



Episode 592: Five Mistakes Libertarians Make

Guest: Stephan Kinsella

WOODS: I've got a whole bunch of these things to talk about because you sent them to me (laughing), and it helped me to come up with some ideas of things we can talk about. There are so many things we can talk about, but I love these little bite-sized errors and fallacies that even I myself I'm sure have fallen into in a few cases. But it helps us to get our thinking clear and straight, so let's see here.

Let's start with one that's a little theoretical but is pretty fundamental to libertarianism. There is this idea that we believe in the idea of negative rights, and our opponents believe in positive rights. And you know, negative rights are things that don't actually require us to do anything; they require us to simply refrain from doing things. That is to say, I don't strictly have a right to life; I have a right not to be killed. If I really say I have a right to life, that could mean that I have a right to you putting me on a kidney dialysis machine, but I don't actually have that right. I don't really have a right to property in the sense that if I don't have any then my rights are being violated; I have a right not to have my property taken from me.

So those are negative rights. A positive right would be I have a right to a Cadillac. That's the basic distinction between these things. What am I missing in here? How am I misstating this in your view? Am I misstating it?

KINSELLA: Well, I think it's largely correct. The insight here that libertarians are drawing on is the idea that they recognize that rights and obligations are correlative. If you say someone has a right, that implies an obligation on the part of someone else and vice versa, so that's why they're correlative. So every time you say someone has a right to something, it implies other people have a duty or an obligation to respect that right.

And if it's a positive right, that means the right to be provided with something, that means other people have the obligation to provide you with it. So whenever you announce that there's a natural human right, a positive right to education or food, which is, by the way, in these United Nations declarations of human rights and things like that and like with the Four Freedoms, these kind of things — freedom from want, freedom from fear, these kinds of things. When you announce that someone has a positive right, you are in effect saying that other people are your slaves, because they have an obligation to provide you with these things. And that's the libertarian intuition

in opposing that, saying the only rights are negative rights, because that only imposes negative obligations on others, the obligation, as you say, to refrain from hurting other people.

The imprecision here is that it leaves out the possibility of positive rights and positive obligations that do exist because of your actions. In other words, what we really should say is we're against unchosen positive obligations —

WOODS: Ah, okay, all right, all right. Yeah, give me some examples then.

KINSELLA: Okay, so there are a couple of obvious examples. One example that I think most libertarians would not disagree with is an obligation that arises as a result of an act of aggression. So as a simple example, if I bump someone into a lake, I have an obligation to rescue them, to try to reduce the harm that I've done to them already. By contrast, if I'm walking by a lake and I see someone drowning, I don't have a positive obligation under law to rescue them. Maybe a moral obligation but not a positive obligation. But in the case where I am responsible for the harm caused to that person, I do have a positive obligation.

So you can acquire positive obligation and someone else could acquire a positive right by virtue of an act of aggression, so that's one example, and I think that's not that controversial, but it does add a nuance to the — so you have to say unchosen. And I would say it's chosen here by your action. If you commit aggression, if you choose to commit aggression, then you've acquired a positive obligation.

Another case which is a little bit more controversial for libertarians —

WOODS: Is it children?

KINSELLA: — is children, and maybe with you and I it's not as controversial. In my view, when you choose to procreate and bring a dependent, needy, rights-bearing child into the world, you are in effect putting that child in the position of someone you pushed into a lake. They're going to drown because you put them in that position; a young baby is helpless and can't survive on its own, so I think you have put that baby into a position of natural need, and you're the natural provider as the procreator, as the parent, so in that case I think there's an argument that could be made for positive obligations on the part of parents to their children. But it's chosen. Again, it's chosen by your actions.

WOODS: All right. Now, have you written on that? I know people who have. I'm asking because I want to have a really robust show notes page for this episode.

KINSELLA: Yes, in my article "How We Come to Own Ourselves" I talk about it, and then I have another blog post, which I can send you the link to, in which I go into a little bit more detail. And of course this goes into the abortion question too, which we probably don't want to get into here today, but you could extend this to the whole issue of abortion.

WOODS: All right, I've also done an episode on that, so I'll link to that. Yeah, this is already — I've already got great links, and we've only been talking for about five seconds. So okay, all right, that's good. There are a couple of things here that I actually want to jump ahead to —

KINSELLA: Sure.

WOODS: — because I'm surprised at them, and what I love is discovering that I haven't been hardcore enough.

KINSELLA: Right.

