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Dialogical Arguments for Libertarian Rights

After publishing articles on my estoppel-based theory of rights\* and Hans-Hermann Hoppe’s “argumentation ethics” defense of libertarian rights† between 1992 and 1996, I published an article surveying estoppel, argumentation ethics, and similar theories in the Journal of Libertarian Studies in 1996, entitled “New Rationalist Directions in Libertarian Rights Theory.” †† An updated version of this article was published as “Dialogical Arguments for Libertarian Rights” in The Dialectics of Liberty in 2019.§ This chapter is based on the latter piece, and is updated still further.\*\*

\* Stephan Kinsella, “Estoppel: A New Justification for Individual Rights,” Reason Papers No. 17 (Fall 1992): 61–74 and the pair of articles that form the basis of “A Libertarian Theory of Punishment and Rights” (ch. 5). See also “How I Became a Libertarian” (ch. 1) and Stephan Kinsella, “The Genesis of Estoppel: My Libertarian Rights Theory,” StephanKinsella.com (March 22, 2016).

† See “The Undeniable Morality of Capitalism” (ch. 22) and Stephan Kinsella, “Book Review: The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy by Hans-Hermann Hoppe,” The Freeman: Ideas on Liberty (November 1994; https://perma.cc/5J2V-R5R6) (each reviewing Hans-Hermann Hoppe, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp)), and “A Libertarian Theory of Punishment and Rights” (ch. 5). See also “Defending Argumentation Ethics” (ch. 7). For more on argumentation ethics, see the references in note 15 to “How We Come to Own Ourselves” (ch. 4).

†† Stephan Kinsella, “New Rationalist Directions in Libertarian Rights Theory,” J. Libertarian Stud. 12, no. 2 (Fall 1996): 313–26. For a recent book-length exploration of some of the arguments discussed in this chapter, see Pavel Slutskiy, Communication and Libertarianism (Springer, 2021).

§ Stephan Kinsella, “Dialogical Arguments for Libertarian Rights,” in Roger Bissell, Chris Sciabarra & Ed Younkins, eds., The Dialectics of Liberty (Lexington Books, 2019).

\*\* The term “dialogical” in my title refers to discourse, or dialogue, which features in many of the theories discussed here, including Hoppe’s discourse or argumentation ethics and many others mentioned in this chapter. As noted in “Defending Argumentation Ethics” (ch. 7) and “The Undeniable Morality of Capitalism” (ch. 22), Hoppe’s discourse ethics was influenced by the discourse ethics of Jürgen Habermas, Hoppe’s PhD advisor, and Karl-Otto Apel. Interestingly, although Rawls says, of his own “original position,” “[l]ike Habermas’s ideal discourse situation, it is a dialogue; indeed, an omnilogue, … Habermas sometimes says that the original position is monological and not dialogical; that is because all the parties have, in effect, the same reasons and so they elect the same principles.” John Rawls, Political Liberalism, expanded ed. (New York: Columbia University Press, 2005), p. 383. For our purposes, I think the term dialogue or dialogical suffices.

Classical liberals and libertarians believe that individuals have rights, even if there is debate about just why we have them or how this can be proved. Robert Nozick opened his book *Anarchy, State, and Utopia* with the assertion: “Individuals have rights, and there are things no person or group may do to them (without violating their rights).”[[1]](#footnote-1) Yet, he did not offer a proof of this assertion, for which he has drawn criticism. It is commonly assumed that Nozick’s argument is not *complete* until a proof of rights is offered.[[2]](#footnote-2) Other theorists have offered, over the years, various reasons—utilitarian, natural law, pragmatic, and the like—why we should respect others’ rights, why we should recognize that individuals have certain rights.[[3]](#footnote-3)

For instance, an economic case can be made for respecting the liberty of others. Given that you are a decent person and generally value your fellow man and wish everyone to live a satisfying life, you will tend to be in favor of the free market and liberty, at least if you understand basic economic principles.[[4]](#footnote-4) But the success of arguments such as these depends on other people accepting particular premises, such as valuing the general well-being of others, without which the argument is incomplete. Skeptics can always deny the validity of the premises even if they cannot refute free-market economics.

There can be no doubt that a rigorous argument for individual rights would be useful. In recent years, interest has been increasing in rationalist, dialectical, or dialogical rights theories or related theories, some of which promise to provide fruitful and unassailable defenses of individual rights. These arguments typically examine the implicit claims that are necessarily presupposed by action or discourse. They then proceed deductively or conventionally from these core premises, or axioms, to establish certain apodictically true conclusions. Several such arguments are surveyed below.

ARGUMENTATION ETHICS

Let us first discuss Hans-Hermann Hoppe’s pathbreaking “argumentation ethics” defense of libertarian rights.[[5]](#footnote-5) Hoppe shows that basic rights are implied in the activity of argumentation itself, so that anyone asserting any claim about anything necessarily presupposes the validity of rights. Hoppe first notes that any truth at all (including norms such as individual rights to life, liberty, and property) that one would wish to discuss, deny, or affirm will be brought up in the course of an argumentation, that is to say, will be brought up in dialogue. If participants in argumentation necessarily accept particular truths, including norms, in order to engage in argumentation, they could never challenge these norms in an argument without thereby engaging in a performative contradiction. This would establish these norms as literally incontestable truths.

Hoppe establishes self-ownership by pointing out that argumentation, as a form of action, implies the use of the scarce resources of one’s body. One must have control over, or own, this scarce resource in order to engage in meaningful discourse. This is because argumentation is, by its very nature, a *conflict-free* way of interacting, since it is an attempt to find what the truth *is*, to establish truth, to persuade or be persuaded by the force of words alone. If one is threatened into accepting the statements or truth-claims of another, this does not tend to get at the truth, which is undeniably a goal of argumentation or discourse. Thus, anyone engaging in argumentation implicitly presupposes the right of self-ownership of other participants in the argument, for otherwise the other would not be able to consider freely and accept or reject the proposed argument. Only as long as there is at least an implicit recognition of each individual’s property right in his or her own body can true argumentation take place. When this right is not recognized, the activity is no longer argumentation, but threat, mere naked aggression, or plain physical fighting. Thus, anyone who denies that rights exist contradicts himself since, by his very engaging in the cooperative and conflict-free activity of argumentation, he necessarily recognizes the right of his listener to be free to listen, think, and decide. That is, any participant in discourse presupposes the non-aggression principle, the libertarian view that one may not initiate force against others. Thus, according to Hoppe, anyone who would ever deny the ethics underlying the free market is already, by his very engaging in the civilized activity of discourse, presupposing the very ethic that he is challenging. This is a powerful argument because, instead of seeking to persuade someone to accept a new position, it points out to him a position that he already maintains, a position that he *necessarily* maintains. Opponents of liberty undercut their own position as soon as they begin to state it.

Hoppe then extends his case for self-ownership to external resources, to show that property rights in external scarce resources, in addition to self-ownership rights, are also presupposed by discourse. As he argues, “one’s body is indeed the *prototype* of a scarce good for the use of which property rights, that is, rights of exclusive ownership, somehow have to be established, in order to avoid clashes.”[[6]](#footnote-6) As Hoppe explains,

The compatibility of this principle with that of nonaggression can be demonstrated by means of an argumentum a contrario. First, it should be noted that if no one had the right to acquire and control anything except his own body … then we would all cease to exist and the problem of the justification of normative statements … simply would not exist. The existence of this problem is only possible because we are alive, and our existence is due to the fact that we do not, indeed cannot, accept   
a norm outlawing property in other scarce goods next and in addition to that of one’s physical body. Hence, the right to acquire such goods must be assumed to exist.[[7]](#footnote-7)

Next, Hoppe argues that the only ownership rule that is compatible with self-ownership and the presuppositions of discourse is the Lockean original-appropriation rule.[[8]](#footnote-8) Hoppe’s basic point here is that self-ownership rights are established just because one’s body is itself a scarce (conflictable) resource, so other scarce resources must be similarly ownable.[[9]](#footnote-9)

Looked at from another angle, participants in argumentation indisputably need to use and control the scarce resources in the world to survive; otherwise, they would perish. But because their scarcity makes conflict over the uses of resources possible, only norms that determine the proper ownership can avoid conflict over these scarce goods. That such norms are valuable cannot be denied, because anyone who is alive in the world and participating in the practical activity of argumentation cannot deny the value of being able to control scarce resources and the value of avoiding conflicts over such scarce (i.e., conflictable) resources.

