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Argumentation Ethics and The Philosophy of Freedom

Frank van Dun°

Reason is an ultimate given and cannot be analyzed or questioned by itself
- Ludwig von Mises.

No person can disobey Reason, without giving up his claim to be a rational creature.
– Jonathan Swift.

I. Introduction

In justificatory argumentation two or more persons seek to justify or to excuse a belief or action, to determine whether it is a belief one *ought* to accept (or to reject) or an action one *ought* to undertake (or to forgo), or whether the circumstances of the case present sufficient reasons (e.g., necessity, duress, compulsion, coercion, manipulation) for excusing a person for believing or doing something that is contrary to right. Philosophers, scientists, and lawyers regularly and publicly engage in such argumentations. In fact, most people do the same at least occasionally, albeit in private, at home, at work, in clubs and barrooms.

Almost twenty years ago, H.-H. Hoppe presented[1] the argument that no justificatory argumentation can invalidate the principles of libertarian capitalism[2]

° Frank van Dun teaches philosophy of law at the University of Ghent (Belgium). This papers incorporates parts of the author's "Comment on R.P.Murphy's & Gene Callahan's Critique of Hans-Hermann Hoppe's Argumentation Ethics" (available online).

[1] Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism*, Kluwer Academic Publishers, Boston, Dordrecht, London, 1989 (hereafter quoted as S&C), in particular

because those principles are presupposed in every dialogue in which their validity would be questioned. Moreover, "no other ethic could be so justified, as justifying something in the course of argumentation implies presupposing the validity of precisely this ethic of the natural theory of property."[3]

In this comment I shall focus on the argument from argumentation[4] itself rather than on its implications for political economy. My purpose is to clarify the relevance of argumentation or dialogue ethics for libertarian theorizing. I shall also endeavor to rebut some frequent criticisms of Hoppe's theory[5], some of which have recently been revived by Robert Murphy and Gene Callahan[6], but only insofar as they betray a serious misunderstanding of the argument from argumentation.

II. The argument from argumentation

The key to understanding the argument from argumentation is, first, that when they are told or asked (not) to believe, say, or do something people are likely and in fact entitled to question why they ought (not) to believe, say, or do it; and second, that an exchange of arguments is a justificatory argumentation only if all the participants acknowledge certain facts and abide by certain norms

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chapter 7. See also the early symposium on Hoppe's argumentation ethics in *Liberty*, November 1988, especially Hoppe's replies to his critics.

[2] Hoppe explicitly mentioned the non-aggression principle (S&C, p.133), the implied principles of self-ownership, private property, and original appropriation through non-aggressive actions (134-136).

[3] S&C, p.144 ("Natural theory of property" is explained in S&C, chapter 2).

[4] My interest in the ethics of argumentation (or "ethics of dialogue" as I called it) dates back to the mid-1970s, when I began to work on my book *Het fundamenteel rechtsbeginsel*, Kluwer-Rechtswetenschappen, Antwerpen, 1983 (hereafter FRB), especially chapter 3. See also my "Economics and the limits of value-free science", *Reason Papers*, XI, Spring 1986, 17-33, which refers to the ethics of dialogue.

[5] Hoppe cites Habermas and Apel and others as sources of inspiration for his theory of argumentation and discusses a few related approaches (S&C, chapter 7, especially footnotes 4-7.) See also Stephan Kinsella, "New Rationalist Directions in Libertarian Rights Theory", *Journal of Libertarian Studies* (Hereafter JLS), 1996, XII, 2, 313-326.

[6] Robert Murphy and Gene Callahan, "Hans-Hermann Hoppe's Argumentation Ethic: A Critique", JLS, XX, 2, 2006, 53-64; hereafter quoted as M&C. The paper is only slightly different from the text the authors published in September 2002 on Anti-State.com. Stephan Kinsella gave an immediate pertinent response on the same website.

— norms that no one can argue are invalid because adherence to those norms is a necessary condition of engaging in argumentation. In short, argumentation does not and cannot take place in a normative void:

> "any truth claim [...] is and must be raised and decided upon in the course of an argumentation. And since it cannot be disputed that this is so, [...] this has been aptly called 'the apriori of communication and argumentation.' Now, arguing never consists of free-floating propositions[7] claiming to be true. Rather, argumentation is always an activity, too. [... It] follows that intersubjectively meaningful norms must exist — precisely those which make some action an argumentation — which have special cognitive status in that they are the practical preconditions of objectivity and truth. Hence [...] norms must indeed be assumed to be justifiable as valid. It is simply impossible to argue otherwise, because the ability to argue so would in fact presuppose the validity of those norms which underlie any argumentation whatsoever."[8]

For example, one cannot seriously make the argument *that one ought not to argue*, or *that one ought not to take argumentation seriously*, without destroying the point of making that argument.[9] A dialectical contradiction[10] emerges when someone states: You ought to take seriously the argument that you ought not to take argumentation seriously. One who seriously makes an argument in fact refers himself and at least the members of his audience to the norm that they ought to take their own and one another's arguments seriously and ought not to

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[7] Note added (FvD) — Contrary to the suggestion in M&C, p.55 note 2, Hoppe does not say that the *truth* of a proposition depends on the fact that someone makes that proposition; he does say that a statement enters into an argumentation only when one of the participants proposes it for consideration.

[8] S&C, p.130.

[9] Arguments of this type have been around for a long time; for an early version, "One ought to philosophize", see Aristotle's *Invitation to Philosophy* (*Protrepticos Philosophias*, e.g. as translated by J. Barnes & G. Lawrence in J. Barnes (ed.), *The Complete Works of Aristotle*, vol. 2, pp. 2404-2416).

[10] Another term is 'performative contradiction'. However, it covers a range of actions that need not have anything to do with argumentation. Thus, when I *say* "Right now I am whistling" then I am not doing what I say I am doing (indeed I cannot *speak* and whistle at the same time). However, I can *write* and whistle at the same time. Therefore, the *communication* "Right now I am whistling" is not necessarily untrue. I used the term 'dialectical' in FRB according to its primary dictionary meaning (which refers to the art or practice of arriving at the truth by the exchange of logical arguments), because of its formal and semantic relation to 'dialogue' (and its evocation of the dialectics of Plato).

dismiss one another's questions or counterarguments without giving relevant, pertinent reasons for doing so. Thus, when the claim is made that one ought not to take argumentation seriously and this claim is presented not as a joke but as a serious proposition for argumentation then the opposite norm, "One ought to take argumentation seriously", is in any case simultaneously posited or presupposed as valid and binding, and is, moreover, argumentatively or dialectically irrefutable.

The point of engaging another in an argumentation is to make him understand the reasons or arguments for believing, saying, or doing something, in such a way that he comes round to the conclusion that believing, saying, or doing it is justified as being in accordance with reason. There is no point in getting another to understand why he ought not ask for reasons, or why he ought not answer requests for reasons.[11] What, indeed, shall we make of the argument "Here are compelling reasons for why there can be no compelling reasons"?

In our present academic culture, dominated by empiricism and tainted by its attendant positivism and scientism, prescriptions such as "Be rational", "Obey the dictates of reason", or "Submit to the law of reason" probably sound archaic. Nevertheless, they are all argumentatively valid, and undeniably so: no compelling reasons can be given for not considering them valid. Even people who do not want to be rational or hate being reminded of such prescriptions cannot find such reasons. The best they can do is refuse to participate in argumentations and restrict themselves to one or another variety of "sales talk"[12],

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[11] There may be occasions when one *should* not ask for or give reasons, for example in an emergency or when there are other *prudential* considerations for not trying to engage another in argumentation. Nevertheless, the normative principle that one ought to act in accordance with reason remains intact: One is entitled to question whether the emergency or other prudential considerations upon reflection justify or excuse the action.

[12] Libertarian sales talk is just sales talk. If there are reasons for believing that libertarianism is a (or the) valid philosophy of human co-existence, then there is a reason for trying to "sell" it; if not then not. Bypassing the *cognitive skeptic* ("Is it true?") to sell directly to *motivational skeptics* ("What is in it for me?") is abandoning libertarian

making appeals to the others' fears and hopes, their greed and vanity, instead of their reason.

III. Dialectical contradictions and dialectical truths

Hoppe's argument raises the question, *which* norms underlie the praxis of argumentation and are therefore logically undeniable for any person who claims to take argumentation seriously. However, it is beyond dispute that there are descriptive and normative statements, *dialectical truths* (hereafter *d-truths*), that are in any case argumentatively undeniable, and other descriptive and normative statements, *dialectical contradictions* (*d-contradictions*), that are in any case argumentatively untenable — even if they are neither analytic tautologies or contradictions, nor empirically or mathematically true or false statements. Of course, not every argumentatively justified conclusion is a d-truth; only argumentatively justifiable conclusions that depend only on arguments referring to the nature and conditions of existence of argumentation qualify as d-truths.

