

*Doris Gordon*  
*National Coordinator*

March 9, 1996

N. Stephan Kinsella  
Schnader Harrison Segal & Lewis  
1600 Market Street, Suite 3600  
Philadelphia, PA 19103-4252

Dear Stephan,

Thanks for the copies of your two articles, "Legislation and Law in a Free Society," and "A Theory of Punishment and Rights." Enclosed are two of my articles, "Why Abortion Violates Rights" and my newer one, "Abortion and Rights: Applying Libertarian Principles Correctly." The two are very similar in certain respects, but each makes points the other does not. You made a remark about promissory estoppel, and I thought you might want to see my use of it in WAVR (page 7).

In reading the table of contents of the September 1995 *The Freeman*, I counted the names of 9 libertarians I've met and conversed with face to face: Rothbard, Rockwell, Leef, Reed, Bandow, Sobran, Tucker, Hospers, and Sirico. If you can arrange with David Saum to speak at his Objectivist supper group in Virginia, then hopefully, I will be able to add you to my list.

If you find any arguments in my article faulty, or if you like them, I hope you will let me know.

Regards,



Author: Stephan Kinsella at SHSL-PH2  
Date: 3/24/96 3:02 PM  
Priority: Normal  
TO: Doris\_Gordon@iad.blkcat.com (Doris Gordon) at INTERNET  
BCC: Stephan Kinsella  
Subject: Abortion etc.

----- Message Contents -----

Doris,

I read your articles with interest. I found them well-written and well-argued on the whole. I was not convinced of your position, however. Let me briefly tell you why.

In short, you do not set forth a theory of rights at all. You merely accept the sort of standard libertarian view that "humans" have rights. Then you build on this. Now I find that 90% of your paper re-states common-sense libertarian or Objectivist views about rights, which I agree with. These points might be controversial to statist, but not libertarians.

It is when you start saying how it makes no sense to distinguish between unborn human life and born human life because it is all life, that it seems to me your argument breaks down. Because you have never shown that "human life" is the standard or source of rights.

I do agree with many of your points. I believe that if we have a negative duty not to kill a fetus, we also have some duty to care for children. You seem reluctant to call these positive obligations, but I think they clearly are. But they are voluntarily entered into, so to speak, by the parents conceiving the child, so are not problematic for libertarians. I also agree that pregnant women cannot really say the fetus is a trespasser. (However, your critique of this view does not take into account the case of rape.) Now I support anti-abortion laws in the later months, but not at the early stages. I simply have not been shown that an embryo has any rights. I never myself said that people have rights just because they are human, so you can't use against me the argument that an embryo is just as much "human" as I am. So what? It is not biological humanness alone that gives us rights, in my view. In any event, you seem to equivocate with the "lifeboat situation" in the case where it's mother v. fetus. I must say that even with my doubts about abortion and willingness to ban it at a late enough point in the term, I would never say the mother has a duty to sacrifice her life for the fetus's. I would literally fight to the death to allow my wife to abort a fetus--even 9th month--to save her life. I cannot imagine any way you could ever justify a contrary view, even if you are pro-life from day 0.

Ultimately I think that if you want to argue so strenuously that an embryo has rights, you must show why we have rights, what is the basis of rights. I am not saying you can't do this, but I have not yet seen it. You cannot just bridge analogies between various libertarian conclusions, which have inconsistent and incomplete justifications.

Anyway, like I said I found it provocative and well-written, and I admire your staunch, uncompromising stand and the courage behind it, and your willingness to divorce your position from religious ones. But I think you have yet to meet your burden of proof.

Best, Stephan

March 31, 1996

*Doris Gordon*  
*National Coordinator*

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Dear Stephan,

Thanks for reading and critiquing my article, "Abortion and Rights: Applying Libertarian Principles Correctly." I'm mulling your objections.

I discussed rights not to set forth "a theory of rights" but to set my remarks on abortion in a libertarian framework. You wrote, "You cannot just bridge analogies between various libertarian conclusions, which have inconsistent and incomplete justifications." I wish you had said what analogies and conclusions you have in mind. What do you think is a satisfactory case for the obligation not to aggress? This needs discussion apart from abortion.