So no one could ever deny that norms for determining the ownership of scarce goods are useful for allowing conflict-free exploitation of such resources. But, as Hoppe points out, there are only two fundamental alternatives for acquiring rights in unowned property: (1) by doing something with things with which no one else had ever done anything before, that is, the Lockean concept of mixing of labor, or homesteading; or (2) simply by verbal declaration or decree. However, a rule that allows property to be owned by mere verbal declaration cannot serve to avoid conflicts, since any number of people could at any time assert conflicting claims of ownership over any particular scarce resource. Only the first alternative, that of Lockean homesteading, establishes an objective (or, as Hoppe sometimes calls it, intersubjectively ascertainable) link between a particular person and a particular scarce resource, and thus no one can deny the Lockean right to homestead unowned resources.

*Argumentation Ethics and Natural Rights*

Before closing this section let me emphasize that Hoppe offered his theory as an improvement on traditional natural rights arguments. For one, by focusing on argumentation instead of action,[[10]](#footnote-10) he seeks to avoid one weakness of previous arguments:

It has been a common quarrel with the natural rights position, even on the part of sympathetic readers, that the concept of human nature is far “too diffuse and varied to provide a determinate set of contents of natural law.”[[11]](#footnote-11)

Hoppe is also critical of classical natural rights reasoning insofar as it violates the is-ought gap. As he writes: “[O]ne can readily subscribe to the almost generally accepted view that the gulf between ‘ought’ and ‘is’ is logically unbridgeable.”[[12]](#footnote-12) Argumentation ethics attempts to sidestep this issue by remaining in the realm of is-statements:

Here the praxeological proof of libertarianism has the advantage of offering a completely value-free justification of private property. It remains entirely in the realm of is-statements, and nowhere tries to derive an ought from an is. The structure of the argument is this: (a) justification is propositional justification—a priori true is-statement; (b) argumentation presupposes property in one’s body and the homesteading principle—a priori true is-statement; and (c) then, no deviation from this ethic can be argumentatively justified—a priori true is-statement.[[13]](#footnote-13)

Thus, as Hoppe writes:

The relationship between our approach and a “natural rights” approach can now be described in some detail, too. The natural law or natural rights tradition of philosophic thought holds that universally valid norms can be discerned by means of reason as grounded in the very nature of man. It has been a common quarrel with this position, even on the part of sympathetic readers, that the concept of human nature is far “too diffuse and varied to provide a determinate set of contents of natural law.” … Furthermore, its description of rationality is equally ambiguous in that it does not seem to distinguish between the role of reason in establishing empirical laws of nature on the one hand, and normative laws of human conduct on the other.…

In recognizing the narrower concept of argumentation (instead of the wider one of human nature) as the necessary starting point in deriving an ethic, and in assigning to moral reasoning the status of a priori reasoning, clearly to be distinguished from the role of reason performed in empirical research, our approach not only claims to avoid these difficulties from the outset, but claims thereby to be at once more straightforward and rigorous. Still, to thus dissociate myself from the natural rights tradition is not to say that I could not agree with its critical assessment of most of contemporary ethical theory; indeed I do agree with H. Veatch’s complementary refutation of all desire (teleological, utilitarian) ethics as well as all duty (deontological) ethics…. Nor do I claim that it is impossible to interpret my approach as falling in a “rightly conceived” natural rights tradition after all. What I claim, though, is that the following approach is clearly out of line with what the natural rights approach has actually come to be, and that it owes nothing to this tradition as it stands.[[14]](#footnote-14)

And this, perhaps, part of the reason why Rothbard gave a wholehearted endorsement to Hoppe’s argumentation ethics:

In a dazzling breakthrough for political philosophy in general and for libertarianism in particular, he [Hoppe] has managed to transcend the famous is/ought, fact/value dichotomy that has plagued philosophy since the days of the scholastics, and that had brought modern libertarianism into a tiresome deadlock. Not only that: Hans Hoppe has managed to establish the case for anarcho-capitalist, Lockean rights in an unprecedentedly hard-core manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison.[[15]](#footnote-15)

ESTOPPEL

Another rationalist-oriented justification of rights is an argument I developed based on the common-law concept of estoppel.[[16]](#footnote-16) As one legal treatise explains:

The word *estoppel* means “not permitted to deny.” If A makes a statement of fact that B relies on in some substantial way, A will not be permitted to deny it (that is, A will be estopped), if the effect of A’s denial would be to injure the party who relies on it.[[17]](#footnote-17)

Thus, under the traditional *legal* principle of estoppel, a person may be prevented, or estopped, from maintaining something (for example in court) inconsistent with his previous conduct or statements. For instance, if a father promises his daughter that he will pay her college tuition for her, and the daughter relies on this promise to her detriment, for example by enrolling in college and becoming obligated to the college for her tuition, then she may be able to recover some of her expenses from her father, even if his original promise is not enforceable as a normal contract (for example, because there was no consideration).[[18]](#footnote-18) The father would be estopped from denying that a contract was formed, even though, technically, one was not.

Drawing on this legal terminology and concept, the approach I advance may be termed “dialogical” estoppel, or simply estoppel. The estoppel principle shows that an aggressor contradicts himself if he objects to others’ enforcement of their rights. Thus, unlike Hoppe’s argumentation ethics approach, which focuses on presuppositions of discourse in general, and which shows that any participant in discourse contradicts himself if he denies these presuppositions, the estoppel theory focuses on the discourse between an aggressor and his victim about punishment of the aggressor and seeks to show that the aggressor contradicts himself if he objects to his punishment.

What would it mean to have a right? Whatever else rights might be, certainly it is the case that rights are legitimately enforceable; that is, one who is physically able to enforce his right *may* *not* be prevented from doing so. In short, having a right allows one to legitimately punish the violator of the right or to legitimately use force to prevent another from violating the right. The only way one could be said *not* to have a right would be if the attempt to punish a violator of the right is for some reason unjustifiable. But clearly this problem itself can arise only when the alleged criminal *objects* to being punished, for if criminals consented to punishment, we would not face the problem of justifying punishing them.[[19]](#footnote-19)

The estoppel argument contends that we have rights just because no aggressor could ever meaningfully object to being punished. Thus, if the only potential obstacle to having a legitimately enforceable right is the unconsenting criminal, and if he is estopped from objecting to his punishment, then the right may be said to exist, or be justified, since, in effect, the criminal cannot deny this.

So why is this the case? Why is a criminal estopped in this manner? Consider: if *B* is a violent aggressor, such as a murderer or rapist, how could he *not* consent to any punishment that *A*, the victim (or the victim’s agent), attempts to inflict? To object to his punishment, *B* must engage in discourse with *A*; he must at least temporarily adopt the stance of a peaceful, civilized person trying to persuade *A*, through the use of reason and consistent, universalizable principles, to provide reasons as to why *A* should not punish him. But to do this, *B* must in essence claim that *A* should not use force against him (*B*), and to do this, *B* must claim that it is wrong, or unjustifiable, to use force. But since he *has* initiated force, he has admitted that (he believes that) it is proper to use force, and *B* would contradict himself if he were to claim the opposite. Since contradictions are always false[[20]](#footnote-20) and since an undeniable goal of discourse is to establish truth, such contradictions are ruled out of bounds in discourse, since they cannot tend to establish truth. Thus, *B* is estopped from making this contradictory assertion, and is therefore unable to object to his punishment.

