ACTION-BASED JURISPRUDENCE: PRAXEOLOGICAL LEGAL THEORY IN RELATION TO ECONOMIC THEORY, ETHICS, AND LEGAL PRACTICE

KONRAD GRAF*

THEORIZING ABOUT LAW and legal concepts falls under the field of jurisprudence, as do certain aspects of the assessment of legal institutions, procedures, and processes. Theorists in this field are typically described as working within various schools of thought, principally: natural law, legal positivism, legal realism, and critical legal studies. An alternative to these schools has been emerging, built on the field of praxeology, which addresses the formal concept of action and its deducible implications.

In this praxeological school of jurisprudence, legal-theory concepts deductively derived from the concept of action interact with interpretive institutional and contextual awareness and a respect for the theory/practice distinction. While aspects of the foundations of deductive legal theory and its general conclusions are related to traditional natural law approaches and might also be viewed as an extension of them, the praxeological approach is distinct in that its logical foundations overcome important weaknesses in previous natural law formulations.

Ludwig von Mises and his student Murray N. Rothbard identified praxeology as the foundation of sound economic theory. They reformulated

*Konrad Graf (konradsgraf@googlemail.com) has been studying Austrian economics, law, philosophy, and history, largely under his own direction, since 1988. He has lived in the US, India, Japan, and now Germany. He works as an independent Japanese-to-English translator specialized in investment research.

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economic theory by grounding it in praxeology.[1] They contributed their own insights to economic theory, while incorporating a vast body of existing economic theories and concepts into the new praxeological synthesis. Praxeology was a criterion for sorting the sound from the unsound. As George Selgin comments:

> …Mises would have insisted that all of the lasting discoveries of the classical and neoclassical economists in the realm of pure theory were in fact results of the method described by praxeology; but this was by no means the *acknowledged* procedure of those schools of thought. (1990, 15)

Mises thought sound economic theory was so dependent on praxeology that he described economics as a branch within it. I argue that elements of the rationalist jurisprudence that has been developing within praxeologically informed "Austro-libertarian" thought comprise a branch of praxeology in the same sense that Mises identified economics as one. This praxeological action-based framework can be used to evaluate, filter, and refine the world's inherited body of legal concepts and traditions. Action and its formal implications emerge as an essential foundation for sound legal theorizing.

The complexity and implications of this topic require a substantial treatment, which has been developed in four parts:

Part I, "Foundations: An Extended Model of Praxeology," makes the primary theoretical arguments. It develops criteria for distinguishing fields that can be considered within, versus merely influenced by, praxeology. It specifies the reformulations that enable the placement of property theory and legal theory within praxeology and examines relevant philosophical issues concerning the foundations of property theory. It reexamines the is/ought gap with regard to the a priori of argumentation and the non-aggression principle. It also asks whether elements of other fields such as sociology and political theory could be considered branches of praxeology and discusses the place within praxeological thought of using discrete fields in combination.

Part II, "Action: Praxeological Legal Reasoning," provides examples of using praxeology to examine and reformulate legal concepts. These are based on themes and examples from the recent Mises Academy course, "Libertarian Legal Theory: Property, Conflict, and Society," taught by attorney and legal scholar Stephan Kinsella, a leading theorist in this field.[2] This section

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[1] Mises [1949] 1998 and Rothbard [1962, 1970] 2004.

[2] The inception of this project owes much to my participation in this course (*Mises Academy*. PP300. January 31—March 11, 2011), which gave me leads and stimulated new thinking, forming the core content for what became Part II, which then formed the basis

illustrates the use of praxeology in the reformulation of key legal-theory concepts and the analysis of legal-theory controversies, with a particular focus on the distinction between rights and actions.

Part III, "Practice: The Armchair and the Bench," discusses the importance of distinguishing legal theory from legal practice. Deductive legal theory is viewed as the application of praxeological reasoning, with legal practice as an application of contextualized understanding, or "thymology" as Mises called it. Legal practice is a form of action taken in specific times and places by specific persons, while legal theory is one of several bodies of knowledge that informs such action. This section suggests correlations between models from several theorists of both economics and law. It concludes with a suggested multi-angled approach to imagining the possible institutional forms of a society with higher degrees of peace and cooperative possibilities, which more precise legal principles would enable. This approach interweaves distinct "deductive," "observational," and "entrepreneurial" perspectives.

Part IV, "Ethics: Disentangling Law and Morality," makes a case for removing legal theory from its loose historically evolved association with ethics, viewed as a field that addresses "ought" questions, or the selection of ends in action. It discusses factors—particularly the development of law within religious intellectual and institutional contexts—that have contributed to legal theory's historical placement and associations with morality. It also examines historical and present-day factors contributing to the evolution of confused conventional formulations of economic and legal concepts. Such factors inhibit the kind of clear thinking in law and economics that could challenge status quo practices and beliefs. It argues that a praxeological approach to jurisprudence is positioned to supply such clear thinking, just as the praxeological approach to economics—causal-realist, counterfactual, deductive economic theory—has done, most famously under the label "Austrian" economics. It also further clarifies the foundations of the rights theory presented in Part I by discussing whether such rights could apply to non-human species.

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for additional integrations with my past studies after the course. My participation in Kinsella's subsequent course, "Social Theory of Hoppe" (*Mises Academy*. PP750. July 1—August 21, 2011), which started while I was working on the second draft after helpful double-blind reviewer feedback, raised additional subtleties with regard to Professor Hoppe's contributions, which aided me in refining Part I's discussion of the a priori of argumentation and property theory.

Part I

Foundations: An Extended Model of Praxeology

A branch without other branches?

An enduring puzzle facing readers of Ludwig von Mises is his view, stated for example in *Human Action* (1998, 3) that economics is the "hitherto best-elaborated part" of praxeology. Nearly 900 pages of economic theory follow, leaving no doubt as to the dominant initial position of economics as a branch. Rothbard speculates about the possibility of other "sub-divisions" of praxeology in *Man, Economy, and State* (2004, 72–74). He distinguishes "praxeology and economics" from other fields such as ethics, psychology, and history. This is based on praxeology's categorical interest in means and ends as such without reference to any particular means or end.[3]

However, such accounts of "praxeology and economics" leave little space for a sphere of content for praxeology to call its own, independent of economics. Rothbard writes that, "With praxeology as the general, formal theory of human action, economics includes the analysis of the action of an isolated individual (Crusoe economics)…" (74). While the proposed distinction appears to be between "general and formal" and greater specificity, this sentence could generate confusion because "Crusoe economics" is a fictional device to explain the most fundamental concepts of praxeology itself—from ends and means to production to time-preference. Rothbard's comment comes at the end of the chapter called "Fundamentals of Human Action," which uses Crusoe to explain the most fundamental praxeological concepts. This could leave the impression that "economics," as represented by "Crusoe economics," has on day one moved in to occupy all of the identifiable territory in this new land of praxeology, taking as its own any and all content that might otherwise be assigned to a core of praxeology itself—an independent core that could be shared with other possible "branches" or "sub-divisions" besides economics.

Unsurprisingly, economics has remained the dominant branch of praxeology decades later, and only a few writers have speculated on what other branches might be. Kinsella (2006b) raised this question and linked to previous references on it. He concluded with a possible direction for further inquiry: "[It is] interesting how Rothbard talks about possible extensions of

[3] This is similar to the distinction between laws and facts drawn in Hülsmann 2003, 59–60. Facts are particularistic; laws universalizable.

praxeology as well as "axiomatics," the logical-deductive approach of Hoppe that is compatible with, if not a type of, praxeology."

The body of thought that I argue comprises praxeological legal theory and its pre-branching underpinnings has thus far been most specifically labeled "Austro-libertarian legal theory." This is commonly understood as legal theory informed by the basic principles of Austrian economics. One may include here several works by Rothbard (2002; 2004), Hoppe (2006; 2010), Jörg Guido Hülsmann (2004; 2008), much of the work of Kinsella (1996a; 1996b; 2003; etc.), and Kinsella and Tinsely 2004. A landmark in discussions of the relationship between praxeology, economics, and legal theory was the March 29–30, 2001 symposium on "Austrian Law and Economics: The Contributions of Rothbard and Reinach," papers originating from which appeared in the Winter 2004 *Quarterly Journal of Austrian Economics*.

Separately, Josef Sima (2004) argued that Austrian school economists from Carl Menger to Rothbard predate or surpass the useful insights normally attributed to conventional versions of "law and economics." Kinsella, in a post on "intellectual property" law, reiterated the call for legal theorizing informed by praxeology to replace conventional law and economics:

> This analysis is a good example of the necessity of Austrian economics—in particular, praxeology—in legal and libertarian theorizing… We must supplant the confused "Law and Economics" movement with "Law and Austrian Economics." (2010a, np)

Rather than advocating a model of "Austrian law and economics" to replace conventional law and economics, I suggest a model of a single field of praxeology, capable of examining the phenomena of human action using both "economic" and "legal" lenses. These lenses are perspectives from which to view different *aspects* of unitary phenomena[4] such as "exchange," "theft," or "the division of labor."

Kinsella and Patrick Tinsley (2004, 97) suggest just how tight the link between legal theory and praxeology might be:

> 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 consent—it can be successfully prohibited only if the law is based

[4] This approach is loosely informed by the integral methodological pluralism and integral multiple-perspectivalism advanced by the philosopher Ken Wilber. One relatively concise account of these models is in Wilber 2006, 1–49. I also summarize and apply aspects of these models below.

> on a sound understanding of the nature of human action more generally.
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> 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…Praxeology is central to Austrian economics…However, other disciplines can benefit from the insights of praxeology. Hans-Hermann Hoppe has already extended praxeology to the field of political ethics (Hoppe 2010, Chapter 7). The related discipline of legal theory, which also concerns ethical implications of human action, can also benefit from the insights of praxeology.

I argue that the implications go further. Deductive legal theory, like deductive economic theory, is so dependent on praxeology for both method and content that it is not only informed by praxeology, but qualifies as a branch. Moreover, while legal theory may indeed have ethical *implications*, it is not itself a component of ethics viewed as an "ought" field, but rather functions in a technical-advisory role in ethical considerations, understood as involving the selection of ends.

The principles often described as useful in legal theorizing are not so much those of "Austrian economics," but rather a core of praxeological methodology and content that *also* underpins economics in the Misesian tradition. Larry Sechrest also approaches the view advanced here. He claims that, "Praxeology can indeed serve as the analytical framework for both economic theory and legal theory" (2004, 21). He also points to a confusing lack of definition between praxeology and economics, reiterating that it is the former that is the science of human action itself (24), and which can provide a foundation for legal, as well as economic reasoning.

Other fields—Influenced by or part of praxeology?

What criteria can help us distinguish a *branch of* praxeology from a field merely *informed by* it? The a priori of argumentation will play a key role in the model advanced here as a praxeological foundation for property rights theory.[5] A look at the range of the implications of the a priori of argumentation (APoA) will help us develop criteria for including/excluding fields as branches.[6]

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[5] Hoppe [1993] 2006; [1989] 2010.

[6] The theory is also sometimes called argumentation "ethics," yet it takes the form of axiomatic-deductive statements. This poses a challenge to traditional categories. Given the descriptive "is" statement emphasis, I prefer the term the a prior of argumentation

In "On Praxeology and the Praxeological Foundation of Epistemology" (2006, Chapter 9), Hoppe argues for an action-based epistemology, with knowing viewed as an *act* of knowing.[7] Hoppe argues that even physics and geometry have praxeological underpinnings that often go unrecognized:

> Spatial knowledge is also included in the meaning of action. Action is the employment of a physical body in space. Without acting there could be no knowledge of spatial relations and no measurements…these norms [of measurement actions] and normative implications cannot be falsified by the result of any empirical measurement. On the contrary their cognitive validity is substantiated by the fact that it is they that make physical measurements in space possible. Any actual measurement must already presuppose the validity of the norms leading to the construction of one's measurement standards. (2006, 288)[8]

Geometry, physics, and epistemology may indeed also have action underpinnings. Does this qualify them as branches *of* praxeology? How can this question be addressed?

The distinction lies in the centrality of the formal implications of human action to the *content* that a given field addresses. Geometry, physics, and epistemology may have praxeological underpinnings, but economic and legal theory have such underpinnings *and* set out to focus on the analysis of human action *as their subject matter*.

What about other social sciences? Do they not also have much to do with human action, and property, as subject matter?

Hoppe writes that, "Next to the concept of action, *property* is the most basic category in the social sciences" (2010, 18). However, the "social sciences" are many and include economics and law as well as sociology, politics, management, much of psychology, organizational theory, and

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rather than formulations that include the word "ethics." These issues are addressed further below.

[7] Hoppe's first doctoral dissertation, in philosophy, (1976), already forwarded an action-based epistemology.

[8] Pointed out with related links in Kinsella 2009b. Hülsmann also discusses the praxeological, counterfactual-law underpinnings of even natural-science experiments, which assume, generally without acknowledgement, the purely deductive counterfactual proposition that empirically observed experimental phenomena *would not have occurred* had the experiment not been conducted, a proposition that is not "testable" in purely positivistic terms because the experiment in question in every case *was* conducted (2003, 87–88).

history. Hoppe is careful to distinguish between praxeology and sociology and history, describing the latter two as more interpretive in, for example, a discussion of taxation:

> Why is there taxation; and why is there always more of it? Answering such questions is not the task of economic theory but of praxeologically informed and constrained sociological or historical interpretations and reconstructions, and from the very outset much more room for speculation in this field of intellectual inquiry exists. (2006, 33)

Sociology appears in this account not as a branch of praxeology, but as a field that can be usefully informed by it. It falls more on the interpretive and historical "thymological" side of Mises's field divide,[9] though it can certainly benefit from being praxeological informed. That said, sociologist Helmut Schoeck's treatise *Envy: A Theory of Social Behavior* undertakes sociological investigations that are unusually insightful in terms of economic analysis and implications. Such work could provide leads toward developing greater clarity between possible praxeological and interpretive elements within a sociology so conceived.[10]

Mises himself originally used the word sociology for some of his work, but had to conclude that the word had already been taken. "Throughout the 1920s, [Mises] had used the word 'sociology,' but by the early 1930s he had to acknowledge that most other social scientists had come to understand something completely different by the term…an alternative social science—one that did not integrate the tenets of economics" (Hülsmann 2007, 720).

Is there another "political" branch of praxeology? What about the analysis of voting or war, as have been suggested?[11]

In *Power and Market*, Rothbard discusses the impact of the behaviors of states on the voluntary order of society. This could be described as a praxeological theory of political intervention. Such reasoning could be considered an extension or sub-category of legal theory. However, while Rothbard's analysis emphasizes states, he also points out that it is not exclusive to them:

> Our major task in this volume is to analyze the effects of various types of violent intervention in society and, especially, in the market. Most of our examples will deal with the State, since the State is

[9] Mises 2007, 266.

[10] Schoeck [1966] 1987, for example, 363–64.

[11] See discussion and links at Kinsella 2006b.

> uniquely the agency engaged in regularized violence on a large scale. (1057)

Hülsmann (2004) also portrays organized expropriations as extensions of the general case of individual rights infringements: "Fiat appropriation can occur without following a general rule, but it can also be institutionalized. The most important example of institutionalized fiat appropriation is the modern State, which relies in fact on two such institutions: taxation and fiat money" (59). He goes on to note that institutionalized cases present additional negative implications because people adjust expectations and plans more to systematic, reliable expropriations than to sporadic criminal acts.

Political theory, including the analysis of voting, might be viewed as a sub-branch of the law of tort. A "law of mass torts" could cover large-scale damage claims. These could include not only cases such as environmental pollution, but also the systematic, organized infringement of rights on scales normally only achievable by state actors. Moreover, states practicing the most systematic aggression against their own people have also presided over notorious cases of environmental pollution, such as the environmental catastrophes that came to light after the collapse of the Soviet Union (Hill 1992), and both systematic state-style aggression and environmental pollution would fall under the law of mass torts.

Root and trunk

Having discussed inclusion/exclusion criteria for branches of praxeology, we return to the relationship between praxeology and its economic and proposed legal theory branches. If deductive legal theory and economic theory stand side by side as sibling branches within praxeology and share a set of fundamentals, what are those fundamentals? What is a branch; what is the trunk; and what are the roots?

Given the tight association of praxeology with Austrian economics and the latter's decades-long de facto status as the sole branch, some room must be made for the long-lost sibling. How can economic theory be defined in relation to praxeology; to legal theory? What foundations do legal and economic theory share? What aspects of praxeology must logically precede branching?

