

DISCUSSION

Rejoinder to Callahan and Hudik on Libertarian Principles

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Abstract: The present paper is the latest installment in a debate over libertarianism that started with Callahan (2012). The thesis of the latter was that deductivist political economic philosophers such as Rothbard, Hoppe, Block, Nozick, Buchanan and Tullock were on the wrong track, since libertarianism cannot rely upon deduction alone, but needs, in addition, what perhaps may be characterized as prudential judgement, perhaps with a dollop of utilitarianism tossed in. Next in the batter's box was Block (2015) which defended two of Callahan's (2012) targets, Rothbard and Block, against the former's charge that the latter two do not realize that rights often conflict with one another, and thus pure deductivism cannot suffice. Third place in this parade was Callahan (2015), a summary of which is that rights do indeed clash with one another, and thus libertarianism cannot consist (solely) of a deductive system. Hudik (2015) also joined in this attempt to shed light on the issue. He maintains that the libertarianism of Rothbard and Block is also problematic, but from additional points of view. The present paper is a response to Callahan (2015) and Hudik (2015). In it, while I acknowledge that there is much of positive value in both critiques, I maintain that the Rothbard and Block perspectives remain unscathed.

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I. INTRODUCTION

I am extremely grateful to Callahan (2015)¹ and Hudik (2015). Although I cannot agree with their conclusions, they are both eminent libertarians, and exhibit broad, deep and thorough knowledge of this subject. Further, there are few better ways to delve deeply into our beloved philosophy than through this process of thesis, anti-thesis and synthesis. And, I know of few other libertarians better able to enter these sorts of lists than these two scholars. In section II an attempt is made to distinguish my views from those of Callahan. The burden of section III is to do the same with regard to Hudik. Section IV is the conclusion.

II. CALLAHAN

I admire Callahan as a libertarian theorist.² I thank him for engaging in this present debate with me, and, having been my co-author on separate topics pertaining to this philosophy, not once but twice.³ However, on this issue we part company.

Callahan claims that had I read his entire publication of 2012, I would have been better able to understand his contribution. I did indeed read it all, but chose to reply, only, to those remarks of his concerning Rothbard and me. As long as the critic does not take anything out of context, he may be excused for what he does *not* write a about. If it is legitimate to criticize an author not for what he focuses on but for what he does not address, I now disparage Callahan (2015) for not addressing baseball.

Next, this learned researcher puts his finger on one of the most vexing and important issues in all of libertarian philosophy, the relationship between deontology and utilitarianism. In Callahan's view, each is crucially important. Only together, in tandem, can both shed light on issues vital to libertarianism. He sees each as akin to one of our legs. What is the problem with each of these concepts, from his point of view? He states:

Deontology and utilitarianism are both abstract conceptions of ethics, and therefore, partial and defective. Their plausibility derives from two factors: 1) They each get at part of the truth: it *is* true, as deontologists insist, that principles are an important part of ethics. And it *is* true, as utilitarians contend, that the consequences of one's actions are an important part of ethics. 2) Each approach is able to benefit from the defective nature of the other: so long as rationalism is understood as the only possible approach to ethics, then, to the rationalist, deontology appears to be the only alternative to utilitarianism, and vice-versa. So deontologists can strengthen their appeal by pointing out the obvious defects in utilitarianism (it ignores principles), while utilitarians do the same by noting the obvious defects in deontology (it ignores consequences).

In my view, deontology is preeminent, utilitarianism is useful for subordinate, or secondary reasons only. Let us consider the case of the all-powerful Martians who want to embarrass libertarian deontologists. They threaten that unless someone murders innocent person Joe, they will blow up our entire planet, and Joe along with everyone else will perish. Here, there is a conflict between the two: utilitarianism clearly indicates that someone kill Joe; he is going to die in any case. Saving the entire populace will bring more utility than will the murder of Joe create disutility. In contrast, deontology, at least the libertarian version thereof, maintains that murder violates the NAP, the core of this philosophy. What to do? We know, from the utilitarian perspective, that adhering to the NAP, and allowing all earthlings to perish, is a non-starter.⁴ So, we engage in a sort of act of intellectual fudging. We know the right answer, courtesy of utilitarianism: kill Joe and save the world. But, we also want to adhere to the NAP. The solution is, we interpret libertarianism not as a no-exceptions-allowed-never-ever-murder-innocents, but, rather, as punishment theory.⁵ The penalty for murdering Joe is thus and such. So, some hero kills Joe, we give him a ticker-tape parade and a medal, and then we impose the proper

castigation on him, presumably the death penalty.⁶ We thus have our deontological cake and eat it too. We achieve our utilitarian goal of saving the planet and all its inhabitants, and also are able to adhere to rights-based libertarianism.⁷