Under the estoppel theory, then, we may enforce our rights against violent aggressors, since they cannot object to the enforcement of rights without self-contradiction.[[21]](#footnote-21)

RIGHTS-SKEPTICISM

A third type of rights argument concerns the very nature of rights themselves and shows how any rights-skeptic contradicts himself whenever he denies that rights exist. It is similar to the estoppel approach outlined above, although the discourse under examination need not involve an aggressor. Instead, this argument focuses on rights-skeptics who deny the existence of rights, rather than on actual criminals who object to being punished in particular instances for a given crime.

If any right at all exists, it is a right of *A* to have or do *X* without *B*’s preventing it; and, therefore, *A* can legitimately use force against *B* to en*force* the right.[[22]](#footnote-22) *A* is concerned with the enforceability of his right to *X*, and this enforceability is all that *A* requires in order to be secure in his right to *X*. For a rights-skeptic meaningfully to challenge *A*’s asserted right, the skeptic must challenge the *enforceability* of the right, instead of merely challenging the existence of the right. Nothing less will do. If the skeptic does not deny that *A*’s proposed enforcement of his purported right is legitimate, then the skeptic has not denied *A*’s right to *X*, because what it *means* to have a right is to be able to legitimately enforce it. If the skeptic maintains, then, that *A* has no right to *X*, indeed, no rights at all since there are no rights, the skeptic must also maintain that *A*’s enforcement of his purported right to *X* is not justified.

But the problem faced by the skeptic here is that he assumes that enforcement—that is, the use of force—*requires* justification. *A*, however, cares not that the rights-skeptic merely challenges *A*’s use of force against *B*. The rights-skeptic must do more than express his *preference* that *A* not enforce his right against *B*, for such an expression does not attack the legitimacy of *A*’s enforcing his right against *B*. The only way for the skeptic meaningfully to challenge *A*’s enforcement action is to acknowledge that *B* may use force to prevent *A*’s (illegitimate) enforcement action. And here the rights-skeptic (perversely) undercuts his own position, because by recognizing the legitimacy of *B*’s use of force against *A*, the rights-skeptic effectively attributes rights to *B* himself, the right not to have unjustifiable force used against him. In short, for anyone to meaningfully maintain that *A* has no rights against *B* on the grounds that no rights exist, he must effectively attribute rights to *B* so that *B* may defend himself against *A*’s purportedly unwarranted enforcement action.

More common-sensically, this demonstration points out the inconsistency on the part of a rights-skeptic who engages in discourse about the propriety of rights at all. If there are no rights, then there is no such thing as the justifiable or legitimate use of force, but neither is there such a thing as the unjust use of force. But if there is no unjust use of force, what is it, exactly, that a rights-skeptic is concerned about? If individuals delude themselves into thinking that they have natural rights, and, acting on this assumption, go about enforcing these rights as if they are true, the skeptic has no grounds to complain. To the extent the skeptic complains about people enforcing these illusory rights, he begins to attribute rights to those having force used against them. Any rights-skeptic can only shut up, because he contradicts himself the moment he objects to others’ acting as if they have rights.[[23]](#footnote-23)

OTHER RATIONALIST-RELATED THEORIES

In addition to the three approaches discussed above, other arguments, which also point out the inherent presuppositions of discourse or action, are briefly discussed below.

*G.B. Madison and Argumentation Ethics-Related Theorists*

One approach that is similar to Hoppe’s argumentation ethics is that of philosopher G.B. Madison. Madison argues that

the various values defended by liberalism are not arbitrary, a matter of mere personal preference, nor do they derive from some natural law. … Rather, they are nothing less and nothing more than what could be called the *operative presuppositions* or intrinsic features and demands of communicative rationality itself. In other words, they are values that are implicitly recognized and affirmed by everyone by the very fact of their engaging in communicative reason. This amounts to saying that no one can rationally deny them without at the same time denying reason, without self-contradiction, without in fact abandoning all attempts to persuade the other and to reach agreement.[[24]](#footnote-24)

These implicitly recognized values include a renunciation of the legitimacy of violence. Thus, “it is absolutely impossible for anyone who claims to be rational, which is to say human, outrightly to defend violence.” [[25]](#footnote-25)

Madison continues:

[Paul] Ricoeur writes: “… *violence is the opposite of discourse*.… Violence is always the interruption of discourse: discourse is always the interruption of violence.” That violence is the opposite of discourse means that it can never justify itself—and is therefore not justifiable—for only through discourse can anything be justified. As the theory of rational argumentation and discussion, liberalism amounts, therefore, to a rejection of power politics.[[26]](#footnote-26)

Madison, like Hoppe, argues that the fact-value gap can be bridged by an appeal to the nature of discourse:

the notion of *universal human rights and liberties* is not an … arbitrary value, a matter of mere personal preference.… On the contrary, it is nothing less and nothing more than the operative presupposition or intrinsic feature and demand of communicative rationality itself.[[27]](#footnote-27)

In a sense, notes Madison, Thomas Jefferson was not so far off in calling our rights “self-evident.”

The general thrust of Madison’s argument seems sound, although it is not as consistent or fully developed as Hoppe’s argumentation ethics. While Hoppe shows that the nonaggression principle (i.e., self-ownership plus the right to homestead external resources) itself is directly implied by any discourse or argumentation, Madison’s train of logic seems more muddled. For instance, he argues that, because discourse has “priority” over violence, this validates the Kantian claim that people ought to be treated as ends rather than means, which is the principle of human dignity. The principle of freedom from coercion then follows from the principle of human dignity. Madison does not specify in any more detail than this the libertarian principles that can be derived from such an approach,[[28]](#footnote-28) although, to be fair, Madison stresses that his remarks are intended only “to indicate the way in which liberalism must seek to” defend the values it advocates.[[29]](#footnote-29)

Frank van Dun similarly suggests that part of “the ethics of dialogue” is that we ought to respect the “dialogical rights of others—their right to speak or not to speak, to listen or not to listen, to use their own judgment.”[[30]](#footnote-30) Van Dun argues that “principles of private property and uncoerced exchange” are also presupposed by participants in discourse and later defended Hoppe’s argumentation ethics.[[31]](#footnote-31) Jeremy Shearmur also proposes[[32]](#footnote-32) that a Habermasian argument may be developed to justify individual property rights and other classical liberal principles, although this argument is different in approach from that of Hoppe, Madison, and Van Dun, and is, in my view, much weaker than Hoppe’s approach.[[33]](#footnote-33)

Other theories that are briefly worth mentioning here include Paul Chevigny’s theory that the nature of discourse may be used to defend the right to free speech[[34]](#footnote-34) and Tibor Machan’s view that discourse in general and political dialogue in particular rest on individualist prerequisites or presuppositions.[[35]](#footnote-35)

Murray Rothbard, who was very enthusiastic about Hoppe’s argumentation ethics, was also hopeful that Hoppe’s argumentation ethics or axiomatic approach could be further extended. As Rothbard stated:

A future research program for Hoppe and other libertarian philosophers would be (a) to see how far axiomatics can be extended into other spheres of ethics, or (b) to see if and how this axiomatic could be integrated into the standard natural law approach.[[36]](#footnote-36)