Sechrest writes that to remedy the conflation of Austrian economics with praxeology, "It would be preferable to define economics in a narrower fashion, one that does not merely equate it with praxeology. What, then, is it that distinguishes economics from other, related disciplines" (2004, 24)? He mentions George Reisman's approach of defining economics as "the science

that studies the production of wealth under a system of division of labor" (Reisman 1996, 15).

Reisman emphasizes the production of material goods, even in a "service economy," arguing that even services ultimately relate to material goods in some way (41). However, this construes economic value too narrowly from the standpoint of the subjective nature of value. If anything, it is goods that can be viewed as services—for their "serviceableness," to use Mises's term (1998, 93). They are means to the satisfaction of an acting person's chosen ends—whatever they may be. In this sense, one purchases a car mainly for the "service" of personal transportation to which this "good" can contribute when combined with complementary inputs such as gasoline (portable energy service) and a driver (machine-operation service). These may be viewed as factors of production of the final consumption good "personal transportation."

The following definition of economics from Rothbard appears more in harmony with the subjective nature of value:

> Economics, therefore, is *not* a science that deals particularly with "material goods" or "material welfare." It deals in general with the action of men to satisfy their desires, and, specifically, with the process of exchange of goods as a means for each individual to "produce" satisfactions for his desires. These goods may be tangible commodities or they may be intangible personal services. The principles of supply and demand, of price determination, are exactly the same for any good, whether it is in one category or the other. (2004, 162)

Despite these contrasts, a commonality between Reisman's and Rothbard's definitions is that economics deals with the production of goods. The difference is in how "goods" are defined. I suggest that while praxeology is defined as the deductive consideration of the categorical concept of action and its implications, economics is the field that applies these insights to the production of goods, whether tangible or intangible.

How and where does legal theory come into play?

To begin with, it is important to clarify that "legal" *services* such as security, investigation, collection, and arbitration are economic goods (services) with no special status.[12] There is no basis for excluding them from the domain of the ordinary principles of economic theory when considering

[12] Following Gustave de Molinari ([1849] 2009) and later Rothbard ([1970] 2004, 1047–56) and others (Stringham, ed. 2007).

their production. Economic theory can therefore examine "legal" goods in the same way that it can examine any other class of goods.

That said, we approach the placement of legal *theory* in this context by first examining what elements must logically underpin *both* economic theory and legal theory and therefore precede their branching into praxeological specializations. What belongs to praxeology itself?

Root: Robinson Crusoe, what he does, and what is "his"

As introduced above, core concepts of praxeology can be explained with reference to the actions of an isolated individual. These include the concept of action as contrasted with mere behavior, means and ends, scarcity, time, causality, time-preference, uncertainty, and the theory of value. These are covered in the first 20 pages of Rothbard 2004 and in Chapters IV–VII of Mises 2008.

We will call such concepts the "root" level of praxeology. These root concepts are presupposed in all further developments of both deductive legal theory and deductive economic theory. This can be brought into better focus by reflecting on a few of the fundamentals implied in action.

Root praxeological concepts are logically dependent on the concept of choice. The praxeological concept of action implies both an actual action with empirically visible aspects involving matter and a possible alternative action that does not occur and that involves no matter. No action is possible without specific material resources to take it with. All action involves some form of movement, if only at a subtle level, and it is matter that moves when we act.[13]

Frédéric Bastiat ([1850] 2007) applied important aspects of this method of categorical-alternative reasoning to economics, most famously in "That Which is Seen, and That Which is Not Seen" (1–48). He applied a similar style of reasoning to legal theory in "The Law" (49–94), arguing that any given law either upholds, or itself violates, its own (presumable) function of protecting rights. A rights-violating "law" is categorically self-contradictory.

Hülsmann (2003, 69–71) formalized this approach and identified it as the method of counterfactual reasoning. He argues that from a praxeological-deductive standpoint, every visible action has an invisible counterpart:

[13] The movement of energy can also be triggered with action, but matter must be involved at least as an intermediary—even an energy weapon, for example, has a trigger.

> Counterfactual laws, therefore, do not concern relationships between the perceptible parts of human action (for example, observed behavior) and other observed events. Rather, they are relationships *within* human action linking its visible and invisible parts. Using these laws to explain observed human behavior, we can relate the state of affairs that we observe as a consequence of this behavior to a counterfactual state of affairs that could have existed instead. (71)

This describes the basic procedure not only of economic reasoning, but also deductive legal reasoning. For example, in assessing liability for an action, one important method is to "relate the state of affairs that we observe as a consequence of this" [alleged rights-invading action] "to a counterfactual state of affairs that could have existed instead" [in the absence of the alleged rights-invading action].

Some notions about and knowledge of ends and means are among other logical requirements for any conceivable action. These help us select both means and ends within an action framework (Kinsella 2011, 1–2). Nevertheless, it remains some aspect of the material world, always assuming the inclusion of our own physical bodies, which is the ultimate prerequisite for any action. Any action must occur at specific sets of spatial coordinates (for example, along a trail) and usually, but not always, also involves some type of external material objects (a mountain bike).

Even Crusoe may think of certain objects and locations as being "his" in the sense that he must make use of certain scarce resources and locations in any possible action, and that these will therefore take on a separate status in his mind from other resources and locations. He will react differently if a bird or animal threatens "his" cache of fish or the patch in front of "his" hut. These are the items or locations that he has brought into his structure of action, or plans to, and they contrast sharply for him with other random objects and locations on the island that have not yet concerned him and may never.

While Crusoe economizes and produces in simple ways and may even think of himself as having possessions in the sense that he considers something "his" rather than a thieving seagull's, he has no need for the concept of property *rights*. The need for this can only arise when Friday arrives and with him the possibility of *interpersonal* conflicts over scarce resources. The function of social norms such as property is the prevention of interpersonal conflict (Hoppe 2011, 1–3). Such social norms can only arise between beings capable of propositional discourse.

> One could have conflicts regarding scarce resources with an animal, yet one would not consider it possible to resolve these conflicts by

> means of proposing property norms. In such cases, the avoidance of conflicts is merely a technical, not an ethical, problem. For it to become an ethical problem, it is also necessary that the conflicting actors be capable, in principle, of argumentation. (Hoppe 2006, 411)

Butler Shaffer (2009, 114–16) points out the role of territoriality in various animal species in reducing intra-species conflict, a sort of proto-property that usually favors the established defender over the invader. What places property rights on a different foundation from mere territoriality is the human capacity for *propositional* exchange. In this light, it is too soon to place property theory at this "root" level of praxeology, which we limit to those fundamentals that can be derived with reference to one actor alone.

Trunk: Communicative action and property rights

In adding Friday and then other actors to the analysis, praxeology begins a process of branching into perspectives on different *aspects* of social interaction that we usually view as being covered by legal theory or economic theory. But where does this branching occur in the logical structure of praxeology?

Both fields depend on the "root" analysis, but do they share anything else? If so, such shared material would also logically precede branching, and would not belong to only one of the branches or the other. What are the elements of praxeology that lie beyond the Crusoe level? What are the further elements *without which* legal theory *and* economic theory could not proceed? What are their additional common foundations?

We will term the universal deductive concepts that cover *interaction* the "trunk" level of praxeology. Beyond this trunk, the addition of assumptions about the real world to the deductive reasoning chain marks a transition into increasingly specific and nuanced legal and economic theory formulations within the branches. This is a movement beyond Rothbard's "general, formal" praxeology (2004, 74), from the universality of principle (root and trunk) toward increasingly specific examples that lie within the possibility sphere of deductive procedure. Applied principles take the form of either "legal" or "economic" statements, depending on the aspects of the phenomena of action being considered.

Mises argued repeatedly that praxeology could be steered in virtually unlimited directions to address different topics, real or imagined, but that as a practical matter, the praxeologist tends to investigate useful, relevant phenomena. This choice of topic directs the formation of specificities within the action axiom's universality without rendering the axiom itself non-universal. As Mises puts it:

> The fact that praxeology, in fixing its eye on the comprehension of reality, concentrates upon the investigation of those problems which are useful for this purpose, does not alter the aprioristic character of its reasoning. But it marks the way in which economics, up to now the only elaborated part of praxeology, presents the results of its endeavors…It adopts for the organized presentation of its results a form in which aprioristic theory and the interpretation of historical phenomena are intertwined. (1998, 66)[14]

This also helps us better indicate the transition from root- and trunk-level praxeology into legal theory and economic theory branches. Praxeological concepts are universal; they apply to all cases of action and interaction by definition. The implications of these concepts in terms of legal or economic categories then emerge with the introduction of specific assumptions about *what kind of world* is being considered. Is it a world with or without a money economy; a society with or without a tradition of written contracting?

If praxeological statements about *interaction* are the "trunk" level, what does this trunk contain?

Just as the root level of praxeology comprises those *aspects of action* that must be present in all forms of action, the trunk level comprises those *aspects of interaction* (in the sense of social *action* as opposed to mere interactive behavior) that are necessarily present in all forms of interaction. Since only an individual can perform actions, it is natural to consider an isolated individual to find the universal and general features that all action must include. Similarly, since interaction must involve two or more actors, it is natural to look to an action-based consideration of two people to locate the most fundamental, universal, and general features that all interaction must include.

Hoppe notes the tight interconnections between the axiom of action, which is the focus of the root level in our model, and the APoA—a set of statements about one type of interaction—which is the focus of the trunk level. He points out that both the action axiom and the APoA are forms of a priori knowledge.[15] Moreover, the APoA is a sub-category derivable from the action axiom. Yet the validity of the APoA is also logically presupposed in any act of so much as stating the action axiom (2006, 371).

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[14] Kinsella 2010c assembles this and numerous other quotations on this point from works by Mises and Hoppe.

[15] Kinsella makes the case in his courses that "axiom" and "a priori" are largely synonymous for these purposes. The main difference is their grounding in different philosophical lineages. Despite their different pedigrees, both denote statements that cannot be denied because they are implied in any attempt to deny them.

For both action and interaction—and this is the genius of Mises's method—we are not speaking in praxeology about the content of any given action or interaction, but rather the universal features that must be shared in all instances of action or interaction. We are speaking of those base characteristics without which a given phenomenon would no longer *be* an action or an interaction as praxeology defines them.

Property theory in the trunk

In addition to a universality/specificity test, another test of whether a concept is root- or trunk-level praxeology is whether the formulations of *both* legal theory and economic theory branches presuppose it. The theory of property rights as elaborated by Rothbard and refined in its foundations and justifications by Hoppe qualifies on this count. I therefore place universalizable elements of property theory in the trunk level.

Derivative concepts in legal theory—such as contracting, fraud, and infringement—and in economic theory—such as direct and indirect exchange—presuppose some theory of, or at least set of working assumptions about, property rights. Property rights are a critical common thread between the concepts of economics and those of law. Hoppe put it this way:

> …as Rothbard pointed out, such common economic terms as direct and indirect exchange, markets and market prices, as well as aggression, invasion, crime, and fraud, cannot be defined or understood without a prior theory of property. Nor is it possible to establish the familiar economic theorems relating to these phenomena without an implied notion of property and property rights. A definition and theory of property must precede the definition and establishment of all other economic terms and theorems. (2002, xii)

Traditionally, economic theorists have for the most part simply assumed a background of concepts such as exchangeable property. However, as Hoppe cautions:

> …starting from imprecisely stated or assumed definitions and building a complex network of thought upon them can lead only to intellectual disaster. For the original imprecisions and loopholes will then pervade and distort everything derived from them. To avoid this, the concept of property must first be clarified. (2010, 17)

But how can property rights—grounded traditionally either in accounts of specific historical practices or in natural-law/natural-rights reasoning—have a place in the *science* of praxeology? Mises, the praxeological scientist,

kept his distance when he felt that rights theory was grounded on more disputable foundations:

> From the notion of natural law some people deduce the justice of the institution of private property in the means of production. Other people resort to natural law for the justification of the abolition of private property in the means of production. As the idea of natural law is quite arbitrary, such discussions are not open to settlement. (1998, 716)

Yet he soon continues, "The notion of justice makes sense only when referring to a definite system of norms which in itself is assumed to be uncontested and safe against any criticism."

But what kind of "norms" could possibly be "safe against any criticism?"

Mises did not anticipate what Rothbard foreshadowed and Hoppe formally developed—the praxeological a priori of argumentation applied to rights theory itself. While in some sense, it may not be "uncontested" by Mises's test, as anyone could *try* to contest it, any such contests are incapable of being successful. This is because arguing against it ensnares speakers in a performative contradiction.

Rothbard draws on traditions of natural law reasoning, including concepts such as uniformity of application, in his praxeologically informed development of property rights theory:

> The society of liberty is the *only* society that can apply the same basic rule to every man, regardless of time or place. Here is one of the ways in which reason can select one theory of natural law over a rival theory…if someone claims that the Hohenzollern or Bourbon families have the "natural right" to rule everyone else, this kind of doctrine is easily refutable by simply pointing to the fact that there is here no uniform ethic for every person. (2002, 42–43)

With the APoA, Hoppe further establishes parameters that must be assumed in any attempt to discuss property norms:

> …anything that must be presupposed in the act of proposition-making cannot be propositionally disputed again. It would be meaningless to ask for a justification of presuppositions which make the production of meaningful propositions possible in the first place. Instead, they must be regarded as ultimately justified by every proposition maker. Any specific propositional content that disputed their validity must be understood as implying a performative or practical contradiction. (2006, 372)

Foreshadowing this model, Rothbard had written in relation to the right to one's own life that:

> 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. (2002, 32–33)

Hoppe ([1989] 2010, Chapters 2 and 7) employed the APoA formally as a foundation for the non-aggression principle (NAP), providing a deductive foundation for property rights.[16] The NAP states that it is illegitimate to initiate aggressive (rights-infringing) actions against others.[17] The NAP has carried a range of justifications, including several natural law, rationalist, and consequentialist variants. Rothbard, a natural law theorist himself, recognized the power and distinctiveness of Hoppe's new approach to NAP justification, arguing that 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. (Rothbard [1988] 2010, np)

A formal implication of the APoA is that arguments about norms must be universalizable. Proponents of the NAP from various orientations often cite its uniform applicability in its favor. In contrast, NAP *alternatives*, all of which must be variations of redistributionism, require recourse to ad hoc exceptions and judgment calls as to what constitutes (redistributive) "justice" in any given case. Such norms *cannot* be applied consistently to all persons in all times and places, and therefore fail the universalizability test.

Hoppe is a former student of Jürgen Habermas, a developer of discourse ethics and the theory of communicative action. Habermas (1984) thought his theory supported a version of open social democracy. However,

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[16] For another account of the foundations of the APoA, or "the argument from argumentation," itself, see Van Dun 2009.

[17] In contrast to pacifism, the NAP allows for appropriate levels of force to be employed in response to aggression. The APoA, as well as an extension of the legal principle of estoppel, support this. Under this application of the estoppel principle (Kinsella 1996a), an aggressor is "estopped" from objecting to appropriate physical force being used in response to his own aggression. He demonstrates through his actions that he does not object to the use of force in human relations *in principle* by having engaged in it.

Hoppe recognized that one of the formal implications of discourse ethics was virtually identical to the NAP, just without its property-rights implications spelled out. Hoppe realized that a discourse ethics approach provides an axiomatic grounding for the entire NAP-based vision of a justice-based private law society, rather than another flavor of social democracy. Rather than discourse ethics implying a social-democratic world in which every socio-economic practice is up for democratic deliberation, certain norms, particularly consistent respect for self-ownership and private property, are logically *presupposed* as a requirement of discourse itself. Alternatives fail the fundamental test of what makes propositional discourse possible.

While any specific property claim is open to disputation on its merits, the concept of property rights *as such* is built into the requirements of a society in which authentic propositional discourse can function. It is in this sense that Van Dun distinguishes, "using principles in argumentation concerning concrete cases" from "argumentatively establishing principles" (2009, 4, fn13).

One of the ways that the APoA approach "transcends" the is/ought gap, as Rothbard put it, is that "norms" are being addressed using "is" rather than "ought" statements. This makes it possible for norms to be established as *justifiable*—and possibly, though more controversially, also *justified*—regardless of whether any particular actor chooses to acknowledge this or to follow such norms. Hoppe uses the example of a simple math problem to draw out this distinction between logical proof and practical action: "Why should the proof that 1+1=2 make any difference? One certainly can still act on the belief that 1+1=3" (2006, 407).