WOODS: I love these discoveries. Oh, darn it, that guy is right. So I picked up two legal principles that everybody takes for granted, and when we hear them repeated we just assume they're probably old and so therefore they're probably compatible with libertarianism, because they're probably just old examples of respect for rights that go back to the Magna Carta or whatever. But maybe they're not. So for instance — well, this one I think actually goes back to some Republican policy proposals of the past 30 years, the idea of loser pays in court, especially given that there are obviously frivolous cases that are brought against people, and if you lose it's thought that you should have to pay the legal fees and the expenses incurred by the other person. You're saying that's not libertarian. I don't know what your argument is, and that's why I'm asking you. What is it?

KINSELLA: Right. I think I read sometime in the past people used to say it was the American rule, but it's basically the everywhere-but-America rule. A lot of other countries apparently — and I'm not an expert on the other legal systems — but it's more common for the prevailing party in a lawsuit to be able to collect the fees from the party who loses. In America it's more usually, unless there's an exceptional case, everyone pays their own fees. And libertarians have argued that it should be loser pays. In other words, if I sue you for harming me and I win, I should be able to collect damages, but you should also have to pay for my attorney's fees because you forced me to go to court to do that.

There are several problems with this. First of all, the law we have now is largely unjust, and so what you would have happen in a large number of cases is you're just magnifying the damage done to the victim of an unjust law. For example, if someone is sued for patent infringement. Okay, now let's just assume that we don't like the patent system or some aspects of it. Someone is suing some innocent guy for making a product because it infringes their patent. Now, let's say the patent holder wins, because we do have a patent system in the country, and some patents are actually valid under the way the law works. Well, then the plaintiff would be able to recover attorney's fees.

Now, the plaintiffs usually are corporations. They already have an overwhelming advantage when they threaten someone some of these lawsuits — anti-trust lawsuits, copyright lawsuits, patent lawsuits, other lawsuits — because if they sue a smaller

person, the legal fees alone could run in the hundreds of thousands of dollars if not millions, on top of statutory damages like \$1,000 per infringement for copyright. So they can be millions of dollars of damages.

So you have someone who is running around and they get sued, and they're facing unimaginably high damages already, so there's a big incentive for them to settle even if it's unjust, and even if they could win they just can't afford to do that. If you add on top of that another penalty, which is they have to pay the attorney's fees, it just makes the whole situation even more unbalanced. It's a little bit like the situation faced by defendants of the criminal system when the prosecutor charges them with dozens of years in jail for some fairly minor offense, which is not even a real offense under libertarian principles, and they don't even want to risk going to jury trial, so they plea bargain and they go to jail for 10 years or something like that. So it's this power that it gives plaintiffs.

And in my view, what we should have is a version of the loser pays rule, but it would only be the losing plaintiff rule. The losing plaintiff pays. So for example, if I sue you for patent infringement and I lose, then I as the guy who initiated the action, basically who initiated the aggression in the courts, I should have to pay the defense costs of the person who was exonerated.

WOODS: Okay, yeah, I can see — I was going to say, because otherwise it does seem like I could just really annoy people all day long by filing frivolous suits against them, so it seemed like there should be some version of the rule.

KINSELLA: I think it should be a one-way rule basically. The person who institutes the suit should have — I would not be opposed to them having to pay the costs of the person that they're hauling into court. But someone who was hauled into court should not have to pay if they lose. If they just stand up and defend themselves, they should not have to pay.

WOODS: Here's another one: aggressors are not innocent until proven guilty. All right, go.

KINSELLA: Okay, this is a good one, yeah. This is fairly trivial, but this is a statement people make, not just libertarians but everyone, and I think it's a result of the fact that we give some credence to the basic rule of the Bill of Rights and natural rights and natural law, but over time we start becoming positivists, legal positivists, in the sense that we start thinking of these rules that are in the Constitution and that are in our legal system and even that are good rules, that they're really part of natural law.

But we have to distinguish between what's called civil rights and what are natural rights. A lot of the rights that are in the Constitution are there just because there's a government, and one of them is the presumption of innocence, for example. The presumption of innocence is simply a way to make the government bear the burden of proving that someone is guilty. It doesn't mean they're not really guilty. Now, if you get technical, "guilty" means someone who's adjudicated to be guilty, but if you go by

that standard then it really means very little in libertarian terms, because even if you're adjudicated to be guilty the court may be wrong, the jury may be wrong, and they may not be guilty. So in our sense as libertarians, guilty means someone who actually did the crime, someone who's really the bad guy.

