

Rethinking the Non-Aggression Principle

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Almost everyone vaguely acquainted with anarcho-libertarian philosophy knows that the non-aggression principle has informed anarcho-libertarian stances on almost every conceivable legal issue for the past forty years or so. I will argue in this paper that the non-aggression principle can ultimately be reduced to contradiction by an argument from self-reference (ASR1). First, it is essential that we delve into the semantics used in describing the function and limitations of the non-aggression principle. Next, I will establish that the non-aggression principle—as a legal rule—stands or falls on its own, being entirely distinct from its moral grounding. Thus, successful criticisms of the non-aggression principle do not at all necessarily apply to objective morality, natural law, self-ownership, homesteading, or argumentation ethics. I will proceed with defining the non-aggression principle and afterwards put forth the ASR1. Once in place, I will briefly examine the role of private defense agencies as essentially playing out my central thesis, and then introduce a derivative argument, namely that for adherents of the non-aggression principle, the only consistent position is strict pacifism. Potential rejoinders to the ASR1 will be addressed, and then finally, the implications of the non-aggression principle's being false will be drawn out, along with a discussion on possible avenues to pursue in order to reconstruct a sound legal rule for anarcho-libertarian philosophy.

First, it is critical to avoid calling the non-aggression principle the non-aggression axiom. While the choice may have been purely for literary reasons, to call it an axiom is incorrect in almost every sense of the word.¹ As Kinsella confirms, “For this reason alone, it’s better to refer to the non-aggression principle instead of the non-aggression axiom.”² I extend this further in modifying the non-aggression principle into the non-aggression rule (NAR), since it functions as

¹ Edward Feser, “Rothbard Revisited,” last modified August 23, 2009, <http://edwardfeser.blogspot.com/2009/08/rothbard-revisited.html>.

² Stephan Kinsella, “The relation between the non-aggression principle and property rights: a response to Division by Zer0,” last modified October 4, 2011, Mises Economics Blog, <http://blog.mises.org/18608/the-relation-between-the-non-aggression-principle-and-property-rights-a-response-to-division-by-zer0/>.

the quintessential anarcho-libertarian *legal* rule, insofar as it serves a different purpose than the self-ownership or homesteading principles. The latter principles serve as the moral underpinnings of the non-aggression rule. The purpose of the non-aggression rule, then, is to bridge the gap between moral principles and legal rules—to act as a filter or bridge, if you will, in pronouncing which moral principles can transcend the gap between morals and law. Mere harm can also be distinguished from aggression. However, since harm in the traditional sense cannot be reduced to aggression, I will refer strictly to aggression rather than harm. As Kinsella notes, “Competing with someone and “taking” his business, “stealing” his girl, beating him in a race—all may be viewed as harming him. But [these do]...not commit aggression.”³ I also prefer to follow Kinsella’s lead in differentiating between aggression and coercion. Anarcho-libertarians do not object to force, *per se*, which is the definition of coercion. What they object to is the initiation of aggression, signifying strictly negative connotations, and not just the use of force. Kinsella writes: “libertarians oppose *aggression*, i.e. the so-called "initiation of force", not force itself. To coerce is just to use force to make someone do something, to compel them.”⁴ Rothbard, despite his equivocation between the two, nevertheless acknowledges that “Anyone who is still unhappy with this use of the term "coercion" can simply eliminate the word from this discussion and substitute for it "physical violence or the threat thereof.”⁵ And here are our other terms: retribution, retaliation, and defense. I treat these as completely synonymous for our purposes. Next is to define the qualifications for retaliatory defense which the NAR permits. Rothbard, in the *Ethics of Liberty*, takes it upon himself to offer a definition of justified defense:

³ Stephan Kinsella, ““Aggression” versus “Harm” in Libertarianism,” last modified December 16, 2009, Mises Economics Blog, <http://blog.mises.org/11263/aggression-versus-harm-in-libertarianism/>.

⁴ Stephan Kinsella, ““Coercion” is annoying, but coercion is neutral,” last modified July 6, 2006, The LRC Blog, <http://www.lewrockwell.com/blog/lewrw/archives/10897.html>.

⁵ Murray Rothbard, “Society Without a State,” Lew Rockwell, <http://www.lewrockwell.com/rothbard/rothbard133.html>.

“Defensive violence, therefore, must be confined to resisting invasive acts against person or property. But such invasion may include two corollaries to actual physical aggression: *intimidation*, or a direct threat of physical violence; and *fraud*.”⁶ And shortly after: “It is important to insist, however, that the threat of aggression be palpable, immediate, and direct; in short, that it be embodied in the initiation of an overt act.”⁷ To summarize, I have removed all negative connotations from the word ‘coercion’ and separated it from aggression, eliminated the term ‘violence,’ and defined retribution, retaliation, and defense as basically equivalent. At this point, even if there are any minute semantic variances between the terms, they are inconsequential to the inquiry at hand.