With this distinction in mind, how does the APoA establish the *justifiability* and possibly also the *justification* of the NAP? Hoppe begins to summarize this as follows with the requirement of the right to control one's own body, which is often described as self-ownership:

> …it must be noted that argumentation does not consist of free-floating propositions but is a form of action requiring the employment of scarce means; and that the means which a person demonstrates as preferring by engaging in propositional exchanges are those of private property. For one thing, no one could possibly propose anything, and no one could become convinced of any proposition by argumentative means, if a person's right to make exclusive use of his physical body were not already presupposed. (2006, 342)

Hoppe next presents further logical links from self-ownership to the first-appropriation principle and therefore property in things and locations (343–44). The commonality between self-ownership and ownership of

objects and locations is the question, in each case, as to who has the *better* claim in a given case. The status of self-ownership claims is more obvious due to the unique, inimitable, and non-transferrable capability of direct self-control. There is little question as to who has the better claim to oneself—oneself or some other person? However, this *better claim* criterion also logically applies in the same way to other objects and locations, which, unlike ones own body, must be acquired or homesteaded.

The comparative, ordinal nature of the "better claim" test

Under the homesteading principle, it is not necessary to establish a first appropriation claim that lives up to any absolute standard of evidence of what is "sufficient" to be a valid claim. It is only necessary to establish that one party has the *better* or *best* claim when compared with conflicting claims.

This is analogous to Mises's conception of ordinal valuation. The praxeologically defined act of choice means preferring "this" to "that" in a specific rank order, which carries no implication of any cardinal valuation scale. It is a criterion concerned with relative order *only*. Any alternative to this ordinal approach would require a claim to meet some devised standard of evidence showing some objectivistically defined *degree* of linkage. However, the legitimacy of an appropriation claim requires no such technocratic approach.

Assuming a competition among claims, each of which are based on *some* objective links between claimant and resource (some act of appropriation), the *first* such claim in time is likely to be superior to any later claim. While it is categorically true that the first claim is superior to any later claim, exceptions are possible when an earlier claim is found to lack evidence of an applicable *act* of appropriation. A first claim may have been overstated in relation to the "relevant technological unit"[18] of the particular claimed resource. For example, perhaps I invented a radio transmitter and sold radios in a certain area. My device transmits only in a certain spectrum over a specified usable radius, but I thereby attempt to claim ownership of all radio waves in all possible spectra and in all places, even with regard to frequency bands and locations that in no way interfere with my radio operations.

Or say I have built a log cabin in one nook of a valley, and announce, "this entire valley is now mine," expecting the valley to be socially recognized as mine. Clearly, my objective linkage to the use of the *entire* valley is probably too weak to hold up to any reasonable counterclaim that others might make

[18] Rothbard 2002a, 153–57

to other parts of the valley on the basis of their respective activities. I have never put those areas to use in any way that others could possibly perceive.[19]

Property in objects and locations—The problem with cut-off points

Most people can intuitively accept the principle of self-ownership and even ownership of simple personal items, vehicles, or homes. But is there some sort of cut-off point that can separate this kind of ownership from ownership of "other" types of property, perhaps, "the means of production?"[20]

Typical redistributionist objections to property theory either state or assume that such a cut-off point is both possible and can be validly established. However, if we attempt to universalize such devices across persons, times, and places, they are revealed to be conceptually arbitrary. No robust *ex ante* cut-off point can be established between what can and cannot be the legitimate property of a given actor in the absence of the details of a specific claim case.

One might argue that personal possessions such as toothbrushes might be justified as private property, but that ownership of an oil tanker cannot. Why? Because it is too big? What about a house versus a car? One is bigger than the other. What about a distillery versus a set of carpentry tools? Both are "means of production." What if the distillery is large; small; or medium-sized? What if the tools are electric; cheap; or top of the line? What if the "owner" is one person; two; three; 10; or 40,000 (shareholders)?

It is soon evident that no such considerations are meaningful *in principle* with regard to formulating an internally consistent set of property norms. They set up the conditions for insoluble conflict over the specifications of such forced-transfer cut-off points, contradicting a core purpose of social norms, which is to prevent conflict. A central theme of Hoppe's *A Theory of Socialism and Capitalism* is that attempts to build such distinctions into a society's property norms serve only the gods of envy, poverty, and unending

[19] Any particular real-world claim must be considered under the methodology and constraints of legal practice, as discussed in Part III below. See also the discussion below on foundations for the logical requirement that a claim be "objective" and "intersubjectively ascertainable."

[20] Among other problems with this formulation, from a subjective value standpoint, virtually *any* economic good can also be viewed as a "means of production." It is the means that the actor is using the "produce" the end, or "consumer good," that any given action, by definition, seeks to produce.

conflict in rough correspondence to the degree to which their practical implementation is actually attempted.

A principled deductive approach to property theory reveals that any such attempts at line-drawing—no matter how sophisticated—are doomed because they must go beyond the requirements for establishing an objective "first/better claim" link between a given owner and a given resource. Those requirements *are* universalizable across persons, times, and places, while line-drawing attempts are not. This is so regardless of the particular sociological or technological character of any given owner or resource.

It is also important to note that those attempting to establish such line-drawing criteria (or merely implement ad hoc property transfers) are also advocating the forced transfer of currently owned property that they in some cases argue is "too big to own." However, the implication is that it is too big to be owned *by* the individuals, groups, or organizations that are designated as targets for expropriation (perhaps, a shipping company in the case of an oil tanker), but *not* too big to be owned by the individuals, groups, or organizations to which the advocate of expropriation would like to reassign ownership.

One key to unraveling such claims is that the recipients of such reassignment can never be "society," which is incapable of exercising control over property of any kind. Rather, the actual transferees are most likely either a hidden blend of particular bureaucrats and cronies, or some other competing company that is using political manipulation to influence the state's transfer mechanism to its own advantage at the expense of the designated victims.

The identities of both the expropriated and of the designated recipients in any such forced-transfer model are both necessarily particularized, which fails the universalizability test. Moreover, from an NAP standpoint, any conceivable form of redistributionism amounts to the particularized forcible transfer of property away from parties with a *better* claim to parties with an *inferior* claim.

The APoA and natural law

Hoppe describes how the praxeological APoA approach to NAP justification differs from previous natural law formulations and how it avoids the classic is/ought gap problem:

> 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 propose a different, non-natural-rights approach to establishing these two related claims. (2006, 313)…
>
> It has been a common quarrel with the natural rights position, even on the part of otherwise sympathetic observers, that the concept of human nature is far too diffuse to allow the derivation of a determinate set of rules of conduct. The praxeological approach solves this problem by recognizing that it is not the wider concept of human nature but the narrower one of propositional exchanges and argumentation which must serve as the starting point in deriving an ethic. Moreover, there exists an a priori justification for this choice insofar as the problem of true and false, of right and wrong, does not arise independent of propositional exchanges. No one, then, could possibly challenge such a starting point without contradiction. Finally, it is argumentation which requires the recognition of private property, so an argumentative challenge of the validity of the private property ethic is praxeologically impossible. (345)

But does this narrower starting point imply that the APoA is *not* part of the natural rights tradition? Rothbard and Van Dun have also advanced various viewpoints on this. Rothbard embraced the APoA approach *next to* his broader natural law approach:

> I don't see…why one cannot hold to both the natural-rights and the Hoppean-rights ethic at the same time. Both rights ethics, after all, are grounded, like the realist version of Kantianism, in the nature of reality. Natural law, too, provides a personal and social ethic apart from libertarianism... (2010, np)

Van Dun, another APoA theorist, also does not distance his arguments from the natural law tradition and appears to consider the APoA to be within a natural law approach. Like Rothbard's, Van Dun's view of natural law contrasts with Mises's impression of its arbitrary nature. Van Dun identifies a key component of the natural law tradition as the long-held ideal in western legal thought of the "court of reason," in which "the ethic of dialogue or argumentation should reign supreme, regardless of how it fares in the rough-and-tumble of daily intercourse" (2009, 12). He also writes that:

> The complementarity of natural law and reason has been known and appreciated for a long time already. Nor should the radical nature of libertarianism blind us to the fact that it is radical only because it *presses the demand for interpersonal justification* among free and equal persons into corners where the argument from authority, be it God, Society, Science, Utility, or whatever other Convenient Abstraction, used to reign unchallenged. (32) [my emphasis]

Hoppe identifies the distinction between the APoA and natural law reasoning as the APoA's more specific choice of starting point—beginning

with the nature of propositional argumentation instead of "human nature" or "the nature of things." Whether the APoA is a logical refinement and extension *within* natural law reasoning or something quite new may be a question of degree, emphasis, or presentation. Hoppe does not claim that "it is impossible to interpret my approach as falling in a 'rightly conceived' natural rights tradition after all," but does say that his approach is "clearly out of line with what the natural rights approach has actually become" (2006, 314, fn15).

While the jury may be out on this, these approaches do not necessarily appear mutually exclusive or contradictory. Either way, the APoA is an approach that is distinct from any previous natural law attempts at grounding the NAP, regardless of whether it can or should be categorized as a type of natural law/natural rights approach.

The is/ought gap issue—Separate natures of justification and acting

We now address further the question of whether the APoA and its grounding of the NAP and property theory are part of "ethics" in a normative sense or can be considered a purely descriptive account that can be placed within praxeology as an "is" science. Hoppe's "normative" formulations of the APoA as applied to the NAP are a priori "is" statements made with regard to certain "norms." However, these particular norms are inescapable implications of propositional discourse itself. These a priori "normative" statements are therefore not in the form of the "ought" statements commonly associated with the "normative" sphere of ethics. Rather, they delimit the sphere of "is"-level conceptual *possibility*.

That Hoppe's formulations take the form of "is" statements *regarding justifiable norms* explains both the magnitude of this innovation and the challenge of interpreting these arguments with conventional categories. A primary Hoppean APoA "is" statement is that the NAP *can be justified* in propositional discourse, while any conceivable contradictory alternative to the NAP *cannot be justified* without performative contradiction. This gains additional significance because propositional discourse is the only method through which justification can be accomplished. Therefore, if one wants to justify a norm with regard to the issues addressed by property rights, there is *only one* possibility, the NAP. Hoppe writes:

> 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 never 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. The proof also offers a key to an understanding of the nature of the fact-value dichotomy: Ought-statements cannot be derived from is statements. They belong to different logical realms. It is also clear, however, that one cannot even state that there are facts and values if no propositional exchanges exist, and that this practice of propositional exchanges in turn presupposes the acceptance of the private property ethic as valid. 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. (2006, 345)

In claiming that the is/ought gap has been "transcended" in Rothbard's words, there remains a risk of overstatement, to assuming that an "ought" has actually been derived from an "is." While it may nearly appear that it has, this is not claimed. What has been done, in my view, is subtler. Praxeology has delimited a sphere of *possibility* for the category of justification with regard to property norms. With no recourse to "oughts," praxeology arrives at a somewhat surprising conclusion: there is *only one* set of norms at the level of property theory that are compatible with the requirements of justification itself—and these are the NAP-based norms.

Praxeology has thus done most of the work when it comes to property theory, leaving ethics itself, understood as an "ought" discipline, with a simple yea-or-nay task—to respect the NAP or not to in action. Only one additional step is required to conclude that the sole property norm that CAN be justified, also IS justified based on additional criteria. Among them, Hoppe argues that the NAP is universalizable, prevents conflicts, can in theory be applied without contradiction from the beginning of mankind onward, and promotes wealth, peace, social harmony, well-being, and character development.

It is important in this context to separate justification as such from any particular act of either following or not following a justified norm. Action implies ends aimed at and requires a choice of ends. Ethics is concerned with choosing ends—some rather than others. Yet justifiability, and possibly also justification itself, can exist independently from any particular action or choice. As Hoppe writes, "There is and remains a difference between establishing a truth claim and instilling a desire to act upon the truth—with 'ought' or without it" (2006, 408).

A clearer distinction can be drawn using the action categories of ends and means themselves. When we consider ends, we speak of the goals or objectives of action, what is sought. This is the realm of teleology, one that

can include "oughts." When we consider means, however, we turn to the realm of causality, that is, cause and effect in a descriptive, empirical sense. Ends are not only chosen, but *must* involve choice: "This or that?" Whether to actually respect the NAP or violate it *in action* will always be a specific choice by an acting person. However, this is an entirely separate matter from justifiability and justification.

A property norm and supportive legal norms can operate to prevent conflict and promote peace and prosperity in society. Nevertheless, while property norms can be viewed as means, they are not, in the view advanced here, the type of testable or empirical means addressed in the natural-science causality realm. They are forms of knowledge derived using praxeological, counterfactual reasoning from the formal concepts of action and interaction. When properly formulated, such property norms carry the status not of contingent scientific hypotheses, but of incontestable, counterfactual, a priori statements about the reality in which we live.

In understanding the foregoing distinctions, it is important to clarify how more than just the causality/teleology distinction is at work. There is a third force because a priori statements have a logical status that differs from both. Both causality and teleology include accounts of cause and effect that operate across time; they must include the implication of a before and an after. A priori synthetic deductions, in contrast, are true simultaneously, now and always, without reference to the operation of time. Yet even though praxeological a priori statements themselves are timeless and simultaneous, the *content* that such statements describe is not. Praxeological statements are *about* the topics of time, causality, and teleology, the relationships of time to the concepts of action, means, and ends. The *status* of such statements is timeless, yet the *content* these concepts carry refers to teleological or causal relationships that operate within the forward march of time. Although action as such must be situated in a specific time and place and performed by a specific person, a priori praxeological statements about action are timeless and not contingent on specific times or places.

The NAP's status as the only justifiable property norm simply *is*, regardless of any particular action taken or not taken with regard to it. Moreover, regardless of whether any given person understands the NAP or its APoA foundations, these nevertheless remain established. By analogy, the mere existence of a person who remains untrained in higher mathematics does not thereby invalidate any particular higher mathematical proof. A particular person's inability to comprehend such proofs has no bearing whatsoever on their validity.

Even without any actual claimed *justification*, we can describe the teleological "ought" action choice with regard to the NAP as a choice between following a *justifiable* norm and an alternative set of *unjustifiable* norms. That there is only *one choice* at this level among justifiable norms provides a reasonably solid *prima facie* case for following that one, and there are additional justifications and reasons to respect the NAP in action as noted above.

What about following no property norm at all?

To begin with, this is a self-contradictory "norm of following no norm." It *is* a proposed norm, and thus fails as impossible merely by being stated. Hoppe also makes clear that every alternative to the NAP implies *some* property norm. The difference among possible property norms is the specific criteria for *who* shall be deemed to justifiably control what. All variants of statism claim that "the people" own certain resources described as "public" via the state, but since this is impossible, it masks the fact that specific people actually control these various resources, only in a less just, less efficient and more arbitrary way than under the NAP, a way dominated by "political" skills rather than skills in employing scarce resources so as to better satisfy demand (Hoppe 2010, Chapter 3).

In sum, this interpretation of the Hoppean APoA alters what "ought" ethics faces in the realm of property theory. Instead of facing a thorny question of *which* property norms are justified, ethics itself is faced only with the question of whether a person should *follow* the only justifiable norms with regard to property. The APoA establishes that there is no justifiable alternative to the NAP and therefore little choice to be made with regard to it except, as Ayn Rand would say, the choice to either acknowledge it or to mentally evade it. The APoA at once does not violate the is/ought gap problem and simultaneously does show that "is" possibility criteria can dramatically inform and delimit what can be justified, particularly when it comes to property norms.

Categories such as ethics and law, normative and descriptive, have evolved to denote fields of interest and investigation. Reality and its understanding must take priority. Resort to field classifications and thought aids such as "branches" of knowledge must always serve this end, not vice versa. It is not our conclusions that must be modified in light of existing field classifications, but our field classifications that, if necessary, must bend to the emerging contours of our understanding of reality.

None of the foregoing should leave the impression that the normative field of ethics in relation to ends is unimportant or uncomplicated at levels *beyond* basic property norms. In Part IV, we shall return to the relationship

between property norms, law, rules, and ethics to examine the role of ethics within an action framework and in relation to law. I will argue that the above division between the "is" and "ought" elements of the APoA-based NAP remains in place and takes on additional importance at higher levels.

Classes of communicative acts in property rights theory

Hoppe's grounding of rights in the APoA suggests a tight link between acts of communication and property rights. This enables us to more clearly identify specific classes of communicative acts as belonging to the "trunk" interaction level of praxeology. A treatment of the communicative acts of embordering/claiming and consenting (or their absence) is presupposed by every concept in deductive jurisprudence and economic theory and therefore logically precedes both in a branched structure.

Initial appropriations of property require communicative acts of boundary creation—or embordering, in Hoppe's terminology—and claiming in such a way that others are capable of recognizing the claims. The initial establishment of rights in unowned goods or locations requires a socially ascertainable action.[21] Only *stating* a claim is a weak ground; talk is cheap. Some action of using, marking, or embordering is also required and is also itself a form of communication or signaling. Communicative acts are not limited to the linguistic sphere, but include any *actions* that convey information to others.