I do not d-contradict myself when I try to convince my wife that our goldfish is not a rational being; but I do when I set out to convince my wife by rational argument that she is not capable of understanding or producing rational arguments.[13] While asking and answering questions, and getting answers to my questions, I cannot without contradiction maintain that I or my opponent in a discussion is not an answerable, responsible person. Thus, in any dialogue, the participants must accept it as a d-truth that each one of them is an "animal

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philosophy for certain defeat in the political market place, where the motivational skeptics quickly learn to accept offers of "free lunches" while they last, even or especially if they know that the offers will not last. (On cognitive and motivational skeptics, see Charles King, "Moral Theory and the foundations of Social Order", in Tibor R. Machan, ed., *The Libertarian Reader*, Rowman and Littlefield, 1982.) Similarly, teaching children and young adults that they should not ask "Is it true?" but only "What is in it for me?" is abandoning their education in favor of preparing them for recruitment by demagogues.

[13] I would make a fool of myself if I were to try to convince our goldfish that it is (or is not) a rational being. No argumentation takes place; there is no d-contradiction.

rationis capax"[14], a being capable of reason — a *person* (as I shall henceforth write). Moreover, they must accept it as a d-truth that they are able to communicate and argue with each other and that each one of them is a separate person, capable of speaking his own mind and, unless specific sufficient reasons to the contrary are adduced, entitled to do so. The point of having a dialogue would be lost if one of the speakers were no more than a mouthpiece for the other with whom he is supposed to be arguing. There would not be a genuine dialogue if the participants were merely actors reading their lines from a script written by someone else. The very idea of a dialogue presupposes an irreducible plurality of natural persons[15]. Thus, in our argumentation, neither you nor I can deny that the other is a separate, independent other person. Moreover, the participants cannot but recognize that they constitute a "community" of free (separate, independent) persons of the same rational kind. *Freedom among likes* is the presupposition of argumentation, and cannot be denied in an argumentation.[16]

It is a d-truth that in the context of argumentation logic and facts ought to be taken seriously. Any attempt to argumentatively deny, refute or defeat that norm would imply the appeal to take logic and facts seriously. Anyone who considered the attempt successful would have to admit that the logic of the arguments or the facts it invoked are irrelevant for its conclusion. Similarly, it is a d-truth that one ought to be willing to respond to demands for reasons or

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[14] Jonathan Swift defined man as an "animal rationis capax" (an animal capable of reason) in a letter to Pope (September 29, 1725), referring to his *Gulliver's Travels*. In this text I shall adopt Swift's definition in preference to the more common definition of man as an "animal rationale" (a rational animal). The difference between the two definitions is important in so far as that by Swift's time "Reason" had come to stand for the perfection of reason. Arguably, the earlier medieval notion of "animal rationale" was no more demanding than Swift's notion of "animal rationis capax". See note 29 to this text.

[15] Only natural persons (individual human beings capable of reason) have the faculty of representing themselves in speech; all other things (including humans incapable of reason, other animals, and supernatural and artificial persons such as organizations) must be represented in a dialogue or argumentation by one or more natural persons.

[16] For the argument that "freedom among likes" defines the condition of order (i.e. the law) of the human world, see FRB, and my "The Lawful and The Legal", *Journal des économistes et des études humaines*, 1995, VI, 4, p.555-577.

justificatory arguments for, and to accept rational criticism of, every thing one does or says.

It is a d-truth that silencing an opponent by forcibly gagging him, or intimidating him by threatening to inflict harm on him (or indeed on anyone else), is not a permissible move in an argumentation. "I'll burn down your house, if you dare to disagree with me" or "I'll see to it that your children never get a decent job in this town" is an illegitimate a move in an argumentation, no less so than "I'll cut out your tongue" is out of order. Such moves would destroy the conditions under which argumentation can serve its purpose. More generally, it is a d-truth that one ought to respect the physical integrity of one's opponents in an argumentation, not only their bodies but also their property (everything they own, i.e. *justifiably possess or control*, or are justified to repossess or bring back under their control[17]). This is, of course, just another way of stating the respectability of the condition of "freedom among likes" that I mentioned earlier.

It is also a d-truth that bribing an opponent, say, by promising him money or a lucrative or prestigious position in return for his not asking certain questions or only giving desired answers, is not a permissible move in an argumentation. Such a move would vitiate the argumentation to the extent that it casts doubt on the opponent's motive in asking questions or answering them.

Evidently, "Persons, i.e., beings capable of reason, ought to be rational" is a d-truth and "Our reason ought to be the slave of our passions" is a d-contradiction.

The above are examples of d-truths, or of d-contradictions, some of them "descriptive", others "prescriptive" or "normative". Together with others, some of which will be mentioned below, they constitute what I shall call *the law of reason*.

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[17] It is not as if persons come to an argumentation as disembodied minds and at the end of it go away with an assortment of bodily organs and other valuable things — prizes won in the argumentation game. Property rights may be *justified* in an argumentation; they are not *created* in an argumentation — no more than free-floating bodies and free-floating minds only come together to form a real person as a result of an argumentation.

IV. Rationally justified norms

Clearly, engaging in argumentation entails a commitment to abide by a number of norms, because any violation of or departure from these norms vitiates and possibly even destroys the purpose of argumentation itself. These norms come into play whenever questions about the justifiability of actions of any kind (not only moves in an argumentation) are raised and submitted to argumentation. Any action, from merely holding one or another belief to producing large-scale effects in the physical world, may be questioned with respect to its justifiability. If an action cannot be argumentatively justified then it *is* unjustifiable; if it can be argumentatively justified then it *is* justifiable.

It is a d-contradiction to hold that an argumentatively justified conclusion is justified only within the context of argumentation itself[18] — for example, that assaulting another person in the course of an argumentation is unjustified, but that assaulting him afterwards is justified even if he has not done anything that would justify the infliction of pain or harm. Similarly, because bribing a person in the course of an argumentation is unjustified, it is also unjustified outside the context of argumentation.[19]

An argumentation that conclusively establishes that one is justified in claiming truth for a particular proposition, or validity for a normative principle, remains conclusive after the actual exchange of arguments has ceased. Of course,

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[18] Quite a number of Hoppe's critics like to argue that the ethics of argumentation binds only at the moment of argumentation itself and then only those who take part in it. (See the early *Liberty* symposium on Hoppe, referred to above in note 1, as well as Murphy and Callahan's critique, referred to in note 7.) If these critics were right, they would not only have "scored" against Hoppe, they would also have deconstructed the entire edifice of reason, law and justice without which the West would never have risen above the level of barbarism. (See section V of this text)

[19] A bribe, strictly speaking, is something offered or given to a person to make him do what he is under a justifiable obligation not to do. Offering the seller of a house more money than another candidate-buyer does is not bribery; offering the agent of the seller more money than his regular commission in return for not telling his principal about higher competing offers is bribery and not justifiable. Obviously, if the principal trusts his agent to do something that is unjustifiable, bribing the agent not to do it is justifiable—for example, bribing an agent of the mafia (or any other predatory organization) to lie to his principal about one's income.

someone who did not hear the arguments may well reserve judgment until he has had a chance to evaluate them himself — but that too is an implication of the ethics of argumentation. However, a blunt refusal to accept the conclusion of an argumentation, unaccompanied by reasons that purport to justify the refusal, cannot commit anyone but the refuser himself and cannot be considered a justification in itself. A lazy skeptic can effortlessly respond to every argument with "I am not convinced"; but there is no point in engaging a lazy skeptic in an argumentation.

Moreover, d-truths oblige not just the actual participants in a dialogue in progress but all human persons. Justificatory argumentation appeals to reason, not to subjective preferences or personal quirks.

It is easy to refuse another person the opportunity to present his arguments, questions and answers, and thereby avoid having an argumentation *with him*. Nevertheless, such a refusal is not a conclusive rational proof that he is not capable of reason. A's refusal to speak to B does not prove that B is beyond the pale of argumentative intercourse. Treating a person as if he were not a person is not justifiable on the mere ground that one has denied him the opportunity to prove himself capable of reason.

It is a d-truth that in dealing with one's likes (other human beings) one ought to *presume* that they are persons, at least until there is sufficient proof that they are not. The contrary presumption, that other people are not capable of reason anyway, is a d-contradiction, because it amounts to an aprioristic refusal to take their arguments seriously — it amounts to a refusal to even recognize their arguments as what they are: arguments. The *presumption of rationality* is implied in the practice of argumentation itself.

Obviously, the presumption of rationality is defeasible in particular cases. There may be occasions when someone is temporarily "out of his mind" or definitively "loses his mind". Moreover, every human being goes through a stage early in life when his rational faculties and his knowledge of the world are still insufficient to allow him to participate in argumentations. However, it is

customary not to hold young children responsible for their actions, and customary to hold grown-ups responsible for their actions, unless the particular case reveals sufficient reason to think otherwise. Few people are inclined to question whether this is a rationally justifiable custom — and with good reason, I should think.

