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# Bridging the Use-Ownership Gap: A Reformulation of Hoppe's Argumentation Ethics on Praxeological Grounds

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*ABSTRACT*: Proving the right to own property when it is not possessed has been an enduring problem for Hans-Hermann Hoppe's argumentation ethics. This article argues that Hoppe's theory successfully establishes first users' absolute right to possess property but proposes a reformulation of the theory, premised on arbitration as the chosen means of conflict resolution, which proves the right to ownership. Praxeological analysis of conflict reveals four methods of resolving conflict: deference, transaction, arbitration, and conflict. This article argues that the choice to engage in arbitration presupposes principles which include but go beyond those identified by Hoppe and Stephan Kinsella. From these presuppositions, procedural and substantive principles can be deduced which lay the foundation for an entire body of law that includes basic rules of property law, such as a right of first users to acquire property and a right to own property which persists when the property is not in the owner's possession. Thus, the use-ownership gap is bridged and a right to own property is proved. The article concludes by inviting future scholarship in other areas of law which extends this praxeological analysis based on arbitration as the foundational legal act.

Argumentation ethics (AE) is Hans-Hermann Hoppe's theory of the libertarian conception of property rights that purposes to establish an unassailable foundation for the libertarian private

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property ethic (LPPE), which is the ethic of self-ownership and absolute property rights initially acquired by homesteading (the acquisition of property through first use or possession). Hoppe's theory has received much praise and much criticism. As this article will show, many of the criticisms have been adequately addressed by Stephan Kinsella, Walter Block, Frank Van Dun, and others. In the process of defending AE, Kinsella has refocused the theory on conflict and identified the basis for a praxeological theory of law. However, one objection to AE persists: No one has managed to demonstrate how argumentation presupposes *owning* scarce goods, as opposed to merely *using* them. No one has managed to cross the gap between use and ownership.

This article, which is divided into two sections, proposes a compelling solution to the use-ownership problem in AE. The first section is a review of the state of the literature on AE up to this point. Hoppe's theory is briefly set out, major objections are reviewed, and subsequent responses provided by defenders of AE are considered. It is shown that the only enduring objection is the use-ownership gap. The second section is a reformulation of Hoppe's theory which bridges this gap. It shows both how the logic of AE can be understood as the application of praxeological principles to human conflict and how law emerges from the rules logically implied by arbitration. The article sets out to demonstrate that ownership (as opposed to mere use) is presupposed by the agreement to resolve human conflict by arbitration.

## ARGUMENTATION ETHICS AND ITS RECEPTION

Hoppe's purpose for argumentation ethics was to irrefutably prove the libertarian private property ethic. The LPPE is a normative system characterized by

> untrammeled private property rights, i.e., of the absolute right of self-ownership and the absolute right to homestead unowned resources, of employing them for whatever purpose one sees fit so long as this does not affect the physical integrity of others' likewise appropriated resources, and of entering into any contractual agreement with other property owners that is deemed mutually beneficial. (Hoppe 2006, 407–8)

Compensation for a violation of the rights to self-ownership and property can be understood as second-order rights derived from the rights identified by Hoppe.

The common proofs for the LPPE fall into two schools of thought: natural law theory and utilitarianism. Hoppe developed a third way by grounding the LPPE in the logical presuppositions of the act of argumentation. He argued that any truth statement can be justified only by argumentation and that argumentation as an act presupposes certain principles against which one cannot argue without engaging in a performative contradiction, which is a logical contradiction between the content of a proposition and the act of asserting it. Therefore, the negation of these principles is not merely unjustified but unjustifiable (Hoppe 1988, 20–21).

The crux of Hoppe's argument is proving that the LPPE is logically necessitated by the presuppositions of argumentation. The LPPE consists of ownership of one's own body and a first user's absolute right to control homesteaded property. Hoppe argues that self-ownership is presupposed by argumentation because, being premised on convincing someone else with justifications, the act of arguing is inconsistent with coercive behavior. That is, the very act of convincing and justifying presupposes that the other party is in control of his own thoughts and body such that he can evaluate the arguments (Hoppe 1988, 21–22).