Moving beyond appropriation, the concept of exchange presupposes the concept of consent. Exchange requires objects, locations, or services that are to be traded, but beyond that, one cannot distinguish "exchange" from "theft" without logical recourse to consent. Consent is the defining characteristic that makes a transfer of property a trade (or a gift) and not a theft.

Consent is required to transfer a property *right*. In Chapter 2 of *Man, Economy, and State* (2004), Rothbard examines "Types of Interpersonal Exchange" (79–94). One type is "violence" and the other "voluntary exchange." The distinction? Consent. The Rothbard-Evers title-transfer theory of contract[22] further shows the foundations of contract in communicative acts that indicate the transfer of property titles. Randy Barnett (1986) also proposes a "consent theory of contract," which he contrasts with the five other principle approaches to contractual

[21] This requirement is discussed in detail in Part III.

[22] Rothbard [1982] 2002, Chapter 19; Evers 1977

jurisprudence, identified as, "the will theory, the reliance theory, the fairness theory, the efficiency theory, and the bargain theory" (269). Each has weaknesses and creates difficulties, which he argues a consent theory overcomes. He defines contract law in terms of consent this way:

> Properly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements[23] are validly transferred from person to person by their consent. Consent is the moral component that distinguishes valid from invalid transfers of alienable rights. (270)

While Barnett identifies consent here as a "moral" component, this may be analyzed as a form of communicative action using praxeology. Hülsmann emphasizes that his own consent-based praxeological formulations of "property economics," derived using the "counterfactual laws of appropriation," fall squarely on the descriptive rather than the moral side:

> …it is a comparative analysis of two mutually excluding types of appropriation. It compares the effects when appropriation takes place *with* the consent of the present owner to the effects that result if appropriation takes place without the present owner's consent. These relative effects are constant in time and space. (2004, 41)

Consent here is an indispensible underpinning of Hülsmann's discussion in both its legal and economic aspects. The distinctive concepts of both branches each require this trunk-level fundamental to be in place before either can proceed.

[23] By "entitlements" Barnett refers to property *titles*. Kinsella (1999) has also noted a general tendency of Barnett to select confusing or non-standard terminology, perhaps in an attempt to appeal to conventional readers.

Figure 1. Proposed model of praxeology: Internal structure

To summarize up to this point, using a simple tree metaphor, the **root** of praxeology can be derived using the analysis of the actions of an isolated individual—the concept of action and its first implications. The **trunk** comprises the analysis of interaction with classes of communicative acts—embordering/claiming and consenting—and accounts of the concept of first appropriation and the possibility of the consensual transfer of property titles. These concepts are logically prior to **branching** into economic theory and legal theory because the concepts of *both* branches logically presuppose some account of the root and trunk foundations, even if this is unacknowledged. The transition into branching may be identified with the move from *universal features* of all action or interaction to axiomatic deductions that are *more narrowly specified* with increasing factual or contextual assumptions that assure the relevance of analysis to the parameters of the type of world and context being considered.

Different *aspects* of the same phenomena?

Although we can understand that economic theory is distinct from legal theory, this need not imply, as a simple branch metaphor might, that they do not interrelate as they develop toward higher complexity. One alternative image is a double-helix that broadens as it rises in complexity, with legal theory as one strand and economic theory as another. Each strand remains distinct and identifiable, yet aspects of each nevertheless depend on aspects of the other for further elaboration in a spiral of rising conceptual interdependence.

Sima (2004) notes that Carl Menger already recognized a tight linkage between these two fields. He quotes the Austrian-school founder:

> Thus human economy and property have a joint economic origin since both have, as the ultimate reason for their existence, the fact that goods exist whose available quantities are smaller than the requirements of men. Property, therefore, like human economy, is not an arbitrary invention but rather the only practically possible solution of the problem that is, in the nature of things, imposed upon us by the disparity between requirements for, and available quantities of, all economic goods. (Menger [1871] 1976, 97)

Sima writes that "Menger's…theory is not time- and place-contingent, and keeps a strict logical status. In short, he derives a *logic of social action*. Menger's new Austrian school…had a broad enough grasp to include the analyses of legal processes as an integral part of its study" (Sima 2004, 78).

The ultimate distinction between economic theory and legal theory may consist in the perspective that the praxeologist takes on a given unitary phenomenon of action. Take, for example, the dual reference to the "division of labor" and the "division of property titles" in Sechrest's speculation that:

> If economics is the science that studies the creation of wealth under a system of division of labor…then how might legal theory be defined? Perhaps one could say that it is the study of the protection of wealth under a system of division of property titles. (2004, 32)

These are two statements about one phenomenon—the division of labor. This may suggest a still deeper vision of the relationship between praxeological law and economics. The unitary phenomena that legal theory and economic theory both treat have *aspects* that each field addresses from its own viewpoint. The shift from one field to the other may consist in *the theorist shifting focus* to address different aspects of given action phenomenon using different concepts applied with the same counterfactual-deductive method.

The concept of an exchange can also serve as example of this. If we view it from the side of economic theory, it looks like a mutual coincidence

of wants in the subjective valuations of each actor. If we view it from the side of legal theory, however, it looks like mutually contingent transfers of titles to property.[24] Yet exactly the same underlying phenomenon is under consideration. The difference is that *we are looking* either from one perspective or another; we are wearing either "legal" glasses or "economic" glasses. Moreover, certain characteristics of an exchange must be present, regardless of which set of glasses we happen to be wearing and which of its necessary characteristics we might therefore be viewing. If either contingent dual transfers of titles (legal theory) or a mutual coincidence of wants (economics) were *not* present, the phenomena being addressed *would not be an exchange*.

Part I *Application*: The combined use of multiple fields

The sibling praxeological fields of legal theory and economic theory have already proven particularly effective when combined explicitly with one another and with other fields such as history and ethics in the analysis of complex issues. This presents no particular challenge for praxeology, provided that each field employed remains true to its own distinctive foundations and methods. Indeed, the more complex the issue examined, the greater reference must be made, whether acknowledged or implicit, to both economic and legal concepts and input from other fields.

No matter how complex the analysis, however, root and trunk level praxeological underpinnings must remain presupposed for both fields to remain effective. These are the foundations on which all complex praxeological accounts must rest, according to the principle of methodological individualism (Mises 2008, 41–45).[25]

Among recent and important examples of praxeological analyses that are deeply informed by multiple fields, Jesús Huerta de Soto produced a thorough explication of the causes and anatomy of economic cycles through the integrated use of legal theory, economic theory, and monetary and legal history in his treatise, *Money, Bank Credit, and Economic Cycles* (2006). Along similar lines, Hülsmann employed economic theory, legal theory, history, and specified ethical frameworks, including business ethics, in examining *The*

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[24] Hülsmann (2004, 54–55), for example, demonstrates such shifting between an economic viewpoint and a legal viewpoint in a praxeological reasoning scenario.

[25] The individual–plural scale in Ken Wilber's four-quadrant model (2006, 18–26) is useful here in maintaining the ability to look at *both* individual *and* emergent system-level aspects of phenomena without inappropriately reducing one to the other or misapplying methods designed for one realm to another. Mises ingeniously moved into system-level social science analysis *without* forgetting essential properties of the constituents—acting individuals—of emergent, systemic phenomena.

Ethics of Money Production (2008). Each field played its own discrete and complementary role in his overall analysis. Hülsmann's book includes repeated examples of using these fields in close coordination while still giving each its own discrete, appropriate role.

In another example, though more focused on extensions of economic theory itself, Peter Klein (2010) applies praxeological economic insights to a finer-grained analysis of entrepreneurship and organizational theory. This is another case in which pure theory informed by widening layers of factual assumptions render the analysis praxeologically "interesting," or relevant to new or modified objects of consideration (Kinsella 2010c, np).

Part II

Action: Praxeological Legal Reasoning

Action-grounded legal concepts

The examples in this section illustrate how the formal concepts of human action and interaction discussed in Part I can be used to clarify legal concepts. Once deductively derived as action-axiom implications, such legal concepts may be viewed as sharing a comparable logical status with other praxeologically derived concepts, such as those found in deductive economic theory. Hoppe writes with regard to basic praxeological concepts "at the heart of economics" that:

> All of these 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. Like the axiom itself, they are not derived from observation. Rather, that one is able to interpret observations in terms of such categories requires that one already knows what it means to act. No one who is not an actor could ever understand them, as they are not "given," ready to be observed, but observational experience is cast in these terms as it is construed by an actor. Further, while they and their interrelations are not obviously implied in the action axiom, once it has been made explicit that and how they are implied, one no longer has any difficulty recognizing them as being a priori true in the same sense as the axiom itself is. (2006, 227)

Once we have likewise viewed one legal theory concept after another *as deducible implications* of action, these concepts may, in the sense that Hoppe suggests above, never look the same again. Moreover, gaining this perspective on legal theory concepts further clarifies how certain praxeological concepts are in the root or trunk positions as presuppositions.

The course "Libertarian Legal Theory,"[26] taught by Stephan Kinsella, repeatedly demonstrated the value of applying the categories of human action to both legal theory and case analysis. Praxeological concepts illuminated legal-theory controversies, hypothetical situations, and classical paradoxes. The means/ends structure of action was applied to the analysis of causation and responsibility (as in Kinsella and Tinsley 2004); the subjective nature of value was used to clarify the definition of property rights and to cut through confusions over property rights vis-à-vis other concepts such as mere possession, value, wealth, and "intellectual property;" and the inherently temporal, risk-taking nature of all action shed light on the legal interpretation of loan contracts.

In the deductive-rationalist, action-based jurisprudence approach that I argue this material represents, a key task of the theorist is the analysis and formulation of legal concepts and situations using the logic of action. Much of what legal reasoning deals with can be most clearly understood in terms of the means/ends structure of action. The truth of particular facts about the external world may be "out there" in the exterior realm, but the understanding of actions happens "in here" in the interior realm, in our subjective ability to understand how people try to achieve results using various methods.[27] As Hoppe writes:

> Clearly, while "objective" (external, observable) criteria must play an important role in the determination of ownership and aggression, such criteria are not sufficient. In particular, defining aggression "objectivistically" as "overt physical invasion" appears deficient because it excludes entrapment, incitement and failed attempts, for instance…
>
> However, in addition to a physical appearance, actions also have an internal, subjective aspect. This aspect cannot be observed by our sense organs. Instead, it must be ascertained by means of understanding (verstehen). The task of the judge cannot—by the nature of things—be reduced to a simple decision rule based on a quasi-mechanical model of causation. Judges must observe the facts and understand the actors and actions involved in order to determine fault and liability. (Hoppe 2004, 94)

The topics that follow illustrate this interplay between interior and exterior perspectives in legal theory from various angles. The interior

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[26] (*Mises Academy*. PP300. January 31—March 11, 2011). See fn1 above.

[27] Here again, the interior–exterior axis of Wilber's multiple-perspectival four-quadrant model is useful in clarification. This model is discussed and used further in Part III.

(subjective) perspective of the understanding of ends and means is the primary component, with exterior (objective) evidence aiding in understanding the relationships between particular means/ends structures and specific constellations of rights.

The proper "limitations" are on actions, not rights

Distinguishing rights from actions has numerous important applications. Hoppe indicates succinctly the way in which *both* rights and their violation have logical roots in action: "The establishment of property rights and their violation spring from actions: acts of appropriation and expropriation" (2004, 94).[28]

The history of and various approaches to deriving rights were discussed in the course (for a review of them, see Kinsella 1996b). In general, the working understanding of rights was property rights and their implications, following Rothbard (2002, 113–20). Property rights are understood as the recognition of a specific person or party—rather than some other person or party—as the one who has decision-making authority regarding a specific scarce location or resource—starting with a person's own self or body. Such definition is understood as an essential social norm for the prevention of conflict over resources and locations.[29] Property titles may be either formally recorded in a title registry, as with land and more valuable items, or socially understood as such, as with most items.

Distinguishing "property rights" from "actions taken with property" is critical. For example, if Edward has a property right in his motorcycle, it means that he is the one—not someone else—who has the legitimate authority to make decisions about its use. He has the title to it. That is a right. Nevertheless, just because Edward (a.k.a. "Fast Eddie") is the motorcycle's owner, he remains responsible for any actions that he takes with it, such as driving recklessly. That is an action.[30]

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[28] For the following discussion, the focus is on present or proximate-cause actions. The assumption is that the action of property acquisition that established rights in the past now operates as a given context for new action situations. On disputations of long-standing property of questionable earlier origin, consult Rothbard 2002, Chapters 10–11.

[29] For a recent restatement of these points as well as a valuable discussion of common property, public property, and easements, see Hoppe 2011.

[30] Barnett also specifies the focus of dispute resolution in actions: "Although differing preferences and opinions can give rise to conflicting actions we need not control preferences and opinions themselves to handle the problem of conflicting action. We need only control actions" (1998, 43).

Does such legal restriction on Edward's scope of action make his property right in his motorcycle "limited"?

Mis- or over-applied metaphors can lead to clouded thinking and the popular concept of "limitations on rights" is an example. Part of the confusion stems from the notion of "rights" as it is used in constitutional-law reasoning that accepts the notion that rights are delimited spheres of action that the state allows to its subjects. The state may restrict or withdraw such "rights" at its "supreme" (as in, for example, "supreme court") discretion.[31]

In contrast, a renewed focus on distinguishing rights from actions supports clearer reasoning about important legal issues. In this approach, the sphere of legitimate action relates to what is done, while rights address which resources and locations each person has the legitimate authority to make decisions about. Such rights can, indeed, be "absolute." It is only *actions* that the requirements of justice limit. Actions are limited precisely by the need of all those who take them not to infringe others' ownership of their respective resources and locations.[32] Rights, rather than needing to be "limited," are, in this conception, the *limiters*. Rights are the source, not the object, of limitation.

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[31] Barnett (2004) argues that the US constitution's actual conception of rights is essentially a libertarian one. He forwards an "original meaning" standard, which uses documentary evidence to establish what the language of the final enacted text meant in view of linguistic usage at the time. He contrasts this with "original intent" attempts to speculate as to what "the Framers" may have wanted to accomplish with the text. He argues that the restrictions and limitations in the document are placed on the powers of the federal government and *not* on the rights of the people and states it was designated to serve. The entire structure creates a "presumption of liberty" for the people in any area of dispute with the federal government.

While he makes a compelling case for respecting what the Constitution *says* so long as it remains notionally in force, I find this line of argument weak if it is be viewed as a reform pathway. This is because, precisely as Barnett shows, the original document *already made its own meaning perfectly clear*. Yet despite this clarity, post-enactment history has still been a story of powers expanding and rights being limited in direct contravention of the unmistakable meaning of the enacted text. We should not expect the underlying factors behind this process to change based on another, even clearer presentation of the plain meaning of the enacted text, such as Barnett's. The problem is that any state placed in charge of judging the extent of its own powers will surely manage to wear down, redirect and overcome such efforts at limiting itself, as the American experiment in substantive constitutional limitation so dramatically attests.

[32] Moreover, if no ad hoc exceptions to justice-rule formulations are granted to persons merely by virtue of their being employed as agents of any particular entity such as a state or corporation, such rules apply universally, even to justice-sector actors, passing the universalizability test.

The problem with shouting "Tyranny!" in a crowded theater

It is popularly repeated in "civics" type discussions of fundamental rights and responsibilities that one may not shout "Fire!" in a crowded theater. Merely intoning the name of this famous example is thought to be enough to remind or instruct those present that "rights" are not absolute and must be "limited."

Before delving into the problems with this reasoning, it may be instructive to understand the shady history of the example. The original statement was: "The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic" (*Schenk vs. United States* 1919).

Oliver Wendell Holmes, Jr. was penning an opinion of the Supreme Court of the United States. Even though specific speech *acts* were under discussion, the (constitutional) "right" of free speech was considered. However, what is less widely known is that the actual speech in the case involved neither fires nor theaters. At issue were statements opposing involuntary military servitude (the "draft") in World War I. Among the examples were leaflets that included such statements as, "Do not submit to intimidation" and "Assert your rights."

It turns out, then, that a supreme agent of the state introduced this example to rationalize an opinion that obfuscated an otherwise clear issue in favor of that same state. The court, in effect, upheld the punishment of legitimate acts of opposition to an exercise of tyranny that was both unjust on general principles and explicitly illegal under the constitution that established the court's own existence.[33] It is no wonder that confused thinking might follow from such an example.