If a man proves himself an *animal rationis capax* by engaging others in argumentation, then he *is* a person and ought to be regarded and treated as such by other persons. My questions and answers do not magically transform a non-rational blob into a responsible, answerable being capable of reason, who will once again become a non-rational blob as soon as I turn my back to him — nor am I so transformed by another's questions and answers.[20] There is no more evidence for the contrary proposition than there is for my saying that things exist only when I have an immediate sensation of them. Moreover, to assume the contrary would make all argumentations about anything other than the current argumentation itself pointless — and that would make the current argumentation pointless.

If there are norms that are undeniably valid for persons capable of arguing and actually participating in an argumentation then they are valid for all persons capable of arguing, even at times when they are not participating in an argumentation. Such norms are not like, say, the rules of chess that bind chess players only while they are playing the game. There is no apriori of chess to match the apriori of argumentation.

The ethics of argumentation does not contend "that whenever people are engaged in a debate, they have implicitly agreed to certain norms..."[21] To accept that contention is to uproot the argument from argumentation and reinterpret it as an argument about a game defined by rules that the participants have agreed

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[20] A few radical materialists may deny the durability of anybody's personal identity (except their own) and thereby the possibility of argumentation among blobs of human matter, even the possibility that (again excepting themselves) the same man starts and finishes a single sentence, but they are prudent enough not to act on their "philosophy" to see how it would fare in a court of law.

[21] M&C, p.54.

upon. If that were the case, then obviously only the participants in an actual argumentation would be bound by those rules, and only for the duration of the argumentation game. However, the point of the apriori and the ethics of argumentation is that in order to participate in an argumentation people *must* accept the norms that are implied in the nature of argumentation. Whether an exchange of questions and answers is or is not an argumentation does not depend on agreement, implicit or otherwise, on an arbitrary set of rules, but on compliance with the norms which *must* be adhered to if the exchange is to be an argumentation. Unlike the rules of chess, which define by stipulation what the game of chess is, the "rules" of argumentation are to be discovered in the nature of argumentation. Similarly, whether A proves B is not a matter of convention but of logic: "Although B does not follow logically from A, it is nevertheless the case that A proves B because we have agreed that a proof is constituted by rules that are different from the rules of logic" is no more than a roundabout way of saying "A does not prove B".

To sum up: It is a d-truth that one should respect one's opponents in an argumentation as free and independent persons whom one should not even try to manipulate or intimidate with anything other than the force of one's arguments. Moreover, one cannot argue with d-consistency that argumentatively unjustifiable ways of dealing with other persons justifiably prevail outside the context of argumentation — those others might be one's opponents in a future argumentation. Therefore there can be no justification for having recourse to such ways of dealing with such others. In short: persons ought to respect their likes as free and independent persons.

Whether or not this is the principle of libertarianism or libertarian capitalism, it is in any case the rationally demonstrable foundation of the classical natural law ethic, the normative framework — the *law of reason* — within which natural persons (human beings, in so far as they are capable of reason) *ought* to solve their differences, disagreements and conflicts. Within this framework, a jurisprudence of freedom can propose and critically consider ways in which

people ought to, or may, interact in various sorts of situations without violating the normative requirements implied in their nature as beings capable of reason.

V. Significance for the history and philosophy of law

A man accused of having committed a crime does not prove his innocence by proving that he committed no crime during the whole time he was in court (where his case was being argued). The point of the argumentation in court is to determine whether some particular action of his before he was hauled into court was justifiable or unjustifiable, excusable or inexcusable.

If a man proves his innocence with respect to a crime of which he has been accused, a *judge* would d-contradict himself if he were to say, "Congratulations, but I am going to hang you anyway. After all, it does not follow from the fact that you gave proof of your innocence that anybody ought[22] to pay attention to it, especially after the trial is over." An agent, officer or magistrate in the service of a government might say such a thing without d-contradiction, but only if he makes no claim to do justice. An official condemns a man to the gallows, having heard only the arguments and witnesses of the prosecution and having denied the accused the right to defend himself. There is not a whiff of d-contradiction there as long as the official places himself in the realm of brute force or cunning manipulation, demonstrating by words or actions that he does not intend to justify his action. However, he would d-contradict himself if he were to go on to say that he has rendered justice and spoken truly as required by the ethics of argumentation, or to justify his refusal to justify his obviously unjust actions.

Perhaps the greatest merit of Western civilization was that, for a remarkably long time, it accepted the normative primacy of reason in human affairs, as the foundational principle of justice. This was the paradigm of natural law, which, in

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[22] A proof of innocence implies that the man *ought* to be acquitted, released and left in peace; it does not imply that anybody has a *motive* for or *interest* in doing so. That is why those who want to cut every *ought* (appeal to reason) from the affairs of men and substitute for it appeals to satisfaction of wants, utility, self-interests or "happiness" are ultimately architects of injustice.

the words of Saint Thomas Aquinas, amounted to the recognition of "man's rational participation in the eternal law".[23] Few thought of arguing against the principle that conflicts, disputes and disagreements ought not to be settled otherwise than by means of rationally justified actions in accordance with rationally validated principles. Force, intimidation, manipulation and so on may be excused on those occasions when they are used as means in *ultima remedio* to help establish or re-establish justice, but never when they are used autonomously to bring about whatever one can get away with.

Thus, it was accepted that there *is* a "court of reason" and that men should have and organize actual courts of justice to help ensure that reason should prevail.[24] The idea of a court of justice as an island of reason, where arguments would be appreciated on their merits, and where attempts at intimidation, trickery and so on would be checked and weeded out, became central to the ideology of the West. Inside the courts the ethic of dialogue or argumentation should reign supreme, regardless of how it fares in the rough-and-tumble of daily intercourse. Moreover, the findings of such a court, with respect to the justifiability of particular actions, should prevail over the emotional or calculated responses of those who witness or hear about them — at least to the extent that the court's findings are justifiable.

Only reason can justify — and that reason is not manifested in a monologue of one side's arguments, but in a dialogue, where arguments and counterarguments can be evaluated in an open confrontation. Thus, it was taken for granted that a court ought to hear all the parties involved in a dispute and give them an opportunity to justify or at least excuse their actions ("Audi et alteram partem"); that judges should arrive at the truth of the matter (in their verdicts, that is, *vera dicta* or truth-sayings) solely on the basis of "the merits of the case" as they

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[23] Thomas Aquinas, *Summa Theologica*, IaIIae, Q.91, art.2, conclusion.

[24] "There is a court of reason" does not imply that such a court actually exists as a place where one can go and sit on a wooden bench. In the face of the fashionable neglect of and disdain for metaphysics, let us remind ourselves that (the law of) *being* does not reduce to (the law of) *existence*. Logically, existence is a contingency but being is not.

emerge from the accounts of reliable witnesses and the arguments presented in court by the parties to the conflict; and that these verdicts should have normative authority as long as they are not shown to be wrong (that is, not *vera dicta* after all). Whatever the degree of social, economic or political inequality in a society, respect for the process of finding justice and a commitment to uphold its findings were held to be the keys to freedom and justice. The courtroom should provide the conditions that make fair argumentation possible ("equality before the law" and, via the practice of permitting the parties to call on advisors and advocates, even a rough equality of intelligence and argumentative skills).

It was a great idea, but of course the powerful, the rulers and their clients, often enough intervened in court proceedings and made a mockery of the independence of the courts of law, replacing them with boards of officials whose main function was (and is) to see to it that their master's voice is heeded by all. The judges were replaced with "magistrates". The *jurists*, whose main concern is the knowledge and application of the principles of justice, were replaced with *legists*, whose main occupation is to know and apply their masters' wishes as these are revealed in legal edicts and codes.[25]

Nevertheless, even in this day of rampant legal positivism, the ideals of justice still fashion the way in which those boards and magistrates present themselves to the public at large and to their masters. Unlike bureaucrats and diplomats, the magistrates posing as judges do not claim authority on account of their loyal subservience to their masters, but on account of their "independence" from them. Paying lip service to the ethics of dialogue and argumentation is vitally important for maintaining not only their position in society but also their status as possessors of a science of necessary things. While positivism rules the curriculum in the law schools, telling their students that only "the law" matters and that "the law" is nothing but the set of legal rules, edicts and decisions promulgated by the authorities that other rules in the same set designate as

[25] For an etymological explication of the distinction between jurists ("ius") and legists ("lex"), see "The Lawful and The Legal" referred to in note 16.

"legal", the schools never tire of instilling in their students the sense that the implications of positivism do not apply to the magistrates and the advocates they are being trained to become. Like scientists, they should be aware that they are supposed to answer to a calling that transcends loyalty to any social or political regime. Like scientists, they should feel entitled to claim immunity from arbitrary interference, admittedly not as a general human right but as a professional privilege. And like scientists in the Age of Big Politicized Science, they should not have any qualms about serving and assisting the powers that be as long as the latter keep up the pretence of their "independence".