The various perspectives of Hoppe, Madison, Van Dun, and others on a similar theme indicate that Rothbard may indeed be correct that this type of rationalist thinking can be further extended in libertarian or ethical theory.[[37]](#footnote-37)

*Crocker’s Moral Estoppel Theory*

In a theory bearing some resemblance to the estoppel theory discussed above, law professor Lawrence Crocker proposes the use of “moral estoppel” in preventing a criminal from asserting the unfairness of being punished in certain situations. Crocker’s theory, while interesting, is not rigorous, and Crocker does not seem to realize the implications of estoppel for justifying only the *libertarian* conception of rights. Rather than focusing on the reciprocity between the force used in punishment and the force of an aggressive act by a wrongdoer, Crocker claims that a person who has “treated another person or the society at large in a fashion that the criminal law prohibits” is “morally estopped” from asserting that his punishment would be unfair.[[38]](#footnote-38) However, Crocker’s use of estoppel is too vague and imprecise, and relies on a legal positivist conception of law, for just because one has violated a criminal law does not mean that one has committed the aggression that is necessary to estop him from complaining about punishment. A breached law must first be legitimate (just) for Crocker’s assumption to hold, but as the estoppel theory indicates, a law is legitimate only if it prohibits aggression. Crocker’s theory seems to assume that any law is valid, even those that do not prohibit the initiation of force.

*Pilon and Gewirth on the Principle of Generic Consistency*

Another rights theory that bears mention here is that of Roger Pilon. Pilon has developed a libertarian version of the theory propounded by his teacher Alan Gewirth.[[39]](#footnote-39) Although he disagrees with the non-libertarian conclusions that Gewirth draws from his own rights theory, Pilon builds “upon much of the justificatory groundwork he [Gewirth] has established, for I believe he has located, drawn together, and solved some of the most basic problems in the theory of rights.”[[40]](#footnote-40)

To determine what rights we have, Pilon (following Gewirth) focuses on “what it is we necessarily claim about ourselves, if only implicitly, when we act.”[[41]](#footnote-41) Pilon argues that all action is *conative*, that is, an agent acts voluntarily and for purposes which seem good to him. Pilon argues that the prerequisites of successful action are “voluntariness and purposiveness,” the so-called generic features that characterize all action. Thus, an agent cannot help valuing these generic features and even making a rights-claim to them, according to Pilon/Gewirth. From this conclusion, it is argued that all agents also necessarily claim rights against coercion and harm. And since it would be inconsistent to maintain that one has rights for these reasons without also admitting that others have these rights too (since the reasoning concerning the nature of action applies equally to all purposive actors), such rights-claims must be universalizable.[[42]](#footnote-42) As Gewirth writes, the

voluntariness and purposiveness which every agent necessarily has in acting, and which he necessarily claims as rights for himself on the ground that he is a prospective agent who wants to fulfill his purposes, he must also, on pain of self-contradiction, admit to be rights of his recipient.[[43]](#footnote-43)

Thus, an agent in any action makes a rights-claim to be free from coercion and harm, since such rights are necessary to provide for the generic features of action, which an agent also necessarily values, and the agent also necessarily grants these rights to others because of the universalizability requirement.

From this point, Pilon/Gewirth develops a sort of modern categorical imperative, which is called the “Principle of Generic Consistency” (PGC). The PGC is: “Act in accord with the generic rights of your recipients as well as of yourself,” and “Recipients are those who stand opposite agents, who are ‘affected by’ or ‘recipients of’ their actions.”[[44]](#footnote-44) Under Pilon’s libertarian working of the PGC:

[T]he PGC does not require anyone to *do* anything. It is addressed to agents, but it does not require anyone to be an agent who has recipients. An individual can “do nothing” if he chooses, spending his life in idle contemplation. Provided there are no recipients of this behavior, he is at perfect liberty to perform it. And if there are recipients, the PGC requires only that he act in accord with the generic rights of those recipients, *i.e.*, that he not coerce or harm them.[[45]](#footnote-45)

Pilon extends his reasoning and works the PGC to flesh out more fully just what (primarily libertarian) rights we do have.

All this is well done, except for one crucial error. As Hoppe points out, it is *argumentation*, not action, that is the appropriate starting point for such an analysis, because:

[F]rom the correctly stated fact that in action an agent must, by necessity, presuppose the existence of certain values or goods, it does not follow that such goods then are universalizable and hence should be respected by others as the agent’s goods by right.… Rather, the idea of truth, or of universalizable rights or goods only emerges with argumentation as a special subclass of actions, but not with action as such, as is clearly revealed by the fact that Gewirth, too, is not engaged simply in action, but more specifically in argumentation when he wants to convince us of the necessary truth of his ethical system.[[46]](#footnote-46)

It is possible that, despite this error, much of Pilon’s work is salvageable by, in effect, moving it to an argumentation context, such as is done in the estoppel approach where an aggressor must engage in argumentation to object to his punishment and is therefore subject to the unique constraints of argumentation. In other words, the weak link in Pilon’s PGC chain may be able to be repaired by considering claims made *about* prior actions when the agent later objects to punishment, for an objection to being punished requires the agent to enter into the special subclass action of argumentation, to which criteria such as universalizability do apply.

CONCLUSION

Under the three theories outlined above—argumentation ethics, estoppel theory, and the self-contradictions of rights-skeptics—we can see that the relevant participant in discourse cannot deny the validity of individual rights. These rationalist-oriented theories offer very good defenses of individual rights, defenses that are more powerful than many other approaches, because they show that the opponent of individual rights, whether criminal, skeptic, or socialist, presupposes that they are true. Critics must enter the cathedral of libertarianism even to deny that it exists. This makes criticism of libertarian beliefs hollow: for if someone asks why we believe in individual rights, we can tell them to look in the mirror and find the answer there.

1. Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), p. ix. [↑](#footnote-ref-1)
2. See e.g., Thomas Nagel, “Libertarianism Without Foundations,” Yale L. J. 85 (1975; https://perma.cc/SZP3-XPBM): 136–49 (reviewing Nozick, Anarchy, State, and Utopia). See also Tibor R. Machan, Individuals and Their Rights (La Salle, Ill.: Open Court, 1989), p. xiii (“In a way this book is a response to Thomas Nagel’s criticism of [Nozick], a criticism often endorsed by others, to wit, that libertarianism lacks moral foundations.”); Loren E. Lomasky, Persons, Rights, and the Moral Community (New York: Oxford University Press, 1987), p. 9, who says that Nozick declines “to offer any systematic rationale for the vaguely specified collection of rights he takes to be basic” (footnote omitted). [↑](#footnote-ref-2)
3. See, e.g., Ludwig von Mises, Liberalism: In the Classical Tradition, 3d ed., Ralph Raico, trans. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1985; https://mises.org/library/liberalism-classical-tradition); Murray N. Rothbard, The Ethics of Liberty (Atlantic Highlands, N.J.: Humanities Press, 1982); idem, For A New Liberty: The Libertarian Manifesto, rev’d ed. (New York: Libertarian Review Foundation, 1985; https://mises.org/library/new-liberty-libertarian-manifesto); Ayn Rand, Capitalism: The Unknown Ideal (New York: Signet, 1967); idem, The Virtue of Selfishness: A New Concept of Egoism (New York: Signet, 1964); Machan, Individuals and Their Rights; Jan Narveson, The Libertarian Idea, reissue ed. (Broadview Press, 2001); Lomasky, Persons, Rights, and the Moral Community; Douglas B. Rasmussen & Douglas J. Den Uyl, Liberty and Nature: An Aristotelian Defense of Liberal Order (La Salle, Ill.: Open Court, 1991).

