⁹ W.W. Buckland & Arnold D. McNair, Roman Law and Common Law: A Comparison in Outline (Cambridge, England: University Press, 2d ed., revised by F.H. Lawson, reprinted with corrections, 1965).

W.W.巴克兰和阿诺德·D.麦克奈尔，《罗马法与普通法：概要比较》（英国剑桥：大学出版社，第二版，由 F.H.劳森修订，1965 年重印并修正）。

第四辑 知识产权

PART IV INTELLECTUAL PROPERTY



第十四章 无国家社会的法律与知识产权

Law and Intellectual Property in a Stateless Society

I've written a large number of articles on intellectual property, or IP, over the years, starting with *Against Intellectual Property*, first published in 2001.* This chapter, originally intended for a symposium issue of the *Griffith Law Review* but withdrawn/rejected because of a dispute with the editors, was originally published in my journal *Libertarian Papers* in 2013. It was the most comprehensive article I'd written on IP since AIP.† It incorporates much of the material from that work and includes some additional material that I had published in the intervening decade or so. Chapter 15 contains additional arguments developed subsequently and complements this work and AIP. These two chapters, together, contain a good presentation of my current views and arguments related to IP.‡

从 2001 年首次发表的《反对知识产权》开始，我多年来撰写了大量关于知识产权的文章。*本章原计划用于《格里菲斯法律评论》的一期专题讨论会，但因与编辑发生争执而撤回/拒绝，最初于 2013 年发表在我的期刊《自由意志主义论文》上。这是自反对知识产权以来我撰写的关于知识产权的最全面的文章。† 本章收录了该著作中的许多材料，并包含了我在这十多年间发表的一些补充材料。第 15 章包含了后来提出的其他论点，是对这部著作和《知识产权协议》的补充。这两章合在一起，很好地阐述了我目前有关知识产权的观点和论据。‡

* *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 1–53. Hereinafter, AIP. In this chapter I will cite the 2008 edition of AIP (www.c4sif.org/aip). In AIP I thanked "Wendy McElroy and Gene Callahan for helpful comments on an earlier draft." My article "In Defense of Napster and Against the Second Homesteading Rule," *LewRockwell.com* (September 4, 2000) presented a summary version of the argument later elaborated in AIP. I thanked Gil Guillory for helpful comments on that piece.

《自由意志主义研究期刊》第 15 卷第 2 期（2001 年春季）：1-53 页。以下简称《反对知识产权》。在本章中，我将引用 2008 年版的《反对知识产权》(www.c4sif.org/aip)。在《反对知识产权》中，我感谢“温迪·麦克尔罗伊和吉恩·卡拉汉对早期草稿提出的有益评论”。我的文章《为 Napster 辩护并反对第二次拓殖规则》，发表于 *LewRockwell.com*

(2000 年 9 月 4 日)，呈现了后来在《反对知识产权》中详细阐述的论点的概要版本。非常感谢吉尔·吉洛里对那篇文章提出的有益评论。

† Stephan Kinsella, "Law and Intellectual Property in a Stateless Society," *Libertarian Papers* 5, no. 1 (2013): 1–44. The publication history is detailed at Kinsella, "Kinsella, 'Law and Intellectual Property in a Stateless Society,'" *C4SIF Blog* (March 1, 2013). The structure of the article is similar to the more concise "Intellectual Property and Libertarianism," *Mises Daily* (Nov. 17, 2009). The title is slightly misleading because the article was really about why IP is unjust and had little to do with anarchy or stateless societies; the title and the slight emphasis on stateless societies in the text was intended to make the article fit the theme of the symposium issue it was intended for, which was "Law and Anarchy: Legal Order and the Idea of a Stateless Society." I've chosen to retain the original title here.

†斯蒂芬·金塞拉，《无国家社会中的法律与知识产权》，《自由意志主义论文》第 5 卷第 1 期（2013 年）：1-44 页。出版历史在金塞拉的《金塞拉，“无国家社会中的法律与知识产权”》，*C4SIF 博客*（2013 年 3 月 1 日）中有详细记载。这篇文章的结构与更为简洁的《知识产权与自由意志主义》（*米塞斯日报*，2009 年 11 月 17 日）相似。这个标题有点误导性，因为这篇文章实际上是关于为什么知识产权是不正义的，与无政府主义或无国家社会关系不大；标题以及文中对无国家社会的轻微强调是为了使文章符合它原本所针对的专题研讨会的主题，即“法律与无政府主义：法律秩序与无国家社会的理念”。在这里我选择保留原来的标题。

†† For those interested in reading my original AIP, I suggest instead the similar version "The Case Against Intellectual Property," in *Handbook of the Philosophical Foundations of Business Ethics* (Prof. Dr. Christoph Lütge, ed.; Springer, 2013) (chapter 68, in Part 18, "Property Rights: Material and Intellectual," Robert McGee, section ed.).

For other articles and blog posts related to IP, see Kinsella, *You Can't Own Ideas: Essays on Intellectual Property* (Papinian Press, 2023); also: the AIP Supplementary Material linked at www.c4sif.org/aip; the Resources page at www.c4sif.org/resources; Kinsella, "A Selection of my Best Articles and Speeches on IP," *C4SIF Blog* (Nov. 30, 2015); and my six-lecture *Mises Academy* course on IP, available at Kinsella, "KOL172 | Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and

Law (Mises Academy, 2011),” Kinsella on Liberty Podcast (Feb. 14, 2015). For criticism of IP by other writers from a libertarian or free market perspective, see Kinsella, ed., The Anti-IP Reader: Free Market Critiques of Intellectual Property (Papinian Press, 2023).

对于那些有兴趣阅读我最初的《反对知识产权》的人，我建议阅读类似的版本《反对知识产权的理由》，收录于《商业伦理哲学基础手册》（克里斯托夫·吕特格教授编辑；施普林格出版社，2013 年）（第 18 部分“财产权：物质与知识”中的第 68 章，罗伯特·麦吉担任章节编辑）。

关于其他与知识产权相关的文章和博客文章，可参阅金塞拉的《你不能拥有思想：知识产权论文集》（帕皮尼安出版社，2023 年）；还有：www.c4sif.org/aip 上链接的《反对知识产权》补充材料；www.c4sif.org/resources 上的资源页面；金塞拉的《我关于知识产权的最佳文章和演讲选集》，C4SIF 博客（2015 年 11 月 30 日）；以及我在米塞斯学院关于知识产权的六次讲座课程，可在金塞拉的“KOL172 | 《重新思考知识产权：历史、理论与经济学》：讲座 1：历史与法律》（米塞斯学院，2011 年），《金塞拉谈自由》播客（2015 年 2 月 14 日）中找到。对于从自由意志主义或自由市场角度对知识产权进行批评的其他作者的作品，可参阅金塞拉编辑的《反知识产权读本：自由市场对知识产权的批判》（帕皮尼安出版社，2023 年）。

a long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides.

Time makes more converts than reason.

—Thomas Paine¹

长期以来，人们习惯于不认为一件事是错的，这就给它披上了一层正确的外衣，起初，人们会为维护习俗而大声疾呼。但这种喧嚣很快就会平息。

时间比理性更能使人皈依。

——托马斯·潘恩⁴⁶⁰

⁴⁶⁰ Thomas Paine, “Introduction,” Common Sense (1776).
托马斯·潘恩，《常识》（1776 年）“引言”部分。

一、简介

INTRODUCTION

It is widely recognized that the institutional protection of property rights was a necessary (though probably not sufficient)¹ condition for the radical prosperity experienced in the West since the advent of the industrial revolution. And property rights include so-called "intellectual property" (IP) rights which emerged in their modern form around the same time.² Or so we have been told. The idea that IP rights are a legitimate type of property right, and a necessary part of a free market economy, has been taken for granted since the dawn of modern patent and copyright approximately two centuries ago.

人们普遍认为，对财产权的制度性保护是西方国家自工业革命以来取得巨大繁荣的必要条件（尽管可能还不是充分条件）。⁴⁶¹ 财产权包括所谓的“知识产权”（IP），这种权利以其现代形式大约在同一时间出现。⁴⁶² 或者说我们一直是这样被告知的。知识产权是一种合法的财产权，是市场经济的必要组成部分，这一观点自大约两个世纪前现代专利和版权出现以来就被认为是理所当然的。

Despite the widespread assumption that IP is legitimate, even its proponents seem somewhat uneasy with it. Thus most of them favor limited terms for patent and

⁴⁶¹ 参见汉斯-赫尔曼·霍普的《从马尔萨斯陷阱到工业革命：对社会进化的一种解释》，收录于《伟大的虚构：财产、经济、社会与衰落的政治》（第二版扩充版）（亚拉巴马州奥本：米塞斯研究院，2021 年；网址：www.hanshoppe.com/tgf）；也可参见同一作者的“PFP041 | 汉斯-赫尔曼·霍普，从马尔萨斯陷阱到工业革命：对社会进化的一种解释（PFS 2009）”，《财产与自由播客》（2022 年 1 月 20 日）。

⁴⁶² 在本章中，除非上下文另有说明，否则“知识产权”主要指专利和版权。关于反对其他形式知识产权（如商标和商业秘密）的论点，可参见《反对知识产权》。虽然诽谤（书面诽谤和口头诽谤）通常不被认为是一种知识产权类型，但我认为它应该是，因为支持该法律所保护的“名誉权”的论点与其他形式的知识产权（如商标）类似。参见金塞拉的《作为一种知识产权类型诽谤法和名誉权》，收录于埃尔维拉·尼卡和格奥尔基·H·波佩斯库主编的《对正义的热情：向沃尔特·布洛克致敬的论文集》（纽约：阿德尔顿学术出版社，即将出版）。关于批评诽谤法与自由意志主义财产权原则不兼容的内容，可参见穆瑞·N·罗斯巴德的《知识，真实与虚假》，收录于《自由的伦理》（纽约：纽约大学出版社，1998 年）；沃尔特·E·布洛克的《诽谤者和造谣者》，收录于《为不可辩护者辩护》（2018 年）。

copyright—about 17 years for the former and usually over 100 years for the latter—unlike the potentially perpetual ownership of traditional forms of property.⁴ And there is continual dissatisfaction with the state of the law, its ambiguities and arbitrary standards, and with patent office efficiency and competence, or lack thereof. There are incessant calls for “reform,” and for curbs on “misuse” or “abuse” of patent and copyright. But in these complaints and debates, it is almost always taken for granted that some form of copyright and patent are essential, even if reform is needed.

尽管人们普遍认为知识产权是合法的，但即使是它的支持者似乎也对它有些不安。因此，他们中的大多数人都赞成专利和版权的有限期限——前者约为 17 年，后者通常超过 100 年——而不像传统形式的财产那样可以永久拥有。⁴⁶³而且，人们对法律的现

⁴⁶³ Yet some defenders of IP go so far as to support perpetual terms, such as Lysander Spooner, Andrew J. Galambos, some Randians (though not Rand herself), Robert Wenzel, Victor Yarros, possibly J. Neil Schulman, etc. See, e.g., Lysander Spooner, “A Letter to Scientists and Inventors, on the Science of Justice, and their Rights of Perpetual Property in their Discoveries and Inventions” and “The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas,” in Charles Shively, ed., *The Collected Works of Lysander Spooner*, vol. 3, reprint ed. (Weston, Mass.: M&S Press, 1971 [1855]; www.lysanderspooner.org/works); discussion of Galambos in AIP; Kinsella, “Transcript: Debate with Robert Wenzel on Intellectual Property,” C4SIF Blog (April 11, 2022). Re Yarros, see Kinsella, “Benjamin Tucker and the Great Nineteenth Century IP Debates in Liberty Magazine,” C4SIF Blog (July 11, 2022) and idem, “James L. Walker (Tak Kak), ‘The Question of Copyright’ (1891),” C4SIF Blog (July 28, 2022); “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17). See also Jeffrey A. Tucker, “Eternal Copyright,” C4SIF Blog (Feb. 21, 2012); and Wendy McElroy, “Intellectual Property,” in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881 – 1908* (Lexington Books, 2002; <https://perma.cc/ZQM2-82B9>), reprinted without endnotes as “Copyright and Patent in Benjamin Tucker ’ s Periodical,” Mises Daily (July 28, 2010; <https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical>).

然而，一些知识产权的捍卫者甚至支持永久期限，例如莱桑德·斯波纳、安德鲁·J·加拉姆波斯、一些兰德主义者（尽管不是兰德本人）、罗伯特·温泽尔、维克多·亚罗斯，可能还有 J·尼尔·舒尔曼等人。例如，参见莱桑德·斯波纳的《致科学家和发明家的一封信，关于正义科学以及他们在发现和发明中的永久财产权》和《知识产权法或关于作者和发明家对其思想拥有永久财产权的论文》，收录于查尔斯·希夫利编辑的《莱桑德·斯波纳文集》第 3 卷，再版（马萨诸塞州韦斯顿：M&S 出版社，1971 年[1855 年]；www.lysanderspooner.org/works）；《反对知识产权》中对加拉姆波斯的讨论；金塞拉的《记录：与罗伯特·温泽尔关于知识产权的论证》，C4SIF 博

状、法律的模糊性和任意性标准以及专利局的效率和能力（或缺乏效率和能力）不断表示不满。要求“改革”、制止“误用”或“滥用”专利和版权的呼声不绝于耳。但在这些抗议和论证中，人们几乎总是想当然地认为，即使需要改革，某种形式的版权和专利也是必不可少的。

In recent years, however, increasing numbers of libertarians have begun to doubt the very legitimacy of IP. In this chapter I argue that patent and copyright should be abolished entirely, not merely reformed. As a preliminary matter, it is necessary to describe the libertarian view of property rights. As this discussion will make clear, IP rights such as patent and copyright are inconsistent with the private property order that would characterize a stateless, private-law society. I will follow with a discussion of what practices or laws might prevail in the absence of IP.

但近年来，越来越多的自由意志主义人士开始怀疑知识产权的合法性。⁴⁶⁴在本章中，我认为专利和版权应该完全废除，而不仅仅是改革。首先，有必要描述一下自由意志主义对财产权的看法。本章将明确指出，专利权和版权等知识产权与私有财产秩序不一致，而私有财产秩序是无国家、私法社会的特征。接下来，我将讨论在没有知识产权的情况下可能盛行的做法或法律。

客（2022 年 4 月 11 日）。关于亚罗斯，参见金塞拉的《本杰明·塔克与 19 世纪《自由》杂志上的伟大知识产权论证》，C4SIF 博客（2022 年 7 月 11 日）以及同一作者的《詹姆斯·L·沃克（塔克·卡克），“版权问题”（1891 年）》，C4SIF 博客（2022 年 7 月 28 日）；“与舒尔曼关于逻辑权利和媒介承载财产的对话”（第 17 章）。也可参见杰弗里·A·塔克的《永恒版权》，C4SIF 博客（2012 年 2 月 21 日）；以及温迪·麦克罗伊的《知识产权》，收录于《自由之辩：个人无政府主义概述，1881-1908》（列克星敦图书，2002 年；<https://perma.cc/ZQM2-82B9>），以无尾注形式再版为《本杰明·塔克期刊中的版权和专利》，米塞斯日报（2010 年 7 月 28 日；<https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical>）。

⁴⁶⁴ See Kinsella, “The Death Throes of Pro-IP Libertarianism,” Mises Daily (July 28, 2010); idem, “The Four Historical Phases of IP Abolitionism,” Mises Economics Blog (April 13, 2011); idem, “The Origins of Libertarian IP Abolitionism,” Mises Economics Blog (April 1, 2011); Kinsella, ed., “The Anti-IP Reader.”

参见金塞拉的《支持知识产权的自由意志主义的垂死挣扎》，米塞斯日报（2010 年 7 月 28 日）；同一作者的《知识产权废除主义的四个历史阶段》，米塞斯经济学博客（2011 年 4 月 13 日）；同一作者的《自由意志主义知识产权废除主义的起源》，米塞斯经济学博客（2011 年 4 月 1 日）；金塞拉编辑的《反知识产权读本》。

二、自由意志主义的框架⁴⁶⁵

THE LIBERTARIAN FRAMEWORK⁶

A 财产，权利和自由

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.

自由意志主义倾向于在一系列广泛的政策和原则上达成一致。尽管如此，要就自由意志主义的决定性特征是什么、它与其他政治理论和制度的区别是什么达成共识并不容易。

Various formulations abound. It is said that libertarianism is concerned with individual rights, property rights,⁷ the free market, capitalism, freedom, liberty, justice, or the nonaggression principle. But are any of these ideas truly fundamental or foundational? "Capitalism" and "the free market," for example, describe the catallactic conditions that arise or are permitted in a libertarian society, but they do not encompass other aspects of libertarianism.⁸ And individual rights, justice, and nonaggression collapse into property rights. As Murray Rothbard explained, individual rights are property rights.⁹ And justice simply means giving someone his due, which depends on what his (property) rights are.¹⁰

各种表述比比皆是。有人说，自由意志主义关注的是个人权利、财产权、⁴⁶⁶ 自由市场、

⁴⁶⁵ The issues in this section are elaborated on in other chapters, e.g. "What Libertarianism Is" (ch. 2) and "How We Come to Own Ourselves" (ch. 4). 本节中的问题在其他章节中进行了详细阐述，例如《何为自由意志主义》（第 2 章）和《我们如何拥有自己》（第 4 章）。

⁴⁶⁶ As noted in "What Libertarianism Is" (ch. 2), n.1, the term "private" property rights is sometimes used by libertarians, yet property rights are necessarily public, in the sense that the borders or boundaries of property must be publicly visible so that nonowners can avoid trespass. For more on this aspect of property borders, see Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics

资本主义、自主、自由、正义或互不侵犯原则。但是，这些思想中是否有真正的根本性或基础性思想呢？例如，“资本主义”和“自由市场”描述的是在自由意志主义社会中出现或被允许的交易条件，但它们并不涵盖自由意志主义的其他方面。⁴⁶⁷而且个人权利、正义和互不侵犯原则都可归结为财产权。正如穆瑞·罗斯巴德（Murray Rothbard）所解释的，个人权利就是财产权。⁴⁶⁸而正义仅仅意味着给予某人应有的权利，这取决于他

(Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), pp. 167 - 68; “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), at n.38; AIP, pp. 30 - 31, 49; also Randy E. Barnett, “A Consent Theory of Contract,” *Colum. L. Rev.* 86 (1986); www.randybarnett.com/pre-2000: 269 - 321, at 303.

正如《何为自由意志主义》（第 2 章）的注释 1 中所指出的，自由意志主义者有时会使用“私有”财产权这个术语，但财产权在一定意义上必然是公共的，即财产的边界必须是公开可见的，以便非所有者能够避免擅自闯入。关于财产边界的这一方面，可参见汉斯-赫尔曼·霍普的《社会主义与资本主义理论：经济学、政治学与伦理学》（亚拉巴马州奥本：米塞斯研究院，2010 年[1989 年]；网址：www.hanshoppe.com/tsc），第 167-168 页；《自由意志主义的契约理论：所有权转让、具有有约束力的承诺和不可让渡性》（第 9 章），注释 38；《反对知识产权》，第 30-31、49 页；还有兰迪·E·巴尼特的《同意的理论》，《哥伦比亚法律评论》86 卷（1986 年；网址：www.randybarnett.com/pre-2000）：269-321，第 303 页。

⁴⁶⁷ “Catallactics” is a term used by the Austrian economist Ludwig von Mises to refer to the economics of an advanced free market system which employs money prices and entrepreneurial calculation, as opposed to a barter or Crusoe economy. See the Wikipedia entry on “Catallactics” at <https://en.wikipedia.org/wiki/Catallactics> and the Introduction et pass. in Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>).

“交换学”（Catallactics）是奥地利经济学家路德维希·冯·米塞斯使用的一个术语，指的是一种先进的自由市场体系的经济学，它采用货币价格和企业计算，与易货经济或鲁滨逊经济相对。参见维基百科上关于“交换学”的条目，网址为 <https://en.wikipedia.org/wiki/Catallactics>，以及路德维希·冯·米塞斯的《人的行动：经济学专论》（学者版）（亚拉巴马州奥本：米塞斯研究院，1998 年；<https://mises.org/library/human-action-0>）中的介绍等内容。

⁴⁶⁸ Murray N. Rothbard, “‘Human Rights’ as Property Rights,” in *The Ethics of Liberty* (<http://mises.org/rothbard/ethics/fifteen.asp>); idem, *For A New Liberty*, 2d ed. (Auburn, Ala.: Mises Institute, 2006; <https://mises.org/library/new-liberty-libertarian-manifesto>), pp. 42 et pass.

穆瑞·N·罗斯巴德，《“人权”即财产权》，收录于《自由的伦理》（<http://mises.org/rothbard/ethics/fifteen.asp>）；同一作者，《为了新自由》第二版（亚拉巴马州奥本：米塞斯研究院，2006 年；<https://mises.org/library/new-liberty->

的（财产）权利是什么。⁴⁶⁹

The nonaggression principle is also dependent on property rights, since what aggression is depends on what our (property) rights are. If you hit me, it is aggression because I have a property right in my body. If I take from you the apple you possess, this is trespass—aggression—only because you own the apple. One cannot identify an act of aggression without implicitly assigning a corresponding property right to the victim. “Freedom” and “liberty” face difficulties similar to that of the concept of aggression, as indicated in the common saying, “Your freedom ends where my nose begins!”

互不侵犯原则也取决于财产权，因为什么是侵犯取决于我们的（财产）权利是什么。如果你打我，这就是侵犯，因为我对我的身体拥有财产权。如果我从你那里拿走你拥有的苹果，这是侵犯——只有因为你拥有这个苹果，这才是非法侵入行为。如果不隐舍地赋予受害者相应的财产权，我们就无法认定侵犯行动。“自主”和“自由”面临着与侵犯概念类似的困难，正如那句俗语所说：“你的自由在我的鼻子开始的地方结束！”

libertarian-manifesto），第 42 页及后续内容。

⁴⁶⁹ “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., trans., *The Institutes of Justinian: Text, Translation, and Commentary* (Amsterdam: North-Holland Publishing Company, 1975). See also Thomas Aquinas, *Summa Theologica*, I – II, Q 64, art 2, in Anton C. Pegis, ed., *Basic Writings of St. Thomas Aquinas* (New York: Random House, 1945), 2: 491 (“the act of justice is to render what is due”), quoted in Tom Bethell, *The Noblest Triumph: Property and Prosperity through the Ages* (New York: St. Martin’ s Griffin, 1998), p. 161. See also Thomas Aquinas, *Summa Theologica* (New Advent, <https://www.newadvent.org/summa>), *Secunda Secundæ Partis*, Question 58, arts. 1, 11.

“正义是给予每个人其应得之物的持续且永恒的愿望……法律的准则如下：诚实地生活，不伤害任何人，给予每个人其应得之物。” J.A.C.托马斯编、译，《查士丁尼法学总论：文本、翻译与评注》（阿姆斯特丹：北荷兰出版公司，1975 年）。另见托马斯·阿奎那，《神学大全》，第一至二卷，问题 64，条目 2，载于安东·C·佩吉斯编，《圣托马斯·阿奎那基本著作》（纽约：兰登书屋，1945 年），第 2 卷，第 491 页（“正义之举是给予应得之物”），引自汤姆·贝塞尔，《最高贵的胜利：历代的财产与繁荣》（纽约：圣马丁格里芬出版社，1998 年），第 161 页。另见托马斯·阿奎那，《神学大全》（新降临网站，<https://www.newadvent.org/summa>），第二部分第二卷，问题 58，条目 1、11。

So capitalism and the free market are too narrow, and justice, individual rights, liberty, freedom, and aggression all boil down to, or are defined in terms of, property rights.

所以资本主义和自由市场过于狭隘，正义、个人权利、自主、自由和侵犯都归结为财产权，或者说都依据财产权来定义的。

What of property rights, then? Is this what differentiates libertarianism from other political philosophies—that we favor property rights, and all others do not? Surely such a claim is untenable. After all, a property right is simply the exclusive right to control a scarce resource. As Professor Yiannopoulos explains:

Property may be defined as an exclusive right to control an economic good...; it is the name of a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of man with respect to things of value. People everywhere and at all times desire the possession of things that are necessary for survival or valuable by cultural definition and which, as a result of the demand placed upon them, become scarce. Laws enforced by organized society control the competition for, and guarantee the enjoyment of, these desired things. What is guaranteed to be one's own is property... [Property rights] confer a direct and immediate authority over a thing.¹¹

那么财产权呢？这就是自由意志主义与其他政治哲学的区别吗——我们赞成财产权，而其他所有政治哲学都不赞成？很显然，这种说法是站不住脚的。毕竟，财产权仅仅是对一种稀缺资源的排他性控制权。正如扬诺普洛斯教授所解释的那样：

财产可以被定义为对一种经济物品的排他性控制权……它是一个概念的名称，指的是管理人与有价值的事物之间关系的权利和义务、特权与限制。无论何时何地，人们都渴望拥有生存所必需或文化定义上有价值的物品，而这些物品由于人们的需求而变得稀缺。有组织的社会所实施的法律控制了对这些所需之物的竞争，并保证了人们对这些所需之物的享有。保证属于自己的东西就是财产……[财产权]赋予人们对某一事物

的直接和即时的权力。⁴⁷⁰

In other words, property rights specify which persons own—that is, have the right to control—various scarce resources in a given region or jurisdiction. Yet every political theory advances some theory of property. None of the various forms of socialism deny property rights per se; each system will specify an owner for each contestable scarce resource.¹² If the state nationalizes an industry, it is asserting ownership of those means of production. If the state taxes you, it is implicitly asserting ownership of the funds taken. If my land is transferred to a private developer by eminent domain statutes, the developer is now the owner. If the law allows a recipient of racial discrimination to sue his employer for a sum of money, he is the owner of the money.¹³

换言之，财产权规定了哪些人拥有——即有权控制——特定地区或管辖范围内的各种稀缺资源。然而，每一种政治理论都提出了某种财产理论。各种形式的社会主义都不否认财产权本身；每种制度都会为每种可竞争的稀缺资源规定一个所有者。⁴⁷¹如果国

⁴⁷⁰ A.N. Yiannopoulos, Louisiana Civil Law Treatise, Property (West Group, 4th ed. 2001), § § 1, 2 (first emphasis in original; remaining emphasis added). See also Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), 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 “What Libertarianism Is” (ch. 2), Appendix I.

A.N. 扬诺普洛斯，《路易斯安那州民法论著，财产》（韦斯特集团，2001 年第四版），§ § 1, 2（第一个着重号为原文所加；其余着重号为作者所加）。另见《路易斯安那民法典》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent），第 477 条（ “所有权是赋予一个人对一事物直接、即时和排他性权威的权利。一事物的所有者可以在法律规定的限度和条件下使用、享有和处置该事物” ）。另见《何为自由意志主义》（第二章），附录 I。

⁴⁷¹ For a systematic analysis of various forms of socialism, such as Socialism Russian-Style, Socialism Social-Democratic Style, the Socialism of Conservatism, and the Socialism of Social Engineering, see Hoppe, A Theory of Socialism and Capitalism, 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 18, below.

关于对各种形式的社会主义的系统分析，如俄国式社会主义、社会民主主义式社会主

家将一个行业国有化，它就是在主张对这些生产资料的所有权。如果国家对你征税，就意味着国家对所征收的资金拥有所有权。如果我的土地被征用法规转让给私人开发商，那么开发商现在就是所有权人。如果法律允许遭受种族歧视的人起诉他的雇主并获得一笔钱，那么他就是这笔钱的所有者。⁴⁷²

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

因此，保护和尊重财产权并非自由意志主义所独有。自由意志主义的独特之处在于其特定的财产分配规则：即决定谁拥有每种竞争性资源的规则。

B 身体财产 Property in Bodies

As indicated above, every legal system assigns a particular owner to each scarce resource. These resources obviously include natural resources such as land, fruits on trees, and so on. Things found in nature are not the only scarce resources, however. Each human actor has, controls, and is identified and associated with a unique human

义、保守主义的社会主义以及社会工程的社会主义，参见汉斯-赫尔曼·霍普的《社会主义和资本主义理论》第 3 至 6 章。认识到各种形式社会主义的共同要素以及它们与自由意志主义（资本主义）的区别，霍普精辟地将社会主义定义为“一种对私有财产和私有财产主张的制度化干涉或侵犯”。同上，第 2 页。另见下文注释 18 中的霍普语录。

⁴⁷² 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, 1982 [1759]), II.II.3.2.

即使是私人小偷，在拿走你的手表时，也暗含着他有权控制手表的格言——他是手表的主人。他并不否认财产权，只是在谁是所有者的问题上与自由意志主义不同而已。事实上，正如亚当·斯密所观察到的：“如果强盗和杀人犯之间存在什么社会关系，那么根据常见的观察，他们至少必须避免相互抢劫和谋杀。”亚当·斯密，《道德情操论》（印第安纳波利斯：自由基金，1982 年[1759 年]），第二卷第二章第三节第二段。

body, which is also a scarce resource.¹⁴ Both human bodies and nonhuman, scarce resources are desired for use as means by actors in the pursuit of various goals.¹⁵

如上所述，每种法律制度都为每种稀缺资源指定了特定的所有者。这些资源显然包括自然资源，如土地、树上的果实等。然而，自然界中的事物并不是唯一的稀缺资源。每一个人类行动人都拥有、控制着一个独特的人体，并且这个人体也被识别并与该行动人相关联，人体也是一种稀缺资源。⁴⁷³ 人体和非人类的稀缺资源都是行动人在追求各种目标时希望使用的手段。⁴⁷⁴

⁴⁷³ As Hoppe observes, even in a paradise with a superabundance of goods: [E]very person’s physical body would still be a scarce resource and thus the need for the establishment of property rules, i.e., rules regarding people’s bodies, would exist. One is not used to thinking of one’s own body in terms of a scarce good, but in imagining the most ideal situation one could ever hope for, the Garden of Eden, it becomes possible to realize that one’s body is indeed the prototype of a scarce good for the use of which property rights, i.e., rights of exclusive ownership, somehow have to be established, in order to avoid clashes. Hoppe, *A Theory of Socialism and Capitalism*, 19. See also “Causation and Aggression” (ch. 8) (discussing the use of other humans’ bodies as means). See also “How We Come to Own Ourselves” (ch. 4).

正如霍普所观察到的，即使在一个物资极度丰富的天堂里：“每个人的身体仍然会是一种稀缺资源，因此就需要建立财产规则，即关于人们身体的规则。人们不习惯从稀缺物品的角度来思考自己的身体，但在想象人们所能期望的最理想的情形——伊甸园时，就有可能认识到自己的身体确实是稀缺物品的原型，为了避免冲突，必须以某种方式确立对其的财产权，即排他性所有权权利。”霍普，《社会主义和资本主义的理论》，第 19 页。另见《因果关系与侵犯》（第 8 章）（讨论将他人身体用作手段）。另见《我们如何拥有自己》（第 4 章）。

⁴⁷⁴ This analysis draws on Ludwig von Mises’s “praxeological” view of the nature of human action, in which actors or agents employ scarce means to causally achieve desired ends. See the section “The Structure of Human Action: Means and Ends” in Kinsella, “Intellectual Freedom and Learning versus Patent and Copyright,” *Economic Notes* No. 113 (Libertarian Alliance, Jan. 18, 2011) and idem, “Ideas Are Free: The Case Against Intellectual Property,” *Mises Daily* (Nov. 23, 2010). See also “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.E.

这一分析借鉴了路德维希·冯·米塞斯关于人的行动本质的“人的行动学”观点，在该观点中，行动人或主体使用稀缺手段来因果性地实现期望的目的。参见金塞拉的《知识自由与学习 vs 专利和版权》经济笔记第 113 号（自由意志主义联盟，2011 年 1 月 18 日）中的“人的行动的结构：手段与目的”部分，以及同一作者的《思想是自由的：反对知识产权》米塞斯日报（2010 年 11 月 23 日）。另见《反对知识产权二十年》（第 15 章），第四部分 E。

Accordingly, any political theory or system must assign ownership or control rights in human bodies as well as in external things.¹⁶ However, there are relevant differences between these two types of scarce resources that justify treating them separately.

因此, 任何政治理论或制度都必须赋予人体以及外部事物以所有权或控制权。⁴⁷⁵ 然而, 这两类稀缺资源之间存在相关差异, 因此有理由将其分开处理。

Let us consider first the libertarian property assignment rules with respect to human bodies, and the corresponding notion of aggression as it pertains to bodies. Libertarians often vigorously assert the “nonaggression principle.” As Ayn Rand said, “So long as men desire to live together, no man may initiate—do you hear me? No man may start—the use of physical force against others.”¹⁷ Or, as Rothbard put it:

*The libertarian creed rests upon one central principle, or “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.*¹⁸

让我们先来看看自由意志主义关于人的身体这一财产的分配规则, 以及与身体有关的相应的侵犯概念。自由意志主义常常大力主张 “互不侵犯原则”。正如安-兰德 (Ayn Rand) 所说: “只要人们希望共同生活, 任何人都不得主动发起——你听到了吗? 任何

⁴⁷⁵ The term “thing” here is used as a synonym for scarce resources, including not only material objects but also human bodies. This usage draws on the civil law, in which the term “things” refers to “material objects” that are “susceptible of appropriation”—that is, to “the objects of patrimonial rights.” See Yiannopoulos, Louisiana Civil Law Treatise, Property, § § 12, 201; Louisiana Civil Code, arts. 448, 453, et pass. For more discussion of the concept of “things,” see “What Libertarianism Is” (ch. 2), Appendix I.

这里的“事物”一词被用作稀缺资源的同义词, 不仅包括物质对象, 还包括人体。这种用法借鉴了民法, 在民法中, “事物”一词指的是“能够被占有”的“物质对象”, 即“世袭权利的对象”。见扬诺普洛斯的《路易斯安那州民法论著, 财产》, 第 12、201 节;《路易斯安那州民法典》, 第 448、453 条及其他条款。关于“事物”概念的更多讨论, 见《何为自由意志主义》(第二章), 附录 I。

人都不得开始——对他人使用身体暴力。⁴⁷⁶或者，如罗斯巴德所说：

自由意志主义的信条建立在一个核心原则或“公理”之上：任何人或任何群体都不得侵犯他人的人身或财产。这可以被称为“互不侵犯公理”。“侵犯”的定义是对他人的人身或财产使用或威胁使用暴力。因此，“入侵”与“侵犯”同义。⁴⁷⁷

⁴⁷⁶ Ayn Rand, “Galt’s Speech,” in *For the New Intellectual*, quoted in the “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 “context-less” concept of aggression—that is, that “aggression” or “rights” are meaningless unless these concepts are embedded in the larger philosophical framework of Objectivism—despite Galt’s straightforward definition of aggression as the initiation of physical force against others. However, there are distinctions to be drawn between property rights in an actor’s body and in external resources homesteaded by that actor or some previous owner. See, on this, Kinsella, “The Relation between the Non-aggression Principle and Property Rights: a response to Division by Zer0,” *Mises Economics Blog* (Oct. 4, 2011). See also the related discussion in “What Libertarianism Is” (ch. 2), at n.13.

安·兰德，《高尔特的演讲》，收录于《为新知识分子而作》，引自《身体暴力》条目，《安·兰德词典：从 A 到 Z 的客观主义》，哈里·宾斯万格编（纽约：新美国图书馆，1986 年；<https://perma.cc/L4YA-96CC>）。具有讽刺意味的是，客观主义者经常严厉批评自由意志主义者对“侵犯”有一个“无背景”的概念——也就是说，“侵犯”或“权利”是没有意义的，除非这些概念被嵌入客观主义的更大哲学框架中——尽管高尔特对侵犯的直截了当的定义是首先对他人使用身体暴力。然而，在行动人身体的财产权与该行动人或某个先前所有者拓殖的外部资源的财产权之间存在区别。关于这一点，见金塞拉的《互不侵犯原则与财产权之间的关系：对 Zer0 所做划分的回应》，米塞斯经济学博客（2011 年 10 月 4 日）。另见《何为自由意志主义》（第二章）注释 13 中的相关讨论。

⁴⁷⁷ Rothbard, *For a New Liberty*, 23. See also idem, *The Ethics of Liberty*: “The fundamental axiom of libertarian theory is that each person must be a self-owner, and that no one has the right to interfere with such self-ownership” (p. 60), and “What… aggressive violence means is that one man invades the property of another without the victim’s consent. The invasion may be against a man’s property in his person (as in the case of bodily assault), or against his property in tangible goods (as in robbery or trespass)” (p. 45). Hoppe writes:

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

In other words, at least when it comes to human bodies, libertarians maintain that the only way to violate rights is by initiating force—that is, by committing aggression. And, correspondingly, that force used in response to aggression—such as defensive, restitutive, or retaliatory/ retributive force—is justified.¹⁹

换句话说，至少在涉及人体时，自由意志主义者坚持认为，侵犯权利的唯一方式是首次使用武力——即实施侵犯行为。相应地，针对侵犯行为而使用的武力——如防御性、赔偿性或报复性/惩罚性武力——是正当的。⁴⁷⁸

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.²⁰The 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.²¹And the notion of self-ownership

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. 22–23, 18.

罗斯巴德《为了新自由》，第 23 页。另见同一作者，《自由的伦理》：“自由意志主义理论的基本公理是，每个人都必须是自我所有者，任何人都无权干涉这种自我所有”（第 60 页），以及“.....侵犯性暴力行为的含义是，一个人未经受害者同意而侵犯另一个人的财产。这种侵犯可能是针对一个人的人身财产（如人身攻击），也可能是针对他的真实财产（如抢劫或非法侵入）”（第 45 页）。霍普写道：

如果.....所实施的行动未经同意地侵犯或改变了他人身体的完整性，并将此身体用于不符合此人自身喜好的用途，则此行动.....被称为侵犯....。在社会科学中，财产是仅次于行动概念的最基本的范畴。事实上，本章将要介绍的所有其他概念——侵犯、资本主义和社会主义——都可以用财产来定义：侵犯是对财产的侵犯，是财产所有者之间的互不侵犯关系，社会主义是对财产侵犯的制度化政策，资本主义是承认财产和主义的制度化政策。

霍普，《社会主义和资本主义理论》，第 22-23 页和第 18 页。

⁴⁷⁸ See “Punishment and Proportionality” (ch. 5).

见《惩罚与相称性》（第 5 章）。

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

现在，就身体而言，何为侵犯，一目了然：侵犯他人身体的边界，通常称为殴打，或更广泛地说，未经他人同意使用其身体。⁴⁷⁹人与人之间的侵犯这一概念本身就预设了身体的财产权——更具体地说，每个人至少初步看来都是自己身体的所有者。⁴⁸⁰自我所有权的概念与互不侵犯原则相对应。二者彼此意涵，或者说是对同一基本观点的不同表述方式：未经他人同意，任何人不得使用他人的身体；这样做是不正当的、不被允许的侵犯。

Non-libertarian political philosophies do not accept the libertarian self-ownership principle. According to them, each person has some limited rights in his own body, but not complete or exclusive rights. Society—or the state, purporting to be society's agent—has certain rights in each citizen's body, too. The state may limit or override the individual's control over his own body. This partial slavery is implicit in state actions such as taxation, conscription, drug prohibitions, and other regulations and laws.

⁴⁷⁹ 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.

根据上下文，以下术语和表述可被视为大致同义词：侵犯；使用武力；非法侵入；入侵；未经同意（或未经邀请）改变他人身体或财产的完整性（或使用、控制或占有）。

⁴⁸⁰ “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 “What Libertarianism Is” (ch. 2), at n.17; “How We Come to Own Ourselves” (ch. 4); “A Libertarian Theory of Contract” (ch. 9); “Inalienability and Punishment: A Reply to George Smith” (ch. 10).

“表面上”，因为在某些情况下，一个人对自己身体的某些权利可以说是被放弃或丧失的，例如，当一个人犯罪时，从而授权受害者至少可以对侵犯者的身体使用防卫性武力（这意味着在这种程度上，侵犯者不再是其身体的所有者）。关于这一点的更多内容，请参见《何为自由意志主义》（第 2 章）注释 17；《我们如何拥有自己》（第 4 章）；《自由意志主义的契约理论》（第 9 章）；《不可让渡性与惩罚：对乔治·史密斯的回应》（第 10 章）。

非自由意志主义政治哲学不接受自由意志主义的自我所有权原则。根据他们的观点，每个人对自己的身体都有一些有限的权利，但不是完全或排他性的权利。社会——或自称是社会代理人的国家——对每个公民的身体也拥有某些权利。国家可以限制或凌驾于个人对自己身体的控制之上。这种部分奴役隐含在税收、征兵、毒品禁令以及其他法规和法律等国家行动中。

The libertarian says that each person is the full owner of his body: he has the right to control his body, to decide whether or not he ingests narcotics, joins an army, and so on. Others, however, maintain that the state, or society, is at least a partial owner of the bodies of those subject to such laws—or even a nearly complete owner in the case of conscriptees or nonaggressor “criminals” incarcerated for life or those killed by government bombs. Libertarians believe in self-ownership. Non-libertarians—statists—of all stripes advocate some form of slavery. This is virtually implicit in the nature of the state as an agency that asserts the right to be “the ultimate arbiter in every case of conflict, including conflicts involving itself, [and that] allows no appeal above and beyond itself.”²² This arrangement permits the state to override individuals’ self-ownership rights—to, in effect, become their master or overlord.

自由意志主义认为，每个人都是其身体的完全所有者：他有权控制自己的身体，有权决定是否摄入毒品、参军等等。然而，另一些人则认为，国家或社会至少是那些受此类法律约束的人的身体的部分所有者——在被征兵者或非侵犯性的“罪犯”被终身监禁或被政府炸弹炸死的情况下，甚至是几乎完全的所有者。自由意志主义者信奉自我所有权。各种非自由意志主义者——国家主义者——都主张某种形式的奴役。这实际上隐含在国家的性质中，即国家作为一个机构，声称有权成为“每一起冲突案件的最终仲裁者，包括涉及其自身的冲突，[并且]不允许在其自身之上和之外上诉”。⁴⁸¹ 这种安

⁴⁸¹ See Hans-Hermann Hoppe, “The Idea of a Private Law Society,” Mises Daily (July 28, 2006; <https://mises.org/library/idea-private-law-society>):

Conventionally, the state is defined as an agency that possesses two unique characteristics. First, the state is an agency that exercises a territorial monopoly of ultimate decision-making. That is, it is the ultimate arbiter in every case of conflict, including conflicts involving itself, and it allows no appeal above and beyond itself. Furthermore, the state is an agency that exercises a territorial monopoly of taxation. That is, it is an agency that unilaterally fixes the price private citizens must pay for its provision of law and order.

排允许国家推翻个人的自我所有权权利——实际上，成为他们的主人或霸主。

As an illustration, consider this exchange between a communist party official and a farmer in China in 1978, when farmers were prohibited from private ownership of their crop yields: "At one meeting with communist party officials, a farmer asked: 'What about the teeth in my head? Do I own those?' Answer: No. Your teeth belong to the collective."²³

作为一个例子，考虑一下 1978 年中国一位共产党官员和一位农民之间的这次交流，当时农民被禁止私人拥有他们的农作物收成：“在一次与共产党官员的会议上，一位农民问道：‘我嘴里的牙齿呢？那些是我的吗？’回答：不。你的牙齿属于集体。”。⁴⁸²

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

自由意志主义者认为农民应该拥有他的牙齿、他的身体、他的家、他的农场以及他的农作物收成。

C 自我所有和避免冲突

Self-Ownership and Conflict-Avoidance

There is always the possibility of conflict over contestable (scarce, conflictable)²⁴ resources. This is in the very nature of scarce, or rivalrous, resources. By assigning an

See also Hoppe’ s definition of the state in note 52, below.
请参阅汉斯-赫尔曼·霍普的《私法社会的理念》，米塞斯日报（2006 年 7 月 28 日；
<https://mises.org/library/idea-private-law-society>）：
传统上，国家被定义为具有两个独特特征的机构。首先，国家是一个在领土范围内拥有最终决策权垄断的机构。也就是说，在每一个冲突案件中，包括涉及自身的冲突，它都是最终仲裁者，并且不允许有超越自身的上诉。此外，国家是一个在领土范围内拥有征税垄断权的机构。也就是说，它是一个单方面确定公民为其提供法律和秩序而必须支付的价格的机构。
另请参阅下文注释 52 中霍普对国家的定义。
⁴⁸² David Kestenbaum & Jacob Goldstein, “The Secret Document That Transformed China,” NPR’ s Planet Money blog (Jan. 20, 2012; <https://perma.cc/C4SP-XSC7>).
大卫·凯斯滕鲍姆（David Kestenbaum）和雅各布·戈尔茨坦（Jacob Goldstein），《改变中国的秘密文件》，美国国家公共电台的“Planet Money”博客（2012 年 1 月 20 日；<https://perma.cc/C4SP-XSC7>）。

owner to each resource, the legal or property rights system establishes objective, publicly visible or discernible boundaries or borders that nonowners can avoid. This makes conflict-free, productive, cooperative use of resources possible. This is true of human bodies as well as of external objects.²⁵ If we seek rules that permit peaceful, productive, and conflict-free use of our very bodies, some rules allocating body ownership must be established. These basic values, or *grundnorms*—peace, conflict-avoidance, prosperity—and related ones such as justice, cooperation, and civilization, are the reason that libertarians, indeed any civilized person who adopts these basic values, seek property assignment rules in the first place.²⁶ We prefer society and civilization to mayhem and fighting and violence. Libertarians believe that self-ownership (and other property acquisition rules discussed further below) is the only property assignment rule compatible with these *grundnorms*; it is implied by them.

竞争性（稀缺的、可引发冲突的）的资源⁴⁸³总是有可能发生冲突。这是稀缺资源或竞争性资源的本质所在。通过为每种资源指定一个所有者，法律或财产权制度确立了客观的、公开可见的或可辨别的边界或界线，非所有者可以避开这些边界或界线。这使得资源无冲突的、有效率的、合作性的使用成为可能。对于人体以及外部物体亦是如此。⁴⁸⁴如果我们寻求允许和平、有效率的、无冲突地使用我们身体的规则，就必须建

⁴⁸³ On the term “conflictible,” see See “Against Intellectual Property After Twenty Years” (ch. 15), text at n.29 et pass.; Kinsella, “On Conflictability and Conflictible Resources,” StephanKinsella.com (Jan. 31, 2022); see also “What Libertarianism Is” (ch. 2), Appendix I; “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), n.19. 关于“可引发冲突的”（conflictible）这一术语，参见《《反对知识产权》二十年后》（第十五章）注释 29 及后续内容；斯蒂芬·金塞拉《论冲突性与冲突性资源》，StephanKinsella.com（2022 年 1 月 31 日）；另见《何为自由意志主义》（第二章）附录一；《我们如何拥有自己》（第四章）注释 10 的内容；《自由意志主义的惩罚与权利理论》（第五章）注释 62；《自由意志主义权利的对话论证》（第六章）注释 6；《因果关系与侵犯》（第八章）注释 19。

⁴⁸⁴ 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*, 160; 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).

立一些分配身体所有权的规则。这些基本价值观，或称“基本准则”——和平、避免冲突、繁荣，以及与之相关的正义、合作和文明，是自由意志主义者，乃至任何接受这些基本价值观的文明人，首先寻求财产分配规则的原因。⁴⁸⁵我们偏好社会和文明，甚

关于稀缺概念的重要性以及冲突可能性对于财产权规则出现的意义，参见霍普的《社会主义和资本主义理论》第 160 页；以及金塞拉在《关于后来者与拓殖观点的思考；或者，为什么“所有权”这个概念本身就意味着只有自由意志主义原则是正当的》（米塞斯经济学博客，2007 年 8 月 15 日）中的讨论。

⁴⁸⁵ “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 political norms.

That the libertarian grundnorms are, in fact, necessarily presupposed by all civilized people to the extent they are civilized—during argumentative justification, that is—is shown by Hoppe in his argumentation-ethics defense of libertarian rights. On this, see Hoppe, *A Theory of Socialism and Capitalism*, chap. 7; “What Libertarianism Is” (ch. 2), at n.2; “Dialogical Arguments for Libertarian Rights” (ch. 6); “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 “Punishment and Proportionality” (ch. 5), at Part I and IV.G:

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 ... 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.

“基本规范”（Grundnorm）是法律哲学家汉斯·凯尔森（Hans Kelsen）提出的术语，指的是作为法律体系合法性基础或最终来源的假设性基本规范或规则。参见汉斯·凯尔森《法与国家的一般理论》，安德斯·韦德伯格译（马萨诸塞州剑桥：哈佛大学出版社，1949 年）。我使用这个术语来指代文明人所预设的基本规范，例如在论证性话语中，而这些基本规范反过来又隐含着自由意志主义的政治规范。

事实上，在其论证伦理学对自由意志主义权利的辩护中，霍普表明，自由意志主义的基本规范实际上必然被所有文明人在其文明程度的范围内所预设——即在论证性的正当化过程中。关于这一点，参见霍普的《社会主义和资本主义理论》第七章；《何为自由意志主义》（第 2 章）注释 2；《自由意志主义权利的对话论证》（第 6 章）；《捍卫论证伦理学》（第 7 章）。

于混乱、争斗和暴力。自由意志主义者认为，自我所有权（以及下面进一步讨论的其他财产获取规则）是唯一与这些基本规范相容的财产权分配规则；这些基本规范隐含着自我所有权。

As noted above, the libertarian view is that the appropriate body-ownership rule is that each person is, *prima facie*, a self-owner: each person owns his own body. It might be argued, however, that any property assignment rule would suffice to permit conflict-free use of resources, that the libertarian self-ownership rule is not necessary. As long as everyone knows who owns a given resource—even if it is a king or tyrant—then people can avoid conflict by respecting existing property boundaries. In the case of bodies, this would mean some form of slavery, where some people are owned partially or completely by others.²⁷ Whether a person A is a self-owner, or owned by some other person or group B, everyone can know who gets to decide who can use A's body, and thus conflict can be avoided so long as everyone respects this property right allocation.

如上所述，自由意志主义认为，适当的身体所有权规则是，初步来看，每个人都是自我所有者：每个人都拥有自己的身体。但也可以说，任何财产分配规则都足以允许无冲突地使用资源，自由意志主义的自我所有权规则并非必要。只要每个人都知道谁拥有特定的资源——即使是国王或暴君——那么人们就可以通过尊重现有的财产边界来避免冲突。就身体而言，这就意味着某种形式的奴隶制，即一些人部分或全部归他人所有。⁴⁸⁶无论一个人 A 是自我所有者，还是被其他人或团体 B 所有，每个人都可

关于人们为何（在一定程度上）重视这些潜在规范的讨论，参见金塞拉的《劳动分工作为基本规范和权利的来源》，米塞斯经济学博客（2009 年 4 月 24 日），以及同一作者的《同理心与权利的来源》，米塞斯经济学博客（2006 年 9 月 6 日）。另见《惩罚与比例性》（第 5 章）第一部分和第四部分 G：

文明人也关心惩罚的正当性。他们想要惩罚，但他们也想知道这样的惩罚是正当的。他们希望能够合法地惩罚……惩罚理论关注的是为惩罚进行正当化，为不愿不道德行事的正派人提供一个他们可以惩罚他人的理由。这当然很有用，为有道德的人提供指导和保证，让他们可以恰当地应对那些试图伤害他们的人。

⁴⁸⁶ As Rothbard argues, there are only two alternatives to self-ownership either:

1.a certain class of people, A, have the right to own another class, B; or

2.everyone has the right to own his equal quota share of everyone else.

The first alternative implies that, while class A deserves the rights of being human, class B is in reality subhuman and, therefore, deserves no such rights. But since they are

indeed human beings, the first alternative contradicts itself in denying natural human rights to one set of humans. Moreover, allowing class A to own class B means that the former is allowed to exploit and, therefore, to live parasitically at the expense of the latter; but, as economics can tell us, this parasitism itself violates the basic economic requirement for human survival: production and exchange.

正如罗斯巴德所言，自我所有权只有两种选择：

1.某一类人（A）有权拥有另一类人（B）；或者

2.每个人都有权拥有对其他每个人的平等份额的所有权。

第一种选择意味着，A 类人应该享有作为人的权利，而 B 类人实际上是次等人，因此不应该享有这种权利。但是，既然他们确实是人，那么第一种选择就自相矛盾，因为它剥夺了一组人的天赋人权。此外，允许 A 类人拥有 B 类人，就意味着允许前者剥削后者，从而以后者为代价寄生于后者；但正如经济学所告诉我们的，这种寄生本身就违反了人类生存的基本经济要求：生产和交换。

The second alternative, which we might call “participatory communalism” or “communism,” holds that every man should have the right to own his equal quota share of everyone else. If there are three billion people in the world, then everyone has the right to own one-three-billionth of every other person. In the first place, this ideal itself rests upon an absurdity—proclaiming that every man is entitled to own a part of everyone else and yet is not entitled to own himself. Second, we can picture the viability of such a world—a world in which no man is free to take any action whatever without prior approval or indeed command by everyone else in society. It should be clear that in this sort of “communist” world, no one would be able to do anything, and the human race would quickly perish.

第二种选择，我们可以称之为“参与性公有制”或“共产主义”，它认为每个人都有权拥有自己与其他人平等份额的所有权。如果世界上有三十亿人，那么每个人都有权拥有其他每个人的三十亿分之一的份额。首先，这一理想本身就是荒谬的，它宣称每个人都有权拥有其他人的一部分，但却无权拥有自己。其次，我们可以想象这样一个世界的可行性——在这个世界里，没有人可以在没有社会中其他每个人的事先批准甚至命令的情况下自由采取任何行动。很显然，在这种“共产主义”的世界里，没有人能够做任何事情，人类将很快灭亡。

Murray N. Rothbard, “Justice and Property Rights,” in Samuel L. Blumenfeld, ed., Property in a Humane Economy by (LaSalle, Ill.: Open Court, 1974; <https://mises.org/library/property-humane-economy>), at 107 – 108 (emphasis added) (also published in Murray N. Rothbard, Economic Controversies (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>)). A similar version of this article under the same title was published in Rothbard, Egalitarianism as a Revolt Against Nature and Other Essays, 2d ed. (Auburn, Ala.: Mises Institute, 2000 [1974]; <https://mises.org/library/egalitarianism-revolt-against-nature-and-other-essays>).

Interestingly, the former piece, published shortly after the latter piece, appended a crucial final paragraph distancing Rothbard from some of the more leftish implications from the latter piece. See Kinsella, “Justice and Property Rights: Rothbard on Scarcity,

以知道谁有权决定谁可以使用 A 的身体, 因此, 只要每个人都尊重这种财产权分配, 冲突就可以避免。

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

自由意志主义认为, 只有其特定的财产分配规则——自我所有权, 而不是他者所有权 (奴隶制) ——才能发挥财产权避免冲突的作用。之所以如此, 有几个相互关联的原因。

Property, Contracts...,” The Libertarian Standard (Nov. 19, 2010) and idem, “Rothbard on the ‘Original Sin’ in Land Titles: 1969 vs. 1974,” StephanKinsella.com (Nov. 5, 2014). See Hoppe’s similar argument, discussed in “How We Come to Own Ourselves” (ch. 4), n.14, and similar comments in David Boaz, The Libertarian Mind: A Manifesto for Freedom (New York: Simon & Schuster, 2015), p. 140.

On Rothbard’s critique of this “communist” approach to property rights assignment, see also “How We Come to Own Ourselves” (ch. 4), at n.14; “Defending Argumentation Ethics” (ch. 7), at n.31; and Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” Mises Daily (May 27, 2011), at n. 1.

穆瑞·N·罗斯巴德,《正义与财产权》,收录于塞缪尔·L·布卢门菲尔德编,《人道经济中的财产》(伊利诺伊州拉萨尔:开放法院,1974年;<https://mises.org/library/property-humane-economy>),第107-108页(着重号为原文所加)(也发表于穆瑞·N·罗斯巴德,《经济学的论证》(阿拉巴马州奥本:米塞斯研究院,2011年;<https://mises.org/library/economic-controversies>))。同一标题的这篇文章的类似版本发表在罗斯巴德的《平等主义是对自然的反抗及其他论文》第二版(阿拉巴马州奥本:米塞斯研究院,2000年[1974年]:<https://mises.org/library/egalitarianism-revolt-against-nature-and-other-essays>)。有趣的是,前一篇文章在后一篇文章发表后不久出版,添加了一个关键的最后段落,使罗斯巴德与后一篇文章中一些更左倾的含义保持距离。参见金塞拉,《正义与财产权:罗斯巴德论稀缺、财产、……》,《自由意志主义标准》(2010年11月19日)以及同一作者的《罗斯巴德论土地所有权中的“原罪”:1969年与1974年》,StephanKinsella.com(2014年11月5日)。参见霍普的类似论证,在《我们如何拥有自己》(第4章)注释14中讨论,以及大卫·鲍兹在《自由意志主义思想:自由宣言》(纽约:西蒙与舒斯特,2015年)第140页中的类似评论。

关于罗斯巴德对这种“共产主义”财产权分配方法的批判,也可参见《我们如何拥有自己》(第4章)注释14;《捍卫论证伦理学》(第7章)注释31;以及金塞拉,《论证伦理学与自由:简明指南》,米塞斯日报(2011年5月27日)注释1。

First, as Professor Hoppe has argued, the assignment of ownership to a given resource must not be random, arbitrary, particularistic, or biased if the property norm is to serve the function of conflict-avoidance.²⁸ This is because any possible norm designed to avoid conflict must be justified in the context of argumentation, in which participants put forth reasons in support of their proposed norms. The norms proposed in genuine argumentation claim universal acceptability, i.e. they must be universalizable. Reasons must be provided that can in principle be acceptable to both sides as grounded in the nature of things, not merely arbitrary or "particularistic" rules such as "I get to hit you, but you do not get to hit me, because I am me and you are you."

首先，正如霍普教授所言，如果财产规范要起到避免冲突的作用，那么对特定资源的所有权分配就不能是任意的、武断的、特殊主义的或有偏见的。⁴⁸⁷这是因为任何旨在避免冲突的可能规范都必须在论证的背景下得到正当化，在论证中，参与者提出支持他们所提议的规范的理由。在真正的论证中所提出的规范主张具有普遍可接受性，即它们必须是具有普适性的。所提出的理由必须是双方原则上都能接受的、基于事物本质的理由，而不仅仅是诸如“我可以打你，但你不能打我，因为我是我，你是你”之类的武断或“特殊主义”规则。

Such an arbitrary assertion fails to even attempt to justify the proposed norm. For another example, B's claim that he owns his own body and also owns A's body, while A does not get to own his own body, is an obviously particularistic claim that makes arbitrary distinctions between two otherwise-similar agents, where the distinction is not

⁴⁸⁷ See Hoppe, *A Theory of Socialism and Capitalism*, 157 – 65; “What Libertarianism Is” (ch. 2), at n.23; “How We Come to Own Ourselves” (ch. 4), n.15; “A Libertarian Theory of Punishment and Rights” (ch. 5), Parts III.C and III.D; “Dialogical Arguments for Libertarian Rights” (ch. 6), at n.43; “Defending Argumentation Ethics” (ch. 7); and Kinsella, “The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle,” *StephanKinsella.com* (Nov. 10, 2011). 参见霍普的《社会主义和资本主义理论》第 157-165 页；《何为自由意志主义》（第 2 章）注释 23；《我们如何拥有自己》（第 4 章）注释 15；《自由意志主义的惩罚与权利理论》（第 5 章）第三部分 C 和 D；《自由意志主义权利的对话论证》（第 6 章）注释 43；《捍卫论证伦理学》（第 7 章）；以及金塞拉的《特殊主义伦理的问题，或者为什么每个人实际上都必须承认普适性原则的有效性》，*StephanKinsella.com*（2011 年 11 月 10 日）。

grounded in any objective difference between A and B. Such particularistic norms or reasons are not universalizable; that is, they are not reasons at all, and thus are contrary to the purpose and nature of the activity of justificatory argumentation.

这种武断的断言甚至没有试图证明所提议的规范的正当性。再比如，B 声称他拥有自己的身体，同时也拥有 A 的身体，而 A 却不能拥有自己的身体，这显然是一种特殊主义的主张，它在两个原本相似的主体之间做出了武断的区分，而这种区分并不是基于 A 和 B 之间的任何客观差异。这样的特殊主义规范或理由是不具有普适性；也就是说，它们根本就不是理由，因此与正当化论证活动的目的和本质背道而驰。

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

[T] here are only two fundamental alternatives for acquiring rights in unowned property: (1) by doing something with the property withwhich no one else had ever done before, such as the mixing of labor or homesteading; or (2) by mere 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; thus, no one can deny the Lockean right to homestead unowned resources.²⁹

在对有争议或竞争性的资源（如 A 的身体）分配财产所有权时，必须在权利主张者和资源之间找到某种客观联系，这样才能确立所有权，这种所有权既能得到他人的公开承认，又能作为公平和基于事物本质而被接受。正如我在其他地方写到：

[要]获得无主财产的权利，只有两种基本选择：(1) 对财产做一些别人从未做过的事情，如混入劳动或拓殖；或 (2) 仅仅通过口头声明或法令。第二种选择是武断的，无法避免冲突。只有第一种选择，即洛克式的拓殖，在特定的人和特定的稀缺资源之

间建立了客观联系；因此，没有人可以否认洛克式的拓殖的无主资源的权利。⁴⁸⁸

Thus, as Hoppe has argued, property title has to be assigned to one of competing claimants based on “the existence of an objective, intersubjectively ascertainable link between owner and the” resource claimed.³⁰ In the case of one’s own body, it is the unique relationship between a person and his body—his direct and immediate control over his body and the fact that, at least in some sense, a body is a given person and vice versa—that constitutes the objective link sufficient to give that person a claim to his body superior to those of typical third party claimants.

因此，正如霍普所言，财产所有权必须在“所有者与所主张的资源之间存在客观的、主体间客确定的联系”的基础上归属于相互竞争的主张者之一。⁴⁸⁹就一个人自己的身体而言，一个人和他的身体之间的独特关系——他对自己身体的直接和即时控制，以及至少在某种意义上，身体就是特定的人，反之亦然——构成了客观联系，足以使这个人对自己的身体拥有比典型的第三方主张者更优越的主张权。

Moreover, any outsider who claims another’s body cannot deny this objective link and its special status, since the outsider also necessarily presupposes this in his own case. This is so because, in seeking dominion over the other and in asserting ownership over the other’s body, he has to presuppose his own ownership of his body. In so doing, the outsider demonstrates that he does place a certain significance on this link, even as (at the same time) he disregards the significance of the other’s link to his own body.³¹

此外，任何主张拥有他人身体的局外人都不能否认这种客观联系及其特殊地位，因为局外人在自己的情况下也必然预设了这一点。这是因为，在寻求对他人身体的支配权和主张对他人身体的所有权时，他必须预先假定自己对自己身体的所有权。这样一来，局外人就表明他确实对这种联系赋予了一定的意义，即使（同时）他无视他人与其自身身体的联系的重要性。⁴⁹⁰

⁴⁸⁸ “Punishment and Proportionality” (ch. 5), Part III.F. 《惩罚与相称性》（第 5 章），第 III.F 部分。

⁴⁸⁹ Hoppe, A Theory of Socialism and Capitalism, 23.

霍普《社会主义与资本主义理论》，第 23 页。

⁴⁹⁰ For elaboration on this point, see “How We Come To Own Ourselves” (ch. 4), the

For these reasons, libertarianism recognizes that only the self-ownership rule is universalizable and compatible with the grundnorms 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.³²

由于这些原因，自由意志主义认识到只有自我所有权规则是具有普适性，并且与和平、合作和避免冲突的基本规范相容。我们认识到每个人初步看来都是自己身体的所有者，因为凭借他与自己身体的独特联系和关联——他对自己身体的直接和即时控制——他对自己的身体比任何人都更有更优的主张权。⁴⁹¹

sections “Direct Control” and “Summary”; “Defending Argumentation Ethics” (ch. 7), text following n.36; Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1, 2, and 7. See also Hoppe, “The Idea of a Private Law Society”:

Outside of the Garden of Eden, in the realm of all-around scarcity, the solution [to the problem of social order—the need for rules to permit conflicts to be avoided] is provided by four interrelated rules... First, every person is the proper owner of his own physical body. Who else, if not Crusoe, should be the owner of Crusoe’s body? Otherwise, would it not constitute a case of slavery, and is slavery not unjust as well as uneconomical?

关于这一点的详细阐述，参见《我们如何拥有自己》（第 4 章）中“直接控制”和“总结”部分；《捍卫论证伦理学》（第 7 章）注释 36 后的内容；霍普的《社会主义和资本主义理论》第 1、2 和 7 章。另见霍普的《私法社会的理念》：

在伊甸园之外，在全面稀缺的领域中，四个相互关联的规则提供了解决方案（针对社会秩序问题——需要规则以避免冲突）……首先，每个人都是自己身体的合法所有者。如果不是鲁滨逊，那谁应该是鲁滨逊身体的所有者呢？否则，岂不构成奴役，而奴役岂不既不正义又不经济？

⁴⁹¹ See “How We Come to Own Ourselves” (ch. 4). Note that if an agent A has committed an act of aggression against B, as discussed in note 21, above, then B’s claim to be able to do things to A’s body without A’s permission would be making a distinction between A and B, but one grounded in the nature of things. As long as A and B have not attacked each other, there is no relevant distinction between them, rendering any unequal allocation of rights between them (such as B can own or hit A, but not vice-versa) non-universalizable, particularistic, and unacceptable in genuine argumentation. But matters are different if A has forcefully invaded B’s body without B’s consent. In this case we could say A is estopped from denying B’s similar right to invade A’s body, that is, to retaliate or defend himself. For similar reasons, critics of Hoppe’s argumentation ethics who claim that the very possibility of a master arguing

D 外部事物的财产

Property in External Things

Libertarians apply similar reasoning in the case of other scarce resources—namely, external objects in the world. One key difference between bodies and external resources—and the reason for their separate treatment—is that the latter were at one point unowned and are acquired by human actors who are already necessarily body-owners. This difference implies a related distinction: as noted above, in the case of

with his slave invalidates argumentation ethics are incorrect. In the case of chattel slavery, the master would be unable to argumentatively justify his use of force against the slave. He would be engaged in a contradiction: only peaceful, mutually-rights respecting norms can be argumentatively justified, because of the normatively peaceful presuppositions of argumentation itself; yet at the same time the master would be employing dominating force against the slave. The implicit logic of his stance in argumentation would condemn his enslaving actions. If he is consistent, he would have to quit arguing and simply behave like a brute, or release the slave. But if the “master” is a victim who is employing some kind of force in response to aggression, such as retaliatory force, then in this case there would be no contradiction involved if the master/victim were to engage in discourse with his slave/ aggressor, since he could point to a justification for treating the slave/aggressor as a slave. I discuss this point also in “Defending Argumentation Ethics” (ch. 7).

参见《我们如何拥有自己》(第 4 章)。请注意,如果主体 A 对 B 实施了侵犯行动,(如上文注 21 所述),那么 B 声称可以不经 A 的允许对 A 的身体做一些事情,就是在 A 和 B 之间做出了区分,但这种区分是以事物的本质为基础的。只要 A 和 B 没有互相攻击,它们之间就不存在相关的区别,因此它们之间任何不平等的权利分配(例如 B 可以拥有或攻击 A,但反之亦然)都是不可普适的、特殊的,在真正的论证中是不可接受的。但是,如果甲未经乙同意强行侵犯了乙的身体,情况就不同了。在这种情况下,我们可以说,A 不得否认 B 同样有侵犯 A 身体的权利,即报复或自卫的权利。出于类似的原因,霍普论证伦理学的批评者声称,主人与奴隶论证的可能性本身就使论证伦理学失效,这种说法是不正确的。在动产奴隶制的情况下,主人无法以论证的方式证明他对奴隶使用武力是正当的。他将陷入一个矛盾之中:只有和平的、相互尊重权利的规范才能被论证为正当的,因为论证本身的规范前提是和平;但与此同时,主人却在对奴隶使用支配性的武力。他的论证立场的隐含逻辑将谴责他的奴役行为。如果“主人”的立场是一致的,那么他就必须放弃论证,干脆像个野蛮人一样行事,或者释放奴隶。但是,如果“主人”是一个受害者,他正在使用某种武力来回应侵犯,比如报复性武力,那么在这种情况下,如果主人/受害者与他的奴隶/侵犯者进行论证,就不会涉及矛盾,因为他可以指出把奴隶/侵犯者当作奴隶对待的理由。我在《捍卫论证伦理学》(第 7 章)中也讨论了这一点。

bodies, the idea of aggression being impermissible immediately implies (*prima facie*) self-ownership. In the case of external objects, however, we must identify who the owner of the object is before we can determine what uses of it constitute aggression.

自由意志主义对其他稀缺资源——即世界上的外部物体——也采用了类似的推理。身体和外部资源之间的一个关键区别——以及对它们分别处理的原因——是后者在某个时刻是无主的，并且是由已经必然是身体所有者的人类行动人所获得。这一差异意味着一个相关的区别：如上所述，就身体而言，不允许侵犯的观念立即意味着（初步看来）自我所有权。然而，就外部物品而言，我们必须先确定谁是物品的所有者，然后才能确定对物品的哪些使用构成了侵犯。

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

与身体的情况一样，人类需要能够利用外物作为手段来达到各种目的。因为这些东西是稀缺的（竞争性的），所以也有可能发生冲突。与身体的情况一样，自由意志主义主张确定财产权，以便能够和平、无冲突、有效率地使用这些资源。因此，与身体的情况一样，财产被归属于对某一稀缺资源拥有最佳权利主张或联系的人——“最佳权利主张”的标准基于允许和平、合作、无冲突的人类互动和资源使用的共同基本准则。

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.³³ Here, the relevant objective link is appropriation—the transformation, possession, or embordering of a previously unowned resource, i.e., Lockean homesteading.³⁴ 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.

然而，与人的身体不同，外物不是人的身份的一部分，不直接受人的意志控制，而且

——重要的是——它们最初是无主的。⁴⁹²在这里，相关的客观联系是占有——对先前无主资源的改造、占有或划界，即洛克式的拓殖。⁴⁹³根据这种方法，先前无主之物的

⁴⁹² 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; “What Libertarianism Is” (ch. 2), the sections “Property in Bodies” and “Property in External Things,” and, in particular, n. 26; and “How We Come to Own Ourselves” (ch. 4). 关于身体与为权利目的而拓殖的物品之间差异的进一步讨论，可参见《自由意志主义的契约理论》（第 9 章）第三部分 B；《何为自由意志主义》（第 2 章）中“身体的财财产权”和“外部事物的财财产权”部分，特别是注释 26；以及《我们如何拥有自己》（第 4 章）。

⁴⁹³ 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 39, below, and accompanying text. In particular, see Hoppe, *A Theory of Socialism and Capitalism*, 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 “Book Review of Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order*” (ch. 20). See also “What Libertarianism Is” (ch. 2), at n.27.) De Jasay’s argument presupposes the value of justice, efficiency, and order. Given these goals, he argues for three principles of politics: (1) if in doubt, abstain from political action (pp. 147 et seq.); (2) the feasible is presumed free (pp. 158 et seq.); and (3) let exclusion stand (pp. 171 et seq.). In connection with principle (3), “let exclusion stand,” de Jasay offers insightful comments about the nature of homesteading or appropriation of unowned goods. De Jasay equates property with its owner’s “excluding” others from using it, for example by enclosing or fencing in immovable property (land) or finding or creating (and keeping) movable property (corporeal, tangible objects). He concludes that since an appropriated thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership. Thus, the principle means “let ownership stand,” i.e., that claims to ownership of property appropriated from the state of nature or acquired ultimately through a chain of title tracing back to such an appropriation should be respected. This is consistent with Hoppe’s defense of the “natural” theory of property. See Hoppe, *A Theory of Socialism and Capitalism*, 21–25 and chap. 7. For further discussion of the nature of appropriation, see Jörg Guido H. Ülsmann, “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>): 41–68, at 51.

关于无主稀缺资源的占有性质，可参见金塞拉在《关于后来者和拓殖观念的思考》中引用和讨论的霍普和德雅赛的观点，以及下面的注释 39 及相关内容。特别地，可参见霍普的《社会主义和资本主义理论》第 24、160–162、169–171 页；以及安东尼·德雅赛的《反对政治：论政府、无政府与秩序》（伦敦和纽约：劳特利奇出版社，1997

第一个（先前的）使用者仅因其时间上在先，就比第二个（后来的）权利主张者拥有表面上更合理的权利主张。

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,³⁵ while possession is actual control—"the factual authority that a person exercises over a corporeal thing."³⁶ The question is not who has physical possession, it is who has ownership. Asking who is the owner of a resource presupposes a crucial distinction between ownership and possession—between the right to control and actual control. And the answer has to take into account the nature of previously unowned things—namely, that they must at some point become owned by a first owner to become goods at all.

为什么占有是确定所有权的相关环节？首先，请记住，与此类稀缺资源有关的问题是：谁是资源的所有者？回想一下，所有权是控制权、使用权或占有权，⁴⁹⁴而占有权是实际控制权——“一个人对有形物体行使的实际权力”。⁴⁹⁵问题不在于谁实际占有，而在于

年），第 158 页及后续页、171 页及后续页等各处（在《安东尼·德雅赛〈反对政治：论政府、无政府与秩序〉书评》（第 20 章）中也对德雅赛进行了广泛讨论。另见《何为自由意志主义》（第 2 章）注释 27。德雅赛的论证预设了正义、效率和秩序的价值。鉴于这些目标，他提出了政治的三个原则：（1）如有疑问，避免政治行动（第 147 页及后续页）；（2）可行的被假定为自由的（第 158 页及后续页）；（3）让排除成立（第 171 页及后续页）。关于原则（3）“让排除成立”，德雅赛对无主物品的拓殖或占有性质提出了深刻的见解。德雅赛将财产等同于其所有者“排除”他人使用它，例如通过围起或用栅栏围住不动产（土地），或者找到或创造（并保留）动产（有形的、可触摸的物体）。他得出结论，由于被占有的东西没有其他所有者，初步看来没有人有权反对第一个占有者主张所有权。因此，这个原则意味着“让所有权成立”，即对从自然状态中占有的财产或最终通过可追溯至这种占有的财产权链获得的财产的所有权主张应该得到尊重。这与霍普对“自然”财产理论的辩护是一致的。参见霍普的《社会主义和资本主义理论》第 21-25 页和第七章。关于占有的性质的进一步讨论，可参见约尔格·吉多·许尔斯曼的《财产经济学的先验基础》，《奥地利经济学季刊》第 7 卷第 4 期（2004 年冬季：<https://mises.org/library/priori-foundations-property-economics-0>）：41-68 页，第 51 页。

⁴⁹⁴ See note 11, above, and accompanying text.

见上文注释 11 及附文。

⁴⁹⁵ Yiannopoulos, Louisiana Civil Law Treatise, Property, § 301 (emphasis added); see

谁拥有所有权。询问谁是资源的所有者预设了所有权和占有之间的关键区别——控制的权利和实际控制之间的区别。并且答案必须考虑到先前无主物品的性质——即它们必须在某个时刻由第一个所有者拥有才能成为财产。

The answer must also take into account the presupposed goals of those seeking this answer: rules that permit conflict-free use of resources. For this reason, the answer cannot be whoever has the resource or whoever is able to take it is its owner. To hold such a view is to endorse mightmakes-right, where ownership collapses into possession for want of a distinction.³⁷ Such a system, far from avoiding conflict, makes conflict inevitable.³⁸

答案还必须考虑到寻求这个答案的人的预设目标：即允许无冲突地使用资源的规则。出于这个原因，答案不能是拥有资源的人或者能够夺取资源的人就是其所有者。持有这样的观点就是认可强权即公理，在这种情况下，由于缺乏区分，所有权就等同于占有。⁴⁹⁶ 这样的制度非但不能避免冲突，反而会使冲突不可避免。⁴⁹⁷

An aspect of ownership and property rights that is not often made explicit is what has been called the “prior-later distinction.” This is the idea that it makes a difference who came first.³⁹ The prior-later distinction is implicit in the very idea of ownership, as the owner has a better claim—again, *prima facie*—to his resource than “latecomers.”

also Louisiana Civil Code, art. 3421 (“Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name ” [emphasis added]); and “What Libertarianism Is” (ch. 2), notes 28 – 29 and accompanying text, *et pass*.

扬诺普洛斯，《路易斯安那民法论著，财产》，第 301 条（着重号为原文所加）；另见《路易斯安那州民法典》，第 3421 条（“占有是对有形物，无论是动产还是不动产的持有或享用，该人自己持有或行使占有，或者由以其名义持有或行使占有的人持有或行使占有” [着重号为原文所加]）；以及《何为自由意志主义》（第 2 章），注释注 28-29 及附文等各处。

⁴⁹⁶ See, in this connection, the quote from Adam Smith in note 13, above.

在这方面，参见上文注释 13 中引用的亚当·斯密的话。

⁴⁹⁷ This is also, incidentally, the reason the mutualist “occupancy” position on land ownership is unlibertarian. See Kinsella, “A Critique of Mutualist Occupancy,” *Mises Economic Blog* (Aug. 2, 2009); and “What Libertarianism Is” (ch. 2), at n.31.

顺便说一下，这也是为什么互助主义者在土地所有权上的“占有”立场是非自由意志主义的原因。参见金塞拉的《对互助主义占有观的批判》，米塞斯经济学博客（2009 年 8 月 2 日）；以及《什么是自由意志主义》（第 2 章），注释 31。

40 If the owner did not have a better claim to the resource than someone who just comes later and physically wrests it from him, then he is not an owner, but merely the current user or possessor, and we are operating under the amoral might-makes-right principle instead of property rights and ownership.

所有权和财产权的一个不常被明确的方面就是所谓的“先来后到的区别”。这是一种认为谁先来是有区别的观念。⁴⁹⁸先到后到的区别隐含在所有权的概念中，因为所有者对其资源有更优的主张权——同样，初步看来——比“后来者”更优。⁴⁹⁹如果所有者对资源的主张权并不比后来者更合理，后来者可以直接从他那里强行夺走资源，那么他就不是所有者，而仅仅是当前的使用者或占有者，并且我们是在不道德的强权即公理原则下而不是在财产权和所有权原则下运作。

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.⁴¹ The crucial importance of the prior-later distinction to libertarian theory is the reason Professor Hoppe repeatedly emphasizes it in his writing.⁴²

更一般地说，后来者的主张权低于先前的占有者或主张者，后者要么拓殖了资源，要么能够将其所有权追溯到拓殖者或更早的所有者。⁵⁰⁰先来后到的区别对自由意志主义

⁴⁹⁸ See Hoppe, *A Theory of Socialism and Capitalism*, 202; idem, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in *The Great Fiction*; also Kinsella, “Thoughts on the Latecomer and Homesteading Ideas”; also “What Libertarianism Is” (ch. 2), n.32.

参见霍普的《社会主义和资本主义理论》，第 202 页；同上，《论共有、公有和私有财产以及全面私有化的基本原理》，收录于《伟大的虚构》；还有金塞拉的《关于后来者和拓殖观念的思考》；以及《何为自由意志主义》（第 2 章），注释 32。

⁴⁹⁹ See Kinsella, “Thoughts on the Latecomer and Homesteading Ideas.”

金塞拉《关于后来者和拓殖观念的思考》

⁵⁰⁰ See Louisiana Code of Civil Procedure (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=68&level=Parent), art. 3653, providing: To obtain a judgment recognizing his ownership of immovable property ... the plaintiff ... shall:

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
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. [emphasis added]

See also Louisiana Civil Code, arts. 526, 531 – 32; Yiannopoulos, Louisiana Civil Law Treatise, Property, § § 255 – 79 and 347 et pass.; and “What Libertarianism Is” (ch. 2), at n.33.

One could make an analogy here between the prior-later distinction and how current title can, in principle, be traced back to the original act of appropriation of a given resource and Mises’ s regression theorem that explains the origin of the value of a commodity money by explaining its value today based on the change from its value yesterday, and so on, back to the original use of the commodity as money. On the latter, see Mises, Human Action, chap. 17, § 4. In fact, some of Mises’ s comments suggest this analogy. As he writes: “When we consider the natural components of goods, apart from the labour components they contain, and when we follow the legal title back, we must necessarily arrive at a point where this title originated in the appropriation of goods accessible to all.” Ludwig von Mises, Socialism: An Economic and Sociological Analysis, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; <https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis>), chap. 1, § 2, p. 32.

参见《路易斯安那州民事诉讼法》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=68&level=Parent），第 3653 条规定：为获得确认其对不动产所有权的判决……原告……应当：

如果法院认定被告占有该不动产，则证明他从先前的所有者那里获得了所有权或者通过取得时效获得了所有权；或者

如果法院认定被告不占有该不动产，则证明他对该不动产拥有比被告更好的所有权。当双方的所有权追溯至同一来源时，该来源被推定为先前的所有者。[着重号为原文所加]

另见《路易斯安那民法典》，第 526、531-532 条；扬诺普洛斯，《路易斯安那民法论著，财产》，第 255-279 条及 347 条及后续等；以及《何为自由意志主义》（第 2 章），注释 33。

在这里，可以在先后来到的区别与当前的所有权原则上如何能够追溯至对给定资源的最初占有行为之间进行类比，也可以与米塞斯的回溯定理进行类比，米塞斯的回溯定理通过今天的价值基于昨天的价值的变化等不断地回溯来解释财货货币的价值起源。关于后者，参见米塞斯的《人的行动》，第 17 章，第 4 节。事实上，米塞斯的一些评论暗示了这种类比。正如他所写：“当我们考虑财货的自然成分，不考虑其中包含的劳动成分，并且当我们追溯法律上的所有权时，我们必然会到达一个点，在这个点上，这个所有权起源于对所有人都可获得的财货的占有。”路德维希·冯·米塞斯，《社会主义：经济与社会学分析》，J. 卡哈内译（印第安纳波利斯，印第安纳州：自由基金，1981 年：<https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis>），第 1 章，第 2 节，第 32 页。

理论至关重要，这也是霍普教授在他的著作中反复强调这一点的原因。⁵⁰¹

⁵⁰¹ See, e.g., Hoppe, *A Theory of Socialism and Capitalism*, p. 202; 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); and “How We Come to Own Ourselves” (ch. 4). As Hoppe explains in “The Idea of a Private Law Society” : every person is the proper owner of all nature-given goods that he has perceived as scarce and put to use by means of his body, before any other person. Indeed, who else, if not the first user, should be their owner? The second or third one? Were this so, however, the first person would not perform his act of original appropriation, and so the second person would become the first, and so on and on. That is, no one would ever be permitted to perform an act of original appropriation and mankind would instantly die out. Alternatively, the first user together with all late-comers become part-owners of the goods in question. Then conflict will not be avoided, however, for what is one to do if the various part-owners have incompatible ideas about what to do with the goods in question? This solution would also be uneconomical because it would reduce the incentive to utilize goods perceived as scarce for the first time.

例如，参见霍普的《社会主义和资本主义理论》，第 202 页；同上，《私有财产的政治经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年 [1993 年]；www.hanshoppe.com/eepp），第 327-330 页；另见金塞拉在《关于后来者和拓殖观念的思考》《捍卫论证伦理学》（第 7 章）和《我们如何拥有自己》（第 4 章）中对这些及相关事项的讨论。正如霍普在《私法社会的理念》中所解释的：

每个人都是大自然赋予他的所有物品的合法所有者，这些物品被他认为是稀缺的，并通过他的身体先于其他人使用。事实上，如果不是第一个使用者，还有谁应该是其所有者？第二个还是第三个？如果是这样的话，第一个人就不会进行最初的占有行为，于是第二个人就会成为第一个人，如此循环往复。也就是说，没有人会被允许进行先占行为，人类将立即灭亡。另一种选择是，第一个使用者与所有后来者一起成为有关物品的部分所有人。然而，这样也无法避免冲突，因为如果不同的部分所有者对如何处理有关物品的想法不一致，又该怎么办呢？这种解决办法也是不经济的，因为它会降低人们利用首次被视为稀缺的物品的积极性。

See also, in this connection, de Jasay, *Against Politics*, further discussed and quoted in Kinsella, “Thoughts on the Latecomer and Homesteading Ideas.” See also de Jasay’s argument (note 34, 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 the thing in dispute is. 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 that is in dispute and what counts as possession of it. If B claims ownership of a given resource, he wants the right to control it, to a certain extent, and according to its nature. Then the question becomes, did someone else previously control it (whatever is in dispute), according to its nature; i.e., did someone else already homestead it, so that B is only a latecomer? This ties in with de Jasay’s “let exclusion stand” principle, which rests on the idea that if someone is actually able to control a resource such that others are excluded, then this exclusion should “stand.” Of course, the physical nature of a given scarce resource and the way in which humans use such resources will determine the nature of actions needed to “control” it and exclude others. See also on this Murray N. Rothbard’s discussion of the “relevant technological unit” in “Law, Property Rights, and Air Pollution,” in *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.

在这方面，也可参见德雅赛的《反对政治》，金塞拉在《关于后来者和先占观念的思考》中对其进行了进一步讨论和引用。还可参见德雅赛的论点（上文注释 34），即由于被占有的东西没有其他所有者，初步看来没有人有权反对第一个占有者主张所有权。德雅赛的“让排除成立”观念，以及霍普对先到后到区别的强调，揭示了先占本身的性质。人们经常会问，什么样的行为构成先占（或者如霍普有时所称的“划界”）或者对先占来说是足够的；什么样的“劳动”必须与一件东西“混合”；先占延伸到什么财产上？什么算作“足够的”先占？我们可以看到，这些问题的答案与有争议的事物的性质有关。换句话说，如果 B 主张对 A 所拥有（或曾经拥有）的一件东西的所有权，那么争议的框架本身有助于确定有争议的东西是什么以及什么算作对它的占有。如果 B 主张对某一给定资源的所有权，他在一定程度上并根据其性质想要控制它的权利。那么问题就变成了，是否有人先前根据其性质控制了（无论有争议的是什么）它；即，是否有人已经先占了它，所以 B 只是一个后来者？这与德雅赛的“让排除成立”原则相关，该原则基于这样的观念，即如果某人实际上能够控制一种资源，使得其他人被排除在外，那么这种排除应该“成立”。当然，给定稀缺资源的物理性质以及人类使用此类资源的方式将决定控制它并排除他人所需行动的性质。关于这一点，也可参见穆瑞·N·罗斯巴德在《经济学的论证》中的《法律、财产权与空气污染》中对“相关技术单位”的讨论；还有 B.K. 马库斯的《频谱应是私有财产：无线技术的经济学、历史和未来》，米塞斯日报（2004 年 10 月 29 日；<https://mises.org/library/spectrum-should-be-private-property-economics-history-and-future-wireless-technology>），以及同上，《罗斯巴德自由电台》，《自由意志主

To sum up, the libertarian position on property rights is that in order to permit conflict-free, productive use of scarce resources, property titles to particular resources are assigned to particular owners. As noted above, however, the title assignment must not be random, arbitrary, or particularistic; instead, it has to be assigned based on “the existence of an objective, intersubjectively ascertainable link between owner” and the resource claimed.⁴³ As can be seen from the considerations presented above, the link is the physical transformation or embordering by the original homesteader, or a contractual chain of title traceable back to him (or to some previous possessor whose claim no one else can defeat).⁴⁴

总之，自由意志主义在财产权问题上的立场是，为了使稀缺资源得到无冲突的有效率的利用，特定资源的财产权应确定给特定的所有者。但如上所述，财产权分配不能是任意的、武断的或特殊主义的；相反，它必须基于“所有者与所主张的资源之间存在一种客观的、主体间可确定的联系”来进行分配确定。⁵⁰²从上述分析中可以看出，这种联系是由最初的拓殖者进行的物理转化或划界，或者是可追溯至他（或某个先前的占有者，其主张权无人能够推翻）的性财产权链。⁵⁰³

E 一致性和原则

Consistency and Principle

Most people give some weight to some of the above considerations. In their eyes, a person is the owner of his own body—usually. A homesteader owns the resource he

义研究杂志》第 20 卷第 2 期（2006 年春季；<https://mises.org/library/radio-free-rothbard>）：17-51。

⁵⁰² 霍普《社会主义和资本主义理论》，第 23 页。

⁵⁰³ On the title transfer theory of contract, see “A Libertarian Theory of Contract” (ch. 9). See also references in note 41, above, including art. 3653 of the Louisiana Code of Civil Procedure, providing that, in the case of a dispute over immovable property (land or realty), “When the titles of the parties are traced to a common author, he is presumed to be the previous owner.” See also “What Libertarianism Is” (ch. 2), at n.33. 关于的所有权转让理论，参见《自由意志主义的契约理论》（第 9 章）。也可参见上文注释 41 中的参考文献，包括《路易斯安那州民事诉讼法》第 3653 条，该条规定，在不动产（土地或房地产）争议的情况下，“当双方的所有权追溯至同一来源时，该来源被推定为先前的所有者”。另见《何为自由意志主义》（第 2 章），注释 33。

appropriates—unless the state takes it from him “by operation of law.”⁴⁵ This is the principal distinction between libertarians and typical non-libertarians (excluding criminals, sociopaths, tyrants, government leaders, and so on): libertarians are consistently opposed to aggression, defined in terms of invasion of property borders, where property rights are understood to be assigned on the basis of self-ownership in the case of bodies. And in the case of non-bodily external objects, rights are understood on the basis of prior possession or homesteading and contractual transfer of title.

大多数人都会重视上述的一些考虑因素。在他们眼中，一个人通常是自己身体的所有者。拓殖者拥有他占有的资源——除非国家“依法”从他手中夺走。⁵⁰⁴ 这就是自由意志

⁵⁰⁴ State laws and constitutional provisions often pay lip service to the existence of various personal and property rights, but then take it back by recognizing the right of the state to regulate or infringe the right so long as it is “by law” or “not arbitrary.” See, e.g., Constitution of Russia, art. 25 (“The home shall be inviolable. No one shall have the right to get into a house against the will of those living there, except for the cases established by a federal law or by court decision”) and art. 34 (“Everyone shall have the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by the law”); Constitution of Estonia, art. 31 (“Estonian citizens shall have the right to engage in commercial activities and to form profit-making associations and leagues. The law may determine conditions and procedures for the exercise of this right”); Universal Declaration of Human Rights, art. 17 (“Everyone has the right to own property alone as well as in association with others... No one shall be arbitrarily deprived of his property”); art. 29(2) (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”). Even the Thirteenth Amendment to the US Constitution, said to have abolished slavery, makes an exception for “crimes” (which, of course, the state can arbitrarily decree, such as drug crimes, tax evasion, evading conscription, etc.): “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” (Emphasis added.)

国家法律和宪法条款往往只是在口头上承认各种人身权和财产权的存在，但随后又收回这种承认，因为它们认可国家有权进行规范或侵犯这些权利，只要是“依法”或“非任意”的。例如，参见《俄罗斯宪法》第 25 条（“住宅不可侵犯。任何人无权违背居住者的意愿进入房屋，除非是联邦法律或法院判决确定的情况”）和第 34 条（“每个人都有权自由地将自己的能力和财产用于创业或任何其他法律未禁止的经济

主义者与典型的非自由意志主义者（不包括罪犯、反社会者、暴君、政府领导人等）之间的主要区别：自由意志主义者一贯反对侵犯，侵犯在财产边界被侵犯的意义上定义，在这里财产权在身体的情况下被理解为基于自我所有权而分配。而对于非身体的外物，则根据先前的占有或拓殖以及转让所有权来理解权利。

This framework for rights is motivated by the libertarian's consistent and principled valuing of peaceful interaction and cooperation— in short, of civilized behavior. Consider the Misesian view of human action. According to Mises, human action is aimed at alleviating some felt uneasiness.⁵⁰⁵ Thus, the actor employs scarce means, according to his understanding of causal laws, to achieve various ends—ultimately, the removal of uneasiness.

这种权利框架是由自由意志主义者对和平互动与合作——简而言之，对文明行为的一贯且有原则的珍视所推动的。考虑米塞斯的人的行动观点。根据米塞斯的观点，人的行动旨在减轻某种感受到的不安逸。⁵⁰⁵因此，行动人根据他对因果规律的理解，运用稀缺手段来实现各种目的——最终是消除不安逸。

Just as felt uneasiness in general is the cause of action aimed at alleviating it, a certain type of “moral” uneasiness gives rise to the practice of normative justification aimed at its alleviation. To-wit, civilized man (evidently) feels morally uneasy at the prospect of violent struggles with others. On the one hand, he wants, for some practical reason, to control a given scarce resource and to use violence against another person, if necessary, to achieve this control. On the other hand, he also wants to avoid a wrongful

活动”）；《爱沙尼亚宪法》第 31 条（“爱沙尼亚公民有权从事商业活动并组建营利性协会和联盟。法律可以确定行使此项权利的条件和程序”）；《世界人权宣言》第 17 条（“人人有权单独或与他人一起拥有财产……任何人的财产不得任意被剥夺”）；第 29 条第 2 款（“在行使其权利和自由时，每个人只应受法律确定的限制，这些限制的唯一目的是确保对他人的权利和自由给予应有的承认和尊重，并满足民主社会中道德、公共秩序和普遍福利的正当要求”）。甚至被认为已经废除了奴隶制的美国宪法第十三修正案也对“犯罪”（当然，国家可以任意规定，如毒品犯罪、逃税、逃避征兵等）做出了例外规定：“在美国境内或受其管辖的任何地方，不得存在奴隶制或非自愿奴役，除非作为对犯罪的惩罚，且犯罪方已被适当定罪。”（着重号为原文所加）

⁵⁰⁵ Mises, *Human Action*, pp. 13–14, et pass.

米塞斯：《人的行动》，第 13-14 页，等处。

use of force. Civilized man, for some reason, feels reluctance and uneasiness at the prospect of conflict or violent interaction with his fellow man. Perhaps he is reluctant to violently clash with others over certain objects because he has empathy with them.⁴⁷ 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.*⁴⁸

正如一般的不安逸是旨在缓解这种不安逸的行动的起因一样，某种“道德”上的不安逸也导致了旨在缓解这种不安逸的规范正当化实践。也就是说，文明人（显然）对与他人暴力斗争的前景感到道德上的不安。一方面，出于某种实际原因，他希望控制某种稀缺资源，并在必要时对他人使用暴力，以达到控制的目的。另一方面，他也希望避免错误地使用武力。出于某种原因，文明人在与同伴发生冲突或暴力互动时会感到不情愿和不安逸。也许他不愿意为了某些物品与他人发生暴力冲突是因为他对他们有同理心。⁵⁰⁶ 也许合作的本能是社会进化的结果。正如米塞斯指出的那样：

有一些人的唯一目标是改善自己的自我状况。还有一些人，对同胞的困境的意识所引起的不安与他们自己的需求所引起的不安一样多，甚至更多。⁵⁰⁷

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

无论出于何种原因，由于这种不安逸，当有可能发生暴力冲突时，文明人就会为使用武力或暴力寻找正当性，以控制或捍卫他人反对或威胁的所需稀缺资源的使用。同理心——或者无论是什么促使人们采纳自由意志主义的基本规范——引起了某种形式

⁵⁰⁶ For further discussion of the role of empathy in the adoption of libertarian grundnorms, see note 26, above.

关于同理心在采纳自由意志主义基本准则中的作用的进一步讨论，见上文注释 26。

⁵⁰⁷ Mises, *Human Action*, p. 14.

米塞斯：《人的行动》，第 14 页。

的不安逸，从而产生了为暴力行动辩护的尝试。

Civilized man may be thus defined as he who seeks justification for the use of interpersonal violence. When the inevitable need to engage in violence arises—for defense of life or property—civilized man seeks justification. Naturally, since this justification-seeking is done by people who are inclined to reason and peace (justification is after all a peaceful activity that necessarily takes place during discourse),⁴⁹ what they seek are rules that are fair, potentially acceptable to all relevant parties, grounded in the nature of things, and universalizable, and which permit conflict-free use of resources.

因此，文明人可以被定义成为使用人际暴力寻求正当理由的人。当不可避免地需要使用暴力时——为了保卫生命或财产——文明人会寻求正当理由。当然，由于寻求正当理由的人倾向于理性与和平（寻求正当理由毕竟是一种和平活动，必然发生在对话过程中），⁵⁰⁸ 他们所寻求的是公平的、有可能为所有相关方接受的、基于事物本质的、普适性的规则，这些规则允许在无冲突的情况下使用资源。

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

⁵⁰⁸ As Hoppe explains, “Justification—proof, conjecture, refutation—is argumentative justification.” Hoppe, *The Economics and Ethics of Private Property*, p. 384; see also *ibid.*, p. 413 and Hoppe, *A Theory of Socialism and Capitalism*, p. 155, *et pass*.

正如霍普所解释的，“证明、猜想、反驳构成了证成过程，这种证成是论证性的。”霍普，《私有财产的经济与伦理学》，第 384 页；另见同上，第 413 页以及霍普，《社会主义和资本主义的理论》，第 155 页及其他各处。

use of such external scarce resources.

正如前文所述，自由意志主义财产权原则是唯一符合这些标准的候选原则。我们赞成对身体的初步自我所有权，认为这是唯一公平合理的身體所有权规则，它允许在无冲突的情况下使用我们身体的资源。而对于人体外部的资源，我们赞成以先占或拓殖以及转让所有权为基础的财产权。也就是说，自由意志主义对外部物品财产权的立场是，在任何特定稀缺资源的争议或竞争中，最初的拓殖者——即通过划界或改造从无主状态占有该资源的人（或其受让人）——比后来者，即那些没有占有该稀缺资源的人，有更合理的主张权。这是唯一公平合理正当的财产分配规则，它允许和谐、有效率、无冲突地使用这种外部稀缺资源。

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.

因此，如果说文明人是为使用暴力寻找正当理由的人，那么自由意志主义者就是认真从事这项工作的人。他对暴力有着深刻的、有原则的、与生俱来的反对，对和平与合作有着同样深刻的承诺。

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.⁵⁰ It recognizes that the only rules that are compatible with the grundnorms of civilized men are the self-ownership principle and the Lockean homesteading principle, applied as consistently as possible.

基于上述原因，自由意志主义可以说是一种政治哲学，它始终赞成旨在促进和平、繁荣与合作的社会规则。⁵⁰⁹它认识到，与文明人的基本准则相一致的唯一规则是自我所有权原则和洛克式的拓殖原则，并尽可能一以贯之地加以应用。

⁵⁰⁹ 另见《何为自由意志主义》（第 2 章）。出于这个原因，亨利·黑兹利特为自由哲学提议的名称“合作主义”有一定的吸引力。见亨利·黑兹利特，《道德的基础》（纽约哈得孙河畔欧文顿：经济教育基金会，1994 年[1964 年]），第 xii 页；金塞拉，《新自由意志主义：反资本主义和社会主义；或者：我更喜欢黑兹利特的“合作主义”》，斯蒂芬·金塞拉网站（2009 年 6 月 19 日）。

F 国家 The State

Libertarians oppose all forms of crime (aggression). Thus we oppose not only private aggression: we also oppose institutionalized or public aggression. The opposition to institutionalized aggression is based on the view, espoused by Bastiat, that an act of aggression that is unjust for a private actor to perform remains illegitimate when performed by agencies, institutions, or collectives.⁵¹ Murder or theft by ten, or a hundred, or a million, people is not better than theft by a lone criminal. It is for this reason that libertarians view the state itself as inherently criminal. For the state does not just happen to engage in institutionalized aggression; it necessarily does so on a systematic basis as part of the very nature of the state. As Hoppe notes:

What must an agent be able to do to qualify as a state? This agent must be able to insist that all conflicts among the inhabitants of a given territory be brought to him for ultimate decision-making or be subject to his final review. In particular, this agent must be able to insist that all conflicts involving himself be adjudicated by him or his agent. And implied in the power to exclude all others from acting as ultimate judge, as the second defining characteristic of a state, is the agent's power to tax: to unilaterally determine the price that justice seekers must pay for his services.⁵²

自由意志主义反对一切形式的犯罪（侵犯）。因此，我们不仅反对私人侵犯：我们还反对制度化或公共侵犯。反对制度化侵犯是基于巴斯夏所主张的观点，即对于私人行动人来说不正义的侵犯行动，当由机构、制度或集体实施时仍然是不合法的。⁵¹⁰由十

⁵¹⁰ As Bastiat writes:

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

Frederic Bastiat, *The Law*, 17 – 18 (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, Dean Russell trans. 1950 [1850]; <https://fee.org/resources/the-law/>).

个人、一百人或一百万人实施的谋杀或盗窃行为并不比由一个罪犯实施的同样的行为更好。正因如此，自由意志主义认为国家本身就是犯罪。因为国家不仅仅是偶然地参与制度化侵犯，它必然会作为国家本质的一部分而系统性地这样做。正如霍普所指出的：

一个主体必须能够做什么才能被认定为国家呢？这个主体必须能够坚持要求特定领土内居民之间的所有冲突都提交给他进行最终决策，或者接受他的最终审查。特别是，这个主体必须能够坚持要求所有涉及他自己的冲突都由他或他的代理人进行裁决。作为国家的第二个定义特征，排除所有其他人担任最终法官的权力意味着这个主体有权征税：单方面决定寻求正义者必须为国家的服务支付的价格。⁵¹¹

Such an agency necessarily commits aggression against either human bodies or owned property (usually both), either by taxing or by outlawing competition (usually both).⁵³

正如巴斯夏所写：

有时候法律为掠夺辩护并参与其中。这样，受益人就可以免于他们的行为所带来的耻辱和危险……但是，如何识别这种合法掠夺呢？很简单。看看法律是否从某些人那里拿走属于他们的东西，并把它给予那些本不属于他们的其他人。看看法律是否以牺牲一个公民为代价使另一个公民受益，做了后者自己如果不犯罪就无法做到的事情。那么就毫不迟疑地废除那条法律——没有合法掠夺；这就是正义、和平、秩序、稳定、和谐与逻辑的原则。

弗雷德里克·巴斯夏，《法律》，第 17-18 页（纽约哈得孙河畔欧文顿：经济教育基金会，迪恩·拉塞尔译，1950 年[1850 年]；<https://fee.org/resources/the-law/>）。

⁵¹¹ See Hans-Hermann Hoppe, “Reflections on the Origin and the Stability of the State,” LewRockwell.com (June 23, 2008; <https://www.lewrockwell.com/2008/06/hans-hermann-hoppe/to-battle-the-state/>); also Kinsella, “The Nature of the State and Why Libertarians Hate It,” The Libertarian Standard (May 3, 2010; <http://libertarianstandard.com/2010/05/03/the-nature-of-the-state-and-why-libertarians-hate-it/>).

参见汉斯-赫尔曼·霍普，《对国家起源和稳定性的思考》，LewRockwell.com（2008 年 6 月 23 日；<https://www.lewrockwell.com/2008/06/hans-hermann-hoppe/to-battle-the-state/>）；也可参见金塞拉，《国家的本质以及为什么自由意志主义者厌恶它》，《自由意志主义标准》（2010 年 5 月 3 日；<http://libertarianstandard.com/2010/05/03/the-nature-of-the-state-and-why-libertarians-hate-it/>）。

For these reasons, the consistent libertarian, in opposing aggression, is also anarchist.⁵⁴

这样的主体必然会通过征税或取缔竞争（通常两者兼而有之），对人的身体或拥有的财产（通常两者兼而有之）实施侵犯。⁵¹²出于这些原因，一贯反对侵犯的自由意志主义者也是无政府主义者。⁵¹³

This also implies that legislation is illegitimate—as legislation requires a state—and that a law that is purely a result of legislation, and that cannot emerge in a decentralized

⁵¹² States invariably claim both powers, but either one alone is sufficient to give the state its unique status, and in fact each power implies the other. The power to tax alone would provide the agency with the ability to outcompete competing agencies that do not have this power, in the same way that public (government) schools outcompete private schools. Thus, the power to tax gives the taxing agency the practical ability to monopolize the field and outlaw or restrict competition. And the power to exclude competition alone would permit the monopolizing agency to charge monopoly prices for its services, akin to a tax.

国家总是同时拥有这两种权力，但单独任何一种权力都足以赋予国家独特的地位，事实上，每种权力都意味着另一种权力。仅征税权就会使该机构有能力在与没有这种权力的竞争机构的竞争中胜出，就如同公立（政府）学校在与私立学校的竞争中胜出一样。因此，征税权赋予征税机构实际的能力去垄断这个领域，并取缔或限制竞争。而仅排除竞争的权力就会允许垄断机构对其服务收取垄断价格，这类似于一种税收。

⁵¹³ 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://web.archive.org/web/20140914044736/www.arts.uwaterloo.ca/~jnarveso/articles/Anarchist's_Argument.pdf) and Hans-Hermann Hoppe, “Anarcho-Capitalism: An Annotated Bibliography,” *LewRockwell.com* (Dec. 31, 2001; <https://archive.lewrockwell.com/hoppe/hoppe5.html>); Kinsella, “The Greatest Libertarian Books,” *StephanKinsella.com* (Aug. 7, 2006); and other references in “Legislation and the Discovery of Law in a Free Society” (ch. 13), n.25.

参见《成为无政府资本主义者意味着什么》（第 3 章）；也可参见扬·纳尔维森，《无政府主义者的理由》，收录于《在理论与实践尊重人》（马里兰州拉纳姆：罗曼与利特菲尔德出版社，2002 年；https://web.archive.org/web/20140914044736/www.arts.uwaterloo.ca/~jnarveso/articles/Anarchist's_Argument.pdf）以及汉斯-赫尔曼·霍普，《无政府资本主义：一个带注释的参考书目》，*LewRockwell.com*（2001 年 12 月 31 日；<https://archive.lewrockwell.com/hoppe/hoppe5.html>）；金塞拉，《最伟大的自由意志主义书籍》，*StephanKinsella.com*（2006 年 8 月 7 日）；以及《自由社会中的立法与法律发现》（第 13 章）注释 25 中的其他参考文献。

legal order, is also invalid.⁵⁵

这也意味着，立法是不合法的——因为立法需要一个国家，而且纯粹由立法产生的法律也是无效的，因为它不可能在一个去中心化的法律秩序中产生。⁵¹⁴

三、自由意志主义在知识产权中的应用

LIBERTARIANISM APPLIED TO IP

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

鉴于上述自由意志主义（以及奥地利经济学所揭示的）对财产权的理解，专利和版权制度显然是站不住脚的。原因如下。

Copyrights pertain to "original works," such as books, articles, movies, and computer programs. They are grants by the state that permit the copyright holder to prevent others from using their own property—e.g., ink and paper—in certain ways. Thus copyright literally results in censorship—not surprising given its origins in suppressing the spread of ideas not favored by crown and church.⁵⁶ For example, shortly before his death, author J.D. Salinger, author of *Catcher in the Rye*, convinced U.S. courts to actually ban the publication of a novel called *60 Years Later: Coming Through the Rye*, based on copyright claims. And when a grocery store in Canada mistakenly sold 14 copies of a new Harry Potter book a few days before its official release on Saturday, July 16, 2005, a Canadian judge "ordered customers not to talk about the book, copy it, sell it or even read it before it is officially released at 12:01 a.m. July 16."⁵⁷

版权涉及“原创作品”，如书籍、文章、电影和计算机程序。它们是国家授予的权利，允许版权所有者以某些方式阻止他人使用他们自己的财产——例如墨水和纸张。因此，版权实际上导致了审查制度——考虑到它起源于压制不受王室和教会青睐的思想传播，这并不令人惊讶。⁵¹⁵例如，《麦田守望者》的作者塞林格（J.D. Salinger）在去世

⁵¹⁴ See “Legislation and the Discovery of Law in a Free Society” (ch. 13).
《自由社会中的立法与法律发现》（第 13 章）。
⁵¹⁵ The Stop Online Piracy Act (SOPA), defeated a few years back through widespread Internet-based outrage, is a good example of a threat to freedom of expression in the

前不久，基于版权主张说服了美国法院实际上禁止出版一本名为《60 年后：穿越麦田》的小说。加拿大一家杂货店在《哈利·波特》新书于 2005 年 7 月 16 日（星期六）正式发行前几天错误地售出了 14 本新书，一位加拿大法官“命令顾客在该书于 7 月 16 日上午 12:01 正式发行前不得谈论该书、不得复制该书、不得出售该书，甚至不得阅读该书”。⁵¹⁶

name of copyright law. See Kinsella, “SOPA is the Symptom, Copyright is the Disease: The SOPA wakeup call to ABOLISH COPYRIGHT,” The Libertarian Standard (Jan. 24, 2012). Regarding the origins of copyright, see Karl Fogel, “The Surprising History of Copyright and The Promise of a Post-Copyright World,” Question Copyright (2006; <https://perma.cc/DV92-TEH3>); Michele Boldrin & David K Levine, Against Intellectual Monopoly (Cambridge University Press, 2008; www.againstmonopoly.org), ch. 2; Eric E. Johnson, “Intellectual Property and the Incentive Fallacy,” Florida State U. L. Rev. 39 (2012; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746343): 623 – 79, at 625 (“[T]he monopolies now understood as copyrights and patents were originally created by royal decree, bestowed as a form of favoritism and control. As the power of the monarchy dwindled, these chartered monopolies were reformed, and essentially by default, they wound up in the hands of authors and inventors.”); Tom W. Bell, Intellectual Privilege: Copyright, Common Law, and the Common Good (Arlington, Virginia: Mercatus Center, 2014; <https://perma.cc/JLC2-396Y>), chap. 3. For more on the origins of IP, see references in “Introduction to Originitent” (ch. 16), n.3.

几年前，《禁止网络盗版法案》（SOPA）在互联网上激起了广泛的愤怒，最终被否决，这就是以版权法的名义威胁言论自由的一个很好的例子。见金塞拉，“《禁止网络盗版法案》是症状，版权是疾病：《禁止网络盗版法案》敲响警钟要求废除版权”，《自由意志主义标准》（2012 年 1 月 24 日）。关于版权的起源，见卡尔·福格尔，《版权令人惊讶的历史以及后版权世界的希望》，质疑版权（2006 年；<https://perma.cc/DV92-TEH3>）；米凯莱·博尔德里尼和大卫·K·莱文，《反对知识垄断》（剑桥大学出版社，2008 年；www.againstmonopoly.org），第 2 章；埃里克·约翰逊，《知识产权与激励谬误》，《佛罗里达州立大学法律评论》39（2012 年；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746343）：623 – 79，第 625 页（“如今被理解为版权和专利的垄断最初是由皇家法令创造的，作为一种偏袒和控制的形式被授予。随着君主权力的减弱，这些特许垄断被改革，并且基本上是默认情况下，它们落入了作者和发明者手中。”）；汤姆·W·贝尔，《知识特权：版权、普通法和共同利益》（弗吉尼亚州阿灵顿：梅卡托斯中心，2014 年；<https://perma.cc/JLC2-396Y>），第 3 章。关于知识产权起源的更多内容，见“《原创导论》”（第 16 章）注释 3 中的参考文献。

⁵¹⁶ See Kinsella, “The Patent, Copyright, Trademark, and Trade Secret Horror Files,” Mises Economics Blog (Feb. 3, 2010).

见金塞拉，《专利、版权、商标和商业秘密恐怖档案》，米塞斯经济学博客（2010 年

Patents grant rights in “inventions”—useful machines or processes. They are grants by the state that permit the patentee to use the state’s court system to prohibit others from using their own property in certain ways—from reconfiguring their property according to a certain pattern or design described in the patent, or from using their property (including their own bodies) in a certain sequence of steps described in the patent.⁵⁸

专利授予 “发明”——有用的机器或工艺——的权利。专利权是国家授予的权利，允许专利权人利用国家法院系统禁止他人以特定方式使用自己的财产——禁止他人按照专利中描述的特定模式或设计重新配置自己的财产，或禁止他人按照专利中描述的特定步骤顺序使用自己的财产（包括自己的身体）。⁵¹⁷

Both patent and copyright are simply state grants of monopoly privilege. In both cases, the state is assigning to A a right to control B’s property: A can force B not to engage in certain actions with B’s resources. Since ownership is the right to control, IP grants to A a co-ownership right (a negative servitude) in B’s property.⁵⁹ This clearly cannot be justified under libertarian principles. B already owns his property. With respect to him, A is a latecomer. B is the one who appropriated the property, not A. It is too late for A to homestead the resource in question—B, or his ancestor in title, already did that. The resource is no longer unowned. Granting A ownership rights in B’s property is quite obviously incompatible with basic libertarian principles. It is nothing more than redistribution of wealth. IP is therefore unlibertarian and unjustified.

专利和版权都只是国家授予的垄断特权。在这两种情况下，国家都在赋予 A 控制 B 的财产的权利：A 可以强迫 B 不得利用 B 的资源从事某些行为。由于所有权是控制权，知识产权授予 A 一项对 B 的财产的共有权（一种消极的奴役）。这很明显不符合自由意志主义原则的正当性。⁵¹⁸ B 已经拥有自己的财产。对他来说，A 是后来者。

2 月 3 日）。

⁵¹⁷ For examples, see *ibid.*

有关例子，见同上。

⁵¹⁸ See “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), Part IV.B. As I noted in AIP, “ownership of an idea, or ideal object, effectively gives the IP owners a property right in every physical embodiment of that work or invention.” See AIP, the section “IP Rights and Relation to Tangible Property,” following n.29.

B 是占有财产的人，而不是 A。A 要拓殖有争议的资源为时已晚——B 或其有所有权的先辈已经这样做了。该资源不再是无主资源。赋予 A 对 B 的财产的所有权显然不符合基本的自由意志主义原则。它只不过是财富的再分配。因此，知识产权是非自由意志主义的，也是不正义、不合理的。

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

There are various arguments advanced for IP. Professor Nance notes that IP arguments:

*... generally fall into two broad categories, deontological and consequentialist. The latter category embraces all theories that purport to justify property rights on the basis of the good consequences of their legal recognition, as distinct from their moral rightness.*⁶⁰

那么，为什么这是一个有争议的问题？为什么一些自由意志主义者仍然赞成知识产权？

支持知识产权的论点多种多样。南斯教授指出，知识产权的论点：

.....一般分为两大类，即义务论和结果⁵¹⁹。后一类包括所有以法律认可良好的后果

（有别于其道德正确性）为基础，为财产权辩护的理论。⁵¹⁹

The consequentialist approach is implied by the Constitution's authorization for IP law, which reads:

The Congress shall have power ... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their

见“《《反对知识产权》二十年后：回顾与展望》”（第 15 章），第四部分 B。正如我在《反对知识产权》中指出的，“对一个想法或理想对象的所有权，实际上给予了知识产权所有者对该作品或发明的每一个物理体现的财财产权。”见《反对知识产权》，注释 29 之后的“知识产权权利与真实财产的关系”部分。

⁵¹⁹ Dale A. Nance, “Foreword: Owning Ideas,” Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 757 – 74, p. 763.

戴尔·A·南斯，《前言：拥有想法》，《哈佛法律与公共政策杂志》第 13 卷第 3 期（1990 年夏季）：757 – 774，第 763 页。

respective writings and discoveries.⁶¹

结果⁵²⁰的方法隐含在美国宪法对知识产权法的授权中，其内容为：

国会⁵²⁰有权……通过在有限时间内确保作者和发明者对他们各自的著作和发现享有排他性的权利，以促进科学和实用技艺的进步。

Nance argues that most deontological arguments for IP—which fall into the “moral rights” tradition:

… fall into one of two sub-categories. First, they can be based upon the creator’s deserving to own the fruits of her labors. This “labor theory” of property is generally associated with John Locke, whose influence on American thought is undeniable. An alternative theory, less familiar to Anglo-American thought, is that such rights are based upon respecting the creator’s extension or reification of personality by the occupation of tangible or intangible things. The “personality theory” of property is most commonly attributed to the German philosopher Hegel and is better established in continental law.⁶²

南斯认为，大多数关于知识产权的义务论论证——都属于“道德权利”传统：

……可分为两个子类别。首先，它们可以建立在创造者理应拥有其劳动成果的基础上。这种财产的“劳动理论”通常与约翰·洛克有关，他对美国思想的影响是不可否认的。英美思想界不太熟悉的另一种理论认为，这种权利的基础是尊重创造者通过对有

⁵²⁰ U.S. Constitution, Art. I, Sec. 8, Cl. 8. Nance comments that “the reference to ‘securing’ (rather than, say, ‘granting’) the ‘right’ to authors and inventors suggests a deontological element as well.” Nance, “Foreword: Owning Ideas,” p. 763.

美国宪法第一条第八款第八项。南斯评论说：“提到‘确保’（而不是，比如说，‘授予’）作者和发明者的‘权利’，这也暗示了一种义务论的因素。”南斯，《前言：拥有想法》，第 763 页。

形或无形事物的占有而实现的人格延伸或具象化。财产的“人格理论”最常见的是德国哲学家黑格尔提出的，在欧洲大陆法中也得到了较好的确立。⁵²¹

⁵²¹ Nance, “Foreword: Owning Ideas,” p. 764 (citations omitted). Tom G. Palmer, who points out that Wilhelm von Humboldt also linked property rights to personality, critiques the personality justification for IP in “Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990; <https://perma.cc/J8LY-L4MQ>): 817 – 65, at pp. 819 – 20 and Part III, esp. pp. 843 – 49). See also Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown L.J.* 77, no. 2 (Dec. 1988; <https://perma.cc/U4XX-5DZV>): 287 – 366, p. 290 (“Properly elaborated, the labor and personality theories together exhaust the set of morally acceptable justifications of intellectual property. In short, intellectual property is either labor or personality, or it is theft.”). See also Peter S. Menell, Mark A. Lemley, Robert P. Merges & Shyamkrishna Balganesh, *Intellectual Property in the New Technological Age: Volume I: Perspectives, Trade Secrets & Patents* (Clause 8 Publishing, 2022), chap. 1, § A, “Philosophical Perspectives.”

The European reception to the personality justification for IP is one reason continental IP systems often include “moral rights,” which, at least until recently, had been less common in Anglo-American jurisdictions. See, on the connection between personality rights in the civil (continental) law and moral rights, John Henry Merryman, “The Refrigerator of Bernard Buffet,” *Hastings L. J.* 27, no. 5 (May 1976; https://repository.uclawsf.edu/hastings_law_journal/vol27/iss5/3/): 1023 – 49, p. 1025. For a more recent illustration of the application of such principles, see Daniel Grant, “Artist’s lawsuit against school that sought to cover up his murals heads to appeals court,” *The Art Newspaper* (Feb. 1, 2023; <https://perma.cc/9EE3-49SA>). See also Palmer, “Are Patents and Copyrights Morally Justified?,” p. 820, n.6 and 841 – 43.

南斯,《前言:拥有想法》,第764页(省略引用)。汤姆·G·帕尔默指出威廉·冯·洪堡也将财产权与人格联系起来,他在《专利和版权在道德上是正当的吗?财产权和理想对象的哲学》一文中批判了知识产权的人格正当性,《哈佛法律与公共政策杂志》第13卷第3期(1990年夏季;<https://perma.cc/J8LY-L4MQ>):817–865,第819–820页和第三部分,特别是第843–849页)。也可参见贾斯汀·休斯,《知识产权哲学》,《乔治城法律杂志》第77卷第2期(1988年12月;<https://perma.cc/U4XX-5DZV>):287–366,第290页(“经过适当阐述,劳动理论和人格理论一起穷尽了在道德上可接受的知识产权正当性的集合。简而言之,知识产权要么是劳动要么是人格,否则就是盗窃。”)。也可参见彼得·S·梅内尔、马克·A·莱姆利、罗伯特·P·默格斯和希亚姆克里希纳·巴尔加内什,《新技术时代的知识产权:第一卷:视角、商业秘密与专利》(Clause 8出版,2022年),第一章,A节,“哲

Consequentialist (incentive-based) arguments also have two major sub-categories: utilitarianism (maximizing preference satisfaction by incentives) and teleology (using incentives to pursue values that deserve government support or encouragement). There are also other theories, sometimes overlapping with each other, such as contract-based arguments and those related to fairness, welfare, and culture.⁶³ I will address and criticize some of these arguments in the following sections.

结果⁵²²（激励论）也有两个主要的子类别：功利主义（通过激励措施最大限度地满足偏好）和目的论（利用激励措施追求值得政府支持或鼓励的价值）。此外还有其他理论，有时相互重叠，如基于的论点以及与公平、福利和文化相关的论点。⁵²²我将在以

学视角”。

欧洲对知识产权人格正当性的接受是大陆法系知识产权制度经常包括“精神权利”的一个原因，至少直到最近，这种权利在英美法系中还不常见。关于大陆法系中的人格权与精神权利之间的联系，见约翰·亨利·梅里曼，《伯纳德·布菲的冰箱》，《黑斯廷斯法律杂志》第 27 卷第 5 期（1976 年 5 月）：https://repository.uclawsf.edu/hastings_law_journal/vol27/iss5/3/）：1023 - 1049，第 1025 页。关于这种原则应用的一个更近的例子，见丹尼尔·格兰特，《艺术家对试图掩盖其壁画的学校的诉讼提交上诉法院》，《艺术新闻》（2023 年 2 月 1 日）：<https://perma.cc/9EE3-49SA>）。也可参见帕尔默，《专利和版权在道德上是正当的吗？》，第 820 页注释 6 和第 841 - 843 页。

⁵²² See, e.g., Hughes, “The Philosophy of Intellectual Property” (discussing the Lockean and Hegelian justifications); William Fisher, “Theories of Intellectual Property,” in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001; <https://perma.cc/4Y LX-P8JF>); idem, “IP Theory” (<https://perma.cc/Y48KHCTV>); Mick Soepboer, “Libertarian views on intellectual property law: An analysis of laissez-faire theories applied on the modern day IP system,” University of Cape Town, School for Advanced Legal Studies, Master Dissertation Commercial Law (July 2009; <https://perma.cc/4HR6-743V>), § 3.3; Edwin C. Hettinger, “Justifying Intellectual Property,” *Philosophy & Public Affairs* 18, no. 1 (Winter 1989): 31 - 52; Vallabhi Rastogi, “Theories of Intellectual Property Rights,” *Enhelion Blogs* (Feb. 27, 2021; <https://perma.cc/U9D5-9V4U>); Oishika Banerji, “Theories of protection of intellectual property rights,” *IPleaders*, in Blog (Oct. 24, 2021; <https://perma.cc/M2BU-T7BC>); Kahsay Debesu Gebray, “Justifications for Claiming Intellectual Property Protection in Traditional Herbal Medicine and Biodiversity Conservation: Prospects and Challenges,” *WIPO-WTO Colloquium Papers* vol. 4 (2013; <https://perma.cc/3TXQ-LNFX>); Adam D. Moore & Kenneth Einar Himma, “Intellectual Property,” in Edward N. Zalta, ed., *Stanford Encyclopedia of Philosophy* (Stanford University, 2011; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980917), § 3.

下部分讨论并批评其中的一些论点。

A 功利主义 Utilitarianism

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

许多自由意志主义者赞成知识产权的一个原因是，他们从功利主义的角度而不是原则性的角度来看待自由意志主义。他们赞成能够增加一般效用或财富的法律。他们相信国家的宣传，认为国家授予的知识产权确实能增加总体财富。

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

例如，见休斯，《知识产权哲学》（讨论洛克式和黑格尔式的正当性）；威廉·费舍尔，《知识产权理论》，收录于斯蒂芬·芒泽编，《财产的法律与政治理论新论》（剑桥大学出版社，2001 年；<https://perma.cc/4YLY-P8JF>）；同上，《知识产权理论》（<https://perma.cc/Y48KHCTV>）；米克·索普博尔，《自由意志主义者对知识产权法的观点：对应用于现代知识产权制度的自由放任理论的分析》，开普敦大学高级法律研究学院，商法硕士论文（2009 年 7 月；<https://perma.cc/4HR6-743V>），第 3.3 节；埃德温·C·赫廷格，《为知识产权辩护》，《哲学与公共事务》第 18 卷第 1 期（1989 年冬季）：31 - 52；瓦拉比·拉斯托吉，《知识产权理论》，Enhelion 博客（2021 年 2 月 27 日；<https://perma.cc/U9D5-9V4U>）；奥伊希卡·班纳吉，《知识产权保护理论》，IPleaders.in 博客（2021 年 10 月 24 日；<https://perma.cc/M2BU-T7BC>）；卡赛·德贝苏·格布雷，《在传统草药和生物多样性保护中要求知识产权保护的正当理由：前景与挑战》，WIPO-WTO 学术讨论会论文集第 4 卷（2013 年；<https://perma.cc/3TXQ-LNFX>）；亚当·D·摩尔和肯尼斯·艾纳·希玛，《知识产权》，收录于爱德华·N·扎尔塔编，《斯坦福哲学百科全书》（斯坦福大学，2011 年），第 3 节。

with utilitarian reasoning if it could lead to such results.

功利主义视角本身就很糟糕，因为各种可怕的政策都可以用这种方式来正当化：为什么不拿走亨利·福特一半的财富分给穷人呢？成千上万的受赠者获得的总福利收益难道不会大于福特减少的效用吗？毕竟，之后他仍然会是一个亿万富翁。再举一个例子：如果一个男人极度渴望性，他的收益难道不会大于他的强奸受害者所遭受的损失吗（比如说，假如她是一个妓女），因此在某些情况下，基于功利主义的理由可以正当化强奸吗？大多数人会认识到，如果功利主义推理会导致这样的结果，那肯定是有问题的。

But even if we ignore the ethical and methodological problems⁶⁴ with the utilitarian or wealth-maximization approach, what is bizarre is that utilitarian libertarians are in favor of IP when they have not demonstrated that IP does increase overall wealth. They merely assume that it does and then base their policy views on this assumption.

但是，即使我们忽略功利主义或财富最大化方法在伦理和方法论上的问题⁵²³，令人奇怪的是，功利主义的自由意志主义者在没有证明知识产权确实能增加整体财富的情况下却支持知识产权。他们只是假定知识产权会增加财富，然后将其政策观点建立在这一假定之上。

It is beyond dispute that the IP system imposes significant costs, in monetary terms alone, not to mention costs in terms of liberty.⁶⁵ The usual argument, that the incentive provided by IP law stimulates additional innovation and creativity, has not even been proven.⁶⁶ It is entirely possible (even likely, in my view) that the IP system not only imposes many billions of dollars of cost on society but actually impedes

⁵²³ On the defects of utilitarianism and interpersonal utility comparisons, see the sources cited in AIP, at n. 40. See also Ronald M. Dworkin, “Is Wealth a Value?”, J. Legal Stud. 9, no. 2 (March 1980; <https://perma.cc/6WS4-LPPB>): 191 – 226; idem, “Why Efficiency? — A Response to Professors Calabresi and Posner,” Hofstra L. Rev. 8, no. 3 (Spring 1980; <https://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/5/>): 563 – 90. 关于功利主义以及人际效用比较的缺陷，可参见《反对知识产权》中注释 40 所引用的资料。也可参见罗纳德·M·德沃金的《财富是一种价值吗？》，发表于《法律研究杂志》第 9 卷第 2 期（1980 年 3 月；<https://perma.cc/6WS4-LPPB>）：191 – 226；以及同一作者的《为何要效率？——对卡拉布雷西教授和波斯纳教授的回应》，发表于《霍夫斯特拉法律评论》第 8 卷第 3 期（1980 年春季；<https://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/5/>）：563 – 590。

innovation, adding damage to injury.

毫无疑问，知识产权制度仅在金钱方面就会带来巨大的成本，更不用说在自由方面的成本了。⁵²⁴通常的观点是，知识产权法提供的激励会刺激更多的创新和创造，但这甚至都没有得到证实。⁵²⁵知识产权制度不仅给社会带来数十亿美元的成本，而且实际上还阻碍创新，这是完全有可能的（在我看来甚至很有可能），这无疑是在雪上加霜。

But even if we assume that the IP system does stimulate some additional, valuable innovation, no one has established that the value of the purported gains is greater than the costs.⁶⁷ If one asks advocates of IP how they know there is a net gain, the result is silence (this is especially true of patent attorneys). They cannot point to any study to support their utilitarian contention; they usually just point to Article 1, Section 8 of the Constitution (if they are even aware of it), as if the backroom dealings of politicians two centuries ago are some sort of empirical evidence in favor of state grants of monopoly privilege.

但即使我们假定知识产权制度确实刺激了一些额外的、有价值的创新，也没有人证实所谓收益的价值大于成本。⁵²⁶如果有人问知识产权的倡导者他们如何知道有净收益，

⁵²⁴ See studies cited in references in note 68, below; also Kinsella, “Reducing the Cost of IP Law,” *Mises Daily* (Jan. 20, 2010); idem, “What Are the Costs of the Patent System?,” *Mises Economics Blog* (Sep. 27, 2007); Julio H. Cole, “Patents and Copyrights: Do the Benefits Exceed the Costs?,” *J. Libertarian Stud.* 15, no. 4 (Fall 2001); <https://mises.org/library/patents-and-copyrights-do-benefits-exceed-costs-0>: 79 – 105, the section “Costs of the Patent System,” p. 89 et seq.

见下文注释 68 中的参考文献所引用的研究；也可参见斯蒂芬·金塞拉的《降低知识产权法的成本》，发表于米塞斯日报（2010 年 1 月 20 日）；同一作者的《专利制度的成本是什么？》，发表于米塞斯经济学博客（2007 年 9 月 27 日）；胡利奥·H·科尔的《专利和版权：收益是否超过成本？》，发表于《自由意志主义研究杂志》第 15 卷第 4 期（2001 年秋季；<https://mises.org/library/patents-and-copyrights-do-benefits-exceed-costs-0>）：79 – 105，“专利制度的成本”一节，第 89 页及后续。

⁵²⁵ See Kinsella, “Yet Another Study Finds Patents Do Not Encourage Innovation,” *Mises Economics Blog* (July 2, 2009).

见斯蒂芬·金塞拉的《又一项研究发现专利并不鼓励创新》，发表于米塞斯经济学博客（2009 年 7 月 2 日）。

⁵²⁶ See Boldrin & Levine, *Against Intellectual Monopoly*; Kinsella, “Yet Another Study Finds Patents Do Not Encourage Innovation”; and references in note 65, above and in

结果就是沉默（专利律师尤其如此）。他们无法指出任何研究来支持他们的功利主义论点；他们通常只是指出《宪法》第 1 条第 8 款（如果他们知道的话），似乎两个世纪前政客们的幕后交易就是支持国家授予垄断特权的某种经验证据。

In fact, as far as I am able to tell, every study that attempts to tally the costs and benefits of copyright or patent law concludes either that these schemes cost more than they are worth, that they actually reduce innovation, or that the research is inconclusive. There are no studies unambiguously showing a net societal gain.⁶⁸ There are only repetitions of state propaganda.

事实上，就我所知，每一项试图计算版权法或专利法的成本和收益的研究都得出这样的结论：这些方案的成本大于其价值，它们实际上减少了创新，或者研究结果不确定。没有任何研究明确显示出社会有净收益。⁵²⁷ 只有对国家宣传的重复。

The Founders only had a hunch that copyrights and patents might “promote the Progress of Science and useful Arts”⁶⁹—that the cost of this system would be “worth it.” But they had no serious evidence. A hundred and fifty years later there was still none. In an exhaustive 1958 study prepared for the U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, economist Fritz Machlup concluded:

No economist, on the basis of present knowledge, could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss upon

note 68, below.

见博尔德里尼和莱文的《反对知识垄断》；斯蒂芬·金塞拉的《又一项研究发现专利并不鼓励创新》；以及上文注释 65 和下文注释 68 中的参考文献。

⁵²⁷ See Kinsella, “The Overwhelming Empirical Case Against Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); idem, “Legal Scholars: Thumbs Down on Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); idem, “KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished,” Kinsella on Liberty Podcast (Nov. 24, 2021); and idem, “Yet Another Study Finds Patents Do Not Encourage Innovation,” Mises Economics Blog (July 2, 2009).

见斯蒂芬·金塞拉的《反对专利和版权的压倒性实证案例》，C4SIF 博客（2012 年 10 月 23 日）；同一作者的《法律学者：对专利和版权投反对票》，C4SIF 博客（2012 年 10 月 23 日）；同一作者的《KOL364 | 苏荷论坛论证对阵理查德·爱泼斯坦：专利和版权法应被废除》，斯蒂芬·《金塞拉谈自由》播客（2021 年 11 月 24 日）；以及同一作者的《又一项研究发现专利并不鼓励创新》，米塞斯经济学博客（2009 年 7 月 2 日）。

*society. The best he can do is to state assumptions and make guesses about the extent to which reality corresponds to these assumptions... If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one.*⁷⁰

国父们只是凭直觉认为，版权和专利可以“促进科学和实用技艺的进步”⁵²⁸——这种制度的成本是“值得的”。但他们没有确凿的证据。一百五十年后，依然没有证据。1958年，经济学家弗里茨·马赫卢普（Fritz Machlup）在为美国参议院专利、商标和版权小组委员会准备的一份详尽研究报告中得出结论：

任何经济学家都不可能在现有知识的基础上肯定地指出，目前运行的专利制度会给社会带来净收益或净损失。他所能做的最好的事情就是提出假设，并猜测现实在多大程度上与这些假设相符.....如果我们没有专利制度，那么根据我们目前对其经济后果的了解，建议建立专利制度是不负责任的。⁵²⁹

And the empirical case for patents has not been shored up at all in the last fifty years. As George Priest wrote in 1986, “[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property.”⁷¹ Similar comments are echoed by other researchers. François Lévêque and Yann Ménière, for example, of the Ecole des Mines de Paris (an engineering university), observed in 2004:

The abolition or preservation of intellectual property protection is... not just a purely

⁵²⁸ U.S. Constitution, Art. I, Sec. 8, Cl. 8. For more background on the origins of copyright in America, see references in note 56, above.

美国宪法》第 1 条第 8 款。I, Sec. 8. 有关美国版权起源的更多背景资料，请参见上文注释 56 中的参考文献。

⁵²⁹ Fritz Machlup, *An Economic Review of the Patent System* (1958; <https://mises.org/library/economic-review-patent-system>), pp. 79 – 80.

弗里茨·马赫卢普，《专利制度的经济评论》（1958 年；<https://mises.org/library/economic-review-patent-system>），第 79-80 页。

*theoretical question. To decide on it from an economic viewpoint, we must be able to assess all the consequences of protection and determine whether the total favorable effects for society outweigh the total negative effects. Unfortunately, this exercise [an economic analysis of the cost and benefits of intellectual property] is no more within our reach today than it was in Machlup's day [1950s].*⁷²

在过去的五十年中，专利权的经验论证根本没有得到加强。正如乔治·普里斯特在 1986 年所写的那样，：“就目前的知识水平而言，经济学家对专利制度或其它知识产权制度对社会福利的影响几乎一无所知。”⁵³⁰ 其他研究人员也发表了类似的意见。例如，巴黎矿业学院（一所工程大学）的弗朗索瓦·勒韦克（François Lévêque）和扬·梅尼埃（Yann Ménière）在 2004 年指出：

废除或保留知识产权保护.....不仅仅是一个纯粹的理论问题。要从经济学的角度对其作出决定，我们必须能够评估保护的所有后果，并确定对社会的总体有利影响是否大于总体不利影响。遗憾的是，这项工作（对知识产权的成本和收益进行经济分析）在今天和马克卢普时代（20 世纪 50 年代）一样超出了我们的能力范围。⁵³¹

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

⁵³⁰ George Priest, “What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung,” Research in Law & Econ. 8 (1986): 19 – 24.
乔治·普里斯特，《关于知识产权经济学家能告诉律师什么：对张五常的评论》，《法律与经济研究》第 8 卷（1986 年）：19-24 页。

⁵³¹ François Lévêque & Yann Ménière, The Economics of Patents and Copyrights (Berkely Electronic Press, 2004; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=642622), at 102.
弗朗索瓦·勒韦克和扬·梅尼埃，《专利与版权经济学》（伯克利电子出版社，2004 年；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=642622），第 102 页。

system fails on its own terms" (p. 145).⁷³

最近，波士顿大学法学院教授（兼经济学家）迈克尔·默勒和吉姆·贝森得出结论，平均而言，专利制度会阻碍创新。正如他们所写：“如今看来，专利不太可能是一种总体上鼓励创新的有效政策工具”（第 216 页）。相反，如今似乎很明显，“专利对创新形成了阻碍”（第 146 页）。简而言之，“专利制度在其自身的目标上失败了”（第 145 页）。

⁵³²

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

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

Our preferred policy solution is to abolish patents entirely to find other legislative instruments, less open to lobbying and rent seeking, to foster innovation when there is clear evidence that laissez-faire undersupplies it.⁷⁴

在最近的一篇文章中，经济学家米凯莱·博尔德里尼和大卫·K·莱文指出：

反对专利的理由可以简单概括为：没有经验证据表明专利有助于提高创新和生产力....。这种脱节是所谓“专利之谜”的根源所在：尽管专利数量及其法律保护力度大幅增加，但美国经济的技术进步速度既没有显著加快，研发支出水平也没有大幅提高.....

我们倾向的政策解决方案是完全废除专利，寻找其他不太容易受到游说和寻租影响的立法工具，在有明确证据表明自由放任会导致创新供给不足时促进创新。⁵³³

⁵³² James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (Princeton University Press, 2008).

詹姆斯·贝森和迈克尔·J·默勒，《专利失败：法官、官僚和律师如何将创新者置于风险之中》（普林斯顿大学出版社，2008 年）。

⁵³³ Michele Boldrin & David K. Levine, "The Case Against Patents," *J. Econ. Perspectives* 27 no. 1 (Winter 2013; <https://perma.cc/Q5NT-9CGA>): 3 - 22.

The Founders' hunch about IP was wrong. Copyright and patent are not necessary for creative or artistic works, invention, and innovation. They do not even encourage it. These monopoly privileges enrich some at the expense of others, distort the market and culture, and impoverish us all.⁷⁵ Given the available evidence, anyone who accepts utilitarianism should be opposed to patent and copyright.⁷⁶

国父们对知识产权的直觉预感是错误的。版权和专利对于创造性或艺术性作品、发明和创新并非必要。它们甚至不鼓励创新。这些垄断特权以牺牲他人利益为代价使一些人致富，扭曲了市场和文化，并使我们所有人陷入贫困。⁵³⁴鉴于现有证据，任何接受功利主义的人都应该反对专利和版权。⁵³⁵

米凯莱·博尔德里尼和大卫·K·莱文，《反对专利的案例》，《经济展望杂志》第 27 卷第 1 期（2013 年冬季；<https://perma.cc/Q5NT-9CGA>）：3-22 页。

⁵³⁴ See, e.g., Kinsella, "Leveraging IP," Mises Economics Blog (Aug. 1, 2010); idem, "Milton Friedman (and Rothbard) on the Distorting and Skewing Effect of Patents," C4SIF Blog (July 3, 2011); Matt Ridley, *How Innovation Works: And Why It Flourishes in Freedom* (Harper, 2020), p. 347 ("patents tend to favour inventions rather than innovations: upstream discoveries of principles, rather than downstream adaptation of devices to the market.").

例如，可参见斯蒂芬·金塞拉的《利用知识产权》，米塞斯经济学博客（2010 年 8 月 1 日）；同一作者的《米尔顿·弗里德曼（和罗斯巴德）论专利的扭曲和偏离效应》，C4SIF 博客（2011 年 7 月 3 日）；马特·里德利的《创新如何运作：以及为何它在自由中蓬勃发展》（哈珀出版社，2020 年），第 347 页（“专利往往有利于发明而非创新：有利于原理的上游发现，而非设备对市场的下游适应”）。

⁵³⁵ Another problem with the wealth-maximization approach is that it has no logical stopping point. If adding (and increasing) IP protection is a cost worth paying to stimulate additional innovation and creation over what would occur on a free market—that is, if the amount of innovation and creation absent IP law is not enough, then how do we know that we have enough now, under a system of patent and copyright? Maybe the penalties or terms should be increased: impose capital punishment, triple the patent and copyright term. And what if there still is not enough? Why don't we expropriate taxpayer funds and set up a government award or prize system, like a huge state-run Nobel prize with thousands of winners, to hand out to deserving innovators, so as to incentivize even more innovation? Incredibly, this has been suggested, too—even by Nobel Prize winners. See Kinsella, "\$30 Billion Taxfunded Innovation Contracts: The 'Progressive-Libertarian' Solution," Mises Economics Blog (Nov. 23, 2008); idem, "Libertarian Favors \$80 Billion Annual Tax-Funded 'Medical Innovation Prize Fund,'" Mises Economic Blog (Aug. 12, 2008).

财富最大化方法的另一个问题是，它没有逻辑止点。如果增加（和提高）知识产权保

B 自由意志主义创造论 ⁵³⁶

Libertarian Creationism ⁷⁷

Another reason why many libertarians favor IP is their confusion about the origin of property and property rights. They accept the careless observation that an individual can come to own things in three ways: through homesteading an unowned thing, by contractual exchange, and by creation. Therefore, they reason, if you own what you create, this is especially true for useful ideas. For example, libertarian philosopher Tibor Machan has stated: “[I]t would seem that so called intellectual stuff is an even better candidate for qualifying as private property than is, say, a tree or mountain.”⁷⁸ And Objectivist philosopher David Kelley writes:

*[T]he essential basis of property rights lies in the phenomenon of creating value... [F]or things that one has created, such as a new product, one's act of creation is the source of the right, regardless of scarcity.*⁷⁹

许多自由意志主义支持知识产权的另一个原因是他们混淆了财产和财产权的起源。他们接受了一种草率的观点，即个人可以通过三种方式获得对事物的所有权：拓殖无主之物、交换和创造。因此，他们的理由是，如果你拥有你创造的东西，那么对于有用的思想来说尤其如此。例如，自由意志主义哲学家蒂博尔·马钱曾说过：“似乎所谓的知

护是值得付出的代价，以刺激比自由市场上更多的创新和创造——也就是说，如果没有知识产权法，创新和创造的数量还不够多，那么我们怎么知道在专利和版权制度下，我们现在的创新和创造已经足够多了呢？也许应该加重处罚或提高期限：处以极刑，将专利和版权期限延长三倍。如果还是不够呢？为什么我们不征用纳税人的资金，建立一个政府奖励或奖金制度，就像一个由国家管理的、有成千上万获奖者的诺贝尔奖一样，颁发给值得奖励的创新者，以激励更多的创新？令人难以置信的是，这也被提出过——甚至是诺贝尔奖获得者也提出过。见斯蒂芬·金塞拉的《300 亿美元税收资助的创新：“进步自由意志主义”解决方案》，米塞斯经济学博客（2008 年 11 月 23 日）；同一作者的《自由意志主义者赞成 800 亿美元年度税收资助的“医疗创新奖金基金”》，米塞斯经济博客（2008 年 8 月 12 日）。

⁵³⁶ See also Part IV.C in “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15).
另见《《反对知识产权》二十年后：回顾与展望》（第 15 章）第四部分 C 节。

识产品比比如一棵树或一座山更有资格成为私有财产。”⁵³⁷ 而客观主义哲学家大卫·凯利写道：

“[财产权]的根本基础在于创造价值的现象……[对于]一个人所创造的东西，比如一种新产品，一个人的创造行动是权利的来源，而不论其是否稀缺。”⁵³⁸

⁵³⁷ Tibor Machan, “Intellectual Property and the Right to Private Property,” Mises.org working paper (2006; <https://mises.org/wire/new-working-paper-machan-ip>), discussed in Kinsella, “Owning Thoughts and Labor,” Mises Economics Blog (Dec. 11, 2006), and in idem, “Remembering Tibor Machan, Libertarian Mentor and Friend: Reflections on a Giant,” StephanKinsella.com (April 19, 2016). See also the similar “ontology” based argument of J. Neil Schulman, mentioned in “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17).

蒂博尔·马钱：《知识产权与私有财产权》，Mises.org 工作文件（2006 年；<https://mises.org/wire/new-working-paper-machan-ip>），在斯蒂芬·金塞拉的《拥有思想和劳动》，米塞斯经济学博客（2006 年 12 月 11 日）以及同一作者的《缅怀蒂博尔·马钱，自由意志主义导师和朋友：对一位巨人的反思》，StephanKinsella.com（2016 年 4 月 19 日）中进行了讨论。另见 J. 尼尔·舒尔曼类似的基于“本体论”的论点，在《与舒尔曼关于逻辑权利和媒介承载财产的对话》（第 17 章）中提及。

⁵³⁸ Quoted in Kinsella, “Rand on IP, Owning ‘Values’, and ‘Rearrangement Rights,’” Mises Economics Blog (Nov. 16, 2009). The idea that you own what you “produce” or “create” is widespread. See, e.g., Kirzner on Mill:

“The institution of property,” John Stuart Mill remarked, “when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it. The foundation of the whole is the right of producers to what they themselves have produced.” The purpose of this paper is to point out the ambiguity of the phrase “what a man has produced”, and to draw attention, in particular, to one significant, economically valid, meaning of the term,—a meaning involving the concept of entrepreneurship—which seems to have been overlooked almost entirely.… Precision in applying the term “what a man has produced” seems to be of considerable importance.

Israel M. Kirzner, “Producer, Entrepreneur, and the Right to Property,” Reason Papers No. 1 (Fall 1974; <https://reasonpapers.com/archives/>): 1 – 17, p.1, quoting J.S. Mill, Principles of Political Economy (Ashley Edition, London, 1923), p. 218. As another example, patent attorney Dale Halling writes: “A patent is a property right it is not a monopoly. Like all property the source of the property right is creation.” See comments

The mistake is the notion that creation is an independent source of ownership, independent from homesteading and contracting. Yet it is easy to see that “creation” is neither necessary nor sufficient as a source of ownership. If you carve a statue using your own hunk of marble, you own the resulting creation because you already owned the marble. You owned it before, and you own it now.⁸⁰ And if you homestead an unowned resource, such as a field, by using it and thereby establishing publicly visible borders, you own it because this first use and embordering gives you a better claim than latecomers.⁸¹ Thus, creation is not necessary for ownership to arise.

错误在于认为创造是一种独立的所有权来源，独立于拓殖和承包。然而，很容易看出“创造”既不是所有权产生的必要条件，也不是充分条件。如果你用自己的一大块大理石雕刻一座雕像，你拥有由此产生的作品，是因为你已经拥有了那块大理石。你以前拥有它，现在也拥有它。⁵³⁹如果你拓殖了一块无主的资源，比如一块田地，通过使用

in Kinsella, “Pro-IP Libertarians Upset about FTC Poaching Patent Turf,” Mises Economics Blog (Aug. 24, 2011).

这段话引自斯蒂芬·金塞拉的《兰德论知识产权、拥有“价值”和“重新排列权”》，发表于米塞斯经济学博客（2009 年 11 月 16 日）。认为你拥有你“生产”或“创造”的东西这种观点很普遍。例如，可参考柯兹纳对穆勒的论述：

“财产制度，”约翰·斯图亚特·穆勒评论道，“当局限于其基本要素时，在于承认每个人对他或她通过自身努力所生产的东西，或者通过礼物或公平协议，在没有强迫或欺诈的情况下从生产者那里获得的东西，拥有排他性的处置权。整个制度的基础是生产者对他们自己所生产的东西的权利。”本文的目的是指出“一个人所生产的东西”这一短语的模糊性，并特别提请注意这个术语的一个重要的、在经济上有效的含义——一种涉及企业家精神概念的含义，而这个含义似乎几乎完全被忽视了……在使用“一个人所生产的东西”这个术语时的精确性似乎相当重要。

伊斯雷尔·M·柯兹纳，《生产者、企业家与财产权》，《理性论文》第 1 期（1974 年秋季；<https://reasonpapers.com/archives/>）：1-17 页，第 1 页，引用了 J.S.穆勒的《政治经济学原理》（阿什利版，伦敦，1923 年），第 218 页。另一个例子是，专利律师戴尔·哈林写道：“专利是一种财产权，它不是垄断。像所有财产一样，财产权的来源是创造。”见斯蒂芬·金塞拉的《支持知识产权的自由意志主义者对联邦贸易委员会侵犯专利领域感到不满》中的评论，发表于米塞斯经济学博客（2011 年 8 月 24 日）。

⁵³⁹ See, on this point, Sheldon Richman, “Intellectual ‘Property’ Versus Real Property: What Are Copyrights and What Do They Mean for Liberty?,” The Freeman (12 June 2009; <https://fee.org/resources/intellectual-property-versus-real-property/>):

If someone writes or composes an original work or invents something new, the argument goes, he or she should own it because it would not have existed without the

它从而建立了公开可见的边界，你就拥有了它，因为这种首次使用和划界使你比后来者拥有更合理的权利要求。⁵⁴⁰因此，创造对于所有权的产生来说不是必要的。

creator. I submit, however, that as important as creativity is to human flourishing, it is not the source of ownership of produced goods... So what is the source? Prior ownership of the inputs through purchase, gift, or original appropriation. This is sufficient to establish ownership of the output. Ideas contribute no necessary additional factor. If I build a model airplane out of wood and glue, I own it not because of any idea in my head, but because I owned the wood, the glue, and myself. If Howard Roark's evil twin trespassed on your land and, using your materials, built the most creatively original house ever seen, would he own it? Of course not. You would—and you'd have every right to tear it down.

See also Dan Sanchez, "The Fruit of Your Labor... is a good, not its form," Medium (Oct. 30, 2014; <https://perma.cc/GD28-JS44>).

关于这一点，可参考谢尔登·里奇曼的《知识产权与不动产：版权是什么？它们对自由意味着什么？》，发表于《自由人》（2009年6月12日；<https://fee.org/resources/intellectual-property-versus-real-property>）：

如果有人创作了原创作品或发明了新东西，那么他或她就应该拥有这些作品或发明，因为如果没有创作者，这些作品或发明就不会存在。然而，我认为，创造力对人类的繁荣固然重要，但它并不是生产产品所有权的来源.....那么来源是什么呢？通过购买、馈赠或先占而获得的投入品的先前所有权。这足以确立产出的所有权。思想并不构成必要的额外因素。如果我用木头和胶水做了一架飞机模型，我拥有它并不是因为我脑子里有什么想法，而是因为我拥有木头、胶水和我自己。如果霍华德·罗克的邪恶孪生兄弟闯入你的土地，用你的材料建造了一栋有史以来最有创意的房子，他会拥有这栋房子吗？当然不会。你会拥有它，而且你完全有权把它拆掉。

另见丹·桑切斯的《你劳动的成果.....是一种物品，而不是它的形式》，发表于 Medium（2014年10月30日；<https://perma.cc/GD28-JS44>）。

⁵⁴⁰ See "What Libertarianism Is" (ch. 2); Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1, 2, and 7; David Hume, *A Treatise of Human Nature*, Selby-Bigge, ed. (Oxford, 1968), Book III, Part II, Section III n16:

Some philosophers account for the right of occupation, by saying, that every one has a property in his own labour; and when he joins that labour to any thing, it gives him the property of the whole: But, 1. There are several kinds of occupation, where we cannot be said to join our labour to the object we acquire: As when we possess a meadow by grazing our cattle upon it. 2. This accounts for the matter by means of accession; which is taking a needless circuit. 3. We cannot be said to join our labour to any thing but in a figurative sense. Properly speaking, we only make an alteration on it by our labour. This forms a relation betwixt us and the object; and thence arises the property, according to the preceding principles.

See also "Against Intellectual Property After Twenty Years: Looking Back and Looking Forward" (ch. 15), at notes 56 – 57.

But suppose you carve a statue in someone else's marble, either without permission or with permission, such as when an employee works with his employer's marble by contract. You do not own the resulting statue, even though you "created" it. If you are using marble stolen from another person, your vandalizing it does not take away the owner's claims to it. And if you are working on your employer's marble, he owns the resulting statue. Thus, creation is not sufficient for ownership rights to arise.

但是，假设你在未经许可或获得许可的情况下，在他人的大理石上雕刻了一座雕像，比如当一名雇员根据使用其雇主的大理石时。尽管你“创造”了雕像，但你并不拥有雕像的所有权。如果你使用的大理石是从别人那里偷来的，你的破坏行为并不能剥夺物主对大理石的所有权。而如果你正在用你雇主的大理石进行工作，他拥有由此产生的雕像。因此，创造对于所有权的产生来说不是充分条件。

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

这并不是否认知识、创造和创新的重要性。人的行动必然会使用（可拥有的）稀缺手段，而人的行动也会受到有关因果规律的技术知识或其他实用信息的影响。行动人的知识、信仰和价值观会影响他选择追求的目的，以及他为实现所追求的目的而选择的因果手段（下一节将进一步讨论）。

见《何为自由意志主义》（第 2 章）；汉斯-赫尔曼·霍普的《社会主义与资本主义理论》第 1、2 和 7 章；大卫·休谟的《人性论》，塞尔比-比格编辑（牛津，1968 年），第三卷，第二部分，第三节注释 16：

有些哲学家解释占有权时说，每个人对自己的劳动都有财产权；当他把自己的劳动与任何东西结合在一起时，他就拥有了整个东西的财产权：但是，1.有几种占有，我们不能说我们的劳动与我们获得的物品是结合在一起的：就像我们在草地上放牧而拥有草地一样。2. 这是用“加入”来说明问题；这是在走不必要的弯路。3. 我们不能说把我们的劳动与任何事物结合在一起，这只是一种比喻的意义。正确地说，我们只是用我们的劳动改变了它。这就形成了我们与物体之间的关系；根据上述原则，财产由此产生。

另见《《反对知识产权》二十年后：回顾与展望》（第 15 章），注释 56-57。

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

*One can acquire and increase wealth either through homesteading, production and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways.*⁸²

创造确实是增加财富的一个重要手段。正如汉斯-赫尔曼·霍普所揭示的：

人们可以通过拓殖、生产和交换来获取和增加财富，也可以通过征用和剥削拓殖者、生产者或交换者来获取和增加财富。别无他法。⁵⁴¹

While production or creation can certainly increase wealth, it is not an independent source of ownership or rights. Production is not the creation of new matter; it is the transformation of things from one form to another—the transformation of things someone already owns, either the producer or someone else. Using your labor and creativity to transform your property into more valuable finished products gives you greater wealth, but not additional property rights.⁸³ (If you transform someone else’s property, he owns the resulting transformed thing, even if it is now more valuable.)

生产或创造固然可以增加财富，但它并不是所有权或权利的独立来源。生产并不是创造新的物质，而是将事物从一种形式转化为另一种形式——将生产者或其他人已经拥有的事物进行转化。利用你的劳动和创造力将你的财产转化为更有价值的成品，会给你带来更多的财富，但不会给你带来额外的财产权。⁵⁴²（如果你转变了别人的财产，

⁵⁴¹ Hans-Hermann Hoppe, “Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order,” in *The Economics and Ethics of Private Property*, at 50 (emphasis added).

汉斯-赫尔曼·霍普，《银行业、民族国家与国际政治：对当前经济秩序的社会学重构》，收录于《私有财产的经济学与伦理学》，第 50 页（着重号为原文所加）。

⁵⁴² See Kinsella, “Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and ‘Rearranging,’ ” Mises Economics Blog (Sep. 29, 2010). See also Pierre-Joseph Proudhon, “Les Majorats littéraires,” Luis Sundkvist, trans. (1868), in Lionel Bently & Martin Kretschmer, eds., *Primary Sources on Copyright (1450 – 1900)*; www.copyrighthistory.org/cam/index.php, at pp. 11 et seq.:

那么即使现在这个转变后的东西更有价值，所有者仍然是他。)

In other words, creation is not the basis for property rights in scarce goods. Creating something does not make you its owner. A mother who creates a child does not own it. A vandal who creates a mural on someone else's property does not own it. An employee who creates a consumer device using his employer's facilities and materials does not own it. Creation is not sufficient to generate rights. And those who transform

The masters of science instruct us all—and the supporters of literary property are the first to argue this—that man does not have the capability of creating a single atom of matter; that all his activity consists of appropriating the forces of nature, of channeling these and modifying their effects, of composing or decomposing substances, of changing their forms, and, by this steering of the natural forces, by this transformation of substances, by this separation of elements, of making nature [la création] more useful, more fertile, more beneficial, more brilliant, more profitable. So that all human production consists (1^o) of an expression of ideas; (2^o) a displacement of matter.

This is essentially Spooner's mistake: he has a broad definition of "wealth," which includes knowledge, ideas, inventions, etc., and then assumes that property is just wealth that can be possessed. Thus, ideas can "be property." See Spooner, "The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas,"

§ 2 - 3, et pass. This also highlights the importance of using the term property to refer to the property rights individuals have with respect to owned resources, as I note in "What Libertarianism Is" (ch. 2), Appendix I.

见金塞拉在其《洛克论知识产权：米塞斯、罗特巴德和兰德论创造、生产和“重新安排”》一文中指出，“米塞斯经济学博客”(2010年9月29日)，参见皮埃尔-约瑟夫·普鲁东的《文学大亨》一文，路易斯·桑德奎斯特译，1868年，收录于莱昂内尔·本特利和马丁·克雷施默编著的《版权原始资料(1450-1900)》(www.copyrighthistory.org/cam/index.php)，第11页及后续页。：

科学大师们教导我们所有人——而文学财产权的支持者们首先提出这一观点——人类没有创造哪怕一个物质原子的能力；人类的所有活动都在于占有自然之力，引导这些力量并改变其效果，合成或分解物质，改变其形式，通过对自然力量的这种引导，通过对物质的这种转变，通过对元素的这种分离，使自然[创造]更有用、更肥沃、更有益、更辉煌、更有利可图。所以，所有人类生产都包括(1)思想的表达；(2)物质的位移。

这本质上是斯波纳的错误：他对“财富”有一个宽泛的定义，其中包括知识、思想、发明等等，然后假设财产只是可以拥有的财富。因此，思想可以“成为财产”。见斯波纳的《知识产权法或关于作者和发明者对其思想拥有永久财产权的论文》，第2-3节及其他各处。这也凸显了如我在《什么是自由意志主义》(第2章)附录一中所指出的，使用“财产”一词来指代个人对所拥有资源所拥有的财产权的重要性。

their own property to create a more valuable product own the resulting product because they already owned the original material, not because of creation. The creator of an idea does not thereby own the idea.⁸⁴

换句话说，创造并不是稀缺物品财产权的基础。创造某样东西并不能使你成为它的所有者。创造孩子的母亲并不拥有孩子。在他人财产上创作壁画的破坏者并不拥有壁画。使用雇主的设施和材料创造出消费设备的雇员并不拥有它。创造不足以产生权利。而那些改造自己的财产以创造出更有价值的产品的人之所以拥有这些产品，是因为他们已经拥有了原始材料，而不是因为创造。一个想法的创造者并不因此就拥有这个想法。

⁵⁴³

⁵⁴³ In fact, as Proudhon notes:

[I]n the strict sense of the term, we do not produce our ideas any more than we produce physical substances. Man does not create his ideas—he receives them. He does not at all make truth—he discovers it. He invents neither beauty, nor justice—they reveal themselves to his soul spontaneously, like the conceptions of metaphysics, in the perception of the phenomena of the world, in the relations between things. The intelligible estate [fonds] of nature is, in the same way as its tangible estate, outside of our domain: neither reason, nor the substance of things are ours. Even that very ideal which we dream about, which we pursue, and which causes us to commit so many acts of folly—this mirage of our understanding and our heart—we are not its creators, we are simply those who are able to see it.

Proudhon, “Les Majorats littéraires,” at p. 12. Or as Isaac Newton put it, “If I have seen further it is only by standing on the shoulders of giants.” Letter to Robert Hooke (February 15, 1676).

事实上，正如蒲鲁东指出的那样：

[从严格意义上讲，我们生产思想，就像生产物质一样。人不是创造思想，而是接受思想。他根本不是创造真理，而是发现真理。他既不创造美，也不创造正义，而是在对世界现象的感知中，在事物之间的关系中，像形而上学的概念一样，自发地向他的灵魂显现。自然界的智慧财产[fonds]与自然界的真实财产一样，都不属于我们的范畴：理性和事物的本质都不属于我们。即使是我们梦想的、我们追求的、导致我们犯下无数愚蠢行为的理想——我们的理解力和心灵的海市蜃楼——我们也不是它的创造者，我们只是能够看到它的人。

蒲鲁东，《文学大亨》，第 12 页。或者正如艾萨克-牛顿所说：“如果说我看得更远，那只是站在巨人的肩膀上”。致罗伯特-胡克的信（1676 年 2 月 15 日）。

C 契约的方法 The Contractual Approach

Many libertarians also argue that some form of copyright or patent could be created by contractual techniques—for example, by selling a patterned medium (book, CD, etc.) or useful machine to a buyer on the condition that it not be copied or revealed to others. For example, Brown sells an innovative mousetrap to Green on the condition that Green not reproduce it.⁸⁵

许多自由意志主义者还认为，可以通过技术来创造某种形式的版权或专利——例如，以不得复制或向他人透露为条件，向买方出售有图案的媒介（书籍、光盘等）或有用的机器。例如，布朗将创新的捕鼠器卖给格林，条件是格林不得复制。⁵⁴⁴

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

然而，要使这种知识产权仿效法定知识产权，它不仅约束卖方和买方，还要约束所有第三方。买方和卖方之间的无法做到这一点——它只约束买方和卖方。在上述例子中，即使格林同意不复制布朗的捕鼠器，布莱克与布朗也没有任何协议。布朗没有权利阻止布莱克根据其掌握的任何知识或信息使用布莱克自己的财产。

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

现在，如果格林不经布朗的允许，把布朗的手表卖给布莱克，大多数自由意志主义者

⁵⁴⁴ This is Rothbard's example, from "Knowledge, True and False," in *The Ethics of Liberty*, which is discussed at pp. 51–55 in AIP. See also Kinsella, "Richard O. Hammer: Intellectual Property Rights Viewed As Contracts," C4SIF Blog (June 13, 2021).

这是罗斯巴德在《自由的伦理》中的《真实与虚假的知识》一文中所举的例子，在《反对知识产权》中第 51 至 55 页进行了讨论。另见斯蒂芬·金塞拉的《理查德·O·哈默：被视为的知识产权》，发表于 C4SIF 博客（2021 年 6 月 13 日）。

会说，布朗仍然拥有这块手表，可以从布莱克那里拿走它。为什么类似的逻辑不能适用于捕鼠器的设计呢？

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

两者的区别在于，手表是一种稀缺资源，是有所有者的，而捕鼠器的设计只是一种信息，不是一种可以拥有的东西。手表是一种稀缺资源，仍然归布朗所有。布莱克需要得到布朗的同意才能使用它。但在捕鼠器的案例中，布莱克只是学会了如何制作捕鼠器。他利用这些信息，通过自己的身体和财产制作了捕鼠器。他不需要布朗的许可，因为他使用的不是布朗的财产。

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

因此，知识产权倡导者不得不说，布朗拥有关于其捕鼠器配置方式的信息。然而，此举是循环论证，因为它断言了需要证明的东西：存在知识产权。因此，知识产权倡导者不得不说，布朗拥有关于其捕鼠器配置方式的信息。然而，此举是循环论证，因为它断言了需要证明的东西：存在知识产权。

If Black does not return Green's watch, Green is without his watch precisely because the watch is a scarce good. But Black's knowing how to make a mousetrap does not take away Green's own mousetrap-making knowledge, highlighting the nonscarce nature of information or patterns. In short, Brown may retake his property from Black but has no right to prevent Black from using information to guide his actions. Thus, the contract approach fails as well.⁸⁶

如果布莱克不归还格林的手表，格林就没有了手表，这正是因为手表是稀缺物品。但是，布莱克知道如何制作捕鼠器并不会剥夺格林自己制作捕鼠器的知识，这突出了信息或模式的非稀缺性。简而言之，布朗可以从布莱克手中夺回自己的财产，但无权阻

止布莱克利利用信息指导自己的行动。因此，方法也失败了。⁵⁴⁵

D 人的行动中的学习、模仿和知识

Learning, Emulation, and Knowledge in Human Action

Another way to understand the error in treating information, ideas, recipes, and patterns as ownable property is to consider IP in the context of human action. Mises explains that “[t]o act means: to strive after ends, that is, to choose a goal and to resort to means in order to attain the goal sought.”⁸⁷ Knowledge and information of course play a key role in action as well. As Mises puts it, “Action … is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and guided by ideas concerning the suitability or unsuitability of definite means.”⁸⁸

理解把信息、思想、秘方和模式视为可拥有财产的错误的另一种方法是把知识产权放在人的行动的背景下考虑。米塞斯解释说：“行动意味着：追求目的，即选择一个目标

⁵⁴⁵ See also Wendy McElroy’s perceptive comments on the “copyright by contract” approach in her note to me reprinted in Kinsella, “McElroy: ‘On the Subject of Intellectual Property’ (1981),” C4SIF Blog (March 19, 2013); also Boudewijn Bouckaert, “What is Property?,” Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 775 – 816, pp. 795 & 804 – 805. On the title-transfer theory of contract, see “A Libertarian Theory of Contract” (ch. 9). For criticism of Rothbard’s attempt to justify something he confusingly calls “common-law copyright” (since that is something totally different in the common law) by use of contracts, see Kinsella, AIP, the section “Contract vs. Reserved Rights.” Schulman also seems to think that IP, or “logorights,” is somehow “an intellectual artifact of contract law,” whatever that means. See “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17).

另见温迪·麦克罗伊在其给我的注释中对“通过获得版权”方法的深刻评论，该注释在斯蒂芬·金塞拉的《麦克罗伊：“论知识产权主题”（1981）》中重印，发表于 C4SIF 博客（2013 年 3 月 19 日）；也可参见布德维因·布卡特的《什么是财产？》，《哈佛法律与公共政策杂志》第 13 卷第 3 期（1990 年夏季）：775-816 页，第 795 页和 804-805 页。关于的所有权转移理论，见《自由意志主义的契约理论》（第 9 章）。对于罗斯巴德试图通过来为他令人困惑地称为“普通法版权”（因为在普通法中那是完全不同的东西）的事物进行辩护的批评，见金塞拉的《反对知识产权》中“与保留权利”一节。舒尔曼似乎也认为知识产权，或“言语权”，在某种程度上是“法的一种知识产物”，无论那意味着什么。见《与舒尔曼关于商标权和媒介承载财产的对话》（第 17 章）。

并采取手段以达到所追求的目标。⁵⁴⁶当然，知识和信息在行动中也起着关键作用。正如米塞斯所说：“行动……不仅仅是行为，而是由价值判断所产生的行为，旨在一个确定的目标，并由关于特定手段的适宜性或不适宜性的观念所引导。”⁵⁴⁷

Rothbard further elaborates on the importance of knowledge to guide actions:

There is another unique type of factor of production that is indispensable in every stage of every production process. This is the “technological idea” of how to proceed from one stage to another and finally to arrive at the desired consumers’ good. This is but an application of the analysis above, namely, that for any action, there must be some plan or idea of the actor about how to use things as means, as definite pathways, to desired ends. Without such plans or ideas, there would be no action. These plans may be called recipes; they are ideas of recipes that the actor uses to arrive at his goal. A recipe must be present at each stage of each production process from which the actor proceeds to a later stage. The actor must have a recipe for transforming iron into steel, wheat into flour, bread and ham into sandwiches, etc.⁸⁹

罗斯巴德进一步阐述了知识指导行动的重要性：

在每个生产过程的每个阶段，还有另一种独特类型的生产要素是不可或缺的。这就是关于如何从一个阶段进展到另一个阶段并最终获得所需消费品的“技术理念”。这不过是上述分析的一种应用，即对于任何行动，行动人都必须有某种计划或想法，知道如何把事物作为手段，作为明确的途径，来达到预期的目的。没有这样的计划或想法，就不会有行动。这些计划可以称为配方；它们是行动人用来达成目标的配方观念。

⁵⁴⁶ Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>), p. 4.

路德维希·冯·米塞斯，《经济科学的最终基础：方法论论文》（新泽西州普林斯顿：D.范诺斯特兰德公司，1962年；网址：<https://mises.org/library/ultimate-foundation-economic-science>），第4页。

⁵⁴⁷ Mises, *Human Action*, 93.

米塞斯，《人的行动》，第93页。

在每个生产过程的每个阶段，行动人都必须有一个配方，以便从一个阶段进展到下一个阶段。行动人必须有把铁变成钢、把小麦变成面粉、把面包和火腿变成三明治等的配方。⁵⁴⁸

Moreover, “[m]eans are necessarily always limited, i.e. scarce, with regard to the services for which man wants to use them.”⁹⁰ This is why property rights emerged. Use of a resource by one person excludes use by another. Property rights are assigned to scarce resources to permit them to be used productively and cooperatively, and to permit conflict to be avoided. In contrast, ownership of the information that guides action is not necessary. For example, two people who each own the ingredients (scarce

⁵⁴⁸ Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholars ed., second ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), p. 11. See also Guido H. U. Ismann, “Knowledge, Judgment, and the Use of Property,” *Rev. Austrian Econ.* 10, no. 1 (1997; <https://perma.cc/DKQ8-JX45>): 23–48, p. 44 (“The quantities of means we can dispose of—our property—are always limited. Thus, choice implies that some of our ends must remain unfulfilled. We steadily run the danger of pursuing ends that are less important than the ends that could have been pursued. We have to choose the supposedly most important action, though what we choose is how we use our property. Action means to employ our property in the pursuit of what appears to be the most important ends. . . . In choosing the most important action we implicitly select some parts of our technological knowledge for application.”; emphasis added). See also the related discussion in “Goods, Scarce and Nonscarce” (ch. 18), text at n.32.

穆瑞·N·罗斯巴德，《人、经济与国家，及权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009年；网址：<https://mises.org/library/man-economy-and-state-power-and-market>），第11页。另见吉多·许尔曼，《知识、判断与财产的使用》，《奥地利经济学评论》第10卷第1期（1997年；网址：<https://perma.cc/DKQ8-JX45>）：23–48，第44页（“我们可以支配的手段——我们的财产——的数量总是有限的。因此，选择意味着我们的一些目标必然无法实现。我们一直面临着追求不太重要的目标而非本可以追求的目标的危险。我们必须选择据认为最重要的行动，尽管我们所选择的是如何使用我们的财产。行动意味着运用我们的财产去追求看似最重要的目标……在选择最重要的行动时，我们隐晦地选择了我们技术知识的某些部分加以应用。”；着重号为原文所加）。另见《稀缺与非稀缺财货》（第18章）中相关的讨论，注释32处的文本。

goods) can simultaneously make a cake with the same recipe.

此外，“就人们想要利用手段所提供的服务而言，手段必然总是有限的、稀缺的。”⁵⁴⁹这就是财产权出现的原因。一个人对资源的使用排除了另一个人的使用。赋予稀缺资源以财产权，是为了使其得到有效率的、合作的使用，并避免冲突。相比之下，指导行动的信息的所有权则没有必要。例如，两个各自拥有原料（稀缺物品）的人可以同时用相同的配方制作蛋糕。

Material progress is made over time because information is not scarce. It can be infinitely multiplied, learned, taught, and built on. The more patterns, recipes, and causal laws that are known, the greater the wealth multiplier as individuals engage in ever-more efficient and productive actions. It is good that ideas are infinitely reproducible. There is no need to impose artificial scarcity on ideas to make them more like physical resources, which—unfortunately—are scarce.⁹¹

随着时间的推移，物质会不断进步，因为信息并不稀缺。它可以被无限地复制、学习、传授和发展。人们知道的模式、配方和因果法则越多，随着个人从事越来越高效和富有成效的行动，财富的乘数效应就越大。想法、思想可以无限复制，这是好事。我们没有必要人为地制造思想的稀缺性，使其更像物质资源，而不幸的是，物质资源是稀缺的。⁵⁵⁰

E 知识产权，立法和国家

IP, Legislation, and the State

A final problem with IP remains: patent and copyright are statutory schemes, schemes that can be constructed only by legislation, and therefore have always been constructed by legislation. A patent or copyright code could no more arise in the decentralized,

⁵⁴⁹ Ibid.同上。

⁵⁵⁰ For elaboration on the ideas discussed in this section, see Kinsella, “Intellectual Freedom and Learning Versus Patent and Copyright” and “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), the section “The Separate Roles of Knowledge and Means in Action.”
关于本节所讨论观点的详细阐述，见金塞拉的《知识自由与学习 Vs 专利和版权》以及《<反对知识产权>二十年后：回顾与展望》（第十五章）中“行动中知识与手段的不同作用”部分。

case-based legal system of a free society than could the Americans with Disabilities Act or Medicare. IP requires both a legislature and a state. For libertarians who reject the legitimacy of the state,⁹² or legislated law,⁹³ this is the final nail in the IP coffin.

知识产权仍然存在最后一个问题：专利和版权是法定方案，这些方案只能通过立法来构建，因此一直都是由立法来构建的。就像《美国残疾人法案》(Americans with Disabilities Act)或《联邦医疗保险法案》(Medicare)一样，专利或版权法典也不可能出现在一个自由社会的去中心化的、以案例为基础的法律体系中。知识产权既需要立法机关，也需要国家。对于那些反对国家合法性，⁵⁵¹ 或立法合法性⁵⁵² 的自由意志主义者来说，这是钉在知识产权棺材上的最后一颗钉子。

四、想象一个无知识产权的世界

IMAGINING AN IP-FREE WORLD

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

解释知识产权的错误之处相当直接：如上文所详述，专利和版权是国家授予的人为垄断特权，它们削弱并侵犯了财产权。但是结果主义和功利主义的思维方式如此根深蒂固，以至于即使看到知识产权法存在伦理问题的人，有时也会要求反对知识产权的人解释在一个没有知识产权的世界里，创新将如何获得资金。作者们将如何赚钱？大片电影将如何获得资金？如果不能获得专利，为什么还会有人去发明？如果企业必须面

⁵⁵¹ See note 54, above, and accompanying text.
见上文注释 54 及相关内容。

⁵⁵² See “Legislation and the Discovery of Law in a Free Society” (ch. 13).
见《自由社会的立法和法律的发现》(第十三章)。

对竞争，它们怎么能负担得起开发药品的费用呢？

When I see such demands and questions, I am reminded of John Hasnas's comments in his classic article "The Myth of the Rule of Law."⁹⁴ After arguing against the state and for anarchy, Hasnas observes:

What would a free market in legal services be like?

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

当我看到这样的要求和问题时，我就会想起约翰·哈斯纳斯在他的经典文章《法治的神

话》⁵⁵³中的评论。在反对国家并支持无政府主义后，哈斯纳斯指出：

法律服务的自由市场会是什么样子呢？

对于这个挑战，我总是忍不住给出诚实而准确的回应，那就是提出这个问题本身就没有抓住重点。如果人类有智慧和创造知识的能力来描述自由市场将如何运作，那将是对中央计划最强有力的论证。人们提倡自由市场，不是因为天上写着某种道德许可，而是因为人类不可能积累起了解当地情况所需的知识以及对数百万人之间的经济关系进行有效组织所必需的预测能力。我们可以描述鞋子的自由市场会是什么样子，是因为我们有这样一个市场。但这样的描述仅仅是对一个正在运行的市场的当前状态的观察，而不是对人类将如何组织起来供应一种目前尚未市场化的财货的预测。要求自由市场法律的倡导者（或者就此而言，莫诺西泽的苏格拉底）提前描述市场将如何供应法律服务（或鞋子）是在提出一个不可能的挑战。此外，对于自由市场法律的倡导者（或者苏格拉底）来说，甚至接受这个挑战将是一种自我挫败的行为，因为他或她越能成功地描述法律（或鞋子）市场将如何运作，他或她就越能证明它可以由国家规划者来运行。自由市场比国家垄断更好地满足人类需求，正是因为它们允许无限数量的供应商尝试这样做。通过光顾那些最有效地满足其特殊需求的企业，并使那些不能满足其特殊需求的企业失败，消费者决定了最优的供应方式。如果有可能事先说明

⁵⁵³ John Hasnas, “The Myth of the Rule of Law,” Wis. L. Rev. 1995, no. 1 (1995; <https://www.copblock.org/40719/myth-rule-law-john-hasnas/>): 199 – 234.

约翰·哈斯纳斯，《法治的神话》，《威斯康星法律评论》1995 年第 1 期（1995 年；网址：<https://www.copblock.org/40719/myth-rule-law-john-hasnas/>）：199 – 234。

这一选择过程的结果是什么，那么就不需要这个过程本身了。

In other words: the answer such a challenge might be, as Leonard Read said, "I don't know."⁹⁵

换句话说，对于这样的挑战，答案可能正如伦纳德·里德所说：“我不知道。”⁵⁵⁴

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

回到当前的主题：随着国家知识产权立法的出现，国家已经打断并取代了在没有它的情况下无疑会出现的任何其他习俗、商业安排、制度和做法等等。因此，那些习惯了知识产权的人对于用……一个真空来取代当前有缺陷的知识产权体系感到有点紧张是很自然的。他们自然会想：“那么，在没有知识产权的情况下会发生什么呢？”如前所述，我们不确定一个没有知识产权的世界会是什么样子的原因是国家扼杀了替代的制度和做法。

Consider the analogous situation in which the FCC preempted and monopolized the field of property rights in airwaves just as they were starting to develop in the common law. Nowadays people are used to the idea of the state regulating and parceling out airwave or spectrum rights and might imagine there would be chaos if the FCC were abolished. Still, we have some idea as to what property rights might emerge in airwaves absent central state involvement.⁹⁶

考虑一个类似的情况，联邦通信委员会（FCC）在电波财产权在普通法中刚刚开始发

⁵⁵⁴ Leonard Read, "I Don't Know," Mises Daily (Nov. 2, 2011 [1965]; <https://mises.org/library/i-dont-know>).

伦纳德·里德，《我不知道》，米塞斯日报（2011年11月2日[1965年]；网址：<https://mises.org/library/i-dont-know>）。

展时就抢先垄断了这个领域。如今，人们已经习惯了国家监管和分配电波或频谱权利的想法，可能会想象如果 FCC 被废除会出现混乱。尽管如此，我们对于在没有中央政府参与的情况下电波中可能出现的财产权有一些想法。⁵⁵⁵

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

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

在任何情况下，因为人们一定会问到那个不可避免的问题：我们这些知识产权的反对者试图提出一些预测、解决方案和答案。因此，最终我们必须同意哈斯纳斯的观点：

虽然我很想给出这样的回应，但我从来没有这样做过。这是因为，尽管这是真实的，但它从来没有说服力。相反，它通常被解释为对自由市场的盲目信仰的呼吁，而未能提供关于这样一个市场将如何提供法律服务的具体解释被解释为它做不到的证据。因此，尽管这种尝试具有自我挫败的性质，但我通常确实会尝试提出法律的自由市场可能如何运作的建议。

So, how would content creators be rewarded in an IP-free market? First, we must

⁵⁵⁵ For more on this see David Kelley & Roger Donway, *Laissez Parler: Freedom in the Electronic Media* (1985), as discussed in Kinsella, “Why Airwaves (Electromagnetic Spectra) Are (Arguably) Property,” *Mises Economics Blog* (Aug. 9, 2009).