The government needs to go through a process of proving that. The state needs to have a burden of proof of proving that. So we have an epistemic issue; we have an issue where we have to have knowledge about who did what. So we come up with these what we call prophylactic rules, things that bind the state, that slow down the state, that restrict what the state can do for the sake of individual and overall liberty. But it doesn't mean that in reality someone is innocent until proven guilty. If someone murders someone, they're actually guilty; they just haven't been proven to be guilty by the legal system.

So when journalists or when everyday people say something like, "Well, did O.J. do it? I don't know; he's innocent until proven guilty," that's just a standard the court has to follow, and it's good that the court has to follow that standard, because we're limiting what the state can do. We're making the state have higher burdens to overcome to put someone in jail. But it doesn't mean we can't have an opinion. It doesn't mean we can't say someone is guilty. I mean, as far as I know, Hitler was never convicted in court of being a mass murderer, but everyone says he's a murderer. I mean, why isn't Hitler innocent until proven guilty? He's been proven guilty by the facts of history. You don't have to have a legal decision. So I just think we should be careful trying to import into everyday understanding of life, in our everyday conclusions and judgments about people the rules and procedures that apply to courts. We don't have to be bound by those.

WOODS: That's a very good point, because you often hear these kinds of expressions about innocent until proven guilty just in casual conversation. When you're talking about a guy you've actually observed do something, they still say, well, you know, we've got to give him his trial. Now, wait! I saw the guy do it.

KINSELLA: No, he attacked me. I saw him. I'm supposed to say —?

WOODS: Yeah, believe me; I was there (laughing). I'm not calling him "the alleged attacker." Come on now.

KINSELLA: Right.

WOODS: And there have even been times when the guy — like, I've heard guys say "alleged attacker," like they're so used to saying it, even after the guy's convicted they're still calling him that.

KINSELLA: Well, honestly I think one reason for that, Tom, is I believe that's a fear of libel lawsuits or defamation lawsuits, so —

WOODS: Oh, yeah.

KINSELLA: — if we did not have defamation law, there would be a lot less tiptoeing around things like that, I believe, by journalists and by others. People would just say, look, it looks like the guy is a murder.

WOODS: (laughing) Yeah, he's got the bloody knife in his hand, right?

KINSELLA: He's not an alleged murder.

WOODS: I shouldn't be laughing about brutal killings here. All right, let's stalk about spam or hacking. I like talking about things where you can imagine non-libertarians saying, how could a libertarian possibly handle X problem, and even libertarians themselves who will write to me and say, I want to be able to say there's some libertarian response to the issue of spam, but yet it's not obvious to me what it would be. So how have you worked this out?

KINSELLA: Yeah, one background piece I've written you might want to have a note to is my piece with Pat Tinsley in the *QJAE*, called "Causation and Aggression," so that's sort of background theory for this. It's a way of looking at what we should be responsible for. I think you and I talked earlier in a — I think it was you — in a previous show about the emergence of how there was a common law developing in airwaves, and then the FCC started expropriating the field and took it over in the early '30s or something like that.

In spam something similar has happened. There have been some cases, like the Cubby vs. Compuserve case and others, which have addressed the spam issue, which I think the right way to approach it from a libertarian point of view is to simply think what is prohibited and what is permissible under libertarian principles.

Think about a neighborhood situation. You own a home; you live next to neighbors; there's a common sidewalk or whatever the sidewalk is, but you have a private sidewalk leading up to your door. You have a doorknocker, a doorbell on your front door. Generally speaking, if a neighbor walks up to your door and they knock on your door, they are using your property. They're using your land; they're using your door. The question is is that a trespass or is that a licensed or a permitted use. And what we would normally say is that's a permitted use, because the standards in the area, by having your house oriented in a certain way without having a "No Trespassing" sign up, you're inviting certain innocuous uses like that. But the whole thing is rooted in the idea of property and property control.

Now, if you go to a computer situation, what is happening if someone calls your house repeatedly as a telemarketer, or what is happening if someone knocks on your door when you've told them not to come to your door? In that case, they are a trespasser, because they're using your property without your consent. Now in my view, hacking is basically using your computer without your consent, because no one really wants their computer to be hacked. Now, it is true that the person that's doing this is sitting in Bangladesh somewhere, and they're doing it over the Internet. They're using a mechanism — we're all connected to a network. So they are basically causing

something to happen using signals and using electrical circuits, but they're manipulating the actual internal operations of your computer.