Moreover, I am not arguing against any meta-ethical principles that provide ontological grounding for the NAR, for example, self-ownership, natural rights, argumentation ethics, etc. I take issue strictly with NAR, which stands or falls on its own. If removed, it does nothing to underlying moral foundations, nor does it “kill libertarian rights”. Although there is considerable confusion about the relationship between the NAR and its meta-ethical foundations, it is necessary to see that the NAR is not the most fundamental principle in anarcho-libertarian thought. Michael Rozeff, however, appears to be the exception to the rule. After stating that “Libertarianism builds upon the self-ownership axiom,” he writes that Rothbard “[defined] the non-aggression axiom [as being] equivalent to the self-ownership axiom.”⁸ There are at least two problems with this statement. The first is that it is incredibly difficult to square this claim with the textual evidence. Rothbard, though he uses the confusing terminology of “axiom”, clearly intended to conceptually separate the NAR from its foundation of property rights. While

⁶ Murray Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), 77.

⁷ *Ibid.*, 78.

⁸ Michael Rozeff, “The Economics of Self-Ownership,” last modified September 6, 2005, Mises Daily, <http://mises.org/daily/1895>.

Rothbard's conflicting passages can be interpreted to mean that the NAR is the most basic tenet through a misleading statement in *For a New Liberty*, a closer reading reveals that his position is more subtle: the NAR is rooted in natural rights, which provides support for both a modified Lockean conception of homesteading and self-ownership. He asks: "If the central axiom of the libertarian creed is nonaggression against anyone's person and property... What is its groundwork or support?"⁹ After rejecting the emotivist and utilitarian groundings, he adopts natural rights, further "[dividing] it into parts and [beginning] with the basic axiom of the "right to self-ownership"". ¹⁰ Although Rothbard is as interesting as he is original, he often obscures his writing for the purpose of literary flourish, sometimes leaving his readers with radically opposite views. However, his philosophy of morality and law can be best reconstructed along the following lines: First, the underlying foundation of Rothbard's anarcho-libertarian philosophy is moral realism, that is, objective morality. Building on this is an atheological conception of natural law in which he recognizes the nature of man as providing the basis for self-ownership, incorporating insights from Aristotle, the Stoics, Scholastics, and other natural lawyers. He states that in order for man to realize his nature, "each individual must think, learn, value, and choose his or her ends and means in order to survive and flourish, [and] the right to self-ownership gives man the right to perform these vital activities without being hampered and restricted by coercive molestation."¹¹ On the same level as the self-ownership principle is the homesteading principle. In order to justify property rights to external objects other than oneself, Rothbard appeals to the homesteading principle in order to justify the acquisition of title to property. At the end of the chain is the NAR and the legal positions deduced from it.

⁹ Murray Rothbard, *For a New Liberty*, 2nd ed. (Auburn: Ludwig von Mises Institute, 2006), 30.

¹⁰ *Ibid.*, 33.

¹¹ *Ibid.*, 34.

The second point against Rozeff is that Block and Kinsella have also made it imminently clear that it is impossible to determine what aggression is without a prior conception of underlying property rights. Block writes: “If the non-aggression axiom is the basic building block of libertarianism, private property rights based on (Lockean and Rothbardian) homesteading principles are the foundation.”¹² Kinsella also remarks: “it’s not clear that “non-aggression” is really the most fundamental libertarian principle...I think the libertarian conception of property rights is more fundamental than aggression. If I use force to take an apple from your hand, is it aggression?...Classifying an action as aggression or not requires knowing who owns what.”¹³ He further clarifies: “The quintessential libertarian view is self-ownership. In the case of one’s body, the libertarian position is that each person is the *prima facie* owner of his body.”¹⁴ Block offers a rejoinder to the view that self-ownership and the NAR can be separated: “the basic building block of libertarianism is, indeed, the non-aggression axiom, but this is predicated upon self-ownership of persons, and of ownership of non-human resources through homesteading. So which is more basic: non-aggression or private property? They are opposite sides of the same coin; neither is possible without the other.”¹⁵

Contra Block, there is a strong defeater for his claim that they are two sides of the same coin, and if at least a single logically possible example can be provided, then his claim that the NAR and self-ownership are equivalent is untenable. For instance, a pacifist can readily adhere to the self-ownership principle, while simultaneously holding that all force, regardless of whether it is retaliatory, is wrong. Robert LeFevre was a prominent example of this view, writing that “if

¹² Walter Block, “The Non-Aggression Axiom of Libertarianism,” last modified February 17, 2003, Lew Rockwell, <http://www.lewrockwell.com/block/block26.html>.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Walter Block, “Reply to “Against Libertarian Legalism” by Frank Van Dun,” *Journal of Libertarian Studies* 18, no. 2 (2004): 2.