关于这一点的更多内容，可参见大卫·凯利和罗杰·唐韦的《自由言说：电子媒体中的自由》（1985 年），正如金塞拉在“为什么电波（电磁频谱）是（可论证的）财产”一文中所讨论的，米塞斯经济学博客（2009 年 8 月 9 日）。

recognize that what advocates of IP want is a world where competition is tamed. Their view is that:

*Governments adopt intellectual property laws in the belief that a privileged, monopolistic domain operating on the margins of the free-market economy promotes long-term cultural and technological progress better than a regime of unbridled competition.*⁹⁷

那么，在一个没有知识产权的市场中，内容创作者将如何获得回报呢？首先，我们必须认识到，知识产权的倡导者所希望的是一个竞争被驯服的世界。他们的观点是：

政府采用知识产权法是基于这样一种信念，即在自由市场经济边缘运作的特权垄断领域比无约束竞争的制度更能促进长期的文化和技术进步。⁵⁵⁶

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

因此，他们赞成国家授予垄断，以保护各种市场参与者免受竞争。但在一个没有知识产权的自由社会里，内容创作者和创新者将和其他人一样面临竞争。

It must be recognized that the position of the creator of content that is easily copied or imitated is no different in kind from that of any other entrepreneur on the market. Every producer faces competition. If a given entrepreneur makes profit, competitors notice this and start to compete, eroding the initial profits made. Thus market actors

⁵⁵⁶ Jerome H. Reichman, “Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System,” *Cardozo Arts & Ent. L.J.* 13 (1995; https://scholarship.law.duke.edu/faculty_scholarship/685/): 475 (emphasis added), quoted in Kinsella, “Intellectual Property Advocates Hate Competition,” *Mises Economics Blog* (July 19, 2011).

杰罗姆·H·赖克曼，《描绘专利与版权二分法的崩溃：重构国际知识产权体系的前提》，《卡多佐艺术与娱乐法杂志》13卷（1995年；网址：https://scholarship.law.duke.edu/faculty_scholarship/685/）：475（着重号为原文所加），引自金塞拉，《知识产权倡导者讨厌竞争》，米塞斯经济学博客（2011年7月19日）。

continually seek to innovate and find new ways to please consumers in the pursuit of elusive profits. Most producers face a variety of costs, including costs of exclusion. For example:

Movie theaters, for example, invest in exclusion devices like ticket windows, walls, and ushers, all designed to exclude non-contributors from enjoyment of service. Alternatively, of course, movie owners could set up projectors and screens in public parks and then attempt to prevent passers-by from watching, or they could ask government to force all non-contributors to wear special glasses which prevent them from enjoying the movie. "Drive-ins," faced with the prospect of free riders peering over the walls, installed—at considerable expense—individual speakers for each car, thus rendering the publicly available visual part of the movie of little interest ... The costs of exclusion are involved in the production of virtually every good imaginable.⁵⁵⁷

必须认识到，容易被复制或模仿的内容创作者的地位与市场上的任何其他企业家在本质上并无不同。每个生产者都面临竞争。如果某个企业家获得利润，竞争对手就会注意到这一点并开始竞争，从而侵蚀最初的利润。因此，市场参与者不断寻求创新，并找到新的方法来取悦消费者，以追求难以捉摸的利润。大多数生产者面临各种成本，包括排他性成本。例如：

例如，电影院投资于诸如售票窗口、墙壁和引座员等排他性设备，所有这些都是为了将非贡献者排除在享受服务之外。或者，当然，电影所有者可以在公园里设置投影仪和屏幕，然后试图阻止路人观看，或者他们可以要求政府强迫所有非贡献者戴上特殊的眼镜，使他们无法欣赏电影。“汽车影院”面临着免费搭车者从墙头窥视的前景，花费大量资金为每辆车安装了单独的扬声器，从而使电影中公众可看到的部分变得没什么吸引力……几乎可以想象到的每一种财货的生产中都涉及到排他性成本。⁵⁵⁷

⁵⁵⁷ Tom G. Palmer, “Intellectual Property: A Non-Posnerian Law and Economics

What this means is that it is the responsibility of entrepreneurs whose products are easily imitated to find a way to profit, and that they may not use state force to stop competitors. In a sense, this is already the situation facing content creators. Piracy is real and is not going away, unless the big media special interests succeed in having the Internet shut down. Even in the face of widespread file sharing and disregard for copyright, creativity is at an all time high.⁹⁹ The only solution to piracy and file sharing is to offer a better service.¹⁰⁰ For example, offering DRM-free movies or music for a reasonable price, as comedian Louis C.K. did, earning \$1M in about two weeks.¹⁰¹ Or use crowd-source fundraising mechanisms like Kickstarter—computer game company Double Fine Productions recently used Kickstarter to raise \$400,000 to fund a new adventure game (\$300,000 for game development, and \$100,000 to make a documentary about the process). In fact, as of this writing, \$1,095,783 had been raised, from 28,921 backers, in one day.¹⁰² And there are a variety of tactics people can adopt in different industries. A singer or musician can garner fans from his recordings, even if they are distributed for free, and charge fees for concerts. Movie studios can sell tickets to movies that have advantages over home viewing, such as better sound, 3D, large screens, and the like. Most non-fiction authors—such as bloggers or law professors publishing law review articles for free—do not get paid now, but engage in this activity to enhance their reputation and employability, for ad revenues, or for other reasons. A novelist could become popular with her first few books and then get fans to pre-purchase the sequel before releasing it or get paid to be a consultant on/endorser of a movie version.¹⁰³ We cannot forecast all the ways human entrepreneurial creativity will discover to profit and flourish in a free society with no state-granted protections from competition. But there is every reason to think that in a private-law society, we would be unimaginably richer and freer, with more diversity and intellectual creativity than ever before. The state is nothing but a hindrance to everything good about human society.

Approach,” Hamline L. Rev. 12, no. 2 (Spring 1989; <https://perma.cc/DH7K-ZCRV>): 261 – 304, at 284 – 85, quoted in AIP, n.67.

汤姆·G·帕尔默，《知识产权：一种非波斯纳式的法律与经济学方法》，《哈姆林法律评论》12 卷第 2 期（1989 年春季；网址：<https://perma.cc/DH7K-ZCRV>）：261 – 304，第 284 – 85 页，引自《反对知识产权》，注释 67。

这意味着，产品容易被模仿的企业家有责任找到盈利的方法，并且他们不能使用国家力量来阻止竞争对手。从某种意义上说，这已经是内容创作者所面临的情况。盗版是真实存在的，而且不会消失，除非大型媒体特殊利益集团成功地让互联网关闭。即使面对广泛的文件共享和对版权的无视，创造力也处于历史最高水平。⁵⁵⁸ 盗版和文件共享的唯一解决方案是提供更好的服务。⁵⁵⁹ 例如，像喜剧演员路易斯·C·K那样以合理的价格提供无数字版权管理（DRM）的电影或音乐，在大约两周内赚了 100 万美元。⁵⁶⁰ 或者使用像 Kickstarter 这样的众筹融资机制——电脑游戏公司 Double Fine Productions 最近使用 Kickstarter 筹集了 40 万美元来资助一款新的冒险游戏（30 万美元用于游戏开发，10 万美元用于制作一部关于这个过程的纪录片）。事实上，在撰写本文时，在一天内从 28921 名支持者那里筹集了 1095783 美元。⁵⁶¹ 在不同的行

⁵⁵⁸ Mike Masnick, “We’re Living In the Most Creative Time In History,” Techdirt (Feb. 12, 2012; <https://perma.cc/F6HY-QHG9>).

迈克·马斯尼克，《我们生活在历史上最具创造力的时代》，Techdirt（2012 年 2 月 12 日；网址：<https://perma.cc/F6HY-QHG9>）。

⁵⁵⁹ See, e.g., Mike Masnick, “Hollywood Wants To Kill Piracy? No Problem: Just Offer Something Better,” Techdirt (Feb. 6, 2012; <https://perma.cc/73TB-YQX8>); Paul Tassi, “You Will Never Kill Piracy, and Piracy Will Never Kill You,” Forbes (Feb. 3, 2012; <https://perma.cc/23W2-E2FT>).

例如，可参见迈克·马斯尼克，《好莱坞想消灭盗版？没问题：只要提供更好的东西》，Techdirt（2012 年 2 月 6 日；网址：<https://perma.cc/73TB-YQX8>）；保罗·塔西，《你永远无法消灭盗版，盗版也永远无法消灭你》，《福布斯》（2012 年 2 月 3 日；网址：<https://perma.cc/23W2-E2FT>）。

⁵⁶⁰ Kinsella, “Comedian Louis C.K. Makes \$1 Million Selling DRM Free Video via PayPal on his own website,” C4SIF.org (Dec. 22, 2011).

金塞拉，《喜剧演员路易斯·C·K通过自己网站上的宝贝销售无数字版权管理视频，赚了 100 万美元》，C4SIF.org（2011 年 12 月 22 日）。

⁵⁶¹ See Kickstarter, <https://perma.cc/MYH4-G38W>. See also Mike Masnick, “People Rushing To Give Hundreds Of Thousands Of Dollars In Just Hours For Brand New Adventure Game,” Techdirt (Feb. 9, 2012; <https://www.techdirt.com/2012/02/09/people-rushing-to-give-hundreds-thousands-dollars-just-hours-brand-new-adventure-game/>); Kyle Orland, “Double Fine seeks to cut out publishers with Kickstarter-funded adventure,” ars technica (Feb. 9, 2012; <https://arstechnica.com/gaming/2012/02/double-fine-seeks-to-cut-out-publishers-with-kickstarter-funded-adventure/>).

参见 Kickstarter，网址：<https://perma.cc/MYH4-G38W>。也可参见迈克·马斯尼克，《人们在短短几个小时内就争先恐后地为全新冒险游戏捐赠数十万美元》，Techdirt

业中，人们可以采用各种策略。歌手或音乐家可以从他们的唱片中吸引粉丝，即使这些唱片是免费分发的，然后对音乐会收取费用。电影制片厂可以出售具有比家庭观看更好优势的电影门票，如更好的音效、3D、大屏幕等等。大多数非虚构类作者——比如免费发布博客文章或法律评论文章的法学教授——现在没有得到报酬，但从事这项活动是为了提高他们的声誉和就业能力，获得广告收入或出于其他原因。一位小说家可以凭借她的前几本书变得受欢迎，然后让粉丝在续集发布之前预先购买，或者获得报酬成为电影版本的顾问/代言人。⁵⁶² 我们无法预测在一个没有国家授予的免受竞争保护的自由社会中，人类企业家的创造力将发现所有盈利和繁荣的方式。但有充分的理由认为，在一个私法社会中，我们将比以往任何时候都更加富有和自由，拥有更多的多样性和智力创造力。国家对于人类社会的一切美好事物来说只是一个障碍。

（2012 年 2 月 9 日；网址：<https://www.techdirt.com/2012/02/09/people-rushing-to-give-hundreds-thousands-dollars-just-hours-brand-new-adventure-game/>）；凯尔·奥兰德，《Double Fine 试图通过 Kickstarter 资助的冒险游戏摆脱发行商》，Ars Technica（2012 年 2 月 9 日；网址：<https://arstechnica.com/gaming/2012/02/double-fine-seeks-to-cut-out-publishers-with-kickstarter-funded-adventure/>）。

⁵⁶² Kinsella, “Conversation with an author about copyright and publishing in a free society,” C4SIF.org (Jan. 23, 2012); see also idem, “Examples of Ways Content Creators Can Profit Without Intellectual Property,” StephanKinsella.com (July 28, 2010); idem, “Innovations that Thrive Without IP,” StephanKinsella.com (Aug. 9, 2010); and idem, Do Business Without Intellectual Property (Liberty.me, 2014).

金塞拉，《与一位作者关于自由社会中的版权和出版的对话》，C4SIF.org（2012 年 1 月 23 日）；也可参见同一作者的《内容创作者在没有知识产权的情况下盈利的方式示例》，StephanKinsella.com（2010 年 7 月 28 日）；同一作者的《没有知识产权也能蓬勃发展的创新》，StephanKinsella.com（2010 年 8 月 9 日）；以及同一作者的《不依赖知识产权做生意》（Liberty.me, 2014 年）。

第十五章 《反对知识产权》二十年后：回顾与展望

Against Intellectual Property After Twenty Years: Looking Back and Looking Forward

This chapter is previously unpublished, other than a working draft posted on c4sif.org. It provides a perspective on the IP debates since my *Against Intellectual Property* (AIP) was published in 2001, and provides an overview of newer arguments about IP that I've made in the twenty-plus years since the publication of AIP. It also discusses changes I would make to the original arguments presented in AIP. This chapter complements chapter 14, which itself was originally published about a decade after AIP.

这一章以前从未发表过，只有一个工作草案发布在 c4sif.org 上。它提供了一种视角，审视自 2001 年我的《反对知识产权》（*Against Intellectual Property*, AIP）出版以来的知识产权论证，并概述了在《反对知识产权》出版后的二十多年里我提出的关于知识产权的新论点。它还讨论了我对《反对知识产权》中最初提出的论点所做的修改。这一章与第 14 章相辅相成，第 14 章本身最初是在《反对知识产权》出版大约十年后发表的。

I 背景

BACKGROUND

Against Intellectual Property originated as a *Journal of Libertarian Studies* article in 2001.¹ At the time there was less interest among libertarians in the topic of intellectual property (IP) than there is now. Libertarian attention was more focused on issues such as taxes, war, central banking, the drug war, government education, asset forfeiture, business regulations, civil liberties, and so on. Not so much on patent and copyright, the two primary forms of IP.

《反对知识产权》最初是 2001 年《自由意志主义研究期刊》上的一篇文章。⁵⁶³在那

⁵⁶³ “*Against Intellectual Property*” first appeared as part of the symposium *Applications of Libertarian Legal Theory*, published in the *Journal of Libertarian Studies*, vol. 15, no. 2 (Spring 2001): 1 – 53; it was later published as a monograph by the Mises

个时候，自由意志主义者对知识产权（IP）这个话题的兴趣比现在要少。自由意志主义者的注意力更多地集中在税收、战争、中央银行、毒品战争、政府教育、资产没收、商业法规、公民自由等问题上。而对专利和版权这两种主要的知识产权形式关注得并不多。

I had no reason to think it was an especially important issue, but I had always been dissatisfied with various libertarian arguments for IP, and it kept nagging at me throughout college and law school. Ayn Rand's brief article on patent and copyright, for example, included strained arguments as to why a 17 year patent term and a life-plus-50 year copyright term were just about right.² She also offered a confused argument as to why it was fair for the first guy to race to the patent office to get a monopoly that could be used against an independent inventor just one day behind him.³

我当时没有理由认为这是一个特别重要的问题，但我一直对各种自由意志主义者支持知识产权的论点感到不满，在大学和法学院期间，这个问题一直困扰着我。例如，安·兰德关于专利和版权的简短文章中，包含了一些牵强的论点，来说明为什么 17 年的专

Institute in 2008 and again by Laissez-Faire Books in 2012 (hereinafter AIP, citing the 2008 version). The 2001 article was based on “The Legitimacy of Intellectual Property,” a paper presented at the Law and Economics panel, Austrian Scholars Conference, Ludwig von Mises Institute, Auburn, Ala., March 25, 2000. It has also been translated into various languages, including, to date, Czech, French, Georgian, German, Italian, Polish, Portuguese, Romanian, and Spanish. See www.stephankinsella.com/translations. AIP and many other works cited herein are available at www.stephankinsella.com/publications and www.c4sif.org/aip. And yes, it's actually been 22 years, not 20.

《反对知识产权》首次作为自由意志主义法律理论应用研讨会的一部分出现，发表在《自由意志主义研究期刊》第 15 卷第 2 期（2001 年春季）：1-53 页；后来在 2008 年由米塞斯研究院作为专著出版，2012 年又由自由放任图书公司再次出版（以下简称 AIP，引用 2008 年版本）。2001 年的这篇文章是基于 2000 年 3 月 25 日在阿拉巴马州奥本的路德维希·冯·米塞斯研究院举行的奥地利学者会议法律与经济学小组上提交的论文《知识产权的合法性》。它也被翻译成了各种语言，包括迄今为止的捷克语、法语、格鲁吉亚语、德语、意大利语、波兰语、葡萄牙语、罗马尼亚语和西班牙语。见 www.stephankinsella.com/translations。AIP 以及本文中引用的许多其他作品可在 www.stephankinsella.com/publications 和 www.c4sif.org/aip 上找到。是的，实际上已经过去了 22 年，而不是 20 年。

利期限和作者有生之年加 50 年的版权期限是恰到好处的。⁵⁶⁴她还提出了一个令人困惑的论点，即为什么第一个冲到专利局获得垄断权的人，可以用它来对抗仅仅比他晚一天的独立发明者是公平的。⁵⁶⁵

⁵⁶⁴ Ayn Rand, “Patents and Copyrights,” in *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), p. 133. The term is now life plus 70 years, thanks to the Sonny Bono Copyright Term Extension Act of 1998, aka the Mickey Mouse Protection Act (https://en.wikipedia.org/wiki/Copyright_Term_Extension_Act).

安·兰德的《专利与版权》一文收录在《资本主义：未知的理想》（纽约：新美国图书馆，1967 年）中，第 133 页。如今，由于 1998 年的《索尼·博诺版权期限延长法案》，也被称为《米老鼠保护法案》（https://en.wikipedia.org/wiki/Copyright_Term_Extension_Act），版权期限变为作者有生之年加 70 年。

⁵⁶⁵ As Rand wrote there:

As an objection to the patent laws, some people cite the fact that two inventors may work independently for years on the same invention, but one will beat the other to the patent office by an hour or a day and will acquire an exclusive monopoly, while the loser’s work will then be totally wasted. This type of objection is based on the error of equating the potential with the actual. The fact that a man might have been first does not alter the fact that he wasn’t. Since the issue is one of commercial rights, the loser in a case of that kind has to accept the fact that in seeking to trade with others he must face the possibility of a competitor winning the race, which is true of all types of competition.

正如兰德在书中所写：

有些人反对专利法，理由是两位发明家可能会各自独立地花费数年时间进行同一项发明，但其中一人可能仅比另一人早一小时或一天到达专利局，从而获得独家垄断权，而失败者的工作成果就会完全白费。这种反对意见基于将潜在与实际相混淆的错误。一个人原本可能是第一个，但这并不能改变他实际上不是第一个的事实。由于这涉及商业权利问题，在情况下的失败者必须接受这样一个事实，即在寻求与他人进行贸易时，他必须面对竞争对手赢得竞赛的可能性，这在所有类型的竞争中都是如此。As it turns out, Rand was incorrect about the US patent law she thought she was defending. At the time she wrote, under US patent law, in the case of two inventors who independently invented and filed patent applications for the same invention, the first to invent (the first to conceive of the invention) won, not the first to file. It was not until the Leahy-Smith America Invents Act, signed into law by President Obama in 2011, that the US switched to the first-to-file standard common in most other countries. See, e.g., “Leahy Smith America Invents Act,” Wikipedia (https://en.wikipedia.org/wiki/Leahy%E2%80%93Smith_America_Invents_Act); and Kinsella, “KOL164 | Obama’s Patent Reform: Improvement or Continuing Calamity? Mises Academy (2011),” Kinsella on Liberty Podcast (Dec. 9, 2014). Rand’s argument

defending what she thought was current US patent law was clearly makeweight; if she had known it was first-to-invent, she would no doubt have cobbled together some flimsy, disingenuous argument to justify that. Likewise, the patent term of 17 years is now 20 years from the date of filing, and the copyright term of life of the author plus 50 years has been extended to life of the author plus 70 years; there is little doubt she would have found a way to justify that, too. In other words, according to the US-Constitutionworshipping Rand, whatever the nearly infallible US Congress decrees just happens to mirror natural rights. Just so happens. One may recall the scene near the end of Atlas Shrugged (1957) in which Judge Narragansett had to make only a few amendments to the Constitution:

He sat at a table, and the light of his lamp fell on the copy of an ancient document. He had marked and crossed out the contradictions in its statements that had once been the cause of its destruction. He was now adding a new clause to its pages: “Congress shall make no law abridging the freedom of production and trade...”

事实证明，兰德对她认为自己在捍卫的美国专利法的理解是错误的。在她写作的时候，根据美国专利法，在两位发明家独立发明并为同一发明提交专利申请的情况下，是第一个发明的人（第一个构思出该发明的人）获胜，而不是第一个提交申请的人。直到2011年奥巴马总统签署《莱希-史密斯美国发明法案》，美国才转而采用大多数其他国家普遍采用的先申请标准。例如，参见“《莱希-史密斯美国发明法案》”，维基百科（https://en.wikipedia.org/wiki/Leahy%E2%80%93Smith_America_Invents_Act）；以及斯蒂芬·金塞拉的“KOL164 | 奥巴马的专利改革：是进步还是持续的灾难？米塞斯学院（2011）”，斯蒂芬·《金塞拉谈自由》播客（2014年12月9日）。兰德为她认为是当时美国专利法进行辩护的论点显然是无关紧要的；如果她知道是先发明原则，她无疑会拼凑出一些站不住脚、不真诚的论点来为其辩护。同样，17年的专利期限现在是在自申请之日起20年，作者有生之年加50年的版权期限已延长至作者有生之年加70年；毫无疑问，她也会找到一种方法来为这一点辩护。换句话说，在崇拜美国宪法的兰德看来，无论几乎不会犯错的美国国会颁布什么法令，都恰好反映了自然权利。恰好如此。人们可能会想起《阿特拉斯耸耸肩》（1957）接近尾声的场景，在那个场景中，纳拉甘塞特法官只需对宪法做几处修正：

他坐在桌前，灯光照在一份古老文件的副本上。他标记并划掉了文件陈述中的矛盾之处，这些矛盾曾经是其被破坏的原因。现在他在文件的页面上添加了一个新条款：“国会不得制定任何剥夺生产和贸易自由的法律……”

Ah, that almost-perfect US Constitution! One can understand Rand’s enthusiasm for the relative superiority of the US system over the communist system of the USSR that she fled, but that doesn’t make it presumptively libertarian in absolute terms. Let’s not be naïve. As I point out in “Ayn Rand Finally Right about the First-to-File US Patent System,” C4SIF Blog (Sep. 9, 2011), Rand was also incorrect in stating “An idea as such cannot be protected until it has been given a material form. An invention has to be embodied in a physical model before it can be patented ...” No working model needs to be made to get a patent. For other mistakes she made about how the actual IP system works, see Kinsella, “Ayn Rand and Atlas Shrugged, Part II: Confused on

It made no sense to me and didn't seem to fit in well with other aspects of libertarian theory and individual rights. I believed Rand's approach was wrong, or at least flawed, since natural property rights can't expire at an arbitrary time, much less one decreed by legislation, but I still assumed IP rights were, somehow, legitimate property rights. Since I was increasingly interested in libertarian theory (my first scholarly libertarian article was published in 1992)⁴ and was beginning to specialize in IP in my law practice (in 1993),⁵ I figured that I might be able to come up with a better defense of IP than previous libertarians had managed, since most of them really didn't have a good grasp of how actual patent and copyright law worked. So I dove deep into the literature and tried to find a way to justify IP rights, only to keep hitting dead ends.⁶ Every argument I could come up with was as flawed and shaky as Ayn Rand's.

这对我来说毫无意义，并且似乎与自由意志主义理论和个人权利的其他方面不太契合。我认为兰德的方法是错误的，或者至少是有缺陷的，因为自然财产权不能在一个任意的时间到期，更不能由立法来规定到期时间，但我仍然假定知识产权在某种程度上是合法的财产权。由于我对自由意志主义理论越来越感兴趣（我的第一篇学术性自由意志主义文章发表于 1992 年），⁵⁶⁶ 并且在我的法律实践中（1993 年）开始专注于知识

Copyright and Patent,” C4SIF Blog (Oct. 21, 2012).

啊，那份近乎完美的美国宪法！人们可以理解兰德对她逃离的苏联共产主义制度下美国制度的相对优越性的热情，但这并不意味着从绝对意义上说美国制度就是自由意志主义的。我们不要天真。正如我在《安·兰德终于在关于美国先申请专利制度上正确了》（C4SIF 博客，2011 年 9 月 9 日）一文中指出的，兰德在声称“一个想法本身在没有被赋予物质形式之前是无法受到保护的。一项发明必须体现在一个物理模型中才能获得专利……”这一点上也是错误的。获得专利并不需要制作一个可工作的模型。关于她在实际知识产权制度运作方面所犯的其他错误，可参见金塞拉的“《安·兰德与阿特拉斯耸耸肩》，第二部分：在版权和专利问题上的困惑”（C4SIF 博客，2012 年 10 月 21 日）。

⁵⁶⁶ See “Estoppel: A New Justification for Individual Rights,” Reason Papers No. 17 (Fall 1992): 61 – 74; elaborated in “A Libertarian Theory of Punishment and Rights” (ch. 5). See also Kinsella, “The Genesis of Estoppel: My Libertarian Rights Theory,” StephanKinsella.com (Mar. 22, 2016).

参考《禁止反言：个人权利的新理由》，《理性论文》第 17 期（1992 年秋季）：61-74 页；在《自由意志主义的惩罚与权利理论》（第五章）中进行了详细阐述。也可参见金塞拉的《禁止反言的起源：我的自由意志主义权利理论》，StephanKinsella.com（2016 年 3 月 22 日）。

产权领域，⁵⁶⁷我认为我也许能够提出比之前的自由意志主义者更合理的对知识产权的辩护，因为他们中的大多数人实际上并不真正了解实际的专利法和版权法是如何运作的。所以我深入研究文献，试图找到一种为知识产权权利辩护的方法，结果却不断碰壁。⁵⁶⁸我能想出的每一个论点都和安·兰德的一样有缺陷且站不住脚。

And in my research I came across libertarian and other criticisms of IP,⁷ and also deepened my understanding of the crucial role of scarcity to property rights, as emphasized in particular by Hans-Hermann Hoppe.⁸ I began to see that older criticisms of IP, such as the writings of Benjamin Tucker, Wendy McElroy, Sam Konkin, and Tom Palmer, were correct, even if their criticisms were not comprehensive or complete.⁹

⁵⁶⁷ I started practicing law in 1992, initially specializing in oil & gas law and started transitioning to patent law in 1993, taking and passing the US Patent Bar Exam in 1994. See “On the Logic of Libertarianism and Why Intellectual Property Doesn’t Exist” (ch. 24); also Kinsella, “The Start of my Legal Career: Past, Present and Future: Survival Stories of Lawyers,” KinsellaLaw.com (Dec. 6, 2010) and www.stephankinsella.com/about. I became interested in libertarianism in 10th grade, around 1980, after reading Ayn Rand’s The Fountainhead. See “How I Became a Libertarian” (ch. 1); Kinsella, “Faculty Spotlight Interview: Stephan Kinsella,” Mises Economics Blog (Feb. 11, 2011); idem, “What Sparked Your Interest in Liberty?,” FEE.org (April 21, 2016); and other biographical pieces at www.stephankinsella.com/publications/#biographical.

我于 1992 年开始从事法律工作，最初专注于石油和天然气法律，并在 1993 年开始转向专利法，于 1994 年参加并通过了美国专利律师考试。参见《论自由意志主义的逻辑以及为何知识产权不存在》（第 24 章）；也可参见金塞拉的《我的法律职业生涯的开始：过去、现在和未来：律师的生存故事》，KinsellaLaw.com（2010 年 12 月 6 日）以及 www.stephankinsella.com/about。我在大约 1980 年，十年级的時候，读了安·兰德的《源泉》后开始对自由意志主义感兴趣。参见《我如何成为一名自由意志主义者》（第 1 章）；金塞拉的“教师聚焦访谈：斯蒂芬·金塞拉”，米塞斯经济学博客（2011 年 2 月 11 日）；同上，《是什么激发了你对自由的兴趣》，FEE.org（2016 年 4 月 21 日）；以及在 www.stephankinsella.com/publications/#biographical 上的其他传记性文章。

⁵⁶⁸ See also the discussion in “Conversation with Schulman about Logorights and MediaCarried Property” (ch. 17) of how both J. Neil Schulman and I tried to find arguments to justify IP, given our dissatisfaction with previous attempts.

另请参阅《与舒尔曼关于商标权利和媒介承载财产的对话》（第 17 章）中的讨论，其中谈到鉴于我们对先前尝试的不满意，J·尼尔·舒尔曼和我都试图找到为知识产权辩护的论据。

在我的研究中，我遇到了自由意志主义者对知识产权的批评以及其他对知识产权的批判，⁵⁶⁹我也加深了稀缺性之于财产权的关键作用的理解，这一点尤其被汉斯-赫尔曼·霍普强调。⁵⁷⁰我开始认识到对知识产权的早期批评，比如本杰明·塔克、温迪·麦克罗伊、

⁵⁶⁹ Some of the works that influenced me and helped me change my mind on IP include Tom G. Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach,” Hamline L. Rev. 12, no. 2 (Spring 1989; <https://perma.cc/DH7K-ZCRV>): 261 – 304 and idem, “Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects,” Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990; <https://perma.cc/J8LY-L4MQ>): 817 – 65; Wendy McElroy, “Contra Copyright,” The Voluntarist (June 1985), included in idem, “Contra Copyright, Again,” Libertarian Papers 3, art. no. 12 (2011; <http://libertarianpapers.org/12-contra-copyright>); Boudewijn Bouckaert, “What is Property?,” Harv. J. L. & Pub. Pol’y 13, no. 3 (Summer 1990): 775 – 816; and idem, “From Property Rights to Property Order,” Encyclopedia of Law and Economics (Springer, forthcoming 2023). Some of these, and others, are included in Kinsella, ed., The Anti-IP Reader: Free Market Critiques of Intellectual Property (Papinian Press, 2023).

一些影响了我并帮助我改变对知识产权看法的作品包括：汤姆·G·帕尔默的《知识产权：一种非波斯纳式的法律与经济学方法》，发表于《哈姆林法律评论》第12卷第2期（1989年春季；<https://perma.cc/DH7K-ZCRV>）：261-304页；以及同一作者的《专利和版权在道德上是合理的吗？财产权与理想客体的哲学》，发表于《哈佛法律与公共政策杂志》第13卷第3期（1990年夏季；<https://perma.cc/J8LY-L4MQ>）：817-865页；温迪·麦克罗伊的《反对版权》，发表于《自愿主义者》（1985年6月），收录在其《再次反对版权》中，发表于《自由意志主义论文》第3卷，第12篇文章（2011年；<http://libertarianpapers.org/12-contra-copyright>）；布德维因·布卡特的《什么是财产？》，发表于《哈佛法律与公共政策杂志》第13卷第3期（1990年夏季）：775-816页；以及同一作者的《从财产权到财产秩序》，即将发表于《法律与经济学百科全书》（施普林格出版社，2023年）。其中一些以及其他作品被收录在斯蒂芬·金塞拉编辑的《反知识产权读本：自由市场对知识产权的批判》（帕皮尼安出版社，2023年）中。

⁵⁷⁰ See Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989], www.hanshoppe.com/tsc); also idem, “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). 参见汉斯-赫尔曼·霍普的《社会主义与资本主义理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010年[1989年]，www.hanshoppe.com/tsc）；也可参见同一作者的《论共有、公有和私有财产以及全面私有化的基本原理》，收录于《伟大的虚构：财产、经济、社会与衰落的政治》（第二版扩充版，米塞斯研究院，2021年；www.hanshoppe.com/tgf）。

山姆·康金和汤姆·帕尔默的著作是正确的，即使他们的批评并不全面或完整。⁵⁷¹

With a relief similar to the one I felt when I finally gave up minarchism and ceded the ground to anarchism, I finally concluded that patent and copyright are completely statist and unjustified derogations from libertarian principles and property rights. No wonder I had been failing in my attempts: I had been trying to justify the unjustifiable!

带着一种类似于我最终放弃最小政府主义并向无政府主义让步时所感受到的解脱，我最终得出结论，专利和版权完全是国家主义的，是对自由意志主义原则和财产权的不正当的贬损。难怪我的尝试一直失败：我一直在试图为不合理不正当的事情辩护！

So I sought to build on the work done by previous thinkers, and clarify and expand it. I gave a few local talks and wrote some short articles on the topic starting in 1995,10 often with a somewhat tentative tone as I was initially concerned that publicly opposing IP law might harm my budding IP law practice (turns out, it never caused a problem). I then wrote a lengthier treatment, which became AIP, mostly to get it out of my system, intending to then turn my attention back to other fields that interest me more, like rights

⁵⁷¹ See Kinsella, “The Origins of Libertarian IP Abolitionism,” Mises Economics Blog (April 1, 2011) and idem, “The Four Historical Phases of IP Abolitionism,” C4SIF Blog (April 13, 2011). On Benjamin Tucker, see also Wendy McElroy, “Intellectual Property,” in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881 – 1908* (Lexington Books, 2002; <https://perma.cc/ZQM2-82B9>), reprinted without endnotes as “Copy- right and Patent in Benjamin Tucker’ s Periodical,” Mises Daily (July 28, 2010; <https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical>); See also Kinsella, “Benjamin Tucker and the Great Nineteenth Century IP Debates in Liberty Magazine,” *StephanKinsella.com* (July 11, 2022). See also the writings by these and others in Kinsella, ed., “The Anti-IP Reader.”

参见金塞拉的《自由意志主义知识产权废除主义的起源》，发表于米塞斯经济学博客（2011 年 4 月 1 日）以及同一作者的《知识产权废除主义的四个历史阶段》，发表于 C4SIF 博客（2011 年 4 月 13 日）。关于本杰明·塔克，也可参见温迪·麦克罗伊的《知识产权》，收录于《自由之辩：个人无政府主义概述，1881-1908》（列克星敦图书，2002 年；<https://perma.cc/ZQM2-82B9>），在没有尾注的情况下以《本杰明·塔克期刊中的版权和专利》重新发表于米塞斯日报（2010 年 7 月 28 日；<https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical>）；也可参见金塞拉的《本杰明·塔克与 19 世纪<自由杂志>上的重大知识产权论证》，发表于 *StephanKinsella.com*（2022 年 7 月 11 日）。也可参见金塞拉编辑的《反对知识产权读本》中这些作者及其他人的作品。

theory, contract theory, causation, and other aspects of libertarian legal theory.¹¹

所以我试图在先辈思想家的工作基础上进行拓展，并对其进行澄清和扩充。从 1995 年开始，我就这个主题做了一些本地演讲并写了一些短文，⁵⁷²起初我的语气常常有些试探性，因为我最初担心公开反对知识产权法可能会损害我刚刚起步的知识产权法律业务（结果证明，这从未造成问题）。然后我写了一篇更长的论述，这篇论述后来成为了《反对知识产权》，主要是为了把这个问题从我的脑海中清除出去，打算之后把注意力转回到我更感兴趣的其他领域，比如权利理论、理论、因果关系以及自由意志主义法律理论的其他方面。⁵⁷³

I presented the paper, then entitled “The Legitimacy of Intellectual Property,” at the Ludwig von Mises Institute’s Austrian Scholars Conference in March 2000. This was the year Objectivist George Reisman started attending Mises Institute events, after having been ousted from Objectivist circles over his favorable remarks about Barbara Branden’s biography of Rand, and had reunited with his old friend Ralph Raico, from whom he had been estranged for many years. I remember Reisman asking me, after I delivered my paper, something like, “Let me make sure I understand you. Are you saying all patent and copyright law should be abolished?” I answered yes and, seeming somewhat stunned, he slowly walked away. In any case, I submitted the paper to the

⁵⁷² See, e.g., Kinsella, “Letter on Intellectual Property Rights,” IOS J. 5, no. 2 (June 1995), pp. 12–13 (see references in idem, “Letter on Intellectual Property Rights,” IOS Journal (June 1995),” C4SIF Blog (Aug. 31, 2022)); and idem, “Is Intellectual Property Legitimate?,” Pennsylvania Bar Association Intellectual Property Newsletter 1 (Winter 1998): 3, republished in the Federalist Society’s Intellectual Property Practice Group Newsletter, 3, no. 3 (Winter 2000); available at www.stephankinsella.com/publications/#againstip.

例如，可参见金塞拉的《关于知识产权的信》，《IOS 杂志》第 5 卷第 2 期（1995 年 6 月），第 12-13 页（参见金塞拉，《关于知识产权的信》，《IOS 杂志》（1995 年 6 月）”，C4SIF 博客（2022 年 8 月 31 日））；以及同一作者的“知识产权是合法的吗？”，宾夕法尼亚州律师协会知识产权通讯 1（1998 年冬季）：3，在联邦主义者协会知识产权实践小组通讯第 3 卷第 3 期（2000 年冬季）中重新发表；可在 www.stephankinsella.com/publications/#againstip 上查阅。

⁵⁷³ See, e.g., various chapters in this book.

例如，可以查看本书中的各个章节。

JLS, where it was published as “Against Intellectual Property,” a title suggested by Professor Hans-Hermann Hoppe, then the journal’s editor.

2000 年 3 月，我在路德维希·冯·米塞斯研究院的奥地利学者会议上提交了一篇论文，当时的题目是《知识产权的合法性》。这一年，客观主义者乔治·赖斯曼开始参加米塞斯研究院的活动，此前他因对芭芭拉·布兰登所著的兰德传记发表了赞许的言论而被逐出客观主义者圈子，并且与他多年疏远的老朋友拉尔夫·雷科重聚。我记得在我发表论文后，赖斯曼问我：“让我确定一下我是否理解你的意思。你是说所有的专利和版权法都应该被废除吗？”我回答说是的，他看起来有些震惊，然后慢慢地走开了。无论如何，我把这篇论文提交给了《自由意志主义研究期刊》，在那里它以《反对知识产权》的标题发表，这个标题是当时该期刊的编辑汉斯·赫尔曼·霍普教授建议的。

AIP, and some other articles around the same time, argues that all forms of intellectual property—including patent, copyright, trademark, and trade secret, but especially the first two—are unjust and unlibertarian laws and should be abolished.¹²

《反对知识产权》以及大约在同一时期的一些其他文章认为，所有形式的知识产权——包括专利、版权、商标和商业秘密，但尤其是前两者——都是不正义且不符合自由意志主义的法律，应该被废除。⁵⁷⁴

II 互联网时代和日益增长的知识产权威胁

THE INTERNET ERA AND THE GROWING IP THREAT

As noted above, IP had not received a great deal of attention from libertarians before the internet era. But IP’s wallflower status was about to change. Some were starting to sense that the IP issue was becoming more important. The need to shine a light on patent and copyright, heretofore relegated to the shadows and the bailiwick of

⁵⁷⁴ 我的文章《为 Napster 辩护并反对第二次拓殖规则》发表于 LewRockwell.com（2000 年 9 月 4 日），呈现了与大约同一时间《反对知识产权》原始版本中相同的论点的一个概括版本。《无国家社会中的法律与知识产权》（第 14 章）重申了反对知识产权的基本观点；一个更简洁的版本可以在金塞拉的《知识产权与自由意志主义》中找到，发表于米塞斯日报（2009 年 11 月 17 日）。对于商标法更广泛的批评，可参见金塞拉的《诽谤法和名誉权作为一种知识产权》，收录于埃尔维拉·尼卡 and 格奥尔基·H·波佩斯库编辑的《对正义的热情：向沃尔特·布洛克致敬的论文集》（纽约：阿德尔顿学术出版社，即将出版）。

specialists, was becoming more apparent. An early sign of this among Austro-libertarians, perhaps, was the Mises Institute's awarding me the O.P. Alford III Prize for 2002 for AIP.¹³

如上文所述，在互联网时代之前，知识产权并没有得到自由意志主义者的大量关注。但是知识产权的被忽视状态即将改变。一些人开始感觉到知识产权问题正变得越来越重要。专利和版权——迄今为止一直被置于专家的阴影和管辖范围之内——受到更多关注的需求变得更加明显。在奥地利自由意志主义者中，这一趋势的一个早期迹象或许是米塞斯研究院因我的《反对知识产权》一文而授予我 2002 年的 O.P.阿尔福德三世奖。⁵⁷⁵

The Internet is the reason for IP emerging from the shadows. The Internet—and digital information and file sharing, social media, and related technologies like cell phones, texting, and ubiquitous video cameras—was at this time gaining steam and becoming a huge social force. It was becoming one of the most important tools to fight statism and to preserve and extend human freedom and prosperity. And this is why it has been under attack by the state, in the guise of anti-pornography, anti-gambling, and anti-terrorism, as well as anti-piracy/ copyright protection efforts.

互联网是知识产权从阴影中走出来的原因。互联网——以及数字信息和文件共享、社交媒体，还有像手机、短信和无处不在的摄像机等相关技术——在这个时候势头越来越猛，成为一股巨大的社会力量。它正在成为对抗国家主义、维护和扩大人类自由与繁荣的最重要工具之一。这就是为什么它一直受到国家的攻击，在反色情、反赌博、反恐以及反盗版/版权保护的幌子下。

The Internet became the world's biggest copying machine, leading to a dramatic increase in the amount of copyright infringement, and thus in the amount of copyright lawsuits and penalties.¹⁴ At the same time, news of shockingly excessive, absurd, and outrageous copyright persecutions were instantly and widely communicated over the Internet—college students and single mothers sued for millions of dollars for sharing a few songs.¹⁵ No longer were these lawsuits hidden in the dark; Internet

⁵⁷⁵ <https://perma.cc/E33D-JST6>.

users were starting to be made aware of them. Writes Siva Vaidhyanathan:

互联网成为世界上最大的复印机，导致侵犯版权的数量急剧增加，从而导致版权诉讼和处罚的数量急剧增加。⁵⁷⁶与此同时，令人震惊的过分的、荒谬的和令人发指的版权迫害的新闻立即在互联网上广泛传播——大学生和单身母亲因分享几首歌而被起诉要求赔偿数百万美元。⁵⁷⁷这些诉讼不再隐藏在暗处；互联网用户开始意识到它们。

西瓦·维迪亚那桑写道：

By 1991 I noticed that [hip-hop] music had changed. The new work lacked the texture and richness that had marked the finest albums of the late 1980s, such as Public Enemy's It Takes a Nation of Millions to Hold Us Back and the Beastie Boys's Paul's Boutique. Instead, the digital samples of others' music that made up the intricate bed of sound

⁵⁷⁶ In fact, one of my earliest publications on IP concerned one of the first streaming music services, which was killed by the copyright industry. See Kinsella, “In Defense of Napster and Against the Second Homesteading Rule.” Napster “originally launched on June 1, 1999, as a pioneering peer-to-peer (P2P) file sharing software service with an emphasis on digital audio file distribution. . . . As the software became popular, the company ran into legal difficulties over copyright infringement. It ceased operations in 2001 after losing a wave of lawsuits and filed for bankruptcy in June 2002.” “Napster,” Wikipedia (retrieved May 11, 2022; <https://en.wikipedia.org/wiki/Napster>). 事实上，我最早关于知识产权的出版物之一就涉及最早的流媒体音乐服务之一，它被版权产业扼杀了。参见金塞拉的《为 Napster 辩护并反对第二次拓殖规则》。Napster “最初于 1999 年 6 月 1 日推出，是一款开创性的点对点 (P2P) 文件共享软件服务，重点是数字音频文件的分发 随着该软件变得流行，该公司因版权侵权陷入法律困境。在输掉一系列诉讼后，它于 2001 年停止运营，并于 2002 年 6 月申请破产。” “Napster”，维基百科（2022 年 5 月 11 日检索；<https://en.wikipedia.org/wiki/Napster>）。

⁵⁷⁷ See, e.g., Kinsella, “The Patent, Copyright, Trademark, and Trade Secret Horror Files,” StephanKinsella.com (Feb. 3, 2010); idem, “KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished,” Kinsella on Liberty Podcast (Nov. 24, 2021); and idem, “First Amendment Defense Act of 2021,” C4SIF Blog (Jan. 17, 2021). See also idem, “We are all copyright criminals: John Tehranian’s ‘Infringement Nation,’” Mises Economics Blog (Aug. 22, 2011); idem, “The tepid mainstream ‘defenses’ of Aaron Swartz,” C4SIF Blog (Jan. 29, 2013); and idem, “Tim Lee and Lawrence Lessig: ‘some punishment’ of Swartz was ‘appropriate,’” C4SIF Blog (Jan. 13, 2013).

*in those great albums was replaced by a thinner, less interesting, less intricate collection of more obvious samples. The language of sampling seemed to become simpler and less interesting. There was less play and less depth to the music by 1992. I knew that several hip-hop artists had faced copyright suits over sampling in 1990 and 1991. So I wondered if the law had had such a profound effect on the art. After a bit of research, I concluded that it had. With a bit more research, I sought to explain the larger, longer relationship between copyright and creativity in American history. That project ... became the germ of my first book, published in 2001, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*.*

到 1991 年，我注意到（嘻哈）音乐发生了变化。新的作品缺乏标志着 20 世纪 80 年代末最优秀专辑的那种质感和丰富性，比如 Public Enemy 的《It Takes a Nation of Millions to Hold Us Back》和 Beastie Boys 的《Paul's Boutique》。相反，在那些伟大专辑中构成复杂声音基础的他人音乐的数字采样被一组更单薄、不那么有趣、不那么复杂的更明显的采样所取代。采样的语言似乎变得更简单、更无趣。到 1992 年，音乐的趣味性和深度都减少了。我知道有几位嘻哈艺术家在 1990 年和 1991 年因采样而面临版权诉讼。所以我想知道法律是否对这种艺术产生了如此深远的影响。经过一番研究，我得出结论，确实如此。再进行更多的研究后，我试图解释美国历史上版权与创造力之间更广泛、更长期的关系。那个项目……成为了我在 2001 年出版的第一本书《版权与抄袭：知识产权的兴起以及它如何威胁我们的创造力》的雏形。

By 2001 copyright had exploded into public consciousness, largely through the remarkable rise and fall of Napster, the first easy-to-use digital file-sharing service. The United States had radically expanded copyright law in the 1990s in anticipation of the "digital moment." But nothing had prepared the copyright industries for the torrent of unauthorized peer-to-peer distribution over the Internet, starting in about 2000.

*Meanwhile, computer software had blossomed from a mere hobby to a multibillion-dollar global industry in the 1980s and 1990s without any clear sense of how intellectual property would work for it (or against it). At about the same time that U.S. courts ruled that software could enjoy the protection of patent law as well as copyright, the movement to lock computer code open for the benefit of security, stability, quality, and creativity (and, to some, humanity) grew to be called the "Free and Open-Source Software" movement. As someone thrown into the copyright battles of the early twenty-first century despite my training as a nineteenth-century cultural historian, I felt compelled to make sense of these and other trends that were remaking our global information ecosystem. Those interests are reflected in my second book, published in 2004, *The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System*.*

到 2001 年，版权问题已经在公众意识中爆发，这在很大程度上是由于 Napster 的惊人崛起和衰落，Napster 是第一个易于使用的数字文件共享服务。美国在 20 世纪 90 年代就预见到了“数字时代”，对版权法进行了大幅扩展。但是，从 2000 年左右开始，互联网上未经授权的点对点文件分发的洪流让版权产业毫无准备。与此同时，在 20 世纪 80 年代和 90 年代，计算机软件从仅仅是一种爱好发展成为一个价值数十亿美元的全球产业，而对于知识产权将如何对其起作用（或起反作用）并没有明确的认识。大约在同一时间，美国法院裁定软件可以同时享受专利法和版权法的保护，而开放计算机代码以利于安全、稳定、质量和创造力（对一些人来说，还有人性）的运动逐渐被称为“自由和开源软件”运动。作为一个尽管接受的是 19 世纪文化史学家的训练却被卷入 21 世纪初版权之战的人，我感到有必要理解这些以及其他正在重塑我们全球信息生态系统的趋势。这些兴趣反映在我 2004 年出版的第二本书《图书馆里的无政府主义者：自由与控制之间的冲突如何入侵现实世界并使系统崩溃》中。

The copyright wars of the first decade of the twenty-first century yielded a global "Free Culture" movement, with law professor Lawrence Lessig as its intellectual leader. Globally, others concerned with issues beyond copyright and creativity, including biopiracy and the cost of pharmaceuticals in developing nations, launched the "Access to Knowledge" movement. During the decade the industries devoted to expanding and strengthening intellectual property succeeded in legislatures and courts around the world. And the United States embedded intellectual property standards into trade treaties with other nations. The issues were becoming more interesting and important every week.

21 世纪头十年的版权战争催生了一场全球性的“自由文化”运动，法学教授劳伦斯·莱西格(Lawrence Lessig)是这场运动的思想领袖。在全球范围内，其他关注版权和创造力之外问题的人，包括生物剽窃和发展中国家药品成本问题，发起了“知识获取”运动。在这十年中，致力于扩大和加强知识产权的产业在世界各地的立法机构和法院中取得了成功。美国将知识产权标准纳入了与其他国家的贸易条约中。这些问题每周都变得越来越有趣和重要。

*Then, in late 2004 Google announced it would begin to scan into electronic form millions of books from dozens of university libraries—many of which would still be covered by copyright. The ensuing debate and lawsuits drew me into the fascinating world of search engines, Internet policy, and the future of libraries and books. That research generated my third book, published in 2011, *The Googlization of Everything and Why We Should Worry*.¹⁶*

然后，在 2004 年末，谷歌宣布它将开始把来自几十个大学图书馆的数百万本书扫描成电子形式——其中许多书仍在版权保护范围内。随后的论证和诉讼把我吸引进了搜索引擎、互联网政策以及图书馆和书籍的未来，这个迷人的世界。这项研究产生了我

的第三本书，于 2011 年出版的《一切皆谷歌化以及我们为何应该担忧》。⁵⁷⁸

Or as Declan McCulloch writes:

Over the past few years, intellectual property has morphed from an arcane topic of interest mostly to academicians and patent attorneys to the stuff of newsmagazine cover stories. Courtrooms' klieg lights have illuminated how copyright law has been

⁵⁷⁸ Siva Vaidhyanathan, *Intellectual Property: A Very Short Introduction* (Oxford University Press, 2017), at xviii – xx. See also Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown L. J.* 77, no. 2 (Dec. 1988; <https://perma.cc/U4XX-5DZV>): 287 – 366, p. 288 (citations omitted):

In the centuries since our founding, the concept of property has changed dramatically in the United States. One repeatedly mentioned change is the trend towards treating new things as property, such as job security and income from social programs. A less frequently discussed trend is that historically recognized but nonetheless atypical forms of property, such as intellectual property, are becoming increasingly important relative to the old paradigms of property, such as farms, factories, and furnishings. As our attention continues to shift from tangible to intangible forms of property, we can expect a growing jurisprudence of intellectual property.

And: Ejan Mackaay, “Economic Incentives in Markets for Information and Innovation,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990): 867 – 910, p. 868 (citation omitted): Recent advances in reprography and computer technology have once more brought the issue of the theoretical status of intellectual rights into question. These advances greatly facilitate and reduce the cost of copying information from one medium to another. Information has become less dependent on the vehicle through which it is conveyed; it has become “purer.”

西瓦·维迪安那桑，《知识产权：极简导论》（牛津大学出版社，2017 年），第 xviii-xx 页。另见贾斯汀·休斯，《知识产权的哲学》，《乔治城法律杂志》第 77 卷第 2 期（1988 年 12 月；<https://perma.cc/U4XX-5DZV>）：287-366，第 288 页（省略引用）：

“自我们国家建立以来的几个世纪里，在美国，财产的概念发生了巨大变化。一个经常被提及的变化是将新事物视为财产的趋势，比如工作保障和来自社会项目的收入。一个较少被讨论的趋势是，历史上被认可但仍属非典型的财产形式，如知识产权，相对于农场、工厂和家具等旧的财产范式正变得越来越重要。随着我们的注意力继续从真实财产形式转向无形财产形式，我们可以预期知识产权的判例法会不断增加。”

以及：埃扬·麦凯，《信息与创新市场中的经济激励》，《哈佛法律与公共政策杂志》第 13 卷第 3 期（1990 年夏季）：867-910，第 868 页（省略引用）：“复印技术和计算机技术的最新进展再次使知识产权的理论地位问题受到质疑。这些进展极大地促进了信息从一种媒介复制到另一种媒介，并降低了其成本。信息已经变得不那么依赖于其传递的载体；它变得更加‘纯粹’。”

stretched in ways unimaginable just five years ago. Software patents have roiled the computer industry and alarmed developers of open-source programs. Meanwhile, displaying all the temperance of a methadone addict, Congress keeps handing more and more power to copyright owners.¹⁷

或者如德克兰·麦卡洛所写：

在过去几年里，知识产权已经从一个主要令学者和专利律师感兴趣的神秘话题，变成了新闻杂志封面故事的素材。法庭的聚光灯照亮了版权法是如何以五年前难以想象的方式被延伸的。软件专利搅乱了计算机行业，并让开源程序的开发者感到震惊。与此同时，国会像一个美沙酮成瘾者一样缺乏节制，不断将越来越多的权力交给版权所有者。⁵⁷⁹

Patent outrages and abuse also increased along with a growing tech sector and economy and were also communicated at light speed to blogs and RSS feeds. And in the meantime the traditional content-producers, ever-resistant to new technologies that disrupt comfortable, established business models, kept lobbying Congress to ratchet up patent and copyright scope and terms and penalties and enforcement,¹⁸ while at the same time the US bullied other countries to keep ratcheting up their own IP laws and enforcement.¹⁹ This culminated in the attempt to enact anti-piracy legislation such as the Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA), which was—at least for the moment—derailed by a historic Internet uprising.²⁰

随着科技行业和经济不断发展，专利的暴行和滥用也在增加，并且以光速传播到博客和 RSS 订阅源中。与此同时，传统的内容生产者一直抵制那些破坏舒适、既定商业模式的新技术，不断游说国会扩大大专利和版权的范围、期限、处罚力度和执法力度。

⁵⁷⁹ Declan McCullagh, “Foreword,” in Adams Thierer & Wayne Crews, Jr., eds., *Copy Fights: The Future of Intellectual Property in the Information Age* (Cato, 2002), p. xi. 德克兰·麦卡洛，“前言”，收录于亚当斯·蒂勒和小韦恩·克鲁斯编辑的《抄袭之争：信息时代知识产权的未来》（卡托研究所，2002 年），第 xi 页。

⁵⁸⁰而与此同时，美国逼迫其他国家不断加强他们自己的知识产权法律和执法力度。⁵⁸¹

⁵⁸⁰ See Kinsella, “The Mountain of IP Legislation,” C4SIF Blog (Nov. 24, 2010); Mike Masnick, “How Much Is Enough? We’ve Passed 15 ‘Anti-Piracy’ Laws In The Last 30 Years,” Techdirt (Feb. 15, 2012; <https://perma.cc/TG7U-768F>); and Timothy B. Lee, “Copyright enforcement and the Internet: we just haven’t tried hard enough?,” ars technica (Feb. 16, 2012; <https://perma.cc/75P9-KM7E>).

参见金塞拉的《知识产权立法之山》，C4SIF 博客（2010 年 11 月 24 日）；迈克·马斯尼克的《多少才够？在过去 30 年里我们已经通过了 15 部“反盗版”法律》，Techdirt（2012 年 2 月 15 日；<https://perma.cc/TG7U-768F>）；以及蒂莫西·B·李的《版权执法与互联网：我们只是还不够努力吗？》，Ars Technica（2012 年 2 月 16 日；<https://perma.cc/75P9-KM7E>）。

⁵⁸¹ See, e.g., the following posts from the C4SIF Blog: “Intellectual Property Imperialism” (Oct. 24, 2010); “Covid-19 Relief Bill Adds Criminal Copyright Streaming Penalties and IP Imperialism” (Dec. 22, 2020); “Intellectual Property Rights: A Critical History and US IP Imperialism” (Dec. 31, 2014); “Blowback from IP Imperialism: Chinese Companies Again Using Patents To Punish Foreign Competitors” (July 14, 2012); “‘Free-trade’ pacts export U.S. copyright controls” (Oct. 17, 2011); “China and Intellectual Property” (Dec. 27, 2010); “Wikileaks cables reveal that the US wrote Spain’s proposed copyright laws” (Dec. 3, 2010); and other posts at www.c4sif.org/tag/ip-imperialism. See also Michael Geist, “U.S. Copyright Lobby Takes Aim at Canadian Copyright Term Through Trans-Pacific Partnership,” MichaelGeist.com (Aug. 7, 2013; <https://perma.cc/9NW4-EMAN>); idem, “Japan Considering Copyright Term Extension, Canada Next?,” MichaelGeist.com (July 15, 2013; <https://perma.cc/G4R8-SDEF>); idem, “The Canadian Government Makes its Choice: Implementation of Copyright Term Extension Without Mitigating Against the Harms,” MichaelGeist.com (April 27, 2022; <https://perma.cc/3DER-JUK2>); Declan McCullagh, “Free-trade pacts export U.S. copyright controls,” CNET (Oct. 14, 2011; <https://perma.cc/7LJE-PG4J>).

例如，可以查看 C4SIF 博客的以下文章：《知识产权帝国主义》（2010 年 10 月 24 日）；《新冠疫情救济法案助长了刑事版权流媒体处罚和知识产权帝国主义》（2020 年 12 月 22 日）；《知识产权：批判历史与美国知识产权帝国主义》（2014 年 12 月 31 日）；《知识产权帝国主义的反噬：中国公司再次利用专利惩罚外国竞争对手》（2012 年 7 月 14 日）；《“自由贸易”协定输出美国版权控制》（2011 年 10 月 17 日）；《中国与知识产权》（2010 年 12 月 27 日）；《维基解密电文显示美国撰写了西班牙拟议的版权法》（2010 年 12 月 3 日）；以及在 www.c4sif.org/tag/ip-imperialism 上的其他文章。还可参见迈克尔·盖斯特的《美国版权游说团体通过跨太平洋伙伴关系瞄准加拿大版权期限》，MichaelGeist.com（2013 年 8 月 7 日；<https://perma.cc/9NW4-EMAN>）；同上，《日本考虑延长版权期限，加拿大会是下一个吗？》，MichaelGeist.com（2013 年 7 月 15 日；<https://perma.cc/G4R8-SDEF>）；同上，《加拿大政府做出选择：实施版权期限延长而不减轻其危害》，MichaelGeist.com（2022 年 4 月 27 日；<https://perma.cc/3DER-JUK2>）；德克兰·麦卡洛的《自由贸

这最终导致了试图颁布反盗版立法，如《禁止网络盗版法案》（SOPA）和《保护知识产权法案》（PIPA），但这一努力至少在目前被一场历史性的互联网起义所挫败。⁵⁸²

For these reasons, in the last couple decades, as IP becomes a more apparent threat to property rights, freedom of expression, and the Internet, the issue became more prominent, and libertarians of various stripes—Austrians, anarchists, left-libertarians, civil libertarians, and the young and Internet dependent—started to become more interested in the IP issue and more receptive to anti-IP arguments.²¹ And more and more libertarians are writing on this important topic and building on, incorporating, or extending previous analyses, calling for significant reform of IP law or even outright abolition.²² In addition, outside of libertarianism proper, a host of economists, empirical researchers, and legal scholars, most notably economists Michele Boldrin and David Levine, authors of the groundbreaking *Against Intellectual Monopoly*, have expressed deep skepticism, on empirical grounds, of the claimed pro-innovation effects of patent and copyright.²³

由于这些原因，在过去的几十年里，随着知识产权对财产权、言论自由和互联网的威胁越来越明显，这个问题变得更加突出，各种各样的自由意志主义者——奥地利学派、无政府主义者、左翼自由意志主义者、公民自由意志主义者、年轻人和依赖互联网的

易协定输出美国版权控制》，CNET（2011 年 10 月 14 日；<https://perma.cc/7LJE-PG4J>）。

⁵⁸² See, e.g., Kinsella, “SOPA is the Symptom, Copyright is the Disease: The SOPA wakeup call to ABOLISH COPYRIGHT,” *The Libertarian Standard* (Jan. 24, 2012). See also idem, “Where does IP Rank Among the Worst State Laws?” , C4SIF Blog (Jan. 20, 2012); idem, “Masnick on the Horrible PROTECT IP Act: The Coming IPolice State,” C4SIF Blog (June 2, 2012); idem, “Copyright and the End of Internet Freedom,” C4SIF Blog (May 10, 2011); and idem, “Patent vs. Copyright: Which is Worse?” , C4SIF Blog (Nov. 5, 2011).

例如，可以查看金塞拉的《<禁止网络盗版法案>（SOPA）只是症状，版权才是疾病：SOPA 敲响警钟要求废除版权》，《自由意志主义标准》（2012 年 1 月 24 日）。还可参见同一作者的《知识产权在最糟糕的国家法律中排名如何？》，C4SIF 博客（2012 年 1 月 20 日）；同一作者的《马斯尼克谈可怕的<保护知识产权法案>：即将到来的知识产权警察国家》，C4SIF 博客（2012 年 6 月 2 日）；同一作者的《版权与互联网自由的终结》，C4SIF 博客（2011 年 5 月 10 日）；以及同一作者的《专利与版权：哪个更糟糕？》，C4SIF 博客（2011 年 11 月 5 日）。

人——开始对知识产权问题更感兴趣，更容易接受反知识产权的论点。⁵⁸³越来越多的自由意志主义者正在就这个重要话题的书写文章，并在之前分析的基础上进行拓展、整合或延伸，呼吁对知识产权法进行重大改革，甚至彻底废除。⁵⁸⁴此外，在严格意义

⁵⁸³ See Kinsella, “The Death Throes of Pro-IP Libertarianism,” Mises Daily (July 28, 2010); idem, “ ‘We, The Web Kids’ : Manifesto For An Anti-ACTA Generation,” C4SIF Blog (March 3, 2012). Even many Randians are now anti-IP. See, e.g., idem, “An Objectivist Recants on IP,” C4SIF Blog (Dec. 4, 2009); idem, “Yet another Randian recants on IP,” C4SIF Blog (Feb. 1, 2012); Timothy Sandefur, “A Critique of Ayn Rand’ s Theory of Intellectual Property Rights,” J. Ayn Rand Stud. 9, no. 1 (Fall 2007; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117269): 139 - 61. But see Kinsella, “Does Cato’ s New Objectivist CEO John Allison Presage Retrogression on IP?,” C4SIF Blog (Aug. 27, 2012).

参见金塞拉的《支持知识产权的自由意志主义的垂死挣扎》，米塞斯日报（2010 年 7 月 28 日）；同一作者的《“我们，网络一代”：反《反假冒贸易协定》一代的宣言》，C4SIF 博客（2012 年 3 月 3 日）。甚至许多兰德主义者现在也反对知识产权。例如，可参见同一作者的《一个客观主义者放弃对知识产权的支持》，C4SIF 博客（2009 年 12 月 4 日）；同一作者的《又一个兰德主义者放弃对知识产权的支持》，C4SIF 博客（2012 年 2 月 1 日）；蒂莫西·桑德富尔的《安·兰德知识产权理论的批判》，《安·兰德研究杂志》第 9 卷第 1 期（2007 年秋季；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117269）：139-161。但也可参见金塞拉的《卡托研究所新的客观主义的首席执行官约翰·艾利森是否预示了知识产权的倒退？》，C4SIF 博客（2012 年 8 月 27 日）。

⁵⁸⁴ See, for example, Butler Shaffer, A Libertarian Critique of Intellectual Property (Auburn, Ala.: Mises Institute, 2013; <https://mises.org/library/libertarian-critique-intellectual-property>); Jacob Huebert, “The Fight against Intellectual Property,” in Libertarianism Today (Santa Barbara, CA: Praeger, 2010; <https://mises.org/library/fight-against-intellectual-property>); Walter Block, “The Intellectual-Property Denier,” in Defending the Undefendable II: Freedom in All Realms (UK and USA: Terra Libertas Publishing House, 2013; reprint edition Auburn, Ala.: Mises Institute, 2018; <https://mises.org/library/defending-undefendable-2>); Jeffrey A. Tucker, “Ideas, Free and Unfree,” and other chapters in the “Can Ideas Be Owned?” section of idem, It’ s a Jetsons World: Private Miracles & Public Crimes (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/its-jetsons-world-private-miracles-and-public-crimes>) (chaps. 37 - 41); idem, several chapters in the “Technology” section of idem, Bourbon for Breakfast: Living Outside the Statist Quo (Auburn, Ala.: Mises Institute, 2010; <https://mises.org/library/bourbon-breakfast>); Adam Kokesh, “Intellectual Property,” in Freedom! (2014; <https://archive.org/details/FREEDOMEbook>), § VI; Sandefur, “A Critique of Ayn Rand’ s Theory of Intellectual Property Rights” ; Chase Rachels, “Property,” in A Spontaneous Order: The Capitalist Case For A

Stateless Society (2015; <https://archive.org/details/ASpontaneousOrder0>), section “Intellectual Property”; Vin Armani, “The Ownable and the Unownable,” in *Self Ownership: The Foundation of Property and Morality* (2017; <https://archive.org/details/ASpontaneousOrder0>); Tom W. Bell, “Copyright, Philosophically,” in *Intellectual Privilege: Copyright, Common Law, and the Common Good* (Arlington, Virginia: Mercatus Center, 2014; <https://perma.cc/JLC2-396Y>); Jerry Brito, ed., *Copyright Unbalanced: From Incentive to Excess* (Arlington, Va.: Mercatus Center, 2013); Jack Lloyd, “Property Rights,” in *The Definitive Guide to Libertarian Voluntarism* (2022); Isaac Morehouse, “How I Changed My Mind on Intellectual Property,” FEE.org (Sept. 27, 2016; <https://perma.cc/324H-TPRY>), also in Keith Knight, ed., *The Voluntarist Handbook: A Collection of Essays, Excerpts, and Quotes* (2022; <https://perma.cc/N8UX-4PX4>). See also various resources collected at www.c4sif.org/resources and Kinsella, ed., “The Anti-IP Reader.”

例如，可参考巴特勒·谢弗的《对知识产权的自由意志主义批判》（亚拉巴马州奥本：米塞斯研究院，2013年；<https://mises.org/library/libertarian-critique-intellectual-property>）；雅各布·休伯特的《与知识产权的斗争》，收录于《今日自由意志主义》（加利福尼亚州圣巴巴拉：普雷格出版社，2010年；<https://mises.org/library/fight-against-intellectual-property>）；沃尔特·布洛克的《知识产权的否定者》，收录于《为不可辩护者辩护 2：所有领域的自由》（英国和美国：特拉·利伯塔斯出版社，2013年；奥本，亚拉巴马州米塞斯研究院2018年再版；<https://mises.org/library/defending-undefendable-2>）；杰弗里·A·塔克的《自由与不自由的思想》以及他的《杰特森一家的世界：私人奇迹与公共罪行》中“思想可以被拥有吗？”部分的其他章节（亚拉巴马州奥本：米塞斯研究院，2011年；<https://mises.org/library/its-jetsons-world-private-miracles-and-public-crimes>）（第37-41章）；同上，在《早餐喝波本威士忌：生活在国家主义现状之外》的“技术”部分的几个章节（亚拉巴马州奥本：米塞斯研究院，2010年；<https://mises.org/library/bourbon-breakfast>）；亚当·科克什的《知识产权》，收录于《自由！》（2014年；<https://archive.org/details/FREEDOMEbook>），第六部分；桑德富尔的《对安·兰德知识产权理论的批判》；蔡斯·雷切尔斯的《财产》，收录于《自发秩序：无国家社会的资本主义案例》（2015年；<https://archive.org/details/ASpontaneousOrder0>），“知识产权”部分；文·阿玛尼的《可拥有的与不可拥有的》，收录于《自我所有权：财产与道德的基础》（2017年；<https://archive.org/details/ASpontaneousOrder0>）；汤姆·W·贝尔的《从哲学角度看版权》，收录于《知识特权：版权、普通法与共同利益》（弗吉尼亚州阿灵顿：梅卡托斯中心，2014年；<https://perma.cc/JLC2-396Y>）；杰里·布里托编辑的《不平衡的版权：从激励到暴行》（弗吉尼亚州阿灵顿：梅卡托斯中心，2013年）；杰克·劳埃德的《财产权》，收录于《自由意志主义自愿主义权威指南》（2022年）；艾萨克·莫尔蒙斯的《我如何改变了对知识产权的看法》，FEE.org（2016年9月27日；<https://perma.cc/324H-TPRY>），也收录于基思·奈特编辑的《自愿主义手册：论文、

上的自由意志主义之外，许多经济学家、实证研究者和法律学者，其中最著名的是经济学家米歇尔·博德里尼和大卫·莱文，他们是具有开创性的《反对知识垄断》一文的作者，基于实证理由对专利和版权所宣称的促进创新的效果表示了深深的怀疑。

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The issue continues to receive attention from a variety of institutions and outlets. I have myself, lectured, debated, and been interviewed countless times on this topic, including on the Stossel show and the Reason.tv-sponsored Soho Forum debate.²⁴ I also gave a six-part lecture course on IP for the Mises Academy in 2010 and reprised in 2011,²⁵ and I have continued to write on this topic.²⁶

这个问题继续受到各种机构和渠道的关注。我自己就这个话题做过无数次演讲、论证以及接受采访，包括在斯托塞尔秀和由 Reason.tv 赞助的 Soho 论坛论证中。⁵⁸⁶ 也在 2010 年为米塞斯学院(Mises Academy)做了一个关于知识产权的六部分讲座课程，并

节选和语录集》（2022 年；<https://perma.cc/N8UX-4PX4>）。另可参见 www.c4sif.org/resources 收集的各种资源以及金塞拉编辑的《反知识产权读本》。

⁵⁸⁵ Michele Boldrin & David K. Levine, *Against Intellectual Monopoly* (Cambridge University Press, 2008; <https://tinyurl.com/bdkn5885>). See also Kinsella, “The Overwhelming Empirical Case Against Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); idem, “Legal Scholars: Thumbs Down on Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); and idem, “Yet Another Study Finds Patents Do Not Encourage Innovation,” Mises Economics Blog (July 2, 2009).

米歇尔·博德里尼和大卫·K·莱文，《反对知识垄断》（剑桥大学出版社，2008 年；<https://tinyurl.com/bdkn5885>）。另见金塞拉的《反对专利和版权的压倒性实证案例》，C4SIF 博客（2012 年 10 月 23 日）；同上，《法律学者：对专利和版权表示反对》，C4SIF 博客（2012 年 10 月 23 日）；以及同上，《又一项研究发现专利并不鼓励创新》，米塞斯经济学博客（2009 年 7 月 2 日）。

⁵⁸⁶ See Kinsella, “KOL308 | Stossel: It’s My Idea (2015),” Kinsella on Liberty Podcast (Dec. 29, 2020) and idem, “KOL364 | Soho Forum Debate vs. Richard Epstein” ; and dozens of speeches and appearances on radio shows and podcasts, collected on the Kinsella on Liberty podcast feed at www.stephankinsella.com/kinsella-on-liberty-podcast.

参见金塞拉的“KOL308 | 斯托塞尔：这是我的想法（2015）”，《金塞拉谈自由》播客（2020 年 12 月 29 日）以及同上，“KOL364 | Soho 论坛论证对阵理查德·爱泼斯坦”；还有在广播节目和播客中的数十次演讲和露面，收集在 www.stephankinsella.com/kinsella-on-liberty-podcast 的《金塞拉谈自由》播客订阅源中。

在 2011 年再次讲授，⁵⁸⁷ 并且我一直在继续撰写关于这个主题的文章。⁵⁸⁸

What about the prospects for reform of patent and copyright law? While more and more libertarians have come to see IP law as unjust, it is unlikely there will be much legislative progress on this matter due to widespread confusion about property rights and entrenched special interests, in particular Hollywood and the American music industry, which rely on copyright, and the pharmaceutical industry, which profits from the patent system. That said, it seems unlikely that copyright terms—once 14 years extendable to 28, and then life of the author plus 50 years, and now life of the author plus 70 years—will be extended any further. And while patent and copyright law will stay on the books for a long time, technology will make them increasingly harder to enforce. Piracy of copyrighted works is already rampant due to the Internet and encryption. As 3D printing technology advances, we may see an increased ability of consumers to evade patent law as well.²⁷

专利和版权法改革的前景如何?虽然越来越多的自由意志主义者认为知识产权法是不正义的，但由于对财产权和根深蒂固的特殊利益的广泛混淆，特别是依赖版权的好莱坞和美国音乐行业，以及从专利制度中获利的制药行业，在这个问题上不太可能有太多的立法进展。也就是说，版权期限——曾经是 14 年可延长至 28 年，然后是作者寿命加 50 年，现在是作者寿命加 70 年——似乎不太可能进一步再延长了。虽然专利和版权法在很长一段时间内仍会存在于法律条文中，但技术将使它们越来越难以执行。

⁵⁸⁷ See Kinsella, “KOL172 | “Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and Law” (Mises Academy, 2011),” Kinsella on Liberty Podcast (Feb. 14, 2015).

参见金塞拉的“KOL172 | 《重新思考知识产权：历史、理论与经济学：讲座 1：历史与法律》（米塞斯学院，2011 年）”，《金塞拉谈自由》播客（2015 年 2 月 14 日）。

⁵⁸⁸ See, e.g., Kinsella, “A Selection of My Best Articles and Speeches on IP,” C4SIF Blog (Nov. 30, 2015), idem, You Can’t Own Ideas: Essays on Intellectual Property (Houston, Texas: Papinian Press, 2023; www.stephankinsella.com/own-ideas), and other material at www.stephankinsella.com/publications and www.c4sif.org/aip.

例如，可以查看金塞拉的《我的关于知识产权的最佳文章和演讲选集》，C4SIF 博客（2015 年 11 月 30 日）；同上，《你不能拥有思想：关于知识产权的论文》（得克萨斯州休斯敦：帕皮尼安出版社，2023 年：www.stephankinsella.com/own-ideas），以及在 www.stephankinsella.com/publications 和 www.c4sif.org/aip 上的其他资料。

由于互联网和加密技术，受版权保护作品的盗版已经泛滥成灾。随着 3D 打印技术的进步，我们可能也会看到消费者逃避专利法的能力增强。⁵⁸⁹

III 改变

CHANGES

I've been asked from time to time what changes I would make to AIP. In my assessment, the basic arguments in AIP are sound. I have yet to see a valid criticism.²⁸ I might change the structure somewhat, or an emphasis or wording here and there. For example, I would clarify that scarcity is meant in the technical economics sense of rivalrousness.

我不时会被问到对《反对知识产权》(Against Intellectual Property, AIP) 我会做出哪些修改。在我看来，《反对知识产权》中的基本论点是合理的。我还没有看到一个有效的批评。⁵⁹⁰我可能会在一定程度上改变其结构, 或者在这里或那里调整重点或措辞。例如, 我会阐明“稀缺性”是在严格的经济学意义上的竞争性这个层面上的意思。

I might even propose the use of the term “conflictible,” to emphasize the nature of resources that gives rise to property rights in the first place, and to head off silly arguments like, “Well, IP is justified since good ideas are scarce.”²⁹ Also, I might use “corporeal” or “material” instead of “tangible.”³⁰ I would try to be more careful to

⁵⁸⁹ See Kinsella, “Gary North on the 3D Printing Threat to Patent Law,” C4SIF Blog(Jan. 31, 2022), and links and references therein.

参见金塞拉的“加里·诺斯谈 3D 打印对专利法的威胁”, C4SIF 博客(2022 年 1 月 31 日), 以及其中的链接和参考文献。

⁵⁹⁰ See Kinsella, “There are No Good Arguments for Intellectual Property,” Mises Economics Blog (Feb. 24, 2009); idem, “Absurd Arguments for IP,” C4SIF Blog (Sep. 19, 2011); idem, “KOL367 | Disenthrall with Patrick Smith: Fisking Strangerous Thoughts’ Critique of ‘Intellectual Communism,’ ” Kinsella on Liberty Podcast (Dec. 20, 2021); idem, “KOL076 | IP Debate with Chris LeRoux,” Kinsella on Liberty Podcast (Aug. 30, 2013).

参见金塞拉的《不存在支持知识产权的好论点》, 米塞斯经济学博客(2009 年 2 月 24 日); 同上, “支持知识产权的荒谬论点”, C4SIF 博客(2011 年 9 月 19 日); 同上, “KOL367 | 与帕特里克·史密斯一起摆脱束缚:《驳斥危险思想, 对‘知识共产主义’的批评》, 《金塞拉谈自由》播客(2021 年 12 月 20 日); 同上, “KOL076 | 与克里斯·勒鲁的知识产权论证”, 《金塞拉谈自由》播客(2013 年 8 月 30 日)。

use the term property to refer not to the owned resource that is the subject of property rights, but only to the relationship between the owner and the resource owned, although this can be tedious if overdone.³¹ I would streamline the initial section providing a positive legal description of the main forms of IP and eliminate the Appendix providing examples of obvious IP abuse, since this can be done now in an easily updated online page or post.³² I would now be a bit harsher on trademark than I was in AIP; all trademark law is evil and should be abolished. The aspects of it that can be defended are already present in contract and fraud law.

我甚至可能提议使用“可引发冲突的”（conflictible）这个术语，以强调资源的本质，而正是这种本质首先引发了财产权，并阻止诸如“好吧，知识产权是正当的，因为好的想法是稀缺的”这样愚蠢的论点。⁵⁹¹此外，我可能会使用“有形的”（corporeal）或“物质的”（material）来代替“可触摸的”（tangible）。⁵⁹²我会更加谨慎地使用“财产”这个术语，

⁵⁹¹ See Kinsella, “On Conflictability and Conflictible Resources,” StephanKinsella.com (Jan. 31, 2022).

参见金塞拉的《论冲突性与冲突性资源》，StephanKinsella.com（2022年1月31日）。

⁵⁹² In AIP I sometimes used the term “tangible” to indicate scarce resources that can be subject to property rights. (I’ve also sometimes used the term corporeal, a civil-law term.) Hardy Bouillon argues that it might be more precise to focus on the difference between material vs. non-material goods, rather than tangible vs. non-tangible goods, as the touchstone of things subject to property rights. As Bouillon writes: Though some speak exclusively of tangible and non-tangible goods, I prefer to talk of material and immaterial goods.... The point about material goods is not that they are tangible, for some are not. For instance, atoms and many other small material units are not tangible; they are identifiable only indirectly, though this does not prevent us from calling them material.

Hardy Bouillon, “A Note on Intellectual Property and Externalities,” *Mises Daily* (Oct. 27, 2009), previously published in Jörg Guido Hülsmann & Stephan Kinsella, eds., *Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe* (Auburn, Ala.: Mises Institute, 2009). I see some merit in his argument, though as noted above I think the essence of what makes some thing a possible subject of property rights is whether it is conflictible or not.

在《反对知识产权》中，我有时会使用“可触摸的”（tangible）这个术语来表示可以成为财产权对象的稀缺资源。（我有时也会使用“有形的”（corporeal）这个民法术语。）哈迪·布永认为，将物质财货与非物质财货之间的区别，而不是可触摸财货与不可触摸财货之间的区别，作为可成为财产权对象事物的试金石，可能会更加精确。正如布永所写：

使其不是指作为财产权对象的所拥有的资源，而只是指所有者与所拥有的资源之间的关系，尽管如果过度这样做可能会单调乏味。⁵⁹³我会精简最初提供知识产权主要形式的正面法律描述的部分，并删除提供明显的知识产权滥用例子的附录，因为现在这可以在一个容易更新的在线页面或帖子中完成。⁵⁹⁴我现在对商标的态度会比我在《反对知识产权》中更加严厉；所有的商标法都是邪恶的，应该被废除。其中可以辩护的方面已经存在于和欺诈法中。

IV 补充

ADDITIONS

But I would not change much, substantively speaking. However, since writing AIP over 20 years ago, I have found additional ways of explaining the fundamental problem with IP law—additional arguments, examples, and evidence.³³ So I would add some material, as I did to some degree in a later paper.³⁴ I'll briefly outline below some of the

尽管有些人只谈论可触摸财货和不可触摸财货，但我更愿意谈论物质财货和非物质财货……物质财货的关键不在于它们是可触摸的，因为有些物质财货不是可触摸的。例如，原子和许多其他小的物质单位是不可触摸的；它们只能间接地被识别，尽管这并不妨碍我们称它们为物质的。

哈迪·布永，《关于知识产权与外部性的一则笔记》，米塞斯日报（2009 年 10 月 27 日），此前发表于约尔格·吉多·许尔斯曼和斯蒂芬·金塞拉编辑的《财产、自由与社会：纪念汉斯-赫尔曼·霍普的论文集》（亚拉巴马州奥本：米塞斯研究院，2009 年）。我认为他的论点有一定的优点，尽管如上文所述，我认为使某事物成为可能的财财产权主体的本质在于它是否是可引发冲突的。

⁵⁹³ See “What Libertarianism Is” (ch. 2), n.5; also Kinsella, “Property: Libertarian Answer Man: Self-ownership for slaves and Crusoe; and Yiannopoulos on Accurate Analysis and the term ‘Property,’ ” StephanKinsella.com (April 3, 2021).

参见《何为自由意志主义》（第 2 章），注释 5；也可参见金塞拉的《财产：自由意志主义的回答，人：奴隶和鲁滨逊的自我所有权；以及扬诺普洛斯关于准确分析和“财产”一词》，StephanKinsella.com（2021 年 4 月 3 日）。

⁵⁹⁴ As I did in a later article based on AIP, “The Case Against Intellectual Property,” in Handbook of the Philosophical Foundations of Business Ethics, Prof. Dr. Christoph Lüdtge, ed. (Springer, 2013) (chapter 68, in Part 18, “Property Rights: Material and Intellectual,” Robert McGee, section ed.).

正如我在一篇基于《反对知识产权》的后续文章《反对知识产权的案例》中所做的那样，该文收录于《商业伦理哲学基础手册》，克里斯托夫·吕特格教授编辑（施普林格出版社，2013 年）（第 18 部分第 68 章《财财产权：物质的和知识的》，罗伯特·麦吉担任部分编辑）。

arguments developed after the initial publication of AIP.

但从实质上讲，我不会做太多改变。然而，自 20 多年前撰写《反对知识产权》以来，我找到了更多解释知识产权法根本问题的方法——更多的论点、例子和证据。⁵⁹⁵所以我会添加一些内容，就像我在后来的一篇论文中在一定程度上所做的那样。⁵⁹⁶下面我将简要概述在《反对知识产权》首次出版后发展出的一些论点。

经验证据 Empirical Evidence

In the “Utilitarian Defenses of IP” section of AIP, I explained various defects in the utilitarian case for IP. First, as Austrians have explained, value is not a measurable, cardinal quantity that can be interpersonally compared.³⁵ Second, even if violating someone’s rights by taking their resources and redistributing them to someone else makes the recipient better off, it is still a rights violation. And third, the proponent of IP, arguing that IP laws lead to net utility gains, has the burden of proof.³⁶

在《反对知识产权》的“知识产权的功利主义辩护”部分，我解释了支持知识产权的功利主义观点的各种缺陷。首先，正如奥地利学派所解释的那样，价值不是一个可测量的、基数的量，不能在人际间进行比较。⁵⁹⁷其次，通过拿走某人的资源并将其重新分

⁵⁹⁵ See, generally, Kinsella, “A Selection of My Best Articles and Speeches on IP.”

一般可参见金塞拉的《我的关于知识产权的最佳文章和演讲选集》。

⁵⁹⁶ “Law and Intellectual Property in a Stateless Society” (ch. 14) restates the basic case against IP and incorporates some new arguments developed after AIP.

《无国家社会中的法律与知识产权》（第 14 章）重申了反对知识产权的基本观点，并纳入了在《反对知识产权》之后发展出的一些新论点。

⁵⁹⁷ See AIP, n.41; also Murray N. Rothbard, “Toward a Reconstruction of Utility and Welfare Economics,” in *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>). For a recent article debunking David Friedman’s scientific and confused contention that “Von Neumann proved” that utility can be measured or expressed cardinally, see Robert P. Murphy, “Why Austrians Stress Ordinal Utility,” *Mises Wire* (Feb. 3, 2022; <https://mises.org/wire/why-austrians-stress-ordinal-utility>).

参见《反对知识产权》，注释 41；也可参见穆瑞·N·罗斯巴德的《重建效用与福利经济学》，收录于《经济学的论证》（亚拉巴马州奥本：米塞斯研究院，2011 年；<https://mises.org/library/economic-controversies>）。关于一篇最近的文章，驳斥了大卫·弗里德曼科学主义且混乱的论点，即“冯·诺依曼证明了”效用可以被测量或用

配给其他人，就算这种侵犯了某人的权利使得接受者的情况变得更好，这依然是一种权利侵犯。第三，知识产权的支持者声称知识产权法会带来净效用收益，他们负有举证责任。⁵⁹⁸

基数来表达，可参见罗伯特·P·墨菲的《为什么奥地利学派强调序数效用》，米塞斯Wire（2022年2月3日；<https://mises.org/wire/why-austrians-stress-ordinal-utility>）。

⁵⁹⁸ See Kinsella, “There’s No Such Thing as a Free Patent,” Mises Daily (Mar. 7, 2005); Palmer, “Are Patents and Copyrights Morally Justified?”, pp. 849 – 50 (emphasis added):

utilitarian arguments of a certain class can cut for or against intellectual property rights claims. As dealt with in much of the economics literature, for example, the utility gains from increased incentives for innovation must be weighed against the utility losses incurred from monopolization of innovations and their diminished diffusion. Some have argued that the first part of the comparison may be either negative or positive; patents or copyrights may actually decrease innovation, rather than increase it.

As Matt Ridley writes:

A further problem is that patents undoubtedly raise the costs of goods. That is the point: to keep competition at bay while the innovator reaps a reward. This slows the development and spread of the innovation. As the economist Joan Robinson put it: “The justification of the patent system is that by slowing down the diffusion of technical progress it ensures that there will be more progress to diffuse.” But this does not necessarily happen. Indeed, history is replete with examples of bursts of innovation that follow the ending of a patent.

Matt Ridley, *How Innovation Works: And Why It Flourishes in Freedom* (Harper, 2020), p. 347. The Robinson quote is from Joan Robinson, *The Accumulation of Capital*, 3d ed. (Palgrave Macmillan, 2013 [1969]), p. 87. This quote is paraphrased (with approval) by free-market economist William Shughart. See William F. Shughart II, “Ideas Need Protection: Abolishing Intellectual-property Patents Would Hurt Innovation: A Middle Ground Is Needed,” *Baltimore Sun* (December 21, 2009); Kinsella, “Independent Institute on The ‘Benefits’ of Intellectual Property Protection,” *C4SIF Blog* (Feb. 15, 2016).

参见金塞拉的《不存在免费的专利》，米塞斯日报（2005年3月7日）；帕尔默的《专利和版权在道德上是正当的吗？》，第849-850页（着重号为原文所加）：

某一类功利主义的论点可能支持或反对知识产权主张。例如，正如在许多经济学文献中所讨论的那样，因创新激励增加而带来的效用收益必须与创新垄断所导致的效用损失以及创新扩散减少所带来的效用损失进行权衡。一些人认为，比较的第一部分可能是负面的也可能是正面的；专利或版权实际上可能会减少而不是增加创新。

正如马特·里德利所写：

另一个问题是，专利无疑会提高财货成本。这就是关键所在：在创新者获得回报的同时阻止竞争。这减缓了创新的发展和传播。正如经济学家琼·罗宾逊所说：“专利制

And it has become increasingly clearer, in the last 60+ years, that those arguing for IP on empirical grounds have not yet satisfied and cannot satisfy their burden of proof that IP makes us better off.³⁷ As I wrote in a subsequent paper, “Given the available evidence, anyone who accepts utilitarianism should be opposed to patent and copyright.”³⁸

并且在过去 60 多年里，越来越明显的是，那些基于经验理由为知识产权辩护的人尚未完成也无法完成他们关于知识产权使我们的情况变得更好的举证责任。⁵⁹⁹正如我在随后的一篇文章中所写：“鉴于现有证据，任何接受功利主义的人都应该反对专利和版权。”⁶⁰⁰

作为消极地役权的知识产权⁶⁰¹

IP Rights as Negative Easements³⁹

Additionally, I have come to understand that IP rights can be properly classified as non-consensual negative easements (or servitudes),⁴⁰ which makes plain

度的合理性在于，通过减缓技术进步的扩散，它确保了会有更多的进步可供扩散。”但这并不一定会发生。事实上，历史上充满了专利结束后创新爆发的例子。马特·里德利，《创新如何运作：以及为何它在自由中蓬勃发展》（哈珀出版社，2020 年），第 347 页。罗宾逊的引述来自琼·罗宾逊的《资本积累》第三版（帕尔格雷夫·麦克米伦出版社，2013 年[1969 年]），第 87 页。自由市场经济学家威廉·舒加特对这句话进行了释义（并表示赞同）。参见威廉·F·舒加特二世的《思想需要保护：废除知识产权专利会损害创新：需要一个中间立场》，《巴尔的摩太阳报》（2009 年 12 月 21 日）；金塞拉的《独立研究机构论知识产权保护的“益处”》，C4SIF 博客（2016 年 2 月 15 日）。

⁵⁹⁹ See Boldrin & Levine, *Against Intellectual Monopoly*; Kinsella, “The Overwhelming Empirical Case Against Patent and Copyright”; idem, “Legal Scholars: Thumbs Down on Patent and Copyright.”; idem, “Tabarrok, Cowen, and Douglass North on Patents,” C4SIF Blog (March 11, 2021).

参见博尔德林和莱文的《反对知识垄断》；金塞拉的《反对专利和版权的压倒性实证案例》；同上，《法律学者：对专利和版权持否定态度》；同上，《塔巴洛克、考恩和道格拉斯·诺斯论专利》，C4SIF 博客（2021 年 3 月 11 日）。

⁶⁰⁰ “Law and Intellectual Property in a Stateless Society” (ch. 14), text at n.76.

《无国家社会中的法律与知识产权》（第 14 章），注释 76 处的文本。

⁶⁰¹ See also Part IV.F, below.

另见下文第四部分 F 节。

exactly how they infringe justly-acquired property rights.⁴¹ All property rights are enforceable rights in material, scarce— conflictable—resources, the type of (causally efficacious) scarce means that human actors can possess and manipulate and employ to causally interfere in the world. It is not that assigning property rights in information or knowledge is wrong, but that it is impossible.⁴² Force cannot be applied to “ideas” or information, but only to scarce resources. Any IP right is just a disguised reassignment of property rights in existing scarce resources. One reason for the confusion here is that people are not careful in distinguishing between motivations and means.

此外，我逐渐明白知识产权可以被恰当地归类为非经同意的消极地役权（或从属性权利），⁶⁰² 这清楚地表明了它们究竟是如何侵犯正当获得的财产权的。⁶⁰³ 所有的财产权都是对物质的、稀缺的——可引发冲突的——资源的可执行权利，这种（具有因果效力的）稀缺手段是人类行动人能够占有、操纵并用来对世界进行因果干预的。并不是

⁶⁰² Servitude is the civil law term; easement the common law term. See Gregory W. Rome & Stephan Kinsella, *Louisiana Civil Law Dictionary* (New Orleans, La.: Quid Pro Books, 2011). These rights are also “nonapparent.” See Kinsella, “Intellectual Property Rights as Negative Servitudes,” C4SIF Blog (June 23, 2011). IP rights can also be classified legally as incorporeal movables, although this classification has no relevance here. See Louisiana Civil Code (https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent), arts. 461, 462, 475; Kinsella, “Are Ideas Movable or Immovable?” C4SIF Blog (April 8, 2013). See also related discussion in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), n.39 and references and quotes in “What Libertarianism Is” (ch. 2), n.5, related to the nature of “things” in the civil law.

“Servitude”是民法术语；“easement”是普通法术语。参见格雷戈里·W·罗姆和斯蒂芬·金塞拉的《路易斯安那州民法词典》（路易斯安那州新奥尔良：Quid Pro Books, 2011年）。这些权利也是“不明显的”。参见金塞拉的《作为消极地役权的知识产权》，C4SIF 博客（2011年6月23日）。知识产权在法律上也可以被归类为无形动产，尽管这种分类在这里并不相关。参见《路易斯安那州民法典》（https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent），第461、462、475条；金塞拉的《思想是动产还是不动产？》，C4SIF 博客（2013年4月8日）。另见《出售并不意味着拥有，反之亦然：一个剖析》（第11章）注释39中的相关讨论，以及《何为自由意志主义》（第2章）注释5中关于民法中“事物”性质的参考和引述。

⁶⁰³ Kinsella, “Intellectual Property Rights as Negative Servitudes.” 金塞拉，《作为消极地役权的知识产权》。

说在信息或知识上设定财产权是错误的，而是这是不可能的。⁶⁰⁴武力不能应用于“思想”或信息，而只能应用于稀缺资源。任何知识产权都只是对现有稀缺资源中财产权的变相重新分配。这里产生混淆的一个原因是人们在区分动机和手段时不够谨慎。

For example, it is sometimes said that people “fight over religion.” But this is not accurate. Religion is not a scarce resource over which there can be conflict. Any interpersonal human conflict is always over scarce, material, conflictable resources. If A kills B or takes his land or cows in a religious dispute, the religious disagreement is merely the motivation or reason for the conflict or clash—the explanation for why parties act as they do—but the clash itself is always over the material things that are the real subject of property rights. We can explain a given human action by reference to the ends aimed at and the means employed. One’s motivations and goals factor into the ends; but the actual means employed and the actions taken are what property rights concern.⁴³

例如，有时人们会说人们“因宗教而战”。但这并不准确。宗教不是一种会引发冲突的稀缺资源。任何人际间的冲突总是围绕着稀缺的、物质的、可引发冲突的资源。如果在一场宗教争端中，A 杀死了 B 或者夺走了他的土地或奶牛，宗教分歧仅仅是冲突或争斗的动机或原因——是对各方为何如此行动的解释——但冲突本身总是围绕着那些作为财产权真正主体的物质事物。我们可以通过所针对的目的和所采用的手段来解释一个特定的人的行动。一个人的动机和目标是目的的一部分；但实际采用的手段和所采取的行动才是财产权所关注的。⁶⁰⁵

⁶⁰⁴ See also Part IV.G, below, and “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11).

另见下文第四部分 G 节以及《出售并不意味着拥有，反之亦然：一个剖析》（第 11 章）。

⁶⁰⁵ For more on this, see the various discussions of what it means to have a “fight over religion,” in “On the Logic of Libertarianism and Why Intellectual Property Doesn’t Exist” (ch. 24); also Kinsella, “The Limits of Libertarianism?: A Dissenting View,” StephanKinsella.com (April 20, 2014); and the comments in the transcripts to these episodes of the Kinsella on Liberty Podcast: “KOL337 | Join the Wasabikas Ep. 15.0: You Don’t Own Bitcoin—Property Rights, Praxeology and the Foundations of Private Law, with Max Hillebrand” (May 23, 2021); “KOL154 | ‘The Social Theory of Hoppe: Lecture 2: Types of Socialism and the Origin of the State’ ”

All rights are human rights, and all human rights are property rights,⁴⁴ and property rights just are rights to the exclusive control of certain conflictable resources.⁴⁵ In the end, every law, every dispute, boils down to some actor being assigned ownership rights in a given contested (conflictible) resource. A copyright grant gives the holder a partial property right in the printing press and computers of other people. A patent grant gives the holder a partial property right in the factories and raw material already owned by others. Such rights are negative easements that permit the holder to veto or prevent certain uses by the owner. Negative easements are legitimate when consented to, but in the case of IP, the state grants these rights to the IP holder without the consent of the owner of the burdened property (the so-called "servient estate"). As I noted in AIP, "ownership of an idea, or ideal object, effectively gives the IP owners a property right in every physical embodiment of that work or invention."⁴⁶ Thus, IP rights amount to a taking or infringement of property rights otherwise established in accordance with the principles of original appropriation and contract.⁴⁷ This insight buttresses the argument in AIP that "a system of property rights in 'ideal objects' necessarily requires violation of other individual property rights, e.g., to use one's own tangible property as one sees fit."⁴⁸

所有的权利都是人权，而所有的人权都是财产权，⁶⁰⁶并且财产权仅仅是对某些冲突性

(Oct. 16, 2014); "KOL076 | IP Debate with Chris LeRoux" (Aug. 30, 2013); and "KOL038 | Debate with Robert Wenzel on Intellectual Property" (April 1, 2013).

关于这一点的更多内容，可参见《关于自由意志主义的逻辑以及为何知识产权不存在》（第 24 章）中对“因宗教而争斗”的各种讨论；也可参见金塞拉的《自由意志主义的局限？：一种不同观点》，StephanKinsella.com（2014 年 4 月 20 日）；以及金塞拉自由在播客这些剧集的文字记录中的评论：“KOL337 | 加入 Wasabikas 第 15.0 集：你并不拥有比特币——财产权、行动学和私法基础，与马克斯·希勒布兰德商榷”（2021 年 5 月 23 日）；“KOL154 | ‘霍普的社会理论：讲座 2：社会主义的类型和国家的起源’”（2014 年 10 月 16 日）；“KOL076 | 与克里斯·勒鲁的知识产权论证”（2013 年 8 月 30 日）；以及“KOL038 | 与罗伯特·温泽尔就知识产权进行论证”（2013 年 4 月 1 日）。

⁶⁰⁶ See 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>).

参见穆瑞·N·罗斯巴德，《“人权”即财产权》，载于《自由的伦理》（纽约：纽约大学出版社，1998；<https://mises.org/library/human-rights-property-rights>）。

资源的排他性控制权。⁶⁰⁷最终，每一项法律、每一个争议都归结为某个行动人被赋予对某个有争议（可引发冲突的）资源的所有权。版权的授予使持有者对他人的印刷机和电脑拥有部分财产权。专利的授予使持有者对他人已经拥有的工厂和原材料拥有部分财产权。这些权利是消极地役权，允许持有者否决或阻止所有者的某些使用。当获得同意时，消极地役权是合法的，但在知识产权的情况下，国家在未获得负担财产所有者（所谓的“从属地役权”）同意的情况下将这些权利授予知识产权持有者。正如我在《反对知识产权》中指出的，“对一个想法或理想对象的所有权，实际上给予了知识产权所有者对该作品或发明的每一个物理体现主体的财产权”。⁶⁰⁸因此，知识产权相当

⁶⁰⁷ See Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1 – 2 & 7.

参见霍普《社会主义与资本主义理论》第一章，第二章和第七章。

⁶⁰⁸ See AIP, the section “IP Rights and Relation to Tangible Property,” p. 15. Rothbard recognizes this in a limited way when he writes: “[P]atents actually invade the property rights of those independent discoverers of an idea or invention who made the discovery after the patentee. Patents, therefore, invade rather than defend property rights.” Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholar’s ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 10, § 7, p. 749. Yet patents invade not only the rights of those who independently discover the same invention; they also invade the rights of competitors and copiers who have every right to use publicly available information to guide their actions and to manipulate their own resources. And as noted in “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.C, and Kinsella, AIP, the section “Contract vs. Reserved Rights,” Rothbard does not really oppose patents. He defends what he erroneously calls copyright or “common law copyright,” with a flawed contract-based argument that contradicts his own contract theory and his criticism of defamation law (another type of IP; see Kinsella, “Defamation Law and Reputation Rights as a Type of Intellectual Property”). But the copyright Rothbard advocates is not like current, legislated copyright, and it also includes inventions, like Brown’s mousetrap (which is the domain of patent law). (For Rothbard’s mousetrap example, see Murray N. Rothbard, “Knowledge, True and False,” in *The Ethics of Liberty* (New York: New York University Press, 1998; <https://mises.org/library/knowledge-true-and-false>), p. 123.) So what he really advocates is a contractual version of patent law (and presumably copyright law, if his argument extends not only to inventions but also to artistic works and things like books). And his contract-based IP/copyright idea is not “common law copyright”; that was doctrine in the common law that was similar to trade secrets and had nothing to do with this contractual IP argument Rothbard is making, or to actual copyright that was not at all rooted in contract. See Wikipedia, <https://en.wikipedia>.

于对根据先占和原则原本已确立的财产权的剥夺或侵犯。⁶⁰⁹这一见解支持了《反对知识产权》中的论点，即“对‘理想对象’的财产权制度必然要求侵犯他人的个人财产权，即按照自己认为合适的方式使用自己的真实财产”。⁶¹⁰

org/wiki/Common_law_copyright. Writes Rothbard: “Violation of (common law) copyright is an equivalent violation of contract and theft of property.” Ibid. I criticize this view in AIP, the section “Contract vs. Reserved Rights.” His reasoning here also makes some of the same mistakes as his view of “implicit theft” that I criticize in “A Libertarian Theory of Contract” (ch. 9), Part III.D.

参见《反对知识产权》中“知识产权与真实财产的关系”一节，第 15 页。罗斯巴德在一定程度上认识到了这一点，他写道：“[专利]实际上侵犯了那些在专利权人之后独立发现某个想法或发明的人的财产权。因此，专利侵犯而非捍卫财产权。”穆瑞·N·罗斯巴德，《人、经济与国家，权力与市场》，学者版，第二版（亚拉巴马州奥本：米塞斯研院，2009 年；<https://mises.org/library/man-economy-and-state-power-and-market>），第 10 章，第 7 节，第 749 页。然而，专利不仅侵犯了那些独立发现同一发明的人的权利；它们还侵犯了竞争者和复制者的权利，这些人完全有权使用公开可得的信息来指导他们的行动并操纵他们自己的资源。正如在《无国家社会中的法律与知识产权》（第 14 章）第三部分 C 节以及金塞拉的《反对知识产权》中“与保留权利”一节所指出的，罗斯巴德实际上并不反对专利。他用一个有缺陷的基于的论点为他错误地称为版权或“普通法版权”的东西进行辩护，这个论点与他自己的理论以及他对诽谤法（另一种知识产权；参见金塞拉的《诽谤法与名誉权作为一种知识产权》）的批评相矛盾。但是罗斯巴德所倡导的版权并不像当前的法定版权，它还包括发明，比如布朗的捕鼠器（这是专利法的范畴）。（关于罗斯巴德的捕鼠器例子，参见穆瑞·罗斯巴德，《真知识与假知识》，收录于《自由的伦理》（纽约：纽约大学出版社，1998 年；<https://mises.org/library/knowledge-true-and-false>），第 123 页。）所以他真正倡导的是专利法（大概还有版权法，如果他的论点不仅适用于发明，还适用于艺术作品和书籍之类的东西）的版本。并且他基于的知识产权/版权观点不是“普通法版权”；普通法中的那个原则与商业秘密类似，与罗斯巴德正在提出的这个基于的知识产权论点毫无关系，也与完全不是基于的实际版权毫无关系。参见维基百科，https://en.wikipedia.org/wiki/Common_law_copyright。罗斯巴德写道：“违反（普通法）版权等同于违反和盗窃财产。”同上。我在《反对知识产权》的“与保留权利”一节中批评了这种观点。他在这里的推理也犯了一些与我在《一种自由意志主义的契约理论》（第 9 章）第三部分 D 节中批评的他的“隐性盗窃”观点相同的错误。

⁶⁰⁹ For further discussion of the principles of original appropriation, contractual title transfer, and the relation principle of transfer for purposes of rectification, see “What Libertarianism Is” (ch. 2), n.11 and accompanying text et pass.

关于先占原则、所有权转让以及用于纠正目的的转让关系原则的进一步讨论，参见《何为自由意志主义》（第 2 章）注释 11 及相关文本等。

⁶¹⁰ AIP, text at n.94; and Roderick T. Long, “The Libertarian Case Against Intellectual

Property Rights,” Formulations (Autumn 1995):

It may be objected that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is a universal, existing in other people’s minds and other people’s property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people.

(Emphasis added) See also note 65, below, and Roderick T. Long, “Owning Ideas Means Owning People,” Cato Unbound (Nov. 19, 2008; <https://www.cato-unbound.org/2008/11/19/roderick-t-long/owning-ideas-means-owning-people>); Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach,” p. 281 and idem, “Are Patents and Copyrights Morally Justified?,” pp. 830 – 31, 862, 863, 865. See also John M. Kraft & Robert Hovden, “Natural Rights, Scarcity & Intellectual Property,” N.Y.U. J. L. & Liberty 7, no. 2 (2013; <https://perma.cc/HLW8-YNVQ>): 464 – 96, p.480: “What is clear is that the observance of such “rights” does interrupt and infringe on others’ natural right to self-ownership” (citing Palmer, “Are Patents and Copyrights Morally Justified?,” pp. 834, 862); also Wojciech Gamrot, “The type individuation problem,” Studia Philosophica Wratislaviensia 16, no. 4 (2021; <https://wuw.r.pl/spwr/article/view/13718>): 47 – 64, p. 49 (“IP rights are about the control of matter” (emphasis added), citing Hughes, “The Philosophy of Intellectual Property,” pp. 330 – 50; Hugh Breakey, “Natural intellectual property rights and the public domain,” Modern L. Rev.73 (2010; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856883): 208 – 39; and Radu Uszkai, “Are Copyrights Compatible with Human Rights?,” Romanian J. Analytic Phil. 8 (2014; <https://philarchive.org/rec/USZACC>): 5 – 20)). See also Bell, writing:

By invoking state power, a copyright or patent owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of tangible property. Because it thus gags our voices, ties our hands, and demolishes our presses, the law of copyrights and patents violates the very rights Locke defended.

Tom W. Bell, “Indelicate Imbalancing in Copyright and Patent Law,” in Thierer & Crews, Jr., eds., Copy Fights (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=984085), p. 4 (citations omitted, emphasis added).

《反对知识产权》注释 94 处的文本；以及罗德里克·T·朗的《自由意志主义反对知识产权的理由》，《构想》（1995 年秋季刊）：

可能会有人反对说，信息的原创者应该对其拥有所有权。但是信息不是一个人可以控制的具体事物；它是一种普遍存在的东西，存在于他人的头脑和他人的财产中，而原创者对这些没有合法的主权。你不能在不拥有他人的情况下拥有信息。

（着重号为原文所加）另见下文注释 65，以及罗德里克·T·朗的《拥有思想意味着拥有他人》，卡托无约束（2008 年 11 月 19 日；<https://www.cato-unbound.org/2008/11/19/roderick-t-long/owning-ideas-means-owning-people>）；帕

洛克式创造主义⁶¹¹

Lockean Creationism⁴⁹

In the “Creation vs. Scarcity” section of AIP, I pointed out that one mistake made by many proponents of IP is the notion that creation is a source of property rights. But it is not. I have elaborated on this topic in subsequent writing, pointing out that creation—i.e., production, transformation, or rearrangement⁵⁰ of existing resources—is a source of wealth but not a source of property rights. After all, transforming a set of input resources into a more valuable output product requires that the input factors already be owned. The resulting product is thus owned according to standard property rights and contract principles.⁵¹

在《反对知识产权》（AIP）“创造 vs. 稀缺”部分，我曾指出，许多知识产权支持者

尔默的《知识产权：一种非波斯纳的法律与经济学方法》，第 281 页，以及同上，《专利和版权在道德上是正当的吗？》，第 830-831、862、863、865 页。另见约翰·M·克拉夫特和罗伯特·霍夫登的《自然权利、稀缺性与知识产权》，《纽约大学法律与自由期刊》第 7 卷第 2 期（2013 年；<https://perma.cc/HLW8-YNVQ>）：464-496，第 480 页：“很明显，遵守这样的‘权利’确实会中断并侵犯他人的自然自有权”（引用帕尔默的《专利和版权在道德上是正当的吗？》，第 834、862 页）；还有沃伊切赫·加姆罗特的《类型个体化问题》，《弗罗茨瓦夫哲学研究》第 16 卷第 4 期（2021 年；<https://wuwr.pl/spwr/article/view/13718>）：47-64，第 49 页（“知识产权是关于对物质的控制”（着重号为原文所加），引用休斯的《知识产权哲学》，第 330-350 页；休·布雷基的《自然知识产权权利与公共领域》，《现代法律评论》73 期（2010 年；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856883）：208-239；以及拉杜·乌斯凯的《版权与人权相容吗？》，《罗马尼亚分析哲学期刊》8 期（2014 年；<https://philarchive.org/rec/USZACC>）：5-20）。另见贝尔的论述：通过援引国家权力，版权或专利所有者可以对那些从事和平表达和安静享受真实财产的人实施事先限制、罚款、监禁和没收。因为版权和专利法这样做会堵住我们的嘴、束缚我们的手并摧毁我们的印刷机，所以它违反了洛克所捍卫的那些权利。汤姆·W·贝尔，《版权和专利法中的不适当失衡》，收录于蒂勒尔和克鲁斯编，《版权之争》（https://papers.ssrn.com/sol3/papers.cfm?abstract_id=984085），第 4 页（省略了引用，着重号为原文所加）。

⁶¹¹ See also the discussion of “rearrangement” in Part IV.F, below, and also Part III.B, “Libertarian Creationism,” in “Law and Intellectual Property in a Stateless Society” (ch. 14).

另请参阅下文第四部分 F 中关于“重新排列”的讨论，以及《无国家社会中的法律与知识产权》（第 14 章）中“自由意志主义创造论”的第三部分 B。

所犯的一个错误就是认为创造是财产权的来源。但事实并非如此。在后续的写作中，我详细阐述了这个话题，指出创造——即对现有资源的生产、转化或重新排列⁶¹²——是财富的来源，但不是财产权的来源。毕竟，将一组输入资源转化为更有价值的输出产品要求输入要素已经被拥有。因此，根据标准的财产权和原则，所产生的产品被拥有。⁶¹³

⁶¹² For more on this concept, see Kinsella, “Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and ‘Rearranging’,” C4SIF Blog (Sep. 29, 2010); also Kinsella, “KOL037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political Theory,” Kinsella on Liberty Podcast (March 28, 2013).

关于这个概念的更多内容，请参阅金塞拉的《洛克论知识产权：米塞斯、罗斯巴德和兰德论创造、生产和“重新排列”》，C4SIF 博客（2010 年 9 月 29 日）；还有金塞拉的《KOL037 | 洛克的大错误：财产的劳动理论如何毁掉政治理论》，《金塞拉谈自由》播客（2013 年 3 月 28 日）。

⁶¹³ See also the section “Creation of Wealth versus Creation of Property” in Kinsella, “Intellectual Freedom and Learning Versus Patent and Copyright,” Economic Notes No. 113 (Libertarian Alliance, Jan. 18, 2011) (also published as “Intellectual Freedom and Learning Versus Patent and Copyright,” The Libertarian Standard (Jan. 19, 2011)); “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.B; and Kinsella, “KOL012 | ‘The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism,’ Austrian Scholars Conference 2008,” Kinsella on Liberty Podcast (Feb. 6, 2013). And see Gary Chartier, *Anarchy and Legal Order: Law and Politics for a Stateless Society* (Cambridge University Press, 2013), at 78 (“the ability to control a possession means that one can transform it as needed in a way that may enhance its value either to the possessor, to others, or to both”; emphasis added); and Israel M. Kirzner, “Producer, Entrepreneur, and the Right to Property,” Reason Papers No. 1 (Fall 1974; <https://reasonpapers.com/archives>): 1–17, p. 1 (“Precision in applying the term ‘what a man has produced’ seems to be of considerable importance.”). See also Uszkai, “Are Copyrights Compatible with Human Rights?,” p. 13, discussing my argument in AIP that creation:

... is neither necessary nor sufficient to establish ownership. The focus on creation distracts from the crucial role of first occupation as a property rule for addressing the fundamental fact of scarcity. First occupation, not creation or labor, is both necessary and sufficient for the homesteading of unowned scarce resources.

另请参阅金塞拉的《知识自由与学习 vs 专利和版权》中的“财富的创造与财产的创造”一节，《经济笔记第 113 号》（自由意志主义联盟，2011 年 1 月 18 日）（也以《知识自由与学习 vs 专利和版权》发表于《自由意志主义标准》，2011 年 1 月 19 日）；《无国家社会中的法律与知识产权》（第 14 章），第三部分 B；以及金塞拉的《KOL012

Property rights in one's body are based in one's direct control over one's body.⁵² Property rights in external, previously unowned scarce resources come from original appropriation, or homesteading — first use and transformation or encroaching—of an unowned scarce resource or by contractual transfer from a previous owner.⁵³ Production or transformation of existing, already-owned resources may increase or create wealth, but is not a source of rights. This is a common confusion among libertarians, especially Randians and those influenced by the confused labor theory of property and the related labor theory of value, as can be seen in nonsensical sayings like, "You have a right to the fruits of your labor."⁵⁴

一个人对自己身体的财产权是基于他对自己身体的直接控制。⁶¹⁴对外部的、先前无主的稀缺资源的财产权来自于先占，或拓殖——对无主稀缺资源的首次使用、改造或划定界限，或从先前的所有者处通过转让而来。⁶¹⁵生产或改造现有的、已拥有的资源可能会增加或创造财富，但不是权利的来源。这是自由意志主义者中常见的一种混淆，尤其是兰德主义者以及那些受混乱的财产劳动理论和相关的劳动价值理论影响的人，正如在诸如“你有权拥有你的劳动成果”这样荒谬的说法中可以看到的那样。⁶¹⁶

| “知识产权的困境，或自由意志主义创造论的危险”，2008 年奥地利学者会议》，《金塞拉谈自由》播客（2013 年 2 月 6 日）。还可参阅加里·查蒂尔的《无政府与法律秩序：无国家社会的法律与政治》（剑桥大学出版社，2013 年），第 78 页（“控制一项财产的能力意味着一个人可以根据需要对其进行改造，以一种可能增加其对所有者的、对他人或对两者的价值的方式”；着重号为原文所加）；以及伊斯雷尔·M·柯兹纳的《生产者、企业家与财产权》，《理性论文》第 1 期（1974 年秋季；<https://reasonpapers.com/archives>）：1-17，第 1 页（“准确应用‘一个人所生产的东西’这个术语似乎相当重要”）。还可参阅乌斯卡伊的《版权与人权兼容吗？》，第 13 页，讨论我在《反对知识产权》中的论点，即创造：

.....既不是确立所有权的必要条件，也不是充分条件。对创造的关注转移了人们的注意力，使人们忽视了首先占有作为解决稀缺性这一基本事实的财产规则的关键作用。首先占有，而不是创造或劳动，对于无主稀缺资源的拓殖既是必要的，也是充分的。

⁶¹⁴ “How We Come to Own Ourselves” (ch. 4).

《我们如何拥有自己》（第四章）。

⁶¹⁵ See note 47, above.

见上文注释 47。

⁶¹⁶ See references in Part IV.D, below. See also *International News Service v. Associated Press*, 248 U.S. 215 (1918; <https://supreme.justia.com/cases/federal/us/248/215/>), where the Supreme Court recognized a quasi-property right in the fruits of one's labor, what is sometimes called the “sweat of the brow” doctrine (a doctrine later rejected

劳动的比喻 The Labor Metaphor

Overreliance on “labor” metaphors also leads to confusion about IP. Locke correctly argued that the first person to “mix his labor with” an unowned resource owns it, since he thereby establishes an objective link to the resource which gives him a better claim to it than latecomers.⁵⁵ However, Locke based his argument on the confused and unnecessary idea that a person “owns” his labor and “therefore” owns resources that he mixes it with. But labor is not owned—it is an action, something a person performs with his body, which he does own—and this assumption is not needed for the Lockean labor-mixture argument to work.⁵⁶ This mistaken notion leads some people to favor IP because they figure that if you own a scarce resource because you mix your labor with it, you also own useful ideas that are produced with your labor. The related Smith-Ricardo-Marx labor theory of value, which underlies Marxism and socialism, is also sometimes used to support IP, as when people argue that if you work or labor, you “deserve” some kind of reward or profit. All this focus on labor must be rejected as overly metaphorical and confused, and, frankly, Marxian.⁵⁷

对“劳动”比喻的过度依赖也会导致知识产权的混乱。洛克正确地认为，第一个“将其劳动与”无主资源“混合”的人拥有该资源，因为他由此建立了与该资源的客观联系，这使他比后来者拥有更合理的权利要求。⁶¹⁷然而，洛克的论点是建立在一种混乱而不必要的想法之上的，即一个人“拥有”他的劳动，因此“拥有”他与之混合的资源。但是，劳动并不为人所拥有——它是一种行动，是一个人用自己的身体所做的事情，而他确实拥有自己的身体，因此，洛克的劳动混合论证并不需要这一假设。⁶¹⁸这种错误

in the copyright context in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991; <https://supreme.justia.com/cases/federal/us/499/340/>)).

参见下文第四部分 D 节中的参考文献。另见 *International News Service v. Associated Press*, 248 U.S. 215 (1918; <https://supreme.justia.com/cases/federal/us/248/215/>)，最高法院在该案中承认了对个人劳动成果的准财产权，即有时被称为“额头上的汗水”理论（该理论后来在《菲斯特出版公司诉农村电话服务公司》，499 U.S. 340（1991 年；<https://supreme.justia.com/cases/federal/us/499/340/>）的版权背景下后来被驳回）。

⁶¹⁷ See Hoppe, *A Theory of Socialism and Capitalism*, chaps. 1 – 2 & 7.

请参阅霍普的《社会主义与资本主义的理论》第 1-2 章和第 7 章。

⁶¹⁸ As J.P. Day, in a critique of Locke’s homesteading argument, correctly observes:

的观念使一些人倾向于知识产权，因为他们认为，如果你拥有稀缺资源是因为你的劳动与之相混合，那么你就拥有了用你的劳动所产生的有用思想。相关的斯密-李嘉图-马克思劳动价值理论是马克思主义和社会主义的基础，有时也被用来支持知识产权，比如当人们争辩说如果你工作或劳动，你就“应然”得到某种回报或利润。所有这些对劳动的关注都必须摒弃，因为它们过于比喻和混淆，坦率地说，是马克思的观点。

[O]ne cannot talk significantly of owning labour¹. For labour¹, or labouring, is an activity, and although activities can be engaged in, performed or done, they cannot be owned. J.P. Day, “Locke on Property,” *Philosophical Quarterly* 16 (1966): 207 – 220, p. 212 (also reprinted in Gordon J. Schochet, ed. *Life, Liberty, And Property: Essays on Locke’s Political Ideas* (Belmont, California: Wadsworth Publishing Company, 1971), p. 113). By “labour¹,” Day is referring to the activity or action of working or labouring, as opposed to a task (labour²), an achievement (labour³), force times distance (labour⁴), or workers themselves (labour⁵) (see the Appendix, p. 220). Day’s comments are briefly discussed in Kirzner, “Producer, Entrepreneur, and the Right to Property,” p. 6. See also Kinsella, “Cordato and Kirzner on Intellectual Property,” *C4SIF Blog* (April 21, 2011). See also the Hume quote in the following note. In Kirzner’s words, Day summarizes Locke’s theory of property argument thusly: “(1) Every man has a (moral) right to own his person; therefore (2) every man has a (moral) right to own the labor of his person; therefore (3) every man has a (moral) right to own that which he has mixed the labor of his person with.” Kirzner, *op. cit.*, p. 5, citing Day, *op. cit.*, p. 208 (and p. 109 of the Schochet book). 正如 J.P. 戴在对洛克的先占论点的批判中正确指出的那样：“人们不能有意义地谈论拥有劳动¹。因为劳动¹，或者说劳动行为，是一种活动，尽管活动可以被从事、执行或完成，但它们不能被拥有。” J.P. 戴，《洛克论财产》，《哲学季刊》16（1966）：207 – 220，第 212 页（也重印于戈登·J. 肖切特编辑的《生命、自由和财产：关于洛克政治思想的论文》（加利福尼亚州贝尔蒙特：沃兹沃思出版公司，1971），第 113 页）。戴所说的“劳动¹”是指工作或劳动的活动或行为，与一项任务（劳动²）、一项成就（劳动³）、力乘以距离（劳动⁴）或工人自身（劳动⁵）相对（见附录，第 220 页）。戴的评论在柯兹纳的《生产者、企业家与财产权》第 6 页中被简要讨论。另请参阅金塞拉的《科达托和柯兹纳论知识产权》，C4SIF 博客（2011 年 4 月 21 日）。也可参见下一条注释中的休谟语录。用柯兹纳的话说，戴这样总结洛克的财产理论论证：“（1）每个人都有（道德上的）权利拥有自己的人身；因此（2）每个人都有（道德上的）权利拥有自己人身的劳动；因此（3）每个人都有（道德上的）权利拥有他将自己人身的劳动与之混合的东西。”柯兹纳，同前引书，第 5 页，引用戴，同前引书，第 208 页（以及肖切特书中的第 109 页）。

知识和手段在行动中的不同作用

The Separate Roles of Knowledge and Means in Action

The purpose of property rights is to permit conflict-free use of resources, the scarce means of action that humans employ to causally interfere with the course of events in an attempt to achieve their ends. But this applies only to conflictable resources. Human action also implies the possession of knowledge by the actor—knowledge of what ends are possible and knowledge of what scarce means might be employed to causally achieve the desired end. Thus all successful human action requires two separate components: the availability of scarce means or resources and knowledge to guide one's action.⁶¹⁹ Property rights apply only to the scarce means or conflictable resources

⁶¹⁹ See Kinsella, “Locke, Smith, Marx; the Labor Theory of Property and the Labor Theory of Value; and Rothbard, Gordon, and Intellectual Property,” StephanKinsella.com (June 23, 2010); idem, “KOL 037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political Theory,” Kinsella on Liberty Podcast (March 28, 2013); and idem, “Cordato and Kirzner on Intellectual Property.” As Hume observes, “We cannot be said to join our labour to any thing but in a figurative sense.” David Hume, *A Treatise of Human Nature*, Selby-Bigge, ed. (Oxford, 1968), Book III, Part II, Section III, n.16; discussed in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.81. On the perils of metaphors see also note 83, below. See also Dan Sanchez, “The Fruit of Your Labor ... is a good, not its form,” Medium (Oct. 30, 2014; <https://perma.cc/GD28-JS44>).

请参阅金塞拉的《洛克、斯密、马克思：财产的劳动理论与价值的劳动理论；以及罗斯巴德、戈登和知识产权》，StephanKinsella.com（2010年6月23日）；同上，《KOL037 | 洛克的大错误：财产的劳动理论如何毁掉政治理论》，《金塞拉谈自由》播客（2013年3月28日）；以及同上，《科达托和柯兹纳论知识产权》。正如休谟所观察到的，“除了在比喻意义上，我们不能说将我们的劳动与任何事物结合起来。”大卫·休谟，《人性论》，塞尔比-比格编辑（牛津，1968年），第三卷，第二部分，第三节，注释16；在《无国家社会中的法律与知识产权》（第14章），注释81中进行了讨论。关于比喻的危险，也请参阅下文注释83。另请参阅丹·桑切斯的《你的劳动成果……是一种物品，而不是其形式》，Medium（2014年10月30日；<https://perma.cc/GD28-JS44>）。

that humans employ, but not to the knowledge or information people possess, which guides their behavior, since anyone can use the same or similar knowledge to guide their own actions without conflict. In fact, it is the accumulation of this technological knowledge over time that enables increasing material prosperity. Property rights are needed to permit conflict-free use of scarce resources, but imposing restrictions on the emulation, learning, and use of knowledge, which is what IP attempts to do, impoverishes the human race.⁵⁹ This is why I concluded one article with these words:

*It is obscene to undermine the glorious operation of the market in producing wealth and abundance by imposing artificial scarcity on human knowledge and learning... Learning, emulation, and information are good. It is good that information can be reproduced, retained, spread, and taught and learned and communicated so easily. Granted, we cannot say that it is bad that the world of physical resources is one of scarcity—this is the way reality is, after all—but it is certainly a challenge, and it makes life a struggle. It is suicidal and foolish to try to hamper one of our most important tools—learning, emulation, knowledge—by imposing scarcity on it. Intellectual property is theft. Intellectual property is statism. Intellectual property is death. Give us intellectual freedom instead!*⁶⁰

财产权的目的是允许无冲突地使用资源，资源是人类用来对事件进程进行因果干预以试图实现其目标的稀缺行动手段。但这只适用可引发冲突的资源。人的行动还意味着行动人拥有知识——知道什么目的是可能的，也知道可能采用什么稀缺手段来因果性地实现预期目的。因此，所有成功的人的行动都需要两个独立的组成部分：稀缺手段或资源的可用性以及指导行动的知识。⁶²⁰财产权只适用于人类所使用的稀缺手段或可

⁶²⁰ For elaboration, see Kinsella, “Intellectual Freedom and Learning Versus Patent and Copyright”; also idem, “The Death Throes of Pro-IP Libertarianism” and “Intellectual Property and the Structure of Human Action,” Mises Economics Blog (Jan. 6, 2010). I also discuss these issues in “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.D and in “Goods, Scarce and Nonscarce” (ch. 18), n.28.

As Hoppe explains, Carl Menger pointed out four requirements for objects to become goods:

The first is the existence of a human need. The second requirement is such properties as render the thing capable of being brought into a causal connection with a satisfaction of this need. That is, this object must be capable, through our performing certain manipulations with it, to cause certain needs to be satisfied or at least relieved. The third

condition is that there must be human knowledge about this connection, which explains, of course, why it is important for people to learn to distinguish between goods and bads. Thus, we have human knowledge about the object, our ability to control it, and the causal power of this object to lead to certain types of satisfactory results. And the fourth factor is, as I already indicated, that we must have command of the thing sufficient to direct it to the satisfaction of the need.

Hans-Hermann Hoppe, *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/esh), p. 9; see also Carl Menger, *Principles of Economics* (Auburn, Ala.: Mises Institute, 2007 [1871]; <https://mises.org/library/principles-economics>), chap. I, § 1, p. 52 et pass. The second requirement corresponds to the means being causally efficacious; the third to the actor's knowledge of causal laws; and the fourth to the availability of the means. See also related discussion in "Goods, Scarce and Nonscarce" (ch. 18), n.28, and in Eugen von Böhm-Bawerk, "Whether Legal Rights and Relationships Are Economic Goods," George D. Huncke, trans., in Eugen von Böhm-Bawerk, *Shorter Classics of Eugen von Böhm-Bawerk* (South Holland, Ill.: Libertarian Press, 1962 [1881]), p. 57 et pass., discussed in Gael J. Campan, "Does Justice Qualify as an Economic Good?: A Böhm-Bawerkian Perspective," *Q. J. Austrian Econ.* 2, no. 1 (Spring 1999; <https://perma.cc/G3CK-B8WB>): 21 - 33, p. 24.

详细阐述请参阅金塞拉的《知识自由与学习 vs. 专利和版权》；还有同一作者的《支持知识产权的自由意志主义的垂死挣扎》以及《知识产权与人的行动的结构》，米塞斯经济学博客（2010 年 1 月 6 日）。我也在《无国家社会中的法律与知识产权》（第 14 章）第三部分 D 以及《稀缺财货与非稀缺财货》（第 18 章）注释 28 中讨论了这些问题。

正如霍普所解释的，卡尔·门格尔指出了物品成为财货的四个条件：

第一是人类需求的存在。第二个条件是物品具有使自身能够与这种需求的满足建立因果联系的属性。也就是说，通过我们对这个物品进行某些操作，这个物品必须能够使某些需求得到满足或者至少得到缓解。第三个条件是必须存在关于这种联系的人类知识，这当然解释了为什么人们学会区分好坏物品是很重要的。因此，我们对这个物品有知识，我们有控制它的能力，并且这个物品有导致某些类型的满意结果的因果力量。第四个因素如我已经指出的，我们必须对这个物品有足够的掌控权以将其用于满足需求。

汉斯-赫尔曼·霍普，《经济、社会与历史》（阿拉巴马州奥本：米塞斯研究院，2021 年；www.hanshoppe.com/esh），第 9 页；也可参阅卡尔·门格尔的《经济学原理》（阿拉巴马州奥本：米塞斯研究院，2007 年 [1871 年]；<https://mises.org/library/principles-economics>），第一章，第 1 节，第 52 页及以后。

第二个条件对应于手段具有因果效力；第三个条件对应于行动人对因果规律的知识；第四个条件对应于手段的可用性。也可参阅《稀缺财货与非稀缺财货》（第 18 章）注释 28 以及欧根·冯·庞巴维克的《法律权利和关系是否是经济物品》，乔治·D·亨克翻译，收录于欧根·冯·庞巴维克的《欧根·冯·庞巴维克短篇经典》（伊利诺伊州南荷兰：自由意志主义出版社，1962 年 [1881 年]），第 57 页及以后，在盖尔·J·坎

引发冲突的资源，而不适用于人们所拥有的指导其行为的知识或信息，因为任何人都可以使用相同或相似的知识来指导自己的行动，而不会产生冲突。事实上，正是这种技术知识的长期积累才使得物质生活日益繁荣。需要财产权来允许稀缺资源的无冲突使用，但对知识的仿效、学习和使用施加限制——这正是知识产权试图做的事情——会使人类更加贫穷。⁶²¹ 因此，我在一篇文章的结尾写道：

通过对人类知识和学习强加人为的稀缺性来破坏市场在创造财富和丰富物质方面的辉煌运作是不道德的。学习、模仿和信息都是好的。学习、仿效和信息是好事。信息能够如此轻易地被复制、保留、传播、教授、学习和交流，这是好事。诚然，我们不能说物质资源世界的稀缺性是坏事 —— 毕竟这就是现实的样子 —— 但这肯定是一个挑战，它使生活成为一场斗争。通过对我们最重要的工具之一 —— 学习、模仿、知识 —— 强加稀缺性来阻碍它是自杀性的和愚蠢的。知识产权就是盗窃。知识产权是国家主义。知识产权就是死亡。给我们知识自由吧！⁶²²

潘的《正义是否可被视为一种经济物品？庞巴维克的视角》，《奥地利经济学季刊》第 2 卷第 1 期（1999 年春季；<https://perma.cc/G3CK-B8WB>）：21-33，第 24 页中进行的相关讨论。

⁶²¹ For elaboration, see Kinsella, “Hayek’s Views on Intellectual Property,” C4SIF Blog (Aug. 2, 2013) and “Intellectual Property and the Structure of Human Action,” discussing Hayek’s comments about how the accumulation of a “fund of experience” helps aid human progress and the creation of wealth. See also Kinsella, “Tucker, ‘Knowledge Is as Valuable as Physical Capital,’ ” C4SIF Blog (March 27, 2017) and George Reisman, “Progress In a Free Economy,” The Freeman (July 1, 1980; <https://perma.cc/2HW6-JJ8J>). See also Julio H. Cole, “Patents and Copyrights: Do the Benefits Exceed the Costs?” , J. Libertarian Stud. 15, no. 4 (Fall 2001; <https://mises.org/library/patents-and-copyrights-do-benefits-exceed-costs-0>): 79 – 105, p. 84 et seq., discussing the importance of technical progress (not to be confused with patents) to economic growth. Cole cites several studies in n.12.

详细阐述请参阅金塞拉的《哈耶克关于知识产权的观点》，C4SIF 博客（2013 年 8 月 2 日）以及《知识产权与人的行动的结构》，其中讨论了哈耶克关于“经验积累”如何有助于人类进步和财富创造的评论。另请参阅金塞拉的《塔克：“知识与实物资本一样有价值”》，C4SIF 博客（2017 年 3 月 27 日）以及乔治·赖斯曼的《自由经济中的进步》，《自由人》（1980 年 7 月 1 日；<https://perma.cc/2HW6-JJ8J>）。还可参阅胡利奥·H·科尔的《专利与版权：收益是否超过成本？》，《自由意志主义研究期刊》第 15 卷第 4 期（2001 年秋季；<https://mises.org/library/patents-and-copyrights-do-benefits-exceed-costs-0>）：79-105，第 84 页及以后，讨论了技术进步（不要与专利相混淆）对经济增长的重要性。科尔在注释 12 中引用了几项研究。

⁶²² Kinsella, “The Death Throes of Pro-IP Libertarianism.”

资源、属性、特征和共相⁶²³

Resources, Properties, Features, and Universals⁶¹

As noted above (see note 31), confusion about the IP issue sometimes stems from identifying “property” with the owned resource. People then get bogged down in loaded or confused questions like, “Are ideas property?” If one keeps in mind that the question is not what is property, but rather who is the owner of a conflictible resource, then the IP mistake is harder to make. A related mistake stems from the failure to understand that all human rights are property rights and all property rights just are rights to the exclusive control of a given scarce (conflictible) resource.⁶² But every property right is an ownership right held by a particular person or owner with respect to a particular conflictible resource. It is the actual resource itself which is owned, not its characteristics.

如上文所述（见注释 31），对知识产权问题的混淆有时源于将“财产”与所拥有的资源混为一谈。人们随后会陷入有倾向性或令人困惑的问题中，比如“思想是财产吗？”如果人们记住问题不是什么是财产，而是谁是冲突性资源的所有者，那么就不太容易犯知识产权方面的错误。一个相关的错误源于未能理解所有的人权都是财产权，并且所有的财产权仅仅是对特定稀缺（冲突性）资源的排他性控制权。⁶²⁴但每一项财产权都

金塞拉的《支持知识产权的自由意志主义的垂死挣扎》。

⁶²³ See also Part IV.B, above.

另请参阅上文第四部分 B。

⁶²⁴ To be even more precise, I would say that a property right is not a right to use a resource, but a right to exclude others from using a resource. In practical terms this gives the owner the ability to use it as he sees fit so long as he is not using trespassing on others’ property rights. This follows from the analysis in 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). However, this nuance need not concern us here. See also “What Libertarianism Is” (ch. 2), p. 32; George Mavrodes, “Property,” in Samuel L. Blumenfeld, Property in a Humane Economy (LaSalle, Ill.: Open Court, 1974; [https:// mises.org/library/propertyhumane-economy](https://mises.org/library/propertyhumane-economy)), p. 184; “A Libertarian Theory of Contract” (ch. 9), n.1; Connell v. Sears, Roebuck Co., 722 F.2d 1542, 1547 (Fed. Cir. 1983; [https:// casetext.com/case/connell-](https://casetext.com/case/connell-)

是特定的人或所有者对特定的可引发冲突的资源所拥有的所有权。被拥有的是实际的资源本身，而不是其特性。

For example, if you own a red car, you own that car, but you do not own its color; you do not own red or redness. If owning a red car meant you owned its characteristics, you would own not only that particular car, but its age, weight, size, shape, color, and so on, and, thus, would thereby have an ownership claim over any other object that is red, and so on. This would amount to reassigning ownership rights in someone else's red car to you, even though he owns that car and you did not homestead it or obtain it by contract. Likewise, information cannot be owned since it is not an independently existing thing; information is always the impatterning of an underlying medium or carrier or substrate, which is itself a scarce resource that has an owner.⁶³If I own a copy of Great Expectations, I own that physical object: paper and glue and ink. It has various characteristics: an age, a size, a shape, and a certain arrangement of ink on its pages—the way the ink is impatterned so that it represents letters and words and meanings to someone who can read and who can observe the features of the book. But just as you don't own the color of your car, you don't own the way an object is arranged or

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>). Further, property rights are rights as between human actors, but with respect to particular resources. See “A Libertarian Theory of Contract” (ch. 9), n.1.

更确切地说，我认为财产权不是使用资源的权利，而是排除他人使用资源的权利。在实践中，这使得所有者只要不侵犯他人的财财产权，就可以按照自己认为合适的方式使用资源。这源于金塞拉的分析，《作为行动限制而非财产权限制的互不侵犯原则：它们的不同之处》（StephanKinsella.com，2010 年 1 月 22 日）中的分析。然而，这个细微差别在这里无需我们关注。另见《何为自由意志主义》（第 2 章），第 32 页；乔治·马夫罗德，斯，《财产》，收录于塞缪尔·L·布卢门菲尔德的《人道经济中的财产》（伊利诺伊州拉萨尔：开放法院，1974 年；<https://mises.org/library/propertyhumane-economy>），第 184 页；《自由意志主义的契约理论》（第 9 章），注释 1；康奈尔诉西尔斯罗巴克公司案，722 F.2d 1542，1547（联邦巡回上诉法院，1983 年；<https://casetext.com/case/connell-v-sears-roebuck-co>）（“专利中所承认的排除权仅仅是财产概念的本质”），援引申克诉诺特朗公司案，713 F.2d 782（联邦巡回上诉法院，1983 年；<https://casetext.com/case/carl-schenck-ag-v-nortron-corp>）。此外，财财产权是行动人之间的权利，但涉及特定资源。见《自由意志主义的契约理论》（第 9 章），注释 1。

shaped.⁶⁴

例如，如果你拥有一辆红色的汽车，你拥有的是那辆车，但你并不拥有它的颜色；你不拥有红色或红色这种属性。如果拥有一辆红色汽车意味着你拥有它的特征，那么你不仅拥有这辆特定的汽车，还拥有它的车龄、重量、大小、形状、颜色等等，因此，你对其他任何红色物体都拥有所有权。这就等于把别人的红色汽车的所有权重新转让给了你，尽管他拥有那辆车，而你并没有拓殖它，也没有通过获得它。同样地，信息不能被拥有，因为它不是一个独立存在的事物；信息总是对一个底层媒介、载体或基质的模式化呈现，而底层媒介、载体或基质本身就是一种稀缺资源，是有所有者的。

⁶²⁵ 如果我拥有一本《远大前程》，我就拥有了这一实物：纸张、胶水和墨水。它有各种特征：年代、大小、形状，以及书页上墨水的特定排列方式——墨水被涂抹的方式，使其对于能够阅读并观察到书本特征的人来说，代表了字母、文字和含义。但是，就像你并不拥有汽车的颜色一样，你也不拥有一件物品的排列方式或形状。⁶²⁶

⁶²⁵ J. Neil Schulman argued for years for a form of IP known as “logorights.” Oddly, perhaps partially in response to my relentless criticism of his flawed argument, he eventually changed his argument to argue for “media-carried property,” thus implicitly acknowledging that he was in favor of property rights in characteristics, or features, of owned objects, i.e., universals. See “Introduction to Origintent” (ch. 16) and “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17).

J.尼尔·舒尔曼多年来一直主张一种被称为“商标权”的知识产权形式。奇怪的是，也许部分是为了回应我对他有缺陷的论点的无情批评，他最终改变了他的论点，转而主张“媒介承载的财产”，从而含蓄地承认他赞成对所拥有物品的特征或特性即共相的财产权。见“《原创导论》”（第十六章）以及《与舒尔曼关于商标权和媒介承载的财产的对话》（第十七章）。

⁶²⁶ Even the pro-IP Ayn Rand implicitly acknowledged this. As she wrote:

The power to rearrange the combinations of natural elements is the only creative power man possesses. It is an enormous and glorious power—and it is the only meaning of the concept “creative.” “Creation” does not (and metaphysically cannot) mean the power to bring something into existence out of nothing. “Creation” means the power to bring into existence an arrangement (or combination or integration) of natural elements that had not existed before.

See Kinsella, “Locke on IP; Mises, Rothbard, and Rand on Creation, Production, and ‘Rearranging,’ ” quoting Ayn Rand, “The Metaphysical and the Man-Made,” in *Philosophy: Who Needs It* (New American Library, 1984), p. 25. See similar quotes by Rothbard, J.S. Mill, and Mises in *ibid*; and Reisman, “Progress In a Free Economy.”

As Roderick Long explains:

*It may be objected that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is a universal, existing in other people's minds and other people's property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people.*⁶²⁷

正如罗德里克·朗所解释的：

可能会有人反对说，创造信息的人应该对其拥有所有权。但信息不是一个个体可以控制的具体事物；它是一种普遍性的存在，存在于他人的头脑和他人的财产中，而创造者对这些没有合法的主权。不拥有他人，你就无法拥有信息。⁶²⁷

Neil Schulman and I bat these ideas around in “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17).

即使是支持知识产权的安·兰德也含蓄地承认了这一点。正如她所写：

重新排列自然元素组合的能力是人类所拥有的唯一创造性能力。这是一种巨大而光荣的能力——并且这是“创造性”这一概念的唯一含义。“创造”并不（且在形而上学层面上也不可能）意味着无中生有地创造出某种东西的能力。“创造”意味着有能力使一种以前不存在的自然元素的排列（或组合或整合）得以存在。

见金塞拉的《洛克论知识产权：米塞斯、罗斯巴德和兰德论创造、生产和“重新排列”》，引用安·兰德的《形而上学与人为》，收录于《哲学：谁需要它》（新美国图书馆，1984 年），第 25 页。在同一文献中还可看到罗斯巴德、J.S.密尔和米塞斯的类似引述；以及赖斯曼的《自由经济中的进步》。

尼尔·舒尔曼和我在《与舒尔曼关于商标权和媒介承载的财产的对话》（第 17 章）中对这些观点进行了讨论。

⁶²⁷ Long, “The Libertarian Case Against Intellectual Property Rights” (emphasis added). See also idem, “Owning Ideas Means Owning People” and idem, “Bye-Bye for IP,” AustroAthenian Empire Blog (May 20, 2010; <https://perma.cc/HD5A-TTX8>), and Part IV.B, above, and Kinsella, “Mr. IP Answer Man Time: On Steel and Swords,” C4SIF Blog (Feb. 4, 2022); idem, “How To Think About Property,” StephanKinsella.com (April 25, 2021); idem, “Libertarian Answer Man: Mind-Body Dualism, Self-Ownership, and Property Rights,” StephanKinsella.com (Jan. 29, 2022); idem, “KOL337 | Join the Wasabikas Ep. 15.0: You Don’t Own Bitcoin—Property Rights, Praxeology and the Foundations of Private Law, with Max Hillebrand” ; idem, “KOL219 | Property: What It

出售并不意味着所有权⁶²⁸

Selling Does Not Imply Ownership⁶⁶

As noted in Part IV.B, above, it is literally impossible to own or have property rights in information or knowledge. People only manipulate and have conflict over scarce resources (they are means of action, after all), so that IP rights are just disguised reassignments of property rights in existing conflictable or scarce resources. And as noted in Part IV.F, above, information cannot be owned since it is not an independently existing thing; information is always the impatterning of an underlying medium or carrier or substrate, which is itself a scarce resource that already has an owner, in accordance with principles of original appropriation, contract, and rectification.

如上文第四部分 B 所述，从字面意义上讲，拥有信息或知识或者对其拥有财产权是完全不可能的。人们只是对稀缺资源进行操作并在其之上产生冲突（毕竟，它们是行动的手段），所以知识产权只是对现有可引发冲突或稀缺资源的财产权的变相重新分配。

Is and Isn't: Houston Property Rights Association," Kinsella on Liberty Podcast," Kinsella on Liberty Podcast (April 28, 2017); and idem, "Nobody Owns Bitcoin," StephanKinsella.com (April 21, 2021). See also idem, "Patrick Smith, Un-Intellectual Property," C4SIF Blog (March 4, 2016).

朗，《反对知识产权的自由意志主义理由》（着重号为原文所加）。另见同一作者的《拥有观念意味着拥有人》以及《再见，知识产权》，奥地利—雅典帝国博客（2010 年 5 月 20 日；<https://perma.cc/HD5A-TTX8>），以及上文第四部分 B 节，还有金塞拉的《知识产权答疑时间：论钢铁与刀剑》，C4SIF 博客（2022 年 2 月 4 日）；同一作者的《如何思考财产》，StephanKinsella.com（2021 年 4 月 25 日）；同一作者的《自由意志主义答疑：身心二元论、自我所有权与财产权》，StephanKinsella.com（2022 年 1 月 29 日）；同一作者的“KOL337 | 加入芥末帮第 15.0 集：你并不拥有比特币——财产权、行动学与私法基础，与马克斯·希勒布兰德商榷”；同一作者的“KOL219 | 财产：是什么和不是什么：休斯顿财产权协会”，“金塞拉自由播客”，《金塞拉谈自由》播客（2017 年 4 月 28 日）；以及同一作者的《无人拥有比特币》，StephanKinsella.com（2021 年 4 月 21 日）。另见同一作者的《帕特里克·史密斯，非知识产权》，C4SIF 博客（2016 年 3 月 4 日）。

⁶²⁸ The ideas in this section are developed more fully in "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11).

本节中的观点在《出售并不意味着拥有，反之亦然：一个剖析》（第 11 章）中得到了更充分的阐述。

并且如上文第四部分 F 所述，信息不能被拥有，因为它不是一个独立存在的事物；信息总是对一个底层媒介、载体或基质的模式化呈现，而这个媒介、载体或基质本身是一种稀缺资源，根据先占、和纠正的原则，它已经有了所有者。

Yet IP proponents sometimes point out that information, ideas, know-how, and so on (as well as labor), can be sold. And so, the reasoning goes, something that can be sold must have been owned by the seller. Therefore, information can, in fact, be owned. As I have explained elsewhere, this reasoning is fallacious and based on conflation of two senses of the word "sell."⁶²⁹ When A and B exchange two owned objects, such as an apple for an orange, then there are two title transfers. A sells his apple to B, and B sells his orange to A.

然而，知识产权的支持者有时会指出，信息、创意、技术诀窍等等（以及劳动）是可以出售的。于是，按照这种推理，能够被出售的东西必定是被卖家所拥有的。因此，信息实际上是可以被拥有的。正如我在其他地方所解释的，这种推理是错误的，并且是基于对“出售”这个词的两种含义的混淆。⁶²⁹当 A 和 B 交换两个被拥有的物品，比如用一个苹果交换一个橘子时，那么就有两次所有权的转移。A 把他的苹果卖给 B，B 把他的橘子卖给 A。

But other contracts only involve one title-transfer. Suppose B pays A to perform some action (labor, a service, providing information, etc.). In this case, B's owned resource (money or something else) transfers to A, but nothing that A owns transfers to B. It is simply that A performed some action that B desired, and was induced to do so by B's payment.

但其他只涉及一种所有权转让。假设 B 付钱让 A 执行某种行动（劳动、服务、提供信息等）。在这种情况下，B 所拥有的资源（金钱或其他东西）转移给了 A，但 A 所拥有的任何东西都没有转移给 B。简单地说，就是 A 执行了 B 所希望的某种行动，

⁶²⁹ See *ibid.*; also Kinsella, “The ‘If you own something, that implies that you can sell it; if you sell something, that implies you must own it first’ Fallacies,” *StephanKinsella.com* (June 1, 2018); “A Libertarian Theory of Contract” (ch. 9). 见上文；也可参见金塞拉的《“如果你拥有某物，那就意味着你可以出售它；如果你出售某物，那就意味着你必须首先拥有它”的错误观点》，*StephanKinsella.com*（2018 年 6 月 1 日）；《自由意志主义的契约理论》（第 9 章）。

并且是在 B 付款的诱导下这样做的。

In this case, the end of B's act of agreeing to pay A was not the attainment of a property right or title transfer, but the achievement of a new state of affairs in which A performed some action desired by B.⁶³⁰ A is sometimes said to "sell" his labor or information to B because of the analogy to a normal exchange of title, but here the word "sell" is used in the economic sense to simply explain A's motivations and to properly characterize his actions: to understand his ends or goals. In order to get B's payment, A performed the action desired by B. A does not "sell" his labor or knowledge in a juristic or legal sense, and thus did not "own" it in a legal sense. Thus, "selling" in the economic sense does not imply owning. Information is unownable.⁶³¹

在这种情况下，B 同意支付 A 的行动的目的不是实现财产权或所有权的转移，而是实现一种新的事态，即 A 实施了 B 所希望的某种行动。⁶³⁰由于与正常的所有权交换相类比，A 有时被说成是向 B “出售”了他的劳动或信息，但这里的“出售”一词是在经济学意义上使用的，只是为了解释 A 的动机并恰当地描述他的行动：理解他的目的或目标。为了得到 B 的报酬，A 执行了 B 所期望的行动。A 并没有在法学或法律意义上“出售”他的劳动或知识，因此在法律意义上也没有“拥有”它。因此，在经济意义上的“出售”并不意味着拥有。信息是不可拥有的。⁶³¹

所有的财产权都是有限的

All Property Rights Are Limited

One final argument may be addressed, which is touched on in some of the above

⁶³⁰ See also Kinsella, “Human Action and Universe Creation,” StephanKinsella.com (June 28, 2022).

另见金塞拉的《人的行动与宇宙创造》，StephanKinsella.com（2022 年 6 月 28 日）。

⁶³¹ As is bitcoin. Bitcoins are just abstract informational entries on a distributed ledger, that is, the impatternings of the memory devices of many people's computers; but they own those computers; nobody owns “how they are arranged.” See Kinsella, “Nobody Owns Bitcoin.”

比特币也是如此。比特币只是分布式账本上的抽象信息条目，也就是许多人电脑存储设备中的印记；但他们拥有那些电脑；没有人拥有“它们的排列方式”。见金塞拉的《无人拥有比特币》。

sections.⁷⁰ When explaining why IP rights violate property rights, we IP opponents explain that the grant of an IP right is tantamount to a nonconsensual negative easement on someone else's property—it limits what the owner of a resource may do with the resource.⁷¹ Or, as Roderick Long would say, “Owning Ideas Means Owning People.”⁷²

最后一个论点可能需要讨论一下，这个论点在上述某些部分中有所涉及。⁶³²当我们这些知识产权的反对者解释为什么知识产权权利侵犯了财产权时，我们解释说授予知识产权等同于在他人财产上未经同意设立的消极地役权——它限制了资源所有者对该资源的使用方式。⁶³³或者，正如罗德里克·朗所说，“拥有思想意味着拥有他人”。⁶³⁴

A common response runs something like this:

Yes, IP rights limit what you can do with your own property. But this is true of all property rights. My ownership of a home, or my body, means you can't shoot your gun at it. So my property rights limit your property rights. Therefore, just because intellectual property rights limit your property rights doesn't mean they are illegitimate any more than my self-ownership limits your property rights in your gun.

常见的回答是这样的：

是的，知识产权限制了你对自己财产的使用。但所有财产权都是如此。我对房屋或身体的所有权意味着你不能用枪射击它。因此，我的财产权限制了你的财产权。因此，知识产权限制了你的财产权，并不意味着它们是非法的，就像我的自我所有权限制了你的枪支财产权一样。

There are many problems with this argument, as I have detailed elsewhere.⁷³ First,

⁶³² See, e.g., the discussion in Part IV.F, above.

参见上文第 IV.F 部分的讨论。

⁶³³ See Part IV.B, above.

参见上文第 IV.B 部分。

⁶³⁴ See Long, “Owning Ideas Means Owning People.”

见朗的《拥有观念意味着拥有人》。

even if we grant that in some cases property rights can be limited, it does not imply that just any limit is legitimate. If a woman objects to being raped, it will not do to say "stop complaining that we are violating your property right in your own body; after all, all property rights are limited." You would need to articulate why it's justified to limit property rights. In the examples given by pro-IP opponents, someone's property rights are limited as needed to keep them from exercising those rights to commit aggression against others' property rights. But IP rights limit the owner's property rights (again, in the form of a negative servitude), even though the owner, in rearranging his own resources in a certain way, does not invade the borders of the inventor's or author's property. In response to this, the IP proponent will say, "Yes, by making a copy of the author/inventor's creation, the copier is infringing the author/inventor's property rights." But this is question-begging. It presupposes that there are rights to universals, when this is the issue under dispute.

正如我在其他地方详述的那样，这一论点存在许多问题。⁶³⁵首先，即使我们承认在某些情况下财产权可以受到限制，但这并不意味着任何限制都是合法的。如果一名妇女反对被强奸，那么说“别再抗议我们侵犯了你对你自己身体的财产权；毕竟，所有的财产权都是有限的”是行不通的。你需要阐明为什么限制财产权是正当的。在知识产权的反对者给出的例子中，某人的财产权在必要时受到限制，以防止他们行使这些权利去侵犯他人的财产权。但知识产权限制了所有者的财产权（同样是以消极地役权的形式），即使所有者以某种方式重新安排自己的资源，并没有侵犯发明者或作者的财产边界。对此，知识产权支持者会说：“是的，复制者复制作者/发明者的创作，就是侵犯了作者/发明者的财产权。”但这是循环论证。它预先假定存在对共相的权利，而这正是争议的问题所在。

Second, it is simply not true that property rights limit other property rights. Rather,

⁶³⁵ See Kinsella, "The Non-Aggression Principle as a Limit on Action, Not on Property Rights"; idem, "IP and Aggression as Limits on Property Rights: How They Differ"; and "Selling Does Not Imply Ownership, and Vice-Versa: A Dissection" (ch. 11), n.11 and accompanying text.

见金塞拉《作为行动的限制而非财产权限制的互不侵犯原则》；同一作者的《作为财产权限制的知识产权与侵犯：它们的不同之处》；以及《出售并不意味着拥有，反之亦然：一个剖析》（第 11 章）注释 11 及相关内容。

property rights limit actions. If A owns his body, then B may not shoot it with a gun, whether he owns the gun or not. The point is that B may not use or invade the borders of A's body—his owned resource—with any means at all, whether it be the use of B's hands, or some other means such as a gun, even if he stole the gun from C and is not its owner. People are responsible for their actions, and actions always employ some means to achieve the end. The means may be simply the actor's own body, or it may be some external object, one that may be owned by the actor, or not.⁷⁴

其次，财产权限制其他财产权的说法根本不成立。相反，财产权限制行动。如果 A 拥有他的身体，那么 B 无论是否拥有一把枪都不能用枪射击 A 的身体。关键是 B 不可以用任何手段使用或侵犯 A 的身体——A 所拥有的资源——的边界，无论是用 B 的手，还是用其他手段，比如一把枪，即使 B 是从 C 那里偷来这把枪而不是其所有者。人要对对自己的行动负责，而行动总是采用某种手段来达到目的。手段可能只是行动人自己的身体，也可能是某个外部物体，这个物体可能是行动人所拥有的，也可能不是。⁶³⁶

⁶³⁶ Likewise, many libertarians, having in mind some form of “strict liability,” advance the confused idea that we are responsible for harms done with property (resources) that we own. This is incorrect. We are responsible only for our actions, not for uses to which inanimate objects are put. If I possess a stolen knife, I am liable if I stab an innocent person with it, even though I don't own the knife, since it is my actions that I am responsible for. And if some thief steals a knife and uses it to harm an innocent victim, it is the thief that is responsible, not the owner of the knife. One common confusion held even by many libertarians is the idea (which underlies many assertions about “strict liability”) that ownership implies responsibility (some have even confusingly said that you “own your actions,” which is incoherent). It does not. Ownership means the right to control (or, more precisely: the right to exclude others from controlling) a given resource; it does not imply responsibility. We are responsible only for our actions, regardless of whatever means are employed by the actor to achieve the illicit end. It is misleading and confusing for libertarians to carelessly use expressions such as “I own that action” to mean “I am responsible for harm I cause.” The term ownership should be restricted to property rights in conflictable resources—and should be used as a synonym for possession, either, as I point out in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), the sections “External Resources” and “Economic vs. Normative Realms of Analysis: Ownership vs. Possession.” On negligence and strict liability, see Kinsella, “The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld,” Mises Economics Blog

Therefore, it is a valid criticism of IP that it unjustly limits others' use of their own resources.

因此，对知识产权的批评是有道理的，因为它不正义地限制了他人使用自己的资源。

真实财产权和知识产权的结构统一性

The Structural Unity of Real and Intellectual Property

Another argument made in support of IP is that it is, legally, structurally similar to normal property rights in scarce resources, such as property rights in realty (land or immovables) or personalty (corporeal movables).⁷⁵

支持知识产权的另一个论点是，从法律上讲，知识产权在结构上类似于稀缺资源的正

(Sep. 1, 2009); “A Libertarian Theory of Punishment and Rights” (ch. 5), at n.78; “Causation and Aggression” (ch. 8), at n.60; and “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), n.6.

同样，许多自由意志主义者出于某种形式的“严格责任”的考虑，提出了一种混乱的观点，即我们要对我们拥有的财产（资源）所造成的伤害负责。这是不正确的。我们只对自己的行动负责，而不是对无生命之物的用途负责。如果我拥有一把偷来的刀，如果我用这把刀刺伤了一个无辜的人，即使我并不拥有这把刀，我也要承担责任，因为我要对我的行动负责。如果某个小偷偷了一把刀，并用它伤害了无辜的受害者，那么要负责任的是小偷，而不是刀的主人。即使是许多自由意志主义者也有一个共同的困惑，那就是认为所有权意味着责任（有些人甚至混淆地说你“拥有你的行动”，这是不一致的）（这是许多关于“严格责任”论断的基础）。其实不然。所有权意味着控制特定资源的权利（或者更准确地说：排除他人控制的权利）；所有权并不意味着责任。我们只对自己的行动负责，无论行动人采用何种手段达到非法目的。自由意志主义人士不小心使用“我拥有该行动”这样的表述来表示“我对我造成的伤害负责”，这是一种误导和混淆。正如我在《出售并不意味着拥有，反之亦然：一个剖析》（第 11 章）、“外部资源”和“经济与规范领域的分析”两节中所指出的，所有权一词应仅限于冲突性资源的财财产权——也不应被用作占有的同义词：所有权与占有权”。

关于过失与严格责任，见金塞拉的《自由意志主义者对过失、侵权和严格责任的处理方法：赎罪金与部分赎罪金》，米塞斯经济学博客（2009 年 9 月 1 日）；《自由意志主义的惩罚与权利理论》（第 5 章）注释 78；《因果关系与侵犯》（第 8 章）注释 60；以及《自由意志主义的契约理论：所有权转让、有约束力的承诺与不可让渡性》（第 9 章）注释 6。

常财产权，如不动产（土地或不动产）或动产（有形的可移动财产）的财产权。⁶³⁷

⁶³⁷ See, e.g., Richard A. Epstein, *The Structural Unity of Real and Intellectual Property* (The Progress and Freedom Foundation, 2006; archived version at <https://perma.cc/B8JP-4MWQ>); idem, “The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary,” *Stanford L. Rev.* 62, no. 2 (2010); <https://perma.cc/79X2-9CS8>): 455 – 523; Wendy J. Gordon, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,” *Stan. L. Rev.* 41 (1989; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581843), Part I; Adam Mossoff, “Commercializing Property Rights in Inventions: Lessons for Modern Patent Theory from Classic Patent Doctrine,” in Geoffrey A. Manne & Joshua D. Wright, eds., *Competition Policy and Patent Law Under Uncertainty: Regulating Innovation* (Cambridge University Press, 2011; <https://perma.cc/SD7Q-F7U9>); idem, “The Trespass Fallacy in Patent Law,” *Florida L. Rev.* 65, no. 6 (2013; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126595): 1687 – 1711; Roger E. Meiners & Robert J. Staaf, “Patents, Copyrights, and Trademarks: Property or Monopoly,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990): 911 – 48, pp. 915, 923, 940, et pass. Mackaay unpersuasively argues that something resembling patent and copyright can emerge through private legal arrangement like trade secret and contractual structures, a “simulated property right,” which the legislator can then “complement” by “by adding the possibility of systematically ensuring exclusivity against third parties.” Mackaay, “Economic Incentives in Markets for Information and Innovation,” p. 904; see also p. 899 – 901 et pass. Or, as summarized by Dale Nance, Mackaay sees IP rights:

... as representing a compromise that appears relatively warranted because they do not have the kind of features associated with the worst kinds of governmental meddling in the economy, and because their functional equivalents could, to a considerable extent but perhaps at greater cost, be achieved by carefully protected trade secrets combined with contractually imposed restrictions on copying by buyers or licensees of the information in question. In other words, he sees patents and copyrights as little more troublesome than state-provided form contracts.

Dale A. Nance, “Foreword: Owning Ideas,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990): 757 – 74, p. 770. Easterbrook makes a similar, and similarly untenable, claim, when he writes: “[I]n the end intellectual property may be understood as the result of voluntary undertakings, which the government simply enforces.” 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. 114.

And many other proponents of IP argue for parallels between IP rights and normal property rights. See, e.g., “Conversation with Schulman about Logorights and MediaCarried Property” (ch. 17).

Yet elsewhere, Epstein concedes there are some significant differences between IP and

real property. As he writes, “There are in fact no ‘natural’ boundaries here [in patent and copyright law], similar to the metes and bounds of land.” Richard A. Epstein, “Why Libertarians Shouldn’t Be (Too) Skeptical about Intellectual Property,” Progress & Freedom Foundation, Progress on Point, Paper No. 13.4 (February 2006; <https://perma.cc/6F5S-7KNS>), p. 8. So much for the “structural unity.”

例如，参见理查德·A·爱泼斯坦的《真实财产与知识产权的结构统一性》（进步与自由基金会，2006年；存档版本见 <https://perma.cc/B8JP-4MWQ>）；同一作者的《知识产权的解体：对一份过早讣告的古典自由主义回应》，《斯坦福法律评论》第62卷第2期（2010年；<https://perma.cc/79X2-9CS8>）：455-523；温迪·J·戈登的《对版权价值的探究：一致性、同意和激励理论的挑战》，《斯坦福法律评论》第41卷（1989年；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581843），第一部分；亚当·莫索夫的《将发明中的财产权商业化：经典专利学说对现代专利理论的启示》，收录于杰弗里·A·曼恩和乔舒亚·D·赖特编辑的《不确定条件下的竞争政策与专利法：规范创新》（剑桥大学出版社，2011年；<https://perma.cc/SD7Q-F7U9>）；同一作者的《专利法中的非法侵入谬误》，《佛罗里达法律评论》第65卷第6期（2013年；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126595）：1687-1711；罗杰·E·迈纳斯和罗伯特·J·斯塔夫的《专利、版权和商标：财产还是垄断》，《哈佛法律与公共政策杂志》第13卷第3期（1990年夏季）：911-48，第915、923、940页及其他各处。麦凯令人难以信服地主张，类似于专利和版权的东西可以通过商业秘密和结构等私人法律安排出现，即一种“模拟财产权”，立法者随后可以通过“增加系统地确保对第三方排他性的可能性”来“补充”这种权利。麦凯，《信息与创新市场中的经济激励》，第904页；另见第899-901页及其他各处。或者，正如戴尔·南斯所总结的，麦凯认为知识产权：

……代表了一种相对合理的妥协，因为它们不具备与政府对经济最严重干预相关的那种特征，并且因为它们的功能等价物在很大程度上（但可能成本更高）可以通过精心保护的商业秘密以及对信息的购买者或被许可人施加的复制限制来实现。换句话说，他认为专利和版权只不过比国家提供的格式稍微麻烦一点。

戴尔·A·南斯，《前言：拥有观念》，《哈佛法律与公共政策杂志》第13卷第3期（1990年夏季）：757-74，第770页。伊斯特布鲁克提出了一个类似但同样站不住脚的主张，他写道：“最终，知识产权可能被理解为自愿承诺的结果，政府只是执行这些承诺。”弗兰克·H·伊斯特布鲁克，《知识产权依然是财产》，《哈佛法律与公共政策杂志》第13卷第1期（1990年冬季；https://chicagounbound.uchicago.edu/journal_articles/309/）：108-118，第114页。

还有许多其他知识产权的支持者主张知识产权权利与正常财产权利之间存在相似之处。例如，见《与舒尔曼关于商标权和媒介承载的财产的对话》（第17章）。

然而，在其他地方，爱泼斯坦承认知识产权与真实财产之间存在一些重大差异。正如他所写：“实际上，在（专利和版权法中）这里没有‘自然’边界，与土地的边界和范围不同。”理查德·A·爱泼斯坦，《为什么自由意志主义者不应该（过于）怀疑知识产权》，进步与自由基金会，《进步要点》，第13.4号论文（2006年2月；<https://perma.cc/6F5S-7KNS>），第8页。所谓的“结构统一性”不过如此。

This is an odd argument. It is true that the state, via legislation, is able to set up positive rights that, in modern legal systems, are treated similarly to property rights in scarce resources (land and personalty). But so what? In antebellum America, under chattel slavery, slaves—innocent human beings—were legally ownable and thus subject to the various legal incidents of property, such as sale, mortgages, and so on. The fact that the state, by artificial legislation, can make inventions and artistic creations the subject of contracts, sales, and so on does not show that the law is just. This is just a facile argument.⁷⁶

这是一个奇怪的论点。诚然，国家可以通过立法设定积极权利，在现代法律体系中，这些权利与稀缺资源（土地和个人财产）的财产权待遇类似。但那又怎样呢？在前美国，在动产奴隶制下，奴隶——无辜的人——在法律上是可以拥有的，因而受制于财产的各种法律事件，如出售、抵押等。国家通过人为立法，可以使发明和艺术创作成为、买卖等的标的物，但这并不能说明法律是正义的。这只是一种肤浅的说法。⁶³⁸

First, patent and copyright were not originally called property rights. They were referred to accurately as state-granted privileges or monopolies.⁷⁷ Referring to patent and copyright as “property rights” was a later innovation, engaged in for propaganda

⁶³⁸ See my posts “Yet more disanalogies between copyright and real property,” C4SIF Blog (Feb. 4, 2013); “Mossoff: Patent Law Really Is as Straightforward as Real Estate Law,” C4SIF Blog (Aug. 17, 2012); “Classifying Patent and Copyright Law as ‘Property’: So What?” Mises Economics Blog (Oct. 4, 2011); and “Richard Epstein on ‘The Structural Unity of Real and Intellectual Property,’” Mises Economics Blog (Oct. 4, 2006). Anyone who thinks there can be a straightforward analogy between normal property rights and property rights in intangibles should consult Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate, 1996; <https://press-files.anu.edu.au/downloads/press/n1902/html/cover.xhtml>), pp. 16–19 et pass., and Alexander Peukert, *A Critique of the Ontology of Intellectual Property Law*, Gill Mertens, trans. (Cambridge University Press, 2021), p. 101 et pass.

参见我的文章《版权与真实财产之间的更多歧义》，C4SIF 博客（2013 年 2 月 4 日）；《莫索夫：专利法确实与房地产法一样简单明了》，C4SIF 博客（2012 年 8 月 17 日）；“将专利法和版权法归类为‘财产’：又如何？”米塞斯经济学博客（2006 年 10 月 4 日）。任何认为正常财产权与无形资产的财产权之间可以有直接类比的人都应该参考彼得·德拉霍斯的《知识产权哲学》（阿什盖特出版社，1996 年；<https://press-files.anu.edu.au/downloads/press/n1902/html/cover.xhtml>），第 16–19 页及其他各处，以及亚历山大·波伊克特的《对知识产权法本体论的批判》，吉尔·默滕斯译（剑桥大学出版社，2021 年），第 101 页及其他各处。

purposes. This was observed by Fritz Machlup and Edith Penrose in a seminal study in 1950:

*There are many writers who habitually call all sorts of rights by the name of property. This may be a harmless waste of words, or it may have a purpose. It happens that those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, "property," for a word that had an unpleasant ring, "privilege."*⁷⁸

首先，专利和版权最初并不被称为财产权。它们被准确地称为国家授予的特权或垄断。⁶³⁹将专利和版权称为“财产权”是后来的一种创新说法，是出于宣传目的而使用的。弗里茨·马赫卢普（Fritz Machlup）和伊迪丝·彭罗斯（Edith Penrose）在 1950 年的一项开创性研究中注意到了这一点：

有很多作者习惯性地用“财产”这个名称来称呼各种各样的权利。这可能是一种无伤大雅的文字浪费，也可能有其目的。碰巧的是，那些开始在与发明相关的语境中使用“财产”这个词的人心中有一个非常明确的目的：他们想用“财产”这个词来代替“特权”这个令人不快的词，因为“财产”这个词有令人尊敬的含义。⁶⁴⁰

⁶³⁹ See Kinsella, “Intellectual Proterganda,” Mises Economics Blog (Dec. 6, 2010). 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. 见金塞拉的《知识产权宣传》，米塞斯经济学博客（2010 年 12 月 6 日）。另见《论自由意志主义的逻辑以及为何知识产权不存在》（第 24 章）注释 32 中对庞巴维克关于不准确术语使用的讨论。

⁶⁴⁰ Fritz Machlup & Edith Penrose, “The Patent Controversy in the Nineteenth Century,” *Econ. History* 10, no. 1 (May 1950): 1 – 29, p. 16 (footnotes omitted; emphasis added). They go on (*ibid.*; footnotes omitted):
This was a very deliberate choice on the part of politicians working for the adoption of a patent law in the French Constitutional Assembly. De Bouffler, reporting the bill to the Assembly, knew that “the spirit of the time was so much for liberty and equality, and against privileges and monopolies of any sort” that there was no hope of saving the

And as Machlup wrote in a later study commissioned by the US Congress:

*While some economists before 1873 were anxious to deny that patents conferred "monopolies"—and, indeed, had talked of "property in inventions" chiefly in order to avoid using the unpopular word "monopoly"—most of this squeamishness has disappeared. But most writers want to make it understood that these are not "odious" monopolies but rather "social monopolies", "general welfare monopolies", or "socially earned" monopolies. Most writers also point out with great emphasis that the monopoly grant is limited and conditional.*⁷⁹

马赫卢普在后来受美国国会委托进行的一项研究中写道：

虽然在 1873 年之前有些经济学家急于否认专利授予了“垄断权”——事实上，他们主要是为了避免使用不受欢迎的“垄断”一词而谈到“发明中的财产权”——但这种过分拘谨大多已经消失了。不过，大多数作者都希望让人明白，这些不是“可憎的”垄断，而是“社会垄断”、“普遍福利垄断”或“社会收益”垄断。大多数作者还特别

institution of patent privileges except under an acceptable theory. Thus, according to Rentzsch, De Bouffler and his friends in deliberate insincerity “construed the artificial theory of the property rights of the inventor” as a part of the rights of man. De Bouffler obviously knew “what’s in a name.” As monopoly privileges, the patents for inventions would be rejected by the Assembly or, if accepted, would be disdained by the people; as natural property rights, they would be accepted and respected.

弗里茨·马赫卢普和伊迪丝·彭罗斯，《19 世纪的专利争议》，《经济史》第 10 卷第 1 期（1950 年 5 月）：1-29，第 16 页（省略脚注；着重号为原文所加）。他们接着说道（同上；省略脚注）：

这是法国制宪议会中致力于通过专利法的政治家们非常刻意的选择。德布弗勒向议会报告该法案时知道，“时代精神如此崇尚自由和平等，反对任何形式的特权和垄断”，以至于除了在一个可接受的理论下，没有希望挽救专利特权制度。因此，根据伦茨施的说法，德布弗勒和他的朋友们故意虚伪地“构建了发明人财产权的人为理论”，作为人权的一部分。德布弗勒显然知道“名字里有什么”。作为垄断特权，发明专利权会被议会拒绝，或者如果被接受，也会被人民所鄙视；而作为自然财产权，它们会被接受和尊重。

强调，垄断的授予是有限的、有条件的。⁶⁴¹

Professor Michael Davis also explores the strategy of those who insist on erroneously classifying patents as property rights. He calls this tactic "the trump of property," which is

a strategy of defining patents according to property law concepts far removed from debates over the public interest in the issuance of patents... [T]he foregoing description of patent law as a form of competition regulation, let alone as a form of national industrial policy, is obviously not the conventional one. Organized patent interests (the patent bar, patent proprietors, and their sponsors) do not espouse that view, but instead habitually offer a more cramped description of patent law. One might call that description the trump of property—a strategy to secure the claim that proprietors can exclusively own patents, and to eliminate any argument that the public has a continuing

⁶⁴¹ Fritz Machlup, U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, An Economic Review of the Patent System (85th Cong., 2nd Session, 1958, Study No. 15; <https://mises.org/library/economic-review-patent-system>), p. 26 (footnotes omitted). As explained in Machlup & Penrose, "The Patent Controversy in the Nineteenth Century," and as summarized in Machlup, An Economic Review of the Patent System, free market economists began to object to the patent system in the mid-1800s, leading some countries to repeal or delay adopting patent laws. The primary criticism was that protectionist patent grants are incompatible with free trade. However, the "Long Depression" starting in 1873 turned public opinion against free trade, leading the anti-patent movement to collapse and for modern patent systems to eventually become dominant world-wide. See also, on this, Meiners & Staaf, "Patents, Copyrights, and Trademarks: Property or Monopoly," p. 911 – 12.

弗里茨·马赫卢普，美国参议院专利、商标和版权小组委员会，《专利制度的经济评论》（第 85 届国会，第二次会议，1958 年，第 15 号研究报告；<https://mises.org/library/economic-review-patent-system>），第 26 页（省略脚注）。正如马赫卢普和彭罗斯在《19 世纪的专利争议》中所解释的，以及马赫卢普在《专利制度的经济评论》中所总结的那样，自由市场经济学家在 19 世纪中叶开始反对专利制度，这导致一些国家废除或推迟采用专利法。主要的批评是保护主义的专利授予与自由贸易不相容。然而，1873 年开始的“长期经济萧条”使公众舆论反对自由贸易，导致反专利运动崩溃，现代专利制度最终在全球占据主导地位。关于这一点，也可参见迈纳斯和斯塔夫的《专利、版权和商标：财产还是垄断》，第 911-912 页。

interest in issued patents. That description promotes patents as just another kind of property, but firmly rejects any suggestion that patent law represents either a form of competition regulation or a national industrial policy. With a firm foundation in free market theories, the strong claim that patents are just another form of property implicitly rejects the idea that patent law serves any regulatory function....⁸⁰

迈克尔-戴维斯教授还探讨了那些坚持错误地将专利归类为财产权的人的策略。他将这种策略称为“财产王牌”，即

一种根据财产法概念定义专利的策略，而这些概念与有关颁发专利的公共利益的论证相去甚远.....[上文将专利法描述为一种竞争监管形式，更不用说将其描述为一种国家产业政策形式，这显然不是传统的描述。有组织的专利利益集团（专利律师协会、专利所有人及其赞助人）并不支持这种观点，而是习惯性地对专利法进行了更为狭隘的描述。我们可以称这种描述为“财产王牌”——一种确保专利所有人可以独享专利的策略，并消除公众对已授权专利拥有持续利益的任何论点。这种说法将专利作为另一种财产来宣传，但却坚决反对任何关于专利法是一种竞争管理或国家产业政策的说法。在自由市场理论的坚实基础上，专利只是另一种形式的财产的强烈主张暗中否定了专利法具有任何监管功能的观点.....⁶⁴²

⁶⁴² Michael H. Davis, “Patent Politics,” S. Carolina L. Rev. 56, no. 2 (Winter 2004); <https://scholarcommons.sc.edu/sclr/vol56/iss2/6>): 337 - 86, pp. 338 - 39 & 373 - 74 (footnote omitted); discussed in Kinsella, “Patent Lawyers Who Don’ t Toe the Line Should Be Punished!” C4SIF Blog (April 12, 2012). Amusingly, the left-leaning Davis, somewhat perplexed, writes “Many libertarians, practically wedded to the free market system, surprisingly oppose patent rights,” citing my AIP. Davis, op cit., p. 374, n.142. 迈克尔·H·戴维斯，“专利政治”，《南卡罗来纳法律评论》第 56 卷第 2 期（2004 年冬季）；<https://scholarcommons.sc.edu/sclr/vol56/iss2/6>）：337 - 386，第 338 - 339 页和 373 - 374 页（省略脚注）；在金塞拉的《不守规律的专利律师应该受到惩罚！》”

Davis also notes, of the attempt to defenders of patents to deny that they are monopolies:

*This “debate” seemingly has only one point: to sanitize the patent monopoly so that it more closely resembles simple property. A monopoly, of course, virtually compels the public interest. Thus, the trump of property depends on asserting not only that a patent is simple property, but also that it does not constitute an economic phenomenon, like a monopoly, in which the public has a particular interest.*⁸¹

戴维斯还提到，在专利捍卫者试图否认专利是垄断的过程中：

这场“论证”似乎只有一个要点：净化专利垄断，使其更接近单纯的财产。当然，垄断实际上是对公共利益的强制。因此，“财产王牌”策略不仅取决于声称专利是单纯的财产，还取决于声称专利不像垄断那样构成一种公众有特殊利益的经济现象。⁶⁴³

C4SIF 博客（2012 年 4 月 12 日）中进行了讨论。有趣的是，左倾的戴维斯有点困惑地写道“许多实际上与自由市场体系紧密结合的自由意志主义者令人惊讶地反对专利权”，并引用了我的《反对知识产权》。戴维斯，同前引，第 374 页，注释 142。

⁶⁴³ Ibid., p. 374, n.141. See also Kinsella, “Are Patents and Copyrights ‘Monopolies’?” ,C4SIF Blog (Aug. 13, 2013). As Hayek wrote:

Perhaps it is not a waste of your time if I illustrate what I have in mind by quoting a rather well-known decision in which an American judge argued that “as to the suggestion that competitors were excluded from the use of the patent we answer that such exclusion may be said to have been the very essence of the right conferred by the patent” and adds “as it is the privilege of any owner of property to use it or not to use it without any question of motive.” It is this last statement which seems to me to be significant for the way in which a mechanical extension of the property concept by lawyers has done so much to create undesirable and harmful privilege.

F.A. Hayek, “‘Free’ Enterprise and Competitive Order,” in *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948; <https://mises.org/library/individualism-and-economic-order>), p. 114 (emphasis added; citation omitted). See also idem, *The Fatal Conceit* (Chicago: University of Chicago Press, 1988), pp. 36 – 37; and Cole, “Patents and Copyrights: Do the Benefits Exceed the Costs?” , at 82 – 83.

It is clear that, despite the assertions of defenders of IP, these rights are not like normal property rights in scarce resources. First, unlike property rights in scarce resources like personalty (movables) and real estate or land (immovables), IP rights in inventions (patents) and creative works (copyright) expire after a finite term—about 17 or so years for patents, and life of the author plus 70 years for copyright (say, about 120 years for a 40 year old author who lives to age 90). Second, the “borders” or boundaries defined by copyright law in “works” and by patent law for “inventions” is inherently murky, vague, arbitrary, and non-objective.