The rights/actions distinction shows how some of the general notions usually assumed to derive from the theater example are confused (Rothbard 2002, 113–18). First, a person has a right to be the one—as opposed to someone else—who controls his own voice. Yet shouting "Fire!" in the theater is an action. What is the means/ends structure? The means is to shout the word. It may be fair to assume, *prima facie*, that the end is to needlessly panic the crowd and disrupt the theater experience. This vocal act endangers and inconveniences other patrons and violates the explicit or implied rules set by the theater owner.

[33] "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." US Const, Amend XIII, § 1.

However, this need imply no "limitation" on the right of the shouter to be the one in charge of his voice. All that is needed is to say that he, *as the absolute and undisputed user of that voice*, is responsible for the actions that he takes with it, just as Edward, as an absolute and undisputed motorcycle owner, is responsible for the results that follow from how he rides his—or any other—motorcycle.

The absolute and unlimited right to own a baseball bat

A simpler example more directly linked to the ownership model of rights further illustrates the importance and usefulness of the rights/actions distinction. The reason attacking another with a baseball bat is an NAP infringement has nothing to do with who owns the bat (maybe the attacker stole it) or whether ownership of bats can be "absolute" or not, or whether rights to own bats are "limited" by coming up against the rights of others not to be hit by them. Nor would it clarify matters if an archivist were to present a tattered parchment bearing a long lost, secretly ratified amendment establishing a "Constitutional Right to Own a Baseball Bat."[34]

What is relevant to praxeological legal analysis is the action of using a baseball bat to *hit* someone, regardless of who owns it or to which degree of alleged "absoluteness" it is owned. The bat is the means. The end is the result sought from the action of attacking—hurting the person and perhaps also stealing their property. The question of who owns the means—the bat—is not directly relevant to the injustice of the action—the hitting. It does not matter, unless there is some specific reason to argue otherwise, *whose* bat is used.

The responsibility to properly manage inherently dangerous property might appear an exception. What about the responsibility of a gun owner not to let a child come into possession of a loaded pistol? Once again, what is important is not whether the actor in question is the *owner* of a gun or not, but whether the person left or stored the gun in an unsafe location. *Negligently storing* a gun is an action. Regardless of who owns the gun, it is from that action, not ownership, per se, that responsibility and liability might be judged to follow in a given case. That said, ownership might help establish *evidence* of who took the particular storing action in question, but the linkage is not a necessary one.

The rights/actions distinction provides an injunction that can be carried into both theoretical reasoning and specific cases: look to actions first,

[34] …which, especially for Americans, must not be denied or disparaged.

rather than property titles, to establish causal responsibility and liability. This distinction may also be helpful in clarifying the terms of debate over highly complex and controversial topics. Take the abortion debate. The two main types of arguments tend to be about either rights or about actions and associated responsibilities and duties. It is useful in such a debate to be able to explicitly toggle between a rights perspective and an actions perspective, recognizing in each instance the significance of *what kind of argument* is being made.

Some action-based approaches to other legal issues

Are limited liability rules for shareholders justifiable? Are corporations essentially state-created entities that might fade away were it not for the ongoing presence of state support?[35]

Kinsella draws on the works of Hessen, Rothbard, and Pilon to argue that the defining features of corporations, including limited liability for shareholders, could be replicated with networks of legitimate contracting that would not require state intervention or any other NAP infringement.[36] Corporations might well look quite different in a society lacking in familiar large targets for political rent-seeking, but their essential defining features as legal-organizational structures could nevertheless be formed contractually. In addition, using the rights/actions distinction and praxeological questions such as "What actions did each relevant actor take?" allows us to sort out where in a complex corporate structure liability rests in any given tort case, among specific employees, managers, directors, and shareholders.

Could debtors' prisons be justified under the NAP? Various points of view were presented in the course, but the overall suggestion was that they could not. Lending is an inherently risk-bearing activity carried out across time. If no money exists that can be repaid at the due date because of the bankruptcy of the debtor (and his lack of substitute assets to seize), it is not equivalent to "theft" for the debtor to not deliver non-existent money or non-existent substitute assets. The debt is still owed; it is just that the scenario is not equivalent to theft and does not warrant employing an analogy to theft to justify an analogous response. The initial borrowing of the money could only become *redefined* as a theft after the fact, and nothing to steal exists when the contract is breached. This leaves the matter as a contracted debt still owed. The important point is that no identifiable act of *aggression* is

[35] For example, Van Dun 2003

[36] Kinsella 2005; 2009e; and 2010b

committed by the debtor that could justify the use of force in response under the NAP (Kinsella 2003).

Another such issue was the assignment of liability for actions taken by individuals as part of a group crime such as a bank robbery. In an action model, an entire chain of decision-makers and participants can be jointly and severally liable for the results of their project. In a group crime, each and every group member may be liable for the specific actions that the other team members take while engaged in a criminal project (Kinsella and Tinsley 2004, 104). At minimum, the interests of all innocent victims must be logically superior to the interests of any non-innocent member of the crime team.

The course also addressed Kinsella's estoppel-based punishment theory (1996a) and its relationship to a pure restitution system model, as advanced, for example, in Barnett 1998. Kinsella argues that a right to punish is justified on both estoppel and APoA grounds. However, rather than actually resulting in the widespread use of punishment, Kinsella argues that this would most likely form a basis for negotiations toward fair restitution amounts, for example, in hard cases such as the so-called "millionaire problem."[37] In this view, what would largely amount to a pure restitution system would most likely arise, with restitution settlements operating in the vast majority of cases as a substitute for riskier and costlier inflictions of physical punishments and retaliations. Kinsella's overall suggestion is that restitution would probably *end up* as the dominant method of response to rights violations in a free society for a number of practical institutional reasons. These include insurance policy rules, risk mitigation, public communication issues, reputation, and the higher risks that lone retaliators face, including ostracism, eviction, counterattack, and being dropped by insurers.

The course also explored the first-appropriation rule of property acquisition through works by Rothbard and Hoppe and hypothetical discussions of various resource and location claim examples—from land to oil, from flight routes to EM spectrum. The key takeaway is that while we can imagine myriad claim situations involving various types of resources—raising the need in practice to identify Rothbard's "relevant technological unit" in each case—the first-appropriation principle still holds.

As previewed in Part I, under this formulation, whenever A has claimed some meaningful, identifiable, and relevant unit of a resource or location before anyone else, we cannot argue that any B or C who comes later can have a *more valid* claim in a dispute over that resource or location. This is because any B or C, unlike A, would have to displace a previous claimant to

[37] See discussion and further reference links in Kinsella 2009c.

do so, would have to *take away* the property from A, making their claims inferior to A's (Kinsella 2009d). However, it is also important to note that later claims by B or C could help to limit exaggerated claims by A. Can B or C make new claims within the edges of A's claims that do not actually take anything away from A? If so, a dispute-resolution process might conclude that A's original claim was unrealistically broad.

Several theorists have also pointed out that under a rule stating that B could legitimately take away a claim from A, C could then take it away from B, and D from C, ad infinitum. This rule would leave no stable ownership structure at all, plunging a society attempting to practice it into a race to self-destruction, as its members struggle to plan, act, or produce in the resulting uncertainty and chaos.

Part III

Practice: The Armchair and the Bench

"Armchair" theorizing and justice entrepreneurship

Part III focuses on the distinction between legal theory and legal practice, particularly the interplay between abstract conceptions of rights and the necessary role of social and institutional conventions. Even though action has categorical dimensions amenable to deductive inquiry in economics and law, any specific action that may become the subject of legal controversy is a unique event in time and place.

A legal case arises when a party disputes a previous act by another. If a justice provider such as an arbitrator or judge is to take a fair look at any real case, a complex of possibly messy or apparently contradictory accounts of details may need to be collected and evaluated. We must therefore be cautious to draw a line around what we can say based on "armchair" theory. The details could easily introduce other dimensions. As Kinsella comments:

> I am increasingly suspicious of the ability, or of at least the usefulness, of answering very particular concrete situations solely by armchair reasoning. First, the number of possible questions you can answer is infinite. Second, even if you answer one, any real-world situation might have a more rich set of relevant facts that means your principle might not apply. Third, you can never know ahead of time what body of "established" principles will have been built up and relied upon. For example, it seems to me that as a general matter, in any society there is going to be some understanding of tacit or implicit consent–e.g., today, it is not presumed to be trespass

> for you to knock on my door to ask me an innocuous favor or question. (2006a, np)

Nevertheless, theoretical reasoning itself, for example, Mises's careful distinction between theory and history, can provide tools for making just this distinction between what should be done from the armchair and what should be handled as practice from "the bench." The legal theorist attempts to ascertain both what justice *is* and what justice *requires* by applying deductive reasoning to categories derived from the examination of either hypothetical or real cases (all of which are cases of "human action"). Despite the strengths of pure deductive reasoning and the convenience and clarity of addressing hypothetical test cases, real cases can also provide material for theorizing, channeling deduction along useful paths. The potential danger of hypothetical case reasoning is that the details of made-up situations can be endlessly shifted in order to support whatever theory is being advanced. One might end up spending time on unrealistic and not particularly informative situations.

Even the most solid grasp of legal theory is insufficient to render one skilled at doing justice in a given case. Legal practice comprises specific risk-taking actions, usually within a set of professional fields such as investigation, arbitration, judging, or collection. George H. Smith (1978) launched a discussion that among other things highlighted the concept of "justice entrepreneurship," which emphasizes that doing justice does not just happen in a timeless, pure realm; it must itself be viewed as a form of action over time amid uncertainty and risk, just like any other.

Central to what a practitioner requires in addition to knowledge of relevant theory is the type of knowledge that Mises labeled "thymology," a word he coined to distinguish the concept he formulated from the field of psychology (Hülsmann 2007, 977). Mises described the content of thymology this way:

> It is what a man knows about the way in which people value different conditions, about their wishes and desires and their plans to realize these wishes and desires. It is the knowledge of the social environment in which a man lives and acts or, with historians, of a foreign milieu about which he has learned by studying special sources. (2007, 266)

Earlier, in *Human Action,* Mises used the word "understanding," a translation of an academic German usage of *das Verstehen*, for instances of using the knowledge provided by what he later labeled thymology:

> … understanding establishes the fact that an individual or a group of individuals have engaged in a definite action emanating from definite

> value judgments and choices and aiming at definite ends, and that they have applied for the attainment of these ends definite means…The scope of understanding is the mental grasp of phenomena which cannot be totally elucidated by logic, mathematics, praxeology, and the natural sciences. (2008, 50)

The legal practitioner must tackle specific cases involving real people who operate in particular times and places. People live in social and cultural contexts with differing sets of assumptions, expectations, and patterns of communicative action as embodied in linguistic and other cultural conventions. Van Dun writes along these lines that:

> Libertarian jurisprudence must take into account the institutional setting in which agents involved in the administration of justice, law enforcement, and personal protection services operate…While general jurisprudence is an abstract intellectual exercise, it should not lose sight of the fact that it inevitably will be applied in a more-or-less dense cultural setting. Those who apply it in real cases must take into account the relevant traditions, customs, conventions, standards, and the like, if they are to understand at all what people do and say, and why they do or say it in one way or another. (2004, 45)

Barnett distinguishes specific legal precepts that may apply in a given time and place from broader justice principles:

> More than one set of legal precepts lie within the frame and natural rights and rule of law principles do not specify a single or unique choice among them. These theoretical considerations do, however, help identify the many sets of rules that are outside the frame and therefore inconsistent with either justice or the rule of law or both. (1998, 110)

The praxeologist may have a deductive model in mind concerning, for example, the embordering and claiming of resources. Yet this model is insufficient to answer the question of how an acting person "on the ground" in a given culture, time, and place, and with respect to a specific type and unit of resource or location is supposed to communicate publicly that said good is being claimed.

Each particular context presents an inevitable challenge of satisfactorily *communicating* claims. In Part I, it was argued that the introduction of explicit factual assumptions concerning the contexts under examination form a transition zone between universal trunk-level praxeological property theory and increasingly specific reasoning about legal institutions and practices within the legal theory sub-division of praxeology. This process brings the

insights of praxeology into usable relation to various practice contexts without blurring the theory/practice distinction.

Along such theoretical lines with regard to property appropriation, Barnett (1998, Chapter 5) discusses a set of general requirements for the practical communication of property claims. Kinsella (2001, 37) writes that "The borders of property must necessarily be objective and intersubjectively ascertainable; they must be *visible*. Only if borders are visible *can* they be respected and property rights serve their function of permitting conflict-avoidance." Hülsmann (2004, 51) also suggests several criteria for property claim legitimacy, one of which is that the claimant should be "in a position to control the thing under consideration." Note the careful formulation. One does not have to *be controlling* the resource all the time once it is claimed, but it has to be at least *possible* for the claimer to exercise effective control over it as one outside limiter among other criteria for a legitimate claim.

John Umbeck 1981 opens with an exhibit of a specific historical resource claim from the milieu of 1849 California: "All and everybody, this is my Claim, fifty feet on the gulch, 'cordin to Clear Creek District Law, backed up by shotgun amendments." Just posting this sign and not proceeding to otherwise actually mark or work on the claim would likely have proven ineffective. Such a sign only *labels* or helps specify the fact of an appropriation act.

The possible details and nuances of a disputed appropriation claim could be many and varied. A legal practitioner would seek testimony and evidence and would need to draw on knowledge of local conventions and context—all of which lie within the scope of thymology, not praxeology itself—to inform the appropriate application of legal concepts to a given dispute.

Note on "objective, intersubjectively ascertainable"

The term "intersubjectively ascertainable" mentioned in Hoppe's work and also employed by Kinsella, might appear synonymous with "objective," with which it is often paired. However, these terms carry an important, but subtle distinction. It is helpful here to refer to Wilber's four-quadrant model (2006, 18–26), which I will now briefly describe, relate to Misesian concepts, and apply to this distinction.

In this model, an interior–exterior axis crosses with an individual–plural axis to create four quadrants of possible perspectives. These are the interior-individual (subjective), interior-plural (cultural), exterior-individual (objective), and exterior-plural (social/natural-science/systems). Various fields of knowledge are most at home in particular quadrants, while each quadrant is

associated with distinctive forms of knowledge. In this view, human beings, for example, stand as both wholes *and* parts ("holons")—both individuals and components of plurals—with both exterior *and* interior aspects. These aspects are both discrete and inseparable—all of them must be present for us to be the kind of beings that we are.

The two axes of this four-quadrant model may, in my view, be translated into Misesian terms as follows. The dual perspectives provided by the interior–exterior axis correspond to Mises's causal/teleological dualism (1998, 17–18). Wilber argues that neither the interior nor the exterior perspective is even *conceivable* without the existence of its opposite, which takes some of the mystery out of dualism. As I understand Wilber's claim, any combination of perspectives on this axis that was *not* an interior-exterior dualism would be *impossible* in the same sense that a hollow sphere with an outside but no inside would be impossible.

It is similar along Wilber's individual–plural axis. No plurals can exist without individuals comprising them. This axis is also reflected in Mises's work, but in his methodological individualism. Mises examines emergent system-level phenomena (pricing, market interest), while recognizing that there can be no system without its components and that those components *do not lose their properties as individuals* merely by being viewed in terms of their roles in a given systemic phenomenon. While Mises thus covers both of Wilber's two axes in different places, it is Wilber's contribution to cross them to form a single, unified model.[38]

We are now better positioned to unpack the phase, "objective, intersubjectively ascertainable." "Objective" refers to *exterior*-realm empirically measurable data. "Intersubjectively ascertainable," however, refers to *interior*-realm data that can be ascertained by multiple persons, but not measured directly.

The interior realm includes concepts such as action and its many derivative concepts such as aggression. Such phenomena are only ascertainable from an interior perspective, the perspective of an actor ("subjective"), and can be ascertained within the subjectivity of multiple persons ("inter-"). Anyone who actually looks/thinks/ascertains *could* compare notes and agree that they were perceiving the same interior-realm phenomenon. They might also disagree, as the case may be. One person might claim that, "He meant to do it." Another that, "It was an accident." However, it is in principle *possible* that they could agree on such a thing in a

[38] To my knowledge as of this writing, Wilber is not aware of praxeological literature or the correspondences I suggest here between his model and Mises's methodology.

given case ("-able"). To put these pieces back together, "intersubjectively ascertainable" points particularly to an *interior*-realm phenomenon such as an action that it is *possible* for *multiple persons* to grasp or understand in the same way.

But is "objective" then redundant with this? This is a subtle point because we ascertain interior-realm phenomena *through* exterior-realm observables or patterns. For example, we understand that a man acted (interior) in that he started punching his argumentation partner, but we know this most definitively because we see fists flying (exterior). These are therefore each *aspects of the same phenomenon* viewed from two different quadrant perspectives. They are *both* present at the same time *and* not reducible to one another.