In contrast, utilitarianism falls victim, quite easily to the utility "monster." This worthy, a cannibal, greatly enjoys eating people, to a much greater degree than we all lose utility from being thrust unwillingly into his maw. The usual utilitarian response to this is that the "happiness units" of all people are equal. But there is never any justification offered for why we should buy into this patently disingenuous response.⁸ If utility is the be-all and end-all of political philosophy, we cannot gainsay this utility monster, and, with him, or it, the same end-of-the-world's human population as in the previous example. Only now, without deontology, there is no way to save the day. We may not kill this creature, whatever he is, because we stipulate that his utility outweighs all of ours. I emerge from these considerations with the conclusion that utilitarianism is at most a junior partner in proper libertarian theory, with deontology functioning as the CEO. If there are indeed two wings on the libertarian airplane, one takes great precedence over the other; the utilitarian one is vestigial at best.

The next fascinating issue to arise from this exchange is Callahan's assertion that "Block goes on to claim that it is somehow *illogical* to argue that rights claims can conflict with one another." He repeats this charge several times.⁹

The difficulty, here, is that I never in a million years said any such thing. Note, my debating partner does not quote me as maintaining this. Nor could he, because I never held that view; not in Block (2015) nor in any of my other publications. Indeed, I now explicitly renounce it. Of course rights *claims* can conflict. The courts are full of them. Any time anyone sues anyone else, there are conflicts in *claims* between plaintiff and defendant; otherwise, there would hardly be a confrontation. What I do hold, which sounds somewhat the same but is very, very different, is that *rights themselves*, not *rights claims*, can never conflict. This means, that when there are two contending parties, only one of them can be completely in the right.¹⁰ There is no clash in *rights*, only rights *claims*. It is one of the most important tasks of libertarianism to demonstrate whenever there is a seeming clash of rights, no such thing exists; that a thorough examination of the property rights involved will determine whose claim is correct, and whose is incorrect.

The example to illuminate this disagreement we have been battling around with each other, Callahan and me, is the case of the trespasser on the 15th story flagpole and its owner.¹¹ In

my view, this is a clear cut case. The property rights belong to the latter, and that is the end of the matter, the fact that the (innocent) trespasser will perish is irrelevant. Libertarians should not be in the business of trying to determine which way the utilities lie; whether the trespasser will suffer more if he dies, than will the flagpole owner if he is allowed to hand-walk down the pole and then enter into her apartment against her will. But, says Callahan “the person clinging to the balcony flagpole, in the scenario presented by Block that I cite in my original paper, has a right to life, while the person whose balcony flagpole is being clung to has a right to her property” and “Justice requires *balancing* these claims; whereas Block’s *unjust* solution to the conflict allows the balcony owner’s rights claims to run roughshod over that of the person merely trying to save her (sic)¹² own life.” Callahan also asserts:

Block attempts to answer the charge that shooting the fall victim if she (sic) attempts to climb off of the balcony flagpole is an absurd elevation of the right to property over the right to life by noting:

Suppose that this woman with the gun was raped only the day before by a man who resembles the flagpole holder. She is in not unreasonable fear of further bodily injury, and even death. Who is Callahan to deprecate her subjective assessment of the situation in which she now finds herself?

Why in the world does Block think I deprecate this assessment? In our legal tradition, the fact that the person clinging to the balcony looked just like the property owner’s recent rapist would undoubtedly be taken into account in deciding whether or not the property owner is guilty of murder.

There are difficulties here. First of all, minor point, there is no “right to life,” at least not under libertarianism. This is a positive right, and there is no such thing in the vernacular of this philosophy. There are no rights to food, clothing or shelter either. Rather, as in the case of the so called “right to life,” they are all attempts to claim the property belonging to other people. All rights imply obligations. If I have a right not to be murdered, raped, stolen from, then you have an obligation not to perpetrate any of these crimes on me. However, if I have a right to life, food, clothing or shelter, then the logic of the argument implies that you have an obligation to supply

these things to me. But that would make you a slave of mine, a position hardly compatible with libertarianism.