很明显，尽管知识产权的捍卫者们这样主张，但这些权利并不像对稀缺资源的正常财产权。首先，与对稀缺资源如动产（可移动的财产）和房地产或土地（不可移动的财产）的财产权不同，对发明（专利）和创造性作品（版权）的知识产权在有限期限后会到期——专利大约为 17 年左右，版权为作者有生之年加上 70 年（比如，一个 40 岁的作者活到 90 岁，版权期限约为 120 年）。其次，版权法对“作品”以及专利法对“发明”所定义的“边界”或界限本质上是模糊、不明确、武断和不客观的。

Scholars have noted other differences between IP and normal property rights. Writes Professor Tom Bell:

Copyrights and patents differ from tangible property in fundamental ways. Economically speaking, copyrights and patents are not rivalrous in consumption; whereas all the world can sing the same beautiful song, for instance, only one person can swallow a cool gulp of iced tea. Legally speaking, copyrights and patents exist only

同上，第 374 页，注释 141。另见金塞拉的《专利和版权是“垄断”吗？》，C4SIF 博客（2013 年 8 月 13 日）。正如哈耶克所写：

如果我引用一个相当著名的判决来说明我的想法，也许这不是在浪费你们的时间。在这个判决中，一位美国法官争辩说：“至于竞争对手被排除在专利使用之外的说法，我们回答说，这种排除可以说是专利所赋予权利的本质所在。”并且补充道：“因为任何财产所有者都有特权使用或不使用其财产，而无需考虑动机问题。”在我看来，最后这句话具有重要意义，因为律师对财产概念的机械引申在很大程度上造成了不可取的、有害的特权。

F.A. 哈耶克，《“自由”企业与竞争秩序》，收录于《个人主义与经济秩序》（芝加哥：芝加哥大学出版社，1948 年；<https://mises.org/library/individualism-and-economic-order>），第 114 页（着重号为原文所加；引用省略）。另见同一作者的《致命的自负》（芝加哥：芝加哥大学出版社，1988 年），第 36-37 页；以及科尔的《专利和版权：收益超过成本吗？》，第 82-83 页。

thanks to the express terms of the U.S. Constitution and various statutory enactments. In contrast, we enjoy tangible property thanks to common law, customary practices, and nature itself. Even birds recognize property rights in nests. They do not, however, copyright their songs.

Those represent but some of the reasons I have argued that we should call copyright an intellectual privilege, reserving property for things that deserve the label. Another, related reason: Calling copyright property risks eroding that valuable service mark.⁸²

学者们已经指出了知识产权与正常财产权之间的其他差异。汤姆·贝尔教授写道：

版权和专利与真实财产有本质区别。从经济角度讲，版权和专利在消费上不具有竞争性；例如，全世界的人都可以唱同一首美妙的歌，而一杯冰茶却只能由一个人畅饮。从法律角度讲，版权和专利的存在仅仅得益于美国宪法的明确条款和各种法定法规。相比之下，我们享有真实的财产则要归功于普通法、习惯做法和大自然本身。就连鸟类也承认对鸟巢的财产权。不过，它们不会为自己的歌声申请版权。

这些只是我认为我们应该将版权称为一种知识特权，而将“财产”这个标签保留给那些当之无愧的事物的部分原因。另一个相关的原因是 将版权称为财产可能会侵蚀这一宝贵的服务标志。⁶⁴⁴

⁶⁴⁴ Tom Bell, “Copyright Erodes PropertySM,” Agoraphilia (July 14, 2011; <https://perma.cc/L25V-A8X8>). See also idem, “Copyright as Intellectual Property Privilege,” Syracuse L. Rev. 58 (2007; <https://perma.cc/7ZLM-CDWA>): 523 – 46. Bell also writes elsewhere: “to call copyright ‘property’ risks vesting copyright holders with more powers than they deserve. To call it ‘privilege’ offers a rhetorical counterbalance, reminding copyright holders of what they owe to the public and recalling lawmakers to their duties.” Bell, Intellectual Privilege, p. 98 (footnote omitted).

Regarding Epstein’s contentions about the “structural unity” between IP and real property rights, Professor Peter Menell concludes that:

[T]he Property Rights Movement is too limited and grounded in absolutist ideology to support the needs of a dynamic, resource-sensitive intellectual property system. Professor Epstein’s simplistic equation of real and intellectual property generates more heat than light. It is not particularly helpful to think of real and intellectual property as structurally unified. The differences matter significantly and resorting to rhetorical metaphors distracts attention from critical issues. As Judge (later Justice) Cardozo cautioned in 1926, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁸³

对于爱泼斯坦关于知识产权与真实财产权之间“结构性统一”的论点，彼得·梅内尔教授得出结论说：“财产权运动过于局限，而且以绝对主义意识形态为基础，无法支持动态的、对资源敏感的知识产权制度的需要：

[产]权运动过于局限且基于绝对主义意识形态，无法支持动态的、对资源敏感的知识产权制度的需要。爱泼斯坦教授将真实财产权和知识产权简单地等同起来，这种做法产生更多是热度而非洞见。认为真实财产权和知识产权在结构上是统一的并不是特别有帮助。两者之间的差异非常重要，诉诸修辞上的比喻会分散对关键问题的注意力。正如卡多佐法官（后来的大法官）在 1926 年所告诫的那样，“法律中的比喻应受到严格审视，因为这些比喻一开始是解放思想的工具，但最终往往会奴役思想。”⁶⁴⁵

汤姆·贝尔，《版权侵蚀财产权》，Agoraphilia（2011 年 7 月 14 日；<https://perma.cc/L25V-A8X8>）。另见同一作者的《作为知识产权特权的版权》，《雪城法律评论》第 58 卷（2007 年；<https://perma.cc/7ZLM-CDWA>）：523–546。贝尔在其他地方也写道：“将版权称为‘财产’有可能冒着赋予版权持有者超出他们应得的更多权力的危险。将其称为‘特权’则提供了一种修辞上的平衡，提醒版权持有者他们对公众的亏欠，并提醒立法者他们的职责。”贝尔，《知识特权》，第 98 页（省略脚注）。

⁶⁴⁵ Peter S. Menell, “The Property Rights Movement’s Embrace of Intellectual Property:

There are even further dissimilarities between IP rights and normal property rights. For example, as Professors Dorfman and Jacob write:

In these pages we seek to integrate two claims. First, we argue that, taken to their logical conclusions, the considerations that support a strict form of protection for tangible property rights do not call for a similar form of protection when applied to the case of copyright. More dramatically, these considerations demand, on pain of glaring inconsistency, a substantially weaker protection for copyright. In pursuing this claim, we show that the form of protecting property rights (including rights in tangibles) is, to an

True Love or Doomed Relationship?” , UC Berkeley Public Law Research Paper No. 965083 (Feb. 26, 2007; <https://perma.cc/F6X9-5L9D>), quoting *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926; <https://casetext.com/case/berkey-v-third-avenue-railway-co>). See also idem, “Intellectual Property and the Property Rights Movement,” Regulation 30, no. 3 (Fall 2007; <https://perma.cc/F6X9-5L9D>): 36 - 42, at 42 (“Suggesting that ‘intellectual property’ must be treated as part of a monolithic ‘property’ edifice masks fundamental differences and distracts attention from critical issues”); and Christina Mulligan & Brian Patrick Quinn, “Who are You Calling a Pirate?: Shaping Public Discourse in the Intellectual Property Debates,” Brandeis University Department of English Eighth Annual Graduate Conference (2010; <https://perma.cc/7SCS-8P3J>), pp. 7 - 8 (regarding overuse of the “piracy” metaphor for copyright infringement).

On the perils of misuse of metaphors, see Kinsella, “On the Danger of Metaphors in Scientific Discourse,” *StephanKinsella.com* (June 12, 2011) and idem, “Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors,” *Mises Economics Blog* (Jan. 3, 2008).

彼得·S·梅内尔,《财产权运动对知识产权的接纳:真爱还是注定失败的关系?》,加州大学伯克利分校公共法律研究论文第 965083 号(2007 年 2 月 26 日;<https://perma.cc/F6X9-5L9D>),引用了伯基诉第三大道铁路公司案,155 N.E. 58, 61 (纽约州,1926 年;<https://casetext.com/case/berkey-v-third-avenue-railway-co>)。另见同一作者的《知识产权与财产权运动》,《管制》第 30 卷第 3 期(2007 年秋季;<https://perma.cc/F6X9-5L9D>):36-42,第 42 页(“认为‘知识产权’必须被视为整个‘财产’大厦的一部分掩盖了根本差异,并分散了对关键问题的注意力”);以及克里斯蒂娜·马利根和布莱恩·帕特里克·奎因,《你叫谁盗版者?:在知识产权论证中塑造公共对话》,布兰迪斯大学英语系第八届研究生年会(2010 年;<https://perma.cc/7SCS-8P3J>),第 7-8 页(关于过度使用“盗版”比喻侵犯版权)。关于滥用比喻的危害,见金塞拉的《论科学论述中比喻的危险》,StephanKinsella.com (2011 年 6 月 12 日)以及同一作者的《客观主义法学教授莫索夫论版权;或者,劳动、价值和创造比喻的错误使用》,米塞斯经济学博客(2008 年 1 月 3 日)。

*important extent, a feature of certain normal, though contingent, facts about the human world. Second, the normative question concerning the selection of a desirable protection for creative works is most naturally pursued from a tort law perspective, in part because the normative structure of copyright law simply is that of tort law.*⁸⁴

知识产权与普通财产权之间还有更多的不同之处。例如，多夫曼教授和雅各布教授写道：

在这些篇章中，我们试图整合两个主张。首先，我们认为，从支持严格形式的真实财产权保护的考虑因素得出的逻辑结论来看，当应用于版权案例时，并不要求类似形式的保护。更重要的是，这些考虑因素要求对版权的保护要弱得多，否则就会出现明显的不一致。为了实现这一主张，我们表明，保护财产权（包括有形资产的权利）的形式在很大程度上是人类世界某些正常事实（尽管是偶然的）的特征。其次，关于为创造性作品选择理想保护的规范性问题最自然地是从侵权法的角度来探讨，部分原因是版权法的规范结构实际上就是侵权法的规范结构。⁶⁴⁶

Thus, as Wendy Gordon writes,

*The “property” portion of the “intellectual property” label has caused practical as well as conceptual difficulties. Too many courts have assumed that all things called “property” should be treated similarly, ignoring the important physical, institutional, and statutory differences that distinguish intellectual “property” from the tangible kind.*⁸⁵

因此，正如温迪·戈登所写：

⁶⁴⁶ Avihay Dorfman & Assaf Jacob, “Copyright as Tort,” *Theoretical Inquiries in Law* 12, no. 1 (Jan. 2011; <https://perma.cc/4HZM-QPHU>): 59 – 97, p. 96 – 97.

“知识产权”标签中的“财产”部分既造成了实际困难，也造成了概念上的困难。

太多的法院认为，所有被称为“财产”的东西都应受到类似的对待，而忽视了将知识

“财产”与真实财产区分开来的重要的物理、制度和法律差异。⁶⁴⁷

⁶⁴⁷ Wendy J. Gordon, “Intellectual Property,” in Oxford Handbook of Legal Studies (Peter Cane & Mark Tushnet ed., 2003; <https://perma.cc/59GP-HRD8>), § 1.1.3. But see idem, “An Inquiry into the Merits of Copyright,” at 1353, 1354, 1378 (“The noncontractual restraints imposed by copyright are of the same nature as those imposed by other areas of the law... [T]he commonalities in structure predominate over the differences... [I]ntellectual and tangible property serve similar economic roles... [T]he tangible and intangible property structures are quite similar... [C]opyright is functionally as well as structurally consistent with tangible property.”). Perhaps the apparent difference in Gordon’s views is due to some evolution of views, as they were published fourteen years apart. See also Adam Mossoff, “Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause,” Boston U. L. Rev. 87 (2007; <https://perma.cc/G7JW-NZNE>): 689 – 724, at pp. 698 – 99 (mentioning some scholars who, accepting the “claim that patents and copyrights were special, limited monopoly grants in the early American Republic ... today condemn recent expansions in intellectual property rights, which they refer to as ‘property’ intellectual property. They also criticize the use of ‘property rhetoric’ in intellectual property doctrines today, which they consider both a novel practice and a contributing factor in the ‘propertization’ of intellectual property doctrines”; footnotes omitted); and Mulligan & Quinn, “Who are You Calling a Pirate?,” p. 1 (arguing that the “analogy between physical property and intellectual property is troubled for a number of reasons”). See also Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity (New York: Penguin Press, 2004; <https://perma.cc/J8ZM-FT46>), pp. 117 – 18, who argues that the desire to treat IP rights the same as other property rights has: ... no reasonable connection to our actual legal tradition. ... While ‘creative property’ is certainly ‘property’ in a nerdy and precise sense that lawyers are trained to understand, it has never been the case, nor should it be, that ‘creative property owners’ have been ‘accorded the same rights and protection resident in all other property owners.’ Indeed, if creative property owners were given the same rights as all other property owners, that would effect a radical, and radically undesirable, change in our tradition. 温迪·J·戈登,《知识产权》,载于《牛津法律研究手册》(彼得·凯恩和马克·图

Incidentally, I should note that, to my knowledge, none of the above-quoted scholars is an IP or patent abolitionist, except perhaps for Davis re patents. But they are honest scholars who recognize IP as being an unnatural legal regime distinct from natural, common law property rights.

顺便说一下，我应该指出，据我所知，上述引述的学者中除了戴维斯可能在专利方面持废除主义观点外，没有一个是知识产权或专利废除主义者。但他们是诚实的学者，他们认识到知识产权是一种不自然的法律制度，与自然的普通法财产权不同。

In sum, IP rights, especially patent and copyright, are not like property rights in scarce resources. And even if they were, this would not make them just, any more than the ability to make human slaves property justifies that institution.

总之，知识产权，尤其是专利权和版权，与稀缺资源的财产权不同。即使它们是，这也不会使它们变得正当，就如同能够将人类奴隶变为财产并不能证明奴隶制度是合理正当的一样。

什内特编，2003 年；<https://perma.cc/59GP-HRD8>），第 1.1.3 节。但参见同一作者的《对版权优点的探究》，第 1353、1354、1378 页（“版权施加的非性限制与法律其他领域施加的限制性质相同……结构上的共性大于差异……知识产权和真实财产发挥着相似的经济作用……有形和无形财产结构非常相似……版权在功能上和结构上与真实财产一致”）。也许戈登观点中明显的差异是由于观点的一些演变，因为这些观点的发表相隔了十四年。另见亚当·莫索夫，《作为宪法私有财产的专利：根据征收条款对专利的历史保护》，《波士顿大学法律评论》第 87 卷（2007 年；<https://perma.cc/G7JW-NZNE>）：689-724，第 698-699 页（提到一些学者，他们接受“在早期美国，专利和版权是特殊的、有限的垄断授予的主张……如今谴责知识产权的近期扩张，他们将其称为知识产权的‘财产化’。他们还批评如今知识产权学说中‘财产修辞’的使用，他们认为这既是一种新的做法，也是知识产权学说‘财产化’的一个促成因素”；省略脚注）；以及克里斯蒂娜·马利根和布莱恩·帕特里克·奎因，《你叫谁盗版者？》，第 1 页（认为“真实财产和知识产权之间的类比由于多种原因而存在问题”）。另见劳伦斯·莱西格，《免费文化：大媒体如何利用技术和法律锁定文化并控制创造力》（纽约：企鹅出版社，2004 年；<https://perma.cc/J8ZM-FT46>），第 117-118 页，他认为将知识产权权利与其他财产权利同等对待的愿望：……与我们实际的 legal 传统没有合理的联系。……虽然‘创造性财产’在律师所受训练理解的那种书呆子式的精确意义上肯定是‘财产’，但‘创造性财产所有者’从来没有也不应该‘被赋予与所有其他财产所有者相同的权利和保护’。事实上，如果给予创造性财产所有者与所有其他财产所有者相同的权利，那将对我们的传统产生一种激进且及其不可取的变化。

约翰·洛克与美国的国父们将知识产权视为一种自然权利

John Locke and the Founders on IP as a Natural Right

In what seems to be nothing more than an appeal to authority, some defenders of IP argue that IP rights are not artificial state-granted monopoly privileges, but rather natural property rights, and that this was recognized by Locke and the Founders of the US Constitution and various constitutional interpretations of patent and copyright.⁸⁶

在似乎仅仅是诉诸权威的情况下，一些知识产权的捍卫者认为，知识产权不是人为的国家授予的垄断特权，而是自然财产权，并且洛克、美国宪法的制定者以及对专利和版权的各种宪法解释都认可这一点。⁶⁴⁸

⁶⁴⁸ See, e.g., Adam Mossoff, “Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent ‘Privilege’ in Historical Context,” *Cornell L. Rev.* 92 (2007); <https://perma.cc/UZ9H-RK77>): 953 – 1012; idem, “Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory,” *Social Philosophy and Policy* 29, no. 2 (2012); <https://perma.cc/QG87-BAMY>): 283 – 317; idem, “The Constitutional Protection of Intellectual Property,” *Heritage Foundation* (March 8, 2021); <https://perma.cc/8ZUN-L4XZ>); idem, “Life, Liberty and Intellectual Property by Adam Mossoff,” *Ayn Rand Institute*, YouTube (Sep. 21, 2021; <https://youtu.be/CfMd1fHc2mE>); Randolph J. May & Seth L. Cooper, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015).

As can be seen, there are a variety of arguments in favor of IP: the utilitarian or consequentialist or incentive-based argument implied by the Constitution’s authorization for IP law (“to promote the progress...”) (see ch. 16, the section “IP in the Industrial Age”; ch. 14, Part III.A); natural rights, and “creationism” (Part IV.C, above; ch. 14, Part III.b); and others, such as theories related to personality or personhood, fairness, welfare, and culture. See references in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.76.

例如，参见亚当·莫索夫的《谁在乎托马斯·杰斐逊对专利的看法？在历史背景下重新评估专利“特权”》，《康奈尔法律评论》第92卷（2007年；<https://perma.cc/UZ9H-RK77>）：953 – 1012；同一作者的《将洛克从马克思那里拯救出来：知识产权理论中的劳动价值论》，《社会哲学与政策》第29卷第2期（2012年；<https://perma.cc/QG87-BAMY>）：283 – 317；同一作者的《知识产权的宪法保护》，传统基金会（2021年3月8日；<https://perma.cc/8ZUN-L4XZ>）；同一作者的《亚当·莫索夫：生命、自由与知识产权》，安·兰德研究所，YouTube（2021年9月21日；<https://youtu.be/CfMd1fHc2mE>）；伦道夫·J·梅和塞思·L·库珀的《知识产权的宪

First, it must be said that it is irrelevant whether Locke and some Founding Fathers thought of IP as a natural right or not. If they did, they were just wrong.

首先，必须指出的是，洛克和一些开国元勋是否认为知识产权是一项自然权利并不重要。如果他们认为是，那他们就是错的。

It is clear that Jefferson did not.⁸⁷ He was not opposed to patent and copyright, but clearly viewed them as grants of monopoly privilege, a policy tool. After all, during the drafting of the Bill of Rights, Jefferson, in a Letter to James Madison, proposed an amendment to the draft Bill of Rights to limit the terms of “monopolies” (patent and copyright) to a fixed number of years, to-wit:

*Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding—years but for no longer term and no other purpose.*⁸⁸

杰斐逊显然不这么认为。⁶⁴⁹他并不反对专利和版权，但显然将其视为授予垄断特权的一种政策工具。毕竟，在起草《权利法案》期间，杰斐逊在给詹姆斯·麦迪逊的一封信中提出了对《权利法案》草案的修正案，将“垄断”（专利和版权）的期限限制在固定的年限内，即：

第 9 条。可以允许个人在文学创作和艺术发明方面享有一定期限不超过——N 年的垄断权，但不得超过此期限，也不得用于其他目的。⁶⁵⁰

法基础：自然权利视角》（卡罗莱纳学术出版社，2015 年）。

可以看出，有各种各样支持知识产权的论点：宪法对知识产权法的授权所隐含的功利主义、结果主义或基于激励的论点（“以促进进步……”）（见第十六章“工业时代的知识产权”部分；第十四章第三部分 A 节）；自然权利和“创造主义”（上文第四部分 C 节；第十四章第三部分 B 节）；以及其他论点，例如与人格、人的地位、公平、福利和文化相关的理论。参见《无国家社会中的法律与知识产权》（第十四章）注释 76 中的参考文献。

⁶⁴⁹ See, e.g., Mossoff, “Who Cares What Thomas Jefferson Thought About Patents?” 例如，参见莫索夫的《谁在乎托马斯·杰斐逊对专利的看法？》。

⁶⁵⁰ See “Letter From Thomas Jefferson to James Madison, 28 August 1789,” Founders Online (https://founders.archives.gov/documents/Jefferson/01-15-02-0354); also

In another letter, to Isaac McPherson, he wrote:

Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.⁸⁹

在另一封写给艾萨克-麦克弗森的信中，他写道：

因此，据我所知，在我们仿效英国之前，英国是世界上唯一——一个通过一般法律赋予思想排他性使用权的国家。在其他一些国家，有时在重大情况下会通过一项特殊的、针对个人的法案来这么做，但一般来说，其他国家认为这些垄断给社会带来的麻烦多于好处；而且可以看到，那些拒绝发明垄断的国家在新的有用发明方面和英国一样富有成果。⁶⁵¹

As for Locke, he did favor copyright for authors, but only as a policy tool. He did not view IP rights as natural property rights. As Professor Tom Bell explains, Locke's:

Kinsella, “Thomas Jefferson’s Proposal to Limit the Length of Patent and Copyright in the Bill of Rights,” C4SIF Blog (Dec. 1, 2011).

见《托马斯·杰斐逊致詹姆斯·麦迪逊的信，1789年8月28日》，Founders Online（<https://founders.archives.gov/documents/Jefferson/01-15-02-0354>）；也可参见金塞拉的《托马斯·杰斐逊在<权利法案>中提议限制专利和版权的期限》，C4SIF 博客（2011年12月1日）。

⁶⁵¹ See “Thomas Jefferson to Isaac McPherson 13 Aug. 1813,” Founders Online (text formatted; emphasis added; <https://founders.archives.gov/documents/Jefferson/03-06-02-0322>).

见《托马斯·杰斐逊致艾萨克·麦克弗森，1813年8月13日》，Founders Online（文本格式已调整；着重号为原文所加；<https://founders.archives.gov/documents/Jefferson/03-06-02-0322>）。

... labor-desert justification of property gives authors clear title to the particular tangible copy in which they fix their expression. If an author has already acquired property rights in paper and ink by dint of creating them or, more likely, consensual exchange, and then mixes those two forms of chattel property, tracing ink words on cellulose paper, then the author enjoys natural and common-law rights in the newly arranged physical property. But it remains a separate—and contestable—question whether that argument establishing rights in atoms also justifies giving an author property rights to a parcel in the imaginary realm of ideas. Locke himself did not try to justify intangible property. He appears, in fact, to have viewed copyright as merely a policy tool for promoting the public good. Modern commentators who would venture so far beyond the boundaries of Locke's thought, into the abstractions of intellectual property, thus go further than Locke ever dared and further than they should in his name. ...

至于洛克，他确实赞成作者享有版权，但只是作为一种政策工具。他并不认为知识产权是自然财产权。正如汤姆-贝尔（Tom Bell）教授所解释的，洛克的：

.....基于劳动应得的财产权理论给予作者对其固定表达的特定有形副本的明确所有权。如果作者已经通过创造纸张和墨水，或者更有可能通过双方同意的交换，获得了纸张和墨水的财产权，然后将这两种形式的动产混合在一起，在纤维素纸张上描摹墨水文字，那么作者对新排列的真实财产享有自然法和普通法权利。但是，确定对原子（有形物质）的权利的这一论点是否也能证明给予作者在想象中的思想领域的一部分财产权，这仍然是一个单独的且有争议的问题。洛克本人并未试图为无形财产辩护。事实上，他似乎仅仅将版权视为促进公共利益的一种政策工具。现代评论家如此大胆地超越洛克思想的界限，进入知识产权的抽象领域，那么他们就比洛克所敢走的更远，并且以他的名义走得比他们应该走的更远.....

Unlike Epstein, I find that natural property rights theory can help fully explain a broad

range of human behavior and offers a useful tool for assessing the justifiability of social institutions. Like him, however, I doubt that Locke's theory can justify copyright. To Epstein's trenchant critiques, I add one targeted at any supposed natural property right in expressive works: copyright contradicts Locke's own justification of property. Locke described legislation authorizing the Stationers' Company monopoly on printing—the nearest thing to a Copyright Act in his day—as a “manifest ... invasion of the trade, liberty, and property of the subject.” Today, by invoking government power a copyright holder can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of tangible property. Copyright law violates the very rights—the tangible property rights—that Locke set out to defend. ...

As our careful review of the historical record has showed ... the Founders probably did not regard copyright as a natural right.⁹⁰

与爱泼斯坦不同，我认为自然财产权理论有助于充分解释人类的各种行为，并为评估社会制度的合理性提供了有用的工具。然而，与他一样，我也怀疑洛克的理论能否证明版权的正当性。除了爱泼斯坦尖锐的批评之外，我还针对任何假定的表达性作品的自然财产权补充了一条：版权与洛克本人对财产的论证相矛盾。洛克将授权出版商会垄断印刷业的立法——在他那个时代最接近《版权法》的法律——描述为“明显.....侵犯了臣民的贸易、自由和财产”。今天，版权持有者通过动用政府权力，可以对从事和平表达和安静享有真实财产的人施加事先限制、罚款、监禁和没收。版权法侵犯了洛克所要捍卫的权利——真实财产权。...

正如我们对历史记录的仔细回顾所显示的那样.....美国的国父们可能并没有将版

权视为一种自然权利。⁶⁵²

In support of his contentions here, Bell cites Ronan Deazley, who “reads Locke’s correspondence to indicate that ‘Locke himself did not consider [that] his theory of property extended to intellectual properties such as copyrights and patents,’ and instead recognized that it could exist only [by] grace of parliamentary action.”⁹¹

为了支持他在这里的论点，贝尔引用了罗南·迪兹利的的话，迪兹利“解读洛克的信件以表明‘洛克本人并不认为他的财产理论延伸到了诸如版权和专利这样的知识产权上’，相反，他认识到知识产权只能凭借议会行动的恩赐而存在”。⁶⁵³

In sum, IP rights, especially patent and copyright, have always been viewed as mere policy tools, not as natural property rights. These laws cannot be justified by appeals to

⁶⁵² Bell, Intellectual Privilege, pp. 69 – 71 (footnotes omitted).

贝尔，《知识特权》，第 69-71 页（脚注省略）。

⁶⁵³ Ibid., p. 192 n.52, quoting Ronan Deazley, Rethinking Copyright: History, Theory, Language (Cheltenham, UK: Edward Elgar, 2006)), at 144 n.32. See also Seana Valentine Shiffrin, “Lockean Arguments for Private Property,” in Munzer, ed., New Essays in the Legal and Political Theory of Property (<https://perma.cc/3TWB-4Z8A>), p. 141: Despite the attractions of a Lockean approach and its apparent amenability to intellectual property, I side with Jefferson. I will challenge the claim that Lockean foundations straightforwardly support most strong natural rights over intellectual works—such things as articles, plays, books, songs, paintings, methods, processes, and other inventions. I will also challenge the related claim that Lockean foundations for strong property rights come easier for these forms of intellectual property than for real property. As Jefferson observed and as I hope to explain, the nature of intellectual works makes them less, rather than more, susceptible to Lockean justifications for private appropriation.

同上，第 192 页注释 52，引用了罗南·迪兹利的《反思版权：历史、理论、语言》（英国切尔滕纳姆：爱德华·埃尔加出版社，2006 年），第 144 页注释 32。另见希夫林的《洛克式的私有财产论证》，收录于芒泽编辑的《财产的法律与政治理论新论》（<https://perma.cc/3TWB-4Z8A>），第 141 页：

尽管洛克的方法很有吸引力，而且显然适合知识产权，但我还是站在杰斐逊一边。我将质疑这样一种说法，即洛克的基础直接支持对知识作品——如文章、戏剧、书籍、歌曲、绘画、方法、工艺和其他发明——的大多数强有力的自然权利。我仍将质疑与此相关的观点，即洛克学说为这些形式的知识产权提供了比不动产更容易的强有力的财产权基础。正如杰斐逊所观察到的，也正如我希望解释的，知识产权作品的性质使其更不容易而不是更容易受到洛克关于私人占有的理由的影响。

authority.

总之，知识产权，尤其是专利权和版权，一直被视为纯粹的政策工具，而非自然财产权。这些法律无法通过诉诸权威来证明其正当性。

V 结论

I may someday provide such an updated treatment, tentatively to be entitled Copy This Book, building on AIP and taking into account more recent arguments, evidence, and examples.⁹² In the meantime, those interested in reading further on this topic may find useful the additional material suggested in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.t.

有朝一日，我可能会在 AIP 的基础上，并考虑到更多最新的论点、证据和例子，提供这样一个更新的论述，暂定名为《复制本书》。⁶⁵⁴ 与此同时，有兴趣进一步阅读这一主题的人可能会发现《无国家社会中的法律与知识产权》（第 14 章）注释中建议的补充材料很有用。

⁶⁵⁴ 见 www.copythisbook.com .

第十六章 原创财产权导论

Introduction to Origintent

Libertarian sci-fi author J. Neil Schulman, an old friend, and I agreed on most political matters, except for intellectual property (IP), over which we've had a decades-long disagreement.* Neil modified his theory over time, moving from "logorights" to "media-carried property," and eventually published Origintent: Why Original Content is Property in 2018, which included debates and discussions with IP abolitionists Wendy McElroy, Sam Konkin III, and me, and included my Introduction.† I have updated my Introduction, but retained the somewhat breezy and informal style.

自由意志主义科幻作家 J.尼尔·舒尔曼是我的一位老朋友，我们在大多数政治问题上意见一致，但在知识产权（IP）问题上，我们已经论证了几十年。*尼尔随着时间的推移修改了他的理论，从“商标权”转变为“媒介承载的财产”，最终在 2018 年出版了《原创财产权：为何原创内容是财产》，其中包括与知识产权废除主义者温迪·麦克罗伊、山姆·康金三世和我进行的论证和讨论，还包括了我的导论。†我更新了我的导论，但保留了那种有点轻松随意的非正式风格。

* See Kinsella, "On J. Neil Schulman's Logorights," Mises Economics Blog (July 2, 2009); idem, "KOL208 | Conversation with Schulman about Logorights and Media- Carried Property," Kinsella on Liberty Podcast (March 4, 2016). Neil passed away in 2019. See Kinsella, "J. Neil Schulman, R.I.P.," StephanKinsella.com (Aug. 10, 2019).

* 参见金塞拉的《论 J.尼尔·舒尔曼的言语权》，米塞斯经济学博客（2009 年 7 月 2 日）；同一作者的《KOL208 | 与舒尔曼关于商标权和媒介承载的财产的对话》，《金塞拉谈自由》播客（2016 年 3 月 4 日）。尼尔于 2019 年去世。参见金塞拉的《J. 尼尔·舒尔曼，安息吧》，StephanKinsella.com（2019 年 8 月 10 日）。

† See Stephan Kinsella, "Introduction," in J. Neil Schulman, Origintent: Why Original Content is Property (Steve Heller Publishing, 2018; <https://perma.cc/2E6G-WWPE>). For related and background material, see Kinsella, "On J. Neil Schulman's Logorights," Mises Economics Blog (July 2, 2009); idem, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property."

† 参见斯蒂芬·金塞拉，“导论”，载于 J.尼尔·舒尔曼《原创财产权：为何原创内容是财产》（史蒂夫·海勒出版公司，2018 年；<https://perma.cc/2E6G-WWPE>）。有关的背景材料，参见金塞拉的《论 J.尼尔·舒尔曼的商标权》，米塞斯经济学博客（2009 年 7 月 2 日）；同一作者的《KOL208 | 与舒尔曼关于商标权和媒介承载的财产的对话》。

一、导论

INTRODUCTION

“Hey, Kinsella, why would you write an introduction for a pro-intellectual property book?” my friends might ask me. I mean, did ask me.

“嘿，金塞拉，你为什么要为一本支持知识产权的书写导论呢？”我的朋友们可能会问我。我是说，他们确实问过我。

为什么干这事？ WHY DO THIS?

I could think of a few possible responses. First—I might say—it's not an introduction. It's really a foreword. Hence my scare quotes.¹ But the publisher insisted on calling my contribution an introduction. Much to my aplomb. Or chagrin. Whatever the word is. But let's face it, this is a weaselly response. What does it matter whether it's a foreword or introduction?

我能想到几种可能的回答。首先，我可以说这不是导论。它实际上是一篇序言。因此我加上了引号。⁶⁵⁵但出版商坚持把我的这篇文章称为导论。比起坦然受之，更让我蛋疼。不管用哪个词吧。但说实话，这是一个滑头的回应。它是序言还是导论又有什么关系呢？

Second, Neil objects to the term “intellectual property” to describe his views, as you'll find in the pages that follow. He argues for property rights in what he used to call logorights but now refers to as “media carried property” (MCP). He tends to say that

⁶⁵⁵ See Pat McNees, “What is the difference between a preface, a foreword, and an introduction?” (March 16, 2023; <https://perma.cc/72AK-MJPX>). 见帕特·麦克尼斯的《前言、序言和导论有什么区别？》（2023 年 3 月 16 日；<https://perma.cc/72AK-MJPX>）。

he opposes modern IP law—patent and copyright. But though he says he's not for IP law, he has sometimes gotten upset at my suggestion that patent and copyright law should be abolished. Hey, Neil, if you're not in favor of IP law then why do you bristle at my call to abolish it? Confuses the hell out of me. I think he does that just to keep me off balance. But it's cool, it's cool, I do the same to him.

其次，尼尔反对用“知识产权”一词来描述他的观点，这一点你会在下文中看到。他主张他过去称之为商标权、现在称为“媒介承载的财产”（MCP）的财产权。他倾向于说他反对现代知识产权法——专利和版权。不过，虽然他说他不赞成知识产权法，但有时我建议废除专利法和版权法时，他也会不高兴。嘿，尼尔，如果你不赞成知识产权法，那你为什么对我呼吁废除知识产权法感到不快呢？让我完全摸不着头脑。我觉得他这么做只是为了让我失去平衡。但没关系，没关系，我也对他做同样的事。

Third, this is my chance to “come out”—to announce that I have finally changed my mind about IP and am now an ardent supporter of a certain form of legal protection for products of the mind. Because of the power and clarity of Neil's revised arguments, I've finally seen the light! As many know, as a newly-minted libertarian, I was initially in favor of IP (Ayn Rand ensnares a lot of us newbies), before developing some doubts about the notion. As a young patent attorney, I diverted my libertarian efforts towards finding and developing a good argument for IP. I pored through the literature, reading and studying tons of articles and books by legal scholars, political philosophers, economists, and libertarians of various stripes, searching for a way to justify patent and copyright. Hey, I did the work, so you don't have to. Anyway. I finally gave up and became an atheist. Sorry, I mean an opponent of IP. Despite my upbringing. I mean career. I became an anti-IP IP attorney. I became a self-hating patent lawyer. (But a damn good one.)

第三，这是我“出柜”的机会——宣布我终于改变了对知识产权的看法，现在我不再是某种形式的思想产品法律保护的热心支持者。由于尼尔修改后的论点有力而清晰，我终于看到了曙光！很多人都知道，作为一名新晋的自由意志主义分子，我最初是支持知识产权的（安-兰德迷惑了很多我们这些新手），后来对这一概念产生了一些怀疑。作为一名年轻的专利律师，我将我的自由意志主义努力转向为知识产权寻找和发展一个好的论据。我翻阅了大量文献，阅读和研究了大量由法律学者、政治哲学家、经济学家和各派自由意志主义人士撰写的文章和书籍，寻找为专利和版权辩护的方法。嘿，我做了这些工作，你就不用做了。总之。我最终放弃了，成了一名无神论者。对不起，

我是说知识产权的反对者。尽管我的成长经历。我是说职业生涯。我成了一名反知识产权的知识产权律师。我成了一名自我厌恶的专利律师。(却偏偏是一名非常优秀的专利律师)。

But keep in mind that I was always looking for proof of God. Sorry—I mean a good argument for IP. I wanted to find a justification for patent law, after all—it was my career. Just like I wanted to find an argument for God after being a lifelong Catholic and altar boy. But I failed in my quest (both of them, not that they are connected, exactly). I was unable to square the circle. So I finally became the IP version of atheist, because I just couldn't find a good argument for IP.

但请记住，我一直在寻找上帝存在的证据。对不起，我是指知识产权的有效论据。我想为专利法找到一个正当理由，毕竟这是我的职业。就像我终生信奉天主教，是个祭坛侍童，我想为上帝找到一个论据一样。但我的探索失败了（两者都失败了，并不是说它们之间有什么联系）。我无法解决这个难题。所以，所以我最终成为了知识产权领域的无神论者，因为我就是找不到知识产权的有效论据。

But Neil never gave up. His original "logorights" argument (first published in 1983) didn't persuade me. But then, after repeated sparring with me, he reformulated his argument. He adjusted it. He tweaked it. Now, it's about "media carried property." And mirabile dictu!, he has done it! He has finally found a solid footing for a type of IP, one that has persuaded even me, Kinsella, arch-enemy of IP! Finally, my whole career is actually justified! All I need do is recant my IP heresy here, in this soi-disant "Introduction."

但尼尔从未放弃。他最初提出的“商标权”论点（1983年首次发表）并没有说服我。但后来，在与我反复论证之后，他重新表述了他的论点。他调整了它。他修改了它。现在，他的论点是“媒介承载的财产”。奇迹出现了！他成功了！他终于为一种知识产权找到了坚实的基础，甚至说服了我——知识产权的头号敌人金塞拉！我的整个职业生涯终于有了正当理由！我所需要做的，就是在这篇“导论”中，重新忏悔我对知识产权的异端邪说。

坦白真相 Coming Clean

Okay, time to come clean. I can't keep up pretenses anymore. As the punchline to the joke goes, "I'm just f*cking with you—she's dead."² In other words—I was

joking. I'm not "coming out." I'm still anti-IP. So everybody just relax. I still think Neil is wrong. And he thinks I'm wrong. And we're cool with that. That's how libertarian bros do.

好了，是时候坦白了。我不能再伪装下去了。正如那个笑话的笑点所说：“我只是在逗你玩——她死了。”⁶⁵⁶ 换句话说——我是在开玩笑。我并不是要“出柜”。我仍然反对知识产权。所以大家都放松点。我仍然认为尼尔是错的。而他也认为我是错的。我们对此都没意见。这就是自由意志主义者兄弟们的相处方式。

One thing you can say: Neil's given this issue repeated valiant efforts. Maybe it just takes him longer than me to give up. I gave it up after a good ten-plus years of diligent study and effort. Neil's been steadfast in his support for his version of IP for maybe 35 years now. That takes a special kind of stupid. I mean dedication.

有一点可以肯定：尼尔在这个问题上屡次付出了巨大的努力。也许他放弃的时间比我长。我是在经过十多年的勤奋学习和努力之后才放弃的。尼尔坚定不移地支持他版本的知识产权可能已经有 35 年了。这需要一种特殊的愚蠢。我是说执着。

So scratch the third reason. And let's face it, my first two "points" were really not very good arguments at all.

所以第三个理由可以排除了。而且说实话，我的前两个“观点”根本就不是很好的论据。

So back to the first question: why would I write this introduction? What's my purpose? What's the purpose of this book? Okay. Let me try this angle. The historical angle. The setting. The context.

那么回到第一个问题：我为什么要写这篇导论呢？我的目的是什么？这本书的目的又是什么？好吧。让我从这个角度试试。历史的角度、背景以及语境。

⁶⁵⁶ See "Grieving Husband," eBaum's World (Sep. 29, 2006; <https://perma.cc/5XHM-KVWS>).

见《悲伤的丈夫》，eBaum's World（2006 年 9 月 29 日；<https://perma.cc/5XHM-KVWS>）。

二、知识产权的历史背景

THE HISTORICAL SETTING OF INTELLECTUAL PROPERTY

Look. Here's what happened. IP existed in scattered/proto forms hundreds of years ago, in the form of monopoly grants of privilege by the state. It goes back a long way, probably as far back as nascent forms of protectionism and proto-state-granted monopoly privilege. We see traces of it as far back as 2,500 years ago: in about 500 B.C., in the Greek city of Sybaris, located in what is now southern Italy, there were annual culinary competitions. The victor was given the exclusive right to prepare his dish for one year.³ Sort of like a copyright. Or patent. Some kind of right to his originent. And then, over the ensuing centuries, there were various forms of protectionism, and also attempts to promote or protect or "incentivize" innovation and creativity. These controls were intermixed with mercantilism (protectionism) and censorship.⁴

你看，事情是这样的。数百年前，知识产权就以国家授予垄断特权的形式零散/原始地存在着。它的历史可以追溯到很早以前，大概可以追溯到保护主义的雏形和国家授予垄断特权的雏形。早在 2500 年前，我们就能看到它的踪迹：大约公元前 500 年，在位于现在意大利南部的希腊城市西巴里斯，每年都会举行烹饪比赛。⁶⁵⁷ 获胜者被授予

⁶⁵⁷ See "History of patent law," Wikipedia (https://en.wikipedia.org/wiki/History_of_patent_law); Michael Witty, "Athenaeus describes the most ancient intellectual property," *Prometheus* 35, no. 2 (March 2018; <https://perma.cc/4J2J-ZNDU>): 137 - 43; Kinsella, "Food Patents in Greece in 500 BC," *StephanKinsella.com* (Aug. 8, 2010). For another example, about a millennium later, see Michael H. Roffer, "The Irish Copyright War," in *The Law Book: From Hammurabi to the International Criminal Court*, 250 Milestones in the History of Law (New York: Sterling, 2015). For more on the origins of IP law, see, e.g., Oren Bracha, "Owning Ideas: A History of Anglo-American Intellectual Property" (June 2005; <https://law.utexas.edu/faculty/obracha/dissertation/>) (unpublished Ph.D dissertation, Harvard Law School); Karl Fogel, "The Surprising History of Copyright and The Promise of a Post-Copyright World," *Question Copyright* (2006; <https://perma.cc/DV92-TEH3>); Fritz Machlup, U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, *An Economic Review of the Patent System* (85th Cong., 2nd Session, 1958, Study No. 15; <https://mises.org/library/economic-review-patent-system>), Part II, "Historical Survey"; Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach,"

Hamline L. Rev. 12, no. 2 (Spring 1989; <https://perma.cc/DH7K-ZCRV>): 261 – 304, Part II, “Historical Origins of Intellectual Property Rights” ; Christopher May & Susan K. Sell, “The Emergence of Intellectual Property Rights,” in *Intellectual Property Rights: A Critical History* (Boulder and London: Lynne Rienner Publishers, 2006); Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760 – 1911* (Cambridge University Press, 1999); Ronan Deazley et al., eds., *Privilege and Property: Essays on the History of Copyright* (Cambridge: OpenBook Publishers, 2010); Maximilian Frumkin, “The Origin of Patents,” *J. Pat. Off. Soc’y* 27, no. 3 (1945; <https://perma.cc/Y575-ZR2A>): 143 – 49; Benedict Atkinson & Brian Fitzgerald, *A Short History of Copyright: The Genie of Information* (Springer, 2014); Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Cheltenham, UK: Edward Elgar, 2006); Adam D. Moore & Kenneth Einar Himma, “Intellectual Property,” in Edward N. Zalta, ed., *Stanford Encyclopedia of Philosophy* (Stanford University, 2011; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980917), § 1; Carla Hesse, “The Rise of Intellectual Property, 700 B.C. – A.D. 2000: An Idea in the Balance,” *Daedalus* 131, no. 2 (Spring, 2002), pp. 26 – 45; Tom W. Bell, *Intellectual Privilege: Copyright, Common Law, and the Common Good* (Arlington, Virginia: Mercatus Center, 2014; <https://perma.cc/JLC2-396Y>), chap. 3. See also the references in Dale A. Nance, “Foreword: Owning Ideas,” *Harv. J. L. & Pub. Pol’y* 13, no. 3 (Summer 1990): 757 – 74.

参见“专利法的历史”，维基百科(https://en.wikipedia.org/wiki/History_of_patent_law)；迈克尔·威蒂，《阿特纳奥斯描述了最古老的知识产权》，《普罗米修斯》第 35 卷第 2 期 (2018 年 3 月；<https://perma.cc/4J2J-ZNDU>)：137 – 143；斯蒂芬·金塞拉，《公元前 500 年希腊的食品专利》，StephanKinsella.com StephanKinsella.com (2010 年 8 月 8 日)。另一个大约一千年后的例子，参见迈克尔·H·罗弗，《爱尔兰版权战争》，收录于《法律之书：从汉谟拉比到国际刑事法院，法律史上的 250 个里程碑》(纽约：斯特林出版社，2015 年)。

关于知识产权法的起源，可进一步参见，例如，奥伦·布拉查，《拥有观念：英美知识产权史》(2005 年 6 月；<https://law.utexas.edu/faculty/obracha/dissertation/>) (未出版的哈佛大学法学院博士论文)；卡尔·福格尔，《版权的惊人历史以及后版权世界的前景》，质疑版权组织 (2006 年；<https://perma.cc/DV92-TEH3>)；弗里茨·马赫卢普，美国参议院专利、商标和版权小组委员会，《专利制度的经济评论》(第 85 届国会第二次会议，1958 年，研究第 15 号；<https://mises.org/library/economic-review-patent-system>)，第二部分，“历史概述”；汤姆·G·帕尔默，《知识产权：一种非波斯纳的法律与经济学方法》，《哈佛法律评论》第 12 卷第 2 期 (1989 年春季；<https://perma.cc/DH7K-ZCRV>)：261 – 304，第二部分，“知识产权的历史起源”；克里斯托弗·梅和苏珊·K·塞尔，《知识产权的出现》，收录于《知识产权：一部批判性历史》(博尔德和伦敦：林恩·里纳出版社，2006 年)；布拉德·谢尔曼和莱昂内尔·本特利，《现代知识产权法的形成：英国经验，1760 – 1911》(剑桥大

在一年内独家制作他的菜肴的权利。这有点像版权。或者专利。某种对其原创内容的权利。在随后的几个世纪里，出现了各种形式的保护主义，并试图促进、保护或“激励”创新和创造。这些管制措施与重商主义（保护主义）和审查制度交织在一起。⁶⁵⁸

三、专利 Patents

Let's consider the origins of patents, property rights in inventions— techniques or machine designs that accomplish some practical purpose. A mousetrap, a method for threshing corn. But the original grant of patents did not usually involve some innovative machine or process. In England, the king would hand out monopoly privilege rights to cronies, maybe in exchange for helping the king out, by helping to collect taxes, and so on. These grants were called “letters patent”—patent meaning “open.” “Only John Smythe may sell playing cards in ye olde town of Bluxsome-on-Thames” or whatever (and then government goons would raid his competitors on occasion to ensure they were not selling counterfeit or “pirated” cards… a bit ironic given that one of the early uses of Letters Patent by the British Crown was to entice pirates to become “privateers”

学出版社，1999 年）；罗南·迪兹利等人编，《特权与财产：版权历史论文集》（剑桥：开放图书出版社，2010 年）；马克西米利安·弗鲁姆金，《专利的起源》，《美国专利局协会杂志》第 27 卷第 3 期（1945 年；<https://perma.cc/Y575-ZR2A>）：143 - 149；本尼迪克特·阿特金森和布莱恩·菲茨杰拉德，《版权简史：信息精灵》（施普林格出版社，2014 年）；罗南·迪兹利，《重新思考版权：历史、理论、语言》（英国切尔滕纳姆：爱德华·埃尔加出版社，2006 年）；亚当·D·摩尔和肯尼斯·艾纳·希玛，《知识产权》，收录于爱德华·N·扎尔塔编，《斯坦福哲学百科全书》（斯坦福大学，2011 年；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980917），第 1 节；卡拉·赫斯，《知识产权的兴起，公元前 700 年至公元 2000 年：一个处于平衡中的观念》，《代达罗斯》第 131 卷第 2 期（2002 年春季），第 26 - 45 页；汤姆·W·贝尔，《知识特权：版权、普通法与共同利益》（弗吉尼亚州阿灵顿：梅卡特图斯中心，2014 年；<https://perma.cc/JLC2-396Y>），第 3 章。也可参见戴尔·A·南斯，《前言：拥有观念》，《哈佛法律与公共政策杂志》第 13 卷第 3 期（1990 年夏季）：757 - 774 中的参考文献。

⁶⁵⁸ As Tom Palmer writes, “[m]onopoly privilege and censorship lie at the historical root of patent and copyright.” Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach,” p. 264 (footnote omitted).

正如汤姆·帕尔默所写：“垄断特权和审查制度是专利和版权的历史根源。”——帕尔默，《知识产权：一种非波斯纳的法律与经济学方法》，第 264 页（脚注省略）。

[a fancy name for legitimized piracy], by giving them a monopoly over some of the spoils of their piracy for a given time).⁵

让我们来考察专利的起源——发明的财产权——能达到某种实用目的的技术或机器设计。捕鼠器、玉米脱粒方法。但最初的专利授予通常并不涉及某种创新机器或工艺。在英国，国王会把垄断特权授予亲信，也许是为了换取他们帮助国王，比如协助收税等等。这些授予被称为“专利证书”——“专利”的意思是“公开的”。“只有约翰·斯迈思可以在泰晤士河畔的布鲁克斯姆古镇出售扑克牌”或诸如此类的话（然后政府的打手们会偶尔突击检查他的竞争对手，以确保他们没有出售假冒或“盗版”扑克牌……有点讽刺的是，英国王室早期使用“专利证书”的目的之一就是吸引海盗成为“私掠者”[海盗行为合法化的别称]，让他们在一定时间内垄断海盗行径的部分战利品）。⁶⁵⁹

四、真正的海盗 Real Pirates

A notorious example is Francis Drake, who was given a Letter Patent on March 15, 1587, to authorize his piracy, such as attacking Spanish ships sailing back from South America laden with silver, handing it over to the Queen after taking his share. Sir Francis Drake:

... made the first English slaving voyages, taking Africans to the New World. Drake attacked Spanish ships sailing back from South America laden with silver. He took their treasure for himself and his queen. He also raided Spanish and Portuguese ports. He undertook a circumnavigation of the world in 1572 and 1573. He discovered that Tierra del Fuego was not part of the Southern Continent and explored the west coast of South America. He plundered ports in Chile and Peru and captured treasure ships. He sailed up to California and then across the Pacific Ocean to the East Indies. He returned to England with his ship full of spices and treasure, so gaining great acclaim.”⁶

弗朗西斯·德雷克（Francis Drake）就是一个臭名昭著的例子，1587 年 3 月 15 日，他获得了一份《专利证书》，授权他从事海盗活动，比如袭击从南美洲满载白银返航的西班牙船只，在分得自己的那一份后将其余上交给女王。弗朗西斯·德雷克爵士：

⁶⁵⁹ See Kinsella, “Rothbard on Mercantilism and State “Patents of Monopoly,” C4SIF Blog (Aug. 29, 2011).
见 Kinsella, 《罗斯巴德论重商主义与国家 “垄断专利”》，C4SIF 博客（2011 年 8 月 29 日）。

……进行了英国最早的奴隶贸易航行，将非洲人带到新大陆。德雷克袭击了从南美洲满载白银返航的西班牙船只。他为自己和女王夺走了他们的财宝。他还袭击了西班牙和葡萄牙的港口。他在 1572 年和 1573 年进行了环球航行。他发现火地岛不是南部大陆的一部分，并探索了南美洲的西海岸。他掠夺了智利和秘鲁的港口，并俘获了宝船。他航行到加利福尼亚，然后穿越太平洋到达东印度群岛。他带着满载香料和财宝的船返回英国，因此获得了极大的赞誉。⁶⁶⁰

In other words, patents were originally used to authorize actual piracy, in addition to protecting favored court cronies from competition and thus restricting the free market. So it is a bit ironic that modern defenders of IP claim to be opposed to IP “pirates”—even though real pirates (like Francis Drake) kill people, break things, and take things from people (and deliver slaves into bondage), while “information pirates” do none of these things.

此外还保护受宠的宫廷亲信免受竞争从而限制自由市场。所以有点讽刺的是，现代知识产权的捍卫者声称反对知识产权“海盗”——尽管真正的海盗（如弗朗西斯·德雷克）杀人、打砸、劫掠（以及奴役奴隶），而“信息海盗”却不做这些事，这就有点讽刺了。

五、1623 年的《垄断法》

The Statute of Monopolies of 1623

⁶⁶⁰ See Wikipedia, “Maritime History of England” (https://en.wikipedia.org/wiki/Maritime_history_of_England). See also my post “The Real IP Pirates,” C4SIF Blog (Oct. 16, 2010).

参见维基百科，“英格兰航海史” (https://en.wikipedia.org/wiki/Maritime_history_of_England)。另见我的文章《真正的知识产权海盗》，C4SIF 博客（2010 年 10 月 16 日）。

In any case, "Letters Patent" began to be used widely by monarchs to grant monopoly privileges to favored cronies on a certain trade or industry or product in a certain region. When this protectionism and restraint on free trade became too noticeably abusive, Parliament stepped in and passed the Statute of Monopolies of 1623 (notice the name: "monopolies"; they were at least honest back then), which restricted the King's power to issue letters patent, since they were basically trade restrictions, protectionism, privileges, monopolies. But the statute made an exception: monopoly privileges could still be granted for genuine "inventions"—i.e., for technical innovations.

无论如何，“专利证书”开始被君主们广泛使用，在某一地区的某一行业、产业或产品上授予受宠的亲信以垄断特权。当这种保护主义和对自由贸易的限制变得过于明显滥用时，议会介入并通过了 1623 年的《垄断法》（注意这个名称：“垄断”；在当时他们至少是诚实的），限制了国王签发专利证书的权力，因为它们基本上是贸易限制、保护主义、特权、垄断。但该法规有一个例外：对于真正的“发明”——即技术创新，仍然可以授予垄断特权。

六、版权 Copyright

As for copyright—until the printing press, the Church and Crown held a nice monopoly over controlling published thought, by means of scribes and guilds like the Stationer's Company, which held a monopoly over publishing from about 1557 until the Statute of Anne of 1710.

至于版权——在印刷机出现之前，教会和王室通过抄写员和诸如书商公会（Stationer's Company）这样的行会，在控制已出版的思想方面拥有良好的垄断地位。书商公会从大约 1557 年起一直到 1710 年的《安妮法案》颁布之前都对出版业拥有垄断权。

During this time the printing press emerged and disrupted the state and church's control over printed works, leading to the Statute of Anne 1710, which recognized authors' copyrights in their works. But because, as a practical matter, authors still had to appeal to regulated presses to publish their works, the state and church were able to maintain their censorial control over what could be published, and the modern publishing system arose where publishing houses served as gatekeepers and the middlemen between authors and consumers.⁷

在此期间，印刷机的出现，打破了国家和教会对印刷作品的控制，促成了 1710 年《安妮法案》的颁布，该法案承认了作者对其作品的版权。但实际上，由于作者仍求助于受管制的印刷厂才能出版作品，国家和教会得以维持对出版内容的审查控制，于是现代出版体系应运而生，出版社充当了作者和消费者之间的守门人和中间人。⁶⁶¹

七、工业时代的知识产权

IP IN THE INDUSTRIAL AGE

Fast-forward to the dawn of the Industrial Revolution. The United States of America managed to break free from England in 1776 and established its own Constitution in 1789, which drew, of course, upon English legal principles and practices. And so Article 1, Section 8, Clause 8 of the US Constitution authorizes Congress “to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries.” Basically, this is the authorization for modern patent and copyright law. And thus emerged the modern system of patent and copyright that dominate the world today. Modern patent law, anchored in protectionist grants of monopoly privilege; and copyright law, rooted in censorship, gatekeepers, and control of thought and freedom of the press.

快进到工业革命的黎明时期。美利坚合众国于 1776 年成功脱离英国，并于 1789 年制定了自己的宪法，该宪法当然借鉴了英国的法律原则和惯例。因此，《美国宪法》第 1 条第 8 款第 8 项授权国会“在一定期限内确保作者和发明者对其著作和发现享有排他性权利，以促进科学和实用艺术的进步”。基本上，这就是现代专利法和版权法的授权依据。现代专利和版权制度由此产生，并在当今世界占据主导地位。现代专利法以保护主义的垄断特权为根基；而版权法则以审查、把关、控制思想和新闻自由为根基。

And of course world GDP, flat for thousands of years, began to exponentially increase right around this time.⁸ Those who mistake correlation with causation argue that the wealth and might and prosperity of the West are linked to our

⁶⁶¹ See Fogel, “The Surprising History of Copyright and The Promise of a Post-Copyright World.”
参见福格尔，《版权的惊人历史以及后版权世界的前景》。

adoption of European/English-style patent and copyright law, though studies backing up these claims are wanting.⁹

当然，在大约这个时候，数千年来一直维持不变的世界 GDP 开始呈指数级增长。⁶⁶²那些将相关性与因果关系混为一谈的人认为，西方的财富、强大和繁荣与我们采用欧洲/英国式的专利法和版权法有关，尽管缺乏支持这些说法的研究。⁶⁶³

And so the narrative was put in motion. The previous gatekeeper publishing industries seized on the new copyright system and quickly internationalized it apace with the progress of the Industrial Revolution (google “Berne Convention”). And new industries, captured by the monopoly profits possible by using institutionalized patents granted by an inept state bureaucracy, became entrenched and started defending patents.

于是，这种叙事开始展开。以前的把关人出版行业抓住了新的版权制度，并随着工业革命的进展迅速将其国际化（谷歌“伯尔尼公约”）。而新的产业，被一个无能的国家官僚机构授予的制度化专利所带来的垄断利润所俘获，变得根深蒂固并开始捍卫专利。

And then the free market economists emerged in the 1800s and started to become alarmed at the proliferation of widespread, institutionalized grants of IP—which was obviously a restraint on trade, protectionism, censorship, and infringement of free market property rights. They basically emerged from their slumbers and said, “What the hell? You people have got to stop this.” And they correctly referred to these state-initiated practices as “grants of monopoly privilege.”¹⁰ In response, the

⁶⁶² See Figure 2 in Hans-Hermann Hoppe, “From the Malthusian Trap to the Industrial Revolution: An Explanation of Social Evolution,” in *The Great Fiction: Property, Economy, Society, and the Politics of Decline*, 2d expanded ed. (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf).

参见汉斯-赫尔曼·霍普所著《从马尔萨斯陷阱到工业革命：对社会演化的一种解释》中的图 2，收录于《伟大的虚构：财产、经济、社会与衰落的政治》第二版扩充版（阿拉巴马州奥本：米塞斯研究院，2021 年；www.hanshoppe.com/tgf）。

⁶⁶³ See Kinsella, “The Overwhelming Empirical Case Against Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); idem, “Legal Scholars: Thumbs Down on Patent and Copyright,” C4SIF Blog (Oct. 23, 2012).

参见金塞拉，《反对专利和版权的压倒性实证案例》，C4SIF 博客（2012 年 10 月 23 日）；同上，《法律学者：对专利和版权表示反对》，C4SIF 博客（2012 年 10 月 23 日）。

publishers, the gatekeepers, and industries now increasingly reliant on patent and copyright, intentionally, and deceitfully, bent the language of “natural property rights” to serve their purpose. Patent and copyright became “intellectual property rights” instead of monopoly privilege grants.¹¹ Much like health care is thought of as a “right” today.¹² And thus the ideological battle for IP was won by means of cheap semantics. Plus pressure groups (big Pharma, Hollywood, music, software), and some confusion spawned by Locke himself about the labor theory of property.¹³

随后，自由市场经济学家在 19 世纪崛起，并开始对广泛的、制度化的知识产权授予的扩散感到震惊——这显然是对贸易的限制、保护主义、审查制度以及对自由市场财产权的侵犯。他们基本上从沉睡中醒来，说：“搞什么鬼？你们必须阻止这一切”。他们正确地将这些由国家发起的行为称为“授予垄断特权”。⁶⁶⁴作为回应，出版商、守门人以及现在越来越依赖专利和版权的行业，有意并欺骗性地弯曲了“自然财产权”的语言，以达到他们的目的。专利和版权变成了“知识产权”，而不是垄断特权。⁶⁶⁵就像今天人们认为医疗保健是一种“权利”一样。⁶⁶⁶就这样，通过廉价的语义手段，知识产

⁶⁶⁴ See Fritz Machlup & Edith Penrose, “The Patent Controversy in the Nineteenth Century,” J. Econ. History 10, no. 1 (May 1950): 1–29; Machlup, *An Economic Review of the Patent System*, Part II, “Historical Survey”; Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach,” Part II, “Historical Origins of Intellectual Property Rights.”

参见弗里茨·马赫卢普和伊迪丝·彭罗斯，《19 世纪的专利之争》，《经济史杂志》第 10 卷第 1 期（1950 年 5 月）：1–29；马赫卢普，《专利制度的经济评论》，第二部分，“历史概述”；帕尔默，《知识产权：一种非波斯纳的法律与经济学方法》，第二部分，“知识产权的历史起源”。

⁶⁶⁵ See Kinsella, “Intellectual Properganda,” Mises Economic Blog (Dec. 6, 2010); and comments by Machlup and Penrose in “Against Intellectual Property After Twenty Years” (ch. 15), n.78; also Machlup, *An Economic Review of the Patent System*, Part II.D, “The victory of the patent advocates (1873–1910).”

参见金塞拉，《知识宣传》，米塞斯经济博客（2010 年 12 月 6 日）；以及马赫卢普和彭罗斯在《二十年后反对知识产权》（第 15 章）注释 78 中的评论；还有马赫卢普，《专利制度的经济评论》，第二部分 D，“专利倡导者的胜利（1873–1910）”。

⁶⁶⁶ See Charles A. Reich, “The New Property,” Yale L. J. 73, no. 5 (April 1964): 733–87; and David A. Super, “A New New Property,” Colum. L. Rev. 113 (2013); <https://columbialawreview.org/content/a-new-new-property>: 1773–1896, p. 1780, noting that the US Supreme Court has adopted Reich’s understanding of entitlements as a form of property:

权的意识形态之战取得了胜利。再加上压力集团（大型制药公司、好莱坞、音乐、软件业），以及洛克本人关于财产的劳动理论所引发的一些混淆。⁶⁶⁷

Reich’s article reshaped legal debate to a degree that most scholars can only dream about. Its influence reached its apogee in 1970 when, in *Goldberg v. Kelly* [397 U.S.254, 262 n.8 (1970)], Justice Brennan relied on it to recognize welfare benefits as property interests protected by the Due Process Clauses.

Interestingly, Super notes:

The half century since Reich wrote has produced a mixed verdict on the concerns animating *The New Property*. His worst fears have not been realized: The country is not approaching the point at which “most private ownership is supplanted by government largess.” [Reich, *op cit.*, p. 771] Yet the steady erosion of independent property rights has continued. The greatest expansion in property rights has been in the form of intellectual property, which rights come as an act of government largesse.

Super, *op cit.*, pp. 1780 – 81, citations omitted. For the IP point, Super cites Lea Shaver, “The Right to Science and Culture,” *Wis. L. Rev.* 2010, no. 1 (2010; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354788): 121 – 84, pp. 124 & 132 – 33 (contending IP “transform[s] creativity, information, science, and technology from public goods into private ones” and describing expansion of IP protections in 1970s and 1980s).

参见查尔斯·A·赖希《新财产》，《耶鲁法学杂志》第73卷第5期（1964年4月）：733 – 87；以及大卫·A·苏泊尔《一种新的新财产》，《哥伦比亚法律评论》第113期（2013年；<https://columbialawreview.org/content/a-new-new-property>）：1773 – 1896，第1780页，其中提到美国最高法院已采纳赖希对权利的理解，将其作为一种财产形式：

赖希的文章在一定程度上重塑了法律论证，这是大多数学者只能梦想的。其影响力在1970年达到顶峰，当时在“戈德堡诉凯利案”[397 U.S.254, 262 n.8 (1970)]中，布伦南大法官依据此文将福利津贴认定为受正当程序条款保护的财产权益。

有趣的是，苏泊尔指出：

自赖希写作以来的半个世纪，对激发《新财产》的那些关切产生了好坏参半的结论。他最担心的情况并未成为现实：这个国家尚未接近“大多数私人所有权被政府慷慨施舍所取代”的地步。[赖希，上文，第771页]然而，独立财产权的持续侵蚀仍在继续。财产权的最大扩张是以知识产权的形式出现的，而这些权利是政府慷慨行为的结果。

苏泊尔，上文，第1780 – 81页，省略了引用。关于知识产权这一点，苏泊尔引用了莉娅·谢弗的《科学与文化的权利》，《威斯康星法律评论》2010年第1期（2010年；https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354788）：121 – 184，第124页和132 – 133页（主张知识产权“将创造力、信息、科学和技术从公共物品转变为私人物品”，并描述了20世纪70年代和80年代知识产权保护的扩张）。

⁶⁶⁷ See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.C; Kinsella, “KOL037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political

Nowadays virtually everyone assumes that the innovation that accompanied the spectacular prosperity in the modern West was due, at least in part, to patent and copyright law. And that if you are in favor of innovation or artistic creativity, you must be in favor of property rights for “products of the mind,” or “the fruits of one’s labor,” or other metaphors that serve only to distort and deceive and lie and confuse thought.

如今，几乎每个人都认为，伴随着现代西方的巨大繁荣而出现的创新，至少部分归功于专利法和版权法。而且，如果你赞成创新或艺术创造，你必须赞成“思想产品”或“个人劳动成果”的财产权，或其他只会扭曲、欺骗、撒谎和混淆思想的比喻。

八、关于知识产权的历史和现代论证

HISTORICAL AND MODERN ARGUMENTS ABOUT IP

We can say that institutionalized IP rights began at the dawn of the Industrial Revolution, for example in the American and then European patent and copyright systems, which traced back to European institutions and practices such as the Statute of Monopolies of 1623 and the Statute of Anne of 1710. As these modern, institutionalized IP systems began to take hold in the 1800s, this provoked, first, a backlash from free market economists and then a defensive response from the entrenched IP interests. By the 1870s, the IP side had won.¹⁴

我们可以说，制度化的知识产权始于工业革命之初，例如美国和欧洲的专利和版权制度，它们可以追溯到欧洲的制度和惯例，如 1623 年的《垄断法规》和 1710 年的《安妮法规》。随着这些现代的、制度化的知识产权制度在 19 世纪开始占据主导地位，这首先引发了自由市场经济学家的强烈反对，然后是既得知识产权利益方的防御性回应。到 19 世纪 70 年代，知识产权方取得了胜利。⁶⁶⁸

Theory,” Kinsella on Liberty Podcast (March 28, 2013).

参见《反对知识产权二十年后》（第十五章），第四部分 C；金塞拉，“KOL037 | 洛克的重大错误：财产的劳动理论如何毁了政治理论”，《金塞拉谈自由》播客（2013 年 3 月 28 日）。

⁶⁶⁸ See Machlup & Penrose, “The Patent Controversy in the Nineteenth Century”; Machlup, An Economic Review of the Patent System, Part II, “Historical Survey.” 参见马赫卢普和彭罗斯的《19 世纪的专利之争》；马赫卢普的《专利制度的经济评论》

Among proto-libertarians, and especially some anarchists, the chief figures debating IP, in the late 1800s, were Lysander Spooner and Benjamin Tucker. Spooner proposed a radically pro-IP theory, rooted in the Lockean labor theory of property, while Tucker opposed IP, on grounds similar to his arguments against other forms of monopoly.¹⁵

在原初的自由意志主义者当中，尤其是在一些无政府主义者当中，19 世纪后期论证知识产权的主要人物是莱桑德·斯波纳和本杰明·塔克。斯波纳提出了一种极端支持知识产权的理论，该理论植根于洛克的财产劳动理论，而塔克则反对知识产权，理由与他反对其他形式垄断的论点相似。⁶⁶⁹

Amongst libertarians and proto-libertarians, the issue lay mostly dormant until the mid-1980s, when thinkers such as Sam Konkin, Wendy McElroy, and J. Neil Schulman entered the fray again. Konkin and especially McElroy provided the first systematic arguments against IP rooted in modern libertarian property rights principles, while Schulman was one of the first to attempt to provide a principled (as opposed to utilitarian or empirical) argument for a type of IP also rooted in libertarian propertarian principles.¹⁶

在自由意志主义者和原初自由意志主义者当中，这个问题在很大程度上一直处于沉寂状态，直到 20 世纪 80 年代中期，萨姆·康金、温迪·麦克罗伊和 J·尼尔·舒尔曼等思想家再次加入这场论证。康金，尤其是麦克罗伊，以现代自由意志主义财产权原则为基础，首次系统地提出了反对知识产权的论点，而舒尔曼则是最早试图为同样以自由意志主义财产权原则为基础的知识产权类型提供原则性（而非功利性或经验性）论证的人之一。⁶⁷⁰

第二部分 “历史概述”。

⁶⁶⁹ See references in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.4 et pass.

参见《无国家社会中的法律与知识产权》（第 14 章）注释 4 及各处提及的参考文献。

⁶⁷⁰ See my posts “The Four Historical Phases of IP Abolitionism,” Mises Economics Blog (April 13, 2011); “The Origins of Libertarian IP Abolitionism,” Mises Economics Blog (April 1, 2011); and “Classical Liberals and Anarchists on Intellectual Property,” C4SIF Blog (Oct. 6, 2015).

参见我的文章《知识产权废除主义的四个历史阶段》，米塞斯经济博客（2011 年 4 月 13 日）；《自由意志主义知识产权废除主义的起源》，米塞斯经济博客（2011 年 4

With the dawning digital age and the Internet of the mid-late 1990s making copying and “piracy” far easier than ever before, copyright and related IP issues began to attract more attention from libertarians. Libertarians have long recognized that the main issues that confront us are war, taxation, state education, the drug war, and central banking. Many of us now believe that IP lies in the baleful company of these other horrible institutions and, in a sense, is worst of all: because war, taxation, etc., are seen, at least by some libertarians, as necessary evils; but patent and copyright are labeled “intellectual property” and thus fly under the banner of “property rights,” which are supposed to be good things, by libertarian lights. Thus, IP is far more insidious because, while you might want to minimize war and taxation as much as possible even if you think they are necessary evils—they are evils, after all—all good libertarians support robust legal support for strong property rights. And if IP is a legitimate property right, it’s not a necessary evil at all; it’s a good thing. With patent law threatening, impeding, and distorting innovation and technological growth and human prosperity, and with copyright distorting culture, censoring thought and speech and freedom of the press and indeed threatening Internet freedom, it is no wonder that IP has become an issue of interest and overwhelming importance amongst libertarians.¹⁷

随着数字时代的来临和 20 世纪 90 年代中后期互联网的发展,复制和“盗版”变得比以往任何时候都要容易得多,版权和相关知识产权问题开始引起自由意志主义人士的更多关注。自由意志主义者早就认识到,我们面临的主要问题是战争、税收、国家教育、毒品战争和中央银行。我们中的许多人现在认为,知识产权与其他这些可怕的制度同属邪恶之列,而且从某种意义上说,是最糟糕的:因为战争、税收等,至少在一些自由意志主义者看来,是必要之恶;但专利和版权却被贴上了“知识产权”的标签,因而打着“财产权”的旗号,而按照自由意志主义的观点,这应该是好事。因此,知识产权要阴险得多,因为即使你认为战争和税收是必要之恶——它们毕竟是恶——你也许希望尽可能减少它们,但所有优秀的自由意志主义者都支持为强大的财产权提供强有力的法律支持。如果知识产权是一种合法的财产权,它就根本不是必要之恶,而是一种善。专利法威胁、阻碍和扭曲创新、技术增长以及人类的繁荣,版权扭曲文

月 1 日);以及《古典自由主义者和无政府主义者论知识产权》,C4SIF 博客(2015 年 10 月 6 日)。

化、审查思想和言论以及新闻自由，甚至威胁到互联网自由，难怪知识产权已成为自由意志主义者感兴趣且具有压倒性重要性的问题。⁶⁷¹

This is why it is crucial for libertarians to understand modern IP and its relationship to property rights. To think about whether and how anything like patent or copyright can be justified. This issue is crucial. Innovation and creativity are essential for human survival, and so are property rights. And the state and its laws are dangerous. So it's important that we get this right: whether there should be any form of intellectual property rights, or not, and, if so, what and why. Unprincipled, utilitarian, empirical thinking will not help us figure this out. You can't just say that a 120 year copyright term is "too much" but we "need something greater than zero."¹⁸ You need a principled approach. And though I disagree with Neil's conclusions, I respect the fact that he has for over three decades fought to figure out these issues with libertarian property rights principles in mind.

正因如此，自由意志主义者理解现代知识产权及其与财产权的关系至关重要。要思考像专利或版权这样的东西是否正当，以及如何正当。这个问题至关重要。创新和创造是人类生存的根本，财产权也是如此。而国家及其法律是危险的。因此，我们必须正

⁶⁷¹ See, e.g., my posts: "Legal Scholars: Thumbs Down on Patent and Copyright" ; "The Overwhelming Empirical Case Against Patent and Copyright" ; "Death by Copyright-IP Fascist Police State Acronym," C4SIF Blog (Jan. 30, 2012); "SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright," The Libertarian Standard (Jan 24, 2012); "Where does IP Rank Among the Worst State Laws?" , C4SIF Blog (Jan. 20, 2012); "Masnick on the Horrible PROTECT IP Act: The Coming IPolice State," C4SIF Blog (June 2, 2012); "Copyright and the End of Internet Freedom," C4SIF Blog (May 10, 2011); and "Patent vs. Copyright: Which is Worse?" , C4SIF Blog (Nov. 5, 2011).

例如，可参见我的以下这些帖子：《法律学者：反对专利和版权》；《反对专利和版权的压倒性实证案例》；《版权—知识产权法西斯警察国家首字母缩略词带来的死亡》，C4SIF 博客（2012 年 1 月 30 日）；《禁止网络盗版法案（SOPA）是症状，版权是疾病：SOPA 敲响警钟要求废除版权》，《自由意志主义标准》（2012 年 1 月 24 日）；《知识产权在最糟糕的国家法律中排名如何？》，C4SIF 博客（2012 年 1 月 20 日）；“马斯尼克论可怕的《保护知识产权法案》：即将到来的知识产权警察国家”，C4SIF 博客（2012 年 6 月 2 日）；“版权与互联网自由的终结”，C4SIF 博客（2011 年 5 月 10 日）；以及“专利与版权：哪个更糟糕？” ，C4SIF 博客（2011 年 11 月 5 日）。

确对待这个问题：是否应该存在任何形式的知识产权，如果应该存在，那是什么以及为什么。无原则的、功利主义的、经验主义的思维无助于我们弄清这个问题。你不能只是说 120 年的版权期限“太长了”，但我们“需要比零大的期限”。⁶⁷² 尽管我不同意尼尔的结论，但我尊重他三十多年来以自由意志主义的财产权原则为弄清这些问题而努力的事实。

One final note. One argument we IP abolitionists use is that copyright is a form of censorship, and we oppose censorship. We applaud the communication and publication of ideas, arguments. Those of us interested in libertarian ideas about justice and property rights, and innovation and creativity, should applaud Neil for providing to the public, in accessible form, his sincere and interesting thoughts about these matters.

最后一点。我们这些知识产权废除主义者使用的一个论点是，版权是一种审查形式，而我们反对审查。我们赞赏思想和论点的交流与发表。我们这些对关于正义和财产权、创新和创造力的自由意志主义理念感兴趣的人，应该为尼尔以易于理解的形式向公众提供他关于这些问题的真诚而有趣的思考而鼓掌。

Stephan Kinsella Houston, June 2018

斯蒂芬·金塞拉，休斯顿，2018 年 6 月

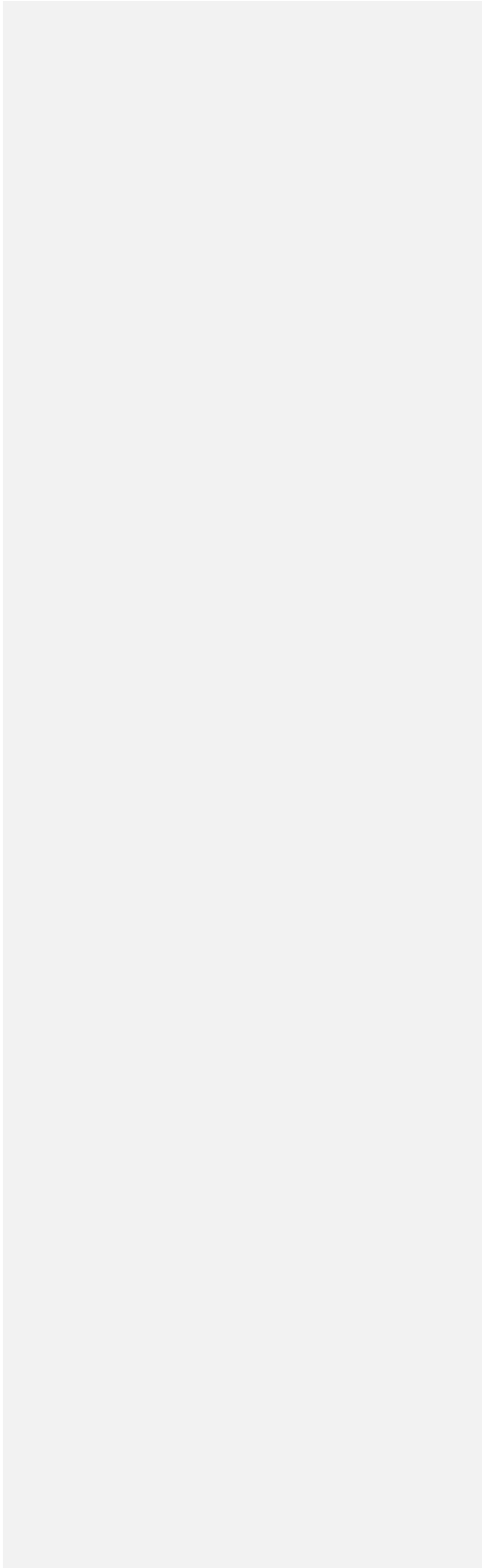
[Note from JNS: I just got off the phone with Stephan, who's approved my making this

⁶⁷² See, e.g., my posts “Tabarrok: Patent Policy on the Back of a Napkin,” C4SIF Blog (Sept. 20, 2012); “Optimal Patent and Copyright Term Length,” Mises Economics Blog (June 16, 2011); “Tom Bell on copyright reform; the Hayekian knowledge problem and copyright terms,” C4SIF Blog (Jan. 6, 2013); “Yaron Brook on the Appropriate Copyright Term,” C4SIF Blog (July 29, 2013); see also Cory Doctorow, “What’s the objectively optimal copyright term?” , Boing Boing (Oct. 6, 2015; <https://perma.cc/UMJ3-4JHH>).

例如，可参见我的以下这些帖子：“塔巴罗克：餐巾纸背面的专利政策”，C4SIF 博客（2012 年 9 月 20 日）；“最优专利和版权期限长度”，米塞斯经济博客（2011 年 6 月 16 日）；“汤姆·贝尔谈版权改革：哈耶克式知识问题与版权期限”，C4SIF 博客（2013 年 1 月 6 日）；“亚龙·布鲁克谈合适的版权期限”，C4SIF 博客（2013 年 7 月 29 日）；也可参见科里·多克托罗的《客观上最优的版权期限是多少？》，Boing Boing（2015 年 10 月 6 日；<https://perma.cc/UMJ3-4JHH>）。

bracketed comment about his Introduction: Stephan is aware that I do not take an historical approach to the question of logorights/MCP/origitent, but a theoretical approach based on natural law and natural rights. —J. Neil Schulman, June 15, 2018]

[JNS 注：我刚与斯蒂芬通完电话，他同意我在括号内对他的导论发表评论：斯蒂芬知道，我不是从历史主义的方法来处理商标权/最小化版权计划/原创财产权的问题，而是从自然法和自然权利的角度来看待这个问题。——J. 尼尔-舒尔曼，2018 年 6 月 15 日]



第十七章 与舒尔曼就商标权和媒介承载财产的对话

Conversation with Schulman about Logorights and Media-Carried Property

This edited transcript of a conversation between libertarian sci-fi author J. Neil Schulman and me was in his book *Origintent: Why Original Content is Property* (2018).^{*} My introduction to *Origintent* is included as chapter 16 in this volume.

这份自由意志主义科幻作家 J·尼尔·舒尔曼和我之间的对话的编辑记录文本，出现在他的书《原创财产权：为何原创内容是财产》（2018）中。^{*} 我为《原创财产权》所写的导论作为本书第 16 章而收录其中。

^{*} J. Neil Schulman, *Origintent: Why Original Content is Property* (Steve Heller Publishing, 2018; <https://perma.cc/2E6G-WWPE>). This chapter of his book was based on Kinsella, "KOL208 | Conversation with Schulman about Logorights and Media-Carried Property," Kinsella on Liberty Podcast (March 4, 2016), which was transcribed by Rosemary Denshaw and edited for clarity for use in Schulman's book. I have further improved the transcript and added some references and comments in footnotes.

^{*} J·尼尔·舒尔曼，《原创财产权：为何原创内容是财产》（史蒂夫·海勒出版社，2018 年；<https://perma.cc/2E6G-WWPE>）。他这本书的这一章基于金塞拉的“KOL208 | 与舒尔曼关于文字权和媒体承载财产的对话”，《金塞拉论自由》播客（2016 年 3 月 4 日），由罗斯玛丽·邓肖（Rosemary Denshaw）转录，并经过编辑使其更加清晰，以用于舒尔曼的书中。我进一步改进了这份记录文本，并在脚注中添加了一些参考文献和评论。

Stephan Kinsella: Hey, this is Stephan Kinsella doing an episode of the Kinsella on Liberty podcast. This should be number 208. I've got my old friend, Neil Schulman, online. We've actually met in person, haven't we Neil?

斯蒂芬·金塞拉：嘿，我是斯蒂芬·金塞拉，正在录制一期《金塞拉谈自由》播客。这应

该是第 208 期。我的老朋友尼尔·舒尔曼在线上。我们实际上已经见过面了，对吧，尼尔？

J. Neil Schulman: Yeah. As I recall, it was at Libertopia a few years ago.¹

J-尼尔·舒尔曼：是的。我记得是几年前在自由乌托邦活动上。⁶⁷³

Kinsella: How are you doing?

Schulman: I'm doing well. How about you?

Kinsella: It's all right. Today is March 4th, 2016. You and I have known each other for maybe, what, 30+ years now?

Schulman: It's been a while. And I must say a lot friendlier now than we used to be.²

金塞拉：你还好吗？

舒尔曼：我很好。你呢？

金塞拉：很好 今天是 2016 年 3 月 4 日。你我相识大概有 30 多年了吧？

舒尔曼：有一段时间了。我必须说，我们现在比以前友好多了。⁶⁷⁴

Kinsella: Well, in the beginning it was friendly. Remember on the GEnie Forums in the

⁶⁷³ See my talks at Libertopia that year (all at the Kinsella on Liberty Podcast): “KOL236| Intellectual Nonsense: Fallacious Arguments for IP (Libertopia 2012)” (Feb. 10, 2018); “KOL237 | Intellectual Nonsense: Fallacious Arguments for IP—Part 2 (Libertopia 2012)” (Feb. 12, 2018); “KOL238 | Libertopia 2012 IP Panel with Charles Johnson and Butler Shaffer” (Feb. 14, 2018). Neil was in the audience for my talk (KOL236) and asked some questions during the Q&A session.

⁶⁷⁴ See Kinsella, “Schulman: ‘If you copy my novel, I’ ll kill you,’ ” C4SIF Blog (June 6, 2012). Or this Facebook post comment by Neil: “Stephan, let me make this as plain as I can. You’ re the foremost enemy of property rights because you masquerade as a defender of them while putting forward the proposition that the unique thing which an author or composer creates is the one thing that cannot be owned because of your misplaced test for non-rivalrousness. ” (March 22, 2011; <https://www.facebook.com/nskinsella/posts/198807836808078>.) See also Kinsella, “Libertarian Sci-Fi Authors and Copyright versus Libertarian IP Abolitionists,” C4SIF Blog (June 14, 2012).

old days before the internet?

Schulman: My God, I didn't remember that we met on GENie. That goes back to the early 90s.

Kinsella: Yeah, that's where I sent you the review of your Heinleiniana book.³

Schulman: Oh yes, yes. And it's one of the many interests we have in common.

Kinsella: Yeah, Heinlein. Of course, you knew him better than I did.⁴

Schulman: Well, I was very lucky to be able to interview him for the The New York Daily News, which led to our meeting and subsequent friendship.

金塞拉：嗯，一开始我们关系是友好的。还记得在互联网出现之前的那些日子里，在 GENie 论坛上的事吗？

舒尔曼：天哪，我不记得我们是在 GENie 上认识的了。那要追溯到 90 年代初了。

金塞拉：是的，我就是在那里把对你的《海因莱因研究》那本书的书评发给你的。⁶⁷⁵

舒尔曼：哦，对，对。这是我们众多共同兴趣之一。

金塞拉：是的，海因莱因。当然，你比我更了解他。⁶⁷⁶

舒尔曼：嗯，我很幸运能够为《纽约每日新闻》采访他，这促成了我们的见面以及后来的友谊。

Kinsella: Right. Right. Well, I think we're friendly when we're not threatening to convert each other to IP socialism. It depends on our definitions.

Schulman: Ha ha. Actually, it's amazing how much we agree on. And there's just one bone of contention which has occupied 90% of our energy.

Kinsella: Yeah and probably it's only because, as I have dug into this IP issue over the

⁶⁷⁵ See Kinsella, "Book Review of Schulman, The Robert Heinlein Interview and Other Heinleiniana (1991)," StephanKinsella.com (Dec. 12, 2013).

⁶⁷⁶ This was tongue in cheek. I didn't know Heinlein at all.

years, I get more and more into meticulous details because I keep seeing what I think are the errors that cause some mistakes to keep being perpetrated. So I get more and more into minutiae, but anyway. Do you remember a few years ago, I think I dug up the old information and got the tapes from someone, from that IP debate you had done with Wendy McElroy back in like '83 I think, right?

金塞拉：对。对。嗯，我觉得只要我们不威胁着要把对方转化为知识产权“社会主义者”，我们的关系就是友好的。这取决于我们的定义。

舒尔曼：哈哈。实际上，令人惊讶的是我们在很多方面都意见一致。只是有一个论证点，它占据了我们的 90% 的精力。

金塞拉：是的，可能只是因为，随着这些年我深入研究知识产权问题，我越来越关注细致的细节，因为我不断看到我认为的那些错误，而这些错误导致一些错误不断被延续。所以我越来越关注细枝末节，但不管怎样。你还记得几年前吗，我想我挖出了旧信息，从某人那里拿到了录音带，就是你和温迪·麦克罗伊在大概 1983 年进行的那场知识产权论证的录音带，对吧？

Schulman: Yes. And that was my first entry into this controversy.

Kinsella: And I think Wendy's was '81 with some newsletters in California and then '83. So I really think the modern debate on this started around then, to be honest.⁵

Schulman: Well, actually for me, it went back even further in time, because I was part of the close circle of Samuel Edward Konkin, III and his magazines: New Libertarian Notes, New Libertarian Weekly, New Libertarian and various other publications. And of course I was also good friends with Robert LeFevre. Both Sam and Bob LeFevre were opposed to the idea of state copyright and state patents.⁶ And where I was coming in was a very early attempt to justify not statist concepts—being an anarchist, an agorist, I'm opposed to that—but to see if there was a natural law and natural right basis for a concept of ownership of content which existed only as what today I now call media-carried property,⁷ but back then I called logorights.

The idea being that something didn't have to be made out of atoms and molecules in order to satisfy the requirements for a copyright claim. Now Sam allowed copyrights for individual writers in his publications. So he was not so opposed to it that he said, no, it has to be without copyright. And at that time, I don't even think there

were Creative Commons licenses to enter the discussion.

舒尔曼：是的。那是我首次参与这场论证。

金塞拉：我认为温迪的论证始于 1981 年，是在加利福尼亚的一些时事通讯上，然后是 1983 年。所以说实话，我真的认为关于这个问题的现代论证大约就是从那个时候开始的。⁶⁷⁷

舒尔曼：嗯，实际上对我来说，这个问题的起源甚至可以追溯到更早的时候，因为我是塞缪尔·爱德华·康金三世及其杂志的亲密圈子的一员，包括《新自由意志主义笔记》《新自由意志主义周刊》《新自由意志主义》以及各种其他出版物。当然，我和罗伯特·勒菲弗也是好朋友。山姆和鲍勃·勒菲弗都反对国家版权和国家专利的概念。⁶⁷⁸而我当时所做的是一个非常早期的尝试，试图为不是国家主义的概念——作为一个无政府主义者、一个市场无政府主义者，我反对国家主义——寻找一种自然法和自然权利的基础，以支持一种仅作为如今我所称的媒体承载财产而存在的内容所有权概念，⁶⁷⁹在那时我称之为商标权。

这个想法是，某样东西不一定要由原子和分子构成才能满足版权主张的要求。现在，山姆允许在他的出版物中为个人作者提供版权。所以他并不是那么反对版权以至于说不，必须没有版权。而且在那个时候，我甚至认为还没有知识共享许可证进入讨论范围。

Kinsella: Well ...8

⁶⁷⁷ See Wendy McElroy, “Contra Copyright,” *The Voluntarist* (June 1985), included in idem, “Contra Copyright, Again,” *Libertarian Papers* vol. 3, art. no. 12 (2011; <http://libertarianpapers.org/12-contra-copyright/>); Kinsella, “The Origins of Libertarian IP Abolitionism,” *Mises Economics Blog* (April 1, 2011) and idem, “The Four Historical Phases of IP Abolitionism,” *C4SIF Blog* (April 13, 2011).

⁶⁷⁸ See Samuel Edward Konkin, III, “Copywrongs,” *The Voluntarist* (July 1986), reprinted at *LewRockwell.com* (Nov. 15, 2010; <https://archive.lewrockwell.com/orig11/konkin1.1.1.html>); Kinsella, “LeFevre on Intellectual Property and the ‘Ownership of Intangibles,’ ” *C4SIF Blog* (Dec. 27, 2012).

⁶⁷⁹ See “MCP,” in *Originitent*.

Schulman: And Bob LeFevre, while he was opposed to copyright, he actually endorsed my concepts of logorights as worth considering, beginning right after my debate with Wendy McElroy.⁹ I would say that if I were to boil it down to my position today, is that I am not so much discussing the question of intellectual property, or ideas as property, two concepts which I reject out of hand, but that I am exploring that property itself is an intellectual artifact. And as I posted on your Facebook wall today, I think that it comes closest to being an intellectual artifact of contract law.¹⁰ Whether or not, as you posted, contract law is a subset of property law or whether property law is a subset of contract law is a debate I don't think is really worth spending a lot of time on. But I do think that property itself is an intellectual concept which falls under both a discussion of legal rights and a discussion of natural law and natural rights as libertarians would understand it.

金塞拉：嗯.....⁶⁸⁰

舒尔曼：而鲍勃·勒菲弗虽然反对版权，但实际上在我与温迪·麦克罗伊论证后不久，他就赞同我的商标权概念，认为值得考虑。⁶⁸¹我想说的是，如果要把我今天的立场归结为，我并不是在讨论知识产权的问题，也不是在讨论思想作为财产的问题，这两个概念我一概拒绝，而是在探讨财产本身就是一种知识性的人工制品。正如我今天在你的 Facebook 留言板上所写的那样，我认为它最接近于法的知识人工制品。⁶⁸²正如你所发布的那样，究竟法是财产法的一个子集，还是财产法是法的一个子集，我认为这并不值得花很多时间去论证。但我确实认为，财产本身是一个知识概念，它既属于法律权利的讨论范畴，也属于自由意志主义所理解的自然法和自然权利的讨论范畴。

⁶⁸⁰ Well before the advent of creative commons (<https://creativecommons.org>), the generally anti-IP libertarian Leonard Read would publish FEE works with the notice “Permission to reprint granted without special request.” See Kinsella, “Leonard Read on Copyright and the Role of Ideas,” C4SIF Blog (Sept. 12, 2011).

⁶⁸¹ See Schulman, “My Unfinished 30-Year-Old Debate with Wendy McElroy,” in Origintent.

⁶⁸² See this Facebook post: <https://www.facebook.com/nskinsella/posts/10153462577483181> (March 4, 2016).

Kinsella: Well before we get into your theories, let's talk a little bit more about the background because I think we have another thing in common. Maybe you would agree or not on this, but my suspicion is you had—I know you had sort of a Randian approach to some issues in your libertarianism, and you also were, and are, a writer and a successful career writer, right, a novelist. So you had an interest in trying to find a way to justify something that you had like a financial interest in, right? And I did, too, in a way, because I was a patent attorney, and I still am. That's one reason I started searching as well. And the reason I was searching was because Ayn Rand influenced me early on. And one of the arguments she made that never did persuade me was her argument for IP. Something about it was just not like her other arguments. It was sort of arbitrary and utilitarian. It just didn't make sense like her other arguments did. But I was going to do patent law and copyright law for my career, and I'm a libertarian. So I started thinking, let me find a better solution for this. So I was searching as well. It's just you came up with logorights and I came up with skepticism.

金塞拉：在我们深入探讨你的理论之前，让我们再多谈谈背景，因为我觉得我们还有另一个共同点。也许你会同意或不同意这一点，但我的猜测是，你在自由意志主义的一些问题上曾有一种类似兰德的方法，而且你过去是，现在也是一名作家，一位成功的职业作家，对吧，一位小说家。所以你有兴趣找到一种方法来为你在经济利益攸关的事情做辩护，对吗？在某种程度上，我的情况类似，因为我曾是一名专利律师，现在仍然是。这也是我开始探索的一个原因。我探索的原因是安·兰德早期对我有影响。

而她提出的一个从未真正说服我的论点就是她对知识产权的论点。其中有些地方不像她的其他论点。它有点武断和功利。它不像她的其他论点那样有道理。但我打算以专利法和版权法作为我的职业，而我又是一个自由意志主义者。所以我开始思考，让我找到一个更好的解决方案。所以我也在寻找。只是你想到了商标权，而我想到了怀疑主义。

Schulman: It's ironic that you, as a patent lawyer, are probably one of the leading scholars today opposed to the very field you are operating in, which is patent law. But, in my case, I think you have the cause and effect reversed. My being a writer was not the reason why I felt it worth pursuing. It was my interest primarily as a libertarian natural law/natural rights believer which led me to this. And, in fact, I would say that I was probably more influenced by Robert LeFevre's approach to property rights per se than

I was to Ayn Rand's.

Kinsella: Okay, I accept that. But you would admit there is, there tends to be some correlation. I tend to find ...

Schulman: Well, let me let you off the hook by saying that in my original article, "Informational Property: Logorights,"¹¹ I did quote from Ayn Rand because I found that parts of her argument were expressive, but in terms of the basic theory of property which I was pursuing, I thought that Robert LeFevre made a more comprehensive case.

舒尔曼：具有讽刺意味的是，作为一名专利律师，你可能是当今反对你所从事的专利法领域的主要学者之一。不过，就我而言，我认为你把因果关系弄反了。我是一名作家，但这并不是我认为值得研究的原因。我的兴趣主要是作为一个自由意志主义自然法/自然权利的信仰者，这导致了我对此的兴趣。而且，事实上，我想说的是，我受到

罗伯特·勒菲弗（Robert LeFevre）对财产权本身的态度可能比受到安·兰德（Ayn Rand）的影响更大。

金塞拉：好吧，我接受这个说法。但你得承认，这之间存在着某种关联。我倾向于认为.....

舒尔曼：好吧，让我告诉你，在我最初的文章《信息财产：商标权》⁶⁸³ 一文中，我确实引用了安·兰德的观点，因为我发现她的部分论点很有表现力，但就我所追求的

财产基本理论而言，我认为罗伯特·勒菲弗的论证更为全面。

Kinsella: No, but what I was going to say it seems to be no coincidence that there's a disproportionate number of libertarian novelists who happen to support copyright, just like almost all patent lawyers happen to support patent and copyright. Do you follow me? I don't think it's quite a coincidence.

Schulman: But you see, it seems to me that that's starting off with, if I may use a term that Ludwig von Mises liked a lot, paralogia. In other words, it transfers the argument

⁶⁸³ Schulman, "Informational Property: Logorights" (1983, 1989; <https://perma.cc/ECB9-KZQ9>) (also in Oritent), responding to Konkin, "Copywrongs."

from a debate of the merits to a debate on the motivation of the people who are arguing it.¹²

金赛拉：不，但我想说的是，有相当多的自由意志主义小说家恰好支持版权，这似乎并非巧合，就像几乎所有的专利律师都恰好支持专利和版权一样。你明白我的意思吗？我不认为这完全是巧合。

舒尔曼：但在在我看来，这似乎一开始就犯了一个错误，如果我可以用路德维希·冯·米塞斯非常喜欢的一个词来说，那就是“诡辩”。换句话说，这是把论证从对是非曲直的论证转移到了对论证者动机的论证上。⁶⁸⁴

Kinsella: Yeah, I don't mean to argue substance by psychologizing, but I do find psychologizing fun sometimes. I can't deny it. And I do think that at least, at the very least, we should be aware of our biases and try to be sure that if you're advocating something that happens to be in your favor, that you have good reasons for it anyway. But, of course, the arguments stand on their own merits, I think.

But, by the converse, I get attacked quite often for being an IP lawyer and for opposing it,¹³ as if, if my arguments, if they were correct, it's as if you wouldn't expect an IP lawyer to be one of the people that would recognize that. I mean it's possible to actually know something about the field that is unjustified and corrupt and to come to those conclusions, even though it's not in your personal, immediate interest.

金赛拉：是的，我并不想通过心理分析来论证实质问题，但我有时确实觉得心理分析很有趣。我不能否认这一点。我确实认为，至少，我们应该意识到自己的偏见，并努力确保，如果你主张的东西碰巧对你有利，无论如何，你都有充分的理由。当然，我认为这些论点都有自己的道理。

⁶⁸⁴ I am unfamiliar with Mises talking about “paralogia,” which appears to have something to do with schizophrenia. I suspect this might have been a mistake by Neil; he may have been thinking of polylogism, even though it is not quite related to the error of psychologizing, but rather to a different, Marxian error. See Jeffrey A. Tucker, “Marxism Without Polylogism,” in Jörg Guido H. Ülsmann & Stephan Kinsella, eds., *Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe* (Auburn, Ala.: Mises Institute, 2009).

但是，反过来说，我经常因为身为知识产权律师而反对它而受到攻击，⁶⁸⁵就好像如果我的论点是正确的，你就不会指望知识产权律师是会承认这一点的人。我的意思是说，你有可能真正了解这个领域的一些不合理的腐败现象，并得出这些结论，尽管这并不符合你个人的切身利益。

Schulman: Well, look, just switching to somewhere else just as a for instance, because what I'm noting is not what I call hypocrisy but merely irony, okay? Wouldn't you find it at least ironic if you had a medical doctor, an obstetrician, say, who said that he was opposed to abortion who then, as part of his practice, performed abortions.

Kinsella: Yes. In fact, I think that might be hypocritical. It could be. But, first of all, I don't think there is anything wrong with pointing out irony any more than psychologizing, it's kind of interesting—and it may be ironic. I don't think it happens to be ironic. Let's suppose that there is a healthy difference of agreement among the population as a whole or among academics or scholars about IP; 30/70, whatever. I don't know. I mean it would be ironic if some percentage of patent lawyers didn't take that side, if everyone automatically agreed with it. As for the hypocrisy or the irony issue, it would be more ironic if I were out there suing people in the name of IP. So I agree that would be more difficult. But if you understand the way ...

舒尔曼：嗯，看，只是举个别的例子，因为我注意到的不是我所说的虚伪，而仅仅是具有讽刺意味，好吗？如果你有一个医生，比如说一个产科医生，他说他反对堕胎，但在他的行医过程中却进行堕胎手术，你难道不觉得这至少很讽刺吗？

金塞拉：是的。事实上，我认为那可能是虚伪的。有可能。但是，首先，我不认为指出具有讽刺意味的地方有什么错，就像进行心理分析一样，这很有趣——而且这可能是具有讽刺意味的。我不认为这恰好是具有讽刺意味的。假设在整个人口中或者在学者中对于知识产权存在健康的分歧，比如 30%对 70%，不管怎样。我不知道。我的意思是，如果有一定比例的专利律师不站在那一边，而每个人都自动同意知识产权，那

⁶⁸⁵ See, e.g., my posts: “Are anti-IP patent attorneys hypocrites?” C4SIF Blog (April 22, 2011); “Patent Lawyers Who Don't Toe the Line Should Be Punished!” C4SIF Blog (April 12, 2012); “Is It So Crazy For A Patent Attorney To Think Patents Harm Innovation?” StephanKinsella.com (Oct. 1, 2009); “An Anti-Patent Patent Attorney? Oh my Gawd!” StephanKinsella.com (July 12, 2009).

才是具有讽刺意味的。至于虚伪或具有讽刺意味的问题，如果我以知识产权的名义起诉别人，那会更具讽刺意味。所以我同意那会更难。但是如果你理解这种方式……

Schulman: Then let me establish this. I have never filed a lawsuit on behalf of any of my literary rights.

Kinsella: Right. No, I understand that ... most copyright holders don't have those scruples. You have your anarchist and your voluntaryist

scruples. So that tamps down the excesses that you might otherwise go to. So I understand that.

Schulman: Okay and now let me also make clear that in practice, when I have opposed pirating of my rights, I've only done so vocally in instances where I felt that it was damaging to a third party.

舒尔曼：那么让我明确一点。我从未为我的任何文学权利提起过诉讼。

金塞拉：对。不，我理解……大多数版权所有者的顾虑。你有你的无政府主义者和自愿主义者的顾虑。所以这抑制了你可能会采取的过度行为。所以我理解这一点。

舒尔曼：好的，现在让我也明确一下，实际上，当我反对侵犯我的权利的盗版行为时，只有在我觉得这对第三方造成损害的情况下，我才会公开表示反对。

Kinsella: Right. Like more of a fraud type argument or something like that?

Schulman: Well, not even fraud. But let me give you an example. There was supposedly, I'm not sure, and I'm being told now that this never happened, but there was a representation that there was going to be a pirate screening of the *Alongside Night* movie at PorcFest to compete with the official screening that I went to a lot of trouble to sell at a movie theater ...

金塞拉：对。就像是一种欺诈类型的理由之类的吗？

舒尔曼：嗯，甚至不是欺诈。我给你举个例子。据说，我不太确定，现在有人告诉我这从未发生过，但有一种说法是，在“猪节”（PorcFest）上将会有一场电影《夜幕降临》的盗版放映，与我费尽周折在电影院出售的官方放映相竞争……

Kinsella: Right. I heard about that.

Schulman: ... nearby Roger's Campground. Okay? And I was upset about it because the whole purpose of the screening was set up as a fundraiser for the Free State Project. And so, I felt that a pirate screening competing with a fundraiser for the Free State Project was damaging to the Free State Project, and that upset me.

金塞拉：对。我听说过那件事。

舒尔曼：.....在罗杰露营地附近。好吗？我对此很不高兴，因为放映的整个目的，是为自由邦计划筹款。所以我觉得海盗电影的放映和自由邦计划的筹款活动相冲突会对自由邦计划造成损害，这让我很不爽。

Kinsella: I understand that. Of course, that has nothing to do with the validity of copyright or even logorights, but I understand.

Schulman: Right. And, again, all of this is sort of like, as I say, paralogia. It's an interesting background discussion, but really it doesn't speak to the actual question of whether under a general theory of property rights which I maintain is a moral and a legal construct—it's a subset of a theory of natural law leading to natural human rights—that I consider property rights to be primarily an ontological and moral issue. And then you get to it as a legal issue.

金塞拉：我理解。当然，这与版权甚至商标权的有效性无关，但我理解。

舒尔曼：对。而且，再次强调，所有这些就像我所说的那样，是一种似是而非的说法。这是一个有趣的背景讨论，但实际上它并没有涉及到在我所主张的一般财产权理论下——我认为财产权是一种道德和法律构建（它是通向自然人权的自然法理论的一个子集）——是否成立的实际问题。我认为财产权主要是一个本体论和道德问题。然后才将其作为一个法律问题来考虑。

But let me start by conceding to you that, as I observe it right now, the mainstream position of the libertarian movement, as I perceive it, is anti what they perceive as artistic rights in things which are not physical objects.¹⁴

金塞拉：我理解。当然，这与版权甚至文字权的有效性毫无关系，但我理解。

舒尔曼：对。而且，再次强调，所有这些就像我说的那样，有点诡辩的味道。这是一个有趣的背景讨论，但实际上它并没有涉及到在我所坚持的一般财产权理论下——我认为财产权是一种道德和法律构建（它是通向自然人权的自然法理论的一个子集）

—— 是否存在的实际问题。我认为财产权主要是一个本体论和道德问题，然后才成为一个法律问题。

但我首先要承认，就我目前的观察来看，自由意志主义运动的主流立场是反对他们所认为的非实物的艺术权利。⁶⁸⁶

Kinsella: Okay.

Schulman: So, in essence, I'm fighting an uphill battle, a battle in which you have the high ground, the strategic high ground.

Kinsella: Well, I understand that, but I think there's also, especially among anarchists, right, we are generally skeptical of existing statutory schemes. And so someone like you who supports some kind of, I don't want to call it intellectual property. You call it informational property or now material-carried property and we can get into the details in a second.

Schulman: Media-carried property.

金塞拉：好的。

舒尔曼：所以，从本质上说，我在进行一场艰苦的战斗，在这场战斗中你占据优势，占据战略高地。

金塞拉：嗯，我理解这一点，但我认为，尤其是在无政府主义者当中，对吧，我们通常对现有的法定方案持怀疑态度。所以像你这样支持某种 —— 我不想称之为知识产权。你称之为信息财产，或者现在是媒介承载财产，我们可以马上深入探讨细节。

舒尔曼：媒介承载财产。

Kinsella: Sorry, media-carried property. You shouldn't be in the position of having to

⁶⁸⁶ On this, see Kinsella, “The Death Throes of Pro-IP Libertarianism,” Mises Daily (July 28, 2010); idem, “The Origins of Libertarian IP Abolitionism” ; idem, “The Four Historical Phases of IP Abolitionism” ; and other references and discussion in “Law and Intellectual Property in a Stateless Society” (ch. 14), at n.5 and “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.21.

defend the existing patent and copyright system.

Schulman: No, and I find it frustrating that most of the vitriolic attacks on me assume that I am supporting what is being portrayed as a monopolistic grant of privilege from the State. In my very first debate with Wendy, I started off by saying if the concept I was putting forward could not be defended other than as a monopolistic grant of privilege from the State, then I would immediately abandon it.

金赛拉：抱歉，媒介承载的财产。你不应该为现有的专利和版权制度辩护。

舒尔曼：不，我感到沮丧的是，大多数对我的恶意攻击都假定我支持被描绘成垄断性的国家特权。在我与温迪的第一次论证中，我一开始就说，如果我提出的概念除了被视为国家赋予的垄断性特权之外无法得到辩护，那么我会立即放弃。

Kinsella: Well, but the problem is, I would say, and see if you agree with this, the vast majority of pro-IP libertarians would oppose the abolition of patent and copyright, at least until we could replace it with their ideal system. So they do not have this abolitionist view towards ...

Schulman: And this is where I go into my usual spiel about how I don't think that any kind of property, if there is in fact a property, that there should be—there's a statist phrase, but it's a legal term of art, mostly [where the nation state is].¹⁵

If you're going to say that a copyright is statist, then why isn't a deed from the county clerk just as statist? And if you're going to say that we need to abolish now one, why not the other?

金赛拉：嗯，但问题是，我想说，看看你是否同意这一点，绝大多数支持知识产权的自由意志主义者会反对废除专利和版权，至少在我们能用他们的理想制度取而代之之前。所以他们对……没有这种废除主义的观点。

舒尔曼：这就是我通常要阐述的地方，关于我如何并不认为任何一种财产，如果实际上存在一种财产，那么应该有——有一个国家主义的说法，但它主要是一个法律术语（在民族国家的范畴内）。⁶⁸⁷

⁶⁸⁷ Neil's words are not quite clear here in the recording.

如果你要说版权是国家主义的，那么为什么县委书记处的就不是国家主义的呢？如果说我们现在需要废除一个，为什么不废除另一个呢？

Kinsella: But you see, then I see that you're trying to have that both ways because you act, on the one hand, like you're not in favor of defending the existing patent and copyright system, but when someone calls for abolishing it, then you sort of say, well, if we abolish that, why not abolish real property titles?

Schulman: But that's the thing. In other words, presumably you drive a car which is registered with the Department of Motor Vehicles and which you're not allowed to operate without that license from the State. And presumably the land deed issued by your county is in the same situation, if you are in fact a homeowner. Or, if not, at one remove as a renter from somebody who does have property which has a deed issued by the county. And so I just don't see the difference.

金塞拉：你一方面表现得不赞成维护现有的专利和版权制度，但当有人要求废除专利和版权制度时，你又会说，既然废除了专利和版权制度，为什么不废除不动产财产权制度呢？

舒尔曼：但问题就在这里。换句话说，你驾驶的汽车应该是在机动车辆管理局登记过的，没有国家颁发的执照，你是不能驾驶这辆车的。如果你确实是房主，那么你所在县签发的地契大概也是同样的情况。或者，如果你不是房东，作为租客，你租的房子所有者有县里颁发的，这也只是隔了一层。所以我看不出有什么区别。

Kinsella: Okay. Well, so the problem I have with that argument, that analogy, is you and I as libertarians don't have much disagreement on the basic notion that there ought to be property titles recognized in scarce resources like land. We oppose the state from monopolizing ...

Schulman: Well, scarcity is only one of the things. Kinsella: Okay.

Schulman: And I don't see scarcity as absolute, as I discuss in my article, "Human Property."¹⁶ Scarcity is not absolute. I'll refer people to that article rather than repeat myself.

金塞拉：好的。那么，我对这个论点、这个类比的问题在于，你和我作为自由意志主义者在基本观念上并没有太大分歧，即对于像土地这样的稀缺资源应当有被认可的财

产所有权。我们反对国家垄断……

舒尔曼：嗯，稀缺只是其中一个方面。

金塞拉：好的。

舒尔曼：而且我不认为稀缺是绝对的，就像我在我的文章《人类财产》⁶⁸⁸中所讨论的那样。稀缺不是绝对的。我会让人们去看那篇文章而不是在这里重复我自己的观点。

Kinsella: I'm just trying to pick something uncontroversial. We both agree there should be property rights in land, right?

Schulman: Yes. I'm not a Henry Georgist.

Kinsella: And the basic function of the existing property title records offices in the counties around the country is to just keep track of that. Now we oppose the State monopolizing that function, but it's basically a correct function, a libertarian function. You can't just leap from that and say that similarly the copyright system does something—crudely, perhaps—but it does a similar function because—well, for several reasons. We don't agree that these kinds of things should be property. That's what we dispute. And, you know, the property title system itself is not terrible, the way the State runs it. It's just that the State has the right to come in and seize your property because of eminent domain.

金塞拉：我只是想挑一个没有争议的点来说。我们都同意土地应该有财产权，对吧？

舒尔曼：是的。我不是亨利·乔治主义者。

金塞拉：全国各个县现有的财产权登记办公室的基本功能就是记录这些。现在我们反对国家垄断这个功能，但它基本上是一个正确的功能，一个符合自由意志主义的功能。你不能就这样直接说版权制度也做了类似的事情——也许很粗略——但它确实有类似的功能，因为有几个原因。我们不同意这些东西应该成为财产。这就是我们论证的地方。而且，你知道，财产权制度本身并不糟糕，虽然国家在运行它的方式上可

⁶⁸⁸ Schulman, “Human Property,” Agorist.com (2012; <https://perma.cc/E9W5-T7UA>); also in Origintent.

能有问题。只是国家有权通过征用权来没收你的财产。

Schulman: Okay. Well, you see here we can get into another agreement immediately. I think that the way that the laws have been lobbied for by large corporations to extend and protect their claims of copyright and patent are egregiously anti-property rights. For example—I will give you one example in patents and another in copyright. What Monsanto did in suing farmers whose crops were invaded by Monsanto's seeds from adjoining property ...

Kinsella: Patented seeds, right.¹⁷

舒尔曼：好的。在这里我们可以马上达成另一个共识。我认为，大公司通过游说制定的法律来扩大和保护他们的版权和专利主张的方式，是极其反财产权的。例如——我在专利和版权方面各给你举一个例子。孟山都公司起诉农作物受到孟山都公司种子入侵的相邻土地的农民……

金塞拉：专利种子，对吧。⁶⁸⁹

Schulman: ... and then sued the small farmers who had no ability to legally defend themselves against this mega-giant corporation, I think is one of the most horrific misuses of patent law that I can imagine.

Similarly, the way that corporations such as Disney have taken things that are traditional fairytales and copyrighted them and then aggressively attacked people who wanted to use this stuff which originated long before Disney got to it and sued the heck out of them to restrict their doing so is equally egregious. Getting images and taking paintings which hang in the Louvre and then pursue claims against people who reproduce them, things that go back hundreds of years, is similarly egregious. So if you are looking for Schulman to agree with Kinsella, that the way that the State handles this is egregious, we have no disagreement.

⁶⁸⁹ See my posts “Monsanto wins lawsuit against Indiana soybean farmer,” C4SIF Blog (Sep. 24, 2011) and “Farmers and Seed Distributors Defend Right to Protect Themselves From Monsanto Patents,” C4SIF Blog (Aug. 24, 2011).

舒尔曼：.....然后起诉那些没有能力合法抵御这家巨型公司的小农户，我认为这是我能想象到的专利法最可怕的滥用之一。

同样，迪斯尼等公司将传统童话故事的内容纳入版权保护，然后对那些想使用这些早在迪斯尼之前就已出现的内容的人大肆侵犯，并起诉他们以限制他们这样做，这种做法同样令人发指。获取挂在卢浮宫里的画作图像，然后对复制这些已有数百年历史的画作的人提出索赔，同样令人震惊。因此，如果你想让舒尔曼同意金塞拉的观点，即国家处理此事的方式令人震惊，我们并无异议。

Kinsella: Well, let me disagree a little bit about on that. I wouldn't, I mean this is a quibble, but I wouldn't call it a misuse at all. And I wouldn't blame Monsanto and Getty. I mean maybe they're immoral, but they're using the legal rights the system gives them. In every one, all three of the cases you mentioned, you can explain why what they're doing is basically supported by the copyright and patent systems. What they're doing is totally legitimate.¹⁸

金塞拉：好吧，在这一点上让我有点不同意见。我的意思是，这只是一个小分歧，但我根本不会称之为滥用。而且我不会责怪孟山都公司和盖蒂图片社。我也不会责怪孟山都和盖蒂。我的意思是，也许他们不道德，但他们使用的是现行体制赋予他们的合法权利。在你提到的所有三个案例中，你都可以解释为什么他们的所作所为基本上得到了版权和专利制度的支持。他们的所作所为完全合法。⁶⁹⁰

Schulman: And I'm not going to disagree with you, but that is the problem with all statist law. None of it supports a pure libertarian concept of property.

Kinsella: Right.

Schulman: And, in fact, one of the historical reasons why libertarians have opposed such law is that they started out with grants from kings and other royalties. So there is an historical parallel that the development of this body of law was corrupt going back to its root.¹⁹ But, to me, that is an artifact of statism itself. In other words, I would say that, in fact, the Robin Hood story of how you have the king's land being poached on,

⁶⁹⁰ “The Thing! the Thing itself is the Abuse!” Edmund Burke, “A Letter To Lord****,” in A Vindication of Natural Society (Liberty Fund, 1756; <https://oll.libertyfund.org/title/burke-a-vindication-of-natural-society>) (emphasis added).

okay, is just as much of an argument not to have privately held land as the argument for grants of privilege from kings being one of the earliest uses of artistic creation. It's equivalent. In other words, the problem here is not that we don't have something which deserves to be treated as a property right. The problem is we have the State.

舒尔曼：我不会不同意你的观点，但这就是所有国家主义法律的问题所在。没有一个国家法律支持纯粹的自由意志主义财产概念。

金塞拉：对。

舒尔曼：事实上，自由意志主义者反对这类法律的一个历史原因是，它们最初是由国王和其他王室成员授予的。所以从历史上看，这一法律体系的发展从根源上就是腐败的。⁶⁹¹在我看来，这是国家主义本身的产物。换句话说，实际上，我想说，就像罗宾汉的故事中，国王的土地被侵占，这同样可以作为反对私有土地的一个论据，就像国王授予特权是艺术创作最早的用途之一，这两者是等同的。换句话说，问题并不在于我们没有值得被视为财产权的东西。问题在于我们有国家。

Kinsella: I don't think that the argument that IP is unjust is the same as arguing that current property rights and land are unjust because of some corruption back in the old days, because we all agree there ought to be property rights in land and we have to have some system for determining who the best owner is. So that's not really controversial.

Schulman: Hold on. You can't say that we all agree. Kinsella: All us libertarians, yeah.

Schulman: There are, in fact, communists who don't agree.

金塞拉 我认为，认为知识产权不正义的论点与认为目前的财产权和土地不正义的论点是不同的，因为我们都同意土地应该有财产权，我们必须有某种制度来确定谁是最好的所有者。所以这并没有什么争议。

⁶⁹¹ I disagree with criticisms of the legitimacy of current property titles because of injustice or taint in the title back in history. See “What Libertarianism Is” (ch. 2), at n.36; and “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), at n.12.

舒尔曼：等等。你不能说我们都同意。

金塞拉： 我们所有的自由意志主义，是的。

舒尔曼：事实上，也有不同意的共产主义者。

Kinsella: Well, you and I agree, okay? You and I agree on the land issues. That's one difference. The other thing is, if someone asks a libertarian, well, what would roads be like and would land title registry be like in a free market, we would say, well, it would be similar to what we have now. You'd have roads. It's just they'd have private owners and that would have different economic effects in how they're run and all that. We would have land title records.

Schulman: If you go to Cato and Reason, you're going to find scholars who found out that some of the earliest highways and turnpikes were, in fact, privately created. Then you get to the long history of the railroads where you have all sorts of statist interference.

金塞拉：嗯，你和我意见一致，对吧？你和我在土地问题上意见一致。这是一个区别。另一点是，如果有人问自由意志主义，在自由市场中，道路会是什么样的，土地所有权登记会是什么样的，我们会说，嗯，会和我们现在的情况差不多。你们会有道路。只是它们会有私人所有者，这将对它们的经营方式产生不同的经济影响。我们会有土地所有权记录。

舒尔曼：如果你去卡托研究所和理性杂志，你会发现有学者发现一些最早的公路和收费公路实际上是私人建造的。然后看看铁路的悠久历史，在那里你会看到各种各样的国家干预。

Kinsella: But my point is you could use some of the existing common law-based and other systems that we have as a rough model as to what the libertarian system would look like, but it would be better. But you cannot say that [re IP]. So in terms of IP, I could give 50 or 100 or 1,000 examples and you might call them misuses of the system. I would just say this is just the implications of the current substantive law of patent and copyright that the State has created and you would probably agree with me on every one of those.

Schulman: I will immediately concede your historical point. What I represented in 1983, beginning with my debate with Wendy, is that I was putting forward a new natural rights

theory that did not have an historical base.

金塞拉：但我的观点是，你可以把我们现有的一些以普通法为基础的制度和与其他制度作为自由意志主义制度的粗略模型，但后者会更好。但 [关于知识产权]方面你不能这样说。因此，就知识产权而言，我可以举出 50、100 或 1000 个例子，你可能会说它们是对制度的滥用。我只想说，这只是国家制定的现行专利和版权实体法的影响，你可能会同意我的每一个观点。

舒尔曼：我立刻承认你的历史观点。从 1983 年我与温迪的论证开始，我所代表的是我提出了一个没有历史基础的新的自然权利理论。

Kinsella: Right. I understand. So let's get to something a little bit ... you and I have gone back and forth over the years, mostly in writing. One reason that I just pinged you today was I was talking with another gentleman, and he was questioning the IP issues, and we were talking about it. And I was trying to explain something to him. And I made the point, which is my view, which I don't know if you completely agree with, but I was arguing that, look, one of the fundamental mistakes in the IP argument, or in your logorights argument I believe, is this idea that you can own an attribute or a characteristic or a feature of an object separate from the object itself, okay? And then I said ...

Schulman: And that ...

Kinsella: Hold on ...

金塞拉：对。我明白。那么我们来谈点稍微……这些年来你和我有过多次交流，大部分是书面形式。我今天给你发短信的一个原因是，我正在和另一位先生聊天，他对知识产权问题提出了质疑，我们正在讨论这个问题。我试图向他解释一些事情。我提出了一个观点，这是我的看法，我不知道你是否完全同意，但我的论点是，你看，知识产权论证中的一个根本性错误，或者我认为你的商标权论证中的一个根本性错误，就是你可以拥有一个独立于对象本身的属性、特征或对象的特性，明白吗？然后我说……

舒尔曼：并且那……

金塞拉：等一下……

Schulman: And that comes directly out of Robert LeFevre's theory of property.

Kinsella: Okay, it may be. It's also somewhat of an implication of Locke. I think Locke was confused on his labor comments, etcetera, but, ... and then I said actually that Schulman has modified his logorights characterization. You call it material-carried property, right?

Schulman: No, media-carried property.

舒尔曼：这直接源于罗伯特·勒菲弗的财产理论。

金塞拉：好吧，可能是这样。这在某种程度上也隐含在洛克的理论中。我认为洛克在他关于劳动的论述等方面有些混乱，但是……然后我说实际上舒尔曼已经修改了他的商标权特征。你称之为物质载体财产，对吗？

舒尔曼：不，是媒介承载财产。

Kinsella: Sorry, I keep messing it up—media-carried property. And I said, so basically, you view it the same as I. You just have a different conclusion. That's why I said, well, let's just talk about it. And let me just summarize quickly what I think the mistake is and you can tell me where you think I'm wrong or what I'm missing.

To my mind, if you own an object, and that's the media, that's the physical thing that is owned, that is always impatterned with some information or some attributes. And, in fact, information cannot be a free floating abstraction. Information, to exist and to be perceived and to persist, has to be embodied in some media. Wouldn't you agree with that part?

金塞拉：不好意思，我总是说错——媒介承载财产。我说，所以基本上，你和我的看法一样。你只是有不同的结论。这就是为什么我说，好吧，那我们就来谈谈这个问题。让我快速总结一下我认为错误在哪里，你可以告诉我你认为我哪里错了或者我遗漏了什么。

在我看来，如果你拥有一个物体，而那就是媒介，那是被拥有的有形之物，它总是带有一些信息或某些属性。事实上，信息不可能是一种自由漂浮的抽象概念。信息要存在、被感知和持续存在，就必须体现在某种媒介中。你同意这一点吗？

Schulman: Yes, but let me tell you where I think you're going where I think that you're not seeing what I'm seeing.

Kinsella: Go ahead.

Schulman: In my view, something intangible can't be owned, okay? For something to be ownable, it has to be something observable in the world and it has to be distinct and definite. Now the question which I pose, which you said that you agreed with my formulation ...

舒尔曼：是的，但让我告诉你，我认为你的想法和我的想法不一样。

金赛拉： 请继续。

舒尔曼：在我看来，无形的东西是无法拥有的，明白吗？要想拥有某样东西，它必须是世界上可以观察到的东西，而且必须是独特而明确的。现在我提出一个问题，你说你同意我的提法.....

Kinsella: No, I don't agree that is sufficient. That might be necessary. Schulman: Let me get this out as concisely as I can.

Kinsella: Alright, go ahead.

Schulman: If you have an alphanumeric sequence which retains its material identity, in going from physical object to physical object, and is a commodity separate from the things on which it is carried, which give value, trade value, to the objects on which it is carried, but it is transferrable from one physical entity to another, I maintain we have now identified an object, a thing, something observable and distinct in the real world, which is in fact a property separable from the objects on which it is carried.

金塞拉：不，我不同意这就足够了。这可能是必要条件。

舒尔曼：让我尽可能简洁地把这个说出来。

金塞拉：好的，说吧。

舒尔曼：如果你有一个字母数字序列，它在从一个物理对象到另一个物理对象的过程中保持了它的物质特性，并且是一种独立于它所承载的事物的财货，它赋予了它所承载的对象以价值、交易价值，但它又可以从一个物理实体转移到另一个物理实体，我认为我们现在已经确定了一个对象、一个事物、一个在现实世界中可以观察到的、与众不同的东西，它实际上是一种可以从它所承载的对象中分离出来的属性。

Kinsella: I got it but what ...

Schulman: ... and the example I gave in my debate with Wendy and have used ever since is, you buy a book with the title Atlas Shrugged. You take it home and start reading. And what you read is, "It was the best of times. It was the worst of times". Obviously—A Tale of Two Cities by Charles Dickens. It's not the same novel.

But if you're a reductionist saying that what can be owned is only a physical object, then you have something which—for the sake of argument—has the same number of pages, has ink impressions, has the same binding. And so, if you were going to reduce it and say that only a physical object can be owned, then the question arises: did you get what you paid for? Or, if you say yes, okay, then you have now eliminated the possibility of a novel being an existent, a thing, an entity; not an existent so much as an entity. You're saying that it cannot be a thing.

But if you're saying that you're entitled to the composition of words of Atlas Shrugged and not of A Tale of Two Cities, then you're saying that the composition of words, the alphanumeric sequence itself which is separable from the thing on which it is carried, the media-carried property, is the economic good which is being traded. And therefore you have an economic good which is a thing separable from the media on which it is carried.

金塞拉： 我明白了，但是.....

舒尔曼：.....我在与温迪的论证中举过一个例子，后来也一直在用，那就是，你买了一本书，书名是《阿特拉斯耸耸肩》。你把它带回家，开始阅读。你读到的是："这是最好的时代。这是最坏的时代"。显然，狄更斯的《双城记》。这不是同一部小说

但如果你是一个还原论者 认为能被拥有的只是实物 那么你就会拥有同样页数 同样墨迹 同样装订的东西 因此，如果你将其还原，说只有实物才能被拥有，那么问题就来了：你是否得到了你为之付出的东西？或者，如果你说 "是的", 好吧，那么你现在已经排除了小说作为一个存在物、一个事物、一个实体的可能性；与其说它是一个存在物，不如说它是一个实体。你是说它不可能是一个事物。

但如果你说，你有权获得《阿特拉斯耸耸肩》的文字构成，而不是《双城记》的文字构成，那么你就是说，文字构成，即字母数字序列本身，是可以与承载它的事物分离的，即媒体承载的财产，是正在交易的经济物品。因此，你有一种经济物品，它是一

种可与载体分离的物品。

Kinsella: I get your chain of reasoning. Let me see if I can summarize it. You tell me if I've got it right. You start off with the presumption that if you can identify something as an existent, entity, as a thing, as you call it, something that is—what was your word? Specific and definite? You're presupposing that that is sufficient for ownership. Like as long as something is specific and definite and you can give it some kind of ontological category or name and call it a "thing," and especially if it is valued in commerce and therefore it's a "commodity"—which I guess is only economic goods, not other kinds of goods—then that's sufficient for ownership. I just don't see the argument for the starting point here ...

Schulman: No, I would say necessary but not sufficient. Kinsella: Okay but ...

金塞拉：我明白你的推理。我来总结一下。你来告诉我我说的对不对。你一开始就假定，如果你能把某样东西确定为存在物、实体、事物，就像你所说的，是——你说什么来着？具体而明确？你的假设是，这足以构成所有权。比如说，只要某样东西是具体而明确的，而且你可以赋予它某种本体论的类别或名称，并称之为“事物”，尤其是如果它在商业中具有价值，因而是一种“财货”——我猜这只是经济财货，而不是其他种类的财货——那么这就足以构成所有权。我只是不明白这里的出发点是什么.....

舒尔曼：不，我认为是必要的，但不是充分的。

金塞拉：好吧，但是.....

Schulman: There are other things. In my original debate with Wendy and then in my subsequent 1983 treatise, "Informational Property: Logorights," I go through a whole bunch of other things that are necessary, but they're the same sets of questions that have to be satisfied for any other claim of ownership.

Kinsella: Well, the way you just stated it though, you only specified what was sufficient for ownership. I'm sorry, what was necessary for ownership, not what was sufficient. Just because ...

Schulman: No, I'm saying that I've identified a category of things that can be owned if the same questions can be answered in the affirmative that you would have to answer for any claim of ownership of anything else.

舒尔曼：还有其他方面。在我最初与温迪的论证中，以及在我后来于 1983 年发表的论文《信息财产： 商标权》中，我探讨了很多其他必要的方面，但这些都是任何其他所有权主张必须满足的问题。

金塞拉：你刚才的说法是，你只说明了所有权的充分条件。对不起，是所有权的必要条件，而不是充分条件。只是因为.....

舒尔曼：不，我是说我已经确定了一类可以拥有的东西，对于这些东西，如果你能够以肯定的方式回答那些对于任何其他东西的所有权主张都必须回答的问题。

Kinsella: See, I just don't think, to me that doesn't make sense, for several reasons. Number one, and I tried to give you an example in writing today, just as a pure contract situation. You could have a contract and the concept of fraud, even, if you want. You don't need to bring fraud into this, just contract. Contract theory and property rights alone explain why you're not getting what you asked for when you get the book that has the wrong pattern of information on it. In other words, if I give you money conditioned upon the book having a certain pattern in the book, and I don't get that, then the money that I paid you didn't transfer to you because it was conditioned upon a certain ...

Schulman: Well, you see, it doesn't have to be fraud. Look, I'm a book publisher, okay? And I have in my possession an accidental artifact of a book which I received from Lightning Source. The cover is the cover of my novel, The Rainbow Cadenza, but the interior of the book is volume one of Robert LeFevre's autobiography. Now there was no deliberate fraud when this was manufactured ...

金塞拉：看，在我看来，这说不通，有几个原因。第一，我今天试着用书面形式给你举了个例子，就是纯的情况。如果你愿意，你甚至可以有一个和欺诈的概念。你不需要把欺诈带入其中，只需要。理论和财产权本身就能解释，为什么当你拿到那本上面有错误信息模式的书时，你并没有得到你要求的東西。换句话说，如果我给你钱的條件是書中有某種圖案，而我没有得到，那么我给你的钱就没有转到你的账上，因为它是 以某种.....为条件的。

舒尔曼：你看，这不一定是欺诈。瞧，我是一个图书出版商，好吗？我手里有一本从“闪电源 ”公司收到的书，是意外的艺术品。封面是我的小说《彩虹华彩乐章》的封面，但书的内页是罗伯特·勒菲弗自传的第一卷。现在看来，制造这本书时并没有故意欺

诈.....

Kinsella: Let's forget fraud, right. Let's just assume it's a contract.

Schulman: I'm not making a legal argument so much as I'm making an ontological argument. I'm saying that if, in fact, the composition, the alphanumeric sequence in this particular case is different, then you have a different thing, a different commodity.²⁰

金塞拉：那我们先不考虑欺诈，好吧。我们就假设这是一份吧。

舒尔曼：与其说我在进行一个法律论证，不如说我在进行一个本体论论证。我的意思是说，如果在这种特殊情况下，字母数字序列的构成实际上是不同的，那么你就有了不同的东西，不同的财货。⁶⁹²

Kinsella: Right. But the different commodity is the physical book which is different than another physical book because of the way it's impatterned. The question is: can you own the attributes of the book in addition to the book itself? That's the question. Can you own ...

Schulman: Well, this is the case even when there were no copyright laws to be enforced. In fact, you can argue ... look, I will tell you right now that the argument you're making is one which is generally accepted by the film and television industry. The Writers Guild treats writing as if it's an act of labor, but they're much less specific on whether the labor produces something which can be owned. And I'll tell you that this is something which the Writers Guild calls separation of rights. In other words, if I as a screenwriter were to write for, let's say, Gunsmoke, it's a work for hire because I'm basically creating new stories based on their existing characters. But when I write an original episode of the Twilight Zone, an anthology series, they say I have separated rights unless it's a

⁶⁹² Tibor Machan advanced a similar “ontology” based argument for IP. See Tibor Machan, “Intellectual Property and the Right to Private Property,” Mises.org working paper (2006; <https://mises.org/wire/new-working-paper-machan-ip>), discussed in Kinsella, “Owning Thoughts and Labor,” Mises Economics Blog (Dec. 11, 2006), and in idem, “Remembering Tibor Machan, Libertarian Mentor and Friend: Reflections on a Giant,” StephanKinsella.com (April 19, 2016); see also “Law and Intellectual Property in a Stateless Society” (ch. 14), at n.78.

remake of an earlier Twilight Zone, such as the 1980s Twilight Zone that I worked on; remade some episodes from the original Rod Serling Twilight Zone from the 50s and 60s.

So, if I were the writer who was creating a new script based on an original script by Richard Matheson or Charles Beaumont or Rod Serling, then there are no separated rights because it's a work for hire. But if I create an original script with original story, not based on that, then there's a separation or rights.

金赛拉： 没错 但不同的财货是实体书，它与其他实体书不同，因为它是以不同的方式呈现的。问题是：除了书本身，你还能拥有书的属性吗？这就是问题所在。你能否拥有.....

舒尔曼：即使在没有版权法的情况下也是如此。事实上，你可以争辩说.....听着，我现在就告诉你，你提出的论点是影视业普遍接受的论点。作家协会将写作视为一种劳动行为，但他们对劳动是否产生了可以拥有的东西并不那么明确。我告诉你，这就是作家协会所说的权利分离。换句话说，换句话说，如果我作为一名编剧为《荒野大镖客》（Gunsmoke）写作，这是一份雇佣作品，因为我基本上是根据他们现有的角色创作新故事。但如果我为《暮光之城》（Twilight Zone）的原创剧集（选集系列）写剧本，他们就会说我的权利是独立的，除非它是翻拍自早期的《暮光之城》，比如我参与制作的 20 世纪 80 年代的《暮光之城》；翻拍自 50 和 60 年代罗德-瑟林（Rod Serling）原创的《暮光之城》的一些剧集。

因此，如果我是根据理查德-马西森（Richard Matheson）、查尔斯-博蒙特（Charles Beaumont）或罗德-瑟林（Rod Serling）的原创剧本创作新剧本的编剧，那么就不存在分离权，因为这是一份雇佣作品。但如果我创作的剧本是原创的，故事也是原创的，而不是在此基础上创作的，那么就会出现权利分离。

Kinsella: Yeah, but these are just legal terms based on current copyright. I don't really see how that's relevant.

Schulman: These are legal terms of art.

Kinsella: It's not really relevant to what we're discussing, philosophy of what natural property rights would be. I mean you wouldn't have all these arcane arrangements.

Schulman: I am arguing, first of all, that all property exists only as an intellectual artifact. And where I make this argument the most concisely is in my essay, "Human Property."

Kinsella: But didn't you just say earlier that you don't believe in property in intangible things?

金赛拉 是的，但这些只是基于当前版权的法律术语。我不太明白这有什么关系。

舒尔曼：这些是艺术的法律术语。

金赛拉：与我们正在讨论的自然财产权哲学并无关系。我的意思是，你不会有所有这些神秘的安排。

舒尔曼：首先，我的论点是，所有的财产都只是作为一种知识性的人工制品而存在。我在《人类财产》一文中简明扼要地阐述了这一观点。

金赛拉：但你刚才不是说你不相信无形财产吗？

Schulman: Nothing found in nature is property. That it is basically a human intellect which creates the concept of property itself.

Kinsella: Well, that's true. But you could say human desire creates it too, but that doesn't mean desire gives rise to property rights absent other features.

Schulman: No, but what we're talking about is how human beings interact with each other. Unlike non-intellectual animals, we do it on the basis of intellectual construct.

舒尔曼：在自然界中发现的任何东西都不是财产。从根本上说，人类的智慧创造了财产概念本身。

金赛拉：没错。但你也可以说人类的欲望也创造了财产，但这并不意味着在没有其他特征的情况下，欲望就会产生财产权。

舒尔曼：不，我们谈论的是人类如何相互影响。与非智力动物不同，我们是在智力建构的基础上进行互动的。

Kinsella: Okay. Let me try to summarize a different way to look at it and get your take on this. It seems to me like your argument is basically this. You want to say, look, here's a book. There are two books that look identical on the outside. They have different patterns on the inside. You would be upset if you wanted one and you got the other. Therefore, it's a commodity or some kind of economic good. And because it's an economic good, that shows that the pattern, the logos as you call it, is an ontological

thing that has existence.

Schulman: That's my argument.

Kinsella: I don't disagree with that as a philosophical exercise. It's just that you want to leap from that to saying, aha, because I've identified that there's a "thing" that has ontological existence, therefore it can have an owner. That, to me, is the entire mistake you're making because you haven't shown that that's ...

金赛拉：好的 让我试着用另一种方式来总结一下，然后听听你的看法。在我看来，你的论点基本上是这样的。你说说，看，这是一本书。有两本外表看起来一模一样的书。但里面的内容模式却不一样。如果你想要此本却得到了彼本，你会很不高兴。因此，这是一种财货或某种经济物品。并且因为它是一种经济物品，这就表明这种模式，也就是你所说的“逻各斯”，是一种具有本体存在的东西。

舒尔曼： 这就是我的论点。

金赛拉：作为一种哲学思考，我并不反对这一点。只是你想从这一点跳出来说，啊哈，因为我已经确定了有一个“东西”在本体论上是存在的，所以它可以有一个主人。在我看来，这就是你犯的全部错误，因为你还没有证明这是.....

Schulman: ... I approach this a number of different ways in my original "Informational Property Rights," 1983, article. And one of the ways I approach is a reduction ad absurdum, using praxeology. In my reply to Konkin, his article, "Copywrongs," I basically deconstruct several of his premises in which I show, using Austrian economics—a praxeological approach—how, in fact, if you eliminate that concept, then you basically run into the contradiction of saying that that which you are arguing about doesn't exist.

I think that it is not a coincidence that literary contracts, regardless of whether we're talking about copyright or not, refer to something as the "work." In other words, it's a noun.

Kinsella: Because the copyright statute defined it that way.

舒尔曼：.....我在 1983 年发表的《信息财产权》一文中，以多种不同的方式探讨了这一问题。其中一种是运用人的行动学方法进行归谬法论证。在我给康金的回信中，即

在他的文章《抄袭》中，我基本上解构了他的几个前提，其中我使用了奥地利经济学——一种行动学的方法——来说明，事实上，如果你消除了那个概念，那么你基本上就会遇到一个矛盾，即你所论证的东西并不存在。

我认为，文学，无论是否涉及版权，都将某物称为“作品”，这并非巧合。换句话说，这是一个名词。

金塞拉：因为版权法是这么定义的。

Schulman: It's not arguing labor. It's arguing that there is a thing that is being traded called the "work." It is referred to in the contracts granting rights, which I have signed—there is a term of art called the work.

Kinsella: That's just how it's defined in the copyright statute, though, Neil.

Schulman: I am saying that is a thing which is, in fact, being traded or licensed in the same way that there is a right of occupancy which is being traded in a rental agreement for a car or an apartment.

Kinsella: Well, okay. So the copyright statute defined that term "work" and that's why contracts use it now.

舒尔曼：这不是在论证劳动。它是在论证有一种被交易的东西叫做“作品”。在我签署的权利授予中，有一个专业术语叫做“作品”。

金塞拉：这只是版权法的定义，尼尔。

舒尔曼：我的意思是说，这实际上是一种交易或许可，就像汽车或公寓的租赁协议中交易的占用权一样。

金塞拉：好吧。因此，版权法对“作品”一词进行了定义，这也是现在使用“作品”一词的原因。

Schulman: The copyright statute is beside the point as far as I'm concerned.

Kinsella: I don't think they would use the term work if not for the copyright statute.

Schulman: We're talking plain language.

Kinsella: But they wouldn't use that word if the copyright statute hadn't introduced it and defined it. That's a new innovation.

舒尔曼：在我看来，版权法并不重要。

金赛拉： 如果不是因为版权法，我认为他们不会使用“作品”这个词。

舒尔曼：我们说的是浅显易懂的语言。

金赛拉： 但如果没有版权法的引入和定义，他们也不会使用这个词。这是一种新的创新。

Schulman: I'm not sure that that's true. In other words, what you're arguing is which is the cart and which is the horse, and so am I. And I'm maintaining that there is a common-sense observation in these contracts which would survive the demise of the State and its admittedly mucked up copyright laws.

Kinsella: Well, let me ask you this. Would you agree with me that for your argument to work, you need to show that something having ontological existence is sufficient for there to be property rights possible in it? Don't you think you need to establish that?

舒尔曼：我不确定这是真的。换句话说，你所论证的是车和马的问题，我也是。我坚持认为，这些中存在着一种常识性的观点，这种观点将在国家及其公认的混乱的版权法消亡后继续存在。

金赛拉：好吧，那我问你。你是否同意我的观点，要使你的论证奏效，你需要证明某种事物在本体论上的存在足以使财产权成为可能？你不认为你需要证明这一点吗？

Schulman: I think that given that you need to establish the same boundary issues that you would with other forms of property and contracts, that, yes, it qualifies as being entered into the running as a possible type of property.

Kinsella: My point is you have to show it, though. That is a presupposition of your argument, that establishing that something is of ontological existence, is an existent, is sufficient for it to be ownable. You have to prove that.

舒尔曼：我认为，鉴于你需要确定与其他形式的财产和相同的边界问题，那么，是的，它有资格作为一种可能的财产类型被纳入考虑范围。

金赛拉：我的观点是你必须证明这一点。这是你论证的一个前提，即确定某物在本体

论上是存在的，是一个存在物，就足以使其可被拥有。你必须证明这一点。

Schulman: It is necessary to qualify it for the debate on whether or not it is a property.

Kinsella: I mean, my view on this, I'm very Randian in my epistemology, my concept theory. I just think what you're doing, is you are doing reification in a sense. You're conflating the efficiency and the usefulness and the practicality of certain concepts with calling something "existing" and then leaping to the point where it can be owned.

Like, so for example, I think the concept of love is a valid concept. It has a referent in the world. You can say there "is" love. But just because we have identified an ontological type of thing that exists— love—doesn't mean it's a type of thing that can be owned. You have to do more than establish the validity of a concept to show that the referent of the concept is an ownable thing. I mean we have time. We have motion.

舒尔曼：要确定它是否为财产，就有必要对其进行资格认定。

金塞拉：我的意思是，在这一点上，我的观点在认识论和概念理论上非常具有兰德主义的特点。我只是觉得你在做的事情，在某种意义上是在实体化。你把某些概念的效率、有用性和实用性与称某物为“存在”混为一谈，然后跳跃到它可以被拥有的地步。

比如说，我认为“爱”是一个有效的概念。它在世界上是有所指的。你可以说“存在”爱。但仅仅因为我们确定了一种本体论上的存在——爱——并不意味着它是一种可以被拥有的事物。你必须做更多的事情，而不仅仅是确定一个概念的有效性，以表明这个概念的所指对象是一个可拥有的东西。我的意思是我们有时间。我们有动机。

Schulman: I agree with that, but that, in fact, when you're identifying something which exists ... look, love is something which is an expression, okay? And it is something which may be observable in human behavior but it is not something which you can identify as existing outside of human behavior in the way that an alphanumeric sequence is. I maintain that an alphanumeric sequence is, in fact, a thing.

Kinsella: Hold on a second. Earlier you said ...

Schulman: An array of photographic frames is an observable thing in the real world.

Kinsella: Not outside of human behavior ... you said earlier that property doesn't even exist, right?

Schulman: Just in the real world.

舒尔曼：我同意这一点，但事实上，当你在识别某种存在的东西时……注意，爱是一种表达，好吗？它是人类行为中可以观察到的东西，但它并不像字母数字序列那样，可以被认定为存在于人类行为之外。我坚持认为，字母数字序列实际上是一种物体。

金赛拉：稍等一下。你刚才说……

舒尔曼：一组摄影画面在现实世界中是一个可观察到的东西。

金赛拉：不是在人类行为之外……你之前说过财产甚至都不存在，对吗？

舒尔曼：只是在现实世界中。

Kinsella: Hold on. You said property doesn't even exist outside of human intentions and human subjective evaluation. So how could alphanumeric sequences in something called a movie exist without regard for human intention?

Schulman: Okay, because "thingness" is one of the necessary, but not sufficient, conditions for a claim of ownership. Ownership is about action and intellectual creation of identity and … look, I would say that the identity exists independent, the thing exists. This is why it's both an ontological and an epistemological question before you get to the moral and legal questions. What I think that my work has done is establish the ontological and epistemological basis for these media-carried objects to be identified as ownable in the same way that other things can be ownable according to the general common sense principles of contract.

金赛拉：等等。你说过，在人类意图和人类主观评价之外，财产根本不存在。那么，被称为电影的东西中的字母数字序列怎么可能不考虑人的意图而存在呢？

舒尔曼：好吧，因为“事物性”是所有权主张的必要条件之一，但不是充分条件。所有权关乎行动以及对身份的智力创造，并且……注意，我会说身份是独立存在的，事物是存在的。这就是为什么在涉及道德和法律问题之前，这既是一个本体论问题，也是一个认识论问题。我认为我的工作所做的就是为这些媒体携带物建立了本体论和认识论基础，使其与其他事物一样，可以根据的一般常识原则被认定为可拥有的。

Kinsella: No, I understand your general thrust, but you seem to be agreeing because you say it on occasion. You seem to be agreeing with me that "thingness," which is just another way of saying something exists—or in my view it just means it's a valid

concept—thingness is a necessary but not sufficient condition. That's why I keep saying ... I just want to make sure you agree with me ...

Schulman: Yes, that's what I'm saying. Kinsella: But you need to ...

Schulman: Necessary but not sufficient. But the sufficiency is by applying the exact same question that you would for any other claim of property.

金塞拉：不，我理解你的大致主旨，但你有时这么说，似乎是在同意我的观点。你似乎是在同意我的说法，即“事物性”，这只是说某物存在的另一种说法——或者在我看来，它只是意味着这是一个有效的概念——事物性是一个必要但非充分条件。这就是为什么我一直说……我只是想确定你同意我的观点……

舒尔曼：是的，我就是这个意思。

金塞拉：但你需要……

舒尔曼：必要但非充分。但充分性是通过应用与你对任何其他财产主张所提出的完全相同的问题来确定。

Kinsella: Yes, I understand. We don't have time to get into that, but in your argument, in your logorights article and, I think, in your ... what's the other, "Human Rights"? What's it called? "Human Property"?

Schulman: Property.

Kinsella: Yeah, in that one I think you try to give reasons why you think it is sufficient. I don't agree with you on that, but I think that's really the crux of our disagreement. But before ...

Schulman: Can we at least come to the point where you think it is debatable, within the realm of possibility?

Kinsella: Honestly, I don't, Neil. But it's only because I've thought about it so much and I can see no way that you can own the characteristic of an object without that being a universal that gives you property rights in other people's owned resources.²¹ In other words, to my mind, information ...

金塞拉：是的，我明白。我们没有时间深入探讨这个问题，但是在你的论证中，在你

的《商标权》一文中，以及我认为在你的…… 另一篇叫什么来着？《人权》？叫什么来着？《人类财产》？

舒尔曼：财产。

金塞拉：对，在那篇文章中我认为你试图给出你认为它是充分条件的理由。在这一点上我不同意你，但我认为这确实是我们分歧的关键。但是在此之前……

舒尔曼：我们能不能至少说到你认为这一点是值得商榷的，是在可能性范围之内的？

金塞拉：说实话，我不这么认为，尼尔。只是因为我对此思考了很多，，如果你不把一个物体的特性作为一个共相，赋予你对他人所拥有资源的财产权，那么我认为你就不可能拥有一个物体的特性。⁶⁹³换句话说，在我看来，信息……

Schulman: And here's where I'm saying, that the defining distinction, which makes it possible, is that it is something outside of one human being. It's something that now exists in the world. At the point where it exists in the world, separate from the person who brought it into existence, now you have something real.

Kinsella: Let me ask you this. Is your view here, is it Platonic or mystical at all? Because I know you're a little bit mystical, more than I am, on some spiritual issues.²² So does this view, because it seems to me …

Schulman: Back in 1983 when I was making these arguments, I was an atheist.

Kinsella: I'm asking about now though. I understand. But do you think there is anything mystical or Platonic about what you're saying? You seem to envision these …

舒尔曼：这就是我要说的区别，它之所以成为可能，是因为它是人类之外的东西。它是现在存在于这个世界上的东西。在它存在于这个世界上的那一刻，与将它带入这个世界的人分离，现在你有了真实的东西。

金塞拉：让我问你 你的观点是柏拉图式的还是神秘主义的？因为我知道，在一些精神问题上，你比我更神秘主义一些。⁶⁹⁴所以你的这个观点也是如此，因为在我看来……

⁶⁹³ For discussion of the “universals” problem of IP law, see “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.F.

⁶⁹⁴ See Neil’ s novel *Escape from Heaven* (Pulpless.com, 2017).

舒尔曼：1983 年，当我提出这些论点时，我是个无神论者。

金塞拉：但我问的是现在。我明白了。但你认为你所说的有什么神秘主义或柏拉图式的东西吗？你似乎在设想这些.....

Schulman: Only in the sense that Ayn Rand used the term "spiritual."

Kinsella: No, I don't mean that. I mean it's like you're envisioning the separate sort of ghostly existence of these Platonic objects that are out there, independent, ontologically separate from the...

Schulman: I don't accept a Platonic metaphysics.

Kinsella: Well would you agree that information has to be ... hold on. Let me ask you this.

Schulman: Let me say this. I have made the argument that there is no such thing as a virtual reality, that either something is real or it isn't. You go back to the movie The Matrix, okay? And in fact there were these bodies ...

舒尔曼：仅在安·兰德使用“精神的”这个术语的意义上是这样。

金塞拉：不，我不是那个意思。我的意思是，就好像你在设想这些柏拉图式的对象有一种独立的、幽灵般的存在，在本体论上与……相分离。

舒尔曼：我不接受柏拉图式的形而上学。

金塞拉：那么你是否同意信息必须是……等一下。让我问你这个问题。

舒尔曼：让我这么说。我已经提出了这样的论点，即不存在虚拟现实这种东西，要么某样东西是真实的，要么它不是。回到电影《黑客帝国》，好吗？实际上有这些身体……

Kinsella: Yeah, yeah, yeah, of course. There 's always an underlying media or underlying ...

Schulman: That was a reality.

Kinsella: Yeah, there is a substrate. I understand. I agree with you on that. But my point is, wouldn't you agree that information—these alphanumeric sequences you're talking about—they're always embedded in some substrate or some media. They have to be just the impatterning of a thing. Wouldn't you agree with that?

金塞拉：是的，是的，是的，当然。总是有一个潜在的媒介或潜在的……

舒尔曼：那是一个现实。

金塞拉：是的，有一个基质。我明白。在这一点上我同意你。但我的观点是，你难道不同意信息——你所说的这些字母数字序列——它们总是嵌入在某种基质或某种媒介中。它们必须只是一个事物的印记。你同意这一点吗？

Schulman: Yes, yes. And that's why I talk about media-carried property. And the question is whether or not there is something separable which can be transferred from physical object to physical object to physical object. And that is the distinction which makes it a thing in and of itself.

Kinsella: Well, let's forget about whether it's separable. Let me ask you this. If all information has to be embodied or impatterned in a media, don't you agree the media has an owner? That physical thing that is the media has some owner.

舒尔曼：是的，是的。这就是为什么我谈到媒介承载的财产。问题在于是否存在某种可分离的东西，可以从一个物理对象转移到另一个物理对象再到另一个物理对象。而这就是使它本身成为一个事物的区别所在。

金塞拉：好吧，先不管它是否可分离。让我问你这个问题。如果所有的信息都必须体现在或印记在一种媒介中，你难道不同意媒介有一个所有者吗？那个作为媒介的物理事物有某个所有者。

Schulman: Yes. And the ownership of that can be separated from the ownership of the thing which is carried.

Kinsella: It can be ... I suppose it could be. But how does the fact that someone writes a novel give them the ability to control the media that other people own?

Schulman: Because there is a thing being carried for which property rights have not been transferred.

舒尔曼：是的。它的所有权可以与所携带物品所有权分离。

金塞拉 我想是可以的。但一个人写了一本小说，怎么就有能力控制其他人拥有的媒介呢？

舒尔曼：因为被承载之物的财产权尚未转让。

Kinsella: Hold on, hold on. Give me thirty seconds. Hold on. Neil, hold on. I've got to answer the door. Hold on thirty seconds. Neil, thirty seconds.

Schulman: If you book a ride with Uber, your claim to a ride is a usage which is separable from ownership of the vehicle.

Kinsella: Neil, sorry. I had to answer the door. Sorry. Go ahead.

金塞拉：等一下，等一下。给我三十秒。等一下。尼尔，等一下。我得去开门。等三十秒。尼尔，三十秒。

舒尔曼：如果你用优步叫车，你对乘车的要求是一种使用权利，它与车辆的所有权是可分离的。

金塞拉：尼尔，抱歉。我不得不去开门。对不起。你继续。

Schulman: I'll repeat that because I don't know if you heard it. I'm saying that it is separable in the same way that if you book a ride with Uber, what you're buying is a use, but you're not buying the Uber vehicle itself.

Kinsella: Well, I agree some things are separable, mostly by contract or by co-ownership arrangements. But that doesn't mean that you can control what other people do with their property unless you have a good reason. I go with the Lockean and Rothbardian theory of property.

舒尔曼：我重复一下，因为我不知道你是否听到了。我的意思是，它是可分离的，就像如果你用优步叫车，你所购买的是一种使用权利，但你并不是在购买优步的车辆本身。

金塞拉 我同意有些东西是可以分离的，主要是通过或共同所有权安排。但这并不意味着你可以控制别人如何处置自己的财产，除非你有充分的理由。我赞同洛克和罗斯巴德的财产理论。

Schulman: Hold on. You're making an assumption. You're begging the question. You're saying you're restricting what other people can do with their property. I'm maintaining that what is being argued over is, in fact, what is not being transferred to somebody else and what they cannot do because it is not their property.²³

Kinsella: Well, but there's not always a transfer. So, for example, let's take the patent case. Okay, if you claim a property right in being the owner of this mousetrap design, alright? Now if I am toiling away in my garage with my own wood and steel, my own substrate, and I configure it into a certain shape, you can use the patent system to tell me I can't sell that. I can't even make that device. Now where was the transfer?

舒尔曼：等一下。你在做一个假设。你在循环论证。你是说你在限制其他人的财产。我坚持认为，事实上，论证的是哪些东西没有转让给别人，哪些东西他们不能做，因为那不是他们的财产。⁶⁹⁵

金塞拉：好吧，但并不总是有转让。所以，例如，以专利案例为例。好吧，如果你声称自己拥有这个捕鼠器设计的财产权，行吗？现在如果我在我的车库里用我自己的木材和钢铁，我自己的基质辛苦劳作，然后我把它做成某种形状，你可以利用专利制度告诉我我不能出售那个。我甚至不能制造那个设备。现在，转让在哪里？

Schulman: You know, Stephan, I have to say that over the years I have become a lot less sanguine over arguing about patent rather than copyright.

Kinsella: Okay.

Schulman: I think the case for a patent is a harder case than arguing for what I've been calling media-carried property.

Kinsella: Well, let me do kind of a lightning round with you because there are some things I want to talk to you about because you know a lot of things about the history and Konkin and these things. Not to dwell too much on them. Let me just get your take on some things.

⁶⁹⁵ Neil is here implicitly making an argument that I criticize elsewhere. See “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), Part IV.H.

Number one, let's just stick with copyright, because you think that is some rough system that approximates something like, might, could exist in a free society. Do you think that the time limits on copyrights should be finite and arbitrary, or perpetual?

舒尔曼：你知道，斯蒂芬，我不得不说，这些年来，我对于论证专利问题远没有论证版权问题那么乐观。

金赛拉： 好吧

舒尔曼：我认为，专利权的论证比我所说的媒体携带财产的论证更难。

金赛拉 舒尔曼：好吧，让我和你来个“速问速答”，因为我想和你谈一些事情，因为你 知道很多关于康金的历史和这些事情。我不想谈太多。让我听听你对一些事情的看法。

第一，我们还是说说版权吧，因为你认为这是一个粗略的体系，近似于自由社会中可能存在的东 西。你认为版权的时间限制应该是有限的、任意的，还是永久的？

Schulman: I think that for media-carried property, you ask the exact same question that you would for ownership of any other kind of property.

Kinsella: So the problem with the copyright system is that it expires at about 120 years. In your view, it should last forever.

Schulman: Yeah, but again you're talking about a statist defined system. Kinsella: I understand but one defect of the system is that ...

Schulman: They could also arbitrarily say that land ownership ends with death and can't be carried ...

舒尔曼：我认为，对于媒介承载的财产，你所提出的问题与你对任何其他类型财产的所有权提出的问题完全相同。

金塞拉： 版权制度的问题在于它的有效期大约为 120 年。在你看来，它应该永远有效。

舒尔曼：是的，但你说的又是一个国家主义定义的系统。

金塞拉： 我明白，但该体系的一个缺陷是.....

舒尔曼：他们也可以武断地说，土地所有权随着人的死亡而终止，不能继承.....

Kinsella: I know. I just want to get you on record and see what you think. I mean you do realize the original copyright act was about fourteen years.

Schulman: All I'm saying is that when approaching this question, I think you need to satisfy the same requirements that you would for ownership and transfer of any other kind of property.

Kinsella: Are you aware, by the way, that Jefferson, when the Bill of Rights was being considered, he wrote a letter to Madison and he proposed ... because at that time the copyright clause was already in the Constitution, right, 1789. But for the Bill of Rights, Jefferson proposed amending the Bill of Rights, or adding a provision to the Bill of Rights saying that the State can grant these monopolies, by which he meant copyright and patent, but only for x years. So he wanted to put a time limit in there. You know, probably fourteen years.²⁴

金塞拉：我知道。我只是想让你表明立场，看看你的想法。我的意思是，你确实知道最初的版权法期限大约是十四年。

舒尔曼：我想说的是，在处理这个问题时，我认为你需要满足与拥有和转让任何其他类型财产相同的要求。

金塞拉：顺便问一下，你是否知道，当《权利法案》正在审议时，杰斐逊给麦迪逊写了一封信，他提议……因为在那个时候，版权条款已经在宪法中了，对吧，1789 年。但是对于《权利法案》，杰斐逊提议修改《权利法案》，或者在《权利法案》中增加一项条款，说国家可以授予这些垄断权，他指的是版权和专利，但只能授予 x 年。所以他想要在那里设定一个时间限制。你知道，可能是十四年。⁶⁹⁶

Schulman: Yeah, Jefferson, like Locke, was taking a utilitarian approach. I'm not. I wrote an entire novel, *The Rainbow Cadenza*, attacking the concept of utilitarianism being sufficient to come up with fairness. I'm an absolute believer in theories of natural law and natural rights. And I would say that would separate me from Jefferson and Locke.

Kinsella: So in your system, you couldn't even republish the Bible or Shakespeare's plays

⁶⁹⁶ See Kinsella, “Thomas Jefferson’s Proposal to Limit the Length of Patent and Copyright in the Bill of Rights,” C4SIF Blog (Dec. 1, 2011).

or Homer's works without getting some permission from some long lost descendent down the line. You would have to permission for everything. There would be a complete permission culture for all ideas.

舒尔曼：是的，杰斐逊和洛克一样，采取的是功利主义的方法。而我不是。我写了一整本小说《彩虹华彩乐章》，抨击功利主义足以实现公平的概念。我绝对相信自然法和自然权利的理论。我想说，这是我与杰斐逊和洛克的不同之处。

金塞拉：所以在你的体系中，如果没有某个失散多年的后人的许可，你甚至不能再版《圣经》、莎士比亚的戏剧或荷马的作品。你必须获得一切许可。对于所有的思想都会有一种完全的许可文化。

Schulman: Well, I mean, again, I expand the question to every other sort of property.

Kinsella: So that's a yes.

Schulman: In other words, do we need to get permission from the heirs of the Roman emperors before we can take a tour of the Colosseum?

Kinsella: Okay. So let me ask you this one, about Konkin. You mentioned that he didn't oppose people using copyright, or in some cases, and LeFevre either. I mean, of course, I don't either. I've gotten copyrights on my works and used it before ...

舒尔曼：嗯，我的意思是，再次强调，我把这个问题扩展到其他各类财产上。

金塞拉：所以这是肯定的回答。

舒尔曼：换句话说，在我们参观罗马斗兽场之前，我们需要从罗马皇帝的继承人那里获得许可吗？

金塞拉：好的。那么让我问你一个关于康金的问题。你提到他不反对人们使用版权，在某些情况下，勒菲弗也不反对。我的意思是，当然，我也不反对。我以前在我的作品上获得过版权并使用过它……

Schulman: Sam did not copyright his own works and Robert LeFevre did not copyright his own works.

Kinsella: Well, you realize that copyright is automatic. So that is actually not true. They do have copyright in their work. As soon as you write something, you have a copyright.

Schulman: Well, according to the State. But, I mean, are we ... these are two people who did not recognize the authority of the State to define these questions.

舒尔曼：山姆没有为自己的作品申请版权，罗伯特·勒菲弗也没有为自己的作品申请版权。

金塞拉：嗯，你要知道版权是自动产生的。所以这实际上不是真的。他们的作品确实有版权。一旦你写下了什么东西，你就拥有了版权。

舒尔曼：嗯，根据国家的规定是这样。但是，我的意思是，我们……这两个人都不承认国家有权定义这些问题。

Kinsella: Well, but they had copyright in their works, whether they wanted it or not.

Schulman: According to the State but not according to their own preferences.

Kinsella: Well, yeah, but someone couldn't, someone can't go publish one of LeFevre's books right now without getting permission from someone, even though LeFevre himself might have opposed copyright, unless he put some kind of license ...

金塞拉：嗯，但他们的作品有版权，不管他们愿不愿意。

舒尔曼：根据国家的规定是这样，但不符合他们自己的偏好。

金塞拉：嗯，是的，但现在如果没有得到某人的许可，某人不能去出版勒菲弗的一本书，即使勒菲弗本人可能反对版权，除非他设置了某种许可……

Schulman: That would be the case if it were an unpublished work. Then that argument could be made. In fact, I will tell you where this arises in a practical sense. As far as I know, the only copy of the manuscript for Samuel Edward Konkin, III's Counter-Economics is in the hands of Victor Koman. And Victor Koman has published other of Sam's works which were first published when Sam was alive. And Sam explicitly published them without a copyright.

Kinsella: No, that's not true. You can't publish something without a copyright.

舒尔曼：如果这是一部未出版的作品，情况会是这样。那么这个论点是可以成立的。

事实上，我来告诉你在实际情况中这个问题是在哪里出现的。据我所知，塞缪尔·爱

德华·康金三世的《反经济学》手稿的唯一副本在维克多·科曼手中。维克多·科曼出版了山姆的其他一些作品，这些作品在山姆在世时首次出版。山姆明确表示出版这些作品时没有版权。

金塞拉：不，那不是真的。你不能在没有版权的情况下出版东西。

Schulman: The legal rights to this are held by the Konkin estate, which devolves upon Sam's brother, Alan Konkin, in which Alan has made me the literary executor. So Victor is in the position of having the only manuscript, the only physical manuscript, which he refuses to provide to the estate. But he cannot legally publish it himself ...

Kinsella: Correct.

Schulman: ... without permission from the estate.

舒尔曼：这本书的法定权利由康金的遗产继承人持有，遗产转归山姆的兄弟艾伦·康金所有，艾伦已指定我为文学遗嘱执行人。所以维克多现在的处境是，他拥有唯一的手稿，唯一的实物手稿，但他拒绝提供给遗产继承人。但他自己又不能合法出版.....

金塞拉：正确

舒尔曼：.....没有遗产继承人的许可。

Kinsella: Right. Well, this is just the kind of bizarre logic that comes from any type of IP system, I believe. You can blame the State's copyright system but I think it's just the logic of copyright. You're going to get these absurd and obviously unjust and obscene results. It's just an inevitable part of separating the idea of ownership from scarce resources. I wanted to ask you. You mentioned earlier that in your earlier arguments you tried to rely on praxeology to support your case. I think praxeology ...

Schulman: In my original 1983 article, "Informational Property: Logorights," Sam makes what he represents as a praxeological case and so I responded with a praxeological case.

金塞拉：对。嗯，我认为这就是任何类型的知识产权制度都会产生的那种奇怪逻辑。你可以责怪国家的版权制度，但我认为这只是版权的逻辑。你会得到这些荒谬、明显不正义和令人厌恶的结果。这恰恰是将所有权与稀缺资源分离的必然结果。我想问你。

你之前提到，在你之前的论证中，你试图依靠行动学的观点来支持你的论点。我认为行动学的.....

舒尔曼：在我最初于 1983 年发表的文章《信息财产： 商标权》一文中，萨姆提出了他所代表的行动学的观点，因此我也用行动学的观点进行了回应。

Kinsella: Right. And then what I was going to say is I think that praxeology, especially Mises's version of the Austrian economics, is absolutely crucial, and indeed essential, to getting these issues straight. But I think it points in the other direction. I think that praxeology, basically, regards human action as the employment, right, the conscious, purposeful employment of scarce means to achieve something in the world, guided by knowledge.²⁵ So praxeology views human action ...

Schulman: Let's start out with the first premise of Austrian economics, which I almost parodied in the first line of my novel, *Alongside Night*.²⁶ Mises argues human beings act to remove felt unease.

金塞拉：对。然后我想说的是，我认为行动学，尤其是米塞斯一派的奥地利经济学，对于理清这些问题绝对是至关重要的，甚至是必不可少的。但我认为它指向了另一个方向。我认为，行动学的基本观点是，人的行动是在知识的指导下，有意识、有目的地使用稀缺的手段来实现世界上的某些目标。⁶⁹⁷所以人的行动学看待人的行动……

舒尔曼：让我们从奥地利经济学的第一个前提开始，我在我的小说《夜幕降临》的第一行中几乎模仿了这个前提。⁶⁹⁸米塞斯认为人的行动是为了消除感到的不安逸。

Kinsella: Correct. That's their purpose. That's their motivation, right.

Schulman: First line of the novel: "Elliot Vreeland felt uneasy the moment he entered

⁶⁹⁷ Here I was trying to explain to Neil why successful action requires both availability of scarce (conflictible) resources and information or knowledge to guide one's action, but that only the former is subject to property rights and ownership, since information cannot be owned. However we started having technical glitches so ended the discussion before we could make much headway on this. I discuss this issue in "Law and Intellectual Property in a Stateless Society" (ch. 14), Part III.D, and "Against Intellectual Property After Twenty Years" (ch. 15), Part IV.E.

⁶⁹⁸ Schulman, *Alongside Night*, 20th anniv. ed. (Pulpless.com, 1999).

his classroom.”

Kinsella: Right. And I think that's a brilliant aspect of praxeology, but it only goes to the motives or the purpose. What human action is, is the employment of scarce means, which you can call scarce resources, guided by knowledge. So there are two important components to successful human action. One is the availability ...

金塞拉：正确。那是他们的目的。那是他们的动机，对。

舒尔曼：小说的第一行：“埃利奥特·弗里兰一走进教室就感到不安。”

金塞拉：对。我认为这是行动学的精妙之处，但它只涉及动机或目的。人的行动，就是在知识的指导下，对稀缺手段的运用，你可以称之为稀缺资源。因此，成功的人的行动有两个重要组成部分。一个是可用性...

Schulman: Mises then goes on, through a whole series of deductive derivations on that premise.

Kinsella: I know. I'm just focusing on the bare structure ... I just want to get your take on this okay? My argument is very simple. And I think Mises is right. When we act in the world, we're trying to achieve an outcome, right, to remove felt uneasiness or to achieve something at the end of the process, but we do it by employing scarce means that are causally effective in the world, and we do it by using our knowledge to decide what to do. So you have to have knowledge and you have to have scarce means. Property rights apply to the second ...

舒尔曼：米塞斯接着在这个前提下进行了一系列演绎推导。

金塞拉：我知道。我只是聚焦于这个基本结构……我只是想听听你对这个的看法，好吗？我的论点很简单。我认为米塞斯是对的。当我们在这个世界上行动时，我们试图达到一个结果，对吧，消除不安逸，或者在过程的最后达到某种目的，但我们是通过使用稀缺的、在这个世界上具有因果效力的手段来做到这一点的，我们是通过使用我们的知识来决定做什么的。因此，你必须拥有知识，你必须拥有稀缺的手段。财产权适用于第二种情况……

Schulman: But you see, again, and I think that I made this argument in one of my other articles responding to that video, Copying is Not Theft.²⁷

Kinsella: By Nina Paley.

Schulman: I responded to that ... I think it's linked in an article called The Libertarian Case for IP. I'm basically saying that scarcity is itself a limited concept. In other words, that it is a relative concept ... That there is no requirement for absolute scarcity. It merely needs to be scarcity within a particular context.

舒尔曼：但是你看，再一次，我认为我在我的另一篇回应那个视频《复制不是盗窃》的文章中提出了这个论点。⁶⁹⁹

金塞拉：作者是尼娜·帕利。

舒尔曼：我回应了那篇文章.....我想它在一篇名为《知识产权的自由意志主义理由》的文章中有链接。我基本上是说，稀缺性本身就是一个有限的概念。换句话说，它是一个相对概念.....并不需要绝对的稀缺。它只需要在特定的情境下稀缺。

Kinsella: But what do you mean when you say you're opposed to intangible property and that you think all information is in a media? A media is a scarce physical resource. Land is a scarce, physical resource.

Schulman: I'm arguing that if there is an alphanumeric sequence, for example, then that alphanumeric sequence is a unique object. There's only one of it ...

Kinsella: I know you think it's a unique object.

金塞拉：但是当你说你反对无形财产，并且你认为所有信息都在一种媒介中时，你是什么意思呢？媒介是一种稀缺的物理资源。土地是一种稀缺的物理资源。

舒尔曼：我在论证，如果有一个字母数字序列，例如，那么那个字母数字序列是一个独特的对象。它只有一个.....

金塞拉：我知道你认为它是一个独特的对象。

Schulman: ... therefore, if there's only one of something, it's by definition scarce.

⁶⁹⁹ See Nina Paley, “Copying Is Not Theft,” YouTube (<https://youtu.be/leTybKL1pM4>; April 1, 2010). Neil’ s reply to the video is in Origintent.

Kinsella: Okay, but let's go back. I want to just finish this very short praxeological argument and see what you think is wrong with it, because you keep stopping me before I get to the end, and it's very simple. We employ scarce means. That is, you manipulate things in the world that can have a cause and effect. But to do that, you have to have some idea of what causality is, what physics laws are. And you have to have some idea of what's possible and what you're going to achieve. So knowledge is in your head. It guides your choice of means and your choice of ends. So every action is the employment of scarce means and the use of knowledge. Would you agree with that?

舒尔曼：…… 因此，如果某样东西只有一个，那么根据定义它就是稀缺的。

金塞拉：好的，但是让我们回到前面。我只想完成这个非常简短的行动学的论证，看看你认为它有什么问题，因为你总是在我结束之前打断我。我们使用的是稀缺手段。也就是说，你要操纵世界上能够具有因果关系的事物。但要做到这一点，你必须知道什么是因果关系，什么是物理定律。你必须知道什么是可能的，什么是你要实现的。因此，知识就在你的头脑中。它指导着你对手段和目的的选择。所以，每一个行动都是稀缺手段的运用和对知识的使用。你同意这一点吗？

Schulman: I would say that that is a chain of reasoning which precedes the possibility of property, yes.

Kinsella: Yeah, I'm just saying that it's inconceivable to imagine human action that doesn't employ scarce means and that isn't guided by knowledge. Correct?

Schulman: Well, ... uh ... yes, but there's the possibility of human action acting on something which is ubiquitous.

Kinsella: Yeah right. That's the general condition of human action. Schulman: In doing so, converting something from ubiquitous to scarce.

舒尔曼：我想说，这是在财产的可能性出现之前的一系列推理，是的。

金塞拉：是的，我只是说人的行动如果不使用稀缺的手段，不以知识为指导，那是不可想象的。对吗？

舒尔曼：嗯…… 呃…… 对，但是存在人的行动作用于普遍存在的事物的可能性。

金塞拉： 没错 。这就是人的行动的一般条件。

舒尔曼：这样一来，某些东西就从普遍存在变成了稀缺。

Kinsella: That's possible. I'm just saying the structure of action is that every single human action has to employ scarce means and has to be guided by knowledge. It's just inconceivable without it.

Schulman: In a sense ...

Kinsella: But wait. Do you agree with that or not?

Schulman: Hold on. Let me try to answer your question. I think that human action is itself a scarcity [Kinsella sighs] and therefore the employment of human action on something else has at least the potential to satisfy the conditions of creating a scarce something.²⁸

金塞拉：那是有可能的。我只是说，行动的结构是，人的每一个行动都必须采用稀缺的手段，必须以知识为指导。没有知识是不可想象的。

舒尔曼：在某种意义上……

金塞拉：但是等等。你同意还是不同意？

舒尔曼：等一下。让我试着回答你的问题。我认为，人的行动本身就是一种稀缺[金塞拉叹了口气]，因此将人类行动用于其他事物，至少有可能满足创造稀缺事物的条件。

⁷⁰⁰

Kinsella: That's fine but I'm not talking about the end results of your action. The end result of an action does not need to be the acquisition of a scarce resource or the ownership of some object. The end of an action can be anything. It can be totally subjective, right? It might be to get a little girl to smile after you do a card trick for her.²⁹

Schulman: No, no. Hold on. The reason that the human mind effects an action is not

⁷⁰⁰ Here Neil is making an argument I call libertarian creationism, which I explain and criticize in “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.B and “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.C.

the same thing, and I would say that there is a disconnect. Once the results of that action produce an etching in the real world, which is separate from the actor and observable by other actors.

金塞拉 这很好，但我说的不是你行动的最终结果。行动的最终结果不一定是获得稀缺资源或拥有某种物品。行动的最终结果可以是任何东西。它可以是完全主观的，对吗？可能是在你给一个小女孩变了一个纸牌魔术之后，博她一笑。⁷⁰¹

舒尔曼：不，不。等一下。人类思维产生行动的原因与此不同，我想说这里存在一种脱节。一旦该行动的结果在现实世界中产生了印记，它与行动人是分离的，也可以被其他行动人观察到。

Kinsella: I know. Okay, but you're getting ... I'm not trying ... I'm just talking about—if you view human action praxeologically as the employment of scarce means to achieve an end, and the action that you take is guided by knowledge, that that shows that knowledge, or information ...

Schulman: We're having a communication artifact problem at the moment. What you

⁷⁰¹ See, e.g., Israel M. Kirzner, *Market Theory and the Price System* (Princeton, N.J.: D. Van Nostrand Co., Inc., 1963; <https://mises.org/library/market-theory-and-price-system-0>), p. 46 – 47:

In the actuality of the everyday world, human beings are able to satisfy their wants only through directing their efforts toward appropriate means for such satisfaction. A man who wishes to eat may purchase food, cook food, or simply put on a hat and coat and go to a restaurant. His actions have been intermediary to the goal of eating. “Eating” is the end of his present endeavors; the means that he adopts for the attainment of his end can be an act of purchase, cooking, or walking to the restaurant.

In a sense, the actual end of action is always the attainment of some new state of affairs, some want-satisfaction, and never the acquisition or ownership of a corporeal good since, as Böhm-Bawerk has observed, such goods are valued only because of the renditions of service they provide. See Eugen von Böhm-Bawerk, “Whether Legal Rights and Relationships Are Economic Goods,” George D. Huncke, trans., in Eugen von Böhm-Bawerk, *Shorter Classics of Eugen von Böhm-Bawerk* (South Holland, Ill.: Libertarian Press, 1962 [1881]), pp. 73, 77 et pass., discussed in Gael J. Campan, “Does Justice Qualify as an Economic Good?: A Böhm-Bawerkian Perspective,” *Q. J. Austrian Econ.* 2, no. 1 (Spring 1999; <https://perma.cc/G3CK-B8WB>): 21 – 33, pp. 23 – 24.

just said verbally. Can you say it again please?

金塞拉：我知道。好的，但你的意思是.....我不是想.....我只是在说，如果你把人的行动学看作是运用稀缺的手段来达到目的，而你采取的行动又是在知识的指导下进行的，那就说明知识或信息.....

舒尔曼：目前我们遇到了一个通信问题。你刚才口头说的。能再说一遍吗？

Kinsella: Oh sorry. What I'm trying to say is my understanding of the way property norms arise and the way they relate to Mises's economic understanding of ...

Schulman: Oh geez. I'm sorry Stephan. What you're talking I'm not hearing verbally ... try saying it one more time.

Kinsella: Test, test, test. Can you hear me now? Hello? Test. Neil?

金塞拉：哦，抱歉。我想说的是，我对财产规范产生方式的理解，以及它们与米塞斯经济学理解的关系.....

舒尔曼：哦，天哪。对不起，斯蒂芬。我没听清你说的话.....再说一遍吧。

金塞拉：喂、喂、喂。现在能听到我说话了吗？喂？尼尔？

Schulman: Yeah, I'm not really getting anything. Do you want to stop the recording and call me back and start it again?

Kinsella: ... Sure. I'll do that right now. Sorry about that. Yeah, let's just finish it up quickly. What I'm doing is calling you on one iPhone and I'm recording it over the air on another. A very low tech solution because everything is always glitchy in technology. In fact, why don't we wrap it up. Yeah, let's just wrap it up. I told you what I wanted. I was just running an alternative praxeological theory by you. The basic argument is that you need property rights in the scarce means that are essential to human action, but you cannot have property rights in the knowledge that guides human action because that's not a scarce human resource.

舒尔曼：好的，我真的什么都听不到。你想停止录制，然后给我回电话重新开始吗？

金塞拉：.....当然。我现在就这么做。很抱歉。是的，那我们就快速结束吧。我现在是用一部 iPhone 给你打电话，然后用另一部在空中录制。这是一个非常低技术含量的解决方案，因为技术总是会出故障。事实上，我们为什么不结束呢。是的，我们就

结束吧。我告诉过你我想要的。我只是在向你阐述一种不同的人的行动学理论。基本的论点是，你需要对人的行动所必需的稀缺手段拥有财产权，但你不能对指导人的行动的知识拥有财产权，因为那不是一种稀缺的人类资源。

Schulman: I agree with you. I'm not making a knowledge argument.

Kinsella: Well, you do believe in informational property. So you think there are property rights in information.

Schulman: I believe that information per se cannot be owned but an information object can be. And that is a crucial distinction.

Kinsella: Okay. Okay. Well, I think ...

舒尔曼：我同意你的观点。我不是在提出一个关于知识的论点。

金塞拉：嗯，你确实相信信息财产。所以你认为信息存在财产权。

舒尔曼：我认为信息本身不能被拥有，但一个信息对象可以。这是一个关键的区别。

金塞拉：好的。好的。嗯，我认为……

Schulman: In the same way that you can't own matter, but you can own things made out of matter. You can't own information but you can own things made out of information.