You objected that I "have never shown that 'human life' is the standard or source of rights." Why do you think one should argue for rights that way? My guess is that it is not my discussion of rights that dissatisfies you but my argument that two tiers of humanity is false. You objected, "It is not biological humanness alone that gives us rights," but I did not only show biological humanness; I also showed personhood from conception (pages 127-130, "Philosophy: When Does Personhood Begin?"). If Adult Stephan has the right not to be killed, then *prima facie* why not Zygote Stephan?

"Ultimately," you wrote, if I "want to argue so strenuously that an embryo has rights, [I] must show why we have rights, what is the basis of rights." Do your articles, "A Theory of Punishment and Rights" and "Legislation and Law in a Free Society," pass your test? If so where? What do you think is the basis for the claim that Adult Stephan has rights?

I'm puzzled why you think me "reluctant" to say parental obligation is a positive obligation. I was talking of parental obligation when I said "we can also incur positive obligations even if we have not done harm" (p. 131). I said that "although the non-endangerment principle is essentially negative, it contains a positive obligation proviso: if we endanger innocent people without their consent, we must protect them from the harm ..." True, I didn't discuss rape, but why I didn't had to do only with editorial considerations. And not true that parental obligation is "not problematic for libertarians" (See the enclosed articles by John Walker on rape and on Rothbard).

It almost sounds romantic that you "would literally fight to the death to allow [your] wife to abort a fetus--even 9th month--to save her life." But "lifeboat cases" are subsidiary to the non-aggression principle and this, too, ought to be discussed apart from abortion. The interpretation that "the mother has a duty to sacrifice her life for the fetus's" is yours, not mine. Does a fetus have a duty to sacrifice her life for her mother's? What if your wife and your infant were the lifeboat case? What if it were wife vs. you?

Thanks for your compliments, but maybe you shouldn't say I've divorced my position from religious ones. Aren't the Pope and I political bedfellows?



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April 15, 1996

Ms. Doris Gordon  
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Wheaton, MD 20906

Dear Doris,

Thanks for your letter of 3/31 replying to my email. The Internet has lots of potential, though except for email and document access I think it's so far pretty much a gimmick and useless. Email is great when you can have regular, reliable communication. But since you are not using it for transmitting I feel uncomfortable using it to send you an email; how could I be sure you got it? Hence this letter.

Let me try to reply as briefly as I can. First, please be aware that I am not attacking you for not developing a theory of rights. Please also do not take the comments in this letter as anything other than friendly, constructive criticism and debate. I simply do not believe you have shown what the basis of rights is; in fact you have not even tried. There is nothing wrong with your not having done this; most people have not. You can write an article showing the negative consequences of government intervention, without proving that we have rights etc.; but then you are appealing to commonly-accepted principles such as the idea that human flourishing and material well-being are good. Most people already believe these things so if we as libertarians can show that the state harms these things, this is a useful demonstration. Now if someone were to challenge these very premises, we'd have to argue on these fundamentals and not just accept them as a given.

Anyway, the point is that you are arguing specifically about the margin—the “hard case” of where life begins. To answer this question, to be able to even approach hard cases or marginal cases, we have to know the validation of the ultimate libertarian principles. I simply do not think you can answer the abortion issue without showing where rights come from in the first place, and why we have rights. I do not think you do this, and I do not think that even you would maintain that you do. You seem to think it is sufficient to assert that there is *prima facie* no relevant difference between me as a zygote and me as an adult human, from a rights-perspective. But this is where your perspective on why we have rights, matters. If you believe rights derive somehow from our “rationality” as Objectivists (sort of) do, then it is not at all clear that a one-celled zygote, which does not even have a brain, has the “rationality” required to give it rights. If you are a utilitarian, as some libertarians are, you might have a different approach to resolving marginal cases.

The point is that the question is answered differently depending on your justification for rights, and that is why I said that you can't make analogies between various libertarian conclusions, which have inconsistent and incomplete justifications. All sorts of libertarians—Objectivists, natural-law, rationalists, utilitarians, intuitionists/religionists, pragmatists—basically oppose aggression. But these wildly different (sometimes mutually exclusive and inconsistent) views may come down differently on the abortion issue and indeed on other marginal issues like tort law, property law, etc.