one individual inflicts a wrong upon another, the response is scarcely in keeping with logic if the victim of attack turns about and victimizes his attacker...Aggression is always wrong. There can be no justification for it in any circumstances.”¹⁶ Now this view is clearly consistent with the claims of self-ownership; it just admits no rule of legal retribution. On LeFevre’s view, it certainly is wrong to initiate aggression, but there is no way to transcend the gulf between moral principles and legal rules, and thus maintains that retaliation is also morally illicit. One of the principle tasks in the philosophy of law is the development of rules that allow us to move from moral principles to legal prohibitions. The difference between morality and justice can be illustrated as follows: Suppose I refuse to open the door for someone, or commit any number of vices that are arguably immoral, for instance, self-deception. Does it follow that these vices should be legally prohibited, and we should be dragging our neighbors before the courts? I think not. The problem that rules of justice are designed to solve is providing a non-arbitrary way of deciding which—if any—moral facts ought to be enshrined as legal principles, whether they are institutionalized or not. In the case of the anarcho-libertarian, the NAR fills exactly this role. However, LeFevre shows that one can easily forgo the anarcho-libertarian NAR and yet still be morally convinced of self-ownership. Regardless of whether one agrees with LeFevre, agreement is not required. I am only illustrating bare logical possibility. Though this may seem presumptuous, I address Rothbard’s rejoinder to this argument later and conclude that it still stands. If it is in principle possible that there is some possible state of affairs in which self-ownership/homesteading and the NAR are not—to use Block’s expression—two sides of the same coin, then it is not the case that they are identical as Block claims.

¹⁶ Robert LeFevre, “Aggression is Wrong,” last modified February 19, 2009, <http://www.lewrockwell.com/orig7/lefevre3.html>.

At this point I have decisively shown that the NAR is separate from its numerous underlying foundations, so that its removal, while having disquieting effects on anarcho-libertarian jurisprudence and conceptions of aggression, leaves the rest intact. The purpose of the next section is to fully lay out exactly what the NAR is. The first definition is provided by Rothbard: “The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else... “Aggression” is defined as the initiation of the use or threat of physical violence against the person or property of anyone else.”¹⁷ The second by Block: “The non-aggression axiom...states...that it shall be legal for anyone to do anything he wants, provided only that he not initiate (or threaten) violence against the person or legitimately owned property of another.”¹⁸ It would not be unfair to say that anarcho-libertarian jurisprudence over the past forty years has been the systematic deduction of complex legal arguments from the NAR, for example, on slavery, taxation, regulation, causation, intellectual property, employment contracts, defamation, prostitution, narcotics, free speech, and virtually every conceivable legal issue to vex the modern mind. Block readily admits that “not only is my article based on this insight, but so is the entire corpus of my work in legal and political philosophy...it is not just that I use the non-aggression axiom as the very basis of my theorizing about libertarian law, it is indeed the case that I use *only* this principle for this purpose.”¹⁹ In a footnote, he explains that the subsequent work done by Hans-Hermann Hoppe is also “equally predicated upon a system of law with the non-aggression axiom at its core.”²⁰

Following anarcho-libertarian logic, Block offers what he thinks to be the most serious objection to the state in the anthology, *The Myth of National Defense*, He argues that the

¹⁷ Murray Rothbard, *New Liberty*, 27.

¹⁸ Walter Block, “The Non-Aggression Axiom of Libertarianism”.

¹⁹ Walter Block, “Reply to “Against Libertarian Legalism”,” 2.

²⁰ *Ibid.*

defender of government commits himself to self-referential incoherency. What this means, Block says, is that the defender of government has strung together a series of meaningless words, analogous to statements like: “all generalizations are false,” “no statement is negative,” and “all truths are perspectival”. Such statements are akin to sawing off the branch upon which one is sitting. This does not mean that these statements are obviously false in an epistemological sense. Indeed, logical positivism, a view which thoroughly dominated the philosophical scene in the early to mid 20th century, has been thought to be one of the only examples in the history of philosophy that can be decisively refuted. The verification principle of logical positivism stipulated that the only propositions that are in any sense meaningful can be divided into two categories: (1) analytic statements like “all unmarried men are bachelors” which are true by definition and (2) empirical facts which are discovered and confirmed by experience. However, not even logical positivism *itself* can be said to be meaningful using this criteria, since it fits neither (1) as an analytic statement, nor (2) as an empirical fact. When this critique was offered, the logical positivist verification principle was hastily abandoned as self-referentially incoherent. Walter Block, then, can be understood as trying to apply the same devastating criticism to proponents of government. He begins:

[T]o argue that a tax-collecting government can legitimately protect its citizens against aggression is to contradict oneself, since such an entity starts off the entire process by doing the very opposite of protecting those under its control...it forces the citizenry to enroll in its “defense” activities, and second, it prohibits others who wish to offer protection to clients in “its” geographical area from making such contracts.²¹

And further: “The problem here is one of self-reference. If the whole point of the exercise is to protect the people against the violent incursions of others, how can this be attained if at the very

²¹ Walter Block, “National Defense and the Theory of Externalities, Public Goods, and Clubs,” in *The Myth of National Defense: Essays on the Theory and History of Security Production*, edited by Hans-Hermann Hoppe (Auburn: Ludwig von Mises Institute, 2003), 304-305.

outset the government does to them precisely what it is supposed to be protecting them from?”²²

