

ARTICLES

Preargumentation Ethics and the Issue of Abortion

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The issue of abortion—and, more broadly, the issue concerning the source of rights or, more precisely, when and why humans acquire or recognize rights—has long vexed libertarians. It's a complex issue with numerous good-faith and reasonable arguments that lead to differing conclusions. This issue is usually brought up when the topic of abortion is discussed in libertarian circles. This article will attempt to show when and why humans get rights by advancing a theory inspired and implied by Hans-Hermann Hoppe's "argumentation ethics"; it will then endeavor to "resolve" and present the consistent libertarian stance on the abortion issue.

This article does not seek to defend argumentation ethics, which has already been done by Hoppe himself, Kinsella, and many others (Hoppe 1988, 2016, 2017; Kinsella 2011, 2023b; Van Dun 2009; Eabrasu 2009). The argument presupposes the validity of the "a priori of argumentation" and is an implication of it. The following arguments about when we get rights are usually presented in libertarian circles.

1. Rationality: Humans get rights when they acquire rationality (Kinsella 2023a). Applied to the unborn, it can be said that it's a continuum or gray area. Some argue that a born baby has rights, because it has rationality or is rational enough, and a zygote doesn't. Somewhere along the way, the unborn baby gets rights because it becomes a person—that is, it develops a brain and acquires rationality. The problem with this argument is twofold. Firstly, it's unclear whether a born baby is rational—in fact, it's reasonable to conclude that babies acquire rationality gradually as they develop *after* birth. Secondly, the argument that a baby is rational enough to possess rights entails that a being with a higher mental capacity than a baby also possesses rights. However, this logic implies that many animals have rights since, arguably, many animals possess a higher



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mental capacity than human babies, contradicting the belief held by most libertarians that animals do not possess rights. If rationality is the standard, then babies either don't have rights or we must grant that a lot of animals also have rights. Furthermore, it is necessary to provide a rigorous argument explaining why rationality should serve as the standard for the source of rights.

2. Engaging in argumentation: Others argue that simply demonstrating, at least once, the ability for argumentation is what gives a person rights (Graf 2011); however, setting aside the fact that babies and young children don't have rights, consider the following hypothetical. Let's say there's a pill that, once ingested, will make your mental capacity and mental characteristics in general indistinguishable from those of an ant. Let's also suppose that the effects are irreversible. Would this "person" still have rights? It is the contention of this article that such a person would no longer have rights. If an ant doesn't have rights, then it makes no sense to say that someone who, for all intents and purposes, is an ant would have rights. The only difference between this "person" and an ant would be their physical form, but humans don't have rights because of their physical form. So even though this "person" at one point in time demonstrated the capacity for argumentation, this "person" no longer has rights, having lost both the ability and potential to ever again engage in argumentation.

Potential to Engage in Argumentation

The basic argument in this article is that humans have rights because of their potential to engage in argumentation and not their ability to do so (or having rationality), as some libertarians sometimes argue (Graf 2011; Kinsella 2023a). If rights are attributed exclusively to individuals with the ability to engage in argumentation (or possess rationality), then, automatically, babies (including the unborn), comatose individuals, and sleeping people do not have rights, because they lack the ability to argue (or possess rationality). Most people would find such a conclusion repugnant and unacceptable—but why? Do babies and others temporarily incapable of arguing have rights? And if so, why? Preconditions are the key.

It's contradictory to say or demonstrate that you value an activity (which you do by taking part in it) and at the same time argue (or even think) that you don't value the prerequisites or preconditions of said activity. For example, a person who practices archery couldn't consistently argue that they don't value bows, arrows, and targets (e.g., that these things shouldn't exist or should be destroyed), the strength to draw a bowstring, or the ability to aim. Likewise, someone who is cooking couldn't consistently argue that they don't value pots and pans, ingredients, and the knowledge and perception required

to cook. Other examples include reading and swimming. Someone who is reading can't deny that they implicitly value books and literacy, and someone who is swimming can't deny that they implicitly value water existing.

Applying this logic to the activity of argumentation, a person engaging in argumentation implicitly values, in the proactive and contemporaneous sense (explored in depth later on), the prerequisites or preconditions of argumentation. Numerous preconditions of argumentation exist, such as the ability to communicate, reason, identify, and process knowledge, among others. Another prerequisite or precondition of argumentation, which forms the essence of this argument, is that, during a contingent period when an individual lacks the ability to engage in argumentation (but possesses the potential to argue after this period ends), the potential arguer is safe and is not killed. Only because one was not killed during this period did it become possible for them to engage in argumentation. Such times include sleep, sedation under general anesthesia, comas (when there's a possibility of waking up), and the early stages of development in which the ability or capability for argumentation is not yet present.