Kinsella: So like, if you own a horseshoe, you don't own the matter in the horseshoe. You only own the way the matter is shaped?

Schulman: I'm sorry. Say that again please.

Kinsella: So like, if you own a horseshoe, you don't own the metal matter of the horseshoe. You only own the way the horseshoe is shaped?

舒尔曼：就像你不能拥有物质，但你可以拥有由物质制成的东西。你不能拥有信息，但你可以拥有由信息制成的东西。

金塞拉：所以，就像如果你拥有一个马蹄铁，你并不拥有马蹄铁中的物质。你只拥有物质被塑造成的形状吗？

舒尔曼：对不起。请再说一遍。

金塞拉：所以，就像如果你拥有一个马蹄铁，你并不拥有马蹄铁的金属物质。你只拥有马蹄铁的形状吗？

Schulman: Well, again, you own the thing which is the horseshoe. You own the thing which is the horseshoe, in the same way that, if you own a novel, you own the thing that is the novel.

Kinsella: Let me ask you this ...

Schulman: Which is the part of the thing on which it is in the same way that you can own the horseshoe without owning the horse.

Kinsella: Yeah, but ... so let's suppose lightning strikes the horseshoe and melts it. And now you have a puddle of molten iron. Do you own that or have you lost the ownership of it because it's not a horseshoe anymore?

舒尔曼：嗯，再次强调，你拥有的是那个作为马蹄铁的东西。你拥有那个作为马蹄铁的东西，就像如果你拥有一本小说，你拥有的是那个作为小说的东西。

金塞拉：让我问你这个……

舒尔曼：这是那个东西的一部分，就像你可以拥有马蹄铁而不拥有马一样。

金塞拉：是的，但是……假设闪电击中马蹄铁并将其熔化。现在你有一滩熔化的铁。你还拥有它吗？还是因为它不再是马蹄铁而失去了对它的所有权？

Schulman: Let me ask you this. If you own a house and the house burns down, do you own the ashes?

Kinsella: Yes, I would say that because I don't believe that the ownership of the house is dependent upon its shape.

Schulman: Well, here we have an interesting thing because unless the sole copy of a thing is destroyed, then you have something which is durable. And destroying a carrier of it does not necessarily destroy the thing which is carried.

舒尔曼：让我问你这个问题。如果你拥有一所房子，而房子被烧毁了，你拥有那些灰烬吗？

金塞拉：是的，我会说拥有，因为我不认为对房子的所有权取决于它的形状。

舒尔曼：嗯，这里有一个有趣的事情，因为除非某样东西的唯一副本被摧毁，否则你拥有的是某种持久的东西。而摧毁它的一个载体并不一定摧毁被承载的东西。

Kinsella: But it does, because you can't have information without some media that it's carried in.

Schulman: Yes and ...

Kinsella: Yeah, there could be multiple copies of it. I know.

Schulman: And here is a case where there needs to be at least one surviving carrier.

Kinsella: Right, but this also implies there could be multiple copies of it. You see, you want to call it one object.

金塞拉：但确实会，因为没有某种承载它的媒介，你就无法拥有信息。

舒尔曼：是的，并且……

金塞拉：是的，可能有多个副本。我知道。

舒尔曼：这里有一个情况，那就是至少需要有一个幸存的载体。

金塞拉：对，但这也意味着可能有多个副本。你看，你想把它称为一个对象。

Schulman: There could be multiple copies. But the way that I would phrase that is, what is the variable is the number of carriers. There is still only unique object which is being carried.

Kinsella: Yeah. So it's a universal or it's a Platonic ... that's why I say it's a Platonic object, to me, it seems like.

Schulman: No, I can understand why, from a philosophical standpoint, this concept could be regarded by Plato as Platonic. However, I am not a Platonist and I'm not making a Platonic argument. There it is. I believe that Aristotle had the concept of the atom but later science started talking about electrons and neutrons and protons and sub-particles called quarks. So just because the language seems to say something which was said by the ancients doesn't mean it's equivalent.

Kinsella: Sure. Sure. Anyway, I'm going to tie it up now. I'm a little upset with you

because I asked you to keep this to thirty minutes and you insisted on going a whole hour, Neil.

舒尔曼：可能有多个副本。但我会这样表述，变量是载体的数量。被承载的仍然只有一个独特的对象。

金塞拉：是的。所以它是一个普遍的东西，或者它是一个柏拉图式的……这就是为什么在我看来它像是一个柏拉图式的对象。

舒尔曼：不，我能理解为什么从哲学的角度来看，柏拉图会把这个概念视为柏拉图式的。然而，我不是一个柏拉图主义者，我也不是在提出一个柏拉图式的论点。就是这样。我相信亚里士多德有原子的概念，但后来科学开始谈论电子、中子、质子和被称为夸克的亚粒子。所以仅仅因为语言似乎在说古人说过的话，并不意味着它是等同的。

金塞拉：当然。当然。总之，我现在要结束了。我有点生你的气，因为我要求你把时间控制在 30 分钟内，而你坚持要讲整整一个小时，尼尔。

Schulman: I'm sorry. How much did we actually use?

Kinsella: [Laughs] No, I'm just joking. I don't know because I have it broken up. Probably about an hour and five minutes.

Schulman: Well, I don't have a problem with that. Kinsella: No, no, I'm joking.

Schulman: But then again, you and I have no problem being loquacious.

Kinsella: That's true. That's true. Well, I appreciate your time and your sincerity on this issue. I think for now we'll have to agree to disagree, but at least people can listen to this and see where you're coming from and evaluate the different ways of looking at this stuff.

Schulman: I appreciate it very much. Thank you.

Kinsella: All right Neil. Hold on, hold on after I stop and we'll chat. Talk to you later. Thanks man.

Schulman: Okay.

金塞拉：（笑）不，我只是在开玩笑。我不知道，因为我的是分开记录的。大概一个小时零五分钟。

舒尔曼：嗯，我对此没意见。

金塞拉：不，不，我在开玩笑。

舒尔曼：但话说回来，你和我都不介意话多。

金塞拉：这是真的。这是真的。嗯，我很感谢你在这个问题上花费的时间和你的真诚。我想目前我们只能求同存异了，但至少人们可以听这个对话，了解你的观点，并评估看待这些问题的不同方式。

舒尔曼：我非常感激。谢谢。

金塞拉：好的，尼尔。等我停止录制后等一下，我们再聊。回头再聊。谢谢，伙计。

舒尔曼：好的。

第十八章 稀缺与非稀缺财货

Goods, Scarce and Nonscarce

Originally published in 2010, with co-author Jeffrey Tucker.* This emerged out of many discussions he and I had about intellectual property and our respective writings on this topic. I have revised and updated the original article,† which included this authors' note: "Special thanks to BK Marcus, Doug French, Jeffrey Herbener, Raymond Walter, David Gordon, Robert Murphy, and Joseph Salerno for comments."

最初发表于 2010 年，合著者为杰弗里·塔克。*这篇文章源于他和我就知识产权进行的多次讨论以及我们各自关于这个主题的写作。我对原文进行了修订和更新，†原文包含了作者说明：“特别感谢 BK·马库斯、道格·弗伦奇、杰弗里·赫伯纳、雷蒙德·沃尔特、大卫·戈登、罗伯特·墨菲和约瑟夫·萨勒诺的评论。”

* Jeffrey A. Tucker & Stephan Kinsella, "Goods, Scarce and Nonscarce," Mises Daily (Aug. 25, 2010).

* 杰弗里·A·塔克与斯蒂芬·金塞拉，《稀缺与非稀缺财货》，米塞斯日报（2010 年 8 月 25 日）。

† My co-author has reviewed the changes made in this chapter and fully agrees with them.

† 我的合著者已经审阅了本章所做的修改，并完全同意这些修改。

Everyone who is serious about ideas now has to deal with the issue of "intellectual property," especially given the advent of digital media and the state's war on the supposed violators of the intellectual rights of others. The situation has at once become very hopeful, with more sharing of ideas than ever before in history, and extremely grim, with the federal government pressuring every internet-service provider to act as proxy enforcers of an unjust law—and twisting the arms of developing countries to adopt draconian, Western-style IP law.¹

现如今，每一个认真对待思想的人都必须面对“知识产权”问题，尤其是在数字媒体出现以及国家对所谓侵犯他人知识产权者发动战争的情况下。现在的形势既充满希望

——思想交流比历史上任何时候都多，又极其严峻——联邦政府迫使每一个互联网服务提供商充当不正义法律的代理执行者，并向发展中国家施压，要求它们采用严厉的西方模式的知识产权法。⁷⁰²

This debate, however, involves more than just IP issues. The discussion surrounding this topic has further clarified other issues, like the character of goods and property, the existence and centrality of nonscarce goods in economic life, and the role of learning in the evolution of society. This partially accounts for why the IP topic is so hot: it causes us to revisit fundamental issues over property, ownership, competition, and other areas we've mistakenly taken for granted. What follows is a summary of some fundamental ideas many of us batted around this summer.²

然而，这场论证涉及的不仅仅是知识产权问题。围绕这一话题的讨论进一步澄清了其他问题，如财货和财产的特性、非稀缺财货在经济生活中的存在和中心地位，以及学习在社会演化中的作用。这也是知识产权话题如此热门的部分原因：它促使我们重新审视有关财产、所有权、竞争和其他我们误以为理所当然的领域的基本问题。以下是我们许多人在今年夏天讨论过的一些基本观点的总结。⁷⁰³

⁷⁰² See Kinsella, “Stop the ACTA (Anti-Counterfeiting Trade Agreement),” StephanKinsella (April 11, 2010). For other and more recent material on IP imperialism, see “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.19.

参见金塞拉的《阻止《反假冒贸易协定》（ACTA）》，斯蒂芬·金塞拉（2010年4月11日）。有关知识产权帝国主义的其他最新资料，见《反对知识产权二十年后：回顾与展望》（第十五章），注释19。

⁷⁰³ For some of these discussions, see the comment threads to the following Mises Economics Blog posts: Kinsella, “The Death Throes of Pro-IP Libertarianism” (July 28, 2010); “Kinsella: Ideas are Free: The Case Against Intellectual Property: or, How Libertarians Went Wrong” (Nov. 23, 2010); “The L. Neil Smith – FreeTalkLive Copyright Dispute” (June 14, 2010); “Replies to Neil Schulman and Neil Smith re IP” (July 19, 2010); “Leveraging IP” (Aug. 1, 2010); “The Creator-Endorsed Mark as an Alternative to Copyright” (July 15, 2010); “Locke, Smith, Marx and the Labor Theory of Value” (June 23, 2010).

关于其中的一些讨论，请参阅以下米塞斯经济学博客文章的评论主题：金塞拉的《支持知识产权的自由意志主义的垂死挣扎》（2010年7月28日）；《金塞拉：思想是自由的：反对知识产权的理由，或者说自由意志主义者错在哪里》（2010年11月

稀缺性和稀缺财货 SCARCITY AND SCARCE GOODS

“Why are tangible goods property?” This is a central question of Against Intellectual Property. Or more precisely: why are there, or why should there be, property rights in material, corporeal, scarce resources? The reason for property rights is:

... the fact that there can be conflict over these goods by multiple human actors. The very possibility of conflict over a resource renders it scarce, giving rise to the need for ethical rules to govern its use. Thus, the fundamental social and ethical function of property rights is to prevent interpersonal conflict over scarce resources.³

“为什么有形物品是财产？”这是《反对知识产权》中的一个核心问题。或者更准确地说：为什么在物质的、有形的、稀缺的资源中存在或者应该存在财产权？财产权存在的原因是：

.....事实上，人类的多个行动人可能会关于这些物品而发生冲突。关于资源产生冲突的可能性本身就导致资源变得稀缺，因此需要道德规则来管理资源的使用。因此，财产权的基本社会和道德功能是防止在稀缺资源上发生人际冲突。⁷⁰⁴

On this point, we can cite Hoppe's Theory of Socialism and Capitalism, where Hoppe writes with singular clarity: “only because scarcity exists is there even a problem of formulating moral laws; insofar as goods are superabundant (‘free’ goods), no conflict

23 日）；《L·尼尔·史密斯与“自由谈话直播”的版权纠纷》（2010 年 6 月 14 日）；《对尼尔·舒尔曼和尼尔·史密斯关于知识产权的回复》（2010 年 7 月 19 日）；《知识产权的杠杆作用》（2010 年 8 月 1 日）；《创作者认可的标志作为版权的替代方案》（2010 年 7 月 15 日）；《洛克、斯密、马克思与劳动价值论》（2010 年 6 月 23 日）。

⁷⁰⁴ Kinsella, Against Intellectual Property (Auburn, Ala.: Mises Institute, 2008), p. 29. See also the related discussions in “Against Intellectual Property After Twenty Years” (ch. 15), Parts II.C and II.D, and “What Libertarianism Is” (ch. 2), passim.

金塞拉，《反对知识产权》（阿拉巴马州奥本：米塞斯研究院，2008 年），第 29 页。另见《反对知识产权二十年》（第 15 章）第 II.C 和 II.D 部分以及《何为自由意志主义》（第 2 章）相关讨论、各处。

over the use of goods is possible and no action-coordination is needed.”⁴ The logic for this insight Hoppe draws from Rothbard, and the term “free goods” he takes from Mises.⁵

关于这一点，我们可以引用霍普的《社会主义和资本主义理论》，霍普在书中写得非常清楚：“仅仅因为存在稀缺性，才会有制定道德法则的问题；只要物品是极为丰富的（‘自由’财货），就不可能在物品的使用上发生冲突，也不需要行动的协调。”⁷⁰⁵ 霍普这一见解的逻辑来自罗斯巴德，而“自由财货”一词则来自米塞斯。⁷⁰⁶

(As for the term “goods” itself, it is used by Austrians more or less as a synonym for the scarce means of action.)⁶

（至于“财货”这个术语本身，奥地利学派或多或少地将其用作行动的稀缺手段的同义词。）⁷⁰⁷

⁷⁰⁵ Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute 2010 [1989]; www.hanshoppe.com/tsc), p. 158 n.120.

汉斯-赫尔曼·霍普，《社会主义与资本主义理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010 年[1989 年]；网址：www.hanshoppe.com/tsc），第 158 页注释 120。

⁷⁰⁶ Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), chap. IV, § 1, p. 93, et pass. (discussing free goods and the general conditions of human welfare).

路德维希·冯·米塞斯，《人的行动：经济学专论》，学者版（阿拉巴马州奥本：米塞斯研究院，1998 年；网址：<https://mises.org/library/human-action-0>），第四章，第 1 节，第 93 页及其他各处（讨论自由财货和人类福利的一般条件）。

⁷⁰⁷ This is explicit in Rothbard. He writes:

The means to satisfy man’s wants are called goods. These goods are all the objects of economizing action. Such goods may all be classified in either of two categories: (a) they are immediately and directly serviceable in the satisfaction of the actor’s wants, or (b) they may be transformable into directly serviceable goods only at some point in the future—i.e., are indirectly serviceable means. The former are called consumption goods or consumers’ goods or goods of the first order. The latter are called producers’ goods or factors of production or goods of higher order.

罗斯巴德对此有明确的论述。他写道：

满足人类需求的手段被称为财货。这些财货都是经济行动的对象。这些财货都可以分为两类：(a) 它们直接服务满足行动人的欲望，或者(b) 它们只有在未来的某个时候才

Hoppe writes:

To develop the concept of property, it is necessary for goods to be scarce, so that conflicts over the use of these goods can possibly arise. It is the function of property rights to avoid such possible clashes over the use of scarce resources by assigning rights of exclusive ownership. Property is thus a normative concept: a concept designed to make a conflict-free interaction possible by stipulating mutually binding rules of conduct (norms) regarding scarce resources.⁷

霍普写道：

要阐述财产的概念，物品必须具有稀缺性，这样才有可能在使用这些物品时产生冲突。财产权的功能就是通过分配排他性所有权来避免在使用稀缺资源时可能发生的冲突。因此，财产是一个规范性的概念：一个通过约定关于稀缺资源的相互具有约束

可能转化为可以直接服务的财货——即属于间接服务的手段。前者被称为消费品或消费者财货或一阶财货。后者称为生产者财货或生产要素或高阶财货。
Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholars ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 1, § 3 (citations omitted). This equivalence between means and goods is also implicit in Mises’ s writings, as well. See, e.g., Mises, *Human Action*, chap. IV, § 1, p. 93:
Economic goods which in themselves are fitted to satisfy human wants directly and whose serviceableness does not depend on the cooperation of other economic goods, are called consumers’ goods or goods of the first order. Means which can satisfy wants only indirectly when complemented by cooperation of other goods are called producers’ goods or factors of production or goods of a remoter or higher order.
穆瑞·N·罗斯巴德，《人、经济与国家》及《权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；网址：<https://mises.org/library/man-economy-and-state-power-and-market>），第一章，第 3 节（引文省略）。在米塞斯的著作中也隐含着手段与财货之间的这种等同性。例如，参见米塞斯，《人的行动》，第四章，第 1 节，第 93 页：
经济财货本身可以直接满足人类的需求，其服务性不依赖于其他经济财货的合作，这些财货被称为消费品或第一阶财货。只有在其他财货的配合下才能间接满足需求的手段，称为生产者财货或生产要素，或间接或更高阶的财货。

力的行为规则（规范）而使无冲突的互动成为可能的概念。⁷⁰⁸

Even in the case of the Garden of Eden, where superabundance would mean that all things we ever wanted were in our grasp, Hoppe explains that there would still be a need for property rights. This is because the human body itself is scarce: choices about who can use it and how it can be used necessarily exclude other choices. One cannot simultaneously eat an apple, smoke a cigarette, climb a tree, and build a house. Likewise, as Hoppe notes:

... because of the scarcity of body and time, even in the Garden of Eden property regulations would have to be established. Without them, and assuming now that more than one person exists, that their range of action overlaps, and that there is no preestablished harmony and synchronization of interests among these persons, conflicts over the use of one's own body would be unavoidable. I might, for instance, want to use my body to enjoy drinking a cup of tea, while someone else might want to start a love affair with it, thus preventing me from having my tea and also reducing the time left to pursue my own goals by means of this body. In order to avoid such possible

⁷⁰⁸ Hoppe, A Theory of Socialism and Capitalism, p. 18. Note here the focus on the possibility of conflict and its connection to the concept of scarcity and the need for property rights. Thus, as noted elsewhere in this volume, in recent years I (Kinsella) sometimes use terms like rivalrous or “conflictible,” instead of, or as an augment to, the concept of “scarce,” to avoid equivocation from IP socialists. See “Against Intellectual Property After Twenty Years” (ch. 15), n.29 et pass.; Kinsella, “On Conflictability and Conflictible Resources,” StephanKinsella.com (Jan. 31, 2022); “What Libertarianism Is” (ch. 2), n.5; “How We Come to Own Ourselves” (ch. 4), n.10. In this chapter I have retained our original use of the term “scarce” but it should be understood to mean “conflictible.”

霍普，《社会主义与资本主义理论》，第 18 页。请注意，这里的重点是冲突的可能性及其与稀缺性概念和产权需求的联系。因此，正如本书其他地方所指出的，近年来我（金塞拉）有时会使用竞争性或“可引发冲突的”等术语来代替或补充“稀缺”概念，以避免知识产权社会主义者的含糊其辞。参见《反对知识产权二十年》（第 15 章），第 29 节等；金塞拉：《论冲突性与可引发冲突的资源》，StephanKinsella.com（2022 年 1 月 31 日）；《何为自由意志主义》（第 2 章），注释 5；《我们如何拥有自己》（第 4 章），注释 10。在这一章中，我保留了我们最初对“稀缺”一词的使用，但应理解为它的意思是“可引发冲突的”。

*clashes, rules of exclusive ownership must be formulated. In fact, so long as there is action, there is a necessity for the establishment of property norms.*⁸

霍普解释说，即使在伊甸园里，物资极为丰富，我们想要的所有东西都唾手可得，但仍然需要财产权。这是因为人体本身是稀缺的：关于谁可以使用它以及如何使用它的选择必然排除其他选择。一个人不可能同时吃苹果、抽烟、爬树和盖房子。同样，霍普指出：

.....由于身体和时间的稀缺，即使在伊甸园里也必须制定财产规则。如果没有这些规则，假定现在存在不止一个人，他们的行动范围相互重叠，而且这些人之间没有预先确定的和谐与利益同步，那么关于自身身体使用的冲突将不可避免。例如，我可能想用我的身体享受喝一杯茶，而另一个人可能想用它开始一段恋情，从而阻止我喝茶，并且也减少了我通过这个身体追求自己目标的剩余时间。为了避免这种可能的冲突，必须制定排他性的所有权规则。事实上，只要有行动，就有必要建立财产规范。⁷⁰⁹

A property right in one's scarce body is a precondition for action even in the face of superabundance. Hoppe goes so far as to say that the body is the "prototype of a scarce good."⁹ Here he agrees with Jefferson's teacher Count Destutt de Tracy: "property exists in nature: for it is impossible that every one should not be the proprietor

⁷⁰⁹ Hoppe, A Theory of Socialism and Capitalism, p. 20 - 21. Thus:

This "ownership" of one's own body implies one's right to invite (agree to) another person's doing something with (to) one's own body: my right to do with my body whatever I want, that is, includes the right to ask and let someone else use my body, love it, examine it, inject medicines or drugs into it, change its physical appearance and even beat, damage, or kill it, if that should be what I like and agree to. [p. 22]

汉斯-赫尔曼·霍普，《社会主义与资本主义理论》，第 20-21 页。因此：

对自己身体的这种“所有权”意味着一个人有权邀请（同意）他人对自己的身体做某些事情：我有权对自己的身体做任何我想做的事情，也就是说，包括有权要求并允许他人使用我的身体、爱护它、检查它、向它注射药物或毒品、改变它的外貌，甚至殴打、伤害或杀死它，如果这是我喜欢并同意的。[第 22 页]

of his individuality and of his faculties.”¹⁰

即使面对物资极为丰富的情况，对自己稀缺的身体的财产权也是行动的一个前提条件。

霍普甚至说身体是“稀缺物品的原型”。⁷¹⁰在这里，他与杰斐逊的老师德斯蒂·德·特拉西伯爵（Count Destutt de Tracy）的观点一致：“财产存在于自然之中：因为每个人都不可能不是其个性和能力的所有者”。⁷¹¹

As Hoppe writes:

The answer to the question what makes my body “mine” lies in the obvious fact that this is not merely an assertion but that, for everyone to see, this is indeed the case. Why do we say, “This is my body”? For this, a twofold requirement exists. On the one hand it must be the case that the body called “mine” must indeed (in an intersubjectively ascertainable way) express or “objectify” my will. Proof of this, as far as my body is concerned, is easy enough to demonstrate: When I announce that I will now lift my arm, turn my head, relax in my chair (or whatever else) and these announcements then become true (are fulfilled), then this shows that the body which does this has been indeed appropriated by my will. If, to the contrary, my announcements showed no systematic relation to my body’s actual behavior, then the proposition “this is my body” would have to be considered as an empty, objectively unfounded assertion; and likewise this proposition would be rejected as incorrect if following my announcement not my

⁷¹⁰ See “What Libertarianism Is” (ch. 2), at n.9; “How We Come to Own Ourselves” (ch. 4), at n.2; “A Libertarian Theory of Punishment and Rights” (ch. 5), at n.60; “Dialogical Arguments for Libertarian Rights” (ch. 6), at n.6 et pass. 见《何为自由意志主义》（第 2 章），注释 9；《我们如何拥有自己》（第 4 章），注释 2；《自由意志主义的惩罚与权利理论》（第 5 章），注释 60；《自由意志主义权利的对话论证》（第 6 章），注释 6 以及随后部分。

⁷¹¹ The Count Destutt Tracy, *A Treatise on Political Economy*, Thomas Jefferson, trans. (Auburn, Ala.: Mises Institute, 2009 [1817]; <https://mises.org/library/treatise-political-economy-0>), p. 125. For further elaboration on Hoppe’s views on body-ownership, see Kinsella, “How We Come to Own Ourselves” (ch. 4). 安托万·路易·克劳德·德斯蒂·德·特拉西伯爵，《政治经济学概论》，托马斯·杰斐逊译（阿拉巴马州奥本：米塞斯研究院，2009 年[1817 年]；网址：<https://mises.org/library/treatise-political-economy-0>），第 125 页。关于霍普对身体所有权观点的进一步阐述，参见金塞拉的《我们如何拥有自己》（第 4 章）。

arm would rise but always that of Müller, Meier, or Schulze (in which case one would more likely be inclined to consider Müller's, Meier's, or Schulze's body "mine"). On the other hand, apart from demonstrating that my will has been "objectified" in the body called "mine," it must be demonstrated that my appropriation has priority as compared to the possible appropriation of the same body by another person.

As far as bodies are concerned, it is also easy to prove this. We demonstrate it by showing that it is under my direct control, while every other person can objectify (express) itself in my body only indirectly, i.e., by means of their own bodies, and direct control must obviously have logical-temporal priority (precedence) as compared to any indirect control. The latter simply follows from the fact that any indirect control of a good by a person presupposes the direct control of this person regarding his own body; thus, in order for a scarce good to become justifiably appropriated, the appropriation of one's directly controlled "own" body must already be presupposed as justified. It thus follows: If the justice of an appropriation by means of direct control must be presupposed by any further-reaching indirect appropriation, and if only I have direct control of my body, then no one except me can ever justifiably own my body (or, put differently, then property in/of my body cannot be transferred onto another person), and every attempt of an indirect control of my body by another person must, unless I have explicitly agreed to it, be regarded as unjust(ified).¹¹

霍普写道：

是什么让我的身体成为“我的”？这个问题的答案在于一个显而易见的事实，那就是这不仅仅是一种断言，而且对于每个人来说，的确事实如此。我们为什么要说“这是我的身体”？这需要两方面的条件。一方面，被称为“我的”身体必须确实（以一种主体间可确定的方式）表达或“客观化”我的意志。就我的身体而言，这一点很容易证明：当我宣布我现在要抬胳膊、转头、在椅子上小憩（或其他任何事情），而这些宣布随后变成了事实（得到了实现），那么这就表明，做出这些动作的身体确实被我的意志所占有。相反，如果我的宣布与我的身体的实际行为没有系统的联系，那么“这

是我的身体 "这个命题就必须被视为一个空洞的、客观上毫无根据的断言；同样，如果在我宣布之后，不是我的胳膊抬起来，而是穆勒、迈尔或舒尔茨的胳膊抬起来（在这种情况下，人们更倾向于认为穆勒、迈尔或舒尔茨的身体是“我的”），那么这个命题就会被视为不正确而遭到否定。另一方面，除了证明我的意志在被称为“我的”的身体中被“客观化”之外，还必须证明我的占有与其他人对同一身体的可能占有相比具有优先性。

就身体而言，证明这一点也很容易。我们可以通过证明它是在我的直接控制之下，而其他他人只能间接地，即通过他们自己的身体，在我的身体中客观化（表达）自己来证明这一点，而与任何间接控制相比，直接控制显然必须具有逻辑-时间上的优先性（优先权）。后者仅仅源于这样一个事实，即一个人对一种物品的任何间接控制都以这个人对自己身体的直接控制为前提；因此，为了使一种稀缺物品被合理正当地占有，对一个人直接控制的“自己的”身体的占有必须已经被预设为合理正当的。由此得出：如果通过直接控制进行的占有的正当性必须被任何进一步的间接占有有所预设，并且如果只有我对我的身体有直接控制，那么除我之外没有人能够合理正当地拥有我的身体（或者，换句话说，我身体的所有权不能转让给另一个人），并且除非我明确同意，否则另一个人对我的身体的任何间接控制的尝试都必须被视为不正当的。⁷¹²

⁷¹² Quoted in “How We Come to Own Ourselves” (ch. 4), text at n.17. See also idem, *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/esh), pp. 7 – 8 (discussing each human’s unique connection to

But let's be clear what we do not mean by the term scarce in the sense that it applies to this discussion. Something can have zero price and still be scarce: a mud pie, soup with a fly in it, a computer that won't boot. So long as no one wants these things, they are not economic goods. And yet, in their physical nature, they are scarce because if someone did want them, and they thus became goods, there could be contests over their possession and use. They would have to be allocated by either violence or market exchange based on property rights.

但我们要明确，稀缺一词在本讨论中并不是指什么。有些东西可以是零价格，但仍然是稀缺的：泥馅饼、有苍蝇的汤、开不了机的电脑。只要没有人想要这些东西，它们就不是经济财货。然而，就其物理性质而言，它们是稀缺的，因为如果有人想要这些东西，它们就成了财货，就会出现对其占有和使用的争夺。它们将不得不通过暴力或基于财产权的市场交换来进行分配。

Nor does scarcity necessarily refer to whether a good is in shortage or surplus, nor to whether there are only a few or whether there are many. There can be a single "owner" of a nonscarce good (a poem I just thought of, which I can share with you without your taking it away from me) or a billion owners of scarce goods (paperclips, which, despite their ubiquity, are still an economic good).

稀缺也不一定是指一种财货是短缺还是过剩，也不是指只有很少或者是有很多。非稀缺物品可能只有一个“所有者”（我刚刚想到的一首诗，我可以和你分享，你也不会把

his own body). See also Emanuele Martinelli, "On Whether We Own What We Think" (draft, 2019; <https://perma.cc/LQ98-HSAB>), p. 3: regarding Locke's notion of self-ownership, "the basic intuition is that no one could metaphysically control another's body and mind." See also John Locke, *Second Treatise on Civil Government* (1690; <https://www.johnlocke.net/2022/07/two-treatises-of-government.html>), chap. 5, "Of Property."

引自《我们如何拥有自己》（第四章），注释 17 处的文本。另见同书，《经济、社会与历史》（阿拉巴马州奥本：米塞斯研究院，2021 年；网址：www.hanshoppe.com/esh），第 7-8 页（讨论每个人与其自身身体的独特联系）。另见伊曼纽尔·马蒂内利，《论我们是否拥有我们的思想》（草稿，2019 年；网址：<https://perma.cc/LQ98-HSAB>），第 3 页：关于洛克的自我所有权概念，“基本直觉是，从形而上学角度讲，没有人能够控制另一个人的身体和心灵”。另见约翰·洛克，《政府论：下》（1690 年；网址：<https://www.johnlocke.net/2022/07/two-treatises-of-government.html>），第五章，“论财产”。

它拿走），稀缺物品也可能有十亿个所有者（回形针，尽管它无处不在，但仍然是一种经济财货）。

Nor does scarcity necessarily refer to tangibility only, to the ability to physically manipulate the thing, or to the ability to perceive something with the senses; airspace and radio airwaves¹² are intangible scarce goods and therefore potentially held as property and therefore priced, while fire is an example of a tangible good of potentially unlimited supply.

稀缺性也不一定仅指有形性，即实际操纵事物的能力，或用感官感知事物的能力；空间和无线电波⁷¹³都是无形的稀缺物品，因此有可能被作为财产持有，并因此被定价，而火则是可能无限供应的有形物品的一个例子。

Instead, the term scarcity here refers to the possible existence of conflict over the possession of a finite thing. It means that a condition of contestable control exists for anything that cannot be simultaneously owned: my ownership and control excludes your control.

相反，“稀缺”一词在这里指的是对有限事物的占有可能存在冲突。这意味着对于任何不能同时被拥有的东西，都存在一种有争议的控制状态：我的所有权和控制排除了你的控制。

复制和非稀缺财货 REPLICATION AND NONSCARCE GOODS

In contrast, there are nonscarce goods. A classic statement on them comes from Frank Fetter's Economic Principles:

⁷¹³ See B.K. Marcus, “The Spectrum Should Be Private Property: The Economics, History, and Future of Wireless Technology,” Mises Daily (Oct. 29, 2004; <https://perma.cc/9VMQ-5VE2>); Kinsella, “Why Airwaves (Electromagnetic Spectra) Are (Arguably) Property,” Mises Economics Blog (Aug. 9, 2009).

参见 B.K. 马库斯的《频谱应是私有财产：无线技术的经济学、历史与未来》，发表于米塞斯日报（2004 年 10 月 29 日；网址：<https://perma.cc/9VMQ-5VE2>）；金塞拉的《为什么无线电波（电磁频谱）（可论证为）是财产》，发表于米塞斯经济学博客（2009 年 8 月 9 日）。

[S]ome things, even such as are indispensable to existence, may yet, because of their abundance, fail to be objects of desire and of choice. Such things are called free goods. They have no value in the sense in which the economist uses that term. Free goods are things which exist in superfluity; that is, in quantities sufficient not only to gratify but also to satisfy all the desires which may depend on them.¹³

相比之下，还有非稀缺财货。弗兰克·费特的《经济学原理》中有一段关于非稀缺财货的经典论述：

[有些]东西，即使是对存在来说不可或缺的东西，也可能因为其丰富性而无法成为欲望和选择的对象。这些东西被称为自由财货。按照经济学家使用这一术语的意义，它们没有价值。自由财货是以过剩存在的物品，也就是说，其数量不仅足以满足而且能够完全满足可能依赖于它们的所有欲望。⁷¹⁴

An example of a necessarily nonscarce good is a thing in demand that can be replicated without limit, so that I can have one, you can have one, and we can all have one. This is a condition under which there can be no contest over ownership. As Hoppe observes, under these conditions, there would be no need for property norms governing their ownership and use.

一个必然非稀缺财货的例子是一种有需求且可以无限复制的东西，这样我可以有一件，你也可以有一件，我们大家都可以有一件。在这种情况下，不存在所有权之争。正如霍普所言，在这种情况下，就不需要关于其所有权和使用的财产规范。

This nonscarce status might apply to many things but it always applies to nonfinite

⁷¹⁴ Frank A. Fetter, *Economics*—Vol. 1: *Economic Principles* (NY: The Century Co., 1915; <https://mises.org/library/economic-principles>), chap. 3, § 2. See also the Mises citation in note 5, above.

弗兰克·A·费特，《经济学——第一卷：经济原理》（纽约：世纪公司，1915年；网址：<https://mises.org/library/economic-principles>），第三章，第2节。另见上文注释5中的米塞斯的引文。

things, that is, goods that can be copied without limit, with no additional copy having displaced the previous copy and with no degradation in the quality of the copied good from the original good.

这种非稀缺性可能适用于许多物品，但它总是适用于非有限的物品，即可以无限复制的物品，没有任何额外的复制取代了先前的复制，而且复制物品的质量与原始物品相比没有任何下降。

Jefferson himself made the lasting statement that clearly distinguishes the two types of goods:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.¹⁴

杰斐逊本人发表了一个永久性的声明，明确区分了这两种类型的财货：

“如果大自然使任何一种东西比其他所有东西都更不容易成为排他性财产，那就是被称为思想的思维力量的作用。一个人只要将其保留在自己心中，就可以排他性地拥有它；但一旦被泄露出去，它就会强行进入每个人的占有之中，接收者无法摆脱它。它的特殊性质还在于，没有人会因为其他人拥有它的全部而拥有得更少。从我这里接

收一个想法的人，在不减少我的想法的情况下自己获得了教导；就像在我这里点燃火把的人，在接受光明的同时，也不会使我变得黑暗。思想应该在全球范围内自由传播，以便对人类进行道德教育和相互教育，并改善人类的状况，这似乎是大自然特别而仁慈地设计的，因为大自然让思想像火一样，可以在所有空间中传播，而不会在任何一点上降低其密度，又像我们呼吸、活动和拥有物质存在的空气一样，无法被限制或被排他性地占有。因此，发明在本质上不可能成为财产的主体。⁷¹⁵

The idea is not just the spawn of Enlightenment thought. St. Augustine also took note of the peculiar goods quality of words.

这一观点并不只是启蒙思想的产物。圣奥古斯丁也注意到了言语特有的财货属性。

The words I am uttering penetrate your senses, so that every hearer holds them, yet withholds them from no other. ... I have no worry that, by giving all to one, the others are deprived. I hope, instead, that everyone will consume everything; so that, denying no other ear or mind, you take all to yourselves, yet leave all to all others. But for individual failures of memory, everyone who came to hear what I say can take it all off, each on one's separate way.¹⁵

我正在说出的话语穿透你的感官，以便每个听众都能拥有它们，同时又不会从其他人那里夺走它们。……我不担心把所有的话语都给了一个人，其他人就会被剥夺。相反，我希望每个人都能消费所有的话语；这样，在不拒绝任何其他耳朵或心灵的情况下，你们把所有的话语都据为己有，同时又把所有的话语都留给其他人。要不是因为个人的记忆失误，每个来听我说话的人都可以把所有的话语都带走，以各自独特的方式。

⁷¹⁵ See “Thomas Jefferson to Isaac McPherson 13 Aug. 1813,” Founders Online (text formatted; <https://founders.archives.gov/documents/Jefferson/03-06-02-0322>). 参见《托马斯·杰斐逊致艾萨克·麦克弗森，1813年8月13日》，国家档案在线（文本已排版；网址：<https://founders.archives.gov/documents/Jefferson/03-06-02-0322>）。

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Imagine if Jefferson's and Augustine's descriptions of ideas applied to finite things. Let's say that someone owns a magic bagel. He could give a friend a bagel and another would magically appear in its place, allowing him to keep his bagel at the same time. The very act of giving it away would create an exact copy of it. A neighbor could do the same. Potentially, everyone in the world could have an identical bagel—all equally delicious.

想象一下，如果杰斐逊和奥古斯丁对思想的描述适用于有限的事物。假设某人拥有一个神奇的百吉饼。他可以给朋友一个百吉饼，然后另一个百吉饼会神奇地出现在原来的位置，这样他就可以同时保留自己的百吉饼。送出百吉饼的行动本身就会创造出一个一模一样的百吉饼。邻居也可以这样做。潜在地，世界上的每个人都可以拥有一个完全相同的百吉饼——都同样美味。

This magic bagel would then constitute what has been traditionally called a free good or what we are now calling a nonscarce good—something that can be possessed unto infinity and by an unlimited number of people without displacing or degrading the original. With free goods, or nonscarce goods, there is no conflict over ownership.

这种神奇的百吉饼就构成了传统上所说的自由财货，或者我们现在所说的非稀缺财货——一种可以被无限拥有且可以被无限多的人拥有而不会取代或降低原物的东西。对于自由财货或非稀缺财货，不存在所有权冲突。

You could say that you have a property right in the magic bagel, but it would be meaningless because anyone could "take it" by the act of replicating it. It cannot be owned in the traditional sense. I could of course keep my magic bagel under wraps and never let anyone know about it. But that changes nothing about its magic properties. It remains a good that can be copied without limit. And my ability to keep the secret is a result of my property right in—my ability to control—the scarce resource of my body.

你可以说你对神奇百吉饼拥有财产权，但这毫无意义，因为任何人都可以通过复制行

⁷¹⁶ Garry Wills, *St. Augustine: A Life* (Viking Penguin, 1999), p. 145.
加里·威尔斯，《圣奥古斯丁传》（维京企鹅出版社，1999年），第145页。

动“拿走”它。从传统意义上讲，它不能被拥有。当然，我也可以保密我的魔法百吉饼，不让任何人知道。但这并不能改变它的神奇特性。它仍然是一种可以无限复制的物品。我之所以能够保守秘密，是我有能力控制我的身体这一稀缺资源的财产权的结果。

Under these conditions, the status of the bagel as a free good is due to its replicability. If it could not be so replicated, if its magic went away, it would become a scarce good. Once it became public, there would be a contest over ownership of that bagel (if I have it, you can't have it).

在这种情况下，百吉饼之所以成为自由财货，是因为它具有可复制性。如果它不能被复制，如果它的魔力消失，它就会变成一种稀缺财货。一旦它被公开，就会对那个百吉饼的所有权产生争夺（如果我有它，你就不能有它）。

So it is with all things: if there is a zero-sum contest over its possession, it is scarce; if there need not be rivalry over its ownership, and its capacity for copying and sharing is infinite, it is nonscarce.

万事万物皆是如此：如果对其占有存在零和竞争，那么它就是稀缺的；如果对其所有权勿需竞争，并且其复制和共享的能力是无限的，那么它就是非稀缺的。

Does that sound fanciful? With regard to bagels, it is. But what if something like the magic-bagel example becomes real? Yesterday we could replicate information with photocopiers and print any number of perfect copies with a laser printer; and now we can copy and reproduce documents and files digitally. What if so-called 3D printers become widespread? These are devices that can fabricate various material objects by using a "recipe." In principle one could see a bagel (or car) that he likes, find or create a blueprint or recipe for it, and have a copy printed using one's own 3D printer, energy, and raw materials.

这听起来是不是有点天方夜谭？就百吉饼而言，的确如此。但如果类似神奇百吉饼的例子变成现实会怎样呢？昨天，我们可以用复印机复制信息，用激光打印机打印任意数量的完美副本；现在，我们可以用数字方式复制和复印文件和文档。如果所谓的 3D 打印机变得普及会怎样呢？这些是可以使用“配方”制造各种实物的设备。原则上，一个人可以看到他喜欢的百吉饼（或汽车），找到或创建一个蓝图或配方，然后使用自己的 3D 打印机、能源和原材料打印出一个副本。

One can only imagine the IP police stopping people from using their 3D printers to make useful tools and goods based on the idea that doing so is somehow “stealing” the property of others that is still sitting in their homes.¹⁶

可以想象，知识产权警察阻止人们使用他们的 3D 打印机制造有用的工具和财货，其依据的理念是这样做在某种程度上是“窃取”仍放在别人家里的他人财产。⁷¹⁷

In any case, for now the technology for 3D copying and printing is in its infancy. Not so for digitally encoded information. For example, consider a file on your hard drive. It can be packaged up and sent via email. The file does not disappear. A perfect copy of that file appears in someone else’s email. That person could similarly forward (a copy of) the file to another person. This can happen billions and trillions of times without compromising the integrity of the first file. In effect, this file is like the magic bagel, a nonscarce good. If the file is on a server, it can be accessed by billions of people, each of whom could similarly host the file until it multiplies without limit.¹⁷

无论如何，3D 复制和打印技术目前还处于起步阶段。数字编码信息则不然。例如，考虑一下硬盘驱动器上的文件。它可以打包并通过电子邮件发送。文件不会消失。该文件的完美副本会出现在其他人的电子邮件中。这个人同样可以将该文件的副本转发给另一个人。这种情况可以发生数十亿乃至数万亿次，而不会损害第一个文件的完整性。实际上，这个文件就像神奇的百吉饼一样，是一种非稀缺财货。如果该文件在服务器上，数十亿人可以访问它，每个人都可以类似地托管该文件，直到它无限复制。⁷¹⁸

⁷¹⁷ See “Against Intellectual Property After Twenty Years” (ch. 15), at n.27, for further discussion of this issue.

关于这一问题的进一步讨论，见《反对知识产权二十年》（第 15 章），注释 27。

⁷¹⁸ For further discussion of why it is impossible to own information (or things like Bitcoin) precisely because it is replicable and always has to be stored on an underlying, already-owned medium, see “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), at n.31; “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), at notes 3 and 5; “Against Intellectual Property After Twenty Years” (ch. 15), at n.69; and “Conversation with Schulman about Logorights and Media-Carried Property” (ch. 17).

关于为何不可能拥有信息（或像比特币之类的事物）的确切原因，即因为信息是可复制的且总是必须存储在一个潜在的、已经被拥有的媒介上，若要进一步讨论这个问题，请参见《自由意志主义的契约理论：所有权转让、有约束力的承诺与不可让渡性》（第

Consider the power of this nonscarce good. That file might contain a database with all the world's financial transactions for last month. The record of those transactions would be nonscarce. The file could contain images of all the paintings in the National Gallery of Art. These images would be nonscarce. It could contain videos of all college lectures given in the United States last semester. Again, nonscarce.

考虑一下这种非稀缺财货的力量。那个文件可能包含一个数据库，其中有上个月全世界的所有金融交易记录。那些交易记录将是非稀缺的。这个文件可能包含国家美术馆中所有绘画的图像。这些图像将是非稀缺的。它可能包含上学期美国所有大学讲座的视频。同样，也是非稀缺的。

All of this is possible and practicable. We experience this every day. We do this every day. All the files on the World Wide Web, unless they have been specially coded to be otherwise, constitute free goods.

所有这一切都是可能且可行的。我们每天都在经历这些。我们每天都在这样做。万维网上的所有文件，除非经过特殊编码，否则都是免费财货。

It seems clear that we are moving into a world in which we have to account for the existence of massive and growing numbers of goods that are not scarce, in the sense that they are potentially replicable into infinity. These goods fall outside the strict confines needed for rationing. There need be no conflict and hence no need for traditional property rights for them.

很明显，我们正在进入一个世界，在这个世界里，我们必须考虑到大量且不断增加的非稀缺财货的存在，这里所说的非稀缺是指它们有可能被无限复制这些财货不在定量供给所需的严格限制范围之内，不存在冲突，因此也不需要传统的财产权。

稀缺与非稀缺财货 GOODS, SCARCE AND NONSCARCE

One helpful way to understand this is to classify all goods as either finite and therefore normally scarce or nonfinite and therefore naturally nonscarce. This distinction appears

九章），注释 31；《出售并不意味着拥有所有权，反之亦然：一个剖析》（第十一章），注释 3 和 5；《反对知识产权二十年》（第十五章），注释 69；以及《与舒尔曼就商标权和媒介承载财产的对话》（第十七章）。

from time to time in the history of thought.¹⁸ Property rights are essential for scarce goods. It is these scarce goods that serve as means for action, while nonscarce goods that can be copied without displacing the original are not means but guides for action.¹⁹ It would be ridiculous to speak of some kind of “social ownership” over scarce goods.²⁰ Scarce goods can only be owned by one person at a time. Sure, you can share them, but that is just a means of allocating a scarce good that changes nothing about the intrinsic nature of the good. In the end, all attempts at socializing scarce resources lead to state ownership and the well-known chaos associated with it.

理解这一点的一个有用方法是将所有财货分为两类：一类是有限的，因此通常是稀缺的；另一类是无限的，因此自然是非稀缺的。这种区分在思想史上不时出现。⁷¹⁹财产权对于稀缺财货来说至关重要。正是这些稀缺财货充当着行动的手段，而可以被复制且不会取代原件的非稀缺财货不是行动的手段，而是行动的指南。⁷²⁰说对稀缺财货实行某种“社会所有制”是荒谬的。⁷²¹稀缺财货在同一时间只能由一个人拥有。当然，你

⁷¹⁹ An example is Armen Alchian and William Allen, who write: “A good is anything desired by at least one person. Goods may be either free goods or economic (that is, scarce) goods.” Armen Alchian & William R. Allen, *Exchange and Production: Competition, Coordination, & Control*, 3d ed. (Belmont, California: Wadsworth, 1983), p. 14. See also the Mises reference in note 5, above.

一个例子是阿尔钦（Armen Alchian）和威廉·艾伦（William Allen），他们写道：“财货是至少有一个人想要的任何东西。财货可以是免费财货，也可以是经济（即稀缺）财货。”阿尔钦和威廉·R·艾伦，《交换与生产：竞争、协调与控制》，第三版（加利福尼亚州贝尔蒙特：沃兹沃思出版社，1983年），第14页。另见上文注释5中的米塞斯的参考文献。

⁷²⁰ For further discussion of why property rights apply to scarce resources or means of action but not to the knowledge that guides action, see “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.E, at notes 58 – 59 et pass.; “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.D. See also the Mises and Rothbard quotes at notes 32 and 33, below.

关于为何产权适用于稀缺资源或行动手段，而不适用于指导行动的知识，若要进一步讨论，请参见“二十年后反对知识产权”（第十五章），第四部分E节，注释58-59及其他各处；“无国家社会中的法律与知识产权”（第十四章），第三部分D节。另请参见下文注释32和33中的米塞斯和罗斯巴德的引述。

⁷²¹ On Rothbard’s critique of the “communist” approach to property rights assignment, see “How We Come to Own Ourselves” (ch. 4), at n.14 and “Law and

可以分享它们，但这只是分配稀缺财货的一种手段，对财货的内在性质没有任何改变。最终，所有稀缺资源社会化的尝试都会导致国家所有权以及与之相关的众所周知的混乱。

But let us return to the bagel, this time one without magic properties. What about the recipe and skills that made it? The recipe and skills can be copied by anyone. Anyone can watch and learn. The recipe can be shared unto infinity. Once the information in the recipe and the techniques of making it are released, they are free goods, nonscarce goods, or nonfinite goods.

但是，让我们再回到百吉饼上，这次是一个没有魔法特性的百吉饼。那么制作它的配方和技能呢？配方和技能可以被任何人复制。任何人都可以观看和学习。配方可以无限分享。一旦配方中的信息和制作技巧被公开，它们就是免费财货、非稀缺财货或无限财货。

What are some more examples of such naturally nonscarce goods? One person can share an idea and it can spread unto infinity, never reducing or degrading the quality of the original. Fire might be considered another example (as Thomas Jefferson said). A match can light a log without displacing the fire from the match. The times tables are another example: the grade-school teacher doesn't "give up" this knowledge when drilling it into the students. An image of anything qualifies too. One person can look at another and memorize what he or she sees, without somehow taking or replacing the original. A tune is the same way. It can be shared and replicated without limit. I can sing a song, and you can sing the same song without taking the song from me.

这种天然非稀缺财货还有哪些例子？一个人分享一个想法，它可以无限传播，而绝不会减少或降低原有想法的质量。火可以被视为另一个例子（正如托马斯-杰斐逊所说）。一根火柴可以点燃一根木头，而不会使火柴上的火消失。时数表是另一个例子：乘法口诀表是另一个例子：小学老师在向学生反复灌输这一知识时并不会“失去”这一知识。任何事物的图像也是如此。一个人可以看着另一个人，记住他或她所看到的东西，

Intellectual Property in a Stateless Society” (ch. 14), at n.27; also “Defending Argumentation Ethics” (ch. 7), n.31.
关于罗斯巴德对“共产主义”财产权分配方法的批判，参见《我们如何拥有自己》（第四章），注释 14 以及《无国家社会中的法律与知识产权》（第十四章），注释 27；还有《捍卫论证伦理学》（第七章），注释 31。

而不会以某种方式拿走或取代原来的东西。一首曲子也是如此。它可以无限制地被分享和复制。我可以唱一首歌，你也可以唱同样的歌，而不会从我这里拿走这首歌。

These goods are all nonscarce and thereby require no economization, and no property rights, as no conflict is possible. Once they are released, they need not be priced. There is no “structure of production” attached to their reproduction or allocation (hence there is no “structure of production” for the dissemination of ideas).

这些财货都是非稀缺的，因此不需要进行节约，也不需要财产权，因为不可能产生冲突。它们一旦被释放，就无需定价。在它们的再生产或分配中不存在“生产结构”（因此，在思想的传播中也不存在“生产结构”）。

To be sure, nonscarce goods can be economized and thereby commercialized by rationing the scarce means of their distribution. For example, a professor, whose time and body are scarce, is paid to share nonscarce ideas. This is a service, but once the professor's ideas are shared, they enter into the realm of all nonscarce goods. What is paid for in fact is not the idea itself but the presentation, the time required to share, the labor services of teaching, all of which are scarce goods.²¹ It is the same with a book or article. What is scarce is the medium through which the idea is expressed, which is why books, articles, and web access cost money. The ideas conveyed in them, however, are copyable without limit.

可以肯定的是，非稀缺财货可以通过对稀缺的分配手段进行配给实现节约从而商业化。例如，一位教授的时间和身体都是稀缺的，但他却有偿分享非稀缺思想。这是一种服务，但教授的思想一旦被分享，就进入了所有非稀缺财货的领域。实际上支付报酬的不是思想本身，而是呈现方式、分享所需的时间、教学的劳务服务，所有这些就是稀缺财货。⁷²²一本书或一篇文章也是如此。稀缺的是表达思想的媒介，这也是书籍、文

⁷²² Technically speaking, a service is a type of labor, which is just a type of action; and actions and services are not ownable things. For discussion of the proper classification of contracts for the “sale” of labor services, see “A Libertarian Theory of Contract” (ch. 9), Part II.C; also “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11).

从技术上讲，服务是一种劳动类型，而劳动只是一种行动类型；行动和服务不是可拥有的东西。关于服务“出售”契约的正确分类的讨论，见《自由意志主义的契约理论》（第9章）第二部分C；另见《出售并不意味着所有权，反之亦然：有一个剖析》

章和上网需要花钱的原因。然而，其中传达的思想却是可以无限复制的。

This is not an insight that applies to digital media alone. This is true regardless of the technology involved. Whether we are talking about a scribe working on velum in the 8th century or a writer working on a web-based document in the 21st century, the ideas conveyed in the words, and the image of the words themselves, are nonscarce goods, while the medium through which they are conveyed is scarce. The range and importance of nonscarce goods has been vastly expanded by the existence of digital media.

这并非仅适用于数字媒体的见解。无论涉及何种技术，这都是正确的。无论我们谈论的是 8 世纪在牛皮纸上工作的抄写员，还是 21 世纪在网络文档上创作的作家，文字所传达的思想和文字本身形象都是非稀缺财货，而传达这些思想和形象的媒介则是稀缺的。由于数字媒体的存在，非稀缺财货的范围和重要性得到了极大的扩展。

As to whether a good is naturally scarce or nonscarce, the test here is simple. If the good can be taken (shared) without displacing the original, it is always nonscarce. If taking the original means that it can no longer exist in the possession of the original owner or possessor, it is a scarce good. All goods fall into one or the other category. All nongoods (unwanted things, necessarily a contingent category)²² can of course be similarly classified. See Table 1, below.²³

至于一种财货是天然稀缺还是非稀缺，这里的检验标准很简单。如果财货可以在不取代原有财货的情况下被拿走（分享），那么它总是非稀缺的。如果拿走原来的财货意味着它不能再为原来的所有者或占有者所拥有，那么它就是稀缺财货。所有财货都属于这两类中的一类。当然，所有非财货（不需要的东西，必然是一个偶然的类别）⁷²³

（第 11 章）。
⁷²³ As Hoppe writes:

... man learns that some of the [scarce] means, some of the things that he can control, that he can move, that he can manipulate, can be referred to as **goods** and others can be referred to as “bads.” Goods would obviously be those means that are suitable in order to satisfy some needs that we have, and bads would be objects that we can control, but that would have negative repercussions on us, that would not satisfy any needs but, to the contrary, may harm us or even kill us.

正如霍普所写：
人们经过学习了解到，某些稀缺手段，某些他可以控制、移动、操作的手段，可以被

也可以进行类似的分类。见下文表 1。⁷²⁴

	Scarce	Nonscarce
Good 财货	Bagel, Factory, Shoes, People, Desk 百吉饼, 工厂, 鞋, 人, 桌子	Recipe, Idea, Tune, Image, Skill, Fire 配方、想法、曲调、图像、技能、火焰。
Nongood 非财货	Mud Pie, Poison Soup, Slug, Road Kill 泥馅饼、毒药汤、鼻涕虫、马路杀手	Bad Idea, Awful Sound, Gibberish Text 糟糕的想法, 可怕的声音, 乱码的文本

称为“财货（goods）”，而其他可能被人称之为“劣货（bads）”。财货显然会是那些适合满足我们某些需要的手段，而劣货会是那些我们能够控制，但是对我们有负面影响，不能满足任何需要，反而有害于我们甚至会杀死我们的物品。

Hoppe, “Lecture 1: The Nature of Man and the Human Condition: Language, Property, and Production,” in *Economy, Society, and History* (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/esh), p. 9. See also *ibid.*, p. 143; *idem*, *The Great Fiction: Property, Economy, Society, and the Politics of Decline* (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf), pp. x, 107, 191; *idem*, *The Economics and Ethics of Private Property*, p. 309 (mentioning “bads”).

霍普，“讲座1：人的本质与人类状况：语言、财产与生产”，收录于《经济、社会与历史》（阿拉巴马州奥本：米塞斯研究院，2021年；网址：www.hanshoppe.com/esh），第9页。另见同上，第143页；同作者，《大虚构：财产、经济、社会与衰落的政治》（第二版扩充版，米塞斯研究院，2021年；网址：www.hanshoppe.com/tgf），第x、107、191页；同作者，《私有财产的经济学与伦理学》，第309页（提到了“劣货（bads）”）。

⁷²⁴ The matrix in Table 1 is presented as a tool for mental experiment only—if anything is a nongood (necessarily a subjective idea), it is also by definition nonscarce, since all (nonexistent) demand for it is satisfied. Nonetheless, the typology illustrated in the matrix helps in categorizing the attributes of goods discussed in this article.

表 1 中的矩阵仅作为一种思维实验工具呈现——如果有任何东西是“非财货”（必然是一个主观概念），那么根据定义，它也是非稀缺的，因为对它的所有（不存在的）需求都得到了满足。尽管如此，矩阵中说明的类型学有助于对本文所讨论的财货属性进行分类。

表 1: 稀缺和非稀缺财货以及非财货

At the same time, it is also true that most things are bundles of scarce and nonscarce goods. A book is a nonscarce text conveying nonscarce ideas on scarce paper and taking up scarce space on a shelf. A key that unlocks a door is made of scarce metal, but its functioning is due to the nonscarce shape of the cut of the key, a shape that is infinitely copyable. A concert by Lady Gaga is a scarce human body backed by scarce instruments and microphones producing music and sound, which immediately become nonscarce in the performing and hearing. Tying a shoe employs scarce laces with scarce hands guided by replicable (nonscarce) skills and techniques.

同时，大多数东西确实是稀缺财货和非稀缺财货的组合。一本书是在稀缺的纸张上传达非稀缺思想的非稀缺文本，并且在书架上占用稀缺的空间。一把开锁的钥匙是由稀缺金属制成的，但它的功能取决于钥匙切口的非稀缺形状，而这种形状是可以无限复制的。Lady Gaga 的演唱会是稀缺的人体在稀缺的乐器和麦克风的衬托下产生的音乐和声音，而这些音乐和声音在表演和听觉中立即变得非稀缺。系鞋带是用稀缺的双手，在可复制（非稀缺）的技能和技巧指导下，系出稀缺的鞋带。

复制与文明 REPLICATION AND CIVILIZATION

Nonscarce goods do not need the assistance of prices to ration their availability. They are free gifts that can be shared the world over. How important are these goods? Given that they are inclusive of all information, art, know-how, and anything else that can be possessed and copied without displacement, they are hugely important. Without these gifts, the whole of learning, imitation, and world culture would come crashing down.²⁴

非稀缺财货不需要价格的协助来调节其可用性。它们是可以在全世界分享的免费礼物。这些财货有多重要呢？鉴于它们包括所有信息、艺术、技术以及任何其他可以在不被取代的情况下拥有和复制的东西，它们非常重要。没有这些礼物，整个学习、模仿和世界文化都将轰然倒塌。⁷²⁵

⁷²⁵ See the citations to Hayek’s comments about how the accumulation of a “fund of experience” helps aid human progress and the creation of wealth in “Against

We are not truly human without being part of human civilization; and there can be no civilization and progress without the spread, dissemination, and accumulation of knowledge. To be human is to be part of a learning society, a communicating society, an information-sharing society. Society is emulation-based.

如果不成为人类文明的一部分，我们就不是真正的人类；而没有知识的传播、扩散和积累，就不会有文明和进步。作为人类，就是成为一个学习型社会、一个交流型社会、一个信息共享型社会的一部分。社会是基于模仿的。

As it stands, the existence of the nonscarce good is the basis of all intellectual progress, the foundation of technological and artistic progress, and thereby a boon to civilization. It is also at the core of enterprise. Entrepreneurs succeed by imitating others who have succeeded. Their nonscarce experience and ideas are first copied and then improved, with the goal of profit. The example of success that entrepreneurs follow is itself a nonscarce good. Anyone with the means to do so is free to copy the successful idea and replicate it. The nonscarce good is the fuel of the competitive process.

就目前而言，非稀缺财货的存在是一切思想进步的基础，是科技和艺术进步的基础，从而也是文明的福音。它也是企业的核心所在。企业家通过模仿成功者取得成功。他们非稀缺的经验和想法首先被复制，然后加以改进，以实现盈利为目标。企业家效仿的成功榜样本身就是一种非稀缺财货。任何有能力的人都可以自由模仿成功的想法并加以复制。非稀缺财货是竞争过程的燃料。

In contrast, a scarce good cannot be shared without limit. It is necessarily owned and controlled by only one person at a time; even the attempt to share implies displacement (while I have it, you do not). To acquire it requires either homesteading unowned resources or stealing, transforming, or contractually acquiring (trading for) already-existing resources.²⁵ Trading is what gives rise to rationing and allocating by the price system.

相比之下，稀缺财货不能无限地分享。它必然在同一时间仅由一个人拥有和控制；即

Intellectual Property After Twenty Years” (ch. 15), at n.59

参见《反对知识产权二十年》（第十五章）注释 59 中对哈耶克关于“经验积累”如何有助于人类进步和财富创造的评论的引用。

使尝试分享也意味着取代（当我拥有它时，你就没有）。要获得它，要么拓殖无主资源，要么偷窃、改造或通过获取（交易）已有的资源。⁷²⁶交易就是价格体系的配给和分配。

Again, it would be preposterous to speak of socialism in scarce goods, because it is physically impossible to imagine two simultaneous owners of the same scarce good.²⁶ However, it is possible to speak of something like “socialism” for a good that is nonscarce by its nature, precisely because it can be infinitely copied.

再次强调，谈论稀缺财货的社会主义是荒谬的，因为在物理上不可能想象同一稀缺财货有两个同时的所有者。⁷²⁷然而，对于本质上非稀缺的财货，谈论某种类似“社会主义”

⁷²⁶ As Hoppe has explained, “One can acquire and increase wealth either through homesteading, production and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchangers. There are no other ways.” Hans-Hermann Hoppe, “Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order,” in *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute 2006 [1993]; www.hanshoppe.com/eepp), p. 50. See also related discussion in “Law and Intellectual Property in a Stateless Society” (ch. 14), text at n.82. But production presupposes the producer already owns the property that he transforms into something more desirable or useful. The only ways to acquire a particular scarce resource is to either homestead it, acquire it contractually, or steal it. (One may also transform already-owned property into the desired configuration.)

正如霍普所解释的那样：“人们要么通过拓殖、生产和契约交换，要么通过征用和剥削拓殖者、生产者或契约交换者来获取和增加财富。此外别无他法。汉斯-赫尔曼·霍普：《银行业、民族国家和国际政治：对当前经济秩序的社会学重构》，收录于《私有财产的经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年 [1993 年]；网址：www.hanshoppe.com/eepp），第 50 页。另见《无国家社会中的法律与知识产权》（第 14 章）注释 82 处的相关讨论。但是生产预先假定生产者已经拥有他将其转化为更令人渴望或有用之物的财产。获得特定稀缺资源的唯一途径要么是拓殖，要么通过契约获得，要么窃取它。（人们也可以将已经拥有的财产转化为期望的形态。）

⁷²⁷ As Hoppe observes, “Two individuals cannot be the exclusive owner of one and the same thing at the same time.” Hoppe, “How is Fiat Money Possible?,” in *The Economics and Ethics of Private Property*, p. 197. See also Hans-Hermann Hoppe, Jörg Guido H ü lsmann & Walter Block, “Against Fiduciary Media,” in Hoppe, *The Economics and Ethics of Private Property*, p. 210 n.8:

Even partners cannot simultaneously own the same thing. A and B can each own half of a household, or half the shares in it, but they each own a different 50 percent. It is as

的东西是可能的，正是因为它可以无限复制。

The nonscarce good is private so long as it is never revealed; so long as it remains a secret. Once the secret is out, the good becomes part of the commons (or socially shared, if you will) because everyone who encounters it can use it. Technology has worked to create ever more goods that have become part of the nonscarce category, and this might be seen as a major feature of technological development for all time.

非稀缺财货只要不被揭示出来，只要它仍是一个秘密，它就是私有的。一旦秘密被公开，该财货就成为公有（或社会共享）的一部分，因为每个遇到它的人都可以使用它。技术努力创造出越来越多的财货，使其成为非稀缺类别的一部分，这可能被视为技术发展的一个主要特征，历久弥新。

奥地利学派论“自由财货” AUSTRIANS ON “FREE GOODS”

Austrians have always, if sometimes only implicitly, recognized the existence of the nonscarce good, which is precisely the good in question with regard to intellectual property. Menger's 1871 book, *Principles of Economics*,²⁷ begins with the definition of a good that excludes the concern over scarcity. Something is a good, in Menger's view, when it is causally capable of satisfying a human need. This is a very broad definition.

奥地利学派的学者们一直（即使有时只是隐含地）认识到非稀缺财货的存在，而这正

logically impossible for them to own the same half as for two people to occupy the same space. Yes, A and B can both be in New York City at the same time, but only in different parts of it.

See also note 20, above.

正如霍普所指出的：“两个人不能在同一时间成为同一物品的排他性所有者。”霍普，《法定货币如何可能？》，收录于《私有财产的经济学与伦理学》，第197页。另见汉斯-赫尔曼·霍普、约尔格·吉多·许尔斯曼和沃尔特·布洛克，《反对信用媒介》，收录于霍普的《私有财产的经济学与伦理学》，第210页注释8：

即使是合伙人也不能同时拥有相同的东西。A 和 B 可以各自拥有一个家庭的一半或一半的股份，但他们各自拥有的 50%是不同的。从逻辑上讲，他们不可能拥有同样的一半，就像两个人不可能占据同样的空间一样。是的，A 和 B 可以同时在新 York 市，但只能在新 York 市的不同地方。

另见上文注释 20。

是涉及知识产权问题时所讨论的财货。门格尔 1871 年的著作《经济学原理》⁷²⁸以对财货的定义开篇，这个定义并不涉及对稀缺性的关注。在门格尔看来，当某样东西能够在因果关系上满足人类的需求时，它就是一种财货。这是一个非常宽泛的定义。

Hoppe summarizes Menger's four requirements for objects to become goods:

*The first is the existence of a human need. The second requirement is such properties as render the thing capable of being brought into a causal connection with a satisfaction of this need. That is, this object must be capable, through our performing certain manipulations with it, to cause certain needs to be satisfied or at least relieved. The third condition is that there must be human knowledge about this connection, which explains, of course, why it is important for people to learn to distinguish between goods and bads. Thus, we have human knowledge about the object, our ability to control it, and the causal power of this object to lead to certain types of satisfactory results. And the fourth factor is, as I already indicated, that we must have command of the thing sufficient to direct it to the satisfaction of the need.*²⁸

霍普总结了门格尔关于物品成为财货的四个条件：

第一个条件是存在人类需求。第二个条件是物品具有使自身能够与满足这种需求建立因果联系的属性。也就是说，通过我们对这个物品进行某些操作，这个物品必须能够导致某些需求得到满足或至少得到缓解。第三个条件是，必须有人类关于这种联系的知识，当然，这当然解释了为什么人们学会区分好坏（goods and bads）很重要。因此，我们有关于对象的人类知识、我们控制它的能力，以及这个对象导致某些类型的令人满意的结果的因果力量。第四个因素是，正如我已经指出的，我们必须对事物有足够的控制能力，以便将其用于满足需求。⁷²⁹

⁷²⁸ Carl Menger, *Principles of Economics* (Auburn, Ala.: Mises Institute 2007 [1871]; <https://mises.org/library/principles-economics>).

卡尔·门格尔，《经济学原理》（阿拉巴马州奥本：米塞斯研究院，2007 年[1871 年]；网址：<https://mises.org/library/principles-economics>）。

⁷²⁹ Hoppe, *Economy, Society, and History*, p. 9; see also Menger, *Principles of Economics*, chap. I, § 1, p. 52 et pass. The second requirement corresponds to the means being causally efficacious; the third to the actor's knowledge of causal laws; and the fourth to the availability of the means. See also related discussion in "Against Intellectual Property After Twenty Years" (ch. 15), n.58, and in Eugen von Böhm-Bawerk,

Thus, for Menger, for something to be a good, there must be human knowledge of this cause-and-effect connection, along with command over the thing so that the relationship between cause and effect can be realized. Among these goods he includes goodwill, family connections, friendship, love, religious and scientific fellowships—all of which fall into the class of things that can be replicated without displacement. Only later in the opening chapter, when discussing the issue of property, does Menger introduce the notion of scarcity and hence the need for economizing.

因此, 对于门格尔来说, 要使某样东西成为财货, 就必须有人对这种因果联系的认识, 以及对该物品的掌控权, 以便实现因果关系。在这些财货中, 他包括商誉、家庭关系、友谊、爱情、宗教和科学团体——所有这些都属于可以在不被取代的情况下进行复制的事物类别。只是在开篇的稍后部分, 在讨论财产问题时, 门格尔才引入了稀缺的概念, 从而提出了节约的必要性。

Seeing property as a subclass under the larger division of goods implies the existence of what Ludwig von Mises called a “free good”—something that is “available in superfluous abundance which man does not need to economize.”²⁹ Mises says that though they are “not the object of any action,” they are useful and even essential for production.³⁰ Giving the example of a recipe, he writes that these free goods, or nonscarce goods, render “unlimited services.” A free good “does not lose anything from its capacity to produce however often it is used; its productive power is

“Whether Legal Rights and Relationships Are Economic Goods,” George D. Huncke, trans., in Eugen von Böhm-Bawerk, *Shorter Classics of Eugen von Böhm-Bawerk* (South Holland, Ill.: Libertarian Press, 1962 [1881]), p. 57 et pass., discussed in Gael J. Campan, “Does Justice Qualify as an Economic Good?: A Böhm-Bawerkian Perspective,” *Q. J. Austrian Econ.* 2, no. 1 (Spring 1999; <https://perma.cc/G3CK-B8WB>): 21–33, p. 24. 霍普, 《经济、社会与历史》, 第9页; 另见门格尔, 《经济学原理》, 第一章, 第1节, 第52页及后续页。。第二个要求对应于手段具有因果效力; 第三个要求对应于行动人对因果规律的认识; 第四个要求对应于手段的可获得性。另见《反对知识产权二十年》(第十五章)注释58中的相关讨论, 以及欧根·冯·庞巴维克的《法律权利和关系是否是经济财货?》, 乔治·D·亨克译, 收录于欧根·冯·庞巴维克的《欧根·冯·庞巴维克短篇经典》(伊利诺伊州南荷兰: 自由意志主义出版社, 1962年[1881年]), 第57页及后续页。盖尔·J·康潘在《正义是否可被视为一种经济财货?: 从庞巴维克的视角看》中进行了讨论, 《奥地利经济学季刊》第2卷第1期(1999年春季; 网址: <https://perma.cc/G3CK-B8WB>): 21-33页, 第24页。

inexhaustible; it is therefore not an economic good.”

将财产视为财货大类下的一个子类意味着存在路德维希·冯·米塞斯所称的“免费财货”——即“以过剩的丰富程度存在，人们无需对其进行节约的东西”。⁷³⁰米塞斯说，尽管它们“不是任何行动的对象”，但它们对生产是有用的，甚至是必不可少的。⁷³¹以一个配方为例，他写道，这些自由财货或非稀缺财货提供“无限的服务”。一种自由财货“无论被使用多少次，其生产能力都不会有所损失；其生产能力是无穷无尽的；因此它不是一种需节约的财货”。

But it is no less important than normal goods: “These designs— the recipes, the formulas, the ideologies—are the primary thing; they transform the original factors— both human and nonhuman—into means.”³¹ Ideas and information are nonscarce goods, but they serve as guides to action in the use of scarce means, to transform scarce things in the world to achieve the actor’s desired end. As Mises wrote, “Action is purposive conduct. It is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and guided by ideas concerning the suitability or unsuitability of definite means.”³²

但其重要性并不亚于普通财货：“这些设计——配方、公式、意识形态——是首要的东西；它们将原始要素——包括人类的和非人类的——转化为手段。”⁷³²思想和信息是非稀缺财货，但它们在使用稀缺手段时充当行动的指南，将世界上的稀缺事物进行转化，从而实现行动人期望的目的。正如米塞斯所写：“行动是有目的的行为。它不是简单的行为，而是由价值判断产生的行为，旨在一个明确的目标，并由关于特定手段是否合适的观念所引导。”⁷³³

⁷³⁰ Mises, *Human Action*, p. 93
米塞斯《人的行动》，第93页。

⁷³¹ Ibid., p. 93; see also p. 128, re formulas and recipes.
同上，第93页；另见第128页，关于公式和方法的内容。

⁷³² Ibid., p. 142.

同上，第142页。

⁷³³ Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>), p. 34 (emphasis added). See also Guido H ü lsmann, “Knowledge, Judgment, and the Use of Property,”

Murray Rothbard elaborated:

There is another unique type of factor of production that is indispensable in every stage of every production process. This is the “technological idea” of how to proceed from one stage to another and finally to arrive at the desired consumers’ good. This is but an application of the analysis above, namely, that for any action, there must be some plan or idea of the actor about how to use things as means, as definite pathways, to desired ends. Without such plans or ideas, there would be no action. These plans may be called recipes; they are ideas of recipes that the actor uses to arrive at his goal. A recipe must be present at each stage of each production process from which the actor proceeds to a later stage. The actor must have a recipe for transforming iron into steel, wheat into flour, bread and ham into sandwiches, etc.³³

Rev. Austrian Econ. 10, no. 1 (1997; <https://perma.cc/DKQ8-JX45>): 23 – 48, p. 44 (emphasis added):

The quantities of means we can dispose of—our property—are always limited. Thus, choice implies that some of our ends must remain unfulfilled. We steadily run the danger of pursuing ends that are less important than the ends that could have been pursued. We have to choose the supposedly most important action, though what we choose is how we use our property. Action means to employ our property in the pursuit of what appears to be the most important ends. ... In choosing the most important action we implicitly select some parts of our technological knowledge for application. On this issue, see also “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.D, and “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.E. 路德维希·冯·米塞斯, 《经济科学的最终基础: 一篇方法论论文》, 新泽西州普林斯顿: D. 范诺斯特兰德公司, 1962 年; 网址: <https://mises.org/library/ultimate-foundation-economic-science>), 第 34 页 (着重号为后加)。另见吉多·许尔斯曼, 《知识、判断与财产的使用》, 《奥地利经济学评论》第 10 卷第 1 期 (1997 年; 网址: <https://perma.cc/DKQ8-JX45>): 23-48 页, 第 44 页 (着重号为后加):

我们可以支配的手段的数量——我们的财产——总是有限的。因此, 选择意味着我们的某些目的必须无法实现。我们会不断面临这样的危险: 所追求的目的不如本可以追求的目的重要。我们必须选择所谓的最重要的行动, 尽管我们选择的是如何使用我们的财产。……在选择最重要的行动时, 我们隐晦地选择了我们技术知识的某些部分进行应用。

关于这个问题, 也可参见《无国家社会中的法律与知识产权》(第 14 章) 第三部分 D 节以及《反对知识产权二十年》(第 15 章) 第四部分 E 节。

穆瑞·罗斯巴德阐述道：

还有一种独特的生产要素在每个生产过程的每个阶段都不可或缺。这就是“技术思想”，即如何从一个阶段进入另一个阶段，并最终达到所需的消费者财货。这不过是上述分析的一种应用，即对于任何行动，行动人都必须有某种计划或想法，知道如何把事物作为手段，作为明确的途径，来达到预期的目的。没有这样的计划或想法，就不会有行动。这些计划可以称为配方；它们是行动人用来达成目标的配方理念。在每个生产过程的每个阶段，行动人都必须有一个配方，以便从一个阶段进展到下一个阶段。行动人必须有将铁变成钢、将小麦变成面粉、将面包和火腿变成三明治等等的配方。⁷³⁴

As Rothbard (and Mises) recognize, once the idea comes about, it no longer has to be produced or economized. It is an “unlimited factor of production that never wears out or needs to be economized by human action.” This is precisely what a nonfinite, nonscarce good is: an unlimited factor of production.

正如罗斯巴德（以及米塞斯）所认识到的，一旦这个理念产生，它就不再需要被生产或进行节约。它是一种“无限的生产要素，永远不会耗尽，也不需要被人的行动节约”。这恰恰就是一种无限的、非稀缺财货：一种无限的生产要素。

Fetter also glimpses that ideas themselves are nonscarce goods:

The gain to the general welfare, however, can result only when the new inventions are actually embodied in machines. An invention is only an immaterial idea, and the machines in which inventions are incorporated are wealth which has a capital value. Further, a gain can result only when the use of the machines is not so high as to absorb the larger part of the gain in efficiency. Not all labor-saving inventions call for more elaborate or more costly machines. Some are merely better methods, and require no more equipment—or even less. Some of them are simpler and less costly than the forms they displace. These (unless patented) are free goods, uplifting the efficiency of production “without money and without price.”³⁴

费特也瞥见了思想本身是非稀缺财货：

⁷³⁴ Rothbard, Man, Economy, and State, with Power and Market, p. 11.
罗斯巴德，《人、经济与国家：权力与市场》，第 11 页。

然而，只有当新发明实际体现在机器中时，才能给总体福利带来增益。一项发明只是一种非物质的理念，而融入发明的机器是具有资本价值的财富。此外，只有当机器的使用成本未高到足以消耗效率提升的大部分收益时，才会产生增益。并非所有节省劳动力的发明都需要更复杂或更昂贵的机器。有些仅仅是更好的方法，不需要更多的设备——甚至更少。其中一些比它们所取代的形式更简单、成本更低。这些（除非获得专利）是自由财货，“无需金钱且无需代价”地提升生产效率。⁷³⁵

Although Fetter assumes the existence of patent rights and does not question their legitimacy, he recognizes that methods—which are merely recipes, a type of information—are nonscarce goods (he calls them “free goods”) that are freely available and increase efficiency and productivity—that is, unless they are patented, thus making them artificially scarce.

虽然费特假定了专利权的存在且并未质疑其合法性，但他认识到方法——仅仅是配方，一种信息类型——是非稀缺财货（他称之为“自由财货”），可以免费获得，并能提高效率和生产力——也就是说，它们只有被授予专利权，从而人为地使其变得稀缺。

One of the longest and most searching essays on this topic is by Eugen von Böhm-Bawerk, in his article “Whether Legal Rights and Relationships are Economic Goods.”³⁵ In this piece, Böhm-Bawerk points to several features of things that make them economic goods, among them physical possession and “the power of disposal and control.” The notion of scarcity as a precondition for calling something an “economic good” is presumed but never stated outright. However, Böhm-Bawerk added critical elements to the idea of the good, noting that personal services must also be included in this category. Whether such are truly goods is not inherent in the service itself but depends on the subjective response to that service, thus introducing to the idea of a good a subjective component.³⁶ Here Böhm-Bawerk keenly observes the interplay between materially scarce and subjectively nonscarce goods:

Be it granted that the poet's soul must have originated thought and emotion, and be it

⁷³⁵ Fetter, *Economic Principles*, 465.

费特：《经济学原理》，第 465 页。

further granted that only in another soul and through intellectual powers can those thoughts and emotions be reproduced, but the path from soul to soul leads through the physical world for one stretch of the journey and on that stretch the intellectual element must make use of the physical vehicle, that is to say, of the forces or powers of nature. The book is that physical material vehicle.³⁷

关于这个主题，篇幅最长且最具探索性的文章之一是欧根·冯·庞巴维克的《法律权利和关系是否为经济财货》⁷³⁶一文。在这篇文章中，庞巴维克指出了使事物成为经济财货的几个特征，其中包括实际占有以及“处置和控制的权力”。稀缺性作为称某物为“经济财货”的前提条件这一概念被假定存在，但从未被明确陈述。然而，庞巴维克为财货的概念增添了关键要素，他指出个人服务也必须包括在这个类别中。这种服务是否真正是财货并非取决于服务本身的内在属性，而是取决于对该服务的主观反应，从而在财货的概念中引入了主观成分。⁷³⁷在这里，庞巴维克敏锐地观察到了物质上稀缺

⁷³⁶ Böhm-Bawerk, “Whether Legal Rights and Relationships Are Economic Goods,” discussed in Campan, “Does Justice Qualify as an Economic Good?: A Böhm-Bawerkian Perspective.”

欧根·冯·庞巴维克，《法律权利和关系是否是经济物品？》，在盖尔·J·康潘的《正义是否可被视为一种经济物品？：庞巴维克的视角》中进行了讨论。

⁷³⁷ See also Hoppe, “Fallacies of the Public Goods Theory and the Production of Security,” in *The Economics and Ethics of Private Property*, pp. 8 – 9:

... looking into the distinction between private and public goods more thoroughly, we discover that the distinction turns out to be completely illusory. A clear-cut dichotomy between private and public goods does not exist, and this is essentially why there can be so many disagreements on how to classify a given good. All goods are more or less private or public and can—and constantly do—change with respect to their degree of privateness/publicness as people’s values and evaluations change, and as changes occur in the composition of the population. In order to recognize that they never fall, once and for all, into either one or the other category, one must only recall what makes something a good. For something to be a good it must be recognized and treated as scarce by someone. Something is not a good as such, that is to say; goods are goods only in the eyes of the beholder. Nothing is a good unless at least one person subjectively evaluates it as such.

另见 霍普，《公共商品理论的谬误与安防的生产》，载于《私有财产的经济学与伦理学》，第 8-9 页：

.....更深入地研究私人商品与公共商品之间的区别，我们发现这种区别原来完全是虚幻的。私人商品与公共商品之间并不存在明确的二分法，这也是为什么在如何对某一商品进行分类的问题上会有如此多的分歧的根本原因。所有商品或多或少都具有私人性

的财货和主观上非稀缺的财货之间的相互作用。

即使承认必定是诗人的心灵产生了思想和情感，并且进一步承认只有在另一个心灵中并通过智力才能使那些思想和情感得以再现，但从一个心灵到另一个心灵的路径在一段旅程中要经过物质世界，在这段旅程中，智力要素必须利用物质载体，也就是说，利用自然的力量或能量。书籍就是那种物质载体。⁷³⁸

As Joseph Salerno notes, “Böhm-Bawerk employed the example of the production and consumption of a poem to illustrate that the good is inextricably bound up with the want-satisfaction process that traverses and links the objective and subjective realms.”³⁸

正如约瑟夫·萨勒诺所指出的：“庞巴维克用一首诗的生产和消费的例子来说明，财货与贯穿并连接客观和主观领域的欲望满足过程紧密相连。”⁷³⁹

稀缺财货、非稀缺财货、进步和干预

SCARCE GOODS, NONSCARCE GOODS, PROGRESS, AND INTERVENTION

Why does all of this matter? It is interesting on the level of theory, but it is also critically important as a practical matter. Enterprise in our time is increasingly dependent on a clear understanding of the difference between scarce and nonscarce goods. In the

或公共性，而且随着人们价值观和评价的变化以及人口构成的变化，其私人性/公共性的程度也会不断变化。为了认识到它们永远不会一劳永逸地归入这一类或那一类，我们只需回顾一下是什么使某物成为商品。某物要成为商品，就必须得到某人的认可，并被视为稀缺品。某种东西本身并不是一种商品，也就是说，商品只有在看货人的眼中才是商品。除非至少有一个人主观地将其评价为商品，否则任何东西都不是商品。⁷³⁸ Böhm-Bawerk, “Whether Legal Rights and Relationships Are Economic Goods,” p. 91.

欧根·冯·庞巴维克，《法律权利和关系是否是经济商品》，第 91 页。

⁷³⁹ Joseph T. Salerno, “Böhm-Bawerk’s Vision of the Capitalist Economic Process: Intellectual Influences and Conceptual Foundations,” *New Perspectives on Political Economy* 4, no. 2 (2008; <https://perma.cc/7XV4-2KQA>): 87 - 112, p. 101.

约瑟夫·T·萨勒诺，《庞巴维克对资本主义经济过程的构想：知识影响与概念基础》，《政治经济学新视角》第 4 卷第 2 期（2008 年；网址：<https://perma.cc/7XV4-2KQA>）：87-112 页，第 101 页。

current recession, for example, the bust hit scarce goods, and it is the scarce-goods sector that the government is attempting to stimulate.³⁹ But the nonscarce sector, which is not subject to the structure of production, and therefore is resistant to business-cycle effects, continues to thrive and has been unaffected by the machinations of bad macroeconomic policy. (But it is affected by “intellectual property” regulation, which imposes artificial scarcity where there is none naturally present.)

为什么这些都很重要？从理论层面来说，这很有趣，但从实践层面来说，这也至关重要。我们这个时代的企业越来越依赖于对稀缺财货和非稀缺财货之间区别的清晰认识。例如，在当前的经济衰退中，泡沫破裂冲击了稀缺财货，而政府正试图刺激的正是稀缺财货部门。⁷⁴⁰ 但非稀缺财货部门不受生产结构的影响，因此可以抵御商业周期的影响，继续蓬勃发展，而且不受糟糕的宏观经济政策的影响。(但它却受到了“知识产权”法规的影响，该法规在自然不存在稀缺性的情况下人为地制造了稀缺性)。

Institutions such as Google and the Mises Institute have discovered the secret of giving away nonscarce goods (search services and digital books) and restricting commercial operations to allocating only scarce goods (teacher services, physical books, and advertising space on screens).⁴⁰ This combination of giving away the nonscarce good and selling the scarce good has permitted both institutions to grow through service.

像谷歌和米塞斯研究院这样的机构已经发现了赠送非稀缺财货（搜索服务和数字书籍）并将商业运营限制在仅分配稀缺财货（教师服务、实体书籍和屏幕上的广告空间）的秘密。⁷⁴¹ 这种赠送非稀缺财货和销售稀缺财货的结合使得这两个机构都能够通过服务

⁷⁴⁰ This was written in 2010, in the aftermath of the Great Recession from 2007 – 2009. 这篇文章写于 2010 年，当时正值 2007-2009 年萧条之后。

⁷⁴¹ See Doug French, “The Intellectual Revolution Is in Process,” Mises Daily (Dec. 12, 2009; <https://mises.org/library/intellectual-revolution-process>); Jeffrey A. Tucker, “A Theory of Open,” Mises Economics Blog (Jan. 7, 2010; <https://mises.org/wire/theory-open>); and Gary North, “A Free Week-Long Economics Seminar,” LewRockwell.com (July 24, 2010; www.lewrockwell.com/2010/07/gary-north/mises-u/).

参见道格·弗伦奇，《知识革命正在进行中》，米塞斯日报（2009 年 12 月 12 日；网址：<https://mises.org/library/intellectual-revolution-process>）；杰弗里·A·塔克，《开放理论》，米塞斯经济学博客（2010 年 1 月 7 日；网址：<https://mises.org/wire/theory-open>）；以及加里·诺斯，《为期一周的免费经济学研讨会》，勒夫·洛克威尔网站（2010 年 7 月 24 日；网址：www.lewrockwell.com/2010/07/gary-north/mises-u/）。

实现增长。

But this distinction is also exceedingly helpful for understanding economic theory. It clarifies the absolute necessity of property rights and free movement of prices for all scarce goods—exactly as classical economists have said. It also illustrates the need to completely de-control access to nonscarce goods and to permit the voluntary learning and sharing process to take its own course.⁴¹

但这种区分对于理解经济理论也非常有帮助。它阐明了对所有稀缺财货而言，财产权和价格的自由变动是绝对必要的——正如古典经济学家所说。它还表明，需要完全解除对非稀缺财货获取的控制，并允许自愿学习和分享的过程自然发展。⁷⁴²

Nonscarce goods are a great gift, courtesy of the structure of reality, a boon to humankind, a vast treasure of resources—tools for making the world a relentlessly better place.⁴²

非稀缺财货是现实结构给予的一份伟大礼物，是人类的福音，是巨大的资源财富——是让世界不断变得更美好的工具。⁷⁴³

The failure to understand the distinction between scarce and intrinsically nonscarce goods might also help to explain the persistence of socialist ideology. For example, one possible explanation of the predictable socialist impulse of religious leaders, intellectuals, and artists is that their primary work consists in the production and distribution of nonscarce goods (salvation, ideas, and art) and that this accounts for the failure of the people in these professions to come to terms with the relentless reality of

⁷⁴² The distinction between scarce and nonscarce goods is crucial. A signal example of the importance of making careful distinctions in fundamental economic concepts is Menger's clarification of price and value theory, which has profound implications with respect to other aspects of economics.

区分稀缺商品和非稀缺商品至关重要。门格尔对价格和价值理论的澄清就是一个典型的例子，它对经济学的其他方面产生了深远的影响，说明了仔细区分基本经济概念的重要性。

⁷⁴³ For elaboration, see the last three paragraphs of Kinsella, "The Death Throes of Pro-IP Libertarianism"; see also note 24, above.

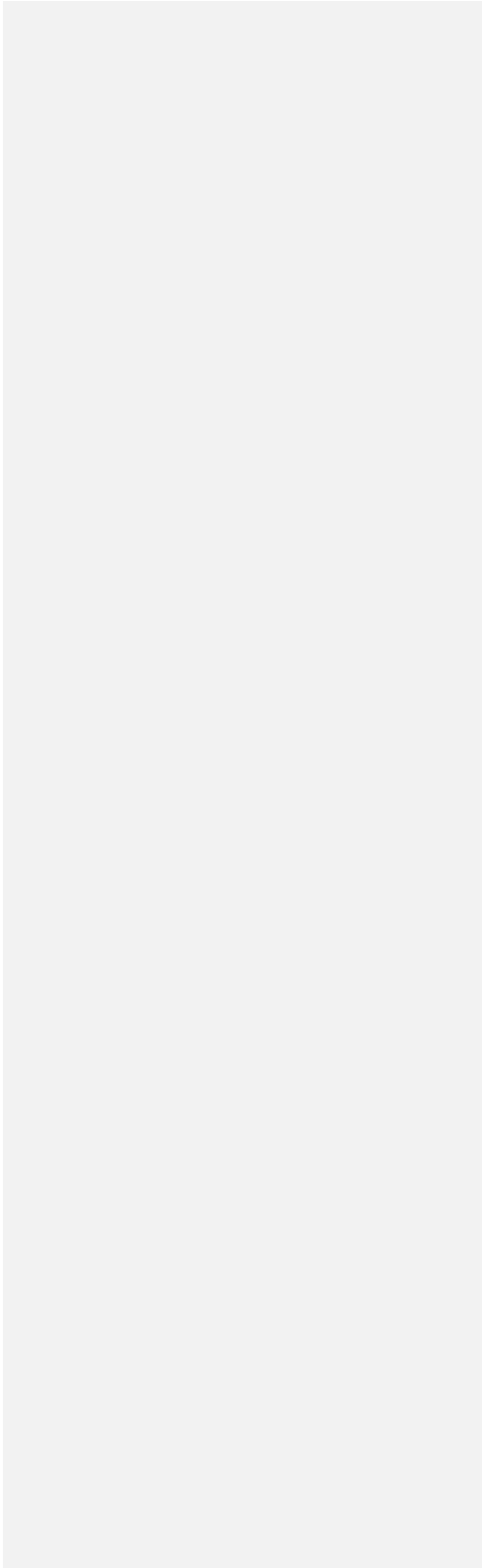
欲知详情，请参阅金塞拉的《支持知识产权的自由意志主义的垂死挣扎》的最后三段；另见上文注释 24。

scarcity.

未能理解稀缺财货与本质上非稀缺财货之间的区别，这或许也有助于解释社会主义意识形态的持续存在。例如，对于宗教领袖、知识分子和艺术家可预见的社会主义冲动，一种可能的解释是，他们的主要工作包括非稀缺财货（救赎、思想和艺术）的生产和分配，这也是这些职业的人们无法接受稀缺性这一无情现实的原因。

In summary, the world has given us two types of goods, one type that demands allocation through property and prices and one type that can be infinitely copied. In the production and distribution of scarce goods, there is no substitute for the commercial marketplace. And the notion that government should ever restrict replicable nonscarce goods or grant protection to a single monopolistic producer of nonscarce goods is contrary to freedom, material advancement, and social peace.

总之，世界为我们提供了两种类型的财货，一种需要通过财产权和价格进行分配，另一种可以无限复制。在稀缺财货的生产和分配中，商业市场无可替代。而政府应该限制可复制的非稀缺财货，或者给予非稀缺财货的单一垄断生产者保护的观念，是与自由、物质进步和社会和平背道而驰的。



第五辑 综述

PART V REVIEWS

第十九章 知识，计算，冲突和法律

Knowledge, Calculation, Conflict, and Law

Originally published as Stephan Kinsella, "Knowledge, Calculation, Conflict, and Law," Q. J. Austrian Econ. 2, no. 4 (Winter 1999): 49–71, a review essay of Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Oxford University Press, 1998). In this chapter, I have updated the references to refer to the second edition, *The Structure of Liberty: Justice and the Rule of Law*, 2d ed. (Oxford: Oxford University Press, 2014), hereinafter cited as *Structure* (apparently no changes were made to the main text, so the page numbers between the first and second editions are in most cases the same).

本文最初以斯蒂芬·金塞拉的《知识、计算、冲突与法律》为题发表于《奥地利经济学季刊》1999 年冬季第 2 卷第 4 期，第 49-71 页，是对兰迪·E·巴尼特的《自由的结构：正义与法治》（牛津：牛津大学出版社，1998 年）的一篇评论文章。在本章中，我更新了参考文献，以指代第二版《自由的结构：正义与法治》（牛津：牛津大学出版社，2014 年），以下简称《结构》（显然正文没有任何改动，所以第一版和第二版的页码在大多数情况下是相同的）。

普遍存在的社会问题 PERVASIVE SOCIAL PROBLEMS

Libertarian theorists have made significant contributions to the fields of economics, politics, and philosophy. Intimately bound up with libertarian and political theory is the question of what laws and legal systems are appropriate. Law and legal theory, therefore, have also been subjected to libertarian scrutiny. One might even say libertarianism is all about law: which laws are just, which are not. The writing in this area, however, is usually focused on narrow legal topics, such as contract or constitutional law.¹ Moreover, many libertarian authors are economists or philosophers who are not sufficiently familiar with the workings of real legal systems; others are not completely or consistently libertarian in their approaches.² Jurisprudence has yet to receive the attention it deserves from libertarians (and, one might say: vice-versa).

自由意志主义理论家对经济、政治和哲学领域做出了重大贡献。与自由意志主义和政治理论密切相关的问题是，什么样的法律和法律体系是合适的。因此，法律和法律理

论也受到了自由意志主义的审视。甚至可以说，自由意志主义就是关于法律的：哪些法律是正义的，哪些不是。然而，这一领域的著作通常聚焦于狭窄的法律主题，如法或宪法。⁷⁴⁴此外，许多自由意志主义的作者是经济学家或哲学家，他们对现实法律体系的运作不够熟悉；还有一些作者的研究方法并不完全或一贯坚持自由意志主义。⁷⁴⁵

⁷⁴⁴ 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; Randy E. Barnett, "A Consent Theory of Contract," Colum. L. Rev. 86 (1986; [www. randybarnett.com](http://www.randybarnett.com)): 269 - 321; idem, Randy E. Barnett, "Getting Normative: The Role of Natural Rights in Constitutional Adjudication," Constitutional Commentary 12 (1995; <http://www.randybarnett.com/pre-2000>): 93 - 122; idem, "The Intersection of Natural Rights and Positive Constitutional Law," Conn. L. Rev. 25 (1993; www.randybarnett.com/pre-2000): 853 - 68; Lysander Spooner, "No Treason No. 4: The Constitution of No Authority," in The Lysander Spooner Reader (San Francisco, Calif.: Fox and Wilkes, 1992; also available at <http://www.lysanderspooner.org/works>); and Robert W. McGee, "The Theory of Secession and Emerging Democracies: A Constitutional Solution," Stanford J. International L. 28, no. 2 (1992; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177439): 451 - 76.

威廉姆森·M·埃弗斯，《重建契约法》，《自由意志主义研究期刊》第1卷第1期（1977年冬季；网址：<https://mises.org/library/toward-reformulation-law-contracts>）：3-13页；兰迪·E·巴尼特，《同意的契约理论》，《哥伦比亚法律评论》第86期（1986年；网址：www.randybarnett.com）：269-321页；同上，兰迪·E·巴尼特，《走向规范：自然权利在宪法裁决中的作用》，《宪法评论》第12期（1995年；网址：<http://www.randybarnett.com/pre-2000>）：93-122页；同上，《自然权利与积极宪法法律的交集》，《康涅狄格法律评论》第25期（1993年；网址：www.randybarnett.com/pre-2000）：853-868页；莱桑德·斯波纳，“无叛国罪之四：无权威的宪法”，收录于《莱桑德·斯波纳读本》（加利福尼亚州旧金山：福克斯与威尔克斯出版社，1992年；也可在网址<http://www.lysanderspooner.org/works>上获取）；以及罗伯特·W·麦吉，“分离理论与新兴民主国家：一种宪法解决方案”，《斯坦福国际法期刊》第28卷第2期（1992年；网址：https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177439）：451-476页。

⁷⁴⁵ Various works with at least a semi-libertarian approach to legal and constitutional theory include Marshall L. DeRosa, *The Ninth Amendment and the Politics of Creative Jurisprudence: Disparaging the Fundamental Right of Popular Control* (New Brunswick, N.J.: Transaction Publishers, 1996); Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman, Okla.: University of Oklahoma Press, 1989); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990); William J. Quirk & R. Randall Bridwell, *Judicial Dictatorship* (New Brunswick, N.J.: Transaction Publishers, 1995); Bruno Leoni, *Freedom and the Law* (Indianapolis: Liberty

法理学还没有得到自由意志主义者应有的关注（也可以说：反之亦然）。

The publication of Randy Barnett's latest book, *The Structure of Liberty: Justice and the Rule of Law*, helps to fill this lacuna. Barnett, as a former criminal prosecutor and now law professor at Boston University School of Law,³ is intimately familiar with the operation of the American legal system and also with the arcana of academic

Fund, expanded 3d. ed. 1991 [1961]; <https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>); F.A. Hayek, *Law, Legislation, and Liberty*, 3 vols. (Chicago: University of Chicago Press, 1973, 1976, 1979); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985); idem, *Simple Rules for a Complex World* (Cambridge, Mass.: Harvard University Press, 1995); idem, *Principles for a Free Society* (Reading, Mass.: Perseus Books, 1998). Richard Epstein has contributed enormously to libertarian and legal theory, but is not a completely consistent libertarian and is certainly not an anarcho-capitalist. He also favors intellectual property. See Kinsella, “KOL364 | Soho Forum Debate vs. Richard Epstein: Patent and Copyright Law Should Be Abolished,” Kinsella on Liberty Podcast (Nov. 24, 2021). Moreover, Epstein adheres more to mainstream, neoclassical economics, in which interpersonal utility is both relevant and comparable (see, e.g., *Simple Rules for a Complex World*, p. 141), than to Austrian economics, which does not suffer the many theoretical deficiencies of neoclassical economics, e.g., interpersonal utility comparisons, logical positivism and scientism, etc.

至少具有半自由意志主义法律和宪法理论方法的各种著作包括：马歇尔·L·德罗萨的《第九修正案与创造性法理学的政治：贬低民众控制的基本权利》（新泽西州新不伦瑞克：Transaction Publishers, 1996 年）；拉乌尔·伯杰的《第十四修正案与权利法案》（俄克拉荷马州诺曼：俄克拉荷马大学出版社，1989 年）；罗伯特·H·博克的《诱惑美国：法律的政治诱惑》（纽约：自由出版社，1990 年）；威廉·J·奎克和 R·兰德尔·布里德韦尔的《司法独裁》（新泽西州新不伦瑞克：Transaction Publishers, 1995 年）；布鲁诺·莱奥尼的《自由与法律》（印第安纳波利斯：自由基金，1991 年扩充第三版[1961 年]；网址：<https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>）；F.A.哈耶克的《法律、立法与自由》三卷本（芝加哥：芝加哥大学出版社，1973 年、1976 年、1979 年）；理查德·A·爱波斯坦的《征收：私有财产与征用权》（马萨诸塞州剑桥：哈佛大学出版社，1985 年）；同上，《复杂世界的简单规则》（马萨诸塞州剑桥：哈佛大学出版社，1995 年）；同上，《自由社会的原则》（马萨诸塞州雷丁：珀尔修斯图书，1998 年）。理查德·爱波斯坦为自由意志主义和法律理论做出了巨大贡献，但他不是一个完全一致的自由意志主义者，当然也不是一个无政府资本主义者。他也赞成知识产权。见金塞拉的“KOL364 | 苏荷论坛论证 vs. 理查德·爱波斯坦：专利和版权法应被废除”，金塞拉自由播客（2021 年 11 月 24 日）。此外，爱波斯坦更倾向于主流的新古典经济学，在其中人际效用既相关又可比较（例如，见《复杂世界的简单规则》，第 141 页），而不是奥地利经济学，奥地利经济学没有新古典经济学的许多理论缺陷，例如人际效用比较、逻辑实证主义和科学主义等。

jurisprudence. His libertarian credentials are also impeccable: he has published important libertarian-oriented works on topics as diverse as contract law, constitutional theory and natural rights, restitution and criminal law, and drug prohibition.⁴ Barnett was thus well-positioned to write *The Structure of Liberty*, the first broad and systematic treatise on legal theory written from a thoroughly libertarian perspective.

兰迪·巴尼特的新书《自由的结构：正义与法治》的出版有助于填补这一空白。巴尼特曾是一名刑事检察官，现在是波士顿大学法学院的教授，⁷⁴⁶他非常熟悉美国法律体系的运作，也深谙学术法理学的奥秘。他的自由意志主义资历也是无可挑剔的：他出版过以自由意志主义为导向的重要著作，涉及法、宪法理论与自然权利、赔偿和刑法以及毒品禁令等不同主题。⁷⁴⁷因此，巴尼特完全有能力撰写《自由的结构》，这是第一部从彻底的自由意志主义视角撰写的广泛而系统的法律理论专著。

⁷⁴⁶ As of 1999. At present (2023), Barnett is a law professor at Georgetown. <http://www.randybarnett.com>.

截至 1999 年。目前（2023 年），巴尼特是乔治城大学的法学教授。网址：<http://www.randybarnett.com>。

⁷⁴⁷ See, e.g., Randy E. Barnett, “Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction,” *Boston U. L. Rev.* 76 (February/April 1996); www.randybarnett.com/pre-2000: 157 – 68; idem, “Consent Theory”; idem, “Natural Rights and Positive Constitutional Law”; idem, “Getting Normative”; idem, “Necessary and Proper,” *UCLA L. Rev.* 76 (1997); www.randybarnett.com/pre-2000: 745 – 93 and others cited in the Bibliography to *Structure*. See also idem, Randy E. Barnett & John Hagel III, eds., *Assessing the Criminal: Restitution, Retribution, And the Legal Process* (Cambridge, Mass.: Ballinger, 1977); Randy E. Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (George Mason Univ. Press, 1991)

例如，参见兰迪·E·巴尼特的《报复：赔偿、预防性拘留以及侵权/犯罪的区别》，《波士顿大学法律评论》第 76 期（1996 年 2 月/4 月；网址：www.randybarnett.com/pre-2000）：157-168 页；同上，《同意理论》；同上，《自然权利与实证宪法法律》；同上，《走向规范》；同上，《必要且适当》，《加州大学洛杉矶分校法律评论》第 76 期（1997 年；网址：www.randybarnett.com/pre-2000）：745-793 页以及在《结构》参考文献中引用的其他文献。另见同上，兰迪·E·巴尼特和约翰·哈格尔三世编，《评估罪犯：赔偿、惩罚与法律程序》（马萨诸塞州剑桥：巴林格出版社，1977 年）；兰迪·E·巴尼特，《人民保留的权利：第九修正案的历史与意义》（乔治梅森大学出版社，1991 年）。

Barnett's aim in this ambitious book is to determine the type of legal system, laws, and rights which are appropriate given the widely-shared "goal of enabling persons to survive and pursue happiness, peace, and prosperity while living in society with others."

5 Happiness, peace, and prosperity are fine principles to select and quite compatible with libertarianism, but Barnett does not attempt to try to justify these basic norms or values. His argument is thus hypothetical and consequentialist, though not, he maintains, utilitarian.⁶

在这本雄心勃勃的著作中，巴尼特的目标是，在“使人们在与他人共同生活的社会中生存并追求幸福、和平与繁荣的目标”得到广泛认同的情况下，确定哪类法律制度、法律和权利是合适的。⁷⁴⁸幸福、和平与繁荣是很好的选择原则，与自由意志主义相当契合，但巴菲特并未试图去证明这些基本准则或价值观的合理性。因此，他的论证是假设性的，是结果主义的，尽管他坚称不是功利主义的。⁷⁴⁹

According to Barnett, the goals of social happiness, peace, and prosperity cannot be achieved unless society's politico-legal system somehow solves certain problems which stand in the way of this happy state. These are "the serious and pervasive social problems of knowledge, interest, and power."⁷ Libertarianism enters the picture because the libertarian (Barnett prefers the term "liberal") conceptions of justice and the rule of law provide the "structure of liberty" that addresses these problems. These principles include the "natural background rights to acquire, possess, use, and dispose of scarce resources (and other rights as well)."⁸ Barnett's argument thus proceeds by showing how and why libertarianism is the best way to overcome the problems of knowledge, interest, and power.⁹

巴尼特认为，除非社会的政治-法律体系以某种方式解决了阻碍实现幸福状态的某些问题，否则社会幸福、和平与繁荣的目标就无法实现。这些问题是“严重且普遍存在的关于知识、利益和权力的社会问题”。⁷⁵⁰自由意志主义之所以进入人们的视野，是因

⁷⁴⁸ Structure, p. 23.
《结构》，第 23 页。

⁷⁴⁹ Ibid., pp. 8, 12, 17 – 23, esp. 22 – 23.
同上，第 8、12、17-23 页，尤其是 22-23 页。

⁷⁵⁰ Ibid., p. 3, emphasis added.
同上，第 3 页，着重号为后加。

为自由意志主义（巴尼特更喜欢用“自由主义”一词）的正义和法治理念提供了解决这些问题的“自由结构”。这些原则包括“获取、拥有、使用和处置稀缺资源的自然背景权利（以及其他权利）”。⁷⁵¹因此，巴尼特的论证是通过说明自由意志主义如何以及为何是克服知识、利益和权力问题的最佳途径来进行的。⁷⁵²

知识的首要问题 THE FIRST-ORDER PROBLEM OF KNOWLEDGE

Parts 1, 2, and 3 of the book respectively describe the three fundamental problems and how they are solved by libertarian rights and institutions. Barnett's first topic, discussed in Part 1, is the problem of knowledge, which is broken down into separate first-order, secondorder, and third-order aspects.

本书的第一、二、三部分分别阐述了三个基本问题以及如何通过自由意志主义的权利和制度来解决这些问题。巴菲特在第一部分中讨论的第一个主题是知识问题，该问题被细分为独立的一阶、二阶和三阶方面。

The first aspect—basically the Hayekian “knowledge problem”¹⁰— concerns how individuals make “knowledgeable” use of physical resources.¹¹ This analysis starts out by presuming that an individual needs to “be able to act on the basis of [his] own personal knowledge,” and “when so acting [he] must somehow take into account the knowledge of others.”¹²

第一个方面——基本上是哈耶克的“知识问题”⁷⁵³——涉及个体如何“明智地”使

⁷⁵¹ Ibid., p. 16.

同上，第 16 页。

⁷⁵² Structure contains excellent summaries provided throughout the book at the end of many chapters and sections.

《结构》在书中的许多章节和部分的结尾处都提供了精彩的总结。

⁷⁵³ F.A. Hayek, “Economics and Knowledge” and “The Use of Knowledge in Society” in *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948; <https://mises.org/library/individualism-and-economic-order>). I explain my disagreement with the Hayekian “knowledge” approach in the “Introductory Note” to Part III.C of “Legislation and the Discovery of Law in a Free Society” (ch. 13).

F.A.哈耶克，《个人主义与经济秩序》中的“经济学与知识”以及“知识在社会中的运用”（芝加哥：芝加哥大学出版社，1948年；网址：<https://mises.org/library/individualism-and-economic-order>）。在“自由社会中的立

用物质资源。⁷⁵⁴这种分析一开始就假定个体需要“能够基于自己的个人知识采取行动”，并且“在这样行动时，他必须以某种方式考虑到他人的知识”。⁷⁵⁵

Alas, this is difficult to achieve, because such knowledge is “dispersed” or “fragmented,” and each individual has “ever-changing and potentially conflicting personal and local knowledge of potential resource use.”¹³ Each person is thus rendered “hopelessly ignorant” of the “knowledge of others.” So the alleged problem is this: given the dispersed, often inaccessible, and potentially “conflicting” nature of such knowledge, how can individuals act on the basis of their own knowledge while avoiding conflicts over resource use? And how can they take into account the knowledge of others?¹⁴

可惜，这很难实现，因为这种知识是“分散的”或“碎片化的”，每个人对潜在资源使用的个人和地方知识“不断变化，而且可能相互冲突”。⁷⁵⁶因此，每个人都对“他人的知识”“一无所知”。因此，所谓的问题是：鉴于这样的知识具有分散、常常难以获取且可能“相互冲突”的性质，个体如何在基于自己的知识采取行动的同时避免在资源使用上发生冲突呢？并且他们又如何考虑到他人的知识呢？⁷⁵⁷

According to Barnett, libertarian rights are necessary because they facilitate the sharing and dissemination of knowledge.¹⁵ They include the natural rights of “several” property (Hayek’s term for private property), Lockean first possession (homesteading), and freedom of contract.¹⁶ If individuals are accorded these rights, the first-order problem of knowledge is solved. One of the main ways this happens is that prices arise under such a private-property order, and prices themselves convey, in “condensed” form, personal and local knowledge.

法与法律的发现”（第 13 章）第三部分 C 的“介绍性说明”中，我解释了我与哈耶克的“知识”方法的不同意见。

⁷⁵⁴ Structure, p. 29.

《结构》，第 29 页。

⁷⁵⁵ Ibid., p. 36 (emphasis added).

同上，第 36 页（着重号为后加）。

⁷⁵⁶ Ibid., p. 40.

同上，第 40 页。

⁷⁵⁷ Ibid., p. 40.

同上，第 40 页。

巴尼特认为，自由意志主义权利是必要的，因为它们有利于知识的共享和传播。⁷⁵⁸它们包括“若干”财产的自然权利（哈耶克对私有财产的术语）、洛克式的先占（拓殖）和自由。¹⁶如果赋予个人这些权利，知识的一阶问题就会得到解决。解决的主要途径之一就是在这种私有财产秩序下产生价格，而价格本身以“浓缩”的形式传递着个人和局部知识。⁷⁵⁹

知识 vs. 计算 Knowledge vs. Calculation

There is, unfortunately, much to be desired in Hayek's emphasis on the role of knowledge in the economy, as opposed to Ludwig von Mises's stress on the more fundamental role of money prices in economic calculation.¹⁷ Hayek's and Mises's differing views have been improperly conflated,¹⁸ and Barnett makes the same error by attributing to Mises Hayek's views on the information-conveying role of prices.¹⁹

不幸的是，与路德维希·冯·米塞斯强调货币价格在经济计算中更为根本的作用相比，哈耶克对知识在经济中作用的强调有很多不足之处。⁷⁶⁰哈耶克和米塞斯的不同观点被

⁷⁵⁸ Ibid., p. 44.

同上，第 44 页。

⁷⁵⁹ Ibid., p. 83.

同上，第 83 页。

⁷⁶⁰ This has been pointed out in recent debates among Austrian economists, published primarily in the pages of the Review of Austrian Economics. See Jörg Guido Hülsmann, “Knowledge, Judgment, and the Use of Property,” Rev. Austrian Econ. 10, no. 1 (1997); <https://mises.org/library/knowledge-judgment-and-use-property>: 23 – 48; Hans-Herman Hoppe, “F.A. Hayek on Government and Social Evolution: A Critique,” “F.A. Hayek on Government and Social Evolution: A Critique,” in The Great Fiction: Property, Economy, Society, and the Politics of Decline, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf); idem, “Socialism: A Property or Knowledge Problem?”, in The Economics and Ethics of Private Property; Joseph T. Salerno, “Ludwig von Mises as Social Rationalist,” Rev. Austrian Econ. 4 (1990); <https://mises.org/library/ludwig-von-mises-social-rationalist>: 25 – 54; idem, “Mises and Hayek Dehomogenized,” Rev. Austrian Econ. 6, no. 2 (1993); <https://mises.org/library/mises-and-hayek-dehomogenized>: 113 – 46; idem, “Reply

不恰当地混为一谈，⁷⁶¹而巴尼特也犯了同样的错误，他把哈耶克关于价格的信息传递

to Leland B. Yeager,” Rev. Austrian Econ. 7, no. 2 (1994; <https://mises.org/library/reply-leland-b-yeager-mises-and-hayek-calculation-and-knowledge>): 111 - 25; Jeffrey M. Herbener, “Ludwig von Mises and the Austrian School of Economics,” Rev. Austrian Econ. 5, no. 2 (1991; <https://mises.org/library/ludwig-von-mises-and-austrian-school-economics>): 33 - 50. For recent, related papers less critical of Hayek’s position, see Steven Horwitz, “Monetary Calculation and Mises’s Critique of Planning,” History of Political Economy 30, no. 3 (1998; <https://perma.cc/9HXZ-T36L>): 427 - 50 and Bruce Caldwell, “Hayek and Socialism,” J. Econ. Literature 35 (December 1997): 1856 - 90. For further discussion, see “Legislation and the Discovery of Law in a Free Society” (ch. 13), the “Introductory Note” to Part III.C. See also Kinsella, “The Great Mises-Hayek Dehomogenization/Economic Calculation Debate,” StephanKinsella.com (Feb. 8, 2016); “Introductory Note” to Part III.C of “Legislation and the Discovery of Law in a Free Society” (ch. 13).

这在奥地利经济学家最近的论证中被指出，这些论证主要发表在《奥地利经济学评论》的页面上。参见约尔格·吉多·许尔施曼，《知识、判断与财产的使用》，《奥地利经济学评论》第10卷第1期（1997年；网址：<https://mises.org/library/knowledge-judgment-and-use-property>）：23-48页；汉斯-赫尔曼·霍普，《F.A.哈耶克论政府与社会演化：一种批判》，收录于《伟大的虚构：财产、经济、社会与衰落的政治》第二版扩充版（阿拉巴马州奥本：米塞斯研究院，2021年；网址：www.hanshoppe.com/tgf）；同上，《社会主义：是财产问题还是知识问题？》，收录于《私有财产的经济学与伦理学》；约瑟夫·T·萨勒诺，《作为社会理性主义者的路德维希·冯·米塞斯》，《奥地利经济学评论》第4期（1990年；网址：<https://mises.org/library/ludwig-von-mises-social-rationalist>）：25-54页；同上，《米塞斯与哈耶克的非同质化》，《奥地利经济学评论》第6卷第2期（1993年；网址：<https://mises.org/library/mises-and-hayek-dehomogenized>）：113-146页；同上，《对利兰·B·耶格斯的回应》，《奥地利经济学评论》第7卷第2期（1994年；网址：<https://mises.org/library/reply-leland-b-yeager-mises-and-hayek-calculation-and-knowledge>）：111-125页；杰弗里·M·赫伯纳，《路德维希·冯·米塞斯与奥地利经济学派》，《奥地利经济学评论》第5卷第2期（1991年；网址：<https://mises.org/library/ludwig-von-mises-and-austrian-school-economics>）：33-50页。对于近期不是严厉批判哈耶克立场的相关论文，参见史蒂文·霍维茨，《货币计算与米塞斯对计划的批判》，《政治经济学史》第30卷第3期（1998年；网址：<https://perma.cc/9HXZ-T36L>）：427-450页以及布鲁斯·考德威尔，《哈耶克与社会主义》，《经济文献杂志》第35期（1997年12月）：1856-1890页。欲进一步讨论，请参见《自由社会中的立法与法律的发现》（第十三章），第三部分C的“介绍性说明”。另见金塞拉，《伟大的米塞斯-哈耶克非同质化/经济计算论证》，StephanKinsella.com（2016年2月8日）；《自由社会中的立法与法律的发现》（第十三章）第三部分C的“介绍性说明”。

⁷⁶¹ Salerno, “Mises and Hayek Dehomogenized.”

作用的观点归因于米塞斯。⁷⁶²

What, then, are the differences between Mises and Hayek on the role of prices in the economy? Hans-Hermann Hoppe has ably summarized Mises's original calculation argument as follows:

If there is no private property in land and other production factors, then there can also be no market prices for them. Hence, economic calculation, i.e., the comparison of anticipated revenue and expected cost expressed in terms of a common medium of exchange (which permits cardinal accounting operations), is literally impossible. Socialism's fatal error is the absence of private property in land and production factors, and by implication, the absence of economic calculation.²⁰

那么，关于价格在经济中的作用问题上，米塞斯和哈耶克的分歧是什么呢？汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）将米塞斯最初的计算论点精辟地概括如下：

如果土地和其他生产要素不存在私有财产，那么它们也就不可能有市场价格。因此，经济计算，即通过共同的交换媒介（它允许进行基数会计运算）来表示的预期收入和预期成本的比较，实际上是不可能的。社会主义的致命错误在于没有土地和生产要素的私有财产，也就意味着没有经济计算。⁷⁶³

The theories of Hayek on which Barnett and others have relied, however, downplay calculation and appraisal in favor of communication of knowledge. For Hayek, as Hülsmann notes:

... the impossibility of socialism stems from its inability to communicate dispersed knowledge... [I]nformation about the particular circumstances of time and place can never be centralized. It necessarily exists in dispersed form and yet it can be communicated by the market prices of capitalist societies. Only capitalism is thus capable of solving the knowledge problem.²¹

萨勒诺，《米塞斯与哈耶克的非同质化》。

⁷⁶² Structure, p. 54, n. 21.

《结构》，第 54 页，注释 21。

⁷⁶³ Hoppe, "Socialism: A Property or Knowledge Problem?", p. 255.

霍普，《社会主义：是财产问题还是知识问题？》，第 255 页。

然而，巴尼特等人所依赖的哈耶克理论却淡化了计算和评估，而倾向于知识的交流。正如许尔曼所指出的，对于哈耶克来说：

.....社会主义的不可能性源于它无法传播分散的知识.....[关于时间和地点的特殊情况的信息永远无法集中化。它必然以分散的形式存在，但却可以通过资本主义社会的市场价格进行传播。因此，只有资本主义才能解决知识问题。⁷⁶⁴

But any informational function of prices is, at best, only secondary in comparison to the primary role of private property and money prices. The fundamental economic role of private property, along with money prices arising from exchanges of such property, as Mises showed, is to permit economic calculation. And, socially speaking, private-property rights serve to prevent conflict over resources. This is why private-property rights serve Barnett's goals of peace and prosperity: private property rights permit conflicts to be avoided (peace) and allow genuine, free-market money prices to form which can be used for economic calculation and hence rational resource allocation (prosperity). Concentration on the information-conveying role of prices instead of calculation obscures this role.²² For example, Hayekians claim that prices "contain" economic information in "condensed" (or encrypted, encoded, or abridged) form.²³ Barnett follows the Hayekians when he states that "the knowledge-disseminating function of prices is largely unknown ... the knowledge embedded in prices is not explicit ... It is encoded knowledge."²⁴

但是，与私有财产和财货价格的主要作用相比，价格的任何信息功能充其量只是次要的。正如米塞斯所指出的那样，私有财产以及由这种财产的交换而产生的货币价格的基本经济作用是允许进行经济计算。而且，从社会角度看，私有财产权有助于防止资源冲突。这就是为什么私有财产权可以实现巴尼特的和平与繁荣目标：私有财产权可以避免冲突（和平），并允许形成真正的自由市场货币价格，用于经济计算，从而实现合理的资源分配（繁荣）。专注于价格的信息传递作用而非计算作用，掩盖了这一作用。⁷⁶⁵例如，哈耶克主义者声称价格以“浓缩”（或加密、编码或简略）的形式“包

⁷⁶⁴ H ü Ismann, "Knowledge, Judgment, Property," p. 23, emphasis added.

许尔曼，《知识、判断与财产》，第 23 页，着重号为后加。

⁷⁶⁵ Leoni seems to similarly attribute Hayekian knowledge-related concepts to Mises: [T]hat the central authorities in a totalitarian economy lack any knowledge of market prices in making their economic plans is only a corollary of the fact that central

含”经济信息。⁷⁶⁶巴尼特在声称“价格的知识传播功能在很大程度上是未知的……价格中嵌入的知识不是明确的……它是编码的知识”时，追随了哈耶克主义者。⁷⁶⁷

There are several problems with viewing prices as encoding information. For one thing, concepts such as encoding, encryption, and the like imply an encoder—a person who actively and consciously encodes information in some communication medium, in accordance with some encoding scheme (i.e., the code). Yet there is clearly no intentional encoding of whatever knowledge may be embedded in prices; there is no encoding scheme and no way to decode the information. I buy a car for \$30,000

authorities always lack a sufficient knowledge of the infinite number of elements and factors that contribute to the social intercourse of individuals at any time and at any level.

Leoni, *Freedom and the Law*, p. 89 et pass.

See also “Legislation and the Discovery of Law in a Free Society” (ch. 13). As noted in the “Introductory Note” to Part III.C, in the original 1995 article upon which that chapter is based, I, too, influenced by Leoni, conflated Hayekian and Misesian ideas in overstating the analogies between central economic planning and central law-creation. See also note 63, below, and accompanying text, concerning the possibility of deducing more concrete legal principles from (themselves deduced) abstract rights.

莱奥尼似乎同样将哈耶克的知识相关概念归因于米塞斯：[极权主义经济中的中央政府在制定经济计划时缺乏对市场价格的了解，这只是一个必然结果，即中央政府总是缺乏对无限多的因素的充分了解，而这些因素在任何时候、任何层面上都有助于个人的社会交往。

莱奥尼，《自由与法律》，第 89 页及之后。

另见《自由社会中的立法与法律的发现》（第十三章）。正如在第三部分 C 的“介绍性说明”中所指出的，在作为该章基础的 1995 年的原始文章中，受莱奥尼的影响，我在夸大中央经济计划与中央法律制定之间的类比时，也混淆了哈耶克和米塞斯的思想。另见下文注释 63 及相关内容，关于从（本身推导出来的）抽象权利中推导出更具体的法律原则的可能性。

⁷⁶⁶ The term “data compression” is often used synonymously by engineers with terms such as data encoding or encryption, so I suppose it is only a matter of time before Hayekians say that prices convey, in “compressed” form, fragmented and dispersed local knowledge of the particular circumstances of time and place.

工程师们经常把“数据压缩”与“数据编码”或“加密”等术语同义使用，因此我认为，哈耶克主义者迟早会说，价格以“压缩”的形式传递着关于特定时间和地点的碎片化分散的局部知识。

⁷⁶⁷ Structure, p. 54.

《结构》，第 54 页。

because I think it is worth it, not to convey some secret message to someone.²⁵ Knowledge that I paid this price for the car does not reveal any information about the underlying objective conditions that give rise to this price (e.g., the intensity of my demand or the relative scarcity of the car). Such knowledge reveals only that I valued the car more than \$30,000, and the seller had the opposite valuation.

将价格视为编码信息存在几个问题。一方面，诸如编码、加密之类的概念意味着存在一个编码器——一个人按照某种编码方案（即代码）在某种通信媒介中主动且有意地编码信息。然而，无论价格中蕴含着什么知识，显然都不存在有意的编码；没有编码方案，也就没有解码信息的方法。我花 3 万美元买一辆车，是因为我认为它值这个价，而不是为了向某人传达某种秘密信息。⁷⁶⁸我以这个价格购买这辆车的知识并没

⁷⁶⁸ The encoding metaphor seems to be a pseudoscientific and scientistic attempt to give this kind of economic theorizing a patina of scientific respectability by borrowing engineering terminology. It is scientistic because, in vainly trying to borrow natural sciences terminology, there is an assumption that only the “hard” or natural sciences have true validity. It is akin to using such inapt phrases as the “momentum” of the leading team in a basketball game, the “energy” of crystals and astral forms, or, even worse, “revving the engine” of the economy. Both economics and ethics can be sciences, but not in the same way as the causal, natural sciences. On scientism and empiricism, see Murray N. Rothbard, “The Mantle of Science” in *Economic Controversies*, and Hans-Hermann Hoppe, “In Defense of Extreme Rationalism,” in *The Great Fiction*. On epistemological dualism, see Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>); idem, *Epistemological Problems of Economics*, 3d ed., George Reisman, trans. (Auburn, Ala.: Mises Institute, 2003; <https://mises.org/library/epistemological-problems-economics>); and Hans-Herman Hoppe, *Economic Science and the Austrian Method* (Auburn, Ala.: Mises Institute, 1995; www.hanshoppe.com/esam).

这种编码的比喻似乎是一种伪科学和科学主义的尝试，通过借用工程学术语来给这种经济理论披上一层科学上的体面外衣。它是科学主义的，因为在徒劳地试图借用自然科学术语时，存在一种假设，即只有“硬”科学或自然科学才具有真正的有效性。这类似于使用不恰当的短语，如篮球比赛中领先队伍的“势头”、水晶和星体形式的“能量”，或者更糟糕的是“加速经济的引擎”。经济学和伦理学都可以是科学，但与因果性的自然科学的方式不同。关于科学主义和经验主义，参见穆瑞·N·罗斯巴德的《经济争议中的科学外衣》以及汉斯-赫尔曼·霍普的《捍卫极端理性主义》，收录于《伟大的虚构》。关于认识论二元论，参见路德维希·冯·米塞斯的《经济科学的终极基础：方法论论文》（新泽西州普林斯顿：D.范诺斯特兰德公司，1962 年；网址：<https://mises.org/library/ultimate-foundation-economic-science>）；同上，《经济学的

有揭示出产生这个价格的潜在客观条件的任何信息（如我的需求强度或汽车的相对稀缺性）。这种知识只表明我对这辆车的估价高于 30,000 美元，而卖方的估价则与之相反。

Prices result from the subjective evaluations of goods by seller and buyer, but prices are exchange ratios. Besides these ratios, what other information could money prices communicate? What information can a mere price ratio convey? Take Hayek's famous tin example, which assumes:

... that somewhere in the world a new opportunity for the use of some raw material, say, tin, has arisen, or that one of the sources of supply of tin has been eliminated. It does not matter for our purpose—and it is significant that it does not matter—which of these two causes has made tin more scarce. All that the users of tin need to know is that some of the tin they used to consume is now more profitably employed elsewhere and that, in consequence, they must economize tin. There is no need for the great majority of them even to know where the more urgent need has arisen, or in favor of what other needs they ought to husband the supply. If only some of them know directly of the new demand, and switch resources over to it, and if the people who are aware of the new gap thus created in turn fill it from still other sources, the effect will rapidly spread throughout the whole economic system and influence not only all the uses of tin but also those of its substitutes and the substitutes of these substitutes, the supply of all the things made of tin, and their substitutes, and so on; and all this without the great majority of those instrumental in bringing about these substitutions knowing anything at all about the original cause of these changes.²⁶

价格源于卖方和买方对财货的主观评价，但价格是交换比率。除了这些比率，货币价格还能传递什么信息？单纯的价格比率又能传递什么信息呢？以哈耶克著名的锡的例子为例，这个例子假设：

.....世界上某个地方出现了使用某种原材料（例如锡）的新机会，或者锡的某个供应来

认识论问题》第三版，乔治·赖斯曼译（阿拉巴马州奥本：米塞斯研究院，2003 年；网址：<https://mises.org/library/epistemological-problems-economics>）；以及汉斯-赫尔曼·霍普的《经济科学与奥地利学派方法》（阿拉巴马州奥本：米塞斯研究院，1995 年；网址：www.hanshoppe.com/esam）。

源被消除了。对于我们的目的来说，这两个原因中哪一个使锡变得更加稀缺并不重要，重要的是这两个原因中哪一个使锡变得更加稀缺并不重要。锡的使用者只需要知道，他们过去消费的一些锡现在在其他地方使用更有利可图，因此，他们必须节约用锡。他们中的绝大多数甚至不需要知道哪里出现了更迫切的需求，也不需要知道为了满足其他什么需求，他们应该节约锡的供应。如果他们中只有一部分人直接知道新的需求，并将资源转移到新的需求上，如果这些知道新需求的人又从其他方面填补了新的缺口，那么这种影响就会迅速蔓延到整个经济体系，不仅影响锡的所有用途，而且影响锡的替代品和这些替代品的替代品，影响所有锡制物品的供应和它们的替代品，等等，而在促成这些替代的大多数人中，没有一个人需要对这些变化的最初原因有任何了解。

In this example, what information, exactly, is supposed to be conveyed by prices? Let us explore the possibilities. Can the original cause of the price increase (i.e., the change in demand or supply) itself be conveyed via prices? Well, no. Prices are the result of action. Thus, action that changes the prices must already be informed by knowledge.²⁷ Entrepreneurs first see the changed conditions and then bid prices up or down. They do not learn about the changed conditions from the resulting prices. Rather, they cause the prices to change, based on their appraisal of tin and knowledge or judgment of underlying conditions. Hayek seems to recognize that those entrepreneurs who “know directly of the new demand, and switch resources over to it” do not learn from prices, but rather help to form prices based on their own preferences, knowledge, evaluations, and judgments.

在这个例子中，价格到底应该传达什么信息呢？让我们探讨一下各种可能性。价格上涨的最初原因（即需求或供给的变化）本身可以通过价格来传递吗？不能。价格是行动的结果。因此，改变价格的行动必须已经了解相关知识。²⁷ 企业家首先看到条件发生了变化，然后竞相提价或降价。⁷⁶⁹ 企业家首先看到条件发生了变化，然后竞相提高

⁷⁶⁹ Hayek, “The Use of Knowledge in Society,” p. 85 (emphasis added).
哈耶克，《知识在社会中的运用》，第 85 页（着重号为后加）。
⁷⁷⁰ In other words, the prices generated on the market are past prices, which are always the outcome of action, not its cause. H. Ü. Ismann explains that “all information that this action was based upon had to be acquired beforehand. The price itself could not have communicated the knowledge that brought it [the price] about.” H. Ü. Ismann, “Knowledge, Judgment, Property,” p. 26. With regard to the tin example, “tin does

或降低价格。他们不是从由此产生的价格中了解到变化的情况。相反，他们根据自己对锡的评估以及对基本条件的了解或判断，导致价格发生变化。哈耶克似乎认识到，那些“直接了解新需求并将资源转向新需求”的企业家并不是从价格中学习，而是根据自己的偏好、知识、评价和判断帮助形成价格。

What about users of tin who merely observe the change in prices paid for tin—do these persons learn anything, from observed past prices, about the underlying conditions or “original cause” of the change in prices? No, because any of a variety of causes results in higher or lower prices (e.g., changes in demand by buyers or sellers, decrease in supply, changes in demand for money on the part of sellers or buyers, etc.). For these reasons, Hayek says that mere users of tin do not know “anything at all about the original cause of these changes.”

那么对于那些仅仅观察到锡的价格变化的锡的使用者来说呢——这些人从观察到的过去价格中，能了解到价格变化的潜在情况或“最初原因”吗？不能，因为各种各样的原因都会导致价格升高或降低（例如，买家或卖家的需求变化、供应减少、卖家或买家对货币的需求变化等等）。由于这些原因，哈耶克说，单纯的锡的使用者对“这些变化的最初原因一无所知”。

Then what possible information can prices convey? Hayek writes: “All that the users of tin need to know is that some of the tin they used to consume is now more profitably employed elsewhere and that, in consequence, they must economize tin.”²⁸ But the users do not need to know this; if tin is scarcer, there is less of it to go around.²⁹ Whether the prospective users know of the increased scarcity or not, they cannot use what does not exist. Their plans will have to conform, sooner or later, to this increased

not become scarcer and then this fact can come to be known to someone and lead to adaptations. Rather is it the other way around. The very fact that demand increases means that someone already knows of a more value-productive employment of tin.” Ibid., p. 28.

换句话说，市场上产生的价格是过去的价格，它们总是行动的结果，而非原因。许尔施曼解释道：“这一行动所基于的所有信息都必须事先获得。价格本身不可能传达带来价格的知识。”许尔施曼，《知识、判断与财产》，第 26 页。关于锡的例子，“不是锡先变得稀缺，然后这个事实被某人知晓并导致调整适应。而恰恰相反。需求增加这一事实本身就意味着已经有人知道锡有更具价值产出的用途。”同上，第 28 页。

unavailability of tin.

那么价格可能传达什么信息呢？哈耶克写道：“锡的使用者只需要知道他们过去消费的一些锡现在在其他地方被更有利可图地使用了，因此，他们必须节约用锡。”⁷⁷¹但是使用者并不需要知道这个；如果锡变得更加稀缺，那么可供分配的就会减少。⁷⁷²无论潜在的使用者是否知道稀缺性增加，他们都无法使用不存在的东西。他们的计划迟早都必须适应锡的这种增加的不可获得性。

At most, one could argue that the existence of prices enables prospective users to recognize the good's relative scarcity somewhat earlier than they would in the absence of prices (that is, sooner rather than later). And even this cannot be stated to be true as an economic law, simply because all prices are speculative and based on entrepreneurial judgments and anticipations about future (uncertain) conditions. An entrepreneur, for example, may bid the price of a good up based on a mistaken judgment about relevant future conditions, such as supply and demand. What do prices then convey in such a case—misinformation?

我们最多可以说，价格的存在使潜在用户能够比没有价格的情况下更早地认识到财货的相对稀缺性（也就是说，是更早而不是更晚）。但即便如此，也不能说这是一条真实的经济规律，因为所有的价格都是投机性的，都是基于企业家对未来（不确定性）条件的判断和预期。例如，一个企业家可能会基于对相关未来情况（如供应和需求）的错误判断而抬高一种财货的价格。在这种情况下，价格传达了什么呢——错误信息吗？

In any event, even granting that observers can learn of relative scarcity of a good from

⁷⁷¹ Hayek, “The Use of Knowledge in Society,” p. 85 (emphasis added).

哈耶克，《知识在社会中的运用》，第 85 页（着重号为后加）。

⁷⁷² Notes H ü Ismann in “Knowledge, Judgment, Property,” p. 28:

An increased scarcity of tin implies that some market participants who otherwise could have benefited from tin are now of necessity prevented from using it. If a quantity of tin is sold, then the seller cannot sell it again, regardless of the exchange rate. There is simply no more of this left.

许尔施曼在《知识、判断与财产》第 28 页中指出：

锡的稀缺性增加意味着一些原本可以从锡中受益的市场参与者现在必然无法使用它。如果一定量的锡被出售，那么卖家无论交换比率如何，都不能再次出售它。因为根本没有更多的锡了。

prices, emphasis on this aspect of prices distracts from the crucial role that prices play in economic calculation. That is, even if prices do tend to help users to become aware of a good's relative scarcity somewhat earlier than they would otherwise, it is not this function of prices which addresses the insurmountable problems of production and human action that are faced in the absence of private property. The fundamental problem faced by acting man is not the fact that information is dispersed.³⁰ Rather, it is deciding how to rationally allocate resources in the face of an uncertain future and given the subjective nature of value, which makes it impossible to compare alternative projects or plans in the absence of a cardinal set of prices.

无论如何，即使承认观察者可以从价格中了解一种财货的相对稀缺性，强调价格的这一方面也会偏离价格在经济计算中的关键作用。也就是说，即使价格确实能够帮助使用者更早地意识到财货的相对稀缺性，但价格的这一功能并不能解决在没有私有财产的情况下生产和人的行动所面临的难以克服的问题。行动人所面临的根本问题不是信息分散这一事实。⁷⁷³相反，问题在于面对不确定的未来和价值的主观性，如何合理地分配资源，而价值的主观性使得在没有一套基数价格的情况下，无法对备选项目或计划进行比较。

Thus, as Rothbard explains, "what acting man is interested in, in committing resources into production and sale, is future prices."The primary role of prices in a productive, advanced economy is not to communicate information, but to serve as the starting point for estimating what future prices will be.³² The forecasted future prices are then used to quantitatively compare various projects and to select the most profitable—and thus most value-productive—use of resources under consideration.³³ Prices are thus important because they serve as an accessory of appraisalment. "Current" (immediate past) prices tell only what the current price structure is, and thus serve as a

⁷⁷³ In fact, as Salerno points out in "Reply to Leland B. Yeager," p. 114 - 15, "dispersed knowledge is not a bane but a boon to the human race; without it, there would be no scope for the intellectual division of labor, and social cooperation under division of labor would consequently, prove impossible."

事实上，正如萨勒诺在《对利兰·B·耶格尔的回应》第 114-115 页中指出的那样，“分散的知识不是人类的祸根，而是福音；没有它，就没有知识分工的空间，而在劳动分工下的社会合作也将因此被证明是不可能的。”

basis for forecasting what the future array of prices will be, given the current starting point. Thus, present prices “can have no communicative function because they are only the, if indispensable, starting point for our understanding of the future.”³⁴

因此，正如罗斯巴德（Rothbard）所解释的，“行动人在将资源投入生产和销售时，感兴趣的是未来的价格”⁷⁷⁴。在一个生产性的发达经济体中，价格的主要作用不是传递信息，而是作为估计未来价格的起点。⁷⁷⁵然后，预测的未来价格被用来对各种项目进

⁷⁷⁴ Murray N. Rothbard, “The End of Socialism and the Calculation Debate Revisited,” in *Economic Controversies* (Auburn, Ala: Mises Institute, 2011; <https://mises.org/library/economic-controversies>). As Mises notes: “Appraisalment is the anticipation of an expected fact. It aims at establishing what prices will be paid on the market for a particular commodity or what amount of money will be required for the purchase of a definite commodity” (emphasis added). Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), p. 329. “The essential elements of economic calculation are speculative anticipations of future conditions,” and the entrepreneur calculates based on “an understanding of future conditions, necessarily always colored by the entrepreneur’s opinion about the future state of the market.” *Ibid.*, p. 349.

穆瑞·N·罗斯巴德，《社会主义的终结与再论经济计算之争》，收录于《经济学的争议》（阿拉巴马州奥本：米塞斯研究院，2011年；网址：<https://mises.org/library/economic-controversies>）。正如米塞斯所指出的：“评价是对预期事实的预见。它旨在确定市场上将为特定商品支付的价格，或者购买一定商品所需的货币金额”（着重号为后加）。路德维希·冯·米塞斯，《人的行动：经济学专论》，学者版（阿拉巴马州奥本：米塞斯研究院，1998年；网址：<https://mises.org/library/human-action-0>），第329页。“经济计算的基本要素是对未来条件的推测性预测”，企业家的计算基于“对未来条件的理解，而这种理解必然总是抹上企业家对未来市场状况的看法”。同上，第349页。

⁷⁷⁵ See H ülsmann, “Knowledge, Judgment, Property,” p. 44, discussing the secondary importance of any possible information communicated through prices. But as Mises points out, in an intriguing and neglected passage, future prices are not only not dependent on past prices, but in principle could be forecasted by entrepreneurs even before there are existing money prices. As Mises writes:

If the memory of all prices of the past were to fade away, the pricing process would become more troublesome, but not impossible as far as the mutual exchange ratios between various commodities are concerned. It would be harder for the entrepreneurs to adjust production to the demand of the public, but it could be done nonetheless. It would be necessary for them to assemble anew all the data they need as the basis of their operations. They would not avoid mistakes which they now evade on account of

experience at their disposal. Price fluctuations would be more violent at the beginning, factors of production would be wasted, want-satisfaction would be impaired. But finally, having paid dearly, people would again have acquired the experience needed for a smooth working of the market process.

Mises, Human Action, chap. XVI. Some people, who are anti-bitcoin, etc., are alarmed by this comment by Mises, since it undercuts their view of the nature and function of money and prices, but I think it gets to the heart of the matter: that all action is aimed at changing the future, which is uncertain; and it is future (uncertain) prices which are used in economic calculation. See Kinsella, “Human Action and Universe Creation,” StephanKinsella.com (June 28, 2022). “Current” —or, immediate past—prices cannot determine future prices, but they can serve as a starting point, an “accessory of appraisal,” since it can be easier to take stock of the current price array and envision the change, the delta, between now and the future, based on one’s forecast of how human interactions will change, than to forecast a future price starting from chaos. But in principle, there is no reason an actor in a barter society could not forecast the emergence of money in the near future and try to predict the prices that would emerge thereafter. This Gedankenexperiment helps to highlight that prices do not convey knowledge or information, but rather reflect the knowledge, preferences, forecasts, and judgments of actors.

见 许尔斯曼,《知识、判断、财产》,第 44 页,讨论了通过价格传递的任何可能信息的次要性。但正如米塞斯在一段耐人寻味而又被忽视的文字中所指出的,未来的价格不仅不依赖于过去的价格,而且原则上企业家甚至可以在现有货币价格出现之前就进行预测。正如米塞斯所写:

如果过去所有价格的记忆都消失了,定价过程会变得更加麻烦,但就各种商品之间的相互交换比率而言并非不可能。企业家要使生产适应公众的需求会更加困难,但仍然可以做到。他们有必要重新收集他们作为经营基础所需的所有数据。他们将无法避免现在由于可利用的经验而得以避免的错误。在一开始,价格波动会更加剧烈,生产要素会被浪费,需求满足会受到削弱。但最终,付出高昂代价后,人们将再次获得市场过程顺利运行所需的经验。

米塞斯,《人的行动》第十六章。一些反对比特币等的人,对米塞斯的这一评论感到震惊,因为这削弱了他们对货币和价格的性质和功能的看法,但我认为,它抓住了问题的核心:所有行动的目的都是为了改变未来,而未来是不确定的;经济计算中使用的正是未来(不确定的)价格。见金塞拉:《人的行动与总体创造》,StephanKinsella.com (2022 年 6 月 28 日)。“当前”——或者说,刚刚过去的——价格不能决定未来价格,但它们可以作为一个起点,一个“评价的辅助”,因为基于一个人对人类互动将如何变化的预测,评估当前价格体系并设想从现在到未来的变化、差值,可能比从混乱状态开始预测未来价格更容易。但原则上,在一个物物交换的社会中,没有理由一个行动人不能预测在不久的将来货币的出现,并试图预测此后会出现的价格。这个思想实验有助于强调价格并不传递知识或信息,而是反映行动人的知识、偏好、预测和判断。

行定量比较，并选择最有利可图——也就是最具生产价值——的资源利用方式。⁷⁷⁶价格之所以重要，是因为它们是评估的一个辅助手段。“当前”（刚——刚过去的）价格只能说明当前的价格结构是怎样的，因此可以作为在当前起点上预测未来一系列价格的基础。因此，现在的价格“不可能有任何传递功能，因为它们只是我们理解未来的起点，哪怕是不可或缺的起点”。⁷⁷⁷

⁷⁷⁶ Barnett gives an example of a consumer using prices to decide whether or not to purchase an airline ticket to fly to France. Structure, p. 55. But this example ignores the role of prices in entrepreneurial appraisal in favor of its economically less essential role in consumer choices. See Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth* (Auburn, Ala.: Mises Institute, 1990 [1920]; <https://mises.org/library/economic-calculation-socialist-commonwealth>), pp. 4 – 6, 24. As Rothbard notes, “consumers goods are not the real problem … . The real problem … is in all the intermediate markets for land and capital.” Rothbard, “The End of Socialism and the Calculation Debate Revisited,” pp. 56 – 57. He goes on: “the crucial decisions in the capitalist economy are the allocation of capital to firms and industries.” Ibid., pp. 58 – 60. See also Mises, *Human Action*, p. 325: “The driving force of the market process is provided neither by the consumers nor by the owners of the means of production … but by the promoting and speculating entrepreneurs.” See also Salerno, “Ludwig von Mises as Social Rationalist,” pp. 45 – 46.

巴尼特举了一个消费者利用价格来决定是否购买飞往法国的机票的例子。《结构》，第 55 页。但这个例子忽略了价格在企业评估中的作用，而忽视了价格在消费者选择中经济上不那么重要的作用。见路德维希·冯·米塞斯：《社会主义共和国的经济计算》（阿拉巴马州奥本：米塞斯研究院，1990 [1920]；网址：<https://mises.org/library/economic-calculation-socialist-commonwealth>），第 4-6 页、24 页。正如罗斯巴德所指出的，“消费品不是真正的问题…… 真正的问题…… 在于所有土地和资本的中间市场”。罗斯巴德，《社会主义的终结与再论经济计算之争》，第 56-57 页。他接着说：“资本主义经济中的关键决策是资本向企业和行业的配置。”同上，第 58-60 页。另见米塞斯的《人的行动》，第 325 页：“市场过程的驱动力既不是由消费者提供，也不是由生产资料的所有者提供…… 而是作为促进者的投机企业家提供。”另见萨勒诺的《作为社会理性主义者的路德维希·冯·米塞斯》，第 45-46 页。

⁷⁷⁷ H ü Ismann, “Knowledge, Judgment, Property,” p. 47. Horwitz also notes that current “prices … do serve as the starting point for the next round of entrepreneurial appraisal,” but then adds, “because they do provide (imperfect) information about scarcity, wants, and opportunity costs.” Horwitz, “Monetary Calculation and Mises’ s Critique of Planning,” p. 441. The latter part of the sentence seems to be superfluous and not logically connected to the first. Current prices are the starting point in appraisal because today’ s prices will change in various ways to result in future prices, which are of interest to entrepreneurs. For a discussion of the connection of

The problem faced in a society without libertarian property rules is that there can be no money prices and there can thus be no economic calculation. Talk of a knowledge-disseminating role for prices is flawed and misses the point. Accordingly, Hoppe concludes that "Hayek's contribution to the socialism debate must be thrown out as false, confusing, and irrelevant."³⁵

一个没有自由意志主义财产规则的社会所面临的问题是，不可能有货币价格，因此也不可能经济计算。谈论价格的知识传播作用是有缺陷的，而且没有抓住重点。因此，霍普得出结论说：“哈耶克对社会主义论证的贡献必须被抛弃，因为它是错误的、混乱的和无关紧要的”。⁷⁷⁸

current prices to previous prices, see Mises' s regression theorem (Human Action, p. 405 et pass.; idem, The Theory of Money and Credit (New Haven: Yale University Press, 1953), pp. 408 et seq.) and Murray N. Rothbard, Man, Economy, and State, with Power and Market, Scholars ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 4, § 5.B.

许尔施曼，《知识、判断与财产》，第 47 页。霍维茨也指出，当前的“价格……的确可以作为下一轮企业家评估的起点”，但随后又补充道，“因为它们的确提供了关于稀缺性、需求和机会成本的（不完全）信息”。霍维茨，《货币计算与米塞斯对计划的批判》，第 441 页。这句话的后半部分似乎是多余的，并且在逻辑上与前半部分没有联系。当前价格是评估的起点，因为今天的价格将以各种方式变化，从而产生未来价格，而未来价格是企业家所关注的。关于当前价格与先前价格的联系的讨论，参见米塞斯的回溯定理（《人的行动》，第 405 页及以后；同上，《货币与信用理论》（纽黑文：耶鲁大学出版社，1953 年），第 408 页及以后）以及穆瑞·N·罗斯巴德的《人、经济与国家，权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；网址：<https://mises.org/library/man-economy-and-state-power-and-market>），第四章，第 5.B 节。

⁷⁷⁸ Hoppe, “Socialism: A Property or Knowledge Problem?”, p. 259. See also Rothbard, “The End of Socialism,” p. 66: “the entire Hayekian emphasis on ‘knowledge’ is misplaced and misconceived;” H ü Ismann, “Knowledge, Judgment, Property,” p. 39, discussing “the irrelevance of knowledge problems;” and Salerno, “Ludwig von Mises as Socialist Rationalist,” p. 44: “[t]he price systems is not—and praxeologically cannot be—a mechanism for economizing and communicating the knowledge relevant to production plans. The realized prices of history are an accessory of appraisalment.” See also related quotes in “Legislation and the Discovery of Law in a Free Society” (ch. 13), at n.68.

霍普，《社会主义：是财产问题还是知识问题？》，第 259 页。另见罗斯巴德，《社

巴尼特论知识 Barnett on Knowledge

Barnett's attempt to make knowledge the central inquiry, instead of calculation, scarcity, and interpersonal conflict, leads, not surprisingly, to confusion. Barnett maintains that the problem to be solved is "potentially conflicting personal and local knowledge of potential resource use"³⁶ or conflicting "preferences."³⁷ He then claims that private property and related liberal rules would minimize such conflicts, because it would lead to you "taking into account" my information and vice-versa, and to a general spreading of information (in "encoded" form).

巴尼特试图将知识作为核心问题，而不是计算、稀缺性和人际冲突，这导致了混乱，这并不奇怪。巴尼特坚持认为，有待解决的问题是“关于潜在资源使用的可能相互冲突的个人和局部知识”，⁷⁷⁹或者相互冲突的“偏好”。⁷⁸⁰然后他声称，私有财产和相关的自由规则将使这种冲突最小化，因为它将导致你“考虑”我的信息，反之亦然，并导致信息（以“编码”形式）的普遍传播。

As an example, Barnett hypothesizes that "there is a particular tree between my neighbor's house and mine."³⁸ One neighbor wants to keep the tree; yet the other wants to cut it down because it blocks his view of the sunset. Although Barnett acknowledges that it is these proposed actions (keeping the tree; cutting it down) which conflict with each other, he awkwardly and unnecessarily tries to fit this within the

会主义的终结》，第 66 页：：“哈耶克对‘知识’的整个强调都是错位和误解的。许尔施曼，《知识、判断与财产》，第 39 页，讨论了“知识问题的无关性”；以及萨勒诺，《作为社会主义理性主义者的路德维希·冯·米塞斯》，第 44 页：“价格体系不是——而且在行动学上也不可能是——一种节约和传播与生产计划相关的知识的机制。历史上实现的价格是评估的附属品”。另见《自由社会中的立法与法律的发现》（第 13 章）中的相关引文，第 68 页。

⁷⁷⁹ Structure, p. 40
《结构》，第 40 页。

⁷⁸⁰ Ibid., p. 38. One wonders why Barnett does not refer instead to “problems of preference.” But this may have been a more obviously faulty notion, as it does not garner automatic respectability due to association with Hayek and other intellectuals. 同上，第 38 页。人们不禁要问，为什么巴尼特不提及“偏好问题”。但这可能是一个更明显的错误概念，因为它不会因为与哈耶克和其他知识分子的联系而自动获得尊重。

knowledge framework. He writes:

In my example, my neighbor and I both have personal knowledge of how the tree affects the view from our respective windows. My neighbor and I have personal knowledge of each of our preferences concerning the use of this particular tree. Finally, and most significantly, these preferences conflict or, more precisely, each of us subjectively prefers to use the tree in physically incompatible ways⁷⁸¹. Notice that there is no problem of scarcity in the absence of an incompatibility of subjective preferences.³⁹

例如，巴尼特假设“在我和邻居的房子之间有一棵特定的树”。⁷⁸¹一个邻居想保留这棵树；而另一个想砍掉它，因为它挡住了他看日落的视线。尽管巴尼特承认是这些提议的行动（保留树；砍掉树）相互冲突，但他却笨拙且不必要地试图将其纳入知识框架内。他写道：

在我的例子中，我和我的邻居都有关于这棵树如何影响我们各自窗户视野的个人知识。我和我的邻居都有关于我们对这棵特定树的使用偏好的个人知识。最后，也是最重要的是，这些偏好相互冲突，或者更准确地说，我们每个人都倾向于以物理上不相容的方式使用这棵树……请注意，在主观偏好不相容的情况不存在时，就没有稀缺性问题。⁷⁸²

Now assigning property rights to the tree, as Barnett advocates, does solve the problem of conflict over use of the tree: Whichever neighbor owns the tree gets to decide whether to cut it down or not. But this solution has nothing to do with knowledge—except to the extent that non-owners must of course know someone else owns the tree in order to avoid conflicts over use of the tree.⁴⁰ The true way to avoid conflict is to establish, and promote respect for, property rights, not to disseminate “local” knowledge or information about others’ preferences.

现在，正如巴尼特所主张的那样，赋予树木以财产权，确实解决了树木使用上的冲突

⁷⁸¹ Ibid.

同上。

⁷⁸² Ibid.

同上。

问题：无论哪位邻居拥有这棵树，都可以决定是否砍掉它。但这个解决方案与知识无关——除非在某种程度上，非所有者当然必须知道别人拥有这棵树，以便避免在树的使用上发生冲突。⁷⁸³避免冲突的真正方法是确立并促进对财产权的尊重，而不是传播“局部”知识或关于他人偏好的信息。

Barnett's account implicitly recognizes this. He says, for example, that the “radical dispersion of knowledge ... leads to a knowledge problem when people seek to act on the basis of their differing knowledge in incompatible ways.”⁴¹ Note that the phrase “on the basis of their differing knowledge” is completely superfluous here; if it is eliminated, then this says that a problem arises “when people seek to act—in incompatible ways”—that is, when there are conflicting actions in the use of scarce resources. But conflicts are not caused by lack of knowledge, and thus cannot be solved by the spreading of knowledge. Conflicts arise because of the fundamental fact of scarcity and the lack of property rights allocating control of resources to specified owners.⁴² That is why property rights are the only way to prevent conflicts over scarce resources.

巴尼特的论述含蓄地承认了这一点。例如，他说，“当人们试图根据他们不同的知识以不相容的方式行事时，知识的极端分散.....会导致知识问题”。⁷⁸⁴ 请注意，这里的“基于他们不同的知识”完全是多余的；如果去掉这个短语，那么这里说的是“当人们试图以不相容的方式行动时”——即在使用稀缺资源时出现相互冲突的行动——就会产生问题。但是，冲突并不是由于缺乏知识造成的，因此也不能通过传播知识来解决。冲突产生的原因是资源稀缺这一基本事实，以及缺乏将资源控制权分配给特定所有者的财产权。⁷⁸⁵ 这就是为什么财产权是防止稀缺资源冲突的唯一途径。

⁷⁸³ See note 58, below, and accompanying text, discussing the boundary-defining role of property rights and its relation to Barnett’s second-order problem of knowledge. 见下文注释 58 及相关内容，其中讨论了产权的界定边界的作用及其与巴尼特的二阶知识问题的关系。

⁷⁸⁴ Structure, p. 41.
《结构》，第 41 页。

⁷⁸⁵ Hayek’s model leads Barnett into further error, as can be seen in his statement that “there is no problem of scarcity in the absence of an incompatibility of subjective preferences.” Ibid., p. 38. But this gets it backwards. We cannot even meaningfully say that preferences “conflict” unless they are manifested in conflicting actions regarding

Why would anyone think knowledge could prevent conflict? Even omniscient actors, who are fully aware of each other's preferences and intentions, may struggle for control of a given scarce resource. If lack of knowledge is the reason for conflict over the tree in Barnett's tree example, surely the two neighbors would be able to learn of each other's conflicting preferences—by speaking with or watching each other— more easily than they learn similar facts in “condensed” form from the general price system! How will prices tell owners who owns the tree, i.e., who may control it? In fact, the existence of prices presupposes a system of private property, which itself already resolves conflicts over the use of scarce resources. As Hoppe puts it, “[p]rivate property is the necessary condition—die Bedingung der Möglichkeit—of the knowledge communicated through prices.”⁴³ In any private-property system, whether or not prices have yet arisen, the private-property rules themselves suffice to promote peace and cooperation.

为何有人 would 认为知识可以防止冲突呢？即使是全知全能的行动人，在完全了解对方的偏好和意图的情况下，也可能会为争夺对某一稀缺资源的控制权而斗争。如果在巴尼特的树的例子中，缺乏知识是冲突的原因，那么这两个邻居肯定能够通过交谈或观察彼此，比从一般价格体系中以“浓缩”形式了解到类似事实更容易地了解到彼此冲突的偏好！价格如何告诉所有者谁拥有这棵树，即谁可以控制这棵树？事实上，价格的存在是以私有财产制度为前提的，而私有财产制度本身已经解决了稀缺资源使用上的冲突。正如霍普所说：“私有财产是通过价格传达知识的必要条件——可能性的条件。”

⁷⁸⁸在任何私有财产制度中，无论价格是否已经出现，私有财产规则本身就足以促进和平与合作。

the use of particular scarce resources. Thus the concepts of scarcity and conflict are more fundamental than the notion of conflicting preferences or knowledge. On the theory of demonstrated preference, see Rothbard, “Toward a Reconstruction of Utility and Welfare Economics,” in *Economic Controversies*; and Mises, *Human Action*.

哈耶克模式使巴尼特陷入了更深的错误，正如在他的陈述中可以看到的那样，“在主观偏好不存在不相容性的情况下，就不存在稀缺问题”。同上，第 38 页。但这是把事情弄反了。除非偏好通过关于特定稀缺资源使用的相互冲突的行动展示出来，否则我们甚至不能有意义地说偏好“冲突”。因此，稀缺和冲突的概念比相互冲突的偏好或知识的概念更为基础。关于偏好展示理论，参见罗斯巴德《重建效用与福利经济学》，收录于《经济学的论证》；以及米塞斯《人的行动》。

⁷⁸⁸ Hoppe, “Socialism: A Property or Knowledge Problem?” , p. 258.

霍普《社会主义：是财产问题还是知识问题？》。第 258。

And a deeper difficulty looms in Barnett's account. For how can knowledge, or even preferences, of two individuals "conflict"? If we use the term "preference" in the precisely defined meaning it has in praxeology, where it concerns only one's demonstrably preferred use of one's own property,⁴⁴ there can be no conflict in preferences. The non-owner simply cannot have demonstrated preferences with regard to his neighbor's property, because these preferences would have to be demonstrated in action with another's property, which is prohibited. And if, instead, Barnett means only to use "preferences" in some colloquial, imprecise sense, how can information prevent conflicting preferences? In this loose sense of preference, individuals can have different preferences, even if they are "aware" of the other's wants. And such a casual conception of preference cannot hope to be used to establish a rigorous case for private property, anyway.

在巴尼特的论述中，还有一个更深层次的难题。两个人的知识甚至偏好怎么会“冲突”呢？如果我们按照行动学的精确定义来使用“偏好”一词，它只涉及一个人对自己财产的明显偏好使用，⁷⁸⁷那么偏好之间就不可能会有冲突。非所有者根本不可能对其邻居的财产表现出明显的偏好，因为这些偏好必须通过对他人财产的行动来展示，而这被禁止的。相反，如果巴尼特的意思只是在某种口语化的、不精确的意义上使用“偏好”，那么信息又如何能防止相互冲突的偏好呢？在这种宽泛的偏好意义上，即使个人“知道”他人的需求，他们也可能有不同的偏好。而且，这种随意的偏好概念无论如何也不能用来为私有财产建立一个严谨的论据。

Libertarians (and Misesian-Austrians) recognize that it is only actions that can conflict; it is the very possibility of conflict over the use of things that renders these things scarce resources and thus possible economic goods. Again, when the rubber hits the road, Barnett recognizes this truth: he notes that "there would be no knowledge problem with respect to resource use in the absence of scarcity."⁴⁵ He also notes that:

The actions of some, not their preferences, are what interfere with the ability of others to pursue happiness by acting on the basis of their own personal and local knowledge. What is sought is a social order in which such knowledgeable actions by everyone are

⁷⁸⁷ Rothbard, "Toward a Reconstruction of Utility and Welfare Economics." 罗斯巴德《重建效用与福利经济学》。

*possible.*⁴⁶

自由意志主义者（以及米塞斯学派的奥地利学派经济学家）认识到，只有行动才会产生冲突；正是由于在使用事物时可能发生冲突，才使得这些事物成为稀缺资源，从而成为可能的经济财货。再次强调，当涉及实际问题时，巴尼特也认识到了这个真理：他指出“在没有稀缺性的情况下，就不会有关于资源使用的知识问题”。⁷⁸⁸他还指出：

是一些人的行动，而不是他们的偏好，干扰了其他人基于他们自己的个人和局部知识通过行动来追求幸福的能力。人们所寻求的是一种社会秩序，在这种秩序中，每个人的这种有知识的行动都是可能的。⁷⁸⁹

Thus, when he actually has to formulate operational rules for guiding conduct, Barnett appropriately focuses on conflicting actions directed at scarce resources and shows that property rights are necessary to prevent such conflicts. Talk about knowledge and preference conflicts, and about the need for “knowledgeable actions” (instead of successful action), is superfluous and distracting window dressing.

因此，当巴尼特实际需要制定指导行为的操作规则时，他恰当地将重点放在了针对稀缺资源的冲突行动上，并表明财产权对于防止这种冲突是必要的。谈论知识和偏好冲突，谈论“有知识的行动”（而不是成功的行动）的必要性，都是多余的、分散注意力的装点门面的东西。

Instead of the misplaced emphasis on knowledge, Barnett could have more straightforwardly noted that there indeed is a problematic potential for interpersonal conflict over scarce resources (including one's body), which would interfere with his

⁷⁸⁸ Structure, p. 37.

《结构》，第 37 页。

⁷⁸⁹ Ibid., p. 43. Barnett's conception of rights is also consistent with this emphasis on scarcity and action (p. 77). “[R]ights are construed as enforceable claims to acquire, use, and transfer resources in the world—claims to control one's person and external resources.” Such rights are thus operational and can serve to guide action so that conflicts are avoided. See also pp. 100 – 101.

同上，第 43 页。巴尼特的权利概念也与这种对稀缺性和行动的强调相一致（第 77 页）。“权利被解释为获取、使用和转让存世资源的可执行的主张——控制个人和外部资源的主张。因此，这种权利具有可操作性，可用于指导行动，从而避免冲突。另见第 100-101 页。

assumed goals of peace and happiness. He could then have argued that private-property rights and the libertarian principles of self-ownership and Lockean homesteading solve this problem of interpersonal conflict.⁴⁷ Libertarian homesteading and property rules give rise to peace and prosperity, because in such a system conflicts can be avoided and prices can arise to allow economic calculation and thus rational resource allocation.

与其错误地强调知识，巴尼特本可以更直截了当地指出，在稀缺资源（包括一个人的身体）问题上确实存在人际冲突的潜在可能性，这将干扰他所假定的和平与幸福的目标。然后，他就可以论证，私有财产权以及自我所有权和洛克式拓殖的自由意志主义原则解决了这一人际冲突问题。⁷⁹⁰自由意志主义的拓殖和财产规则带来了和平与繁荣，因为在这样的制度中，冲突可以避免，价格可以产生，从而可以进行经济计算，进而合理分配资源。

In fact, this more direct approach could have led Barnett to recognize that it is possible to give much more than a merely hypothetical or consequentialist defense of libertarian principles by using Hoppe's pathbreaking argument that advocacy of any social ethic other than private property contradicts peace and happiness-conducive norms such as cooperation and conflict-avoidance, which are necessarily presupposed by all participants in argumentation.⁴⁸ In fact, in other writings Barnett argues, in a way compatible in approach with Hoppe's argumentation ethics, that those who claim that the U.S. Constitution justifies certain government regulation of individuals are themselves introducing normative claims into discourse and thus cannot object, on positivist or wertfrei grounds, to a moral or normative criticism of their position.⁴⁹

事实上，这种更直接的方法本可以使巴尼特认识到，通过使用霍普的开创性论证，为自由意志主义原则提供的可能远不止是假设性或结果主义的辩护，霍普的论证认为，倡导私有财产以外的任何社会伦理都与合作和避免冲突等有利于和平与幸福的规范

⁷⁹⁰ As Hoppe does. See Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), p. 157; "What Libertarianism Is" (ch. 2).

正如汉斯-赫尔曼·霍普所做的那样。参见汉斯-赫尔曼·霍普的《社会主义与资本主义理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010[1989]；网址：www.hanshoppe.com/tsc），第157页；《何为自由意志主义》（第二章）。

相矛盾，而这些规范是所有论证参与者的必要前提。⁷⁹¹事实上，在其他著作中，巴尼特以一种与霍普的论证伦理学方法相容的方式论证说，那些声称美国宪法为政府对个人的某些管制提供正当性理由的人，其自身在对话中引入了规范性主张，因此不能基于实证主义或价值无涉的理由反对对他们立场的道德或规范性批评。⁷⁹²

What about the goal of prosperity? Here Barnett could have pointed out, following Mises, that the private-property order and its accompanying price system also permits economic calculation and thus is the only way to achieve this goal. "Knowledge" would have been recognized as merely a technical problem that confronts any individual when choosing means to achieve certain ends and when deciding which ends to pursue.⁵⁰

那么繁荣的目标呢？在这里，巴尼特本可以效仿米塞斯指出，私有财产秩序及其伴随

⁷⁹¹ Hoppe, *A Theory of Socialism and Capitalism*, p. 157 et pass; "Dialogical Arguments for Libertarian Rights" (ch. 6). Hoppe's discourse ethics would appear to be a natural complement to Barnett's own views and previous writings, especially given that Barnett has in the past been heavily influenced by Hoppe's mentor Rothbard, who claimed that Hoppe "has managed to establish the case for anarcho-capitalist-Lockean rights in an unprecedentedly hard-core manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison." See Murray N. Rothbard, "Beyond Is and Ought," *Liberty* (Nov. 1988; <https://perma.cc/6HMQ-7CVQ>): 44 - 45, 44, discussed in "Dialogical Arguments for Libertarian Rights" (ch. 6), n.15.

霍普：《社会主义与资本主义理论》，第 157 页等；《自由意志主义权利的对话论证》（第 6 章）。霍普的对话伦理学似乎是对巴尼特自身的观点和以往著作的自然补充，特别是考虑到巴内特过去深受霍普的导师罗斯巴德的影响，他声称霍普“以前所未有的硬核方式成功地确立了无政府资本主义-洛克式权利的论点，这种论点使我自己的自然法/自然权利立场相比之下几乎显得软弱无力”。参见穆瑞·N·罗斯巴德，《超越是与应当》，《自由》（1988 年 11 月；网址：<https://perma.cc/6HMQ-7CVQ>）：44-45、44，在《自由意志主义权利的对话论证》（第六章）注释 15 中进行了讨论。

⁷⁹² Barnett, "Getting Normative," p. 100. See also idem, "The Intersection of Natural Rights and Positive Constitutional Law"; and *Structure*, p. 122 et seq., following Fuller in arguing that the common law usefully requires parties to state their claims in terms of rights, thus necessarily asserting (presupposing) some principle or standard by which the claim of right can be tested.

巴尼特，《走向规范性》，第 100 页。另见同上，《自然权利与实证宪法法律的交集》；以及《结构》，第 122 页及以后，跟随富勒的观点，认为普通法有效地要求各方以权利术语陈述他们的主张，从而必然地主张（预设）某种可以用来检验权利主张的原则或标准。

的价格体系也允许经济计算，因此是实现这一目标的唯一途径。“知识”本应被视为任何个人在选择实现某些目标的手段和决定追求哪些目标时所面临的一个技术问题。⁷⁹³

As for the right to contract (contractually transfer resources to others), Barnett provides a Byzantine argument that such a contract-based system is desirable because it requires the buyer to take the current owner's knowledge "into account."⁵¹ Barnett also favors freedom of contract because it allows a price system to emerge, which serves as a powerful engine for the encoding and transmission of knowledge. Again, knowledge need not be even mentioned to support the institution of contracting. First, Barnett has already argued that the rights to homestead and use property are necessary to solve conflicts and promote prosperity. But the right to contract is implicit in the rights to acquire and use property. This is because if one has the right to acquire property, one has the right to abandon it (i.e., one has to be permitted to get rid of it, e.g., give it to another). And if one has the right to use property, this implies that others cannot take the property without obtaining the owner's consent.

至于权（以形式将资源转让给他人），巴尼特提出了一个拜占庭式的论点，认为这种以为基础的制度是可取的，因为它要求买方将当前所有者的知识“考虑在内”。⁷⁹⁴

Second, as Barnett notes, the right to exchange titles to property allows a price system to arise. Yet as already noted, the price system promotes Barnett's goal of prosperity not because of knowledge dissemination but because of the crucial role of prices as accessories of appraisalment. Third, permitting contractual transfer of resources promotes prosperity because both parties to a voluntary exchange are made better off.⁵²

巴尼特也赞成自由，因为它允许价格体系的出现，而价格体系是知识编码和传播的强

⁷⁹³ H ü Ismann, "Knowledge, Judgment, Property," p. 44. The need to acquire knowledge faces even Crusoe alone on his island, who has no need for private property rules because there are no other people and thus no possibility of interpersonal conflict. 许尔施曼，《知识、判断与财产》，第 44 页。即使是在孤岛上的鲁滨逊也面临着获取知识的需要，他不需要私有财产规则，因为岛上没有其他人，也就不可能发生人际冲突。

⁷⁹⁴ Structure, pp. 53 - 54. 《结构》，第 53-54 页。

大引擎。同样，为支持制度，根本无需提及知识。首先，巴尼特已经论证过，拓殖权和财产使用权是解决冲突、促进繁荣的必要条件。但权是隐含在获得和使用财产的权利中的。这是因为，如果一个人有获得财产的权利，他就有放弃财产的权利（也就是说，他必须被允许摆脱财产，例如将财产赠与他人）。如果一个人有使用财产的权利，这就意味着他人在未征得所有者同意的情况下不能拿走财产。⁷⁹⁵

Thus, it is the potential for interpersonal conflict and lack of objectively and justly defined property rights that endangers liberty, peace, and prosperity, not ignorance of others' preferences and local knowledge. Barnett's various "knowledge problems" are therefore better reformulated as "conflict problems." Libertarian principles would then be seen as ways to promote harmony and prosperity and to avoid conflict, instead of remedying the non-problem of deficiencies in knowledge.

因此，危及自由、和平与繁荣的是潜在的人际冲突和缺乏客观正义界定的财产权，而不是对他人偏好和局部知识的无知。因此，巴尼特提出的各种“知识问题”最好重新表述为“冲突问题”。这样，自由意志主义原则就会被视为促进和谐与繁荣、避免冲突的方法，而不是补救知识缺陷这一非问题的方法。

知识的二阶问题与法治 THE SECOND-ORDER PROBLEM OF

KNOWLEDGE AND THE RULE OF LAW

"The second-order problem of knowledge is the need to communicate knowledge of justice in a manner that makes the actions it requires accessible to everyone."⁵³ This is where the rule of law comes in. The rules of justice (i.e., substantive laws concerning private-property rights, etc.) must be adequately communicated to individuals so that they can serve as guides to action and thus prevent conflicts. To ensure adequate communication, various "formal" requirements must be satisfied. These formal requirements—the rule of law—govern both the form of laws and processes by which they are generated and promulgated.⁵⁴

⁷⁹⁵ Rothbard, "Toward a Reconstruction of Utility and Welfare Economics."
罗斯巴德，《重建效用与福利经济学》。

“知识的第二级问题是，需要以一种人人都能采取所需行动的方式传播正义知识。这就是法治的作用所在。⁷⁹⁶正义规则（即有关私有财产权等的实体法）必须充分传达给个人，使其成为行动指南，从而防止冲突。为确保充分沟通，必须满足各种“规范的”要求。这些“规范的”要求——法治——既规范法律的形式，也规范法律的产生和颁布过程。⁷⁹⁷

For example, rules of conduct must be communicated ahead of time (ex ante); and they must also be sufficiently concrete to be applied in a variety of situations. These and other considerations lead to the conclusion that laws must be: “(a) general rules or principles that are (b) publicized, (c) prospective in effect, (d) understandable,(e) compossible, (f) possible to follow, (g) stable, and (h) enforced as publicized.”⁵⁵ Otherwise, a rule cannot serve as an operational guide to conduct or will not be just.

例如，行为规则必须提前传达（事前）；并且它们还必须足够具体以便在各种情况下适用。这些及其他考虑因素得出这样的结论：法律必须是：“（a）一般性规则或原则，且（b）被公布，（c）在效果上具有前瞻性，（d）可理解，（e）相互兼容，（f）能够被遵循，（g）稳定，以及（h）按照公布的那样被执行。”⁷⁹⁸否则，一条规则就不能作为行为的操作指南，或者就不是正义的。

抽象权利与法律规则 Abstract Rights and Legal Precepts

As Barnett insightfully explains, principles such as private property, first possession, and freedom of contract are very abstract, and thus cannot serve to guide conduct except in relatively rare situations.⁵⁶ (Barnett refers to such abstract natural rights as “background” rights, as opposed to the actually existing or enforced laws or rights, which he refers to as legal rights. It is background rights to which legal rights should conform.)⁵⁷ Thus, any legal system must develop a body of specific or concrete legal rules or principles, based on or at least compatible with more abstract background

⁷⁹⁶ Structure, p. 85.
《结构》，第 85 页。

⁷⁹⁷ Ibid., p. 84.
同上，第 84 页。

⁷⁹⁸ Ibid., p. 107.
同上，第 107 页。

rights. Barnett refers to the particular, concrete rules or principles that serve as guides to action as legal precepts.⁵⁸

正如巴尼特深刻阐释的那样，诸如私有财产、先占以及自由等原则是非常抽象的，因此，除了在相对罕见的情况下，它们无法起到指导行为的作用。⁷⁹⁹（巴尼特将这些抽象的自然权利称为“背景”权利，与实际存在或执行的法律或权利相对，他将后者称为法定权利。法定权利应当符合背景权利。）⁸⁰⁰因此，任何法律体系都必须基于更抽象的背景权利，或者至少与之兼容，发展出一套具体的法律规则或原则。巴尼特将那些作为行动指南的特定、具体规则或原则称为法律规范。⁸⁰¹

⁷⁹⁹ Ibid., pp. 84 – 85, 94 – 97, and 109 – 117.

同上，第 84-85 页，第 94-97 页，第 109-117 页。

⁸⁰⁰ Ibid., p. 16.

同上，第 16 页。

⁸⁰¹ Ibid., pp. 94 – 95. On the objective function of property rules, see Hoppe, A Theory of Socialism and Capitalism and idem, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp); “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), at n.16; “Legislation and the Discovery of Law in a Free Society” (ch. 13), n.147. See also Structure, p. 101: “Only a general reliance on objectively ascertainable assertive conduct will enable a decentralized system of rights to perform its allotted boundary-defining function.”

See also Saúl Litvinoff, The Law of Obligations: Part I: Obligations in General, 2d ed. (St. Paul, Minn.: West Publishing Company, 2001), § 1.9 (footnotes omitted):

... the law of obligations is one area of the vast region of the law of patrimony, which comprises, precisely, property and obligations.

The theory of obligations appears as a peculiar intellectual phenomenon in the evolution of legal thought. No doubt, it belongs together with the law of obligations but the theory does not reach as far as the law itself. The theory of obligations concerns itself only with an analysis of the component parts, the blueprint, of a certain mechanism, but without exploring the ways in which that mechanism works in concrete situations. Thus, the theory of obligations concerns itself with contract as the general scheme of all sorts of accords of the will of parties, without looking into the variations to which that scheme is susceptible according to the different needs it must satisfy. The theory leaves these variations to be explored elsewhere, in the sphere of special contracts, or contracts in particular, such as sale, lease, loan, and the many others that exist.

同上，第 94-95 页。关于财产规则的目标功能，参见霍普的《社会主义与资本主义理论》以及《私有财产的经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：

This analysis is on the mark, because it is true that legal principles must be known (communicated or published) and operational (sufficiently concrete) if they are to be used to avoid conflicts. The common tie between Barnett's second-order and first-order problems is therefore not knowledge but rather conflict-avoidance. A private-property order helps to avoid conflicts because each scarce resource is assigned a specified proper owner (reformulated first-order analysis). For conflicts to actually be avoided by individuals respecting these rules, however, the various rules as well as actual property boundaries must of course be known: I cannot consciously avoid trespassing on your property unless I know it is property and that trespassing is impermissible.

这种分析是恰当的，因为确实如果法律原则要被用来避免冲突，它们就必须是已知的（被传达或公布）且可操作的（足够具体）。因此，巴尼特的二阶问题和一阶问题之间的共同纽带不是知识，而是避免冲突。私有财产秩序有助于避免冲突，因为每一种稀缺资源都被分配给了一个特定的正当所有者（重新阐述的一阶分析）。然而，要使尊重这些规则的个人真正避免冲突，当然必须知道各种规则以及实际的财产边界：我无法有意识地避免侵入你的财产，除非我知道它是财产，而且侵入是不允许的。

As a practical matter, this requires the rule of law be followed and that legal rules be concrete enough (Barnett's legal precepts) to serve as operational guides to action. This problem is in a sense inherent in the very idea of a private-property order, because the latter cannot exist if no one knows what conflict-avoidance rules to follow, but it is a

米塞斯研究院，2006[1993]；网址：www.hanshoppe.com/eepp）；《出售并不意味着拥有所有权，反之亦然：一个剖析》（第十一章）注释 16；《自由社会中的立法与法律发现》（第十三章）注释 147。另见《结构》，第 101 页：“只有普遍依赖客观上可确定的断言行为，去中心化的权利体系才能发挥其应有的界定边界的功能。”

另见索尔·利特维诺夫，《义务法：第一部分：一般义务》，第二版（明尼苏达州圣保罗：韦斯特出版公司，2001 年），第 1.9 节（省略脚注）：

.....义务法是财产法广阔领域的一个方面，而财产法恰恰包括财产和义务。

义务理论是法律思想演变过程中的一种特殊的思想现象。毫无疑问，它与义务法同属一个领域，但理论的深度却不及法律本身。义务理论只关注对某种机制的组成部分、蓝图的分析，却不探讨该机制在具体情况下的运作方式。因此，义务理论关注的是作为当事人各种意愿协议的一般方案的契约，而不去研究该方案根据其必须满足的不同需要而可能产生的各种变化。该理论将这些变化留待在其他地方，在特殊契约或特定契约（如买卖、租赁、借贷和其他许多存在的契约）的领域中进行探讨。

real problem nonetheless and deserves the attention Barnett gives it.

实际上，这要求遵循法治，并且法律规则要足够具体（巴尼特所说的法律规范），以便作为行动的实际指南。从某种意义上说，这个问题是私有财产秩序这一概念本身所固有的，因为如果没有人知道要遵循哪些避免冲突的规则，那么私有财产秩序就无法存在。但这仍然是一个实际问题，值得巴尼特给予关注。

知识的三阶问题与普通法 THE THIRD-ORDER PROBLEM OF KNOWLEDGE AND THE COMMON LAW

What kind of legal and political system guarantees (or at least makes it possible) that the rule of law will be followed? How will concrete legal precepts be developed? (Barnett does not ask how the abstract natural or background rights are to be developed; presumably through the writings of academic specialists like Barnett.) Clearly, some institutional means of providing such concrete private-property rules is needed. This is where a decentralized law-generation process such as the common law steps in.