Albeit in an increasingly emaciated and perverted form the ethics of argumentation still has a hold on the imagination as the bulwark of civilized co-existence, no matter how obscure the distinction between a scientist and a government expert, or between a judge and a magistrate, has become in public discourse. However, its force is sapped when the point of argumentation in a court no longer is to reveal which actions are justifiable and which are not but merely to determine which party complied with some set of arbitrary politically imposed rules. Then argumentation gives way to a contest in which one "legal mind" tries to outwit his opponent in a game that turns primarily on one's skills in combining officially recognized legal classifications of facts, legal rules, other legal data such as precedents, and currently fashionable notions into "a strong case". Similarly, the ethics of argumentation and dialogue loses its grip on the intercourse of scientists if convincing the authorities of the social or political relevance of one's research becomes a priority.

The argument from argumentation is not a mere academic artifact without any practical significance. It underlies the Western tradition of the philosophy of law and its impressive harvest of principles of substantive and procedural justice, which command respect even after more than a century of systematic

"debunking" at the hands of scientistic positivists and others for whom man's reason counts for nothing and his voice ("vote") for everything.[26]

VI. To argue or not to argue

With few unfortunate exceptions, human beings are capable of reason. With unfortunately few exceptions, human beings prefer not to upgrade to the condition of an "animal rationale" by accepting or at least striving to live within the law of reason; many are opportunists, who appeal to the laws of reason, if at all, only when it suits them. For them, "What is in it for me?" is a far more pressing question than "What is the right thing to do?" Consequently, they prefer to get by on the basis of prudence rather than wisdom (prudence controlled by reason), just as they would do in their interactions with animals and other natural phenomena. Nevertheless, few people can resist the urge to distinguish between right and wrong, and to claim justification for their judgments in matters of right and wrong. However, many want the reward of justification without arduous argumentation and are likely to settle for prejudices rather than well-argued judgments: "Many people would sooner die than think. In fact they do."[27] That is not a refutation of the law of reason but an indication of man's imperfection in the light of his most distinctive faculty: reason.

Consider Jonathan Swift's statement that I have chosen as a motto for this paper: "[N]o person can disobey Reason, without giving up his claim to be a rational creature."[28] It expresses a d-truth, "Reason ought to be obeyed" (for one cannot consistently argue that reason ought not to be obeyed), and it states an argumentatively justified consequence of disobeying reason: one thereby gives up the claim to be a rational being (for one cannot consistently argue that one is a

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[26] On the distinction between *speech* (logos, Latin ratio) and *voice* (phonè), see Aristotle, *Politics*, I, 2, 1253a9-15.

[27] Bertrand Russell, as quoted in Anthony Flew, *Thinking about Thinking*, Fontana / Collins, Glasgow, 1975.

[28] Jonathan Swift, *Gulliver's Travels*, Part IV, chapter 10. (Part IV is his "romance of reason": *A voyage to the country of the Houyhnhnms*.)

rational being and reject the obligation to abide by the dictates of reason). Recall that Swift defined the human being as an "animal rationis capax" — not as a being that is always and everywhere, as it were automatically, in tune with reason, but as one for whom it is a matter of choice whether or not he or she will accept to be rational: to live or to strive to live, to accept to judge and be judged, in accordance with the dictates of reason.[29]

Obviously, it is physically possible for a human being to refuse to place himself under the authority of reason. However, he cannot without d-contradiction argue that the dictates of reason do not apply to him but only to others. The same holds for a man who wants to claim his rights according to the ethic of argumentation but refuses to recognize the obligations it imposes. That too is an argumentatively untenable position. Men who refuse to be bound by the ethics of dialogue or argumentation cannot hope to succeed in justifying that position argumentatively. Such people choose to act, and to interact with others, outside the "realm of reason". Placing themselves outside the law of reason, the context where appeals to reason or justice can meaningfully be made, they choose to be *outlaws*. They not only give up the claim to be rational persons; they also free all others from the rationally, argumentatively valid obligation to treat them as persons according to the dictates of reason.

The point is that whether or not one activates one's rational capabilities *is* a matter of choice. We can choose to enter into civilized commerce with one another by accepting the apriori of argumentation and all that it entails, or we

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[29] On the basis of Swift's definition, the fundamental choice for humans is "Either be rational or be irrational", and the corresponding basic norm "Be rational". (The distinction between *rational* and *irrational* applies only to beings capable of reason.) On the basis of the more common definition of man as an "animal rationale" (a rational animal), the fundamental alternative is "Either be reasonable or be unreasonable" and the basic norm is "Be reasonable". (The distinction between *reasonable* and *unreasonable* applies only to rational beings.) Of course, some human beings may not even be capable of reason because of a genetic defect, an accident or an illness. For the purpose of this discussion, we need not consider them further: they are not potential opponents in argumentation. Although someone else may take it upon himself to represent them in an argumentation, for example in a court of law, they are not capable of self-representation (or indeed of choosing their representatives).

can refuse to do so and play the Hobbesian jungle game[30]. Some will choose the second option, thereby waiving their rights under the law of reason and justifying others to treat them as "wild things" (which one can try to manipulate but with which it is pointless to argue) — and if they do "injury contrary to right", justifying others to treat them as "enemies".[31] There is no contradiction in their choice as long as they do not pretend to be able to argue that placing themselves outside the law of reason is "the right thing to do". Indeed, some people succeed remarkably well in placing themselves outside (or "above") the law of reason. Nevertheless, they, their supporters, clients and apologists, cannot ever justify their stance in a rational argument. They may not care about that as long as they get their way, but that is their choice; it is not a an argument with any rational force. Their choice to make themselves outlaws in no way invalidates the laws of reason.

VII. Outlaws and the presumption of innocence

Hoppe had no pressing reason to discuss the concept of an outlaw in the context of his comparison of socialism and capitalism. Nevertheless, the concept is essential for a correct appreciation of argumentation ethics. Not understanding this, critics such as Murphy and Callahan assume 1) that Hoppe's theory implies that criminals are self-owners, who cannot rightfully be punished for their crimes because punishment violates their self-ownership[32]; and 2) that, if the

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[30] Hobbes, *Leviathan* (1651), especially Part I, Chapter XIII.

[31] Democritus: "If a thing does injury contrary to right, it is needful to kill it. This covers all cases." [B258] "According as has been written concerning wild things and creeping things, if they are 'enemy', so also is it needful to do in the case of human beings." [B259a] (Fragments as translated in Eric A. Havelock, *The Liberal Temper in Greek Politics*, Jonathan Cape, London, 1957, p. 128).

[32] M&C, p.58: "Hoppe has shown that bashing someone on the head is an illogical form of argumentation. He has not shown that the fact that one has ever argued demonstrates that one may never bash anyone on the head, nor has he demonstrated that one may not validly argue that it would be a good thing to bash so-and-so on the head." They then assert "We cannot convince you of anything by clubbing you, but we may quite logically try to convince you that we should have the right to club you." (M&C, p.58) True, they may try to convince me that they ought to have the right to punish me for my crimes, if I have committed any. There is a good chance that they will succeed.

theory should deny that criminals are self-owners, it cannot claim self-ownership for anyone:

> "if Hoppe's argument doesn't prove that criminals own themselves, then it can't prove that non-criminals do, either, since there is nothing in the argument itself concerning criminal behavior."[33]

Against Murphy and Callahan's reading of it, we must point out that the argument from argumentation clearly distinguishes between persons who stay within the law of reason and persons who avoid or evade that law. Among the former self-ownership is argumentatively undeniable; among the latter the question of ownership (as distinct from effective control), let alone self-ownership (as distinct from effective self-control), does not even arise.[34]

Of course, rational persons may be justified in using violence against a *brute* or a *criminal*, i.e. one who is by nature or by his own volition outside the law of reason, incapable or unwilling to submit to the test of justificatory argumentation. The ethics of argumentation restricts the range of one rational being's lawful actions with respect to other rational beings, who like him accept that actions should be justifiable; it does not impose restrictions on what a rational being may do to a rock that threatens to crush his home, a bear that threatens to tear him apart, a criminal who tries to rob him. A thing that is outside the realm of the law of reason, or a man who makes himself an outlaw, say, by fleeing from justice or refusing to make restitution to those he has unlawfully wronged, is not (or is no longer) in the same position as one who continues to submit to the law of reason or as the repentant robber who recognizes that his actions were unjustifiable and makes a genuine offer of full restitution to his victim. Murphy and Callahan simply assume that bashing the head of an outlaw, a brute or an unrepentant robber, is just as much a violation

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But how on earth do they hope to convince me by means of logical arguments that they should have the right to club me, regardless of what I may have done or will do? If the (unqualified) statement "We have a right to club you" were justifiable then clubbing a person would be a justifiable action also in an argumentation.