Every participant in argumentation was once someone who didn't have the ability to argue and merely had the potential to engage in argumentation. By arguing, they are necessarily valuing (proactively or contemporaneously) what made it possible for them to currently be able to engage in argumentation. One of these things is not being killed during a period when the ability to engage in argumentation is absent. Therefore, anyone who argues that babies, the unborn, or sleeping or comatose people don't have rights is engaging in a performative contradiction. This has several implications—namely, that if an individual is a potential arguer they have rights. This means that humans have rights as soon as they are created, as soon as they become a zygote. This also means comatose or sleeping people have rights (as said, people can be expected to wake up unless it can be definitively said that they won't).

The implication of this argument when it comes to abortion is that the pro-life position is the only consistent position on abortion for libertarians. The only exception would be if you could prove with certainty that a zygote (for whatever reason) does not have the potential to engage in argumentation. That is to say, virtually all abortions are unjustifiable since the person arguing that a zygote doesn't have rights would be engaging in a contradiction since they would be arguing against a precondition of argumentation itself. The evictionist might argue that the zygote can be "evicted" because they are a "trespasser" (Block and Whitehead 2005; Block 2014). This article contends that this argument is fundamentally flawed. Stephan Kinsella has demonstrated that a zygote is not—and in fact can't possibly be—a trespasser, because a trespasser is an aggressor and aggression is a type of action. Implicit in this argument is that to even be capable of committing aggression—trespassing, in this case—one must first be an actor. But a

zygote—or even a born baby, for that matter—is not an actor, because it has not yet developed the ability to act, and it’s therefore impossible for it to commit aggression (Kinsella 2023a; Kinsella and Tinsley 2023).

No arguers can drop the implicit proposition “I value that zygotes not be killed,” because they were once zygotes and their not being killed is what, among other things, has made it possible for them to be able to engage in argumentation. Therefore, the proposition “It is justifiable that we be able to kill zygotes” is contradictory.

In the form of a syllogism, this argument would go as follows:

1. By engaging in argumentation (or any activity), one implicitly values, or has a preference for, what makes argumentation (or any activity) possible (the preconditions of argumentation).
2. Not being killed when one is a zygote is a prerequisite or precondition of argumentation.
3. Therefore, if one argues that a zygote may be killed (that it is justifiable that a zygote be killed), they are engaging in a contradiction since they are arguing against (that they don’t value or have a preference for) a precondition of argumentation.

Or, alternatively:

1. By engaging in argumentation (or any activity), one is demonstrating that one values or has a preference for argumentation (or any activity).
2. Not being killed when one is a zygote is a prerequisite or precondition of argumentation.
3. Therefore, someone who argues that a zygote may be killed (that it is justifiable that a zygote be killed), is engaging in a contradiction since they are arguing against a precondition of argumentation, which means they are in essence, arguing against (that they don’t value or have a preference for) argumentation itself.

This theory shall henceforth be called preargumentation ethics or preconditionism.

Possible Criticisms

The Potentiality of Other Animal Species

This criticism argues that if the potential to engage in argumentation is what determines whether a being has rights, then one could argue that every species has rights since it’s possible that at some point it will evolve and acquire

the ability to engage in argumentation. This criticism misunderstands the purpose of argumentation. The purpose of argumentation (about norms) is to peacefully settle conflicts over scarce (conflictible) resources. When using a cow for milk or meat, what matters is whether this cow has rights at the moment of use, not whether its descendants a million years from now will have rights, because there cannot be a conflict about resources that do not yet exist. Currently existing cows, which are the only cows over the use of which there can be a conflict, do not have the potential to engage in argumentation and therefore do not have rights.

Contemporaneous, Proactive, and Retroactive Evaluation

To explain and address the following two criticisms, it's necessary to talk about the different ways and senses in which one can value something. One can value something retroactively, contemporaneously, and proactively. For the purposes of this argument, it's important to understand that argumentative justification of norms (what one can argue they value or prefer in argumentation) is always contemporaneous or proactive and never retroactive—that is, whether an action is justifiable or unjustifiable is determined when it takes place or before, when discussing a hypothetical future action, but not after the fact. When one engages in argumentation about norms, they presuppose, and therefore demonstrate the valuing of, the noninitiation of conflict. When one values the noninitiation of conflict during argumentation, this is done in the contemporaneous or proactive sense and not in the retroactive sense—that is, when one seeks to justify an action or norm, this always pertains to the moment in time when the action takes place. If A hits B, whether said action is justifiable is not determined after the fact but when or before the action takes place. The reason is because the purpose of argumentation about norms is to peacefully settle conflicts over rivalrous resources, and in order to do this, one needs to know who the private owners of a resource are at any given moment (not after the action or interaction has taken place) in order to be able to interact peacefully.