The same thing with spam. If someone sends me a bunch of spam — and no one wants spam, and that's commonly understood; people don't want spam — they're basically clogging up the operations of your computer. They're putting stuff on your hard drive; they're making your hard drive do stuff, especially when people put these malicious viruses and things like that on to your computer. My point is it's basically like a remote control use of your property without your permission, and so I think that could be considered a type of trespass.

Let me give you a more concrete example. Let's suppose you have a neighbor, and they have one of these remote control drones in their house. And you can see into their living room through their window, and you have a device that you're able to control their drone in their house. And one night for kicks, you turn on your little remote control, and you start flying their drone around inside their kitchen, and you break a bunch of their cups and you scare their dog and all that kind of stuff. I would say that's an act of trespass, because you're commandeering one of their resources without their permission. So that kind of analysis I think could show why spam and why uninvited telemarketing calls, all these kind of things can be types of trespass or maybe a nuisance.

WOODS: All right, I'm sorry for just jumping from one to the other, but —

KINSELLA: That's all right.

WOODS: — I've got so many of these great ones you sent me, and I want to get the answer. I actually, for this one I've read your answer, and I think it's just absolutely airtight. It's this idea of creation as an alleged source of property rights, that, look, I created this, and therefore I own it.

KINSELLA: Right.

WOODS: And this, obviously we see this a lot of times when it comes to IP —

KINSELLA: Yes.

WOODS: — but I don't think the concept is not necessarily tied to IP, that creation and property rights, one doesn't follow from the other, unless by creation you have some kind of homesteading in mind.

KINSELLA: Right.

WOODS: But creation in and of itself does not give rise to property rights. So let's hear it.

KINSELLA: Well, yes, and some people, what they'll say is if you homestead a virgin piece of land in the middle of the wilderness, then you've in effect created that land, because it didn't exist before in some sense because no one was observing it or valuing it. You can play games with words like that, and you can say that every act of homesteading is an act of creation, and that's fine. But then there's some equivocation involved, because they switch the meaning later on. The reason this is something to get straight, the reason it's important to get this issue straight is because it can lead to confusion.

So my view on this is the following: when people say that creation is a source of property rights, I think that they're wrong, because they're conflating two different things. There's a source of wealth, and there's a source of property rights. Those are two different things. It is true that if I own a raw material, and I use my labor and my intellectual abilities and my creativity and my ideas to transform it, I might transform it into something newer and better that is worth more to me and to someone I might sell it to.

So in that sense, creation is a source of wealth, but it's not a source of property rights, because to do that I have to already own some underlying resource: my body and some resource that I'm transforming. And I transform this thing that I own into something that's more valuable. And that makes it more valuable; I increase the sum total of wealth in the world or for me, but there's no new property right involved. I have a piece of raw steel, and I transform it into a horseshoe. Now it's more valuable, because I can use it for something. But I already owned the steel that was in the horseshoe; I've just rearranged its shape. And by the way, Mises and Rothbard and even Ayn Rand have statements that say almost exactly this, that really we're just rearranging materials in the world.

The reason that I say creation is not a source of property rights is because there's only really two or three sources of property rights. Number one, you acquire something that was unowned. That's homesteading; that's Lockean homesteading. You do something to mix your labor with it, to put up a border around it, to create a visible, objective connection between you and the thing that other people can see. That's one way to acquire ownership. The other way is to get the thing from someone who previously owned it by contract or by some other conveyance.

There is no other way that you can imagine why creation is a source of ownership, and let me just give a couple of examples where creation is neither necessary nor sufficient for ownership. Okay, it's not necessary, because as I said, if you're just the first one to stumble across an unowned resource, you didn't really create the resource, so creation is not necessary. You're the owner of the resource, because you were the first one to use it, not because you created it.

And it's not sufficient, because let's imagine I have a small factory or a company, and I hire someone to take my resources, like my raw iron, and make horseshoes with those. Now, the laborer is actually the one creating the horseshoe in a sense, because he is changing the shape of the metal into a horseshoe. But he didn't own the raw material,

and we have a contract as employer-employee where he doesn't own the result either. He gets paid a wage. That's what our contract is. So that shows that creation is also not sufficient for ownership. So basically it's just a mistake. People are right to think that creation is a source of wealth, but it's not a source of property rights.

WOODS: Stephan, I want to talk about the rest of these on a future episode, but for now tell people once again how they can follow you, because a lot of times people listen to you and they want more. So how do they get more Kinsella?

KINSELLA: Just StephanKinsella.com.