   Randy Barnett contends that consequentialist arguments for rights need not be utilitarian. See Randy E. Barnett, “Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses,” Harv. J. L. & Pub. Pol’y 12 (1989; www.randybarnett.com/pre-2000): 611–36, and idem, “Introduction: Liberty vs. License,” in The Structure of Liberty: Justice and the Rule of Law, 2d ed. (Oxford, 2014). Some libertarian theorists provide arguments other than traditional deontological, principled, or natural rights, and utilitarian, empirical, or consequentialist, approaches. For example, Michael Huemer argues for a type of intuitionism in his Ethical Intuitionism (Palgrave Macmillan, 2007). In his Escape from Leviathan: Liberty, Welfare and Anarchy Reconciled (New York: St. Martin’s Press, 2000), J.C. Lester opposes “justificationist” arguments for liberty and advances a critical-rationalist, “conjecturalist” approach influenced by Karl Popper’s empiricist-positivist views. Patrick Burke proposes “causing harm” as the main linchpin of libertarian justice. See T. Patrick Burke, No Harm: Ethical Principles for a Free Market (New York: Paragon House, 1994). On Lester, see David Gordon & Roberta A. Modugno, “Review of J.C. Lester’s Escape from Leviathan: Liberty, Welfare, and Anarchy Reconciled,” J. Libertarian Stud. 17, no. 4 (2003, https://mises.org/library/review-jc-lesters-escape-leviathan-liberty-welfare-and-anarchy-reconciled-0): 101–109; and Kinsella, “‘Aggression’ versus ‘Harm’ in Libertarianism,” Mises Economics Blog (Dec. 16, 2009) (criticizing Lester’s approach, his opposition to “justificationism,” and his focus on “imposing costs” instead of aggression as the key libertarian principle). On Burke, see Kinsella “Book Review,” Reason Papers No. 20 (Fall 1995; https://reasonpapers.com/archives/), p. 135–46, and idem, “‘Aggression’ versus ‘Harm’ in Libertarianism.” See also Kinsella, “Hoppe on Property Rights in Physical Integrity vs Value,” StephanKinsella.com (June 12, 2011). See also “A Libertarian Theory of Punishment and Rights” (ch. 5), n.16, including the quote by Rothbard criticizing the “harm” approach and Mill, Hayek, and Nozick. [↑](#footnote-ref-3)
4. See Kinsella, “The Division of Labor as the Source of Grundnorms and Rights,” Mises Economics Blog (April 24, 2009), and idem, “Empathy and the Source of Rights,” Mises Economics Blog (Sept. 6, 2006). [↑](#footnote-ref-4)
5. See Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), ch. 7; idem, “From the Economics of Laissez Faire to the Ethics of Libertarianism,” “The Justice of Economic Efficiency,” and “On the Ultimate Justification of the Ethics of Private Property,” chaps. 11–13 in The Economics and Ethics of Private Property, esp. pp. 314–22. See also “Defending Argumentation Ethics” (ch. 7) and other references in note 15, below. [↑](#footnote-ref-5)
6. Hoppe, A Theory of Socialism and Capitalism, at 19. In recent years I have tried to emphasize that “scarce” in this technical economic sense does not mean merely “rare” but rivalrous, or “not-superabundant,” and have sometimes employed the term “conflictability” to avoid confusion and to forestall equivocation. See Stephan Kinsella, “On Conflictability and Conflictable Resources,” StephanKinsella.com (Jan. 31, 2022); also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), text at n.29; “What Libertarianism Is” (ch. 2), n.5. [↑](#footnote-ref-6)
7. Ibid., at 161. [↑](#footnote-ref-7)
8. Ibid., at 160–69. [↑](#footnote-ref-8)
9. See note 21, below, for one view of the U.S. Supreme Court regarding the connection between property and other rights. [↑](#footnote-ref-9)
10. See text at note 46, below. [↑](#footnote-ref-10)
11. Hoppe, A Theory of Socialism and Capitalism, p. 156 n.118, quoting Alan Gewirth, “Law, Action, and Morality,” in Georgetown Symposium on Ethics: Essays in Honor of Henry B. Veatch, R. Porreco, ed. (New York: University Press of America, 1984), p. 73); see also “The Undeniable Morality of Capitalism” (ch. 22), at n. 31. This point should not be confused with:

    H.L.A. Hart’s notion of the minimum content of the natural law [which Hart] introduces to show that the constraints on the nature of law imposed by the human condition are very weak indeed, whereas Barnett invokes Hart’s notion in support of what, at first blush, might seem to be the opposite conclusion, i.e., that fundamental problems of human nature impose very strong constraints on the content of the law. This seeming opposition is dissolved once we appreciate that Hart introduced his idea to show that nature imposes very weak constraints on the concept of law, that is, on what can count as a “law,” from the point of view of philosophical analysis.… Barnett uses Hart’s terminology for the very different purpose of showing that nature imposes very strong constraints on what laws can be justified.… Barnett would not claim that his argument establishes that compliance with his liberal conception of justice is required for a norm to count as a law.

    Lawrence B. Solum, “The Foundations of Liberty” [review of the first edition of Barnett’s The Structure of Liberty], Mich. L. Rev. 97, no. 6 (May 1999; https://repository.law.umich.edu/mlr/vol97/iss6/26/): 1780–1812, p. 1782 n.4 (citations omitted). See also H.L.A. Hart, The Concept of Law 3d ed. (Oxford: Oxford University Press, 2012 [1961]), chap. IX, §2, “The Minimum Content of Natural Law”; Barnett, The Structure of Liberty: Justice and the Rule of Law, pp. 11–12 (discussing this aspect of Hart’s work) and 332–34 (discussing Solum’s criticism of Barnett in this regard). [↑](#footnote-ref-11)
12. Hoppe, A Theory of Socialism and Capitalism, p. 163 (citing W.D. Hudson, ed., The Is-Ought Question (London: Macmillan, 1969)). [↑](#footnote-ref-12)
13. Hoppe, The Economics and Ethics of Private Property, p. 345. See also “The Undeniable Morality of Capitalism” (ch. 22), at n. 31. [↑](#footnote-ref-13)
14. Hoppe, A Theory of Socialism and Capitalism, pp. 156–57, n.118 (citations omitted). It should be noted that other thinkers have glimpsed the idea that the requirements of human reason and reasoning/discourse itself can help to inform which norms can be justified, but none of them recognize the crucial importance of scarcity and praxeological action as Hoppe does, so their arguments only go so far or end in error (e.g. supporting welfare rights). See, e.g., Solum, “The Foundations of Liberty,” p. 1809 (“The justification for a conception of justice can be limited to the resources of public reason, the common reason of all the rational and reasonable members of a community.”); Rawls, Political Liberalism, Lectures IV and VI, and Part Four; Barnett, The Structure of Liberty: Justice and the Rule of Law, pp. 332–34.

    See also Hoppe’s criticism of Gewirth’s argument for rights in the section “Pilon and Gewirth on the Principle of Generic Consistency,” below. [↑](#footnote-ref-14)
15. Murray N. Rothbard, “Beyond Is and Ought,” Liberty 2, no. 2 (Nov. 1988; https://perma.cc/A5UU-P64A): 44–45, at 44. The late Leland Yeager claimed that Rothbard, who died in January 1995, had changed his mind before his death regarding the validity of Hoppe’s argument, even after endorsing it in 1988. Leland B. Yeager, “Book Review,” Rev. Austrian Econ. 9, no. 1 (1996; https://perma.cc/UDC3-UQ3Z): 181–88 (reviewing Murray N. Rothbard, Economic Thought Before Adam Smith and Classical Economics, vols. 1 and 2 of An Austrian Perspective on the History of Economic Thought (Aldershot, England and Brookfield, Vt.: Edward Elgar, 1995; https://perma.cc/3ABN-9FD2)). Yeager asserts that, based on language in this posthumously-published treatise:

    Rothbard no longer endorses Hans-Hermann Hoppe’s claim to derive libertarian policy positions purely from the circumstances of discussion itself, without any appeal to value judgments.… On the contrary, and as he had done earlier, Rothbard now correctly observes that policy recommendations and decisions presuppose value judgments as well as positive analysis. (p. 185)

    There is no doubt that Yeager himself sees no merit in Hoppe’s argumentation ethics. See Leland B. Yeager, “Raw Assertions,” Liberty 2, no. 2 (Nov. 1988; https://perma.cc/A5UU-P64A): 45–46. However, Yeager provides no evidence for his contention about Rothbard’s change of mind. It is undoubtedly wrong.

