

NEW RATIONALIST DIRECTIONS IN LIBERTARIAN RIGHTS THEORY

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*What you do speaks so loud I can't hear what you are saying.*¹

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)."² 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.³ Other theorists have offered, over the years, various reasons—utilitarian, natural law, pragmatic, and the like—why we should respect others' rights, and why we should recognize that individuals have particular rights.⁴

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¹Old saying, quoted in Clarence Carson, "Free Enterprise: The Key to Prosperity," in *The Freedom Philosophy* (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1988), p. 27.

²Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. ix.

³See e.g., Thomas Nagel, "Libertarianism Without Foundations," *Yale Law Journal* 85 (1975): 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. Nozick declines "to offer any systematic rationale for the vaguely specified collection of rights he takes to be basic" (footnote omitted).

⁴See, e.g., Ludwig von Mises, *Liberalism: In the Classical Tradition*, 3rd ed., Ralph Raico, trans. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1985); Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982); Murray N. Rothbard, *For A New Liberty: The Libertarian Manifesto*, rev'd ed. (New York: Libertarian Review Foundation, 1985); Ayn Rand, *Capitalism: The Unknown Ideal* (New York: Signet, 1967); Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* (New York: Signet, 1964); Machan, *Individuals and Their Rights*; Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988); Lomasky, *Persons*; Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, Ill.: Open Court, 1991).

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 favor the free market and liberty, at least if you understand basic economic principles. But arguments such as these depend 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-oriented 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 discussed below.

ARGUMENTATION ETHICS

The first rationalist argument that I will discuss is Hans-Hermann Hoppe's path-breaking *argumentation ethics*.⁵ Professor 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.

⁵Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Boston: Kluwer Academic Publishers, 1989), ch. 7; Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer Academic Publishers, 1993), pp. 180–86. The following discussion is drawn from these sources. For a detailed review of the latter book, see N. Stephan Kinsella, "The Undeniable Morality of Capitalism," *St. Mary's Law Journal* 25 (1994): 1419–47. See also Hans-Hermann Hoppe, "The Ultimate Justification of the Private Property Ethic," *Liberty* (Sep. 1988): 20–22.

This is because argumentation is a *conflict-free* way of interacting, by its very nature, 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 axiom, the libertarian view that one may not initiate force against others.

Thus, Hoppe points out that 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 ethics 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. Thus, opponents of liberty undercut their own position as soon as they begin to state it.

Hoppe has extended his argument to show that property rights, in addition to self-ownership rights, are also presupposed by discourse. Hoppe's basic point here is that self-ownership rights are established just because one's body is itself a scarce resource, so other scarce resources must be similarly ownable.⁶ 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 scarcity makes conflict over the uses of resources possible, only norms that determine 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 resources.

⁶See note 12, below, for one view of the U.S. Supreme Court regarding the connection between property and other rights.

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, i.e. 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 of a particular scarce resource. This type of norm is no better than no norm at all. Only the first alternative, that of Lockean homesteading, establishes an objective (or, as Hoppe 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.⁷

ESTOPPEL

Another rationalist-oriented justification of rights is an argument I have developed based on the common-law concept of estoppel.⁸ "The word *estoppel* means 'not permitted to deny.' If

⁷Rothbard gave wholehearted endorsement to Hoppe's argumentation ethics approach early on:

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 an-archo-capitalist-Lockean rights in an unprecedentedly hard-core manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison.

Murray N. Rothbard, "Beyond Is and Ought," *Liberty* (Nov. 1988): 44-45, 44. It should be noted that Leland Yeager has recently claimed that Rothbard, who died in January 1995, had changed his mind before his death regarding the validity of Hoppe's argument. Leland B. Yeager, "Book Review," *Review of Austrian Economics* 9 (1996): 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]). 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* (Nov. 1988): 45-46. However, although the validity of Hoppe's theories do not, of course, depend on Rothbard's support, Yeager's contention about Rothbard's change of mind appears to be completely erroneous and unsupported by any reason or evidence whatsoever.

⁸N. Stephan Kinsella, "Punishment and Proportionality: The Estoppel Approach," *Journal of Libertarian Studies* 12, no. 1 (1996): 51-73; also, N. Stephan

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."⁹ 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).¹⁰ 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 urge here 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 to *not* 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 the punishment.¹¹

Kinsella, "Estoppel: A New Justification for Individual Rights," *Reason Papers* 17 (Fall 1992): 61-74.