There are at least two problems with Block’s main thesis. The first is a dialectical error, while the second is far more substantial, which is where I introduce the ASR1. For now, we can term Block’s argument the ASR2. Presumably, Block is not addressing an audience of fellow anarcho-libertarians and would like to demonstrate to apologists of government that their beliefs are inherently contradictory. If we are operating under the assumption that Block means to persuade non-anarcho-libertarians, then he is clearly begging the question. Notice that his analysis applies *if and only if* one already accepts the NAR’s being true, prior to being acquainted with Block’s ASR2. Non-anarcho-libertarians would be absolutely puzzled why this would resemble the slightest affront to their respective positions, since they do not accept the main premise of the NAR in the first place, namely that the initiation of force is illegitimate. In this respect, Block and Kinsella are correct to point out that minarchists who adhere to the NAR are inconsistent. However, unless Block intends to restrict his audience to anarcho-libertarians—which would be trivial, (e.g. “I just discovered that the NAR implies that government is necessarily aggressive and hence unjust!”) or corrective towards NAR-adhering minarchists, then any function beyond that is patently unallowable. Dressing up the NAR as the ASR2 and attempting to persuade a non-NAR adhering minarchist or non-libertarian with this line of reasoning is question-begging. Block’s non-libertarian victim is unable to see the wolf in sheep’s clothing, for otherwise it would be obvious that the ASR2 is masquerading as a new-fangled argument. In Block’s case, the ASR2 relies exclusively on the NAR’s already being true in order for it to be a successful argument. At this point, we have the argument in clear terms expressed as: “If the NAR is true, then ASR2 is true,” and “If the ASR2 is true, then the NAR is true”. As a further analogy: Normally, one cannot argue for the branches of the tree (the consequent)

²² Ibid., 306.

without arguing for the base (the antecedent). So if this were any normal question-begging argument, one could attempt to transplant the branches (ASR2) onto another antecedent base in an attempt to render it non-question-begging. But this is a special circumstance. Again, under normal conditions, the best strategy would have been to list at least three different bases that could support the ASR2, and then argue independently for the plausibility of all three of these bases. For Block, there just *is* no possibility for transplantation, since the relationship between the NAR and ASR2 is not a regular hypothetical conditional. The argument that Block gives is a bi-conditional (NAR \leftrightarrow ASR2), that is, the branches and base are absolutely inseparable. So while most question-begging arguments could be reconstructed to eliminate this problem, Block's ASR2 cannot. So we can conclude on the first counter argument that Block's bold thesis is either trivial or corrective, or it is entirely question-begging. The second problem is even more insoluble.

As the second problem, I introduce ASR1, which is the central thesis of this paper. I argue, *contra* Block that the NAR—rather than the state—is actually self-referential. With that qualification, next is an illustration. Imagine a private defense agency publishing the following notice in the local paper: “Being doctrinaire anarcho-libertarians (or simply because we have eager clients and effective demand), we, the XYZ private defense agency, have deemed it appropriate to impose upon all persons in the surrounding area our particular conception of law, the NAR, which for all intents and purposes will be based on self-ownership and homesteading. The NAR is in effect *ex ante*, that is, before any aggression even takes place, and all persons live under pain of retaliatory coercion if you transgress. If you do transgress, we can claim that we aren't actually initiating aggression, only engaging in *post facto* justified retaliation. The system, as you can see, is rigged in our favor.” Examine what is occurring: A sphere of acceptable

actions is being predefined, and if one steps outside these narrow bounds, entities will emerge from the walls and rain down force upon transgressors. I submit that this is precisely what the initiation of aggression is. Here's a typical example, where Block writes:

I have no objection to a "proprietary community" organizing itself along any lines it wishes, including "non-libertarian" ones, provided that this is limited to those who specifically embrace it...I only insist that if it is to be an overall libertarian society, then the relations between the members of this small group and everyone else must be founded upon the Rothbardian philosophy of no threats or carrying out of physical invasion.²³

Block is quite willingly to use *ex ante* aggression in order to maintain an anarcho-libertarian system. However, it is clear that this does not square well with the NAR. If he were to maintain consistency, Block would have to abandon any thought of interference with the non-libertarian proprietary community, regardless of whether it embraces the rights of free exit, contract, and consent, among others. This is where I introduce the first hint that the consistent anarcho-libertarian position as of now is pacifism, which I will address more substantially later. Let's take an undisputed definition of the NAR and specifically apply self-reference. Recall Block's definition: "The non-aggression axiom...states, simply, that it shall be legal for anyone to do anything he wants, provided only that he not initiate (or threaten) violence against the person or legitimately owned property of another."²⁴ We'll call Block's definition proposition P. By self-referential, it should be clear that since P is itself an act of *ex ante* aggression, P refers to itself. So if P is true, then P is false. If P is false, then P is false. Therefore, it follows necessarily and inescapably that according to its own terms, the NAR forbids its own implementation, since the NAR itself initiates aggression. The *ex ante* imposition of the NAR cannot qualify as justified retaliation, since its imposition occurs before the fact, that is, before any particular instance of

²³ Walter Block, "Reply to Frank Van Dun's "Natural Law and the Jurisprudence of Freedom"," *Journal of Libertarian Studies* 18, no. 2 (2004): 71.