Second, I claim anew that this author is indeed deprecating the rights of the flagpole owner. How so? By “taking into account” in some sort of balancing act her fears of another rape, and his certain death if he is relieved of the support now given to him by the flagpole. This is a deprecation compared to the open and shut verdict that there is no rights conflict, that the entirety of the rights belong to the property owner and none to the trespasser. Third, there is no such thing as “the ... elevation of the right to property over the right to life.” This is just as problematic as saying that the streets belong to the people, not to the cars. Whoever is it thought that occupies automobiles other than different people? In the flagpole case, what is in contention is not property rights versus life rights. The latter concept is an entirely invalid one, as we have just seen, since it is part and parcel of positive rights, necessarily anathema to libertarianism.

Callahan waxes eloquent about the “subjective assessment” of the situation on the part of the flagpole owner and urges us to ask, “Was it *reasonable* for the property owner to feel threatened by the person hanging onto her balcony?” This is entirely irrelevant. On the contrary, the flagpole owner has the entire right to determine who occupies her property and who does not, and the reasonableness of her assessments of the utilities involved is entirely beside the point. Why did I mention in Block (2015) her fear that she would be raped again and perhaps even murdered this time since the trespasser resembles the criminal who brutalized her in the past? I did so only in order to supply a motivation for what would otherwise appear to be a very callous act. But, she has the right to remove the trespasser¹³ simply because she owns the property and for no other reason whatsoever. I of course fully and enthusiastically agree with my learned colleague that “it is fundamentally *unjust* to kill people simply on the basis of unfounded fears that they might conceivably be a threat.” But to say this is to wrench our discussion entirely out of context. We are simply not discussing murdering people because they look at you the “wrong way,” or any such thing. Rather, we are attempting to apply a basic building block of libertarianism, private property rights, to a complicated situation. The flagpole owner is justified in removing the trespasser from the property he is perched upon not because he looks like a threat, but simply because she owns it. Her home, including the flagpole, is her castle, and she and she alone has the sole right to determine who may benefit from their presence on her premises, and for any reason, or no reason at all.

Let us now consider gentrification in this context. Here, rich people buy up properties, and evict poor renters. Some of the latter have been in these domiciles for years. They have formed roots in the community. They have friends there. Some of these targets of gentrification might even commit suicide were they to be booted out of their familiar surroundings. Should we not consider their utility when forming public policy to deal with this threat against their “rights” to continue to live where they have been living for decades in many cases? To be sure, the new owners also have “rights,” property rights in this case. If we were to extrapolate from Callahan’s version of libertarianism, we would have to “balance” these different “rights” one against the other. We would not want to be too callous, after all. Rent control, particularly coupled with “tenant’s rights” prohibitions against eviction, is the main enemy of gentrification. With this law on the books, rich people can still purchase residential rental units in the targeted area alright, but they may not displace the present occupants. Perhaps, if the gentrifiers were using their new real estate only as *pieds-à-terre*, Callahan’s “balancing” would veer in the direction of strict rent controls. No evictions would be allowed, period. On the other hand, if these new owners were more “deserving,” for example, wanted to use the real estate claimed by both parties as their main residence, the rent controls might well be less severe. For example, it would allow the gentrifier to evict at least one tenant, to make way for his occupancy.

Needless to say, these sorts of Callahanian considerations are 180 degrees at odds from libertarianism. In that philosophy, there is no “hard work” of “balancing”¹⁴ rights when they are incompatible with one another. Rather, we instead engage in our “obsession with achieving easy, deductive answers to conflicts.” We “easily” rule that the gentrifiers, as the legitimate owners of the property in question, should be the sole determiners of how it shall be used. The flagpole is but an extreme case of this scenario. Private property rights *uber alles* is the libertarian response to these conflicts, whether they concern flagpoles or gentrification.

Next, consider the case of the police seemingly violating the rights of an innocent person. States Callahan (2015):

Similarly, Block mistakes my case against police torture of suspects as turning on the utilitarian results of such torture; that is all wrong: I contend that it is *unjust* for law enforcement officials to torture suspects, even when it is absolutely clear to those officials that the suspects are guilty. Every human being is worthy of respect for their human person, and no one, whatever

they have done, is *ever* justly tortured. The fact that allowing such torture produces bad results is not the *reason* that torture is unjust; it is *evidence* that it is unjust.