⁹Bernard F. Cataldo, et al., *Introduction to Law and the Legal Process*, 3rd 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* (St. Paul, Minn.: West Publishing Co., 1996), art. 1967.

¹⁰See, e.g., *Zimmerman v. Zimmerman*, 86 A.D.2d 525, 447 N.Y.S. 2d 675 (Sup. Ct. 1982), from which this example was derived.

¹¹Of 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

Estoppel argues that we have rights just because no actual criminal—that is, an 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 we may be said to have the right, since, in effect, the criminal cannot deny this.

Why, then, 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, of 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 to use force. But since *B* 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 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.¹²

must engage in argumentation and thus be subject to the rules of argumentation. As R.M. 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).

¹²As 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 Kinsella, "Punishment and Proportionality," 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 footnote 4 in *United States v. Carolene*

RIGHTS-SKEPTICISM

A third rationalist 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 enforce the right.¹³ *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 else 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—i.e., the use of force—*requires* justification. *A*, however, cares not that the rights-skeptic merely challenges *A*'s

Products Co., 304 U.S. 144, 152 n.4 (1938) (implying that economic and property rights are less fundamental than personal rights).

¹³Many definitions of the concept "rights" have been offered. See, e.g., Antony Flew, *A Dictionary of Philosophy*, rev'd 2nd ed. (New York: St. Martin's Press, 1984), 306 (defining "rights"); Antony Flew, "What is a 'Right'?", *Georgia Law Review* 13 (1979): 1117-41; Alan Gewirth, "The Basis and Content of Human Rights," *Georgia Law Review* 13 (1979): 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); Lomasky, *Persons, Rights, and the Moral Community*, p. 101; Machan, *Individuals and Their Rights*, pp. 1-2; Narveson, *The Libertarian Idea*, p. 41; Nozick, *Anarchy, State and Utopia*, pp. 29-30; Ayn Rand, "Man's Rights," in Rand, *The Virtue of Selfishness*; Rasmussen and Den Uyl, *Liberty and Nature*, p. 111. One of the clearest, non-tautological definitions of rights of which I am aware is James Sadowsky's definition: "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, 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.

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 to not 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.¹⁴

OTHER RATIONALIST-RELATED THEORIES

In addition to the three approaches outlined 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 approach 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

¹⁴Indeed, another way to respond to a rights-skeptic would be to shoot him. If there are no rights, as he maintains, then he cannot object to being shot. 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 shot), or we would soon have no more rights-skeptics left alive to give us rights-advocates any trouble.

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.¹⁵

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."¹⁶ 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.¹⁷

Madison, like Hoppe, argues that the fact-value gap can be bridged by an appeal to the nature of discourse. "[T]he 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 rational-

¹⁵G.B. Madison, *The Logic of Liberty* (New York: Greenwood Press, 1986), p. 266.

¹⁶Madison, *The Logic of Liberty*, p. 267. 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 *The Communicative Ethics Controversy*, Seyla Benhabib and Fred Dallmayr, eds. (Cambridge, Mass.: MIT Press, 1990). Professor Rasmussen has criticized both Habermas's discourse ethics, see Douglas B. Rasmussen, "Political Legitimacy and Discourse Ethics," *International Philosophical Quarterly* 32 (1992): 17-34, and Hoppe's argumentation ethics, see Douglas B. Rasmussen, "Arguing and Y-ing," *Liberty* (Nov 1988): 50. This latter article was part of a symposium, "Breakthrough or Buncombe," containing discussion of Hoppe's argumentation ethics by several libertarian theorists.

¹⁷Madison, *The Logic of Liberty*, pp. 267 and 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.

ity itself."¹⁸ 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 non-aggression principle (i.e., self-ownership plus the right to homestead) 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 hard-core libertarian principles that can be derived from such an approach,¹⁹ 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.²⁰

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."²¹ Van Dun even suggests that "principles of private property and uncoerced exchange" are also presupposed by participants in discourse, although he does not elaborate very much on his theory.²² Jeremy Shearmur also proposes 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, van Dun, and is, in my view, much weaker, at least in its current stage of development.²³

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,²⁴ and Tibor Machan's

¹⁸Madison, *The Logic of Liberty*, p. 269.

¹⁹He 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." Madison, *The Logic of Liberty*, p. 266.

²⁰Madison, *The Logic of Liberty*, pp. 269–70.