    Hoppe’s argumentation ethics has drawn a number of critics and defenders since its debut in the mid-1980s, and continues to attract attention. See generally Stephan Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” StephanKinsella.com (May 27, 2011); and idem, “Hoppe’s Argumentation Ethics and Its Critics,” StephanKinsella.com (Aug. 11, 2015). See also Chris Matthew Sciabarra, Total Freedom: Toward a Dialectical Libertarianism (Penn State University Press, 2000), pp. 367–69 (discussing Hoppe’s argumentation ethics as well as my own estoppel views and other dialectical approaches); and Bissell, Sciabarra & Younkins, “Introduction,” in Bissell, Sciabarra & Younkins, eds., The Dialectics of Liberty (discussing the estoppel theory). Several scholars have responded to Bob Murphy & Gene Callahan, “Hans-Hermann Hoppe’s Argumentation Ethic: A Critique,” Anti-state.com (Sept. 19, 2002), republished in substantially similar form as “Hans-Hermann Hoppe’s Argumentation Ethic: A Critique,” J. Libertarian Stud. 20, no. 2 (2006; https://mises.org/library/hans-hermann-hoppes-argumentation-ethic-critique): 53–64, including: “Defending Argumentation Ethics” (ch. 7); Frank van Dun, “Argumentation Ethics and the Philosophy of Freedom,” Libertarian Papers 1, art. no. 19 (2009; www.libertarianpapers.org); Marian Eabrasu, “A Reply to the Current Critiques Formulated Against Hoppe’s Argumentation Ethics,” Libertarian Papers 1, art. no. 20 (2009; www.libertarianpapers.org); Walter Block, “Rejoinder to Murphy and Callahan on Hoppe’s Argumentation Ethics,” J. Libertarian Stud. 22, no. 1 (2011; www.walterblock.com); and Norbert Slenzok, “The Libertarian Argumentation Ethics, the Transcendental Pragmatics of Language, and the Conflict-Freedom Principle,” Analiza i Egzystencja 58 (2022), 35–64.

    Hoppe re-presented his argument and responded to a variety of critics in his 2016 speech, at “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016),” The Property and Freedom Podcast, ep. 163 (June 30, 2022), stating:

    Some later critics, in particular Robert Murphy and Gene Callahan, who apparently accepted my libertarian conclusion but rejected my way of deriving it (without, however, proposing any alternative reason for their own libertarian “beliefs”), were argumentatively demolished by Stephan Kinsella, Frank van Dun and also Marian Eabrasu. [↑](#footnote-ref-15)
16. See references at note \*, above. [↑](#footnote-ref-16)
17. Bernard F. Cataldo, et al., Introduction to Law and the Legal Process, 3d ed. (New York: John Wiley and Sons, 1980), p. 479. See also American Law Institute, Restatement (Second) of Contracts (St. Paul, Minn.: American Law Institute Publishers, 1981), §90; Louisiana Civil Code (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=67&level=Parent), art. 1967. See also references in Part III.A of “A Libertarian Theory of Punishment and Rights” (ch. 5). [↑](#footnote-ref-17)
18. See, for example, Zimmerman v. Zimmerman, 447 N.Y.S.2d 675 (App. Div. 1982), from which this example was derived. For another recent example concerning a Bitcoin-related defamation lawsuit, see “A Libertarian Theory of Punishment and Rights” (ch. 5), at n.23. [↑](#footnote-ref-18)
19. Of course, an accused criminal need not engage in discourse with his accuser at all. But if the criminal is to put forward an objection to his punishment, he must engage in argumentation and thus be subject to the rules of argumentation. As Hare noted in a similar context:

    Just as one cannot win a game of chess against an opponent who will not make any moves—and just as one cannot argue mathematically with a person who will not commit himself to any mathematical statements—so moral argument is impossible with a man who will make no moral judgments at all.… Such a person is not entering the arena of moral dispute, and therefore it is impossible to contest with him. He is compelled also—and this is important—to abjure the protection of morality for his own interests.

    R.M. Hare, Freedom and Reason (Oxford: Clarendon Press, 1963), § 6.6 (emphasis added). See also Hannah Arendt’s justification of the execution of Adolf Eichmann:

    [J]ust as you [Eichmann] supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.

    Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (Penguin, 2006), p. 279.

    For other, similar quotes, see Kinsella, “Quotes on the Logic of Liberty,” StephanKinsella.com (June 22, 2009). [↑](#footnote-ref-19)
20. See “A Libertarian Theory of Punishment and Rights” (ch. 5), n.29 and accompanying text. [↑](#footnote-ref-20)
21. As Hoppe’s argumentation ethics approach grounds self-ownership rights and then is extended to cover property rights, so the estoppel argument may also be extended to cover property rights and the Lockean homesteading principle, essentially by showing that self-ownership rights presuppose the right to homestead, because one is meaningless without the other. See “A Libertarian Theory of Punishment and Rights” (ch. 5), Part III.F. As the U.S. Supreme Court has recognized, “The right to enjoy property without lawful deprivation … is in truth a ‘personal’ right.… In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (emphasis added). But see the famous (infamous, to some of us) footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (implying that economic and property rights are less fundamental than personal rights). [↑](#footnote-ref-21)
22. Many definitions of the concept “rights” have been offered. See, e.g., Antony Flew, A Dictionary of Philosophy, rev’d 2d ed. (New York: St. Martin’s Press, 1984), p. 306 (defining “rights”); idem, “What is a ‘Right’?”, Georgia L. Rev. 13 (1979): 1117–41; Alan Gewirth, “The Basis and Content of Human Rights,” Georgia L. Rev. 13 (1979): 1143–70, at 1148; Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, W.W. Cook, ed. (New Haven, Conn.: Yale University Press, 1946), p. 30 et passim (discussing four senses of “rights” and explaining that a right is a three-term relation between a right-holder, a type of action, and one or more other persons); Albert Kocourek, Jural Relations (Indianapolis: Bobbs-Merrill, 1927), p. 7; Lomasky, Persons, Rights, and the Moral Community, p. 101; Machan, Individuals and Their Rights, pp. 1–2; Narveson, The Libertarian Idea, chap. 5; Nozick, Anarchy, State, and Utopia, pp. 29–30; Ayn Rand, “Man’s Rights,” in Rand, The Virtue of Selfishness, pp. 29–30; Rasmussen and Den Uyl, Liberty and Nature, p. 111. One of the clearest, non-tautological definitions of rights of which I am aware is Sadowsky’s:

    When we say that one has the right to do certain things we mean this and only this, that it would be immoral for another, alone or in combination, to stop him from doing this by the use of physical force or the threat thereof. We do not mean that any use a man makes of his property within the limits set forth is necessarily a moral use.

    James A. Sadowsky, “Private Property and Collective Ownership,” in The Libertarian Alternative, Tibor R. Machan, ed. (Chicago: Nelson-Hall Co., 1974), pp. 120–21. Whatever the definition, however, it seems clear that the concept of rights and the concept of enforceability are mutually dependent in the sense discussed in the text.