The implication for legal theory is that "objective" (physical, measurable, empirical) indications of subjective phenomena must be present to a sufficient degree in order for them to be "intersubjectively ascertainable." This is why the phrase, "objective, intersubjectively ascertainable," is not merely a repetition of synonyms. It specifies both the thing stated and one of its prerequisites.

By contrast, purely subjective interior-individual phenomena can lack intersubjective ascertainability because they lack observable corollaries. I might just "think" something sitting in my chair, but no one could reliably guess what it was that I had thought. This is because there is insufficient objective (exterior) evidence for anyone to ascertain what I was thinking (interior).

A certain practical degree of objective *indicators* of subjective phenomena must therefore be present to render them intersubjectively ascertainable. This is important in considering property rights in general, and is essential in considering first-appropriation claims in particular. This "objective" component correlates with the concept of "evidence" in the law. "Evidence" comprises objective, exterior *indications* of criminal or other *actions*, which are only understandable by other actors in the interior realm.

Deductive statements, practice, and historical sources

Sound legal theory concepts can serve as tools to the legal practitioner. The practitioner's active relationship to deductive formulations is crucial—he must assess the situation and task at hand and select the appropriate law or combination of laws to apply. Whatever the details of a case, *some* theory of justice is needed through which to interpret them. And *some* version of a justice theory is always at work, even if its users have only assumed one subconsciously.

Action-based legal theory provides tools to take into each case. It supplies some of the underlying questions to which case-specific details shape answers. Legal principles guide inquiry into specifics while emerging details suggest the most relevant set of legal principles to apply. Justice may be found at the meeting theory and practice—of deduction, institutions, and the details of specific cases.[39]

Sound theory functions as a service to legal practitioners, enabling them do their jobs more easily and reliably. Legal theory, as such, is an intangible good, or as Tucker and Kinsella (2010) term it, a "nonscarce good." In this case, it is a good that provides a class of means that is among the requirements for producing justice in specific cases. When specified in the form of a given society's legal precepts, theory also serves ordinary people by enabling them to understand the permissible scope of just action—action that does not infringe others' rights. Barnett offers a useful distinction here with his conception of "background rights" versus "legal rights."

> ...*background rights* are those claims a person has to legal enforcement that are valid, right, or just, whether or not they are actually recognized and enforced by a legal system; *legal rights* are those claims that an actual legal system will recognize as valid, right, or just. Justice requires that the legal rights that actually result from a system of laws correspond as closely as possible with the background rights to posses, use, and dispose of scarce resources that persons have. (90–91)

Legal theory includes formulating what Barnett calls background rights and using background rights to assess and formulate legal rights. Legal practice involves acts of applying particular formulations of legal rights—as reflected in any conceivable, inevitably imperfect, "really existing" legal system—to specific cases. It may also include evaluating legal rights against understandings of background rights in practice, as in the tradition of jury nullification.

Historical and anthropological sources can inform the development and refinement of both theory and practice. Patterns of experience with resolving disputes between parties can produce legal precepts and "rules of thumb" that *tend* to be in harmony with just background rights over time, as distinct from the tendency of legislated, state-imposed law and legal systems to progressively infringe such rights (Leoni 1961).

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[39] On the important relationship between deductive principles and concrete rules, see Barnett 1998, Chapter 6. For further discussion and assessment of Barnett's presentation of this, see Kinsella's review (1999, 60–63).

This is so *provided* that such outcomes constitute resolutions of disputes between legitimate parties to those disputes.[40] This contrasts to the state intervening in "its own interests." A monarch used to have "his own interests" in a relatively more meaningful sense, which may be the origin of such thinking. Today, however, the obfuscating construction of "the state's interests" generally conceals the *actual* interests of various actors such as rulers, politicians, bureaucrats, contractors, and the members of various "special-interest" groups.

Bruce Benson (1990) argues that customary law systems have a dynamic tendency in the direction of just outcomes based on structural factors:

> Because the source of recognition of customary law is reciprocity, private property rights and the rights of individuals are likely to constitute the most important primary rules of conduct in such legal systems…incentives must be largely positive when customary law prevails. . . . Protection of personal property and individual rights is a very attractive benefit. (13)

This suggests a high value to legal thinkers of examining patterns of practice and outcomes in customary law.[41] Some of the dynamics of customary law may also apply to legal principles from the major evolved case-oriented legal traditions of the world,[42] particularly the Roman Law and the Common Law (Kinsella 1995; 1999), which are more likely to involve conflicts between parties with legitimate standing, as contrasted with legislated law, in which state agents often insert themselves as one of the parties.

The combination of deductive "top-down" and historical "bottom-up" considerations might appear to suggest a chicken and egg paradox. Do rights emerge out of practice or does practice adjust to reflect prevailing conceptions of rights?

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[40] Or at least realistic hypothetical cases *of* such disputes, as in certain practices in the Roman Law (Kinsella 1999, 61). On the traditions of "judge-found" law in general, see Kinsella 1995.

[41] For detailed accounts of three customary law systems in diverse times and places see Byock 2001 on medieval Iceland, Van Notten 2006 on traditional and contemporary Somali tribal law, and Patterson 1994 on early Ireland.

[42] "Evolved" here refers metaphorically to traditions the development of which owed much to case-based reasoning, the writing of non-binding reference treatises by respected legal scholars (theory that is useful to practitioners), and other convention-formalizing processes arising out of accumulating experience with resolving disputes. This can also include doing legal reasoning about realistically possible disputes (realistic enough to be praxeologically "interesting" in Mises's sense, as highlighted in Kinsella 2010c).

Writers in the libertarian tradition from Étienne de La Boétie (1530–1563) onward have tended to emphasize the role of ideas and opinion in driving social change ([1552–53] 2008). However, economist and historian Thomas Sowell, in the concluding chapter of his massive trilogy on global cultural history,[43] writes:

> The role of ideas and ideologies in history is much more difficult to establish than is often believed. Neither freedom nor slavery, for example, were the results of ideas or ideologies. Freedom began to emerge where governments were too fragmented, too poorly organized, or too much in need of voluntary cooperation to prevent its emergence (1998, 352–53)…Where no such fragmentation of power existed, or where there was no such lucrative commerce and industry to tempt rulers to relax their despotism, there freedom remained rare. (354)
>
> Freedom did not begin as an idea but as a reality that was then treasured and analyzed by those who possessed it…
>
> The relationship of ideas and history has been one of reciprocal interaction, rather than one-way causation, so that no formula can substitute for an investigation of the specifics of this interaction in particular times and places. (356)

The direction of developmental causality between theoretical rights and practical liberties is most likely interactive and evolutionary.[44] This view of back-and-forth causal interactivity is in harmony with the solution to the chicken-and-egg paradox itself. The context-sensitive instruction sequences that encode for the development of both creatures and their reproductive pathways—including chickens and eggs—have gradually co-evolved in parallel over vast stretches of geological time (Dawkins 2009, Chapter 4). Neither comes first because they travel together as *aspects* of a co-evolving "chicken-*and*-egg" phenomenon.

That said, "rights" conceived as historically evolved phenomena must be kept distinct from "rights" viewed within the framework of a priori reasoning and justification, as discussed in Part I. On this, Hoppe writes: "Can rights emerge from tradition a la Hume or Burke? Of course, they always do. But the question of the factual emergence of rights has nothing to do with the question of whether or not what exists can be justified" (2006, 402).

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[43] Sowell 1994; 1996; and 1998

[44] "Evolution," however, does not imply a movement in a necessarily positive direction of "progress," as some early evolutionists and historians optimistically assumed.

With this distinction in mind, in the world of ideas, progress in the field of rights—that is, an increase in the frequency of correct conceptions of what justifiable rights are—can still benefit from theoretical leadership. Memetic evolution can move many orders of magnitude faster than genetic evolution, and our every act of discourse helps influence the direction of mindshare change by "artificially selecting" the ideas that we focus on and speak.[45] "Really existing" legal practices must be evaluated in legal-theory terms. Impacting mindshare represents the side of the above co-causal process between ideas and history that we *can* influence. The libertarian tendency to focus on the idea side over the historical conditions side of causality is therefore reasonable, at least in an advocacy context. As Stephen Covey emphasizes, effectiveness grows to the extent that one focuses one's attention and activities within one's "circle of influence," those areas in which one is currently capable of acting and having an impact, rather than in the "circle of concern," meaning areas one may have an interest in, but over which one is not (*yet*) able to have a direct impact through action (1989, 81–91).

One of the challenges of both legal theory and legal practice is to move patterns of outcomes in any given legal system toward as close an alignment as possible with the requirements of justice. Legal practice should always be on trial in the court of legal theory, while legal theory should be recognized as insufficient to do justice in any real case. Legal theory and legal practice must therefore persist in a challenging but necessary marriage between distinctive partners if they are to produce the offspring of justice. Used properly, praxeological legal concepts not only boost the clarity of legal theorizing from "the armchair," they also enhance the ability of practitioners to parse specific cases from "the bench."

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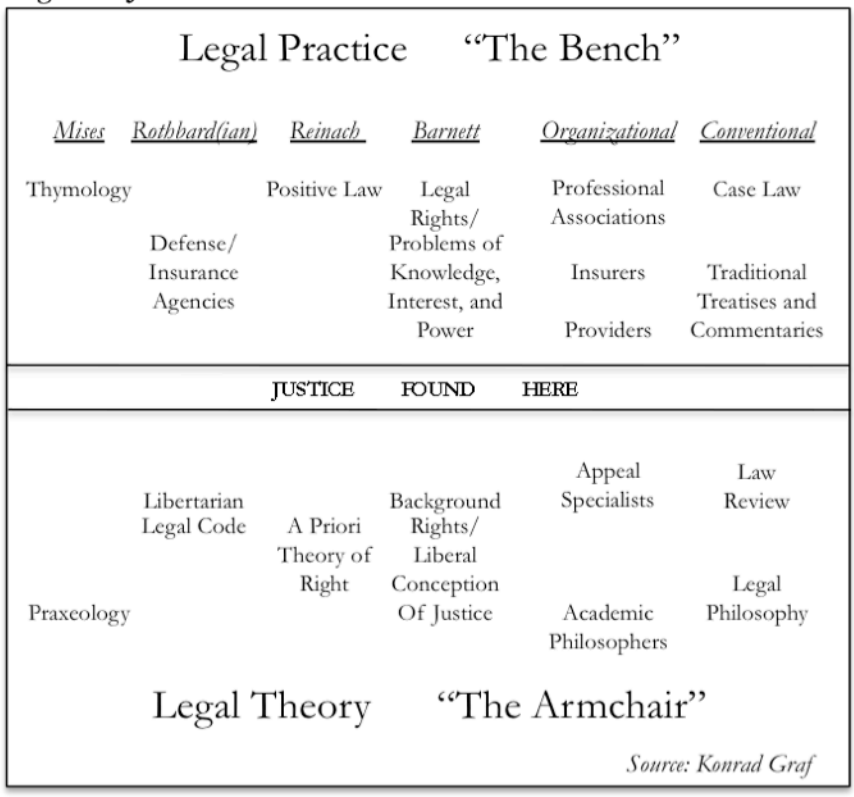
[45] In originally introducing the "meme" concept, Dawkins ([1976] 2006, 192) writes that, "We need a name for the new replicator, a noun that conveys the idea of a unit of cultural transmission, or a unit of *imitation*."

It is important to distinguish that genetic evolution is an *exterior*-plural quadrant tool (in Wilber's terms) for the study of changes in the *frequency of specific genes* (and characteristics) in populations, while memetic evolution is an *interior*-plural quadrant tool for the study of changes in the *frequency of specific opinions* in populations. It is *possible* for the frequency of an opinion in a given population to change much more quickly than it is possible for the frequency of a gene to change.

Figure 2. Justice: Between the armchair and the bench



Part III *Application*: The "How could that *work*?" question

Modern praxeological formulations of property rights contrast with less robust early formulations found in classical-liberal literature, such as traditional Lockean appropriation. Such principles, proposed as a society-wide practice, have demonstrated rhetorical weakness. Lingering public doubts about the first-appropriation principle take the simple form of, "But how could that really *work*?" or even "That has been tried and failed."

This is partly due to the extent to which governments have historically taken over and corrupted the process of initial resource acquisition as a means of securing a source of handouts to be exchanged for support and power. This has left the popular imagination with only a handful of isolated examples of legitimate first-claiming practices, such as the California Gold Rush (Umbeck 1981). Even the famous American "homesteading" experience occurred within a legislated framework comprising statutory

opportunities for settlers to claim arbitrarily pre-defined 160-acre land units as political handouts for those who met legislatively defined criteria (Rothbard [1982] 2002, 154).

Warlords and states are the archetypes of illegitimate property claimants. Governments are notorious for making "claims" to large tracts of land, even continents, based on military might and threat. Hoppe goes so far as to call the act of making a baseless property claim aggression:

> At the bottom of the natural property theory lies the idea of basing the assignment of an exclusive ownership right on the existence of an objective, intersubjectively ascertainable link between owner and the property owned and, mutatis mutandis, of calling all property claims that can only invoke purely subjective evidence in their favor aggressive. (2010, 23)

The first-appropriation theory discussed here concerns right-based claims in contrast to such might-based claims. Yet within a right-based model of appropriation, with no state presuming to own and manage all land, how can we consider complex situations? Multiple people, such as the members of a tribe or village or competing independent resource extractors may be involved. They may all be attempting to homestead, share, or struggle against each other to exploit a single large resource.

Such questions can affect the credibility of calls for the adoption of the justifiable social norms discussed in Part I. To become more convincing to a wider range of people, the first-appropriation principle could benefit from being illustrated in reference to a greater range of situations, both real and hypothetical, to which we can apply general deductive principles.

There is already some promising work in this direction that comes from several different orientations. From the **deductive**/rights-based side itself, see Hoppe's recent article, "Of Private, Common, and Public Property and the Rationale for Total Privatization" (2011), as well as Rothbard 2002, and Kinsella 2009d (especially fn26).

On what I will call the **observational** side, see Elinor Ostrom's *Governing the Commons* (1990), which collects documented "common-pool resource" situations involving resources such as water and fish and examines the efforts of the people involved in such situations to find ways forward, with varying degrees of success depending on their methods and the larger institutional context. Jane Jacob's work on cities (1993 and others) is also largely observational and provides complex nuances of causal interactions in urban environments that armchair theorists of all kinds would miss (and usually have missed).

Sources that we might categorize as **entrepreneurial** or organizational are Spencer H. MacCallum's *The Art of Community* (1970) and article, "The Enterprise of Community" (2003). We might also place here a number of chapters in *The Voluntary City: Choice, Community, and Civil Society* (Beito, Gordon, and Tabarrok 2002).

Though not directly related to first-appropriation as such, an important theoretical contribution to the category of "entrepreneurial" literature in the above sense is Guillory & Tinsley 2009, which presents specific business models for the contemporary provision of private security and justice services. In drawing general implications (3–10), the authors discuss the "amplifying effect that ideology has upon society through the entrepreneurial creation of ideologically-infused social institutions" (7).

The interweaving of insights from deductive, observational, and entrepreneurial investigations provides a platform for explicating complex legal-economic phenomena and visualizing how such phenomena might function in societies whose institutions and practices harmonized to a greater degree with the requirements of justice.[46] Examples of such complex phenomena include urban organization, common-pool resource management, community easements, pollution torts, and complex first appropriations involving resources that are difficult to mark as claimed or that are being claimed by multiple persons or groups.

Another source of reference in addressing such issues is positive case law and arbitration results. However, great care must be taken with such sources in evaluating the soundness of the legal theories that were at work in the particular decisions. That said, even an unjust decision might point the way toward how a just one might have looked through counterfactual reasoning.

Private "rules" are possibilities within NAP space

The role of private rules is also important to consider in relation to the "How could that work?" question. Deductive legal theory delimits the sphere of law to issues pertaining to property rights. However, this does not mean, as critics of the NAP tend to argue, that the NAP is suggested as the *only* enforceable norm for society, and that anything else "goes." What is

[46] Numerous important writings on the issues involved in, and the possible contours of, private law societies have been helpfully collected and edited into one volume by Edward Stringham (2007).

suggested, rather, is that the NAP forms the *outer boundary* of *justifiability* for any norm or rule.

The NAP-based property model establishes justifiable norms under which decision-making rights to specific scarce resources and locations rest with specific persons or contractually formed entities that can claim the first/best objective link to those resources. However, as the size and public nature of locations—particularly, larger plots of land or buildings—increases, so does the likelihood that owners will assign to such locations sets of explicit rules and expectations for site visitors.