Again I must part company with my learned friend. Here is what I said about this issue in Block (2015):

Callahan’s (2012) next attempt to show that rights do conflict, and/or that Rothbard’s deductivist libertarianism cannot be accepted, is the view of the latter that *if* the police engage in brutality against a suspected criminal who later is proven to be murderer, then they are not themselves guilty of violating the non aggression principle (NAP) of libertarianism, since they have not battered an innocent person. Callahan (2012, p. 8) rejects this line of reasoning on the ground that there is a “practical downside of permitting police torture so long as the tortured party is ultimately convicted, which is that it gives law-enforcement officers a strong motive to frame anyone they have tortured.”

This is my response to this point made in Callahan (2015). Let us note but two things here. First minor point, how did we get from “brutality” to “torture?” Surely, the two are rather different. The former includes the latter, but much else besides. That is, there are a myriad of acts of “brutality” that are less obnoxious than “torture.” A punch in the nose for instance may well be brutal, but it is difficult to equate this with torture. Second, and more important, the situation is not that it is “absolutely clear to those officials that the suspects are guilty.” They may be wrong, in which case their act of brutality, not torture, was, Callahan and I would agree, wrong. But suppose that the victim of the brutality, not torture, was indeed guilty.¹⁵ Then, can it be said that an innocent person was brutalized? Of course not. Suppose A fires a pistol at random, a very dangerous act to be sure. But, he is lucky; A’s bullet hits a murderer, B, who at that exact moment is engaging in this despicable act, and kills him. Thus, A saves the life of innocent person C, who otherwise would have been murdered by B. What can we now say about A and his random spraying of a bullet? Is A guilty of murder? Of course not. If anything, he is a hero. He did not kill an innocent person; he saved one. Yes, A killed someone, B, but he did not murder him.¹⁶ It cannot be denied that A is very lucky in this case, and might be well-advised to cease and desist from such performances in future. But this time he did not implement an “unjust act,” contrary to Callahan. Note, I mentioned in Block (2015), a “practical downside” such as

bad motives for law-enforcement officers, and characterized these as utilitarian considerations. Callahan (2015) denies this, but the grounds upon which he makes this determination are unclear to me. He also avers that “it is *unjust* for people to be framed by corrupt cops.” Who could argue with that? Not I. But, I do not see the relevance of that since we are not discussing corrupt cops, but rather policemen who do not brutalize innocent people; rather, they do so to *criminals*. Is there to be no legal difference for libertarians between initiating violence against the guiltless and the guilty? Perish the thought.

At this point, Callahan fastens upon Rothbard’s analysis of the obligation to feed babies. Here, again, his error is based on positive obligations, of which there are none, at least not for libertarians. My debating partner writes about his “horror at the Rothbardian idea that parents ought to be able to starve their own children to death without consequence.” Does Rothbard say this? Not at all. This is Rothbard instead brought to us through the intermediation of Callahan. What, then, did he write on this topic? Yes, Rothbard (1998, p. 101) did reject the notion “that parents should have a legally enforceable obligation to keep their children alive.” This, presumably, engendered the “horror” in Callahan. However, Mr. Libertarian (1998, pp. 103-104) also averred:

Now if a parent may own his child (within the framework of nonaggression and runaway-freedom), then he may also transfer that ownership to someone else. He may give the child out for adoption, or he may sell the rights to the child in a voluntary contract. In short, we must face the fact that the purely free society will have a flourishing free market in children. Superficially, this sounds monstrous and inhuman. But closer thought will reveal the superior humanism of such a market. For we must realize that there is a market for children now, but that since the government prohibits sale of children at a price, the parents may now only give their children away to a licensed adoption agency free of charge. This means that we now indeed have a child-market, but that the government enforces a maximum price control of zero, and restricts the market to a few privileged and therefore monopolistic agencies. The result has been a typical market where the price of the commodity is held by government far below the free-market price: an enormous “shortage” of the good. The demand for babies and children is usually far greater than the supply, and hence we see daily tragedies of adults denied the joys of adopting children by pry-

ing and tyrannical adoption agencies. In fact, we find a large unsatisfied demand by adults and couples for children, along with a large number of surplus and unwanted babies neglected or maltreated by their parents. Allowing a free market in children would eliminate this imbalance, and would allow for an allocation of babies and children *away from* parents who dislike or do not care for their children, and *toward* foster parents who deeply desire such children. *Everyone* involved: the natural parents, the children, and the foster parents purchasing the children, would be better off in this sort of society. In the libertarian society, then, the mother would have the absolute right to her own body and therefore to perform an abortion; and would have the trustee-ownership of her children, an ownership limited only by the illegality of aggressing against their persons and by their absolute right to run away or to leave home at any time. Parents would be able to sell their trustee-rights in children to anyone who wished to buy them at any mutually agreed price.