什么样的法律和政治制度能够保证（或至少能够保证）法治得到遵守？如何制定具体的法律规范？（巴尼特没有问如何发展抽象的自然权利或背景权利；大概是通过像巴尼特这样的学术专家的著作吧）。显然，需要某种制度手段来提供这种具体的私有财产规则。这就是普通法等去中性化的法律生成过程的作用所在。

In chapter 6, Barnett expands the conception of the rule of law to include the way in which a body of legal precepts is developed. According to Barnett, the "third-order problem of knowledge is the need to determine specific action-guiding precepts that are consistent with both the requirements of justice and the rule of law."⁵⁹ Again, I would characterize this as related to conflict-avoidance rather than knowledge. In order to avoid conflicts, concrete private-property rules must be developed by some institution, and the institution must be such that the rules developed are just.⁶⁰

在第六章中，巴尼特扩展了法治的概念，使其包括一套法律规范的发展方式。根据巴尼特的说法，“知识的三阶问题是需要确定与正义要求和法治一致的具体行动指导规

范。”⁸⁰² 再次，我认为这与避免冲突而非知识相关。为了避免冲突，具体的私有财产规则必须由某个机构制定，并且这个机构必须确保制定的规则是正义的。⁸⁰³

Barnett first maintains that there are limits to the ability to deduce specific legal precepts from abstract principles of justice (natural rights), in part because many sets of legal precepts are consistent with the general parameters of the abstract principles of natural rights.⁶¹ He argues that a common-law type decentralized legal system, unlike law professors and philosophers, can develop legal precepts, because, in such a system, they gradually develop and evolve from the outcomes of thousands of actual cases.

巴尼特首先认为，从抽象的正义原则（自然权利）中推导出具体的法律规范的能力是有限的，部分原因是许多法律规范都与自然权利的抽象原则的一般参数相一致。⁸⁰⁴他认为，与法学教授和哲学家不同，普通法类型的去中心化的法律体系能够发展法律规范，因为在这样的体系中，法律规范是从数千个实际案例的结果中逐渐发展和演变而来的。

Yet, Barnett does not provide a rigorous argument showing where the exact limits of the ability to deduce concrete rules are. He evidently feels that the more abstract principles can, for some reason, be established by armchair theorists. If denizens of the ivory tower can do this, why can they not deduce or establish more concrete rules by simply considering more and more contextual facts?⁶² In the Roman law system—a somewhat decentralized legal system superior in many ways to the common law—Roman jurists (jurisconsults) helped develop the great body of Roman law by providing

⁸⁰² Structure, p. 108.

《结构》，第 108 页。

⁸⁰³ Just rules are those that conform to the type of private-property order that serves to permit conflict avoidance and enable prosperity. As Hoppe has shown, such a privateproperty order is based on Lockean type homesteading since the first-possessor rule is the only objective rule that can be intersubjectively and universalizably agreed upon by potential disputants. See Hoppe, A Theory of Socialism and Capitalism, p. 157. 正义的规则是那些符合私有财产秩序类型的规则，这种私有财产秩序有助于避免冲突和实现繁荣。正如霍普所表明的那样，这样一种私有财产秩序基于洛克式的拓殖原则，因为首次占有者规则是唯一能够被潜在争议方跨主体间普遍同意的客观规则。参见霍普的《社会主义与资本主义理论》，第 157 页。

⁸⁰⁴ Structure, pp. 109 - 111.

《结构》，第 109-111 页。

opinions on the best way to resolve disputes. These disputes were often purely hypothetical or imaginary cases, in which the jurists asked, "Under such and such a possible or conceivable combination of circumstances, what would the law require?"⁶³ It is conceivable that a large part or even all of the legal code existing in a given society can be "deduced" in this fashion and then these rules applied like precedents to actual controversies as they arise. As a libertarian (and, I confess, a lawyer), I must say that I believe I would be more comfortable living under a set of concrete rules deduced by libertarian philosophers than the (perhaps more concrete) set of rules developed under the actual common law, although, as noted, there are limits to armchair theorizing.

然而，巴尼特并没有提供严谨的论证，说明推导具体规则的能力的确切界限在哪里。他显然认为，出于某种原因，更抽象的原则可以由纯理论研究的理论家来确立。既然象牙塔里的人可以做到这一点，为什么他们不能通过考虑越来越多的背景事实来推导或确立更具体的规则呢？⁸⁰⁵在罗马法体系中——在许多方面都优于普通法的某种程度的去中性的法律体系——罗马法学家（法律顾问 *jurisconsults*）通过就解决争议的最佳方式提供意见来帮助发展罗马法的庞大体系。这些争议往往是纯粹的假设或想象案例，在这些案例中，法学家们会问：“在这样或那样的可能或可想象的情况组合下，法律会有什么要求？”⁸⁰⁶可以想象，一个特定社会中存在的大部分甚至全部法典都可以通

⁸⁰⁵ But see Kinsella, "The Limits of Armchair Theorizing: The Case of Threats," Mises Economics Blog (Jul. 27, 2006).

但可参见金塞拉的《纸上谈兵的局限：以威胁为例》，米塞斯经济学博客（2006 年 7 月 27 日）。

⁸⁰⁶ James Hadley, *Introduction to Roman Law* (Littleton, Colo.: Fred Rothman, 1996; <https://archive.org/details/introductiontoro029387mbp>), p. 66. Hadley notes that "A recent able lecturer on ancient law, Mr. Maine, finds in this fact an explanation of the more thorough scientific development which distinguishes the Roman law from the English." Ibid. On the use of hypotheticals by Roman jurists, see also the following sources, quoted more extensively in Kinsella, "Roman Law and Hypothetical Cases," StephanKinsella.com (Dec. 19, 2022): H.F. Jolowicz & Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3d ed. (Cambridge, U.K.: University Press, 1972), pp. 95 & 97; Bruce W. Frier, *The Rise of the Roman Jurists* (Princeton, N.J.: Princeton University Press, 1985), pp. 163 – 71, esp. p. 167; W.W. Buckland & Arnold D. McNair, *Roman Law and Common Law: A Comparison in Outline* (Cambridge, England: University Press, 2d ed., revised by F.H. Lawson, reprinted with corrections 1965), pp. 6 – 15, esp. p. 9; Peter Stein, *Roman Law in European History* (Cambridge University

过这种方式“推导”出来，然后这些规则就像先例一样适用于实际出现的争议。作为

Press, 1999), pp. 8 – 9, 18, and 67 – 68; A. Arthur Schiller, Roman Law: Mechanisms of Development (Mouton Publishers, 1978), § 137; Alan Watson, “Justinian’s Corpus Iuris Civilis: Oddities of Legal Development; and Human Civilization,” Lecture 2 in Authority of Law; and Law: Eight Lectures (Stockholm: Institutet för Rätshistorisk Forskning, 2003; <https://perma.cc/2BD5-4P4K>), p. 65; James Gordley, The Jurists: A Critical History (Oxford University Press, 2013), p. 17; John P. Dawson, The Oracles of the Law (Thomas M. Cooley Lectures, Ann Arbor: University of Michigan Law School, 1968), pp. 116 – 17, 63 – 64, 71 – 72 (commenting on the use of hypotheticals in the Roman law as well as English common law); Barry Nicholas, An Introduction to Roman Law (Oxford University Press, 1962), pp. 33 – 34; Alan Watson, Roman Law and Comparative Law (University of Georgia Press, 1991), pp. 261, 250 – 51; and Wolfgang Kunkel, An Introduction to Roman Legal and Constitutional History, J.M. Kelly, trans (Oxford University Press, 1966), p. 86. I cite so many sources here because the comments of these various authors on the issue of hypothetical cases do not always seem fully consistent with each other, though the overall general thrust in this regard seems clear.

詹姆斯·哈德利，《罗马法导论》（科罗拉多州利特尔顿：弗雷德·罗特曼，1996 年；网址：<https://archive.org/details/introductiontoro029387mbp>），第 66 页。哈德利指出：“最近一位有能力的古代法讲师，梅因先生，从这一事实中找到了对罗马法与英国法相比更彻底的科学发展的一种解释。”同上。关于罗马法学家对假设案例的使用，也可参见以下资料，在金塞拉的《罗马法与假设案例》（StephanKinsella.com，2022 年 12 月 19 日）中被更广泛地引用：H.F.约洛维茨和巴里·尼古拉斯，《罗马法研究历史导论》第三版（英国剑桥：大学出版社，1972 年），第 95 和 97 页；布鲁斯·W·弗里尔，《罗马法学家的崛起》（新泽西州普林斯顿：普林斯顿大学出版社，1985 年），第 163-171 页，尤其是第 167 页；W.W.巴克兰和阿诺德·D·麦克奈尔，《罗马法与普通法：概要比较》（英国剑桥：大学出版社，第二版，由 F.H.劳森修订，1965 年修订后重印），第 6-15 页，尤其是第 9 页；彼得·斯坦因，《欧洲历史中的罗马法》（剑桥大学出版社，1999 年），第 8-9、18 和 67-68 页；A.亚瑟·席勒，《罗马法：发展机制》（莫顿出版社，1978 年），第 137 节；艾伦·沃森，“查士丁尼的《民法大全》：法律发展的奇特之处；以及人类文明”，《法律权威；以及法律：八次讲座》中的第二讲（斯德哥尔摩：法律史研究协会，2003 年；网址：<https://perma.cc/2BD5-4P4K>），第 65 页；詹姆斯·戈德利，《法学家：一部批判性历史》（牛津大学出版社，2013 年），第 17 页；约翰·P·道森，《法律的神谕》（托马斯·M·库利讲座，安阿伯：密歇根大学法学院，1968 年），第 116-117、63-64、71-72 页（评论了罗马法和英国普通法中对假设案例的使用）；巴里·尼古拉斯，《罗马法导论》（牛津大学出版社，1962 年），第 33-34 页；艾伦·沃森，《罗马法与比较法》（佐治亚大学出版社，1991 年），第 261、250-51 页；以及沃尔夫冈·昆克尔，《罗马法律与宪法史导论》，J.M.凯利译（牛津大学出版社，1966 年），第 86 页。我在这里引用这么多资料，是因为这些不同作者关于假设案例问题的评论似乎并不总是完全一致，尽管在这方面的总体大致方向似乎是明确的。

一名自由意志主义者（我承认我也是一名律师），我必须说，我相信我在自由意志主义哲学家推导出的一套具体规则下生活，会比在实际普通法下制定的（也许更具体的）一套规则下生活得更舒适，尽管如前所述，纯理论研究是有局限性的。

Still, Barnett's argument in favor of a common-law system makes sense, even to libertarians who favor a deductive approach to rights.⁶⁴ Legal rules must be concrete in the sense that the rules must take into account the entire relevant factual context. Since there are an infinite number of factual situations that could exist in interactions between individuals, a process which focuses on actual cases or controversies is likely to produce the most "interesting" or useful rules.⁶⁵ It probably makes little sense devoting scarce time and resources to developing legal precepts for imaginary or unrealistic scenarios. If nothing else, a common-law type system that develops and refines legal precepts as new cases arise serves as a sort of filter that selects which disputes (i.e., real, commonly-encountered ones) to devote attention to.

不过，巴尼特支持普通法体系的论点是有道理的，即使对于那些赞成以演绎法来确定权利的自由意志主义者来说也是如此。⁸⁰⁷ 法律规则必须是具体的，因为规则必须考虑到整个相关的事实背景。由于在个人之间的互动中可能存在无穷无尽的事实情况，因此以实际案例或争议为重点的程序可能会产生最“有趣”或最有用的规则。⁸⁰⁸ 把稀缺

⁸⁰⁷ Hoppe, *A Theory of Socialism and Capitalism*, p. 157; Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998); "A Libertarian Theory of Punishment and Rights" (ch. 5); "Dialogical Arguments for Libertarian Rights" (ch. 6).

霍普，《社会主义与资本主义理论》，第 157 页；穆瑞·N·罗斯巴德，《自由的伦理》（纽约：纽约大学出版社，1998 年）；《自由意志主义的惩罚与权利理论》（第五章）；《自由意志主义权利的对话论证》（第六章）。

⁸⁰⁸ This is analogous to Mises' s method selecting certain empirical assumptions (e.g., assuming there is money instead of barter) to develop "interesting" laws based on the fundamental axioms of praxeology, rather than irrelevant or uninteresting (though not invalid) laws. See Mises, *The Ultimate Foundation of Economic Science*, p. 41; idem, *Epistemological Problems of Economics*, pp. 14 - 16, 30 - 31, 87 - 88; idem, *Human Action*, pp. 64 et seq. See also Hoppe, *A Theory of Socialism and Capitalism*, p. 142, as quoted in "Causation and Aggression" (ch. 8), n.4. See also "A Libertarian Theory of Punishment and Rights" (ch. 5), n.36.

这类似于米塞斯的方法，即选择某些经验假设（例如，假设存在货币而非物物交换）来发展基于行动学的基本公理的“有趣的”法则，而不是无关或无趣的（尽管不是

的时间和资源用于为想象的或不实际的情景制定法律规范可能意义不大。如果不出意外，普通法类型的体系在新案件出现时发展和完善法律规范，可以作为一种过滤器，选择对哪些争议（即真实的、经常遇到的争议）给予关注。

Barnett thus makes a convincing case that, in a decentralized legal system such as the English common law (or the early Roman law, the Law Merchant, and even modern arbitral systems)—especially one in which judges or arbitrators attempt to apply fundamental notions of justice to concrete situations—it is reasonable to expect a body of concrete legal concepts and precepts to develop which are more or less compatible with fundamental notions of justice.⁶⁶

因此，巴尼特令人信服地指出，在一个去中心化的法律体系中，比如英国普通法（或者早期罗马法、商人法，甚至现代仲裁体系）——尤其是在一个法官或仲裁员试图将基本的正义观念应用于具体情况的体系中——有理由期望发展出一套或多或少与基本正义观念相兼容的具体法律概念和规范。⁸⁰⁹

If and when unjust legal precepts do arise, they are not necessarily permanent, because a common-law process allows them to be modified or replaced when this becomes apparent. However, unless it is clear that a given legal precept is inconsistent with justice, then there should be reluctance to jettison established legal rules or precedents. This thus gives rise to the legal doctrine of stare decisis (or jurisprudence constante in

无效的）法则。见米塞斯，《经济科学的终极基础》，第 41 页；同上，《经济学的认识论问题》，第 14-16 页、第 30-31 页、第 87-88 页；同上，《人的行动》，第 64 页及后续页。另见 Hoppe，《社会主义与资本主义理论》，第 142 页，引自“因果关系与侵犯”（第 8 章），第 4 节。另见《自由意志主义的惩罚与权利理论》（第 5 章），第 36 节。

⁸⁰⁹ Barnett does note the similarity between common law and civil law systems. Structure, p. 116 n.10. The civil law was derived from principles developed in a common-law fashion in the Roman law. It is the Roman law, more than the more positivistic and legislation-worshipping civil law, that bears a similarity with the common law. For further discussion on decentralized legal systems and related matters, see “Legislation and the Discovery of Law in a Free Society” (ch. 13), at n.153.

巴尼特确实注意到了普通法体系和大陆法体系之间的相似性。《结构》，第 116 页注释 10。大陆法源自以普通法方式在罗马法中发展起来的原则。与普通法具有相似性的是罗马法，而非更具实证主义且崇尚立法的大陆法。关于去中心化的法律体系及相关事宜的进一步讨论，见《自由社会中的立法与法律发现》（第十三章）注释 153。

continental or civil-law systems).⁶⁷

如果当不正义的法律规范确实出现时，它们也不一定是永久性的，因为普通法程序允许在其不正义性变得明显时对其进行修改或替换。然而，除非明确某一法律规范与正义不一致，否则就不应抛弃已确立的法律规则或先例。这就产生了遵循先例的法律原则（在大陆法系或民法体系中称为“一贯判例 *jurisprudence constante*”）。⁸¹⁰

This leads Barnett to make the provocative (for libertarians) argument that the “legal rights generated by a sound legal process may even be entitled to presumptive legitimacy”⁶⁸ and thus can even assist in determining the content of our background rights. We can always subject concrete legal precepts developed by courts to the scrutiny of the more abstract principles of justice and natural rights. This can help identify legal precepts “that are … inconsistent with either justice or the rule of law or both.”⁶⁹

这导致巴尼特提出了一个具有挑衅性的(对自由意志主义者而言的)论点，即“由健全的法律程序产生的合法权利甚至可能具有假定的合法性”，⁸¹¹并且因此甚至可以帮助确定我们的背景权利的内容。我们总是可以将法院制定的具体法律规范置于更抽象的正义

⁸¹⁰ See “Legislation and the Discovery of Law in a Free Society” (ch. 13), n.43; also Gregory Rome & Stephan Kinsella, *Louisiana Civil Law Dictionary* (New Orleans, La.: Quid Pro Books, 2011).

见《自由社会中的立法与法律发现》（第十三章），注释 43；还有格雷戈里·罗姆与斯蒂芬·金塞拉合著的《路易斯安那州民法词典》（路易斯安那州新奥尔良：Quid Pro Books，2011 年）。

⁸¹¹ Structure, p. 22, emphasis added; also p. 130. For conventional views regarding the duty to obey laws promulgated by the state, see M.B.E. Smith, “Is There a Prima Facie Obligation to Obey the Law?,” *Yale L. J.* 82 (1973; <https://perma.cc/MF3A-LBEV>): 950 – 76 and Leslie Green, “Who Believes in Political Obligation?” in *For and Against State*, John T. Sanders & Jan Narveson, eds. (Lanham, Md.: Rowman and Littlefield, 1996), p. 15.

《结构》，第 22 页，着重号为原文所加；也见第 130 页。关于对服从国家颁布的法律的义务的传统观点，参见 M.B.E. 史密斯的《是否存在服从法律的初步义务？》，《耶鲁法学杂志》82 期（1973 年；网址：<https://perma.cc/MF3A-LBEV>）：950-976 页，以及莱斯利·格林的《谁相信政治义务？》，收录于《支持与反对国家》，约翰·T·桑德斯和扬·纳维森编（马里兰州拉纳姆：罗曼与利特菲尔德出版社，1996 年），第 15 页。

原则和自然权利的审查之下。这有助于识别 “与正义或法治或两者都不一致的” 法律规范。⁸¹²

One question that bears exploring in this regard is exactly how libertarian are the abstract principles of justice that have been followed throughout the ages by judges and jurists of the common law, Roman law, and Law Merchant? In other words, just how libertarian are the legal precepts actually developed historically, and just how strong is the presumption of legitimacy which is to be accorded to these extant bodies of law? Which concepts of the common law are illiberal enough, when compared to Barnett's carefully-developed abstract principles of justice, to overcome the presumption of legitimacy? And how did the common law happen to employ more or less correct abstract principles of justice even before modern libertarian theory? Are these principles intuitive? Was it luck? Natural selection? Barnett does not answer these questions, but cannot be criticized for not doing everything.⁷⁰ Libertarian law students and scholars looking for topics to research, pay heed!

在这方面，有一个值得探讨的问题是，普通法、罗马法和商法的法官和法学家们长期以来所遵循的抽象正义原则，自由意志主义的含金量到底有几何？换句话说，历史上实际发展出来的法律规范到底有多自由意志主义，以及应该给予这些现存法律体系的合法性推定到底有多强？与巴尼特精心制定的抽象正义原则相比，普通法中的哪些概念不够自由，以至于消解了合法性的推定？普通法是如何在现代自由意志主义理论出现之前就或多或少地采用了正确的抽象正义原则的呢？这些原则是直观的吗？是运气吗？是自然选择吗？巴尼特没有回答这些问题，但不能因为他没有做到面面俱到而受到批评。⁸¹³寻找研究课题的自由意志主义法律学生和学者们，还需烦请注意！

利益问题和权力问题 PROBLEMS OF INTEREST AND POWER

After discussing the problems of knowledge (better characterized as conflict-avoidance,

⁸¹² Structure, p. 110.
《结构》，第 110 页
⁸¹³ But see his discussion at *ibid.*, pp. 122 - 23.
但可参见他在同上文献第 122-123 页的讨论。

as noted above), Barnett turns to problems of interest and power. The problems of interest concern how individuals balance questions of incentive, compliance, and partiality in access to resources. The problems of power are the possibility that there will be error and abuse in applying or enforcing legal precepts. Barnett elaborates on these challenges, and shows how each of them is addressed by the libertarian conception of justice and the rule of law.

在讨论了知识问题（如上文所述，更好地描述为避免冲突问题）之后，巴尼特转向了利益和权力问题。利益问题涉及个人如何在获取资源时平衡激励、遵守和偏袒等问题。权力问题是在应用或执行法律规范时可能出现错误和滥用的可能性。巴尼特详细阐述了这些挑战，并展示了自由意志主义的正义观和法治理念是如何应对每一个挑战的。

Most of Barnett's arguments concerning interest and power are more straightforward than those regarding knowledge in Part 1, even where Barnett tries to support his arguments by referring to various knowledge-related aspects of the issue at hand. Barnett's discussion of the "problem of partiality," however (the first problem of interest), seems overly muddled due to the preoccupation with knowledge. Barnett claims that there is a "partiality problem" which "arises from the fact that people tend to make judgments that are partial to their own interests or the interests of those who are close to them at the expense of others."⁷¹ This partiality "leads to a tendency to favor ones own interest"; partiality "is judgment affected by interest." Maybe I am slow, but I cannot see what is the alleged problem here. This seems to be nothing more than the unavoidable fact of self-interest. Of course people are "partial" to themselves. What is wrong with this? I see no need for people to take "into account the partial interests of others."⁷² So long as others' property rights are respected, it seems to me that one ought to be able to be as "partial" as one likes without others complaining about it.

巴尼特关于利益和权力的大部分论点比第一部分中关于知识的论点更直接，即使在巴尼特试图通过提及手头问题的各种与知识相关的方面来支持他的论点时也是如此。然而，巴尼特对“偏袒问题”（利益的第一个问题）的讨论由于对知识的关注而显得过于混乱。巴尼特声称存在一个“偏袒问题”，这个问题“源于这样一个事实，即人们倾向于

做出偏向于自己或与其亲近的人的利益判断，而牺牲他人的利益。”⁸¹⁴这种偏袒“导致偏袒自身利益的倾向”；偏袒“是受利益影响的判断”。也许我反应比较慢，但我看不出这里所谓的问题是什么。这似乎只不过是不可避免的自利事实。当然，人们对自己是“偏袒”的。这有什么错呢？我认为没有必要让人们“考虑他人的部分利益”。⁸¹⁵只要他人的财产权得到尊重，在我看来，一个人应该可以随心所欲地“偏袒”，而不会让他人抱怨。

Barnett's discussion of the other problems of interest and the problems of power, though, are much more fruitful and less tainted by the occasional and vain attempt to link it to the Hayekian knowledge paradigm. For example, it is certainly true that the incentives which are provided under capitalism are very useful and are missing under socialism.⁷³ And there is indeed a need to ensure compliance ⁷⁴ with private-property rules, e.g., by using force for self-defense, restitution, and punishment.⁷⁵ I see no strong reason to call these problems of “interest,” although the label seems harmless enough.

然而，巴尼特对其他利益问题和权力问题的讨论要更有成效得多，并且较少受到偶尔且徒劳地试图将其与哈耶克的知识范式联系起来的影响。例如，在资本主义下提供的激励确实非常有用，而在社会主义下则缺失这些激励，这一点肯定是正确的。⁸¹⁶并且确实有必要确保遵守⁸¹⁷私有财产规则，例如通过使用武力进行自卫、赔偿和惩罚。⁸¹⁸我看不出有什么强有力的理由将这些问题称为“利益”问题，尽管这个标签似乎也没什么坏处。

And (Part 3), there are indeed dangers involved in the use of power, such as the possibility of error in enforcement and punishment⁷⁶ and abuse of the power of law

⁸¹⁴ Ibid., p. 136.
同上，第 136 页。
⁸¹⁵ Ibid., p. 137.
同上，第 137 页。
⁸¹⁶ Ibid., chap. 8.
同上，第八章。
⁸¹⁷ Ibid., chap. 9.
同上，第九章。
⁸¹⁸ Ibid., pp. 176, 184, 191.
同上，第 176, 184, 191 页。

enforcement.⁷⁷ Many of Barnett's arguments here are very insightful and persuasive (some discussed below), although again, I find most of them to be so despite the superfluous comments on knowledge. In fact, I found the last half of the book,⁷⁸ which bears less and less on the knowledge paradigm introduced at the beginning, to be the most fascinating and best part of the book (plus the discussion of the common law in chapter 6).

并且（第三部分），在权力的使用中确实存在危险，例如在执行和惩罚中出现错误的可能性⁸¹⁹以及执法权的滥用。⁸²⁰巴尼特在这里的许多论点都非常有见地、有说服力（下面会有讨论），再次强调，尽管关于知识的多余评论很多，我认为其中大部分论点是如此。事实上，我发现这本书的后半部分，⁸²¹尽管与开头介绍的知识范式的关系越来越小，却是这本书最引人入胜和最好的部分（加上第六章对普通法的讨论）。

赔偿与报复 Restitution vs. Retribution

One interesting argument that Barnett makes, with regard to enforcement error and abuse, is that all criminal justice should be restitutive, not punitive or retributive. As I have argued elsewhere,⁷⁹ I believe Barnett is mistaken that retribution (punishment) violates the rights of (actually guilty) aggressors.⁸⁰ However, in keeping with his consequentialist approach, which avoids questions of justification of fundamental norms, Barnett does not pretend to make a strong theoretical case for the rights of aggressors to be free from punishment.⁸¹

巴尼特在关于执法错误和滥用权力方面提出的一个有趣论点是，所有刑事司法都应该是赔偿性的，而不是惩罚性或报复性的。正如我在其他地方所论述的，⁸²²我认为巴尼

⁸¹⁹ Ibid., chaps. 10 and 11. 同上，第十章和第十一章。

⁸²⁰ Ibid., chap. 12. 同上，第十二章。

⁸²¹ Ibid., chaps. 9 - 15. 同上，第9-15章。

⁸²² “Inalienability and Punishment: A Reply to George Smith” (ch. 10); for more on the theory of inalienability, including discussion of Barnett’s views in this regard, see “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9). See also Walter E. Block, “Toward a Libertarian Theory of Inalienability: A

特错在认为报复（惩罚）侵犯了（确实有罪的）侵犯者的权利。⁸²³ 然而，与他的结果方法一致，这种方法避开了基本规范的正当性问题，巴尼特并没有假装为侵犯者不受惩罚的权利提出一个强有力的理论依据。⁸²⁴

Critique of Rothbard, Barnett, Smith, Kinsella, Gordon, and Epstein,” J. Libertarian Stud. 17, no. 3 (Spring 2003; <https://perma.cc/79AC-34BZ>): 39 – 85, and my discussion of Block’s views in “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11).

《不可让渡性与惩罚：对乔治·史密斯的回应》（第十章）；关于不可让渡性的理论的更多内容，包括对巴尼特在这方面观点的讨论，参见《自由意志主义的契约理论：所有权转让、有约束力的承诺与不可让渡性》（第九章）。另见沃尔特·E·布洛克的《迈向一种自由意志主义的不可让渡性理论：对罗斯巴德、巴尼特、史密斯、金塞拉、戈登和爱波斯坦的批判》，《自由意志主义研究杂志》第 17 卷第 3 期（2003 年春季；网址：<https://perma.cc/79AC-34BZ>）：39-85 页，以及我在《出售并不意味着所有权，反之亦然：一个剖析》（第十一章）中对布洛克观点的讨论。

⁸²³ For justification of the right to punish aggressors, see “A Libertarian Theory of Punishment and Rights” (ch. 5); “Dialogical Arguments for Libertarian Rights” (ch. 6); and Hoppe, *A Theory of Socialism and Capitalism*, p. 157 et pass.

关于惩罚侵犯者的权利的正当性论证，参见《自由意志主义的惩罚与权利理论》（第五章）；《自由意志主义权利的对话论证》（第六章）；以及霍普的《社会主义与资本主义理论》，第 157 页及以后。

⁸²⁴ As Barnett acknowledges, “this analysis cannot conclusively prove that no combination of compensation or punishment can ever address effectively the compliance problem.” *Structure*, p. 237. And further: “I do not claim to have completely demonstrated this proposition [that justice requires restitution, no punishment] either in my earlier writings, or in this book.” *Ibid.*, p. 185 n.36. See also pp. 228 & 320, and p. 321: “If men were gods, then perhaps imposing rewards and punishments on the basis of desert would be a workable theory.” Also: “It has been noted that one who wishes to extinguish or convey an inalienable right may do so by committing the appropriate wrongful act and thereby forfeiting it.” Randy E. Barnett, “Contract Remedies and Inalienable Rights,” *Social Pol’y & Phil.* 4, no. 1 (Autumn 1986; <https://perma.cc/P8JL-KAT2>): 179 – 202, p. 186, citing Diane T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia University Press, 1985). As I noted in “Inalienability and Punishment: A Reply to George Smith” (ch. 10), Smith is incorrect in claiming that Barnett’s writings support Smith’s view that all rights, even those of a murderer, are inalienable. See George H. Smith, “A Killer’s Right to Life,” *Liberty* 10, no. 2 (November 1996; <https://perma.cc/AF2J-RAL9>): 46 – 54. For more on forfeiture or waiver of rights, see also Herbert Morris, “Persons and Punishment,” in *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (Berkeley: University of California Press, 1976), pp. 31, 52, et pass., discussing the right to bodily

Indeed, most of Barnett's concerns regarding punishment are warranted: he opposes it because he believes it may deter crime less than would a restitution-based system and also because the unavoidable possibility of error can lead to "infliction of harm on the innocent."⁸² Like Barnett, I am concerned about the unavoidable possibility of mistakenly punishing the innocent, and thus admit the appeal of a restitution-based system in order to avoid punishing innocents. Moreover, Barnett makes a powerful and original argument for why the standard of proof should be higher if a victim seeks to punish a purported aggressor rather than merely obtain restitution.⁸³ Thus, a victim seeking to punish the aggressor must prove guilt beyond a reasonable doubt, whereas the lower standard of preponderance of the evidence is more appropriate for a civil trial for damages. It is therefore more costly to seek punishment than to seek restitution. For this and other reasons, restitution would probably become the predominant mode of justice in a free society.

事实上，巴尼特对惩罚的大部分担忧都是有道理的：他反对惩罚是因为他认为与基于赔偿的制度相比，惩罚在威慑犯罪方面可能效果更差，还因为不可避免的错误可能性

integrity and the waiver of this right; also "A Libertarian Theory of Punishment and Rights" (ch. 5), n.88 and Appendix: The Justice of Responsive Force.

正如巴尼特所承认的，“这种分析不能确凿地证明，没有任何一种补偿或惩罚的组合能够有效地解决合规问题。”《结构》，第 237 页。并且进一步说道：“我也没有声称在我以前的著作中或者在这本书里完全证明了这个命题（即正义要求赔偿，而非惩罚）。”同上，第 185 页注释 36。另见第 228 页和第 320 页，以及第 321 页：“如果人类是神，那么或许基于应得进行奖赏和惩罚会是一个可行的理论。”还有：“有人指出，一个希望消除或转让不可让渡的权利的人可以通过实施适当的错误行为从而丧失该权利。”兰迪·E·巴尼特，《契约救济与不可让渡的权利》，《社会政策与哲学》第 4 卷第 1 期（1986 年秋季；网址：<https://perma.cc/P8JL-KAT2>）：179 - 202，第 186 页，引用了黛安·T·迈耶斯的《不可让渡的权利：一种辩护》（纽约：哥伦比亚大学出版社，1985 年）。正如我在《不可让渡性与惩罚：对乔治·史密斯的回应》（第十章）中所指出的，史密斯错误地声称巴尼特的著作支持史密斯的观点，即所有的权利，甚至是凶手的权利都是不可让渡的。见乔治·H·史密斯，《一个杀手的生命权》，《自由》第 10 卷第 2 期（1996 年 11 月；网址：<https://perma.cc/AF2J-RAL9>）：46 - 54。关于权利的丧失或放弃的更多内容，也可参见赫伯特·莫里斯的《人与惩罚》，收录于《论有罪与无辜：法律哲学与道德心理学论文集》（伯克利：加利福尼亚大学出版社，1976 年），第 31、52 页及以后，讨论了身体完整权以及该权利的放弃；还有《自由意志主义的惩罚与权利理论》（第五章），注释 88 以及附录：回应性武力的正当性。

可能会导致“对无辜者造成伤害”。⁸²⁵和巴尼特一样，我也担心不可避免地会错误地惩罚无辜者，因此承认基于赔偿的制度在避免惩罚无辜者方面的吸引力。此外，巴尼特提出了一个有力且新颖的论点，说明为什么如果受害者寻求惩罚所谓的侵犯者而不仅仅是获得赔偿，那么举证标准应该更高。⁸²⁶因此，寻求惩罚侵犯者的受害者必须排除合理怀疑地证明前者有罪，而在民事损害赔偿审判中，优势证据的较低标准更为合适。所以，寻求惩罚比寻求赔偿成本更高。由于这个以及其他原因，在自由社会中，赔偿可能会成为主要的司法模式。

Nevertheless, acknowledging (and justifying) the theoretical legitimacy of punishment can be useful. For example, punishment (or a theory of punishment) may be utilized to reach a more objective determination of the proper amount of restitution,⁸⁴ because a serious aggression leads to the right to inflict more severe punishment on the aggressor, which would thus tend to be traded for a higher average amount of ransom or restitution than for comparatively minor crimes.⁸⁵ Especially offended victims will tend to bargain for a higher ransom; and richer aggressors will tend to be willing to pay more ransom to avoid the punishment the victim has a right to inflict, thereby solving the so-called “millionaire” problem faced under a pure restitution system (where a rich man may commit crimes with impunity, since he can simply pay easily-affordable restitution after committing the crime).

然而，承认(并证明)惩罚在理论上的合法性是有用的。例如，惩罚(或惩罚理论)可用于更客观地确定适当的赔偿金额，⁸²⁷因为严重的侵犯行为会导致有权对侵犯者施加更严

⁸²⁵ Structure, p. 228, emphasis added; also pp. 197, 228.

《结构》，第 228 页，着重号为原文所加；也见第 197 页、228 页。

⁸²⁶ Ibid., p. 212.

同上，第 212 页。

⁸²⁷ On the issue of determination of the proper amount of damages, see Bruce L. Benson, “Restitution in Theory and Practice,” J. Libertarian Stud. 12, no. 1 (Spring 1996; <https://mises.org/library/restitution-theory-and-practice>): 79–83, and Murray N. Rothbard, “Punishment and Proportionality,” in The Ethics of Liberty (<https://mises.org/library/punishment-and-proportionality-0>), pp. 88–89.

关于确定适当损害赔偿金额的问题，参见布鲁斯·L·本森的《理论与实践中的赔偿》，《自由意志主义研究杂志》第 12 卷第 1 期（1996 年春季；网址：<https://mises.org/library/restitution-theory-and-practice>）：79-83 页，以及穆瑞·N·罗斯巴德的《惩罚与相称性》，收录于《自由的伦理》（网址：<https://mises.org/library/punishment-and-proportionality-0>），第 88-89 页。

厉的惩罚，因此，与相对较轻的罪行相比，这种惩罚倾向于换取更高的平均赎金或赔偿额。⁸²⁸尤其是被冒犯的受害者会倾向于讨价还价以获得更高的赎金；而更富有的侵犯者会倾向于支付更多赎金以避免受害者有权实施的惩罚，从而解决在纯粹赔偿制度下面临的所谓“百万富翁”问题（在纯粹赔偿制度下，一个富人可能会犯罪却不受惩罚，因为他在犯罪后可以轻松支付得起赔偿）。

Moreover, even if punishment is banned (de facto or de jure) and is not an actual option—because of the possibility of mistakenly punishing innocents, say—an award of restitution can be based on the model of punishment. To-wit: a jury could be instructed to award the victim an amount of money it believes he could bargain for, given all the circumstances, if he could threaten to proportionately punish the aggressor. This can lead to more just and objective restitution awards than would result if the jury is simply told to award the amount of damages it “feels” is “fair.” Barnett nowhere specifies any objective standards or criteria by which a judge or jury is to determine the amount of restitution a victim is to receive for a non-economic crime like murder, rape, and the like. He specifies only that the aggressor must “compensate” the victim for the “harm caused,” to “restore” the victim.⁸⁶ Thus, a retribution-based system, even if used only as a model to help determine the amount or standard of restitutive damages, supplements Barnett’s theory of a restitution-based justice system.

此外，即使惩罚被禁止（事实上或法律上）并且不是一个实际的选择——比如说，因为有可能错误地惩罚无辜者——赔偿的裁决也可以基于惩罚的模式。也就是说：可以指示陪审团在考虑所有情况后，如果受害者能够威胁对侵犯者进行相应的惩罚，那么就裁决给予受害者一笔他可以讨价还价得到的金额。与仅仅告诉陪审团裁决他们“感觉”

⁸²⁸ For further discussion of criminals buying their way out of punishment, see “Inalienability and Punishment: A Reply to George Smith” (ch. 10); “A Libertarian Theory of Punishment and Rights” (ch. 5); Rothbard, “Punishment and Proportionality,” pp. 86, 89; Roger Pilon, “Criminal Remedies: Restitution, Retribution, or Both?” *Ethics* 88, no. 4 (July 1978): 348–57, at 356.

关于罪犯通过花钱逃避惩罚的进一步讨论，可参见《不可让渡性与惩罚：对乔治·史密斯的回应》（第十章）；《自由意志主义的惩罚与权利理论》（第五章）；罗斯巴德的《惩罚与相称性》，第86、89页；罗杰·皮隆的《刑事救济：赔偿、报复，或是两者兼而有之？》，《伦理学》第88卷第4期（1978年7月）：348-357页，第356页。

“公平”的损害赔偿金额相比，这可以导致更正义和客观的赔偿裁决。巴尼特在任何地方都没有具体说明法官或陪审团确定受害者因谋杀、强奸等非经济犯罪应获得的赔偿金额的任何客观标准或准则。他只规定侵犯者必须“补偿”受害者所受的“伤害”，以“恢复”受害者。⁸²⁹因此，即使仅作为一种帮助确定赔偿性损害赔偿金额或标准的模式，基于报复的制度也补充了巴尼特基于赔偿的司法制度理论。

预防性力量 Preventative Force

Barnett makes a convincing case that the principle of “extended self-defense” justifies imprisoning (sometimes for life) those who have made a sufficiently unambiguous communication of a threat to another.⁸⁷ Because of the possibility of enforcement abuse and rule of law considerations, however, Barnett would limit this remedy to those persons who have communicated a threat to others by their past criminal behavior (i.e., those who have been convicted, perhaps multiple times, of a crime), and only if the previous crimes were proved beyond a reasonable doubt.⁸⁸

巴尼特令人信服地指出，“扩大自卫”原则证明将那些对他人发出足够明确威胁的人监禁（有时是终身监禁）是合理的。⁸³⁰然而，由于存在执法滥用的可能性和法治方面的考虑，巴尼特将这种补救措施仅限于那些通过过去的犯罪行为向他人发出威胁的人（即那些已经被定罪，可能多次犯罪的人），并且只有在以前的罪行被排除合理怀疑地证明的情况下。⁸³¹

This limitation on the principle of extended self-defense seems to me to be unduly

⁸²⁹ Structure, pp. 159, 185.
《结构》，第 159, 185 页。

⁸³⁰ Ibid., pp. 186 – 91.
同上，第 186-191 页。

⁸³¹ Ibid., pp. 213 – 14. See also idem, “Getting Normative,” p. 157. One problem with Barnett’s solution here is that, under his restitution-based system, previous crimes would have been proved by some standard less than the “beyond a reasonable doubt standard,” such as the “preponderance of the evidence” standard, and thus it would be very difficult to jail threatening individuals.
同上，第 213-214 页。另见同一作者的《走向规范性》，第 157 页。巴尼特在此处的解决方案存在一个问题，即在他基于赔偿的体系下，先前的犯罪将通过低于“排除合理怀疑标准”的某种标准来证明，例如“优势证据标准”，因此，要监禁具有威胁性的个人将非常困难。

restrictive, however. In my view, a threat can be viewed as a species of the crime of assault. Assault is defined as putting someone in fear of receiving a battery (physical beating).⁸⁹ A threat should count as a type of assault because the threatener puts the victim in fear of receiving a battery and also deliberately increases the likelihood of physical harm befalling the victim. As explained elsewhere,⁹⁰ assault may be punished because this is the only way the victim can reciprocate and put the aggressor–threatener in a like state of fear. I see no reason to allow extended self-defense only where the aggressor has previously been convicted of a crime. Even the first crime is a crime.

然而，在我看来，这种对扩大自卫原则的限制似乎过于严格。在我看来，威胁可以被视为一种攻击罪。攻击被定义为使某人害怕受到殴打（身体打击）。⁸³²威胁应该算作一种攻击类型，因为威胁者使受害者害怕受到殴打，并故意增加受害者遭受身体伤害的可能性。正如在其他地方所解释的，⁸³³攻击可以受到惩罚，因为这是受害者能够进

⁸³² Louisiana Criminal Code § 36 (https://www.legis.la.gov/legis/laws_Toc.aspx?older=75&level=Parent); Black’ s Law Dictionary (1994, p. 114; defining assault); Mason v. Cohn, 108 Misc. 2d 674, 438 N.Y.S.2d 462 (N.Y. Sup. Ct. 1981; <https://casetext.com/case/mason-v-cohn-1>) (defining assault). The Louisiana Criminal Code defines assault as “an attempt to commit battery, or the intentional placing of another in reasonable apprehension of receiving battery.” A battery is defined as “the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.” Louisiana Criminal Code § 33. Assault can thus also include an attempted battery (which need not put the victim in a state of apprehension of receiving a battery—e.g., the victim may be asleep and be unaware that another has just swung a club at his head, but missed. 《路易斯安那州刑法典》第 36 条 (https://www.legis.la.gov/legis/laws_Toc.aspx?older=75&level=Parent)；《布莱克法律词典》（1994 年，第 114 页；对“袭击”的定义）；梅森诉科恩案，108 Misc. 2d 674，438 N.Y.S.2d 462（纽约州最高法院，1981 年；<https://casetext.com/case/mason-v-cohn-1>）（对“攻击”的定义）。《路易斯安那州刑法典》将攻击定义为“企图实施殴打，或故意使他人合理地担心受到殴打”。殴打的定义是“故意对他人使用武力或暴力；或故意对他人施用毒药或其他有毒液体或物质”。路易斯安那州刑法典》第 33 条。因此，攻击也可以包括殴打未遂（不一定要使受害者处于担心受到殴打的状态--例如，受害者可能正在睡觉，不知道另一个人刚刚向他的头部挥了一棒，但没有打中。）

⁸³³ “A Libertarian Theory of Punishment and Rights” (ch. 5).

行报复并使侵犯者-威胁者处于类似恐惧状态的唯一方式。我认为没有理由只在侵犯者先前已被定罪的情况下才允许扩大自卫。即使是第一次犯罪也是犯罪。

多中心主义——我意指无政府资本主义 POLYCENTRISM—I MEAN, ANARCHO-CAPITALISM

One of the best parts of The Structure of Liberty is its argument in favor of anarcho-capitalism. It is marred by its strict avoidance of the more appropriate terms anarcho-capitalism or anarchy; Barnett for some reason prefers to describe anarcho-capitalism as a “polycentric constitutional order,” presumably to avoid unduly alienating statist readers. (If he feels polycentric is a better term than anarcho-capitalism, he does not offer reasons.)

《自由的结构》最精彩的部分之一是其支持无政府资本主义的论点。但它因严格避免使用更恰当的术语“无政府资本主义”或“无政府主义”而有所瑕疵；巴尼特出于某种原因更喜欢将无政府资本主义描述为“多中心宪政秩序”，大概是为了避免过度疏远支持国家主义的读者。（如果他觉得“多中心”比“无政府资本主义”一词更恰当，他却并未给出理由。）

Barnett notes that various types of structures have been tried “to deal with the problem of enforcement abuse by a coercive monopoly of power,” i.e., government, including elections, federalism, and free emigration. Yet, he recognizes, these have failed to keep government in check. Thus, he argues that each of these three principles “reflects a more fundamental principle that needs to be more robustly incorporated into institutional arrangements: reciprocity, checks and balances, and the power of exit.” 91

巴尼特指出，为了应对权力的强制垄断（即政府）在执法中的滥用问题，人们尝试了各种类型的结构，包括选举、联邦制和自由移民。然而，他认识到，这些都未能对政府进行有效制约。因此，他认为这三个原则中的每一个“都反映了一个更基本的原则，这个原则需要更有力地纳入制度安排中：互惠、制衡和退出的权力”。⁸³⁴

《自由意志主义的惩罚和权力理论》，（第五章）。

⁸³⁴ Structure, p. 256.

《结构》，第 256 页。

Barnett elaborates on these in chapter 13, one of the best in the book. He notes that two constitutional principles are sufficient to achieve a polycentric order: nonconfiscation and competition. Under the former, "[l]aw-enforcement and adjudicative agencies should not be able to confiscate their income by force, but should have to contract with the persons they serve." Under the latter, they "should not be able to put their competitors out of business by force."⁹² As is clear to libertarians, adherence to these two principles would indeed result in the anarcho-capitalist society, for no government can exist without the ability of a coercive monopoly over its services.⁹³

巴尼特在书中最精彩的章节之一——第 13 章中详细阐述了这些内容。他指出，有两项宪法原则足以实现多中心秩序：非没收原则和竞争原则。在非没收原则下，“执法和裁决机构不应能够通过武力没收其服务对象的收入，而应与他们所服务的人签订。”在竞争原则下，它们“不应该能够通过武力将竞争对手赶出市场”。⁸³⁵正如自由意志主义者所清楚的那样，遵守这两个原则确实会导致无政府资本主义社会的出现，因为没有政府能够在其服务没有强制垄断能力的情况下存在。⁸³⁶

Barnett makes several excellent points in chapter 13. He notes, for example, that if an individual refuses to contract with any legal system, force can still be used against him if he harms others. "The justice of using force against such a person is based on the fact that he or she violated the rights of the victim, not that he or she consented to the jurisdiction of a court."⁹⁴ It is refreshing to see this point emphasized, because many advocates of anarcho-capitalism seem to feel that an aggressor can be punished by a defense agency only if the aggressor somehow previously consented to the jurisdiction of the agency (if he did not consent, the only permissible remedy is presumably

⁸³⁵ Ibid., p. 258.

同上，第 258 页。

⁸³⁶ Charles Murray, *What it Means to Be a Libertarian* (New York: Broadway Books, 1997), p. 64, makes a similar point when he argues that citizens should be able to opt out of certain government programs.

查尔斯·穆瑞在《成为一名自由意志主义者意味着什么》（纽约：百老汇图书公司，1997 年）第 64 页提出了一个类似的观点，他认为公民应该能够选择退出某些政府计划。

ostracism).

巴尼特在第 13 章中提出了几个出色的观点。例如，他指出，如果一个人拒绝与任何法律体系签订，那么如果他伤害了他人，仍然可以对他使用武力。“对这样一个人使用武力的正当性基于他或她侵犯了受害者的权利这一事实，而不是他或她同意了法院的管辖权。”⁸³⁷ 看到这一点得到强调令人耳目一新，因为许多无政府资本主义的倡导者似乎觉得，只有在侵犯者以某种方式事先同意了防卫机构的管辖权的情况下，防卫机构才能惩罚侵犯者（如果他不同意，那么大概唯一允许的补救办法就是排斥）。

Another excellent point concerns the likelihood of a polycentric order actually embodying liberal norms. Barnett sensibly points out that:

... it is difficult to imagine a society that did not adhere to some version of a liberal conception of justice ever accepting a polycentric constitutional order in the first instance. A societal consensus supporting these rights and remedies would seem to be a precondition for ever peacefully ending [monopoly government power]. And, once adopted, the inherent stability of the robust “checks and balances” provided by a competitive system is likely to preserve this initial consensus.⁹⁵

另一个出色的观点涉及多中心秩序实际体现自由主义规范的可能性。巴尼特明智地指出：

“……很难想象一个一开始就不遵循某种自由正义观念的社会会接受多中心宪法秩序。

支持这些权利和补救措施的社会共识似乎是永远和平终结（垄断的政府权力）的先决条件。而且，一旦被采纳，竞争体系所提供的强大‘制衡’的内在稳定性很可能会保持这种最初的共识。”⁸³⁸

Finally, my favorite part of the book is the well-written, thoughtful, and imaginative chapter 14, “Imagining a Polycentric Constitutional Order: A Short Fable,” in which

⁸³⁷ Structure, p. 278.

《结构》，第 278 页。

⁸³⁸ Ibid., p. 281 – 82.

同上，第 281-282 页。

Barnett speculates on what a possible polycentric-ordered society might look like and how it might function. I mean, an anarcho-capitalist society.

最后，这本书中我最喜欢的部分是写得很棒、富有思想且具有想象力的第 14 章《想象一个多中心宪法秩序：一则简短的寓言》，在这一章中，巴尼特推测了一个可能的多中心秩序社会应该是什么样子以及它可能如何运作。我意指一个无政府资本主义社会。

术语 TERMINOLOGY

It is clear that Barnett is a libertarian and that *The Structure of Liberty* is thoroughly infused with libertarian principles with regard to rights, government, and economics. He even goes so far as to advocate a polycentric—i.e., anarcho-capitalist—system. But one irritating aspect of the book is the unconventional and idiosyncratic use of terminology. Some of these terms seem to be used to try to avoid alienating statist. It is understandable—but ultimately futile, in my view—why Barnett might want to soften the blow of loaded terms like libertarian and anarchy and use the kinder, gentler (but blander, less descriptive, and more misleading) terms liberal and polycentric instead. In my view it is preferable to call a spade a spade.⁸³⁹ We won't fool anyone into supporting anarcho-capitalism by using a fancier term.

很明显，巴尼特是一个自由意志主义者，并且《自由的结构》在权利、政府和经济方面全面融入了自由意志主义原则。他甚至主张建立一个多中心的——即无政府资本主义的——体系。但是这本书令人恼火的一个方面，是它对术语的非传统和特殊用法。其中一些术语似乎是为了避免疏远国家主义者。可以理解——但在我看来最终是徒劳的——也许巴尼特可能想要淡化像“自由意志主义”和“无政府主义”这样有强烈色彩的术语的冲击，而使用更友好更温和（但更平淡、描述性更弱且更具误导性）的术语“自由主义”和“多中心主义”来代替。在我看来，直言不讳更可取。⁸³⁹ 我们不会通过使用一

⁸³⁹ See Ayn Rand, “Introduction,” in *The Virtue of Selfishness: A New Concept of Egoism*

(New York: Signet, 1964), p. vii:

The title of this book [*The Virtue of Selfishness*] may evoke the kind of question that I hear once in a while: “Why do you use the word ‘selfishness’ to denote virtuous

个更花哨的术语来欺骗任何人支持无政府资本主义。

Some of the terms employed, such as “several property” and “polycentric” order, clearly reveal the Hayekian influence on Barnett; other Hayekian terms such as “spontaneous” and “coordination” are also sprinkled throughout the book. Nothing seems to be gained except confusion and lack of clarity by replacing perfectly good terms like private property and anarcho-capitalism with inferior terms, or even with equally conceptually valid terms.⁹⁷

书中使用的一些术语，如“分立的财产”和“多中心”秩序，清楚揭示了哈耶克对巴尼特的影响；其他哈耶克式的术语，如“自发的”和“协调的”也在书中随处可见。用较差的术语，哪怕是在概念上同样有效的术语来取代像“私有财产”和“无政府资本主义”这样非常好的术语，除了造成混乱和缺乏清晰度之外，似乎并无任何收获。⁸⁴⁰

qualities of character, when that word antagonizes so many people to whom it does not mean the things that you mean?” To those who ask it, my answer is: “For the reason that makes you afraid of it.”

Rand also unabashedly, and admirably, proclaimed herself to be a radical for capitalism. 参见安·兰德《自私的美德：一种新的利己主义概念》（纽约：西格内特出版社，1964年）中的“引言”部分，第vii页：

“这本书的书名（《自私的美德》）可能会引发我偶尔听到的那种问题：‘当“自私”这个词对那么多人来说并不意味着你所指的那些东西时，你为什么要用“自私”这个词来表示美德品质呢？’对于那些提出这个问题的人，我的回答是：“因为让你害怕它的原因”。

兰德也毫不掩饰且令人钦佩地宣称自己是资本主义的激进支持者。

⁸⁴⁰ In the second edition of Structure, Barnett grants that the use of the term “several” in the first edition was a mistake:

Were I writing the book today, however, I might change one term. I might use the term “private property” rather than the term “several property” that I borrowed from Hayek, who himself borrowed it from Scottish Enlightenment thinkers. I preferred “several property” because it emphasized the need to recognize jurisdiction over resources among the several or many individuals and associations that comprise a society. Were property held in the private hands of a very few, this type of “private property” would not address the problems of knowledge and interest. But in the interest of clarity and the avoidance of jargon, “private property” would have been clearer and, I now think, preferable.

Structure, p. 330 – 31.

在《结构》第二版中，巴尼特承认第一版中使用“若干”一词是个错误：

不过，如果我今天写这本书，我可能会改动一个词。我可能会使用“私有财产”一

Barnett also uses the expressions "background rights" instead of natural rights, and "legal precepts" instead of "concrete legal rules" or some other such descriptive term. I must admit that I like having a term for operational, concrete legal rules as distinct from more abstract principles; and "legal precepts" seems, I suppose, as good as any. But "background rights" does not seem to be an improvement over terms such as natural or moral or individual rights (or just plain "rights"). However, these quibbles mainly relate to Barnett's strategy or style, not to the substance or soundness of his arguments.

巴尼特还使用“背景权利”来代替自然权利，使用“法律规范”来代替“具体的法律规则”或其他类似的描述性术语。我必须承认，我喜欢用一个术语来区分操作性的具体法律规则和更抽象的原则；我承认，“法律规范”似乎和任何其他术语一样好。但是“背景权利”似乎并不比诸如自然权利、道德权利或个人权利（或者仅仅是简单的“权利”）这样的术语更好。无论如何，这些吹毛求疵主要与巴尼特的策略或风格有关，而与他的论点的实质内容或健全性无关。

关于问题的问题 PROBLEMS WITH THE PROBLEMS

A consequentialist analysis can be valuable, but one difficulty with Barnett's account is that he presumes that the universally shared goals of peace, prosperity, and happiness can be achieved if only we solve three main problems (of knowledge, interest, and power). I have already explained that the Barnettian problems of knowledge are better reformulated as aimed at conflict-avoidance, and thus peace (and perhaps at enabling economic calculation, and thus prosperity). A deeper question is why are these the only problems that get in the way of our goals? Why are these three problems exhaustive? What about other purported problems harped on by communitarians, socialists, or other consequentialists, such as inequality and poverty, commercialism and

词，而不是我从哈耶克那里借来的“若干财产”（“several property”）一词，哈耶克本人也是从苏格兰启蒙思想家那里借来的。我更倾向于使用“若干财产”，因为它强调有必要承认组成社会的几个或许多个人和协会对资源的管辖权。如果财产只掌握在极少数人手中，这种“私有财产”就无法解决知识和利益问题。但为了清楚起见和避免使用行话，“私有财产”会更清楚，我现在认为也更可取。

《结构》，第 330-331 页。

consumerism? Barnett's considers this issue,⁹⁸ but provides only a brief and somewhat unconvincing argument that addressing these other problems with legal coercion would undermine the "foundations" of the "structure of liberty" and thus prevent the three fundamental problems from being solved.⁹⁹

结果⁸⁴¹分析可能是有价值的，但巴尼特的论述存在一个难题，即他假定只要我们解决三个主要问题（知识、利益和权力问题），就能实现和平、繁荣和幸福这些普遍共有的目标。我已经解释过，巴尼特的知识问题最好重新表述为旨在避免冲突，从而实现和平（也许还旨在实现经济计算，从而实现繁荣）。一个更深层次的问题是，为什么只有这些问题会阻碍我们的目标？为什么这三个问题是详尽无遗的？社群主义者、社会主义者或其他结果⁸⁴²者所强调的其他所谓问题，如不平等和贫困、商业主义和消费主义呢？巴尼特的书考虑了这个问题，⁸⁴¹但只提供了一个简短且有些难以令人信服的论点，即通过法律强制手段解决这些其他问题会破坏“自由结构”的“基础”，从而阻止这三个基本问题得到解决。⁸⁴²

结论 CONCLUSION

As is often the case in a review of this sort, many of my comments have been critical, but this should not give the impression that I find fault with the bulk of Barnett's work. I have focused primarily on the aspects with which I disagree, and have emphasized economic calculation and the Hayekian knowledge paradigm, and have largely omitted discussion of the many valuable ideas in *The Structure of Liberty*. In fact, I have profited immensely from many of Barnett's previous theories, such as his views on constitutional interpretation, contract theory, and his tantalizing suggestion that there should be a presumption against the legitimacy of government statutes in derogation of common law or liberties—a "presumption of liberty."¹⁰⁰ Most of these are not included or

⁸⁴¹ Structure, pp. 325 - 26. 《结构》，第 325-326 页。
⁸⁴² For a similar critique of Barnett's argument in this regard, see Lawrence B. Solum's review of *The Structure of Liberty* (first edition), "The Foundations of Liberty," Mich. L. Rev. 97, no. 6 (May 1999; <https://repository.law.umich.edu/mlr/vol97/iss6/26/>): 1780 - 1812, at 1791 - 92.
对于巴尼特在这方面观点的类似批评，可参见劳伦斯·B·索卢姆对《自由的结构》（第一版）的评论《自由的基础》，《密歇根法律评论》第 97 卷第 6 期（1999 年 5 月）：1780-1812 页，第 1791-1792 页。

discussed at length in this treatise. Luckily, Barnett's next book is reportedly *The Presumption of Liberty: Restoring the Constitution*.¹⁰¹

在这种类型的评论中，情况往往如此，我的许多评论都是批评性的，但这不应该给人一种我对巴尼特的大部分作品都有意见的印象。我主要关注我不同意的方面，并强调了经济计算和哈耶克的知识范式，并且在很大程度上省略了对《自由的结构》中许多有价值的观点的讨论。事实上，我从巴尼特以前的许多理论中受益匪浅，比如他对宪法解释、理论的观点，以及他那个诱人的建议，即应该有一种反对政府法规减损普通法或自由的合法性的推定——一种“自由推定”。⁸⁴³其中大部分都没有包括在内，也没有在本书中详细讨论。幸运的是，据说巴尼特的下一本书是《自由推定：恢复宪法》。

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The Structure of Liberty is an important new work by one of libertarianism's most significant and thoughtful legal scholars. Its primary substantive deficiency is its over-reliance on the Hayekian knowledge paradigm, but the work nonetheless arrives at the private-property norms that address the more relevant issue of interpersonal conflict. The book is full of subtle insights regarding standards and burdens of proof, restitution, the workings of the common law, and the operation of anarcho-capitalism. It is must-reading for all those seriously interested in libertarian theory.

《自由的结构》是一位最重要、最有思想的自由意志主义法学者的重磅新著。它的主要的实质性缺陷是过度依赖哈耶克的知识范式，但这部作品仍然得出了解决更相关的人际冲突问题的私有财产规范。这本书在证明标准和举证责任、赔偿、普通法的运作以及无政府资本主义的运行方面充满了微妙的见解。这是所有对自由意志主义理论真正感兴趣的人的必读之作。

⁸⁴³ Barnett, “Getting Normative”; idem, “Natural Rights and Positive Constitutional Law.”

巴尼特，《走向规范性》（“Getting Normative”）；同上，《自然权利与实证宪法》（“Natural Rights and Positive Constitutional Law”）。

⁸⁴⁴ Since the original review was written, this book has indeed been published; see Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, 2d ed. (Princeton University Press, 2013).

自撰写最初的评论以来，这本书确实已经出版；参见兰迪·E·巴尼特的《恢复失落的宪法：自由的推定》第二版（普林斯顿大学出版社，2013年）。

第二十章 评安东尼·德·雅赛著《反对政治：论政府、无政府和秩序》

Review of Against Politics:

On Government, Anarchy, and Order, by Anthony de Jasay

Originally published as Stephan Kinsella, "Against Politics: On Government, Anarchy, and Order. By Anthony de Jasay. London and New York: Routledge, 1997," Q. J. Austrian Econ. 1, no. 1. (Fall 1998): 85–93. De Jasay's book will be referred to herein as Against Politics.

本文最初题为“《反对政治：论政府、无政府与秩序》（安东尼·德·雅赛著，伦敦和纽约：劳特利奇出版社，1997 年）”，发表于《奥地利经济学季刊》第 1 卷第 1 期（1998 年秋季）：85-93，署名斯蒂芬·金塞拉。德·雅赛的这本书在此章节中将被称为《反对政治》。

This is a wonderful collection of previously published articles by Anthony de Jasay who, it turns out, is an undiscovered Austrian, or at least a close cousin. The essays in Against Politics, published between 1989 and 1996, are united around a common theme, the economic and political aspects of government and “ordered anarchy.” The book is full of sparkling insight and penetrating, calm dissections of pro-state arguments. Opponents of the state will find much ammunition here. Statists (even of the minimalist variety) will find much to ponder.

这是安东尼·德·雅赛先前发表的文章的精彩合集，事实证明，他是一位未被发现的奥地利学派学者，或者至少是关系密切的同类学者。《反对政治》中的文章发表于 1989 年至 1996 年间，它们围绕一个共同的主题——政府的经济和政治方面以及“有序的无政府主义”——而统一起来。这本书充满了杰出闪光的见解，对支持国家的论点进行了深刻而冷静的剖析。反对国家的人会在这里找到很多有力的论据。国家主义者（即使是最小政府的国家主义者）也会在这里找到很多值得思考的东西。

De Jasay's arguments pack quite a punch, and make it clear that he is a powerful, careful

scholar. He also appears to be a quasi-Austrian economist and political theorist, which is surprising given that he does not appear to be very familiar with the work of Austrian theorists, such as Mises and Rothbard. Has he even read *Human Action*? One wonders. The primary well-known Austrians he cites are Hayek and Wieser, who represent the "Vienna School" instead of the Austrian school.¹ He has apparently come to many Austrian conclusions without the benefit of much exposure to Austrianism. For example, he makes good use of the observation that not only is utility not measurable, but interpersonal utility is also completely incommensurate.² He even writes that, "[u]nlike the physical sciences, inference presupposing purposiveness is proper to the study of reasoning beings and cannot be avoided without inordinate loss of content,"³ which bears an uncanny similarity to Mises's own epistemology.⁴

德·雅赛的论据相当有力，很明显他是一位有影响力且严谨的学者。他似乎也是一位准奥地利学派经济学家和政治理论家，令人惊讶的是，他好像对米塞斯和罗斯巴德等奥地利学派理论家的作品不是很熟悉。人们不仅会好奇，他读过《人的行动》吗？他引用的主要知名奥地利学派学者是哈耶克和维塞尔，而二者代表的是“维也纳学派”而非奥地利学派。⁸⁴⁵他显然在没有大量接触奥地利学派思想的情况下得出了许多奥地利学派的结论。例如，他很好地利用了这样一个观点，即不仅效用不可测量，而且跨人际效用也完全不可通约。⁸⁴⁶他甚至写道：“与自然科学不同，以目的性为前提的推理适用于对理性生物的研究，若不这样做，就会不可避免地造成内容的极大损失。”⁸⁴⁷这与米塞斯本人的认识论有着惊人的相似之处。⁸⁴⁸

⁸⁴⁵ Against Politics, p. 162.

《反对政治》，第 162 页。

⁸⁴⁶ See, e.g., *ibid.*, 81 – 81, 92, 98, 144

例如，见同上，第 81-81 页、92 页、98 页、144 页。

⁸⁴⁷ *Ibid.*, 74.

见同上，第 74 页。

⁸⁴⁸ See, e.g., Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar's ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>); *idem*, *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>); *idem*, *Epistemological Problems of Economics*, 3d ed., George Reisman, trans. (Auburn, Ala.: Mises Institute, 2003; <https://mises.org/library/epistemological-problems-economics>).

The book is divided into two parts. The seven chapters of Part 1 are critical of statism, the view that political action is necessary, efficient, or desirable. In the four chapters of Part 2, our author somewhat tentatively proffers his own politico-economic theories, designed to show that various desirable social institutions are possible without political arrangements. The essays are well-ordered and generally fit together almost as well as chapters of an integrated work, although, as is to be expected in a collection of this kind, there is some repetition and redundancy. (A useful summary of the book's themes, structure, and arguments is found in the Introduction, at pp. 4–7.)

这本书分为两部分。第一部分的七章对国家主义进行了批判，国家主义认为政治行动是必要的、有效的或可取的。在第二部分的四章中，作者有点试探性地提出了他自己的政治经济理论，旨在表明在没有政治安排的情况下，各种理想的社会制度也是可能的。这些文章条理清晰，总体上几乎像一部完整作品的章节一样紧密结合，尽管正如在这种文集中可以预料到的那样，存在一些重复和冗余。（在导论中可以找到对本书主题、结构和论点的有用总结，见第 4-7 页。）

De Jasay is a master of criticism. A standard technique is to hold a statist's logic up to standards that the statist himself espouses. In a rare personal glimpse, he reveals an instance of applying this technique in his own life:

The present writer, when a subject of a "people's democracy" [presumably the author's country of origin, Hungary], used to taunt his political masters that capitalism had never existed anywhere, that it was yet to come, it was the "wave of the future"—a taunt that reduced them to fury but naturally failed to provoke any refutation.⁵

德·雅赛是一位批评的大师。他的一种标准的技巧是用国家主义者自己所拥护的标准来拷打国家主义者的逻辑。在一次罕见的个人回忆中，他透露了自己在生活中运用这种技巧的一个例子：

例如，参见路德维希·冯·米塞斯的《人的行动：经济学专论》，学者版（阿拉巴马州奥本：米塞斯研究院，1998 年；网址：<https://mises.org/library/human-action-0>）；同上，《经济科学的终极基础：方法论文》（新泽西州普林斯顿：D.范诺斯特兰公司，1962 年；网址：<https://mises.org/library/ultimate-foundation-economic-science>）；同上，《经济学的认识论问题》第三版，乔治·赖斯曼译（阿拉巴马州奥本：米塞斯研究院，2003 年；网址：<https://mises.org/library/epistemological-problems-economics>）。

本文作者在曾是“人民民主国家”[大概是作者的原籍国匈牙利]的臣民时，曾嘲讽他的政治主子说，资本主义从未在任何地方存在过，它还没有到来，它是“未来的浪潮”——这种嘲讽让他们怒不可遏，但自然也无法引致任何反驳。⁸⁴⁹

Given his power of criticism, the critical pieces in Part 1 contain stronger arguments than Part 2, although for some (such as this reviewer), the essays in Part 2 will still be of at least as much or more interest. For although his positive theorizing is weakened by his own moral skepticism (more on this below), it is strengthened by his critique of statist alternatives; further, his basic intuitions and premises are largely sound. Combine this with a multitude of keen insights and critiques of opposing social theories, and Part 2 is of immense interest, even with its deficiencies.

鉴于他的批判能力，第一部分中的批判性文章比第二部分包含更有力的论据，尽管对某些人（如本评论者）来说，第二部分中的文章仍至少具有同样或更多的意义。因为尽管他的积极理论建构因他自己的道德怀疑主义而被削弱（下文会对此有更多阐述），但通过对国家主义替代方案的批判，它又得到了加强；此外，他的基本直觉和前提在很大程度上是合理的。再加上对对立社会理论的众多敏锐见解和批判，第二部分即使有不足也极具吸引力。

Part 1 opens with “Self-Contradictory Contractarianism,” which addresses the argument that various “intractable” problems of the state of nature, such as prisoner’s dilemmas and free riding,⁶ prevent systematic social cooperation. One way out of these dilemmas would be to make “binding” contracts. However, people cannot make binding contracts in the state of nature, since rational actors without fear of sanction will always default, thereby making contracting impossible and requiring the state to provide an effective contract enforcement mechanism.

第一部分以“自相矛盾的论”开篇，论述了自然状态下各种“棘手”的问题，如囚徒困境和搭便车，⁸⁵⁰阻碍了系统的社会合作。摆脱这些困境的一个办法就是订立“有约束

⁸⁴⁹ Against Politics, pp. 108 – 9.

《反对政治》，第 108-109 页。

⁸⁵⁰ Ibid., pp. 11 – 12.

同上，第 11-12 页。

力”的。然而，在自然状态下，人们无法订立有约束力的，因为毫无制裁之忧的理性的行动人总会违约，从而导致无法订立，这就需要国家提供有效的执行机制。

But, de Jasay asks, “if contracts require an enforcer, how could there be a social contract creating an enforcer without its enforcement being assured by a meta-enforcer created by a meta-social contract, and so on in an infinite regress.”⁷ De Jasay recognizes that the proposed solution assumes that the state can act as an “enforcing agent acting as a programmed automaton.”⁸ Yet this is to “assume away the principal-agent problem,”⁹ since the state has little reason to restrict itself to enforcing the contract. For these and other reasons, “[t]here is … no contractual exit from the state of nature: if the state is to be created by contract, it cannot be created, since it is its own antecedent condition.”¹⁰ Thus this particular ground for the necessity of the state contradicts itself, and advocates of government are hoisted by their own petard.

但是，德·雅赛问道：“如果需要一个执行者，那么怎么会会有一个社会创造了一个执行者，而其执行却没有一个元社会创造的元执行者来保证，如此循环往复，无限倒退。”⁸⁵¹德·雅赛承认，所提出的解决方案假定国家可以作为一个“执行者，作为一个程序化的机器人”行事。⁸⁵²然而，这是“把委托代理问题通过假设消除了”，⁸⁵³因为国家几乎没有理由把自己限制在执行契约上。由于这些和其他原因，“……没有从自然状态通过契约退出的途径：如果国家要通过契约来创建，它就无法被创建，因为它是它自己的先决条件。”⁸⁵⁴因此，国家必要性的这一特定依据自相矛盾，政府的倡导者被他们自己的策略所驳斥。

De Jasay correctly recognizes that the real question is whether ordered anarchy (what we would call anarcho-capitalism) is possible or not, and this question “ultimately boils down to the issue of the enforcement of mutual promises without a final specialized enforcer.”¹¹ De Jasay seems at home with the somewhat dubious field of game

⁸⁵¹ Ibid., p. 5.
同上，第 5 页。
⁸⁵² Ibid., p. 19
同上，第 19 页。
⁸⁵³ Ibid.
同上。
⁸⁵⁴ Ibid., p. 22
同上，第 22 页。

theory, but this helps to make him especially suited to criticize its irrelevance to the actual world. He argues that typical game-theoretical arguments are unrealistic and inapplicable to real life situations, since “[a]nyone who has a name, lives in a place, does something for a living—that is, anyone tied into the fabric of society—would think twice before treating mutual promise as the single-play prisoner’s dilemma says he must.”¹² We can, therefore, expect that contracts can be self-enforcing, without the aid of a centralized enforcing agent, and thus at least some of the dilemmas that are claimed to be part of anarchy are chimerical.¹³

德·雅塞正确地认识到，真正的问题在于有序的王政府主义（我们称之为王政府资本主义）是否可能，而这个问题“最终归结为在没有最终专门执行者的情况下如何执行相互承诺的问题”。⁸⁵⁵德·雅塞似乎对博弈论这个有点可疑的领域很在行，但这有助于使他特别适合批评博弈论与现实世界的不相关性。他认为典型的博弈论论证是不现实的，不适用于现实生活情况，因为“任何有名字、生活在一个地方、以某种方式谋生的人——也就是说，任何融入社会结构的人——在把相互承诺当作单次囚徒困境所说的那样对待之前都会三思。”⁸⁵⁶于是乎，我们可以预期契约可以自我执行，无需中央执行机构的帮助，因此，至少有一些声称属于王政府主义的两难困境是子虚乌有的。

⁸⁵⁷

⁸⁵⁵ Ibid., p. 29.

同上，第 29 页。

⁸⁵⁶ Ibid., p. 33.

同上，第 33 页。

⁸⁵⁷ Further, as Alfred G. Cuz á n has insightfully pointed out, the existence of the state itself is evidence that anarchy is possible, for officials of the state “voluntarily” abide by certain hierarchies and rules, e.g., the American president is physically less powerful than his armies, yet they tend to obey him rather than vice-versa. Alfred G. Cuz á n, “Do We Ever Really Get Out of Anarchy?,” J. Libertarian Stud. 3, no. 2 (Summer 1979; [https:// mises.org/library/do-we-ever-really-get-out-anarchy](https://mises.org/library/do-we-ever-really-get-out-anarchy)): 151 – 58. See also idem, “Revisiting ‘Do We Ever Really Get Out of Anarchy?’ ”, J. Libertarian Stud. 22, no. 1 (2010; [https:// mises.org/library/revisiting-do-we-ever-really-get-out-anarchy](https://mises.org/library/revisiting-do-we-ever-really-get-out-anarchy)): 3 – 21.

此外，正如阿尔弗雷德·G·库赞富有洞察力地指出的那样，国家本身的存在就是王政府主义具有可能性的证据，因为国家官员“自愿”遵守某些等级制度和规则，例如，美国总统在身体力量上比他的军队弱小，但他们倾向于服从他，而不是相反。阿尔弗

Indeed, as argued in chapter 2, “Is Limited Government Possible?,” it is not proponents of anarcho-capitalism but rather those who advocate limited government who hold unrealistic views. Our author recognizes that “[t]here is a plethora of constitutional devices for ‘rigging’ rules and procedures in such a way as to clip the wings of the state.”¹⁴ However, the real problem is not how to invent such devices but to find the conditions, if possible, that would be likely to be adopted and to stay intact long enough to do any good.¹⁵ De Jasay’s economic reasoning here persuasively demonstrates why no such artificial restriction is likely to succeed, and why any government can be expected to have a tendency to grow.¹⁶

事实上，正如第 2 章《有限政府是否可行？》所论证的，持不切实际观点的不是无政府资本主义的支持者，而是那些主张有限政府的人。我们的作者认识到“有大量的宪法手段可以用来‘操纵’规则和程序，以束缚国家的翅膀。”⁸⁵⁸然而，真正的问题并不在于如何发明这些手段，而在于找到可能被采纳并保持足够长的时间以发挥任何作用的条件（如果可能的话）。⁸⁵⁹德·雅塞在这里的经济学推理令人信服地证明了为什么这种人为的限制不可能成功，以及为什么任何政府都必然有膨胀的趋势。⁸⁶⁰

The other chapters of Part 1 are also interesting and insightful. “Frogs’ Legs, Shared Ends, and the Rationality of Politics”¹⁷ argues that political grounds generally cannot have rational grounds and cannot be rationally defended. This essay, however, seems more hastily written and more poorly organized than most others in the book. “The Twistable is Not Testable,”¹⁸ a review essay of Popper’s *The Open Society and Its Enemies*,¹⁹ shows de Jasay at the height of his critical powers. In this piece, de Jasay subjects Popper’s own (socialistic) propositions “to the acid of the very method of

雷德·G·库赞，“我们真的能摆脱无政府主义吗？”，《自由意志主义研究杂志》第 3 卷第 2 期（1979 年夏季；网址：<https://mises.org/library/do-we-ever-really-get-out-anarchy>）：151-158 页。另见同一作者的“再论‘我们真的能摆脱无政府主义吗？’”，《自由意志主义研究杂志》第 22 卷第 1 期（2010 年；网址：<https://mises.org/library/revisiting-do-we-ever-really-get-out-anarchy>）：3-21 页。

⁸⁵⁸ Against Politics, p. 53.

《反对政治》，第 53 页。

⁸⁵⁹ Ibid.

同上。

⁸⁶⁰ Ibid., p. 57ff.

同上，第 57 页及以下。

which he is the champion," the test of falsifiability.²⁰ Popper contended that "[g]enuine propositions are capable of being corroborated, and are criticized by a process of confrontation with the ascertainable facts of the case."²¹ However, Popper advocated both democracy and socialism; yet, as de Jasay shows, this advocacy rests upon the completely unfalsifiable building block descriptions, concepts, and judgments, such as "weak" and "strong." For example, these concepts are essential to the Popperian proposition that social institutions must be constructed to protect the "economically weak" from the "economically strong."²² Thus, de Jasay shows that Popper's socialism is indefensible by Popper's very own scientific standards.²³

第一部分的其他章节也很有趣，很有见地。《青蛙腿、共同目的和政治的合理性》⁸⁶¹认为，政治理由一般不可能有合理的依据，也不可能得到合理的辩护。不过，与书中其他文章相比，这篇文章显得更加仓促，条理也更不清晰。《可扭曲的不可检验》⁸⁶²（The Twistable is Not Testable）是对波普尔的《开放社会及其敌人》⁸⁶³的一篇评论文章，展现了德·雅赛处于批判能力的巅峰状态。在这篇文章中，德·雅赛将波普尔自己（社会主义的）命题“置于他所倡导的方法——可证伪性检验——的试剂之中”。⁸⁶⁴波普尔认为“真正的命题能够得到确证，并通过与可确定的事实情况相对照的过程受到批判”。⁸⁶⁵然而，波普尔既主张民主又主张社会主义；但正如德·雅赛所表明的，这种主张建立在完全不可证伪的构建基础描述、概念和判断之上，比如“弱”和“强”。例如，这些概念对于波普尔的命题至关重要，即社会制度的构建必须保护“经济弱者”

⁸⁶¹ Ibid., chap. 3.

同上，第三章。

⁸⁶² Ibid., chap. 5.

同上，第五章。

⁸⁶³ Karl R. Popper, *The Open Society and Its Enemies*, vol. 2, 4th rev. ed. (London: Routledge and Kegan Paul, 1962).

卡尔·R·波普尔，《开放社会及其敌人（第二卷）》，第四修订版（伦敦：劳特利奇与基根·保罗出版社，1962年）。

⁸⁶⁴ *Against Politics*, p. 105.

《反对政治》，第105页。

⁸⁶⁵ Ibid.

同上。

免受“经济强者”的伤害。⁸⁶⁶因此，德·雅赛指出，按照波普尔自己的科学标准，波普尔的社会主义是站不住脚的。⁸⁶⁷

In the course of this essay, de Jasay also deflates the myth that Popper was a liberal.²⁴ Also of interest is de Jasay's critical treatment of other prominent liberal economists and political theorists, notably James Buchanan, F.A. Hayek, and Robert Nozick. In "Hayek: Some Missing Pieces,"²⁵ for example, de Jasay argues that Hayek "has

⁸⁶⁶ Ibid., pp. 114 - 15.

同上，第 114-115 页。

⁸⁶⁷ As has been pointed out, logical positivism is inherently contradictory since it fails its own test, as it is not itself falsifiable. Mises, for example, writes:

The essence of logical positivism is to deny the cognitive value of a priori knowledge by pointing out that all a priori propositions are merely analytic. They do not provide new information, but are merely verbal or tautological, asserting what has already been implied in the definitions and premises. Only experience can lead to synthetic propositions. There is an obvious objection against this doctrine, viz., that this proposition that there are no synthetic a priori propositions is in itself a—as the present writer thinks, false—synthetic a priori proposition, for it can manifestly not be established by experience.

Mises, *The Ultimate Foundation of Economic Science*, p. 5. See also Hoppe, "Austrian Rationalism in the Age of the Decline of Positivism," in *The Economics and Ethics of Private Property*, p. 363; idem, *The Economics and Ethics of Private Property*, p. 271; idem, *Economic Science and the Austrian Method* (Auburn, Ala.: Mises Institute, 1995; www.hanshoppe.com/esam), pp. 33 - 34; idem, *A Theory of Socialism and Capitalism*, pp. 126 - 27; and Martin Hollis & Edward J. Nell, *Rational Economic Man: A Philosophical Critique of Neo-Classical Economics* (Cambridge, 1975), p. 110.

正如已经指出的那样，逻辑实证主义本质上是自相矛盾的，因为它未能通过自身的检验，因为它本身是不可证伪的。例如，米塞斯写道：

“逻辑实证主义的本质是通过指出所有先验命题仅仅是分析性的，从而否定先验知识的认知价值。它们不提供新的信息，而仅仅是言辞上的或重言式的，断言的只是已经隐含在定义和前提中的内容。只有经验才能得出综合命题。对这一学说存在一个明显的反对意见，即‘不存在先验综合命题’这一命题本身就是一个——在本文作者看来是错误的——先验综合命题，因为它显然不能通过经验来确立。”

米塞斯：《经济科学的终极基础》，第 5 页。另见霍普，《实证主义衰落时代的奥地利学派理性主义》，收录于《私有财产的经济学与伦理学》，第 363 页；同上，《私有财产的经济学与伦理学》，第 271 页；同上，《经济科学与奥地利学派方法》（阿拉巴马州奥本：米塞斯研究院，1995 年；www.hanshoppe.com/esam），第 33-34 页；同上，《社会主义与资本主义理论》，第 126-127 页；以及马丁·霍利斯和爱德华·J·内尔，《理性经济人：对新古典经济学的哲学批判》（剑桥，1975 年），第 110 页。

no complete theory of the social order to back up his liberal recommendations.”²⁶ In advocating that government should go beyond the maintenance of law and order to provide amorphous and endless “highly desirable” public goods, Hayek ends up supporting virtually unlimited government. De Jasay will have none of this:

*A theory of social order is incomplete if it makes no serious attempt at assessing the long-term forces that make the public sector grow or shrink. This can hardly be done without relying on a defensible theory of public goods. Hayek feels no necessity for one. Strangely, the question seems to have held no interest for him.*²⁷

在这本书中，德·雅赛还戳破了波普尔是自由主义者的神话。⁸⁶⁸ 德·雅赛对其他杰出的自由主义经济学家和政治理论家，尤其是詹姆斯·布坎南、F.A.哈耶克和罗伯特·诺齐克的批判也值得关注。例如，在《哈耶克：缺失部分》⁸⁶⁹一文中，德·雅赛认为哈耶克“没有完整的社会秩序理论来支持他的自由主义建议”⁸⁷⁰。哈耶克主张政府应该超越维护法律和秩序，去提供模糊且无穷的“非常理想的”公共产品，最终他实际上支持了几乎不受限制的政府。德·雅赛对此不屑一顾：

如果一种社会秩序理论没有认真尝试评估使公共部门增长或收缩的长期力量，那它就是不完整的。而如果不依赖一种站得住脚的公共产品理论，这几乎是不可能做到的。

哈耶克觉得没有必要有此一种理论。奇怪的是，这个问题似乎对他没有吸引力。⁸⁷¹

In other words, Hayek has not done his homework and his half-baked political theory

⁸⁶⁸ Against Politics., p. 114.

《反对政治》，第 114 页。

⁸⁶⁹ Ibid., chap. 6.

同上，第六章。

⁸⁷⁰ Ibid., p. 120.

同上，第 120 页。

⁸⁷¹ Ibid., p. 125. See also Walter Block, “Hayek’s Road to Serfdom,” J. Libertarian Stud. 12, no. 2 (Fall 1996; <https://perma.cc/5NZM-QLCV>): 327 – 50.

同上，第 125 页。另见沃尔特·布洛克，《哈耶克的<通往奴役之路>》，《自由意志主义研究杂志》第 12 卷第 2 期（1996 年秋季；网址：<https://perma.cc/5NZM-QLCV>）：327-350 页。

endangers the very freedom that he is viewed as upholding. (The critiques of Nozick and Buchanan are discussed below in the discussion of Part 2.)

换句话说，哈耶克没有做足功课，他那半吊子的政治理论危及了他所支持维护的自由。（对诺齐克和布坎南的批评将在下文第二部分的讨论中论述）。

I have mentioned above that de Jasay's work could be improved if it built more on and dealt more with contemporary Austrian theory, in particular Misesian economic theory as well as associated political theories, such as those of Rothbard. But this is unfair and somewhat ungrateful. We cannot rightfully criticize him for what he has not done, especially when what he has done is so significant. It might be better to say that, given his obvious acuity and talents, it seems a shame that he has not done so. One can only hope that we see more treatment and use of Austrian work in his further output.

我在上文提到，如果德·雅赛的著作能更多地借鉴和涉及当代奥地利理论，特别是米塞斯经济理论以及相关的政治理论，如罗斯巴德的理论，那么他的著作就会更上一层楼。但这是不公平的，也有点求全责备。我们不能因为他没有做的事情而理直气壮地批评他，尤其是当他所做的事情如此重要的时候。倒不如说，鉴于他有目共睹的敏锐和才华，他没有这样做似乎是一种遗憾。我们只能希望在他今后的作品中看到更多对奥地利学派作品的讨论与应用。

For example, his discussions of the so-called public goods "dilemma"²⁸ could have profited from the trenchant insights of Austrians Murray Rothbard and Hans-Hermann Hoppe, among others.²⁹ His discussion of why government will tend to grow³⁰ could also be usefully supplemented by recent Austrian politico-economic theory.³¹ Rothbard (relying on Schütz) criticized the empiricist assumption that only "verifiable" (or falsifiable) propositions are "scientific," and thus the existence of human action and even other human actors cannot be scientifically maintained, on the grounds that the principle of verifiability itself requires other human beings to exist to replicate experimental results.³² This insight could have been used with profit in de Jasay's Popper critique.³³ De Jasay's critiques of Nozick³⁴ (discussed below) and Hayek³⁵ could have also fit well with Austrian analysis.³⁶

例如，他对所谓公共产品“困境”⁸⁷²的讨论本可以从奥地利学派的穆瑞·罗斯巴德和汉斯-赫尔曼·霍普等人的深刻见解中获益。⁸⁷³他对政府为何倾向于膨胀的讨论⁸⁷⁴也可以通过近期的奥地利学派的政治经济学理论得到有益的补充。⁸⁷⁵罗斯巴德（基于舒茨）批评了经验主义的假设，即只有“可验证的”（或可证伪的）命题才是“科学的”，因此人的行动甚至其他人类行动的存在不能在科学上得到维护，理由是可验证性原则本身需要其他人类存在才能复制实验结果。⁸⁷⁶在德·雅赛对波普尔的批判中，这一见解本

⁸⁷² Ibid., pp. 20, 124.

同上，第 20 页，124 页。

⁸⁷³ See, e.g., Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp), chap. 1; idem, “The Private Production of Defense,” in *The Great Fiction: Property, Economy, Society, and the Politics of Decline*, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf); Murray N. Rothbard, *Man, Economy, and State, with Power and Market*, Scholars ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>); idem, “The Myth of Neutral Taxation,” in Rothbard, *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>).

例如，参见汉斯-赫尔曼·霍普的《私有财产的经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年 [1993 年]；网址：www.hanshoppe.com/eepp），第一章；同上，《安防的私人生产》，收录于《伟大的虚构：财产、经济、社会与衰落的政治（第二版增订版）》（阿拉巴马州奥本：米塞斯研究院，2021 年；网址：www.hanshoppe.com/tgf）；穆瑞·N·罗斯巴德的《人、经济与国家，权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；网址：<https://mises.org/library/man-economy-and-state-power-and-market>）；同上，《中立税收的神话》，收录于罗斯巴德的《经济学的论证》（阿拉巴马州奥本：米塞斯研究院，2011 年；网址：<https://mises.org/library/economic-controversies>）。

⁸⁷⁴ *Against Politics*, p. 57 et seq.

《反对政治》，第 57 页及后续页。

⁸⁷⁵ See, e.g., Hoppe, “Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy,” in John Denson, ed., *The Costs of War* (New Brunswick: Transaction Publishers, 1997; <https://perma.cc/N7NA-24C8>).

例如，参见霍普的《时间偏好、政府与去文明化进程——从君主制到民主制》，收录于约翰·丹森编，《战争的代价》（新不伦瑞克：交易出版社，1997 年；网址：<https://perma.cc/N7NA-24C8>）。

⁸⁷⁶ Murray N. Rothbard, “Praxeology as the Method of the Social Sciences,” in

可以得到很好的利用。⁸⁷⁷德·雅赛对诺齐克⁸⁷⁸（下文将讨论）和哈耶克⁸⁷⁹的批判也可以与奥地利学派的分析很好地契合。⁸⁸⁰

A more serious objection lies in de Jasay's moral skepticism. His general skepticism serves him well as a critic, since it leads him invariably to put the burden of proof on those who advocate the state and to find their proof wanting. However, his own skepticism goes too far and is itself unwarranted. It also undercuts his own positive theorizing, since even that, as tentative as it is, depends on some modicum of moral judgment or assumptions.

更严重的反对意见在于德·雅赛的道德怀疑主义。作为一名批评家，他的普遍怀疑主义对他很有帮助，因为这使他总是把举证责任推给主张国家的人，并发现他们的举证缺乏说服力。然而，他自己的怀疑主义走得太远，本身就是毫无根据的。这也削弱了他自己的积极理论建构，因为即使这些理论是试探性的，也依赖于一定程度的道德判断

Economic Controversies.
穆瑞·N·罗斯巴德，《作为社会科学方法的行动学》，收录于《经济学的论证》。
⁸⁷⁷ Against Politics, chap. 5.
《反对政治》，第五章。
⁸⁷⁸ Ibid., p. 170, 174.
同上，第 170 页，174 页。
⁸⁷⁹ Ibid., chap. 6.
同上，第六章。
⁸⁸⁰ On Nozick, see Rothbard, “Robert Nozick and the Immaculate Conception of the State,” The Ethics of Liberty (New York: New York University Press, 1998; <https://perma.cc/5BU9-YLXD>); on the error in the Lockean proviso and Nozick’s adoption thereof, see Hoppe, The Economics and Ethics of Private Property, p. 410. On Hayek, see Hoppe, “F.A. Hayek on Government and Social Evolution: A Critique,” in The Great Fiction, and Block, “Hayek’s Road to Serfdom.” Hoppe also criticizes Nozick in “Murray N. Rothbard and the Ethics of Liberty,” in Rothbard, The Ethics of Liberty (www.hanshoppe.com/publications).
关于诺齐克，参见罗斯巴德的《罗伯特·诺齐克与国家的完美构想》，收录于《自由的伦理》（纽约：纽约大学出版社，1998 年；网址：<https://perma.cc/5BU9-YLXD>）；关于洛克式限制条款中的错误以及诺齐克对其的采用，参见霍普的《私有财产的经济学与伦理学》，第 410 页。关于哈耶克，参见霍普的《F.A.哈耶克论政府与社会演化：一种批判》，收录于《伟大的虚构》，以及布洛克的《哈耶克的<通往奴役之路>》。霍普在《穆瑞·N·罗斯巴德与<自由的伦理>》（收录于罗斯巴德的《自由的伦理》，网址：www.hanshoppe.com/publications）中也对诺齐克提出了批评。

或假设。

De Jasay seems to believe that the only meaningful propositions are those that are subject to rational criticism, and that only falsifiable propositions that can be corroborated or not, fall into this category. One exception is that "value judgments" that are not merely ad hoc, i.e., that fit into some coherent hierarchy or system, can also be criticized if they are not internally consistent.³⁷ I may be too hasty here and may be unfairly attributing to him a kind of Popperian scientism that he means to present and critique rather than adopt. However, over and over, de Jasay denigrates the idea that ends or values can be rational. Thus, "[w]hat is ultimately unfalsifiable, immune to rational criticism and useless except as a piece of gratuitous self-expression, is the standalone, ad hoc value judgment."³⁸

德·雅赛似乎认为，唯一有意义的命题是那些可以接受理性批判的命题，只有可证伪的命题，可以被证实或不被证实，才属于这一类。一个例外是，如果“价值判断”不只是临时性的，即符合某种连贯的等级或体系，那么，如果这些“价值判断”不具有内在一致性，也会受到批判。⁸⁸¹在此，我可能过于草率，可能不公平地将一种波普尔式的科学主义归咎于他，而他的本意是提出和批判而非采纳这种科学主义。然而，德·雅赛一再诋毁目的或价值可以是理性的这一观点。因此，因此，“那最终是不可证伪的，不受理性批判的影响，除了作为一种无端的自我表达之外毫无用处，是孤立的、特定情况下的价值判断。”⁸⁸²

Here is where perhaps the greatest improvement could be made to de Jasay's thought by careful consideration of important Austrian work. In particular, Hoppe's extension of praxeology into the field of ethics, the importance of which cannot be overstated, demonstrates that there is indeed an unchallengeable, rational basis for ethics.³⁹ In fact, in his skepticism and his subsequently deficient political theorizing, de Jasay has more in common with Mises than just economics. For Mises himself, as Rothbard has pointed out, as an opponent of objective ethics, presented a very weak, half-hearted,

⁸⁸¹ Against Politics, p. 106.

《反对政治》，第 106 页。

⁸⁸² Ibid., p. 106; see also pp. 16 - 17, 36 n. 2, 66.

同上，第 106 页；另见第 16-17 页、第 36 页注释 2、第 66 页。

and, ultimately, unsuccessful, utilitarian defense of liberalism.⁴⁰

在这里，通过仔细研究奥地利的重要著作，或许可以对德·雅赛的思想做出最大的改进。特别是霍普将行动学的理论延伸到伦理学领域，其重要性无论怎样强调都不为过，这表明伦理学确实存在着不可质疑的理性基础。⁸⁸³事实上，德·雅赛在怀疑主义和其后有缺陷的政治理论方面，与米塞斯的共同之处不仅仅是经济学。正如罗斯巴德所指出的，米塞斯本人作为客观伦理学的反对者，对自由主义提出了一种极其无力、三心二意且最终不成功的功利主义辩护。⁸⁸⁴

The most important and interesting essay of Part 2 is “Before Resorting to Politics,”⁴¹ which de Jasay admits is “the book’s most ambitious.”⁴² In this chapter, he criticizes consequentialism and other problems that, as he sees it, plague modern liberal theory. In its stead he “proposes three, admittedly sketchy, ‘principles of politics,’” which are “entailed in the liberal ethic” and which must be incorporated into the foundations of any coherent liberal theory.⁴³

第二部分最重要、最有趣的文章是《诉诸政治之前》⁸⁸⁵，德·雅赛承认这是“全书最具雄心的一章”⁸⁸⁶。在这一章中，他批判了结果主义以及他认为困扰现代自由主义理论

⁸⁸³ See, e.g., Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), chap. 7; idem, *The Economics and Ethics of Private Property*, chaps. 8 – 11; *The Undeniable Morality of Capitalism*” (ch. 22); “A Libertarian Theory of Punishment and Rights” (ch. 5); “Dialogical Arguments for Libertarian Rights” (ch. 6); Rothbard, *The Ethics of Liberty*; idem, *For A New Liberty: The Libertarian Manifesto*, 2d ed. (Auburn, Ala.: Mises Institute, 2006; <https://mises.org/library/new-liberty-libertarian-manifesto>).

例如，参见霍普的《社会主义与资本主义理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010 年[1989 年]；网址：www.hanshoppe.com/tsc），第七章；同上，《私有财产的经济学与伦理学》，第八章至第十一章；《资本主义不可否认的道德》（第二十二章）；《自由意志主义的惩罚与权利理论》（第五章）；《自由意志主义权利的对话论证》（第六章）；罗斯巴德，《自由的伦理》；同上，《为了新自由：自由意志主义宣言》第二版（阿拉巴马州奥本：米塞斯研究院，2006 年；网址：<https://mises.org/library/new-liberty-libertarian-manifesto>）。

⁸⁸⁴ Rothbard, “Praxeology, Value Judgments, and Public Policy,” in *Economic Controversies*.

罗斯巴德，《行动学、价值判断与公共政策》，收录于《经济学的论证》。

⁸⁸⁵ *Against Politics*, chap. 8.

《反对政治》，第八章。

⁸⁸⁶ *Ibid.*, p. 6.

的其他问题。取而代之的是，他“提出了三条诚然粗略的‘政治原则’”，这些原则“蕴含在自由主义的伦理之中”，任何一致的自由主义理论都必须将其纳入基础之中。⁸⁸⁷

As noted above, however, de Jasay does not seem to believe that normative propositions can be justified, and he does not really try to do so. He just uses the occasional “should” and normative premise where it is unavoidable, and appears to simply presume that the reader shares these (uncontroversial) premises, perhaps counting on the reader’s own good will or love of consistency. For example, he merely asserts that “[i]t is dubious in the extreme that a political authority is entitled to employ its power of coercion for imposing value choices on society … and on individual members.”⁴⁴ Yet the force of the normative concepts “dubious” and “entitled” here is diluted by the lack of even an attempt at justification.

然而，如上所述，德·雅赛似乎并不认为规范性命题可以得到证明，而且他实际上也没有真正去尝试这么做。他只是在不可避免的地方偶尔使用“应该”和规范性前提，而且似乎只是简单地假定读者赞同这些（无争议的）前提，也许是寄希望于读者本身的善意或对一致性的热爱。例如，他仅仅断言“政治权威有权利用其强制力将价值选择强加给社会……以及个体成员，这是极其可疑的”。⁸⁸⁸然而，此处的“可疑”和“有权”这些规范性概念的力度由于甚至没有尝试进行证明而被削弱了。

De Jasay’s argument is thus a hypothetical one—and I am not sure if he would disagree, for I am not sure he thinks anything better is possible—for it relies for its persuasiveness on the listener already valuing (for some reason) the goals of justice, efficiency, and order. Nevertheless, because most of these principles are certainly sound and justifiable anyway (for example, using Rothbard’s or Hoppe’s ethical theory), and because de Jasay’s critical and analytical skills are so acute, much of interest emerges from this essay.

因此，德·雅赛的论证是一种假设性的论证——而且不确定他是否会反对，因为我不确定他是否认为还有更好的论证，——因为它的说服力依赖于听众已经出于某种原

同上，第六章。

⁸⁸⁷ Ibid., p. 147.

同上，第 147 页。

⁸⁸⁸ Ibid., p. 151.

同上，第 151 页。

因重视正义、效率和秩序的目标。尽管如此，由于这些原则中的大多数无论如何肯定都是合理的且可证明的（例如，使用罗斯巴德或霍普的伦理理论），而且德·雅赛的批判和分析能力非常敏锐，因此这篇文章中出现了许多令人感兴趣的内容。

His three principles of politics are: (1) if in doubt, abstain from political action;⁴⁵(2) the feasible is presumed free;⁴⁶ and (3) let exclusion stand.⁴⁷ The justification of principle (1) begins with a vigorous critique of consequentialism. De Jasay notes that most political action requires assessing the worth or value of various policies. Drawing on the idea that interpersonal utility and values are incommensurate, de Jasay points out that we can rarely know if any proposed government measure is really “worth it” or not.⁴⁸ Thus, government action, which necessarily employs the power of coercion, should be avoided where possible; the burden of proof should be on those agitating for it. This entails a corollary principle, “that applying coercion is legitimate when it is positively invited by the prospective coercee.”⁴⁹

他的政治三原则是 (1)如有疑问，放弃政治行动；⁸⁸⁹(2)可行者被假定是自由的；⁸⁹⁰(3)允许排除。⁸⁹¹原则（1）的合理正当性始于对结果⁸⁹²的有力批判。德·雅赛指出，大多数政治行动都需要评估各种政策的价值。借鉴人际效用和价值不可通约的观点，德·雅赛指出，我们很少能知道任何拟议的政府措施是否真的“值得”。⁸⁹²因此，应尽可能避免采取必然会动用强制力的政府行动；举证责任应由主张采取行动的人承担。这就产生了一个必然的原则，即“当潜在的被胁迫者积极要求使用胁迫时，使用胁迫是合法的”。

⁸⁹³

Next, in principle (2), “the feasible is presumed free,” de Jasay asserts that “[t]he basic rule is that a person is presumed free to do what is feasible for him to do,”⁵⁰ as long

⁸⁸⁹ Ibid., pp. 147 et seq.
同上，第 147 页及后续页。
⁸⁹⁰ Ibid., pp. 158 et seq.
同上，第 158 页及后续页。
⁸⁹¹ Ibid., pp. 171 et seq.
同上，第 171 页及后续页。
⁸⁹² Ibid., pp. 149, 151.
同上，第 149 页，151 页。
⁸⁹³ Ibid., p. 156.
同上，第 156 页。

as the proposed feasible action is not ruled out by his own obligations or the possibility of harm to others. We should live by right and not by permission, presumably in part because the former situation is more workable and efficient. If a feasible action is thus presumed free, then the actor need not prove that the action is permissible; rather, the burden is on he who challenges the permissibility of the action.⁵¹ Otherwise, an actor might be unable to ever act since it would be essentially very difficult to prove a negative by showing that no one will be harmed.⁵²

接下来，在原则（2）“可行者被假定是自由的”中，德·雅赛断言，“基本规则是，一个人被推定为可以自由地做对他来说可行的事情”，⁸⁹⁴只要所提议的可行行动不被他自己的义务或对他造成伤害的可能性所排除。我们应该靠权利而不是靠许可生活，部分原因可能是前者更可行、更有效率。如果一个可行的行动因此被假定为自由的，那么行动人无需证明该行动是可允许的；相反，质疑该行动可允许性的人负有举证责任。⁸⁹⁵否则，行动人可能永远无法采取行动，因为通过证明没有人会受到伤害来证明一个否定的情况本质上是非常困难的。⁸⁹⁶

Incidentally, de Jasay offers an interesting critique of Nozick's conception of rights here. By viewing rights as “permissions” to do something, rather than as claims for performance by another, Nozick perhaps unwittingly endorses a system in which action is not presumed free, as action is undertaken with “permission” by others, which presumably must first be granted.⁵³

顺便提一下，德·雅赛在这里对诺齐克的权利概念提出了有趣的批评。诺齐克将权利视为做某事的“许可”，而不是对他人行为的要求，这或许是在无意中认可了一种制度，

⁸⁹⁴ Ibid., p. 160.

同上，第 160 页。

⁸⁹⁵ Ibid.

同上。

⁸⁹⁶ For criticism of norms that would not permit actors to act now because they would be unable to get permission, see “How We Come to Own Ourselves” (ch. 4), at n.14; “Defending Argumentation Ethics” (ch. 7), n.31; and “Law and Intellectual Property in a Stateless Society” (ch. 14), at n.27.

对于那些因为行动人无法获得许可而不允许他们现在行动的规范的批评，见《我们如何拥有自己》（第四章）注释 14；《捍卫论证伦理学》（第七章）注释 31；以及《无国家社会中的法律与知识产权》（第十四章）注释 27。

在这种制度中，行动并不假定是自由的，因为行动是在他人的“许可”下进行的，而这种“许可”据推测必须首先得到他人的同意。⁸⁹⁷

I found the justification of principle (3), "let exclusion stand," to be of most interest, especially the discussion of homesteading or appropriation of unowned goods.⁵⁴ De Jasay equates property with its owner's "excluding" others from using it, for example by fencing in immovable property (land) or finding or creating (and keeping) movable property (corporeal, tangible objects). 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.

我认为原则(3)“允许排除”的理由最令人感兴趣，尤其是关于拓殖或占有无主物品的讨论。⁸⁹⁸德·雅赛将财产等同于所有者“排除”他人对其的使用，例如通过用栅栏围住不动产（土地）抑或找到或创造（并保留）动产（有形的、可触摸的物体）。因此，该原则意味着“让所有权存在”，即对从自然状态中占有或最终通过可追溯至这种占有的所有权链获得的财产，其所有权主张应该得到尊重。

The basic defense of the Lockean proposition that the first or original appropriator of property is entitled to appropriate it draws on his previous "feasible" principle (2) as well as his distinction between rights and liberties. Others have objected to the idea that one can appropriate unowned property on the grounds that such an action unilaterally (and thus unjustifiably) imposes on others moral duties to refrain from interfering.

对洛克式命题（即财产的第一或最初占有者有权占有它）的基本辩护借鉴了他先前的“可行”原则（2）以及他对权利和自由的区分。还有人反对一个人可以占有无主财产的观点，理由是这种行动单方面地（因而不合理地）强加给他人不得干涉的道德义务。

The basic defense, however, is quite general and straightforward. It is that if a prospective owner can in fact perform it, taking first possession of a thing is a feasible

⁸⁹⁷ Against Politics, p. 170.

《反对政治》，第 170 页。

⁸⁹⁸ See also "What Libertarianism Is" (ch. 2), at n.27.

另见《何为自由意志主义》（第二章）注释 27。

act of his that is admissible if it is not a tort (in this case not trespass) and violates no right; but this is the case by definition, i.e., by the thing being identified as "unowned."
55

然而，这个基本辩护是相当普遍且直接的。即如果一个潜在的所有者实际上能够做到，对一件物品的首次占有是他的一个可行行为，如果它不是侵权行为（在这种情况下不是非法侵入）且不侵犯任何权利，那么这个行为就是可接受的；但根据定义，也就是当这个物品被确定为“无主”时，情况就是如此。⁸⁹⁹

Thus, by treating individuals as being free to act unless it contravenes a right (claim) of another, there is simply no reason not to allow a person to appropriate unowned property. For who could object, if not another, prior owner? To be entitled to object is to be able to "exclude" the claimant, but the right to exclude is an incident of ownership, and the property is by presumption unowned. No one can validly object to my appropriating unowned property, then, because, assuming feasible actions are free, any objection itself must claim a right, and this itself raises a type of ownership claim.⁵⁶

因此，如果把个人的行动看作是自由的，除非它违反了他人的权利（要求），那么就根本没有理由不允许一个人占有无主财产。因为如果不是另一个先前的所有者，谁能反对呢？有权反对就是能够“排除”主张者，但排除权是所有权的附带权利，而该财产根据假定是无主的。那么，没有人能有效地反对我占有无主财产，因为假定可行的行动是自由的，任何反对行动本身必然是主张一种权利，而这本身就提出了一种所有权主张。⁹⁰⁰

⁸⁹⁹ Ibid., p. 173.

同上，第 173 页。

⁹⁰⁰ Similar reasoning is employed in my estoppel theory of rights to preclude someone from denying the rights that they necessarily presume exist in a certain context (punishment). This theory is related to and draws on Hoppe's argumentation ethics. See "A Libertarian Theory of Punishment and Rights" (ch. 5); "Dialogical Arguments for Libertarian Rights" (ch. 6), the section "Estoppel." Hoppe's insights into why the first appropriator has a better moral claim than latecomers is also of relevance here. See Hoppe, *A Theory of Socialism and Capitalism*, pp. 168 et seq.; idem, *Economics and Ethics of Private Property*, pp. 328 – 30.

在我的禁止反言的权利理论中也采用了类似的推理，以阻止某人否认他们在特定情境（惩罚）中必然假定存在的权利。这个理论与霍普的论证伦理学相关并借鉴了它。见

The beauty of this approach is that it avoids the troublesome “Lockean proviso,” which allows homesteading of unowned goods only so long as “enough and as good is left to others.”⁵⁷ Nozick, on the other hand, allowed appropriation of an unowned object only if it did not worsen the situation of others. However, de Jasay points out, in a world with finite resources, this condition would make it impossible for any unowned property to be ever used, since any appropriation causes a loss of opportunity for others to homestead the object and thereby worsens their situation. By contrast, de Jasay’s position “does not require that nobody loses as a result of first possession, as long as the losses were not vested interests.”⁵⁸

这种方法的美妙之处在于它避免了麻烦的“洛克式限制条件”，即只有在“把足够的和同样好的东西留给他人”⁹⁰¹的情况下，才允许拓殖无主物品。诺齐克则认为，只有在“不恶化他人处境的情况下，才允许占有无主物品。然而，德·雅赛指出，在一个资源有限的世界里，这个条件将使得任何无主财产都不可能使用，因为任何占有都会导致他人失去拓殖该物品的机会，从而使他们的处境恶化。相比之下，德·雅赛的立场“并不要求没有人因第一占有权而蒙受损失，只要这些损失不是既得利益”。⁹⁰²

De Jasay’s application of his appropriation rule to two basic types of appropriation is also worth study. These two types are “finding and keeping” and “enclosure.”⁵⁹ The former appears to apply primarily to movable objects that may be found, taken, and

《自由意志主义的惩罚与权利理论》（第五章）；《自由意志主义权利的对话论证》（第六章），“禁止反言”部分。霍普关于为什么第一占有者比后来者具有更合理的道德主张的见解在这里也具有相关性。见霍普的《社会主义与资本主义理论》，第 168 页及后续页；同上，《私有财产的经济学与伦理学》，第 328-330 页。

⁹⁰¹ Against Politics, p. 188, n.15; see also p. 195.

《反对政治》，第 188 页，注释 15；另见第 195 页。

⁹⁰² Ibid., p. 188, n. 15. For other libertarian critiques of the Lockean Proviso, see the reference in note 36, above; Kinsella, “Down With the Lockean Proviso,” Mises Economics Blog (Aug. 26, 2009); and Michael Makovi, “The ‘Self-Defeating Morality’ of the Lockean Proviso,” Homo Oeconomicus 32, no. 2 (2015; <https://perma.cc/G8PQ-LJ85>): 235 – 74.

同上，第 188 页，注释 15。关于对洛克式限制条款的其他自由意志主义批评，见上文注释 36 中的参考文献：斯蒂芬·柯斯林那，《摒弃洛克式限制条款》，米塞斯经济学博客（2009 年 8 月 26 日）；以及迈克尔·马科维，《洛克式限制条款之‘自我挫败的道德性’》，《经济人》第 32 卷第 2 期（2015 年；网址：<https://perma.cc/G8PQ-LJ85>）：235-274 页。

hidden or used exclusively. Since the thing has no other owner, prima facie, no one is entitled to object to the first possessor claiming ownership. Others grounds opposing this might be that the thing was found at least partly by luck, and was thus undeserved. But for this to be relevant, there would have to be a general rule requiring the lucky in life to compensate the unlucky. But such a rule rests on a simply unsupportable assertion.

德雅塞将其占有规则应用于两种基本的占有类型同样值得研究这两种类型是“发现并保留”和“圈占”。⁹⁰³前者似乎主要适用于可以被发现、拿走、隐藏或排他性使用的可移动物体。由于该物品没有其他所有者，初步看来，没有人有权反对第一个占有者主张所有权。其他反对的理由可能是，该物品至少有一部分是靠运气发现的，因此是不应得的。但要使这一点具有相关性，就必须有一个普遍规则要求生活中的幸运者补偿不幸者。但这样的规则基于一个根本站不住脚的断言。

For immovable property (land), possession is taken by “enclosing” the land and incurring exclusion costs, e.g., erecting a fence. As in the case with movables, others’ loss of the opportunity to appropriate the property does not give rise to a claim sufficient to oust the first possessor (if it did, it would be an ownership claim). However, for those who used to occasionally enjoy access to and use of the property, they do lose an actual benefit.⁶⁰ De Jasay admits that he cannot do full justice to this difficult issue, but offers a tentative solution. If some people previously used the property merely in passing, on an ad hoc basis, no right of theirs is violated by the homesteader enclosing it. However, if some identifiable, closed set of persons have used the property regularly enough to establish a precedent on which they rely, compensation must be paid them by the new owner.⁶¹ (It is unclear why this regular use and “precedent” does not itself establish an ownership claim on behalf of the prior users; but de Jasay is here speaking of borderline cases.)

对于不动产（土地）来说，占有是通过“圈占”土地并承担排除费用（如修建围墙）来实现的。其他人失去占有该财产的机会并不会产生足以剥夺第一个占有者的权利主张（如果会，那将是一种所有权主张）。但是，对于那些曾经偶尔可以接触和使用该财

⁹⁰³ Ibid., p. 174.同上，第 174 页。

产的人来说，他们确实失去了实际利益。⁹⁰⁴德·雅赛承认他不能完全正义地处理这个棘手的难题，但他提供了一个初步的解决方案。如果一些人以前只是偶尔、临时地使用该财产，那么拓殖者将其围起来并没有侵犯他们的权利。但是，如果某些可识别的、不公开的人经常使用该财产，足以建立起他们所依赖的先例，则新所有人必须向他们支付补偿。⁹⁰⁵（不清楚为什么这种经常使用和“先例”本身没有为先前的使用者确立所有权主张；但德·雅赛在这里讨论的是罕见情形。）

Other chapters in Part 2 argue that rational choices by individuals in the state of nature can be expected to lead to enforcement of property rights and contractual promises.⁶² This chapter also shows that James Buchanan's interpretation of Hobbes and history is incorrect, and that proper understanding of both supports the idea that markets can exist prior to and without states, contra Buchanan.⁶³ In the last chapter, "Liberties, Rights, and the Standing of Groups,"⁶⁴ one has to agree with his conclusion that "group rights" are problematic, and the proper bearers of rights are individuals.

第二部分的其他章节认为，自然状态下个人的理性选择可望导致财产权和契约承诺的实施。⁹⁰⁶本章还表明，詹姆斯·布坎南对霍布斯和历史的解释是不正确的，对二者的正确理解支持了市场可以先于国家和没有国家而存在的观点，这与布坎南的观点相反。⁹⁰⁷在最后一章《自由、权利和群体的地位》⁹⁰⁸，我们不得不同意他的结论，即“群体权利”是有问题的，权利的适当承担者是个人。

This is a thought-provoking book. I have only been able to touch upon some of the nuances and important insights it contains. This work is an important contribution to economic and political literature; it should be read and studied by the serious student.

这是一本发人深省的书。我只能触及其中的一些细微差别和重要见解。这部著作是对经济和政治文献的重要贡献；严肃的学者应该阅读它、研究它。

⁹⁰⁴ Ibid., p. 176 - 77.同上，第 176-177 页。

⁹⁰⁵ Ibid., p. 177.同上，第 177 页。

⁹⁰⁶ Ibid., chap. 9.同上，第九章。

⁹⁰⁷ Ibid., p. 198.同上，第 198 页。

⁹⁰⁸ Ibid., chap. 11.同上，第十一章。

第二十一章 严肃对待第九修正案

Taking the Ninth Amendment Seriously

Originally published in 1997 in the Hastings Constitutional Law Quarterly, at the suggestion of Professor Randy Barnett.* The original article thanked "Paul Comeaux for helpful comments on an earlier draft of this Book Review."[†]

最初于 1997 年应兰迪·巴尼特教授的建议发表在《黑斯廷斯宪法法律季刊》上。*原文感谢了“保罗·科莫克斯对这篇书评的早期草稿提出的有益意见”。[†]

* Stephan Kinsella, "Taking the Ninth Amendment Seriously: A Review of Calvin R. Massey's *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights*," *Hastings Const. L.Q.* 24, no. 3 (Spring 1997): 757–84, reviewing Calvin R. Massey, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights* (Philadelphia: Temple University Press, 1995) (hereinafter, *Silent Rights*).

*斯蒂芬·金塞拉,《严肃对待第九修正案:评卡尔文·R·梅西的沉默的权利:第九修正案与宪法未列举的权利》,《黑斯廷斯宪法季刊》第 24 卷第 3 期(1997 年春季): 757–784, 评卡尔文·R·梅西所著《沉默的权利:第九修正案与宪法未列举的权利》(费城:天普大学出版社,1995 年)(以下简称《沉默的权利》)。

[†] Comeaux, currently an attorney in Dallas, was a law school and grad school friend, and a colleague, from 1992–94, at Jackson Walker in Houston.

[†] 科莫克斯目前是达拉斯的一名律师。1992 年至 1994 年期间,他在休斯顿的杰克逊·沃克律师事务所就职,他是我的法学院和研究生学院的朋友,也是同事。

What we need is an amendment forbidding the circumvention of the Constitution. It could read: "The Constitution shall not be circumvented." I just got a big laugh from any lawyers who may be reading this.

—Joe Sobran¹

我们需要的是一项禁止规避宪法的修正案。它可以这样表述：“不得规避宪法。”我刚
刚让正在阅读此文的律师们大笑起来。

——乔·索布兰。⁹⁰⁹

一、 导论：美国宪法的工具价值

INTRODUCTION: THE INSTRUMENTAL VALUE OF THE AMERICAN CONSTITUTION

We Americans are lucky indeed to have inherited our Constitution and our classical liberal tradition. For suppose we had inherited a totalitarian form of government, a government that did not respect property rights or other individual rights, that arbitrarily discriminated against—even executed or exterminated—certain classes of its subjects from time to time.² If such a government on occasion failed to implement its totalitarian “constitution” to the letter—say, it was slow to adopt a fully socialized agriculture policy or temporarily retreated from such a policy after causing the starvation of a few million people—it is unlikely even the strictest “originalists” in that society would complain that the government was shirking its duties under the totalitarian constitution. The totalitarian constitution itself—the basic plan underlying the government—would be seen by even the originalists as inherently illegitimate, with no purpose served by advocating stricter adherence to its precepts. No purpose in service of liberty, at least.³

我们美国人确实很幸运，因为我们继承了宪法和古典自由主义传统。假设我们继承的是一个极权形式的政府，一个不尊重财产权或其他个人权利、任意歧视——甚至不时处决或消灭——某些阶层臣民的政府。⁹¹⁰如果这样一个政府偶尔未能严格执行其极权

⁹⁰⁹ Joe Sobran, “Constitutional Legerdemain,” syndicated column of April 11, 1996 (reprinted in Sobran’s 3, no. 5 (May 1996), page 12).

乔·索布兰，《宪法的把戏》，1996年4月11日联合专栏(转载于《索布兰文集》第3卷第5期(1996年5月)，第12页)。

⁹¹⁰ Examples of totalitarian governments include communist and fascist states, both of which are types of socialism. Socialism may be defined as a system of “institutionalized interference with or aggression against private property and private property claims.” Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), p. 2.
极权政府的例子包括共产主义国家和法西斯国家，这两者都是社会主义的类型。社会

主义“宪法”——比如说，它在采取完全社会化的农业政策方面行动迟缓，或者在导致几百万人挨饿后暂时放弃了这样的政策——在那个社会中，即使是最严格的“原旨主义者”也不太可能抱怨政府在极权主义宪法下逃避责任。极权主义宪法本身——政府所依据的基本计划——甚至会被原旨主义者视为本质上不合法，倡导更严格地遵守其戒律没有任何意义。至少在为自由服务方面没有任何意义。⁹¹¹

主义可以被定义为一种“对私有财产和私有财产主张进行制度化干涉或侵犯”的制度。——汉斯-赫尔曼·霍普，《社会主义与资本主义理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010 年[1989 年]；网址：www.hanshoppe.com/tsc），第 2 页。

⁹¹¹ To put it even more starkly, suppose the government adopts a plan to exterminate all Hungarians at a rate of ten per day, but, for some reason, is bungling the job and is only executing one Hungarian per day. No sane person would admonish the government to speed up its executions or even to investigate the cause of the government's "inefficiency" in this regard. For a similar point, see Bruce L. Benson, "Third Thoughts on Contracting Out," J. Libertarian Stud. 11, no. 1 (Fall 1994; <https://mises.org/library/third-thoughts-contracting-out>): 44 - 78, which argues that privatization of governmental services should not always be favored, even by libertarians; for example, when the privatized service, such as the IRS, is unjust and increasing its efficiency would simply increase injustice. See also Randy E. Barnett, "The Relevance of the Framers' Intent," Harv. J. L. & Pub. Pol'y 19 (1995 - 96; <http://www.randybarnett.com/pre-2000>): 403 - 410, p. 410 (arguing that one reason we should interpret the Constitution in accordance with the Framers' original intentions is "because we today share their intentions to limit the power of government in a way that enhances and protects the liberty of the people.").

说得更直白一点，假设政府采取一项计划，以每天十人的速度灭绝所有匈牙利人，但由于某种原因，政府把这件事办砸了，每天只处决一名匈牙利人。没有一个理智的人会告诫政府加快处决速度，甚至去调查政府在这方面“效率低下”的原因。关于类似的观点，参见布鲁斯·L·本森的《关于外包的再思考》，《自由意志主义研究杂志》第 11 卷第 1 期（1994 年秋季；网址：<https://mises.org/library/third-thoughts-contracting-out>）：44-78 页，该文认为，政府服务的私有化并不总是应该受到支持，即使是自由意志主义者也这么认为；例如，当像美国国税局这样被私有化的服务是不正义的，而提高其效率只会增加不正义。另见兰迪·E·巴尼特的《制宪者意图的相关性》，《哈佛法律与公共政策杂志》第 19 期（1995-1996 年；网址：<http://www.randybarnett.com/pre-2000>）：403-410 页，第 410 页（认为我们应该按照制宪者的原始意图来解释宪法的一个原因是“因为我们今天和他们有着同样的意图，即以增强和保护人民自由的方式限制政府权力”）。

需要注意的是，原文中“灭绝 exterminate”一词使用不当，容易引起误解和争议。请谨慎对待此类表述，并确保使用恰当的语言来进行学术讨论和交流。

Under a totalitarian system, proponents of liberty and individual rights⁴ would be relegated to other tactics, such as fomenting revolution or civil disobedience, trying to persuade or educate society or government officials to see the light of liberty, or even advocating outright dishonest interpretation of the constitution to achieve better results. A constitution, then, has only instrumental value; it is worth supporting and interpreting honestly only if such an interpretation would tend to lead to desirable results. To a supporter of individual rights, for example, a constitution providing for an explicitly totalitarian system does not have instrumental value, and he would not seek to have such a constitution put into effect or put into effect more stringently.

在极权体制下，自由和个人权利⁹¹²的拥护者只能被迫采取其他策略，如煽动革命或公

⁹¹² By individual rights, I mean the specifically libertarian conception of individual rights, in which the only fundamental right is to be free from aggression, where “ ‘[a]ggression’ is defined as the initiation of the use or threat of physical violence against the person or property of anyone else.” Murray N. Rothbard, *For A New Liberty*, 2d ed. (Auburn, Ala.: Mises Institute, 2006; <https://mises.org/library/new-liberty-libertarian-manifesto>), 27. (See also “What Libertarianism Is” (ch. 2).) The phrase “individual rights” is preferable to the phrase “human rights,” since the latter expression, like the term “liberal” in American usage, has acquired a leftist or socialist tinge. See, e.g., the United Nation’s Universal Declaration of Human Rights, U.N. GAOR, 217A (III) (1948), at articles 22 – 26 (reciting, for example, “human rights” to “social security” and to “free” “education”). Libertarian individual rights are roughly equivalent to the set of natural rights under older terminology. For libertarian justifications for the existence of individual rights, see Hoppe, *A Theory of Socialism and Capitalism* (especially chap. 7); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp); Rothbard, *For a New Liberty*; idem, *The Ethics of Liberty* (Atlantic Highlands, NJ: Humanities Press, 1982); “A Libertarian Theory of Punishment and Rights” (ch. 5); “Dialogical Arguments for Libertarian Rights” (ch. 6); Roger A. Pilon, “Ordering Rights Consistently: Or What We Do and Do Not Have Rights To,” *Georgia L. Rev.* 13, no. 4 (Summer 1979; <https://perma.cc/C68C-C5HC>): 1171 – 96; Ayn Rand, *Capitalism: The Unknown Ideal* (New York: Signet, 1967); idem, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964); Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Plume, 1991); Tibor R. Machan, *Individuals and Their Rights* (Open Court, 1989); Douglas B. Rasmussen & Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (Chicago: Open Court, 1991); Ludwig von Mises, *Liberalism: In the Classical Tradition*, 3d ed., Ralph Raico, trans. (New York: The Foundation for Economic Education, 1985;

民抗命，试图说服或教育社会或政府官员看到自由的曙光，甚至主张对宪法进行赤裸裸的不诚实解释，以达到更好的效果。因此，宪法只具有工具价值；只有在诚实地解释宪法会带来理想结果的情况下，宪法才值得支持和解释。例如，对于个人权利的支持者来说，一部规定了明确极权制度的宪法没有工具价值，他不会寻求让这样一部宪法生效或更严格地实施。

<https://perma.cc/7KMG-X4DD>); Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988); Loren E. Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987). For more recent works, see the list of books at Kinsella, “The Greatest Libertarian Books,” StephanKinsella.com (Aug. 7, 2006).

我所说的个人权利，指的是特定的自由意志主义个人权利概念，在这种概念中，唯一的基本权利是免受侵犯，其中“‘侵犯’被定义为对任何人的的人身或财产使用或威胁使用身体暴力的起始行为”。穆瑞·N·罗斯巴德，《为了新自由》第二版（阿拉巴马州奥本：米塞斯研究院，2006年；网址：<https://mises.org/library/new-liberty-libertarian-manifesto>），第27页。（另见《何为自由意志主义》（第二章）。）“个人权利”这个表述比“人权”这个表述更可取，因为后者，就像“自由派”这个词在美国的用法一样，已经带上了左派或社会主义的色彩。例如，参见联合国《世界人权宣言》，联合国大会第217A(III)号决议（1948年），第22-26条（例如，列举了获得“社会保障”和“免费”“教育”的“人权”）。自由意志主义的个人权利大致等同于旧术语下的自然权利集合。关于自由意志主义对个人权利存在的正当性论证，参见霍普的《社会主义与资本主义理论》（特别是第七章）；汉斯-赫尔曼·霍普，《私有财产的经济与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006年[1993年]；网址：www.hanshoppe.com/eepp）；罗斯巴德，《为了新自由》；同上，《自由的伦理》（新泽西州大西洋高地：人文出版社，1982年）；《自由意志主义的惩罚与权利理论》（第五章）；《自由意志主义权利的对话论证》（第六章）；罗杰·A·皮隆，《一致地确定权利的顺序：或者我们有哪些权利以及没有哪些权利》，《佐治亚法律评论》第13卷第4期（1979年夏季；网址：<https://perma.cc/C68C-C5HC>）：1171-1196页；安·兰德，《资本主义：未知的理想》（纽约：Signet，1967年）；同上，《自私的美德：利己主义的新概念》（纽约：Signet，1964年）；伦纳德·培科夫，《客观主义：安·兰德的哲学》（纽约：Plume，1991年）；蒂博尔·R·马钱，《个人及其权利》（开放法院，1989年）；道格拉斯·B·拉斯穆森和道格拉斯·J·登·尤尔，《自由与自然：对自由秩序的亚里士多德式辩护》（芝加哥：开放法院，1991年）；路德维希·冯·米塞斯，《自由主义：古典传统》第三版，拉尔夫·莱科翻译（纽约：经济教育基金会，1985年；网址：<https://perma.cc/7KMG-X4DD>）；扬·纳尔维森，《自由意志主义理念》（费城：天普大学出版社，1988年）；洛伦·E·洛马斯基，《个人、权利与道德共同体》（牛津：牛津大学出版社，1987年）。关于更近的著作，参见斯蒂芬·柯斯林那的《最伟大的自由意志主义书籍》所列的书单，StephanKinsella.com（2006年8月7日）。

Now imagine that there is a better constitution in place, one originally designed to undergird limited government and individual rights. Over the decades, however, the government has incrementally misconstrued this constitution, seizing more and more power not authorized by it. Imagine also that, for a variety of reasons, the population had acquiesced, and even grown somewhat accustomed, to this state of affairs.⁵ Advocates of limited government and individual rights in this setting have an option available to them that those in our hypothetical socialist society do not: they can insist that the government respect the constitution's original meaning. They can argue, for example, that the supreme court has been misinterpreting the constitution and should now interpret the constitution in accordance with its original understanding.⁶ Given the country's traditional respect for the constitution and at least some widespread sentiment that the government's very legitimacy depends on its acting within limits proscribed by the constitution, this might be a reasonable, even hopeful, course to take.⁷

想象一下，现在有一部更好的宪法，一部最初旨在支持有限政府和个人权利的宪法。然而，几十年来，政府逐渐地曲解了这部宪法，攫取了越来越多宪法未授权的权力。再设想一下，由于种种原因，民众已经默认甚至在某种程度上习惯了这种状况。⁹¹³在

⁹¹³ Reasons for the populace's acquiescence might include: a sympathy with socialism over the years on the part of intellectuals and large portions of society; the corruption wrought by democracy itself, which breeds special interest wars and the willingness to use government to get one's piece of the pie before one is made victim by others; the welfare/warfare state, which provides recipients of redistributed tax dollars (in the form of welfare payments or government salaries) with an incentive to support ever-growing government; and public education, which inevitably results in the state propagandizing each generation of students in favor of its programs. See generally Frederic Bastiat, *The Law* (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, Dean Russell, trans. 1950 [1850]; <https://fee.org/resources/the-law/>), pp. 17 - 18 (discussing ever-escalating conflicts among disparate special interest groups); Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987) (discussing the public's acquiescence in expansions in government power during times of crisis, power which is never returned after the crisis is over, leading to a ratchet effect of growing government power with each new "crisis"); Bruno Leoni, *Freedom and the Law* (Indianapolis: Liberty Fund, expanded 3d. ed. 1991 [1961]; <https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>) (discussing special interest group warfare); William C. Mitchell & Randy T. Simmons,

Beyond Politics: Markets, Welfare, and the Failure of Bureaucracy (Boulder, Colo.: Westview Press, 1994) (discussing the unintended consequences of governmental programs and the large number of special interest groups that accompany big government); Sheldon Richman, Separating School and State: How to Liberate America's Families (Fairfax, Va.: Future of Freedom Foundation, 1994) (tracing the history of government-sponsored education, its use as propaganda, and other pernicious effects); Giovanni Sartori, Liberty and Law (Menlo Park, Calif.: Institute for Humane Studies, 1976) (discussing the tendency of citizens ruled by increasing legislation and regulation to become more docile and accustomed to following orders and thus to allow fundamental rights to be trammelled by the government); Hans-Hermann Hoppe, "Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy," J. des Economistes et des Etudes Humaines 5, no. 2/3 (June/September 1994; <https://www.hanshoppe.com/publications/>): 319–49, p. 319 (also included in Democracy: The God That Failed and in John Denson, ed., The Costs of War: America's Pyrrhic Victories (New Brunswick: Transaction Publishers, 1997; <https://mises.org/library/costs-war-americas-pyrrhic-victories>)) (discussing systemic features of democracy that make it likely to oppress liberty).

民众默许的原因可能包括：多年来知识分子和社会的很大一部分人对社会主义的同情；民主自身带来的腐败，这滋生了特殊利益战争以及在自己成为他人的受害者之前利用政府获取自己一份利益的意愿；福利/战争国家，它为重新分配的税收美元的接受者（以福利支付或政府工资的形式）提供了支持不断增长的政府的动力；以及公共教育，它不可避免地导致国家向每一代学生宣传有利于其计划的内容。大致可参考弗雷德里克·巴斯夏的《法律》（纽约州哈得逊河畔欧文顿：经济教育基金会，迪安·拉塞尔译，1950年[1850年]；网址：<https://fee.org/resources/the-law/>），第17-18页（讨论了不同特殊利益群体之间不断升级的冲突）；罗伯特·希格斯的《危机与利维坦：美国政府成长中的关键事件》（纽约：牛津大学出版社，1987年）（讨论了公众在危机时期对政府权力扩张的默许，而在危机结束后权力从未被归还，导致随着每一次新的“危机”政府权力不断增长的棘轮效应）；布鲁诺·莱奥尼的《自由与法律》（印第安纳波利斯：自由基金，1991年扩充第三版[1961年]；网址：<https://oll.libertyfund.org/title/kemp-freedom-and-the-law-lf-ed>）（讨论特殊利益群体战争）；威廉·C·米切尔和兰迪·T·西蒙斯的《超越政治：市场、福利与官僚主义的失败》（科罗拉多州博尔德：韦斯特维尔出版社，1994年）（讨论政府计划的意外后果以及伴随大政府的大量特殊利益群体）；谢尔登·里奇曼的《分离学校与国家：如何解放美国家庭》（弗吉尼亚州费尔法克斯：未来自由基金会，1994年）（追溯政府资助教育的历史、其作为宣传的用途以及其他有害影响）；乔瓦尼·萨托里的《自由与法律》（加利福尼亚州门洛帕克：人道研究所，1976年）（讨论了受越来越多的立法和监管统治的公民变得更加温顺并习惯于服从命令的趋势，从而允许政府践踏基本权利）；汉斯-赫尔曼·霍普的“时间偏好、政府与去文明化进程——从君主制到民主制”，《经济学家与人文研究杂志》第5卷第2/3期（1994年6月/9月；网址：<https://www.hanshoppe.com/publications/>），第319页（也收录在《民主：失败的上

这种情况下，有限政府和个人权利的倡导者有一个选择，而我们假设的社会主义社会中的倡导者却没有：他们可以坚持要求政府尊重宪法的原意。例如，他们可以争辩说，最高法院一直在曲解宪法，现在应该按照宪法的原意来解释宪法。⁹¹⁴ 鉴于该国历来尊重宪法，而且至少有一些人普遍认为，政府的合法性取决于它是否在宪法规定的范围内行事，因此这可能是一个合理的、甚至是充满希望的做法。⁹¹⁵

帝》以及约翰·丹森编的《战争的代价：美国的惨胜》（新不伦瑞克：交易出版社，1997 年；网址：<https://mises.org/library/costs-war-americas-pyrrhic-victories>）中）（讨论了民主的系统性特征，这些特征使得它很可能压迫自由）。

⁹¹⁴ Judge Robert Bork’s theory of original understanding is largely sound, although Bork himself occasionally misapplies his own theory, for example, with respect to the Ninth Amendment. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), pp. 143 – 45, 183 – 85. Original understanding should not be confused with original intent. The “original intent” of the Framers is relevant only insofar as it is evidence for the public’s “original understanding” of the Constitution, the so-called “original public meaning,” as agreed to by the people or their representatives. See also Louisiana Civil Code (<https://www.legis.la.gov/legis/Law.aspx?d=111052>), art. 9: When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

法官罗伯特·博克的原意理解理论在很大程度上是合理的，尽管博克本人偶尔会错误地应用他自己的理论，例如在涉及第九修正案时。见罗伯特·H·博克，《诱惑美国：法律的政治诱惑》（纽约：自由出版社，1990 年），第 143-145 页、第 183-185 页。原意理解不应与制宪者原意相混淆。制宪者的“原意”仅在其作为公众对宪法的“原意理解”（即所谓的“原初公共含义”）的证据时才具有相关性，这是人民或其代表所同意的。另见《路易斯安那民法典》（<https://www.legis.la.gov/legis/Law.aspx?d=111052>），第 9 条：当一项法律清晰明确且其适用不会导致荒谬的后果时，该法律应按其字面规定适用，不得为探寻立法机关的意图而进行进一步的解释。

⁹¹⁵ Regarding the presumption of governmental legitimacy, Professor Barnett makes the interesting and promising argument that the necessary assumption that citizens have a moral obligation to obey positive law presumes that there be some mechanism to ensure that such laws are legitimate. See Randy E. Barnett, “Foreword: The Ninth Amendment and Constitutional Legitimacy,” *Chicago-Kent L. Rev.* 64 (1988): 37 – 65, reprinted in Randy E. Barnett, ed., *The Rights Retained by the People*, vol. 2 (Fairfax, Va.: George Mason University Press, 1993), p. 391. Under our system of government, this requires Ninth Amendment-based judicial review of legislation to provide a sort of “quality control” to ensure the promulgated laws do not infringe the citizens’ enumerated or unenumerated rights. See *ibid.*; see also *idem*, “Getting Normative: The

America is largely in this latter situation since our Constitution was originally designed to establish limited government. It is for this reason that I say that we Americans are lucky to have inherited our Constitution and our classical liberal tradition. We are not limited to the unattractive options of revolution or despairing resignation as our only responses to government tyranny. We can urge the Supreme Court and Congress to respect individual rights and limit government powers in accordance with the original design of the Constitution. Our Constitution has instrumental value—at least for those who support limited government and both personal and economic individual freedom.⁸

美国在很大程度上属于后一种情况，因为我们的宪法最初就是为了建立有限政府而设计的。正因如此，我说我们美国人很幸运，因为我们继承了宪法和古典自由主义传统。面对政府的暴政，我们并不局限于革命或绝望的屈服这两种毫无吸引力的唯二选择。我们可以敦促最高法院和国会尊重个人权利，按照宪法的最初设计限制政府权力。我们的宪法具有工具价值——至少对于那些支持有限政府以及个人和经济自由的人来说是如此。⁹¹⁶

Role of Natural Rights in Constitutional Adjudication,” *Constitutional Commentary* 12 (1995; www.randybarnett.com/pre-2000): 93–122, p. 100; idem, “Implementing the Ninth Amendment,” in idem, ed., *The Rights Retained by the People*, vol. 2, p. 1; idem, “The Intersection of Natural Rights and Positive Constitutional Law,” *Connecticut L. Rev.* 25 (1993; www.randybarnett.com/pre-2000): 853–68.

关于政府合法性的推定，兰迪·E·巴尼特教授提出了一个有趣且有前景的论点，即公民有遵守实在法的道德义务这一必要假设预设了存在某种机制以确保此类法律是合法的。见兰迪·E·巴尼特，《前言：第九修正案与宪法合法性》，《芝加哥—肯特法律评论》第64期（1988年）：37-65页，重印于兰迪·E·巴尼特编，《人民保留的权利》第2卷（弗吉尼亚州费尔法克斯：乔治梅森大学出版社，1993年），第391页。在我们的政府体制下，这需要基于第九修正案对立法进行司法审查，以提供一种“质量控制”，确保颁布的法律不侵犯公民列举的或未列举的权利。见同上；另见同上，《走向规范性：自然权利在宪法裁决中的作用》，《宪法评论》第12期（1995年；网址：www.randybarnett.com/pre-2000）：93-122页，第100页；同上，《实施第九修正案》，收录于同上编，《人民保留的权利》第2卷，第1页；同上，《自然权利与实在宪法法律的交集》，《康涅狄格法律评论》第25期（1993年；网址：www.randybarnett.com/pre-2000）：853-868页。

⁹¹⁶ Another option, of course, is to attempt to have the Constitution amended so as to better serve liberty. See U.S. Const. art. V.

One problem with trying to persuade the Court to move towards a more originalist interpretation of the Constitution is that, even if the Court wants to do this, it may be too late. Given the entrenched and accumulated accretions of government power and court decisions that have resulted from over a century of misinterpretation of the Constitution,⁹ the Supreme Court is unlikely to simply undo its own jurisprudence and interpret the Constitution anew. Further, even if the Court wanted to start reining in the federal government's powers, it would not be able to get away with it, at least not without a sufficiently sneaky or clever theory that would allow some incremental movement toward liberty in a manner not obvious enough to catch the Leviathan's eye.

试图说服法院转向对宪法进行更贴近原意解释的一个问题是，即使法院想这样做，也可能为时已晚。鉴于一个多世纪以来对宪法的错误解释所导致的政府权力和法院判决的积重难返，⁹¹⁷最高法院不太可能简单地撤销自己的判例并重新解释宪法。此外，即使最高法院想开始限制联邦政府的权力，它也无法逃脱责任，至少在没有一个足够巧妙或聪明的理论的情况下做不到，这个理论要能以一种不那么明显以至于不会引起利维坦注意的方式，允许朝着自由的方向逐步迈进。

In his new book, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights*, Professor Calvin R. Massey seeks to provide such a "stealth" theory (my words, not his) by providing a new way to read the Ninth Amendment. As Massey points out, this amendment has been largely ignored since its addition to the Constitution in 1791.¹⁰ In this book, Massey proposes a novel and somewhat radical theory to reincorporate the Amendment and its original purposes into the current constitutional landscape. At the heart of Massey's theory is his proposed "constitutional cy pres doctrine"¹¹ and his contention that the Ninth Amendment incorporates rights based in state law.¹² Before further exploring this theory, it is necessary to delve into, as Massey does, the history and political context of the Ninth Amendment.

在他的新书《沉默的权利：第九修正案与宪法未列举的权利》中，卡尔文·R·梅西教授试图通过提供一种解读第九修正案的新方法来提供这样一种“隐秘”的理论（这是我的用词，不是他的）。正如梅西所指出的，自 1791 年被加入宪法以来，这项修正案在很

当然，另一种选择是尝试修改宪法以更好地服务于自由。见《美国宪法》第五条。

⁹¹⁷ See sources cited in note 21, below.

见下文注释 21 中引用的资料。

大程度上一直被忽视。⁹¹⁸ 在本书中，梅西提出了一个新颖且有些激进的理论，将修正案及其最初的目的重新纳入当前的宪法格局。梅西理论的核心是他提出的“宪法近似原则理论”（constitutional cy pres doctrine）⁹¹⁹以及他的主张，即第九修正案纳入了基于州法律的权利。⁹²⁰ 在进一步探讨这一理论之前，有必要像梅西所做的那样，深入研究第九修正案的历史和政治背景。

二、第九修正案的双重目的

THE DUAL PURPOSES OF THE NINTH AMENDMENT

The Ninth Amendment provides as follows: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹³ It follows, of course, the various rights enumerated in the first eight amendments in the Bill of Rights, and it precedes the Tenth Amendment.¹⁴ In a discussion of the original debate concerning the Ninth Amendment, Massey points out that there are many possible answers as to just what the Ninth Amendment means:

Some, like former Judge Robert Bork, contend that the amendment has no discernible meaning whatever. Others ... suggest that the amendment is merely hortatory and duplicative of the axiomatic reminder in the Tenth Amendment that the states retain all powers not surrendered under the Constitution. Still others ... contend that the amendment prohibits the federal government from exercising any power with respect to the “rights retained by the people.” ... Yet another view ... asserts that the Ninth Amendment was merely a cautionary device to check unwarranted extension of the powers of the federal government. Some ... suggest that the amendment is best

⁹¹⁸ See *ibid.*, at 7 (citing Alex Kozinski & J.D. Williams, “It Is a Constitution We Are Expounding,” *Utah L. Rev.* 1987, no. 4 (1987): 977 – 994, pp. 981 & 984).

见同上，第 7 页（引用亚历克斯·科津斯基和 J.D.威廉姆斯，《我们正在阐释的是一部宪法》，《犹他法律评论》1987 年第 4 期（1987 年）：977-994 页，第 981 页和 984 页）。

⁹¹⁹ *Ibid.*, at 97 – 98; see also Part II, above.

同上，第 97-98 页;另见上文第二部分。

⁹²⁰ See *Silent Rights*, at 122; see also notes 67 – 73, above.

见《沉默的权利》，第 122 页;另见上文注释 67-73。

regarded as a ... rule of interpretation [that] invalidates [the] argument that any given right (such as the right to use contraceptives) is not to be included within some enumerated right of the Constitution (such as due process) simply because the right to use contraceptives is not expressly enumerated in the Constitution... Finally, [some] contend that the amendment ought to be treated as an independent source of substantive and judicially enforceable individual rights, determined without reference to any of the enumerated rights.¹⁵

第九修正案规定如下：“宪法对某些权利的列举，不得被解释为否定或贬低人民所保留的其他权利。”⁹²¹当然，它紧随《权利法案》中前八个修正案所列举的各种权利之后，并在第十修正案之前。⁹²²在讨论有关第九修正案的最初论证时，梅西指出，关于第九修正案的含义有很多可能的答案：

一些人，如前法官罗伯特·博克（Robert Bork），认为该修正案没有任何明显的意义。其他人……认为该修正案仅仅是劝告性的，并且与第十修正案中不言而喻的提醒（即各州保留宪法未交出的所有权力）重复。还有一些人……认为该修正案禁止联邦政府对“人民保留的权利”行使任何权力……然而，另一种观点……声称，第九修正案只是一种警示手段，旨在遏制联邦政府权力的无端扩张。有些人……建议最好将修正案视为……解释规则，[该规则]使以下论点失效：仅仅因为使用避孕药具的权利未在《宪法》中明确列举，就认为任何特定权利（如使用避孕药具的权利）不应被包含在宪法的某些列举权利（如正当程序）中……最后，[一些人]主张该修正案应被视为实质性的、

⁹²¹ U.S. Const. amend. IX.
《美国宪法》第九修正案。
⁹²² The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.” U.S. Const. amend. X.
第十修正案内容为：“宪法未授予合众国、也未禁止各州行使的权力，由各州各自保留，或由人民保留。”《美国宪法》第十修正案。

可由司法强制执行的个人权利的独立来源，其确定无需参考任何列举权利。⁹²³

As Massey explains, one of the objectives of the Ninth Amendment was to preserve the states' sovereignty and independence, in part so that the states could serve as a check on expansions of federal power.¹⁶ To this end, the central government was vested only with a few defined powers, reserving other powers to the states.¹⁷ Protection of the natural rights of citizens, for example, would be largely a matter for the states to handle.¹⁸ Because of the limited delegation of power to the federal government, the Federalists did not believe an enumerated bill of rights to be necessary.¹⁹ Without the granted power to invade rights, the federal government would simply be unable to do so.

正如梅西所解释的，第九修正案的目的之一是维护各州的主权和独立，部分原因是为了让各州能够对联邦权力的扩张起到制衡作用。⁹²⁴为此，中央政府只被赋予少数明确的权力，其他权力则保留给各州。⁹²⁵例如，保护公民的自然权利在很大程度上将由各州处理。⁹²⁶由于对联邦政府的权力授予是有限的，联邦党人认为没有必要制定列举权利法案。⁹²⁷如果没有被授予侵犯权利的权力，联邦政府根本无法这样做。

The Antifederalists, nevertheless, demanded a bill of rights, fearing that without one, the federal government would both encroach on the states' sovereignty and violate the natural rights of the people.²⁰ History has proven the Antifederalists right; it would have been too dangerous to create the federal government without also providing a bill of rights. Although the current federal government has arrogated for

⁹²³ Silent Rights, at 10 - 11.

《沉默的权利》，第 10-11 页。

⁹²⁴ Ibid., at 55.

同上，第 55 页。

⁹²⁵ Ibid., at 56.

同上，第 56 页。

⁹²⁶ Ibid.

同上。

⁹²⁷ Ibid.

同上。

itself vast powers not authorized by the Constitution,²¹ it seems almost certain that things would have been worse had the Bill of Rights not been added as a precautionary measure.

然而，反联邦党人要求制定一份权利法案，他们担心如果没有这样一份法案，联邦政府将会侵犯各州的主权，也会侵犯人民的自然权利。⁹²⁸历史已经证明反联邦党人是正确的；在不提供权利法案的同时，建立联邦政府太危险了。尽管目前的联邦政府僭取了《宪法》未授权的巨大权力，⁹²⁹但几乎可以肯定的是，如果当初没有《权利法案》作为预防措施，情况将会更加糟糕。

On the other hand, as the Federalists countered, even if having no bill of rights would be dangerous, enumerating rights to limit a government of purportedly limited powers is also dangerous, for two primary reasons. First, the very declaration of a particular right (e.g., freedom of speech) might be construed to imply that some power had been given to the federal government to invade this right.²² This could lead to the implication that the federal government possessed unenumerated powers, similar to the broad “police powers” exercised by states, rather than strictly limited, enumerated powers. These unenumerated powers of the central government could be used to

⁹²⁸ Ibid., at 56 – 57.

同上，第 56-57 页。

⁹²⁹ For discussions of the Supreme Court’s various misinterpretations of the Constitution, see Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Univ. Oklahoma Press, 1989); idem, *Government by Judiciary: The Transformation of the Fourteenth Amendment*(Cambridge, Mass.: Harvard Univ Press, 1977); Bork, *The Tempting of America*; James A. Dorn & Henry G. Manne eds. *Economic Liberties and the Judiciary* (Fairfax, Va.: George Mason Univ Press, 1987); Henry Mark Holzer, *Sweet Land of Liberty: The Supreme Court and Individual Rights* (Costa Mesa, Calif.: The Common Sense Press, 1983); and Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980).

关于最高法院对宪法的各种错误解释的讨论，可参见劳尔·伯杰的《第十四条修正案与权利法案》（俄克拉荷马大学出版社，1989 年）；同上，《司法统治：第十四条修正案的转变》（马萨诸塞州剑桥：哈佛大学出版社，1977 年）；罗伯特·博克的《诱惑美国：法律的政治诱惑》；詹姆斯·A·多恩和亨利·G·曼恩编的《经济自由与司法》（弗吉尼亚州费尔法克斯：乔治梅森大学出版社，1987 年）；亨利·马克·霍尔泽的《自由的甜蜜之地：最高法院与个人权利》（加利福尼亚州科斯塔梅萨：常识出版社，1983 年）；以及伯纳德·H·西根的《经济自由与宪法》（芝加哥：芝加哥大学出版社，1980 年）。

invade any (unenumerated) rights of the citizenry as well as the sovereignty of the states.²³ Second, listing certain rights in the “bill of rights might raise the implication that the only rights possessed by the people were those enumerated,”²⁴ that is, that the listing of rights in the Constitution was exhaustive. Enter the Ninth Amendment, designed, as Massey shows, to combat both these dangers.

另一方面，正如联邦党人所反驳的，即使没有权利法案是危险的，但列举权利来限制一个声称权力有限的政府也是危险的，主要原因有两个。首先，宣布某项权利（如言论自由）本身就可能被解释为暗示联邦政府已被赋予某种权力来侵犯这项权利。⁹³⁰这可能会导致这样一种暗示，即联邦政府拥有未列举的权力，类似于各州行使的广泛“警察权力”，而不是严格受限的列举权力。中央政府的这些未列举权力可以被用来侵犯公民的任何（未列举的）权利以及各州的主权。⁹³¹其次，在“权利法案”中列出某些权利可能会引发这样一种暗示，即人民所拥有的唯一权利是那些被列举出来的权利，⁹³²也就是说，宪法中对权利的列举是详尽无遗的。于是就有了第九修正案，正如梅西所表明的，该修正案旨在应对这两种危险。

Some commentators acknowledge that the Amendment was meant only to address the first of these two dangers by serving as a rule of construction as to federal powers. Under this “single-purpose” interpretation, it is held that:

[T]he amendment’s function was merely to restrain constitutional interpreters from construing too broadly the powers delegated to the central government. By doing so, it had the secondary effect of preserving individual liberties, because the “residual rights” of the citizenry were protected by the sheer absence of governmental power to curtail them.²⁵

一些评论家承认，修正案的本意只是通过作为联邦权力的解释规则来解决这两种危险

⁹³⁰ See Silent Rights, at 60 – 61.
《沉默的权利》，第 60-61 页。
⁹³¹ See *ibid.*, at 61 – 62; see also *ibid.*, at 24.
同上，第 61-62 页；同上，第 24 页。
⁹³² *Ibid.*, at 62; see also *ibid.*, at 23 – 24.
同上，第 62 页；同上，第 32-24 页。

中的第一种危险。根据这种“单一目的”的解释，人们认为：

该修正案的作用仅仅是限制宪法解释者过于宽泛地解释授予中央政府的权力。这样做的次要作用是维护个人自由，因为公民的“剩余权利”由于政府根本没有权力去削减它们而得到了保护。⁹³³

Thus, the Amendment merely served as a rule of construction regarding federal powers, and “adherents to this view reject the idea that the Ninth Amendment is itself an independent source of human rights capable of judicial cognizance.”²⁶

因此，修正案只是作为有关联邦权力的解释规则，“这种观点的支持者拒绝接受第九修正案本身是能够得到司法承认的人权的独立来源这一观点”。⁹³⁴

Massey disagrees with such a single-purpose interpretation of the Ninth Amendment. He argues persuasively that the Ninth Amendment had dual, but complementary, purposes: To prevent the listing of rights from being used to imply that the federal government had powers beyond those enumerated, and to prevent the listing of rights from implying that the list is an exclusive and exhaustive one.²⁷ For example, as Massey notes, many states admitted to the Union in the nineteenth century added a version of the Ninth Amendment to their own constitutions:

*It is hard to understand why any group of state constitution makers would have done so if they had thought the Ninth Amendment was simply a device to confine federal legislative power... The presence of Ninth Amendment analogues in state constitutions is reason to conclude that nineteenth-century legal actors continued to regard the federal Ninth Amendment as instantiating dual paths to a single end of preserving human liberty.*²⁸

梅西不同意对第九修正案的这种单一目的解释。他很有说服力地指出，第九修正案有双重但互补的目的：防止权利的列举被用来暗示联邦政府拥有超出所列举的权力，以及防止权利的列举被暗示该列表是唯一且详尽无遗的。⁹³⁵例如，正如梅西所指出的，

⁹³³ Ibid., at 24.
同上，第 24 页。

⁹³⁴ Ibid.

同上。

⁹³⁵ See *ibid.*, at 62, 93. Hereinafter, I will sometimes refer to these as the limited-powers

在 19 世纪加入联邦的许多州在其自己的宪法中加入了第九修正案的一个版本：

很难理解，如果一群制定州宪法的人认为第九修正案仅仅是一种限制联邦立法权的手段，他们为什么会这样做……州宪法中存在类似第九修正案的内容，这让我们有理由得出结论：19 世纪的法律行动人仍然认为联邦第九修正案体现了通往保护人类自由这一单一目标的双重途径。⁹³⁶

The distinction between the dual purposes of the Ninth Amendment was not completely clear two hundred years ago. One reason for this, Massey claims, is that, in the Founding Fathers' generation, "rights were thought of as the absence of governmental powers,"²⁹ that is, individual rights were merely conceived of "as the complement of governmental powers."³⁰ Thus, to the Framers, the distinction between these two purposes was "blurry at best."³¹ Individual rights could be secured simply by limiting government power, since "rights could not lawfully be invaded by a government lacking power to do so."³² However, today's conception of the relation between individual rights and governmental power is different. Massey claims that:

Today we would be unlikely to converse in the same vernacular. We are likely to think of rights as trumping governmental powers. Thus, pursuant to the commerce clause Congress may have the power to enact a law forbidding the interstate shipment of Bibles, but its effective ability to do so is trumped by at least two First Amendment rights—freedom of speech and the right to free exercise of religion.³³

purpose or function, and the unenumerated-rights purpose or function, respectively. 见同上，第 62、93 页。在下文中，我有时将它们分别称为有限权力的目的或职能，以及未列举的权利的目的或职能。

⁹³⁶ Ibid., at 86–87.

同上，第 86–87 页。

两百年前，《第九修正案》双重目的之间的区别并不完全清晰。梅西称，其中一个原因是，在国父那一代，“权利被认为是政府权力的缺失”，⁹³⁷也就是说，个人权利仅仅被认为是“政府权力的补充”。⁹³⁸因此，在制宪者看来，这两个目的之间的区别“充其量只是模糊不清”⁹³⁹。个人权利只需通过限制政府权力即可得到保障，因为“缺乏此种权力的政府不能合法地侵犯权利”。⁹⁴⁰然而，如今对个人权利与政府权力之间关系的概念是不同的。梅西声称：

今天，我们不太可能用同样的白话交谈。我们可能会认为权利高于政府权力。因此，根据商业条款，国会可能有权制定禁止跨州运输《圣经》的法律，但国会这样做的有效能力至少被第一修正案中的两项权利——言论自由和宗教自由的权利——所压制。⁹⁴¹

Massey provides a brief survey of Supreme Court jurisprudence to document the changing conception of rights vis-a-vis powers.³⁴ Because of this “shift in perspective over the past two centuries,” there is disagreement today over what the Framers originally meant by the Amendment. ³⁵ Modern observers tend to ascribe to the Ninth Amendment merely the first objective, that of preventing the enumeration of

⁹³⁷ Ibid., at 93.

同上，第 93 页。

⁹³⁸ Ibid., at 67.

同上，第 67 页。

⁹³⁹ Ibid., at 93.

同上，第 93 页。

⁹⁴⁰ Ibid., at 67.

同上，第 67 页。

⁹⁴¹ Ibid., at 67, see also *ibid.*, at 79:

Today, ... we perceive rights as uncoupled from governmental powers. Limiting governmental powers may indeed preserve liberty obliquely, but creating enforceable rights is a far more direct way of preventing governmental abuse of individual liberty, given our modern conception that rights “trump” powers.
同上，第 67 页，另见同上，第 79 页：如今，……我们认为权利与政府权力是分离的。鉴于我们现代的观念是权利“高于”权力，限制政府权力确实可能间接地维护自由，但创造可执行的权利是防止政府滥用个人自由的一种更直接的方式。

rights from implying that the federal government must therefore possess unenumerated powers to invade rights, since this seems to be synonymous with the purpose of the Tenth Amendment, that is, to preserve a separate sphere of state powers. This view, however, ignores the Ninth Amendment's other purpose of ensuring "that the catalog of constitutional rights did not stop with the enumerated rights. As rights no longer were thought of as the absence of governmental powers, but rather as independent restraints upon governmental powers, it was inevitable that the lost function of the Ninth Amendment would again be perceived."³⁶

梅西简要回顾了最高法院的判例，记录了权利相对于权力观念的变化。⁹⁴²由于“过去两个世纪中观点的转变”，如今对于制宪者最初通过该修正案所表达的含义存在分歧。⁹⁴³现代观察家往往仅将第九修正案的第一个目标，即防止权利的列举暗示联邦政府因此必然拥有未列举的侵犯权利的权力，归因于第九修正案，因为这似乎与第十修正案的目的，即保留一个独立的州权力领域。然而，这种观点忽视了第九修正案的另一个目的，即确保“宪法权利的目录不会止于列举的权利。当权利不再被认为是政府权力的缺失，而是对政府权力的独立限制，第九修正案失去的功能将不可避免地再次被认识到”。⁹⁴⁴

Massey also argues that the interrelationship between the Ninth and Tenth Amendments can be better explained if one realizes that the founding generation viewed rights and powers as complementary, that is, merely two sides of the same coin.³⁷ In order to secure individual rights against infringement by the federal government, both Amendments were necessary to constrain the government's powers.³⁸

梅西还认为，如果人们意识到建国一代将权利和权力视为互补的，即仅仅是同一枚硬币的两面，就能更好地解释第九修正案和第十修正案之间的相互关系。⁹⁴⁵为了确保个

⁹⁴² See Ibid., at 88 - 93.

同上，第 88-93 页。

⁹⁴³ Ibid., at 67.

同上，第 67 页。

⁹⁴⁴ Ibid., at 94.

同上，第 94 页。

⁹⁴⁵ See ibid., at 79.

人权利不受联邦政府侵犯，这两项修正案对于约束政府权力都是必要的。⁹⁴⁶

The Ninth would do so by guarding against either the inference of nonexistent unenumerated rights or the inference of constructive powers. The Tenth would do so by an explicit statement that the central government possessed only its specified powers. The Tenth Amendment may be seen as performing the principal function of rebutting the Antifederalist concern that the new government might be presumed to possess all powers not specifically retained, while the Ninth Amendment may be seen as primarily addressing the Federalist concern that any enumeration of rights might be viewed as recognition of the existence of implied governmental powers. But both amendments are more complex. The Ninth Amendment also addresses, in part, the fear that rights enumeration would eliminate other rights, and the Tenth also preserves to the people their discretionary authority to allocate (or not) powers to their state governmental agents. The complex and dual nature of the two amendments is deeply rooted in the founding generation's perceptions of the inextricable relationship between rights and powers. Thus, the lack of either amendment would be inimical to the preservation of a zone of individual autonomy where governments could not intrude.³⁹

第九条通过防止推断出不存在的未列举的权利或推断出推定的权力来做到这一点。第十修正案则通过明确声明中央政府只拥有规定的权力来实现这一目的。第十修正案的主要功能可能是反驳反联邦党人的担忧，即新政府可能被推定拥有所有未明确保留的权力，而第九修正案则可能被视为主要解决联邦党人的担忧，即任何权利列举都可能被视为承认政府隐含权力的存在。但这两项修正案都更为复杂。第九修正案在一定程度上也解决了这样一种担忧，即权利的列举会消除其他权利；第十修正案也保留了人民向州政府机构分配（或不分配）权力的自由裁量权。这两项修正案的复杂性和双重性深深植根于国父一代对权利与权力之间不可分割关系的认知。因此，缺少其中任何一项修正案都不利于维护政府不得侵犯的个人自治区域。⁹⁴⁷

同上，第 79 页。

⁹⁴⁶ See *ibid.*, at 79 – 80.

同上，第 79-80 页。

⁹⁴⁷ *Ibid.*, at 78, see also *ibid.*, at 80, 106; note 80, below.

同上，第 78 页，另见同上，第 80、106 页；下文注释 80。

As Massey points out, even if it is admitted that the Ninth Amendment “could be a proper constitutional basis for unenumerated rights[, this] does nothing to solve the enormous problem of selecting which unenumerated rights deserve designation as constitutionally protected.”⁴⁰ Under Massey’s theory of “constitutional cy pres doctrine,” elaborated in Part III of Silent Rights, he lets the states do most of this work for us.⁴¹ It is to this doctrine that we now turn.

正如梅西指出的，即使承认第九修正案“可以成为未列举权利的适当宪法基础，但对于解决选择哪些未列举权利应被指定为受宪法保护的这一巨大问题毫无帮助”。⁹⁴⁸根据梅西在《沉默的权利》第三部分中阐述的“宪法近似原则理论”，他让各州为我们完成大部分这项工作。现在我们来谈谈这个原则。⁹⁴⁹

三、宪法的近似原则

CONSTITUTIONAL CY PRES

It is largely undisputed, even by single-purpose theorists, that the Ninth Amendment was intended to prevent the enumeration of rights from implying federal powers not explicitly granted in the Constitution.

即使是单一目的论者，第九修正案旨在防止列举权利暗示宪法未明确授予的联邦权力，这一点在很大程度上也是无可争议的。

However, “apart from a radical reconstruction of existing doctrine, that intent can no longer be accomplished.”⁴² As Massey puts it:

After two centuries of constitutional development, we no longer make any serious attempt to control the extent of the implied powers of Congress. If the Ninth Amendment’s original intent was only to provide a rule of construction by which claims

⁹⁴⁸ Ibid., at 94.

同上，第 94 页。

⁹⁴⁹ Ibid., at 97.

同上，第 97 页。

*of implied congressional power would be rejected, that function has been irretrievably eclipsed by the awesome breadth of contemporary federal power.*⁴³

然而，“除了对现有理论进行彻底重构之外，那个意图已无法再实现。”⁹⁵⁰正如梅西所说：经过两个世纪的宪法发展，我们不再认真尝试去控制国会隐含权力的范围。如果第九修正案的最初意图仅仅是提供一种解释规则，依据该规则可以拒绝国会隐含权力的主张，那么这一功能已经被当代联邦权力的可怕广度所取代，且无法挽回。⁹⁵¹

In other words, it is now, perhaps regrettably, “impossible” to achieve the Ninth Amendment’s original function of limiting the implied powers of the federal government (the limited-powers function). The genie is, irrevocably, out of the bottle.

换句话说，也许令人遗憾的是，现在“已不可能”实现第九修正案最初限制联邦政府隐含权力的功能（限权功能）。潘多拉的魔盒已被打开，魔鬼被释放，徒唤奈何。

It is here that Massey borrows from the concept *cy pres* to announce his “constitutional” *cy pres* doctrine. Under the doctrine of *cy pres*, “[w]hen faced with the problem of an expressed testamentary intent that is impossible to achieve, courts seek to effectuate as nearly as possible (*cy pres*) the testator’s intent.”⁴⁴ Similarly, if we still wish to “preserve the supposed original function of preventing implied federal powers,”⁴⁵ a new interpretation must be given to the Ninth Amendment to attempt to limit governmental power.⁴⁶ In fact, “To effectuate the original intent as nearly as possible, it is necessary to constrain governmental power by reading the Ninth Amendment as a source of judicially enforceable individual rights that operate to limit the exercise of governmental power.”⁴⁷ Thus, in today’s context, even those who attribute only the limited-powers function to the Ninth Amendment must be willing to accept use of the Amendment to generate unenumerated rights if the amendment is to be at all effective

⁹⁵⁰ Ibid., at 98.
同上，第 98 页。
⁹⁵¹ Ibid., at 97.
同上，第 97 页。

in limiting the exercise and unwarranted expansions of governmental power:

*If the original intention of the amendment was to confine governmental power, the reason for doing so was entirely to preserve rights. We have failed to confine those powers, partly because we now regard the affirmative assertion of rights as the vehicle for controlling the unwarranted assumption of governmental power. Thus, the only way the Ninth Amendment can be applied in our times to accomplish its original purpose is to regard the amendment as an independent source of individual rights.*⁴⁸

正是在这里，梅西从近似原则的概念中借鉴并宣布了他的“宪法”近似原则理论。根据近似原则理论，“当面临所表达的遗嘱意图无法实现的问题时，法院会寻求尽可能接近（拟制地）遗嘱人的意图”。⁹⁵²同样，如果我们仍然希望“保留防止隐含联邦权力的所谓原始功能”，⁹⁵³就必须对第九修正案做出新的解释，以试图限制政府权力。⁹⁵⁴事实上，“为了尽可能地实现原始意图，有必要通过将第九修正案解读为可由司法强制执行的个人权利的来源来约束政府权力，这些个人权利起到限制政府权力行使的作用。”⁹⁵⁵因此，在今天的背景下，即使是那些仅将有限权力功能归于第九修正案的人，也必须愿意接受利用该修正案来产生未列举的权利，这样修正案才能有效地限制政府权力的行使和无端扩张：

如果说修正案的初衷是限制政府权力，那么这样做的原因完全是为了维护权利。我们未能限制这些权力，部分原因是我们现在将对权利的肯定性主张视为控制政府权

⁹⁵² Ibid.; see also La.Rev.Stat.(https://www.legis.la.gov/legis/laws_Toc.aspx?folder=75&level=Parent), § 9:2331 (relating to cy pres).

同上；另见《路易斯安那州法规》(https://www.legis.la.gov/legis/laws_Toc.aspx?folder=75&level=Parent)，第 9:2331 条（与近似原则相关）。

⁹⁵³ Silent Rights, p. 97.
《沉默的权利》，第 97 页。

⁹⁵⁴ See *ibid.*, at 97 - 98.
同上，第 97-98 页。

⁹⁵⁵ *Ibid.*, at 98.
同上，第 98 页。

力无理僭越的工具。因此，在我们这个时代适用第九修正案以实现其最初目的的唯一途径就是将该修正案视为个人权利的独立来源。⁹⁵⁶

Massey notes that the second (unenumerated-rights) purpose of the Ninth Amendment (preventing the implication that enumerated rights were the only rights capable of blocking governmental action) is not really impossible, as is the limited-powers purpose, “but the legitimacy of this endeavor is badly eroded by our undue reliance upon an inappropriate and ill-suited vehicle—the due process clause—for the task of providing constitutional recognition to unenumerated rights,”⁴⁹ that is, only a strained interpretation of the Due Process Clause allows it to be mined as a source for unenumerated rights. Therefore, “[s]traightforward recognition of the Ninth Amendment as the vehicle for this project would be consistent with the founding intentions as well as provide a more ready answer to those critics of unenumerated rights who loudly question the connection of those rights to the constitutional text.”⁵⁰

梅西指出，第九修正案的第二个目的（未列举权利的目的，即防止暗示列举的权利是唯一能够阻止政府行动的权利）像有限权力的目的一样，实际上并非不可能，“但是这一努力的合法性因我们过度依赖一种不适当且不合适的工具——正当程序条款——来为未列举权利提供宪法认可而严重受损”，⁹⁵⁷也就是说，只有对正当程序条款的严格解释才允许将其作为未列举权利的来源。因此，“直接承认第九修正案是这一项目的的工具，既符合建国初衷，也为那些对未列举权利的批评者提供了一个更现成的答案，这些批评者大声质疑这些权利与宪法文本之间的联系”。⁹⁵⁸

Massey consoles those who are uncomfortable with using a cy pres-type doctrine to interpret the Constitution by showing that this type of reasoning is not really without precedent, although Massey’s jazzy term “constitutional cy pres” appears not to have been used before. For example, the Court gave “an expansive reading to the due

⁹⁵⁶ Ibid., at 98–99.

同上，第 98-99 页。

⁹⁵⁷ Ibid., at 114.

同上，第 114 页。

⁹⁵⁸ Ibid.

同上。

process and equal protection clauses of the Fourteenth Amendment in order to accomplish the intended purposes of the privileges and immunities clause”⁵¹ when the Slaughter-House Cases⁵² decision, and the lack of will to overturn that decision, made it impossible to implement the original purposes of this clause. Other supposed examples of constitutional cy pres include cases involving the Eleventh and Fourteenth Amendments.⁵³

梅西通过表明这种类型的推理并非真的没有先例，来安抚那些对使用近似原则类型的理论来解释宪法感到不安的人，尽管梅西那富有创意的术语“宪法近似原则”似乎在此之前从未被使用过。例如，当“屠宰场案”⁹⁵⁹的判决以及缺乏推翻该判决的意愿使得该条款的最初目的无法实现时，法院“对第十四修正案的正当程序和 equal protection 条款进行了宽泛解读，以实现该特权和豁免条款的预期目的”⁹⁶⁰。其他被认为是宪法近似原则的例子包括涉及第十一条和第十四条修正案的案件。⁹⁶¹

But the utility of Massey’s appeal to constitutional cy pres is unclear. In a standard cy pres situation where, for some external reason, it is actually impossible to achieve the testator’s will, the court attempts to effectuate as nearly as possible the testator’s intent. However, if today it is impossible to honestly interpret the Constitution and to give the Ninth Amendment its original reading, this is not due to some impersonal, external cause about which the Court is helpless to do anything. Instead, it is largely the Court’s own twisting of the Constitution over the last two centuries, as well as its current unwillingness to return to a traditional reading of the Constitution, that lies behind the

⁹⁵⁹ Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); https://en.wikipedia.org/wiki/Slaughter-House_Cases).

屠宰场案, 83 U.S. (16 Wall.) 36 (1873 年; 网址: https://en.wikipedia.org/wiki/Slaughter-House_Cases)。

⁹⁶⁰ Ibid., at 99.

同上, 第 99 页。

⁹⁶¹ See Silent Rights, at 100 – 01 (discussing Hans v. Louisiana, 134 U.S. 1 (1890) (Eleventh Amendment)); *ibid.*, pp. 102 – 104 (discussing Brown v. Board of Education, 347 U.S. 483 (1954) (Fourteenth Amendment)).

见《沉默的权利》，第 100-101 页（讨论汉斯诉路易斯安那州案，134 U.S. 1 (1890)（第十一修正案））；同上，第 102-104 页（讨论布朗诉教育委员会案，347 U.S. 483 (1954)（第十四修正案））。

current impossibility of limiting the federal government's powers.⁵⁴ The government will be equally unable to implement a proposed law or regulation if it is declared by the Court to be unconstitutional on the grounds that (a) it did not have the power (an “impossible” result nowadays), or (b) unenumerated Ninth Amendment rights stand in the way (Massey's *cy pres* method). Thus, one wonders why the Court would overturn a law based on an unenumerated right, given its unwillingness to do so on the ground that there is a lack of legitimate governmental power to implement the law in the first place. It is not as if Congress or the President would be any less upset at being thwarted by the Court in the second manner as opposed to the first.⁵⁵

但是梅西对宪法近似原则的呼吁的效用并不明确。在标准的近似原则情形下，由于某种外部原因，实际上不可能实现立遗嘱人的意愿，法院会尽可能实现立遗嘱人的意图。然而，如果在今天，诚实地解释宪法并赋予第九修正案其原始含义已不可能，这并非是由于某种非个人的、法院对此无能为力的外部原因所致。相反，主要是法院自身在过去两个世纪里对宪法的扭曲，以及目前不愿回到对宪法的传统解读，才是目前无法限制联邦政府权力的原因。⁹⁶²如果法院以以下理由宣布一项拟议的法律或法规违宪，政府将同样无法实施该法律或法规：（a）政府没有权力（如今这是一个“不可能”的结果），或者（b）未列举的第九修正案权利构成阻碍（梅西的近似原则方法）。因此，人们不禁要问，既然法院不愿意以政府缺乏实施法律的合法权力为由推翻一项基于未列举权利的法律，那么法院为什么要推翻它呢？与第一种方式相比，国会或总统对法院以第二种方式进行阻挠的不满情绪并不会减少。⁹⁶³

Massey appears to believe that the reason for the current impossibility of using the

⁹⁶² See sources cited in note 21, above.
见上文注释 21 中引用的资料。

⁹⁶³ In fact, given that these proposals would seem to be equally unacceptable to the ruling elites, the Framers’ view of the complementary nature of rights and powers seems correct, not “sloppy thinking about the methodology of protecting human liberty.” *Silent Rights*, at 79. As Massey claims, we now tend to regard the founding generation’s view that the “the distinction between rights and powers [is] of no consequence.” *Ibid*.
事实上，鉴于这些提议似乎同样不为统治精英所接受，制宪者关于权利与权力互补性质的观点似乎是正确的，而不是“对保护人类自由的方法的草率思考”。《沉默的权利》，第 79 页。正如梅西所声称的，我们现在倾向于认为建国一代的观点，即“权利与权力之间的区别‘无关紧要’”。同上。

Ninth Amendment to limit directly the federal government's powers is the aforementioned shift in how rights and powers are viewed.⁵⁶ He claims that "[w]e have failed to confine [the federal government's] powers, partly because we now regard the affirmative assertion of rights as the vehicle for controlling the unwarranted assumption of governmental power."⁵⁷ This claim is unconvincing, however, since Massey does not provide a clear case as to just how the alleged shift in viewing powers and rights has led to a failure to confine the government's usurpation of more and more powers. Massey's account makes decades of misinterpretation of the Constitution by the Court seem downright innocent, an honest mistake caused by simple confusion over the conceptual relation between rights and powers. More conventional, and less benign, explanations for the unfortunate state of the Court's modern jurisprudence seem more appropriate.⁵⁸

梅西西似乎认为，目前无法利用第九修正案直接限制联邦政府权力的原因是上述对权利和权力的看法发生了转变。⁹⁶⁴他声称，“我们未能限制[联邦政府的]权力，部分原因是我们现在将对权利的肯定性主张视为控制对政府权力无端扩张的工具”。⁹⁶⁵然而，这种说法并不令人信服，因为梅西并没有提供一个明确的理由，说明所谓的权力与权利观的转变是如何导致政府篡夺越来越多的权力而无法受到限制的。梅西的说法让法院数十年来对宪法的误读显得完全无辜，是由于对权利和权力之间的概念关系的简单混淆而造成的无心之过。对于法院现代法理学的不幸状况，更传统、更不友善的解释似乎更为恰当。⁹⁶⁶

Additionally, there are other, less serious, problems with Massey's *cy pres* approach. First, Massey's theory claims to work even if one adheres only to the limited-powers purpose. In this case, however, it is inexplicable why so much attention is given earlier in the book to proving that the Amendment had a dual purpose. After showing in Part II that the Ninth Amendment had dual purposes,⁵⁹ Massey largely omits the second

⁹⁶⁴ See *ibid.*, at 98 - 99.

同上，第 98-99 页。

⁹⁶⁵ *Ibid.*, at 99.

同上，第 99 页。

⁹⁶⁶ See sources cited note 21, above.

见上文注释 21 中引用的资料。

purpose and assumes, for the sake of argument, only the limited-powers purpose.

此外，梅西的诉讼保全方法还存在其他一些不太严重的问题。首先，梅西的理论声称即使只坚持有限权力的目的也是可行的。然而，在这种情况下，令人费解的是，为何在本书的前半部分如此重视证明修正案具有双重目的。梅西在第二部分证明了第九修正案具有双重目的之后，⁹⁶⁷ 在很大程度上忽略了第二个目的，为了论证的需要，只假定了有限权力的目的。

Second, in Part II, prior to his cy pres analysis in Part III, Massey argues, without appealing to cy pres, that one function of the amendment was to generate enforceable, unenumerated rights.⁶⁰ It is, therefore, not clear why one needs to use cy pres to turn the limiting-powers function into the unenumerated-rights function. The unenumerated-rights function should stand alone and can apparently be reasonably argued without the aid of constitutional cy pres. In fact, in an earlier incarnation of Massey's theory, the doctrine of constitutional cy pres is not invoked at all.⁶¹ As best I can tell, the primary purpose of constitutional cy pres is to convince those who favor the limited-powers function but who shun the unenumerated-rights function that, in today's constitutional landscape, the only way to achieve the limited-powers function is to allow the Ninth Amendment to be construed to protect unenumerated rights. Since Massey sets forth other, independent grounds for the unenumerated-rights function of the Ninth Amendment, it is not clear why constitutional cy pres is given such prominent attention in the book, nor why it is brought up again and again once this point is made. For example, Massey's application of constitutional cy pres to the unenumerated powers purpose of the Ninth Amendment is confusing. If the unenumerated powers purpose is not impossible to attain but has merely had its legitimacy eroded, why is cy pres applicable at all, since the doctrine has to do with impossible or unattainable purposes?

其次，在第二部分中，在第三部分进行近似原则分析之前，梅西在没有诉诸近似原则的情况下主张，该修正案的一个功能是产生可执行的、未列举的权利。⁹⁶⁸ 因此，不清

⁹⁶⁷ See Silent Rights, at 53.
《沉默的权利》，第 53 页。

⁹⁶⁸ See *ibid.*, at 93 – 94.
同上，第 93-94 页。

楚为什么需要使用近似原则将限制权力的功能转变为未列举权利的功能。未列举权利的功能应该独立存在，并且显然可以在没有宪法近似原则的帮助下进行合理的论证。事实上，在梅西理论的早期版本中，根本没有援引宪法近似原则。⁹⁶⁹就我所能理解的而言，宪法近似原则的主要目的是说服那些赞成限制权力功能但回避未列举权利功能的人，在当今的宪法格局下，实现限制权力功能的唯一途径是允许对第九修正案进行解释以保护未列举权利。由于梅西为第九修正案的未列举权利功能提出了其他独立的理由，所以不清楚为什么宪法近似原则在书中受到如此突出的关注，也不清楚为什么在提出这一观点后又反复提及。例如，梅西将宪法近似原则应用于《第九修正案》的未列举权力的目的就令人困惑。如果未列举权力的目的并非不可能实现，而仅仅是其合法性受到了侵蚀，那么为什么近似原则完全适用呢？因为该原则与不可能或无法实现的目的有关。

⁹⁶⁹ See Calvin R. Massey, “Antifederalism and the Ninth Amendment,” Chicago-Kent L. Rev. 64 (1989); <https://scholarship.kentlaw.iit.edu/cklawreview/vol64/iss3/13/>; 987 – 1000, reprinted in Barnett, ed., The Rights Retained by the People, vol. 2, at 267, 277 (arguing “that individual liberties secured by state constitutions against state invasion were federalized by the ninth amendment,” without resort to a “cy pres” theory, without even resorting to the argument that it is “too late” or “impossible” to now use the Ninth Amendment to limit government powers directly); idem, “Federalism and Fundamental Rights: The Ninth Amendment,” Hastings L.J. 38, no. 2 (1987); https://repository.uchastings.edu/hastings_law_journal/vol38/iss2/2/; 305 – 44, reprinted in Barnett, ed., The Rights Retained by the People, vol. 1. Massey’s first discussion of constitutional cy pres of which I am aware came after these two articles, in “The Natural Law Component of the Ninth Amendment,” University of Cincinnati L. Rev. 61 (1992); https://repository.uchastings.edu/faculty_scholarship/1142/; 49 – 105. 见卡尔文·R·梅西的《反联邦主义与第九修正案》，《芝加哥—肯特法律评论》第64期（1989年；网址：<https://scholarship.kentlaw.iit.edu/cklawreview/vol64/iss3/13/>）：987-1000页，重印于巴尼特编，《人民保留的权利》第2卷，第267、277页（主张“由州宪法保障的个人自由免受州侵犯，通过第九修正案被联邦化”，不借助“近似原则”理论，甚至不借助现在用第九修正案直接限制政府权力“为时已晚”或“不可能”的论点）；同上，《联邦制与基本权利：第九修正案》，《黑斯廷斯法律杂志》第38卷第2期（1987年；网址：https://repository.uchastings.edu/hastings_law_journal/vol38/iss2/2/）：305-344页，重印于巴尼特编，《人民保留的权利》第1卷。据我所知，梅西对宪法近似原则的首次讨论是在这两篇文章之后，见《第九修正案的自然法成分》，《辛辛那提大学法律评论》第61期（1992年；网址：https://repository.uchastings.edu/faculty_scholarship/1142/）：49-105页。

Third, it appears to be quite an ordinary and reasonable interpretive method to try to interpret difficult or ambiguous constitutional provisions in accordance with the provision's original objectives, just as was done in the cases cited by Massey as examples of "de facto" applications of constitutional cy pres. But this technique is just one of dozens of standard canons of interpretation of legislation or constitutional provisions,⁶² and it is not clear why a new terminology and doctrine is needed for this one particular technique.⁶³

第三，试图根据宪法条款的最初目的来解释困难或含糊的宪法条款，似乎是一种非常普通和合理的解释方法，就像梅西所引用的作为“事实上”应用宪法近似原则的例子中的那些案例所做的那样。但是，这种技术只是解释立法或宪法条款的几十种标准准则之一，⁹⁷⁰并且不清楚为什么对于这一特定技术需要一种新的术语和理论。⁹⁷¹

Continuing with the development of his theory, Massey next argues that "there are three major ways in which constitutional cy pres can be applied to the Ninth Amendment."⁶⁴ First, the amendment can be used to secure "against federal

⁹⁷⁰ For example, a law should be interpreted, if possible, so as not to produce absurd or unconstitutional results. One explicit canon of interpretation in Louisiana is: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Louisiana Civil Code, art. 9.