So let me return to your letter. No, you do not show what is the basis of rights, nor is this a criticism, except when you are explicitly *trying*, as you are, to solve a borderline or controversial basic issue. You ask if my own articles pass this test. First, whether they do or not is irrelevant, for as I said you can write useful stuff without reinventing (or even inventing) the wheel each time. Thus, my article "Legislation and Law" does not; but then it is not necessary in that case. But as a matter of fact, I believe that my "Punishment" article actually *does* pass the test, for it does show why we have rights. That is the very heart and purpose of that paper. I am starting from the very bottom and thus have not even gotten yet beyond clear cases, to see how it is applied to the fuzzy issues like abortion, but I think in principle it could be, and perhaps someday I will myself attempt to extend my own theory to further and further areas.

Only religious theories that assume a soul inhering in the individual from conception can really justify attributing rights to humans from day 0, i.e. from conception. For they believe the soul is both necessary and sufficient for rights; and since we have it from day 0, we have rights from day 0. Yet this is of course irrational since there is no soul, so it is not really a justification at all. In my view, the only sensible defenses of rights concern at least somewhat rationality. In my and Hoppe's defenses, it is more specifically dialogue or discourse-based. Rand assumes man is the rational animal. A zygote only has a potential capacity to reason. To me it thus seems clear that one-celled organisms simply cannot be said to have rights, as they do not have a brain and clearly have no capacity to reason. They are no different than an animal, which does not have rights because it too does not have the capacity to reason.

An animal has no soul, and is not rational. A fetus does not either (if you are not religious, that is). So the only difference is that it is *biologically* a human; and also it has the *potential* to develop *into* an organism that is rational. I don't see how biology could be relevant; it is not our genes that gives us rights. Indeed an intelligent cow would have rights. So you would need, then, to hang your hat on the potential rationality of a fetus. Yet you assume that a fetus/embryo/zygote and adult are *prima facie* the same, despite this huge difference. You have the onus of proof to show that rationality and potential rationality imply the same thing from a rights-perspective (that is, unless you do not even think rationality has anything to do with rights, in which case your task is even harder since I do not know what your justification would be then). Imagine an egg and sperm in a test tube, separated by a short distance. Say, the sperm is tied by its tail with a tiny thread, and it is trying to get into the egg, and just cannot. If we simply cut the thread it will enter and fertilize the egg. Now in this situation we have as much "potential"

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

Please note that I am not trying to state a full theory here to say when fetuses gain rights. To do that you would have to specify exactly why we have rights, and what extent and in what sense rationality matters, the ability to choose, argue, etc. I am unsure at this time. But I am choosing an easy case, the one-celled zygote. I cannot imagine any rational standard under which a one-celled organism has rights. By my own theory, though, I think it is clear that, say, 18-year-olds have rights. We know these things, and the fact that a gray area lies in between is no one’s fault, but may be true nonetheless. For instance if we are neighbors, it is clear that my house is on my land and yours is on yours; yet the fence running between our property lies on an inherently vague and imprecise boundary. This might be unfortunate but yet does not invalidate the clarity of our clearly-delineated property rights. We can try to narrow down the gray areas as best we can.

In the case of abortion we know the endpoints: zygotes have no rights; adult humans do. Somewhere in between we develop rights. Think about evolution: if we evolved from non-rights-bearing pre-humans to rights-bearing humans, this was a smooth evolution. There was a point at which the question would be hard to answer, does this creature have rights or not. So what? This is not *my* fault; this is reality, this is nature. There are some marginal cases, some gray areas. I know that pre-pre-humans had no rights; and (adult) humans do. I am not too concerned about the marginal case. If I have to confront it, say if apes continue to evolve and get smarter, then we will have to decide this issue. As for abortion, we know the endpoints. What do we do about the middle? You could say, “well, we have to draw a line somewhere, we can’t help it that it’s this way, but we must draw a line somewhere,” then you could argue that you might as well pick a bright-line, like conception. You could also pick birth, or quickening, or the point in time at which brain activity reaches a certain level, say that point at which we would declare a dying person to have died (to mirror the criteria we use to declare brain-death, to see when brain-life has been reached). Or you could use a “bright” line of the second trimester, etc. But I am not so sure you have to draw a line somewhere anyway; perhaps, given the uncertainty, the jurisdiction of drawing the line should be placed with the mother. This is not outlandish; you would not advocate that the French government come into America to prevent murder, would you? No, even advocates of rights need to place the jurisdiction somewhere; I would not even have the federal government make murder illegal, much less abortion. Only the state ought to do it. Following this principle, we could argue that because of the uncertainty etc., the mother ought to be the one who enforces this natural law. If she breaks it and has an abortion, this is as if the French government fails to prohibit theft in its own land; it is simply none of our business, even if we can unambiguously say that it is a rights-violation.