    Note: I now am of the view that rights are best viewed as metanorms that direct us as to which laws are just, not directly to personal behavior. Most libertarians would view rights as a subset of morality; not everything that is immoral should be illegal, but every rights violation is necessarily immoral. I believe the sets are intersecting sets only. Just as some immoral actions are not rights violations, some rights violations might be morally mandatory (breaking into a cabin to feed your baby in the middle of a storm). I do believe most rights violations are immoral, though libertarianism itself cannot make this determination. For more on rights as metanorms, see Douglas B. Rasmussen & Douglas J. Den Uyl, “Why Individual Rights? Rights as Metanormative Principles,” in Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics (Pennsylvania State University Press, 2005):

    An individual’s right to liberty is thus not in essence a normative principle. Rather, it is a metanormative principle. In other words, it is concerned with the creation, interpretation, and justification of a political/legal context in which the possibility of the pursuit of flourishing is secured. [↑](#footnote-ref-22)
23. Indeed, another way to respond to a rights-skeptic would be to propose to physically harm him. If there are no rights, as he maintains, then he cannot object to being harmed. So, presumably, any rights-skeptic would change his position and admit there were rights (if only so as to be able to object to being harmed)—or there would soon be no more rights-skeptics left alive to give rights-advocates any guff. See also Murray Rothbard, “On The Duty Of Natural Outlaws To Shut Up,” New Libertarian (April 1985; https://mises.org/library/duty-natural-outlaws-shut):

    The nihilists remind me of the classic bore at college bull sessions: “Nyah, nyah, prove to me that this chair exists!” Trying desperately for “proof” accomplishes nothing, of course, to wipe the mocking smile off the face of the Outlaw. In a deep sense, and on many levels, the proper riposte is to hit the Outlaw over the head with the chair. For one thing, the purpose of philosophic discourse is, or should be, to arrive mutually at the truth, not to engage in parlor games or verbal fencing. To engage in such games, to be a bravura pest for pest’s sake, is to put oneself outside the realm of rational discourse. (But this, of course, is a moral as well as factual statement!)

    See also Hans-Hermann Hoppe, “In Defense of Extreme Rationalism,” in The Great Fiction: Property, Economy, Society, and the Politics of Decline (Second Expanded Edition, Mises Institute, 2021; www.hanshoppe.com/tgf), p. 310:

    Why should we follow [McCloskey’s] advice of paying attention to talk and not resorting to violence, particularly in view of the fact that what is advocated here is talk of the sort where anything goes and where everything said is just as good a candidate for one’s attention as anything else? It certainly is not evident that one should pay much attention to talk if that is what talk is all about! Moreover, it would be downright fatal to follow this ethic. For any viable human ethic must evidently allow people to do things other than talk, if only to have a single human survivor who could possibly have any ethical questions; McCloskey’s talk-ethic, however, gives us precisely such deadly advice of never to stop talking or stop listening to others talk. In addition, McCloskey himself and his fellow hermeneuticians must admit that they can have no objective ground for proposing their ethic anyway. For if there are no objective standards of truth, then it must also be the case that one’s ethical proposals cannot claim to be objectively justifiable either. But what is wrong, then, with not being persuaded by all of this and, rather than listening further, hitting McCloskey on the head straightaway rather than waiting until he perishes from following his own prescription of endless talk? Clearly, if McCloskey were right, nothing could be said to be objectively wrong with this.

    The arguments directed here against rights-skeptics also apply, mutatis mutandis, to radical pacifists—that is, to those who claim not just that pacifism is preferred morally or tactically, but that victims of aggression are not entitled to use force in self-defense or that victims somehow violate the rights of their aggressors. [↑](#footnote-ref-23)
24. G.B. Madison, The Logic of Liberty (New York: Greenwood Press, 1986), p. 266. [↑](#footnote-ref-24)
25. Ibid., p. 267. See also Kinsella, “Quotes on the Logic of Liberty,” and n. 19, above. Madison and Hoppe both draw on the “discourse ethics” of Jürgen Habermas and Karl-Otto Apel. See, e.g., Jürgen Habermas, “Discourse Ethics: Notes on a Program of Philosophical Justification,” and Karl-Otto Apel, “Is the Ethics of the Ideal Communication Community a Utopia? On the Relationship between Ethics, Utopia, and the Critique of Utopia,” both in Seyla Benhabib & Fred Dallmayr, eds., The Communicative Ethics Controversy (Cambridge, Mass.: MIT Press, 1990). Douglas Rasmussen has criticized both Habermas’s discourse ethics and Hoppe’s argumentation ethics. See Douglas B. Rasmussen, “Political Legitimacy and Discourse Ethics,” International Philosophical Quarterly 32 (1992; https://perma.cc/MK59-QEVV): 17–34 (on Habermas) and idem, “Arguing and Y-ing,” Liberty 2, no. 2 (Nov. 1988; https://perma.cc/A5UU-P64A): 50 (on Hoppe). The latter article was part of a symposium, “Breakthrough or Buncombe” (pp. 44–53), containing discussion of Hoppe’s argumentation ethics by several libertarian theorists, and Hoppe’s reply, “Utilitarians and Randians vs Reason” (53–54). This reply and replies to other critics are included in “Appendix: Four Critical Replies” in Hoppe, The Economics and Ethics of Private Property; see also subsequent response to critics in idem, “PFP163 | Hans Hermann Hoppe, ‘On The Ethics of Argumentation’ (PFS 2016).” [↑](#footnote-ref-25)
26. Madison, The Logic of Liberty, pp. 267 & 274, n. 37 (quoting Paul Ricoeur, Main Trends in Philosophy (New York: Holmes and Meier, 1979), pp. 226–76). Madison also notes that Frank Knight made a similar point. Madison quotes Knight’s statement, in his book Freedom and Reform (Indianapolis: Liberty Press, 1982), pp. 473–74, that:

    The only “proof” that can be offered for the validity of the liberal position is that we are discussing it and its acceptance is a presupposition of discussion, since discussion is the essence of the position itself. From this point of view, the core of liberalism is a faith in the ultimate potential equality of men as the basis of democracy.