Hoppe claims that argumentation presupposes one's own survival, which requires the appropriation of scarce goods for one's own use. Therefore, he argues, there must be some principle according to which one may appropriate goods. Homesteading, Hoppe argues, is the only principle available because any other principle would require that first users seek the approval of all possible subsequent users, which would be impossible (Hoppe 1988, 21–22). Thus, he finds that argumentation presupposes a right to homestead and own property.

## Critiques and Rebuttals

Hoppe's argumentation ethics elicited praise and criticism alike. On the one hand, Murray Rothbard praised AE for transcending the "is/ought dichotomy" (Rothbard 2010). On the other hand, multiple writers otherwise sympathetic to the conclusions of Hoppe's argument criticized it for failing to prove what it claims. The strongest critiques are persuasively set out in Robert Murphy and Gene Callahan's (2006) paper, which argues that AE proves only that each has a right to his own body parts necessary for argumentation and, even then, only during the course of the

debate. They further argue that AE does not establish rights for third parties and certainly not for individuals, such as babies and comatose patients, who could not participate in the argumentation. Most powerfully, as will be addressed below, Murphy and Callahan (2006, 56, 58–60) argue that Hoppe has failed to establish a right to *own* property as opposed a right to merely *use* it.

Many of the critiques of Hoppe's theory have subsequently been addressed by writers such as Walter Block (2011), Frank Van Dun (n.d.; 2009), and Stephan Kinsella (2002), who have demonstrated that self-ownership must extend to every body part because violence against any body part is inconsistent with the persuasive purpose of argumentation. Kinsella (2002) shows that the act of arguing entails an attempt to justify and persuade, which presupposes the interlocutor's ability to make up his own mind. Because this ability would be limited by any interference with his bodily integrity, this presupposition contradicts any attempt to justify interfering with his body.

Further, Block has addressed the criticism that AE establishes rights for either too few or too many—either including animals or excluding babies, the comatose, and so on. Block notes that this critique of AE simply asks too much because any ethical theory is bound to have hard cases at the margins; Hoppe could not simultaneously explain and argue in favor of AE while also providing comprehensive answers for all the hard cases. However, by establishing a foundation for rights for the easy cases (i.e., healthy adult humans), AE provides a framework for addressing the hard cases (Block 2011, 637).

In responding to criticisms of AE, Kinsella reformulates the theory with an emphasis on property rights as emerging from peaceful conflict resolution. Kinsella's formulation of the theory avoids many of the criticisms levelled at Hoppe by developing the most contentious parts of the argument: those which show how the presuppositions of argumentation necessitate the libertarian private property ethic. Kinsella identifies multiple presuppositions, including universalizability, peace, and objectivity. Then, in the Misesian tradition, he applies the presupposed principles to an observable phenomenon—namely, conflict, which occurs

because of the existence of scarce goods.[1] He then posits that because any norm for conflict resolution can be justified only by argumentation, any norm that conflicts with the previously identified presuppositions is unjustifiable (Kinsella 2002).

Kinsella argues that LPPE is the only system that is consistent with the presuppositions of argumentation because it grants ownership to first users. He states that any other system would make the first user's claim dependent on subsequent users, which would systematically generate conflict (Kinsella 2002). Kinsella's formulation is important because it reveals how Hoppe's AE can be used to establish a foundation for a praxeological theory of law. This possibility will be revisited in the second half of the article.

## The Use-Ownership Gap

An enduring objection to argumentation ethics remains: the theory fails to cross the use-ownership gap. No one has yet explained how the presuppositions of argumentation entail a right to own property. Kinsella (2002) has attempted to demonstrate the validity of ownership by arguing that the existence of conflict necessitates a theory of property (i.e., a system that assigns control of scarce means which are not human bodies). Any other theory, he argues, favors subsequent users over first users. However, Kinsella merely presumes the validity of ownership without considering it apart from a mere right to possess.

Hoppe himself does the same when he states that to argue

> that a late-comer, independent and irrespective of the will of the first possessor of some given thing, should be regarded as its owner entails a performative or dialectic contradiction. Because this would lead to endless conflict rather than eternal peace and hence be contrary to the very purpose of argumentation. (Hoppe 2016)

Hoppe's argument is effective against theories of ownership other than those grounded in acquisition by homesteading, such as theories of communal or state ownership. However, it assumes that items must be *owned* rather than temporarily possessed and used.