²⁴ Walter Block, "The Non-Aggression Axiom of Libertarianism".

aggression occurs, and neither is it fraud. *Ex ante* imposition is properly thought of as the threat of physical coercion if certain conditions obtain, namely the breach of anarcho-libertarian property rights. Insofar as it actively limits the unbounded freedom of autonomous agents, it is inherently aggressive. It has a semblance of neutrality by claiming to rectify aggression (which is perfectly legitimate), but lurking beneath is the implicit stricture on action—one's liberty is *already* being restricted with the threat behind the order. If one defines liberty along anarcho-libertarian lines to escape the charge, then the familiar question-begging objection emerges once again. In terms of how this accords with the rest of the philosophy, William A. Edmundson writes on John Austin's thought, that, "For Austin... a law just is an order backed by a threat. (The threat might be a threat to use force to compel conformity, but it need not be: it might be a threat to bring about some unpleasant consequence.)"²⁵ Hoppe lists a similar, yet alternative rule to the NAR that would have been necessary even in the Garden of Eden, a place where ordinary property rights are mostly unnecessary, since scarcity would not exist. He writes: "In the Garden of Eden, the solution is provided by the simple rule stipulating that everyone may place or move his own body wherever he pleases, *provided only that no one else is already standing there and occupying the same space.*"²⁶ He makes the obviously correct point that even though the Garden of Eden might be a state of affairs without scarcity, there are still two factors that would generate conflict, namely any violations of the ownership of one's own body and its standing space. An order that initiates aggression in the form of an *ex ante* prohibition is necessary to avoid conflict, although Hoppe probably would not see it in that light. Regardless of Hoppe's reservations, however, legal rules that move beyond their moral foundations seem to essentially invoke

²⁵ William A. Edmundson, "Coercion" *The Routledge Companion to the Philosophy of Law*, Forthcoming.

²⁶ Hans-Hermann Hoppe, "The Idea of a Private Law Society," last modified August 1, 2006, Lew Rockwell, <http://www.lewrockwell.com/hoppe/hoppe16.html>.

aggression. Any appeals to the neutrality of the NAR, as opposed to all other aggression-inherent philosophies of law are ultimately illusory.

The first question asked in response is: Why think that the NAR commits aggression? Isn't it every *other* principle of justice that commits aggression? By attempting to cordon off for itself the title of 'aggression-less law', and gift itself with a semblance of neutrality, it has illustrated that the NAR is, in fact, a non-starter. Let's take a classic example of the neutrality the NAR attempts to ascribe to itself *par excellence*. When describing competing systems of law in the anarcho-libertarian state of affairs, Hoppe writes:

There could and would exist side by side, for instance, Catholic insurers applying Canon law, Jewish insurers applying Mosaic law, Muslims applying Islamic law, and nonbelievers applying secular law of one variant or another... Consumers could and would choose, and sometimes change, the law applied to them and their property. That is, no one would be forced to live under "foreign" law; and hence, a prominent source of conflict would be eliminated.²⁷

Hoppe is making a mistake here by smuggling in neutrality between systems of law that are inherently incompatible. These separate systems are being uncomfortably molded into the overarching framework of non-aggression, a rule that Catholics, Jews, and Muslims, for the most part, would utterly repudiate, as a result of their commitments to their respective religious legal systems. This is the rule designed to eliminate the inevitable tension present in conflicting systems of law, and it is lurking in the background as imposed foreign law. Canon law, purely unmolested by an overarching NAR, is completely incompatible with Islamic law. Note that I am not making the bold claim that an anarcho-libertarian state of affairs would degenerate into an orgy of violence between competing systems of law. Rather, the foreign law that Hoppe conspicuously labels as absent, is actually the NAR, which ensures that Catholics, for instance,

²⁷ Hans-Hermann Hoppe, "Government and the Private Production of Defense," in *The Myth of National Defense: Essays on the Theory and History of Security Production*, edited by Hans-Hermann Hoppe (Auburn: Ludwig von Mises Institute, 2003), 349.

would not be forced to live under Islamic law, and vice versa. What there is no mention of is that by default Catholics, Muslims, and Jews are *ex ante already* being aggressed through the artificial imposition of the NAR. The NAR creates a state of affairs such that the members of these religions act differently towards one another than they would have absent the NAR. Frank Van Dun, the eminent libertarian scholar, also calls attention to a separate instance of feigned neutrality by Walter Block. “Why,” he asks, “does Block focus on the single criterion of physical violence or invasion? Presumably because he wants to make it clear that he rejects the notion that, in libertarian society, the law will punish victimless crimes, enforce a particular moral code, or coercively impose a particular attitude or lifestyle.”²⁸ Take this separate example provided by the Tannehills: “In a laissez-faire society, no man or group of men would dictate anyone's life-style, or force them to pay taxes to a State bureaucracy, or prohibit them from making any voluntary trades they wanted... Rather, it is a society which does not *institutionalize* the initiation of force and in which there are means for dealing with aggression justly when it does occur.”²⁹ Although this at first sounds appealing and imminently neutral for the following reason that there is no clear, singular institution that dictates life-styles, what the Tannehill's summary amounts to is that the NAR dictates that no one dictate anyone's life-style, a hardly neutral or coherent philosophy. Kinsella has attempted a rejoinder to the charge of pretend neutrality, claiming that “the *principled opposition to aggression* does not rely in the slightest upon being "neutral between comprehensive doctrines"... this view is NOT "neutral." It is anti-aggression, and pro-victim.”³⁰ While Kinsella is technically correct on one count, anarcho-libertarians proudly proclaim that theirs is the only philosophy of law that avoids the initiation of aggression, and so

²⁸ Frank Van Dun, “Natural Law and the Jurisprudence of Freedom,” *Journal of Libertarian Studies* 18, no. 2 (2004): 34.