例如，一项法律如果可能的话，应当被解释为不会产生荒谬或违宪的结果。路易斯安那州的一个明确的解释准则是：“当一项法律清晰明确且其适用不会导致荒谬的后果时，该法律应按其字面规定适用，不得为探寻立法机关的意图而进行进一步的解释。”

《路易斯安那民法典》，第9条。

⁹⁷¹ As Ayn Rand explained in her doctrine known as "Rand's Razor": "The requirements of cognition determine the objective criteria of conceptualization. They can be summed up best in the form of an epistemological 'razor': concepts are not to be multiplied beyond necessity—the corollary of which is: nor are they to be integrated in disregard of necessity." "Rand's Razor" entry, Harry Binswanger, ed., *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986; <https://perma.cc/Z6QZ-CJW4>); see also note 61, above, and accompanying text.

正如安·兰德在她被称为“兰德剃刀”的学说中所解释的那样：“认知的要求决定了概念化的客观标准。它们可以用一种认识论的‘剃刀’形式最好地总结出来：概念不应在不必要的情况下被增多——其必然结果是：也不应在无视必要性的情况下被整合。”“兰德剃刀”条目，哈里·宾斯万格编，《安·兰德词典：从A到Z的客观主义》（纽约：新美国图书馆，1986年；网址：<https://perma.cc/Z6QZ-CJW4>）；另见上文注释61及相关内容。

invasion individual rights having their origin in state constitutions.”⁶⁵ Massey refers to this as the positive law component of the Ninth Amendment, or “positive Ninth Amendment rights.”⁶⁶ Second, it can be read as a rule of interpretation in favor of generalizing explicitly enumerated constitutional rights to protect unenumerated rights that are consistent with the enumerated rights. Third, the Ninth Amendment can be used “to locate and enforce rights having their origin in natural law.”⁶⁷ Massey refers to this third approach as the natural law component of the Ninth Amendment, or “natural Ninth Amendment rights.”⁶⁸

随着他的理论的进一步发展，梅西接着指出“宪法近似原则可以通过三种主要方式应用于第九修正案”。⁹⁷²首先，该修正案可用于确保“源于州宪法的个人权利免受联邦侵犯”。⁹⁷³梅西将此称为第九修正案的实在法组成部分，或“第九修正案的积极权利”。⁹⁷⁴其次，它可以被理解作为一种解释规则，有利于概括明确列举的宪法权利，以保护与列举权利相一致的未列举权利。第三，第九修正案可用于“定位和执行源于自然法的权利”。⁹⁷⁵梅西将第三种方法称为第九修正案的自然法组成部分，或“第九修正案的自然权利”。⁹⁷⁶

The listing of these three proposals reveals further problems with Massey’s theory. One is that this list of three ways to apply constitutional cy pres seems arbitrary. Further, it is unclear whether this list is exhaustive: Are there more ways to apply constitutional cy pres? Why, for example, could not his cy pres theory be used to argue that the Fourteenth Amendment and the incorporation doctrine should be reinterpreted to return more power to the states, to better accomplish the original constitutional function of federalism?

⁹⁷² Silent Rights, at 106.
《沉默的权利》，第 106 页。
⁹⁷³ Ibid.
同上。
⁹⁷⁴ Ibid.
同上。
⁹⁷⁵ Ibid.
同上。
⁹⁷⁶ Ibid., at 106, 182.
同上，第 106 页，182 页。

列出这三个提议进一步揭示了梅西理论的问题。其一，这三种应用宪法近似原则的方式列表似乎是随意的。此外，尚不清楚这个列表是否详尽无遗：是否还有更多应用宪法近似原则的方式呢？例如，为什么他的近似原则理论不能被用来主张对第十四条修正案和合并原则进行重新解释，以便将更多权力归还给各州，从而更好地实现联邦制的原始宪法功能呢？

Another problem with Massey's constitutional cy pres theory is that the second and third proposals do not need constitutional cy pres to be recommended, and in fact have been advanced by others, without requiring Massey's innovative cy pres theory.⁹⁷⁷ Massey himself has previously argued for the first proposal without even mentioning constitutional cy pres.⁹⁷⁸ Massey seems to view the second proposal as largely subsumed by, and inferior to, the first and third proposals,⁹⁷⁹ and thus devotes most of the remainder of the book—chapters 5 and 6—to elaborating positive and natural Ninth Amendment rights.

梅西的宪法近似原则理论的另一个问题是，第二个和第三个提议并不需要宪法近似原则来推荐，事实上，其他人已经提出了这些提议，而不需要梅西创新的近似原则理论。⁹⁷⁷ 梅西本人此前曾为第一个提议进行过论证，甚至都没有提及宪法近似原则。⁹⁷⁸ 梅西似乎认为第二个提议在很大程度上被第一个和第三个提议所包含，并且不如它们，⁹⁷⁹ 因此在本书的剩余部分——第五章和第六章——大部分内容都用于阐述第九修正案中的积极权利和自然权利。

⁹⁷⁷ See, e.g., Laurence Tribe & Michael Dorf, *On Reading the Constitution* (Cambridge, Mass.: Harvard University Press, 1991), 54, 111, 110, cited in *Silent Rights*, at 245 n.20 (suggesting the second proposal); Barnett, *Getting Normative and “The Intersection of Natural Rights and Positive Constitutional Law”* (suggesting the third proposal). 例如，见劳伦斯·特赖布和迈克尔·多夫，《论解读宪法》（马萨诸塞州剑桥：哈佛大学出版社，1991年），第54、111、110页，在《沉默的权利》第245页注释20中被引用（提出了第二种提议）；兰迪·E·巴尼特，《走向规范性：自然权利在宪法裁决中的作用》以及《自然权利与实证宪法法律的交集》（提出了第三种提议）。

⁹⁷⁸ See note 61, above, and accompanying text.
见上文注释61及相关内容。

⁹⁷⁹ See *Silent Rights*, at 109–10.
《沉默的权利》，第109–110页。

四、第九修正案的积极权利

POSITIVE NINTH AMENDMENT RIGHTS

The most innovative and controversial aspect of Massey's thesis is his view that the Ninth Amendment ought to be read to include judicially enforceable rights having their origin in state constitutions, as well as natural rights. Massey argues that the unenumerated rights contemplated by the Ninth Amendment were of the following two types: "natural" and "civil," or "positive," rights.⁷² Natural rights include, in the words of Madison, "those rights which are retained when particular powers are given up to be exercised by the Legislature,"⁷³ and positive rights are those that "result from the nature of the compact."⁷⁴ For example, freedom of speech is a natural right; trial by jury is not a natural right, but results "from the social compact which regulates the action of the community."⁷⁵ However, Massey cleverly reasons that:

... the founding generation did not use the distinction between natural and positive rights as a basis for selection of the rights worthy of constitutional enumeration. The package of rights expressly enumerated in the Constitution contains natural and positive rights. It is a fair inference, then, that the unenumerated rights of the Ninth Amendment were thought to consist of both varieties. Positive rights had their source in state common, constitutional, and statutory law. Natural rights stemmed from Lockean notions concerning the inalienable rights of the people.⁷⁶

梅西论文中最具创新性和争议性的方面是他的观点，即应当将第九修正案解读为包括源自州宪法的可由司法强制执行的权利以及自然权利。梅西认为，第九修正案所考虑的未列举权利包括以下两类：“自然权利”和“公民权利”或“积极权利”。⁹⁸⁰ 用麦迪逊的话来说，自然权利包括“在特定权力被让渡给立法机关行使时所保留的那些权利”，

⁹⁸⁰ Ibid., at 118.
同上，第 118 页。

⁹⁸¹而实在权利是那些“由契约的性质所产生的权利”。⁹⁸²例如，言论自由是一项自然权利；陪审团审判并非自然权利，而是“规范社会行动的社会契约”的结果。⁹⁸³然而，梅西巧妙地推理道：

.....建国一代并没有将自然权利和积极权利之间的区别作为选择值得在宪法中列举的权利的依据。宪法中明确列举的一揽子权利包括自然权利和积极权利。因此，可以合理地推断，第九修正案中未列举的权利被认为包括这两种权利。积极权利来源于各州的普通法、宪法和成文法。自然权利源于洛克关于人民不可让渡权利的观念。⁹⁸⁴

Thus, the Ninth Amendment's unenumerated rights contain both positive and natural rights.

因此，第九修正案中未列举的权利既包括积极权利，也包括自然权利。

As Massey notes, most of the Framers looked “to the states not only as the source of, but as the vehicle for, protection of their cherished liberties.”⁷⁷ “The inclusion of the Ninth Amendment was, in part, an attempt to be certain that rights protected by state law were not supplanted by federal law simply because they were not enumerated.”⁷⁸ Since “the Ninth Amendment was as much an enumerated right for purposes of judicial enforcement as any other aspect of the Bill of Rights,”⁷⁹ both types of unenumerated rights—natural rights and positive rights having their source in state law—are subject to judicial protection. In other words, any federal law that violates an unenumerated positive (i.e., state law-based) right is subject to being stricken down by federal courts as violative of the Ninth Amendment.⁸⁰ In

⁹⁸¹ Ibid.
同上。
⁹⁸² Ibid., at 118 n.6.
同上，第 118 页注释 6。
⁹⁸³ Ibid.
同上。
⁹⁸⁴ Ibid., at 118.
同上，第 118 页。

giving effect to the Ninth Amendment, then, the courts are to recognize that one source of the unenumerated rights protected by the Ninth Amendment is state constitutions.

正如梅西所指出的，大多数制宪者“不仅将各州视为他们所珍视的自由的来源，而且还将其视为保护这些自由的工具”。⁹⁸⁵ “纳入第九修正案在一定程度上是为了确保受州法律保护的权利不会仅仅因为没有被列举出来而被联邦法律所取代”。⁹⁸⁶ 由于“就司法执行而言，《第九修正案》与《权利法案》的任何其他方面一样，都是一项列举的权利”，⁹⁸⁷ 因此，两类未列举的权利--自然权利和源于州法的积极权利--都受到司法保护。换句话说，任何违反未列举的积极权利（即基于州法权利）的联邦法律都会被联邦法院视为违反第九修正案而予以废除。⁹⁸⁸ 因此，在使第九修正案生效时，法院应认识到

⁹⁸⁵ Ibid., at 118 n.5.

同上，第 118 页注释 5。

⁹⁸⁶ Ibid., at 121 - 22.

同上，第 121-122 页。

⁹⁸⁷ Ibid., at 119.

同上，第 119 页。

⁹⁸⁸ See *ibid.*, at 124. In support of this theory, Massey discusses the symbiotic relationship between the Ninth and Tenth Amendments:

The Tenth Amendment ... was intended to complement the power limiting aspect of the Ninth Amendment. If the Ninth Amendment was intended in part to prevent the accretion of federal power implied by virtue of the existence of enumerated rights exempt from the reach of federal power, the Tenth Amendment was designed to prevent the accretion of federal power by implication from any other source in the Constitution... Both Amendments were intended to preserve to the people of the states the sovereign's prerogative to confer powers upon their state governmental agents (recognized in the Tenth Amendment) and to maintain all manner of individual rights secure from governmental invasion (recognized in the Ninth Amendment). An intended medium for doing so, in both cases, was the state constitution.

Ibid., at 106 - 107.

见同上，第 124 页。为了支持这一理论，梅西讨论了第九修正案和第十修正案之间的共生关系：

第十修正案……旨在补充第九修正案的权力限制方面。如果第九修正案部分意图是防止因存在不受联邦权力管辖的列举权利而隐含的联邦权力的增加，那么第十修正案的目的就是防止联邦权力因宪法中的任何其他来源而隐含地增加……这两个修正案都旨在为各州人民保留君主将权力授予其州政府代理人的特权（在第十修正案中得到承认），并确保各种个人权利不受政府侵犯（在第九修正案中得到承认）。在这两种情况下，预期的实现手段都是州宪法。

同上，第 106-107 页。

第九修正案所保护的未列举权利的一个来源是州宪法。

One advantage that Massey sees in this understanding of the Ninth Amendment is that it would give “citizens of the states … the power, through their state constitutions, to preserve areas of individual life from invasion by the federal Congress in the exercise of its delegated powers.”⁸¹ This, in turn, would “prevent Congress from using its delegated powers to contravene an unenumerated federal right contained within a state constitution.”⁸²

梅西认为对第九修正案的这种理解有一个优势，即它将给予“各州的公民……通过他们的州宪法，有权保护个人生活的各个领域不受联邦国会在行使其被授予的权力时的侵犯”。⁹⁸⁹ 这反过来又将“防止国会利用其被授予的权力去违反包含在州宪法中的未列举的联邦权利”。⁹⁹⁰

Massey recognizes that his theory “is radical stuff,”⁸³ and also admits that the implementation of his theory would give rise to “a number of difficulties,” none of which, however, “are indisputably insuperable.”⁸⁴ The first difficulty is whether state-sourced positive rights protected by the Ninth Amendment “are a set of rights antecedent to the federal Constitution and, thus, effectively frozen in time and content, or whether such rights are a dynamic, evolving list that change as sentiment shifts within the states.”⁸⁵ Massey admits that there is much to be said for the static view, but ultimately concludes, albeit unsatisfactorily and confusingly,⁸⁶ that “a dynamic concept holds more promise.”⁸⁷ (Interestingly, in an earlier version of his theory, Massey rejected the dynamic concept in favor of the static, on the grounds that the “more radical” dynamic conception “poses enormous practical problems” that make it “hopelessly unworkable.”⁸⁸)

梅西认识到他的理论“是激进的东西”，⁹⁹¹ 并且也承认他的理论的实施会带来“许多困难”，

⁹⁸⁹ Ibid., at 124 – 25.
同上，第 124-125 页。

⁹⁹⁰ Ibid., at 124.
同上，第 124 页。

⁹⁹¹ Ibid., at 125.
同上，第 125 页。

然而，这些困难中没有一个“是无可争议地不可克服的”。⁹⁹²第一个难题是，第九修正案所保护的源自各州的积极权利是否“是一套先于联邦宪法的权利，因此在时间和内容上都是不定不变的，还是说这些权利是一个动态的、不断演变的列表，会随着各州的民意变化而改变”。⁹⁹³梅西承认，静态观点有很多可取之处，但最终得出的结论是，“动态概念更有前途”，⁹⁹⁴ 尽管这一结论并不令人满意，而且令人困惑。⁹⁹⁵ (有趣的是，在其理论的早期版本中，梅西摒弃了动态概念，而选择了静态概念，理由是“更激进”的动态概念“带来了巨大的实际问题”，使其“完全不可行”。⁹⁹⁶)

The dynamic view leads to further difficulties. For example, can these federalized, state-sourced rights be applied uniformly across the nation? Can such rights, once created, be altered or abolished by the states removing the rights from their constitutions?89 Massey grapples mightily with these and other thorny problems that his own theory has engendered. On the one hand, positive Ninth Amendment rights could be uniformly applied across the entire nation, what Massey terms the “national concept” of positive Ninth Amendment rights.⁹⁰ Where state constitutional norms conflict, however, the Court would have to decide which one to prefer, a job “of considerable difficulty and uncertainty.”⁹¹ As for whether these rights are permanent or not, Massey concludes, for reasons that are not made entirely clear, that once such rights are recognized, “they would presumably be immune from elimination as a constitutional right at the hands of the state polity that sowed the seed of the federal right.”⁹²

动态观点会导致进一步的困难。例如，这些联邦化的、源自各州的权利能够在全国范围内统一适用吗？一旦这些权利被创设出来，各州能够通过从其宪法中删除这些权利

⁹⁹² Ibid., at 128.

同上，第 128 页。

⁹⁹³ Ibid., at 129.

同上，第 129 页。

⁹⁹⁴ See *ibid.*, at 128–31.

同上，第 128–131 页。

⁹⁹⁵ Ibid., at 131.

同上，第 131 页。

⁹⁹⁶ Massey, “Federalism and Fundamental Rights,” at p. 326 & n.109.

梅西，《联邦制与基本权利》，第 326 页及注释 109。

来改变或废除它们吗？⁹⁹⁷ 梅西竭力应对这些以及他自己的理论所引发的其他棘手问题。一方面，第九修正案中的积极权利可以在全国范围内统一适用，梅西将其称为第九修正案之积极权利的“全国性概念”。⁹⁹⁸ 然而，在各州宪法准则发生冲突的情况下，法院将不得不决定优先采用哪一个，这是一项“相当困难且具有不确定性的工作”。⁹⁹⁹ 至于这些权利是否是永久性的，梅西得出结论说，一旦这些权利得到承认，“它们作为一项宪法权利，大概就不会在播下联邦权利种子的州政体手中作为宪法权利而被取消”。¹⁰⁰⁰

On the other hand, it could be acknowledged that, because positive Ninth Amendment rights:

... have their origin in state constitutions, the substance of federal positive Ninth Amendment rights varies with the differing state constitutions. On this view, Ninth Amendment decisional law would develop a richly variegated pattern. A federal Ninth Amendment right of privacy would be recognized with respect to Californians and Alaskans, for example, because both states explicitly recognize such a right. In contrast, Missouri does not recognize that right. As a results, the citizens of each state would be uniquely and separately entitled to define the nature of their relationship with all of their governmental agents. They would be able to do this immediately (with the state via the state constitution) and ... mediatly (with the national government via the Ninth Amendment's incorporation of state constitutional guarantees).⁹³

另一方面，可以承认，由于第九修正案规定了积极的权利：

.....源于州宪法，联邦第九修正案积极权利的实质内容因不同的州宪法而异。根据这种观点，第九修正案的判决法将发展出丰富多彩的模式。例如，联邦第九修正案中

⁹⁹⁷ See Silent Rights, at 131 – 32.
《沉默的权利》，第 131-132 页。
⁹⁹⁸ Ibid., at 132.
同上，第 132 页。
⁹⁹⁹ Ibid.
同上。
¹⁰⁰⁰ Ibid., at 133.
同上，第 133 页。

的隐私权将被加利福尼亚人和阿拉斯加人所认可，因为这两个州都明确承认这种权利。相比之下，密苏里州并不承认这一权利。结果，每个州的公民都将独特且分别有权界定他们与所有政府机构之间关系的性质。他们能够立即（通过州宪法与州进行界定）以及……间接地（通过第九修正案纳入州宪法保障从而与国家政府进行界定）做到这一点。¹⁰⁰¹

Although this state-specific concept of positive Ninth Amendment rights would effectively result in a different federal constitutional law (with respect to the content of such rights) for each of the fifty states, Massey quite correctly points out that such a scheme is similar to the current federal practice, under *Erie Railroad Co. v. Tompkins*,⁹⁴ by which the federal courts in diversity cases follow the law of the appropriate state.⁹⁵ Further, under the state-specific concept of positive Ninth Amendment rights, unlike under the uniform national concept, a state could eliminate a positive Ninth Amendment right by eradicating it from its own constitution (although the reason for this difference in treatment is unclear).⁹⁶

虽然这种针对各州的第九修正案积极权利的概念实际上会导致 50 个州中每个州都有不同的联邦宪法法律（就这些权利的内容而言），但梅西非常正确地指出，这种方案类似于“伊利铁路公司诉汤普金斯案”¹⁰⁰²中的现行联邦做法，联邦法院在不同州公民之间的案件中遵循相应州的法律。¹⁰⁰³此外，与全国统一概念不同的是，根据各州具体的第九修正案积极权利概念，各州可以通过从自己的宪法中删除第九修正案积极权利

¹⁰⁰¹ Ibid., at 134.

同上，第 134 页。

¹⁰⁰² *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938; https://en.wikipedia.org/wiki/Erie_Railroad_Co._v._Tompkins).

伊利铁路公司诉汤普金斯案，304 U.S. 64（1938 年；网址：https://en.wikipedia.org/wiki/Erie_Railroad_Co._v._Tompkins）。

¹⁰⁰³ See *Silent Rights*, at 134, 136.

《沉默的权利》，第 134 页，136 页。

来消除该权利（尽管造成这种待遇差异的原因尚不清楚）。¹⁰⁰⁴

One of the most serious disadvantages of the national concept of positive Ninth Amendment rights, Massey points out, is the Fourteenth Amendment and the incorporation doctrine. The Bill of Rights, when enacted in 1791, was intended to bind only the federal government, not the states.⁹⁷ Under the incorporation doctrine, most of the guarantees of the Bill of Rights have been held to be applicable to the states by reading them into the Due Process Clause of the Fourteenth Amendment. Although it is unclear whether unenumerated rights applicable against the federal government through the Ninth Amendment would be applied against states via the incorporation doctrine, it is possible, and even likely, at least under the national conception of positive Ninth Amendment rights.⁹⁸ This would mean that positive Ninth Amendment rights would be applied against states by the federal government. In the state-specific conception of positive Ninth Amendment rights, this would amount to the federal government's forcing the state to abide by its own law. Massey sees little problem with this, since "[s]urely, a requirement that a government abide by its own law is the essence of due process."⁹⁹ (So formulated, Massey's conception of due process is bizarre, and the "surely" here is surely misplaced. I fail to see how abrogating federalism and transforming the states from sovereign entities into mere administrative units of the federal government has anything to do with due process.)

梅西指出，第九修正案中积极权利的全国性概念的一个最严重的缺点是第十四修正案和合并原则。1791 年颁布的《权利法案》旨在仅约束联邦政府，而非各州。¹⁰⁰⁵根据合并原则，《权利法案》中的大多数保障条款都被认为适用于各州，办法是将这些保障条款纳入第十四修正案的“正当程序条款”。虽然目前还不清楚通过第九修正案适用于联邦政府的未列举权利是否会通过合并原则适用于各州，但至少在第九修正案积极权利的全国性概念下，这是可能的，甚至是有可能的。¹⁰⁰⁶这将意味着联邦政府会针对各

¹⁰⁰⁴ See Ibid., at 136.

同上，第 136 页。

¹⁰⁰⁵ See U.S. Const. amend. XIV; Berger, The Fourteenth Amendment and the Bill of Rights; idem, Government by Judiciary; Silent Rights, at 138.

见《美国宪法》第十四修正案；劳尔·伯杰的《第十四条修正案与权利法案》；同上，《司法统治：第十四条修正案的转变》；《沉默的权利》，第 138 页。

¹⁰⁰⁶ See Silent Rights, at 138 – 41.

州适用第九修正案中的积极权利。根据各州对第九修正案积极权利的具体理解，这相当于联邦政府强迫各州遵守其自身的法律。梅西认为这没有什么问题，因为“当然，要求一个政府遵守其自身的法律是正当程序的本质”。¹⁰⁰⁷（如此表述的话，梅西的正当程序概念是怪异的，这里的“当然”肯定用错了地方。我看不出废除联邦制并将各州从主权实体转变为联邦政府的纯粹行政单位与正当程序有什么关系。）

Under the national conception, Massey notes, incorporating positive Ninth Amendment rights into the Fourteenth Amendment's Due Process Clause would be likely, and would result in the constitutional rights of one state being used to override contrary rights in other states.¹⁰⁰ For example, suppose Louisiana provides for a constitutional right of the fetus to life, while most other states provide for a constitutional right to abortion. Further suppose that the Supreme Court decides that the right to abortion is a positive Ninth Amendment right.¹⁰¹ In this case, the local decision of some states with respect to the abortion issue would be used to trump the decisions of other states. For this reason, "[t]he incorporation problem would be experienced most acutely if a national concept of positive Ninth Amendment rights were adopted. The state-specific concept ... avoids these problems."¹⁰² In the end, after much vacillating and consideration of the myriad and complicated pros and cons of each of the national and state-specific concepts of positive Ninth Amendment rights, Massey tentatively comes down in favor of the state-specific conception.¹⁰³

梅西指出，在全国性概念下，将第九修正案的积极权利合并纳入第十四修正案的正当程序条款将是可能的，这将导致一个州的宪法权利被用来推翻其他州的相反权利。¹⁰⁰⁸ 例如，假设路易斯安那州规定了胎儿生命权是一项宪法权利，而其他大多数州则规定了堕胎权是一项宪法权利。进一步假设最高法院裁定堕胎权是第九修正案中的一项积极权利。¹⁰⁰⁹ 在这种情况下，一些州在堕胎问题上的当地决定将被用来推翻其他州的决

《沉默的权利》，第 138-141 页。

¹⁰⁰⁷ Ibid., at 140.

同上，第 140 页。

¹⁰⁰⁸ See *ibid.*, at 142.

同上，第 142 页。

¹⁰⁰⁹ My own example, not Massey's.

我自己的例子，不是梅西的例子。

定。出于这个原因，“如果采用第九修正案积极权利的全国性概念，合并问题将最为尖锐地显现出来。针对各州的概念……避免了这些问题”。¹⁰¹⁰最后，经过反复斟酌，并考虑到第九修正案积极权利的全国性概念和针对各州概念的纷繁复杂的利弊之后，梅西暂时倾向于针对各州的概念。¹⁰¹¹

Before further assessing the merits of Massey's theory, I first turn to Massey's discussion, in chapter 6, of natural Ninth Amendment rights.¹⁰⁴

在进一步评估梅西理论的优点之前，我首先要谈谈梅西在第 6 章中对第九修正案自然权利的讨论。¹⁰¹²

五、第九条修正案的自然权利

NATURAL NINTH AMENDMENT RIGHTS

After the extensive discussion in chapter 5 concerning positive Ninth Amendment rights, Massey argues in chapter 6 that the Ninth Amendment should also be read to include natural rights, rights that are “prepolitical retained rights.”¹⁰⁵ (Although Massey asserts, inexplicably and without support, that “the fact is that there is probably no such

¹⁰¹⁰ Silent Rights, at 42.
《沉默的权利》，第 42 页。
¹⁰¹¹ See *ibid.*, at 137; 186. But see *ibid.*, at 138 (stating that “it is not clear that the best concept of the substantive content of positive Ninth Amendment rights is state-specific”).
见同上，第 137 页；第 186 页。但见同上，第 138 页（指出“目前尚不清楚第九修正案的积极权利的实质性内容的最佳概念是否因州而异”）。
¹⁰¹² In the remainder of chapter 5, Massey addresses many other issues related to implementing positive Ninth Amendment rights. For example, a state-specific positive Ninth Amendment right could be incompatible with a constitutional right based in federal law. See *ibid.*, at 147 – 73. In this case, Massey recommends that one right be chosen over another by examining the competing rights’ “constitutional fundamentality” and by engaging in a complicated balancing test. See *ibid.*
在第五章的其余部分，梅西讨论了许多与实施第九修正案的积极权利相关的其他问题。例如，因州而异的第九修正案的积极权利可能与基于联邦法律的宪法权利不兼容。见同上，第 147-173 页。在这种情况下，梅西建议通过考察相互竞争的权利的“宪法根本性”并进行复杂的平衡测试来在不同权利中做出选择。见同上。

thing.”¹⁰⁶) As in his theory of positive Ninth Amendment rights, Massey's theory of natural Ninth Amendment rights also bears some innovative features.

在第 5 章对第九修正案中的积极权利进行了广泛讨论之后，梅西在第 6 章中主张，第九修正案也应被解读为包括自然权利，即那些“先于政治的保留权利”。¹⁰¹³（尽管梅西莫名其妙且毫无根据地断言“事实是可能并不存在这样的东西”。¹⁰¹⁴）与他关于第九修正案积极权利的理论一样，梅西关于第九修正案自然权利的理论也具有某些创新性特征。

Massey begins by noting that we should not “expunge natural law from the Constitution”;¹⁰⁷ however, the attempt to inject natural law into constitutional adjudication must be tempered by the realization that “[n]atural law cannot be forced on an unwilling and disbelieving community.”¹⁰⁸ Also, natural Ninth Amendment rights are difficult to determine, and judges and legislators are inherently fallible “as the prophets of natural Ninth Amendment rights.”¹⁰⁹ Thus, there should be a role for natural Ninth Amendment rights, but they should given only “contingent” status, so as to provide “an iterative dialogue between the courts and legislatures whenever the subject is the content or scope of natural Ninth Amendment rights.”¹¹⁰ This iterative dialogue is meant to ensure that there is “a sufficiently widely shared cultural understanding to support recognition”¹¹¹ of an asserted natural right.

梅西首先指出，我们不应“将自然法从宪法中删除”；¹⁰¹⁵然而，在试图将自然法注入宪法裁决时，必须因认识到“自然法不能强加给一个不情愿且不相信的群体”而有所节制。¹⁰¹⁶此外，第九修正案中的自然权利很难确定，而法官和立法者作为第九修正案自然权利的“预言者”天生就容易犯错。¹⁰¹⁷因此，第九修正案中的自然权利应该发挥一

¹⁰¹³ Ibid., 187.

同上，第 187 页。

¹⁰¹⁴ Ibid.

同上。

¹⁰¹⁵ Ibid., at 182.

同上，第 182 页。

¹⁰¹⁶ Ibid.

同上。

¹⁰¹⁷ Ibid., at 188.

同上，第 188 页。

定的作用, 但它们应该只被赋予“或有”的地位, 以便在“每当涉及第九修正案自然权利的内容或范围这个主题时, 在法院和立法机构之间提供一种反复的对话”。¹⁰¹⁸这种反复的对话旨在确保存在“一种足够广泛共享的文化理解来支持对”¹⁰¹⁹所主张的自然权利的“认可”。

Massey notes that there are several devices to accomplish this dialogue and to make sure that any declared natural Ninth Amendment rights are merely contingent. For example, in recognizing any natural Ninth Amendment right, the Supreme Court could make it clear that its decision is provisional and subject to congressional override.¹¹² Alternatively, the Court could weaken its usual rule of stare decisis with respect to natural Ninth Amendment rights so that it is free “to change its mind if it realizes that its earlier recognition of a natural Ninth Amendment right was inappropriate.”¹¹³

梅西指出, 有几种方式可以实现这种对话, 并确保任何被宣布的第九修正案自然权利都只是或有性的。例如, 在认可任何第九修正案自然权利时, 最高法院可以明确表明其裁决是临时性的, 并服从国会的否决。¹⁰²⁰或者, 法院可以在涉及第九修正案自然权利方面弱化其通常的遵循先例原则, 以便在“如果法院意识到其先前对第九修正案自然权利的认可不恰当, 就可以自由地改变主意”。¹⁰²¹

As for identifying an asserted right in the first place as a natural Ninth Amendment right, Massey provides various methods that a court could use to make this decision. First, natural rights can be identified from the nature of rights already guaranteed (e.g., locating the right to privacy in the penumbra of other enumerated rights).¹¹⁴ Second, a presumption of validity can be given to any asserted right that is consistent with rights enumerated in the Constitution.¹¹⁵ The right would be recognized unless the government could overcome the presumption.¹¹⁶ Finally, to recognize a natural Ninth Amendment right, “[i]n addition to demanding consistency

¹⁰¹⁸ Ibid.; see also *ibid.*, at 182.

同上; 同上第 182 页。

¹⁰¹⁹ Ibid., at 193; see also *ibid.*, at 187.

同上, 第 193 页; 另见同上, 第 187 页。

¹⁰²⁰ See *ibid.*, at 189.

同上, 第 189 页。

¹⁰²¹ Ibid.

同上。

with enumerated rights and some logical nexus with the themes that inform the enumerated rights, we might also require that any claimed natural Ninth Amendment right be consistent with our dynamic history and traditions.”¹¹⁷

至于首先将所主张的权利确定为第九修正案中的自然权利，梅西提供了法院可以用来做出这一决定的各种方法。首先，可以从已经得到保障的权利的性质中确定自然权利（例如，在其他列举权利的边缘地带找到隐私权）。¹⁰²²其次，任何主张的权利，只要与《宪法》列举的权利相一致，就可以推定其有效。¹⁰²³除非政府能够推翻这种推定，否则该权利将被认可。¹⁰²⁴最后，要认可一项第九修正案中的自然权利，“除了要求与列举的权利相一致以及告知列举权利的主题有某种逻辑联系之外，我们可能还要求任何被主张的第九修正案自然权利与我们动态的历史和传统相一致”。¹⁰²⁵

Whereas Massey is not quite sure whether state-specific positive Ninth Amendment rights would be applicable to the states via the incorporation doctrine,¹¹⁸ he is not so hesitant regarding natural Ninth Amendment rights.¹¹⁹ Since natural rights are “prepolitical entitlements,” they are necessarily “fundamental” in the sense relevant to the Fourteenth Amendment.¹²⁰ Thus, any recognized natural Ninth Amendment rights presumably would be applicable against the states by the incorporation doctrine, since the Due Process Clause of the Fourteenth Amendment is seen as incorporating rights of sufficient fundamentality.¹²¹

梅西不太确定第九修正案中各州具体的积极权利是否可以通过合并原则适用于各州，¹⁰²⁶但他对第九修正案中的自然权利却不那么犹豫。¹⁰²⁷由于自然权利是“先于政治的权

¹⁰²² See *ibid.*, at 193.

同上第 193 页。

¹⁰²³ See *ibid.*

同上。

¹⁰²⁴ *Ibid.*, 194 - 95.

同上，第 194-195 页。

¹⁰²⁵ *Ibid.*, pp. 200-01.

同上，第 200-201 页。

¹⁰²⁶ See *ibid.*, at 186.

同上，第 186 页。

¹⁰²⁷ See *ibid.*

见同上。

利”，它们必然是第十四修正案意义上的“基本权利”。¹⁰²⁸因此，《宪法第九修正案》中任何公认的自然权利都可以通过合并原则适用于各州，因为《宪法第十四修正案》的正当程序条款被视为合并纳入了具有足够根本性的权利。¹⁰²⁹

六、梅西的第九修正案

MASSEY'S NINTH AMENDMENT

I have mentioned above some problems with Massey's constitutional cy pres theory.¹²² At this point, it is appropriate to address further weaknesses in Massey's theory. Most seriously, Massey's argument that the Ninth Amendment actually does incorporate state-sourced rights is unconvincing.¹²³ The contention seems to be pulled out of thin air, not rooted in the text or history of the Constitution. The Ninth Amendment does not state this, for example, and even if it were understood in 1791 to protect the set of natural rights, some of which happened to also be enumerated at the time in state constitutions, there is no reason to think that new positive rights subsequently added to various state constitutions were to be included in the original set of natural rights contemplated by the Ninth Amendment.

我在上文提到了梅西的宪法拟制理论的一些问题。¹⁰³⁰在这一点上，有必要进一步指出梅西理论中的不足之处。最为严重的是，梅西关于第九修正案实际上确实包含了源于各州的权利的论点缺乏说服力。¹⁰³¹这一论点似乎是凭空捏造出来的，并非植根于《宪

¹⁰²⁸ Ibid.

同上。

¹⁰²⁹ See *ibid.*

见同上。

¹⁰³⁰ See text accompanying notes 44 – 71, above.

见上文注释 44-71 的相关内容。

¹⁰³¹ Thomas McAfee has concluded that:

Massey’ s claim that the Ninth Amendment secures state-created rights as affirmative limitations on federal power had not been advanced by a single commentator between 1789 and the 1980s. This reading, moreover, presents an incoherent amalgamation of diametrically opposed readings of the text and history of the Ninth Amendment. Thomas B. McAfee, “Federalism and the Protection of Rights: The Modern Ninth Amendment’ s Spreading Confusion,” *Brigham Young U. L. Rev.* 1996, no. 2 (1996;

法》文本或历史。例如，第九修正案并没有说明这一点，即使在 1791 年被理解为保护一系列自然权利，其中一些权利当时恰好也被列举在州宪法中，也没有理由认为后来添加到各州宪法中的新的积极权利会被包含在第九修正案最初所设想的一系列自然权利之中。

Furthermore, regardless of the merits of Massey's reasoning in support of the thesis that the Ninth Amendment protects state-sourced unenumerated rights, it is not clear how this reasoning is strengthened by appeal to the constitutional cy pres doctrine.¹²⁴ Both his theories of natural and positive Ninth Amendment rights seem to be supported by quite respectable (though ultimately unpersuasive) reasoning that is independent of cy pres-type reasoning. Indeed, Massey's constitutional cy pres doctrine seems to be more of an afterthought, a sophisticated justification or overarching framework added after the fact—to his original insight that the Ninth Amendment might be read to directly incorporate state-sourced rights.

此外，无论梅西支持第九修正案保护源于各州的未列举权利这一论点的推理有何优点，都不清楚通过诉诸宪法近似原则如何能加强这种推理。¹⁰³²他关于第九修正案自然权利和积极权利的理论似乎都得到了相当合理（尽管最终缺乏说服力）的推理的支持，这些推理独立于拟制类型的推理。实际上，梅西的宪法近似原则似乎更像是事后的想法，是在事后添加的一种复杂的正当理由或总体框架——以支持他最初的见解，即第九修正案可能被解读为直接包含源于各州的权利。

Additionally, even if we accept Massey's contention that the Ninth Amendment ought to incorporate state-sourced rights, why would this include only rights explicitly

<https://digitalcommons.law.byu.edu/lawreview/vol1996/iss2/3/>): 351 - 88, p. 374.

托马斯·麦卡菲得出结论：

“在 1789 年至 20 世纪 80 年代期间，没有一个评论者提出过梅西的观点，即第九修正案将州所创设的权利作为对联邦权力的积极限制加以保障。此外，这种解读呈现出对第九修正案的文本和历史的完全相反的解读的不连贯混合。”

托马斯·B·麦卡菲，《联邦制与权利保护：现代第九修正案日益扩散的困惑》，《杨百翰大学法律评论》1996 年第 2 期（1996 年；网址：<https://digitalcommons.law.byu.edu/lawreview/vol1996/iss2/3/>）：351-388 页，第 374 页。

¹⁰³² See note 61, above, and accompanying text.

见上文注释 61 及相关内容。

enumerated in state constitutions? As in the federal system, some rights might be protected by the states in other ways—by decisions of their state supreme courts, by legislation, by common law, or even by mere state practice.¹²⁵ In Louisiana, for example, a civil-law jurisdiction,¹²⁶ its Civil Code, according to the civilian tradition, is treated more like a constitution than like mere legislation.¹²⁷ Massey's focus on state constitutions does avoid the seemingly insurmountable problems that his theory would face if all of these potential state sources of rights were to be considered, but the focus seems arbitrary, nonetheless.

此外，即使我们接受梅西的论点，即第九修正案应合并纳入源自各州的权利，但为什么这只包括州宪法中明确列举的权利呢？与联邦制度一样，一些权利可能会以其他方式受到各州的保护——通过各州最高法院的判决、立法、普通法，甚至仅仅是通过各州的惯例。¹⁰³³例如，在路易斯安那州，这是一个大陆法系的司法管辖区，¹⁰³⁴根据大陆法系的传统，其《民法典》更像是一部宪法，而不仅仅是普通立法。¹⁰³⁵梅西将重点放在州宪法上，确实避免了他的理论在考虑所有这些潜在的州权利来源时所面临的看似无法解决的问题，但这一重点似乎仍然是武断的。

Massey's theory is also worrisome because it gives natural rights relatively short shrift in comparison to positive rights; Massey's discussion of the latter is much longer than

¹⁰³³ Indeed, as Massey himself points out, “Positive rights had their source in state common, constitutional, and statutory law.” *Silent Rights*, at 118.

事实上，正如梅西自己指出的那样，“积极权利来源于州普通法、宪法和成文法。”《沉默的权利》，118页。

¹⁰³⁴ Puerto Rico is also a civil-law jurisdiction, although it is not, as of this writing, a state. 波多黎各也是一个大陆法系司法管辖区，不过在撰写本文时，它不是一个州。

¹⁰³⁵ In civil-law systems, a code is more like a constitution, which changes only rarely, relative to legislation. See Jean Louis Bergel, “Principal Features and Methods of Codification,” *La. L. Rev.* 48, no. 5 (May 1988): <https://digitalcommons.law.lsu.edu/lalrev/vol48/iss5/3/>: 1073–1097, p. 1079; Vernon Palmer, “The Death of a Code—The Birth of a Digest,” *Tul. L. Rev.* 63, no. 2 (December 1988): 221–64, p. 235.

在大陆法系中，法典更像是一部宪法，相对于立法而言，它很少发生变化。见让·路易·贝尔热尔，《法典编纂的主要特征和方法》，《路易斯安那法律评论》第48卷第5期（1988年5月；网址：<https://digitalcommons.law.lsu.edu/lalrev/vol48/iss5/3/>）：1073-1097页，第1079页；弗农·帕尔默，《一部法典之死——一部摘要之诞生》，《杜兰法律评论》第63卷第2期（1988年12月）：221-264页，第235页。

the former.¹²⁸ Also, unlike positive Ninth Amendment rights, which would presumably be very large in number due to the potentially unlimited number of rights provided in state constitutions, Massey's natural Ninth Amendment rights would likely be very few in number.¹²⁹ Natural Ninth Amendment rights are granted reluctantly, and have only contingent status.¹³⁰ Massey does not similarly insist that the Court's recognition of positive Ninth Amendment rights be merely contingent. Further, Massey provides no method for resolving conflicts between incompatible natural and positive Ninth Amendment rights, and, indeed, does not even allude to the possibility of such a conflict. This is inexplicable, given Massey's extended discussions of how to resolve potential incompatibilities between Ninth Amendment rights and other (federal) constitutional rights.¹³¹

梅西的理论也令人担忧，因为与积极权利相比，它对自然权利的重视程度相对较低；梅西对后者的讨论比前者要长得多。¹⁰³⁶此外，与第九修正案的积极权利不同，由于各州宪法规定的权利数量可能是不受限的，因此积极权利的数量可能会非常大，梅西的第九修正案自然权利的数量可能会非常少。¹⁰³⁷第九修正案中的自然权利是勉强被赋予的，并且只具有或有地位。¹⁰³⁸梅西并没有同样坚持法院对第九修正案积极权利的承认仅仅是或有性的。此外，梅西没有提供任何方法来解决第九修正案中不相容的自然权利与积极权利之间的冲突，事实上，梅西甚至没有提到这种冲突的可能性。鉴于梅西对如何解决第九修正案权利与其他（联邦）宪法权利之间潜在的不相容问题进行了广泛的讨论，这一点令人费解。¹⁰³⁹

Consider, for example, the following conflict between natural and positive rights. Assume that the original understanding of Ninth Amendment rights is largely consistent with the libertarian conception of rights as being strictly negative rights, that is, rights

¹⁰³⁶ See Silent Rights, at 218.

见《沉默的权利》，第 218 页。

¹⁰³⁷ See *ibid.*

见同上。

¹⁰³⁸ Query: Under this approach, would previously recognized unenumerated rights suddenly become merely contingent?

问题：在这种方法下，以前被认可的未列举权利会突然仅仅变成偶然的吗？

¹⁰³⁹ See, e.g., Silent Rights, at 142 – 73, 193 – 94.

例如，见《沉默的权利》，第 142-173 页、193-194 页。

against aggression, the initiation of force.¹³² In this case, one could very well argue that there is a natural Ninth Amendment right against having one's property forcibly taken by the government and redistributed as welfare benefits to others. Now suppose that California enshrines various welfare rights in its constitution—a right to education, to housing, to a minimum income, and the like (in contravention to natural law). Under Massey's doctrine of positive Ninth Amendment rights, this could also result in a federal Ninth Amendment right to these things, at least for California citizens. This would be a disastrous result, if only because an illegitimate conception of rights, formerly localized to California—and such localization of policy is one of the benefits of federalism—is now imposed on the federal government.

例如，考虑以下自然权利与积极权利之间的冲突。假设对第九修正案权利的最初理解与自由意志主义的权利概念基本一致，即权利是严格的消极权利，即反对侵犯、发动武力的权利。¹⁰⁴⁰在这种情况下，人们完全可以说，第九修正案规定了一项自然权利，即反对政府强行剥夺个人财产，并将其作为福利重新分配给他人。现在假设加利福尼亚州在其宪法中规定了各种福利权——受教育权、住房权、最低收入权等等（违反自然法）。根据梅西的第九修正案积极权利理论，这也可能导致产生一种联邦层面的第九修正案权利来获得这些东西，至少对加州公民而言是如此。这将是一个灾难性的结果，如果只是因为一个不合法的权利概念，以前仅限于加利福尼亚州——这种政策的本地化是联邦制的好处之一——现在强加给了联邦政府。

Even worse, under the national concept of positive Ninth Amendment rights, the federal government (acting through its agent, the Supreme Court) could adopt this welfare right as a positive Ninth Amendment right of national scope, and force all the states to provide education and welfare rights, an even worse attack on the principle of federalism and an illegitimate result to boot (since there are, in truth, no such welfare rights). The only possible saving grace to this situation would be if the courts were to find that the natural Ninth Amendment right to not have one's property expropriated and redistributed to others somehow outweighed the positive Ninth Amendment welfare right. But Massey does not address how such potential conflicts between natural

¹⁰⁴⁰ See note 4, above (discussing the libertarian conception of rights and Rothbard's definition of aggression).
见上文注释4（讨论了自由意志主义的权利概念以及罗斯巴德对侵犯的定义）。

and positive Ninth Amendment rights would be resolved; in any event, it is contrary to principles of federalism to allow the federal government to resolve such conflicts. Additionally, lest it be thought that my interpretation that Massey's theory would yield positive rights is paranoid, it should be noted that Massey himself explicitly states that the Ninth Amendment, when interpreted under today's conceptions of rights, might require non-negative rights such as welfare rights.¹³³

更糟糕的是，根据第九修正案积极权利的全国性概念，联邦政府（通过其代理人--最高法院）可以将这种福利权利作为全国范围的第九修正案积极权利，并强迫所有州提供教育和福利权利，这是对联邦制原则的更严重的攻击，而且是非法的结果（因为事实上并不存在这种福利权利）。在这种情况下，唯一可能的补救办法是，如果法院认定第九修正案中的自然权利，即不允许自己的财产被征用并重新分配给他人的权利，在某种程度上超过了第九修正案积极的福利权利。但是，梅西并未提及如何解决第九修正案中自然权利与积极权利之间的潜在冲突；无论如何，允许联邦政府解决此类冲突有悖于联邦制原则。此外，为了避免有人认为我关于梅西的理论将产生积极权利的解释是偏执的，应该指出的是，梅西本人明确表示，根据当今的权利概念解释第九修正案时，可能需要非消极权利，如福利权利。¹⁰⁴¹

In my view, if the Ninth Amendment is to be judicially enforceable, it is unnecessary to use a *cy pres*-type theory or to include positive rights in the Ninth Amendment. Rather, it ought to be recognized that the Ninth Amendment essentially protects unenumerated natural rights as long as the natural rights can be identified with sufficient certainty. By now, this reading of the Ninth Amendment has been adequately established.¹³⁴ For example, as Randy Barnett has pointed out, even if the Framers' view of natural rights was incorrect—even if there are no natural rights—it is relevant that the Framers believed in natural rights and embodied a certain conception of these rights in the Constitution. Thus, anyone who "allow[s] a role for [the] Framers' intent" and who "view[s] the Constitution as a kind of contract entered into at the time of ratification" should "make some effort to discern and protect at least the kinds of rights the Framers had in mind when they ratified the Ninth Amendment."¹³⁵

¹⁰⁴¹ See *Silent Rights*, at 128.
见《沉默的权利》，第 128 页。

在我看来，如果第九修正案要在司法上可执行，就没有必要使用拟制类型的理论也没有必要将积极权利纳入第九修正案。相反，我们应该认识到，第九修正案本质上保护的是未列举的自然权利，只要这些自然权利能够被足够确定地识别出来。到目前为止，对第九修正案的这种解读已经充分确立。¹⁰⁴²例如，正如兰迪·巴内特（Randy Barnett）所指出的，即使制宪者对自然权利的看法不正确——即使不存在自然权利——制宪者相信自然权利并在宪法中体现了对这些权利的某种相关概念。因此，任何“允许[制宪者]的意图发挥作用”以及“将《宪法》视为在批准时签订的一种契约”的人，都应该“做出一些努力，至少辨别和保护制宪者在批准第九修正案时所考虑的权利种类”。¹⁰⁴³

¹⁰⁴² See, e.g., sources cited at note 7, above. For an (unconvincing) opposing view, see Raoul Berger, “The Ninth Amendment, As Perceived by Randy Barnett,” *Northwestern U. L. Rev.* 88, no. 4 (1994): 1508–36.

例如，见上文注释 7 中引用的资料。对于一种（没有说服力的）相反观点，见劳尔·伯杰，《兰迪·巴内特所理解的第九修正案》，《西北大学法律评论》第 88 卷第 4 期（1994 年）：1508-1536 页。

¹⁰⁴³ Randy E. Barnett, “Introduction: James Madison’s Ninth Amendment,” in Barnett, ed., *The Rights Retained by the People*, vol. 1, at 1, 33; see also note 7, above (discussing Randy Barnett’s “constitutional legitimacy” argument for judicial enforcement of unenumerated Ninth Amendment rights). There is another argument in favor of protecting rights unenumerated by the Ninth Amendment. The Constitution was ratified in 1789 only on the understanding that a bill of rights would be added. However, since the Bill of Rights was not completed and adopted until 1791, at the time of ratification, the rights that were to be added by a bill of rights were unspecified. Since these rights were unspecified, but the Constitution was initially conceived as being limited by whatever these rights were, merely enumerating some of these rights at a later time in the Bill of Rights does not necessarily exhaust all the background rights that could have been enumerated in the Bill of Rights (i.e., there is no guarantee that the Bill of Rights captured all the enumerated rights on which the Constitution’s ratification was dependent). Thus, for the ratification to be effective and for the Constitution to have validity, the rights enumerated in the Bill of Rights cannot be seen as an exhaustive list. For a complementary argument, see Randy E. Barnett, “Reconceiving the Ninth Amendment,” *Cornell L. Rev.* 74, no. 1 (1988; www.randybarnett.com/pre-2000): 1–42, p. 29 (“Only a handful of the many rights proposed by state ratification conventions were eventually incorporated in the Bill of Rights. The Ninth Amendment was offered precisely to ‘compensate’ these critics for the absence of an extended list of rights.”). 兰迪·E·巴内特，《导论：詹姆斯·麦迪逊的第九修正案》，载于巴内特编，《人民保留的权利》第 1 卷，第 1、33 页；另见上文注释 7（讨论兰迪·巴内特关于司法执行未列举的第九修正案权利的“宪法合法性”论点）。还有另一个支持保护第九修正案未列举权利的论点。1789 年宪法仅在将添加权利法案这一理解的基础上获得批准。

In identifying what these rights are, the various techniques proposed by Massey, Barnett, and others are useful. It seems reasonable that one way to discover the content of the natural rights included within the scope of the Ninth Amendment would be to examine the rights guaranteed by state constitutions, especially since, as Massey points out, protection of natural rights was to be left primarily to the states.¹³⁶ However, in this view, state-sourced rights are merely evidence of which natural rights are protected by the Ninth Amendment. Whether these rights are dynamic and ever-evolving and growing, as Massey maintains,¹³⁷ or static is another question, but I am unconvinced by Massey's argument that both positive and natural Ninth Amendment rights should be envisioned as changing with the times. It is a written constitution that we are interpreting, after all.

在确定这些权利是什么时，梅西、巴内特和其他人提出的各种方法都很有用。要发现第九修正案所包含的自然权利的内容，一个合理的方法似乎是研究各州宪法所保障的权利，特别是正如梅西所指出的，自然权利的保护主要由各州负责。¹⁰⁴⁴然而，这种观点认为，国家来源的权利只是第九修正案保护哪些自然权利的证据。至于这些权利是动态的、不断演变和增长的，正如梅西所坚持的那样，¹⁰⁴⁵或者是静态的，这是另一个问题，但梅西认为第九修正案中的积极权利和自然权利都应被视为与时俱进的论点并不能令我信服。毕竟，我们正在解释的是一部成文宪法。

Further, given that the modern conception of rights and legitimate state power is thoroughly statist, the Framers' conception of rights is vastly preferable, at least for

然而，由于权利法案直到 1791 年才完成并被采纳，在批准之时，将由权利法案添加的权利是未具体说明的。由于这些权利未被具体说明，但宪法最初被认为受到无论这些权利是什么的限制，仅仅在后来的权利法案中列举其中一些权利并不一定穷尽权利法案中可能列举的所有背景权利（即，不能保证权利法案囊括了宪法批准所依赖的所有列举权利）。因此，为了使批准有效且宪法具有效力，权利法案中列举的权利不能被视为详尽无遗的清单。对于一个补充性的论点，见兰迪·E·巴尼特，《重新构想第九修正案》，《康奈尔法律评论》第 74 卷第 1 期（1988 年；www.randybarnett.com/pre-2000）：1-42 页，第 29 页（“州批准大会提出的众多权利中只有少数最终被纳入权利法案。第九修正案正是为了‘补偿’这些批评者，因为缺少一个扩展的权利清单。”）。

¹⁰⁴⁴ See *Silent Rights*, at 56.

见《沉默的权利》，第 56 页。

¹⁰⁴⁵ See text accompanying notes 132 - 133, above.

见上文注释 132-133 的相关内容。

anyone who favors individual rights. For example, as mentioned above, the dynamic view of unenumerated rights might result in the cross-pollination and thus spreading of (illegitimate) welfare-type rights.¹³⁸ Interpreting the Constitution in accordance with its original, that is, static, understanding is therefore preferable to reading socialist rights into it, as it is a more honest interpretation and also more likely to be in accord with individual rights.

此外，鉴于现代权利和合法的国家权力概念是彻底的国家主义，因此，至少对任何赞成个人权利的人来说，制宪者的权利概念是非常可取的。例如，如上所述，对未列举权利的动态观点可能会导致（不合法的）福利型权利的交叉影响并进而传播开来。¹⁰⁴⁶因此，按照宪法的原始理解，即静态理解来解释宪法，比将社会主义权利解读为宪法更为可取，因为这样的解释更为诚实，也更有可能符合个人权利。

Finally, there is another serious weakness in Massey’s theory. As Massey readily acknowledges, one of the original purposes of the Constitution was federalism, the sovereignty of each state.¹³⁹ Indeed, one of Massey’s reasons to support constitutional cy pres and positive Ninth Amendment rights is to help limit the powers (though indirectly, by trumping these powers with Ninth Amendment rights) that the federal government has illegitimately usurped over the years.¹⁴⁰ Yet there can be little doubt that, in this age of an untrustworthy federal government and Supreme Court, expanding the Court’s jurisdiction to declare rights would result in the further weakening of federalism.¹⁴¹

最后，梅西的理论还有另一个严重的缺陷。正如梅西欣然承认的那样，宪法的初衷之一是联邦制，即每个州的主权。¹⁰⁴⁷事实上，梅西支持宪法近似原则和第九修正案积极

¹⁰⁴⁶ See text accompanying notes 83 – 88, above.
见上文注释 83- 88 的相关内容。

¹⁰⁴⁷ See Silent Rights, at 56; see also Raoul Berger, *Federalism: The Founders’ Design* (Norman, Okla.: University of Oklahoma Press, 1987); Bork, *The Tempting of America*, at 52 – 53; John C. Calhoun, *Union and Liberty: The Political Philosophy of John C. Calhoun*, Ross M. Lence, ed. (Indianapolis, Ind.: Liberty Fund, 1992) (discussing the advantages of federalism); Paul K. Conkin, *Self-Evident Truths: Being a Discourse on the Origins & Development of the First Principles of American Government—Popular Sovereignty, Natural Rights, and Balance & Separation of Powers* (Bloomington, Ind.: Indiana Univ. Press, 1974); Martin H. Redish, *The Constitution as Political Structure* (New

权利的原因之一，是为了帮助限制联邦政府多年来非法篡夺的权力（尽管是间接地通过用第九修正案权利来胜过这些权力）。¹⁰⁴⁸然而，毫无疑问，在联邦政府和最高法院都不值得信任的时代，扩大法院宣布权利的管辖权将导致联邦制的进一步削弱。¹⁰⁴⁹

Massey admits that Ninth Amendment rights would likely be applied to the states by the incorporation doctrine.¹⁴² But the incorporation doctrine is one reason why Massey's theory should be rejected, for as long as that is in place, further federal judicial activism only imperils our rights, leading to further erosion of federalism by making state policy subject to federal control. One would think that Massey, since he is obviously willing to urge an innovative interpretation of the Ninth Amendment, would have used his constitutional *cy pres* doctrine, or at least ordinary reasoning, to build a rejection of the incorporation doctrine into his theory. Federalism, in the American constitutional system, is essential to the protection of individual rights, both enumerated and unenumerated ones.¹⁴³ The greatest violator of individual rights, even if measured by such a simple parameter as the overall level of taxation, is the federal leviathan; in comparison, the states are minarchist utopias. Although Massey's proposal is intended to increase the protection of individual rights, it involves ceding

York: Oxford University Press, USA, 1995); For Massey's own views of the importance of federalism, see Massey, "Federalism and Fundamental Rights."

见《沉默的权利》，第56页；另见劳尔·伯杰，《联邦制：国父们的设计》（俄克拉荷马州诺曼：俄克拉荷马大学出版社，1987年）；博克，《美国的诱惑》，第52-53页；约翰·C·卡尔霍恩，《联邦与自由：约翰·C·卡尔霍恩的政治哲学》，罗斯·M·伦斯编（印第安纳波利斯，印第安纳州：自由基金，1992年）（讨论联邦制的优势）；保罗·K·康金，《不言而喻的真理：关于美国政府首要原则——人民主权、自然权利以及权力制衡与分立的起源与发展的论述》（印第安纳州布卢明顿：印第安纳大学出版社，1974年）；马丁·H·雷迪什，《作为政治结构的宪法》（美国纽约：牛津大学出版社，1995年）；关于梅西自己对联邦制重要性的观点，见梅西，《联邦制与基本权利》。

¹⁰⁴⁸ See, e.g., notes 81 - 82, above, and accompanying text.

例如，见上文注释 81-82 及相关内容。

¹⁰⁴⁹ See, e.g., Marshall L. DeRosa, *The Ninth Amendment and the Politics of Creative Jurisprudence: Disparaging the Fundamental Right of Popular Control* (New Brunswick, N.J.: Transaction, 1996).

例如，见马歇尔·L·德罗萨，《第九修正案与创造性法理学的政治：贬低人民控制的基本权利》（新泽西州新不伦瑞克：Transaction，1996年）。

more power to the federal government to control and oversee the states and to define what rights are to apply at which level of government.¹⁴⁴ As Ludwig von Mises wisely observed in a related context, “No socialist author ever gave a thought to the possibility that the abstract entity which he wants to vest with unlimited power—whether it is called humanity, society, nation, state, or government—could act in a way of which he himself disapproves.”¹⁴⁵ In other words, the central government cannot be trusted to safely exercise any extra power that is given to it, even if the purpose of the power is ostensibly to protect rights. Accordingly, as Paul Conkin has noted, “Ironically, the tremendous expansion of federal power in all areas, including the expanded role in protecting individual rights, has finally transformed the often fantastic eighteenth-century fears of a federal leviathan into prophetic admonitions.”¹⁴⁶ Handing more power to the federal government, as Massey’s theory unfortunately does, would ill-serve the original understanding and purpose of the Ninth Amendment.

梅西承认, 第九修正案的权利很可能会通过合并原则适用于各州。¹⁰⁵⁰但是, “合并原则”是梅西的理论应当被摒弃的原因之一, 因为只要“合并原则”还在, 进一步的联邦司法能动主义就只会危及我们的权利, 使州政府的政策受制于联邦的控制, 从而导致联邦制的进一步削弱。人们会认为, 既然梅西显然愿意对第九修正案进行创新性的解释, 那么他就会利用其宪法近似原则, 或者至少运用普通的推理, 在他的理论中构建对“纳入原则”的拒绝。在美国宪法体系中, 联邦制对于保护个人权利至关重要, 包括已列举和未列举的权利。¹⁰⁵¹最大的个人权利侵犯者, 即使仅以总体税收水平这样一个简单的参数来衡量, 也是联邦这个庞然大物; 相比之下, 各州则是小政府主义的乌托邦。尽管梅西的提议旨在加强对个人权利的保护, 但它涉及将更多权力让渡给联邦政府, 以控制和监督各州, 并确定哪些权利适用于哪个级别的政府。¹⁰⁵²正如路德维希·冯·米

¹⁰⁵⁰ See text accompanying notes 97 – 103, 118 – 121, above.
见上文注释 97-103、118-121 的相关内容。

¹⁰⁵¹ See note 140, above.
见上文注释 140。

¹⁰⁵² See note 94, above, and accompanying text; see also McAfee, “Federalism and the Protection of Rights,” at 386:
Recognizing that the Supremacy Clause and structural analysis cannot do all of the work required to avoid unwelcome outcomes of his states’ rights thesis, Massey eventually simply delegates to the Supreme Court the task of preventing potential state abuses

塞斯（Ludwig von Mises）在相关背景下明智地指出的那样：“没有一个社会主义作者曾想到过这样一种可能性，即他想要赋予无限权力的那个抽象实体——无论是被称为人类、社会、民族、国家还是政府——会以一种他自己不赞成的方式行事。”¹⁰⁵³换句话说，我们不能相信中央政府能够安全地行使赋予它的任何额外权力，即使权力的目的表面上是为了保护权利。因此，正如保罗·康金（Paul Conkin）所指出的，“具有讽刺意味的是，联邦权力在各个领域的巨大扩张，包括在保护个人权利方面作用的扩大，最终将十八世纪常常看似荒谬的对联邦利维坦的恐惧变成了具有预言性的告诫”。¹⁰⁵⁴正如梅西的理论不幸所做的那样，将更多权力交给联邦政府，将不利于第九修正案的原意和目的。

Unlike the Supreme Court, most modern constitutional scholars, and other intellectuals, Massey takes the Ninth Amendment seriously. He has written a provocative study of the Ninth Amendment, but, due to the problems with Massey’s thesis detailed above, I believe a better approach to the Ninth Amendment may be found in the writings of other scholars, such as Randy Barnett¹⁴⁷ and Marshall DeRosa.¹⁴⁸

与最高法院、大多数现代宪法学者和其他知识分子不同，梅西严肃对待第九修正案。他撰写的《第九修正案》研究报告极具启发性，但由于上述梅西论点中存在的问题，我认为在其他学者的著作中可以找到对第九修正案更好的解读方法，例如兰迪·巴内

that such a guarantee might permit.
见上文注释 94 及相关内容；另见麦卡菲《联邦制与权利保护》第 386 页：
梅西认识到至上条款和结构分析无法完成避免其州权理论可能产生的不受欢迎结果所需的所有工作，最终干脆将防止这种保障可能允许的潜在州滥用行为的任务委托给了最高法院。
¹⁰⁵³ Ludwig von Mises, *Human Action: A Treatise on Economics*, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; <https://mises.org/library/human-action-0>), p. 692.
路德维希·冯·米塞斯，《人的行动：经济学专论》，学者版（阿拉巴马州奥本：米塞斯研究院，1998 年；网址：<https://mises.org/library/human-action-0>），第 692 页。
¹⁰⁵⁴ Conkin, *Self-Evident Truths*, at 141.
康金，《不言而喻的真理》，第 141 页。

特¹⁰⁵⁵和马歇尔·德罗萨¹⁰⁵⁶。

七、结论：宪法解释还是政治理论？

CONCLUSION: CONSTITUTIONAL INTERPRETATION OR POLITICAL THEORY?

If Massey is correct that it is too late to limit the federal government to its proper powers, it is unlikely that the Court will try to, or even want to, accomplish the same thing by trumping those powers with Ninth Amendment rights. The truth is, and I doubt Massey would demur, that Massey’s theory stands no realistic chance of being adopted by the Supreme Court. Most likely, from the Court’s point of view, it is too radical, too academic, and at least has the potential of imposing some limits on federal power. So Massey’s theory is not really a theory of how the Constitution should be interpreted. What, then, is it? In truth, it is a proposal to amend the Constitution.

如果梅西的观点是正确的，即把联邦政府限制在其适当的权力范围内为时已晚，那么法院就不太可能试图，甚至不希望通过用第九修正案的权利压倒这些权力来达到同样的目的。事实是，梅西的理论不可能被最高法院采纳，而且我怀疑梅西会对此表示反对。从法院的角度来看，这很可能过于激进、过于学术化，至少有可能对联邦权力施加一些限制。因此，梅西的理论并不是真正关于宪法应如何解释的理论。那么，它是什么呢？实际上，它是一项修改宪法的提案。

There are, however, better and simpler alternatives available — alternatives that strengthen, rather than weaken, federalism. One such alternative is that of Marshall DeRosa, as explained in his recent book *The Ninth Amendment and the Politics of Creative Jurisprudence*.¹⁴⁹ DeRosa proposes an ingenious constitutional amendment, which would read as follows:

When a national majority of each State’s chief judicial official declares a decision by the

¹⁰⁵⁵ See sources cited note 7, above.
见上文注释 7 中引用的资料。
¹⁰⁵⁶ See DeRosa, *The Ninth Amendment and the Politics of Creative Jurisprudence*.
见德罗萨的《第九修正案与创造性法理学的政治》。

*U.S. Supreme Court to be inconsistent with the U.S. Constitution, the said decision shall thereby be negated and precedent restored. The States' designated chief judicial officers shall convey their declarations to the U.S. Solicitor General, who in turn will notify the Chief Justice of the U.S. Supreme Court to take appropriate measures consistent with this amendment.*¹⁵⁰

然而，有更好、更简单的替代方案可供选择——这些替代方案会加强而不是削弱联邦制。其中一个替代方案是马歇尔·德罗萨（Marshall DeRosa）提出的，正如在其最近出版的《第九修正案和创造性法理学的政治学》一书中所解释的那样。¹⁰⁵⁷德罗萨提出了一项巧妙的宪法修正案，其内容如下：

当各州首席司法官员的全国多数宣布美国最高法院的裁决不符合《美国宪法》时，上述裁决将被否定，先例将得到恢复。各州指定的首席司法官员应将他们的声明传达给美国司法部长，司法部长进而将通知美国最高法院首席大法官采取与本修正案一致的适当措施。¹⁰⁵⁸

As DeRosa explains, this would allow controversial Supreme Court decisions to be overturned “more expeditiously and competently” than at present.¹⁵¹ The states would not have to “resort[] to a cumbersome amendment process or the national

¹⁰⁵⁷ Ibid.

同上。

¹⁰⁵⁸ Ibid., at 192. This proposed amendment is preferable to an amendment recently suggested by Robert Bork, which would have little beneficial effect on federalism. See Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: ReganBooks, 1996), 117 (proposing a constitutional amendment to make “any federal or state court decision subject to being overruled by a majority vote of each House of Congress.”).

同上，第 192 页。这个拟议的修正案比罗伯特·博克最近提出的修正案更可取，博克的修正案对联邦制几乎没有什么有益影响。见罗伯特·H·博克，《滑向蛾摩拉城：现代自由主义与美国的衰落》（纽约：ReganBooks，1996 年），第 117 页（提议一项宪法修正案，使“任何联邦或州法院的判决都可以被国会两院的多数票否决”）。

congress that is significantly detached from states' interests."152 Also, the amendment would have a chilling effect on the Supreme Court, making it more reluctant to issue unreasoned or unconstitutional decisions,153 just as lower courts are reluctant to issue decisions that may be overturned by higher courts. In essence, this amendment would "heighten popular control over unenumerated rights jurisprudence, and to that extent a significant portion of originalism would be recovered."154

正如德罗萨所解释的，这将使有争议的最高法院裁决能够比目前“更迅速、更妥善地”被推翻。¹⁰⁵⁹各州将不必“诉诸繁琐的修宪程序或与各州利益严重脱节的国会”。¹⁰⁶⁰此外，该修正案还将对最高法院产生寒蝉效应，使其更不愿做出不合理或违宪的判决，¹⁰⁶¹正如下级法院不愿做出可能被上级法院推翻的判决一样。从本质上讲，该修正案将“加强民众对未列举权利法理的控制，在此程度上，原旨主义的很大一部分将得以恢复”。

¹⁰⁶²

As for other potentially useful amendments, unfortunately, Sobran's proposed amendment, "The Constitution shall not be circumvented," would be easily circumvented, as Sobran recognized.155 However, Sobran proposes another "amendment that would actually restrain the federal government. It would read: 'Any state may, by an act of its legislature, secede from the United States.'"156 Either Sobran's or DeRosa's proposed amendment (or both) would straightforwardly enhance federalism and increase the likelihood that our individual rights would be respected.157

至于其他可能有用的修正案，不幸的是，索布兰提出的修正案“不得规避宪法”很容易被规避，索布兰也承认这一点。¹⁰⁶³然而，索布兰提出了另一项“能够真正约束联邦

¹⁰⁵⁹ DeRosa, The Ninth Amendment and the Politics of Creative Jurisprudence, at 192. 德罗萨，《第九修正案与创造性法理学的政治》，第 192 页。

¹⁰⁶⁰ Ibid., at 193.

同上，第 193 页。

¹⁰⁶¹ See *ibid.*

见同上。

¹⁰⁶² Ibid., at 194.

同上，第 194 页。

¹⁰⁶³ Sobran, "Constitutional Legerdemain," at 12.

索布兰，《宪法的把戏》，第 12 页。

政府的修正案”。其内容为：“任何州均可通过其立法机构的法案脱离美国”。¹⁰⁶⁴无论是索布兰还是德罗萨提出的修正案（或两者），都将直接加强联邦制，增加我们个人权利得到尊重的可能性。¹⁰⁶⁵

And while we're at it, let us amend the Constitution to repeal the incorporation doctrine. We also might as well eliminate judicial supremacy (sometimes confusingly referred to as “judicial review”), the idea that the Supreme Court is the sole and final arbiter of the Constitution and constitutionality. Instead, the original scheme of separation of powers required concurrent review, sometimes referred to as Jefferson's tripartite theory of constitutionalism.¹⁵⁸ Under concurrent review, each branch (executive, legislative, judicial) has an equal right to determine the constitutionality of government action. But enough of making my wish list. Any one of these changes would be enough to warm the heart of a true constitutionalist.¹⁵⁹

既然说到这里，让我们修改宪法以废除合并原则。我们也不妨取消司法至上主义（有时被混淆地称为“司法审查”），即最高法院是宪法和合宪性的唯一和最终仲裁者的观念。相反，最初的权力分立方案需要并行审查，有时被称为杰斐逊的三权分立宪政理论。¹⁰⁶⁶在并行审查制度下，每个部门（行政、立法、司法）都有平等的权利来确定政府行为的合宪性。不过，我的愿望清单列得够多了。这些变化中的任何一项都足以

¹⁰⁶⁴ Ibid.

同上。

¹⁰⁶⁵ The proposed amendments are also consistent with Jefferson's “belief that the states were the prime interpreters of the federal compact.” Conkin, *Self-Evident Truths*, at 72.

这些拟议的修正案也与杰斐逊的“认为各州是联邦契约的主要解释者”的信念相一致。康金，《不言而喻的真理》，第72页。

¹⁰⁶⁶ See *ibid.*, at 69 – 73; David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville, Va.: Univ of Virginia Press, 1994), 131, 259, 263, 269 – 72; William J. Quirk & R. Randall Bridwell, *Judicial Dictatorship* (New Brunswick, N.J.: Transaction, 1995), pp. xiv, 10 – 11, 13.

见同上，第69-73页；大卫·N·梅尔，《托马斯·杰斐逊的宪法思想》（弗吉尼亚州夏洛茨维尔：弗吉尼亚大学出版社，1994年），第131、259、263、269-272页；威廉·J·奎克和R·兰德尔·布里德韦尔，《司法独裁》（新泽西州新不伦瑞克：Transaction，1995年），第xiv、10-11、13页。

温暖一个真正的宪政主义者的内心。¹⁰⁶⁷

¹⁰⁶⁷ I should reiterate that, as I said at the beginning, written constitutions and statutes, such as the US Constitution, have only instrumental value for libertarians; they are useful only insofar as they happen to embody some more or less liberty-friendly provisions or can be used in state courts to limit the application of unjust state laws. That is, we should only be “constitutionalists” insofar as insisting that the state should adhere to constitutional limitations can be useful in restraining state power.

我应该再次强调，正如我在一开始所说，成文宪法和法规，例如美国宪法，对自由意志主义者来说只有工具价值；它们只有在恰好体现了一些或多或少有利于自由的条款，或者可以在州法院中被用来限制不正义的州法律的适用时才是有用的。也就是说，我们只有在坚持国家应当遵守宪法限制能够有助于约束国家权力这一范围内，才应当是“立宪主义者”。

第二十二章 资本主义不可否认的道德

The Undeniable Morality of Capitalism

Originally published in 1994, this is one of my first scholarly articles.* As noted in "How I Became a Libertarian" (ch. 1), I sent this article to Hoppe and soon after met him and others at the Mises Institute. I have made only minimal revisions to the original piece, except for deleting the initial section "Criticisms," since, in retrospect, these criticisms now seem silly and trivial.†

本文最初发表于 1994 年，是我最早的学术文章之一*。正如《我如何成为一名自由意志主义者》（第 1 章）中所述，我把这篇文章寄给了霍普，不久后在米塞斯研究院见到了他本人以及其他人士。我对原文只做了极少的修改，只是删去了开头的“批评”部分，因为现在回想起来，这些批评显得愚蠢而琐碎。†

* Stephan Kinsella, "The Undeniable Morality of Capitalism," St. Mary's L. J. 25, no. 4 (1994): 1419–47, a review essay of Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (Boston/Dordrecht/London, Kluwer Academic Publishers, 1993). In this chapter I will cite to the most recent edition, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp); hereinafter "EEPP."

*斯蒂芬·金塞拉，《资本主义不可否认的道德》，《圣玛丽法律杂志》第 25 卷第 4 期（1994 年）：1419–1447，是对汉斯-赫尔曼·霍普《私有财产的经济学与伦理学》（波士顿/多德雷赫特/伦敦，克卢威尔学术出版社，1993 年）的评论文章。在这一章中，我将引用最新版本，即《私有财产的经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006 年[1993 年]；www.hanshoppe.com/eepp）；以下简称“EEPP”。

† In the original article, I wrote that it was unfortunate that Hoppe's article "In Defense of Extreme Rationalism" was not included in EEPP. See Hoppe, "In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's *The Rhetoric of Economics*," *Rev. Austrian Econ.* 3, no. 1 (1989; <https://mises.org/library/defense-extreme-rationalism-thoughts-donald-mccloskys-rhetoric-economics>): 179 – 214. This has now been

remedied, as this article was later published in Hans-Hermann Hoppe, The Great Fiction: Property, Economy, Society, and the Politics of Decline (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf).

†在原文中，我写道，很遗憾霍普的文章《捍卫极致理性主义》没有被收录在《私有财产的经济学与伦理学》中。参见霍普，《捍卫极致理性主义》：关于唐纳德·麦克洛斯基《经济学的修辞》的思考，《奥地利经济学评论》第 3 卷第 1 期（1989 年）：179–214。现在这个问题已经得到解决，因为这篇文章后来发表在汉斯-赫尔曼·霍普的《伟大的虚构：财产、经济、社会与衰落的政治》（第二版扩充版，米塞斯研究院，2021 年；www.hanshoppe.com/tgf）中。

I. 导论

INTRODUCTION

If Professor Hans-Hermann Hoppe's books and articles would come already-underlined and highlighted, it would save readers a lot of time. Or at least each book should come with a free pen attached. For when I follow my usual habit of underlining, circling, checking, starring, or highlighting important insights in the books I read, I find that my copies of Hoppe's books start to look as if a two-year-old with a crayon had gotten hold of them.

如果汉斯-赫尔曼·霍普教授的著作和文章都附带有下划线和突出标记，就能为读者节省大量时间。或者至少每本书都应该附赠一支免费的笔。因为当我按照自己的习惯，在阅读的书籍中划线、圈点、打钩、加星号或突出重要见解时，我发现我手中霍普的书开始看起来就像一个被手拿蜡笔的两岁小孩涂鸦过一般。

In 1989, Hoppe published A Theory of Socialism and Capitalism, in my eyes one of the most important books of the decade for its analysis of capitalism, socialism, and property rights, focus on scarcity in property and economic theory, and its revolutionary "argumentation ethic" defense of individual rights.¹ Over the past few years, Hoppe has produced a significant assortment of articles elaborating on his argumentation ethic and the epistemology that underlies it, as well as on his impressive economic writings. His new book, The Economics and Ethics of Private Property, is a collection of almost all of these related writings (not counting a large number of writings published previously in German). This may come as a disappointment to some, who, like me, were

expecting a new treatise, building upon the prior one. The book is significant, nonetheless, for drawing together material previously published in such varied sources as Liberty magazine, the Journal of Libertarian Studies, the Review of Austrian Economics, Ratio, and others.²

1989 年，霍普出版了《社会主义与资本主义理论》，在我看来，这本书是那个十年中最重要的书籍之一，因为它对资本主义、社会主义和财产权进行了分析，关注财产和经济理论中的稀缺性，并以革命性的“论证伦理学”捍卫个人权利。¹⁰⁶⁸ 在过去几年中，霍普发表了大量文章，阐述了他的论证伦理学和作为其基础的认识论，以及他令人印象深刻的经济学著作。他的新书《私有财产的经济与伦理学》几乎是所有相关著作的合集（不包括之前以德文出版的大量著作）。这可能会让一些人感到失望，因为他们和我一样，期待的是在前一部著作的基础上再写一部新的论著。不过，这本书的重要意义在于，它汇集了以前发表在《自由意志主义》杂志、《自由意志主义研究期刊》、《奥地利经济学评论》、《理性》等各种刊物上的资料。¹⁰⁶⁹

¹⁰⁶⁸ See “The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible,” chap. 7 in Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc). Argumentation ethics is discussed in “Dialogical Arguments for Libertarian Rights” (ch. 6) and “Defending Argumentation Ethics” (ch. 7). 见汉斯-赫尔曼·霍普《社会主义与资本主义的理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010 年[1989 年]；网址：www.hanshoppe.com/tsc）第 7 章《资本主义的伦理正当性以及为何社会主义在道德上站不住脚》。论证伦理学在《自由意志主义权利的对话论证》（第 6 章）和《捍卫论证伦理学》（第 7 章）中进行了讨论。

¹⁰⁶⁹ Hoppe’s article, “The Ultimate Justification of the Private Property Ethic,” *Liberty* 2, no. 1 (Sept. 1988; <https://perma.cc/6TYM-BJRZ>): 20 – 22 (included as chap. 13 of EEPP), was the subject of the symposium, “Breakthrough or Buncombe,” *Liberty* 2, no. 2 (Nov. 1988; <https://perma.cc/A5UU-P64A>): 44 – 53, containing discussion of Hoppe’s argumentation ethics by several libertarian theorists, many critical, and Hoppe’s reply, “Utilitarians and Randians vs Reason” (53 – 54). This reply is included in “Appendix: Four Critical Replies” in EEPP; see also subsequent response to critics in idem, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016),” *The Property and Freedom Podcast*, ep. 163 (June 30, 2022). In addition to the response to the Liberty symposium, “Appendix: Four Critical Replies” also includes responses to David Osterfeld, Loren Lomasky, and David Conway in other

publications. See David Osterfeld, “Comment on Hoppe,” Austrian Economics Newsletter 9, no. 3 (Spring/Summer 1988; <https://perma.cc/4229-ZR7P>): 9 – 10 (also including Hoppe’s reply, “Demonstrated Preference and Private Property: Reply to Professor Osterfeld,” pp. 10 – 12, and Sheldon Richman, “Comment on Osterfeld,” p. 10). David Conway’s review of Hoppe, A Theory of Socialism and Capitalism (pp. 11 – 14) and Hoppe’s response, “On the Indefensibility of Welfare Rights: A Comment on Conway” (pp. 14 – 16), appeared in Austrian Economics Newsletter 11, no. 1 (Winter/Spring 1990; <https://perma.cc/X2PR-H8BW>). Loren Lomasky’s criticism was “The Argument from Mere Argument,” Liberty 3, no. 1 (Sept. 1989; <https://perma.cc/38XS-ZDEL>): 55 – 57. Hoppe’s reply to Lomasky was “Intimidation by Argument—Once Again,” Liberty 3, no. 2 (Nov. 1989; <https://perma.cc/4382-RKSQ>): 37 – 39, republished as “Intimidation by Argument,” section III in “Appendix: Four Critical Replies.” Rothbard’s humorous response to Lomasky was “Hoppephobia,” originally published in Liberty 3, no. 4 (March 1990; <https://perma.cc/3T7K-YTUU>): 11 – 12, reprinted at LewRockwell.com (Oct. 4, 2014; <https://perma.cc/5HH6-2P78>). See also the discussion re Lomasky and others in “Defending Argumentation Ethics” (ch. 7), at n.4 et pass., including excerpts from Hoppe’s and Rothbard’s responses to Lomasky’s critique.

For more on argumentation ethics, see Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” StephanKinsella.com (May 27, 2011); idem, “Hoppe’s Argumentation Ethics and Its Critics,” StephanKinsella.com (Aug. 11, 2015).

Regarding Yeager—in my view, he is wrong about several topics. First, he is wrong about Hoppe’s argumentation ethics; see also “Defending Argumentation Ethics” (ch. 7), n.5. Also, he is wrong about self-ownership; see “How We Come to Own Ourselves” (ch. 4), n.1. And he is wrong about knowledge and the calculation problem. On this latter issue, see “Legislation and the Discovery of Law in a Free Society” (ch. 13), at n.66, and references in Kinsella, “The Great Mises-Hayek Dehomogenization/Economic Calculation Debate,” StephanKinsella.com (Feb. 8, 2016), including Leland B. Yeager, “Mises and Hayek and Calculation and Knowledge,” Rev. Austrian Econ. 7, no. 2 (1994; <https://mises.org/library/mises-and-hayek-and-calculation-and-knowledge>): 93 – 109; Joseph Salerno, “Reply to Leland B. Yeager on Mises and Hayek on Calculation and Knowledge,” Rev. Austrian Econ. 7, no. 2 (1994; <https://mises.org/library/reply-leland-b-yeager-mises-and-hayek-calculation-and-knowledge>): 111 – 25, and Yeager, “Calculation and Knowledge: Let’s Write Finis,” Rev. Austrian Econ. 10, no. 1 (1997; <https://mises.org/library/calculation-and-knowledge-lets-write-finis>): 133 – 36.

霍普的文章《私产伦理的终极证成》，发表于《自由》第2卷第1期（1988年9月；网址：<https://perma.cc/6TYM-BJRZ>）：第20-22页（收录于《经济科学与奥地利学派方法》第十三章），是专题研讨会《突破还是胡说》的主题，该研讨会发表于《自由》第2卷第2期（1988年11月；网址：<https://perma.cc/A5UU-P64A>）：第44-53页，

其中包含几位自由意志主义理论家对霍普的论证伦理学的讨论，许多是批判性的，以及霍普的回应《功利主义者和兰德主义者 vs. 理性》（第 53-54 页）。这一回应收录在《经济科学与奥地利学派方法》的“附录：四个批判性回应”中；另见他在《PFP163 | 汉斯-赫尔曼·霍普，‘关于论证伦理学’（2016 年财产与自由协会研讨会）》，《财产与自由播客》第 163 集（2022 年 6 月 30 日）中对批评者的后续回应。

除了对《自由》专题研讨会的回应外，“附录：四个批判性回应”还包括对其他出版物中大卫·奥斯特费尔德、洛伦·洛马斯基和大卫·康威的回应。见大卫·奥斯特费尔德的《对霍普的评论》，《奥地利经济学通讯》第 9 卷第 3 期（1988 年春/夏；网址：<https://perma.cc/4229-ZR7P>）：第 9-10 页（也包括霍普的回应《展示偏好与私有财产：对奥斯特费尔德教授的回复》，第 10-12 页，以及谢尔登·里奇曼的《对奥斯特费尔德的评论》，第 10 页）。大卫·康威对霍普的《社会主义与资本主义的理论》的评论（第 11-14 页）以及霍普的回应《论福利权的不可辩护性：对康威的评论》（第 14-16 页），发表于《奥地利经济学通讯》第 11 卷第 1 期（1990 年冬/春；网址：<https://perma.cc/X2PR-H8BW>）。洛伦·洛马斯基的批评是《仅由论证而来的论证》，发表于《自由》第 3 卷第 1 期（1989 年 9 月；网址：<https://perma.cc/38XS-ZDEL>）：第 55-57 页。霍普对洛马斯基的回应是《再次由论证产生的恐吓》，发表于《自由》第 3 卷第 2 期（1989 年 11 月；网址：<https://perma.cc/4382-RKSQ>）：第 37-39 页，后作为“附录：四个批判性回应”中的第三部分“由论证产生的恐吓”重新发表。罗斯巴德对洛马斯基的幽默回应是《霍普恐惧症》，最初发表于《自由》第 3 卷第 4 期（1990 年 3 月；网址：<https://perma.cc/JT7K-YTUJ>）：第 11-12 页，2014 年 10 月 4 日在 LewRockwell.com 上重新发表（网址：<https://perma.cc/5HH6-2P78>）。另见《捍卫论证伦理学》（第七章）注释 4 及各处关于洛马斯基和其他人的讨论，包括霍普和罗斯巴德对洛马斯基批评的回应摘录。

关于论证伦理学的更多内容，见斯蒂芬·金塞拉的《论证伦理学与自由：简明指南》，StephanKinsella.com（2011 年 5 月 27 日）；同上，《霍普的论证伦理学及其批评者》，StephanKinsella.com（2015 年 8 月 11 日）。

关于耶格尔——在我看来，他在几个问题是错误的。首先，他在霍普的论证伦理学上是错误的；另见《捍卫论证伦理学》（第七章）注释 5。此外，他在自我所有权上是错误的；见《我们如何拥有自己》（第四章）注释 1。并且他在知识和计算问题是错误的。关于后一个问题，见《自由社会中的立法与法律发现》（第十三章）注释 66，以及斯蒂芬·金塞拉的《伟大的米塞斯-哈耶克异质化/经济计算论证》，StephanKinsella.com（2016 年 2 月 8 日）中的参考文献，包括利兰·B·耶格尔的《米塞斯和哈耶克以及经济计算和知识》，《奥地利经济学评论》第 7 卷第 2 期（1994 年；网址：<https://mises.org/library/mises-and-hayek-and-calculation-and-knowledge>）：第 93-109 页；约瑟夫·萨勒诺的《对利兰·B·耶格尔关于米塞斯和哈耶克的经济计算和知识的回复》，《奥地利经济学评论》第 7 卷第 2 期（1994 年；网址：<https://mises.org/library/reply-leland-b-yeager-mises-and-hayek-calculation-and-knowledge>）：第 111-125 页，以及耶格尔的《经济计算和知识：让我们写下终结语》，《奥地利经济学评论》第 10 卷第 1 期（1997 年；网址：<https://mises.org/library/calculation-and-knowledge-lets-write-finis>）：第 133-136 页。

II.个人权利 INDIVIDUAL RIGHTS

A. 霍普思想的反响 *The Reception of Hoppe's Ideas*

This book is fascinating, stimulating, provocative, and ground-breaking. In the September 1988 issue of *Liberty*, Hoppe published "The Ultimate Justification of the Private Property Ethic." This article gave rise to a symposium, "Breakthrough or Buncombe?", published in the November 1988 issue of *Liberty*, containing the critical comments of ten commentators, including Murray Rothbard, Tibor Machan, David Friedman, Leland Yeager, David Gordon, Douglas Rasmussen, David Ramsay Steele, Timothy Virkkala, and others.

这本书引人入胜、令人振奋、具有启发性和开创性。在 1988 年 9 月的《自由》杂志上，霍普发表了《私有财产伦理的终极证成》一文。这篇文章引发了一场大论战，1988 年 11 月《自由》杂志上发表的《是突破还是胡说？》专栏，其中包含了十位评论员的批评意见，包括穆瑞·罗斯巴德、蒂博尔·马钱、大卫·弗里德曼、利兰·

耶格尔、大卫·戈登、道格拉斯·拉斯穆森、大卫·拉姆齐·斯蒂尔、蒂莫西·维尔卡拉等人。

To my surprise, almost all of these libertarian commentators were unimpressed by, if not downright hostile to, Hoppe's argument. Only Murray Rothbard gave Hoppe's thesis wholehearted endorsement and recognized its validity and significance:

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 hard-core manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison.³

令我惊讶的是，几乎所有这些自由意志主义评论家都对霍普的论点不以为然，甚至完全持敌视态度。只有穆瑞·罗斯巴德全心全意地支持霍普的论点，并承认其有效性和重

要性：

对于整个政治哲学，尤其是自由意志主义而言，他成功地超越了著名的“实然”/“应然”、“事实”/“价值”二分法，这是一个令人惊叹的突破，自经院学者时代以来，这种二分法就一直困扰着哲学，并使现代自由意志主义陷入了令人厌烦的僵局。不仅如此：汉斯-霍普以前所未有的硬核方式为无政府-资本主义-洛克式的权利确立了论据，这让我自己的自然法/自然权利立场与之相比几乎显得微不足道。¹⁰⁷⁰

Why Hoppe's ideas, which are such an important advance in political and libertarian thought, have failed to cause more excitement or gain more adherents than they have is baffling, but the best solution to this is the publication of further elaborations and defenses contained in Hoppe's newest book.

霍普的思想是政治思想和自由意志主义思想中极其重要的一踏步，为何却未能引起更大的轰动或获得更多的追随者，这令人费解，但最好的解决办法就是出版霍普最新著作中所包含的进一步阐述和辩护。

The book is divided into two parts, "Economics" and "Philosophy." Because Part Two: Philosophy contains Hoppe's most important ideas— his defense of individual rights—I will discuss this part first. The six chapters (chapters 6 through 11) in Part Two plus the "Four Critical Replies" in the Appendix present Hoppe's argumentation ethic and its underlying epistemology—often repeatedly and redundantly, because the chapters were first published as independent papers, and little editing, except in chapter 6, has been done to integrate them or to delete redundancies.

这本书分为两部分，“经济学”和“哲学”。由于“第二部分：哲学”包含了霍普最重要的思想——他对个人权利的辩护——所以我将首先讨论这一部分。第二部分的六个章节（第6章至第11章）以及附录中的“四个批判性答复”介绍了霍普的论证伦理学及其背后的认识论——由于这些章节最初是作为独立论文发表的，因此经常重复和冗余，除了第六章之外，几乎没有进行整合或删除冗余内容的编辑工作。

¹⁰⁷⁰ Rothbard, "Beyond Is and Ought," p. 44.
罗斯巴德，《超越“是”与“应然”》，第44页。

B. 论证伦理学 Argumentation Ethics

Hoppe's "argumentation ethics" theory, briefly stated, starts by noting that all truths, including ethics and normative statements, must be discoverable through the process of argumentation. This "a priori of communication and argumentation" is undeniable, as one would have to contradict oneself in using argument to deny this. Therefore, whatever facts or norms are postulated while engaging in argumentation cannot be contradicted by any proposed fact or norms.⁴ As Hoppe writes:

*In analyzing any actual norm proposal reason's task is merely confined to analyzing whether or not it is logically consistent with the very ethics which the proponent must presuppose as valid insofar as he is able to make his proposal at all.*⁵

霍普的“论证伦理学”理论首先指出，所有真理，包括伦理学和规范性陈述，都必须通过论证过程才能发现。这种“交流和论证的先验性”是不可否认的，因为如果用论证来否定这一点，就会自相矛盾。因此，在进行论证时所假设的任何事实或规范都不能被任何提议的事实或规范所否定。¹⁰⁷¹正如霍普所写：

在分析任何实际的规范提议时，理性的任务仅仅局限于分析它在逻辑上是否与提议者

在能够提出该提议的范围内必须预设为有效的那种伦理相一致。¹⁰⁷²

In argumentation, the validity of certain implications cannot be disputed. For example, the universalization principle, as formulated in the Golden Rule of ethics or in the Kantian Categorical Imperative, states:

... that only those norms can be justified that can be formulated as general principles which without exception are valid for everyone. Indeed, as it 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, the universalization principle

¹⁰⁷¹ EEPP, pp. 314 – 15

《私有财产的经济学与伦理学：政治经济学与哲学研究》，第 314-315 页。

¹⁰⁷² Ibid., p. 315.

同上，第 315 页。

of ethics can now be understood and explained in the wider a priori of communication and argumentation.⁶

在论证中，某些隐含意义的有效性是无可争议的。例如，普适性原则，如在伦理的黄金法则或康德的绝对命令中所表述的那样，内容为：

.....只有那些可以被表述为普遍原则的规范才是正当合理的，这些原则无一例外地对每个人都有效。事实上，正如论证中所隐含的那样，每个能够理解论证的人原则上都能被论证所说服，这仅仅是因为论证的力量。伦理学的普适性原则现在可以在更广泛的交流和论证的先验范围内得到理解和解释。¹⁰⁷³

In other words, anyone who argues accepts the validity of the universalization principle implicitly.

"The universalization principle only provides one with a purely formal criterion for morality... However, there are other positive norms implied in argumentation apart from" this principle.⁷ First Hoppe points out three interrelated facts: "First, that argumentation is not only a cognitive but a practical affair. Second, that argumentation, as a form of action, implies the use of the scarce resource of one's body. And third, that argumentation is a conflict-free way of interacting."⁸

换句话说，任何论证者都默认了普适性原则的有效性。

“普适性原则只为道德提供了一个纯粹形式上的标准……然而，除了这一原则之外，论

¹⁰⁷³ Ibid., p. 316. On universalizability, see Kinsella, "The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle," StephanKinsella.com (Nov. 10, 2011); "What Libertarianism Is" (ch. 2), at n.23; "How We Come to Own Ourselves" (ch. 4), n.15; "A Libertarian Theory of Punishment and Rights" (ch. 5), Part III.D.1; "Dialogical Arguments for Libertarian Rights" (ch. 6), at n.43; and "Defending Argumentation Ethics" (ch. 7), the section "Universalizability." 同上，第 316 页。关于普适性，见斯蒂芬·金塞拉的《特殊主义伦理的问题，或者为什么每个人都必须承认普适性原则的有效性》，StephanKinsella.com（2011 年 11 月 10 日）；《何为自由意志主义》（第二章），注释 23；《我们如何拥有自己》（第四章），注释 15；《自由意志主义的惩罚与权利理论》（第五章），第三部分 D.1；《自由意志主义权利的对话论证》（第六章），注释 43；以及《捍卫论证伦理学》（第七章）中“普适性”部分。

证中还隐含着其他积极的规范”。¹⁰⁷⁴首先，霍普指出了三个相互关联的事实：“第一，论证不仅是一种认知活动，也是一种实践活动。其次，作为一种行动形式，论证意味着使用身体这一稀缺资源。第三，论证是一种无冲突的互动方式。”¹⁰⁷⁵

Therefore, anyone engaging in argumentation (or, indeed, any discourse at all, even with oneself) must accept 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, which is undeniably a goal of argumentation. “It is only as long as there is at least an implicit recognition of each individual’s property right in his or her own body that argumentation can take place.”⁹ The libertarian nonaggression principle—“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”—is implied in the concept of argumentative justification, because justifying means justifying without having to rely on coercion.

因此，任何参与论证的人(或者说，任何对话，哪怕是自说自话)都必须接受所有听众甚至潜在听众的自我所有权这一预设权利：否则，听众就无法自由地思考，以及接受或拒绝所提出的论证，而这无疑是论证的一个目标。“只有至少隐含地承认每个人对自己身体的财产权，论证才有可能进行。”¹⁰⁷⁶ 自由意志主义的互不侵犯原则——“任何人都无权不请自来地侵犯任何其他人的身体，从而界定或限制任何人对自己身体的控制权”——隐含在论证正当性的概念中，因为正当性意味着无需依赖强制而进行论证。

The concomitant right to homestead private property is also presupposed by anyone engaging in argumentation: since the use of natural resources, i.e., property rights in land, food, water, etc., is absolutely necessary for any listener to survive and be able to participate in an argument, and since homesteading unowned property is the only objective and conflict-free way to assign property rights, all arguers must also presuppose the validity of the homesteading of unowned property, the Lockean

¹⁰⁷⁴ Ibid., pp. 316 & 317 (emphasis added).
同上，第 316 和 317 页（着重号为原文所加）。
¹⁰⁷⁵ Ibid., p. 317.
同上，第 317 页。
¹⁰⁷⁶ Ibid.
同上。

“mixing of labor” with scarce resources, for otherwise argumentation could not occur.¹⁰⁷⁷ And, of course, the right to self-ownership plus the right to homestead are the bases of laissez-faire capitalism.¹⁰⁷⁸

任何参与论证的人都必须预先假定拥有拓殖私有财产的权利：由于使用自然资源，即土地、食物、水等方面的财产权，是任何倾听者生存并参与论证的绝对必要条件，而且拓殖无主财产是分配财产权的唯一客观且无冲突的方式，所有论证者也必须预先假定拓殖无主财产的有效性，即洛克所说的“劳动与稀缺资源的混合”，否则论证就无法进行。¹⁰⁷⁷当然，自我所有权加上拓殖的权利是自由放任资本主义的基础。¹⁰⁷⁸

C. 禁止反言与进一步探究的方向 *Estoppel and Directions for Further Inquiry*

Professor Hoppe's discovery of such a rock-solid defense of individual rights is a profoundly important achievement. Because so many of Hoppe's insights deserve further exploration and development, one welcomes future writing by Hoppe and by others building upon his work.¹²

霍普教授发现的对个人权利如此坚如磐石的捍卫，这是一项极其重要的成就。由于霍普的许多见解值得进一步探讨和发展，我们欢迎霍普和其他人在其著作的基础上继续

¹⁰⁷⁷ Ibid., pp. 319 – 22. Hoppe makes it clear that, although he agrees with Locke's theory of homesteading by mixing one's labor with resources, he believes the Lockean proviso— Locke's limitation that the right to homestead extends only when “enough and as good” is left for others—is false and must be rejected (contra Lomasky). Ibid., p. 410.

同上，第 319-322 页。霍普明确表示，尽管他同意洛克关于通过将自己的劳动与资源相结合来拓殖（homesteading）的理论，但他认为洛克的限制性条件——洛克的限制即拓殖的权利仅在为他人留下“足够多且同样好的”资源时才成立——是错误的，必须被拒绝（与洛马斯基的观点相反）。同上，第 410 页。

¹⁰⁷⁸ For further elaboration of these issues, see “What Libertarianism Is” (ch. 2) and “How We Come to Own Ourselves” (ch. 4).

关于这些问题的进一步阐述，见《何为自由意志主义》（第二章）和《我们如何拥有自己》（第四章）。

创作。¹⁰⁷⁹

For example, in my own article, “Estoppel: A New Justification for Individual Rights,”¹³ I draw on Hoppe’s work—especially his application of the principle of universalizability to the activity of argumentation—in making another argumentation-based or discourse-based defense of individual rights. Hoppe’s main argument is that any person who argues must accept certain principles that must be implicitly acknowledged by any person engaged in the very activity of arguing, and that these principles imply the rights of self-ownership and homesteading, as they are incompatible with any other—“socialist”—ethic. In my estoppel theory, I argue that the existence of rights can be demonstrated by looking at the consistency of the arguments made by a rights violator at the moment when he is about to be punished for the rights violation.

例如，在我自己的文章《禁止反言：个人权利的新理由》¹⁰⁸⁰一文中，我借鉴了霍普的著作——尤其是他将普适性原则应用于论证活动——为个人权利做了另一种基于论证或基于对话的辩护。霍普的主要论点是，任何进行论证的人都必须接受某些原则，任何从事论证活动的人都必须默认这些原则，这些原则意味着自我所有权和拓殖权，因为它们与任何其他——“社会主义”——伦理不相容。在我的禁止反言理论中，我认为权利的存在可以通过观察权利侵犯者在即将因侵犯权利而受到惩罚时所作论证的一致性来证明。

Since what is important about rights is that they are (legitimately) enforceable, if an alleged rights-violator is unable to meaningfully object to his punishment or, indeed, if he implicitly consents to his punishment, then this is enough to justify the existence of the rights claimed. And it is indeed true that if A initiates violence against B, A is estopped, or prevented, from complaining (i.e., objecting or withholding consent) if B

¹⁰⁷⁹ For subsequent discussion of argumentation ethics since the publication of the original article in 1994, see Kinsella, “Argumentation Ethics and Liberty: A Concise Guide” and idem, “Hoppe’s Argumentation Ethics and Its Critics.”

自 1994 年原文发表以来，关于论证伦理学的后续讨论，见金塞拉的《论证伦理学与自由：简明指南》以及同一作者的《霍普的论证伦理学及其批评者》。

¹⁰⁸⁰ Kinsella, “Estoppel: A New Justification for Individual Rights,” Reason Papers No. 17 (Fall 1992): 61–74. See note 15, below.

金塞拉，《禁止反言：个人权利的新理由》，《理性论文》第 17 期（1992 年秋季）：61-74 页。见下文注释 15。

retaliates or punishes A. For A has admitted the validity of aggression, and it would be inconsistent for him to object to his own punishment, which is, after all, "only" aggression.

由于权利的重要性在于其（合法的）可实施性，如果一个被指控的权利侵犯者无法对他的惩罚提出有意义的反对，或者说，如果他默许了对他的惩罚，那么这就足以证明所主张的权利的存在。事实上，如果 A 对 B 施暴，那么如果 B 对 A 进行报复或惩罚，A 就会被禁止或阻止申诉（即反对或不同意）。因为 A 已经承认了侵犯的有效性，如果他反对对其的惩罚，那将是前后不一致的，毕竟这“只是”侵犯。

By the same token, however, laws that attempt to enforce "positive" rights (such as the right to food or a job) or to prohibit nonaggressive behavior (such as expression, prostitution, the use of drugs, or the offer to pay someone less than minimum wage) are not legitimate. For here the state, in enforcing such laws against nonaggressors, is itself an aggressor.¹⁴ If the imprisoned, nonaggressive "criminal" asserts his right to be freed and his concomitant right to use force against the aggressor-state to escape, the state cannot deny this asserted right nor the legitimacy of the prisoner's (proposed) use of force against the state, since the state, by being an aggressor, is estopped from denying the legitimacy of the use of force. Since the prisoner has a right to be freed, of course the state has no contrary "right" to imprison him. By this same logic, an aggressive criminal has a right to not be disproportionately punished. For example, someone who steals an ink pen may not be executed as punishment.¹⁵

然而，同样道理，试图实施“积极”权利（如获得食物或工作的权利）或禁止非侵害性行为（如言论、卖淫、吸毒或向他人支付低于最低工资的报酬）的法律也是不合法的。因为在这里，国家在对非侵犯者执行此类法律时，国家本身就是侵犯者。¹⁰⁸¹如果被监

¹⁰⁸¹ Rothbard has developed a useful classification or typology of aggressive intervention. If an aggressor's command or order involves only the commanded individual himself—i.e., the aggressor restricts the individual's use of his own property, when exchange with someone else is not involved—this Rothbard calls autistic intervention. If the aggressor compels an exchange between the individual and himself, or coerces a "gift" from the individual subject, this may be called a binary intervention, since a hegemonic relation is established between two people: the aggressor and the individual subject. If the aggressor compels or prohibits an exchange between a pair of

subjects, this is called triangular intervention.

Examples of autistic intervention are murder or compulsory prohibition or enforcement of a salute or speech. Taxation, conscription, slavery, and compulsory jury service are examples of binary intervention. Examples of triangular intervention are price controls, minimum wage laws, and licensing. Murray N. Rothbard, *Man, Economy, and State*, with Power and Market, Scholars ed., 2d ed. (Auburn, Ala.: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 12, § 2. In chapter 3, “Banking, Nation States and International Politics: A Sociological Reconstruction of the Present Economic Order,” Hoppe makes similar distinctions among aggressive actions in pointing out why states with relatively more liberal internal economic policies are more successful in war against states with relatively less internal liberalization:

The need for a productive economy that a warring state must have also explains why it is that *ceteris paribus* those states which have adjusted their internal redistributive policies so as to decrease the importance of economic regulations relative to that of taxation tend to outstrip their competitors in the arena of international politics. Regulations through which states either compel or prohibit certain exchanges between two or more private persons as well as taxation imply a non-productive and/or non-contractual income expropriation and thus both damage homesteaders, producers or contractors i.e., those that cause wealth to come into existence. However, while by no means less destructive of productive output than taxation, regulations have the peculiar characteristic of requiring the state’s control over economic resources in order to become enforceable without simultaneously increasing the resources at its disposal. In practice, this is to say that they require the state’s command over taxes, yet they produce no monetary income for the state (instead, they satisfy pure power lust, as when A, for no material gain of his own, prohibits B and C from engaging in mutually beneficial trade). On the other hand, taxation and a redistribution of tax revenue according to the principle “from Peter to Paul,” increases the economic means at the government’s disposal at least by its own “handling charge” for the act of redistribution. Since a policy of taxation, and taxation without regulation, yields a higher monetary return to the state (and with this more resources expendable on the war effort!) than a policy of regulation, and regulation with taxation, states must move in the direction of a comparatively deregulated economy and a comparatively pure tax-state in order to avoid international defeat.... A highly characteristic example of this connection between a policy of internal deregulation and increased external aggressiveness is provided by the Reagan administration.

EEPP, p. 102 – 103 & n.22.

罗斯巴德发展出了一种有用的侵犯性干预的分类或类型。如果侵犯者的命令或指令只涉及被命令的个人自身——即侵犯者限制个人对自己财产的使用，而不涉及与他人的交换——罗斯巴德将此称为一元干预。如果侵犯者强迫个人与自己进行交换，或强迫个人给予“礼物”，这可以被称为二元干预，因为在两个人之间建立了一种霸权关系：

禁的非侵害性的“罪犯”主张其获得自由的权利以及随之而来的对侵犯者-国家使用武力越狱的权利，则国家不能否认这一主张的权利，也不能否认囚犯（提议的）对国家使用武力的合法性，因为国家作为侵犯者，被禁止反言，不能否认使用武力的合法性。既然囚犯有权获得自由，国家当然就没有相反的“权利”监禁他。根据同样的逻辑，一个有侵害行为的罪犯有权不受到不相称的惩罚。例如，偷一支钢笔的人不能被处以死刑作为惩罚。¹⁰⁸²

侵犯者和个人主体。如果侵犯者强迫或禁止一对主体之间的交换，这被称为三元干预。一元干预的例子有谋杀或强制禁止或强制行礼或演讲。税收、征兵、奴隶制和强制陪审团服务是二元干预的例子。三元干预的例子有价格管制、最低工资法和许可证制度。穆瑞·N·罗斯巴德，《人、经济与国家，权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009年；网址：<https://mises.org/library/man-economy-and-state-power-and-market>），第12章，第2节。在第3章《银行业、民族国家与国际政治：对当前经济秩序的社会学重构》中，霍普在指出为什么内部经济政策相对更自由的国家在与内部自由化程度相对较低的国家的战争中更成功时，对侵犯性行为做出了类似的区分：

一个处于战争状态的国家对生产性经济的需求也解释了为什么在其他条件相同的情况下，那些调整了内部再分配政策以降低经济管制相对于税收的重要性的国家，往往会在国际政治舞台上超越其竞争对手。国家通过管制要么强迫要么禁止两个或更多私人之间的某些交换，以及税收，都意味着一种非生产性和/或非契约性的收入没收，因此都会损害拓殖者、生产者或契约人，即那些使财富得以产生的人。然而，尽管管制在对生产性产出的破坏程度上绝不亚于税收，但管制具有一种特殊的特点，即需要国家对经济资源的控制才能得以执行，而不会同时增加其可支配的资源。实际上，这就是说它们需要国家对税收的掌控，但它们却不会为国家产生货币收入（相反，它们满足纯粹的权力欲望，就像A在没有自己的任何物质收益的情况下，禁止B和C进行互利贸易）。另一方面，税收以及根据“从彼得到保罗”的原则进行的税收再分配，至少会通过政府再分配行为的“手续费”增加政府可支配的经济手段。由于税收政策以及无管制的税收，比管制政策以及有税收的管制，能为国家带来更高的货币回报（从而有更多可用于战争努力的资源！），所以国家必须朝着相对放松管制的经济和相对纯粹的税收国家的方向发展，以避免在国际上被击败……里根政府就是内部放松管制政策与外部侵犯性增强之间这种联系的一个非常典型的例子。

《私有财产的经济学与伦理学》，第102-103页及注释22。

¹⁰⁸² Kinsella, “Estoppel: A New Justification for Individual Rights.” An expanded discussion of the estoppel theory will be presented in my work-in-progress, Estoppel: A Theory of Rights. (Author’s note: This previous comment was included in the original 1994 article. Subsequently, I elaborated on this theory, albeit under different titles than previously envisioned. See “A Libertarian Theory of Punishment and Rights” (ch. 5) and “Dialogical Arguments for Libertarian Rights” (ch. 6).)

金塞拉，《禁止反言：个人权利的新理由》。关于禁止反言理论的进一步讨论将在我

It is hoped that others will also build upon or critique Hoppe's work. Murray Rothbard stated in the Liberty symposium that "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."¹⁶ Also of interest would be a systematic cataloguing of just what is a priori axiomatic knowledge.¹⁷

希望其他人也能借鉴或批评霍普的研究成果。穆瑞·罗斯巴德 (Murray Rothbard) 在《自由》研讨会上指出：“霍普和其他自由意志主义哲学家未来的研究计划将是：(a) 看看公理能在多大程度上扩展到伦理学的其他领域，或者 (b) 看看这种公理能否以及如何融入标准的自然法方法。”¹⁰⁸³此外，对什么是先验公理知识进行系统的编目也很有意义。¹⁰⁸⁴

Another tantalizing idea deserving further exploration is Hoppe's discussion of free will:

[O]ne must regard one's knowledge and actions as uncaused. One might hold this conception of "freedom" to be an illusion, and from the point of view of a "scientist" with cognitive powers substantially superior to any human intelligence, from the point of view of God, for example, such a description may well be correct—but we are not God, and even if freedom is illusory from His standpoint, for we [sic] human beings it is a necessary illusion.¹⁸

正在进行的作品《禁止反言：一种权利理论》中呈现。（作者注：这一先前的评论包含在 1994 年的原始文章中。随后，我对这一理论进行了阐述，尽管使用的标题与之前设想的不同。见《自由意志主义的惩罚与权利理论》（第五章）和《自由意志主义权利的对立论证》（第六章）。）

¹⁰⁸³ Murray N. Rothbard, "Beyond Is and Ought," Liberty 2, no. 2 (Nov. 1988; <https://perma.cc/8LZR-DN6Y>; also <https://mises.org/library/beyond-and-ought>): 44 - 45.

穆瑞·N·罗斯巴德，《超越实然与应然》，发表于《自由》第2卷第2期（1988年11月；网址：<https://perma.cc/8LZR-DN6Y>；也可参见 <https://mises.org/library/beyond-and-ought>）：第44-45页。

¹⁰⁸⁴ Although Hoppe demonstrates the a priori character of several concepts, he neither systematically nor exhaustively catalogues them. See Part IV, below, for a discussion of Hoppe's a priori concepts.

虽然霍普论证了几个概念的先验特征，但他既没有系统地也没有详尽地对它们进行分类。关于霍普先验概念的讨论，请参见下面的第四部分。

另一个值得进一步探讨的诱人观点是霍普对自由意志的讨论：

[我们必须把自己的知识和行动视为不由原因决定的。有人可能会认为这种“自由”概念是一种幻觉，从认知能力远超过任何人类智慧的“科学家”的角度来看，例如从上帝的角度来看，这种描述很可能是正确的——但我们不是上帝，即使从上帝的角度来看自由是虚幻的，但对我们[原文如此]人类来说，自由也是一种必要的幻觉。¹⁰⁸⁵

D. 遗留问题——胎儿、婴儿和有缺陷人类的权利 Remaining

Questions—Rights of Fetuses, Babies, and Defective Humans

Hoppe establishes the foundation for individual rights, but takes it no further. One almost salivates at the prospect of Hoppe writing more on this, answering the questions of exactly how to apply the rights of self-ownership and homesteading to the hard cases, such as fetuses, babies, children, and retarded people (who, after all, cannot argue). Hoppe deals only suggestively or obliquely with this problem: the question of what is just or unjust “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.”¹⁹

霍普为个体权利奠定了基础，但没有进一步深入探讨。人们几乎迫不及待地期待霍普

¹⁰⁸⁵ EEPP, p. 301. For an interesting discussion of neuropsychologist Roger W. Sperry’s writing on the subject of free will, determinism, and causality, see Charles Ripley, “Sperry’s Concept of Consciousness,” *Inquiry* 27 (1990): 399 – 423; see also Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (1991), pp. 69 – 72 (discussing Ayn Rand’s theory of volition and its relation to causality); and David Kelley, “The Nature of Free Will,” *The Foundations of Knowledge*, Lecture 6 (Portland Institute Conference, 1986; YouTube; <https://youtu.be/m8qeaxNI7jE>).

《私有财产的经济与伦理学》，第 301 页。关于神经心理学家罗杰·W·斯佩里在自由意志、决定论和因果关系主题上的著作的有趣讨论，见查尔斯·里普利的《斯佩里的意识概念》，《探究》第 27 期（1990 年）：第 399-423 页；另见伦纳德·皮科夫的《客观主义：安·兰德的哲学》（1991 年），第 69-72 页（讨论安·兰德的意志理论及其与因果关系的关系）；以及大卫·凯利的《自由意志的本质》，《知识的基础》，第 6 讲（波特兰研究所会议，1986 年；YouTube: <https://youtu.be/m8qeaxNI7jE>）。

能在这方面有更多著述，回答如何将自我所有权和拓殖权应用于诸如胎儿、婴儿、儿童和智障人士（毕竟他们无法进行论证）等棘手案例的问题。霍普只是暗示性地或隐晦地讨论了这个问题：何为正义或何为不正义的问题“不会在石头或鱼身上出现，因为它们没有能力进行这样的交流，也没有能力提出有效性主张的命题”。¹⁰⁸⁶

What about fetuses, or even babies? Another related statement of Hoppe's fails to answer this question:

*Obviously, we could have conflicts regarding the use of scarce resources with, let us say, an elephant or a mosquito, yet we would not consider it possible to resolve these conflicts by means of proposing property norms. The avoidance of possible conflicts, in such cases, is merely a technological, not an ethical, problem. For it to turn into an ethical problem, it is also necessary that the conflicting actors be capable, in principle, of argumentation.*²⁰

Is a baby “in principle” capable of argumentation? Hoppe's view on this is unfortunately unrevealed.

那么胎儿呢，甚或婴儿呢？霍普的另一个相关陈述也未能回答这个问题：

显然，我们可能会在使用稀缺资源方面与大象或蚊子发生冲突，但我们不会认为可以通过提出财产规范来解决这些冲突。在这种情况下，避免可能的冲突仅仅只是一个技术问题，而不是伦理问题。要使之成为一个伦理问题，还必须要求发生冲突的行人原则上能够进行论证。¹⁰⁸⁷

婴儿“原则上”能够进行论证吗？遗憾的是，霍普在这个问题上的观点并未透露。

¹⁰⁸⁶ EEPP, p. 341.
《私有财产的经济学与伦理学》，第 341 页。
¹⁰⁸⁷ Ibid., pp. 333 - 34.
同上，第 333-334 页。

*E. 霍普，罗斯巴德，兰德和古典自然权利理论 Hoppe, Rothbard, Rand,
and Classical Natural Rights Theory*

Hoppe never commits himself as to whether he believes other defenders of natural rights—such as Rothbard, whom Hoppe obviously admires greatly—are correct in their support of natural law and natural rights. He remains noncommittal, stating:

Agreeing with Rothbard on the possibility of a rational ethic and, more specifically, on the fact that only a libertarian ethic can indeed be morally justified, I want to propose here a different, non-natural-rights approach to establishing these two related claims. It has been a common quarrel with the natural rights position, even by sympathetic readers, that the concept of human nature is far “too diffuse and varied to provide a determinate set of contents of natural law.”²¹

霍普从未明确表态他是否认为其他自然权利的捍卫者——比如他显然极为钦佩的罗斯巴德——在支持自然法和自然权利方面是正确的。他保持不置可否的态度，他论述道：

我同意罗斯巴德关于理性伦理学可能性的观点，更具体地说，我同意只有自由意志主义伦理学才能真正在道德上得到合理证明这一事实，但我想在此提出一种不同的、非自然权利的方法来确立这两种相关的主张。即使是富有同情心的读者，对自然权利立场的一个常见争议是，人性的概念“过于分散和多样，无法提供一套确定的自然法内容”。¹⁰⁸⁸

Does Hoppe agree that natural law is hogwash? Is he a “sympathetic reader”? One

¹⁰⁸⁸ Ibid., p. 313 (Alan Gewirth, “Law, Action, and Morality,” in Georgetown Symposium on Ethics: Essays in Honor of Henry B. Veatch, R. Porreco, ed. (New York: University Press of America, 1984), p. 73)). See also the related discussion in “Dialogical Arguments for Libertarian Rights” (ch. 6), the section “Argumentation Ethics and Natural Rights.”

同上，第 313 页（艾伦·格维思，《法律、行动与道德》，载于《乔治城伦理学专题研讨会：纪念亨利·B·维奇的论文集》，R. 波雷科编辑（纽约：美国大学出版社，1984 年），第 73 页）。另见《自由意志主义权利的对话论证》（第六章）中“论证伦理学与自然权利”部分的相关讨论。

gets the impression that he agrees with this criticism of natural law. If so, however, it is unclear how Rothbard, aligning himself with the natural law or natural rights tradition of philosophy, in “The Ethics of Liberty presents the full case [that] the libertarian property norms” are the rules that “can be discerned by means of reason as grounded in the very nature of man.”²²

霍普是否认为自然法是无稽之谈呢？他是一个“富有同情心的读者”吗？人们会得到这样的印象，即他同意对自然法的这种批评。然而，如果是这样的话，就不清楚与自然法或自然权利哲学传统保持一致的罗斯巴德，在《自由的伦理》一书中，如何充分阐述“自由意志主义的财产规范”是那些“可以通过理性辨别出来、基于人的本质的”规则。¹⁰⁸⁹

Hoppe even attempts to define his own theory as being, really, a new type of natural rights theory:

*Nor, then, do I claim that it is impossible to interpret my approach as falling in a “rightly conceived” natural rights tradition after all... What is claimed, though, is that the following approach is clearly out of line with what the natural rights approach has actually come to be, and that it owes nothing to this tradition as it stands... Of course, then, since the capability of argumentation is an essential part of human nature—one could not even say anything about the latter without the former—it could also be argued that norms which cannot be defended effectively in the course of argumentation are also incompatible with human nature.*²³

霍普甚至试图将他自己的理论定义为真正的新型的自然权利理论：

那么，我也并非声称不可能将我的方法解释为属于“正确构想的”自然权利传统....。不过，我所声称的是，以下方法显然与自然权利方法的实际内容不符，而且它对这一传统毫无贡献....。当然，既然论证能力是人性的重要组成部分——如果没有前者，后者就无从谈起——那么也可以说，不能在论证过程中得到有效辩护的规范也不

¹⁰⁸⁹ Ibid.
同上。

符合人性。¹⁰⁹⁰

Yet, Hoppe states:

[T]his defense of private property is essentially also Rothbard's. In spite of his formal allegiance to the natural rights tradition Rothbard, in what I consider his most crucial argument in defense of a private property ethic, not only chooses essentially the same starting point—argumentation—but also gives a justification by means of a priori reasoning almost identical to the one just developed. To prove the point I can do no better than simply quote: "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 continuing to be alive. Hence, the supposed opponent of life is really affirming it in the very process of discussion, and hence the preservation and furtherance of one's life takes on the stature of an incontestable axiom."²⁴

然而，霍普指出：

这种对私有财产的辩护在本质上也是罗斯巴德式的。尽管罗斯巴德在形式上忠于自然权利传统，但在我认为他为私有财产伦理辩护的最关键论证中，他不仅选择了基本相同的出发点——论证，而且还通过先验推理给出了与刚才的论证几乎完全相同的理由。为了证明这一点，我最好的做法就是简单地引用：“现在，任何人参与任何形式的讨论，包括关于价值观的讨论，由于参与其中，都是活着的并且肯定生命。因为如果他真的反对生命，他就没有必要继续活着。因此，所谓的生命反对者在讨论的过程中实际上就是在肯定生命，因此，保存和促进一个人的生命就具有了无可争议的公

¹⁰⁹⁰ Ibid., pp. 314 n.15, 315 n.17.
同上，第 314 页注释 15，第 315 页注释 17。

理的地位 ”。¹⁰⁹¹

¹⁰⁹¹ Ibid., pp. 321 – 22, quoting Murray N. Rothbard, “A Crusoe Social Philosophy,” in *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 32 – 33, also published as idem, “A Crusoe Social Philosophy,” *Mises Daily* (December 7, 2021; <https://mises.org/library/crusoe-social-philosophy>). Ayn Rand’s thought related to this subject is worth noting:

[A]s Rand maintains, all “oughts” are hypothetical, based on valuing one’s life… The point is not that one has to be alive in order to act to achieve anything. The point is that being pro-life is what makes end states qualify as values. Only choosing to hold one’s life as a value gives one the stake in one’s actions that is required for the whole issue of evaluation to arise…

Contrary to biological determinism, one does not have to pursue any goals or proclaim anything to be of value. But contrary to subjectivism, if one does, the action or proclamation logically depends on implicitly accepting one’s life as one’s ultimate value…

The issue of justifying choices arises only in the context of having already chosen to live. The choice to live is not extra-moral, but pre-moral; it is a precondition of all moral evaluation.

Harry Binswanger, “Life-Based Teleology and the Foundations of Ethics,” *The Monist* 75, no. 1 (Jan. 1992): 84 – 103, at 99 – 100. As Ayn Rand states:

Life or death is man’s only fundamental alternative. To live is his basic act of choice. If he chooses to live, a rational ethics will tell him what principles of action are required to implement his choice. If he does not choose to live, nature will take its course.

Ibid., at 100 (quoting Ayn Rand, “Causality Versus Duty,” in *Philosophy: Who Needs It* (Signet 1984), pp. 95, 99. For further discussion of the structure of this Rothbard’s argument for rights here, see David Osterfeld, “Natural Rights Debate: A Comment on a Reply,” *J. Libertarian Stud.* 7, no. 1 (Spring 1983; <https://mises.org/library/natural-rights-debate-comment-reply-0>): 101 – 13, pp. 106 – 07.

同上，第 321-322 页，引用了穆瑞·N·罗斯巴德的《鲁宾逊式的社会哲学》，该文收录于《自由的伦理》（纽约：纽约大学出版社，1998 年），第 32-33 页，也以同样的标题发表于米塞斯日报（2021 年 12 月 7 日；<https://mises.org/library/crusoe-social-philosophy>）。安·兰德与此主题相关的思想值得注意：

正如兰德所坚持的，所有的“应然”都是假设性的，基于珍视自己的生命……关键不在于一个人必须活着才能采取行动去实现任何事情。关键在于，支持生命是使最终状态有资格成为价值的原因。只有选择将自己的生命视为一种价值，才能赋予一个人在其行动中的利害关系，而这是整个评价问题出现所必需的……

与生物决定论相反，一个人不必追求任何目标或宣称任何事物具有价值。但与主观主义相反，如果一个人这样做了，该行动或宣告在逻辑上取决于隐舍地接受自己的生命作为自己的终极价值……

F. 霍普之价值无涉 (?) 伦理学 Hoppe's Value-Free (?) Ethics

In addition to Hoppe's seeming unwillingness to criticize wholeheartedly the natural rights tradition, he is also curiously reluctant to admit the ethical aspects of his argumentation ethic:

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—a priori true is-statement; (b) argumentation presupposes property in one's body and the homesteading principle— a priori true is-statement; and (c) then, no deviation from this ethic can be argumentatively justified—a priori true is-statement.²⁵

除了霍普似乎不愿全盘批判自然权利传统之外，他还奇怪地不愿承认其论证伦理学的伦理方面：

在这里，自由意志主义的行动学证明的优势在于为私有财产提供了一个完全价值无涉的理由。它完全属于“实然”的范畴，并且从不在任何地方试图从“实然”中推导出“应然”。论证的结构是这样的：(a) 论证是命题论证——先验真实的“实然”陈述；(b) 论证的前提是个人的身体财产和拓殖原则——先验真实的“实然”陈述；(c) 那么，对于

证明选择的合理性问题只在已经选择活着的背景下才会出现。选择生存不是道德之外的事，而是道德之前的事；它是所有道德评价的先决条件。

哈里·宾斯万格，《基于生命的目的论与伦理学基础》，《一元论者》第 75 卷第 1 期（1992 年 1 月）：84-103，第 99-100 页。正如安·兰德所说：

生或死是人类唯一的根本选择。活着是他基本的选择行动。如果他选择活着，一种理性的伦理将告诉他为实现这一选择需要哪些行动原则。如果他不选择活着，自然会顺其自然。

同上，第 100 页（引用安·兰德的《因果关系 vs. 责任》，收录于《哲学：谁需要它》（西格内特出版社，1984 年），第 95、99 页。关于罗斯巴德在此处的权利论证结构的进一步讨论，见大卫·奥斯特菲尔德，《自然权利论证：对一个回复的评论》，《自由意志主义研究杂志》第 7 卷第 1 期（1983 年春季；<https://mises.org/library/natural-rights-debate-comment-reply-0>）：101-113，第 106-107 页。

这种伦理的偏离是不能通过论证来正当化的 —— 先验真实的“实然”陈述。¹⁰⁹²

Now I do not see how this is a “completely value-free justification of private property.” Private property means rights in private property; and “rights” is indeed a normative, value-laden concept. Of course, in a trivial sense, any statement such as “A should do X” is an is-statement, because one is implicitly stating that “it is the case that A should do X.” But this is still really an ought-statement, as is step (b) above, in making a statement about property rights. I do not see, however, why Hoppe is reluctant to admit this, as this is not a defect of his argument, but is in fact why it is so powerful—because it does justify the subset of ethics concerning rights.

现在，我不明白这怎么会是“私有财产完全价值无涉的正当性”。私有财产意味着私有财产的权利；而“权利”确实是一个规范性的、带价值的概念。当然，在一种微不足道的意义上，任何诸如“A 应该做 X”的陈述都是一个“实然”陈述，因为人们隐含地在陈述“事实上 A 应该做 X”。但这仍然实际上是一个“应然”陈述，正如上文(b)步骤中关于财产权的陈述一样。不过，我不明白霍普为什么不愿承认这一点，因为这并不是他的论证的缺陷，事实上，这正是他的论证如此有力的原因——因为它确实证明了有关权利的伦理学子集的合理正当性。

G. 霍普的“权利”概念 Hoppe's Conception of “Rights”

Unfortunately, Hoppe never clearly defines what he means by “rights,” which leads to some slight confusion in the presentation of aspects of his argument.²⁶ Primarily, he uses the word in a normative, ethical sense. He occasionally, however, seems to mean “power,” which is value-neutral and non-normative: “[I]f no one had the right to acquire and control anything except his own body ... then we would all cease to exist...”²⁷ It is true that we would all cease to exist if we had no power or ability to acquire and control things; however, a “right” is not logically necessary for this power to be exercised. For example, in a Robinsonade, Crusoe alone on his desert island has no rights because rights are relevant only socially, as they concern relationships between

¹⁰⁹² EEPP, p. 345.

《私有财产的经济学与伦理学》，第 345 页。

individuals. Yet Crusoe, if he has the power to build a hut and gather fruit, can actually survive.

遗憾的是，霍普从未明确界定过他所说的“权利”的含义，这就导致了他在论证某些方面的表述略显混乱。¹⁰⁹³他主要是在规范、伦理的意义上使用这个词。不过，他偶尔似乎是指“权力”，这是价值无涉且非规范性的：“如果除了自己的身体之外，没有人有权获得和控制任何东西……那么我们都将不复存在……”。¹⁰⁹⁴诚然，如果我们没有获取和控制事物的权力或能力，我们都将不复存在；但是，“权利”在逻辑上并不是行使这种权力的必要条件。例如，在《鲁滨逊漂流记》中，孤身一人在荒岛上的克鲁索没有权利，因为权利只与社会有关，因为它涉及个人之间的关系。然而，如果克鲁索有能力建造小屋和采集水果，他实际上就能生存下去。

Certainly we have the ability to affect the world, otherwise we would not continue to exist—and this may explain why, according to Hoppe's theory, we must have the right to exercise this ability. But the problem with switching to the power-sense of "rights" in a justification of normative-rights is that one may end up justifying the former and not the latter, or neither. And certainly it would be both useless and futile to try to prove that we all have the actual ability and power to control our bodies and to homestead; the very existence of the Internal Revenue Service disproves this contention immediately. Hoppe's inconsistent use of "rights" is not fatal to his argument, but clarification of this step in his argument and a precise definition of "rights" would be welcome.²⁸

我们当然有影响世界的能力，否则我们就无法继续存在——这也许可以解释为什么根据霍普的理论，我们必须有行使这种能力的权利。但是，在论证规范性权利时转而使

¹⁰⁹³ This is in marked contrast to Hoppe's normal habit of clearly defining key terms. For example, Hoppe has brilliantly demonstrated that socialism "must be conceptualized as an institutionalized interference with or aggression against private property and private property claims." Hoppe, *A Theory of Socialism and Capitalism*, p. 10.

这与霍普一贯明确界定关键术语的习惯形成了鲜明对比。例如，霍普曾精辟地证明，社会主义“必须被概念化为对私有财产和私有财产要求的制度化干涉或侵犯”。霍普：《社会主义与资本主义理论》，第 10 页。

¹⁰⁹⁴ EEPP, p. 320.

《私有财产的经济与伦理学》，第 320 页。

用权力意义上的“权利”的问题在于，我们最终可能只论证了前者，而没有论证后者，或者两者都没有论证。当然，试图证明我们每个人实际都有控制身体和拓殖的能力和权力是无用且徒劳的；美国国税局的存在本身就立即推翻了这一论点。霍普对“权利”的不一致使用对他的论证并非致命的，但我们欢迎他澄清论证中的这一步，并对“权利”下一个准确的定义。¹⁰⁹⁵

H. 哈贝马斯和阿佩尔的“对话伦理学”以及格维希斯和皮隆的“普遍一致性原则”
Habermas's and Apel's "Discourse Ethics" and Gewirth's and Pilon's "Principle of Generic Consistency"

Much of Hoppe's argumentation ethics draws on the “discourse ethics” theories of Jürgen Habermas and Karl-Otto Apel.²⁹ Hoppe's argumentation ethic also bears some similarities to Alan Gewirth's “dialectically necessary method.”³⁰ Applying this method and the principle of universalizability, Gewirth derives the precept “act in accord with the generic rights of your recipients as well as of yourself,” which he calls the “Principle of Generic Consistency” (PGC).³¹ Gewirth holds that his theory shows that individuals have rights to “freedom and well-being,” which in turn justify a welfare state.³²

霍普的论证伦理学在很大程度上借鉴了尤尔根·哈贝马斯（Jürgen Habermas）和卡尔·奥托·阿佩尔（Karl-Otto Apel）的“对话伦理学”理论。¹⁰⁹⁶ 霍普的论证伦理学也与艾

¹⁰⁹⁵ Lomasky makes a similar critique in “The Argument from Mere Argument.”

洛马斯基在《来自纯粹论证的论证》中提出了类似的批评。

¹⁰⁹⁶ EEPP, p. 314 n.16. Jürgen Habermas's works, often in German, are cited frequently throughout the book. Habermas's work on “communicative action” is crucial in Hoppe's own argumentation ethics. See also discussion in “Dialogical Arguments for Libertarian Rights” (ch. 6), n.25 et pass. Habermas's writings published in English, or English-language discussions of Habermas's works, include: Seyla Benhabib & Fred Dallmayr, eds., *The Communicative Ethics Controversy* (Cambridge, Mass.: MIT Press, 1990); Douglas B. Rasmussen, “Political Legitimacy and Discourse Ethics,” *International Philosophical Quarterly* 32 (1992; <https://perma.cc/MK59-QEVV>); Jeremy Shearmur, “Habermas: A Critical Approach,” *Critical Rev.* 2 (1988): 39 – 50; Kenneth

Baynes, *The Normative Grounds of Social Criticism: Kant, Rawls, and Habermas* (Albany: State University of New York Press, 1992), pp. 77 – 122; Jane Braaten, *Habermas’ s Critical Theory of Society* (1991); J ü rgen Habermas, *Moral Consciousness and Communicative Action*, Christian Lenhardt & Shierry Weber NicholSEN, trans. (Cambridge, Mass.: MIT Press, 1990 [1983]) (containing English translation of work originally published in German as “Moralbewusstsein und kommunikatives Handeln”); idem, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, William Rehg, trans. (Cambridge, Mass.: MIT Press, 1996; <https://perma.cc/27K9-YWW2>); idem, *Communication and the Evolution of Society*, Thomas McCarthy, trans. (Boston: Beacon Press, 1979); idem, *Knowledge and Human Interests*, Jeremy Shapiro, trans. (Boston: Beacon Press, 1972); idem, *Legitimation Crisis*, Thomas McCarthy, trans. (Boston: Beacon Press, 1975); idem, *The Philosophical Discourse of Modernity : Twelve Lectures*, Fredrick Lawrence, trans. (Cambridge, Mass.: MIT Press, 1987); idem, *Theory and Practice*, John Viertel, trans. (Boston: Beacon Press, 1973); idem, *The Theory of Communicative Action*, Thomas McCarthy, trans. (Boston: Beacon Press, 1984 & 1987) (two volumes); Thomas McCarthy, *The Critical Theory of J ü rgen Habermas* (Cambridge, Mass.: MIT Press, 1981); idem, *Ideals and Illusions: On Reconstruction and Deconstruction in Contemporary Critical Theory* (Cambridge, Mass.: MIT Press, 1993); John B. Thompson & David Held, eds., *Habermas: Critical Debates* (London: Macmillan Press, 1982); Michael Pusey, *J ü rgen Habermas* (London and New York: Routledge, 1987); Richard J. Bernstein, ed., *Habermas and Modernity* (Cambridge, Mass.: MIT Press, 1985); J ü rgen Habermas, *J ü rgen Habermas on Society and Politics: A Reader*, Steven Seidman, ed. (Boston: Beacon Press, 1989); David M. Rasmussen, ed., *Reading Habermas* (Wiley-Blackwell, 1991); Stephen K. White, *The Recent Work of J ü rgen Habermas* (Cambridge University Press, 1988); Gary C. Leedes, “The Discourse Ethics Alternative to Rust v. Sullivan,” *U. Rich. L. Rev.* 26 (1991; <https://scholarship.richmond.edu/lawreview/vol26/iss1/4/>): 87 – 143, at 108-11; Lawrence B. Solum, “Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech,” *Northwestern U.L. Rev.* 83 (1989; <https://scholarship.law.georgetown.edu/facpub/1954/>): 54 – 135, at 86 – 106.

See also Karl-Otto Apel, “Is the Ethics of the Ideal Communication Community a Utopia? On the Relationship between Ethics, Utopia, and the Critique of Utopia,” in Benhabib & Dallmayr, eds., *The Communicative Ethics Controversy*; idem, “The A Priori of the Communication Community and the Foundations of Ethics,” in *Towards a Transformation of Philosophy* (London and New York: Routledge, 1980); idem, “The Problem of Philosophical Foundations Grounding in Light of a Transcendental Pragmatics of Language,” in Kenneth Baynes, James Bohman & Thomas McCarthy, eds., *After Philosophy: End or Transformation?* (Cambridge, Mass.: MIT Press, 1986); Kim Davies, “Review of K-O Apel, *Towards a Transformation of Philosophy* (1980),” *Radical Philosophy* 30 (Spring 1982; <https://www.stephankinsella.com/wp-content/>

uploads/texts/davies_apel-review.pdf); Michel Rosenfeld, “Book Review of Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy,” Harv. L. Rev. 108 (1995): 1163 – 89.

《私有财产的经济学与伦理学》，第 314 页注释 16。尤尔根·哈贝马斯的著作（通常为德文）在整本书中被频繁引用。哈贝马斯关于“交流行动”的作品在霍普自己的论证伦理学中至关重要。另见《自由意志主义权利的对话论证》（第六章）注释 25 及其他各处的讨论。哈贝马斯以英文出版的著作，或关于哈贝马斯作品的英文讨论包括：塞拉·本哈比与弗雷德·多尔迈尔编，《交流伦理之争》（马萨诸塞州剑桥：麻省理工学院出版社，1990 年）；道格拉斯·B·拉斯穆森，《政治合法性与话语伦理》，《国际哲学季刊》32（1992 年；<https://perma.cc/MK59-QEVV>）；杰里米·希尔默，《哈贝马斯：一种批判性方法》，《批判性评论》2（1988 年）：39 – 50；肯尼斯·贝恩斯，《社会批判的规范基础：康德、罗尔斯与哈贝马斯》（纽约州奥尔巴尼：纽约州立大学出版社，1992 年），第 77 – 122 页；简·布拉滕，《哈贝马斯的社会批判理论》（1991 年）；尤尔根·哈贝马斯，《道德意识与交往行为》，克里斯蒂安·伦哈特与谢里·韦伯·尼科尔森译（马萨诸塞州剑桥：麻省理工学院出版社，1990[1983]）（包含最初以德文出版的作品“Moralbewusstsein und kommunikatives Handeln”的英文译本）；同上，《在事实与规范之间：对法律和民主的交流理论的贡献》，威廉·雷格译（马萨诸塞州剑桥：麻省理工学院出版社，1996 年；<https://perma.cc/27K9-YWW2>）；同上，《交流与社会进化》，托马斯·麦卡锡译（波士顿：灯塔出版社，1979 年）；同上，《知识与人类旨趣》，杰里米·夏皮罗译（波士顿：灯塔出版社，1972 年）；同上，《合法化危机》，托马斯·麦卡锡译（波士顿：灯塔出版社，1975 年）；同上，《现代性的哲学话语：十二讲》，弗雷德里克·劳伦斯译（马萨诸塞州剑桥：麻省理工学院出版社，1987 年）；同上，《理论与实践》，约翰·维特儿译（波士顿：灯塔出版社，1973 年）；同上，《交流行为理论》，托马斯·麦卡锡译（波士顿：灯塔出版社，1984 年与 1987 年）（两卷）；托马斯·麦卡锡，《尤尔根·哈贝马斯的批判理论》（马萨诸塞州剑桥：麻省理工学院出版社，1981 年）；同上，《理想与幻想：当代批判理论中的重构与解构》（马萨诸塞州剑桥：麻省理工学院出版社，1993 年）；约翰·B·汤普森与大卫·赫尔德编，《哈贝马斯：批判性论证》（伦敦：麦克米伦出版社，1982 年）；迈克尔·普西，《尤尔根·哈贝马斯》（伦敦与纽约：劳特利奇出版社，1987 年）；理查德·J·伯恩斯坦编，《哈贝马斯与现代性》（马萨诸塞州剑桥：麻省理工学院出版社，1985 年）；尤尔根·哈贝马斯，《尤尔根·哈贝马斯论社会与政治：读本》，史蒂文·塞德曼编（波士顿：灯塔出版社，1989 年）；大卫·M·拉斯穆森编，《解读哈贝马斯》（威利-布莱克韦尔出版社，1991 年）；斯蒂芬·K·怀特，《尤尔根·哈贝马斯的近期作品》（剑桥大学出版社，1988 年）；加里·C·利兹，《对话伦理 vs. 拉斯特诉沙利文案的替代方案》，《里士满大学法律评论》26（1991 年；<https://scholarship.richmond.edu/lawreview/vol26/iss1/4/>）：87 – 143，第 108-11 页；劳伦斯·B·索卢姆，《交流行动的自由：第一修正案言论自由的理论》，《西北大学法律评论》83（1989 年；<https://scholarship.law.georgetown.edu/facpub/1954/>）：54 – 135，第 86 – 106 页。

另见卡尔·奥托·阿佩尔，《理想交流共同体的伦理是乌托邦吗？论伦理、乌托邦与对

伦·格维斯的“辩证必要方法”¹⁰⁹⁷有某些相似之处。运用这一方法和普适性原则，格维
斯得出了“行动要符合你的接受者以及你自己的一般权利”这一戒律，他称之为“普
遍一致性原则”（PGC）¹⁰⁹⁸。格维认为，他的理论表明个人拥有“自由和幸福”的权
利，而这反过来又为福利国家提供了正当性。¹⁰⁹⁹

Hoppe criticizes Gewirth's "dialectically necessary method" because it is based on
action in general as opposed to the specific communicative subcategory of action.³³
It is interesting to note that Gewirth's former student, Roger Pilon, believes Gewirth's
PGC is correct, important, and pathbreaking, but that Gewirth himself has applied his

乌托邦的批判之间的关系》，收录于本哈比与多尔迈尔编，《交流伦理之争》；同上，
《交流共同体的先验性与伦理基础》，收录于《迈向哲学的转型》（伦敦与纽约：劳
特利奇出版社，1980年）；同上，《从先验语用学的角度看哲学基础奠基问题》，收
录于肯尼斯·贝恩斯、詹姆斯·博曼与托马斯·麦卡锡编，《哲学之后：终结还是转
型？》（马萨诸塞州剑桥：麻省理工学院出版社，1986年）；金·戴维斯，“评 K-O
阿佩尔《迈向哲学的转型（1980）》”，《激进哲学》30（1982年春季）：
https://www.stephankinsella.com/wp-content/uploads/texts/davies_apel-review.pdf；
米歇尔·罗森菲尔德，“《哈贝马斯，在事实与规范之间：对法律和民主的商谈理论
的贡献》书评”，《哈佛法律评论》108（1995年）：1163-89。

¹⁰⁹⁷ EEPP, p. 315 n.18. Gewirth's theory is presented in his book *Reason and Morality*
(Chicago: University of Chicago Press, 1978). For a concise statement of Gewirth's
theories, see his article "The Basis and Content of Human Rights," *Georgia L. Rev.* 13
(1979): 1143-70; also *idem*, *Moral Rationality* (The Lindley Lecture, Univ. of Kansas,
1972; <https://core.ac.uk/download/pdf/213402925.pdf>); *idem*, "Law, Action, and
Morality," p. 73.

See also the discussion of Gewirth and his libertarian student Roger Pilon in "Dialogical
Arguments for Libertarian Rights" (ch. 6).

《私有财产的经济与伦理学》，第315页注释18。格维斯的理论在他的著作《理性
与道德》（芝加哥：芝加哥大学出版社，1978年）中有所呈现。关于格维理论的简
要阐述，可参见他的文章《人权的基础与内容》，《佐治亚法律评论》13（1979年）：
1143-70；还有他的《道德理性》（堪萨斯大学林德利讲座，1972年）：
<https://core.ac.uk/download/pdf/213402925.pdf>；以及他的《法律、行动与道德》，
第73页。另见《自由意志主义权利的对话论证》（第六章）中对格维及其自由意志
主义的学生罗杰·皮隆的讨论。

¹⁰⁹⁸ Gewirth, "The Basis and Content of Human Rights," p. 1155.

格维《人权的基础与内容》，第1155页。

¹⁰⁹⁹ *Ibid.*, at 1149, 1167-69.

同上，第1149页，1167-1169页。

own theories incorrectly in an attempt to justify the welfare state.³⁴ The libertarian Pilon believes he can reform his own teacher's work in order to justify libertarian principles.³⁵ Similarly, Hoppe believes his former teacher Habermas's discourse-ethics theories, while correct at core, are applied incorrectly by Habermas to yield a socialistic ethic; Hoppe feels that Habermas's theories, if correctly applied (as Hoppe himself does), yield the libertarian non-aggression norm.

霍佩批评格维斯的“辩证必要方法”，因为它是基于一般的行动，而不是特定的交流子范畴行动。¹¹⁰⁰有趣的是，格维斯的前学生罗杰·皮隆认为格维斯的普遍一致性原则是正确的、重要的且具有开创性，但格维斯本人在试图为福利国家提供正当性时错误地应用了自己的理论。¹¹⁰¹自由意志主义者皮隆认为他可以修正自己老师的作品，以证明自由意志主义原则的正确性。¹¹⁰²类似地，霍普认为他的前老师哈贝马斯的对话伦理学理论在核心上是正确的，但哈贝马斯错误地应用了这些理论，得出了社会主义伦理；霍普觉得哈贝马斯的理论如果正确应用（正如霍普本人所做的那样），会得出自由意志主义的互不侵犯规范。

Hoppe states:

*Apel and Habermas are essentially silent on the all-decisive question of what ethical prescription actually follows from the recognition of the "a priori of argumentation." However, there are remarks indicating that they both seem to believe some sort of participatory social democracy to be implied in this a priori. The following [i.e., argumentation ethics] explains why hardly anything could be farther from the truth.*³⁶

¹¹⁰⁰ EEPP, p. 315 n.18.

《私有财产的经济学与伦理学》，第 315 页注释 18。

¹¹⁰¹ Roger A. Pilon, "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," Georgia L. Rev. 13 (1979; <https://perma.cc/FYX4-CFNH>): 1171 - 96, pp. 1178, 1187; see also idem, A Theory of Rights: Toward Limited Government (Ph.D. dissertation, University of Chicago, 1979; <https://perma.cc/DGS3-W4UA>).

罗杰·A·皮隆，《权利的一致性排序：或者我们有哪些权利和没有哪些权利》，《佐治亚法律评论》13（1979 年；<https://perma.cc/FYX4-CFNH>）：1171 - 96，第 1178、1187 页；另见其《一种权利理论：迈向有限政府》（芝加哥大学博士论文，1979 年；<https://perma.cc/DGS3-W4UA>）。

¹¹⁰² Ibid at 1186 - 87.

同上，第 1186-1187 页。

霍普指出：

阿佩尔和哈贝马斯在关于从对“论证的先验性”的认识中实际得出什么伦理规范这个决定性的问题上基本上保持沉默。然而，有评论指出他们似乎都认为这种先验性隐含着某种参与式的社会民主。下文（即论证伦理）将解释为什么几乎没有什么比这更远离真相。¹¹⁰³

Although Habermas and Apel agree that argumentation implies that certain intersubjectively meaningful norms exist,³⁷ they would not agree with the next step taken by Hoppe. Hoppe next recognizes that argumentation, as a form of action, requires exclusive control of the scarce resources in one's body; this implies that "as long as there is any argumentation, there is a mutual recognition of each other's property right in his own body."³⁸ As Hoppe observes, "That Habermas and Apel are unable to take this step is, I submit, due to the fact that they, too, suffer, as do many other philosophers, from a complete ignorance of economics, and a corresponding blindness towards the fact of scarcity."³⁹ Presumably, just as Hoppe criticizes Gewirth's welfare-state-justifying theory, not only because of its results but also because of its action-based method, he would also find fault in Pilon's neo-Gewirthian theory and methods, despite Pilon's libertarian (i.e., correct) conclusions.

尽管哈贝马斯和阿佩尔都同意论证意味着存在某些主体间有意义的规范，¹¹⁰⁴但他们不会同意霍普接下来的一步。霍普接着承认，论证作为一种行动形式，需要自己身体这种稀缺资源进行排他性控制；这意味着“只要存在任何论证，就存在着对对方关于自己身体财产权的相互承认”。¹¹⁰⁵正如霍普所观察到的，“我认为，哈贝马斯和阿佩尔无

¹¹⁰³ EEPP, p. 335 n.2.

《私有财产的经济学与伦理学》，第 335 页注释 2。

¹¹⁰⁴ Ibid., p. 334.

同上，第 334 页。

¹¹⁰⁵ Ibid., p. 335.

同上，第 335 页。

法迈出这一步，是因为他们也像许多其他哲学家一样，完全不了解经济学，并且对稀缺性这一事实相应地视而不见。¹¹⁰⁶大概就像霍普批评格维斯为福利国家提供正当性的理论，不仅是因为其结果，还因为其基于行动的方法一样，他也会在皮隆的新格维斯理论和方法中发现错误，尽管皮隆得出了自由意志主义的（即正确的）结论。

III.认识论

A. 行动学在认识论和伦理学中的应用 *The Application of Praxeology to Epistemology and Ethics*

Hoppe's epistemology is basically an extension of Ludwig von Mises's praxeology, which Mises had previously applied only to economics.⁴⁰ Mises inquired into the logical status of typical economic propositions such as the law of marginal utility. Mises showed that both empiricism and historicism are self-contradictory doctrines and justified the claims of rationalist philosophy by demonstrating the existence of a priori synthetic propositions.⁴¹

霍普的认识论基本上是路德维希·冯·米塞斯（Ludwig von Mises）行动学的延伸，米塞斯以前只将其应用于经济学。¹¹⁰⁷米塞斯探究了边际效用定律等典型经济命题的逻辑地位。米塞斯揭露了经验主义和历史主义都是自相矛盾的学说，并通过证明先验综合命题的存在来为理性主义哲学的主张提供正当性。¹¹⁰⁸

In the Kantian and Misesian framework, analytic truths like “all bachelors are unmarried” are true, but circular or tautological. Synthetic truths, like “all bachelors are unfulfilled” (if that were true), say something substantial about bachelors that is not already part of the definition of bachelors. We may know a synthetic truth through experience or empirically (or a posteriori). But these truths are not necessarily true, and might have

¹¹⁰⁶ Ibid.
同上。
¹¹⁰⁷ Ibid., p. 278 et seq.
同上，第 278 页及后续页。
¹¹⁰⁸ Ibid., p. 271 et seq.
同上，第 271 页及后续页。

been false if experience had been different. According to empiricism, synthetic truths can be known only through experience.⁴²

在康德和米塞斯的框架中，“所有单身汉都是未婚的”这样的分析真理是真实的，但却是循环论证或同义反复。综合真理，如“所有的单身汉都是不满足的”（如果这是真的），则说明了单身汉的一些实质内容，而这些内容并不是单身汉定义的一部分。我们可以通过经验或实证（或后验）来认识综合真理。但这些真理并不必然为真，如果经验不同，这些真理也可能是假的。根据经验主义，综合真理只能通过经验来认识。¹¹⁰⁹

A synthetic a priori proposition is significant because it is necessarily true yet is not a tautology, thus yielding certain unchallengeable real knowledge about the world.⁴³

先验综合命题之所以重要，是因为它必然为真，但又不是同义反复，从而产生了关于世界的某些无可置疑的真实知识。¹¹¹⁰

Mises shows that the propositions of economics are indeed knowledge that is not derived from observation and yet is constrained by objective laws. In the science of praxeology, the general theory of human action, the “axiom of action” (i.e., the proposition that humans act, that they display intentional behavior), qualifies as a priori synthetic knowledge because (a) the “axiom is not derived from observation—there are only bodily movements to be observed but no such thing as actions—but stems instead from reflective understanding”; and (b) this understanding is of a self-evident proposition, “for its truth cannot be denied, since the denial would itself have to be categorized as an action.”⁴⁴ Mises shows that all of the “categories which we know to be the very heart of economics—values, ends, means, choice, preference, cost, profit and loss—are implied in the axiom of action.”⁴⁵

米塞斯表明，经济学的命题确实是一种知识，它不是从观察中得来的，但又受到客观规律的制约。在行动学的科学中，关于人的行动的一般理论，即“行动公理”（即人类

¹¹⁰⁹ Roger Scruton, *Kant* (Oxford University Press, 1982), pp. 18 – 19.

罗杰·斯克鲁顿，《康德》（牛津大学出版社，1982年），第18-19页。

¹¹¹⁰ David Gordon, *The Philosophical Origins of Austrian Economics* (Auburn, Ala.: Mises Institute, 1993; <https://perma.cc/AQ6N-VS4H>), pp. 30 – 31.

大卫·戈登，《奥地利经济学的哲学起源》（阿拉巴马州奥本：米塞斯研究院，1993年；<https://perma.cc/AQ6N-VS4H>），第30-31页。

行动、人类表现出有意行为的命题）是先验综合知识，因为（a）“公理并非源自观察——只有身体运动可以观察，而没有行动这种东西——而是源于反思性理解”；（b）这种理解是对一个不言而喻的命题的理解，“因为它的真实性是无法否认的，因为否认本身就必须归类为一种行动。”¹¹¹¹米塞斯表明，我们所知的作为经济学核心的所有范畴——价值、目的、手段、选择、偏好、成本、利润和损失——都隐含在行动公理中”。

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Hoppe's achievement is to explain how praxeology also provides the foundation for epistemology and ethics (the argumentation ethic has already been discussed above). To the a priori axiom of action, Hoppe adds a second a priori axiom, the “a priori of argumentation.” This axiom:

... states that humans are capable of argumentation and hence know the meaning of truth and validity. As in the case of the action axiom, this knowledge is not derived from observation: there is only verbal behavior to be observed and prior reflective cognition is required in order to interpret such behavior as meaningful arguments. And the validity of the axiom, like that of the action axiom, is indisputable. It is impossible to deny that one can argue, as the very denial would itself be an argument....

Recognizing, as we have just done, that knowledge claims are raised and decided upon in the course of argumentation and that this is undeniably so, one can now reconstruct the task of epistemology more precisely as that of formulating those propositions which are argumentatively indisputable in that their truth is already implied in the very fact of making one's argument and so cannot be denied argumentatively; and to delineate the range of such a priori knowledge from the realm of propositions whose validity cannot be established in this way but require additional, contingent information for their validation, or that cannot be validated at all and so are mere metaphysical statements in the pejorative sense of the term metaphysical.⁴⁶

霍普的成就是解释了人的行动学如何也为认识论和伦理学提供基础（论证伦理学已在

¹¹¹¹ EEPP, pp. 275 – 76.

《私有财产的经济学与伦理学》，第 275-276 页。

¹¹¹² Ibid., p. 277.

同上，第 277 页。

上文讨论过)。在行动的先验公理之外, 霍普又增加了第二个先验公理, 即“论证的先验公理”。这个公理是:

……指出人类有进行论证的能力, 因此知道真理和有效性的含义。与行动公理的情况一样, 这种知识并非源于观察: 只能观察到言语行为, 并且需要先验的反思性认知才能将这种行为解释为有意义的论证。而且这个公理的有效性, 就像行动公理的有效性一样, 是无可争议的。不可能否认一个人能够进行论证, 因为这种否认本身就是一个论证……

正如我们刚才所认识到的, 知识主张是在论证过程中提出并确定的, 这一点是无可否认的, 因此我们现在可以更准确地重构认识论的任务, 即提出那些在论证上无可争议的命题, 因为它们的真理性已经隐含在提出论证这一事实中, 因此无法在论证上予以否认; 并将这种先验知识与另外一些命题区分开来, 这些命题的有效性不能以这种方式确立, 而是需要额外的、偶然的信息来验证, 或者根本无法被验证, 因此在“形而上学”这个术语的贬义意义上只是形而上学的陈述。¹¹¹³

B. 霍普和康德 vs. 兰德 Hoppe and Kant Versus Rand

Hoppe offers a stunning justification and interpretation of Kant's controversial statement that “[so] far it has been assumed that our knowledge had to conform to reality,” instead it should be assumed “that observational reality should conform to our

¹¹¹³ Ibid., p. 280.
同上, 第 280 页。

mind.”⁴⁷

霍普对康德那句有争议的论述——“迄今为止人们一直认为我们的知识必须符合现实”，给出了一个令人惊叹的辩护和阐释，即应该反过来理解“可观察的现实应当符合我们的思维”。¹¹¹⁴

According to rationalist philosophy, a priori true propositions had their foundation in the operation of principles of thinking which one could not possibly conceive of as operating otherwise; they were grounded in categories of an active mind. Now, as empiricists were only too eager to point out, the obvious critique of such a position is, that if this were indeed the case, it could not be explained why such mental categories should fit reality. Rather, one would be forced to accept the absurd idealistic assumption that reality would have to be conceived of as a creation of the mind, in order to claim that a priori knowledge could incorporate any information about the structure of reality.⁴⁸

根据理性主义哲学，先验为真的命题建立在人们不可能设想其以其他方式运作的思维原则的运作之上；它们基于积极思维的范畴。现在，正如经验主义者急于指出的那样，对这种立场的明显批评是，如果情况确实如此，就无法解释为什么这种思维范畴应该符合现实。相反，人们将不得不接受荒谬的唯心主义假设，即必须把现实视为心智的创造物，才能声称先验知识可以包含有关现实结构的任何信息。¹¹¹⁵

The empiricists' critique seemed to be justified by statements such as that of Kant above. However, writes Hoppe:

... recognizing knowledge as being structurally constrained by its role in the framework of action categories provides the solution to such a complaint. For as soon as this is realized, all idealistic suggestions of rationalist philosophy disappear, and an epistemology claiming that a priori true propositions exist becomes a realistic

¹¹¹⁴ Ibid., p. 282, quoting Immanuel Kant, Kritik der Reinen Vernunft [Critique of Pure Reason], in vol. 3 Werke, Wilhelm Weischedel, ed. (Frankfurt/M.: Suhrkamp, 1968), p. 45.

同上，第 282 页，引用伊曼努尔·康德《纯粹理性批判》，收录于《著作集》第 3 卷，威廉·魏施德编（美茵河畔法兰克福：苏尔坎普出版社，1968 年），第 45 页。

¹¹¹⁵ EEPP, p. 282.

《私有财产的经济学与伦理学》，第 282 页。

epistemology instead. Understood as constrained by action categories, the seemingly unbridgeable gulf between the mental on the one hand and the real, outside physical world on the other is bridged. So constrained, a priori knowledge must be as much a mental thing as a reflection of the structure of reality, since it is only through actions that the mind comes into contact with reality, so to speak. Acting is a cognitively guided adjustment of a physical body in physical reality. And thus, there can be no doubt that a priori knowledge, conceived of as an insight into the structural constraints imposed on knowledge qua knowledge of actors, must indeed correspond to the nature of things. The realistic character of such knowledge would manifest itself not only in the fact that one could not think it to be otherwise, but in the fact that one could not undo its truth.⁴⁹

经验主义者的批评似乎因康德等人的上述言论而显得合理。然而，霍普写道：

.....承认知识在结构上受制于它在行动范畴框架中的作用，就为这种质疑提供了解决方案。因为一旦认识到这一点，理性主义哲学的所有唯心主义暗示就会消失，声称存在先验真命题的认识论就会变成一种现实的认识论。如果理解为受到行动范畴的制约，精神世界与真实的外部物理世界之间看似不可逾越的鸿沟就被弥合了。受此制约，先验知识必然是一种心智的产物，就像对现实结构的反映一样，因为可以说，只有通过行动，心智才能接触到现实。行动是在认知指导下对物理现实中的物理躯体进行的调整。因此，毫无疑问，先验知识被视为对作为行动人知识（知识就是行动人的知识 knowledge qua knowledge of actors）所受结构制约的洞察，它确实必须符合事物的本质。这种知识的现实特征不仅体现在人们不能认为它是别的样子这一事实中，还体现在人们不能否定其真实性这一事实中。¹¹¹⁶

In Hoppe's pamphlet *Praxeology and Economic Science*,⁵⁰ which contains a discussion similar to the one in chapter 6 of his book, he makes it clear that he does not think that Kant himself meant that reality is created by the mind.⁵¹ Indeed, Kant had hinted at the solution presented in Hoppe's interpretation above. Hoppe writes, "He thought mathematics, for instance, had to be grounded in our knowledge of the meaning of repetition, of repetitive operations. And he also realized, if only somewhat vaguely, that

¹¹¹⁶ Ibid., pp. 282 - 83.

同上，第 282-283 页。

the principle of causality is implied in our understanding of what it is and means to act.”
52

在霍普的小册子《行动学与经济科学》¹¹¹⁷中，其中包含与他的书中第六章类似的讨论，他明确表示，他不认为康德本人的意思是现实是由心智创造的。¹¹¹⁸事实上，康德已经暗示了霍普在上述解释中提出的解决方案。霍普写道：“例如，他认为数学必须基于我们对重复、重复操作的意义的认识。并且他也认识到，即使只是有些模糊地认识到，因果关系的原则隐含在我们对行动是什么以及意味着什么的理解之中。”¹¹¹⁹

As for the Objectivist or Randian denunciation of Kant for this statement that observational reality should conform to the mind, Hoppe states:

Among some followers of Austrianism, the Kant interpretation of Ayn Rand (see, for instance, her Introduction to Objectivist Epistemology [1979]; or For the New Intellectual [1961]) enjoys great popularity. Her interpretation, replete with sweeping denunciatory pronouncements, however, is characterized by a complete absence of any interpretive documentation whatsoever. On Rand's arrogant ignorance regarding Kant, see B. Goldberg, "Ayn Rand's 'For the New Intellectual,'" New Individualist Rev., vol. 1, no. 3 (1961).53

至于客观主义者或兰德派对康德“可观察的现实应当符合我们的心智”这一说法的谴责，霍普指出：

在一些奥地利学派的追随者中，安·兰德对康德的解读（例如，可参见她的《客观主义认识论导论》[1979]；或《致新知识分子》（For the New Intellectual）[1961]）

¹¹¹⁷ Hans-Hermann Hoppe, Praxeology and Economic Science (1988), later included in idem, Economic Science and the Austrian Method (Auburn, Ala.: Mises Institute, 1995; www.hanshoppe.com/esam).

汉斯-赫尔曼·霍普，《行动学与经济科学》（1988年），后收录于同一作者的《经济科学与奥地利学派方法》（阿拉巴马州奥本：米塞斯研究所，1995年；www.hanshoppe.com/esam）。

¹¹¹⁸ Ibid., pp. 17 – 18.

同上，第17-18页。

¹¹¹⁹ Ibid., p. 18.

同上，第18页。

非常受欢迎。然而，她的解读充满了一概而论的谴责性言论，其特点是完全没有任何解释性的文献依据。关于兰德在康德问题上的傲慢无知，见 B. 戈德堡的《安·兰德的“致新知识分子”》，《新个人主义评论》，第 1 卷，第 3 期（1961 年）。¹¹²⁰

¹¹²⁰ Ibid., at 45 n.14. Goldberg’s article, however, is poorly reasoned and largely unconvincing. See David Kelley, *The Evidence of the Senses: A Realist Theory of Perception* (1986), p. 27 – 31 (discussing the primacy of existence); Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand* (New York: Dutton, 1991), pp. 148 – 52 (discussing Ayn Rand and philosophy of objectivity). The notorious phrase of Kant’s can be found in English in Immanuel Kant, *Critique of Pure Reason* (Norman K. Smith trans. 1953 [1929]), pp. 21 – 22. As David Kelley, executive director of the Institute for Objectivist Studies, paraphrases Kant:

Hitherto it has been supposed,” Kant says in his major work, “that all our knowledge must conform to the objects,” but, he argues, “... under that supposition, every effort to establish the validity of consciousness has failed. So, “the experiment therefore ought to be made, whether we should not succeed better with the problems of metaphysic by assuming that the objects must conform to our mode of cognition.

Kelley perceptively criticizes Kant here with an analogy, that of Kant’s thought applied to the driving of a car:

Hitherto it has been supposed that our steering must conform to the road. But on this supposition it has proved impossible to establish the validity of our steering. The experiment therefore ought to be made, whether we should not have more success with the problem of driving by assuming that the road must conform to our steering.

David Kelley, “The Primacy of Existence,” *The Foundations of Knowledge*, Lecture 1 (The Jefferson School Conference, San Diego; YouTube, 1985; <https://youtu.be/AVBgfamJxFk>). Author’s note (2023): As Hoppe has observed, Kant’s meaning is ambiguous or murky enough because of his wording to cause some, such as Kelley, and other, primarily American, philosophers, to interpret Kant in this idealistic way, while others, primarily on the continent, have interpreted him in a more realistic way. See EEPP, p. 282 and 282 n.17, citing, as examples of the latter, Friedrich Kambartel, *Erfahrung und Struktur* (Frankfurt/M.: Suhrkamp, 1968), chap. 3 as well as Hoppe’s own *Handeln und Erkennen: Zur Kritik des Empirismus am Beispiel der Philosophie David Humes* (Bern: Lang, 1976; www.hanshoppe.com/german). Some other books suggested to me in this regard, which I have not yet read (and I don’t know German), include: Ralph C.S. Walker, *Kant* (London: Routledge and Kegan Paul, 1978) (suggested by Barry Smith); Paul Abela, *Kant’s Empirical Realism* (Oxford: Clarendon Press, 2002)

and J.N. Findlay, *Kant and the Transcendental Object: A Hermeneutic Study* (Oxford: Clarendon Press, 1981) (suggested by David Gordon); Paul Lorenzen, *Methodisches Denken* (Frankfurt/M.: Suhrkamp, 1968) and idem, *Normative Logic and Ethics* (Mannheim: Bibliographisches Institut, 1969) (suggested by Hoppe); Magdalena Aebi, *Kants Begründung der “Deutschen Philosophie” : Kants Transzendente Logik, Kritik Ihrer Begründung* (Basel: Verlag für Recht und Gesellschaft, 1947) (suggested by Kevin Mulligan).

But as Hoppe points out, “Whether or not such an interpretation of Kant’s epistemology is indeed correct is a very different matter. Clarifying this problem is of no concern here, however.” EEPP, p. 282 n.17. In any case, Kantians such as Mises, Kantian-Misesians such as Hoppe, and Aristotelean-Misesians such as Rothbard are in fact epistemological realists and not idealists as some philosophers construe Kant to be. To the contrary, the Misesian praxeological perspective helps to ground a realist epistemology. As Hoppe notes,

Recognizing knowledge as being structurally constrained by its role in the framework of action categories provides the solution to such a complaint, for as soon as this is realized, all idealistic suggestions of rationalist philosophy disappear, and an epistemology claiming that a priori true propositions exist becomes a realistic epistemology instead. Understood as constrained by action categories, the seemingly unbridgeable gulf between the mental on the one hand and the real, outside physical world on the other is bridged.

Ibid., pp. 282 – 83. For more on Hoppe’s realistic, Misesian-based epistemology, see his *Economic Science and the Austrian Method*, pp. 68 – 70. On Rothbard’s, see his “The Mantle of Science,” “In Defense of ‘Extreme Apriorism,’ ” and other chapters in *Section One: Method, of Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>). On Mises’s realism, see Ludwig von Mises, “Epistemological Studies,” in *Memoirs, Arlene Oost-Zinner, trans* (Auburn, Ala.: Mises Institute, 2009) (formerly *Notes and Recollections*); Mises’s dismissive remarks on Popper in *The Ultimate Foundation of Economic Science: An Essay on Method* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>), chap. 4, § 8 and chap. 7, § 4; idem, *Theory and History: An Interpretation of Social and Economic Evolution* (Auburn, Ala.: Mises Institute, 2007 [1957]; <https://mises.org/library/theory-and-history-interpretation-social-and-economic-evolution>), chap. 1, § 3. See also Edward W. Younkins, “Menger, Mises, Rand, and Beyond,” *J. Ayn Rand Stud.* 6, no. 2 (Spring 2005; <https://perma.cc/SM4J-TYBV>): 337 – 74, p. 342 et pass. (also in Edward W. Younkins, ed., *Philosophers of Capitalism: Menger, Mises, Rand, and Beyond* (Lexington Books, 2005)), and Heidi C. Morris, “Reason and Reality: The Logical Compatibility of Austrian Economics and Objectivism,” *Rebirth of Reason* (May 10, 2005; <https://perma.cc/PSR5-MNFE>).

同上，第 45 页注释 14。然而，戈德堡的文章推理欠佳且在很大程度上缺乏说服力。

参见大卫·凯利的《感官的证据：一种实在论的知觉理论》（1986 年），第 27-31 页（讨论存在的首要性）；伦纳德·佩科夫的《客观主义：安·兰德的哲学》（纽约：达顿出版社，1991 年），第 148-152 页（讨论安·兰德与客观主义哲学）。康德的那句著名表述可在伊曼努尔·康德的《纯粹理性批判》（诺曼·K·史密斯译，1953 年 [1929 年]）中找到英文版本，第 21-22 页。正如客观主义研究协会执行主任大卫·凯利对康德的话进行的阐释：

“迄今为止，人们一直认为，我们所有的知识都必须符合对象。”康德在其主要著作中说道，但他论证道……在这种假设下，为确立意识的有效性所做的每一次努力都失败了。所以，“因此应当进行这样一个实验，即假定对象必须符合我们的认知模式，我们在形而上学问题上是否会取得更大的成功。”

凯利在这里用了一个类比，即把康德的思想应用于汽车驾驶，对康德进行了敏锐的批评：

迄今为止，人们一直认为我们的转向必须符合道路。但事实证明，根据这种假设，我们无法确定转向的正确性。因此，我们应该做一个实验，假设道路必须符合我们的转向，那么我们在驾驶问题上是否会取得更大的成功。

戴维·凯利，《存在的首要性》，《知识的基础》，第一讲（杰斐逊学校会议，圣地亚哥；YouTube，1985 年；<https://youtu.be/AVBgfamJxFk>）。作者注（2023 年）：正如霍普所观察到的，由于康德的措辞，他的意思足够模糊或晦涩，以至于像凯利这样的一些人以及其他主要是美国的哲学家以这种唯心主义的方式来解释康德，而其他主要是欧洲大陆的人则以一种更实在论的方式来解释他。参见《私有财产的经济与伦理学》，第 282 页和第 282 页注 17，作为后一种解释的例子，引用了弗里德里希·坎巴泰尔的《经验与结构》（美茵河畔法兰克福：苏尔坎普出版社，1968 年）第三章以及霍普自己的《行动与认识：以大卫·休谟的哲学为例对经验主义的批判》（伯尔尼：朗出版社，1976 年；www.hanshoppe.com/german）。在这方面有人向我推荐了其他一些我还没读过的书（而且我不懂德语），包括：拉尔夫·C·S·沃克的《康德》（伦敦：劳特利奇与基根·保罗出版社，1978 年）（由巴里·史密斯推荐）；保罗·阿贝拉的《康德的经验实在论》（牛津：克拉伦登出版社，2002 年）以及 J·N·芬德利的《康德与先验客体：一项解释学研究》（牛津：克拉伦登出版社，1981 年）（由大卫·戈登推荐）；保罗·洛伦岑的《方法论思维》（美茵河畔法兰克福：苏尔坎普出版社，1968 年）以及他的《规范逻辑与伦理学》（曼海姆：文献研究所，1969 年）（由霍普推荐）；玛格达莱娜·埃比的《康德对“德国哲学”的奠基：康德的先验逻辑，对其奠基的批判》（巴塞尔：法律与社会出版社，1947 年）（由凯文·穆里根推荐）。

但正如霍普所指出的，“对康德认识论的这种解释是否确实正确是一个非常不同的问题。然而，澄清这个问题在这里并不重要。”《经济、伦理与私有财产》，第 282 页注释 17。在任何情况下，像米塞斯这样的康德主义者、像霍普这样的康德-米塞斯主义者以及像罗斯巴德这样的亚里士多德-米塞斯主义者实际上都是认识论实在论者，而不是像一些哲学家所理解的康德那样是唯心主义者。相反，米塞斯的行动学观点有助于奠定一种实在论的认识论。正如霍普所指出的：

“认识到知识在结构上受到其在行动范畴框架中的作用的限制，为这样的责难提供了解决方案，因为一旦认识到这一点，理性主义哲学的所有唯心主义暗示就都消失了，

C. 先验真理 A Priori Truths

Hoppe then ferrets out various truths that are implied in the very fact of arguing. The laws of logic, such as junctors ("and," "or," "if-then," "not"), quantors ("there is," "all," "some"), and the laws of identity and contradiction:

... are a priori true propositions about reality and not mere verbal stipulations regarding the transformation rules of arbitrarily chosen signs, as empiricist-formalists would have it. They are as much laws of thinking as of reality, because they are laws that have their ultimate foundation in action and could not be undone by any actor. In each and every action, an actor identifies some specific situation and categorizes it in one way rather than another in order to be able to make a choice.⁵⁴

然后，霍普发现了各种隐含在论证事实中的真理。逻辑法则，如分词（“和”、“或”、“如果-那么”、“并非”）、量词（“存在”“所有”“一些”）以及同一律和矛盾律：

而声称存在先验真命题的认识论就变成了一种实在论的认识论。当被理解为受到行动范畴的限制时，一方面是精神，另一方面是真实的外部物质世界之间看似不可逾越的鸿沟就被跨越了。”

同上，第 282-283 页。关于霍普的实在论的、基于米塞斯的认识论的更多内容，参见他的《经济科学与奥地利学派方法》，第 68-70 页。关于罗斯巴德的认识论，参见他的《科学的衣钵》《捍卫“极端先验主义”》以及《经济学的论证》（阿拉巴马州奥本：米塞斯研究院，2011 年；<https://mises.org/library/economic-controversies>）第一部分“方法”中的其他章节。关于米塞斯的实在论，参见路德维希·冯·米塞斯的《认识论研究》，收录于《回忆录》，阿琳·奥斯特-津纳译（阿拉巴马州奥本：米塞斯研究院，2009 年）（以前是《笔记与回忆》）；米塞斯在《经济科学的终极基础：方法论论文》（新泽西州普林斯顿：D. 范诺斯特兰德公司，1962 年；<https://mises.org/library/ultimate-foundation-economic-science>）第四章第 8 节和第七章第 4 节中对波普尔的不屑一顾的评论；同上，《理论与历史：对社会和经济演化的解释》（阿拉巴马州奥本：米塞斯研究院，2007 年 [1957 年]；<https://mises.org/library/theory-and-history-interpretation-social-and-economic-evolution>），第一章第 3 节。另见爱德华·W·扬金斯的《门格尔、米塞斯、兰德及其他》，《安·兰德研究杂志》6 卷 2 期（2005 年春季；<https://perma.cc/SM4J-TYBV>）：337-374，第 342 页及以后（也收录在爱德华·W·扬金斯编，《资本主义哲学家：门格尔、米塞斯、兰德及其他》（列克星敦图书，2005 年）），以及海蒂·C·莫里斯的《理性与现实：奥地利经济学与客观主义的逻辑兼容性》，《理性的重生》（2005 年 5 月 10 日；<https://perma.cc/PSR5-MNFE>）。

.....是关于现实的先验真命题，而不是像经验主义形式主义者所认为的那样，仅仅是关于任意选择的符号的转换规则的口头规定。它们既是思维的法则，也是现实的法则，因为它们是以行动为最终基础的法则，任何行动人都无法取消。在每一次行动中，行动人都会确定某种具体的情况，并以一种方式而不是另一种方式对其进行分类，以便能够做出选择。¹¹²¹

Hoppe goes on to show that arithmetic is an a priori and yet empirical discipline and "is rooted in our understanding of repetition—the repetition of action."⁵⁵ He even demonstrates the irrelevance of Gödel's Incompleteness theorem.⁵⁶ Euclidean geometry is a priori and yet incorporates empirical knowledge about space, "because it is not only the very precondition for any empirical spatial description, it is also the precondition for any active orientation in space."⁵⁷ Einstein's nonEuclidean theories even presuppose the validity of Euclidean geometry: "After all, the lenses of the telescopes which one uses to confirm Einstein's theory regarding the non-Euclidean structure of physical space must themselves be constructed according to Euclidean principles."⁵⁸

霍普接着表明算术是一门先验但又具有经验性的学科，“它植根于我们对重复——行动的重复——的理解”。¹¹²²他甚至证明了哥德尔不完全性定理的无关性。¹¹²³欧氏几何是先验，却包含了关于空间的经验知识，“因为它不仅是任何经验空间描述的先决条件，也是任何空间主动定向的先决条件”。¹¹²⁴爱因斯坦的非欧几里得理论甚至预设了欧几里得几何的有效性：“毕竟，人们用来证实爱因斯坦关于物理空间非欧几里得结构的

¹¹²¹ EEPP, p. 284.

《私有财产的经济学与伦理学》，第 284 页。

¹¹²² Ibid., p. 286.

同上，第 286 页。

¹¹²³ Ibid., p. 286 n.20.

同上，第 286 页注释 20.

¹¹²⁴ Ibid., pp. 288.