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[1] Note that in this use, scarcity refers to the inability of something to be simultaneously employed in various actions. Even in the Garden of Eden, each person's own body would be scarce. Even apples, though abundant, would be scarce insofar as any individual apple cannot be wholly eaten by two different people.

To establish a foundation for the LPPE, one must show that ownership is necessitated by the act of argumentation. Hoppe and Kinsella have shown only that the libertarian principle of homesteading is the only principle of ownership consistent with argumentation. They have not shown why ownership is necessary at all. If there were a right to use but not to own, every first user of property would have an absolute right to use and possess a piece of property until he relinquished physical control of it. Explanation requires first highlighting the distinction between possession, use, and ownership.

Possession is the "fact of having or holding property in one's power; the exercise of dominion over" it.[2] To possess a thing, one must physically control it. To use a thing is to employ it as a means for some action (see Mises 1998, 92). Use entails possession because one must have control over a thing to employ it as a means; however, one may possess a thing and not use it. Ownership is the right to act as the exclusive agenda-setting authority with respect to a thing (Katz 2008, 277–78). From this authority flow the traditional ownership rights of *usus* (the right to use), *fructus* (the right to the fruits of a thing), and *abusus* (the right to dispose of a thing) (Pierre 1997, 253). Ownership also implies the right to possess a thing and the right to exclude others from it. A key distinction between possession and ownership is their temporal characteristics.

As possession refers to physical control over a thing, one has possession only for the duration of one's control. By contrast, ownership is the *rightful* authority over a thing. It is the right to control a thing which endures into the future beyond the times when the thing is actually possessed. For example, if Alice owns a hammer, Alice can lend the hammer to Bob and rightfully demand it back in the future. This future-oriented element of ownership includes making decisions about a thing's future use. For example, a farmer who sows his seeds so that he may return and harvest in the fall is making a decision about the future use of his field.

The definition of ownership as exclusive agenda-setting authority corresponds to Mises's definition of property as "full control of the services that can be derived from a good" (Mises 1998, 678). However, Larissa Katz's (2008, 277–78) definition goes beyond describing the "purely physical relationship of man to

[2] *Black's Law Dictionary*, 11th ed. (2015), s.v. "possession."

the goods" of Mises's (1951, 37) "catallactic" notion of property. Rather, the above definition is a legal concept that relates to the right to exclusive *authority* over a good.

For AE to successfully establish a right to own property, it must establish that one cannot deny the right to ownership—with all its constituent rights, such as to possess, use, dispose of, and control a thing now and into the future—without engaging in a performative contradiction. Hoppe's argument for why the right to own property is established by AE is that

> it would be equally impossible to sustain argumentation for any length of time and rely on the propositional force of one's arguments if one were not allowed to appropriate in addition to one's body other scarce means through homesteading action (by putting them to use before somebody else does), and if such means and the rights of exclusive control regarding them were not defined in objective physical terms.
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> Moreover, if a person did not acquire the right of exclusive control over such goods by homesteading action, i.e., by establishing an objective link between a particular person and a particular scarce resource before anybody else had done so, but if instead late-comers were assumed to have ownership claims to goods, then no one would be allowed to do anything with anything as one would have to have all of the late-comers' consent prior to ever doing what one wanted to do. (Hoppe 2006, 342–43)

Hoppe's first point is that humans need other goods to sustain themselves and so must have some way of legitimately using those things. His second point takes this further by showing why a system that favors ownership by some hypothetical late-comer is unreasonable. However, his points do not address an ethical system where every person has the right to use something which is not being presently used but where this right extinguishes upon their relinquishing actual possession of the object. Such a system may be criticized as being impractical or naïve, but responses of this nature step outside of the a priori frame of AE, which is what gives AE its claim to an "ultimate" justification of private property (Hoppe 2006, 339). The problem with Hoppe's argument stems from implicitly charging the term "late-comer" with existing norms of private property ownership.