[33] M&C, p.64.

[34] See below, section VIII.

of an argumentatively justifiable property right as is bashing the head of an innocent person or a repentant criminal. They are wrong.

My argument here refers to the theory of crime and punishment implied in the ethics of argumentation, a theory that is familiar to libertarians.[35] Its bare outline[36] is as follows: Suppose that one person, T (a tortfeasor), intentionally or unintentionally, voluntarily or involuntarily, caused unlawful harm to another, V (his victim). Then there is an argumentatively justified obligation for T to undo, or compensate for, all the harm he caused V to suffer. This obligation corresponds to V's right not to suffer unlawful harm from another person. If T readily demonstrates his willingness and ability to make full restitution to V, the two must rely on negotiation, mediation, arbitration or adjudication to determine how and when full restitution is to be made. As soon as full restitution is made, the matter is settled, and V has no right to demand or extract *more* from T. In particular, V has no right to "punish" repentant T. However, if T *refuses* to honor his obligation to make restitution, for example by trying to evade being brought to justice, then he turns himself into a criminal[37]. Consequently, V has the right to *enforce* his claim against unrepentant T,[38] who is now no longer a mere tortfeasor but a criminal.

Thus, we have the *presumption of innocence*, i.e., the principle that no person shall be considered a criminal or punished as a criminal unless he willfully places himself outside the law of reason. Any "animal rationis capax" is to be presumed to accept the law of reason until it demonstrates that it does not.[39] However, one

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[35] Randy Barnett, "Restitution: A New Paradigm of Criminal Justice", in Randy Barnett & John Hagel, eds, *Assessing the Criminal, Restitution, Retribution, and the Legal Process*, Ballinger Books, Cambridge, Mass., 1977.

[36] FRB, 224-231.

[37] A crime (*crimen*) is an act that does not discriminate between right and wrong.

[38] T invades the property of V and thereby places himself under the jurisdiction of the latter: either he recognizes his transgression and agrees to behave as V requests him to behave as long as he remains on V's property, or he refuses and consequently remains within the jurisdiction of V, thereby relinquishing any claim to be a self-owner

[39] This presumption is rationally justified as being undeniable in any argumentation. The contrary presumption, that a person rejects the laws of reason until he proves otherwise, a fortiori that a person rejects the laws of reason even if he may occasionally

who does place himself outside that law, not only gives up his claim to be a rational person but every other claim as well that invokes that law, including claims to ownership or self-ownership. As will become clear in the next section, none of this implies or even suggests that claims of ownership and self-ownership cannot be justified within the law of reason.

VIII. Self-ownership as seen through positivist spectacles

Argumentation ethics does not fit the modern academe's dominant paradigm of empirical science and its attendant positivistic and scientistic methodologies. It is therefore no surprise that many of the academic critics of argumentation ethics have no use for it. Normative propositions such as "Being capable of reason, human persons ought to be rational" simply do not pass the positivists' muster and should therefore never be used in "scientific reasoning". Positivists do not care to argumentatively justify their rejection of such propositions: "dialectical truth" and "dialectical contradiction" are not in their methodological or epistemological repertoire. They do not, of course, deny that *they* themselves are capable of reason, and they do not deny that in their academic discourses they ought to show respect for truth and logic; ought to be willing to produce reasons or justifications for, and to accept rational criticism of, every thing they do or say; ought to respect each other as free and independent persons who should not even try to manipulate or intimidate one another with anything other than the force of their arguments; and indeed ought to respect the full range of libertarian rights in so far as they are relevant for academic intercourse[40]. They are unlikely

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pretend to accept them, defines the Hobbesian view of man (which may fit some people but cannot be presumed to fit all).

[40] E.g., using or threatening to use one's own or, say, the state's force or violence against an opponent or his property; taxing or regulating one's opponent's research; fraudulent doctoring or manufacturing of evidence; tampering with, stealing or destroying an opponent's research material; and so on — these *are* unlawful moves in any academic, scientific or philosophical discussion. The essential, internal norms and values of scientific and philosophical discourse are those of the ethics of argumentation, and such discourses presuppose respect for the full set of libertarian rights on the part of all who seek to participate in them. (See "Economics and the limits of value-free science", referred to in note 4.) The picture has become more complicated with the rise of

to consider these norms rationally justified or even justifiable; they are far more likely to consider them as no more than "conventions" or "rules of the game", like the rules of chess. In the perspective of positivism, such rules are not grounded in a rational appreciation of the essence or final form of science; rather, they happen to be the rules effectively followed by people who are conventionally regarded as scientists, and at least tolerated by public opinion and public authorities (the powers that be).

Consequently, the norms implied in argumentation ethics can enter the discourses of positivists only as "mere conventions" or as perhaps disguised empirical statements. Thus, we may expect two sorts of attack from positivists on any presentation of argumentation ethics such as Hoppe's: 1) argumentation is a conventional game and as such its rules have binding force only for those who play the game and only for the duration of the game; 2) the ethics of argumentation implies empirical generalizations which can be shown to be false by suitable counterexamples. Murphy and Callahan, indeed, try both sorts of attack, although they certainly would not like being labeled as positivists. They sum up their critique as follows:

> "[Even] on its own terms, Hoppe's proof at most establishes fleeting and partial ownership of one's body. [... His] proof doesn't even succeed in this, for it confuses temporary control with rightful ownership."[41]

The first sentence says that Hoppe has only shown fleeting ownership of one's body, namely, *ownership for the duration of the argumentation*, and even so only partial ownership, namely, *ownership of those parts of one's body that one effectively needs to participate in an argumentation*. The second sentence states that Hoppe does not demonstrate ownership but only effective use of those parts of one's body.

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bureaucratic Big Science and the concomitant reduction of many scientists to employees working to agendas set by their superiors in the organization, department, or corporation that employs them — cf., for example, the transformation of the university from a "community of scholars" into a hierarchical organization of employees.

[41] M&C, p.64.

As we have seen already[42], the "fleeting ownership" criticism fails. What a justificatory argument justifies (whether or not that is an ownership claim) is justified not only while the argumentation is in progress and not only for those who actually participate in it but for all time and for all actual and potential arguers — for all persons. This is also true for the validity of the norm "Beings capable of reason ought to respect each other as free, independent, separate persons", which implies that they ought to abstain from using force or other non-rational means against one another unless there is justification for resorting to such means. As Hoppe put it:

> 'Nobody has the right to uninvitedly aggress against the body of any other person and thus delimit or restrict anyone's control over his own body.' This rule is implied in the concept of justification as argumentative justification.... Since according to the nonagression principle a person can do with his body whatever he wants as long as he does not thereby aggress against another person's body, that person could also make use of other scarce means, just as one makes use of one's own body, provided those other things have not already been appropriated by someone else but are still in a natural, unowned state."[43]

Clearly, it cannot be concluded from this that all human beings per se *are* self-owners. Moreover, there is no reason to suppose that the argument intends to show that all human beings as such *are* self-owners. Why then do so many critics seem to assume that the argument *intends* to prove precisely that, and therefore *fails* because it does not?

> "At best, Hoppe has proven that it would be contradictory to argue that someone does not rightfully own his mouth, ears... and any other bodily parts essential for engaging in debate. But that clearly would not include, say, a person's legs..."[44]

It is a d-truth that the participants in an argumentation must have *physical control* over some parts of the world and in particular of their own bodies. This does not mean, however, that participants in an argumentation must have or

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[42] See section IV of this paper.
[43] S&C, 133-134.
[44] M&C, p.56.

even must be presupposed to have *ownership* of those parts of the world or their bodies. Ownership, unlike possession or effective control, is *not* a merely physical relation. 'Ownership' means justifiable control, that is, argumentatively justifiable control; therefore ownership can be determined only as the result of an argumentation about the justifiability of a person's having possession or control of one or another means of action.

Nevertheless Murphy and Callahan consider it "a more fundamental objection" that "one is not necessarily the rightful owner of a piece of property even if control of it is necessary in a debate over its ownership."[45] That proposition is simply true but the question is whether it is a relevant objection to Hoppe's argument. Suppose I am charged with a crime in China. To comply with some minimal requirements of justice the Chinese court concedes that I should be assisted by a competent translator. I need one to be able to participate in the arguments made in court. Yet, my need for such a translator does not prove that the one I eventually get is my property. Did Hoppe say anything to suggest otherwise? I cannot find any place where he logically committed himself to such an absurdity and Murphy and Callahan do not direct me to one. Instead, they attempt to make Hoppe sound as if he were a Georgist.[46] The insinuation is pointless. The fact that I need standing room in the Chinese court in order to be able to attempt to justify my actions does not make me the owner of a little piece of China. The Chinese are not contradicting themselves in conceding me standing room in the court without granting me ownership rights in Chinese soil. Murphy and Callahan suggest that if the Chinese are not contradicting themselves then also one who "concedes" another the use of his body or some parts of it for the duration of the discussion is not contradicting himself if he denies the other ownership of his body. True enough: denying that some person is a self-owner is not per se a d-contradiction. But that does not mean that his

[45] M&C, p.60.
[46] M&C, p.61.

claim to be a self-owner — i.e., his claim that only he has justified and indeed justifiable possession and control of his body — cannot be justified.