²⁹ Linda and Morris Tannehill, *The Market for Liberty* (Auburn: The Ludwig von Mises Institute, 2007), 4.

³⁰ Stephan Kinsella, “The Trouble with Feser”.

is neutral in that respect. Contrary to their misplaced enthusiasm, I have demonstrated that insofar as the NAR affirms it is the only philosophy which abstains from aggression, it is completely underwhelming.

Although this section on private defense agencies is not entirely necessary to illustrate the self-reference argument, I include it in case the anarcho-libertarian thinks he can construct a possible state of affairs in which the NAR does not impose itself *ex ante* on persons. And everyone is intimately aware of the controversy surrounding them. To be clear: I'm not discussing their efficiency, adequacy, affordability, accessibility, violent tendencies, or capability of defending national borders, etc. This is a purely formal and extremely brief analysis of their operations for clarity's sake, to show that they either blatantly commit *ex ante* aggression or cannot avoid it even with intricate workarounds. Rothbard and Hoppe are two prominent contributors to the literature in this area, as well as subsequent efforts by Hoppe, Kinsella, and Robert P. Murphy, with special notice of Murphy's more subtle developments.

Here's Rothbard's account:

Even if purely voluntary arbitration is sufficient for commercial disputes, however, what of frankly criminal activities: the mugger, the rapist, the bank robber?...For the criminal cases, then, courts and legal enforcement become necessary...In all their operations, furthermore, they must observe the critical libertarian rule that no physical force may be used against anyone who has not been convicted as a criminal.³¹

Elsewhere he attempts to avoid the prospect of retaliation as much as possible, preferring to invoke arbitration and ostracism rather than direct coercion, but in the end admits that coercion is unavoidable. And further: "So, in our case, Jones would go to the Prudential Court Company to charge Brown with theft....If Brown is declared guilty, then the court and its marshals will employ force to seize Brown and exact whatever punishment is decided upon—a punishment

³¹ Murray Rothbard, *New Liberty*, 229.

which obviously will focus first on restitution to the victim.”³² This situation does not change if Brown is a client of Metropolitan Court Company, for if the MCC finds Brown guilty, then it accords with the decision laid down by the Prudential Court Company. None of these examples avoid the problem of *ex ante* aggression in the slightest. And further, he writes that “all would have to abide by the basic law code, in particular, prohibition of aggression against person and property, in order to fulfill our definition of anarchism as a system which provides no legal sanction for such aggression.”³³ As Rothbard notes, “all legal systems, whether libertarian or not, must work out some theory of punishment”³⁴

Hoppe’s private law solution, on the other hand, conflates self-ownership as a moral principle and non-aggression as a legal rule, which is why I originally spilt much ink in distinguishing the two. He asks:

[H]ow is law and order *vis-à-vis* actual and potential lawbreakers maintained? The solution lies in a private law society — a society where every individual and institution is subject to one and the same set of laws!...There is only private law (and private property), equally applicable to each and everyone. No one is permitted to acquire property by any other means than through original appropriation, production, or voluntary exchange; and no one possesses the privilege to tax and expropriate. Moreover, no one in a private law society is permitted to prohibit anyone else from using his property in order to enter any line of production and compete against whomever he pleases.³⁵

Hoppe illicitly moves from the moral principle of self-ownership as universally applicable to a legal rule that is universally applicable. Subjecting agents to law is different than them being subject to morality. The former is accomplished through *ex ante* aggression at the very least, while the latter involves no force whatsoever, aside from the disapproving howls of on-looking anarcho-libertarians. Hoppe is just conflating the difference between moral principles and legal

³² Ibid., 230.

³³ Rothbard, “Society”.

³⁴ Rothbard, *Ethics*, 85.

³⁵ Hans-Hermann Hoppe, “Private Law Society”.

rules, continuing as if there were no bridge to cross from morals to laws. I have already laid out in detail how these must be treated separately.

In an article co-authored with Patrick Tinsley, Kinsella begins by discussing the quintessential error of the NAR, only he declines to move one step further in recognizing self-reference. He writes:

For libertarians, the purpose of a legal system is to establish and enforce rules that facilitate and support peaceful, conflict-free interaction between individuals. In short, the law should prohibit aggression, [an]...action that intentionally violates or threatens to violate the physical integrity of another person or another person's property without that person's consent.³⁶

Robert P. Murphy is the final theorist I will include, since his account of an anarcho-capitalist state of affairs is far more subtle than Rothbard's. Murphy begins by differentiating himself from the systems of law constructed other anarcho-libertarians:

[T]he system of market law that I describe is not entirely congruent with the vision of some other anarcho-capitalist writers. They believe the "just" system of property rights is deducible axiomatically, and that objectively valid law will be discovered and enforced by private firms...First, we must abandon the idea of a mythical "law of the land." There doesn't need to be a single set of laws binding everyone. In any event, such a system never existed."³⁷

Murphy prefers social intercourse to be governed under contracts, but as he asks: "What about the incorrigible bank robber, or the crazed ax murderer?...First, keep in mind that wherever someone is standing in a purely libertarian society, he would be on somebody's property. This is the way in which force could be brought to bear on criminals without violating their natural rights."³⁸ And later: "So we see that it is not a contradiction to use force to capture fugitives in a completely voluntary society. All such uses would have been authorized by the recipients

³⁶ Patrick Tinsley and Stephan Kinsella, "Causation and Aggression," *The Quarterly Journal of Austrian Economics* 7, no. 4 (2004): 97.