To illustrate the norms implied in the term, suppose that Alice builds a house and inhabits it. Now suppose that Alice goes on a trip and while she is gone Bob moves into the house. Upon her return Alice is angered and demands that Bob leave. Is it really true that Bob could not justify his possession without engaging

in a performative contradiction? Bob could argue that there is no right to own a thing; Alice left, and Bob became the new possessor. Now, Alice is the second user and the one generating conflict.

The characterization of Bob as a "late-comer" implies that Alice retains a lasting right to control the house. From the point of view of an ethic that denies ownership, Bob was a new "first-comer," and Alice, upon her return, became the "late-comer." Hoppe's arguments fail to refute this contrary ethic. An ethic of a right to use an object satisfies the conditions identified by Hoppe and Kinsella of (1) assigning rights so as to eliminate conflict; (2) providing a mechanism for the legitimate use of scarce goods; and (3) providing an objective link between particular persons and particular resources. Such an ethic is, however, a far cry from the libertarian private property ethic.

Consider the argument of Marian Eabrasu in defense of AE. To refute Murphy and Callahan's (2006) argument that AE leads to the conclusion that each person has a right to own land on which to stand to make an argument, Eabrasu argues that there is no right to land ownership, because land, unlike a body, can be lent for the purpose of argument (Eabrasu 2009, 23–24). However, this is precisely why AE fails to establish ownership of any property that is not one's own body. One needs to use property but not to own it; there is no performative contradiction in denying ownership wholesale.

Note that this problem does not arise with respect to one's authority over oneself. As explained above, the persuasive purpose of argumentation presupposes that each interlocutor is capable of making up his own mind (Hoppe 2016; Kinsella 2002). Any actions which interfere with the ability of each person to control his own body violate that presupposition. The ethic against interfering with another's person is sufficient to establish libertarian conceptions of one's rights over one's own body; the use-ownership gap arises when extending the logic of AE to external things. The difference between the application of AE to persons and its application to things mirrors the traditional legal distinction between rights over one's one person and rights over property. For example, the Napoleonic Code and its modern derivatives, such as the Civil Code of Québec, treat the rights of the person and of property as distinct areas of law (see *Code Napoleon* 1827, bks. 1 and 2; Civil Code of Québec, CQLR c. CCQ-1991, bks. 1 and 4 (Can.)).

In order to fully demonstrate that AE establishes an irrefutable foundation for libertarian property rights, one must prove that the act of argumentation entails a right to own property beyond its mere use. This is the task of the next section.

## ARBITRATION AS THE BASIS FOR LAW

The following is a reformulation of the theory of argumentation ethics, grounded in a praxeological analysis of conflict, which builds on the work of Hoppe and Kinsella and provides the framework to bridge the use-ownership gap. The Austrian economists devised an entire body of economic thought by developing praxeological principles and applying them to transactions. This argument will show that an entire body of law can be derived by using the analytical lens of praxeology to study conflict (see also Graf 2011).

The starting point of the analysis (and praxeology as a whole) is the axiom of action: humans act. From this axiom further principles can be deduced. Actions use means to achieve ends. Means are scarce[3] and ends are infinite,[4] so acting man is forced to make choices about how to employ scarce means to achieve his highest-priority ends. Conflict becomes a praxeological possibility once two humans are close enough to affect each other. Because means are scarce, their employment in one course of action excludes other courses of action. Conflict results when two people both try to employ the same means (Kinsella 2002)—for example, when Alice and Bob each try to build a house in the same location. When conflict arises, there are four potential responses.

### The Four Methods of Conflict Resolution

The first possible response is deference. This is when one party recognizes the other's course of action and simply changes course. Alice sees that Bob would like to build his house in the same place she would like to, and so, to avoid the conflict, she lets him. Anybody who has ever let a stranger go through the elevator doors first has experienced a conflict resolved by deference. Deference

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[3] Means are scarce by definition. If something is not scarce (see note 1), such as air, then it is merely a general condition of human welfare.

[4] Were it not so, it would be conceivable that one could achieve all of his ends and no longer have a purpose for action. The infinite nature of the list of ends is implied in the axiom of action.

occurs when one party values avoiding the conflict more than he values the contested good. When this is not the case, one of the other three methods must be resorted to.