    See also Frank H. Knight, On the History and Method of Economics (Chicago: University of Chicago Press, 1956), p. 268; Kinsella, “Quotes on the Logic of Liberty.” [↑](#footnote-ref-26)
27. Madison, The Logic of Liberty, p. 269. [↑](#footnote-ref-27)
28. Madison does maintain that the supreme “ought” or demand of liberalism is “that conflicts of interest and differences of opinion should be resolved through free, open, peaceful discussion aimed at consensus and not by recourse to force.” Ibid., p. 266. [↑](#footnote-ref-28)
29. Ibid., pp. 269–70. [↑](#footnote-ref-29)
30. Frank van Dun, “Economics and the Limits of Value-Free Science,” Reason Papers 11 (Spring 1986): 24; see also idem, “On the Philosophy of Argument and the Logic of Common Morality,” in Argumentation: Approaches to Theory Formation, E.M. Barth & J.L. Martens, eds. (Amsterdam: John Benjamins, 1982), p. 281; idem, “Argumentation Ethics and The Philosophy of Freedom.” [↑](#footnote-ref-30)
31. Van Dun, “Economics and the Limits of Value-Free Science,” p. 28; idem, “Argumentation Ethics and The Philosophy of Freedom.” [↑](#footnote-ref-31)
32. Jeremy Shearmur, “Habermas: A Critical Approach,” Critical Review 2 (1988): 39–50, at 47; see also idem, “From Dialogue Rights to Property Rights: Foundations for Hayek’s Legal Theory,” Critical Review 4 (1990): 106–32. [↑](#footnote-ref-32)
33. See also Shearmur, “From Dialogue Rights to Property Rights,” pp. 106–32. [↑](#footnote-ref-33)
34. See Paul G. Chevigny, “Philosophy of Language and Free Expression,” N.Y. U. L. Rev. 55 (1980): 157–94; Michael Martin, “On a New Argument for Freedom of Speech,” N.Y. U. L. Rev. 57 (1982): 906–19; Paul G. Chevigny, “The Dialogic Right of Free Expression: A Reply to Michael Martin,” N.Y. U. L. Rev. 57 (1982): 920–31. See also Rodney J. Blackman, “There is There There: Defending the Defenseless with Procedural Natural Law,” Ariz. L. Rev. 37 (1995): 285–353, which defends a procedural natural-law position on the grounds that, as we normally use language and define “law,” “law” has a procedural component that, if adhered to, limits a government’s arbitrary and irrational use of power. Blackman contends that language users implicitly accept this normative, procedural aspect of what is described as law; they use a definition of law that also limits what state power can be classified as law. Of course, H.L.A. Hart argues that some types of rules or arbitrary commands enforced by a given regime are too unlawlike to be considered even positive law. See Hart, The Concept of Law, chap. II, §2; chap. IX, §3. A somewhat similar argument may be found in Randy E. Barnett, “Getting Normative, the Role of Natural Rights in Constitutional Adjudication,” Constitutional Commentary 12 (1995; www.randybarnett.com/pre-2000): 93–122, where Barnett argues that those who claim that the U.S. Constitution justifies certain government regulation of individuals are themselves introducing normative claims into discourse, and thus cannot object, on positivist or wertfrei grounds, to a moral or normative criticism of their position. See also idem, “The Intersection of Natural Rights and Positive Constitutional Law,” Connecticut L. Rev. 25 (1993; www.randybarnett.com/pre-2000): 853–68. [↑](#footnote-ref-34)
35. Tibor R. Machan, “Individualism and Political Dialogue,” Poznan Studies in the Philosophy of Science and the Humanities 46 (June 1996; https://www.stephankinsella.com/wp-content/uploads/texts/machan\_dialogue.pdf): 45–55. Several other related theories are mentioned in “The Undeniable Morality of Capitalism” (ch. 22), n.29, e.g. Lawrence B. Solum, “Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech,” Northwestern U. L. Rev. 83 (1989; https://scholarship.law.georgetown.edu/facpub/1954/): 54–135. [↑](#footnote-ref-35)
36. Rothbard, “Beyond Is and Ought,” p. 45. For some efforts in this direction, see Konrad Graf, “Action-Based Jurisprudence: Praxeological Legal Theory in Relation to Economic Theory, Ethics, and Legal Practice,” Libertarian Papers 3, art. no. 19 (2011; http://libertarianpapers.org/19-action-based-jurisprudence-praxeological-legal-theory-  
    relation-economic-theory-ethics-legal-practice/). See also Kinsella, “Extreme Praxeology,” StephanKinsella.com (Jan. 19, 2007). Van Dun also seems to have a somewhat broader conception of the normative or moral implications of discourse ethics than Hoppe explores in his argumentation ethics. See Van Dun, “Argumentation Ethics and the Philosophy of Freedom.” [↑](#footnote-ref-36)
37. Madison notes that “it should be possible to derive in a strictly systematic fashion all of the … universal values” necessary to defend liberalism. Madison, The Logic of Liberty, p. 268. Concerning extending Hoppe’s discourse ethics to natural law, it should be pointed out that both Hoppe and Madison appear skeptical of the validity of classic natural law theory. Madison states that rights are not “a requirement of some natural law existing independently of the reasoning process and discernible only by metaphysical insight into the ‘nature of things’” (p. 269); Hoppe states, as noted in text at note 11, above: “It has been a common quarrel with the natural rights position, even on the part of sympathetic readers, that the concept of human nature is far ‘too diffuse and varied to provide a determinate set of contents of natural law’”; see also notes 10–14, above, and accompanying text; and “The Undeniable Morality of Capitalism” (ch. 22). However, Machan, accepting the validity of action-based ethical theories (similar to Pilon’s and Gewirth’s approach, discussed below), but not purely-argumentation-based theories, also maintains that “human action needs to be understood by reference to human nature.” Machan, “Individualism and Political Dialogue,” p. 46. See also more of the quote by Machan in note 46 below. [↑](#footnote-ref-37)
38. Lawrence Crocker, “The Upper Limit of Just Punishment,” Emory L. J. 41 (1992): 1059–1110, at 1067. [↑](#footnote-ref-38)
39. See Roger A. Pilon, “Ordering Rights Consistently: Or What We Do and Do Not Have Rights To,” Georgia L. Rev. 13 (1979; https://perma.cc/FYX4-CFNH): 1171–96; idem, A Theory of Rights: Toward Limited Government (Ph.D. dissertation, University of   
    Chicago, 1979; https://perma.cc/DGS3-W4UA). See also Alan Gewirth, Moral Rationality (The Lindley Lecture, Univ. of Kansas, 1972; https://core.ac.uk/download/pdf/213402925.pdf); also idem, “The Basis and Content of Human Rights,” and idem, Reason and Morality   
    (Chicago: University of Chicago Press, 1978). [↑](#footnote-ref-39)
40. Pilon, “Ordering Rights Consistently,” p. 1173. [↑](#footnote-ref-40)
41. Ibid., p. 1177. [↑](#footnote-ref-41)
42. Ibid., p. 1179. [↑](#footnote-ref-42)
43. Gewirth, Moral Rationality, p. 20. On universalizability, see also Kinsella, “The problem of particularistic ethics or, why everyone really has to admit the validity of the universalizability principle,” StephanKinsella.com (Nov. 10, 2011); Hoppe, A Theory of Socialism and Capitalism, p. 157 and n. 119 et pass.; Hare, Freedom and Reason, § 11.6 (“It is part of the meanings of … moral words that we are logically prohibited from making different moral judgements about two cases, when we cannot adduce any difference between the cases which is the ground for the difference in moral judgements”). See also “What Libertarianism Is” (ch. 2), the section “Self-ownership and Conflict Avoidance”; “How We Come to Own Ourselves” (ch. 4), n.15; and “A Libertarian Theory of Punishment and Rights” (ch. 5), Part III.D.2. [↑](#footnote-ref-43)
44. Ibid., p. 1184. [↑](#footnote-ref-44)
45. Ibid. [↑](#footnote-ref-45)
46. Hoppe, The Economics and Ethics of Private Property, pp. 315–16, n. 18. For further criticism and discussion of the Gewirthian argument, see Machan, Individuals and Their Rights, pp. 197–99; Alisdair MacIntyre, After Virtue (Notre Dame, Ind.: University of Notre Dame Press, 1981), pp. 64–65; Henry Veatch, Human Rights: Fact or Fancy? (Baton Rouge: Louisiana State University Press, 1985), pp. 159–60; and Jan Narveson, “Gewirth’s Reason and Morality: A Study in the Hazards of Universalizability in Ethics,” Dialogue 19 (1980): 651–74. Perhaps somewhat ironically, given his criticisms of Gewirth, Machan seems to agree with Gewirth/Pilon on this issue rather than Hoppe, claiming that

    [D]iscourse is not primary. Instead, it is human action itself that is primary, with discourse being only one form of human action. It is the presuppositions of human action that require certain political principles to be respected and protected. And human action needs to be understood by reference to human nature.

    Machan, “Individualism and Political Dialogue,” p. 45. In my view, Hoppe’s criticisms of Pilon/Gewirth, as well as his criticism of classical natural rights arguments (see note 37, above), applies also to Machan. [↑](#footnote-ref-46)