This may sound “obnoxious” to Callahan, but not to the present author. Rather, I appreciate Rothbard’s efforts to save and protect children, and his insight that it is the all-loving government which is the villain of the piece. But Callahan would have none of this. In his view, unless the parent is compelled by law to be responsible for a positive obligation, Rothbardian libertarianism must be rejected, at least on this point. I responded (Block 2015) that in this view, the parents have an obligation not to feed the child, but to notify others (the orphanage, the hospital, the church, etc.) that they no longer wish to do so. Callahan rejects this. He says:

Block’s argument here is simply that I addressed Rothbard’s argument as he wrote it, rather than taking up the numerous attempts to patch over how horrific the conclusion of that argument is, as Rothbard initially framed it. I congratulate Block and others for recognizing the problem and for their attempts to save Rothbard from the condemnation his original argument rightly deserves...

But, no. There is no “patching up” going on here. Instead, there is an attempt on my part and other Rothbardians I cited to make explicit which is only implicit in Rothbard’s treatment. Consider the six-month old child. Rothbard maintains he has a right to “run away” from unsuitable parents. However, this is physically impossible. A baby that

young can barely sit up, let alone walk. And even if the infant could, somehow, perambulate in this manner it would be unmanageable for him to “leave home” under his own steam. But, if he has an “absolute right to run away or to leave home at any time” as Rothbard maintains, surely other people may help him do so. If so, they must be notified; or, at the very least, private organizations such as “friends of babies” must be allowed to inquire of all parents if they are no longer feeding their infants.¹⁷ This is in addition to the reasoning offered in Block (2015) along the lines of if the unwilling parents do not inform others of this type of situation, they are guilty of the libertarian crime of forestalling: keeping property to themselves that they have not, or in the case of an infant, no longer homesteading, or guarding.

Callahan states: “Oddly, despite apparently lacking the time to read my entire paper, Block did have time to make up objections to libertarianism himself. See, for instance, his whole digression about Okinawa, Japan, and China. What this has to do with the many arguments I actually made is unclear to me.”

First, it is an illicit deduction from the fact that I did not comment on his entire paper that I did not read it. As far as I know, Callahan has not commented on every jot and tittle of Smith (1776). Does this mean he has not read it in its entirety? Hardly. Second, how can this be a “digression” when Callahan (2012) initially mentioned Okinawa, Japan, and China? I was merely commenting upon the point he made about them. Indeed, in Block (2015) I explicitly quoted him on this matter.

Last but certainly not least, Callahan delivers what he considers to be a knockout blow in our little debate. He writes:

However, in his eagerness to supply his own libertarian counter-examples that he can then refute, Block actually undermines his whole case with his example of the niqab-wearing witness. A Muslim woman’s right to free exercise of her religion suggests that she should be able to wear such a garment wherever she is. But if she is in court accusing another person of some crime or tort, the accused has a right to “face” his accuser. Here is a clear-cut example of rights conflicting, offered by Block himself! His “handling of this obvious case of a rights conflicting (sic) is to assert that anarcho-capitalist courts will resolve this conflict in various ways, and that this result will be better than that achieved by statist courts. Well, perhaps he is right about this: my paper was not intended to decide between various judicial systems. But if Block is correct, it is because

anarcho-capitalist courts are *better at resolving rights conflicts* than are statist courts! After all, if there were no rights conflict here, and we could just deductively arrive at the “correct” result, then all anarcho-capitalist courts should reach the exact same, deductively correct, resolution to the issue. By admitting that just courts might resolve this issue in different ways, Block has given away the entire game.