³⁷ Robert P. Murphy, *Chaos Theory: Two Essays on Market Anarchy*, 2nd ed. (Auburn: Ludwig von Mises Institute, 2002), 14.

³⁸ *Ibid.*

themselves beforehand.”³⁹ And here is the key point: “Of course, if someone tried to simply barge onto another’s property, without agreeing to any contractual obligations, then the owner would be perfectly justified in using force to repel him.”⁴⁰ A thought experiment is appropriate here: Property owner X appeals to the NAR, while person Y who moves across X’s property without consent appeals to a theory of property rights which states that the principles of justice demand limited easement rights in the real property of others for the purposes of traveling from place to place. We have two conflicting conceptions of justice, and both individuals are willing to use aggression, not just retaliation to enforce their position. The problem arises for X, since he is unaware of the *ex ante* aggressive status of the NAR. Y, however, is completely at ease with the idea that his system imposes involuntary obligations or prohibitions on others. But where they differ is that Y does not suffer from a severe case of cognitive dissonance, because he does not consider *ex ante* aggression to be unacceptable. X, on the other hand, must find an alternative account to support his claim, for as it stands, he is unable to retaliate and expel Y from the land, supposing he is consistent. X possesses firm moral principles but lacks a theory of justice and is therefore unable to retaliate in the slightest. He can only patiently explain to Y that trespassing on another’s rightfully owned property is morally wrong, but beyond that nothing more is possible.

Previously, anarcho-libertarians have thought of their principle as being virtually unassailable. Kinsella is a representative of this phenomenon. Laying it out in logical terms he states:

To disprove libertarianism's central contention--that aggression is unjustified—one must actually try to (a) show that aggression is actually justified (in some cases); or (b) show that what we view as aggression (e.g., murder and other

³⁹ Ibid., 20.

⁴⁰ Ibid.

private crime; or activities of the state such as taxation, regulation, conscription) is not actually aggression. I honestly see no other logical alternative.⁴¹

I think I have satisfactorily shown that Kinsella has presented us with a false dichotomy. There is indeed a third option, namely that the ASR1 is successful. But is there some way the NAR can be reframed to create, say, a new non-aggression rule (NNAR) that is immune from the ASR1? The project would be tremendously optimistic, and I see no possible way to accomplish this. For if *ex ante* aggression is the initiation of aggression, then it is not permitted to say that initiation of aggression is illegitimate *except* for our own preferred system of *ex ante* aggression. That workaround drunkenly stumbles into the brick wall of special pleading. A version that evades the charge of special pleading could be developed, but not through trying to add or subtract from the NAR. While it is special pleading to exempt one's own preferred system of aggression under the NAR, the way out of this dilemma, it seems, is to say that the initiation of a certain type of aggression just *is* good and permissible. And out of all the various systems, the libertarian system of aggression based on an objective standard of property rights is just, while other competing theories fail to meet this standard. However, this endeavor cannot be accomplished with the NAR. A new principle will have to be developed in its stead, one that approves of a specific type of aggression within the confines of anarcho-libertarian theories of property. A second potential response to the ASR1 is that the moral principle of property rights already applies *ex ante* before we even step into the picture, and so there is no aggression at all—just the restoration of rights into right order through defensive retribution. And the bringing of things back into right order is the restoration of property rights formed through various theories of self-ownership, argumentation ethics, natural law, etc. This counter-argument fails on two points: First, it is inconsequential whether these pre-established property rights are objective or not, and

⁴¹ Stephan Kinsella, "Trouble with Feser".

let's grant that they are objective. What counts is their aggressive imposition on dissenters, that is, those who adhere to a non-anarcho-libertarian theory of rights. Second, I made the point earlier that (1) moral principles are separate from legal rules, although legal rules may be based on moral principles and (2) objective moral principles *qua* moral principles are never actively imposed by individuals. It is precisely the bearing of arms to restore right order of these principles through adherence to the NAR where self-reference arises. Rothbard, in attempting to respond to such a charge, writes: "Absolute pacifists who also assert their belief in property rights...are caught in an inescapable inner contradiction: for if a man owns property and yet is denied the right to defend it against attack, then it is clear that a very important aspect of that ownership is being denied to him."⁴² Again, Rothbard is (1) ignoring the distinction between theories of morality and theories of justice as previously laid out, and (2) failing to see that even if there were no distinction, this would still be committing aggression. Notice that my argument is not a defeater for libertarian rights. It simply demonstrates that the NAR is unjustified and that anarcho-libertarians must modify their stance towards the initiation of aggression. When we move from principles to rules, we have to realize that law is essentially aggressive. In sum, we cannot say that it isn't aggression because it is good. Yet one final objection: Without any implementation or risk of enforcement, the NAR does not aggress, for the simple reason that morals do not aggress. If we imagine a possible scenario where (1) the NAR is held in such absolute contempt, that no entity, no private enterprise, and no individual have attempted to impose it *ex ante*, then even if aggression does occur, there is no threat of retaliation according to the NAR and thus no intimidation. Taken strictly as a moral principle, the NAR is not self-referential. However, the NAR is a legal rule, separate from its moral foundations, and this is precisely where the ASR1 applies. Of course, to claim the NAR is not aggressive because it is

⁴² Rothbard, *Ethics*, 77.

never implemented, or adhered to, or feared, is to defeat the purpose of law. Thus, this objection is no objection at all, unless one is a pacifist.