It is also not clear that we should simply “err on the side of life” and prohibit abortion if there is any doubt on the gray area; for if we prohibit abortion in cases where it is really not murder then we are violating the mother’s life, so such overcautious erring is not costless.

Personally, given thinking such as that laid out above, I would be in favor of state laws (not federal ones; thus I would favor overturning *Roe v. Wade*) that make abortion illegal, as some species of murder or perhaps as a unique crime that is somewhat junior to murder, if it is performed after the second trimester, unless the mother’s physical health is in serious danger. I believe this does draw a line that is useful and somewhat reflects the brain-development of the fetus. It also errs somewhat on the side of life, which is not too unfair to the mother, since she is given 6 months to make up her mind. Personally I would not want ever to abort a fetus, I would consider it closer to a type of murder the closer it got to the time for birth. (However, note that if a state prohibited *all* abortions I still would not be in favor of the U.S. Supreme Court interfering, as I am a federalist; yet I would think that the state supreme court ought to overturn this, presuming a typical state constitution.)

I hope you get a flavor of my opinion on this topic, though I do not claim that it is the last word, it is just an opinion, not even a full-fledged theory yet. My main contention is that you yourself do not carry your burden of proof. Essentially you think it is enough to say to other libertarians that (a) they already support the nonaggression axiom; and (b) adults and zygotes *prima facie* have the same rights so the nonaggression axiom applies also to zygotes. But (b) does not follow, and I do not believe this is enough to establish your case. I mean, in simple language, why in the world would you think that an embryo has rights? What is your case? I have not seen it, other than your inability to see a difference between an embryo and a full-grown adult.

On to a few specific comments of yours. You say: “You objected that I ‘have never shown that “human life” is the standard or source of rights.’ Why do you think one should argue for rights that way?” Well, I do not. You apparently do. Your whole argument boils down to showing that since both an embryo and adult are humans, they have life. To hold this you must believe that other differences between them are irrelevant, like rationality, intelligence, volition, etc. The only thing they have in common is that they are biologically human. Thus, you must believe that “human life” is the source of rights, otherwise I don’t see how you could say the fetus has rights. And otherwise what is the point of your section “When did you begin your life?” (p. 3)? Yet my point was that this contention—that “human life” simpliciter is the source of rights—is not accepted by most libertarians, and indeed is not their rationale for being libertarian. You ask what is my own basis for thinking I, as an adult, have rights. It is answered in my “Punishment” paper. The same reasoning there would *not* apply to a fetus, for you cannot imagine it objecting to being punished, etc. I am not saying that you must accept my views on this, but the point is that this is one libertarian rationale for rights, and this it affects one’s view on the abortion position, which is exactly why I am saying that it is important which foundation you have for rights.



Regarding your puzzlement as to why I say you seem “reluctant” to say parental obligation is a positive obligation. You say that on p. 131 you say “we can also incur positive obligations even if we have not done harm,” yet I am unable to find this on p. 131. [Nevermind, I found it—on p. 137.] But in your other paper on pp. 7-8, you keep taking about the “negative obligation” that “gives rise” to positive obligations. Yet you say “[Parents’ obligation of support] arises out of the obligation not to aggress; it is a concrete example of this obligation. By caring for the child, they prevent an aggression that would take place if they were to willfully or negligently permit harm to befall her.” This seems a weird way to word it to me, and it seems as if you are doing so to avoid having to simply say that of course parents have a (positive) obligation to care for their children. I do not see how it is “aggression” to not feed the child, *unless* we had some pre-existing positive obligation to feed the child in the first place. You seem to want to do it backwards, but this may be a mere quibble or semantics, I don’t know. I don’t really disagree with you here, I just thought you were using such seemingly convoluted logic to bend over backwards to avoid simply saying parents owe their children certain obligations, like love, affection, education, support, food, shelter, etc.