Second, conflict can be resolved through transaction. Alice sees that Bob would like to build his house in the same spot and so offers him a horse to convince him to leave and let her have the spot. Transaction can be understood as a form of incentivized deference. However, such a resolution is not always possible. Whether the parties can arrive at a deal will depend on their respective value hierarchies. If each party values the contested good more than anything the other party is willing to offer, a mutually satisfactory deal will be impossible. Deference and transaction are the two ways the parties can voluntarily resolve the conflict between themselves.

Arbitration is the third potential method of conflict resolution. Even where a voluntary agreement cannot be reached between the parties, there is often plenty of motivation to resolve the conflict without resort to force (in practice, violence is undesirable for a number of reasons). If the parties cannot agree about how to employ the means, they can agree to let someone else decide. Alice and Bob can bring in Charlie to choose who gets the coveted plot of land.

The fourth possible way to resolve conflict is by force. Indeed, if one of the other methods is not used, the use of force is the inevitable resolution. Due to the impossibility of both individuals' employing the same means toward their respective ends, conflict *must* resolve some way. If Alice and Bob both insist on building their houses in the same spot, they will be on a collision course. If neither defers to the other, a transaction is not reached, and they reject arbitration, their collision course will inevitably result in the two physically coming into contact with each other. They will have to fight it out. This could include all uses of force or threats thereof.

## The Presuppositions of Arbitration

Analysis of arbitration as a chosen means of conflict resolution reveals principles which can form the foundation of a theory of law and the libertarian private property ethic. Arbitration is an act: it involves the use of means to achieve an end—namely, the resolution of the conflict. It carries with it presuppositions which are necessarily implied in the act of arbitration.

First, the choice to arbitrate presupposes that one is not choosing to use the other methods to resolve the conflict. Because both parties "demonstrate that they seek a peaceful . . . resolution" to their dispute (Hoppe 2016), any resort to violence, force, or preference for the more powerful party is at odds with the concept of arbitration. Likewise, arbitration is not a transaction, and so it is presupposed that the arbitrator's role is not to find some sort of a compromise position. He must adjudicate between the parties' claims.

Second, arbitration must be impartial. This is implied in the parties' agreement to let the third party decide. By the very choice of agreeing to arbitration, each party implicitly expects to get a fair shot. This is inconsistent with an arbitrator who makes his decision for any personal vested interest, whether it is his preference for one party, an expectation of receiving some gain, or a personally held ideological opinion. No one would agree to use an explicitly partial arbitrator. When an arbitrator acts partially, he steps outside the bounds of the agreed method of resolution.

Third, arbitration presupposes objectivity; this is implied by the principle of impartiality. If the arbitrator is not to decide based on some personal interest, he must still base his decision on *something*. The very act of resorting to an impartial third party implies that the parties will have to justify their claims based on objective facts and objective principles. Here, "objective" simply means "intersubjectively verifiable." Facts and principles cannot be privately held in the mind of one of the parties but must be ascertainable to an impartial third party.

Fourth, arbitration presupposes adjudication between the parties to the arbitration *and between the parties only*. This is implied by the nature of arbitration as a choice made by the parties to resolve the conflict between them; resort to the decision of another is a means to that end. The arbitrator's job is to resolve the conflict by deciding which of the parties has the better claim. This presupposition would be contravened if the arbitrator were to draw in external interests. Alice and Bob agree to let Charlie decide who gets to build the house. They do not agree to let Charlie decide that any nonparty has the best claim.

Note that the foregoing presuppositions are all generally accepted elements of any legal system that operates fairly (sometimes referred to in law as natural justice; Vancise 1984, 1). The purpose of the previous four paragraphs is simply to show

that these principles are presupposed by the act of arbitration itself. However, these are merely procedural principles: they say *how* one must arrive at a decision but provide no guidance on *what* that decision ought to be. An impartial arbitrator would need to apply a body of objective principles to the facts of the case, and those objective principles would need to include substantive rules to guide who ought to prevail in various kinds of disputes.