The Sperm, the Egg, and the Thread

Stephan Kinsella (2023a), in “Abortion Correspondence with Doris Gordon, Libertarians for Life (1996),” proposes an interesting hypothetical, not directly concerning the potential to engage in argumentation but the potential for rationality. The logic of the argument could foreseeably be applied to the potential to engage in argumentation. Kinsella argues as follows:

Imagine an egg and sperm in a test tube, separated by a short distance. Say, the sperm is tied by its tail with a tiny thread, and it is trying to get into the egg, and just cannot. If we simply cut the thread it will enter and fertilize the egg. Now in this situation we have as much “potential” life as in a fertilized

egg, do we not? The total genes are there, etc. Is it “murder” to keep the sperm and egg from fertilizing? Do the sperm/egg pair constitute a “human” that has “rights”? If not, why not, because giving relevance to “potentiality” would seem to indicate this. In fact a man and woman standing near each other could be said to be under a duty to have sex to impregnate the woman, otherwise think of all the potential lives that are not being allowed to live. Condoms are a form of murder, etc.

This article contends that this criticism is flawed for the following reasons:

1. The “pair” Kinsella speaks of, strictly speaking, does not exist, as it’s merely an abstraction. It’s like saying “society” has rights or preferences. This is flawed because there’s simply no such thing (in the literal sense). In order to speak of the potentiality of something, that something must first exist.
2. This criticism misunderstands what the contradiction actually is. The reason why one is in contradiction if they argue that a zygote may be killed is because they were once a zygote themselves, and being killed at that stage would have ended their precondition (potential) for argumentation. But the arguer was never a “pair” composed of sperm and egg. Before being a zygote, the arguer simply didn’t exist. Consider this as a practical matter, if a couple decides not to copulate, whose precondition for argumentation are they ending? Which currently existing being has their precondition or potential for argumentation ended because of this decision? None, because no being exists yet that could possibly have their precondition or potential for argumentation ended. Only a possible future being has their preconditions ended. But in order to even consider a being as bearing rights, it must first exist.
3. When engaging in argumentation, one seeks to peacefully settle conflicts over the control of scarce or conflictable resources. Argumentation concerns currently existing resources and currently existing beings. Beings that are outside of the “argumentative community” (like beings that don’t yet exist) are not something that argumentation is concerned with by definition. The reason is that you could never have a conflict over not yet existing resources or beings, and therefore the preconditions of argumentation relate to currently existing beings or resources.

Moreover, as explained above, one can value something in the retroactive sense and not in the contemporaneous or proactive sense, which is what argumentation over norms is concerned with. When examining the justifiability of an action, which is what one is concerned with when engaging in argumentation over norms, one always examines the action in its specific

context—that is, contemporaneously and proactively, not retroactively. So, while it is true that one cannot dismiss the value of their parents copulating in a sense this evaluation is retroactive and therefore doesn't pertain to the actual justifiability of their action to copulate, because the justifiability of this action is necessarily examined contemporaneously or proactively. In other words, one cannot argue that they value that one's parents strictly ought to have copulated and that the alternative is unjustifiable.

Aggression as a Precondition for Argumentation

Let's say a woman is raped, and as a result, she becomes pregnant, and the zygote grows up and is able to argue. In this case, it's descriptively true that the rape is a necessary precondition for the zygote inside her to exist, and therefore a necessary precondition for argumentation for this zygote. So, does that mean, then, that when the person who was once the zygote engages in argumentation and thereby necessarily demonstrates that they value the preconditions of argumentation, they also value and believe that this woman being raped was justifiable? And does this mean that one's demonstrated preference for the noninitiation of conflict that one espouses when engaging in argumentation is in contradiction with this specific precondition of argumentation since this precondition initiates conflict? The answer is no, the woman being raped is valued retroactively (not in the sense of pertaining to or concerning argumentation) and not proactively or contemporaneously. At the time the woman was being assaulted, if she resisted, her action would not have ended the preconditions or potentiality of any existing being at that time (since no such being exists) and is therefore a justifiable action, and one necessarily does not value the assault and considers it unjustifiable when they engage in argumentation. When examining the justifiability of an action and, therefore, when examining the normative presuppositions of someone who participates in argumentation, one is always doing so from the perspective and in the sense of proactivity or contemporaneity. One can value something retroactively (a way of valuing something not relevant to argumentation) and contemporaneously or proactively (relevant to argumentation) at the same time, so there is no contradiction.

Conclusion

The justifiability or unjustifiability of abortion and the source of rights are areas of libertarian theory that, for many, seem unsatisfactory. The present article seeks to provide an answer pertaining to these issues based on the praxeological logic of the “a priori of argumentation”—specifically, that a being has rights if it has the potential to engage in argumentation and that those who seek to justify the killing of that being engage in a performative contradiction. The reason is that they necessarily demonstrate that they value

(in the contemporaneous or proactive sense, which pertains to justifiability) that said being may not be killed, because this is a precondition of argumentation that they have demonstrated they value by engaging in it.

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