There are several flaws in this charge. For one thing, “A Muslim woman’s right to free exercise of her religion” might *suggest* “that she should be able to wear such a garment wherever she is” but that is a mere suggestion, very far from a basic premise of libertarianism. Certainly she may not do so in my house, if I object to her wearing this apparel. A “right to free exercise of ... religion” means, merely, that it would be unlawful to prevent her from wearing the niqab on *her* property, or on the premises of anyone who welcomes such garb. Callahan seems to forget libertarianism 101 which is predicated upon the fact that private property rights are central to the entire enterprise. Nor is there any “right” for anyone to “face” accusers. It would appear that Callahan makes up rights as he goes along. The only right, the single solitary right in libertarianism is the right not to be threatened or aggressed against, e.g., the NAP. “Facing” accusers is a not unreasonable *technique* for ferreting out the truth,¹⁸ but, surely, it is not a basic libertarian right. As well, this goal can be achieved in other ways too.¹⁹ Surely, I have not myself mentioned any rights “conflict” when there are no “rights” on either side of this controversy. Nor is the fact that anarcho capitalist courts might not agree with one another as to whether a witness may wear a niqab even touch upon whether or not rights conflicts exist. If they disagreed, they would merely be diverging on the best technique for ascertaining the truth.

Of course, no true Rothbardian maintains that *all* of law may be deduced from basic premises such as the NAP and private property rights. There are all sorts of lacunae in a legal system based only on these basic premises; they are (crucially important) guide posts only. For example, there is the continuum problem. Private courts must decide on the statutory rape age; they must rely upon the proverbial “reasonable man” to determine whether an act of violence is one of offense or defense. Even when matters of fact are not in dispute, new technology often requires that the NAP be applied to entirely new domains, and even with the best will in the world, and great intelligence, private courts might not fully agree with each other on how the libertarian principles are

to be applied. There is no more eminent Rothbardian than Hoppe (2015) who maintains:

This does not mean that, with the discovery of the principles of natural law, all problems of social order are solved and all friction will disappear. Conflicts can and do occur, even if everyone knows how to avoid them. And, in every case of conflict between two or more contending parties, then, the law must be *applied* – and for this *juris-prudence* and *judgment* and *adjudication* (in contrast to *jurisdiction*) is required. There can be disputes about whether you or I have misapplied the principles in specific instances regarding particular means. There can be disagreements as to the “true” facts of a case: who was where and when, and who had taken possession of this or that at such and such times and places? And it can be tedious and time-consuming to establish and sort out these facts. Various prior-later disputes must be investigated. Contracts may have to be scrutinized. Difficulties may arise in the application of the principles to underground resources, to water and to air, and especially to flows of water and air. Moreover, there is always the question of “fitting” a punishment to a given crime, *i.e.*, of finding the appropriate measure of restitution or retribution that a victimizer owes his victim, and of then enforcing the verdicts of law. Difficult as these problems may occasionally be, however, the guiding principles to be followed in searching for a solution are always clear and beyond dispute.

III. HUDIK

This author starts out on a sound footing when he writes “that the preference structure describing Rothbard-Block libertarianism is but one of many possible logically consistent preference structures.” This is eloquently put, true, and unobjectionable. There are indeed many possible preference structures, all of which are logically consistent. For example, the view that Smith should be king, and all the rest of us his subjects. There is no logical inconsistency here, even though such a basic premise is about as far from libertarianism as it is possible to be.

Then, in his analysis, Hudik offers us a set of indifference curves, in an attempt to elucidate his thinking. I find this somewhat unfortunate, in view of the scathing rejection of this technique of the part of Austrian economists. But that is

a minor point; indifference curves are merely a vehicle to express his views, which can be fully articulated without them.

This scholar asks: “Why should law disallow substitution between libertarian justice and other commodities?” My answer is, Because that is what *libertarian* law is all about. Suppose it were to consider other goods, and weigh them against justice. Then, and to that extent, it would no longer be *libertarian* law. It would become something else. Maybe, quasi or semi or demi libertarian law. Perhaps something else entirely different: fascist law, or socialist law or utilitarian law. But, whatever it would be, it would no longer be *libertarian* law, since it stood by while *justice* was diminished, in an attempt to attain other goals.