同上，第 288 页。

理论的望远镜镜片，本身就必须根据欧几里得原理构造。¹¹²⁵

Hoppe also demonstrates the a prioristic character of causality and teleology. Significantly, Hoppe shows that “everything which is not an action must necessarily be categorized causally”; and, “in contrast, everything that is an action must be categorized teleologically.”⁵⁹ Also, because the causality principle is a necessary presupposition even of the Heisenberg Uncertainty Principle in physics, there is a “fundamental misconception involved in interpreting the Heisenberg principle as invalidating the causality principle.”⁶⁰

霍普还证明了因果关系和目的论的先验特征。值得注意的是，霍普表明“所有不是行动的事物必然要从因果关系上进行分类”；并且，“相反，所有是行动的事物都必须从目的论上进行分类”。¹¹²⁶此外，由于因果性原理甚至是物理学中海森堡不确定性原理的

¹¹²⁵ Ibid, p. 288 n.23; see Petr Beckmann, *Einstein Plus Two* (Golem Press, 1987), p. 27 et pass. (proposing theory implying that Einstein’s work does not prove physical space is non-Euclidean). In the journal founded by Dr. Beckmann, who passed away in 1993, a recent article purports to have found evidence disproving part of Einstein’s theory, thereby confirming Beckmann and Hoppe. Howard C. Hayden, “Stellar Aberration,” *Galilean Electrodynamics* [https://perma.cc/JUY8-W7WS] vol. 4, no. 5 (Sept./Oct. 1993; https://perma.cc/GQY6-KUVK): 89 – 92. In this article, Hayden, a professor of physics at the University of Connecticut, claims that evidence shows that the phenomenon of stellar aberration is not due to the relative velocity of a star with respect to Earth, as is claimed by Einstein’s theory of relativity. Ibid., at 91 – 92. The evidence thus casts doubt on the validity of Einsteinian relativity. *Galilean Electrodynamics* is now edited by Howard C. Hayden. (Author’s note (2023): this original comment was written in 1994.) 同上，第 288 页注释 23；参见彼得·贝克曼的《爱因斯坦及其他两人》（Golem Press，1987 年），第 27 页及后续页（提出一种理论，暗示爱因斯坦的工作并不能证明物理空间是非欧几里得的）。在 1993 年去世的贝克曼博士创办的杂志上，最近有一篇文章声称找到了推翻爱因斯坦部分理论的证据，从而证实了贝克曼和霍普的观点。霍华德·C·海登，《恒星光行差》，《伽利略电动力学》[https://perma.cc/JUY8-W7WS] 第 4 卷第 5 期（1993 年 9 月 / 10 月；https://perma.cc/GQY6-KUVK）：89 – 92。在这篇文章中，康涅狄格大学物理学教授海登声称，证据表明恒星光行差现象并非如爱因斯坦相对论所声称的那样是由于恒星相对于地球的相对速度引起的。同上，第 91 – 92 页。因此，该证据使人们对爱因斯坦相对论的有效性产生怀疑。《伽利略电动力学》现在由霍华德·C·海登编辑。（作者注（2023 年）：这条原始评论写于 1994 年。）

¹¹²⁶ Ibid., pp. 291 – 92. 同上，第 291-292 页。

必要前提，因此“将海森堡原理解释为因果性原理无效涉及到一个根本性的误解”。
¹¹²⁷

IV.经济学

A. 公共品理论和安保的生产 *Public Goods Theory and the Production of Security*

Part One: Economics contains five interesting and insightful chapters. In chapter 1, “Fallacies of the Public Goods Theory and the Production of Security,” Hoppe shows that the distinction between “private” and “public” goods is completely illusory:

A clear-cut dichotomy between private and public goods does not exist... All goods are more or less private or public and can—and constantly do—change with respect to their degree of privateness/publicness as people's values and evaluations change, and as changes occur in the composition of the population. In order to recognize that they never fall, once and for all, into either one or the other category, one must only recall what makes something a good. For something to be a good it must be recognized and treated as scarce by someone. Something is not a good as such, that is to say; goods are goods only in the eyes of the beholder. Nothing is a good unless at least one person subjectively evaluates it as such. But then, when goods are never goods-as-such—when no physico-chemical analysis can identify something as an economic good—there is clearly no fixed, objective criterion for classifying goods as either private or public. They can never be private or public goods as such. Their private or public character depends on how few or how many people consider them to be goods, with the degree to which they are private or public changing as these evaluations change and ranging from one to infinity.⁶¹

第一部分：经济学包含五个有趣而深刻的章节。在第一章《公共商品理论的谬误与安

¹¹²⁷ Ibid., p. 290 n.25.
同上，第 290 页注释 25。

保的生产》中，霍普指出，“私人”商品和“公共”商品之间的区别完全是虚幻的：

私人商品与公共商品之间并不存在明确的二分法……所有商品或多或少都具有私人性或公共性，而且随着人们价值观和评价的变化以及人口构成的变化，商品的私人性/公共性程度也会不断变化。为了认识到这些商品永远不会一劳永逸地归入这一类或那一类，我们只需回顾一下是什么使某一物品成为商品。要使某物成为商品，就必须有人承认它是稀缺的，并将其视为稀缺的。某种物品本身并不是商品，也就是说，商品只是在赏识者的眼中才是商品。除非至少有一个人主观地将其评价为商品，否则任何东西都不是商品。但是，当商品从来都不是纯粹的商品——当任何物理化学分析都无法确定某种东西是经济商品时——显然就没有固定的、客观的标准来将商品划分为私人商品或公共商品。商品本身永远不可能是私人商品或公共商品。它们的私人性或公共性取决于有多少人认为它们是商品，其私人性或公共性的程度会随着这些评价的变化而变化，范围从一个人到无限多的人。¹¹²⁸

Hoppe then applies this analysis to the production of security, commonly held to be a public good. Because the production of security is no more a “public good” than goods and services such as cheese, houses, or insurance, there is no special economic reason that prevents markets from producing security, and thus no justification to require remedial state action, such as state monopolization of police and defense.

霍普随后将这一分析应用于通常被认为是公共商品的安保生产。因为安保的生产并不比奶酪、房屋或保险等商品和服务更像是一种“公共物品”，所以不存在阻止市场生产安保的特殊经济原因，因此也没有理由要求采取国家补救行动，比如国家对警察和防卫的垄断。

B. 税收的经济学和社会学 The Economics and Sociology of Taxation

In chapter 2, “The Economics and Sociology of Taxation,” Hoppe argues that only three ways exist of acquiring or increasing wealth: through homesteading, producing, or contracting. Since taxation implies a reduction of income a person can expect to receive from these three activities, the opportunity cost for using one’s time and body

¹¹²⁸ Ibid., pp. 8 – 9.

同上，第 8-9 页。

to perform these activities is raised by taxation. Thus the marginal utility of producing wealth is decreased, and the marginal utility of consumption and leisure is increased, leading to a shift away from the production of wealth and towards consumption and leisure. Therefore taxation is a means for the destruction of property and wealth-formation.⁶²

在第二章《税收的经济学与社会学》中，霍普认为，获得或增加财富只有三种途径：拓殖、生产或契约。由于税收意味着一个人从这三种活动中预期获得的收入减少，通过税收，一个人将时间和身体用于从事这些活动的机会成本就提高了。因此，创造财富的边际效用降低，而消费和休闲的边际效用增加，从而导致从财富创造转向消费和休闲。所以，税收是一种破坏财产和财富形成的手段。¹¹²⁹

To the objection that taxation makes people actually work harder in order to earn the same income as before taxation, Hoppe replies that even if increased taxation causes:

... [an] increase in workaholism, it is still the case that the income of value-productive individuals has fallen. For even if they produce the same output as previously, they can only do so if they expend more labor now than before. And since any additional labor expenditure implies foregone leisure or consumption (leisure or consumption which they otherwise could have enjoyed along with the same output of valuable assets), their overall standard of living must be lower now.⁶³

有人反对说，征税会使人们为了获得与征税前相同的收入而更加努力地工作，霍普回应说，即使增加税收会导致：

.....工作狂的增加，但有价值产出的个人的收入仍然下降了。因为，即使他们的产量与以前相同，他们也只能在现在比以前花费更多劳动的情况下才能做到这一点。并且由于任何额外的劳动支出都意味着放弃休闲或消费（他们原本可以在产出同样有

¹¹²⁹ Ibid., p. 35.
同上，第 35 页。

价值的资产的同时享受的休闲或消费），因此他们现在的整体生活水平必然更低。¹¹³⁰

Hoppe also explains “why the assumption that taxation can possibly leave the productive output of valuable assets unaffected and exclusively cripple consumption is fatally flawed.”⁶⁴ This is because time preference—people’s preference of present goods over future goods—combines with the increased marginal utility of leisure and consumption and the decreased marginal utility of production. Because people have an increased preference for consumption (in the present), and a relatively decreased preference for production (in the future), the length of the structure of production is shortened, and thus fewer valuable future assets are produced. “Every act of taxation necessarily exerts a push away from more highly capitalized, and hence more productive production processes, and into the direction of a hand-to-mouth existence.”⁶⁵

霍普还解释了“为什么那种认为税收可能会使有价值资产的生产性产出不受影响而仅仅削弱消费的假设是存在致命缺陷的”。¹¹³¹

这是因为时间偏好——人们对现在商品的偏好甚于对未来商品的偏好——与休闲和消费的边际效用增加和生产的边际效用降低相结合。由于人们对消费（现在）的偏好增加，而对生产（未来）的偏好相对降低，生产结构的长度就会缩短，因此有价值的未来资产的生产就会减少。“每一次征税行为必然会推动人们远离资本化程度更高、因而也更具生产力的生产过程，而转向仅能糊口的生存方式。”¹¹³²

After showing that taxes reduce the standard of living of consumers, Hoppe discusses

¹¹³⁰ Ibid., p. 39.

同上，第 39 页。

¹¹³¹ Ibid.

同上。

¹¹³² Ibid., p. 42.

同上，第 42 页。

the sociological reasons for taxation, and ever more of it. This discussion is fascinating and insightful, but it comes down to the fact that there is taxation because the government can get away with it; the government can get away with it because a majority of the population either actively or passively support such governmental policies; and the majority support government because of the lack of (complete, principled) acceptance of a private property ethic.⁶⁶

在说明税收会降低消费者的生活水平之后，霍普讨论了征税以及更多征税的社会学原因。这一讨论引人入胜且富有洞察力，但归根结底是因为政府能够逃脱惩罚所以才会有税收；政府能够逃脱惩罚是因为大多数民众要么积极地要么被动地支持这样的政府政策；而大多数人支持政府是因为缺乏（完全的、有原则的）对私有财产伦理的赞同。

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Government propaganda plays a role in influencing public opinion. Hoppe asks how the government could change public opinion from true ideas (i.e., the historical support in the United States for freedom and private property) to wrong ideas. He points out:

It would seem that such a change towards falsehood requires the systematic introduction of exogenous forces: A true ideology is capable of supporting itself merely by virtue of being true. A false one needs reinforcement by outside influences with a

¹¹³³ In this book I often use “government” more or less synonymously with “the state,” although it is probably preferable to use the term state, when possible, as it is conceptually distinct from “government,” as one can imagine “governing institutions” of law and order in a private-law society. In fact many statist and mini-statist (minarchists) often engage in equivocation on this point; they presuppose that there cannot be law and order, or “government,” without the state, but if the anarchist claims to favor law and order, then the statist equates government with state and accuses the anarchist of being inconsistent. This is really simply disingenuous question-begging hidden behind an equivocation.

在本书中，我经常或多或少地将“政府”与“国家”作为同义词来使用，尽管在可能的情况下，使用国家一词可能更为可取，因为它在概念上有别于“政府”，因为人们可以想象在私法社会中法律和秩序的“管理机构”。事实上，许多国家主义者和小国家主义者（无政府主义者）经常在这点上含糊其辞：他们预先假定，没有国家就不可能有法律和秩序，也不可能“有政府”，但如果无政府主义者声称赞成法律和秩序，那么国家主义者就会把政府等同于国家，并指责无政府主义者前后矛盾。这其实只是隐藏在模棱两可背后的虚伪的诱导性提问。

*clear-cut, tangible impact on people in order to be capable of generating and supporting a climate of intellectual corruption.*⁶⁷

政府宣传在影响公众舆论方面发挥着作用。霍普问道，政府如何将公众舆论从正确的观念（即美国历史上对自由和私有财产的支持）转变为错误的观念。他指出：

似乎这种向错误的转变需要系统性地引入外部力量：一种正确的意识形态仅仅凭借其正确性就能够自我维持。一种错误的意识形态需要外部影响的强化，这些外部影响对人们具有明确、切实的影响，以便能够产生并维持一种思想腐朽的氛围。¹¹³⁴

(Objectivists who would criticize Hoppe because many of his ideas were influenced by Kant should note Hoppe's radical lack of epistemological and moral skepticism evident in this statement.)

（那些会因为霍普的许多观点受康德影响而批评他的客观主义者应该注意到，霍普在这句话中明显完全没有认识论和道德上的怀疑主义。）

Thus the government effectively buys support from the populace through a system of transfer payments, grants of privilege, and governmental provision of certain goods, e.g., education, which makes the populace increasingly dependent on the continuation of state rule.⁶⁸ By adopting democracy, the state "opens every government position to everyone and grants equal and universal rights of participation and competition in the making of state-policy." ⁶⁹ Thus people gradually lose sight of the immorality of the exploitation and expropriation in which they participate, and are lured "into accepting the view that such acts are legitimate as long as one is guaranteed a say over them..."⁷⁰

因此，政府通过转移支付、授予特权和政府提供某些商品（如教育）等制度，有效地从民众那里购买支持，这使得民众越来越依赖于国家统治的延续。¹¹³⁵通过实行民主，国家“向每个人开放每一个政府职位，并在制定国家政策时赋予每个人平等和普遍的

¹¹³⁴ Ibid., p. 65.

同上，第 65 页。

¹¹³⁵ Hoppe discusses some of these themes also in *Democracy: The God That Failed* (Transaction, 2001; www.hanshoppe.com/democracy).

霍普在《民主：失败的上帝》(Transaction, 2001 年; www.hanshoppe.com/democracy) 中也讨论了其中一些主题。

参与权和竞争权”。¹¹³⁶因此，人们逐渐忽视了他们所参与的剥削和征用行为的不道德

¹¹³⁶ Ibid., p. 67. This calls to mind the words of Lysander Spooner, writing in 1870. Note especially Spooner’s point 2:

The ostensible supporters of the Constitution ... are made up of three classes, viz.:

1. Knaves, a numerous and active class, who see in the government an instrument which they can use for their own aggrandizement or wealth. 2. Dupes—a large class, no doubt—each of whom, because he is allowed one voice out of millions in deciding what he may do with his own person and his own property, and because he is permitted to have the same voice in robbing, enslaving, and murdering others, that others have in robbing, enslaving, and murdering himself, is stupid enough to imagine that he is a “free man,” a “sovereign”; that this is a “free government”; “a government of equal rights,” “the best government on earth,” and such like absurdities. 3. A class who have some appreciation of the evils of government, but either do not see how to get rid of them, or do not choose to so far sacrifice their private interests as to give themselves seriously and earnestly to the work of making a change.

Lysander Spooner, “No Treason No. 4: The Constitution of No Authority,” in *The Lysander Spooner Reader* (San Francisco, Calif.: Fox and Wilkes, 1992; <http://www.lysanderspooner.org/works>). Spooner (1808–1887), an anarchist, was a Massachusetts lawyer noted for his vigorous opposition to the encroachment of the state upon the liberty of the individual, such as the institution of slavery. In *No Treason*, Spooner demolishes the “consent” theory of the validity of the Constitution. Unfortunately, Spooner was a total crank and wrong on the important issue of intellectual property. See “Law and Intellectual Property in a Stateless Society” (ch. 14), n.4 et pass.

同上，第 67 页。这让人想起 1870 年莱桑德-斯普纳（Lysander Spooner）写的一段话。请特别注意斯普纳的第 2 点：

宪法的表面支持者……由三个阶层组成，即：1：

1. 骗子，一个人数众多且活跃的阶层，他们认为政府是他们可以用来为自己谋取利益或财富的工具。2. 受骗者——毫无疑问，这是一个很大的阶级——每个人都因为在决定如何处置自己的人身和财产时，他可以在数百万人中发出一个声音，而且因为他在抢劫、奴役和谋杀他人时可以发出与他在抢劫、奴役和谋杀自己时同样的声音，而愚蠢地认为自己是一个“自由人”、一个“主权者”；这是一个“自由的政府”、“一个权利平等的政府”、“地球上最好的政府”，以及诸如此类的荒谬的奇谈怪论。3. 他们对政府的弊端有一定的认识，但要么不知道如何摆脱这些弊端，要么不愿意牺牲自己的私利，严肃认真地致力于变革。

莱桑德·斯波纳，《无叛国罪之四：无权威的宪法》，收录于《莱桑德·斯波纳读本》（加利福尼亚州旧金山：福克斯与威尔克斯出版社，1992 年；<http://www.lysanderspooner.org/works>）。斯波纳（1808-1887），一位无政府主义者，是马萨诸塞州的一名律师，以强烈反对国家侵犯个人自由（例如奴隶制制度）而闻名。在《无叛国罪》中，斯波纳粉碎了宪法有效性的“同意”理论。不幸的是，斯波纳

性，并被引诱“接受这样一种观点，即只要人们对这些行为有发言权，这些行为就是合法的……”。¹¹³⁷

*[W]hen everyone is potentially a minister, no one is concerned to cut down an office to which he aspires one day himself, or to put sand in a machine which he means to use himself when his turn comes. Hence it is that there is in the political circles of a modern society a wide complicity in the extension of power.*⁷¹

当每个人都有可能成为部长时，就没有人会想着去削减一个自己有朝一日也渴望得到的职位，或者在一台自己轮到时打算使用的机器里放沙子。因此，在现代社会的政治圈子里，在权力扩张方面存在着广泛的共谋。¹¹³⁸

Hoppe concludes that everything depends on a change in public opinion. Although this may appear hopeless, “ideas have changed in the past and can change again in the future … and the idea of private property has certainly one attraction: it, and only it, is a true reflection of man's nature as a rational being.”⁷²

霍普总结道，一切都取决于公众舆论的变化。尽管这似乎毫无希望，但“观念在过去已经改变，在未来也可能再次改变……而私有财产的观念无疑具有一种吸引力：它，也只有它，才真正反映了人类作为理性存在物的本性”。¹¹³⁹

C. 银行业、民族国家和国际政治 *Banking, Nation States, and International Politics*

Chapter 3, “Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order,” is the best and most important chapter in Part One. Here Hoppe explores how and why the state monopolizes money and

在知识产权这个重要问题上完全是个怪人且是错误的。见《无国家社会中的法律与知识产权》（第 14 章），注释 4 及其他各处。

¹¹³⁷ EEPP, p. 68.

《私有财产的经济学与伦理学》，第 68 页。

¹¹³⁸ Ibid., p. 69.

同上，第 69 页。

¹¹³⁹ Ibid., p. 75.

同上，第 75 页。

banking and shows the danger of the ever-approaching international monetary order.⁷³ Similarly to the discussion in chapter 2, this chapter argues that the state arises despite its inefficiencies and immorality and therefore depends upon public support, either active or passive. To create legitimacy in the minds of the public, the state engages in propaganda:

*Much time and effort is spent persuading the public that things are not really as they appear: Exploitation is really freedom; taxes are really voluntary ... no one is ruled by anyone but we all rule ourselves; ... etc.*⁷⁴

第 3 章《银行业、民族国家与国际政治：对当前经济秩序的社会学重构》是第一部分中最精彩、最重要的一章。

霍普在此探讨了国家如何以及为何垄断货币和银行业，并展示了日益逼近的国际货币秩序的危险。¹¹⁴⁰与第 2 章的讨论类似，这一章也认为，尽管国家效率低下且不道德，但它仍然存在，因此有赖于公众或主动或被动的支持。为了在公众心目中树立合法性，国家需要进行宣传：

政府花费了大量的时间和精力来说服公众，让他们相信事情并非真的如他们所看到的那样：剥削其实是自由；税收其实是自愿的……没有人被任何人统治，而是我们自己统治自己；……等等。¹¹⁴¹

Additionally, to garner public support, the state also engages in redistribution: it takes individuals' wealth, which individuals tend to resist, but redistributes some of it to

¹¹⁴⁰ See note 14, above (quoting Hoppe's explanation of why more liberal or free-market states are more successful in war or imperialism than more socialist states). 见上文注释 14（引用霍普关于为什么更自由或更自由市场的国家在战争或帝国主义方面比更社会主义的国家更成功的解释）。

¹¹⁴¹ EEPP, pp. 86 – 87. Here one is reminded of government leaders referring to taxes as “contributions.”

《私有财产的经济与伦理学》，第 86-87 页。这里让人想起政府领导人将税收称为“贡献”。

individuals in order to corrupt them into assuming state-supportive roles. Because the state rests upon coercion, it must of course monopolize the police, defense, and courts.⁷⁵ In order to be able to regularly exploit the population, the state must also control traffic and communications, so it monopolizes these also. The state monopolizes the field of education to eliminate ideological competition. The state also adopts a democratic system that opens up potential government jobs and votes to all, giving the people a legal stake in the state in order to reduce resistance to state power.⁷⁶

此外，为了获取公众支持，国家还进行再分配：它拿走个人的财富（个人往往会抵制这种行为），但又将其中一部分再分配给个人，以诱使他们扮演支持国家的角色。由于国家以强制为基础，它当然必须垄断警察、国防和法院。¹¹⁴²为了能够定期剥削民众，国家还必须控制交通和通讯，因此它也垄断了这些领域。国家垄断教育领域，以消除意识形态竞争。国家还采用民主制度，向所有人开放潜在的政府职位和投票权，给予人民在国家中的合法权益，以减少对国家权力的抵抗。¹¹⁴³

But “[t]he monopolization of money and banking is the ultimate pillar on which the modern state rests.”⁷⁷ Thus the state monopolizes the minting of gold (to shift psychologically the emphasis from gold in universal terms like ounces to terms of fiat labels like “dollars”); passes legal tender laws; monopolizes the banking system; nationalizes gold; and finally cuts the last tie to gold by declaring paper notes irredeemable in gold.

但是，“货币和银行业的垄断是现代国家所依赖的最终支柱。”¹¹⁴⁴因此，国家垄断黄金铸币（从心理上把重点从通用的盎司等黄金单位转移到诸如“美元”等法定货币标签上）；通过法定货币法；垄断银行系统；将黄金国有化；最后通过宣布纸币不能兑换黄金来切断与黄金的最后联系。

But because there is still competition among states, which limits governments' abilities

¹¹⁴² Ibid., p. 88.

同上，第 88 页。

¹¹⁴³ Ibid., pp. 88 – 89.

同上，第 88-89 页。

¹¹⁴⁴ Ibid.

同上。

to inflate their currencies, governments have an incentive to expand their territories and to expand the territory in which each government's currency is in place. Historically, the tendency has been towards a one-world government, with a one-world paper currency, with the United States at the helm, and with no remaining limit on inflation of the money supply except hyperinflation and a collapse of the economy. This tendency is likely to continue unless public opinion:

... the only constraint on government growth[,] undergoes a substantial change and the public begins to understand the lessons explained in this [chapter]: that economic rationality as well as justice and morality demand a worldwide gold standard and free, 100% reserve banking as well as free markets worldwide; and that world government, a world central bank and a world paper currency—contrary to the deceptive impression of representing universal values—actually means the universalization and intensification of exploitation, counterfeiting-fraud, and economic destruction.⁷⁸

但是，由于国家之间仍然存在竞争，这限制了各国政府膨胀本国通货的能力，因此各国政府都有动力扩大自己的领土，并扩大每个政府的货币所流通的领土范围。从历史上看，趋势一直是朝着一个世界政府、一种世界纸币的方向发展，由美国掌舵，并且除了恶性通货膨胀和经济崩溃之外，对货币供应的通货膨胀不再有任何限制。这种趋势很可能会继续下去，除非公众舆论：

.....对政府增长的唯一限制[，]发生了实质性的变化，公众开始理解本[章]所阐述的教训：经济理性以及正义和道德要求世界范围的金本位和自由、100%储备银行以及世界范围的自由市场；并且世界政府、世界中央银行和世界纸币 —— 与代表普遍价值的欺骗性印象相反 —— 实际上意味着剥削、伪造欺诈和经济破坏的普遍化和加剧。

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¹¹⁴⁵ Ibid., p. 116.

同上，第 116 页。

D. 被行动学改造的马克思主义 Marxism Reformed by Praxeology

Chapter 4, "Marxist and Austrian Class Analysis," is an interesting chapter that reinterprets the Marxist theory of history from an Austrian economics perspective. Hoppe argues that the hard-core tenets of the Marxist theory of history are essentially correct, but are derived in Marxism from a false starting point; and that the Mises-Rothbard brand of Austrianism can give a different justification for the validity of these theses.

第四章“马克思主义与奥地利学派的阶级分析”是一个有趣的章节，它从奥地利经济学的视角重新诠释了马克思主义的历史理论。霍普认为，马克思主义历史理论的核心理念在本质上是正确的，但马克思主义是从一个错误的起点推导出来的；并且米塞斯-罗斯巴德一派的奥地利学派能够为这些论点的有效性提供一种不同的辩护。

The five hard-core Marxist beliefs are: (1) The history of mankind is the history of class struggles; (2) the ruling class is unified by its common interest in upholding its exploitative position and maximizing its exploitatively appropriated surplus product; (3) class rule manifests itself primarily in specific arrangements regarding the relations of production (i.e., the assignment of property rights); (4) internally, the process of competition within the ruling class generates a tendency toward increasing concentration and centralization; and (5) finally, with the centralization and expansion of exploitative rule gradually approaching its ultimate limit of world domination, class rule will increasingly become incompatible with the further development and improvement of "productive forces."¹¹⁴⁶

马克思主义的五个核心理念是：（1）人类历史是阶级斗争的历史；（2）统治阶级因维护其剥削地位并使剥削性占有剩余产品最大化的共同利益而团结一致；（3）阶级统治主要体现在关于生产关系（即财产权分配）的特定安排中；（4）在内部，统治阶级内部的竞争过程产生一种日益集中和集权的趋势；（5）最后，随着剥削统治的集中和扩张逐渐接近其世界统治的最终极限，阶级统治将越来越与“生产力”的进一步发展和提高互不相容。¹¹⁴⁶

¹¹⁴⁶ Ibid., pp. 117 - 19.

Hoppe points out that Marx's theory of exploitation is flawed because, in maintaining that there is exploitation when a capitalist retains a surplus profit after paying a laborer, his theory does not take into account nor "understand the phenomenon of time preferences as a universal category of human action."⁸⁰ Of course, once time preference is considered, it can be seen that "contrary to the case of slave and slave master where the latter benefits at the expense of the former, the relationship between the free laborer and the capitalist is a mutually beneficial one."⁸¹ It is logically absurd to regard homesteading of unowned goods, or voluntary agreements between different homesteaders, as exploitative, because nothing is taken away from anybody by these activities, and goods are actually created. "Instead, exploitation takes place whenever any deviation from the homesteading principle occurs... Exploitation is the expropriation of homesteaders, producers and savers by late-coming non-homesteaders, non-producers, non-savers and non-contractors..."⁸² Given this theory of exploitation, Hoppe analyzes the nature of government to justify the five Marxist theses above.

霍普指出，马克思的剥削理论是有缺陷的，因为在坚持资本家在支付劳动者报酬后保留剩余利润时就存在剥削这一观点时，马克思的理论没有考虑到也“不理解时间偏好现象作为人的行动的一个普遍范畴”。¹¹⁴⁷当然，一旦考虑到时间偏好，就可以看出“与奴隶主和奴隶的情况不同，在那种情况下后者以牺牲前者为代价获益，自由劳动者和资本家之间的关系是一种互利关系”。¹¹⁴⁸将无主物品的拓殖或不同拓殖者之间的自愿协议视为剥削，在逻辑上是荒谬的，因为这些活动没有从任何人那里夺走任何东西，物品实际上是被创造出来的。“相反，只要出现任何偏离拓殖原则的情况，剥削就会发生....。剥削是后来的非拓殖者、非生产者、非储蓄者和非契约人对拓殖者、生产者和储蓄者的征用....”¹¹⁴⁹鉴于这种剥削理论，霍普分析了政府的性质，以证明上述五个马克思主

同上，第 117-119 页。

¹¹⁴⁷ Ibid., p. 122.

同上，第 122 页。

¹¹⁴⁸ Ibid.

同上。

¹¹⁴⁹ Ibid., pp. 125 - 26.

同上，第 125-126 页。

义理念的正确性。

E. 米塞斯 Vs.凯恩斯 *Mises Versus Keynes*

The final chapter in Part One, “Theory of Employment, Money, Interest, and the Capitalist Process: The Misesian Case Against Keynes,” contains an illuminating discussion of the Austrian theories of employment, money, and interest. After this discussion, Hoppe states that it is now “easy to recognize Keynes’s ‘new’ General Theory of Employment, Interest, and Money as fundamentally flawed and the Keynesian revolution as one of this century’s foremost intellectual scandals.”⁸³ Hoppe then proceeds to eviscerate Keynes’s theories against this backdrop.

第一部分的最后一章《就业、货币、利息和资本主义过程理论：米塞斯对凯恩斯的批判》包含了对奥地利学派关于就业、货币和利息理论的富有启发性的讨论。在这次讨论之后，霍普指出，现在“很容易认识到凯恩斯的‘新’《就业、利息和货币通论》从根本上存在缺陷，而凯恩斯革命是本世纪最重要的智识丑闻之一”。¹¹⁵⁰然后，霍普在这个背景下对凯恩斯的理论进行了犀利的批判。

V.结论 CONCLUSION

Like A Theory of Socialism and Capitalism before it, The Economics and Ethics of Private Property contains cutting-edge economic theories and breakthroughs in epistemology and individual rights theories. Hoppe is indeed correct that, in the long run, immoral government policies depend upon the tacit support of the majority of the population. The only way to win more recognition and enforcement of our individual rights is to educate the populace of the truth and wisdom of freedom. The publication of works like Hoppe’s, with an uncompromising, hard-core (and, more importantly, correct) defense of liberty, certainly advances this cause.

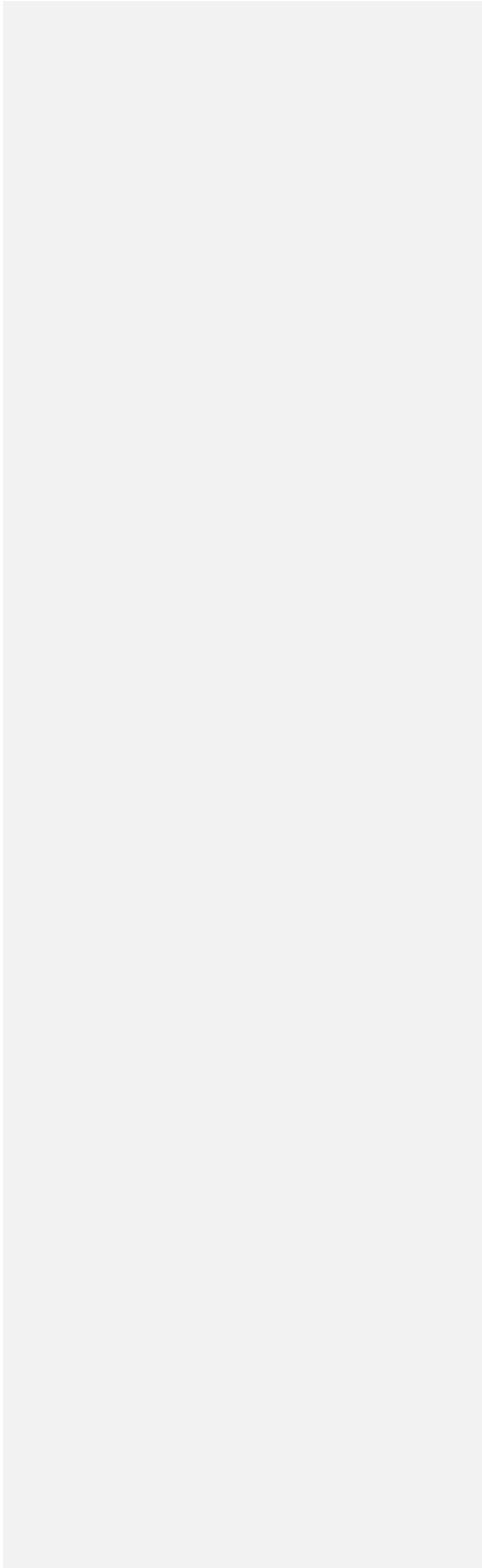
与之前的《社会主义与资本主义理论》一样，《私有财产的经济学与伦理学》包含了最前沿的经济理论以及认识论和个人权利理论方面的突破。霍普确实正确地指出，从长远来看，不道德的政府政策依赖于大多数民众的默许支持。要想让我们的个人权利

¹¹⁵⁰ Ibid., p. 155. 同上，第 155 页。

得到更多的认可和执行，唯一的办法就是教育民众了解自由的真理和智慧。像霍普著作的出版，以毫不妥协、坚定（更重要的是正确）地捍卫自由，无疑推动了这一事业。

第六辑 访谈与演讲

PART VI INTERVIEWS & SPEECHES



第二十三章 论自由意志主义的法律理论、自我所有权与毒品法

On Libertarian Legal Theory, Self-Ownership, and Drug Laws

This was an interview by Anthony Wile at The Daily Bell: "Stephan Kinsella on Libertarian Legal Theory, Self-Ownership and Drug Laws," The Daily Bell (July 20, 2014).

这是安东尼·威尔在贝尔日报上的一次采访:《斯蒂芬·金塞拉谈自由意志主义法律理论、自我所有权和毒品法》, 贝尔日报 (2014 年 7 月 20 日)。

The Daily Bell: It's been a while since we interviewed you. Let's focus on some areas that you've been exploring lately. You've been thinking a lot about the essential basis of the libertarian idea lately, and the relationship between the non-aggression principle, property rights and related matters. Can you give us insight into your thinking? What specifically remains confused? What is the difficulty that people struggle with regarding the non-aggression principle and property rights?

贝尔日报: 距离我们上次采访你已经有一段时间了。让我们聚焦于你最近一直在探索的一些领域。你最近对自由意志主义理念的根基以及互不侵犯原则、财产权和相关事宜之间的关系进行了很多思考。你能让我们了解一下你的想法吗? 具体还有哪些方面让人感到困惑? 人们在思考互不侵犯原则和财产权方面所面临的困难是什么?

Stephan Kinsella: The core insight of the founding generation of modern libertarian thinkers like Ayn Rand and Murray Rothbard is that initiating violence against others is wrong, unjustified, and should be prohibited by law—whether that is state law (in Rand's case) or private law (for anarchist libertarians like Rothbard and Hoppe).

斯蒂芬·金塞拉: 像安-兰德 (Ayn Rand) 和穆瑞·罗斯巴德 (Murray Rothbard) 等新一代现代自由意志主义思想家的核心观点是, 对他人使用暴力是错误的、不正当的, 应该受到法律的禁止——无论是国家法律 (兰德的观点) 还是私法 (罗斯巴德和霍普等无政府自由意志主义者的观点)。

Rand, in Galt's speech, sets out a “non-initiation of force” principle:

*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.*¹¹⁵¹

兰德在高尔特的演讲中提出了“不主动使用武力”原则：

只要人们希望共同生活，任何人都不得主动——你们听到了吗？任何人都不得首先——对他人使用暴力。¹¹⁵¹

Rothbard formulated a similar idea but called it an “axiom”:

*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.*²

罗斯巴德提出了一个类似的观点，但称之为“公理”：

自由意志主义的信念建基于一个核心公理：任何一个人或一群人都不得侵犯他人的人身或财产。这可以被称为“互不侵犯公理”。“侵犯”的定义是对他人的人身或财产使用或威胁使用暴力。因此，“侵犯”与“入侵”同义。¹¹⁵²

¹¹⁵¹ Ayn Rand, “Galt’s Speech,” in *For the New Intellectual*, quoted in the “Physical Force” entry, Harry Binswanger, ed., *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986; <https://perma.cc/L4YA-96CC>). See discussion in “What Libertarianism Is” (ch. 2), n.13 et pass.

安·兰德，《高尔特的演讲》，收录于《为了新知识分子》，在哈里·宾斯万格编辑的《安·兰德词典：从 A 到 Z 的客观主义》中的“武力”条目被引用（纽约：新美国图书馆，1986 年；<https://perma.cc/L4YA-96CC>）。另见“什么是自由意志主义”（第二章）注释 13 及其他各处的讨论。

¹¹⁵² Murray N. Rothbard, *For A New Liberty* 2d ed. (Auburn, Ala.: Mises Institute, 2006; <https://mises.org/library/new-liberty-libertarian-manifesto>), p. 23.

穆瑞·N·罗斯巴德，《为了一种新自由（第二版）》（阿拉巴马州奥本：米塞斯研究院，2006 年；<https://mises.org/library/new-liberty-libertarian-manifesto>），第 23 页。

Rothbard goes on, in *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. ... 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).³

(I provide elaboration on some of these issues in other articles and posts.⁴)

罗斯巴德在《自由的伦理》中进一步指出：

自由意志主义理论的基本公理是，每个人都必须是自我所有者，任何人都无权干涉这种自我所有.....侵犯性暴力行为的含义是，一个人未经受害者同意侵犯另一个人的财产。这种侵犯可能是针对一个人的人身财产（如人身攻击），也可能是针对他的有形物质财产（如抢劫或非法侵入）。¹¹⁵³

(我在其他文章和帖子中对其中一些问题进行了阐述。)¹¹⁵⁴

¹¹⁵³ Murray N. Rothbard, “Property and Criminality,” p. 60, and “Interpersonal Relations: Ownership and Aggression,” p. 45, both in *The Ethics of Liberty* (New York: New York University Press, 1998; <https://mises.org/library/crusoe-social-philosophy>). 穆瑞·N·罗斯巴德，《财产与犯罪》，第60页，以及《人际关系：所有权与侵犯》，第45页，两篇均收录于《自由的伦理》（纽约：纽约大学出版社，1998年；<https://mises.org/library/crusoe-social-philosophy>）。

¹¹⁵⁴ E.g., “What Libertarianism Is” (ch. 2), “How We Come to Own Ourselves” (ch. 4), and posts such as Kinsella, “The Relation between the Non-aggression Principle and Property Rights: a response to Division by Zer0,” *Mises Economics Blog* (Oct. 4, 2011).

例如，《何为自由意志主义》（第2章）、《我们如何拥有自己》（第4章），以及金塞拉的文章，《互不侵犯原则与财产权之间的关系：对 Zer0 所作划分的回应》，米塞斯经济学博客（2011年10月4日）。

Rand's non-initiation of force principle, and Rothbard's so-called "non-aggression axiom," are usually today referred to as the non-aggression principle, or NAP, by libertarians (some call it the zero-aggression principle, or ZAP). My impression is that "axiom" changed to "principle" over the last few decades for a couple reasons. First, "axiom" was a term heavily used by Objectivists, e.g., in their epistemological reasoning and terminology, and a growing number of libertarians are not Objectivists, and so shun that usage.

兰德的“不主动使用武力原则”和罗斯巴德所谓的“互不侵犯公理”，如今通常被自由意志主义人士称为“互不侵犯原则”（或 NAP）（也有人称之为“零侵犯原则”（或 ZAP））。在我的印象中，“公理”之所以在过去几十年里变成了“原则”，有几个原因。首先，“公理”是客观主义者大量使用的一个术语，例如，在他们的认识论推理和术语中，而越来越多的自由意志主义者不是客观主义者，因此回避了这种用法。

Second, calling the principle an "axiom" implies that it is either the primary or only principle, or self-contained or complete; or perhaps that it is simply an arbitrary postulate as in mathematical axioms; or even that it is an undeniable, logically deduced starting point. Because libertarians are diverse in their views on the nature of rights and how they are justified, it seems better to refer to the non-aggression principle—a better way to define what views we all share in common, regardless of how they are arrived at. Randians, for instance, think that the individual rights implied by the non-initiation of force principle (i.e., the NAP) are validated by more fundamental philosophical insights about the nature of man, so they would not want to view non-aggression as some arbitrary or postulated math-type axiom. Utilitarian and empiricist type libertarians, intuitionists, religionists who ultimately base their political ethics on some divine or moral law or commands, etc., might not want to view non-aggression as some self-contained or logically deduced starting point. And so on. So the term "axiom" has become less common. Nonetheless, definitions and categories are necessary—there is something that makes us all libertarian, after all. And the idea of the "non-aggression principle" seems to best capture that, at least as a generally descriptive if shorthand term.⁵

其次，称这一原则为“公理”，意味着它要么是首要的或唯一的原则，要么是自足的或完整的；或者，也许它只是一个任意的公设，如数学公理；甚至，它是一个不可否认的、逻辑上推导出来的起点。由于自由意志主义者对权利的性质以及如何证明权利的

正当性的看法各不相同，因此，似乎更应该提及“不侵犯原则”——这是界定我们的共同观点的更好方法，而不论这些观点是如何得出的。例如，兰德主义者认为，不首次使用武力原则（即互不侵犯原则）所隐含的个人权利是由关于人的本质的更基本的哲学见解所证实的，所以他们不希望将互不侵犯视为某种任意的或假设的数学类型公理。功利主义和经验主义类型的自由意志主义者、直觉主义者、最终将自己的政治伦理建立在某种神圣或道德法则或命令之上的宗教主义者等等，可能都不愿意将互不侵犯视为某种自足的或逻辑上推导出来的出发点。诸如此类，不一而足。因此，“公理”一词已不再常见。尽管如此，定义和范畴还是必要的——毕竟有某种东西使我们所有人成为自由意志主义者。互不侵犯原则“这一概念似乎最能体现这一点，至少是一个具有普遍描述性的简明术语。¹¹⁵⁵

However, one problem that has arisen is that aggression, as commonly thought of, has to do with interpersonal violence: invading another person's body: physical fighting or clashing. If you say you are opposed to aggression, this implies you favor self-ownership or, more precisely, body ownership. But it does not obviously, immediately imply property rights in other resources, such as land or movable objects. One would not think of stealing the owned resources of others as "aggression," as the term is used in everyday talk. Squatting on someone's land or using their hut while they are away might be trespass, but it does not seem like interpersonal violence that the term "aggression" seems to be aimed at.

然而，出现的一个问题是，通常所认为的侵犯与人际暴力有关：侵犯他人身体，即身体上的打斗或冲突。如果你说你反对侵犯，这就意味着你赞成自我所有权，或者更准确地说，身体所有权。但这显然不会立即意味着对其他资源（如土地或可移动物品）的财产权。在日常用语中，人们不会认为窃取他人拥有的资源是“侵犯”。在某人不在时占用他们的土地或使用他们的小屋可能是非法侵入，但这似乎不像“侵犯”这个词所针对的人际暴力。

Thus, libertarians tend to elaborate or define the NAP in a somewhat counterintuitive or idiosyncratic way, so that "aggression," as they mean it, covers both interpersonal bodily violence and theft or trespass against other owned resources. In their

¹¹⁵⁵ See, on this, "What Libertarianism Is" (ch. 2), n.4.

关于这一点，见《何为自由意志主义》（第二章），注释4。

elaborations they say that we oppose aggression against the bodies or property of other people—and also, that this means fraud is also prohibited ... as is contract breach. This is a lot to pack into the notion of aggression, into the NAP, which on its face only prohibits attacking others' bodies without provocation. They take the idea that it is wrong to physically attack others' bodies and then pack into it related libertarian notions such as: homesteading (how property rights arise), trespass (use of someone's owned resource without permission), contract and abandonment (the capacity to transfer or alienate property rights in owned resources), and even fraud theory. This cluster of related ideas or principles is crucial to the libertarian political philosophy, but it is a lot to put under the rubric of "aggression." Both libertarians and our opponents have noticed this, and the former have sought to clarify our principles, and our terminology.

因此，自由意志主义者倾向于以一种有点违反直觉或独特的方式阐述或定义互不侵犯原则，以至于他们所指的“侵犯”既包括人际间的身体暴力，也包括对他人拥有的其他资源的盗窃或非法侵入。在他们的阐述中，他们说我们反对侵犯他人的身体或财产——而且，这意味着欺诈也是被禁止的.....违反契约也是被禁止的。在互不侵犯原则中，侵犯的概念包含了很多内容，而互不侵犯原则表面上只禁止在没有挑衅的情况下攻击他人的身体。他们把“对他人身体进行人身攻击是错误的”这一观点，再将其纳入相关的自由意志主义理念，如：拓殖（财产权如何产生）、非法侵入（未经许可使用他人拥有的资源）、契约和放弃（转让或让渡拥有资源的财产权的能力），甚至还有欺诈理论。这一组相关的思想或原则对自由意志主义的政治哲学至关重要，但将这么多内容置于“侵犯”的标题下确实有些勉强。自由意志主义者和我们的反对者都注意到了这一点，前者试图澄清我们的原则，以及我们的术语。

And, thus, the more sophisticated libertarians have recognized that property rights are more fundamental than the non-aggression principle. This is part of what Rothbard was getting at in his insistence that all rights are essentially property rights.⁶ It is what Hoppe is getting at in his Misesian-Austrian influenced theory that property rights arise because of the fundamental fact of scarcity: the possibility of conflict.⁷

因此，更为成熟的自由意志主义者已经认识到，财产权比互不侵犯原则更基本。这就

是罗斯巴德坚持所有权利本质上都是财产权的部分含义。¹¹⁵⁶这也是霍普在其受米塞斯——奥地利学派影响的理论中所表达的观点，即财产权的产生是由于资源稀缺这一基本事实：存在冲突的可能性。¹¹⁵⁷

Why are property rights and how they are allocated more fundamental than the non-aggression principle? Well, in the case of bodies, the NAP is virtually synonymous with body-ownership; to say you oppose aggression is to say that you endorse self-ownership; and vice-versa. These are basically equivalent normative statements. We do not need a theory of property allocation for bodies, since opposing aggression automatically implies that each person is the owner of his body (libertarians differ on the rationale, but all consistent libertarians favor self-ownership and oppose interpersonal aggression, for whatever reason).

为什么财产权及其分配方式比互不侵犯原则更为基础？那么，就身体而言，互不侵犯原则几乎等同于身体所有权；说你反对侵犯，就是说你赞同自我所有权；反之亦然。这些基本上是等价的规范性陈述。我们不需要身体的财产分配理论，因为反对侵犯就自动意味着每个人都是其身体的所有者（自由意志主义者在基本原理上有分歧，但所有一致的自由意志主义者都赞成自我所有权，反对人际侵犯，不管出于什么原因）。

¹¹⁵⁶ See Rothbard, “‘Human Rights’ as Property Rights,” in *The Ethics of Liberty* (<http://mises.org/rothbard/ethics/fifteen.asp>).

见罗斯巴德的《“人权”即财产权》，收录于《自由的伦理》（<http://mises.org/rothbard/ethics/fifteen.asp>）。

¹¹⁵⁷ See, e.g., Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), chaps. 1, 2, and 7; idem, “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 (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf); “What Libertarianism Is” (ch. 2), n.9 et pass.

例如，可参见汉斯-赫尔曼·霍普的《社会主义与资本主义理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010年[1989年]；www.hanshoppe.com/tsc），第1、2和7章；同上，《论共有、公有和私有财产以及全面私有化的理由》，收录于《伟大的虚构：财产、经济、社会与衰落的政治，第二版扩充版》（阿拉巴马州奥本：米塞斯研究院，2021年；www.hanshoppe.com/tgf）；见《何为自由意志主义》（第二章），注释9及其他各处。

But this is not so in the case of external resources—that is to say, scarce means or goods that were once unowned, unused, unclaimed, but that now are regarded as means of action by some human actors.⁸

但外部资源的情况并非如此——也就是说，稀缺的手段或物品曾经是无主的、未被使用的、无人认领的，但现在却被一些人类行为者视为行动手段。¹¹⁵⁸

For such resources, we need a theory of property allocation to determine the owner of the resource before we can judge a given use of the resource as “aggression”—i.e., trespass, theft—or not. If A enters into a hut that B claims, it is trespass, or “aggression,” only if B is the owner of the hut. If A is the owner of the hut, then it is not trespass to use it, even if B objects. Contrast this with A using B’s body without B’s consent (hitting it, say); simply by being opposed to aggression, we take B’s side over A’s, because to oppose interpersonal, bodily aggression means that each person (at least presumptively) owns his own body.⁹ But opposing “aggression” (trespass) for non-human resources requires us to identify who the owner of a given resource is. In the case of human bodies, it is obvious who the (presumptive) owner of the body is. Not so for external, previously-unowned, resources.

对于此类资源，我们需要一种财产分配理论来确定资源的所有者，然后才能判断对资源的某种使用是否属于“侵犯”——即非法侵入、偷窃——活着不属于“侵犯”。如果 A 进入了 B 所拥有的小屋，那么只有当 B 是小屋的所有者时，这才是非法侵入或“侵犯”。如果 A 是小屋的主人，那么即使 B 反对，A 使用小屋也不是非法侵入。这与 A 未经 B 同意使用 B 的身体（比如说打它）形成鲜明对比；仅仅通过反对侵犯，我们就站在了 B 的一边而不是 A 的一边，因为反对人际的、身体的侵犯意味着每个人（至少推定）都拥有自己的身体。¹¹⁵⁹但是，对于反对“侵犯”（非法侵入）非人类资源要求我们确定特定资源的所有者是谁。就人的身体而言，谁是（推定）身体的所有者是显而易见的。而外部的、先前无主的资源则不然。

¹¹⁵⁸ For further discussion of the difference between bodies and previously unowned things, see “A Libertarian Theory of Contract” (ch. 9), Part III.B. 关于身体与先前无主之物之间区别的进一步讨论，见《自由意志主义的契约理论》（第 9 章），第 III.B 部分。

¹¹⁵⁹ See “What Libertarianism Is” (ch. 2), n.4 et pass. 见《何为自由意志主义》（第二章），注释 4 及其他各处。

To be sure, there is definitely a connection between self-ownership and property rights in other resources. One's body is a means of action, as are other scarce means (resources, goods) in the world. There can be clashes or conflict over both, and because of the fundamental, unavoidable and undeniable fact of scarcity, only one person, one actor, can have the right, or ability, to use a body or other resource for a given purpose at a given time.

可以肯定的是，自我所有权与其他资源的财产权之间肯定存在联系。一个人的身体是一种行动手段，世界上其他稀缺的手段（资源、物品）也是如此。在这两者之上都可能发生冲突，并且由于资源稀缺这一根本的、不可避免的和不可否认的事实，在特定时间针对特定目的，只有一个人、一个行动人能够拥有使用一个身体或其他资源的权利或能力。

The libertarian principle, then, is based on recognizing this fundamental condition of human life, and it says that we ought to have property rights assigned in all scarce resources—any means over which there could be conflict—so that humans can peacefully, cooperatively, and productively employ scarce means to pursue their goals; and that property rights have to be determined in accordance with some objective criteria—some objective link between the claimant and the resource in question. It has to be a link that is objective so that various contestants who claim the resource can recognize it and come to an agreement about who has the better claim to the resource.

那么，自由意志主义原则是基于对人类生活这一基本状况的认识，它指出我们应当在所有稀缺资源——任何可能引发冲突的手段——中确定财产权，以便人类能够和平、合作且有效率地利用稀缺手段来追求他们的目标；并且财产权必须根据一些客观标准来确定——在主张者与所涉资源之间存在某种客观联系。这种联系必须是客观的，以便不同的资源主张者能够认识到它，并就谁对该资源拥有更合理的主张达成一致。

In the case of one's body, the obvious answer is: each person himself presumptively has the best link to his body, because of his direct control of it. It is only presumptive, since some actions, like violent attacks on others, can justify the victim using self-defense; but it is the default presumption.

就一个人的身体而言，显而易见的答案是：每个人自己推定与自己的身体有着最佳联系，因为他直接控制着自己的身体。这只是推定，因为某些行动，比如暴力攻击他人，

可以证明受害者有理由进行自卫；但这是默认的推定。

And in the case of other resources, external resources, things that were once unowned, then obviously the first user of the resource has a better claim than a latecomer, since without what Hoppe calls the “prior-later” distinction, there can be no property rights at all, only a war of all against all and might-makes-right. This latter rule is supplemented by principles of contractual transfer and rectification. That is, the earlier user has a better claim to the resource than some latecomer—unless he did something to change this, such as contractually transfer (or abandon) the thing, or commit some offense (tort) against someone else, which obligates him to transfer some of his property to the victim to make restitution.¹⁰

而在其他资源，即外部资源，那些曾经无主的事物的情况下，很明显资源的第一个使用者比后来者有更合理的主张，因为如果没有霍普所说的“先来-后到”的区别，就根本不可能有财产权，只能是所有人对所有人的战争，强权即公理。后一条规则由契约转让和纠正原则加以补充。也就是说，更早的使用者对资源的主张比后来者更合理——除非他做了什么事情改变了这一状况，比如通过契约转让（或放弃）该物品，或者对他人实施了某种违法行为（侵权行为），从而使他有义务将自己的部分财产转让给受害者以进行赔偿。¹¹⁶⁰

I have no problem with using the concept of aggression, or the NAP formulation, as a shorthand summary of the basic libertarian idea, but it must be kept in mind that it is only shorthand, and its meaning can only be fully grasped by appreciating the nature and purpose of property rights and how they are allocated.¹¹ We cannot forget the fundamental fact of scarcity is what gives rise to the possibility of conflict and thus for the need for property rights to enable social cooperation.

我不反对使用“侵犯”这个概念，或者互不侵犯原则的表述，将其作为自由意志主义基本理念的简要概括，但必须记住，这只是一种简略的说法，只有理解财产权的性质、目的以及它们是如何分配的，才能完全领会其含义。我们不能忘记稀缺这一基本事实，

¹¹⁶⁰ These issues are discussed in other chapters, such as “What Libertarianism Is” (ch. 2), “How We Come to Own Ourselves” (ch. 4), and “A Libertarian Theory of Contract” (ch. 9).

这些问题将在其他章节中讨论，《何为自由意志主义》（第二章）、《我们如何拥有自己》（第 4 章）和《自由意志主义的契约理论》（第 9 章）。

正是稀缺导致了冲突的可能性，因此需要财产权来促成社会合作。¹¹⁶¹

In recent years some libertarians have objected to the NAP. I think there are a variety of reasons for this. One is that the relationship between property and scarcity and rights and aggression as sketched above has not been fully comprehended by everyone in our relatively young freedom philosophy (which basically started in the 1960s with Rand and Rothbard, in my view).¹² And, the movement has been growing in recent decades, with a lot of the newcomers coming in through Ron Paul and political activism rather than through more intellectual Randian or Rothbardian approaches. This has resulted in a large number of people with a fairly surface level understanding of the connections between liberty, property rights, aggression, and so on. And they sense that the NAP does not capture everything about the libertarian principles. So they reject it and seek some deeper connections or better formulations.

近年来，一些自由意志主义人士反对互不侵犯原则。我认为原因是多方面的。其中一个原因是，在我们相对年轻的自由哲学中（我认为，自由哲学基本上始于 20 世纪 60 年代的兰德和罗斯巴德），并非每个人都完全理解上文勾勒的财产与稀缺性、权利与侵犯之间的关系。¹¹⁶²而且，近几十年来，这一运动一直在发展壮大，许多新人都是通过荣·保罗和政治激进主义，而非通过更具思想深度的的兰德主义或罗斯巴德主义的方式加入进来的。这就导致很多人对自由、财产权、侵犯等之间的联系只有相当肤浅的理解。他们意识到互不侵犯原则并没有涵盖自由意志主义原则的一切。因此，他们拒绝接受它，并寻求一些更深层次的联系或更好的表述。

Another reason is that there are many minarchist or even classical liberaltype libertarians who do not oppose the state itself on principle, they do not oppose taxation, they accept the idea of public goods, market failure, and the need for state provision

¹¹⁶¹ Again, see “What Libertarianism Is” (ch. 2), n.4 et pass.

同样，见《何为自由意志主义》（第二章），注释 4 及其他各处。

¹¹⁶² 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>).

见《自由意志主义五十年：我们学到了什么？》（第二十五章）；斯蒂芬·金塞拉，《前言》，收录于蔡斯·雷切尔斯的《一种自发秩序：无国家社会的资本主义理由》（2015 年；<https://archive.org/details/ASpontaneousOrder0>）。

of law and justice and infrastructure and so on. In other words, they recognize that if we oppose all aggression, on principle, they have to oppose the state, and they do not want to do that. So they essentially do what conservatives and liberals do, which is to count the NAP as just one of many important moral or societal “values” that “matter.” So they are against aggression, they will say—but they are also for or against other things too, and all these competing values must be “balanced” against each other. We can’t be dogmatic or extreme or doctrinaire, you see. Yes, yes, we want to reduce aggression, but we want to defend the country, we want to fund the state and the police and the roads, we want to prevent people from racially discriminating against minorities and so on—so you have to compromise or bend the NAP. You have to permit the state to commit aggression—to tax, to put people in jail for reading the wrong books or using the wrong drugs or for refusing to fight for the country in a war—for the greater good. In other words, if you are going to make an omelet, you have to be willing to break a few eggs.

另一个原因是，有许多小政府主义者，甚至是古典自由主义类型的自由意志主义者原则上并不反对国家本身，他们不反对征税，接受公共商品、市场失灵的理念，以及国家提供法律、司法和基础设施等的必要性。换句话说，他们认识到，如果我们在原则上反对一切侵犯，他们就必须反对国家，而他们并不想这样做。因此，他们基本上做了保守派和自由派所做的事情，那就是把互不侵犯原则仅仅当作许多重要的道德或社会“价值”之一，而这些“价值”都“很重要”。因此，他们会说，他们反对侵犯——但他们也支持或反对其他事情，所有这些相互竞争的价值观必须相互“平衡”。你看，我们不能教条主义、极端主义或空谈主义。是的，是的，我们要减少侵犯，但我们要保卫国家，我们要为国家、警察和道路提供资金，我们想要防止人们对少数族裔进行种族歧视等等——所以你必须妥协折中或变通互不侵犯原则。为了更大的利益，你必须允许国家实施侵犯——征税，把读错书、用错药或拒绝为国参战的人关进监狱。换句话说，如果要炒鸡蛋，就必须愿意打破几个鸡蛋。

Some of these statist- “libertarians” are honest and admit they are in favor of aggression. They think it is unfortunate that we have to permit some aggression, but it’s necessary to prevent some anarchist chaos. I can almost respect this type of “rights-utilitarianism,” though I disagree with it. But others are more disingenuous about this. For example, they will engage in equivocation—equating aggression to all forms of force, including self-defense, and saying that the anarcho-libertarian himself supports

aggression (because he recognizes that self-defense is legitimate), so he makes an "exception" too, just like the minarchist-statist does. This is blatantly stupid, or dishonest, in my view, but I've seen it many times.

这些支持国家主义的“自由意志主义者”中的一些人很诚实，他们承认自己赞成侵犯。他们认为我们不得不允许一些侵犯行为是不幸的，但这是为了防止无政府主义的混乱所必需的。我几乎可以尊重这种“权利-功利主义”，尽管我不同意它。但其他人在这方面就比较虚伪了。例如，他们会举出模棱两可的说法——把侵犯等同于包括自卫在内的一切形式的武力，并说无政府主义的自由意志主义者自己也支持侵犯（因为他认识到自卫是合法的），所以他也像小政府主义的国家主义者一样做出了“例外”。在我看来，这显然是愚蠢或不诚实的，但我已经见怪不怪。

Then we have the emergence of the soi-disant "bleeding heart" libertarians, the "privilege" checkers and the "thickers," and so on, many of whom are in favor of the state and the promotion of values other than individual (property) rights. They don't want a rigid—i.e., principled—adherence to the NAP to get in the way of using the state or law to pursue their a-libertarian, or even unlibertarian, goals.

然后，我们看到了与社会格格不入的“同情心泛滥的”自由意志主义者、“特权”检查者和“加速主义者”等等，他们中的许多人都赞成国家推崇个人（财产）权利以外的价值观。他们不希望刚性的——即原则性的——坚守互不侵犯原则妨碍他们利用国家或法律来实现他们的非自由意志主义甚至是反自由意志主义的目标。

Now, as a human being, I, like every other libertarian, have values other than liberty. We are not just libertarians, ever. However, we do value liberty, and we oppose aggression. For us it is a "side-constraint," to use Nozick's phrase: we believe aggression is simply wrong, or unjustifiable. As Nozick wrote, "Individuals have rights, and there are things no person or group may do to them (without violating their rights)." 13 When the conservative, or liberal, or minarchist, or "bleeding heart" libertarian starts wagging their finger and tut-tutting that they oppose aggression but that unlike the "simpleminded" libertarian it is not their "only value," you can be sure they are setting the stage to propose or endorse or condone some kind of invasion of liberty—some act of aggression. That is, when I hear people, even some libertarians, condescendingly denounce our focus on aggression as the primary social evil, ... I want

to hold onto my wallet, because they are coming after it. Or as Ayn Rand says in "Francisco's Money Speech," "Run for your life from any man who tells you that money is evil. That sentence is the leper's bell of an approaching looter."¹¹⁶⁴ Likewise, when someone says aggression is not the only thing that matters, they are about to advocate aggression. Keep an eye on these people.

现在，作为一个人，我和其他每一个自由意志主义者一样，都有自由之外的价值观。我们从来都不只是自由意志主义者。然而，我们确实珍视自由，我们反对侵犯。对我们来说，这是一个“附带约束”，用诺齐克的话来说：我们认为侵犯根底上就是错误的，或者说不正当的。正如诺齐克所写：“个人拥有权利，有些事情任何人或团体都不可以对他们做（否则就侵犯了他们的权利）。”¹¹⁶³当保守主义者、自由主义者、小政府主义者或“同情心泛滥”的自由意志主义者开始摇头晃脑地啧啧称奇，说他们反对侵犯，但与“头脑简单”的自由意志主义者不同，这并非他们的“唯一价值观”时，你可以肯定，他们是在为提议、赞同或纵容某种侵犯自由的行为——某种侵犯行动——做铺垫。也就是说，当我听到人们，甚至是一些自由意志主义者，以居高临下的态度谴责我们将侵犯视为主要社会罪恶的关注点时……我就想紧紧抓住我的钱包，因为他们正虎视眈眈地觊觎我的钱包。或者如安·兰德在《弗兰西斯科的金钱演讲》中所说：“如果有人告诉你金钱是邪恶的，那你就赶紧逃命吧。这句话是即将到来的掠夺者的麻风病人的钟声。”¹¹⁶⁴同样，当有人说侵犯不是唯一重要的事情时，他们就要鼓吹侵犯了。对

¹¹⁶³ See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. ix. 见罗伯特·诺齐克的《无政府、国家与乌托邦》（纽约：基础图书公司，1974年），第 ix 页。

¹¹⁶⁴ See Ayn Rand, "Francisco's Money Speech," *Capitalism Magazine* (Aug. 30, 2002; <https://perma.cc/J2G2-TU2U>). See also Llewellyn H. Rockwell, Jr., "The Tax-Reform Racket," *Mises Daily* (Jan. 17, 2005; <https://mises.org/library/tax-reform-racket>):

Is there a need to reform taxes? Most certainly. Always and everywhere. You can always make a strong case against all forms of taxation and all tax codes and all mechanisms by which a privileged elite attempts to extract wealth from the population. And this is always the first step in any tax reform: get the public seething about the tax code, and do it by way of preparation for step two, which is the proposed replacement system. Of course, this is the stage at which you need to hold onto your wallet.

见安·兰德的《弗兰西斯科的金钱演讲》，发表于《资本主义》杂志（2002年8月30日；<https://perma.cc/J2G2-TU2U>）。另见小卢埃林·H·罗克韦尔的《税收改革骗局》，发表于米塞斯日报（2005年1月17日；<https://mises.org/library/tax-reform>）。

这些人我们要时刻擦亮双眼。

To be clear here, among some of these “leftish” type libertarians, I would distinguish two prominent groups very differently: the “bleeding heart” libertarians seem by and large to be mushy-headed, non-rigorous and pro-state while the anarchist left-libertarians are largely solid—they are against the state, they are mostly solid on economics and Austrianism (except perhaps for some of the mutualists), they are against war, they are against intellectual property, etc.

需要明确的是，在这些“偏左派”的自由意志主义者当中，我会区分截然不同的两个突出的群体：“同情心泛滥”的自由意志主义者总体上似乎头脑糊涂、不严谨且亲国家，而无政府主义的左派自由意志主义者在很大程度上是可靠的——他们反对国家，他们大多坚定地支持经济学和奥派经济学主张（也许某些互助主义者除外），反对战争，反对知识产权，等等。

In my view, the bleeding heart types are by and large barely libertarian and promote horrible and statist ideas, such as a basic guaranteed income, an insane proposal that most libertarians for the last fifty years could have instantly recognized as a socialistic and unjustified positive right. By contrast, the anarchist left-libertarians are by and large great. That said, I personally think the best and most consistent approach to libertarianism is Misesian-Rothbardian-Hoppean anarcho-libertarianism, sometimes called anarcho-capitalism. Incidentally, that latter term is one I use less now than I used to, partly because of the damage done to the term “capitalism” by the left-libertarians’ relentless campaign against it, and partly because it is somewhat misdescriptive: capitalism refers to only one aspect of the economy of an advanced free market society; and the economy itself is only one part of a libertarian society. Just as the NAP can be used as a convenient shorthand for the libertarian vision of a cooperative, property-rights respecting society, “capitalism” can also be used as a shorthand term to describe

racket)：

是否有必要进行税制改革？当然需要。随时随地都需要。你总是可以提出强有力的理由来反对一切形式的税收、一切税法以及一切特权精英试图从民众中攫取财富的机制。这始终是一切税制改革的第一步：让公众对税法感到愤怒，并为第二步，即拟议的替代制度做好准备。当然，在这个阶段你需要紧紧捂住自己的钱包。

the libertarian society, though it's increasingly difficult to do this and the term is fraught with the potential for confusion. Anyway, this is somewhat of a tangent, now, but what I primarily disagree with the anarchist left-libertarians on is their “thickism,” some of their cultural preferences and predictions about what a free society would look like, and their endorsement of the left-right spectrum or dichotomy in their use of the left prefix itself. I reject the left-right spectrum. I think the right or conservatism is virtually incoherent (why would there be an alliance of neocons, religious right, and free market chamber of commerce types), and the left is soft-socialism, and ultimately the right is some variant of socialism too.¹⁵

在我看来，“同情心泛滥”一型的自由意志主义者总体上来说几乎称不上是自由意志主义者，他们宣扬可怕的国家主义理念，比如基本保障收入，这是一个疯狂的提议，在过去五十年里，大多数自由意志主义者都能立刻认识到这是一种社会主义的、不正当的积极权利。相比之下，无政府主义的左派自由意志主义者总体上非常出色。话虽如此，我个人认为，自由意志主义的最佳且最一致的方法是米塞斯-罗斯巴德-霍普一派的无政府自由意志主义，有时也称为无政府资本主义。顺便说一下，我现在使用“无政府资本主义”这个术语的频率比过去低了，部分原因是左派自由意志主义者对该术语的无情抨击对其造成了损害，部分原因是这个术语有点不准确的描述：资本主义仅指发达的自由市场社会经济的一个方面；而经济本身只是自由意志主义社会的一部分。正如互不侵犯原则可以作为自由意志主义者对一个合作的、尊重财产权的社会的愿景的一种方便的简略表述一样，“资本主义”也可以作为描述自由意志主义社会的一个简略术语，尽管现在越来越难以这样做，而且这个术语充满了引起混淆的可能性。无论如何，现在这有点离题了，但我主要不同意无政府主义左派自由意志主义者的地方在于他们的“加速主义”、他们的一些文化偏好以及对自由社会愿景的预测，还有他们在使用“左派”这个前缀时对左派-右派光谱或二分法的认可。我拒绝左派-右派光谱。我认为右派或保守主义实际上是逻辑不一致的（为什么会有新保守主义者、宗教右派和自由市场商会类型的联盟），而左派是软社会主义，最终右派也是社会主义的某种变体。¹¹⁶⁵

¹¹⁶⁵ See, e.g., Hans-Hermann Hoppe, “The Socialism of Conservatism,” in *A Theory of Socialism and Capitalism*. But see Hoppe’s article “A Realistic Libertarianism,” *LewRockwell.com* (Sept. 30, 2013; <https://www.hanshoppe.com/2014/10/a-realistic-libertarianism>), arguing that “libertarian theory [is] compatible with the world-view of

The Daily Bell: Murray Rothbard insisted that all “human rights” are property rights—why?

贝尔日报：穆瑞·罗斯巴德坚持认为所有的“人权”都是财产权——为什么呢？

Stephan Kinsella: He talked about this in his chapter “‘Human Rights’ As Property Rights,” from his great work *The Ethics of Liberty*. Rothbard understood that all disputes—all real disputes—are ultimately about control of scarce means of action, i.e., physical resources. The right to freedom of speech or the press makes sense only if understood as a theory of property rights: the right of a publisher or person to use his own paper and ink and body as he sees fit. Rothbard was influenced not only by Rand, but by Mises (Hoppe was in turn influenced heavily by Rothbard and Mises).

斯蒂芬·金塞拉：他在其伟大著作《自由的伦理》中的“人权即财产权”这一章节中谈到了这个问题。罗斯巴德明白，所有的争议——所有真正的争议——归根结底都是关于稀缺的行动手段（即物质资源）的控制问题。言论或出版自由权只有被理解为一种财产权理论才有意义：出版商或个人有权按照自己的意愿使用自己的纸张、墨水 and 身体。罗斯巴德不仅受到兰德的影响，还受到米塞斯的影响（霍普又深受罗斯巴德和米塞斯的影响）。

Mises's praxeology provides an incredibly lucid and useful analysis of the nature of

the Right,” because the right is essentially “realistic”—it recognizes “the existence of individual human differences and diversities and accepts them as natural”—while the left is egalitarian and thus destructive and contrary to human nature since it “denies the existence of such differences and diversities or tries to explain them away and in any case regards them as something unnatural that must be rectified to establish a natural state of human equality.”

例如，可参见汉斯-赫尔曼·霍普的《保守主义的社会主义》，收录于《社会主义与资本主义理论》。但也可参见霍普的文章《一种现实主义的自由意志主义》，发表于 *LewRockwell.com*（2013 年 9 月 30 日；<https://www.hanshoppe.com/2014/10/a-realistic-libertarianism>），认为“自由意志主义理论[是]与右派的世界观相容的”，因为右派本质上是“现实主义的”——它承认“人类个体差异和多样性的存在，并将其视为自然的”——而左派是平等主义的，因而是破坏性的，违背了人的本性，因为它“否认这种差异和多样性的存在，或试图将它们解释掉，并在任何情况下将它们视为非自然的东西，必须加以纠正，以建立人类平等的自然状态”。

human action. When humans act, they employ scarce means (including their bodies) to attempt to causally interfere with the universe, so as to bring about a different future outcome than they predict or forecast would otherwise transpire without their acting intervention—a prospect that gives rise to uneasiness (Mises's term) that they seek to quell. In a magical world or the Garden of Eden or the Land of Cockaigne (Hoppe sometimes calls it Schlaraffenland)¹¹⁶⁶ there is no conflict possible, but human action is also virtually inconceivable. (Just as human action is virtually inconceivable in the unrealistic and hypothetical construct of the “evenly rotating economy” employed by Mises and Rothbard.)¹¹⁶⁷

米塞斯的行动学对人的行动的本质进行了极其清晰和有用的分析。当人类行动时，他们运用稀缺的手段（包括他们的身体）试图对宇宙进行因果干预，以便带来一个与他们预测或预见的在没有他们的行动干预下会发生的不同的未来结果——这种前景会引起不安（米塞斯的术语），而他们试图消除这种不安。在一个神奇的世界、伊甸园或安乐乡（霍普有时称之为懒人国 Schlaraffenland）¹¹⁶⁶中，冲突是不可能发生的，但人的行动也几乎是不可想象的。（正如在米塞斯和罗斯巴德所使用的“均匀轮转经济”这一不切实际的假构中，人的行动几乎是不可想象的）。¹¹⁶⁷

In our world, the real world, there is always scarcity, always the possibility of conflict between actors, always the need to employ scarce means to pursue ends or goals. Property rights are simply conflict-avoidance or conflict-reduction norms that civilized

¹¹⁶⁶ See, e.g., Hoppe, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” p. 86 (using “Schlaraffenland”); Hoppe, *A Theory of Socialism and Capitalism*, p. 219 (quoting Mises using the term “land of Cockaigne”). See also the Wikipedia entry for “Cockaigne” (<https://en.wikipedia.org/wiki/Cockaigne>).

例如，可参见霍普的《论共有、公有和私有财产以及全面私有化的理由》，第 86 页（使用了“Schlaraffenland”）；霍普的《社会主义与资本主义理论》，第 219 页（引用米塞斯时使用了“安乐乡”一词）。另见维基百科中关于“安乐乡”的条目（<https://en.wikipedia.org/wiki/Cockaigne>）。

¹¹⁶⁷ See the criticism of the ERE in Jörg Guido Hülsmann, “A Realist Approach to Equilibrium Analysis,” *Q. J. Austrian Econ.* 3, no. 4 (Winter 2000; <https://mises.org/library/realist-approach-equilibrium-analysis>): 3–51.

参见约尔格·吉多·许尔曼对均匀轮转经济研究（ERE）的批评，《均衡分析的现实主义方法》，《奥地利经济学季刊》第 3 卷第 4 期（2000 年冬季；<https://mises.org/library/realist-approach-equilibrium-analysis>）：3–51 页。

people adopt, respect, and abide by because of their basic values: pro-peace, pro-society, pro-prosperity, pro-cooperation and so on (I have referred to these basic values as “grundnorms,” drawing on legal philosopher Hans Kelsen’s terminology).¹⁸ That is why every right, every human right, every individual right, is ultimately a property right. All property rights are ultimately enforceable by physical control of the possessor/user/claimant, and defensible by physical force (e.g., self defense) or the literal use of force implied by a law that protects such right.

在我们的世界中，在现实世界中，总是存在着稀缺性，总是存在着行动人之间发生冲突的可能性，总是需要使用稀缺的手段来追求目的或目标。财产权只是一种避免冲突或减少冲突的规范，是文明人因其基本价值观而采纳、尊重和遵守的：支持和平、支持社会、支持繁荣、支持合作等等（我借鉴法律哲学家汉斯-凯尔森（Hans Kelsen）的术语，将这些基本价值观称为“基本规范”“grundnorms”）。¹¹⁶⁸ 这就是为什么每一项权利，每一项人权，每一项个人权利，归根结底都是财产权。所有财产权最终都可以通过对占有者/使用者/ 权利主张者的实际控制来实施，并可以通过实际武力（如自卫）或保护这种权利的法律所隐含的实际的武力使用来捍卫。

All law, after all, ultimately is enforced by the use of force against the body or other possessions of the transgressor. (This is recognized in the so-called “bad man” theory of law espoused by Supreme Court Justice Oliver Wendell Holmes.)¹⁹ Every conflict, every dispute, is always, ultimately, about who gets to control a given disputed resource. That is why every law, every right, is ultimately about property rights: deciding who the owner is, or should be. There is no way around this. This is why it is frustrating when mainstream thinkers and even some libertarians talk vaguely about “human rights”; it opens the door to legal invasions of property rights. People confusingly say that people fight over religion; they do not. They fight over others’ bodies and the physical things, the scarce means (land and so on) that the others have or want to use. If I threaten to kill you if you do not convert to Islam, I am really asserting a property right in your body: I am asserting the right to decide whether to stick a sword into your belly. The libertarian says: you have the right to control what gets stuck into your body. Religion is just an

¹¹⁶⁸ See “What Libertarianism Is” (ch. 2), at n.22.
见《何为自由意志主义》（第二章），注释 22。

excuse for the property invasion; it is the motivation or reason for the invasion. But it is impossible to own religion and it is literally impossible to “fight over religion.” It is always, always, always about property rights.²⁰

毕竟，所有法律最终都是通过对违法者的身体或其他财产使用武力来实施的。（最高法院大法官奥利弗-温德尔-霍姆斯（Oliver Wendell Holmes）信奉的所谓“坏人”法律理论承认了这一点）。¹¹⁶⁹每一次冲突，每一次争端，归根结底都是关于谁能控制特定的争议资源。这就是为什么每部法律、每项权利最终都与财产权有关：决定谁是或应该是所有者。这一点无法回避。这就是为什么当主流思想家甚至一些自由意志主义者含糊地谈论“人权”时会令人沮丧；这为法律侵犯财产权打开了大门。人们迷惑不解地说，人们为宗教而战；其实不然。他们争夺的是别人的身体、有形的物质，以及别人拥有或想要使用的稀缺手段（土地等）。如果我威胁说，如果你不皈依伊斯兰教，我就杀了你，这实际上是在主张对你身体的财产权：我在主张决定是否将剑插入你腹部的权利。自由意志主义者说：你有权控制插进你身体的东西。宗教只是侵犯财产的借口；它是侵犯财产的动机或理由。但宗教是不可能被拥有的，而且从字面上来说“为宗教而争斗”是不可能的。永远、永远、永远都是关于财产权的问题。¹¹⁷⁰

The same goes for other false and positive rights, such as intellectual property (e.g., patent and copyright). The IP advocate says they support property rights in general but “also” in useful, valuable, “created” patterns and ideas. But what they really support is legal theft: using IP as an excuse to take others’ money or to seize a “negative servitude” over others’ already-owned scarce resources.²¹

对于其他虚假的积极权利，如知识产权（例如专利和版权）也是如此。知识产权的倡导者说他们总体上支持财产权，但“也”支持有用的、有价值的、“创造出来的”模式和理念中的财产权。但他们真正支持的是法律上的盗窃：以知识产权为借口拿走他人

¹¹⁶⁹ See the Wikipedia entry for “Prediction theory of law” (https://en.wikipedia.org/wiki/Prediction_theory_of_law).

见 维 基 百 科 中 “ 法 律 的 预 测 理 论 ” 条 目 (https://en.wikipedia.org/wiki/Prediction_theory_of_law)。

¹¹⁷⁰ See also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n.43 et pass.

另见《反对知识产权二十年：回顾与展望》（第十五章），注释 43 及其他各处。

的钱财，或者对他人已经拥有的稀缺资源实施“消极地役权”。¹¹⁷¹

Ultimately, every political philosophy, every legal system, is about property rights. They specify a set of rules that determines who the owner of any given scarce resource is, in the case of a dispute or contest to control that resource. The libertarian view simply has a unique way of allocating such property rights, different than other systems.²² All other systems advocate some form of slavery or theft, since they endorse aggression against others, which is a form of slavery, or taking of owned resources from the owner when he does not contractually consent to this.²³

归根结底，每一种政治哲学、每一种法律制度都与财产权有关。它们规定了一套规则，在发生争端或争夺稀缺资源控制权的情况下，决定谁是该资源的所有者。自由意志主义的观点只是在分配这种财产权方面有一种独特的方式，与其他制度不同。¹¹⁷²所有其他制度都主张某种形式的奴役或盗窃，因为它们赞同对他人的侵犯。这是一种奴役形式，或在所有者未授权契约同意的情况下从其手中夺走其拥有的资源。¹¹⁷³

The Daily Bell: Why is it crucial that libertarian theory have a sound basis for property rights and for its unique property assignment rules?

贝尔日报：为什么自由意志主义理论必须要有一个关于财产权及其独特的财产分配规则的可靠基础，这一点至关重要呢？

Stephan Kinsella: Property rights make sense only in a world where there is potential conflict over some identifiable scarce means (meaning: the real world). For humans to live in society, they need to acknowledge each other's existence and respect others' right to live. Every human society that has persisted has figured out a way for people to get along— to agree to certain rules that specify who has the recognized right to use or control a given resource. Humans need to use scarce means to achieve results. For those people who recognize that we exist in society, they recognize benefits of being

¹¹⁷¹ See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.B. 见《反对知识产权二十年》（第十五章），第四部分 B。

¹¹⁷² See the first two sections of “What Libertarianism Is” (ch. 2). 参见《何为自由意志主义》（第 2 章）的前两节。

¹¹⁷³ See “What Libertarianism Is” (ch. 2) at notes 19 & 21 et pass. 见《何为自由意志主义》（第二章）注释 19 和 21 及其他各处。

social (trade, intercourse, division and specialization of labor) and drawbacks (you have to curtail certain appetites). The obvious result is the libertarian property assignment or allocation rule: the owner of a resource is determined by inquiring into its origin: original appropriation or contract.²⁴

斯蒂芬·金塞拉：财产权只有在一个对某些可识别的稀缺资源存在潜在冲突的世界（即现实世界）中才有意义。为了让人类在社会中生活，他们需要承认彼此的存在并尊重他人的生存权利。每一个持续存在的人类社会都找到了一种让人们相处的方式——商定某些规则，规定谁拥有使用或控制特定资源的普遍接受的权利。人类需要利用稀缺的手段来实现结果。对于那些认识到我们存在于社会中的人来说，他们认识到社会存在的好处（贸易、交往、劳动分工和专业化）以及弊端（你必须抑制某些欲望）。显而易见的结果就是自由意志主义的财产分配或分配规则：通过探究资源的来源来确定资源的所有者：先占或契约。¹¹⁷⁴

The Daily Bell: Libertarianism rightly focuses on the concept of first use of a previously unowned scarce resource as the key test for determining ownership of it. But some say that land, for instance, can never be owned, only the improvements on the land. Any truth to this?

贝尔日报：自由意志主义正确地将对先前无主的稀缺资源的首次使用这一概念作为确定其所有权的关键准则。但是有人说，例如土地永远不能被拥有，只能拥有土地上的改良物。这种说法有道理吗？

Stephan Kinsella: "Land" is just a referent to a particular scarce resource. It is surface area on the Earth. Land is just one type of scarce resource, so is not special in any fundamental sense (although the law classifies it as realty or immovable property, which has some different rules for transfer and alienation than does personalty or immovable

¹¹⁷⁴ See Hoppe’s pithy summary in “A Realistic Libertarianism”; and in “Of Common, Public, and Private Property and the Rationale for Total Privatization,” at pp. 85 – 87; “What Libertarianism Is” (ch. 2), at n.37.
见霍普在《一种现实主义的自由意志主义》中的精辟总结；以及在《论共有、公有和私有财产以及全面私有化的理由》第 85-87 页；《何为自由意志主义》（第二章），注释 37。

property, due to its different nature; but in principle it is just another ownable scarce resource). This is one problem I have with Georgists, who obsess about land as some special good.²⁵

斯蒂芬·金塞拉：“土地”只是对一种特定稀缺资源的指代。它是地球的表面积。土地只是稀缺资源的一种，因此从根本上说并不特殊（尽管法律将其归类为真实财产或不动产，由于其性质不同，其转让和让渡规则与个人财产或动产不同；但原则上，它只是另一种可拥有的稀缺资源）。这就是我对乔治主义者的一个疑问，他们总是把土地当作某种特殊的物品而痴迷不已。¹¹⁷⁵

One argument against ownership of land is that the bulk of the value of the land is due to natural features that the user/homesteader did not cause, so he does not “deserve” the full value of the land, but only that which he himself worked on—the improvement. There are many problems with this argument. First, in a sense, the homesteader of a good is its creator—because of the subjective nature of values, the type of “good” a thing is and whether it is really even a “good,” depends on how it is regarded by its user.²⁶

反对土地所有权的一个论点是，土地的大部分价值是由于自然特征造成的，而这些特征并不是土地使用者/拓殖者带来的，因此他并不“应得”土地的全部价值，而只应得他自己付出劳动的部分——即改良部分的价值。这种说法有很多问题。首先，从某种意义上说，物品的拓殖者就是物品的创造者——由于价值的主观性，一件东西是什么类型的“物品”，甚至是否真的是“物品”，都取决于使用者如何看待它。¹¹⁷⁶

¹¹⁷⁵ See, e.g., Murray N. Rothbard, “The Single Tax: Economic and Moral Implications,” in *Economic Controversies* (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>).

例如，可参见穆瑞·N·罗斯巴德的《单一税：经济与道德影响》，收录于《经济学的论证》（阿拉巴马州奥本：米塞斯研究院，2011年；<https://mises.org/library/economic-controversies>）。

¹¹⁷⁶ See Hoppe’s discussion of the public/private nature of goods based on subjective evaluations of users, in “Goods, Scarce and Nonscarce” (ch. 18), at n.35. This applies also to the classification of goods as consumer or capital goods, or even as goods vs. “bads,” as well as the classification of a physical resource as a good at all, depending on whether it is valued by any given actor. On goods vs. “bads,” see “Against

Second, the argument is anchored in the flawed labor theory of property and value. It assumes that values are what property rights protect; that value can be owned. It cannot. Property rights have to do with the physical integrity of scarce resources, since all conflicts are ultimately about incompatible uses of such resources. There is no property right in the value of resources one owns. Value cannot be owned.²⁷ Nor can labor.²⁸ Lockean are wrong to say that the reason there is property rights in things like land is because a person owns his “self” and therefore he owns his “labor” and therefore he owns what unowned things he “mixes” his labor with.

其次，该论点立足于有缺陷的财产和价值劳动理论。它假定价值是财产权所保护的东西；价值可以被拥有。这是不可能的。财产权与稀缺资源的物理完整性有关，因为所有冲突归根结底都是关于这些资源的不相容的使用。对于一个人所拥有的资源的价值，不存在财产权。价值不能被拥有。¹¹⁷⁷劳动也不能被拥有。¹¹⁷⁸洛克主义者认为土地之类

Intellectual Property After Twenty Years” (ch. 15), at n.58 and “Goods, Scarce and Nonscarce” (ch. 18), n.21.

见霍普在《稀缺与非稀缺财货》（第十八章）注释 35 中基于使用者的主观评价对财货的公共/私人性质的讨论。这也适用于将财货分类为消费品或资本品，甚至是财货与“劣货”的分类，以及将一种物质资源确定为财货的分类，这取决于它是否被任何特定的行动人所重视。关于财货与“劣货”，见《反对知识产权二十年》（第十五章）注释 58 以及《稀缺与非稀缺财货》（第十八章）注释 21。

¹¹⁷⁷ See Hoppe, A Theory of Socialism and Capitalism, p. 23 n.11 & 165 – 68; also Hans-Hermann & Walter Block, “Property and Exploitation,” Int’l J. Value-Based Mgt 15, no. 3 (2002; <https://perma.cc/UQ8U-UM35>): 225 – 36; Rothbard, “Law, Property Rights, and Air Pollution,” in Economic Controversies, p. 375; idem, Man, Economy, and State, with Power and Market, Scholar’s ed., second ed. (Auburn, Ala: Mises Institute, 2009; <https://mises.org/library/man-economy-and-state-power-and-market>), chap. 2, § 12, p. 183; Kinsella, “Hoppe on Property Rights in Physical Integrity vs Value,” StephanKinsella.com (June 12, 2011).

见汉斯-赫尔曼·霍普的《社会主义与资本主义理论》，第 23 页注释 11 及 165-168 页；还有汉斯-赫尔曼·霍普与沃尔特·布洛克的《财产与剥削》，发表于《基于价值的管理国际期刊》第 15 卷第 3 期（2002 年；<https://perma.cc/UQ8U-UM35>）：225-236 页；穆瑞·罗斯巴德的《法律、财产权与空气污染》，收录于《经济学的论证》，第 375 页；同上，《人、经济与国家，权力与市场》，学者版，第二版（阿拉巴马州奥本：米塞斯研究院，2009 年；<https://mises.org/library/man-economy-and-state-power-and-market>），第二章，第 12 节，第 183 页；斯蒂芬·金塞拉的《霍普论身体完整性与价值的财产权》，发表于 StephanKinsella.com（2011 年 6 月 12 日）。

¹¹⁷⁸ See “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11),

的事物存在财产权是因为一个人拥有他的“自我”，因此他拥有自己的“劳动”，因此他拥有自己的劳动所“混合”的无主之物，这种说法是错误的。

Almost every part of this version of Locke is wrong. First, we do not own our “selves”; this is metaphorical nonsense. We own our bodies. Second, you do not own your labor any more than you own your actions. Owning your body gives you the ability and perhaps the right to use it as you see fit. Just as owning a home gives you the right to contemplate the stars at midnight, but we would not say there is some independent “right to contemplate the stars”; this ability is rather a consequence of having property rights respected in one’s body, land, and other resources. And even if you owned your labor, mixing it with some resource—well, “mixing” is itself an ambiguous metaphor—but it might well simply result in the loss of ownership of the labor, rather than the acquisition of ownership of the thing the labor mixed with. If you spit in the ocean, you lose your spit, you do not homestead the ocean. That said, I think Locke’s basic insight was right; it is just that it is too complicated and adorned by imprecise metaphors and unnecessary steps. Hume recognized this.²⁹ The reason you have a right to own a resource like land is not that you created its value, but that you staked out a claim before anyone else did. Hoppe calls this *embordering*.³⁰

这个版本的洛克观点几乎每一部分都是错误的。首先，我们并不拥有“自我”；这是比喻性的无稽之谈。我们拥有自己的身体。其次，你不拥有你的劳动，就像你不拥有你的行动一样。拥有自己的身体，你就有能力，甚至有权利按照自己的意愿使用它。就像拥有一个家，你就有权在午夜仰望星空，但我们不会说有某种独立的“仰望星空的权利”；这种能力是一个人的身体、土地和其他资源的财产权受到尊重的结果。即使你拥有自己的劳动，将其与某种资源混合——好吧，“混合”本身就是一个模糊的比喻——但它很可能只是导致丧失对劳动的所有权，而不是获得对劳动所混合之物的所有权。如果你往海里吐口水，你失去了你的口水，你并没有拓殖海洋。尽管如此，我认为洛克的基本见解是正确的，只是它过于复杂，被不精确的比喻和不必要的步骤所修饰。休谟认识到了这一点。¹¹⁷⁹你之所以有权拥有像土地这样的资源，并不是因为你

at n.33 et pass.

见《出售并不意味着拥有所有权，反之亦然：一个剖析》（第十一章），注释 33 及其他各处。

¹¹⁷⁹ See “Against Intellectual Property After Twenty Years” (ch. 15), n.56.

创造了它的价值，而是因为你比其他人更早地提出了权利要求。霍普将此称为“划界”（*embordering*）¹¹⁸⁰。

For someone to object to my ownership of a plot of land is for them to assert a property right in the land. For only an owner of the resource has a ground for objecting to my use of it. But if they claim to own it, they have to have a basis. Yet per assumption, I was the first owner or user, not them. So I have a better claim to the land. This is the essential flaw in the state ownership of national forests and other undeveloped resources: state agents have not used or appropriated the resource, they have not done anything to establish a legitimate claim to the land (and I would argue no state ever can, since by its nature it is criminal, so that any property rights it ever acquires, either by contract, expropriation, or even homesteading, are owed as restitution to the state's victims), yet they prevent others from homesteading the resource. They are acting as the owner even though they are not a legitimate owner. Something similar is the case in the way the states of the world have coordinated via treaties to claim ownership of the seabeds, the moon, outer space, Antarctica and the like.

如果有人反对我对一块土地的所有权，那就是他们在主张对这块土地的财产权。因为只有资源的所有者才有理由反对我对它的使用。但是如果他们声称拥有它，他们就必须有一个依据。然而，根据假设，我是第一个所有者或使用者，而不是他们。所以我对这块土地有更合理的主张。这就是国家对国家森林和其他未开发资源拥有所有权的本质缺陷：国家代理人没有使用或占用该资源，他们没有做任何事情来确立对土地的合法主张（而且我认为国家永远不可能做到，因为国家本质上是犯罪性的，所以它所获得的任何财产权，无论是通过契约、征用，甚至是拓殖，都应作为赔偿归还给国家的受害者），但他们却阻止他人拓殖资源。尽管他们虽然不是合法所有者，却表现得像所有者一样。世界各国通过条约协调声称对海床、月球、外层空间、南极洲等拥有所有权的方式也存在类似情况。

So the anti-land-ownership “libertarians,” if we can call them that, are taking a line similar to that of statists and tyrants. In denying someone the ownership of a resource, they are themselves acting as owners. Only an owner of a resource can exclude

见《反对知识产权二十年》，（第十五章），注释 56。
¹¹⁸⁰ Hoppe, A Theory of Socialism and Capitalism, chaps. 1, 2.
霍普，《社会主义与资本主义理论》，第 1，2 章。

someone else from using it.³¹ Yet they have no basis for this ownership claim; it is just arbitrary verbal decree, the type of claim that cannot serve the function of property rights since it cannot prevent conflict.³²

因此，反土地所有权的“自由意志主义”（如果我们可以这样称呼他们的话）所采取的路线与国家主义者和暴君相似。在否认某人对一种资源的所有权时，他们自己却表现得像所有者一样。只有资源的所有者才能将其他人排除在使用该资源之外。¹¹⁸¹然而，他们对这种所有权主张没有任何依据；这只是任意的口头法令，这种主张类型不能起到财产权的作用，因为它无法防止冲突。¹¹⁸²

But there is another argument against land ownership that is more consistent with libertarian principles. This is the objection to the enclosure movement, e.g., in England. The argument is that when the state grants ownership rights in plots of land, they take away existing rights of people to use the land in certain ways, e.g., for passage. Or they assign the rights to their cronies. Or they take the land away from previous owners (e.g., Native Americans in the US). Hoppe sketches a theory that partial property rights can be homesteaded by use.³³ For example, in a town a common path is used, establishing a collectively owned easement, a right of passage or right of way (a servitude or easement). Someone who builds a road later has to recognize the pre-existing passage rights, owned by residents of the town or their heirs. I believe I read

¹¹⁸¹ See “What Libertarianism Is” (ch. 2), Appendix I; “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9), n.1.

见《何为自由意志主义》（第二章），附录一；《自由意志主义的契约理论：所有权转让、有约束力的承诺与不可让渡性》（第九章），注释1。

¹¹⁸² See “How We Come to Own Ourselves” (ch. 4), text at n.12; “Defending Argumentation Ethics” (ch. 7), the section “Objective Links: First Use, Verbal Claims, and the Prior-Later Distinction.” See also Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp), pp. 320 - 21 (re the insufficiency of verbal decree).

见《我们如何拥有自己》（第四章），注释12处的文本；《捍卫论证伦理学》（第七章），“客观联系：首次使用、口头主张以及先来后到的区分”部分。另见汉斯-赫尔曼·霍普的《私有财产的经济学与伦理学：政治经济学与哲学研究》（阿拉巴马州奥本：米塞斯研究院，2006年[1993年]；www.hanshoppe.com/eepp），第320-321页（关于口头命令的不足）。

not too long about some legally recognized right in Italy of the people to cross over privately owned property for purposes of hunting. One could argue this type of law is justified by the "partial homesteading" approach Hoppe outlines.

但还有一种反对土地所有权的论点更符合自由意志主义的原则。这就是反对圈地运动的观点，例如在英国。其论点是，当国家授予地块所有权时，就剥夺了人们以某些方式使用土地的现有权利，如通行权。或者他们将权利分配给他们的亲信。或者他们从先前的所有者（例如美国的原住民）手中夺走土地。霍普勾勒出一种理论，即部分产权可以通过使用来拓殖。¹¹⁸³例如，在一个城镇中，一条公共道路被使用，从而确立了一种集体所有的地役权、通行权或道路通行权（一种地役权或从物权）。后来修建道路的人必须承认先前存在的通行权，这些通行权由城镇居民或其继承人拥有。我记得不久前读到过在意大利，人们为了狩猎目的而穿越私人所有的财产的某种法律认可的权利。可以说，霍普概述的“部分拓殖”方法证明了这类法律的正当性。

In this sense one could argue that the state recognition and enforcement of property rights in land sometimes amounts to a taking of pre-existing easements that had been privately homesteaded by others. But this only highlights the fact that the state, and its legislation-based legal system, inevitably violates rights and mucks things up. It does not mean that land is special or that property rights in land are not legitimate. It only means that sometimes there are partial usage-rights homesteaded by earlier users of the resource, which property rights must be respected by later comers. In other words, the only coherent objection to property rights in land rests on a recognition of the legitimacy of property rights in land (and on at least an implicit recognition that the state messes things up).³⁴

从这个意义上可以说，国家对土地财产权的承认和强制执行，有时相当于剥夺了他人私人拓殖的原有地役权。但这只是突出了一个事实，即国家及其以立法为基础的法律体系不可避免地会侵犯权利，并把事情搞砸。这并不意味着土地是特殊的，也不意味着土地财产权不合法。它只是说，有时会有部分使用权，即早期资源使用者拓殖的权利，后来者必须尊重这些财产权。换句话说，对土地财产权唯一一致的反对是基于对

¹¹⁸³ See Hoppe, "Of Common, Public, and Private Property and the Rationale for Total Privatization."

见霍普《关于共有、公有和私有财产以及全面私有化的理由》。

土地财产权合法性的认可（以及至少对国家把事情搞砸的一种隐含认可）。¹¹⁸⁴

The Daily Bell: Is ownership always defined by first use?

贝尔日报：所有权总是由首次使用来定义吗？

Stephan Kinsella: As indicated above, ownership in one's body is not based on first use, but on one's intimate connection to, and direct control over, one's body. That is, the objective link in the case of the body that connects a person-claimant-owner to "his" body is that it is his body; it houses his identity, and he directly controls it.

斯蒂芬·金塞拉：如上文所述，一个人对自己身体的所有权不是建立在首次使用的基础上，而是建立在一个人与自己身体的密切联系和对自己身体的直接控制上。也就是说，关于身体，将一个人（主张者、所有者）与“他的”身体联系起来的客观联系在于：这是他的身体；这是他的身份所在，并且他直接控制着它。

For other things — that is, scarce resources, scarce means, economic goods — “conflictible” things³⁵ — things that were previously unowned, unclaimed and unused—the objective link between a given claimant and the disputed resource in question is based upon three factors or principles: original appropriation (first use, or labor-mixing), contract, and rectification. In other words, being the original appropriator is not enough to show ownership, because the original owner might have abandoned the resource; or contractually transferred it to someone else, by gift or sale; or might have a debt to them due to some offense (rectification). So all three considerations play a role. But as between any two or more claimants to a given resource, we can in principle decide which one has the better claim by asking: who had

¹¹⁸⁴ Likewise, arguments for IP based on the contention that IP limits on property are legitimate since “all property rights are limited by other property rights” fail because of a fundamental confusion. It is not property rights that property rights limit; it is actions that property rights limit. See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.H.

同样，基于“所有财产权都受到其他财产权的限制”这一论点而认为知识产权对财产的限制是合理正当的论证是失败的，因为存在一个根本性的混淆。限制财产权的不是财产权本身，而是行动受到财产权的限制。见《反对知识产权二十年》（第十五章），第四部分 H。”

it first; was any contractual transfer or abandonment done; is there a debt between the claimants that can or has to be satisfied by a property title transfer. So if A can show he was using the property before B, he has a presumptively better claim (note: A does not need to show that he was the first user of the property, only that he was using it before B).³⁶ But if B can show that A contractually transferred the property to B, then B has a better claim than A. Or if A harmed B and owes A restitution. Or, if A abandoned the property and then B re-homesteaded it.

对于其他事物 —— 即稀缺资源、稀缺手段、经济物品 —— “冲突性的” 事物¹¹⁸⁵ —— 那些先前无主、无人主张且未被使用的事物 —— 特定主张者与有争议的资源之间的客观联系基于三个因素或原则：先占（首次使用或劳动混合）、契约以及纠正。换句话说，仅仅是先占者并不足以证明所有权，因为最初的所有者可能已经放弃了该资源；或者通过赠与或出售的方式以契约的形式将其转让给了其他人；或者由于某种违法行为（纠正）而欠下了他们的债务。因此，这三个因素都会发挥作用。但是，在对某一资源的两个或两个以上权利主张人之间，我们原则上可以通过询问以下问题来决定谁的权利主张更合理：谁首次拥有它；是否进行了某种契约转让或放弃；主张者之间是否存在可以或必须通过财产权转让来清偿的债务。所以，如果 A 能够证明他在 B 之前就在使用该财产，那么他就有一个推定上更合理的主张（注意：A 不需要证明他是该财产的第一个使用者，只需要证明他在 B 之前就在使用它）。¹¹⁸⁶但是，如果 B 能够证明 A 通过契约将该财产转让给了 B，那么 B 就比 A 有更合理的主张。或者如果 A 伤害了 B 并且欠 B 赔偿或者，如果 A 放弃了该财产，然后 B 重新拓殖了该财产。

The Daily Bell: What constitutes first use?

贝尔日报：什么构成首次使用？

Stephan Kinsella: Some questions cannot be answered from the armchair.³⁷ There are more or less general or abstract legal precepts, and then more or less refined, developed and applied concrete rules that develop over time due to custom

¹¹⁸⁵ See “What Libertarianism Is” (ch. 2), Appendix I. 见《何为自由意志主义》，（第二章），附录 I。

¹¹⁸⁶ Ibid., n.36. 同上，注释 36。

and the legal system of an advanced society. That said, we have had over two thousand years of such processes in the Roman law and English common law, so we are not totally in the dark. I would say that the essential principle here is what Hoppe identifies in chaps. 1-2 of *A Theory of Socialism and Capitalism*: the idea of embordering. If a resource is not yet claimed or used, then the person who somehow starts to use it in a way that is publicly visible has a better claim than others. There needs to be publicly visible borders or boundaries (one reason I sometimes think the term “private” property is somewhat inappropriate; all property rights are in some sense “public,” as in publicly visible),³⁸ to serve the conflict-avoidance function of property rights. The purpose of property rights is to permit resources to be used without conflict, and the only way they can serve this function is if the boundaries or borders of the resource, or of the usage-right or property rights in the resource, are publicly visible—that is, objectively visible, or as some Kantian-inspired theorists like Hoppe might say, “intersubjectively ascertainable.”

斯蒂芬·金塞拉：有些问题无法仅靠空想得出答案。¹¹⁸⁷法律概念或多或少具有一般性或抽象性，而具体规则则或多或少经过提炼、发展和应用，这些规则随着时间的推移因习惯和先进社会的法律制度而发展。话虽如此，在罗马法和英国普通法中，我们已经有了两千多年这样的发展历程，因此我们并非完全蒙在鼓里。我想说，这里的基本原则是霍普在《社会主义和资本主义的理论》第 1-2 章中所确定的：划界的理念。如果一种资源尚未被主张或使用，那么以一种公开可见的方式首先开始使用它的人比其他人有更合理的主张。需要有公开可见的边界或界限（这也是我有时认为“私有”财产这个术语在某种程度上不太恰当的一个原因；所有的财产权在某种意义上都是“公共的”，即公开可见的）¹¹⁸⁸，以发挥财产权避免冲突的功能。财产权的目的是允许资源在没有冲突的情况下被使用，而它们实现这一功能的唯一途径是资源的边界或界限，或者资源的使用权或财产权的边界是公开可见的——也就是说，客观上可见的，或者如一些受康德启发的理论家，例如霍普可能会说的，是“主体间可确定的”。

¹¹⁸⁷ See “Legislation and the Discovery of Law in a Free Society” (ch. 13), n.147. 见《自由社会的立法与法律发现》，（第十三章），注释 147。

¹¹⁸⁸ See “What Libertarianism Is” (ch. 2), n.1. 见《何为自由意志主义》，（第二章），注释 1。

And then, also, we have to recognize that if the purpose of property rights is to permit conflict-free use of resources, and if there would be no need for property rights in a conflict-free world, then the only time a question about the scope and nature of particular property rights could ever arise, in the real world, is in an actual, real, dispute between two or more persons over a given scarce resource. And in that dispute, the very nature of the resource in question will be defined: it is whatever is being disputed or sought by the competing claimants. The very dispute itself helps define what is the resource in question. This, in turn, helps determine what type of usage “counts” for homesteading in the first place.³⁹

然后，我们还必须认识到，如果财产权的目的是允许在没有冲突的情况下使用资源，如果在一个没有冲突的世界里不需要产权，那么在现实世界中，唯一可能出现关于特定产权的范围和性质的问题的时候，就是在两个或更多的人就特定的稀缺资源发生实际的、真正的争议时才会出现。在这一争端中，有关资源的性质将被界定：它就是相互竞争的权利主张者所争议或寻求的任何东西。争议本身就有助于界定什么是相关资源。这反过来又有助于确定哪种使用方式首先“算作”拓殖。¹¹⁸⁹

The Daily Bell: When does a child become “first owner”?

贝尔日报：孩子何时成为“首位所有者”？

Stephan Kinsella: I do not pretend to have a solid answer to this difficult issue. My view is that rights are bound up with human rationality and the capacity to understand, agree with and respect others’ rights. Hoppe implies as much in the opening chapters of A Theory of Socialism and Capitalism. Rothbard and others imply that it is when the child has enough capacity to say “no” and try to run away.⁴⁰ My view is roughly along these lines, but different in some ways. My thinking is this. First, it seems obvious to me that a one-day old zygote has no rights yet, even though it is a potential human person, and biologically a “human life.” It also seems obvious to me that infants have rights,

¹¹⁸⁹ See “What Libertarianism Is” (ch. 2), n.34 et pass. and “Law and Intellectual Property in a Stateless Society” (ch. 14), at n.42; see also Rothbard’s discussion of the “relevant technological unit” in “Law, Property Rights, and Air Pollution.” 见《何为自由意志主义》，（第二章），注释 34 及其他各处，以及《无国家社会中的法律与知识产权》（第十四章），注释 42；另见罗斯巴德在《法律、财产权与空气污染》中对“相关技术单元”的讨论。。

so that infanticide is murder. And that there is little difference between late-term abortion and infanticide (even the pro-choice Ayn Rand recognized this: she wrote “A piece of protoplasm has no rights—and no life in the human sense of the term. One may argue about the later stages of a pregnancy, but the essential issue concerns only the first three months.”).⁴¹

斯蒂芬·金塞拉：对于这个棘手的问题，我并不自诩有确切的答案。我认为，权利与人类的理性以及理解、认同和尊重他人权利的能力息息相关。霍普在《社会主义和资本主义理论》的开篇几个章节中也暗示了这一点。。罗斯巴德等人也暗示，当孩子有足够的力量说“不”并试图逃跑时，他就成为了所有者。¹¹⁹⁰ 我的观点大致如此，但在某些方面略有不同。我的想法是这样的。首先，在我看来，一个仅一天大的受精卵显然还没有权利，尽管它是一个潜在的人类个体，并且在生物学上是“人类生命”。在我看来同样明显的是，婴儿有权利，所以杀婴是谋杀。并且晚期堕胎和杀婴之间几乎没有区别（甚至支持堕胎选择权的安·兰德也认识到了这一点：她写道“一团原生质没有权利——也没有人类意义上的生命。人们可以论证怀孕的后期阶段，但根本问题只涉及头三个月。”）¹¹⁹¹

It seems to me that it is usually immoral or wrong to abort, even early on, but at a certain point it becomes tantamount to infanticide. However, I still think the state or even private law should not intervene, for a variety of reasons. Basically, the jurisdiction should remain with the mother or the family until birth. But I think that at least for a born human, it should be recognized as having full human rights. The parents can care for and make decisions on behalf of the child as its natural agent or guardian. So I think a child is a self-owner from at least the moment of birth, but it is , and thus we presume the child implicitly consents to care by its guardians, presumptively its parents.⁴² As for when the child reaches the capacity to be responsible for acts of aggression, or to

¹¹⁹⁰ Rothbard, “Children and Rights,” in *The Ethics of Liberty* (<https://mises.org/library/children-and-rights>), p. 103.

罗斯巴德，《儿童与权利》，收录于《自由的伦理》（<https://mises.org/library/children-and-rights>），第 103 页。

¹¹⁹¹ See “Abortion” entry, *The Ayn Rand Lexicon* (<https://perma.cc/CN8B-RGZ8>). 见《安·兰德词典》中“堕胎”条目（<https://perma.cc/CN8B-RGZ8>）。

run away and manumit himself, my feeling is roughly along the lines endorsed by common sense and the common law—at certain ages or stages of development in mid-childhood.

在我看来，堕胎通常是不道德或错误的，即使是早期堕胎，但到了一定时间点，就等同于杀婴。不过，出于种种原因，我仍然认为国家甚至私法都不应干预。从根本上说，在孩子出生之前，管辖权应属于母亲或家庭。但我认为，至少对于一个已出生的人来说，应该承认他拥有完全的人权。父母作为孩子的自然代理人或监护人，可以照顾孩子并代表孩子做出决定。因此，我认为孩子至少从出生的那一刻起就是一个自我所有者，但孩子没有行为能力，因此我们推定孩子默示同意由其监护人（通常为其父母）照顾。¹¹⁹²至于孩子什么时候才有能力对侵犯行动负责，或者离家出走、自食其力，我的感觉大致是按照常识和普通法所认可的思路——在儿童中期的某些年龄或发展阶段。

The Daily Bell: How does a child homestead himself, or reach adulthood?

贝尔日报：孩子如何拓殖自己，或者说如何成人？

Stephan Kinsella: This is interesting because the Montessori educational approach sees adulthood being reached after four six-year planes of development, or about age 24. Which seems about right to me, psychologically, but legally, I think the standard cultural norms on this get it about right. Eighteen years of age seems to be a good rule of thumb, though in my view, children younger than this ultimately have the right to declare independence, if they want to, so long as they have sufficient mental capacity and maturity so that it is clear the choice is a considered and real one.

斯蒂芬·金塞拉：这很有趣，因为蒙台梭利教育方法认为在经历四个六年的发展阶段后，即大约 24 岁时达到成年。在我看来，从心理上来说这似乎是正确的，但从法律上讲，我认为关于这一点的标准文化规范大致是正确的。18 岁似乎是一个很好的经验法则，不过在我看来，如果年龄小于 18 岁的孩子愿意，并且他们足够的心智能力和成熟度，以至于很明显这个选择是经过深思熟虑且真实的，那么他们最终有权宣布独立。

¹¹⁹² See “How We Come to Own Ourselves” (ch. 4) and Kinsella, “Objectivists on Positive Parental Obligations and Abortion,” The Libertarian Standard (Jan. 14, 2011). 见《我们如何拥有自己》（第四章）以及金塞拉的《客观主义者论父母的积极义务与堕胎》，发表于《自由意志主义标准》（2011 年 1 月 14 日）。

The Daily Bell: Henry George believed that no land can be owned; only improvements on land. Can you comment? Was Henry George correct in any of his thinking in this area?

贝尔日报：亨利·乔治认为土地不能被拥有，只有对土地的改良可以被拥有。你能对此发表评论吗？亨利·乔治在这方面的思考有正确的地方吗？

Stephan Kinsella: Well, as indicated above in the comments about land, I think this is complete nonsense and a deep confusion. First, land is not special; it is just one type of scarce resource. Second, the idea that you have a right to own resources only insofar as you improve them is based on the labor theory of property, which is itself deeply flawed and which is related to the Marxian labor theory of value.⁴³ Property rights allocate the legal right to control a resource when there is a conflict or potential conflict over the resource. The only question, then, is which of the two or more contestants or claimants has the better claim. The first user of a tract of land has a better connection than a latecomer, regardless of whether the first user can be said to have “created” or even “deserved” the land or not. His first use is better than that of latecomers, because without this principle there is no right to ever first use land; it would lie fallow forever.⁴⁴ Indeed, it would not exist, in a sense, because goods are things that are subjectively regarded as such as demonstrated in action, and if use of the thing is not possible, it in some sense does not “exist” as a good.⁴⁵ Notice that any institution or agency or person that tells you that you cannot homestead or use a piece of land is himself or itself asserting ownership rights in it. But based on what? Not even on first use. But on some arbitrary verbal decree. And property rights cannot be allocated based on verbal decree, because such a rule would permit any number of simultaneous claims of ownership with no objective way to distinguish therebetween, and thus would not serve the very purpose of property rights, which is to reduce conflict, to permit conflict-free and cooperative use of scarce resources.

斯蒂芬·金塞拉：嗯，正如上文关于土地的评论所述，我认为这完全是无稽之谈，是一种严重的混淆。首先，土地并不特殊，它只是一种稀缺资源。其次，只有在你改良资源的情况下，你才有权拥有资源，这种观点建立在劳动财产理论的基础之上，而劳

动财产理论本身就存在很大缺陷，它与马克思的劳动价值论有关。¹¹⁹³当资源发生冲突或潜在冲突时，财产权分配控制资源的合法权利。那么，唯一的问题就是两个或两个以上的竞争者或权利主张者中谁的权利主张更合理。一块土地的第一个使用者比后来者拥有更合理的联系，无论第一个使用者是否可以被说成是“创造”了这块土地，甚至是否“应得”这块土地。他的首次使用优于后来者，因为如果没有这一原则，就永远没有首次使用土地的权利；土地将永远荒芜。¹¹⁹⁴事实上，在某种意义上，它（商品）将不存在，因为商品是那些在行动中被主观地视为商品的东西，如果对这个东西的使用是不可能的，那么在某种意义上它作为一种商品就并不“存在”。¹¹⁹⁵请注意，任何告诉你不能拓殖或使用某块土地的机构、机关或个人，本身就是在主张对这块土地的所有权。但依据是什么呢？甚至不是基于首次使用。而是基于某种任意的口头法令。而财产权不能基于口头法令来分配，因为这样的规则会允许无数同时出现的所有权主张，且没有客观的方法来区分它们，因此将无法实现财产权的真正目的，即减少冲突，允许对稀缺资源进行无冲突的合作性使用。

The Daily Bell: You've called the following a fallacy: "If you own something, that implies that you can sell it; and if you sell something, that implies you must own it first. The former idea, which is based on a flawed idea about the origin and nature of property rights and contract theory, is used to justify voluntary slavery; the second, which is based on a flawed understanding of contract theory, is used to justify intellectual property." Can you elaborate please?

贝尔日报：你把以下观点称为谬论：“如果你拥有某样东西，那就意味着你可以出售它；如果你出售某样东西，那就意味着你必须先拥有它。前一种观点基于对产权起源和性质以及契约理论的错误认识，被用来为自愿奴隶制辩护；后一种想法基于对契约理论

¹¹⁹³ See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.D. 见《反对知识产权二十年》（第十五章），第四部分 D。

¹¹⁹⁴ On Rothbard’s critique of the “communist” approach to property rights assignment, see “How We Come to Own Ourselves” (ch. 4), at n.14 and “Law and Intellectual Property in a Stateless Society” (ch. 14), at n.27; also “Defending Argumentation Ethics” (ch. 7), n.31. 关于罗斯巴德对“共产主义”财产权分配方法的批判，见《我们如何拥有自己》（第四章）注释 14 以及《无国家社会中的法律与知识产权》（第十四章）注释 27；还有《捍卫论证伦理学》（第七章）注释 31。

¹¹⁹⁵ See note 26, above. 见上文注释 26。

的错误认识，被用来为知识产权辩护。”你能详细阐述一下吗？

Stephan Kinsella: I discuss this in more detail elsewhere.⁴⁶ This is hard to elaborate in a quick interview. But here is a summary answer.

斯蒂芬·金塞拉：我在其他地方更详细地讨论了这个问题。¹¹⁹⁶在一次简短的采访中很难详细阐述。但这里有一个简要的回答。

Ownership means the right to control (technically: the right to exclude others).⁴⁷ It is not automatically clear why this would imply the power or ability or right to stop having the right to control it. My view is that we own our bodies not because of homesteading but because each person has a unique link to his body: his ability to directly control it. Hoppe recognized this decades ago, as I point out in “How We Come to Own Ourselves” (ch. 4). I had to find an old German text of his and have it translated to find out his early insight on this, from 1987. This has implications for the idea of the voluntary slavery contract and the so-called inalienability debate. (See chapters 9 and 10.) In fact, the idea of homesteading one’s body is obvious nonsense. A homesteader is an actor; an actor already has a body. It is inconceivable to imagine an actor homesteading his body. Homesteading, or original appropriation, has to do with the acquisition of property rights, by already body-owning actors, in external scarce resources in the world that were previously unowned. For these resources, they are acquired by intentional action and thus can be abandoned—or, thus, sold or given to others. So ownership of external resource does imply the capacity to contract, or sell, but selfor body-ownership does not, because they have different bases. The point is that ownership as a legal concept does not imply the right to sell. Too many libertarians just assume that it does. They are used to the right to sell in the case of ownership of external resources and thus assume that right to sell is some inherent right of ownership; it is not.

所有权意味着控制权（技术上说：排除他人的权利）。¹¹⁹⁷人们并不清楚为什么这会意味着有停止拥有控制权的权力、能力或权利。我的观点是，我们拥有自己的身体并不

¹¹⁹⁶ See “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11). 见《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）。

¹¹⁹⁷ See note 31, above.
见上文注释 31。

是因为拓殖，而是因为每个人与自己的身体都有独特的联系：即他直接控制身体的能力。正如我在《我们如何拥有自己》（第四章）中所指出的，霍普在几十年前就认识到了这一点。我不得不找到他的一篇德文旧文并将其翻译，以了解他早在 1987 年就对此发表的见解。这对自愿奴役契约的思想和所谓不可让渡性的论证都有影响。（见第 9 章和第 10 章）事实上，拓殖自己身体的观点显然是无稽之谈。拓殖者是一个行动人；行动人已经有了身体。想象一个演行动人拓殖自己的身体是不可思议的。拓殖，或者说先占，与已经拥有身体的行动人对世界上先前无主的外部稀缺资源获得财产权有关。对于这些资源而言，它们是通过有意行动获得的，因此可以被放弃——或者说，可以被出售或给予他人。因此，外部资源的所有权确实意味着契约或出售的能力，但自我或身体的所有权却不意味着契约或出售的能力，因为它们的基础不同。问题的关键在于，所有权作为一个法律概念并不意味着出售的权利。太多的自由意志主义者只是认为这意味着所有权。他们习惯了在拥有外部资源的情况下有出售的权利，因此就认为出售的权利是所有权的某种固有权利；但事实并非如此。

The converse mistake is the assertion that if you sell something you must have owned it. Otherwise you could not have sold it. So pro-IP advocates observe that people are paid to teach or to provide information or to invent. So they reason that the person being paid must have sold something. And to sell it, you must have owned it. You can only sell things that you own, right? Well what was sold? It was the information that you were paid to come up with or transmit. Therefore, information is an object of a sale contract and must be an ownable thing. Of course, the argument is rarely put this explicitly, mostly because people making such arguments are legal naifs, but if it was, it would be easier to show how ridiculous and flawed it is. Contracts are simply ways owners of resources grant, or deny, permission to others, to use the resource, whether the grant of control is temporary or permanent (as with a lease versus a sale) or whether it is partial or complete, or whether it is conditional or unconditional. Often this involves an exchange where two owners of two resources exchange title to these things: my apple for your pear. My coin for your milk. And so on. But some title transfers—contracts—are only one-way: a gift, or donation, say. Or if I agree to perform some action within my capability on the condition that you give me a monetary payment, this is a one-way title transfer: only the money is being transferred.

相反的错误是这样一种断言：如果你出售某样东西，你就必须已经拥有它。否则，你就不可能出售它。因此，支持知识产权的倡导者注意到，有人因传授知识、提供信息

或发明创造而获得报酬。因此，他们的理由是，获得报酬的人一定出售了某样东西。而要出售，你就必须先拥有它。你只能出售自己拥有的东西，对吗？那么出售的是什么呢？是你受雇提出或传播的信息。因此，信息是销售契约的标的物，并且一定是可以拥有的东西。当然，这个论点很少被明确提出来，主要是因为提出这种论点的人在法律方面都很天真，但如果被明确提出来，就更容易说明它是多么荒谬和漏洞百出了。契约只是资源所有者授予或拒绝他人使用资源的许可的方式，无论这种控制权的授予是暂时的还是永久的（如租赁与出售），或者是部分的还是完全的，或者是有条件的还是无条件的。这通常涉及一种交换，即两种资源的两个所有者交换这些东西的所有权：我的苹果换你的梨。我的硬币换你的牛奶。等等。但有些所有权转让——契约——只是单向的：比如说，赠与或捐赠。或者，如果我同意在我的能力范围内做一些事情，条件是你给我一笔钱，这也是一种单向的所有权转移：只有钱被转移了。

People confuse this because they analogize it to a normal bilateral exchange and wonder what is being exchanged in the service contract, and they assume the thing being sold is labor and that it must be ownable. This is just wrong. A careful study of Rothbard's truly revolutionary and path-breaking title-transfer theory of contract is a good idea for people who want to argue this way. (See chapters 9 and 11.) But the point is that you cannot use this confused legal reasoning to shore up the arguments for ownership of labor, or for ownership of the "fruits of one's labor," or IP. Just because I can persuade someone to give me money on the condition that I invent something for them or teach or divulge to them some information does not mean that an invention or information is an ownable object.

人们之所以会混淆这一点，是因为他们把它类比为正常的双边交换，不知道服务契约中交换的是什么，他们认为出售的东西是劳动力，它一定是可以拥有的。这完全是错误的。对于想这样论证的人来说，仔细研究罗斯巴德真正具有革命性和开创性的契约所有权转移理论是个好主意。（见第 9 章和第 11 章）。但关键是，你不能用这种混乱的法律推理来支持对劳动力的所有权、对“一个人劳动成果”的所有权或者对知识产权的所有权的论点。仅仅因为我能说服某人在我为他们发明某样东西、教他们或者向他们透露一些信息的条件下给我钱，并不意味着一项发明或信息是一个可以拥有的对象。

The Daily Bell: Another major question for libertarians involves when and why agreements are legally enforceable or in other words, how rights are voluntarily transferred. Can you offer some insight?

贝尔日报：自由意志主义的另一个主要问题涉及协议何时以及为何具有法律强制力，或者换句话说，权利是如何自愿转让的。你能提供一些见解吗？

Stephan Kinsella: As indicated above, I think the theory of Rothbard and Evers on this is the place to start. Contracts are just transfers of title, or ownership, to a scarce resource by the owner, by some sufficient communication of his consent (see chapter 9). Outside of this, actions that are crimes or torts—invasions of the borders of others' owned resources—can also be considered to be transfers of rights, via “rectification” or retaliation. For example if A attacks B, now B has a right to punch A. A has in a sense given up his right to object to this force. The right has been transferred, or forfeited. Or if A negligently harms B, now B is entitled to claim some of A's money as damages; that too results in a transfer. But notice that intentional aggression, sometimes called “crime,” and torts, are all intentional actions—as are contracts. These are all basically actions human actors can take that result in some kind of change in the rights landscape. This is one reason I am not hostile to the idea of positive rights—so long as they are the result of one's action. If you push someone in a lake, you now have an obligation to rescue them even though a stranger does not. If you create a dependent child by copulation, then you have certain parental obligations to care for this child. It's a positive obligation but one that you created by your free action. Libertarians, in my view, are not against positive obligations — we are just against unchosen positive obligations.⁴⁸

斯蒂芬·金塞拉：如上所述，我认为可以从罗斯巴德和埃弗斯的理论入手。契约只是所有者通过某种充分的沟通表示同意，对稀缺资源的所有权或拥有权的转让（见第 9 章）。除此之外，犯罪或侵权行为——侵犯他人所拥有资源的边界——也可以被认为是通过“纠正”或报复来实现权利的转移。例如，如果 A 攻击了 B，那么现在 B 就有权揍 A。A 在某种意义上放弃了反对这种武力的权利。权利已经转让或丧失。或者说，如果 A 因疏忽而伤害了 B，现在 B 有权要求甲赔偿一笔钱；这也是一种权利的转移。但要注意的是，故意侵犯（有时称为“犯罪”）和侵权行为都是故意的行动——契约也是如此。从根本上说，这些都是人类行动人可以采取的行动，它们会导致权利状况发生某种变化。这也是我不反对积极权利观点的一个原因——只要积极权利是一个人行动的结果。如果你把某人推到湖里，那么你现在就有义务去救他们，而陌生人则没有这个义务。如果你通过嘿咻创造了一个需抚养的孩子，那么你就有一定的父母

义务来照顾这个孩子。这是一种积极的义务，但却是你通过自己的自由行动创造出来的。在我看来，自由意志主义者并不反对积极义务——我们只是反对未经选择的积极义务。¹¹⁹⁸

The Daily Bell: Why does making a promise or agreeing or “committing” to do something result in a transfer of rights from the promisor to the promisee? To many—even to many libertarians—it seems elementary and obvious: If you promise to do something, you may be forced to do it.

贝尔日报：为什么许诺、同意或“承诺”做某事会导致权利从许诺人转移到被许诺人？对许多人——甚至对许多自由意志主义者来说——这似乎是基本且显而易见的：如果你承诺做某事，你可能会被强制去做这件事。

Stephan Kinsella: We are used to thinking this way because the state’s legal system has characterized it this way for some time. The idea now is that promises should be binding, if they are made with the right formalities. One theory that is used to back this up is that people rely on your promises and would be harmed, would suffer damage, if you were to be free to renege. But this reasoning is circular, of course—if the law did not enforce promises it would be unreasonable for promisees to “rely” on that promise.⁴⁹ So as Rothbard recognizes, the “binding promise” theory of contract is not coherent. Contract really simply means a transaction or arrangement whereby the owner of a resource exercises his ownership power to grant permission or even to transfer ownership of the resource to someone else. That is all that contracts are: title-transfers, with various conditions (triggers) attached to the transfers.

斯蒂芬·金塞拉：我们习惯于这样思考，因为国家的法律制度早就这样定性了。现在的观点是，如果承诺的形式正确，就应该具有约束力。用来支持这一观点的一个理论

¹¹⁹⁸ See “How We Come to Own Ourselves” (ch. 4) and Kinsella, “Objectivists on Positive Parental Obligations and Abortion.” On forfeiting or waiving rights by acts of aggression, see “Knowledge, Calculation, Conflict, and Law” (ch. 19), n.81 and “A Libertarian Theory of Punishment and Rights” (ch. 5), n.88.

见《我们如何拥有自己》（第四章）以及金塞拉的《客观主义者论父母的积极义务与堕胎》。关于因侵犯行动而丧失或放弃权利，见《知识、计算、冲突与法律》（第十九章）注释 81 以及《自由意志主义的惩罚与权利理论》（第五章）注释 88。

是，人们依赖于你的承诺，如果你可以随意反悔，人们就会受到伤害，蒙受损失。但这种推理当然是循环论证——如果法律不强制执行承诺，那么被承诺者就没有理由“依赖”该承诺。¹¹⁹⁹ 因此，正如罗斯巴德所认识到的，契约的“约束性承诺”理论是不一致的。契约实际上只是指一种交易或安排，资源的所有者通过这种交易或安排行使其所有权，授予许可，甚至将资源的所有权转让给他人。这就是契约的全部内容：所有权转让，并附加各种转让条件（触发条件）。

The Daily Bell: By recognizing the legitimacy of defensive force, the non-aggression principle recognizes that you normally own your body but you can partially or completely forfeit this right by committing aggression. True? False?

贝尔日报：互不侵犯原则通过承认防卫性武力的合法性，承认你通常拥有自己的身体，但你可以通过实施侵犯部分或完全放弃这一权利。是这样吗？

Stephan Kinsella: In my view, this is correct. Each person owns his body—presumptively. But if he aggresses against others, they acquire the right to use force against him—in self-defense, first and foremost, but also, arguably, to obtain restitution or even for purposes of retribution. We must, however keep proportionality considerations in mind, so that aggressors are not “over-punished.” I go into such matters in some detail in chapter 5.

斯蒂芬·金塞拉：在我看来，这是正确的。每个人都拥有自己的身体——推定拥有。但如果他侵犯他人，他人就有权对他使用武力——首先是自卫，但也可以说是为了获得赔偿，甚至是出于报复的目的。不过，我们必须牢记相称性的考虑，以免侵犯者受到“过度惩罚”。我在第五章中较为详细地探讨了这些问题。

The Daily Bell: Can we postulate that only by committing aggression can you lose rights in your body?

贝尔日报：我们能否假设只有在实施侵犯时你才会失去对自己身体的权利？

Stephan Kinsella: That is my view. It is a direct implication of the non-aggression principle. Force is justified in response to initiated force only. That is the reciprocity or

¹¹⁹⁹ See “A Libertarian Theory of Contract” (ch. 9), Part I.E. 见《自由意志主义的契约理论》（第 9 章），第一部分 E。

symmetry of the libertarian ethos. You can do to someone what they do to you, meaning: you can only use force against someone if they have used force against you. Making a promise is not a use of force. So voluntary slavery contracts are not enforceable, as I point out in chapters 9 and 10.

斯蒂芬·金塞拉：这是我的观点。这是互不侵犯原则的直接含义。武力只有在回应主动使用的武力时才是正当的。这就是自由意志主义精髓的对等性或对称性。你可以以其人之道还治其人之身，也就是说：只有当别人对你使用武力时，你才可以对其使用武力。许诺不是使用武力。所以，正如我在第 9 章和第 10 章中指出的那样，自愿奴役契约是不可强制执行的。

The Daily Bell: Some argue that there are two ways you can forfeit or alienate your rights: aggression and saying certain words. Does this follow?

贝尔日报：有人认为有两种方式可以让你丧失或让渡你的权利：一是侵犯，二是说出某些话。这说得通吗？

Stephan Kinsella: Well, I believe in general that speech is not a use of force and thus cannot be considered aggression. Which means force in response to such speech cannot be justified and would have to be characterized as aggression. But speech-acts can sometimes be aggression. Imagine a mafia captain saying to an underling, "Kill Mr. Jones." Or President Truman ordering a nuclear bomb to be dropped on civilian populations in Japan. And so on. (See chapter 8.)

斯蒂芬·金塞拉：嗯，我认为，一般来说，言论不是使用武力，因此不能被视为侵犯。

也就是说，针对这种言论使用武力是不正当的，必须被定性为侵犯。但言语行动有时也可能是侵犯。想象一下，一个黑手党头目对下属说：“杀了琼斯先生”。或者杜鲁门总统下令向日本平民投掷核弹。等等。（见第 8 章）。

The Daily Bell: To change the subject a bit ... we've been writing a lot about marijuana legalization here at The Daily Bell. High Alert, in fact, is involved in a marijuana venture. If marijuana is generally legalized, does the state owe compensation to those who were previously incarcerated?

贝尔日报：换个话题.....我们在贝尔日报上写了很多关于大麻合法化的文章。实际上，

“高度警惕”（High Alert）参与了一项大麻相关的冒险活动。如果大麻普遍合法化，国家是否应该赔偿之前因大麻而被监禁的人？

Stephan Kinsella: Well, the state claims ownership of certain scarce resources, to which everyone who is a state victim has a legitimate claim for restitution—taxpayers, victims of regulation, prisoners incarcerated for victimless crimes, and so on. There can never, in principle, be enough resources in the state's hands to make full restitution, since the state always destroys wealth and wealth creation. So if the state dissolved, it could only pay one cent on the dollar to its victims, if that. But if a given person has the ability to get a higher restitution award, I believe they are justified in doing so.

斯蒂芬·金塞拉：嗯，国家声称对某些稀缺资源拥有所有权，而作为国家受害者的每个人都有合法权利要求归还这些资源——纳税人、监管的受害者、因无受害者犯罪而被监禁的囚犯等等。原则上，国家手中永远不可能有足够的资源来完全赔偿，因为国家总是在摧毁财富和创造财富。因此，如果国家解体，它只能向受害者支付一美元中的一分钱，如果能做到这样的话。但是如果某一个特定的人有能力获得更高的赔偿裁决，我认为他们这样做是正当的。

The Daily Bell: Was there any justifiable reason to incarcerate them in the first place?

贝尔日报：当初监禁他们有什么正当理由吗？

Stephan Kinsella: Well, finally, an easy one! Of course not. Drug laws are completely evil. I believe some day we will look back on this like we look back on the days of chattel slavery now.

斯蒂芬·金塞拉：嗯，终于有个简单的问题了！当然没有。毒品法完全是邪恶的。我相信有一天，我们会像现在回顾奴隶制时代一样回顾这一切。

The Daily Bell: As a matter of reality, will they receive compensation?

Stephan Kinsella: Of course not.

贝尔日报：就现实而言，他们会得到赔偿吗？

斯蒂芬·金塞拉：当然不会。

The Daily Bell: Any other points you want to make?

Stephan Kinsella: I would just encourage people to think consistently, use coherent and consistent terminology, and think about the liberty of your neighbors as well as your own.

The Daily Bell: Thanks again for your time.

贝尔日报：你还有什么要补充吗？

斯蒂芬·金塞拉：我只想鼓励人们坚持思考，使用连贯一致的术语，在考虑自己的自由的同时，也要考虑邻居的自由。

贝尔日报：再次感谢你抽出时间。

后 记 AFTER THOUGHTS

安东尼·威尔 by Anthony Wile

Stephan Kinsella makes many good and interesting points in this interview. He is an eloquent proponent for logical libertarianism and has offered significant theories on issues of property rights, copyrights, and ownership in general.

斯蒂芬·金塞拉在这次访谈中提出了许多精彩而有趣的观点。他是逻辑自由意志主义的雄辩支持者，并就财产权、版权以及一般所有权等问题提出了重要理论。

He's been attacked in the past for empyrean proposals—ones that are not entirely realistic. But to oppose his vision based on what is currently real and practical is to miss the point.

他过去曾因一些不切实际的宏伟提议而受到攻击。但是基于当前的现实和实际情况来反对他的愿景，那就没有抓住重点。

Kinsella is building an argument brick by brick for freedom and for how freedom works. There are others that concentrate on less hypothetical perspectives. We're partial to Stephan's vision because it's an uncompromising one.

金塞拉正在一砖一瓦地构建关于自由以及自由如何运作的论点。还有一些人专注于假设性较低的观点。我们偏爱斯蒂芬的观点，因为它是一种毫不妥协的观点。

There are plenty of people that can provide information on how government interacts with a “free” society but few who follow Ayn Rand's hyper-rigorous logic. Of course, Ayn Rand is controversial, especially in this day and age, but she's certainly inspired several generations of libertarian thinkers.

有很多人可以提供关于政府如何与“自由”社会互动的信息，但很少有人遵循安·兰德的极其严格的逻辑。当然，安·兰德是有争议的，尤其是在当今这个时代，但她肯确实启迪了几代自由意志主义思想家。

In statements such as “drug laws are completely evil,” we can see clearly Kinsella's impatience with what he considers moral relativism. Again, he can be attacked by enemies for presenting a black and white vision. But in an era where so many are eager to proclaim shades of gray, we're happy to observe (and present) his arguments.

从诸如“毒品法完全是邪恶的”这样的言论中，我们可以清楚地看到金塞拉对他所认为的道德相对主义的不耐烦。同样，他也会因为提出非黑即白的观点而遭到敌人的攻击。但在这个许多人热衷于宣扬各种灰色地带的时代，我们乐于观察（并介绍）他的论点。

He is a steadfast and creative intellect at a time where it takes considerable courage to be either. One very obviously worth paying attention to whether you agree with him or not.

他是一位坚定而富有创造力的智者，而在这个时代，要做到这两点都需要相当大的勇气。无论你是否同意他的观点，他显然都值得关注。

第二十四章 论自由意志主义的逻辑和为什么不存在知识产权

On the Logic of Libertarianism and Why Intellectual Property Doesn't Exist

This was an interview by Anthony Wile at The Daily Bell: “Stephan Kinsella on the Logic of Libertarianism and Why Intellectual Property Doesn't Exist,” The Daily Bell (March 18, 2012). I would not word the title this way—the problem with intellectual property (IP) is not that it doesn't “exist” but rather that IP law is unjust. But I didn't choose the title, and have not changed it here.

这是安东尼·威尔在贝尔日报杂志上发表的一篇访谈：“斯蒂芬·金塞拉谈自由意志主义的逻辑和为什么知识产权不存在”，贝尔日报（2012 年 3 月 18 日）。我不会这样措辞标题——知识产权 (IP) 的问题不在于它不“存在”，而是在于知识产权法不正义。但标题不是我选的，这里也没有改动。

Daily Bell: Give us some background on yourself. Where did you go to school? How did you become a lawyer?

贝尔日报：给我们讲讲你的背景情况吧。你哪里上的学？你是如何成为一名律师的？

Stephan Kinsella: I was from a young age interested in science, philosophy, justice, fairness, and “the big questions.” In high school a librarian recommended I read Ayn Rand's *The Fountainhead*, which started me down that rabbit-hole. I ended up majoring in electrical engineering at Louisiana State University, from 1983–87. I liked engineering but over time became more and more interested in political philosophy, economics, philosophy, and so on.

斯蒂芬·金塞拉：我从小就对科学、哲学、正义、公平以及“重大问题”感兴趣。在高中时，一位图书管理员推荐我读安·兰德的《源泉》，这让我踏上了那条探索之路。1983 年至 1987 年，我最终在路易斯安那州立大学主修电气工程。我喜欢工程学，但

随着时间的推移，我对政治哲学、经济学、哲学等越来越感兴趣。

In the late '80s, I started publishing columns in the LSU student newspaper, The Daily Reveille, from an explicitly libertarian perspective. As my interests became more sharply political and philosophical, my girlfriend (later wife) and friends urged me to consider law school. After all, I liked to argue. I might as well get paid for it! I was by this time in engineering grad school, pursuing an MSEE degree. Unlike many attorneys I now know, I had not always "wanted to be a lawyer." In fact, it had never occurred to me until my girlfriend suggested it over a family dinner, when I was wondering what degree I could pursue next—partly in order to avoid having to enter the workforce just yet. And also to make more money.

上世纪 80 年代末，我开始在路易斯安那州立大学的学生报刊《笛声日报》(The Daily Reveille) 上发表专栏文章，明确提出自由意志主义的观点。随着我对政治和哲学的兴趣越来越浓厚，我的女朋友（后来的妻子）和朋友们都敦促我考虑上法学院。毕竟，我喜欢论证。我不妨以此谋生！那时我正在工程研究生院攻读电气工程硕士学位（MSEE）。与我现在认识的许多律师不同，我并不总是“想成为一名律师”。事实上，我从未想过要成为一名律师，直到我的女朋友在一次家庭聚餐时提出了这个建议，当时我正在想我下一步可以攻读什么学位——部分原因是为了暂时避免进入职场。同时也是为了赚更多的钱。

At the time I naively thought one had to have a pre-law degree and many prerequisite courses that engineers would lack; and I feared law school would be very difficult. I remember my girlfriend's chemical engineer father laughing out loud at my concern that law school might be more difficult than engineering.

当时我天真地认为，一个人必须拥有法学预科学位和许多工程师缺乏的先修课程；而且我担心读法学院会非常难。我还记得，我女朋友的化学工程师父亲听到我担心法学院可能比工程学院更难，笑得前仰后合。

So I walked across the LSU campus one day and talked to the vice chancellor about all this. He tried to dissuade me, saying that engineering undergrads tended to find law school difficult. But he conceded that a pre-law degree is not needed; all one needs is a bachelor's degree in something, in anything, really. I took the LSAT and did well enough to get accepted at LSU Law Center. (In the US, law is a graduate degree, the Juris Doctor, which requires an initial B.A. or B.S. degree. Because of ABA protectionism.

But I digress.)¹

于是，有一天我走过路易斯安那州立大学校园，和副校长谈起了这一切。他试图劝阻我，说工程专业的本科生往往会觉得法学院很难。但他也承认不需要法律预科学位，只要有某个专业的学士学位就可以了，其实什么专业都可以。我参加了法学院入学考试（LSAT），成绩很好，被路易斯安那州立大学法学院录取。（在美国，法学是一个研究生学位，即法学博士，需要先获得文学或理学学士学位。因为美国律师协会的保护主义。但我走岔了。）¹²⁰⁰

I actually greatly enjoyed law school. Unlike many of my fellow law students, apparently, who seemed in agony. I was free to talk about laws, rules, human action and interaction. I wasn't stuck with mathematical equations. Norms and opinions were relevant. Human interactions interested me. I enjoyed the Socratic discussion method.

实际上，我非常喜欢法学院。显然，与我的许多法学院同学不同，他们似乎很痛苦。我可以自由地谈论法律、规则、人的行动和互动交流。我并不拘泥于数学公式。规范和观点与我息息相关。人类的互动让我感兴趣。我喜欢苏格拉底式的讨论方法。

In one sense, it was unlike electrical engineering, which studies the impersonal behavior of subatomic particles. In law, the subject matter is acting humans and the legal norms that pertain to human action. On the other hand, I found it similar to engineering in that it was analytical and focused on solving problems. It is less mechanistic and deterministic than is engineering, but it is still analytical. So if you are the type of engineer who can shift modes of thought and who is able to write and speak coherently (not all engineers are), then law school is fairly easy. By contrast, many liberal arts majors are not used to thinking analytically. The first year of law school is meant to teach you to “think like a lawyer”—essentially, to break their spirit and remold them into the analytical, lawyer-thinking, problem-solving mold.

从某种意义上说，它不同于电气工程，后者研究的是亚原子粒子的非人格行为。法

¹²⁰⁰ I discuss some of this in “How I Became A Libertarian” (ch. 1); additional biographical material is at www.stephankinsella.com/publications/#biographical. 我在《我如何成为一名自由意志主义者》（第1章）中讨论了其中的一些内容；更多的传记材料可在 www.stephankinsella.com/publications/#biographical 上找到。

学的研究对象是行动的人类以及与人的行动相关的法律规范。另一方面，我发现它与工程学相似，都是分析性的，侧重于解决问题。它没有工程学那么机械化和确定性，但仍然是分析性的。因此，如果你是那种能够转换思维模式、能够连贯地写作和发言的工程师（并非所有工程师都是如此），那么法学院的学习就会相当轻松。相比之下，许多文科专业的学生不习惯分析性思维。法学院的第一年就是要教你“像律师一样思考”——实质上，就是要打破他们的固有思维，将他们重塑为分析型、律师思维型、解决问题型人才。

In any case, I became a lawyer and do not regret it. It can be lucrative and mentally stimulating. In my own case, my legal career has complemented my libertarian and scholarly interests. As Gary North has pointed out, for most people there is a difference between career and calling.² Your career or occupation is what puts food on the table. Your calling is what you are passionate about—“the most important thing you can do with your life in which you are most difficult to replace.” Occasionally they are the same, but often not; but there is no reason not to arrange your life so as to have both. If you can manage it. In my case, my various scholarly publications and networks helped my legal career if only by adding publications to my CV. And my legal knowledge and expertise, I believe, has helped to inform my libertarian theorizing.

无论如何，我成为了一名律师，而且并不后悔。它既能带来丰厚的利润，也能在精神上带来刺激。就我个人而言，我的法律职业与我的自由意志主义和学术兴趣相辅相成。正如加里·诺斯（Gary North）所指出的，对大多数人来说，职业和使命是有区别的。¹²⁰¹你的职业或工作是用来养家糊口的。你的使命是你所热爱的——“你一生中能做的最重要的事情，在这件事情上你是最难被替代的”。“有时，它们是相同的，但往往不是；但没有理由不安排好自己的生活，使两者兼而有之。假如你能做到的话。就我而言，我的各种学术著作和网络对我的法律职业生涯大有帮助，哪怕只是在我的简历上增加了一些出版物。而且我相信，我的法律知识和专长也有助于我的自由意志主义理论研究。

Daily Bell: You founded your own firm. Tell us how that came about.

贝尔日报：你创立了自己的事务所。跟我们讲讲这是怎么回事。

¹²⁰¹ Kinsella, “Career Advice by North,” StephanKinsella.com (Aug. 12, 2009).
金塞拉，《诺斯的职业建议》，发表于 StephanKinsella.com（2009 年 8 月 12 日）。

Stephan Kinsella: After law school my first job was in oil and gas law at a large Houston-based law firm, Jackson Walker. I found the work fascinating; it was all about contract and property rights. Then I moved into patent law because it was more in demand at this time (mid '90s), and unlike state-based oil & gas law, it is a national legal field and so allows more geographic mobility. My wife's employer at the time was pushing her to take a job in the head office outside Philadelphia. So I switched to patent law in part to accommodate this and in part to capitalize on the then-burgeoning field of IP law.

斯蒂芬·金塞拉：从法学院毕业后，我的第一份工作是在一家总部位于休斯敦的大型律师事务所——杰克逊·沃克律师事务所从事石油和天然气法律业务。我发现这份工作非常吸引人，它涉及的都是契约和产权。后来我转到了专利法领域，因为专利法在当时（90年代中期）的需求量更大，而且与基于州的石油和天然气法不同，专利法是一个全国性的法律领域，因此允许更多的地域流动。我妻子当时的雇主催促她去费城以外的总部工作。因此，我转到了专利法领域，一方面是为了适应这种情况，另一方面也是为了利用当时正在蓬勃发展的知识产权法领域。

I recall discussing my career choices at this time with my friend, LSU law professor Saúl Litvinoff, an old-world gentleman, who confessed that he was “nonplussed” that I, a man, a husband, would take into account my wife's career plans in my own career decisions. Oh, well. Different times.

我记得当时我和我的朋友，路易斯安那州立大学的法学教授萨索尔·利特维诺夫（Saúl Litvinoff）讨论我的职业选择，他是一位老派绅士，他坦言，他对我这个男人、丈夫在自己的职业决策中考虑妻子的职业规划感到“不可思议”。哦，好吧。时代不同了。

I ended up taking a job with a Philadelphia law firm, Schnader Harrison, doing patents and related IP work. I and others there ended up moving later to Duane Morris, and when I moved back to Houston in 1997, I opened their Houston office and was eventually made partner. In 2000 I decided to join one of my clients, an optoelectronics company (think: lasers), as general counsel. At the time I had been at big law firms for about ten years and had learned a lot and enjoyed it but was ready for a change. And after about ten years as general counsel, I was ready for another shift, so I have recently

formed my own legal practice, specializing in intellectual property, technology and commercial law.

最后，我在费城一家名为谢恩德勒·哈里森（Schnader Harrison）的律师事务所工作，从事专利和相关知识产权工作。后来，我和那里的其他人一起转到了杜恩·莫里斯（Duane Morris）律师事务所，1997 年搬回休斯顿后，我开设了他们的休斯顿办事处，并最终成为合伙人。2000 年，我决定加入我的一个客户——一家光电子公司（如：激光器），担任总法律顾问。当时，我在大型律师事务所工作了大约十年，学到了很多，也很享受这份工作，但我已经做好了改变的准备。在担任了大约十年的总法律顾问之后，我准备好了再次转变，因此我最近成立了自己的法律事务所，专门从事知识产权、技术和商业法律业务。

Daily Bell: Why were you attracted to Austrian economics and why did libertarianism attract you?

贝尔日报：你为什么会被奥地利经济学吸引？为什么自由意志主义会吸引你？

Stephan Kinsella: I was always interested in science, truth, goodness, and fairness. I have always been strongly individualistic and merit-oriented. This is probably because I was adopted and thus have always tended to cavalierly dismiss the importance of “blood ties” and any inherited or “unearned” group characteristics. This made me an ideal candidate to be enthralled by Ayn Rand's master-of-universe “I don't need anything from you or owe you anything” themes.

斯蒂芬·金塞拉：我一直对科学、真理、善良和公平感兴趣。我一直强烈地具有个人主义倾向和以成就为导向。这可能是因为我是被领养的，因此我一直倾向于满不在乎地否定“血缘关系”以及任何遗传的或“不劳而获”的群体特征的重要性。这使我成为一个很容易被安·兰德那种主宰世界的“我不需要你那里得到任何东西，也不欠你任何东西”的主题所吸引的理想人选。

Another factor is my strong sense of outrage at injustice, which probably developed as a result of my hatred of bullies and bullying. I was frequently attacked by them as a kid because I was small for my age, bookish, and a smartass. Not a good combination.

另一个因素是我对不正义的强烈愤慨，这可能是我憎恨恶霸和欺凌的结果。我小时候经常受到他们的攻击，因为我在同龄人中个子小、书呆子气且爱耍嘴皮子。这可不是一个好的组合。

A librarian at my high school (Catholic High School in Baton Rouge, Louisiana), Mrs. Reinhardt, one day recommended Ayn Rand's *The Fountainhead* to me. (I believe this was in 1982, when I was a junior in high school—the same year Rand died.) "Read this. You'll like it," she told me. I devoured it. Rand's ruthless logic of justice appealed to me. I was thrilled to see a more-or-less rigorous application of reason to fields outside the natural sciences. I think this helped me to avoid succumbing, in college, to the simplistic and naïve empiricism-scientism that most of my fellow engineering classmates naturally absorbed. Mises's dualistic epistemology and criticism of monism-positivism-empiricism, which I studied much later, also helped shield me from scientism.

我高中（路易斯安那州巴吞鲁日的天主教高中）的一位图书管理员莱因哈特夫人有一天向我推荐了安·兰德的《源泉》。（我记得那是在 1982 年，我读高中三年级的时候——也是兰德去世的那一年。）“读读这本书。你会喜欢的。”她告诉我。我如饥似渴地读完了它。兰德对正义的无情逻辑吸引了我。看到在自然科学之外的领域或多或少地严格运用理性，我感到很兴奋。我认为这帮助我在大学时避免屈服于我的大多数工程学同学自然而然吸收的那种简单化和幼稚的经验主义—科学主义。米塞斯的二元认识论以及对一元论—实证主义—经验主义的批判（我在很久以后才研究到），也帮助我免受科学主义的影响。

By my first year of college (1983), where I studied electrical engineering, I was a fairly avid "Objectivist" style libertarian. I had read Henry Hazlitt's *Economics in One Lesson* and some of Milton Friedman's works,³ but I initially steered clear of self-styled "libertarian" writing. Since Rand was so right on so many things, I at first assumed she must be right in denouncing libertarianism as the enemy of liberty. I eventually learned better, of course (for example, when I saw Libertarian Party pamphlets on campus before the 1988 Presidential election, and when I attended a Ron Paul appearance on campus as part of his campaign).

我在大学一年级（1983 年）学习电气工程，那时我已经是一个相当狂热的“客观主义”风格的自由意志主义者。我读过亨利·哈兹利特（Henry Hazlitt）的《经济学一课》

(Economics in One Lesson) 和米尔顿-弗里德曼 (Milton Friedman) 的一些作品，¹²⁰²但我最初对自诩为 “自由意志主义 ”的文章避而远之。既然兰德在很多事情上都是对的，我起初就认为她谴责自由意志主义是自由的敌人一定是对的。当然，我最终还是有了更好的认知 (例如，1988 年总统大选前，我在校园里看到了自由意志主义的小册子，还参加了荣-保罗在校园里的演讲，这也是他竞选活动的一部分) 。

Daily Bell: How did you meet Lew Rockwell and become affiliated with Mises?

贝尔日报：你是如何认识卢·罗克韦尔并与米塞斯研究院产生联系的？

Stephan Kinsella: I eventually started reading more radical libertarians like Rothbard and Austrians like Mises and Hayek and soon became an Austrian and anarchist. The Austrian approach to knowledge made so much sense to me. It was rigorous without being mathematical and it was “Kantian” without succumbing to idealism: Like Rand's epistemology, the Misesian approach is also realistic.⁴

斯蒂芬·金塞拉：我最终开始阅读像罗斯巴德这样更激进的自由意志主义者以及像米塞斯和哈耶克这样的奥地利学派学者的著作，很快我就成为了一名奥地利学派学者和无政府主义者。奥地利学派的认知方法对我来说非常有意义。它严谨而不数学化，它是 “康德式的 ”而不屈服于唯心主义：与兰德的认识论一样，米塞斯的方法也是现实主义的。¹²⁰³

¹²⁰² See Kinsella, “The Greatest Libertarian Books,” StephanKinsella.com (Aug. 7, 2006). 见金塞拉：《最伟大的自由意志主义书籍》，StephanKinsella.com（2006 年 8 月 7 日）。

¹²⁰³ Some of my favorite works in this regard are Ludwig von Mises, The Ultimate Founda- tion of Economic Science: An Essay on Method (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; <https://mises.org/library/ultimate-foundation-economic-science>); Murray N. Rothbard, “The Mantle of Science,” in idem, Economic Controversies (Auburn, Ala.: Mises Institute, 2011; <https://mises.org/library/economic-controversies>); and Hans-Hermann Hoppe, Economic Science and the Austrian Method (Auburn, Ala.: Mises Institute, 1995; www.hanshoppe.com/esam). See also David Kelley’ s lecture series, “The Foundations of Knowledge ” (YouTube playlist at <https://www.youtube.com/playlist?list=PLnHOyZsmJrozETJ9zzryDhW0kliZkbIsu>). 在这方面，我最喜欢的一些作品有：路德维希·冯·米塞斯的《经济科学的终极基础：

In 1988, when I was in law school, I read Hans-Hermann Hoppe's controversial and provocative article in *Liberty*, "The Ultimate Justification of the Private Property Ethic."

5 In this article Hoppe sets forth his "argumentation ethics" defense of libertarianism. This idea had a profound influence on me. I wrote several papers defending libertarian ethics based on this theory, and I wrote an in-depth review essay of Hoppe's *The Economics and Ethics of Private Property* (see chapter 22). I promptly sent it to Hoppe, who sent back a warm thank you note. This was around 1994.

1988 年，当我还在读法学院时，我在《自由》杂志上读到了汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）那篇颇具争议和启发性的文章——《私有财产伦理的终极证成》。

¹²⁰⁴ 霍普在这篇文章中提出了他为自由意志主义辩护的“论证伦理学”。这一观点对我影响深远。我根据这一理论写了几篇为自由意志主义伦理学辩护的论文，还写了一篇对霍普的《私有财产的经济学与伦理学》（见第 22 章）的深入评论文章。我立马把这篇文章寄给了霍普，他给我回了一封热情洋溢的感谢信。这大约是在 1994 年。

Later that year, in October 1994, I attended the John Randolph Club meeting which was held near Washington, D.C., primarily to meet Hoppe, Rothbard, and Rockwell. While there I was able to get Rothbard to autograph my copy of *Man, Economy, and State*, which he inscribed "To Stephan: For Man & Economy, and against the state—Best regards, Murray Rothbard" (he died the following January). I started attending and speaking at various Mises Institute conferences such as their annual Austrian Scholars Conference.⁶ I am now involved with Hoppe's Property and Freedom Society, which

方法论文》（新泽西州普林斯顿：D.范诺斯特兰德公司，1962 年；<https://mises.org/library/ultimate-foundation-economic-science>）；穆瑞·N·罗斯巴德的《科学的衣钵》，收录于其《经济学的论证》（阿拉巴马州奥本：米塞斯研究院，2011 年；<https://mises.org/library/economic-controversies>）；以及汉斯-赫尔曼·霍普的《经济科学与奥地利学派方法》（阿拉巴马州奥本：米塞斯研究院，1995 年；www.hanshoppe.com/esam）。另见大卫·凯利的系列讲座“知识的基础”（YouTube 播放列表，网址为 <https://www.youtube.com/playlist?list=PLnHOyZsmJrozETJ9zzryDhW0kliZkblsu>）。

¹²⁰⁴ See "Dialogical Arguments for Libertarian Rights" (ch. 6); "Defending Argumentation Ethics" (ch. 7); "The Undeniable Morality of Capitalism" (ch. 22). 参见《自由意志主义权利的对话论证》（第 6 章）；《捍卫论证伦理学》（第 7 章）；《资本主义不可否认的道德》（第 22 章）。

has annual meetings in Bodrum, Turkey, since its founding in 2006.⁷

同年晚些时候，1994 年 10 月，我参加了在华盛顿特区附近举行的约翰-伦道夫俱乐部会议，主要是为了与霍普、罗斯巴德和卢克韦尔会面。在那里，我得到了罗斯巴德在《人、经济与国家》一书亲笔签名的机会，他在书上题词：“致斯蒂芬：支持人与经济，反对国家——致以最美好的祝愿，穆瑞·罗斯巴德”（他于次年 1 月去世）。我开始参加米塞斯研究院的各种会议，如奥地利学者年会，并在会上发言。¹²⁰⁵我现在参与了霍普的财产与自由协会，自 2006 年成立以来，该协会每年在土耳其博德鲁姆举行会议。¹²⁰⁶

Daily Bell: Tell us about your legal theory of property and how you came to believe that intellectual property doesn't exist.

贝尔日报：请谈谈你的财产法律理论，以及你是如何认为知识产权并不存在的。

Stephan Kinsella: My main interest has always been and remains the basics of libertarian ethics: What are individual rights and property, how is this justified, and so on. As I discuss in some previous writing, from the beginning of my exposure to libertarian ideas, the IP issue nagged at me.⁸ I was never satisfied with Ayn Rand's justification for it, for example. Her argument is a bizarre mixture of utilitarianism with overwrought deification of “the creator”—not the Creator up there, but Man, The Creator, initial caps, who has a property right in what He Creates. Her proof that patents and copyrights are property rights is lacking.⁹

斯蒂芬·金塞拉：我的主要兴趣一直是并且仍然是自由意志主义伦理的基础：什么是个人权利和财产，如何证明其合理正当性，等等。正如我在之前的一些文章中讨论的那样，从接触自由意志主义思想开始，知识产权问题就一直困扰着我。¹²⁰⁷例如，我从

¹²⁰⁵ It was eventually disbanded years later. In recent years, the Mises Institute has revived the Libertarian Scholars Conference and also hosts the Austrian Economics Research Conference.

多年后，该会议最终解散。近年来，米塞斯研究所恢复了自由意志主义学者会议，还主办了奥地利经济学研究会议。

¹²⁰⁶ More at www.propertyandfreedom.org.

更多在 www.propertyandfreedom.org。

¹²⁰⁷ See, e.g., Kinsella, “Intellectual Property and Libertarianism,” *Mises Daily* (Nov. 17, 2009).

来都不满意安·兰德对知识产权的论证。她的论证是功利主义和对“创造者”过度神化的奇怪混合——这里不是指天上的创造者，而是指人，大写的创造者，他对自己所创造的东西拥有财产权。她关于专利和版权是财产权的证明是缺乏说服力的。¹²⁰⁸

So I kept trying to find a better justification for IP and this search continued after I started practicing patent law, in 1993 or so.

因此，我一直在努力为知识产权寻找更好的论证依据在，我于 1993 年左右开始从事专利法工作之后，这种探索仍在继续。

Many libertarians abandon minarchy in favor of anarchy when they realize that even a minarchist government is unlibertarian. That was my experience.¹⁰ And it was like this for me also with IP. I came to see that the reason I had been unable to find a way to justify IP was because it is, in fact, unlibertarian. As the anti-IP Benjamin Tucker said of his pro-IP opponent Victor Yarros, in the IP debate in the pages of Liberty in the late 1800s, “if he [Yarros] has failed [in his attempts to justify IP] and, so far as I know it, such is the nearly unanimous verdict of the readers of Liberty,—the fault is not with the champion, but with his hopeless cause.”¹¹ So, too, was my attempt to justify IP a

例如，参见金塞拉《知识产权与自由意志主义》，发表于米塞斯日报（2009 年 11 月 17 日）。

¹²⁰⁸ See, e.g., my speeches “KOL012 | ‘The Intellectual Property Quagmire, or, The Perils of Libertarian Creationism,’ Austrian Scholars Conference 2008,” Kinsella on Liberty Podcast (Feb. 6, 2013) and “KOL253 | Berkeley Law Federalist Society: A Libertarian’s Case Against Intellectual Property,” Kinsella on Liberty Podcast (Oct. 12, 2018); and my blog posts “Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors,” Mises Economics Blog (Jan. 3, 2008); “Regret: The Glory of State Law,” Mises Economics Blog (July 31, 2008); and “Inventors are Like Unto... GODS...,” Mises Economics Blog (Aug. 7, 2008).

例如，可参见我的演讲“KOL012 | 《知识产权泥潭，或自由意志主义神创论的危险》，2008 年奥地利学者会议”，金塞拉自由播客（2013 年 2 月 6 日）以及“KOL253 | 伯克利法学院联邦主义者协会：自由意志主义者反对知识产权的理由”，金塞拉自由播客（2018 年 10 月 12 日）；还有我的博客文章《客观主义法学教授莫索夫论版权：或者，对劳动、价值和创造比喻的滥用》，米塞斯经济学博客（2008 年 1 月 3 日）；《遗憾：国家法律的荣耀》，米塞斯经济学博客（2008 年 7 月 31 日）；以及《发明家就像……神……》，米塞斯经济学博客（2008 年 8 月 7 日）。

hopeless cause.

许多自由意志主义者在意识到即使是最小政府也是非自由意志主义的时候，就会放弃最小政府而支持无政府。那就是我的经历。¹²⁰⁹我逐渐明白，我之所以一直找不到为知识产权辩护的方法，是因为它实际上是非自由意志主义的。正如反对知识产权的本杰明·塔克（Benjamin Tucker）在 19 世纪末《自由》杂志的知识产权论证中谈到他支持知识产权的对手维克多·亚罗斯（Victor Yarros）时所说的那样：“如果他（亚罗斯）失败了（在他为知识产权辩护的尝试中），而且据我所知，《自由》的读者几乎一致做出这样的裁决——那么错不在这位捍卫者，而在于他那毫无希望的事业。”¹²¹⁰我为知识产权辩护的尝试何尝不也是一项毫无希望的事业。

In coming to understand IP could not be justified, I was heavily influenced by previous thinkers, such as Tom Palmer and Wendy McElroy.¹² Perhaps the unlibertarian character of patent and copyright would have been obvious if Congress had not enacted patent and copyright statutes long ago, making them part and parcel of America's "free-market" legal system—and if early libertarians like Rand had not so vigorously championed such rights.

在认识到知识产权无法被证明合理正当的过程中，我深受前辈思想家的影响，比如汤

¹²⁰⁹ The old joke is: What's the difference between a minarchist and an anarchist? A: About six months.

有个老笑话是这样的：小政府主义者和无政府主义者之间有什么区别？答：大约六个月。

¹²¹⁰ Wendy McElroy, "Intellectual Property," in *The Debates of Liberty: An Overview of Individualist Anarchism, 1881 - 1908* (Lexington Books, 2002; <https://perma.cc/ZQM2-82B9>), p. 97, reprinted without endnotes as "Copyright and Patent in Benjamin Tucker's Periodical," *Mises Daily* (July 28, 2010; <https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical>). See also Kinsella, "Benjamin Tucker and the Great Nineteenth Century IP Debates in Liberty Magazine," *StephanKinsella.com* (July 11, 2022).

温迪·麦克罗伊，《知识产权》，收录于《自由之论证：1881-1908 年个人无政府主义概述》（列克星敦图书，2002 年；<https://perma.cc/ZQM2-82B9>），第 97 页，在没有尾注的情况下以《本杰明·塔克期刊中的版权与专利》重新发表，米塞斯日报（2010 年 7 月 28 日；<https://mises.org/library/copyright-and-patent-benjamin-tuckers-periodical>）。另见金塞拉，《本杰明·塔克与 19 世纪〈自由〉杂志中的重大知识产权论证》，*StephanKinsella.com*（2022 年 7 月 11 日）。

姆·帕尔默和温迪·麦克罗伊。¹²¹¹如果美国国会没有在很久以前就颁布专利法和版权法，使其成为美国“自由市场”法律体系的重要组成部分，如果兰德等早期自由意志主义人士没有大力提倡这些权利，那么专利和版权的非自由意志主义特征也许就会显而易见。

But libertarianism's initial presumption should have been that IP is invalid, not the other way around. After all, we libertarians already realize that “intellectual” rights, such as the right to a reputation protected by defamation law, are illegitimate.¹³

但自由意志主义最初的推定应该是知识产权是无效的，而不是相反。毕竟，我们自由意志主义已经意识到，“知识”权利，比如受诽谤法保护的名誉权，是非法的。¹²¹²

Why, then, would we presume that other laws, protecting intangible, intellectual rights, are valid—especially artificial rights that are solely the product of legislation, i.e., decrees of the fake-law-generating wing of a criminal state?¹⁴

¹²¹¹ See Kinsella, “The Four Historical Phases of IP Abolitionism,” Mises Economics Blog (April 13, 2011); idem, “The Origins of Libertarian IP Abolitionism,” Mises Economics Blog (April 1, 2011).

见金塞拉的《知识产权废除主义的四个历史阶段》，发表于米塞斯经济学博客（2011年4月13日）；以及同一作者的《自由意志主义知识产权废除主义的起源》，发表于米塞斯经济学博客（2011年4月1日）。

¹²¹² See Murray N. Rothbard, “Knowledge, True and False,” in *The Ethics of Liberty* (New York: New York University Press, 1998; <https://mises.org/library/knowledge-true-and-false>); Walter E. Block, “The Slanderer and Libeler,” in *Defending the Undefendable* (2018; <https://mises.org/library/defending-undefendable>); “Law and Intellectual Property in a Stateless Society” (ch. 14), n.3; Kinsella, “Defamation as a Type of Intellectual Property,” in Elvira Nica & Gheorghe H. Popescu, eds., *A Passion for Justice: Essays in Honor of Walter Block* (New York: Addleton Academic Publishers, forthcoming).

见穆瑞·N·罗斯巴德，《知识，真与假》，收录于《自由的伦理》（纽约：纽约大学出版社，1998年；<https://mises.org/library/knowledge-true-and-false>）；沃尔特·E·布洛克，《诽谤者与造谣者》，收录于《为不可辩护者辩护》（2018年；<https://mises.org/library/defending-undefendable>）；《无国家社会中的法律与知识产权》（第十四章），注释3；金塞拉，《诽谤作为一种知识产权》，收录于埃尔维拉·尼卡和格奥尔基·H·波佩斯库编，《对正义的热情：向沃尔特·布洛克致敬的论文集》（纽约：阿德尔顿学术出版社，即将出版）。

那么，为什么我们会假定其他保护无形的知识产权的法律是有效的呢？——尤其是那些仅仅是立法产物的人为权利，即犯罪国家的伪法律制定部门的法令所产生的权利呢？

¹²¹³

But IP is widely seen as basically legitimate. There have always been criticisms of existing IP laws and policies and many calls for “reform.” But I became opposed not just to “ridiculous” patents and “outrageous” IP lawsuits, but to patent and copyright per se. Patent and copyright law should be abolished, not reformed. The problem is not “abuse” of the system, but, as Burke said, the “thing itself.”¹²¹⁵ The basic reason is that patent and copyright are explicitly anti-competitive grants by the state of monopoly privilege, rooted in mercantilism, protectionism, and thought control.¹⁶ To grant someone a patent or copyright is to grant them a right to control others’ property—a “negative servitude” granted by state fiat instead of contractually negotiated.¹⁷ This is a form of theft, trespass, or wealth redistribution.

但是知识产权被广泛认为基本上是合法的。对现行知识产权法律和政策的批评一直不绝于耳，“改革”的呼声也不绝于耳。但我不仅反对“荒谬”的专利和“离谱”的知识产权诉讼，而且反对专利和版权本身。专利法和版权法应该废除，而不是改革。问题不在于制度的“滥用”，而正如伯克所说，在于“事物本身”。¹²¹⁴根本原因在于，专利和版权是国家明确授予的反竞争垄断特权，其根源在于重商主义、保护主义和思想控制。

¹²¹⁵ 授予某人专利或版权就是授予他们控制他人财产的权利——一种由国家法令而非

¹²¹³ See “Legislation and the Discovery of Law in a Free Society” (ch. 13), and the James Carter quote at n.154.

见《自由社会中的立法与法律发现》（第十三章），以及注释 154 中的詹姆斯·卡特语录。

¹²¹⁴ “The Thing! the Thing itself is the Abuse!” Edmund Burke, “A Letter To Lord****,” in A Vindication of Natural Society (Liberty Fund, 1756; <https://oll.libertyfund.org/title/burke-a-vindication-of-natural-society>) (emphasis added).

《事情本身！事情本身就是弊端！》埃德蒙·伯克，《致****勋爵的一封信》，收录于《为自然社会辩护》（自由基金，1756 年；<https://oll.libertyfund.org/title/burke-a-vindication-of-natural-society>）（着重号为原文所加）。

¹²¹⁵ See, e.g., Kinsella, “Intellectual Property Advocates Hate Competition,” Mises Economics Blog (July 19, 2011); Karl Fogel, “The Surprising History of Copyright and The Promise of a Post-Copyright World,” Question Copyright (2006; <https://perma.cc/DV92-TEH3>); Kinsella, “Rothbard on Mercantilism and State “Patents of Monopoly,” C4SIF Blog (Aug. 29, 2011). For more on the origins of IP,

通过七月协商授予的“消极地役权”。¹²¹⁶这是一种盗窃、侵犯或财富再分配的形式。

So to answer your question: IP rights—patent and copyright—“exist,” but are not legitimate any more than welfare rights are. There are many types of IP;¹⁸ all are illegitimate, in my view. Not only because most of them are based on and require legislation (I view all legislation as unlibertarian; see chapter 13) but because they try to set up rights in non-scarce things, which in effect grants negative servitudes to some people at the expense of the property rights of others.

所以，回答你的问题：知识产权——专利和版权——“存在”，但不合法，就像福利权一样。知识产权有很多种，¹²¹⁷在我看来，它们都是非法的。这不仅是因为它们大多以立法为基础，需要立法（我认为所有立法都是非自由主义的；见第 13 章），而且还因为它们试图在非稀缺物品上设定权利，这实际上是以牺牲他人的财产权为代价，给予某些人消极地役权。

Daily Bell: According to Wikipedia and other sources, “In contract theory, you extend Murray Rothbard's and Williamson Evers's title transfer theory of contract linking with inalienability theory.” What does that mean?

贝尔日报：根据维基百科和其他来源，“在契约理论中，你将穆瑞·罗斯巴德和威廉姆森-埃弗斯的所有权转让理论与不可让渡理论联系起来，扩展了契约理论”。这是什么意思？

Stephan Kinsella: I discuss these issues in various articles (see chapters 9 and 10). The basic idea is to root the entire idea of contract in a libertarian theory of property. The latter is based on the realization that the entire purpose of property rights is to solve

see references in “Introduction to Origintent” (ch. 16), n.3.

例如，可参见金塞拉的《知识产权倡导者讨厌竞争》，发表于米塞斯经济学博客（2011 年 7 月 19 日）；卡尔·福格尔的《版权的惊人历史以及后版权世界的希望》，“质疑版权”组织（2006 年；<https://perma.cc/DV92-TEH3>）；金塞拉的《罗斯巴德论重商主义与国家“垄断专利”》，C4SIF 博客（2011 年 8 月 29 日）。关于知识产权的起源，更多内容可参见“《原创导论》（第十六章）注释 3 中的参考文献”。

¹²¹⁶ See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.B.

见《反对知识产权二十年》（第 15 章），第四部分 B。

¹²¹⁷ See Kinsella, “Types of Intellectual Property,” C4SIF Blog (March 4, 2011).

见金塞拉的《知识产权的类型》，C4SIF 博客（2011 年 3 月 4 日）。

the problem of incompatible uses of scarce resources. The fact that some things in the world are scarce (or conflictable) resources means that these resources can be used as means of action only if ownership is assigned and socially recognized. For things that are not scarce, there is no social problem to be solved. Hans-Hermann Hoppe addresses these issues in the opening chapters of his foundational treatise *A Theory of Socialism and Capitalism*.

斯蒂芬·金塞拉：我在多篇文章中讨论过这些问题（见第 9 章和第 10 章）。其基本思想是将契约的整个理念根植于自由意志主义的财产理论。后者基于这样一种认识，即产权的全部目的是解决稀缺资源的不相容使用问题。世界上有些东西是稀缺资源（或冲突性资源），这意味着只有在所有权被分配并得到社会承认的情况下，这些资源才能被用作行动手段。对于非稀缺资源而言，不存在需要解决的社会问题。汉斯-赫尔曼·霍普（Hans-Hermann Hoppe）在其奠基之作《社会主义与资本主义理论》（*A Theory of Socialism and Capitalism*）的开篇章节中论述了这些问题。

Rothbard recognized that all individual rights are property rights and, therefore, that a theory of contract is not about enforceable or binding “promises” but simply about how owners of resources can contractually transfer title to others. As Rothbard recognized, this has implications for alienability or so-called “voluntary slavery” contracts. Many libertarians, assuming contracts are just binding promises, see no reason one could not bind oneself to be a slave. (See chapters 9–11.) But if you view contracts as simply transfers of title to owned objects, then the question arises: Is one’s body alienable, or not? You cannot just assume that it is. Rothbard argued that it was not.

罗斯巴德承认，所有个人权利都是财产权，因此，契约理论并不是关于可执行或有约束力的“承诺”，而只是关于资源所有者如何通过契约将所有权转让给他人。正如罗斯巴德所认识到的，这对可让渡性或所谓的“自愿奴役”契约产生了影响。许多自由意志主义者假定契约只是有约束力的承诺，认为没有理由一个人不能约束自己成为奴隶。（见第 9-11 章。）但是，如果你将契约仅仅视为对所拥有物品的所有权转让，那么问题就出现了：一个人的身体是可让渡的，还是不可让渡的呢？你不能仅仅假设它是可让渡的。罗斯巴德认为它是不可让渡的。

Daily Bell: You also attempted to clarify the theory. How so?

贝尔日报：你还试图澄清这一理论。怎么说？

Stephan Kinsella: Rothbard sketched the theory in 1974; Evers elaborated on it in 1977, based on Rothbard's insights. Rothbard then built on Evers's pioneering article in his 1982 *Ethics of Liberty*.¹⁹ But neither were lawyers and only took this analysis so far. I tried to incorporate their insights and integrate them with other Rothbardian, Misesian, and Hoppean insights about property rights and liberty and with established legal concepts, such as those developed under the Roman-influenced continental or civil-law systems, which I regard as more libertarian, in some respects, than the more feudalistic common-law concepts.²⁰

斯蒂芬·金塞拉：罗斯巴德在 1974 年勾勒了这一理论；埃弗斯在 1977 年根据罗斯巴德的见解对其进行了阐述。随后，罗斯巴德在 1982 年出版的《自由的伦理》（*Ethics of Liberty*）一书中对埃弗斯的开创性文章进行了进一步阐述。¹²¹⁸但他们都不是律师，只能将分析进行到这一步。我试图吸收他们的见解，并将其与罗斯巴德、米塞斯和霍普关于财产权和自由的其他见解以及既有的法律概念相结合，例如在受罗马影响的大陆法系或民法体系下形成的法律概念，我认为这些概念在某些方面比封建主义色彩更浓的普通法概念更具自由意志主义色彩。¹²¹⁹

¹²¹⁸ See “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9); Murray N. Rothbard, “Property Rights and the Theory of Contracts,” in *The Ethics of Liberty*; 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. Kinsella, “Justice and Property Rights: Rothbard on Scarcity, Property, Contracts...,” *The Libertarian Standard* (Nov.19,2010), discusses the origins of the RothbardEvers contract theory.

见《一种自由意志主义的契约理论：所有权转移、有约束力的承诺和不可让渡性》（第九章）；穆瑞·N·罗斯巴德，《财产权与契约理论》，收录于《自由的伦理》；威廉姆森·M·埃弗斯，《迈向契约法的重新表述》，《自由意志主义研究期刊》第 1 卷第 1 期（1977 年冬季；<https://mises.org/library/toward-reformulation-law-contracts>）：3-13 页。金塞拉的《正义与财产权：罗斯巴德论稀缺、财产、契约……》，发表于《自由意志主义标准》（2010 年 11 月 19 日），讨论了罗斯巴德-埃弗斯契约理论的起源。

¹²¹⁹ See “Legislation and the Discovery of Law in a Free Society” (ch. 13) at n.153.

My basic approach is to recognize that mainstream legal theories of contract have been muddled by unlibertarian and positivistic conceptions of law and rights. Questions about what rights are "alienable" or not, loose talk about how promises should be "binding," etc., highlight the need for clarity in this area. In my view, to sort these issues out one needs a very clear and consistent understanding of the nature of property rights and ownership. First, we must recognize that only scarce resources are ownable; second, that the body is a type of scarce resource; third, that the mode of acquiring title to external objects is different from the basis of ownership of one's own body. The libertarian view is that human actors are self-owners, and these self-owners are capable of appropriating unowned scarce resources by Lockean homesteading—some type of first use or embordering activity. Obviously, an actor must already own his body if he is to be a homesteader; self-ownership is not acquired by homesteading but rather is presupposed in any act or defense of homesteading. The basis of self-ownership is the fact that each person has direct control over the scarce resource of his body and therefore has a better claim to it than any third party (and any third party seeking to dispute my self-ownership must presuppose the principle of self-ownership in the first place since he is acting as a self-owner).²¹

我的基本方法是承认主流契约法律理论已被非自由意志主义和实证主义的法律和权利概念所搅浑。关于哪些权利可以“让渡”或不可以“让渡”的问题，关于承诺应如何具有“约束力”的宽泛说法，等等，都凸显了在这一领域澄清的必要性。我认为，要理清这些问题，我们需要对财产权和所有权的性质有一个非常清晰和一致的认识。首先，我们必须认识到，只有稀缺资源才是可拥有的；其次，身体是稀缺资源的一种；第三，获得外物所有权的方式不同于拥有自己身体的基础。自由意志主义认为，行动人是自我所有者，这些自我所有者能够通过洛克式的拓殖——某种类型的首次使用或划界活动——来占有无主的稀缺资源。显然，一个行动人如果要成为拓殖者，就必须已经拥有自己的身体；自我所有权不是通过拓殖获得的，而是在任何拓殖先定或对拓殖的辩护中预先假定的。自我所有权的基础是，每个人都直接控制着自己身体这一稀缺资源，因此比任何第三方都更有资格获得这一资源（并且任何试图质疑我的自我所有权的第三方首先必须预先假定自我所有权原则，因为他是以自我所有者的身份在行动）。¹²²⁰

见《自由社会中的立法与法律发现》（第十三章）注释 153。

¹²²⁰ See “How We Come to Own Ourselves” (ch. 4), text at n.15; see also “What

So there is a difference between body-ownership and ownership of external scarce goods. An actor is a self-owner; self-owners are able to acquire property rights in external, unowned objects by homesteading them—or by contractual acquisition from a previous owner. Many libertarians simply assume that if you own something, you can sell it. Thus, they conclude that if we are self-owners, we can sell our bodies. (Walter Block makes this argument.) My view is that we start with the nature of ownership: Ownership means the right to exclude others. It does not automatically imply the “right to sell,” since this is actually moving from a situation where you have the right to exclude to one where you do not.

所以，身体所有权与外部稀缺物品的所有权是有区别的。行动人是自我所有者；自我所有者能够通过拓殖外部无主物——或者通过契约从以前的所有者那里获得外部无主物的产权。许多自由意志主义者简单地认为，如果你拥有某物，你就可以出售它。因此，他们得出结论，如果我们是自我所有者，我们就可以出售我们的身体。（沃尔特·布洛克提出了这个论点。）我的观点是，我们从所有权的本质出发：所有权意味着排除他人的权利。它并不自动意味着“出售的权利”，因为这实际上是从一个你有权排除他人的状态转变为一个你无权排除他人的状态。

But in the case of formerly unowned resources, because of the way ownership is acquired, it can be undone, in effect. Homesteading an object requires more than just possession—it requires the intent to own. So if the intent to own is abandoned, then the thing is no longer owned, but merely possessed (if that). Thus, an owner of an object can transfer ownership to another by allowing the other to possess the object and then manifesting his intent to abandon ownership “in favor” of the new possessor. The new possessor then, in effect, re-homesteads the item, becoming its new owner. In other words, the nature of ownership in external objects means that it is possible to abandon

Libertarianism Is” (ch. 2) and Kinsella, “The Relation between the Non-aggression Principle and Property Rights: a response to Division by Zer0,” Mises Economics Blog (Oct. 4, 2011).