MacCallum (1970; 2003) suggests factors that might tend to stimulate—in the absence of state regulations retarding such developments—the ownership of larger plots of land, organized with layers of sub-lease contracts based on a master-lease agreement. A master-lease agreement, in this sense, could carry certain features of the kind associated with historical city charters in a form that is authentically contractual. This contrasts sharply with the "consent" manufactured out of thin air in certain political-philosophical constitutional theories such as the—non-contractual—"social contract." This master- and sub-lease organizational concept provides an entrepreneurial mechanism for competing to raise the total market value of larger-scale site "environments," while funding the provision of what are sometimes called "public goods" in those environments through land rent.[47]

The only strictly rights-based legal limitation on the scope of owner-set rules for properties is the NAP. It is, after all, the NAP that establishes the justifiability of ownership claims, along with their concomitant authority to make, maintain, or enforce rules concerning the use of owned property. The content of such rules could not legitimately contradict the foundations on which the justification of such rule-making authority rests.

Conversely, a violator of site rules also violates the NAP. This is because the violator fails to fulfill the (explicit or tacit) contractual conditions set by the site owner in exchange for (explicit or tacit) permission to enter the site and remain on it. Violating a rule that is set as a condition for being on an other-owned site renders the violator a trespasser. At the moment of rule violation, the violator transforms himself from a guest into a trespasser who has ceased to meet the criteria for retaining permission to remain. The unskilled rule violator might as well stand up and shout, "I was just a guest, but now I have chosen to violate this rule and become a trespasser." This forms the basis in legal theory for responses to private rule violations. Such

[47] See Hoppe 2006, Chapter 1 on theoretical problems with the public goods concept.

responses might include the forcible removal of the trespasser or other suitably proportionate actions, at the discretion of the owner or the owner's agent.

Such rules could form any set of possibilities within the boundaries of the NAP. However, it must also be recognized that other considerations would tend to come into play for owner/actors. For example, owners operating public establishments would tend to want to constrain their own rule-making actions in such a way as to best satisfy their own subjective goals in operating the location as a public one. If they are operating a club, the rules should be designed to support the specific club's values and objectives ("no right-handers in the left-hander-only club"). However, if the owners operate a more broadly conceived public business, it would tend to be in their interests to try to select as consistent and non-arbitrary a set of rules as possible in order to promote customer traffic and revenue from the particular line of business.[48] One should expect a general tendency in this context toward more universalizable, less particularistic rules as the size of a given site increases and the anticipated demographic of its visitors widens.

Moreover, operators of public sites would benefit from being wary of possible follow-on effects, such as boycotts and reduced customer traffic, if they attempt to implement rules that prove significantly unpopular. This is clearly so if the unpopularity is with components of their target customer base. However, it also applies even if the unpopularity is among non-customer activists or the general public, which might become upset by hearing of rules that were sufficiently morally offensive, in their opinions. This too could lead to protests and boycotts, or even forms of ostracism.

Understanding the details of such situations is the realm of sociology or interpretation—the specific grasp of given actions in specific times and places. Praxeology itself can say that 1) due to the requirement for internal consistency, any such rules must logically remain within the NAP sphere and not *be* NAP violations (legal theory branch) and 2) any given set of rules will have opportunity costs for their purveyors, and the effects of specific sets of rules will appear as (psychic and/or monetary) profits and losses for the actors setting and enforcing those rules (economic theory branch).

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[48] This follows from the general economic analysis showing that the monetary costs of acts of institutional "discrimination" on private businesses fall mainly on discriminators themselves. This contrasts with legal discrimination, which distributes costs more widely, essentially *redistributing* the natural incidence of costs on discriminators to other non-discriminators.

Another likely source of general rules in a more NAP-respecting society would derive from the terms and conditions of insurance policies. Freed from onerous state-imposed regulations on their operations, insurers could develop and market sets of competitive contractual terms. Defining such terms would enable insurers to control for behaviors and practices that tend to affect the site risks that they agree to cover. This would enable insurers to lower premiums in a competitive process to the extent that their risk-management requirements for clients tended to be actuarially successful. Insurers would thereby be better able to specify practices that would lower the risk of adverse events or reduce payout liabilities from actual events. The latter, for example, might take the form of specifying in advance the parameters of required disaster-response plans and established contracts with rescue and recovery agencies. Insurance customers, conversely, could select from among various plans and options featuring differing trade-offs in terms of policy restrictions, requirements, premium and benefit levels, and coverage.

Such practices could have the potential to evolve into standardized (yet still adaptable) sets of insurance-industry rules. Since insurers as individual companies and even as an industry would not be forced to offer coverage in any given case or under any given terms (as they are under state regulation), their coverage terms could freely evolve so as to balance demonstrable risks with risk-mitigating practices in a reality-responsive, customer-responsive, interactive, and adaptive process. This could form another rich source of site rules, rules that could tend to develop through authentically competitive market processes toward "best practice" standardization and consistency.

Part IV

Ethics: Disentangling Law and Morality

Some factors in the association between law and morality

Libertarians have often pointed out that just because something may be morally wrong does not imply that it should be illegal. Better distinguishing legal concepts from ethical ones and locating legal theory within the a priori domain of praxeology puts this division on a robust theoretical foundation. Conceptions of the relationship between ethics and praxeology are still valuable, in this view, but certain concepts that are sometimes treated under "ethics" are viewed instead as praxeological categories. Having proposed discrete field boundaries for praxeology, economic theory, and legal theory in Part I, we now consider the nature of ethics itself to further clarify the natures and positions of law and morality from a praxeological perspective.

The word "ethics" appears in titles of works that have contributed to the Austro-libertarian legal-theory tradition, for example, *The Ethics of Liberty* and *The Economics and Ethics of Private Property*. These works do discuss ethics, as such, to varying degrees. However, they employ praxeological definition and deduction and typically address proto-legal praxeological or legal-theory topics, such as property, torts, contracting and lending.

Placing deductive legal theory within praxeology enables its reconstruction as a categorical and definitional assessment of what *types* of actions are NAP infringements—separate from moral assessment of such infringements. In this view, an example of an ethical statement would be, "One should not violate rights." Legal theory helps to make this goal actionable by supplying information concerning the question: "What *is* 'violating rights?'"

Huerta de Soto, in a chapter called "The Ethics of Capitalism" (2009, Chapter 12), argues that "efficiency" and "morality and justice" only appear to be competing values if we have an unrealistic, static theory of what "efficiency" is. The discussion interchanges or pairs terms such as morality and justice (170, 172). The model proposed here treats these with greater differentiation. In this view, justice lies within a deductive legal-theory domain, not the "ought" domain of ethics.

Moreover, if deductive legal theory and economic theory are siblings *within the same field* of praxeology, it should also be unsurprising that properly formulated concepts from each branch are in harmony with one another, as Huerta de Soto argues that they are in this case. Indeed, he writes of justice that:

> What is just cannot be inefficient, nor can what is efficient be unjust. The fact is that, under the perspective of dynamic analysis, equity or justice and efficiency are simply two sides of the same coin…This…not only allows efficiency to be appropriately redefined in dynamic terms, but also throws a great deal of light on the criterion of justice which should prevail in social relations. This criterion is based on the traditional principles of morality which allow individual behavior to be judged as just or unjust in accordance with general and abstract juridical rules regulating, basically…property rights… (173).

Thus, when it comes to specifics, the bedrock of Huerta de Soto's argument often returns to principles of *justice*, effectively defined in terms of property rights. Nevertheless, it should be noted that some of his arguments may well *also* apply to more strictly ethical as distinct from property-rights considerations.

Ethical systems as sets of claims about specific categories of means and ends

The focus of ethics as an "ought" field is on the teleological realm of ends, as contrasted with both the "is" realm of causality as treated by the natural sciences and the "must necessarily be" realm of a priori deduction. At the same time, many ethical statements also assert specific relationships among means and ends and recommend certain types of ends and means over others. As Rand put it, "What is morality, or ethics? It is a code of values to guide man's choices and actions—the choices and actions that determine the purpose and the course of his life" (1961, 13).

Huerta de Soto likens the role of ethical principles to "automatic pilots" (173) that provide *ex ante* guides for action. He contrasts this with attempts to weigh each and every action in terms of perceived costs and benefits. He demonstrates how such an attempted pragmatic approach is actually a largely hopeless and ill-conceived task from the point of view of economic theory (170). Covey (1989) similarly reformulates traditional ethical principles in contemporary terms as "habits" or "practices." Such habits have various degrees of likelihood of creating long-term patterns of individual and group success, patterns that are demonstrably superior to the results of attempts to weigh the "costs and benefits" of each action in advance in the absence of such guidelines.

In general, the above accounts conceive of a given code of ethics as a specific body of knowledge or know-how. In praxeological terms, knowledge or know-how can be described as functioning in the context of action in the way that a recipe does for a cook (Kinsella 2011, 1–2). Like recipes, ethical claims often take the form of "Perform action (or action set) of type X and expect to get result (or result set) of type Y." An ethical code, like a cookbook, provides sets of claims and instructions regarding what the good is (which things to cook) and how it is to be pursued (how to cook them). Even though traditional ethical systems have often also tended to emphasize topics such as what *not* to cook and how *not* to burn the casserole, they nevertheless also advance some positive conception of the "good."

Ethical codes thus provide specific sets of claims about the range of possible ends and means available to actors along with asserted sets of causal relationships among these various ends and means. Ethical codes that contradict laws of human action, or any other laws or principles pertaining to the reality of action as such, or the contextual reality in which given actions occur, are less likely to be successful than those that are better informed by such laws.

Historical roots of the mixing of law with morality

Shooting up with heroin is unlikely to be recommended in a given ethical system that attempts to offer some vision of means and ends in relation to the good, not least due to its addictiveness, long-term health effects and general tendency to undermine the pursuit of other "goods" in both ethical and economic senses. Nevertheless, libertarians argue that even though such an action may be construed as unhelpful or wrong according to most ethical systems, to the extent that it does not violate anyone's rights, it is not a proper subject of *law*, defined as that field that addresses violations of rights *only*.[49]

Yet there is far more to the distinction between the legal and the moral than that libertarians are known to controversially assert it—something that helps explain the very origins of such confusions. The mixing in of law with ethics has long roots.

Legal scholar and historian Harold J. Berman examines the process through which law was altered and employed as a tool for enforcing specific religious morality systems on subject populations during the course of the German and English Reformations. Drawing on original sources, he argues that, "What has traditionally been called a process of secularization of the spiritual law of the church must thus also be viewed as a process of spiritualization of the secular law of the state" (2003, 64).

This "spiritualization of the secular law" formed a pathway through which "moral" matters traditionally handled by the church or communities became the subject of legislation—a legacy that remains with us to this day in the impulse to use the machinery of the state in attempts to "make people better."[50] He observes in the case of Germany that:

> Five principle types of spiritual matters were regulated by ordinances promulgated by secular authority in Protestant German lands during the sixteenth century. These ordinances regulated (1) church liturgy, (2), marriage, (3) schooling, (4) moral discipline, and (5) poor relief. (179)
>
> Disciplinary ordinances (*Zuchtornungen*) were enacted…to enforce morality by secular authority…it was Lutheran theologians, often

[49] Such an action might still become a rights issue if the use of a drug by a tenant violated contractual terms or site rules set by his landlord. This is an issue of property rights and contract law, not directly one of ethics, per se. Indirectly, ethics might advise the tenant of the "good" of avoiding eviction, or might advise him to find a residential format the rules of which were in harmony with this practice.

[50] The 2006 Prometheus Special Award-winning film *Serenity* (2005) dramatizes examples of attempts at moral engineering going terribly wrong in a futuristic setting.

> law-trained, who not only inspired but also drafted that legislation and presented it to the civil authorities for enactment. (187)

A broader factor in the traditional association of law with morality and ethics is that the origins and development of the entire western legal tradition were inextricably tied with the history of religion. The Canon Law influenced the form and evolution of law and legal reasoning. Canon Law and other bodies of law in medieval Europe—such as the Common Law, Urban Law, the Law Merchant, and Royal Law—were tied in with an ongoing set of power conflicts between geographically scattered and overlapping religious, political, and commercial entities (Berman 1983).

Moreover, it is often monks and priests who become the first formal intellectuals in a society and they are immediately associated through their professions with morality and adherence to ethical codes.[51] Beyond the medieval European universities, think of, as one example, the Buddhist University at Nalanda, India, a major center of philosophy and learning from C.E. 427–1197. Supported financially by others, full-time seekers often proceed to specialize in the study, copying, and debating of formal religious doctrines. They sometimes then also begin to apply the skills thereby developed to wider fields of knowledge—such as the natural sciences, administration, law, and even economics.

This has sometimes led to real progress even in fields such as law and economics, as happened among the Spanish Late Scholastics.[52] Yet one general result of this historical and intellectual linkage with traditional religions is to leave a lingering association between such extensions of scholarship and the religious morality systems in the institutional and intellectual context of which they developed.

The long-term skewing of theory by establishment influences

A variety of religious and political influence processes have shaped conceptions of law, economics, and their relationship to one another over long stretches of historical time up to the present. Such influence processes have not always had the pursuit of truth as their guide, but have nevertheless helped shape the development of conventional schools of jurisprudence and economics. They have systematically disfavored clear reasoning in the social

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[51] Or at least bitter Renaissance complaints about a lack of adherence (Brucker 1983).

[52] Rothbard [1995] 2006, Chapter 4; Chafuen 2003; Huerta de Soto 2009, Chapters 15–16

sciences. How does this tendency originate and operate and how does it look today?

In traditional societies with formal religious classes, believers support monks, nuns, or priests. Rulers, regardless of whether they may also happen to be authentic believers, often also begin providing support (or persecution, as the case may be). Whether it is part of their intention or not in any given instance, this helps to secure the public legitimization of their power.

Such establishment pressures and supports operate as "carrots and sticks" that skew the incentives facing theorists in such religious/proto-academic institutional contexts. These influences tend to operate on theorists in particular directions: Produce theories and interpretations that support the establishment's interests. Specifically, find ways to exclude the otherwise criminal or unethical actions of rulers from the ordinary strictures for non-rulers. Finally, develop theoretical formulations capable of concealing or obscuring exploitation.[53]

Historically, theorists who persisted in arguing for the consistent application of rules to rulers and refusing to obscure exploitation or wrong-doing sometimes met with the "stick" for their interpretations. For example, Juan de Mariana (1536–1624) published *De monetae mutatione* ('On the alteration of money') in 1605, arguing that the king could not tax without consent and attacking the inflationary (metal-content debasement in those days) polices of Philip III (Huerta de Soto 2009, 204–06). The state's monopolization and manipulation of money is both a legal and an economic issue that has proven a fertile ground over the centuries for the production of confused, obfuscating theories in both fields. Clarity in this field has generally been unwelcome, as the official response to Juan de Mariana's work exemplifies. Rothbard retraces the aftermath of this early and bold attempt at principled inflation-fighting:

> Mariana's book attacking the king's debasement of the currency led the monarch to haul the aged (73-year-old) scholar into prison, charging him with the high crime of *lese-majeste*. The judges convicted Mariana of this crime against the king, but the pope refused to punish him, and Mariana was finally released from prison after four months on the condition that he would cut out the offensive passages in his work, and that he would be more careful in the future.

[53] That is, exploitation as formulated in Austrian class analysis, rather than the better-known Marxist version (Hoppe 2006, Chapter 4).

> King Philip and his minions, however, did not leave the fate of the book to an eventual change of heart on the part of Mariana. Instead, the king ordered his officials to buy up every published copy of *De Monetae Mutatione* they could get their hands on and to destroy them. Not only that; after Mariana's death, the Spanish Inquisition expurgated the remaining copies, deleted many sentences and smeared entire pages with ink. All non-expurgated copies were put on the Spanish *Index,* and these in turn were expurgated during the seventeenth century. As a result of this savage campaign of censorship, the existence of the Latin text of this important booklet remained unknown for 250 years, and was only rediscovered because the Spanish text was incorporated into a nineteenth century collection of classical Spanish essays. (2006, 21)

Lest we moderns think we are much beyond cases such as King Philip III's insistence on inflating in the face of Mariana's impassioned and well-founded protests, four centuries later, modern fiat currencies are dropping in value precipitously. The responsible central banks, meanwhile, finance and support many of the same monetary economists whom one might think would be best qualified to challenge such fraudulent and destructive practices—practices the evaluation and critique of which are the joint provinces of economic and legal theory.[54]

Lawrence White (2005) demonstrated the massive influence the US Federal Reserve System has on the monetary economics profession. "Judging by the abstracts compiled by the December 2002 issue of the *e-JEL*, some 74 percent of the articles on monetary policy published by US-based economists in US-edited journals appear in Fed-published journals or are co-authored by Fed staff economists" (325). The Fed thus pays directly for research that tends to stay within an underlying paradigm of state-sponsored monopoly central banks coordinating the inflationary activities of state-cartelized banking industries. White argues that even beyond such direct effects, network effects also have a pervasive impact on career and research decision-making by academicians:

> If academic research is subject to network effects—meaning that the larger the community of researchers who investigate a particular topic or take a particular approach, the greater the professional rewards to other researchers for doing likewise—then even those researchers outside the Fed's direct sphere of influence will be

[54] For comprehensive multi-disciplinary refutations of the entire fiat money and central banking paradigm, with detailed explications of the causal chains involved in its destructive consequences, along with historical and legal context and proposed alternatives, see Huerta de Soto (2006) and Hülsmann (2008).