Murphy and Callahan also claim[47] that a theist may be wrong in asserting that God owns all of us, but insist that he is not thereby contradicting himself. Therefore, or so they say, the thesis of self-ownership is not without a logically coherent alternative and so cannot be necessarily true. They fail to see that a d-contradiction is not a *contradictio in terminis* but a contradiction between what is said and the saying of it. In this particular case, they moreover fail to note the difference between arguing about God and arguing with God. The question of God's ownership would have to be decided in an argumentation with God[48], not with any self-proclaimed representative of God, who would have a hard time proving his credentials anyway — so much so that it is doubtful that he would ever get to discuss the question of God's ownership itself. The same applies to discussions about Society or The People's having ultimate ownership of our bodies or other things.

The concept of ownership makes sense in the context of argumentation (the moral sciences), not in the context of describing the interaction of merely physical forces (the behavioral sciences). Unless I am prepared to argumentatively justify my actions and to accept justifying arguments made by or on behalf of others — in short, unless I agree to live within the law of reason, I cannot without d-contradiction claim ownership of anything, including ownership of myself. A wild animal, no matter how strong and cunning, makes no ownership claims; a man who does not care about the dictates of reason cannot consistently claim that his control over or use of some parts of the universe is to be respected because it is argumentatively justified.

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[47] M&C, 60-61.

[48] Assume that Murphy and Callahan refer to a theist in the Judeo-Christian tradition: Would God claim justifiable possession or control of a creature that He put out of his Garden when He discovered that it was capable of reason and free will? What does all the biblical talk about Covenants mean if we are asked to consider a covenant between an owner and his property?

In many cases, of course, possession or effective control is unjustified, even unjustifiable. The argument from argumentation does not deny that. But neither does it deny that there are cases of justified or justifiable possession or effective control. Recall once more Swift's definition of man as an "animal rationis capax", bound by the argumentatively undeniable norm that it ought to be rational. Swift concluded: "No person can disobey Reason, without giving up his claim to be a rational creature." We can now add: "Giving up the claim to be a rational creature entails giving up the claim to be a self-owner, or indeed an owner of anything whatsoever." One who places himself outside the law of reason, thumping his nose at justificatory argumentation, cannot consistently claim to own what he possesses or controls. In contrast, a person who lives within the bounds of reason will have no difficulty proving justifiable possession of any part of his body or indeed of any other thing that he acquired without injustice to anyone. After all, one cannot without d-contradiction *presume* that another person does not own his body. A person is to be regarded as a self-owner unless and until specific reasons are adduced for holding that his control of his body is not justified. It would be a d-contradiction to deny this: there is no point to engaging in an argumentation with someone who believes that no person has a right to use his body to express himself or to speak his mind.

To appreciate the undeniable justifiability of *the presumption of self-ownership*, it suffices to step out of the rarified atmosphere of academic discourse, where self-ownership is just a word or free-floating concept. Let us sit down, you and I, and facing one another argue about who may be presumed to own (justifiably control) whom: I me and you you (self-ownership); I you and you me; I both of us; you both of us; I and you both of us; or none of us either of us.[49] Chances are

[49] An academic might argue that humans are not individual persons at all but merely contingent aggregates of cells; or that they are merely abstractions ("Me man, you woman"; "Me philosopher, you economist"). Such a supposition certainly would remove self-ownership as an argumentatively defensible position... along with every other possible distribution of ownership. Indeed it would render the concept of argumentation meaningless, and with it also the concept of the ethics of argumentation. Academics can,

that you and I are already in the perfect condition for an argumentation of that kind, if there is no prior event that has caused one of us to be indebted or subordinated to the other, say, as debtor to creditor or criminal to victim. It will soon become obvious that the presumption of self-ownership is the only argumentatively robust principle in the list,[50] the only one that is part and parcel of the factual and ethical presuppositions of argumentation.

Of course, from the perspective of positivism this explication is to no avail: for the positivists, justification adds nothing to anything and ownership reduces to effective possession, either actual possession or possession recognized and protected by the powers that be; ethical notions must be eliminated from "scientific reasoning", if not by simply ignoring them then by re-interpreting them as merely empirical concepts.[51]

Disregarding Hoppe's explicit protestations,[52] even Murphy and Callahan prefer to interpret Hoppe's dialectical statements about ownership (justifiable control) as empirical statements about the physical preconditions of the ability to speak (effective control) and to attack him by means of empirical counterexamples. Hence, their reference to the fact that a person without legs can argue with others[53] and their conclusion that, since legs are not needed for

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and in fact often do, dismiss the evidence that the objects of their research are arguers like them (see below, section IX) but do not often try to justify that dismissal.

[50] Rothbard appreciated this, not surprisingly, because he had made use of the device of listing the logical alternatives to the principle of self-ownership and had found each of them wanting (although not on account of their demonstrable untenability in an argumentation, see Murray N. Rothbard, *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J., 1982, p.45f).

[51] E.g., "desirable" means "desired"; "ought" means "is preferred", and so on.

[52] S&C, p.137; M&C, p.62.

[53] Legless people can communicate and argue; so can a blind people, people attached to or using a device that replaces their heart or lungs, or remedies their severely incapacitated hearing. However, a distinction must be made between asking a person whether he can justify the possession of his natural body or any of its parts, and asking him whether he can justify his possession of an artificial contraption or device. "Where and how did you get that hearing aid?" makes sense in a way "Where and how did you get your stomach?" does not. The reason is not that a stomach cannot be acquired in unlawful, unjustifiable ways — given the state of modern medical technology it probably can be — but that there is a decisive reply that, if true, stops any request for a

the purpose of communication, Hoppe's argument cannot even account for the fact that a person owns his own legs. Hence also, their reference to "slaves". These do not *enjoy* libertarian rights, yet are able to argue. Therefore — or so Murphy and Callahan claim — libertarian rights are not necessary for the ability to argue, and Hoppe's argument cannot account for self-ownership at all. However, because the general empirical statements against which they are directed are not part of Hoppe's theory, the counterexamples do not affect the theory in the least.

Hoppe's argument is not that "This is mine" follows from "I need this to be able to participate in an argumentation" because it would be contradictory to say, "Indeed, you need it, but I deny that it is yours." The argument is that when A and B enter into an argumentation both of them do so under the d-valid presumptions of rationality, innocence, and self-ownership—presumptions that will hold until there is proof that they should be withdrawn. Neither A nor B can deny that he is arguing with *another* person, one who is both a person and another person — in the words of the time-honored formula, a separate "free and equal person". Neither of them can justifiably claim to own any other participant's justifiable possessions (his body or any part thereof, or any other, non-somatic means of action), or, of course, the law of reason itself. However, the fact that an outlaw (one who has placed himself outside the law of reason) needs his tongue to utter or his hand to write statements does not mean that he *owns* (as distinct from *possesses* or *has physical control over*) these body parts. One cannot at the same time repudiate the law of reason, which is what a criminal does, and invoke it to prove justifiable control, i.e. ownership.

Murphy and Callahan then claim that, even if one sets aside their remarks about fleeting and partial self-ownership,

> " it's still the case that Hoppe has only proven self-ownership for the individuals in the debate... For example, so long as Aristotle only argued with other Greeks about the inferiority of barbarians and their

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justification: "I was born with it; it's been a part of me for as long as I have been around."

> natural status as slaves then he would not be engaging in a performative contradiction."[54]

That is not true: Aristotle's general statement that barbarians have enough reason to obey orders and please their Greek masters but not enough to qualify as fully human[55] is not defensible in an argumentation. If Aristotle had tried to justify his views to a moderately articulate barbarian, the contradiction would have been obvious. He could only try to avoid the humiliation of being caught in a d-contradiction by *refusing* to justify his views to the so-called barbarians, by refusing to give them a hearing. However, the attempt would have been in vain. For that refusal itself is a contravention of the ethics of dialogue and argumentation. It exemplifies not simply an intellectual mistake but a morally vicious stance. Any person, Greek or non-Greek, could have made that clear.

There is no way in which Aristotle — the Philosopher! — could have argued that his refusal to let the "barbarian" others speak for themselves was argumentatively justified. Refusing to argue is not a form of producing an argument. There can be no argumentative justification for Aristotle's refusal to put his statements to the only relevant test: engage a non-Greek in an argumentation. After all, Aristotle was not merely stating the obvious, namely that the sentence 'Greeks are rational in a way non-Greeks are not' is not a *contradictio in terminis*. Yet, Murphy and Callahan claim (without argument) that Aristotle's refusal to talk to barbarians is as justified or as unjustified as our refusal to try to justify our views on zoos to a polar bear or a horse!