These objective, substantive principles are also presupposed by the act of arbitration. They can be derived from the metaprinciple, presupposed by the act of arbitrating, that any substantive principle resorted to must be conflict resolving, not conflict generating (Kinsella 2002). That is not to say that an arbitrator is to try to predict which rules would create the most social harmony. An arbitrator can't be expected to have the data to make such a prediction, and in any event, such a prediction would be open to reasonable disagreement. Rather, any principle relied on by the arbitrator must not generate conflict a priori.

## "First in Time, Better in Right" as a Foundational Legal Principle

This means that an arbitrator has to give preference to the claims of first users over those of any subsequent user. Any conceivable principle of arbitration must either favor the first user or not (i.e., it could favor subsequent users for any of a number of conceivable reasons). Any principle that does not favor the first user would be conflict generating a priori because conflict occurs between individuals—it requires at least two parties. Where there is only one person, there can be no conflict. Conflict only arises when a second user makes a claim to the possession of the first (Kinsella 2002).

Any principle which does not favor first users renders claims subject to potential subsequent users who can argue a better standing on the basis of that principle (e.g., greater need, more august nobility, more virtuous intentions). This opens every claim of possession and ownership to future conflict and arbitration (Hoppe 2016). By contrast, when the first user is favored, arbitration settles the issue. Once the first user is determined and found to have a better claim than the second user, any potential claims of third and fourth users are defeated before they begin. Charlie's arbitration would not only settle the dispute between Alice and Bob but foreclose potential claims by Dan and Emily.

As with the procedural principles, the substantive principle that arbitration ought to favor the first user already exists in law as the principle "first in time, better in right" (Berger 1985, 350).[5] This article's argument departs from classical legal theory in two respects. First, it shows that the principle can be deduced from the praxeological analysis of conflict and arbitration. Second, it elevates the importance of the rule. Whereas the legal tradition treats "first in time, better in right" as one among many principles of property law, the following demonstrates that it can be a foundational principle of an entire body of law deduced praxeologically.

Substantive legal principles would guide the arbitrator in resolving conflict by assigning control of scarce means. Arbitration presupposes conflict, which presupposes scarce means. The role of the arbitrator is to decide who gets to use and control the means which are the subject of conflict. Law is the body of principles by which the arbitrator does so. Therefore, a complete legal system would have to, at least in theory, assign a rightful user/controller for all things (see also Hoppe 2016).

Further, consider that every thing must belong to one of two praxeological categories: things that act and things that do not. Acting agents can be called "persons," and everything else, "objects." Every person is necessarily a first user of his own body, and so each person is the rightful controller of his own body. Thus, everyone has the right to make decisions about his own body. This is not so because of a temporal arrival; rather, it follows from the inherent connection between the agent that acts and his body, which is the subject of the action.

This right, however, extends only as far as the person's own body. In practice, every action one performs with one's own body engages other things (be they persons or objects) and so requires the voluntary consent of the rightful controller of any thing employed in the act. For example, Alice controls her body and may choose whom to kiss. However, that right does not mean she can unilaterally choose to kiss Bob. The action uses his body as well and so requires both of their consent.

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[5] The Latin maxim is *qui prior est tempore, potior est jure*. It can be translated as "who is first in time is first in right," "who is first in time is stronger in right," or, as above, "who is first in time is better in right."

The principles of property law can be derived through the application of this analysis to objects (read: nonacting things). Objects are rightfully under the control of the first person to use them in an objectively verifiable way (Kinsella 2002). Once under someone's control, an object can be used in whatever way the person chooses so long as it is consistent with the voluntary agreement of those who control any other thing employed in the action. A person who controls an object can decide how the object is to be used, including excluding others from using it and determining how the thing is to be disposed of. If Alice controls the house, she may choose to tear it down, and Bob has no right to stop her. The right to dispose of a thing includes not only the right to destroy it but also the right to abandon it, thereby relinquishing the right to control it. A logical corollary of the right to dispose of a thing would include the right to transfer it (i.e., relinquish control to another).