²¹Frank van Dun, "Economics and the Limits of Value-Free Science," *Reason Papers* 11 (Spring 1986): 24; see also Frank van Dun, "On the Philosophy of Argument and the Logic of Common Morality," in *Argumentation: Approaches to Theory Formation*, E.M. Barth and J.L. Martens, eds. (Amsterdam: John Benjamins, 1982), p. 281.

²²Van Dun, "Economics and the Limits of Value-Free Science," p. 28.

²³Jeremy Shearmur, "Habermas: A Critical Approach," *Critical Review* 2 (1988): 47; see also Jeremy Shearmur, "From Dialogue Rights to Property Rights: Foundations for Hayek's Legal Theory," *Critical Review* 4 (1990): 106–32.

²⁴See Paul G. Chevigny, "Philosophy of Language and Free Expression," *New York University Law Review* 55 (1980): 157–94; Michael Martin, "On a New Argument for Freedom of Speech," *New York University Law Review* 57 (1982): 906–

view that discourse in general and political dialogue in particular rest on individualist prerequisites or presuppositions.²⁵

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."²⁶ 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.²⁷

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 assert-

19; Paul G. Chevigny, "The Dialogic Right of Free Expression: A Reply to Michael Martin," *New York University Law Review* 57 (1982): 920–31. See also Rodney J. Blackman, "There is There There: Defending the Defenseless with Procedural Natural Law," *Arizona Law Review* 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. 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): 93–122, where Professor 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 Randy E. Barnett, "The Intersection of Natural Rights and Positive Constitutional Law," *Connecticut Law Review* 25 (1993): 853–68.

²⁵Tibor R. Machan, "Individualism and Political Dialogue," *Poznan Studies in the Philosophy of Science and the Humanities* 46 (June 1996): 45–55.

²⁶Rothbard, "Beyond Is and Ought," p. 45.

²⁷Madison 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. On p. 269, 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.'"; Hoppe, *Economics and Ethics*, p. 179, states "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.'" (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). 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." See the quote by Machan in note 36, below.

ing the unfairness of being punished in certain situations.²⁸ 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. However, Crocker's use of estoppel is too vague and imprecise, for just because one has violated a criminal law does not mean that one has committed the aggression which is necessary to estop him from complaining about punishment. A breached law must first be valid for Crocker's assumption to hold, but as the estoppel theory indicates, a law is valid only if it prohibits aggression. 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 rights theory of his teacher, Alan Gewirth.²⁹ Although he disagrees with the non-libertarian conclusions that Gewirth himself draws from his own rights theory, Pilon builds "upon much of the justificatory groundwork he has established, for I believe he [Gewirth] has located, drawn together, and solved some of the most basic problems in the theory of rights."³⁰

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."³¹ 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

²⁸Lawrence Crocker, "The Upper Limit of Just Punishment," *Emory Law Journal* 41 (1992): 1067.

²⁹Roger A. Pilon, "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," *Georgia Law Review* 13 (1979): 1171-96; Roger A. Pilon, *A Theory of Rights: Toward Limited Government* (unpublished Ph.D. dissertation, University of Chicago, 1979). See also Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978), and Alan Gewirth, "The Basis and Content of Human Rights."

³⁰Pilon, "Ordering Rights Consistently," p. 1173.

³¹Pilon, "Ordering Rights Consistently," p. 1177.

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.³² 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." ("Recipients are those who stand opposite agents, who are 'affected by' or 'recipients of' their actions.")³³ Under Pilon's libertarian working of the PGC,

the 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.³⁴

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,

from 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.³⁵

³²Pilon, "Ordering Rights Consistently," p. 1179.

³³Pilon, "Ordering Rights Consistently," p. 1184.

³⁴Pilon, "Ordering Rights Consistently," p. 1184.

³⁵Hoppe, *Economics and Ethics*, p. 181 n.18. Note that Machan seems to agree with Gewirth/Pilon here rather than with 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

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. I do not maintain here that such an approach will definitely work, or that all of the remainder of Pilon's rights *corpus* can be salvaged in this manner, but such a possible remedy does seem promising.

CONCLUSION

Under the first 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, in my opinion, 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.

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. For further criticism and discussion of the Gewirthian argument, see Machan, *Individuals and Their Rights*, pp. 197–99; Alisdair MacIntyre, *After Virtue* (Notre Dame, Indiana: 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.