Next is an attack on my flagpole example. In Block (2015) I maintained that the flagpole owner had an absolute right to control this bit of private property, even if it resulted in the death from falling from the 15th floor of an otherwise innocent trespasser. Here is my second debating partner’s response:

However, Block’s argument is a *non sequitur*: a violation property rights in one situation does not imply that in order to be logically consistent one has to violate property rights always. To use an analogy with consumption behavior, if you drink coffee in the morning you do not have to drink coffee the whole day to preserve logical consistency of your choices. In some situation you prefer coffee to tea, while in other situation you prefer tea to coffee (for instance because marginal importance of coffee diminishes with its quantity). Likewise, a legal system may sometimes sacrifice libertarian justice to other commodities, and vice versa at other times, without compromising logical consistency.

I cannot see my way clear to agreeing with this assessment. The point is, *if* the flagpole owner’s rights are violated in this one instance, and *if* this becomes the law of the land in *all* such cases, then, indeed, “in order to be logically consistent one has to violate property rights always.” Drinking tea and coffee are quite irrelevant. Suppose that the flagpole owner’s rights are violated in this one instance so as to accommodate the utilitarian benefits to the trespasser. Why, then would this legal finding not be employed in all other such cases? If it is not, then we must say goodbye to the rule of law.²⁰

Let us take another case. Here, the dispute is between a property owner and again a trespasser, but in this scenario the latter will not die if he is forced to relinquish his control over someone else’s property. Rather, he will suffer, only,

a minor diminution in wealth, or to put this in Hudikian terms, be forced to occupy only a slightly lower²¹ indifference curve.²² Hudik might opine that in such a situation the legal nod should indeed go to the property owner, but not in the flagpole case, since a far greater penalty will be imposed on the trespasser. But this opens up a large can of philosophical worms. How much inconvenience is required to overturn property rights? What about the problem of lack of interpersonal comparisons of utility? And, most damning in terms of the present dispute, logical inconsistency will be smuggled into the law if property rights cases are treated differently, based upon the perceived degree of harm to the violator of them. There will truly be an end to the rule of law if defendants' claim of harm can override it.

I previously said that Hudik made a valuable contribution to this dialogue, and no words of mine were ever truer. States this author:

Callahan's critique of Rothbard and Block in my view misses the main point." And "I agree with Block (2015, p. 12) that Callahan's critique does not kill the Rothbard-Block version of libertarianism.

However, Hudik also avers:

If one thinks that law should reflect single-value or lexicographic preference structure, so be it. But there is also nothing irrational about convex preference structure which allows for substitutability between libertarian justice and other goods. The principle *de gustibus non est disputandum* is perfectly applicable here. The only way how Rothbard-Block version of libertarianism can be "killed", is that no one finds it attractive. My aim was to show that one may find it unattractive without accepting logical inconsistency.

In contrast, I do not see this as a matter of *de gustibus non est disputandum*. Yes, this applies full well to the choice between coffee and tea. There, taste is all. But we are not now discussing anything of this sort. Rather, the object of our contention is, What is libertarianism? I cannot see how Hudik has overturned the Rothbardian emphasis on the NAP, in its unadulterated form, not contaminated by considerations of utility.

Let us consider one further case in this latter regard, mentioned in Block (2015) but ignored by Hudik:

A black man has been falsely accused of raping a white woman in Alabama in 1920. He is in jail, awaiting trial. A white lynch mob demands that the sheriff hand over his prisoner to them. The lawman refuses and the mob attacks. The sheriff, the prisoner, most of the mob, and dozens of innocent bystanders die in the ensuing melee. Justice is clearly on the side of the jailor's decision. It is unjust that the innocent black prisoner be lynched for a crime he did not commit. But social peace is incompatible with justice in this case.

It should by this point be clear to all libertarians that justice requires the sheriff to fight the mob to the best of his ability. "Justice though the heavens fall" should be the motto. Any compromise with this principle in behalf of utilitarianism undermines liberty and libertarianism. Hudik's indifference curve analysis, his willingness to compromise with pure libertarian principle, bespeaks either his misunderstanding of this philosophy or his rejection of it.

IV. CONCLUSION

Callahan (2015) and Hudik (2015) to the contrary notwithstanding, I conclude that the views on libertarianism of Rothbard, and my Block (2015) support of the latter, remain unimpeached. Callahan (2015) and Hudik (2015) both make important contributions to the libertarian philosophy, but, there are still no rights conflicts in this perspective, and libertarianism a la Rothbard has not been undermined by either of them.