The principle of "first in time, better in right" favors first users whose claim is objectively verifiable. A rule favoring first users both ensures an objective connection between owners and property and is more consistent with the praxeological nature of the argument. That said, one could argue that a principle favoring first possessors (the first to bring an object within their control) would be equally consistent with the presuppositions of arbitration. It is a worthy debate to be had, but its result does not help or hurt the validity of the overall argument made in this article. All that is required by the presuppositions of arbitration is that the appropriating act be objective, which means that declarations would be insufficient.

The theory posed by this article would exclude certain legal mechanisms of appropriation which currently exist in private law systems. First, adverse possession (or the similar civil law principle of usucapion) must be rejected. Adverse possession is the doctrine whereby a person who uses the property of another without permission can, after sufficient time, acquire title to the property.[6] This rule favors subsequent users and, for all the reasons above, is inconsistent with the presuppositions of arbitration. Likewise, the *ad coelum* doctrine, which holds that the owner of a plot of land owns the vertical column of space extending down from it to hell and up from it to heaven,[7] must be excluded. The appropriation of

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[6] *Black's Law Dictionary*, 11th ed. (2015), s.v. "adverse possession."

[7] *Black's Law Dictionary*, 11th ed. (2015), s.v. "*ad coelum* doctrine."

property by an individual is dependent on an objective connection; such a connection does not exist with respect to the air at thirty thousand feet above land, which is neither used nor controlled by such a person.

By contrast, accession is consistent with the presuppositions of arbitration. Accession is the doctrine that once an object becomes attached to some other object, it ceases to have an independent legal identity.[8] For example, if Alice's tree is mistakenly planted on Bob's land, it becomes a part of Bob's land and therefore his property. This is consistent with arbitration because it can be argued without creating a principle that favors subsequent users. In the case of the tree, the argument is not that Bob has a better claim to the tree but rather that the tree is no longer an independent object capable of being owned. It cannot be used separately from the land, and so the tree and the land become one piece of property. The presuppositions of arbitration may carry implications for accession that are different from its common law or civil law rules, but such analysis is beyond the scope of this article.

## A Praxeological Legal Theory That Justifies Ownership

Hoppe's theory of argumentation ethics proves as much as the foregoing much more elegantly. However, Hoppe and his supporters have been unable to cross the use-ownership gap. This praxeological legal theory provides the framework for understanding how ownership is logically implied by the act of arbitration. Fleshing out the framework requires turning to the foundational principles of praxeology.

One tenet of praxeology is that all action takes place in time. Because the flow of time as experienced by humans is asymmetrical in that there is a definite and receding past and a potential, indefinite, and approaching future, all action is future oriented. Since ends, by definition, are not currently satisfied, action aims to satisfy them in the future. Mises writes that "the idea of time is a praxeological category. Action is always directed toward the future; it is essentially and necessarily always to render the future conditions more satisfactory than they would be without the interference of action" (Mises 1998, 99–101).

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[8] *Black's Law Dictionary*, 11th ed. (2015), s.v. "accession."

Action is rational in that it is directed to an end. If time is a praxeological category, then acting man can act with respect to a thing's future. For example, the act of farming land to grow produce is not the simple act of tilling the soil and sowing seed in the present. Rather, it includes the anticipated process of watering, tending, and then harvesting the crops. However, in the absence of the anticipated harvest, sowing seeds becomes divorced from its end—it becomes irrational. Therefore, when Alice chooses to grow produce, she is deciding not only how to use the land in the present (i.e., to till and sow) but also how to use it in the future.

Once it is recognized that the future use of an object can be understood praxeologically, the question that follows is whether that future use can be the subject of control. If so, it forms the basis for ownership. If not, there is only a right to use a thing presently in one's possession.

When the question is approached from the perspective of an arbitrator, the answer must be that the future use of an object *can* be the subject of control. To conclude otherwise would be to say that individuals are barred from exercising control over a potential use of an object, which is inconsistent with arbitration as an act of adjudication *between the parties*. Every decision must favor one party over another. If one party is excluded from the use of some object, this exclusion must be premised on another's right to exclude: exclusion requires an excluder. Denying the possibility of control of the future use of an object places future use outside the realm of legitimate human action (see also Kant 2017, 45–46). It excludes everyone without giving anyone the right to exclude.