> indirectly influenced by its program. They know, for instance, that their research must pass muster with Fed-affiliated journal editors and referees. (326)

Thus, today, the influence of power-wielders on theorists continues to shape the direction of thought and research in law and economics—particularly in the form of the pervasive ongoing state-origin funding of academic work. This systematically skews intellectual work, especially in those fields on which established interests depend for a certain acceptable range of conclusions that help maintain their general legitimation.

The road to the state's lingering domestication of the economics profession and consequent taming of a potent source of political-economic criticism was already paved in the crucial formative decades of the modern discipline. Hülsmann describes the early selection pressures that disfavored economic research that might upset the establishment:

> Because of this ostracism of genuine economists, those who held (or hoped to hold) academic positions in political economy became eager to avoid any behavior that could offend the powers that be. The most innocent strategy was to understate one's findings when they risked upsetting certain powerful social groups…
>
> In a similar vein, an increasing number of young economists turned their attention to abstract and technical problems that did not have any political implications unwelcome to their employers. This helps explain the success of mathematical economics, econometrics, Keynesian economics, and game theory after WWII…
>
> The transformation of economics into a self-absorbed technical discipline made it politically toothless. A mere "theory" based on fictitious stipulations and therefore without scientifically valid implications for public policy was no threat to vested interests, and the champions of this theory did not have to fear reprisals. Clearly, this state of affairs suited the majority in the economics profession, both employers and employees. But it was disastrous for science, human liberty, and economic progress. (2007, 549–52)

A related development was the decline of "political economy" itself, which predates modern "economics," and which implied a combined analysis of naturally interdependent economic and legal-institutional concepts. The shift toward mathematics and empiricism in economics coincided with a distancing from such broader investigations.

We argued in Part I that the proper method for both legal and economic theory is deductive and counterfactual. Empiricists, according to their method, must distance themselves from deductive versions of both disciplines and attempt to construct interior-to-exterior reductionist versions.

The model I advance here revisits part of the original integral spirit of "political economy" in the sense of addressing both legal and economic issues in combination. However, it goes further by bringing legal and economic theory explicitly under the same praxeological umbrella.

Frederick von Hayek in 1949 restated Schumpeter's observation that widespread state funding of education enables intellectuals to develop their worldviews with no practical experience of business or the management of property. He also speculated that "intellectual property"[55] legislation could moreover tend to influence the content of intellectual work in the direction of statism.

More recently, Klein (2010, 149–56) examines in detail the multiple levels on which, "for academics, there are many benefits to living in a highly interventionist society. It should be no wonder, then, that academics tend to support those interventions" (153). He also notes, following Hayek, a form of self-selection pressure in academic participation itself:

> Exceptionally intelligent people who favor the market tend to find opportunities for professional and financial success outside the Academy (i.e., in the business or professional world). Those who are highly intelligent but ill-disposed toward the market are more likely to choose an academic career. For this reason, the universities come to be filled with those intellectuals who were favorably disposed toward socialism from the beginning. (151)

One category of social-science methodology that has tended to be amenable to established interests is empiricism/positivism. Hoppe identifies the reasons why positivism, which vehemently denies validity to the type of reasoning about human action found in praxeology, was especially successful in the social sciences:

> Their philosophical message was quickly recognized by the powers that be as a mighty ideological weapon in the pursuit of their own goal of increasing their control over others and of enriching themselves at the expense of others. Accordingly, lavish support was bestowed on the positivist movement, and this movement returned the favor by destroying economics and ethics in particular as the traditional bastions of social rationalism and eradicating from public consciousness a vast body of knowledge that had once constituted a seemingly permanent part of the heritage of Western thought and civilization. (2006, 356)

[55] For a deductive legal theory treatment of this topic, reasoning from ground-level property theory, see Kinsella 2001.

Patterns of "carrot and stick" influences on social theorizing originated in a historical milieu in which rulers either threatened or funded proto-academic religious professionals according to their conclusions and statements on topics that fall under the modern fields of economic and legal theory. As an echo of this, right up to the present day, "carrot" influences steadily guide conventional social-science approaches in pervasively statist, pro-establishment directions. This has had a deep impact on the form and content of conventional approaches to jurisprudence and economics.

This background helps highlight the importance of placing both of these fields on as sound a methodological basis as possible. Basing work in these fields to the greatest extent possible on internal standards of evidence grounded in a priori deductive reasoning from first principles should simultaneously help immunize such work against the kind of distorting carrot and stick "incentives" described above while also contributing directly to the advancement of sound, useful theorizing.

Discrete roles for legal theory and ethics

In common usage, concepts such as "right and wrong" or "just and unjust" overlap vaguely between ethical statements and legal claims. Violating (legal) "rights" is also (morally) "wrong" in many ethical systems, inviting confusion. Nevertheless, the single category of legal wrongs does not exhaust the sphere of moral wrongs in ethical systems. This at first may seem to make respecting legal rights one sub-category of ethics among others.

There *is* an intuitive relationship between law and ethics. However, I argue that it is not one of a field to a sub-field, but rather an *advisory* relationship between two distinct fields. This is analogous to Mises's conception of the role of economic theory in providing statements of definition and causality for use in normative political discourse. In a similar way, sound legal theory can provide categorical distinctions and formal sets of descriptive relationships that can then be subjected to moral evaluation for action purposes.

If one takes on the moral objective of not aggressing, one is more likely to be *successful* at this in action with a clear idea of what aggression *is*. "Rights infringements" become one category of wrongs next to other non-legal categories of wrongs that a given ethical system may specify. Yet the definition of *what constitutes* infringing rights is derived independently of ethics using the categorical, counterfactual method of praxeology.

Although the APoA establishes that no *propositional* argument against the NAP can succeed, it does not prevent human beings from infringing the NAP *anyway*. The clarity that deductive legal theory provides gives people

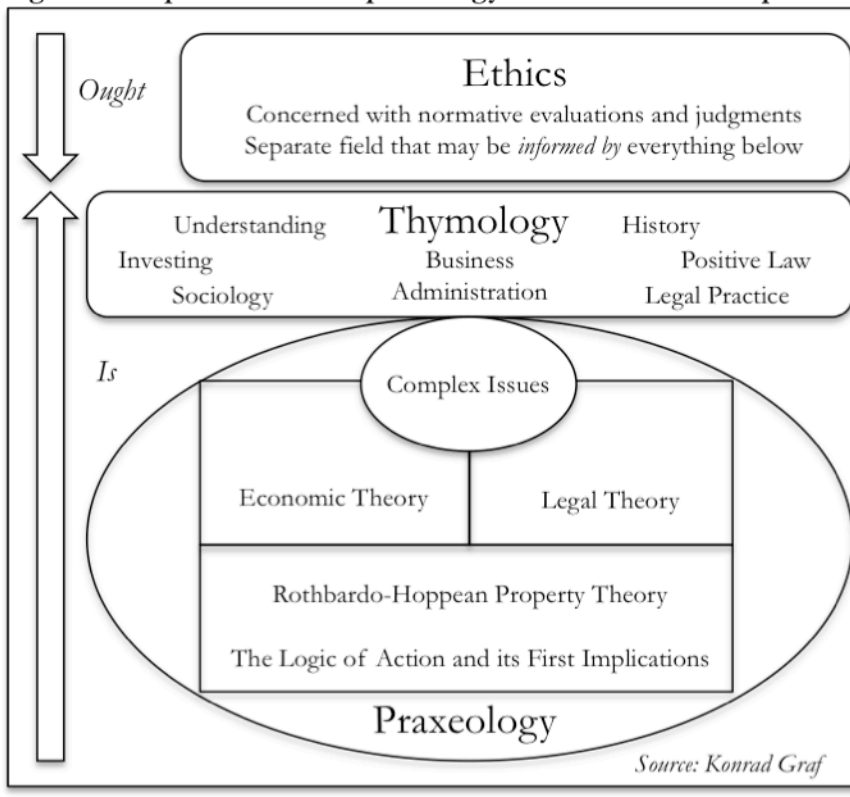
who are trying to do the right thing tools that they need to succeed *if* respecting the rights of others is among their particular action goals or among things they claim to uphold.[56] The task of doing the (morally) right thing vis-à-vis the (legal) rights of others is greatly simplified if what those rights are is clearly specified.

However, such tools of clarification hardly replace a moral compass as such. As Huerta de Soto (2009, 171) writes, "it is basically moral considerations that drive the reformist behavior of human beings, who are often willing to make significant sacrifices in order to pursue what they consider good and just from the moral point of view." Along similar lines, Hoppe (2006, 394) writes, "Few are inspired and willing to accept sacrifices if what they are opposed to is mere error and waste. More inspiration and courage can be drawn from knowing that one is engaged in fighting evil and lies."

Deductive legal theory, when properly applied in a given context, objectively and descriptively defines the parameters of *what justice is* in relation to questions of property rights, contracts, torts, and other legal matters. This yields a deeper-than-expected foundation for the traditional libertarian insistence on not mixing law with morality and the corollary opposition to "legislating morality." Legal theory is a discrete field that, like Mises's conception of economic theory, can provide descriptive, categorical input for use in "ought" considerations, even as legal theory and ethics remain distinct in foundations, scope, and method.

[56] Van Dun (2009, 11) provides an example of the latter: "An official condemns a man to the gallows, having heard only the arguments and witnesses of the prosecution and having denied the accused the right to defend himself. There is not a whiff of dialectical contradiction there as long as the official places himself in the realm of brute force or cunning manipulation, demonstrating by words or actions that he does not intend to justify his action. However, he would dialectically contradict himself if he were to go on to say that he has rendered justice and spoken truly as required by the ethics of argumentation."

Figure 3. Proposed model of praxeology: Vis-à-vis other disciplines



Part IV *Application*: Rights for other species?

Part I defined "interaction," as it concerns praxeology, as those aspects of the broader concept of interrelating that can uniquely transpire among *actors* as opposed to mere behavers, such as animals. Certain animals might be said to interrelate in a sense, but not in a praxeological one. Propositional justification, which is the foundation of the APoA and its justification of the NAP, is a type of communication that humans do not share with animals. It is distinct from other communicative functions found in certain social animals, such as the signaling of threat and subservience in social power relationships. Propositional truth-claiming is the specific realm that, so far as we know, is unique to human beings, and this is the realm from which the APoA springs and to which it applies.

Humans remain capable of communications that are *not* grounded in truth claims, but in acts of social influence and social signaling. This

distinction between influence-focused versus truth-focused communication is a critical one and is transmitted through culture. As Van Dun warns, "teaching children and young adults that they should not ask "Is it true?" but only "What is in it for me?" is abandoning their education in favor of preparing them for recruitment by demagogues" (2009, 5, fn14).

Consent is among the forms of proposition that is invalidated under conditions of aggression. In other words, consent is distinct from acquiescence or surrender. Force may include various "communications" ("Hands up!"), but this type of communication functions as exposed fangs do for wolves, as a threat, not as a statement in the distinctly human sense of words that are to be judged by their truth, internal consistency (lack of performative contradiction) and authenticity.

The classical *ad hominem* fallacy reminds us of the logical need in discourse to judge statements primarily on their content rather than on the identity of their speaker. From there, it is a short, though perhaps surprising, extension to conjecture that *if* some as-yet unknown animal or alien species were encountered that proved to be capable of, and actually engaged with humans in, propositional communication, such propositions would likewise logically have to be given priority in judgment over the identity of their speakers. Such a shared foundation could logically form the basis of a cross-species rights framework. This should follow if our foundation for rights does indeed rest in discourse principles and in the sphere of restrictive conditions that the nature of propositional justification entails.

In this context, the idea of a *presumption* of rationality could also be helpful in considering an expanded definition of personhood: "If a man proves himself an *animal rationis capax* [animal capable of reason] by engaging others in argumentation, then he *is* a person and ought to be regarded and treated as such by other persons" (Van Dun 2009, 9). Members of some newly encountered race may thus at first have to establish through actions their propensity to engage in discourse rather than violence and thereby establish a general presumption of rationality. It is even possible that certain aliens could prove *more* trustworthy and reliably rational as "persons," than some fellow humans, as the Vulcans in *Star Trek* famously dramatized.

The concept of the presumption of rationality also links to the justification of children's rights. In the case of children—or others who have not actually developed or who have lost through accident propositional discourse abilities—it can be presumed that during a contingent absence of such abilities, they would want to appoint for themselves guardians to employ such abilities on their behalf in protection of their rights. The case for such a

presumption is superior to the case for any alternative presumption in the absence of specific contravening evidence.[57]

The key point in considering claims in favor of "animal rights" is that propositional communication remains among the things that we do *not* share with any known non-humans.[58] Yet it is this capability that is the foundation for the justification of NAP-defined rights using the APoA. This is why, despite the possibility of having empathy for and interrelating with pets and various other animals, there is no basis for involving the concept of "rights" in relation to any known animals, except insofar as specified animals may be the property of some humans, but not of others. It is for this reason that, given our current knowledge, rights are restricted to humans.[59]

This analysis excludes known animals from having legal "rights" of their own, and preserves a sharp legal/moral distinction. However, it says nothing about the extent to which some humans might choose to engage in ethically motivated actions with regard to animals. Concerned persons might choose to boycott products or people, run educational campaigns against what they may argue is unnecessary cruelty to various animals, buy or claim unowned animals and proceed to treat them in any way that they would like them to be treated, or develop and market new products claiming ethical alignments, such as "dolphin-safe tuna."

Part IV has argued from several angles that no sound basis exists for blending together the realm of morality with the properly defined fields of property rights theory and law, or vice-versa. The tendency to view these fields too closely together has arisen at least as much from historical-developmental factors as from the inherent nature of the fields themselves. Moreover, the distinction between ethical and legal issues is not ad hoc, merely arguable, or based on political preference, but is based on the very foundational definitions and methods of legal theory and ethics as fields.

Conclusion: Sound Legal Theory

Central aspects of the emerging body of "Austro-libertarian legal theory" are of the same logical character as the further elaborations of praxeology in the Misesian lineage of economics. Since such legal theory deals

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[57] See the discussions in Rothbard 2002, Chapter 14 and Kinsella 2006c.

[58] This is an empirical fact derived from the realm of the natural sciences. As such, we add it as a factual assumption to the deductive reasoning chain concerning property rights. It contains no a priori validation of its own; it simply happens to be so in the world under consideration, according to current empirical knowledge.

[59] Not to be confused with "human rights."

with and defines formal sub-sets and categories of human action using an action-based, counterfactual deductive methodology, it is itself a branch or sub-division of praxeology.

While economic theory takes its praxeological inquiry in the direction of "economic" categories, legal theory takes this same type of inquiry in the direction of "legal" categories. Such sets of concepts can be used to consider different *aspects* of the same phenomena. Examinations of complex issues such as business cycles or the cultural impact of fiat inflation can profitably use both economic theory and legal theory branches in combination with other discrete fields, such as history, ethics, or sociology.

An account of the "root" praxeological concepts of action and its first implications and the "trunk" elements of the communicative acts of embordering/claiming and consenting are presupposed in all further content in both economic theory and legal theory. These root and trunk concepts therefore logically precede branching. The APoA provides a praxeological account of property rights that fits in the trunk position soundly, in contrast to the uncomfortable fit of previous historical, ethical, and natural law approaches.

Theory and practice are discrete, complementary realms, which must interact and communicate if justice is to be achieved in any real case. Legal theory evolved partly in the context of religious ethical systems, but the content and nature of deductive legal theory differs from ethics as a field concerned with the selection of ends. The clear separation of these fields unravels various confusions stemming from their historical associations.

Action-based jurisprudence produces internally consistent formulations of the requirements of justice. It is helping to weed out confused, arbitrary, and inconsistent elements from traditional and positive-law formulations, even as it draws on valuable insights and distinctions found in traditional legal principles from customary law and case-based legal traditions. This is helping to move legal theory—a field central to the cause of human liberty—toward increasing logical consistency and clarity.

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