> "[T]he Hoppeian might respond that horses are not as rational as humans, and therefore do not need to be consulted. But Aristotle need only contend the same thing about barbarians: they are not as rational as Greeks."[56]

What sort of argument is that? Do I need only contend that I am the only rational person in the world to *justify* the claim that my arguments are unassailable? We should soon discover that polar bears and horses are not

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[54] M&C, p.58.
[55] Aristotle, *Politics*, I, 5, especially at 1254b21-23.
[56] M&C, p.59.

creatures with which it is wise or safe or indeed possible to reason. Are Murphy and Callahan suggesting that that is exactly what Aristotle would have discovered if he had had a face-to-face discussion with a barbarian, any barbarian; and that he therefore was justified in refusing to give any barbarian an opportunity to prove him wrong?

Murphy and Callahan's contention, that refusing another person a hearing is just as rationally justifiable or unjustifiable as not giving animals a forum in which to expound their views on zoos and animal rights, is ridiculous. It is precisely in the context of argumentation that we cannot overlook the difference between another person and another animal without making complete fools of ourselves. In defense of Murphy and Callahan one might point out that academics, including most economists and social scientists, tend to deem scientific only theories *about* humans beings that treat them not as potential opponents in an argumentation but only as suitable matter for "empirical research".[57] I should think that that is a fundamental flaw in much of contemporary social and economic science.[58] In an enquiry relating to the foundations of ethics it is utterly out of place.

Murphy and Callahan then refer to David Friedman who argued that Hoppe must be wrong when he claims that self-ownership is a prerequisite to debate because countless slaves have engaged in successful argumentation.[59] However, Hoppe did not make the empirical and absurd claim that a person is incapable of arguing merely because the powers that be *legally* classify him as a slave, or that being the *legally recognized* "owner" of one's body is a necessary condition for

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[57] However, as the "Austrian praxeologists" Murphy and Callahan claim to be they should be aware of Mises's statement, "The real thing which is the subject matter of praxeology, human action stems from the same source as human reasoning." Ludwig von Mises, *Human Action*, 3rd revised edition, Henry Regnery, Chicago, 1966 (hereafter HA), p.39. Not just the students of, but also the people studied by, praxeology are *rational* agents. Indeed, that is the basic insight of praxeology.

[58] That was the point of "Economics and The Limits of Value-Free Science", referred to in note 4.

[59] M&C, p.62. The reference is to D. Friedman, "The Trouble with Hoppe", *Liberty*, 1988. Note the ambiguity of the word 'successful' here. How many slaves have successfully argued their way to freedom?

being capable of engaging in argumentation. His argument was that such legal classifications and the actions they sanction or legitimize cannot be justified in an argumentation with the slaves or indeed in any argumentation that takes the presuppositions of argumentation seriously.[60]

Consider, on the one hand, a master who enjoys debating the justifiability of slavery with his slaves after dinner and then sends them back to their cage, no matter what the outcome of the discussion may be. Consider, on the other hand, a master who frees his slaves after being exposed to the argument that slavery is not justifiable. Which of the two takes argumentation seriously? Which of the two acts as a rational being rather than a mere "animal rationis capax"? The first master obviously regards argumentation as no more than a parlor game; he refuses to argumentatively justify his actions outside that game and to make them conform to justified principles. He demonstrates by his actions that he does not take argumentation seriously if it does not suit his purposes. Why should his opponents in the discussion, his "slaves", take the argumentation in question seriously? Why should anyone? Hoppe answers: No one should take that argumentation seriously because it is not a genuine argumentation. Embracing Friedman's avowed positivism, which instructs him to find an *empirical* difference between the moves of a genuine argumentation and those of a mock argumentation, Murphy and Callahan jump to the conclusion that they have refuted Hoppe. They are mistaken: to refute the Hoppeian argument from argumentation they would have to show that the first master and his "slaves" can with d-consistency engage in serious argumentation, accepting the dialectical

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[60] Obviously, as noted before, there may be cases where the use of force to deprive another of his freedom is justified, for example to make him pay for his crimes, or to stop him from completing the crime he is in the process of committing. There is the difference between a criminal and a man who is in a delirium: the latter is temporarily incapable of exercising self-control. Depriving him temporarily of his freedom of movement (he is ex hypothesi temporarily not capable of *acting*) is not a matter of justice but of prudence and maybe even kindness. One may be justified in using uninvited force against such persons. However, these are not paradigmatic cases of the sort of slavery to which Friedman or Murphy and Callahan refer.

principles such argumentation entails. Murphy and Callahan do not even try to make that argument.

Recall that Aristotle defended slavery with the argument that it is not primarily a conventional institution but a natural (and justifiable) condition of "inferior people". His defense failed, as we have seen, because contrary to the requirements of the ethics of argumentation he had refused to submit his reasoning to the only test that could decisively refute it. The scandal of slavery is not in the fact that slaves are not, let alone cannot be, self-owners but in the fact that most of the people held as slaves are self-owners, unjustifiably deprived of their freedom. In other words, the scandal of slavery has very little to do with the persons held as slaves and very much with the people holding them unjustifiably as slaves.

IX. The fallacy of scientism

The conventions of academic writing tend to prevail over the requirements of the ethics of argumentation, even where adherence to those conventions leads to scientistic fallacies.[61] The basic convention is the subject-object distinction, in particular, the notion that the subjects and the objects of research are qualitatively different sorts of entities. That notion is appropriate where the subject is a human person and the object some non-human, non-personal form of life or matter. However, it is inappropriate where both the subjects and the objects are human persons.[62] There is a difference between theorizing about the human world *as if* it were a separate realm of things with which we can have no intellectual, argumentative intercourse whatsoever, and theorizing from within the human world about the human condition.

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[61] F.A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason*, LibertyPress, Indianapolis, 1976 (1952) is the seminal discussion of scientism in English.

[62] As Mises put it with characteristic aplomb: "All authors eager to construct an epistemological system of the sciences of human action according to the pattern of natural sciences err lamentably." (HA, p.39)

The scientistic fallacy results when academics pretend to study the human world "from the outside" as if they (*rational* beings) are no part of it, as if the objects of their study (*human animals* or, perhaps, mere *black boxes*) are as different from them as are snails or crystals. On the one hand, the academics recognize that in their own disputes, where they face one another, they should abide scrupulously by the requirements of the ethics of dialogue, if they want to be accepted as members in good standing of their academic communities. Thus, in the communications and argumentative exchanges within their academic community, ill defined as it may be, they fully accept that argumentation is between one person and another, between an *I* and a *You*, and also that the success or force of the argumentation does not depend on who is the *I* and who the *You*. On the other hand, people outside the academic community should never be considered even a potential *You* or *I*; they are assigned the status of an impersonal *It* or *Them* and should not be regarded as rational persons of the same sort as the academics who theorize about them. Consequently, it makes no sense to think that *among themselves* those human animals or black boxes are rationally bound by, and entitled to treatment according to, the ethics of argumentation in the way the academics are. As a corollary, statements about "ordinary people" should not be applied to the academics themselves.[63]

The scientistic and positivistic insistence on a radical subject-object dichotomy between "us" and "them" precludes that the two sides of the dichotomy are united by any apriori of argumentation. Indeed, scientism requires that the rationality of ordinary people be methodically disregarded: their *arguments* must be re-interpreted as instances of mere behavior to qualify as legitimate scientific data. In a similar vein, the ethical notions that define the academic community must be emptied of their primary ethical content before they can be applied to

[63] I recall an incident involving the late George Stigler at a conference in Spain in the 1980s. Hearing that I had written a book on reason and natural law, Stigler started to ridicule reason, going so far as to say that there is as much reason in a monkey's antics as in any human act. At that point I asked him whether he was trying to tell me something about how he wrote his books; he gave me a blank stare and stormed out of the room.

the human objects of research. As Anthony de Jasay memorably put it with respect to justice, unless justice is defined as something else than justice,[64] it has no place in the contemporary academy's "scientific" research concerning the human world. "Justice" is no more than a subjective relative value or it is a nominal standard imposed by the scientific observer that answers, say, to this or that quantifiable maximum or this or that calculable condition of equilibrium in the pool of human matter. Libertarianism likewise must boil down to the *mere belief* that ordinary human beings have more or less the same rights relative to each other as academics have in their academic community. However, any justification of that belief about the ethics of beings outside the academic community of scientists must be different in kind from the justification of the ethics of the academic community itself. Indeed, the subject-object dichotomy implies that rational, argumentative capacities cannot have the same kind of ethical implications for "ordinary people" that they have for intellectuals. Consequently, an academic's commitment to libertarianism as a valid principle for *all* human persons has the same sort of contingent relation to the ethics of argumentation as any opinion or theory of animal rights has.