As for rape, I said that I agree with you<sup>f</sup> that the “trespasser” argument is weak, although I pointed out that your own critique of this argument does not take into account the case of rape. You replied that this was an editorial consideration. My point is this. A pro-choicer uses the trespasser argument to say that abortion cannot be criminalized. You try to rebut this argument in a certain way, but I am pointing out that your critique of the trespasser argument is pretty good except it does not invalidate the trespasser argument as far as rape goes. You said (p. 133) that since a pregnant woman is the “cause of the child’s predicament, then presumably the woman does have a duty to protect her child from harm.” But a raped woman is *not* the cause of the child’s predicament. Would you then say that the trespasser argument *works* when asserted by pregnant women? You have not shown that the trespasser argument is invalid in the rape case; thus it is possible that the trespasser argument at least justifies abortion in the case of rape. You have no positive duty to discuss this in your paper, of course, but I was merely pointing out the fact that I saw one argument left that you did not touch.

By the way, re John Walker’s critique of Rothbard, I did not find it to be a very well-reasoned piece. I think his critique of Rothbard’s “self-ownership” concept is weak. I think we are self-owners and also have the ability to own external property. That is, we own our bodies and have the right to homestead unowned property. To attack this view is to fruitlessly engage in semantics, in my opinion. I also think his attack on Rothbard’s use of the term “eviction” is weak. Even if the term is euphemistic and “window dressing,” it still is physically accurate, and the Rothbard’s argument may be right or wrong. I do not think it ought to be attacked on grounds of the terms chosen, but on its argumentative force. Again, this is primarily a semantic quibble Walker has with Rothbard and certainly does not call for the sarcastic treatment of Rothbard that Walker gives (saying Rothbard chose his terms because more honest ones would make him “uncomfortable” and allows him to gloss over “inconvenient” facts—I give Rothbard’s integrity the benefit of the doubt here; we needn’t challenge his motivation to challenge the substance of

his arguments; also, sarcastically referring to him as libertarianism's "chief guru" and to his "acolytes" is, in my view, disrespectful).

As for lifeboat type cases, I agree that they are subsidiary. I agree that "hard cases should not obscure fundamental issues." (p. 134) You say, "The interpretation that 'the mother has a duty to sacrifice her life for the fetus's' is yours, not mine." Doris, that is clearly wrong. If you would say that the mother may not abort her fetus even to save her life, then you are indeed saying the mother has a duty to sacrifice her life for the fetus's. If you admit that abortion to save one's life may not constitute murder, then fine, but I saw no evidence that this is your position. In fact I am not clear what your position is on the case where the mother's life (or health?) is in danger, although you do indicate vaguely that you would agree that the mother has a duty to sacrifice her life in this situation. Your section on p. 134 seems inconclusive, and in fact I am not even sure what the purpose of your discussing lifeboat cases is in this context, since you seem to come to no conclusion about it. But you do seem to lean to saying that abortion is impermissible even here, as you say that "nobody caught in a dire circumstance has a *right* to attack any of the others." In the lifeboat situation where it is mother against fetus, each one's life at stake, if the fetus wishes to fight for its life, let it. I will side with my wife. If it was my wife versus my infant baby, which would I choose, you ask? Well, that is difficult, and I am not a parent yet, but I believe I would choose to save my wife. If it was my wife and an older child, that is one of those impossible dilemmas. If it was my wife versus me, why, I would sacrifice my own life to save hers, just as I would do the same to protect her. Where's the dilemma?

Re the Pope—surely you know I meant that you do not base your argument on the existence of the soul, unlike the Pope. You try to ground your argument in reason, rather than superstition and nonreason. You have the same conclusions as him on abortion, but that is not what I was getting at, as I'm sure you realize.

Best,

Sincerely yours,

**Original Signed By  
N. STEPHAN KINSELLA**

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