见《我们如何拥有自己》（第 4 章），注释 15 处的文本；另见《何为自由意志主义》（第 2 章）和金塞拉，《互不侵犯原则与财产权的关系：对 Zer0 所作划分的回应》，发表于米塞斯经济学博客（2011 年 10 月 4 日）。

ownership to them or use this abandonment method to transfer title to someone else. So ownership does not directly include the “right to sell,” but it so happens to imply this power, for acquired property. However, the same is simply not true of one’s body. There is no way to “undo” the homesteading of your body since you did not homestead it in the first place. There is no way to abandon your ownership of your body since it is rooted in your better claim to it based on your direct control over it. Merely stating “I promise to be your slave” doesn’t change your status as having a better claim to your body, than third parties. (For more on this, see chapter 11.)

但是，对于先前的无主资源，由于所有权的取得方式，实际上是可以取消的。拓殖一件物品需要的不仅仅是占有，还需要拥有的意图。因此，如果放弃了拥有的意图，那么该物品就不再是拥有的，而仅仅是占有的（如果是这样的话）。因此，物品的所有者可以通过允许他人占有物品，然后向新的占有者表示放弃所有权的意图，从而将所有权转让给他人。然后，新的拥有者实际上重新拓殖了该物品，成为其新的所有者。换句话说，外物所有权的性质意味着可以放弃对外物的所有权，或利用这种放弃的方法将所有权转让给他人。因此，所有权并不直接包括“出售权”，但对于后天获得的财产来说，它恰好意味着这种权力。然而，对于一个人的身体来说，情况却根本不是如此。你无法“撤销”对身体的拓殖，因为你一开始就没有拓殖它。你无法放弃对身体的所有权，因为你对身体的所有权根植于你对身体的直接控制权。仅仅声明“我承诺做你的奴隶”并不能改变你对你身体的所有权优于第三方的地位。（有关这方面的更多信息，请参见第 11 章）。

So in exploring the Rothbard-Evers title transfer theory of contract and in building on insights by Hoppe about the crucial importance of scarcity to property rights and his insights as to the nature of self-ownership and homesteading, I tried to identify the difference between body and external resource ownership, the basis and nature of acquisition of rights in each, and the nature of what contracts are (transfers of title to alienable owned objects) and what implications this has for body-alienability (namely, that voluntary slavery contracts are unenforceable and invalid).

因此，在探讨罗斯巴德-埃弗斯的契约所有权转移理论时，在霍普关于稀缺性对财产权至关重要的见解以及他对自我所有权和拓殖的本质的见解的基础上，我试图找出身体所有权和外部资源所有权的区别、两者获得权利的基础和性质、契约的本质（对可让渡的所有物的所有权转移）以及这对身体可让渡性有何影响（即自愿奴役契约是不可执行和无效的）。

Daily Bell: You advance a theory of causation that attempts to explain why remote actors can be liable under libertarian theory. Can you clarify this point, please?

贝尔日报：你提出了一种因果关系理论，试图解释为什么在自由意志主义理论下，遥远的行动人可以承担责任。能否请你阐明这一点？

Stephan Kinsella: I had long been dissatisfied with the approach various libertarians take to the issue of responsibility for aggression caused by leaders or groups. Too often libertarians made what seemed to me to be too simplistic or unjustified assumptions, which they relied on in their analysis. For example, some seemed to assume that there is a fixed amount of responsibility, so that if you say the mafia boss is responsible for ordering a hit, then the lackey who committed the killing is innocent. Or some would argue that a mafia boss or general or president is not responsible for the aggression committed by his underlings, unless he had coerced them or had a “contract” with them.

斯蒂芬·金塞拉斯蒂芬·金塞拉：长期以来，我一直对各种自由意志主义人士在处理领导人或团体所造成的侵犯的责任问题上所采取的方法感到不满。在我看来，自由意志主义者常常做出过于简单或不合理的假设，并以此为依据进行分析。例如，有些人似乎认为责任是固定的，因此如果你说黑手党老大对下令杀人负有责任，那么杀人的走狗就是无辜的。或者有人会说，黑手党老大、将军或总统对其下属所犯的侵犯行动不负责任，除非他胁迫了他们，或者与他们签订了“契约”。

These all seemed confused to me. As for the latter: a contract is just a title transfer, so it is unclear why A hiring B to kill C means A is liable, but A persuading B through sexual favors to kill C is not. Focusing on ad hoc exceptions to the rule that A is not responsible for B's actions seemed confused to me. The Austrian theory of subjective value teaches us that there are many ways to incentivize or motivate or induce someone to commit an action for you: you can promise sexual favors, promise to pay money, hire someone, and so on. Also, there is no reason to think that both the boss and his underling cannot both be 100% responsible: in the law this is called joint and several liability.

这些在我看来都很混乱。至于后者：契约只是所有权的转移，所以不清楚为什么 A 雇用 B 杀害 C 意味着 A 要承担责任，而 A 通过性贿赂说服 B 杀害 C 却不需要承

担责任。专注于 A 不对 B 的行动负责这一规则的特设例外，在我看来是混乱的。奥地利的主观价值理论告诉我们，有很多方法可以激励或促使或诱使某人为你实施行动：你可以许诺性好处、许诺给钱、雇人等等。此外，我们没有理由认为老板和下属不能都承担 100% 的责任：在法律上，这被称为连带责任。

So in developing a paper called "Reinach and the Property Libertarians on Causality in the Law" for a Mises Institute symposium in 2001 on Adolf Reinach and Murray Rothbard (see chapter 8), I relied on Mises's praxeological understanding of the structure of human action and cooperative action in general. Mises points out that in a market economy with the division and specialization of labor, people use others as means to achieve their ends. This is the essence of market cooperation.

因此，在为米塞斯研究院 2001 年关于阿道夫·赖纳赫和穆瑞·罗斯巴德的研讨会（见第 8 章）撰写一篇名为《赖纳赫和财产自由意志主义关于法律中的因果关系》的论文时，我借助米塞斯对人的行动和一般合作行动结构的行动学的理解。米塞斯指出，在劳动分工和专业化的市场经济中，人们利用他人作为手段来实现自己的目的。这就是市场合作的本质。

When the aim is peaceful production of wealth, this is good. But people can cooperate to engage in collective aggression too. In this case the members of the group conspire to achieve an illicit end, such as theft or murder. Just as a man can use a gun (a means) to commit aggression, so people can employ others as means to commit crimes. Sometimes these other people are innocent (e.g., hiring a boy to deliver a bomb concealed in a package) and other times they are complicit (the mafia boss's underling). In the latter case, both actors are aggressors, as they play a causal role in action that uses efficacious means to achieve the end of invading the borders of the property of innocent victims. The argument is general and praxeological and focuses on the intent of the actor (which relates to the praxeological end or goal of the action) and the means employed, whether that means be an inanimate good or another human. Thus, there is no need to resort to ad hoc exceptions such as "the boss is liable because he was coercing the underling" or "the boss is liable because of a contract with" the underling. (For more on this, see chapter 8; also chapters 9–11.)

当目的是和平地创造财富时，这是好事。但人们也可以合作进行集体侵犯。在这种情况下，群体成员合谋达到非法目的，如盗窃或谋杀。就像一个人可以用枪（一种手段）

来实施侵犯一样，人们也可以利用其他人作为手段来实施犯罪。有时，这些其他人是无辜的（例如，雇用一个小男孩运送藏在包裹里的炸弹），有时他们是同谋（黑手党老大的手下）。在后一种情况下，两个行动人都是侵犯者，因为他们在行动中发挥了因果作用，使用有效的手段达到侵占无辜受害者财产边界的目的。这一论证是一般性的，也是行动学的，重点在于行动人的意图（这与行动学的目的或目标有关）和所采用的手段，无论这一手段是无生命的物品还是另一个人。因此，没有必要诉诸特殊的例外情况，如“老板有责任是因为他在强迫下属”或“老板有责任是因为他与下属有契约”。（有关这方面的更多内容，请参见第 8 章；也可参见第 9 至 11 章。）

Daily Bell: You provide non-utilitarian arguments for intellectual property being incompatible with libertarian property rights principles. Can you explain this?

贝尔日报：你提出了非功利主义的论点，说明知识产权与自由意志主义的财产权原则不相容。你能解释一下吗？

Stephan Kinsella: I alluded to this above in my discussion about negative servitudes. An IP right gives the holder the right to stop others from using their property as they wish. For example, George Lucas, courtesy of copyright law, can use the force of state courts to stop me from writing and publishing “The Continuing Adventures of Han Solo.” J.D. Salinger’s estate was able to block the publication of a sequel to *Catcher in the Rye*, for example. This is censorship.¹²²¹ And Apple can get a court order blocking Samsung from selling a tablet if it resembles an iPad too closely. This is just protection from competition.¹²²²

斯蒂芬·金塞拉：我在上面关于消极地役权的讨论中提到了这一点。知识产权赋予持有者阻止他人按其意愿使用自己财产的权利。例如，由于版权法的存在，乔治·卢卡斯可以借助国家法院的力量阻止我撰写和出版《汉·索罗的后续冒险》。例如，J.D. 塞林格的遗产可以阻止《麦田守望者》续集的出版。这就是审查制度。¹²²¹苹果公司可以获得法院命令，阻止三星销售与 iPad 过于相似的平板电脑。这仅仅是免受竞争的保护。¹²²²

¹²²¹ See “Law and Intellectual Property in a Stateless Society” (ch. 14), n.57 et pass. 见《无国家社会中的法律与知识产权》（第十四章），注释 57 及随后部分。

¹²²² See Kinsella, “Apple Secures Win Against Motorola Over ‘Slide-to-Unlock’

Daily Bell: You offer a discourse ethics argument for the justification of individual rights, using an extension of the concept of “estoppel.” Can you expand please?

贝尔日报：你利用“禁止反言”概念的延伸，为个人权利的正当性提供了一个对话伦理学的论证。你能详细阐述一下吗？

Stephan Kinsella: This approach is laid out in chapters 5 and 6. The libertarian approach is a very symmetrical one: the non-aggression principle does not rule out force, but only the initiation of force. In other words, you are permitted to use force only in response to some else’s use of force. If they do not use force you may not use force yourself. There is a symmetry here: force for force, but no force if no force was used.

斯蒂芬·金塞拉：这种方法在第 5 章和第 6 章中有所阐述。自由意志主义的方法是一种非常对称的方法：互不侵犯原则并不排除武力，只仅仅排除首次使用武力。换句话说，只有在回应他人使用的武力时，你才被允许使用武力。如果他们不使用武力，你自己也不得使用武力。这里有一个对称性：以武力回应武力，但如果没有遭受武力，则不能使用武力。

Now in law school I learned about the concept of estoppel, which is a legal doctrine that estops or prevents you from asserting a position in a legal proceeding that is inconsistent with something you had done previously (see chapters 1 and 9). You have to be consistent. I was at this time fascinated with Hoppe’s argumentation ethics, which is probably why it struck me that the basic reasoning of legal estoppel could be used to explain or justify the libertarian approach to symmetry in force: The reason you are permitted to use force against someone who himself initiated force is that he has already, in a sense, admitted that he thinks force is permissible, by his act of aggression. Therefore if he were to complain if the victim or the victim’s agents were to try to use

Patent,” C4SIF Blog (Feb. 17, 2012); idem, “Intellectual Property Advocates Hate Competition.” For a more recent example, see Blake Brittain, “US trade commission sides with iRobot, bans SharkNinja robot vacuum imports,” Reuters (March 21, 2023; <https://perma.cc/2MH9-2ZGG>).

见金塞拉的《苹果在“滑动解锁”专利案中战胜摩托罗拉》，C4SIF 博客（2012 年 2 月 17 日）；同一作者的《知识产权倡导者讨厌竞争》。关于一个更近的例子，见布莱克·布里顿的《美国贸易委员会支持 iRobot，禁止 SharkNinja 机器人吸尘器进口》，路透社（2023 年 3 月 21 日；<https://perma.cc/2MH9-2ZGG>）。

defensive or even retaliatory force against him, he would be holding inconsistent positions: His pro-force view that is implicit and inherent in his act of aggression and his anti-force view implicit in his objection to being punished. Using language borrowed from the law, we might say he should be "estopped" (prevented) from complaining if a victim were to use force to defend himself from the aggressor or even to punish or retaliate against the aggressor. I tried to work this into a theory of libertarian rights, relying heavily on insights from Hoppe's argumentation ethics and from his social theory in general.

在法学院的时候，我学到了“禁止反言”的概念，这是一种法律原则，它禁止或阻止你在法律程序中主张与你以前所做的事情不一致的立场（见第 1 章和第 9 章）。你必须前后一致。彼时，我对霍普的论证伦理学很着迷，这可能就是为什么我突然悟到，法律上禁止反言的基本推理可以用来解释或证明自由意志主义在武力使用上的对称性方法：你之所以被允许对一个自己主动使用武力的人使用武力，是因为他在某种意义上已经通过他的侵犯行为承认了他认为武力是允许的。因此，当受害者或受害者的代理人试图对他使用防卫性甚或报复性的武力，假如他申诉，那他就是在持不一致的立场：他的支持武力的观点隐含和内生于他的侵犯行动之中，而他反对武力的观点则隐含于他反对受到惩罚。借用法律的术语，我们可以说，如果受害者使用武力保护自己免受侵犯者的伤害，甚至惩罚或报复侵犯者，那么后者应该“禁止”（被阻止）提出申诉。我试图将此纳入自由意志主义的权利理论，这在很大程度上借鉴了霍普的论证伦理学及其一般社会理论的洞见。

Daily Bell: Please comment on and summarize the following books you wrote, with special emphasis on your IP theory:

- *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (with Paul E. Comeaux). Oceana Publications, 1997
- *Online Contract Formation* (with Andrew Simpson). Oxford University Press, 2004
- *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (with Noah Rubins). Oxford University Press, 2005

- *Against Intellectual Property*. Ludwig von Mises Institute, 2008

贝尔日报：请评论并总结你所写的以下书籍，尤其是你的知识产权理论：

- 《国际法下的外国投资保护：政治风险的法律方面》（与保罗·E·科莫合著）。海洋出版社，1997 年。
- 《在线契约签订》（与安德鲁·辛普森合著）。牛津大学出版社，2004 年。
- 《国际投资、政治风险与争议解决：从业者指南》（与诺亚·鲁宾斯合著）。牛津大学出版社，2005 年。
- 《反对知识产权》。米塞斯研究院，2008 年。

Stephan Kinsella: The first three books are legal treatises that have little to do with libertarianism or IP, although the first and third do examine practical ways for international investors to use international law to protect their property from takings from the host state.²⁴

斯蒂芬·金塞拉：前三本书是法律专著，与自由意志主义或知识产权关系不大，尽管第一本和第三本确实探讨了国际投资者利用国际法保护其财产免受东道国没收的实际方法。¹²²³

The latter monograph was first published as an article in the Journal of Libertarian Studies in 2001, with the title suggested by Professor Hans-Hermann Hoppe, then the journal's editor. My initial title had been "The Legitimacy of Intellectual Property," the name of the earlier paper I had delivered at the Austrian Scholars Conference the

¹²²³ These books and other strictly legal publications (not libertarian-related) are linked at www.kinsellalaw.com/publications. Since the original article upon which this chapter is based was published in 2012, a second edition of the third book listed above has been published: Noah D. Rubins, Thomas N. Papanastasiou & N. Stephan Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide*, 2d ed. (Oxford University Press, 2020).

这些书籍和其他严格意义上的法律出版物（与自由意志主义无关）的链接见 www.kinsellalaw.com/publications。自本章所依据的原文于 2012 年发表以来，上述第三本书的第二版已经出版：诺亚·D·鲁宾斯、托马斯·N·帕帕纳斯塔西乌和 N·斯蒂芬·金塞拉合著的《国际投资、政治风险与争议解决：从业者指南（第二版）》（牛津大学出版社，2020 年）。

preceding year. (I discuss this in chapter 14.)

后一本专著最初于 2001 年以一篇文章的形式发表在《自由意志主义研究期刊》上，标题由时任该期刊编辑的汉斯-赫尔曼·霍普汉斯-赫尔曼·霍普教授建议。我最初的标题是《知识产权的合法性》，这是我在前一年的奥地利学者研讨会上提交的早期论文的题目。（我在第 14 章中讨论了这个问题。）

It was only 11 years ago [from 2012], but at the time there was not yet much interest among libertarians in intellectual property (IP). It was thought of as an arcane and insignificant issue, not as one of our most pressing problems. Libertarian attention was focused on taxes, war, the state, the drug war, asset forfeiture, business regulations, civil liberties, and so on, not on patent and copyright.

尽管这只是 11 年前的事情（从 2012 年算起），但当时自由意志主义者对知识产权（IP）还没有多大兴趣。知识产权被认为是一个神秘且无足轻重的问题，而不是我们最紧迫的问题之一。自由意志主义关注的焦点是税收、战争、国家、毒品战争、资产没收、商业法规、公民自由等方面，而不是专利和版权。

I felt the same way. I looked into this issue primarily because I had been, since 1993, a practicing patent attorney and had always been dissatisfied with Ayn Rand's arguments in favor of IP.²⁵ Her weird admixture of utilitarian and propertarian arguments raised red flags for me. It included tortuous arguments as to why a 17-year patent term and a 70-year copyright term were just about right and why it was fair for the first guy to the patent office to get a monopoly that could be used against an independent inventor just one day behind him.

我也有同感。我之所以研究这个问题，主要是因为我自 1993 年以来一直是一名执业专利律师，而且一直对安·兰德支持知识产权的论点感到不满。¹²²⁴ 她将功利主义和财产权主义主义的论点诡异地混杂在一起，让我大跌眼镜。其中包括迂回曲折的论证，为什么 17 年的专利期和 70 年的版权期是恰如其分的，为什么第一个进入专利局的

¹²²⁴ See “Against Intellectual Property After Twenty Years” (ch. 15), Part I. 见《反对知识产权二十年》（第十五章），第一部分。

人获得垄断权是公平的，而这种垄断权可以用来对付仅比他晚一天的独立发明人。

I sensed Rand's approach was wrong, but I assumed there must be a better way to justify IP rights. So I read and thought and tried to figure this out. In the end, I concluded that patent and copyright are completely statist and unjustified derogations from property rights and the free market. So I wrote the article to get it out of my system and then moved on to other fields that interest me more, like rights theory, libertarian legal theory and the intersection of Austrian economics and law.

我感觉兰德的方法是错误的，但我想一定有更好的方法来证明知识产权的正当性。于是，我阅读、思考，试图找出答案。最后，我得出结论，专利和版权完全是国家主义的，是对财产权和自由市场毫无正当性的减损。所以我写了这篇文章来摆脱这个问题，然后转向其他我更感兴趣的领域，如权利理论、自由意志主义法律理论以及奥地利经济学与法律的交叉领域。

In the meantime, with the flowering of the Internet and digital information and with increasing abuses of rights in the name of IP, more and more libertarians have become interested in the IP issue and have realized that it is antithetical to libertarian property rights and freedom.¹²²⁶ It is in fact becoming a huge threat to freedom and increasingly used by the state against the Internet, which is one of the most important weapons we have against state oppression.¹²²⁷

与此同时，随着互联网和数字信息的蓬勃发展，以及以知识产权之名的权利滥用现象日益增多，越来越多的自由意志主义者对知识产权问题产生了兴趣，并意识到它与自由意志主义的财产权和自由是背道而驰的。¹²²⁵事实上，它正成为对自由的巨大威胁，并且越来越多地被国家利用它来对付互联网，而互联网是我们对抗国家压迫的最重要武器之一。¹²²⁶

¹²²⁵ See *ibid.*, Part II; and “Introduction to *Originit*” (ch. 16), the section “Historical and Modern Arguments About IP.”

见同上，第二部分；以及《原创导论》（第十六章）中“关于知识产权的历史和现代论点”部分。

¹²²⁶ See references in “Against Intellectual Property After Twenty Years” (ch. 15), at n.20 and “Law and Intellectual Property in a Stateless Society” (ch. 14), n.56.

见《反对知识产权二十年》（第十五章）注释 20 以及《无国家社会中的法律与知识产权》（第十四章）注释 56 中的参考文献。

Daily Bell: What is the reaction to your theory of IP? Hostility?

贝尔日报：对于你的知识产权理论有什么反应呢？是敌意吗？

Stephan Kinsella: At first there was apathy. The few people who thought about it mostly thought my views were too extreme—maybe we need to fix copyright and patent, but surely the basic idea is sound. But my impression is that nowadays most libertarians are strongly opposed to IP.¹²²⁷ And, in fact, scholars associated with the Mises Institute sensed the importance of this issue earlier than most—for example, the Mises Institute awarded my “Against Intellectual Property” paper the O.P. Alford III Prize for 2002.¹²²⁸

斯蒂芬·金塞拉：起初，人们对此很冷漠。少数考虑过这个问题的人多数认为我的观点过于极端——也许我们需要修正版权和专利，但基本理念肯定是正确的。但我的印象是，现在大多数自由意志主义者都强烈反对知识产权。¹²²⁷事实上，与米塞斯研究院有关的学者比大多数人更早地意识到了这一问题的重要性——例如，米塞斯研究院在2002年将我的论文《反对知识产权》了2002年的O.P. 阿尔福德三世奖（the O.P. Alford III Prize）。¹²²⁸

Laissez Faire Books is coming out with a new edition of my Against Intellectual Property later this year.³⁰ I also plan to someday write a new book on IP, tentatively entitled Copy This Book, taking into account more recent arguments, evidence and examples. In the meantime, those interested in this topic may find useful the additional material suggested in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.†.

今年晚些时候，自由放任图书公司将推出新版的《反对知识产权》。¹²²⁹我还计划有朝一日写一本关于知识产权的新书，书名暂定为《复制这本书》，此书会考虑到更多最新的论点、证据和实例。与此同时，对这一话题感兴趣的人可能会发现《无国家社会

¹²²⁷ See references in “Law and Intellectual Property in a Stateless Society” (ch. 14), n.5.

见《无国家社会中的法律与知识产权》（第十四章）注释5中的参考文献。

¹²²⁸ See Mises Institute Awards, archived at <https://perma.cc/E33D-JST6>.

见米塞斯研究院奖项，存档于 <https://perma.cc/E33D-JST6>。

¹²²⁹ See the 2012 Laissez Faire Books edition linked at www.c4sif.org/aip.
见链接为 www.c4sif.org/aip 的2012年自由放任图书版。

中的法律与知识产权》（第 14 章）脚注中建议的补充材料非常有用。

Daily Bell: How do you think artists and writers feel about it? What do they do to make a living if they do not receive royalties?

贝尔日报：你认为艺术家和作家对此作何感想？如果拿不到版税，他们该如何谋生？

Stephan Kinsella: Well, sharing is not piracy, and copying is not theft. (And competition is not theft, either.)¹²³⁰ But people are used to thinking in these terms, due to state and special interest-inspired propaganda to the contrary.³² Most artists and writers do not make much money from copyright; if they are successful at all, they typically go through a publisher who makes most of the profits and owns the copyrights anyway. Luckily, technology is allowing writers and musicians to bypass the publishing and music industry gatekeepers.

斯蒂芬·金塞拉：嗯，共享不是盗版，复制也不是盗窃。（竞争也不是盗窃。）¹²³⁰但是由于国家和特殊利益集团的鼓动宣传，人们习惯于用这些术语来思考问题。¹²³¹大多数

¹²³⁰ See Kinsella, “Stop calling patent and copyright ‘property’; stop calling copying ‘theft’ and ‘piracy,’ ” C4SIF Blog (Jan 9, 2012); Christina Mulligan & Brian Patrick Quinn, “Who are You Calling a Pirate?: Shaping Public Discourse in the Intellectual Property Debates,” Brandeis University Department of English Eighth Annual Graduate Conference (2010; <https://perma.cc/7SCS-8P3J>); Nina Paley, “Copying Is Not Theft,” YouTube (<https://youtu.be/leTybKL1pM4>); Kinsella, “Intellectual Property Advocates Hate Competition.”

见金塞拉的《别再把专利和版权称为“财产”；别再把复制称为“盗窃”和“盗版”》，C4SIF 博客（2012 年 1 月 9 日）；克里斯蒂娜·马利根和布莱恩·帕特里克·奎因的《你在称谁是盗版？：在知识产权论证中塑造公共话语》，布兰迪斯大学英语系第八届年度研究生会议（2010 年；<https://perma.cc/7SCS-8P3J>）；尼娜·佩利的《复制不是盗窃》，YouTube（<https://youtu.be/leTybKL1pM4>）；金塞拉的《知识产权倡导者讨厌竞争》。

¹²³¹ See Kinsella, “Intellectual Property,” Mises Economic Blog (Dec. 6, 2010); and comments by Machlup and Penrose in “Against Intellectual Property After Twenty Years” (ch. 15), n.78. As I note in “What Libertarianism Is” (ch. 2), I employ the term intellectual property or IP even though it is loaded, because these terms are so commonly employed one must adopt them in order to communicate about these topics with others. See also “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.I. Böhm-Bawerk makes a similar point about the necessity of continuing to use some inaccurate terms in economics. As he writes:

[I]f we undertake a theoretical examination of the sources of our well-being, we cannot but recognize the truly useful element when it is present, even in this area, in personal and material renditions of service, nor can we do aught but recognize that, from the economic viewpoint, such “goods” as family, church, love and the like are merely linguistic disguises for a totality of concretely useful renditions of service....

No matter how clearly I may have proved that payment-claims and good-will relationships are not genuine goods, no matter how clearly I have therefore proved that, whenever, in practical economic life rights and relationships are bought and sold, it is not, in truth, those intangibles that are meant and are valued and transferred, but that actually it is material goods and renditions of service that are so dealt in; no matter, I say, how clear my proof, I am not going to pretend to believe that economic practice will submit to any slavish accuracy in the matter. It will in the future continue to be the custom, and rightly so, to say that A’s wealth consists in payment-claims, that B sold his good will for \$50,000 to C, and that the state, the church and the family are valuable “goods.” Yes, I believe even economic theory will, quite properly, continue talking that same language because it is the language that all the world talks and understands. For it would be an absurd undertaking to banish from the language of economic theory every manner of speaking that is not literally correct; it would be sheer pedantry to proscribe every figure of speech, particularly since we could not say the hundredth part of what we have to say, if we refused ever to take recourse to a metaphor.

One requirement is essential, that economic theory avoid the error of confusing a practical habit, indulged in for the sake of expediency, with scientific truth.

Eugen von Böhm-Bawerk, “Whether Legal Rights and Relationships Are Economic Goods,” George D. Huncke, trans., in Eugen von Böhm-Bawerk, *Shorter Classics of Eugen von Böhm-Bawerk* (South Holland, Ill.: Libertarian Press, 1962 [1881]), pp. 173 – 75 (first emphasis added).

见金塞拉的《知识产权宣传》，米塞斯经济博客（2010 年 12 月 6 日）；以及马赫卢普和彭罗斯在《反对知识产权二十年》（第十五章）注释 78 中的评论。正如我在《何为自由意志主义》（第二章）中提到的，我使用“知识产权”或“IP”这个术语，尽管它带有倾向性，因为这些术语被广泛使用，为了与他人就这些主题进行交流，我们必须采用它们。另见《反对知识产权二十年》（第十五章）第四部分 1。庞巴维克在经济学中关于继续使用一些不准确术语的必要性提出了类似的观点。正如他所写：

“如果我们从理论上研究我们福祉的来源，我们就不能不认识到真正有用的因素，即使在这个领域，在个人和物质的服务中也是如此，我们也不能不认识到，从经济学的观点来看，家庭、教会、爱情等“商品”只不过是全部具体有用的服务的语言伪装....。

无论我已经多么清楚地证明，付款要求和善意关系并不是真正的商品，无论我因此多么清楚地证明，在实际经济生活中，每当权利和关系被买卖的时候，实际上并不是指那些无形资产，也不是这些无形资产的价值和转让，而实际上是物质商品和服务的提供；我说，无论我的证明多么清楚，我都不会假装相信，经济实践会在这个问题上屈

艺术家和作家从版权中并没有赚到多少钱；如果他们真的获得了成功，通常也是通过出版商，而出版商赚取了大部分利润并且无论如何都拥有版权。幸运的是，科技的发展让作家和音乐家可以绕过出版商和音乐行业的守门人。

There are any number of models artists can use to profit from their talent and artistry. It is not up to the state to protect them from competition. Musicians can obviously get paid for performing, and having their music copied and “pirated” helps them in this respect by making them more well known, more popular. As Cory Doctorow has noted, “for pretty much every writer—the big problem isn’t piracy, it’s obscurity.”³³ Artists are just entrepreneurs. It’s up to them to figure out how or if they can make a monetary profit from their passion—from their calling, as I discussed above. Sometimes they can. Musicians can sell music, even in the face of piracy. Or they can sell their services—concerts, etc. Painters and other artists can profit in similar ways. A novelist could use kickstarter for a sequel or get paid to consult on a movie version.³⁴ Authors of non-fiction such as academic articles do not even get paid today—but it enhances their reputations and helps them land jobs in academia, for example. Inventors have an incentive to invent to make better products that outcompete the competition—for a while. Or they are hired in the R&D department of a corporation that is always trying to innovate. And so on.³⁵ And if you cannot make your calling your career, then find a way. As director Francis Ford Coppola has observed:

You have to remember that it’s only a few hundred years, if that much, that artists are

从于任何一成不变的准确性。今后，人们将继续习惯于这样说，而且这样说也是对的，即 A 的财富是由付款要求构成的，B 以 5 万美元的价格把他的善意卖给了 C，国家、教会和家庭都是有价值的“商品”。是的，我相信即使是经济理论也会很恰当地继续使用同样的语言，因为这是全世界都在使用和理解的语言。因为，如果要从经济理论的语言中摒弃每一种不符合字面意思的说话方式，那将是一项荒谬的事业；如果要禁止每一种比喻，那将是纯粹的迂腐，尤其是如果我们拒绝使用比喻，我们就无法说出我们要说的话的百分之一。

有一个必要条件，那就是经济理论必须避免把为了权宜之计而养成的实用习惯与科学真理混为一谈。”

——欧根·冯·庞巴维克，《法律权利和关系是否是经济财货》，乔治·D·亨克译，收录于欧根·冯·庞巴维克《欧根·冯·庞巴维克短篇经典》（伊利诺伊州南荷兰：自由意志主义出版社，1962 年[1881 年]），第 173 - 175 页（首次强调为后加）。

*working with money. Artists never got money. Artists had a patron, either the leader of the state or the duke of Weimar or somewhere, or the church, the pope. Or they had another job. I have another job. I make films. No one tells me what to do. But I make the money in the wine industry. You work another job and get up at five in the morning and write your script.*³⁶

艺术家们可以利用各种模式从自己的才华和艺术中获利。国家无权保护他们免受竞争。音乐家显然可以通过表演获得报酬，而他们的音乐被复制和“盗版”，会使他们更加知名、更加流行，从而有助于他们在这方面的发展。正如科里·多克托罗 (Cory Doctorow) 所指出的，“对于几乎所有作家来说，最大的问题不是盗版，而是默默无闻”。¹²³² 艺术家亦是企业家。就像我在上文讨论的那样，如何或能否从他们的激情——从他们的使命——中获得金钱利润，取决于他们自己。有时他们可以。音乐家可以出售音乐，即使面临盗版。他们也可以出售自己的服务——音乐会等。画家和其他艺术家也可以通过类似的方式获利。小说家可以利用众筹推出续集，或者为电影版提供顾问服务，从而获得报酬。¹²³³ 如今，学术论文等非虚构作品的作者甚至都拿不到稿酬——但这会提高他们的声誉，帮助他们在学术界找到工作。发明家有动力去发明更好的产品以在一段时间内超越竞争对手。或者，他们受雇于一直努力创新的公司研发部门。如此等等。¹²³⁴ 如果你不能把自己的职业当做事业，那就另谋生路。正如导演弗朗西斯·福特·科波拉 (Francis Ford Coppola) 所言：

¹²³² Kinsella, “Cory Doctorow on Giving Away Free E-Books and the Morality of ‘Copying,’” Mises Economics Blog (Sept. 16, 2008).

金塞拉，《科里·多克托罗论免费赠送电子书以及“复制”的道德性》，米塞斯经济学博客（2008年9月16日）。

¹²³³ See Kinsella, “Conversation with an author about copyright and publishing in a free society,” C4SIF Blog (Jan. 23, 2012).

见金塞拉的《与一位作家关于自由社会中的版权与出版的对话》，C4SIF 博客（2012年1月23日）。

¹²³⁴ See Kinsella, “Examples of Ways Content Creators Can Profit Without Intellectual Property,” StephanKinsella.com (July 28, 2010); and references and discussion in “Law and Intellectual Property in a Stateless Society” (ch. 14), at n.102 et pass.

见金塞拉的《内容创作者在没有知识产权的情况下获利的方式示例》，StephanKinsella.com（2010年7月28日）；以及《无国家社会中的法律与知识产权》（第十四章）注释 102 及随后部分中的参考文献和讨论。

你必须记住，艺术家与金钱打交道的历史只有几百年，甚至更短。艺术家有赞助人，要么是国家领导人，要么是魏玛公爵之类的人，要么是教会、教皇。或者他们有另一份工作。我有另一份工作。我拍电影。没人告诉我该怎么做。但我在葡萄酒行业赚钱。你有另一份工作，同时每天早上五点起床写剧本。¹²³⁵

Daily Bell: We find your theories reasonable, but are you making headway? Are people generally hostile?

贝尔日报：我们觉得你的理论很有道理，但你是否取得了进展？人们普遍有敌意吗？

Stephan Kinsella: As I mentioned earlier, libertarians have, in my impression, generally become more opposed to IP, and generally on principled grounds. Most “mainstream” people are reluctant to take a principled or “extreme” position, instead recognizing that IP is “broken” and needs to be “reformed.” They think IP abolitionism is too extreme, but really cannot articulate why. So they advocate “reform.”³⁷ Those who stubbornly insist on defending IP have to keep coming up with increasingly absurd arguments to justify it.³⁸

斯蒂芬·金塞拉：正如我前面提到的，在我的印象中，自由意志主义者普遍变得更加反对知识产权，而且通常都是基于原则性的理由。大多数“主流”人士不愿意采取原则性或“极致”的立场，而是承认知识产权“有问题”，需要“改革”。他们认为知识产权的废除主义过于极端，但实际上又无法说清楚为什么。因此，他们主张“改革”。¹²³⁶那

¹²³⁵ See Kinsella, “Francis Ford Coppola, copyfighter,” C4SIF Blog (Jan. 29, 2011). 见金塞拉的《弗朗西斯·福特·科波拉，版权斗士》，C4SIF 博客（2011 年 1 月 29 日）。

¹²³⁶ Most libertarian or free-market oriented IP critics, or others who pose as critics of IP, are not actually IP abolitionists; they simply want to reform or tame the “excesses” of the system, e.g., Tom Bell, Jerry Brito, Alexander Tabarrok, Michael Masnick, Cory Doctorow, Larry Lessig, Mark Cuban (who has sponsored a chair at the EFF to fight “stupid patents” ; see <https://perma.cc/3K8N-8RMG>), even leftists like Eben Moglen and Richard Stallman etc. who pose as opponents of corporate IP. But none of them want to abolish patent and copyright. They just want to reform it, and/or replace it with

some other statist system, like taxpayer funded innovation awards or prizes. E.g., Tom Bell wants to return to the “Founder’s Copyright.” I mean, better than nothing, but thin gruel. As for the others, see Kinsella, “Tom Bell on copyright reform; the Hayekian knowledge problem and copyright terms,” C4SIF Blog (Jan. 6, 2013). Tabarrok supports reducing the patent term, but not to zero, and also supports a tax funded innovation prize. Kinsella, “Tabarrok’s Launching the Innovation Renaissance: Statism, not renaissance,” StephanKinsella.com (Dec. 2, 2011). Lessig thinks “some punishment” of Aaron Swartz—the brilliant young co-creator of RSS, who committed suicide when facing decades in federal prison on copyright charges for uploading academic articles to the Internet—was justified. See Kinsella, “Tim Lee and Lawrence Lessig: ‘some punishment’ of Swartz was ‘appropriate,’ ” StephanKinsella.com (Jan. 13, 2013), idem, “The tepid mainstream ‘defenses’ of Aaron Swartz,” C4SIF Blog (Jan. 29, 2013), and idem, “Lessig on the Anniversary of Aaron’s Swartz Death,” C4SIF Blog (Jan. 10, 2014). See also idem, “Tabarrok: Patent Policy on the Back of a Napkin,” C4SIF Blog (Sept. 20, 2012); idem, “‘Intellectual Property’ as an umbrella term and as propaganda: a reply to Richard Stallman,” C4SIF Blog (Feb. 10, 2012); idem, “Stallman: An Internet-Connectivity Tax to Compensate Artists and Authors,” C4SIF Blog (June 19, 2011); idem, “Eben Moglen and Leftist Opposition to Intellectual Property,” C4SIF Blog (Dec. 4, 2011); idem, “Cory Doctorow, Victim of Fox Copyright Legal Bullying, Should Take A Stand Against Copyright,” C4SIF Blog (April 27, 2013). 大多数自由意志主义或以自由市场为导向的知识产权批评家，或其他冒充知识产权批评家的人，实际上并不是废除知识产权主义者；他们只是想改革或驯服知识产权制度中的“过激行为”，例如汤姆·贝尔、杰里·布里托、亚历山大·塔巴洛克、迈克尔·马斯尼克、科里·多克托罗、拉里·莱斯格、马克·库班（他在电子前沿基金会赞助了一个教席以对抗“愚蠢的专利”；见 <https://perma.cc/3K8N-8RMG>），甚至像埃本·莫格伦和理查德·斯托曼这样的左派人士，他们装作是企业知识产权的反对者。但他们中没有一个人想要废除专利和版权。他们只是想改革它，和 / 或用其他一些国家主义的体系来取代它，比如由纳税人资助的创新奖励或奖金。例如，汤姆·贝尔想回归“开国元勋版权”。我的意思是，总比没有好，但也只是很微薄的改进。至于其他人，见金塞拉的《汤姆·贝尔谈版权改革：哈耶克式的知识问题与版权期限》，C4SIF 博客（2013 年 1 月 6 日）。塔巴洛克支持缩短专利期限，但不是缩短到零，并且也支持由税收资助的创新奖励。金塞拉的《塔巴洛克的〈启动创新复兴：国家主义，而非复兴〉》，StephanKinsella.com（2011 年 12 月 2 日）。莱斯格认为对亚伦·斯沃茨——RSS 的杰出年轻共同创造者——进行“一些惩罚”是合理的，亚伦·斯沃茨因将学术文章上传到互联网而面临数十年的联邦监狱版权指控时自杀。见金塞拉的《蒂姆·李和劳伦斯·莱斯格：对斯沃茨的“一些惩罚”是“适当的”》，StephanKinsella.com（2013 年 1 月 13 日），同一作者的《对亚伦·斯沃茨不温不火的主流“辩护”》，C4SIF 博客（2013 年 1 月 29 日），以及同一作者的《莱斯格在亚伦·斯沃茨去世周年纪念日》，C4SIF 博客（2014 年 1 月 10 日）。另见同一作者的《塔巴洛克：餐巾背面的专利政策》，C4SIF 博客（2012 年 9 月 20 日）；

些一意孤行、坚持捍卫知识产权的人不得不不断地提出越来越荒谬的论据来为之辩护。

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同一作者的《“知识产权” 作为一个涵盖性术语和宣传手段：对理查德·斯托曼的回复》，C4SIF 博客（2012 年 2 月 10 日）；同一作者的《斯托曼：一项互联网连接税以补偿艺术家和作者》，C4SIF 博客（2011 年 6 月 19 日）；同一作者的《埃本·莫格伦与左派对知识产权的反对》，C4SIF 博客（2011 年 12 月 4 日）；同一作者的《科里·多克托罗，福克斯版权法律霸凌的受害者，应该站出来反对版权》，C4SIF 博客（2013 年 4 月 27 日）。

1237 For example:

“Thank goodness the Swiss did have a Patent Office. That is where Albert Einstein worked and during his time as a patent examiner came up with his theory of relativity.”

“It is true that other means exist for creative people to profit from their effort. In the case of copyright, authors can charge fees for reading their works to paying audiences. Charles Dickens did this, but his heavy schedule of public performances in the United States, where his works were not protected by copyright, arguably contributed to his untimely death.”

If you are not for IP, you must be in favor of pedophilia.

If you oppose IP, you are advocating slavery.

“Patents are the heart and core of property rights.”

Song piracy and file-sharing are the cause of stage collapses at concerts.

“To make a distinction between things which are ownable or not ownable with the difference being whether they’ re constructed out of molecules or pixels is to create a new kind of apartheid, in which some kinds of property are just [n-words].”

If IP isn’ t legitimate, then it’ s okay to steal other people’ s babies.

Without IP you can’ t have money

See Kinsella, “Absurd Arguments for IP,” Mises Economics Blog (Dec. 10, 2010); see also idem, “There are No Good Arguments for Intellectual Property,” Mises Economics Blog (Feb. 24, 2009); idem, “There are No Good Arguments for Intellectual Property: Redux,” StephanKinsella.com (Sep. 27, 2010).

例如：

“谢天谢地，瑞士确实有一个专利局。阿尔伯特·爱因斯坦就在那里工作，在他担任专利审查员期间提出了相对论。”

“的确，有创造力的人可以通过其他方式从他们的努力中获利。就版权而言，作者可以向付费听众收取阅读他们作品的费用。查尔斯·狄更斯就是这么做的，但他在美国的公开演出日程繁重，而在那里他的作品不受版权保护，可以说这促成了他的过早离世。”

如果你不支持知识产权，那你一定是支持恋童癖。

如果你反对知识产权，那你就是在提倡奴隶制。

“专利是产权的核心和精髓。”

歌曲盗版和文件共享是音乐会舞台坍塌的原因。

Daily Bell: We've come to the conclusion that copyright law and patent law are deterrents to progress and technology. Your view?

贝尔日报：我们得出的结论是，版权法和专利法阻碍了进步和技术的发展。你的观点呢？

Stephan Kinsella: The empirical studies all point in this direction.³⁹ And this should not be surprising. Everything the state does, without exception, destroys (okay, it's good at propaganda as well—making people think it's necessary). Patent and copyright are pure creatures of state legislation. The origins of copyright lie in censorship and thought control; the origins of patents lie in mercantilism and protectionism. As Tom Palmer writes, "[m]onopoly privilege and censorship lie at the historical root of patent and copyright."⁴⁰ It should be no surprise that state interventions in the market lead to destruction of wealth, which of course will have an adverse effect on innovation.

斯蒂芬·金塞拉：所有的实证研究都指向这个方向。¹²³⁸这一点不足为奇。国家所做的一切，无一例外都是在破坏（好吧，它也很擅长宣传——让人们认为它是必要的）。专利和版权纯粹是国家立法的产物。版权起源于审查制度和思想控制；专利起源于重商主义和保护主义。正如汤姆·帕尔默（Tom Palmer）所写，“垄断特权和审查制度是专利和版权的历史根源”。¹²³⁹ 国家对市场的干预会导致财富的毁灭，这当然会对创新

“以物品是由分子构成还是由像素构成来区分可拥有的东西和不可拥有的东西，这是在制造一种新的种族隔离，在这种隔离中，某些种类的财产就像是（带有歧视性的词汇）。”

如果知识产权不合法，那么偷别人的婴儿就是可以的。

没有知识产权你就不能拥有金钱。

见金塞拉的《支持知识产权的荒谬论点》，米塞斯经济学博客（2010 年 12 月 10 日）；另见同一作者的《没有支持知识产权的好论点》，米塞斯经济学博客（2009 年 2 月 24 日）；同一作者的《没有支持知识产权的好论点：再论》，StephanKinsella.com（2010 年 9 月 27 日）。

¹²³⁸ See references in “Against Intellectual Property After Twenty Years” (ch. 15), n.23. 见《反对知识产权二十年》（第十五章）注释 23 中的参考文献。

¹²³⁹ Tom G. Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach,” *Hamline L. Rev.* 12, no. 2 (Spring 1989; <https://perma.cc/DH7K-ZCRV>): 261 – 304, p. 264 (footnote omitted).

产生不利影响，这一点不足为奇。

Daily Bell: What would the world look like without patent and copyright law?

贝尔日报：如果没有专利法和版权法，世界将会怎样？

Stephan Kinsella: As far as copyright, I think it would look somewhat like what our current world is heading to since there is rampant “piracy” despite copyright law. Except there would be fewer outrageous, draconian results like jail terms and prison.⁴¹ And there would be more freedom to engage in remixing and other forms of creativity and a richer public domain to draw on. We would still have a huge amount of artistic works being created, of course.

斯蒂芬·金塞拉：就版权而言，我认为这有点像我们当今世界的走向，因为尽管有版权法，但“盗版”猖獗。不过，像监禁和牢狱之灾这样令人发指的恶性结果会减少，¹²⁴⁰而且会有更多从事再混合和其他形式的创造性活动的自由，以及一个更丰富的公共领域可供利用。当然，我们仍然会有大量的艺术作品被创作出来。

Without patents, companies would be free to compete without fear of lawsuits—and without being able to rely on a state-granted monopoly privilege to protect them from competition. I believe that an IP-free world would have far more innovation and diverse creativity than today’s world. And there would be fewer barriers to entry, so smaller companies could compete with the oligopolies that patent law has helped to create.⁴²

汤姆·G·帕尔默，《知识产权：一种非波斯纳式的法律与经济学方法》，《哈姆林法律评论》第 12 卷第 2 期（1989 年春季；<https://perma.cc/DH7K-ZCRV>）：261 - 304 页，第 264 页（省略脚注）。

¹²⁴⁰ See, e.g., references re Aaron Swartz in note 36, above; Kinsella, “Six Year Federal Prison Sentence for Copyright Infringement,” C4SIF Blog (March 3, 2012); idem, “Man sentenced to federal prison for uploading “Wolverine” movie,” C4SIF Blog (Dec. 21, 2011); idem, “British student Richard O’ Dwyer can be extradited to US for having website with links to pirated movies,” C4SIF Blog (Jan. 13, 2012).

例如，见上文注释 36 中关于亚伦·斯沃茨的参考文献；金塞拉的《因侵犯版权被判处六年联邦监禁》，C4SIF 博客（2012 年 3 月 3 日）；同一作者的《男子因上传《金刚狼》电影被判处联邦监禁》，C4SIF 博客（2011 年 12 月 21 日）；同一作者的《英国学生理查德·奥德怀尔因拥有包含盗版电影链接的网站可能被引渡至美国》，C4SIF 博客（2012 年 1 月 13 日）。

没有专利，公司就可以自由竞争，不必担心诉讼，也不必依靠国家授予的垄断特权来保护自己免受竞争。我相信，一个没有知识产权的世界将比当今世界拥有更多的创新和多样化的创造力。而且进入壁垒也会减少，这样小公司就能与借助于专利法而形成的寡头垄断相竞争。¹²⁴¹

Daily Bell: Can you explain how patent and copyright law evolved and why it was likely a reaction to the Gutenberg Press and a means of controlling information rather than protecting the public?

贝尔日报：你能解释一下专利法和版权法是如何演变的吗？以及为什么它很可能是对古登堡出版社（the Gutenberg Press）的一种反动，是一种控制信息的手段而非保护公众的方式呢？

Stephan Kinsella: The roots of copyright lie in censorship. It was easy for state and church to control thought by controlling the scribes, but then the printing press came along, and the authorities worried that they couldn't control official thought as easily. So Queen Mary created the Stationer's Company in 1557, with the exclusive franchise over book publishing, to control the press and what information the people could access. When the charter of the Stationer's Company expired, the publishers lobbied for an extension, but in the Statute of Anne (1710), Parliament gave copyright to authors instead. Authors liked this because it freed their works from state control. Nowadays they use copyright much as the state originally did: to censor and ban books—or their publishers do, who have gained a quasi-oligopolistic gatekeeper function, courtesy of copyright law.⁴³ And now we see copyright being used, along with regulation of gambling, child pornography, and terrorism, as an excuse for the state to radically infringe Internet freedom and civil liberties.⁴⁴

斯蒂芬·金塞拉：版权的根源在于审查制度。国家和教会很容易通过控制誊抄人员来控制思想，但后来印刷术出现了，当局担心他们不能像以前那样容易地控制官方思想。

¹²⁴¹ Kinsella, “Google’s Schmidt on the Patent-Caused Smartphone Oligopoly,” C4SIF Blog (Dec. 5, 2012).

金塞拉，《谷歌的施密特谈由专利导致的智能手机寡头垄断》，C4SIF 博客（2012 年 12 月 5 日）。

于是，玛丽女王在 1557 年创建了书商公司，拥有图书出版的独家专营权，以控制印刷业和人们可以获取的信息。当书商公司的特许状到期时，出版商游说要求延期，但在 1710 年的《安妮法令》中，议会将版权授予了作者。作者们喜欢这个做法，因为这使他们的作品摆脱了国家的控制。如今，他们使用版权的方式与当初国家使用版权的方式大同小异：审查和禁止书籍——或者他们的出版商这样做，由于版权法，出版商获得了一种准寡头垄断的守门人功能。¹²⁴²现在，我们看到版权与赌博、儿童色情制品和恐怖主义的监管一样，被国家用作从根本上侵犯互联网自由和公民自由的借口。

¹²⁴³

¹²⁴² See references in note 16, above; also Kinsella, “History of Copyright, part 1: Black Death,” C4SIF Blog (Feb. 2, 2012); idem, “How Intellectual Property Hampers the Free Market,” The Freeman (May 25, 2011). See also Justin Hughes, “The Philosophy of Intellectual Property,” Georgetown L. J. 77, no. 2 (Dec. 1988; <https://perma.cc/U4XX-5DZV>): 287 - 366, p. 291 (citations omitted):

One cannot call the history of intellectual property a purely proletarian struggle. While ancient Roman laws afforded a form of copyright protection to authors, the rise of Anglo-Saxon copyright was a saga of publishing interests attempting to protect a concentrated market and a central government attempting to apply a subtle form of censorship to the new technology of the printing press.

Regarding Roman law protecting a form of copyright, Hughes cites UNESCO, The ABC of Copyright (1981; <https://unesdoc.unesco.org/ark:/48223/pf0000187677>), p. 12. Yet this reference does not support the contention that copyright law was recognized, only that plagiarism was seen as dishonorable. Plagiarism has nothing to do with copyright law. See references in “Libertarianism After Fifty Years: What Have We Learned?” (ch. 25), n.39.

见上文注释 16 中的参考文献；还有金塞拉的《版权历史，第一部分：黑死病》，C4SIF 博客（2012 年 2 月 2 日）；同一作者的《知识产权如何阻碍自由市场》，《自由人》（2011 年 5 月 25 日）。另见贾斯汀·休斯的《知识产权哲学》，《乔治城法律杂志》第 77 卷第 2 期（1988 年 12 月；<https://perma.cc/U4XX-5DZV>）：287 - 366 页，第 291 页（省略引用）：

我们不能把知识产权的历史称为纯粹的无产阶级斗争史。古罗马法律为作者提供了某种形式的版权保护，而盎格鲁-撒克逊版权的兴起则是出版利益集团试图保护集中的市场，以及中央政府试图对印刷机这一新技术进行微妙审查的传奇。

关于罗马法律保护某种形式的版权，休斯引用了联合国教科文组织的《版权入门》（1981 年；<https://unesdoc.unesco.org/ark:/48223/pf0000187677>），第 12 页。然而，这个参考文献并不支持版权法得到认可的论点，而只是表明剽窃被视为不光彩的行为。剽窃与版权法毫无关系。见《自由意志主义五十年：我们学到了什么？》（第 25 章）注释 39 中的参考文献。

¹²⁴³ See references in “Against Intellectual Property After Twenty Years” (ch. 15), n.20.

Patents originated in mercantilism and protectionism; the crown would grant monopolies to favored court cronies, such as monopolies on playing cards, leather, iron, soap, coal, books, and wine. The Statute of Monopolies (1623) eliminated much of this but retained the idea of a monopoly grant to an inventor of some useful machine or process.⁴⁵

专利权起源于重商主义和保护主义；王室会将垄断权授予受宠的宫廷亲信，如扑克牌、皮革、铁、肥皂、煤炭、书籍和葡萄酒的垄断权。《垄断法规》（1623 年）取消了大部分这种做法，但保留了向某些有用的机器或工艺的发明者授予垄断权的理念。¹²⁴⁴

Daily Bell: Didn't Germany do better without strict copyright than Britain did with it? Isn't this the reason that Germany progressed so much in literature, philosophy, mathematics, etc., during the 17th and 18th centuries?

贝尔日报：没有严格版权的德国不是比有版权的英国做得更好吗？这不正是 17、18 世纪德国在文学、哲学、数学等方面取得巨大进步的原因吗？

Stephan Kinsella: It probably had something to do with it. One study, by economic historian Eckhard Höffner, indicates that Germany's lack of copyright in the 19th century led to an unprecedented explosion of publishing, knowledge, etc., unlike in neighboring countries England and France, where copyright law enriched publishers but stultified the spread of knowledge and limited publishing to a mass audience.⁴⁶ Höffner's study claims that this is the main reason that Germany's production and industry had caught up with everyone else by 1900. This seems believable to me.

斯蒂芬·金塞拉：可能与此有关。经济史学家埃克哈德-霍夫纳（Eckhard Höffner）的一项研究表明，德国在 19 世纪没有版权，导致出版、知识等领域出现了前所未有的

见《反对知识产权二十年》（第十五章）注释 20 中的参考文献。

¹²⁴⁴ See “KOL108 | ‘Why ‘Intellectual Property’ is not Genuine Property,” Adam Smith Forum, Moscow (2011),” Kinsella on Liberty Podcast (Dec. 11, 2013); also Kinsella, “How Intellectual Property Hampers the Free Market.”

见“KOL108 | 《为什么“知识产权”不是真正的财产》，莫斯科亚当·斯密论坛（2011 年）”，金塞拉自由播客（2013 年 12 月 11 日）；还有金塞拉的《知识产权如何阻碍自由市场》。

爆炸式增长，这与邻国英国和法国的情况不同。在英国和法国，版权法肥了出版商，但却阻碍了知识的传播，并限制了面向大众的出版。¹²⁴⁵ 霍夫纳的研究称，这是德国的生产和工业在 1900 年赶上其他国家的主要原因。这在我看来是可信的。

Daily Bell: Shouldn't the enforcement of copyright law be strictly civil? When did it become a criminal offence?

贝尔日报：版权法的执行难道不应该严格限定在民事范畴吗？它是什么时候变成刑事犯罪的呢？

Stephan Kinsella: I am not sure exactly when the criminal penalties were added, but as I noted above, there are potentially severe civil and criminal penalties for copyright infringement, including prison, extradition, being banned from the Internet, and so on.⁴⁷ Patent law can also be enforced not only by a damages award but also by a court injunction ordering a competitor to stop making a given product, on pain of contempt of court. And patent law literally kills people.⁴⁸

斯蒂芬·金塞拉：我不确定具体是何时增加了刑事处罚，但正如我上面提到的，侵犯版权可能会面临严重的民事和刑事处罚，包括监禁、引渡、被禁止上网等等。¹²⁴⁶ 专利法不仅可以通过损害赔偿裁决来执行，还可以通过法院禁令来执行，命令竞争对手停

¹²⁴⁵ See Frank Thadeusz, “No Copyright Law: The Real Reason for Germany’s Industrial Expansion?,” Spiegel International (Aug. 18, 2010; <https://perma.cc/R3H7-6KG8>). As indicated by Thadeusz, a new study by economic historian Eckhard Hoffner argues that the main reason that Germany’s production and industry had caught up with everyone else by 1900 is the absence of copyright law. This seems plausible to me. See also Jeffrey A. Tucker, “Germany and Its Industrial Rise: Due to No Copyright,” Mises Economics Blog (Aug. 18, 2010).

见弗兰克·塔德乌斯的《没有版权法：德国工业扩张的真正原因？》，《明镜国际》（2010 年 8 月 18 日；<https://perma.cc/R3H7-6KG8>）。正如塔德乌斯所指出的，经济史学家埃克哈德·霍夫纳的一项新研究认为，到 1900 年德国的生产和工业赶上其他国家的主要原因是没有版权法。在我看来，这似乎是有道理的。另见杰弗里·A·塔克的《德国及其工业崛起：由于没有版权》，米塞斯经济学博客（2010 年 8 月 18 日）。

¹²⁴⁶ As noted in note 36, above, there are serious criminal consequences for copyright violation, which led to Aaron Swartz’s suicide, for example.

如上文注释 36 所述，侵犯版权会带来严重的刑事后果，例如导致了亚伦·斯沃茨自杀。

止生产特定产品，否则将以藐视法庭罪论处。而且专利法实际上会害死人。¹²⁴⁷

Daily Bell: Why is Kim Dotcom in prison in New Zealand?

《每日钟摆》：为什么金·多特康姆（Kim Dotcom）被关在新西兰的监狱里？

Stephan Kinsella: I've discussed this case in a number of posts on C4SIF.⁴⁹ Basically, he offered a service that permitted people to share files (information) with each other. This crackdown threatens any number of "legitimate" sites and services such as YouTube, Yousendit, Dropbox, and so on.⁵⁰

斯蒂芬·金塞拉：我在“抵制知识产权的理由”网站（C4SIF）¹²⁴⁸的一些帖子中讨论过这个案例。基本上，他提供了一种服务，允许人们相互分享文件（信息）。这种打击威胁到许多“合法”网站和服务，如 YouTube、Yousendit、Dropbox 等等。¹²⁴⁹

¹²⁴⁷ Kinsella, "Patents Kill Update: Volunteers 3D-Print Unobtainable \$11,000 Valve For \$1 To Keep Covid-19 Patients Alive; Original Manufacturer Threatens To Sue," C4SIF Blog (March 18, 2020); idem, "Patents Kill: Millions Die in Africa After Big Pharma Blocks Imports of Generic AIDS Drugs," C4SIF Blog (Jan. 31, 2013); idem, "Patents Kill: Compulsory Licenses and Genzyme's Life Saving Drug," C4SIF Blog (Dec. 8, 2010); idem, "Killing people with patents," C4SIF Blog (June 1, 2015). Not to mention that IP is death. See the final lines of Kinsella, "The Death Throes of Pro-IP Libertarianism," Mises Daily (July 28, 2010), quoted in "Against Intellectual Property After Twenty Years" (ch. 15), text at n.60.

金塞拉，《专利夺命更新：志愿者 3D 打印无法获得的 11000 美元阀门仅需 1 美元以维持新冠肺炎患者的生命；原制造商威胁要起诉》，C4SIF 博客（2020 年 3 月 18 日）；同一作者，《专利夺命：大型制药公司阻止仿制药进口后，非洲数百万人死于艾滋病》，C4SIF 博客（2013 年 1 月 31 日）；同一作者，《专利夺命：强制许可与健赞公司的救命药》，C4SIF 博客（2010 年 12 月 8 日）；同一作者，《专利杀人》，C4SIF 博客（2015 年 6 月 1 日）。更不用说知识产权就是死亡。见金塞拉《支持知识产权的自由意志主义的垂死挣扎》（米塞斯日报，2010 年 7 月 28 日）的最后几行，在《反对知识产权二十年》（第十五章）注释 60 所引用的文本中。

¹²⁴⁸ See, e.g., Kinsella, "Two lessons from the Megaupload seizure," C4SIF Blog (Jan. 24, 2012).

例如，见金塞拉的《从 Megaupload 被查封事件中得到的两个教训》，C4SIF 博客（2012 年 1 月 24 日）。

¹²⁴⁹ A recent copyright threat is to the Internet Archive. See Mike Glyer, "Judge Decides Against Internet Archive," File 770 (March 24, 2023; <https://perma.cc/K5UH-VCWT>);

Daily Bell: We've postulated a simpler solution than what you present. We've pressed the argument for private justice—clan and tribal justice as practiced for thousands of years. In this formulation no "authority" is present but those agreed upon by the two parties to the quarrel/crime. Thus, copyright issues would become incumbent on the copyright holder to enforce. In other words, the copyright holder not the state would have the expense of enforcement. What's your take on this?

贝尔日报： 我们已经提出了一个比你提出的更简单的解决方案。我们主张私人司法——几千年来一直实行的氏族和部落司法。在这种模式下，除了争端 / 犯罪双方认可的“权威”之外，不存在其他“权威”。因此，版权问题将由版权持有者负责执行。换句话说，版权持有者而不是国家将承担执法费用。你对此有何看法？

Stephan Kinsella: I suppose this could be an improvement but I think it's still misguided. Any attempt to use force against people using information would be aggression. The only exception would be if someone has contractually agreed to pay a fine if they use information in an unapproved way. But who would sign such a ridiculous contract?

斯蒂芬·金塞拉：我想这可能是一种改进，但我认为它仍然是错误的方向。任何试图对使用信息的人使用武力的尝试都是侵犯。唯一的例外是，如果有人在契约中约定，如果他们以未经批准的方式使用信息，就要支付罚款。但谁会签署这样荒唐的契约呢？

In the end, I believe there is nothing wrong with using information. If you reveal information to the public by telling people or selling some product that embodies or otherwise makes evident some idea, you have to expect people to learn from this, compete with you, maybe emulate or copy it or even build on and improve on it. As Wendy McElroy has explained, quoting Benjamin Tucker:

[I]f a man publicized an idea without the protection of a contract, then he was presumed

Mike Masnick, “Publishers Get One Step Closer To Killing Libraries,” TechDirt (March 27, 2023; <https://perma.cc/BYG5-6MXL>).

最近的一个版权威胁指向互联网档案馆。见迈克·格利尔的《法官裁定互联网档案馆败诉》，File770（2023 年 3 月 24 日；<https://perma.cc/K5UH-VCWT>）；迈克·马斯尼克的《出版商向扼杀图书馆又迈进了一步》，TechDirt（2023 年 3 月 27 日；<https://perma.cc/BYG5-6MXL>）。

to be abandoning his exclusive claim to that idea.

"If a man scatters money in the street, he does not thereby formally relinquish title to it ... but those who pick it up are thereafter considered the rightful owners...". Similarly a man who reproduces his writings by thousands and spreads them everywhere voluntarily abandons his right of privacy and those who read them ... no more put themselves by the act under any obligation in regard to the author than those who pick up scattered money put themselves under obligations to the scatterer."

归根结底，我认为利用信息无可厚非。如果你向公众披露信息，告诉人们或出售某种产品，体现或以其他方式彰显某种观念，你就必须期待人们从中学习，与你竞争，或许效仿或复制，甚至在此基础上发展和改进。正如温迪-麦克罗伊引用本杰明-塔克的话所解释的那样：

[如果一个人在没有契约保护的情况下公布了一个想法，那么他就被推定为放弃了对该想法的独占权。

“如果一个人把钱撒在大街上，他并没有因此而正式放弃对钱的所有权.....但捡到钱的人此后被视为合法的所有者.....。同样，一个人如果成千上万地复制自己的著作并到处传播，他就自愿放弃了自己的隐私权，而那些阅读这些作品的人.....并没有因为这一行动而使自己对作者承担任何义务，就像那些拾起撒落的钱的人使自己对撒钱者承担义务一样”。

Perhaps the essence of Tucker's approach to intellectual property was best expressed when he exclaimed, "You want your invention to yourself? Then keep it to yourself."⁵¹

也许塔克在知识产权问题上的方法的本质在他高呼“你想把你的发明据为己有？那就

自己留着吧。”这句话时得到了最好的体现。¹²⁵⁰

Daily Bell: Why should the state enforce copyright on behalf of the individual?

贝尔日报： 国家为什么要代表个人行使版权？

Stephan Kinsella: It shouldn't. In fact, the only thing the state should do is commit suicide. Staticide. Whatever the word would be.

斯蒂芬·金塞拉：国家不应该这样做。事实上，国家唯一应该做的就是自我毁灭。不管用什么词来形容。

Daily Bell: Why should disinterested third parties pay for copyright enforcement?

贝尔日报：无利害关系的第三方为何要为版权执法买单？

Stephan Kinsella: They shouldn't and wouldn't. The whole idea is preposterous and flies in the face of human action. The market provides abundance in the face of physical scarcity. It's a good thing when we are more productive. Likewise more information and knowledge is good. To try to restrict the spread and use of knowledge is insane.

斯蒂芬·金塞拉：他们不应该也不会这样做。整个想法都是荒谬的，与人的行动背道而驰。在物质稀缺的情况下，市场提供了富足。我们的生产力提高了，这是好事。同样，更多的信息和知识也是好事。试图限制知识的传播和使用是疯狂的。

Daily Bell: If people want to claim copyright and third party contracts, shouldn't it be up to them to enforce those contracts?

贝尔日报：如果人们想主张版权和第三方契约，难道不应该由他们来执行这些契约吗？

Stephan Kinsella: Sure. But you can't get IP from contracts. IP is an in rem or erga omnes right—something good against the world. Contractual rights are good only as between the parties—in personam—and can never result in in rem IP rights. I've explained this

¹²⁵⁰ McElroy, “Intellectual Property,” in The Debates of Liberty: An Overview of Individualist Anarchism, 1881 - 1908 (Lexington Books, 2002), pp. 97 - 98.
麦克尔罗伊，《知识产权》，收录于《自由之辩：个人无政府主义概述，1881 - 1908》（列克星敦图书，2002 年），第 97 - 98 页。

over and over.⁵²

斯蒂芬·金塞拉：当然。但你不能从契约中获得知识产权。知识产权是一种物权(in rem or erga omnes right) —— 一种对抗整个世界的权利。契约权利只在当事人之间有效——以个人名义——永远不会产生对物的知识产权。我已经反复解释过这一点。¹²⁵¹

Daily Bell: Is the US legal system—which is a state-run, “public” judicial system—competent and fair in your estimation?

贝尔日报：美国的法律体系是一个由国家管理的“公共”司法体系，你认为它是否称职、正义？

Stephan Kinsella: No. It is thoroughly unjust and illegitimate. It is just the facade of a criminal organization with a pretense to legitimacy.

斯蒂芬·金塞拉：不。它完全不正义且不合法。它只是一个犯罪组织的幌子，伪装出合法性。

Daily Bell: Why does the US have so many millions of prisoners, half the world's [prison] population?

贝尔日报：为什么美国有数百万囚犯，占世界[监狱]人口的一半？

Stephan Kinsella: Someone has to be first. But seriously—it's partly due to our insane war on drugs and also due to the devastation various state (mostly federal) policies have imposed on the Black population: minimum wage, welfare, inflation, unemployment, war, Jim Crow and other vestiges of slavery.

斯蒂芬·金塞拉：总得有人是第一。但说真的，这一方面是由于我们疯狂的禁毒战争，另一方面也是由于各州（主要是联邦政府）政策给黑人人口带来的破坏：最低工资、福利、通货膨胀、失业、战争、种族隔离以及其他奴隶制的残余。

And the US regularly uses IP as an excuse to engage in imperialistic bullying of other

¹²⁵¹ See “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.C. 见《无国家社会中的法律与知识产权》（第 14 章），第 III.C 部分。

nations, to benefit US industries such as Hollywood, the music and software industries, big Pharma, and the like.⁵³

美国经常以知识产权为借口对其他国家进行帝国主义式的欺凌，以自肥美国的产业，如好莱坞、音乐和软件产业、大型制药业等等。¹²⁵²

Daily Bell: Is there a power elite intent on moving toward one-world government, and are they behind copyright and patent laws?

贝尔日报：是否存在一个权力精英团体有意推动建立世界政府？他们是版权法和专利法的幕后推手吗？

Stephan Kinsella: I used to be fearful of a one-world state, but my current view is that the big powers, primarily the US, are the biggest threat. But yes, the Western powers are using copyright and patent to crack down on dissent and to influence other countries' policies at the behest of the MPAA, RIAA, and so on.

斯蒂芬·金塞拉：我曾经对世界政府感到恐惧，但我现在的看法是，大国，主要是美国，才是最大的威胁。是的，西方列强正在利用版权和专利打击异己，并在美国电影协会（MPAA）、美国唱片业协会（RIAA）等的授意下影响其他国家的政策。

Daily Bell: What would be the best approach to socio-politics in your view?

贝尔日报：在你看来，何为最佳治国理政？

Stephan Kinsella: As I explain in chapters 2 and 3, I am definitely an anarchist—have been since 1988 or so. I prefer the term “anarcho-libertarian” nowadays, in part because of confusion spread by some left-libertarians about the connotations of “capitalism.” But I am in favor of a free market and capitalism rightly understood. I am basically a Rothbardian-Hoppean in terms of politics.

斯蒂芬·金塞拉：正如我在第二章和第三章中所解释的，我绝对是一个无政府主义者——大约从 1988 年起就是了。我现在更喜欢用“无政府自由意志主义”这个词，部分原因是一些左翼自由意志主义者混淆了“资本主义”的内涵。但我支持自由市场和

¹²⁵² See references in “Against Intellectual Property After Twenty Years” (ch. 15), n.19. 见《反对知识产权二十年》（第十五章）注释 19 中的参考文献。

正确理解的资本主义。在政治方面，我基本上是一个罗斯巴德-霍普派（Rothbardian-Hoppean）。

Daily Bell: Do you think the Internet itself, via what we call the Internet Reformation, is having a big impact on the powers-that-be and their ability to control society and information?

贝尔日报：你是否认为互联网本身，通过我们所说的互联网改革，正在对当权者及其控制社会和信息的能力产生巨大影响？

Stephan Kinsella: As some earlier answers have indicated—yes. The Internet is one of the most significant developments in our lifetime, perhaps in the history of humanity.⁵⁴ The state is trying to control the Internet but I believe and hope that by the time the state is fully roused to the danger the Internet poses to it, it will be too late for it to stop it. As a Salon writer said about former congressman/now copyright lobbyist Chris Dodd after the Internet uprising that helped defeat the Stop Online Piracy Act (SOPA): “No wonder Chris Dodd is so angry. The Internet is treating him like damage, and routing around it.”⁵⁵ My hope is that the Internet will find ways to treat the state like the cancerous damage that it is, and route around it and leave it in the dust.

斯蒂芬·金塞拉：正如之前的一些回答所表明的——是的。互联网是我们有生之年，或许是人类历史上最重要的发展之一。¹²⁵³ 国家正试图控制互联网，但我相信并希望，当国家完全意识到互联网对其构成的威胁时，再想阻止它就为时已晚了。正如《沙龙》（Salon）的一位作者在互联网起义帮助击败了《制止网络盗版法案》（SOPA）后，对前国会议员、现版权说客克里斯-多德（Chris Dodd）的评价：“难怪克里斯-多德如此愤怒。互联网把他当作一种损害，并绕过了他。”¹²⁵⁴ 我的希望是，互联网能够找到办法，

¹²⁵³ Though as of late (2023), the Omni Magazine types and space cadets seem to be overly obsessed with AI and ChatGPT. See Kinsella, “Rothbard on Libertarian ‘Space Cadets,’ ” StephanKinsella.com (Sep. 23, 2009).

尽管在近期（2023 年），《全科学》杂志类型的人和太空迷们似乎过度痴迷于人工智能和 ChatGPT。见金塞拉的《罗斯巴德论自由意志主义的“太空迷”》，StephanKinsella.com（2009 年 9 月 23 日）。

¹²⁵⁴ See Kinsella, “Kevin Carson: So What if SOPA Passes?,” StephanKinsella.com (Jan. 23, 2012). For more on SOPA, see “Law and Intellectual Property in a Stateless Society”

将国家视为毒瘤，绕开它，让它灰飞烟灭。

Daily Bell: Where does the IP movement go now? What are the next moves? Are you content with theorizing about it? Is it having a real-world impact? What would that be?

贝尔日报：知识产权运动何去何从？下一步该怎么走？你是否满足于理论上的探讨？它对现实世界有影响吗？会有什么影响？

Stephan Kinsella: Ultimately we have to try to highlight the illogic and injustices of the system so that people realize IP is illegitimate. This is an uphill battle, of course. Most people are unprincipled and utilitarian, influenced by state propaganda and economically illiterate. I have pondered trying to set up some kind of patent defense league but have not yet figured out how viable this is.¹²⁵⁵ I would also like to urge some group like EFF or Creative Commons to come up with a simple, reliable, inexpensive way for people to abandon their copyrights. At present there is no easy way to do this.⁵⁶ And though it is not prudent to advocate that people flout the law, the widespread disregard for copyright and resort to piracy, torrents, and encryption will put some limits on how effective copyright enforcement can be.

斯蒂芬·金塞拉：归根结底，我们必须努力凸显突出这一制度的不合逻辑和不正义之处，让人们认识到知识产权是非法的。当然，这是一场艰苦的斗争。大多数人没有原则且功利，受国家宣传的影响，是经济学文盲。我曾考虑尝试建立某种专利辩护联盟，但还没有想好这样做的可行性有多大。¹²⁵⁵我也希望像电子前沿基金会（EFF）或知识共享（Creative Commons）能够提出一种简单、可靠、低成本的方法，让人们放弃自己的版权。目前还没有容易的方法做到这一点。¹²⁵⁶并且，尽管提倡人们无视法律是不明

(ch. 14), n.56 and “Against Intellectual Property After Twenty Years” (ch. 15), at n.20. 见金塞拉的《凯文·卡森：如果<禁止网络盗版法案>通过了会怎样？》，StephanKinsella.com（2012年1月23日）。关于《禁止网络盗版法案》的更多内容，见《无国家社会中的法律与知识产权》（第十四章）注释56以及《反对知识产权二十年后》（第十五章）注释20。

¹²⁵⁵ See Kinsella, “The Patent Defense League and Defensive Patent Pooling,” C4SIF Blog (Aug. 18, 2011).

见金塞拉的《专利防御联盟与防御性专利池》，C4SIF博客（2011年8月18日）。

¹²⁵⁶ See note 34, above.

见上文注释34。

智的，但对版权的普遍无视以及诉诸盗版、种子文件和加密手段，将在一定程度上限制版权执行的有效性。

Daily Bell: Any other points you want to make?

贝尔日报：你还有其他要点想说吗？

Stephan Kinsella: Let me close with a quote from Lew Rockwell:

Let me state this as plainly as possible. The enemy is the state. There are other enemies too, but none so fearsome, destructive, dangerous, or culturally and economically debilitating. No matter what other proximate enemy you can name—big business, unions, victim lobbies, foreign lobbies, medical cartels, religious groups, classes, city dwellers, farmers, left-wing professors, right-wing blue-collar workers, or even bankers and arms merchants—none are as horrible as the hydra known as the leviathan state. If you understand this point—and only this point—you can understand the core of libertarian strategy.⁵⁸

斯蒂芬·金塞拉：最后，请允许我引用卢·罗克韦尔（Lew Rockwell）的一段话作为总结：

让我尽可能直白地陈述这一点。敌人就是国家。当然也有其他敌人，但没有一个像国家这么可怕、具有破坏性、危险，或者在文化和经济上具有如此大的削弱能力。无论你能说出其他什么近似的敌人——大企业、工会、受害者游说团体、外国游说团体、医疗卡特尔、宗教团体、阶级、城市居民、农民、左翼教授、右翼蓝领工人，甚至银行家和军火商——没有一个像被称为利维坦国家的这个多头怪物那么可怕。如果你理解了这一点——且只有这一点——你就能理解自由意志主义战略的核心。

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Daily Bell: Any references, web sites, etc., you want to point to?

贝尔日报：有什么参考文献、网站等需要指出的吗？

Stephan Kinsella: As mentioned, I may someday write Copy This Book, and I also have another book in the works, Law in a Libertarian World: Legal Foundations of a Free Society, an edited selection of my rights and law-related articles [note: this is now the current book]. Also, I blog regularly at The Libertarian Standard [now defunct] and C4SIF. Finally, the slides and audio/video for the four Mises Academy lectures I delivered in 2011: Rethinking Intellectual Property, Libertarian Legal Theory, The Social Theory of Hoppe, and Libertarian Controversies, are also available.⁵⁹

斯蒂芬·金塞拉：如前所述，有一天我可能会写一本《复制这本书》，我还有另一本书正在创作中，即《自由意志主义世界中的法律：自由社会的法律根基》，这本书精选了我撰写的与权利和法律相关的文章[注：现在这本书已经出版]。此外，我还定期在《自由意志主义标准》(The Libertarian Standard) [现已停刊] 和 C4SIF 上发表博客。最后，我在 2011 年为米塞斯学院所做的四次讲座的幻灯片以及音频 / 视频也可供使用，这些讲座的主题分别是：《重新思考知识产权》《自由意志主义的法律理论》《霍普的社会理论》和《自由意志主义的争议》。¹²⁵⁸

¹²⁵⁷ Kinsella, “Rothbard and Rockwell on Conservatives and the State,” The Libertarian Standard (Jan. 26, 2012).

金塞拉，《罗斯巴德和罗克韦尔论保守派与国家》，《自由意志主义标准》（2012 年 1 月 26 日）。

¹²⁵⁸ See these Kinsella on Liberty Podcast episodes: “KOL172 | ‘Rethinking Intellectual Property: History, Theory, and Economics: Lecture 1: History and Law’ (Mises Academy, 2011)” (Feb. 14, 2015); “KOL018 | ‘Libertarian Legal Theory: Property, Conflict, and Society, Lecture 1: Libertarian Basics: Rights and Law’ (Mises Academy, 2011)” (Feb. 20, 2013); “KOL153 | ‘The Social Theory of Hoppe: Lecture 1: Property Foundations’ (Mises Academy, 2011)” (Oct. 16, 2014); and “KOL045 | ‘Libertarian Controversies Lecture 1’ (Mises Academy, 2011)” (May 2, 2013).

见以下金塞拉自由播客剧集：“KOL172 | 《重新思考知识产权：历史、理论与经济学：讲座 1：历史与法律》（米塞斯学院，2011 年）”（2015 年 2 月 14 日）；“KOL018 | 《自由意志主义法律理论：财产、冲突与社会，讲座 1：自由意志主义基础：权利与

Daily Bell: Thanks for your time.

贝尔日报：感谢你抽出宝贵时间。

Stephan Kinsella: You're welcome. Thanks for your interest.

斯蒂芬·金塞拉：不客气。感谢你的关注。

后记 AFTER THOUGHTS

安东尼·威尔 by Anthony Wile

We thank Stephan Kinsella for this interview and for the work he has done generally on this issue of copyright. Ideas have ramifications far beyond their apparent initial non-acceptance. What seems impractical now may be common sense tomorrow.

我们感谢斯蒂芬·金塞拉接受这次采访，并感谢他在版权问题所做的大量工作。思想的影响远远超出了它们最初明显不被接受的范围。现在看似不切实际的东西，明天可能就会成为常识。

Human history seems to go in cycles. Right now we are seemingly at the top of the totalitarian arc. Cold comfort to most, but there has probably never been a time in human history when there was so much hidden totalitarianism and when a cabal of individuals controlling Money Power were likely making final moves to try to control the world. It is very hard to peer through the confusion purposefully laid by the dynastic families that apparently control central banking (and thus money) around the world. Monetary apologists are out in force these days, claiming that various forms of government money are an antidote to the abuse of mercantilism.

人类历史似乎在循环往复。现如今，我们似乎正处于极权主义弧线的顶端。对大多数人来说这只是一种冷冰冰的安慰，但在人类历史上可能从未有过这样一个时期，隐藏

法律》（米塞斯学院，2011 年）”（2013 年 2 月 20 日）；“KOL153 | 《霍普的社会理论：讲座 1：财产基础》（米塞斯学院，2011 年）”（2014 年 10 月 16 日）；以及“KOL045 | 《自由意志主义论证讲座 1》（米塞斯学院，2011 年）”（2013 年 5 月 2 日）。

的极权主义如此之多，而控制货币权力的一小撮人可能正在采取最后行动试图控制世界。要透过显然控制着全球央银（从而控制着货币）的王朝家族故意制造的混乱去看清真相非常困难。如今，货币卫道士们大行其道，声称各种形式的政府货币是重商主义滥用的解毒剂。

Of course, it is via mercantilism, the abuse of government laws and regulations by private parties, that Money Power retains its clout. Only by controlling the "democratic process" does a tiny group of people retain their hold on the levers of government. Behind the scenes these levers are pulled for their benefit. And they do the pulling.

当然，正是通过重商主义，通过私人滥用政府法律法规，金钱势力才得以保持其影响力。只有通过控制“民主进程”，一小撮人才能继续掌控政府的杠杆。在幕后，这些杠杆都是为了他们的利益而拉动的。而他们就是拉杆的人。

It is mercantilism, the use of public law to reinforce private privilege, that bides at the base of Money Power. And those who are behind Money Power, the assorted apologists and enablers, will use any tool to buttress their privilege. Lately, in our view, they've been behind the resurgence of Georgism, Greenbackerism, Social Credit, and a number of other "movements" that claim "the people" need to take back government. Of course, it is improbable, these days anyway, that people can "take back" their government. What is more likely is that the powers-that-be are encouraging these movements because they provide a fertile methodology for the continuance of mercantilism. Mercantilism is impossible to apply in the absence of government.

正是重商主义，利用公法来强化私人特权，构成了金钱权力的基础。而那些金钱势力的幕后黑手，各种各样的卫道士和推动者，会运用任何工具来巩固他们的特权。在我们看来，现如今他们是乔治主义、绿背纸币主义、社会信用论和其他一些声称“人民”需要夺回政府的“运动”的幕后推手。当然，无论如何，在当今时代，人们不可能“夺回”自己的政府。更有可能的是，当权者正在鼓励这些运动，因为它们为重商主义的延续提供了肥沃的方法论土壤。在没有政府的情况下，重商主义是不可能实行的。

But so long as public nostrums are being peddled, it is fairly easy for Money Power to gain a foothold once again. This is why we are proponents of laissez faire and libertarianism. The solution to the problem of government is not to have more of it "properly controlled," but to have as little of it as possible. The less government there is, the less feasible it is to abuse it.

但是，只要公共的万能灵药还在被兜售，金钱权力就很容易再次站稳脚跟。这就是为什么我们是自由放任主义和自由意志主义的支持者。解决政府问题的方法不是让更多的政府被“适当控制”，而是尽可能减少政府。政府越少，滥用的可能性就越小。

People like Stephan Kinsella do us a great favor when it comes to establishing this sort of argument. Any perspective that shows us how laws and regulations provide artificial benefits to some at the expense of others is of a larger benefit as well because it delegitimizes force.

像斯蒂芬·金塞拉这样的人在确立这种论点时帮了我们一个大忙。任何一种观点，如果它向我们展示了法律和法规如何以牺牲他人作为代价为某些人提供人为的利益，那也是非常有意义的，因为它消解了武力的合法性。

Force, in fact, is at the heart of government, any government. A handful of people pass the laws that bind us to the state, and generations to come as well. But Rothbardian libertarianism (and Misesian libertarianism generally) has been all about providing an alternative narrative to the force of the state.

事实上，武力是任何政府的核心。一小撮人通过法律将我们与国家绑定，也将后代与国家绑定。但是罗斯巴德式的自由意志主义（以及一般意义上的米塞斯式自由意志主义）一直都是在为国家的武力提供一种非主流的叙事。

Logically, Rothbard, Mises, and other Austrian economists have shown us that force is the common currency of government and that voluntary, free-market societies have existed in the past and are likely the better alternative.

从逻辑上讲，罗斯巴德、米塞斯和其他奥地利学派经济学家向我们表明，武力是政府的通用货币，而自愿的、自由市场的社会在过去就曾存在过，而且很可能是更好的选择。

By opening up our minds to an alternative view of copyright, Kinsella continues this process. You don't have to agree with him, of course, and we ourselves have proposed a simpler solution: If people want to enforce copyright (or any other legal nostrum for that matter), let them do so out of their own pocket. That would put an end to the regulatory state in short order.

金塞拉让我们对版权有了另一种看法，并且在继续这一进程。当然，你不必同意他的

观点，我们自己也提出了一个更简单的解决方案：如果人们想要行使版权（或其他任何法律手段），就让他们自掏腰包。这将很快终结监管型国家。

Beyond that, government doesn't work on a logical level. Every law and regulation, enforced by the threat of incarceration or even death, fixes prices by transferring wealth from those who earn to those who haven't. The more price-fixing you have, the more unfair, disorderly, and inefficient society becomes. Eventually, society falls apart entirely.

除此之外，政府在逻辑层面上不起作用。通过监禁甚至死亡的威胁来执行的每一项法律法规，都是通过将财富从劳动者手中转移到不劳动者手中来固定价格。价格管制越多，社会就越不公平、越无序、越低效。最终，社会完全分崩离析。

Of course, in the West, one could argue we're at that stage now. Humans badly need new solutions. People need to understand that they need to think for themselves and exercise their own "human action" in order to help themselves and their families to survive as the world continues its slow-motion spiral into depression and military destruction.

当然，在西方，可以说我们现在正处于这个阶段。人类迫切需要新的解决方案。人们需要明白，他们需要独立思考并采取自己的“人的行动”，以便在世界继续缓慢陷入大萧条和军事毁灭的螺旋中帮助自己和家人生存下来。

People like Stephan Kinsella are indispensable to this process. Austrian economics, generally, and the larger ambit of free-market thinking it encourages, are necessary in providing us with alternatives showing us that the current environment is not the "only alternative." Whether you agree with Kinsella or not, we're happy he's around and has presented such thought-provoking ideas. It's people like Kinsella with exciting new ways of looking at sociopolitical and economic issues who provide us with a vision for the future. He is, in fact, part of the so-called "great conversation."

像斯蒂芬-金塞拉这样的人在这一过程中是不可或缺的。奥地利经济学以及它所鼓励的更广泛的自由市场思想，在为我们提供替代方案方面是必要的，它向我们表明，当前的环境并不是“唯一的可选方案”。无论你是否同意金塞拉的观点，我们都很高兴他的存在，并提出了如此发人深省的观点。正是像金塞拉这样以令人振奋的新方式看待社会政治和经济问题的人，为我们提供了未来的愿景。事实上，他是所谓“伟大对话”的一部分。

You can join it, too. Just study the great thinkers and come up with your own ideas. If the ideas are interesting enough, people will start to discuss them and write about them and respond to them. That's how the Austrian school succeeded and why its ideas are now part of the larger economic dialogue.

你亦可以参与其中。只需学习伟大的思想家，并提出自己的想法。如果这些观点足够有趣，人们就会开始讨论它们、撰写相关文章并作出回应。这就是奥地利学派的成功之道，也是其思想如今成为更广泛的经济对话之一部分的原因。

We know it's a real discipline because it builds on thousands of years of economic history. Don't let the sophists and the wily ones distract you from the truth. As free-market thinking succeeds, they are coming out in force. But the bottom line, unfortunately, is that government is force, no matter the "law" it is enforcing.

我们知道这是一门真正的学科，因为它建立在数千年的经济历史基础之上。不要让诡辩者和狡猾之徒分散你对真理的注意力。随着自由市场思想的成功，他们大量涌现。但不幸的是，政府的底线就是武力，无论它执行的是什么“法律”。

Of course, there is no absolute freedom, and human beings are innately tribal. But within this context, we choose to advocate for freedom above all. One travels toward minarchism via rigorous anarchic logic, not by advocating more government. We're glad that people like Kinsella give us additional intellectual tools to make persuasive arguments for a less coercive society.

当然，不存在绝对的自由，人类天生就具有部落性。但在此背景下，我们选择倡导自由至上。我们是通过严格的无政府主义逻辑，而不是通过主张更多的政府来走向小政府主义的。我们很高兴像金塞拉这样的人给我们提供了更多的智识工具，让我们为一个较少胁迫的社会提出有说服力的论据。

第二十五章 自由意志主义五十年：我们学到了什么？

Libertarianism After Fifty Years: What Have We Learned?

This chapter is an edited transcript of my speech “Libertarianism After Fifty Years: What Have We Learned?”, delivered at the NYC LibertyFest in Brooklyn in 2014. I was allotted only a short speaking time, so the speech was somewhat condensed. I expanded on the issues touched upon in a transcript posted on my site, which is the basis for this chapter.*

本章是我 2014 年在布鲁克林举行的纽约自由节上发表的演讲《自由意志主义五十年：我们学到了什么？》的编辑转录稿。我只有很短的演讲时间，所以演讲内容有些精简。我在我的网站上发布的转录稿中对演讲中涉及的问题进行了扩展，本章即以此转录稿为基础。*

* My talk was originally billed as “Libertarianism After Fifty Years: A Reassessment and Reappraisal,” NYC LibertyFest, Brooklyn, NY (October 11, 2014), but I changed the subtitle before speaking. The speech is available at “KOL152 | NYC LibertyFest: ‘Libertarianism After Fifty Years: What Have We Learned?’”, Kinsella on Liberty Podcast (Oct. 12, 2014); the transcript was posted as “Libertarianism After Fifty Years: What Have We Learned? (transcript),” StephanKinsella.com (Oct. 12, 2014). I have updated and reworked it for this chapter.

* 我演讲的最初标题是 《自由意志主义五十年：重新评估与再评价》，纽约自由节，纽约布鲁克林（2014 年 10 月 11 日），但在演讲前我更改了副标题。该演讲可在 “KOL152 | 纽约自由节：‘自由意志主义五十年：我们学到了什么？’”，金塞拉自由播客（2014 年 10 月 12 日）中收听；转录稿以 《自由意志主义五十年：我们学到了什么》（转录稿）发布在 StephanKinsella.com（2014 年 10 月 12 日）。我已根据本章对其进行了更新和修改。

导论 INTRODUCTION

Hello. I'm glad to be here. Thank you to Ian and Mike for the invitation. I do have my eleven-year-old son with me. It's the second or third time he's seen me speak. He's

been to Auburn with me. I went to the New York Comic Con with him on Thursday. So turnabout's fair play although it was fun. Comic Con was great.

大家好。我很高兴来到这里。感谢伊恩和迈克的邀请。我确实带着我 11 岁的儿子一起来了。这是他第二次或第三次看我演讲。他和我一起去过奥本。周四我陪他一起去了纽约动漫展。所以礼尚往来很公平，而且很有趣。动漫展很棒。

I have fifteen minutes. My topic is “Libertarianism After Fifty Years—What Have We Learned”? If I get cut off, I will continue this in a private podcast. You can find more information, if I run out of time, because this is a big topic for fifteen minutes.

我有十五分钟时间。我的主题是《自由意志主义五十年 —— 我们学到了什么？》如果我被打断了，我将在私人播客中继续这个话题。如果我时间不够了，你可以在播客找到更多信息，因为对于十五分钟来说这是一个很大的话题。

This is my own view of libertarianism. It might not be shared by everyone here. But what I would like to talk about is—what is the libertarian movement? How old is it? Where did we come from? What have we learned, and what's to come?

这是我对自由意志主义的个人观点。也许在座各位并不认同。但我想谈的是 —— 何为自由意志主义运动？它有多久的历史？我们从何处来？我们学到了什么，以及未来会怎样？

当代自由意志主义运动¹²⁵⁹ THE MODERN LIBERTARIAN MOVEMENT¹

In my view, the modern libertarian movement is only about five or six decades old. The

¹²⁵⁹ This section did not appear in my original talk for lack of time. It is an expanded version of my introductory remarks, and was included in a long footnote in the transcript posted on my site. I have adapted this section from Kinsella, “Foreword,” in Chase Rachels, *A Spontaneous Order: The Capitalist Case For A Stateless Society* (2015; <https://archive.org/details/ASpontaneousOrder0>). For another interesting retrospective, see Mark Thornton, “Libertarianism: A Fifty-Year Personal Retrospective,” *J. Libertarian Stud.* 24, no. 2 (2020; <https://mises.org/library/libertarianism-fifty-year-personal-retrospective>): 445 – 60.

ideas that have influenced our greatest thinkers can be traced back decades and centuries to previous movements and thinkers² — to the Enlightenment, to classical liberal thinkers, to thinkers from the Old Right, to luminaries such as Hugo Grotius, John Locke, Thomas Paine, Herbert Spencer, David Hume, and John Stuart Mill, and to more recent and largely even more radical thinkers, such as Gustave de Molinari, Benjamin Tucker, Lysander Spooner, Bertrand de Jouvenal, Franz Oppenheimer, and Albert Jay Nock.³

在我看来，现代自由意志主义运动大约只有五六十年的历史。影响我们最伟大思想家的那些理念可以追溯到数十年甚至数百年前的运动和思想家们¹²⁶⁰——追溯到启蒙运动、古典自由主义思想家、旧右派思想家，追溯到雨果·格劳秀斯、约翰·洛克、托马斯·潘恩、赫伯特·斯宾塞、大卫·休谟和约翰·斯图亚特·穆勒等杰出人物，还可以追溯到更近一些且在很大程度上更加激进的思想家，如古斯塔夫·德·莫利纳利、本杰明·塔克、莱桑德·斯波纳、伯特兰·德·儒弗内尔、弗朗茨·奥本海默和阿尔伯特·杰伊·诺克。¹²⁶¹

由于时间关系，这部分内容没有出现在我最初的演讲中。它是我开场白的扩充版，在我的网站上发布的记录稿中有一个长长的脚注。这部分内容改编自金塞拉的“前言”，收录于蔡斯·雷切尔斯的《一种自发秩序：资本主义视角下的无国家社会》（2015 年；<https://archive.org/details/ASpontaneousOrder0>）。关于另一个有趣的回顾，可参见马克·桑顿的《自由意志主义：五十年个人回顾》，《自由意志主义研究期刊》第 24 卷第 2 期（2020 年；<https://mises.org/library/libertarianism-fifty-year-personal-retrospective>）：445 - 460 页。<https://mises.org/library/libertarianism-fifty-year-personal-retrospective>）：445-60.

¹²⁶⁰ See Brian Doherty, *Radicals for Capitalism: A Freewheeling History of the Modern American Libertarian Movement* (New York: PublicAffairs, 2008); and David Boaz, ed., *The Libertarian Reader: Classic & Contemporary Writings from Lao Tzu to Milton Friedman* (Simon & Schuster, 2015).

见布莱恩·多赫蒂的《资本主义激进分子：现代美国自由意志主义运动的自由奔放历史》（纽约：公共事务出版社，2008 年）；以及大卫·鲍兹编辑的《自由意志主义读本：从老子到米尔顿·弗里德曼的经典与当代作品》（西蒙与舒斯特出版社，2015 年）。

¹²⁶¹ See Boaz, *The Libertarian Reader*.

大卫·鲍兹《自由意志主义读本》。

The beginnings of the modern movement can be detected in the works of the “three furies of libertarianism,” as Brian Doherty calls them: Rose Wilder Lane, Ayn Rand, and Isabel Patterson, whose respective books, *The Discovery of Freedom*, *The Fountainhead*, and *The God of the Machine*, were all published, rather remarkably, in the same year: 1943.⁴ But in its more modern form, libertarianism originated in the 1960s and 1970s from thinkers based primarily in the United States, notably Ayn Rand and Murray Rothbard. There’s a reason Jerome Tuccille’s hilarious satirical memoir is entitled *It Usually Begins with Ayn Rand*.⁵ Other significant influences on the nascent libertarian movement include Ludwig von Mises, author of *Liberalism* (1927) and *Human Action* (1949, with a predecessor version published in German in 1940); Nobel laureate F.A. von Hayek, author of *The Road to Serfdom* (1944); Leonard Read, head of the Foundation for Economic Education (founded 1946); and Nobel laureate Milton Friedman, author of the influential *Capitalism and Freedom* (1962).

布赖恩·多尔蒂 (Brian Doherty) 称之为 “自由意志主义三巨头”，从他们的作品中可以发现现代运动的雏形：罗斯·怀尔德·莱恩、安·兰德和伊莎贝尔·帕特森。她们各自的著作《发现自由》《源泉》和《机器之神》都在同一年——相当引人注目的 1943 年——出版。¹²⁶²但是以其更现代的形式而言，自由意志主义起源于 20 世纪 60 年代和 70 年代，主要来自美国的思想家，尤其是安·兰德和穆瑞·罗斯巴德。杰罗姆

·图西勒 (Jerome Tuccille) 的搞笑讽刺回忆录名为《通常始于安·兰德》 (*It Usually Begins with Ayn Rand*) 是有原因的。¹²⁶³对新生的自由意志主义运动产生重大影响的其他人包括路德维希·冯·米塞斯，他是《自由主义》 (1927 年) 和《人的行动》 (1949 年，其德语前身版本于 1940 年出版) 的作者；诺贝尔奖获得者 F.A.冯·哈耶克，《通往奴役之路》 (1944 年) 的作者；伦纳德·里德，经济教育基金会 (1946 年成立) 负责人；以及诺贝尔奖获得者米尔顿·弗里德曼，有影响力的《资本主义与自由》 (1962 年) 的作者。

¹²⁶² See Doherty, *Radicals for Capitalism*, chap. 3.

见多赫蒂，《资本主义激进分子》，第三章。

¹²⁶³ Jerome Tuccille, *It Usually Begins with Ayn Rand* (New York: Stein and Day, 1971). 杰罗姆·图西勒，《通常始于安·兰德》 (纽约：斯坦与戴出版社，1971 年)。

The most prominent and influential of modern libertarian figures, however, were novelist-philosopher Ayn Rand, the founder of “Objectivism”—the political wing of which, dubbed “capitalism” by her, is more or less co-extensive with libertarian minarchism—and a “radical for capitalism”; and Murray Rothbard, the Mises-influenced libertarian anarcho-capitalist economist and political theorist. Rothbard’s seminal role is widely recognized, even by non-Rothbardians. Objectivist John McCaskey, for example, has observed, that out of the debates in the mid-1900s about what rights citizens ought to have:

... grew the main sort of libertarianism of the last fifty years. It was based on a principle articulated by Murray Rothbard in the 1970s this way: No one may initiate the use or threat of physical violence against the person or property of anyone else. The idea had roots in John Locke, America’s founders, and more immediately Ayn Rand, but it was Rothbard’s formulation that became standard. It became known as the non-aggression principle or—since Rothbard took it as the starting point of political theory and not the conclusion of philosophical justification—the non-aggression axiom. In the late twentieth century, anyone who accepted this principle could call himself, or could find himself called, a libertarian, even if he disagreed with Rothbard’s own insistence that rights are best protected when there is no government at all.⁶

然而，现代自由意志主义人物中最杰出和最具影响力的是小说家兼哲学家安·兰德，她是“客观主义”的创始人——其政治派别被她称为“资本主义”，或多或少与自由意志主义的最小政府主义相一致，并且她是一个“资本主义的激进分子”；以及受米塞斯影响的自由意志主义无政府资本主义经济学家和政治理论家穆瑞·罗斯巴德。罗斯巴德的开创性作用得到了广泛认可，甚至得到了非罗斯巴德主义者的认可。例如，客观主义者约翰·麦卡斯基（John McCaskey）指出，在 20 世纪中期关于公民应享有哪些权利的论证中，公民应享有哪些权利：

.....在过去的五十年里，自由意志主义发展成为一种主要的自由主义。它基于穆瑞·罗斯巴德（Murray Rothbard）在 20 世纪 70 年代阐述的一项原则：任何人不得对他人的人身或财产使用或威胁使用暴力。这一思想源于约翰·洛克、美国的开国元勋以及更直接地来自安·兰德，但正是罗斯巴德的表述成为了标准。这一原则后来被称为“互

不侵犯原则” (non-aggression principle) 或 “互不侵犯公理” (non-aggression axiom)——因为罗斯巴德将其视为政治理论的出发点，而非哲学论证的结论。在二十世纪末，任何接受这一原则的人都可以自称为自由意志主义者，或者可能被他人称为自由意志主义者，即使他不同意罗斯巴德所坚持的观点，即不存在政府，权利才能得到最好的保障。¹²⁶⁴

We can date the dawn of today's libertarianism to the works of Rand and Rothbard: to Rand's *Atlas Shrugged* (1957), and to Rothbard's *Man, Economy, and State* (1962), *Power and Market* (1970), and *For a New Liberty* (1973), plus his journal *The Libertarian Forum* (1969–1984). *For a New Liberty* stands today as a brilliant, and early, bold statement of the radical libertarian vision. By the mid-60s, the modern libertarian movement was coalescing, primarily behind the non-initiation of force principle and the “radical capitalism” of Ayn Rand and Rothbard's systematic libertarian corpus based upon the non-aggression principle, or axiom. It is no surprise that the Libertarian Party was founded in 1971, as these ideas, and the liberty movement, were gaining steam.

我们可以将当今自由意志主义的开端追溯至兰德和罗斯巴德的著作：兰德的《阿特拉斯耸耸肩》（1957 年），以及罗斯巴德的《人、经济与国家》（1962 年）、《权力与市场》（1970 年）和《为了新自由》（1973 年），以及他的期刊《自由意志主义

¹²⁶⁴ John P. McCaskey, “New Libertarians: New Promoters of a Welfare State,” *JohnMcCaskey.com* (April 14, 2014; <https://perma.cc/259E-K2AB>). See also Wendy McElroy, “Murray N. Rothbard: Mr. Libertarian,” *LewRockwell.com* (July 6, 2000; <https://perma.cc/H7P2-P2YD>). Writes Hoppe in the Foreword to this book, “through his work Rothbard became the founder of the modern libertarian movement.”

约翰·P·麦卡斯基，《新自由意志主义者：福利国家的新推动者》，*JohnMcCaskey.com*（2014 年 4 月 14 日；<https://perma.cc/259E-K2AB>）。另见温迪·麦克罗伊，《穆瑞·N·罗斯巴德：自由意志主义先生》，*LewRockwell.com*（2000 年 7 月 6 日；<https://perma.cc/H7P2-P2YD>）。霍普在本书的前言中写道：“通过他的作品，罗斯巴德成为了现代自由意志主义运动的创始人。”

论坛》（1969 年至 1984 年）。时至今日，《为了新自由》依然对激进自由意志主义愿景的一份杰出的、早期的、大胆的阐述。到 20 世纪 60 年代中期，现代自由意志主义运动逐渐凝聚，主要围绕着一个首次使用暴力原则以及安·兰德的“激进资本主义”，以及罗斯巴德以互不侵犯原则或公理为基础的系统性的自由意志主义著作集。自由意志主义党成立于 1971 年不足为奇，正值这些观念和自由运动风起云涌之时。

In the ensuing decades, many other influential works appeared expounding on the libertarian idea.⁷

在随后的几十年里，出现了许多阐述自由意志主义思想的其他有影响力的著作。¹²⁶⁵

¹²⁶⁵ See various works listed in Kinsella, “The Greatest Libertarian Books,” StephanKinsella.com (Aug. 7, 2006) and in Kinsella, “Foreword,” including works by the Tannehills, Hospers, David Friedman, Henri Lepage, and many others. Regarding the proliferation of books presenting or re-stating libertarian thought in the last couple decades, recall this comment by scholar A.H.J. Greenidge, in his “Historical Introduction” to Gaius’ s Institutes of Roman Law: “The Institutes of Gaius are a product of this activity; for it is necessary that a great deal of detailed and special work shall be done in a science before a good handbook on the subject can be written for the use of students.” A.H.J. Greenidge, “Historical Introduction,” in Gaius, Institutes of Roman Law, with a translation and commentary by Edward Poste, 4th ed., revised and enlarged by E.A. Whittuck (Oxford: 1904; <https://oll.libertyfund.org/title/gaius-institutes-of-roman-law>), p. li (§ 20; emphasis added). This important work by Gaius was mostly lost until found in nearly complete form in a palimpsest in Verona in 1816. (See Wikipedia entry, “Institutes (Gaius),” [https://en.wikipedia.org/wiki/Institutes_\(Gaius\)](https://en.wikipedia.org/wiki/Institutes_(Gaius))). The “activity” referred to by Greenidge above is described in the preceding section thusly: The literary activity in the domain of law, during the period which intervened between the accession of Augustus and the time of Gaius, was of the most varied character. Religious law (Jus Pontificium) attracted the attention of Capito. Labeo wrote on the Twelve Tables. The Praetor’ s Edict was the subject of studies by Labeo, Masurius Sabinus, Pedius and Pomponius. The Edict of the Curule Aediles was commented on by Caelius Sabinus. Salvius Julianus, besides his redaction of the Edicts, produced a work known as Digesta, which perhaps assumed the form of detailed explanations of points of law systematically arranged. Comprehensive works on the Civil Law were furnished by Masurius Sabinus and Caius Cassius Longinus. Other jurists produced monographs on special branches of law, as the younger Nerva on Usucapion, Pedms on Stipulations, Pomponius on Fideicommissa. Some lawyers wrote commentaries on the works of their predecessors. It was thus that Aristo dealt with Labeo, and Pomponius with Sabinus.

Other works took the form of Epistolae, which furnished opinions on special cases which had been submitted to their author, and collections of Problems (Quaestiones). Nor was history neglected. There must have been much of it in Labeo's commentary on the Twelve Tables; and Pomponius wrote a Handbook (Enehiridion), which contained a sketch of the legal history of Rome from the earliest times.

Greenidge, "Historical Introduction," § 19, pp. l - li.

On the issue of the preservation and transmission of bodies of knowledge, such as legal systems, see also Alan Watson: "The Importance of 'Nutshells,'" Am. J. Comp. L. 42, no. 1 (Winter 1994; https://digitalcommons.law.uga.edu/fac_artchop/668): 1 - 23.

见金塞拉在《最伟大的自由意志主义书籍》(StephanKinsella.com, 2006 年 8 月 7 日)以及在“前言”中列出的各种作品,包括坦尼希尔夫妇、霍斯珀斯、大卫·弗里德曼、亨利·勒佩奇以及许多其他人的作品。

关于近几十年来介绍或重新阐述自由意志主义思想的书籍大量涌现,可以回想一下学者 A.H.J. 格里尼奇在他为盖尤斯的《罗马法原理》所写的“历史导论”中的这句话:

“盖尤斯的《原理》是这种活动的产物;因为在一门学科中,必须先进行大量详细而专门的工作,才能为学生撰写一本关于该主题的好手册。”A.H.J. 格里尼奇,“历史导论”,收录于盖尤斯的《罗马法原理》,爱德华·波斯特翻译并评注,E.A. 惠特克修订并扩充第四版(牛津:1904 年;<https://oll.libertyfund.org/title/gaius-institutes-of-roman-law>),第 li 页(§ 20;着重号为原文所加)。盖尤斯的这部重要作品大部分都已失传,直到 1816 年在维罗纳的一份重写本中被发现时才几乎完整地呈现出来。

(见维基百科条目“《原理》(盖尤斯)”,[https://en.wikipedia.org/wiki/Institutes_\(Gaius\)](https://en.wikipedia.org/wiki/Institutes_(Gaius)))。格里尼奇上述所指的“活动”在前一部分是这样描述的:

从奥古斯都登基到盖乌斯时期,法律领域的文学活动最为丰富多彩。宗教法(Jus Pontificium)吸引了卡皮托的注意。拉贝奥撰写了《十二表》。拉贝奥、马苏里乌斯-萨比努斯(Masurius Sabinus)、佩迪乌斯(Pedius)和庞波尼乌斯(Pomponius)对禁卫军敕令进行了研究。Caelius Sabinus 对《Curule Aediles 敕令》进行了评论。萨尔维乌斯-朱利安努斯(Salvius Julianus)除了对敕令进行修订外,还创作了一部被称为 Digesta 的著作,该著作可能是对法律要点进行详细解释的系统排列形式。Masurius Sabinus 和 Caius Cassius Longinus 出版了关于民法的综合性著作。其他法学家还就法律的特殊分支撰写了专著,如年轻的内尔瓦(Nerva)撰写的《Usucapion》、佩德姆斯(Pedms)撰写的《Stipulations》、庞波尼乌斯(Pomponius)撰写的《Fideicommissa》。一些法学家还为前人的著作撰写评注。阿里斯托(Aristo)对拉贝奥(Labeo)、庞波尼乌斯(Pomponius)对萨比努斯(Sabinus)的评论就是这样写成的。其他作品则以书信和问题集(Quaestiones)的形式出现,前者就提交给作者的特殊案件提供意见,后者则提供观点。历史也没有被忽视。拉贝奥对《十二表》的注释中肯定有很多历史内容;庞波尼乌斯写了一本《手册》(Enehiridion),其中包含罗马自古以来的法律史草图。

格林里奇,“历史导论”,第 19 节,第 l-li 页。

关于知识体系(如法律体系)的保存和传承问题,也可参见艾伦·沃森:“‘概要’

So the movement is about fifty or sixty years old. It's a relatively young movement as far as ideologies and political philosophies go. We still have our disagreements over certain controversies like abortion and other issues. But a lot of progress has been made in the last fifty years. We've had a lot of development, partly because of incessant libertarian internal debate, criticism by outsiders, criticism by minarchists, criticism by insiders. But at the fifty year stage, I do think it is a good time to step back and reflect and think what have we learned over the last fifty years. How we could use this going forward to further refine and develop our ideas.

因此，这场运动大约有五六十年的历史。就意识形态和政治哲学而言，这是一个相对年轻的运动。我们在某些争议上仍有分歧，比如堕胎和其他问题。但在过去的五十年里，我们已经取得了很大的进步。我们有了很多发展，部分原因是持续不断的自由意志主义内部论证、外部人士的批评、最小政府主义者的批评以及内部人士的批评。但是在五十周年这个阶段，我确实认为这是一个很好的时机，可以退一步进行反思，思考在过去的五十年里我们学到了什么。我们如何利用这些经验来进一步完善和发展我们的思想理念。

什么变得更清晰了 WHAT HAS BECOME CLEARER

So let's talk first about what has become clearer in the last fifty years. And, again, not everyone is going to agree with this—but this is my take. My take is from the position of an Austrian and anarchist influenced libertarian; from someone influenced greatly by Rothbard, Mises, Ayn Rand—and Hans-Hermann Hoppe, whom I regard as the greatest living libertarian theorist and Austrian economist.

因此，让我们先来谈谈过去五十年中变得更加清晰的事物。同样，不是每个人都会同意这一点，但这是我的看法。我的观点来自一个受奥地利学派和无政府主义影响的自由意志主义者的立场；来自一个深受罗斯巴德、米塞斯、安·兰德以及汉斯-赫尔曼·霍普影响的人，我认为霍普是在世的最伟大的自由意志主义理论家和奥地利经济学家。

This first insight may not be the most popular with everyone here, but I think the one

的重要性”，《美国比较法杂志》第 42 卷第 1 期（1994 年冬季；
https://digitalcommons.law.uga.edu/fac_artchop/668）：1-23。

thing we've learned is that political activism as a primary means of progress is limited at best.⁸ I don't want to discourage people from doing it, but not everyone agrees with voting or that electoral politics is the way to go.⁹ And the sort of sorry history and state of the Libertarian Party since 1971 — incompetence, corruption, and inefficacy—shows that electoral politics has not succeeded very much so far.¹⁰

这第一个见解可能并不受在座各位的欢迎，但我认为我们学到的一件事是，将政治行动主义作为主要的进步手段，其效果充其量是有限的。¹²⁶⁶我不想打击人们的积极性，但并不是每个人都认同投票，也不是每个人都认为选举政治是必由之路。¹²⁶⁷而自由意志主义党自 1971 年以来的那种令人遗憾的历史和状况——无能、腐败和低效——表明选举政治迄今为止并未取得多大成功。¹²⁶⁸

I would also say that we've learned that a principled libertarian position is preferred over an ad hoc or single purpose one like NORML or marijuana legalization or a utilitarian approach. Those have their purpose. They have their role. But a principled approach is superior and necessary. You really need to have a love for liberty, a love for libertarianism. You have to believe that aggression is really wrong, not just impractical.¹¹

我还想说的是，我们已经认识到，有原则的自由意志主义立场要比 全国大麻法律改革组织（NORML）或大麻合法化或功利主义方法等临时或单一目的的立场更受欢迎。

¹²⁶⁶ Kinsella, “The Trouble with Libertarian Activism,” LewRockwell.com (Jan. 26, 2006; <https://archive.lewrockwell.com/kinsella/kinsella19.html>).

金塞拉，《自由意志主义行动主义的问题》，LewRockwell.com（2006 年 1 月 26 日；<https://archive.lewrockwell.com/kinsella/kinsella19.html>）。

¹²⁶⁷ For a libertarian argument against voting, see Wendy McElroy, “Why I Would Not Vote Against Hitler,” *Liberty* 9, no. 5 (May 1996; <https://perma.cc/5NE3-BWES>): 46 – 47.

关于自由意志主义者反对投票的观点，可参见温迪·麦克罗伊的《我为什么不会投票反对希特勒》，《自由》第 9 卷第 5 期（1996 年 5 月；<https://perma.cc/5NE3-BWES>）：46–47 页。

¹²⁶⁸ That said, since this speech, I have joined the LP. See Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform,” *StephanKinsella.com* (May 30, 2022).

话虽如此，自从这次演讲之后，我加入了自由党。见金塞拉：《自由意志主义党纲中的侵犯与财产权要点》，*StephanKinsella.com*（2022 年 5 月 30 日）。

这些都有其目的。它们有其作用。但有原则的方法更优越，也更有必要。你真的需要热爱自由，热爱自由意志主义。你必须相信侵犯真的是错误的，而不仅仅是不切实际的迂腐之见。¹²⁶⁹

It has become clear that libertarianism has to be 100% anti-war, not merely against “unjust” wars—as even Rothbard said, in the history of America, there have only been two “just” wars: the Revolutionary War and the war to prevent the independence of the South. We need to condemn both of those wars, the Revolutionary War and the Civil War, on both the South’s and the North’s side. These are both wars waged by the state.

很显然，自由意志主义必须百分之百地反战，而不仅仅是反对“非正义”的战争——就连罗斯巴德也说过，在美国历史上，只有两场“正义”的战争：独立战争和阻止南方独立的战争。我们需要谴责这两场战争，即独立战争和南北战争，无论是南方还是北方。这些都是国家发动的战争。

In the case of the Revolutionary War, it was a war that involved conscription, shooting deserters, tons of war crimes, taxation, inflation.¹² And it resulted in the current state that we have now. The American Revolution was a failure as well.¹³

就独立战争而言，这是一场涉及征兵、射杀逃兵、大量战争罪行、征税和通货膨胀的战争。¹²⁷⁰它导致了我们现在所处的这种状态。美国独立战争也是一次失败。¹²⁷¹

¹²⁶⁹ Kinsella, “Why I’m a Libertarian – or, Why Libertarianism is Beautiful,” Mises Economics Blog (Dec. 12, 2006).

金塞拉：《为什么我是自由意志主义者——或者说，为什么自由意志主义是美好的》，米塞斯经济学博客（2006年12月12日）。

¹²⁷⁰ Kinsella, “The Murdering, Thieving, Enslaving, Unlibertarian Continental Army,” LewRockwell.com (July 3, 2009).

金塞拉，《杀人、盗窃、奴役、非自由意志主义的大陆军》，LewRockwell.com（2009年7月3日）。

¹²⁷¹ See Kinsella, “When Did the Trouble Start?,” LewRockwell.com (Sep. 5, 2003); idem, “Happy We-Should-Restore-the-Monarchy-and-Rejoin-Britain Day! ” , Mises Economics Blog (July 2, 2009).

见金塞拉的《麻烦是什么时候开始的？》，LewRockwell.com（2003年9月5日）；同上，《幸福的我们应该恢复君主制并重新加入英国日！》，米塞斯经济学博客（2009年7月2日）。

Libertarianism is anti-state, or at least it is increasingly becoming so.¹⁴ There's an increasing number of libertarians and an increasing number of those that get drawn to anarchy. What's the old joke? "What's the difference between a minarchist and an anarchist? About six months." To be against aggression, you have to be against all aggression: private aggression, that is, crime, and public aggression, or institutional aggression, which is what the state always does.

自由意志主义是反国家的，或者至少它正越来越趋向于如此。¹²⁷²有越来越多的自由意志主义者以及越来越多被无政府主义吸引的人。有句老笑话怎么说来着？有个老笑话是怎么说的？“最小政府主义者和无政府主义者之间的区别是什么？大约六个月。”要反对侵犯，就必须反对一切侵犯：私人侵犯，也就是犯罪；公共侵犯，或者说制度性侵犯，而这正是国家一直在做的事情。

Libertarianism is radical. It's not incremental. There is nothing wrong with being incremental, but libertarianism is really a radical doctrine. And it's also unique and radical and different from, and superior to, the Left and the Right. We have to recognize that. We're not "of the Left." We're not "of the Right."

自由意志主义是激进的。它不是渐进的。渐进本身并没有错，但自由意志主义确实是一种激进的学说。它也是独特的、激进的，不同于左派和右派，也优于左派和右派。我们必须认识到这一点。我们不属于“左派”。我们也不属于“右派”。

Also, libertarianism is now increasingly, overwhelmingly, anti-intellectual property.¹⁵ Intellectual property, patent and copyright law, and related laws like trademark and trade secret used to be the boring province of specialists and policy wonks, but with the advent of the internet and the increase of global trade and high tech, the so-called "abuses" of patent and copyright law have become evident to all of us.

另外，自由意志主义现在越来越多地、压倒性地反知识产权。¹²⁷³知识产权法、专利法、

¹²⁷² Kinsella, "The Nature of the State and Why Libertarians Hate It," StephanKinsella.com (May 3, 2010).

金塞拉：《国家的本质以及自由意志主义者为何憎恨国家》，StephanKinsella.com（2010年5月3日）。

¹²⁷³ See "Law and Intellectual Property in a Stateless Society" (ch. 14), at n.5; "Against Intellectual Property After Twenty Years: Looking Back and Looking Forward" (ch. 15),

版权法以及商标法、商业秘密法等相关法律过去一直是专家和政策制定者的枯燥领域，但随着互联网的出现以及全球贸易和高科技的发展，专利法和版权法的所谓“滥用”已变得有目共睹。

We have to realize that intellectual property is one of the top five or six horrible things the state does to society. After war, public education, the drug war, central banking, taxation—intellectual property is up there.¹⁶ It's one of the worst things that helps support the police state and suppress individual liberties and reduce innovation and impose hundreds of billions of dollars of cost on the globe every year.¹⁷ This kind of view upsets a lot of the old guard libertarians, Objectivists and minarchists and utilitarians and “Constitutionalists,” who still attempt to defend IP ... but modern libertarians, left libertarians, tech libertarians, young people, people who actually “use the Internet”—they all know that there's something wrong with a law that prevents you from learning and sharing in what we call, in the free market, “competition.” There's nothing wrong with competition!

我们必须认识到，知识产权是国家对社会所做的五六件可怕事情之一。在战争、公共教育、毒品战争、中央银行、税收之后，知识产权亦添列其中。¹²⁷⁴它是最糟糕的事物之一，有助于支持警察国家，压制个人自由，减少创新，每年给全球造成数千亿美元的损失。¹²⁷⁵这种观点让许多老派守旧的自由意志主义者、客观主义者、最小政府主义

at n.21.
见《无国家社会中的法律与知识产权》（第十四章）注释 5；《反对知识产权二十年：回顾与展望》（第十五章）注释 21。
¹²⁷⁴ Kinsella, “Where does IP Rank Among the Worst State Laws?” , C4SIF Blog (Jan. 20, 2012).
金塞拉，《知识产权在最糟糕的国家法律中处于什么位置？》，C4SIF 博客（2012 年 1 月 20 日）。
¹²⁷⁵ Kinsella, “Copyright and Free Trade; Patents and Censorship,” C4SIF Blog (Feb. 29, 2012); Kinsella, “Death by Copyright-IP Fascist Police State Acronym,” C4SIF Blog (Jan. 30, 2012); “SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright,” The Libertarian Standard (Jan 24, 2012); idem, “Masnick on the Horrible PROTECT IP Act: The Coming IPolice State,” C4SIF Blog (June 2, 2012); idem, “Copyright and the End of Internet Freedom,” C4SIF Blog (May 10, 2011); idem, “Copyright Censorship versus Free Speech and Human Rights; Excessive Fines and the Eighth Amendment,” C4SIF Blog (Sep. 6, 2011); idem, “The Overwhelming Empirical Case Against Patent and Copyright,” C4SIF Blog (Oct. 23, 2012); idem, “Yet Another

者、功利主义者和“立宪主义者”感到不安，他们仍然试图为知识产权辩护……但现代自由意志主义者、左翼自由意志主义者、科技自由意志主义者、年轻人、真正“使用互联网”的人——他们都知道，有一项法律阻止你在我们所谓的自由市场的“竞争”中学习和分享，这是有问题的。竞争没有任何问题！

Another thing we've learned in the last fifty years, due to the work of writers like Bruno Leoni, Hayek, others: legislation is not the way to make law. Law has to arise from custom, from contract, from agreement, from decentralized processes like the common law or arbitration.¹⁸

在过去的五十年里，由于布鲁诺·莱奥尼、哈耶克及其他一些作家的努力，我们还学到了另一件事：立法并非制定法律的途径。法律必须源自习俗、契约、协议，以及像普通法或仲裁这样去中性化的进程。¹²⁷⁶

Also, I think we've learned, due to the work primarily of HansHerman Hoppe and others ... we've had to recognize that democracy was not a step on the road to progress towards a libertarian society. Moving from monarchies in the ancient regimes to democracy might have been better in some ways, but it wasn't unambiguously better, and it's definitely not a simulation of a libertarian or a liberal society.¹⁹

Study Finds Patents Do Not Encourage Innovation,” Mises Economics Blog (July 2, 2009); idem, “Costs of the Patent System Revisited,” Mises Economics Blog (Sep. 29, 2010).

金塞拉，《版权与自由贸易：专利与审查制度》，C4SIF 博客（2012 年 2 月 29 日）；金塞拉，《死于版权—知识产权法西斯警察国家的缩写》，C4SIF 博客（2012 年 1 月 30 日）；《<禁止网络盗版法案>只是症状，版权才是疾病：<禁止网络盗版法案>敲响废除版权的警钟》，《自由意志主义标准》（2012 年 1 月 24 日）；同上，《马斯尼克谈可怕的<保护知识产权法案>：即将到来的知识产权警察国家》，C4SIF 博客（2012 年 6 月 2 日）；同上，《版权与互联网自由的终结》，C4SIF 博客（2011 年 5 月 10 日）；同上，《版权审查制度与言论自由和人权：过度罚款与第八修正案》，C4SIF 博客（2011 年 9 月 6 日）；同上，《反对专利和版权的压倒性实证案例》，C4SIF 博客（2012 年 10 月 23 日）；同上，《又一项研究发现专利并不鼓励创新》，米塞斯经济学博客（2009 年 7 月 2 日）；同上，《重新审视专利制度的成本》，米塞斯经济学博客（2010 年 9 月 29 日）。

¹²⁷⁶ See “Legislation and the Discovery of Law in a Free Society” (ch. 13).

参见《自由社会中的立法与法律发现》（第 13 章）。

此外，我认为，由于汉斯-赫尔曼·霍普等人的主要努力，我们已经认识到.....我们不得不承认，民主并不是迈向自由意志主义社会的一步。从古代政权的君主制转向民主制，在某些方面可能会更好，但并非明确地更好，而且它绝对不是对自由意志主义或自由社会的模拟。¹²⁷⁷

And along those lines I think we also have to recognize that we need to quit thinking of America as some kind of proto-libertarian paradise back in the day of the Founders. The Constitution is not libertarian. It was a centralizing document. It was a power grab. It failed... or rather, it succeeded in what it was really meant to do, which is to centralize power in the hands of the federal government.²⁰ So we need to wipe these illusions from our eyes about the American Founders being proto-libertarians. They were not. The Constitution is not libertarian. America was not a libertarian country early on. There's any number of victim classes you could ask, and they would probably agree with this.

按照这种思路，我认为我们还必须认识到，我们必须放弃将美国视为国父时代的某种原初自由意志主义天堂的想法。宪法并非自由意志主义。它是一份中心化的文件。它是权力的攫取。它失败了.....或者说，它成功地实现了其真正目的，将权力集中到联邦政府手中。¹²⁷⁸ 所以我们需要消除这些关于美国开国父们是原初自由意志主义者的幻想。

¹²⁷⁷ See Hans-Hermann Hoppe, *Democracy: The God That Failed* (New Brunswick: Transaction, 2001; www.hanshoppe.com/democracy). As Hoppe notes in the Introduction: “although aware of the economic and ethical deficiencies of democracy, both Mises and Rothbard had a soft spot for democracy and tended to view the transition from monarchy to democracy as progress.”

见汉斯-赫尔曼·霍普的《民主：失败的上帝》（新不伦瑞克：交易出版社，2001年；www.hanshoppe.com/democracy）。正如霍普在引言中所指出的：“尽管米塞斯和罗斯巴德都意识到了民主在经济和伦理方面的缺陷，但他们对民主都有一定的好感，并倾向于将从君主制向民主制的转变视为一种进步。”

¹²⁷⁸ Kinsella, “On Constitutional Sentimentalism,” StephanKinsella.com (Jan. 16, 2011); idem, “Black Armbands for ‘Constitution Day,’ ” *The Libertarian Standard* (Sept. 17, 2010); idem, “The Bad Bill of Rights,” LewRockwell.com (Dec. 17, 2004; www.lewrockwell.com/lrc-blog/the-bad-bill-of-rights); idem, “Goodbye 1776, 1789, Tom,” StephanKinsella.com (June 29, 2009); idem, “Rockwell on Hoppe on the Constitution as Expansion of Government Power,” StephanKinsella.com (Aug. 3, 2009); idem, “Richman on the 4th of July and American Independence,” StephanKinsella.com (July 2, 2009); idem, “The Murdering, Thieving, Enslaving, Unlibertarian Continental Army”; idem, “Napolitano on Health-Care Reform and the

他们不是。宪法不是自由意志主义的。早期美国也不是一个自由意志主义国家。你可以询问任何数量的受害群体，他们可能都会同意这一点。

Another thing that has become clear, just in recent years, has been the libertarian approach to peace and cooperation as informing the issue of children. That is, there has been a reexamination of how we rear our children, how we discipline children and how we educate children. Thus we have the rise of the anti-spanking and the “peaceful parenting” movement. And we have an increasing resort to homeschooling and even so-called unschooling. So these are all things that we are starting to learn.²¹

另一件在近几年变得清晰的事情是，自由意志主义对待和平与合作的方式为儿童问题

Constitution: Is the Commerce Clause Really Limit- ed?” , StephanKinsella.com (Sep. 17, 2009); idem, “Was the American Revolution Really about Taxes?” , The Libertarian Standard (April 14, 2010); idem, “Bill Marina (R.I.P.) on American Imperialism from the Beginning,” StephanKinsella.com (July 8, 2009); idem, “Happy We-Should-Restore-the-Monarchy-and-Rejoin-Britain Day!”; idem, “Revising the American Revolution,” StephanKinsella.com (July 6, 2009); idem, “The Declaration and Conscription,” StephanKinsella.com (July 6, 2009); idem, “Untold Truths about the American Revolution,” StephanKinsella.com (July 7, 2009); idem, “Jeff Hummel’ s ‘The Constitution as a Counter-Revolution,’ ” StephanKinsella.com (July 1, 2009).

金塞拉,《论宪法感伤主义》, StephanKinsella.com (2011 年 1 月 16 日); 同上,《“宪法日”的黑色臂章》,《自由意志主义标准》(2010 年 9 月 17 日); 同上,《糟糕的权利法案》, LewRockwell.com (2004 年 12 月 17 日; www.lewrockwell.com/lrc-blog/the-bad-bill-of-rights); 同上,《再见 1776, 1789, 汤姆》, StephanKinsella.com (2009 年 6 月 29 日); 同上,《罗克韦尔论霍普关于作为政府权力扩张的宪法》, StephanKinsella.com (2009 年 8 月 3 日); 同上,《里奇曼论七月四日与美国独立》, StephanKinsella.com (2009 年 7 月 2 日); 同上,《杀人、盗窃、奴役、非自由意志主义的大陆军》; 同上,《纳波利塔诺论医疗改革与宪法: 商业条款真的有限制吗? 》, StephanKinsella.com (2009 年 9 月 17 日); 同上,《美国革命真的是与税收有关吗? 》,《自由意志主义标准》(2010 年 4 月 14 日); 同上,《比尔·玛丽娜(安息吧)论从一开始的美国帝国主义》, StephanKinsella.com (2009 年 7 月 8 日); 同上,《快乐的我们应该恢复君主制并重新加入英国日! 》; 同上,《修正美国革命》, StephanKinsella.com (2009 年 7 月 6 日); 同上,《独立宣言与征兵》, StephanKinsella.com (2009 年 7 月 6 日); 同上,《关于美国革命的不为人知的真相》, StephanKinsella.com (2009 年 7 月 7 日); 同上,《杰夫·胡梅尔的“作为反革命的宪法”》, StephanKinsella.com (2009 年 7 月 1 日)。

提供了启示。也就是说，人们开始重新审视我们如何养育子女、如何管教子女以及如何教育子女。因此，出现了反对打孩子的“和平育儿”运动。我们越来越多地选择在家教育，甚至是所谓的“非学校教育”。所以这些都是我们开始认识到的事情。¹²⁷⁹

The two most important things I think that have become clear— and some of these were known to earlier thinkers before—number one is the importance of a solid understanding of economics to inform your case. And I think that means Austrian Economics.²² You have to be economically literate. And the rise in the popularity of Austrian Economics has been stunning to see.²³ There is a reason for that. You don't see the Chicago school or the Coasean school being passionately argued for by most libertarians now.

我认为有两件最重要的事情已经变得很清楚了——其中一些在早期的思想家那里就已经为人所知——第一，扎实地理解经济学对你的论点的重要性。我认为这就是奥地利学派经济学。¹²⁸⁰你必须具备经济学素养。奥派经济学受欢迎程度的上升令人惊叹。¹²⁸¹这是有原因的。现在，大多数自由意志主义人士都不热衷于为芝加哥学派或科科学

¹²⁷⁹ See Kinsella, “Montessori, Peace, and Libertarianism,” LewRockwell.com (April 28, 2011); idem, “KOL059 | Libertarian Parenting — Freedom Radio with Stefan Molyneux (2010),” Kinsella on Liberty Podcast (May 22, 2013); idem, “Stefan Molyneux’s ‘Libertarian Parenting’ Series,” The Libertarian Standard (July 21, 2010); idem, “Montessori and ‘Un-schooling,’” StephanKinsella.com (Oct. 16, 2010).

见金塞拉的《蒙台梭利、和平与自由意志主义》，LewRockwell.com（2011年4月28日）；同上，《KOL059 | 自由意志主义育儿——斯特凡·莫利纽克斯的自由电台（2010）》，金塞拉自由播客（2013年5月22日）；同上，《斯特凡·莫利纽克斯的“自由意志主义育儿”系列》，《自由意志主义标准》（2010年7月21日）；同上，《蒙台梭利与“非学校教育”》，StephanKinsella.com（2010年10月16日）。

¹²⁸⁰ Kinsella, “Afterword,” in Hans-Hermann Hoppe, in The Great Fiction: Property, Economy, Society, and the Politics of Decline, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; www.hanshoppe.com/tgf); Kinsella, “Foreword,” in Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc).

金塞拉，《后记》，收录于汉斯-赫尔曼·霍普的《伟大的虚构：财产、经济、社会与衰落的政治（第二版扩充版）》（阿拉巴马州奥本：米塞斯研究院，2021年；www.hanshoppe.com/tgf）；金塞拉，《前言》，收录于汉斯-赫尔曼·霍普的《社会主义与资本主义理论：经济学、政治学与伦理学》（阿拉巴马州奥本：米塞斯研究院，2010年[1989年]；www.hanshoppe.com/tsc）。

¹²⁸¹ For a recent example, the LP’s Mises Caucus (https://lpmisescaucus.com)

派辩护了。

Finally, the most important point, it has become clear, and we need to return to this and emphasize this, libertarianism is essentially about property rights. That's really what it's all about.²⁴ Liberty is a consequence of property rights. It's what you can do when your property rights are respected.

最后，最重要的一点，已经清晰明白，我们需要回到这一点并强调这一点，自由意志主义本质上是关于财产权的。这才是它的真正核心所在。¹²⁸²自由是财产权的结果。自由就是当你的财产权受到尊重时你能做什么。

分歧或混淆的问题 ISSUES THAT DIVIDE OR CONFUSE

Now there are still some issues that divide or confuse us. There is this left vs. right debate.²⁵ Are we of the left? Or are we of the right? There is the thick vs. thin debate.

completely took over the US Libertarian Party at the 2022 convention. See Brian Doherty, “Mises Caucus Takes Control of Libertarian Party,” Reason.com (May 29, 2022; <https://perma.cc/US78-Y24C>); Zach Weissmueller, Nick Gillespie & Danielle Thompson, “Inside the Mises Caucus Takeover of the Libertarian Party,” Reason.com (June 15, 2022; <https://perma.cc/QCK5-3HND>). See also Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform,” StephanKinsella.com (May 30, 2022). 举一个近期的例子，自由党的米塞斯核心小组 (<https://lpmisescaucus.com>) 在 2022 年的大会上完全接管了美国自由意志主义党。见布莱恩·多尔蒂的《米塞斯核心小组掌控自由意志主义党》，Reason.com (2022 年 5 月 29 日; <https://perma.cc/US78-Y24C>)；扎克·韦斯穆勒、尼克·吉莱斯皮和丹妮尔·汤普森的《米塞斯核心小组接管自由意志主义党内部情况》，Reason.com (2022 年 6 月 15 日; <https://perma.cc/QCK5-3HND>)。另见金塞拉的《自由意志主义党纲领中的侵犯与财产权要点》，StephanKinsella.com (2022 年 5 月 30 日)。

¹²⁸² Murray N. Rothbard, “‘Human Rights’ as Property Rights,” in The Ethics of Liberty (New York: New York University Press, 1998; <http://mises.org/rothbard/ethics/fifteen.asp>); Hoppe, A Theory of Socialism and Capitalism, chaps. 1 – 2 et pass.

穆瑞·N·罗斯巴德，《“人权”即财产权》，收录于《自由的伦理》（纽约：纽约大学出版社，1998 年；<http://mises.org/rothbard/ethics/fifteen.asp>）；汉斯-赫尔曼·霍普，《社会主义与资本主义理论》，第 1 – 2 章及其他各处。

Should we be thick libertarians or thin libertarians? There's the debate whether we should be activists or whether we should be theorists or whether we should just mind our own business and not work for the state.²⁶

现在仍然有一些问题使我们产生分歧或感到困惑。存在左派与右派的论证。¹²⁸³我们属于左派吗？还是属于右派呢？有“厚”与“薄”的论证。我们应该是“厚”自由意志主义者还是“薄”自由意志主义者呢？我们是应该成为活动家，还是应该成为理论家，还是应该只管自己的事，不为国家工作？¹²⁸⁴

There are esoteric issues like voluntary slavery. Should I be able to sign a contract and sell my kidneys, or myself? This is the alienability issue.²⁷

还有一些深奥的问题，比如自愿为奴。我是否应该能够签署契约，卖掉我的肾脏，或者卖掉我自己？这就是可让渡性问题。¹²⁸⁵

There is sometimes debate about whether you should be responsible for the actions of others. I have had people tell me that Adolf Hitler really never pulled the trigger, so he really didn't commit murder.²⁸ Only the henchmen are guilty. Truman didn't really drop the bomb on Japan. A mafia boss doesn't actually pull the trigger. His hit man does. So you have this kind of confusion, I would say.

有时，人们会论证自己是否应该为他人的行动负责。有人告诉我，阿道夫·希特勒实

¹²⁸³ Kinsella, “The Limits of Libertarianism?: A Dissenting View,” StephanKinsella.com (April 20, 2014)

金塞拉：《自由意志主义的局限？一种不同观点》，StephanKinsella.com（2014 年 4 月 20 日）

¹²⁸⁴ Kinsella, “The Trouble with Libertarian Activism.”

金塞拉，《自由意志主义行动主义的问题》。

¹²⁸⁵ See “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9); “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11); and Kinsella, “KOL004 | Interview with Walter Block on Voluntary Slavery and Inalienability,” Kinsella on Liberty Podcast (Jan. 27, 2013).

见《自由意志主义的契约理论：所有权转让、有约束力的承诺和不可让渡性》（第 9 章）；《出售并不意味着拥有权，反之亦然：一个剖析》（第 11 章）；以及金塞拉的《KOL004 | 斯蒂芬·金塞拉就自愿为奴与不可让渡性采访沃尔特·布洛克》，金塞拉自由播客（2013 年 1 月 27 日）。

实际上从未扣动扳机，所以他实际上没有犯谋杀罪。¹²⁸⁶只有那些爪牙才是有罪的。杜鲁门实际上并没有在日本投下炸弹。黑手党老大实际上并没有扣动扳机。是他的杀手扣动了扳机。所以我想说，存在这样一种困惑。

And on the topic of intellectual property, even though libertarians are largely moving in our direction on this—there is still widespread confusion among people about this issue.

而在知识产权这个话题上，尽管自由意志主义在很大程度上正朝着我们的方向发展——但人们在这个问题上仍然普遍存在困惑。

And there is also still confusion about the basis and the nature of property rights; about utilitarianism or consequentialism vs. deontological or natural rights thinking vs. intuitionism vs. Popperian conjecturalism.²⁹

而在财产权的基础和性质方面，在功利主义或结果主义 Vs. 道义论或自然权利思想 Vs. 直觉主义与波普尔猜想主义之间，也仍然存在着混淆。¹²⁸⁷

¹²⁸⁶ See “Causation and Aggression” (ch. 8), at n.31 et pass; also Kinsella, “KOL149 | IP And Beyond With Stephan Kinsella—Non-Aggression Podcast,” Kinsella on Liberty Podcast (Aug. 30, 2014).

见《因果关系与侵犯》（第八章）注释 31 及其他各处；也可参见金塞拉的《KOL149 | 斯蒂芬·金塞拉谈知识产权及其他——互不侵犯播客》，金塞拉自由播客（2014 年 8 月 30 日）。

¹²⁸⁷ Hoppe’s approach is not a standard natural rights argument, but he grants that it could be interpreted “as falling in a ‘rightly conceived’ natural rights tradition…” See Hoppe, *A Theory of Socialism and Capitalism*, pp. 156 – 57, n.118, quoted in “Dialogical Arguments for Libertarian Rights” (ch. 6), n.14. For Randy Barnett’s argument distinguishing consequentialism from utilitarianism, and on Jan Lester’s Popperian “conjecturalism,” see references in “Dialogical Arguments for Libertarian Rights” (ch. 6), n.3.

霍普的方法并非标准的自然权利论证，但他承认它可以被解释为“属于一种‘正确理解的’自然权利传统……”。见霍普的《社会主义与资本主义理论》，第 156-157 页，注释 118，在《自由意志主义权利的对话论证》（第六章）注释 14 中被引用。关于兰迪·巴奈特区分结果主义与功利主义的论证，以及关于简·莱姆斯特的波普尔式“猜想主义”，见《自由意志主义权利的对话论证》（第六章）注释 3 中的参考文献。

不清晰的语言和比喻的危险 DANGER OF UNCLEAR LANGUAGE
AND METAPHORS

Now one reason for this confusion is the lack of careful attention to speaking clearly, thinking clearly, and being aware of the danger of the use of metaphors.³⁰ When libertarianism arose in the middle of the last century, it was so much superior to the prevailing thought that we could speak in sloppy terms. It was still better, even with imprecise language. After all, our competitors also employed, and still employ, vague and nonrigorous terms. But even though the libertarian approach seems obviously superior to statist alternatives, even in its early days, as it gets applied to more and more issues, harder issues arise and the older ways of thinking and reasoning don't always suffice. We need to revisit our foundations and we need to think more carefully about this.

现在，造成这种困惑的一个原因是缺乏对清晰表达、清晰思考以及意识到使用比喻之危险的谨慎关注。¹²⁸⁸ 当自由意志主义在上个世纪中叶兴起时，它比当时盛行的思想优

¹²⁸⁸ See discussion and references at “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), notes 1 and 33; “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.D and n.83; “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23), n.29 et pass. See also Kinsella, “On the Danger of Metaphors in Scientific Discourse,” StephanKinsella.com (June 12, 2011); idem, “Objectivist Law Prof Mossoff on Copyright; or, the Misuse of Labor, Value, and Creation Metaphors,” Mises Economics Blog (Jan. 3, 2008); idem, “KOL044 | ‘Correcting some Common Libertarian Misconceptions’ (PFS 2011),” Kinsella on Liberty Podcast (May 2, 2013); idem, “KOL045 | ‘Libertarian Controversies Lecture 1’ (Mises Academy, 2011),” Kinsella on Liberty Podcast (May 2, 2013); idem, “KOL118 | Tom Woods Show: Against Fuzzy Thinking,” Kinsella on Liberty Podcast (March 31, 2014). 见《出售并不意味着拥有所有权，反之亦然：一个剖析》（第十一章）注释 1 和 33 中的讨论及参考文献：《反对知识产权二十年》（第十五章）第四部分 D 及注释 83；《论自由意志主义法律理论、自我所有权与毒品法》（第二十三章）注释 29 及其他各处。也可参见金塞拉的《论科学论述中比喻的危险》，StephanKinsella.com（2011 年 6 月 12 日）；同上，《客观主义法学教授莫索夫论版权：或者，对劳动、价值和创造比喻的误用》，米塞斯经济学博客（2008 年 1 月 3 日）；同上，《KOL044 | “纠正一些常见的自由意志主义误解”（2011 年自由意志主义者论坛）》，金塞拉自由播客（2013

越多，以至于我们可以用不严谨的语言来表达。即使语言不精确，它仍然更好。毕竟，我们的竞争对手也曾使用过，而且现在仍在使用模糊和不严谨的术语。但是，即使自由意志主义的方法看起来明显优于国家主义的替代方法，即使在其早期，随着它被应用于越来越多的问题，更难的问题出现了，旧的思维和推理方式并不总是足够的。我们需要重新审视我们的基础，我们需要更仔细地思考这个问题。

Let me give some examples of metaphors or uncareful use of terms, things that can lead to equivocation by our opponents, things that can lead to confusion when we try to analyze difficult issues.

让我举出一些比喻或不谨慎使用术语的例子，这些可能会被我们的对手用来制造歧义，也可能导致我们在试图分析难题时出现混乱。

So one is, for example, most libertarians have always been against what we call “public schools.” And in recent years, maybe in the last decade or two, I’ve heard libertarians say, they’ve used the term “government schools,” because they want to make clear, “I’m against government schools.” They’re trying to call to the attention of the proponents of “public” schools that they’re really in favor of the government being in charge of educating people.

举个例子 大多数自由意志主义人士 一直反对我们所说的“公立学校”。近年来，也许是在过去的十年或二十年里，我听到自由意志主义者说，他们使用了“政府学校”这个术语，因为他们想明确表示，“我反对政府学校”。他们试图提醒“公立”学校的支持者，后者实际上是在支持政府负责教育人民。

Well, even the word “government,” in my view, is a dangerous word to use. I use it from time to time but I increasingly try to use the word “state” to make it clear that I’m against the state because the state has a definition. It’s a monopoly in a geographic area over the provision of law, justice, and force.³¹ The word government has ambiguous meanings. And your opponent—either a minarchist, which we can call a mini-statist, or a regular statist—by the word government, they mean the governing

年5月2日)；同上，《KOL045 | “自由意志主义争议讲座1”（米塞斯学院，2011年）》，金塞拉自由播客（2013年5月2日）；同上，《KOL118 | 汤姆·伍兹秀：反对模糊思维》，金塞拉自由播客（2014年3月31日）。

institutions in society. And they also use it as an equivalent to the state because they believe the state is necessary for these governing institutions. So they are smuggling in their presuppositions, a type of question-begging.

嗯，在我看来，即使是“政府”这个词也是一个危险的用词。我有时会使用它，但我越来越多地尝试使用“国家”这个词，以明确表示我反对国家，因为国家有一个定义。它是在一个地理区域内对法律、司法和武力的垄断者。¹²⁸⁹“政府”这个词有模糊的含义。而

¹²⁸⁹ Writes Hoppe:

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

Based on this definition of a state, it is easy to understand why a desire to control a state might exist. For whoever is a monopolist of final arbitration within a given territory can make laws. And he who can legislate can also tax. Surely, this is an enviable position. Hans-Hermann Hoppe, “Reflections on the Origin and the Stability of the State,” LewRockwell.com (June 23, 2008; <https://archive.lewrockwell.com/hoppe/hoppe18.html>), quoted in in Kinsella, “The Nature of the State and Why Libertarians Hate It,” StephanKinsella.com (May 3, 2010). Hoppe’ s article was based on his 2008 speech, available at Hoppe, “PFP020 | Hans-Hermann Hoppe, Reflections on the Origin of the State (PFS 2008), ” Property and Freedom Podcast (Dec. 24, 2021; <https://propertyandfreedom.org/pfp>).

霍普写道：

让我从国家的定义开始。作为一个国家，代理人必须能够做什么？这个代理人必须能够坚持将特定领土上居民之间的所有冲突提交给他进行最终决策，或者接受他的最终审查。特别是，这个代理人必须能够坚持由他或他的代理人裁决所有涉及他本人的冲突。作为国家的第二个决定性特征，排除所有其他人担任最终法官的权力隐含着代理人的征税权：单方面决定寻求正义者为其服务必须支付的价格。

根据国家的这一定义，就不难理解为什么会存在控制国家的愿望。因为，谁垄断了特定领土内的最终仲裁，谁就能制定法律。谁能立法，谁就能征税。当然，这是一个令人羡慕的地位。

—— 汉斯-赫尔曼·霍普，《对国家起源和稳定性的思考》，LewRockwell.com（2008 年 6 月 23 日；<https://archive.lewrockwell.com/hoppe/hoppe18.html>），引自金塞拉的《国家的本质以及为什么自由意志主义者厌恶它》，StephanKinsella.com（2010 年 5 月 3 日）。霍普的这篇文章基于他 2008 年的演讲，可在霍普的《PFP020 | 汉斯-赫尔曼·霍普，对国家起源的思考（2008 年自由意志主义者论坛）》，财产与自由播

你的对手 —— 无论是最小政府主义者（我们可以称之为小国家主义者），还是普通的国家主义者 —— 他们所说的“政府”，指的是社会中的管理机构。他们也把它等同于“国家”，因为他们认为国家对于这些管理机构来说是必要的。因此，他们是在偷换自己的预设，这是一种循环论证。

So if you say, as an anarchist, I'm against the government (meaning: against the state), they will take you to mean you're against law and order. So if they ask you, "Well, do you believe in law?"

因此，如果你说，作为一个无政府主义者，我反对政府（意思是：反对国家），他们就会认为你是在反对法律和秩序。所以，如果他们问你，“那么，你相信法律吗？”

You say, "Yes."

你回答说，“我相信。”

Then they say, "Well, then you believe in government." And I say, "Well, I believe in government as law and order."

然后他们会说：“那么，你相信政府。”而我说：“嗯，我所认为的政府是指法律和秩序。”

And then they say, "Well, then you must believe in the state."

然后他们说：“那么，你一定相信国家。”

You see there's that trick there. So we have to stay focused on being opposed to the state, defined in a certain way.

你看，这里有个陷阱。所以我们必须始终专注于反对以特定方式定义的国家。

Here's another one. It's the use of the word aggression in sloppy ways. Some libertarians, or some of our opponents, will use it just to mean force. So they'll say, "Well even you guys aren't against aggression. You believe in force to defend yourself."

还有另一个例子。就是对“侵犯”这个词的不严谨使用。一些自由意志主义者，或者我们的一些对手，会把它仅仅理解为武力。所以他们会说：“好吧，即使你们这些人也不

是反对侵犯。你们相信用武力来保护自己。”

Well, aggression is the initiation of force. And then you see other sloppy terminology, like I'm against "the initiation of aggression." Well, that's saying I'm against the initiation of the initiation of force. It's just not clear terminology.

是的，侵犯就是首次使用武力。然后你会看到其他不严谨的术语，比如我反对“首先发动侵犯”。嗯，这就相当于说我反对“首次使用武力的开始”。这是不清晰的术语表达。

Another one, it's just a little issue, is the word "coercion." Coercion technically means the use of the threat of force to compel someone to do something. Now just like force or violence, which is sometimes justified if it's used defensively, coercion can be justified sometimes too. If I coerce a guy trying to rob me, there's nothing wrong with that. So we should quit using the word coercion as a synonym for aggression.³² And we should never refer to defensive force as aggression.

还有一个问题，虽然是个小问题，就是“胁迫”这个词。从技术上讲，“胁迫”是指使用武力威胁迫使某人做某事。现在，就像武力或暴力，如果是防卫性使用，有时是正当的，胁迫有时也是正当的。如果我胁迫一个想抢劫我的人，这并没有什么不对。因此，我们不应该把胁迫当作侵犯的同义词。¹²⁹⁰并且我们永远不应该将自卫性武力称为侵犯。

There is also the labor theory of property and its close cousin, the labor theory of value.³³ This is what I think the fundamental mistake in a lot of libertarian thinking is, which is what led to intellectual property, and it also led to communism and the deaths of tens of millions of people in the 20th century.³⁴ It all started with John Locke who was responding to Filmer and understandably used this labor metaphor. But we have to stop thinking of labor as a special thing (it's just a type of action), and we have to get rid of this confused idea that we own our labor. You don't own your labor. Labor is what you do with something you own: your body. (You don't own your "self" by the way. That's another vague term. You own your body.)³⁵

¹²⁹⁰ See Kinsella, "The Problem with 'Coercion,'" StephanKinsella.com (Aug. 7, 2009); also "Legislation and the Discovery of Law in a Free Society" (ch. 13), n.2. 见金塞拉的《“胁迫”的问题》，StephanKinsella.com（2009年8月7日）；也可参见《自由社会中的立法与法律发现》（第十三章）注释2。

还有劳动价值论及其近亲劳动产权论。¹²⁹¹我认为这是很多自由意志主义思想中的根本错误所在，它导致了知识产权的产生，也导致了共产主义以及 20 世纪数以千万计的人死亡。¹²⁹²这一切都源于约翰·洛克，他在回应菲尔默（Filmer）时使用了这个劳动的比喻，这是可以理解的。但是，我们不能再把劳动看成是一种特殊的东西（它只是一种行动），我们必须摆脱“我们拥有自己的劳动”这种混乱的想法。你并不拥有自己的劳动。劳动是你用自己的身体所做的事情。（顺便说一句，你并不拥有你的“自我”。那是另一个模糊的术语。你拥有自己的身体）。¹²⁹³

Property rights are rights to control scarce, or conflictable, resources in the world. These are the only things that can be conflicted over. Your body is an example, and other things in the world are examples. Property rules always specify the owner of that thing. Owning your body is sufficient to allow you to act as you please, but it doesn't mean you “own your actions.” It doesn't mean you “own your labor.” If you start thinking

¹²⁹¹ See “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.D. 见《反对知识产权二十年》（第十五章），第四部分 D。

¹²⁹² Kinsella, “KOL037 | Locke’s Big Mistake: How the Labor Theory of Property Ruined Political Theory,” Kinsella on Liberty Podcast (March 28, 2013); “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.C, and other references in notes 51 & 57 et pass.

金塞拉，《KOL037 | 洛克的重大错误：财产的劳动理论如何毁了政治理论》，金塞拉自由播客（2013 年 3 月 28 日）；《反对知识产权二十年》（第十五章），第四部分 C，以及注释 51 和 57 及其他各处中的参考文献。

¹²⁹³ See “What Libertarianism Is” (ch. 2) and “How We Come to Own Ourselves” (ch. 4). But admittedly, it is difficult to avoid using these terms, as I have indicated elsewhere in this book. Thought it might be better to refer to the state instead of government; to an owned resource in which someone has a property right, rather than to calling the resource “property”; to aggression instead of coercion, it is sometimes more convenient to use more conventional or colloquial terms to avoid tedium. I don’t even like referring to patent, copyright, trademark, trade secret as “intellectual property” rights, but if one is to communicate with normies, sometimes one has to accept conventional terminology, even if it is loaded or ambiguous.

参见《何为自由意志主义》（第 2 章）和《我们如何拥有自己》（第 4 章）。但诚然，正如我在本书其他地方所指出的，很难避免使用这些术语。我认为，使用“国家”而不是“政府”；使用“某人拥有产权的自有资源”而不是将该资源称为“财产”；使用“侵犯”而不是“胁迫”可能更好，但有时使用更传统或更口语化的术语会更方便，以避免乏味。我甚至不喜欢把专利权、版权、商标、商业秘密称为“知识产权”，但如果要与常人交流，有时就必须接受传统术语，即使它很累赘或模棱两可。

this way, you're going to get to intellectual property. This is what results. I own my labor. I own what I mix it with. I own my labor. I own whatever it creates that "has" "value." But there are no property rights in value, as Hans-Herman Hoppe has pointed out. I could elaborate, but I would run out of time.³⁶

财产权是控制世界上稀缺资源或冲突性资源的权利。只有这些东西才可能发生冲突。你的身体就是一个例子，世界上的其他事物也是例子。财产规则总是明确规定该事物的所有者。拥有你的身体足以让你随心所欲地行动，但这并不意味着你“拥有你的行动”。也并不意味着你“拥有自己的劳动”。如果你开始这样思考，你就会走向知识产权。结果就是这样。我拥有我的劳动。我拥有我与之混合的东西。我拥有我的劳动。我拥有它所创造的任何“有”“价值”的东西。正如汉斯-赫尔曼·霍普所指出的，价值并不存在产权。我可以详细阐述，但我没时间了。¹²⁹⁴

Another issue is the word "contract." Libertarians are confused by contract. Rothbard and Bill Evers have written revolutionary work on this topic, viewing contract as the exercise of property rights in resources that are owned. It is not an "enforceable promise." That way of thinking leads also to confused conclusions like debtor's prison which leads to the idea of voluntary slavery, etc.³⁷

另一个问题是“契约”一词。自由意志主义者对契约感到困惑。罗斯巴德和比尔·埃弗斯就这一话题撰写了革命性的著作，将契约视为对拥有的资源行使财产权。它不是

¹²⁹⁴ Kinsella, “Hoppe on Property Rights in Physical Integrity vs Value,” StephanKinsella.com (June 12, 2011); “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23), n.7 et pass. As Justice Holmes recognized in passing in a dissent in a case establishing a quasi-property right in the product of the sweat of the brow, or the fruits of one’s labor: “Property, a creation of law, does not arise from value, although exchangeable—a matter of fact.” *International News Service v. Associated Press*, 248 U.S. 215, 246 (1918); <https://supreme.justia.com/cases/federal/us/248/215/>).

金塞拉，《霍普论物理完整性与关于价值的财产权》，StephanKinsella.com（2011年6月12日）；“论自由意志主义法律理论、自我所有权与毒品法”（第二十三章），注释7及其他各处。正如霍姆斯大法官在一个确立了对辛勤劳动的成果或个人劳动果实的准产权的案件的异议中顺带指出的那样：“财产是法律的创造物，并非源于价值，尽管它是可交换的——这是一个事实问题。”《国际新闻社诉美联社》，248 U.S. 215, 246（1918年；<https://supreme.justia.com/cases/federal/us/248/215/>）。

“可强制执行的承诺”。这种思维方式也会导致混乱的结论，比如债务人监狱，这会引出自愿为奴的观念等等。¹²⁹⁵

Another one is the word “fraud.”³⁸ Libertarians throw this word, fraud, around a lot, especially advocates of intellectual property; also the word plagiarism. They totally confuse fraud, contract, plagiarism, property rights, labor theory of value, and patent and copyright law.³⁹ They mix them together into a big gumbo of confusion. And, you know, they’ll imply that if you’re against patent law then you’re in favor of fraud or you’re in favor of dishonesty or you’re not in favor of giving someone attribution for their ideas. These are all confused, and they’re all disingenuous usually, or they’re said in total ignorance of what these terms mean and how the law really works and what property rights really are.

另一个是“欺诈”一词。¹²⁹⁶ 自由意志主义人士，尤其是知识产权的拥护者，经常把“欺诈”一词挂在嘴边；还有“剽窃”一词。他们完全混淆了欺诈、契约、剽窃、产权、劳动价值论以及专利法和版权法。¹²⁹⁷ 他们把这些概念混在一起，形成了一锅混淆视听的大杂烩。而且，你知道，他们会暗示，如果你反对专利法，那么你就是支持欺诈，或者你就是支持不诚实，或者你就是不支持为某人的创意给予应有的赞誉。这些都是混淆视听的说法，通常都是不真诚的，或者是在完全不了解这些术语的含义、法律的实

¹²⁹⁵ “A Libertarian Theory of Contract” (ch. 9).

《自由意志主义的契约理论》，（第九章）。

¹²⁹⁶ See “A Libertarian Theory of Contract” (ch. 9), Part III.E.

《自由意志主义的契约理论》，（第九章），第 III 部分 E。

¹²⁹⁷ See Kinsella, “KOL207 | Patent, Copyright, and Trademark Are Not About Plagiarism, Theft, Fraud, or Contract,” Kinsella on Liberty Podcast (Feb. 21, 2016); idem, “If you oppose IP you support plagiarism; copying others is fraud or contract breach,” in “Hello! You’ve Been Referred Here Because You’re Wrong About Intellectual Property” C4SIF (2023); Kinsella, “Common Misconceptions about Plagiarism and Patents: A Call for an Independent Inventor Defense,” Mises Economics Blog (Nov. 21, 2009).

见金塞拉的《KOL207 | 专利、版权、商标与剽窃、盗窃、欺诈或契约无关》，金塞拉自由播客（2016 年 2 月 21 日）；同上，“如果你反对知识产权，你就是支持剽窃；复制他人是欺诈或违反契约”，收录于《你好！你被引到这里是因为你对知识产权的认识是错误的》，C4SIF（2023 年）；金塞拉的《关于剽窃和专利的常见误解：呼吁捍卫独立发明人》，米塞斯经济学博客（2009 年 11 月 21 日）。

际运作方式以及财产权的真正含义的情况下说出来的。

There's another confusion, which is the common paired set of expressions which everyone takes for granted. There are two paired notions. "If you own something, well, you can sell it"—which is wrong actually. "And if you sell something, that must mean you had to own it to sell it." That's also wrong.⁴⁰ Those ideas lead to the idea of voluntary slavery on the one hand⁴¹ and the idea of intellectual property on the other. And I've taken those apart in other contexts as well. I can revisit them at some point when I have more time.

还有一种困惑，那是一组被大家视为理所当然的常见成对表达。有两个成对的概念。“如果你拥有某物，那么，你可以出售它”——实际上这是错误的。“如果你出售了某物，那一定意味着你必须先拥有它才能出售它。”这也是错误的。¹²⁹⁸ 这些观念一方面导致了自愿为奴的观念，¹²⁹⁹ 另一方面导致了知识产权的观念。我在其他场合也对这些进行过剖析。等我有更多时间的时候，我可以重新阐述。

Now another source of confusion is the idea about where property rights come from and the idea that just because we believe that the first user of an unowned resource, like Locke's idea of original appropriation or homesteading—just because we believe he is the proper owner of that resource, that because there's been this “original sin” or this “taint” of property titles throughout human history, because we can rarely trace our title to a resource back to the original owner, back to Adam, let's say, then that means our entire theory of property rights is flawed. And then what's the next step? Then we're going to say, well, we are going to have to have redistribution someday. The current allocation of resources, the property rights that the rich have, really came from conquests 700 years ago. So no one is really entitled to their wealth. “You didn't build that,” as Obama might say. And that when we have a libertarian revolution, a left-libertarian revolution, we need to redistribute these titles and everyone is going to be

¹²⁹⁸ See “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11). 见《出售并不意味着所有权，反之亦然：一个剖析》（第 11 章）。

¹²⁹⁹ See “Inalienability and Punishment: A Reply to George Smith” (ch. 10) and “A Libertarian Theory of Contract” (ch. 9). 见《不可让渡性与惩罚：对乔治·史密斯的回应》（第十章）以及《自由意志主义的契约理论》，（第九章）。

equal. Egalitarianism is driving these people.⁴²

现在，混淆的另一个来源是关于财产权从何而来的观念，以及仅仅因为我们相信无主资源的第一个使用者，就像洛克的先占或拓殖的观念——仅仅因为我们相信他是那个资源的合法所有者，就认为由于在整个人类历史中产权一直存在这种“原罪”或“污点”，因为我们很少能将我们对一种资源的所有权追溯到最初的所有者，比如说追溯到亚当，那就意味着我们整个产权理论是有缺陷的。那么下一步该如何？然后我们会说，好吧，我们总有一天要进行再分配。目前的资源分配，富人拥有的财产权，其实都来自于 700 年前的征服。因此，没有人真正有权拥有他们的财富。就像奥巴马可能会说的那样，“那不是你创造的”。当我们进行一场自由意志主义革命，一场左翼自由意志主义革命时，我们需要重新分配这些财产权，然后人人平等。平均主义是这些人的动力。¹³⁰⁰

So whenever I hear someone say that there's something wrong with your theory of property, I hold on to my wallet, because I know they're coming after it. The people that condemn materialism and rich people and money always want your money. So you have to be very wary of these people.⁴³

因此，每当我听到有人说你的产权理论有问题时，我就会紧紧护住我的钱包，因为我知道他们在觊觎它。那些谴责物质主义、富人和金钱的人总是想要你的钱。所以，你必须对这些人时刻保持高度警惕。¹³⁰¹

Now there's another related problem which afflicts a lot of quasi-left libertarians, and

¹³⁰⁰ See related discussion in “What Libertarianism Is” (ch. 2), at n.36 and “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), at n.12; also Hans-Hermann Hoppe, “A Realistic Libertarianism,” LewRockwell.com (Sept. 30, 2013; www.hanshoppe.com/2014/10/a-realistic-libertarianism), discussed in “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23), n.15.

见《何为自由意志主义》（第二章）注释 36 以及《出售并不意味着拥有所有权，反之亦然：一个剖析》（第十一章）注释 12 中的相关讨论；也可参见汉斯-赫尔曼·霍普的《一种现实的自由意志主义》，LewRockwell.com（2013 年 9 月 30 日；www.hanshoppe.com/2014/10/a-realistic-libertarianism），在《论自由意志主义法律理论、自我所有权与毒品法》（第二十三章）注释 15 中进行了讨论。

¹³⁰¹ See “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23), at n.14.

《论自由意志主义法律理论、自我所有权与毒品法》（第二十三章）注释 14。

that is this idea that if you are in favor of property rights, you're really in favor of "aggression." Now, how do they come up with this idea? Basically, they don't believe in ownership. They believe that if you are using a resource that you have the right to use it in an undisturbed fashion, but as soon as you set it down and walk away, it's up for grabs. And if you maintain the right to use force to retrieve your resource, or to get damages from them for damaging or using your property, you're committing aggression.⁴⁴ This is obviously confused and unlibertarian.

现在，还有一个相关的问题困扰着许多准左翼自由意志主义分子，那就是他们认为，如果你支持财产权，你实际上是在支持“侵犯”。他们怎么会有这种观念呢？基本上，他们不相信所有权。他们认为，如果你正在使用一种资源，你有权不受干扰地使用它，但一旦你放下它然后离开，它就可以被任何人占有。而如果你坚持有权使用武力取回你的资源，或因他们破坏或使用你的财产而向他们索取损害赔偿，那你就是在实施侵犯。¹³⁰²这显然是混乱的且不符合自由意志主义的。

前进 MOVING FORWARD

So this is the fundamental problem that we need to focus on here. We need to understand that aggression is not the fundamental concept of libertarianism. Aggression is a shorthand description of our view of property rights. Every political philosophy, every person on the planet, has an implicit or explicit view of property rights. Because property rights arise only because we live in a world of scarcity, a world of scarce resources, which means a world where conflict is possible.⁴⁵ If you understand Mises's praxeology and his analysis of human action and how human action is the purposeful employment of scarce means— things that are causally efficacious in the world to achieve your end, guided by your knowledge (which is why there are no

¹³⁰² This is also similar to the views of some mutualists, who in effect basically conflate possession with ownership, since “absentee” owners lose title to squatters, tenants, employees, and so on. See “What Libertarianism Is” (ch. 2), n.31; also “Law and Intellectual Property in a Stateless Society” (ch. 14), n.38.
这也与一些互助主义者的观点类似，他们实际上基本上将占有与所有权混为一谈，因为“缺席的”所有者会失去对擅自占地者、租户、雇员等的所有权。见《何为自由意志主义》（第二章）注释 31；也可参见《无国家社会中的法律与知识产权》（第十四章）注释 38。

property rights in ideas)⁴⁶—then you'll understand that property rights are always the right to control a given resource. It's about that.⁴⁷

因此，这是我们在此需要关注的根本问题。我们需要明白，侵犯并不是自由意志主义的基本概念。侵犯是我们对财产权观点的一种简略描述。每一种政治哲学，地球上的每一个人，都有一种或隐或显的产权观。因为产权之所以产生，只是因为我们生活在一个稀缺的世界，一个资源稀缺的世界，这意味着一个可能发生冲突的世界。¹³⁰³如果你理解了米塞斯的行动学，理解了他对人的行动的分析，理解了人的行动是如何有目的地运用稀缺的手段——世界上有因果效力的东西，在你的知识指导下实现你的目的（这就是为什么观念不存在产权）¹³⁰⁴——那么你就会明白，产权始终是控制特定资源的权利。就是这样。¹³⁰⁵

Aggression is just a shorthand for our particular view of how property should be assigned.⁴⁸ Communists, socialists, liberals, environmentalists all believe in a certain allocation of property rights. They believe the state should own the property or maybe the poor people should own the property. So the question is what makes libertarianism

¹³⁰³ See “What Libertarianism Is” (ch. 2), the section “Libertarian Property Rights”; “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11), at n.6 et pass.; “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23), at n.16 et pass. See also Hans-Hermann Hoppe, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” in Hoppe, *The Great Fiction*; Hoppe, “A Realistic Libertarianism.”

见《何为自由意志主义》（第二章）中“自由意志主义产权”部分；《出售并不意味着拥有所有权，反之亦然：一个剖析》（第十一章）注释6及其他各处；《论自由意志主义的法律理论、自我所有权与毒品法》（第二十三章）注释16及其他各处。也可参见汉斯-赫尔曼·霍普的《论共有、公有和私有财产以及完全私有化的基本原理》，收录于霍普的《伟大的虚构》；霍普的《一种现实的自由意志主义》。

¹³⁰⁴ See “Law and Intellectual Property in a Stateless Society” (ch. 14), Part III.D; and “Against Intellectual Property After Twenty Years” (ch. 15), Part IV.E.

见《无国家社会中的法律与知识产权》（第十四章），第三部分D；以及《反对知识产权二十年》（第十五章），第四部分E。

¹³⁰⁵ “What Libertarianism Is” (ch. 2); also “On Libertarian Legal Theory, Self-Ownership and Drug Laws” (ch. 23), text at notes 6 – 7 and 18 – 23 et pass.

见《何为自由意志主义》（第二章）；《论自由意志主义的法律理论、自我所有权与毒品法》（第二十三章）注释6至7以及18至23及其他各处的文本。

unique? It is our particular property allocation scheme.⁴⁹

侵犯只是我们对财产应如何分配的特定观点的一种简略表述。¹³⁰⁶ 共产主义者、社会主义者、自由主义者、环保主义者都相信某种财产权的分配。他们认为国家应该拥有财产，或者穷人应该拥有财产。那么问题来了，是什么让自由意志主义独树一帜呢？在于我们特定的财产分配方案。¹³⁰⁷

And I will conclude by just summarizing the way I think we need to view the libertarian paradigm and how, if you think about it consistently, it will answer all the questions I just went through that are confusing to people. That is this: the rule of libertarianism is very simple. It is that when two or more people—because if you only have only one person, then there's no dispute, there's no problem to be solved; there is no social problem—when two or more people both want to use a given resource, when there is a possible dispute or conflict, the question is simply, for the resource in question: which of those two or more people has the better claim to the resource?

最后，我只想总结一下我认为我们需要如何看待自由意志主义的范式，以及如果你对它进行连贯一致的思考，它将如何回答我刚才所提到的所有让人们感到困惑的问题。答案就是：自由意志主义的规则非常简单。那就是当两个或更多的人——因为如果你只有一个人，那么就没有争议，也没有问题需要解决；就不存在社会问题——当两个或更多的人都想使用一个给定的资源，当存在可能的争议或冲突时，问题很简单，对于有争议的资源来说：这两个或更多的人中哪一个对该资源有更合理的主张？

We answer that question by resorting to some very simple and common sense and almost undeniably true rules.⁵⁰ In the case of a person's body, which is a resource over which there can be dispute, the rule is self-ownership, or self-body-ownership: each person is the presumptive owner of his own body. We oppose slavery, which is "other-ownership" and instead favor self-ownership. Controversial, I know.

我们通过诉诸一些非常简单、符合常识且几乎无可否认的真实规则来回答这个问题。

¹³⁰⁶ See "What Libertarianism Is" (ch. 2), n.4.
见《何为自由意志主义》（第二章）注释 4。

¹³⁰⁷ See *ibid.*
同上。

¹³⁰⁸ 对于一个人的身体这种可能存在争议的资源来说，规则就是自我所有权，或身体自我所有权：每个人都是自己身体的推定所有者。我们反对“他人所有权”的奴隶制，而赞成自我所有权。我知道这有争议。

And as for previously-unowned, external resources, the types of things that can serve as scarce means of action, there are three simple rules. The first one is: who had it first? Or as between those two, who had it first as far as we know? You don't have to trace back to Adam. You can trace it back to a common ancestor as the law has it.⁵¹ This is original appropriation, or homesteading. This has to be the basic property allocation rule, because for people to survive, they must use resources, and there must be a first user. His use has to be rightful if we are to have ownership and property rights as a concept distinct from mere possession.

至于先前无主的外部资源，即可以作为稀缺行动手段的那类东西，有三条简单的规则。第一条是：谁先拥有？或者在这两者之间，就我们所知，谁先拥有它？你不必追溯到亚当。你可以根据法律追溯到共同的祖先。¹³⁰⁸ 这就是先占，或者说拓殖。这必定是财产分配的基本规则，因为人们要生存，就必须使用资源，而且必定存在第一个使用者。如果我们要将所有权和财产权作为一个有别于单纯占有的概念，那么他的使用就必须

¹³⁰⁸ See *ibid.*, the section “Libertarian Property Rights.” See also “How We Come to Own Ourselves” (ch. 4) and “Goods, Scarce and Nonscarce” (ch. 18); as well as Hoppe’s summary of these basic rules in “A Realistic Libertarianism” and in *idem*, “Of Common, Public, and Private Property and the Rationale for Total Privatization,” pp. 85 – 87. See also Kinsella, “How To Think About Property (2019),” *StephanKinsella.com* (April 25, 2021).

见同上，“自由意志主义产权”部分。也可参见《我们如何拥有自己》（第四章）以及《稀缺与非稀缺商品》（第十八章）；还有霍普在《一种现实的自由意志主义》以及在《论共有、公有和私有财产以及完全私有化的基本原理》第 85 至 87 页中对这些基本规则的总结。也可参见金塞拉的《如何思考财产（2019）》，*StephanKinsella.com*（2021 年 4 月 25 日）。

¹³⁰⁹ See the discussion of the civil law’s solution of tracing title back to a “common author” (meaning ancestor in title) at “What Libertarianism Is” (ch. 2), at n.33 and “Law and Intellectual Property in a Stateless Society” (ch. 14), at n.41.

见《何为自由意志主义》（第二章）注释 33 以及《无国家社会中的法律与知识产权》（第十四章）注释 41 中对民法将所有权追溯至“共同创始人”（意指所有权上的祖先）的解决方案的讨论。

是正当合法的。

Second: was there a consensual transfer from an owner to someone else? That's contract, or contractual title transfer.

第二：是否存在所有者向他人的合意转让？这就是契约，或契约性产权转让。

And third: did one person harm the other, commit a tort or a crime, so that he owes compensation or rectification or restitution to the other guy, leading to a transfer of money or some resource from one guy to the other.

第三：一个人是否伤害了另一个人，犯下了侵权行为或罪行，从而欠另一个人赔偿、纠正或补偿，导致金钱或某些资源从前者转移到后者手中。

So if you look at those three principles, that will tell you who owns the resource in question. If I had it first, I am the owner—unless I gave it to someone else, and then they own it. They have a better claim than me. Every other philosophy, other than libertarianism, violates one of those three rules. They ultimately believe that someone has the right to a resource even though they didn't obtain it by contract, even though they weren't harmed by the previous owner, and even though they may have never found the resource or started using it and put it to productive use.

因此，如果你看一下这三个原则，就会知道谁拥有相关资源。如果是我先拥有的，我就是拥有者——除非我把它给了别人，然后他们拥有了它。他们比我有更合理的权利主张。除了自由意志主义，其他任何哲学都违反了这三条规则中的一条。他们最终认为，即使某人没有通过契约获得资源，即使他们没有受到前拥有人的伤害，即使他们可能从未发现资源或开始使用资源并将其投入生产性用途，但他们对资源拥有权利。

Basically every philosophy, other than libertarianism, believes either in a lawless world, a world of might makes right—or in some form of slavery: owning the products of other people's efforts or owning their bodies.⁵² That is why libertarianism is superior. And if we focus on property rights and this foundational view of looking at things, it helps us to move forward and improve the libertarian project. Thank you.

基本上，除了自由意志主义之外的每一种哲学，要么相信一个无法无天的世界、一个强权即公理的世界，要么相信某种形式的奴隶制：拥有他人努力的成果或者拥有他人

的身体。¹³¹⁰这就是自由意志主义具有优越性的原因所在。而只要我们关注财产权，关注这种看待事物的根基性观点，它将有助于我们向前推动并改进自由意志主义的事业。非常感谢大家。

¹³¹⁰ See “What Libertarianism Is” (ch. 2).
见《何为自由意志主义》（第二章）。

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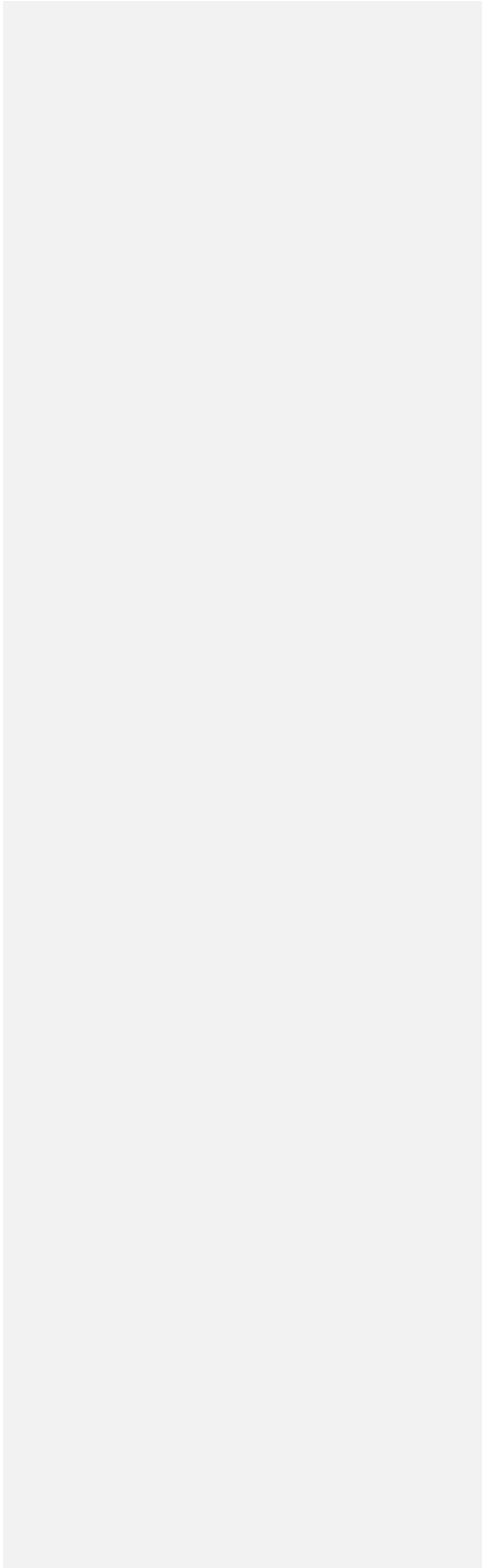
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关于作者



Stephan Kinsella, a libertarian since high school in the early 1980s, is a patent attorney and libertarian writer. Formerly a partner with Duane Morris LLP and General Counsel for Applied Optoelectronics, Inc., he has over thirty years' experience in patent, intellectual property, and general commercial and corporate law. He was founder and Executive Editor of Libertarian Papers, is Director of the Center for the Study of

Innovative Freedom, and was adjunct professor at South Texas College of Law Houston. His libertarian publications include *Property, Freedom, and Society: Essays in Honor of Hans-Hermann Hoppe* (Mises Institute, 2009), *Against Intellectual Property* (Mises Institute, 2008), and numerous articles on the application of libertarian principles to legal topics. His legal publications include *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide*, 2d ed. (Oxford University Press, 2020); *Trademark Practice and Forms* (Oxford/Thomson Reuters, 2001–2013); *Digest of Commercial Laws of the World* (Oxford, 1998–2013); and *Louisiana Civil Law Dictionary* (Quid Pro Books, 2011). He received an LL.M. (international business law) from King's College London, a JD from the Paul M. Hebert Law Center at Louisiana State University, and BS and MS degrees in electrical engineering from LSU. A native of Prairieville,

Louisiana, he lives with his wife, Cindy in Houston, Texas.

Legal Foundations of a Free Society Society is an updated selection of articles published over three decades dealing with a variety of issues in libertarian rights and legal theory, including the nature and foundations of libertarianism, rights and punishment theory, causation and responsibility, contract theory, and intellectual property. The chapters have been significantly revised and updated and integrated with each other with extensive cross-references, and with an extensive bibliography and index.

"... more than 40 years after the first publication of Rothbard's *Ethics of Liberty* and characterized by much practical disappointment and increasing theoretical confusion, the publication of Stephan Kinsella's present work must be considered a most welcome sign of renewed hope and new, refreshing intellectual inspiration. Indeed, with this work, that has been in the making for more than two decades, Kinsella has produced no less than an intellectual landmark, establishing himself as the leading legal theorist and the foremost libertarian thinker of his generation. While following in Rothbard's footsteps, Kinsella's work does not merely rehash what has been said or written before. Rather, having absorbed as well all of the relevant literature that has appeared during the last few decades since Rothbard's passing, Kinsella in the following offers some fresh perspectives and an innovative approach to the age-old quest for justice, and he adds several highly significant refinements and improvements and some centrally important new insights to the theories of personhood, property and contract, most famously some radical criticism and rejection of the idea of 'intellectual property' and 'intellectual property rights.' ... Henceforth, then, all essential studies in the philosophy of law and the field of legal theory will have to take full account of the theories and criticisms expounded by Kinsella."

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