NOTES

- 1 Unless otherwise indicated, all quotes to Callahan emanate from this one publication of his.
- 2 I must now say "ex-libertarian" since he no longer espouses these views.
- 3 See Block and Callahan, 2003; Block, Barnett and Callahan 2005.
- 4 Although even at this level of analysis, problems crop up, since we are now relying upon illicit interpersonal comparisons of utility, and improper cardinal, not proper ordinal utility. For more on this see below.
- 5 In the view of Rothbard (1998, p. 88, ft. 6): "It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—

- is frankly a *retributive* theory of punishment, a “tooth (or two teeth) for a tooth” theory. Retribution is in bad repute among philosophers, who generally dismiss the concept quickly as “primitive” or “barbaric” and then race on to a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as “barbaric” can hardly suffice; after all, it is possible that in this case, the “barbarians” hit on a concept that was superior to the more modern creeds.”
- 6 But not necessarily so. The heir of Joe may forgive his heroic murderer, given these extenuating circumstances.
 - 7 The only time this breaks down is if the Martians are really intent upon undermining libertarian theory, curse them (is it still politically correct to bad-mouth Martians?) They can beam down yet another message to Earth stating that if we follow libertarian principles in this or any other matter, they will blow us up. Only then can they drive a wedge between libertarian utilitarians and libertarian deontologists. But, note have far down this philosophical garden path the Martians (curse them!) have to travel in order to achieve their evil ends.
 - 8 Of course, this entire discussion makes no sense, since there is no valid way to compare utility interpersonally, or, rather, inter-creaturally.
 - 9 Callahan mentions the importance of doing “the hard work of actually trying to achieve real world justice by careful balancing of competing rights claims.” For one thing, at issue are not rights *claims*, but “competing rights.” For another, he never quite tells us the principles by which such “balancing” may take place.
 - 10 Of course, each party can be partially in the right and partially in the wrong.
 - 11 The latter wishes to remove the former from her property, which implies he will drop to his death.
 - 12 In the original depiction of this scenario, a man hangs on to the flagpole, and the woman wishes him not to do so.
 - 13 Always in the gentlest manner possible, but in this case that option is foreclosed by stipulation
 - 14 States Callahan: “And Block’s dismissal of such concerns does not demonstrate his (or Rothbard’s) greater commitment to justice: instead, it demonstrates their obsession with achieving easy, deductive answers to conflicts, rather than doing the hard work of actually trying to achieve real world justice by careful balancing of competing rights claims.”
 - 15 As I stated in Block (2015), and now add emphasis to the word “proven”: “the police engage in brutality against a suspected criminal who later is *proven* to be murderer.” This is not at all the same as Callahan’s “when it is absolutely clear to those officials that the suspects are guilty.”
 - 16 Murder is unjustified killing.
 - 17 There would be financial incentives to engage in such inquiries in the free enterprise system in which babies may be sold. Or, rather, given Callahan’s sensibilities and the fact that I have no wish to outrage him, where the right to parent or guard children can be for sale.
 - 18 Indeed, it is a very good technique for so doing. But there are others, too, none of which constitute basic rights in the libertarian philosophy. For example, cameras, witnesses, posting bonds, reputation, etc.
 - 19 And none of them constitute rights either.
 - 20 The rule of law is a necessary, but not sufficient, condition for just law. It only means that the law will determine judicial findings, and nothing else. This is a necessary condition, for if it is not followed, as advocated by Hudik, then arbitrariness seeps in to the legal system. It is no longer predicated upon the non-aggression principle (NAP) the bedrock of Rothbardian libertarianism. It is not a sufficient condition because in addition to being law abiding, a libertarian legal system must be *just*. For example, Nazi law could have been, and probably was, based on the rule of law. But the law was that Aryans have rights, and none others do. This is clearly unjust, for no relevant differences have ever been put forth to justify such a distinction. The Nazis would say that everyone else is vermin, but this will hardly suffice. Another example: Communist law. Here, the proletariat was in the right, and the bourgeoisie was in the wrong. Here a distinction was put forth; the former are the workers, and the latter the employers, and firms always exploit employees. But this is erroneous, and must be rejected on that ground alone, for the employer-employee relationship is a voluntary one, and the latter are made better off by this relationship, otherwise they would not enter into it.
 - 21 See his figure 3.
 - 22 How many utils will he lose? To ask this question is to see the difficulties of the indifference curve technique. There is no such thing as a util, and drawing this as the difference between two curves only places a veneer of a supposedly sophisticated approach over a fallacious economic argument.

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