Returning to the example of Alice's house, suppose that Alice leaves on vacation and returns to find that Bob has taken over her house. Suppose further that Alice and Bob choose arbitration to settle their dispute. Alice argues that she was the first user and so has the better right. Suppose that Bob responds that Alice relinquished her right when she left and that she became the second user upon her return from vacation. There are other arguments Bob could make. For example, he could argue that Alice abandoned the house, but abandonment is consistent with a theory of ownership; one must own something in order to be able to abandon it.

But in order to show that arbitration implies substantive rights to own property, it must be shown that Bob (or anyone) could not deny them in the course of an arbitrated dispute without

performatively contradicting any presuppositions implied by the act of arbitration. To make the argument that Alice did not have a right to own the house, Bob would have to deny that Alice had a right to choose to exclude people from the house until her return. That is, he would have to deny the possibility of legitimate control of the future of the house. As demonstrated above, this denial excludes Alice from controlling the future use of the house without granting anyone else that right to exclude anyone. It places the future use of the house outside the realm of human action without any justification. Therefore, Bob's argument would fail, and Alice would win her claim to not only use the house but own it.

Two objections that may be made against the above argument pertain to its connection to AE: (1) that it has nothing to do with AE or (2) that it does nothing but restate AE in a different format.

With respect to the first objection, the above argument is an extension of the basic logic of AE. First, argumentation is a category of action. The argument of this article is focused on arbitration, which is a subset of argumentation. Second, the overall nature of the argument is the same as that of AE. Both AE and this article's argument function by arguing that the nature of a given activity (argumentation in AE and arbitration in this article) creates substantive limits on positions that can be taken. Third, this article relies on AE (as articulated by both Hoppe and Kinsella) for the ideas that law arises from scarcity-caused conflict, that rules which favor subsequent users are conflict generating, and that engaging in arbitration or argumentation is premised on a desire for peaceful conflict resolution.

With respect to the second objection, the argument of this article attempts to go further than AE by focusing on arbitration. Arbitration involves argumentation, but it is a more specific kind of activity. Because it is more specific, arbitration entails further presuppositions. Specifically, arbitration, unlike argumentation in general, is concerned with allocating control of goods. The act of allocating control of goods presupposes that all goods may be controlled by someone. This is the crux of the argument that future use may not be excluded and so ownership cannot be reasonably denied in the course of arbitration. This principle is not presupposed by argumentation in general. As argued by Hoppe, argumentation merely requires that people may appropriate resources in order to survive to argue (Hoppe 2006, 342–43). As shown in the first

section of the article, there is no reason why people cannot use goods while denying ownership rights. Accordingly, ownership in the fullest sense is entailed by arbitration but not by argumentation more generally.

## CONCLUSION

This article has reviewed both Hoppe's case for the libertarian private property ethic based on argumentation ethics and the ensuing debate about argumentation ethics, showing that Hoppe and Kinsella have successfully defended argumentation ethics against all criticisms except one: that it cannot cross the use-ownership gap.

This article has made a case for a modified framework of argumentation ethics premised on a praxeological analysis of conflict, specifically arbitration as a fundamental category of responses to conflict. Arbitration is an act which presupposes a set of principles which form the foundation for a body of law. This article has applied these principles to establish the basis for a body of property law consistent with the libertarian private property ethic and has shown why this framework is capable of bridging the use-ownership gap.

This article is an invitation for further praxeological legal analysis. There is room for additional study building upon this foundation to articulate more property law concepts and to expand the study into other fields of law, such as tort and contract.

The praxeological study of arbitration unifies two important fields of study for libertarians: economics and law. While praxeology has traditionally been used to study economics, its application to the law is a relatively undeveloped field. The two fields have a competitive yet synergistic relationship among libertarians. On the one hand, there is a fundamental disagreement about what founds libertarian principles: is it natural law or utilitarian efficiency understood by economics? On the other hand, economics and law provide two powerful reasons why libertarian principles are preferable to other forms of social organization.

The framework set out above shows that both economics and legal principles can be understood as praxeological studies applied in different directions. When the study of praxeology is applied to voluntary transactions, the principles of economics can be derived.

When, on the other hand, the lens of praxeology is applied to resolving conflict through arbitration, the principles of private law can be derived.

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