If the separation of mankind in two distinct species — "*we*, the arguers who make up the academic community, and *they*, the black boxes we define as relevant behavioral units" — is made into an axiom of the scientific study of the human world, the relevance of "our" ethical principles to ordinary mankind must be as contingent, arbitrary or delusional as it is to mosquitoes or black holes. Hoppe explicitly refuses to accept that axiom.[65] Given the arguments that they set forth in their critique, it seems fair to say that critics such as Murphy and Callahan at least implicitly subscribe to that axiom. Hoppe most certainly

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[64] Anthony de Jasay, "Justice as Something Else", chapter 9 in his *Justice and Its Surroundings*, Liberty Fund, Indianapolis, 2002, 127-141.

[65] Cf. S&C, p.128, where Hoppe calls empiricism in general and emotivism in particular "self-defeating". Empiricism and emotivism reflect the positivist and scientistic requirement that human actions and normative statements be interpreted as mere behavioral data before "science" can deal with them. For Hoppe's critique of empiricism, see S&C, chapter 6.

does not appeal to the prevailing consensus in, or the mere conventions of, any particular human community, no matter how it labels itself. He appeals to the capacity of *all* human persons to recognize one another as persons, at least when they get involved in asking questions and giving answers, and arguing about the reasons for their questions and answers.

In scientistic positivism the critics of argumentation ethics may well find all the arguments they need for their belief that an academic does not formally contradict himself when he says that human or other animals do (or do not) have one or another right. True as this is, it does not amount to an argumentative justification of any form of scientistic positivism — unless, of course, it were true that academics belong to a different species than ordinary men and women.

The baneful influence of scientistic positivism emerges most clearly in the context of education. What happens to education when the apriori and ethic of argumentation no longer binds teachers and pupils in a single community of rational persons? The enthusiasm with which many academics support, say, Hume's dictum that *reason is and ought to be the slave of the passions*,[66] as if it were a deep insight into the truth about human nature, raises the question what sort of education could be built upon the positivist principle as it is applied to human affairs. At the individual level, it translates into "Your reason is and ought to be the slave of your passions; do not question your desires, only the efficacy and efficiency of the means to realize them"[67]; at the institutional level, it translates into, say, "Schools and universities, the pursuit of scientific knowledge itself, are

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[66] David Hume, *A Treatise of Human Nature*, II, part 3, section 3. Hume attempts to explain this "somewhat extraordinary opinion" (his words) as a mere tautology in the terms of his own system (that defines reason as inert and therefore capable only of "serving" and "obeying" the passions by pronouncing on the existence of objects or the sufficiency of means for attaining an object). However, it was as an "extraordinary opinion", not as a mere analytical tautology, that Hume's dictum became the more or less explicit premisse of so many academic discussions in the sciences of man.

[67] Ibidum, "Where a passion is neither founded on false suppositions, nor chuses means insufficient for the end, the understanding can neither justify nor condemn it. 'Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger."

and ought to be the slaves of politics—or if not of politics then of public opinion". In either case, we seem to be left with no principle of education at all, for what is the purpose of an education if not to teach men to learn to discern right from wrong?

Hume never leads us beyond the question of how to get what we want in the most efficient way, no matter what we want. To give only one example: Increased unemployment of certain classes of men may be an almost inevitable consequence of imposing an effective minimum wage. Some people (those who see their employment opportunities diminished or their labor costs increased by such a measure) will say that that is a reason for *not* imposing a minimum wage; others (employers fearing competition from regions with lower wage rates, union members seeking to restrict entry into the labor market, politicians looking for a client base of people dependent on political re-distribution and those hoping to become clients of such re-distributive schemes) will say that it is a reason for imposing a minimum wage.[68] Humean "reason", having established the relation between minimum-wage legislation and unemployment, sits back until the balance of power among the passions tilts towards a particular goal and then enlists itself in the service of the winner. "Education" based on Humean reason teaches service to the ruling passion or opinion—in a word, conformism.[69] Questions of right and wrong, justice and injustice, and the presumptions of rationality, innocence and self-ownership, lie outside its scope.[70] At best, such

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[68] The example brings out the emptiness of, for example, Mises's remark, "If an economist calls minimum wage rates a bad policy, what he means is that its effects are contrary to the purpose of those who recommend their application." (HA, p.883) Moreover, substituting "publicly announced purpose" for "purpose" in that sentence solves nothing: lying about one's purpose may be (and often is) an effective means for achieving it.

[69] "What is learned in school is often very soon forgotten and cannot carry on against the continuous hammering of the social milieu in which a man moves." (HA, p.878) Of course, schools and universities committed to the "Reason is and ought to be the slave of the passions" doctrine would not even think of going against the ruling opinion.

[70] In this respect, Hume consolidated the victory in much of Anglo-Saxon philosophy of Hobbes (and the theology of Power: God Almighty) over Aquinas (and the theology of Judgment: God the infallible Judge). In another respect, Hume's criticisms of religion helped to undermine the ethics of responsibility and accountability that the Church,

questions are admitted only after they have been reduced to questions of compliance with existing, merely conventional rules. Of course, there is no reason to suppose that what lies outside the scope of Humean "reason" is irrelevant and cannot be subjected to justificatory argumentation. The effects of the adoption of Hume's principle in "education" are easily observable in the proliferation of experts and social and economic theories that, while claiming to be scientific, are examples of sophisticated sales talk promising the greatest happiness to those who adopt them.

X. But does it justify libertarianism?

While I was working on my ethics of dialogue, some people began to call me a libertarian because of the considerable overlap between the conclusions I reached (in particular about the State being unjustifiable) and positions defended in the writings of Murray Rothbard and others who by that time had made "libertarianism" a distinctive brand of American political philosophy. At least to the extent of that overlap, the ethic of dialogue or argumentation does justify Rothbardian libertarianism. Since I received the label "libertarian" because of my work on that ethic, I suppose I may say that my libertarianism is identical to that ethic. Rooted in the philosophy of law rather than any particular theory of economics, it is the philosophy of people who accept that the ethic of justificatory argumentation is the proper framework for discovering rationally undeniable norms for human interaction as well as justifiable solutions to particular disagreements and conflicts. Advocating such a framework is

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insisting on the regular practice of prayer and confession, brought to every parish and every aspect of daily life. That practice sustained the habit of thinking in terms of right and wrong rather than of more or less immediate rewards and punishments; indeed, it was predicated on the conviction that the ultimate consequences of actions could be determined only at the end of time, far beyond any person's lifespan and the span of any generation's predictive powers—in short, could not be determined at all by any human intelligence. The least we can say about this aspect of the "sociology of religion" is that the ethics of responsibility and accountability has not fared well since education became a political or state enterprise and the perfection of power (efficacy, efficiency) displaced the perfection of judgment as its raison d'être.

admittedly far less spectacular than promising a ready-made solution for every conceivable problem. Nevertheless, it is all that libertarian philosophy can offer if it is to be true to the concept of freedom for all persons under the law of reason and the (in particular cases defeasible) presumptions of rationality, innocence, and self-ownership.[71]

With that in mind, it is fair to say that only libertarian rights can be argumentatively justified, because only libertarian rights define a context in which the conditions necessary for justificatory argumentation can be respected universally.

A final caveat: The arguments from the apriori of argumentation and the ethics it entails do not, and are not intended to, supplant the study of the natural law of the human world (that is to say, the natural conditions that mark the difference between order and disorder in the human world). They complement it by proving how we can be rational and argumentatively justify certain actions or statements if we are conscious of the fact that we, all of us, are *in* that world. The relative novelty of the word 'libertarianism' should not blind us to the fact that the complementarity of natural law and reason has been known and appreciated for a long time already. Nor should the radical nature of libertarianism blind us to the fact that it is radical only because it presses the demand for interpersonal justification among free and equal persons into corners where the argument from authority, be it God, Society, Science, Utility, or whatever other Convenient Abstraction, used to reign unchallenged.

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[71] I am a reluctant reader of articles in which "the" libertarian position on, say, lying, making false accusations, blackmail, incitement to violence, or copyright and trade mark infringement is spelled out legalistically in terms of absolute general rules: either "Everybody has a right to lie" or "Lying is in any case a punishable offense". (See my "Against Libertarian Legalism", JLS, XVII, 3, 2003, 63-89, and "Natural Law and the Jurisprudence of Freedom", JLS, XVIII, 2, 2004, 31-54.) In my view, the key figure for a libertarian theory of law is a *judge*, not a *legislator*. According to the ethics of argumentation, lying is wrong and there is no argumentatively justifiable "right to lie" but that is not to say that every lie is a criminal violation of someone else's rights. Whether a particular lie is excusably or not, whether it is inconsequential or not (as a cause of unlawful harm), depends on the particulars of the case. Conflicts caused by people lying to or about others ought to be settled by justificatory argumentation, hearing the parties to the conflict and taking the circumstances of their case into account.