The implications of the ASR1 are austere. First, any legal or political positions based explicitly—and for no other reason—on the NAR will have to be discarded until a new anarcho-libertarian rule emerges. Of course, the majority of these can be salvaged, but the rejection of positions for the simple fact that they fall outside the sphere of non-aggression is no longer legitimate. Kinsella states: “The libertarian believes...that the only case in which force is justified is if it is in response to an initiated act of force. Otherwise, the outlawing of the conduct is itself an initiation of force.”⁴³ This view of Kinsella’s is no longer tenable. That a new rule does arrive is absolutely essential, for otherwise anarcho-libertarianism is left a moral framework without a corresponding theory of justice. For the host of other libertarians with relatively different conceptions of justice, the ASR1 leaves no mark. But for anarcho-libertarians, it is a significant problem, since it seems necessary to allow the move beyond serious social pressure to coercion if the efficacy and preservation of property rights is to be maintained at all. So there is an uncomfortable tension. While an anarcho-libertarian state of affairs in some sense requires aggression in order to sustain its existence for more than a moment, the consistent anarcho-libertarian—at least at this point in time—must be a pacifist, since there exists no rule by which he may justify the move from morality to law. He may express moral outrage at the breach of his property rights or an affront on his person, but there is literally no opportunity for redress in any fashion. This is not, of course, because two wrongs do not make a right, or any other arguments provided by a pacifist like LeFevre. While I agree with him that the consistent position—as of now—for anarcho-libertarians is pacifism, we have very different reasons for believing so.

⁴³ Stephan Kinsella, “Reply to Van Dun: Non-Aggression and Title Transfer,” *Journal of Libertarian Studies* 18, no. 2. (2004): 55-56.

A potential modified rule could sound something like this: The *ex ante* imposition of a libertarian conception of rights is morally justified, since it is a restoration of a morally right state of affairs, and this is what law is for, whether instituted privately by individuals or firms, or by government. There now opens up to the anarcho-libertarian an unforeseen possibility here: the justification of the state, for the great portion of arguments offered against the state have implicitly or explicitly presupposed the NAR. At this point, normative grounds separate from this will have to be provided by a new rule that has its base in self-ownership, natural law, or some other traditional anarcho-libertarian conception of property rights that renders the state *necessarily immoral* on some factor other than the initiation of aggression. While the minarchist state is usually criticized as the visual embodiment of the initiation of aggression, an anarcho-libertarian state of affairs also implicitly requires the initiation of aggression. Again, to refer to an argument addressed previously, there is no paradox or self-reference in initiating aggression to prevent aggression, for that assumes that the NAR is a sound principle. This discussion on the state is by no means meant to convince anarcho-libertarians that minarchy is a viable option. I am merely exploring possibilities previously held unthinkable. One thing is clear, however. Being strictly pacifistic in an anarcho-libertarian state of affairs is an uncomfortable reality. As Murphy mentions above, there is really no reason to suppose that the NAR will emerge from a polycentric legal order at all. David Friedman also recognizes the tension inherent in such an arrangement, and he expresses no confidence—beyond the obvious profit/loss motive—that libertarian laws would arise. He writes:

I have described how a private system of courts and police might function, but not the laws it would produce and enforce... Whether these institutions will produce a libertarian society—a society in which each person is free to do as he likes with himself and his property as long as he does not use either to initiate force against others—remains to be proven... If the value of a law to its supporters is less than

its cost to its victims, that law, by the logic of the previous chapter, will not survive in an anarcho-capitalist society.⁴⁴

Friedman is right to be cautious, since we have no access to counterfactual states of affairs that may or may not obtain. In a polycentric legal order, there is no mandate that private courts or private defense agencies adhere to the NAR. If the ASR1 is successful, there would be no such entity as an anarcho-libertarian private defense agency—at least if consistency prevails, and even less reason to suppose a libertarian order would emerge.

In this paper I have shown that (1) the NAR is conceptually separate from its underlying foundations of objective morality, natural law or argumentation ethics, and self-ownership or homesteading, insofar as those are purely moral principles rather than legal rules. I invoked Robert LeFevre's anarcho-libertarian pacifism in order to demonstrate that if it is logically possible that the identity relationship between self-ownership and the NAR is not true, then they are not identical at all. I then defined the NAR with reference to previous and contemporary anarcho-libertarian scholars and then proceeded to show that the NAR, along with allowing *post facto* retaliatory force, also necessitates *ex ante* aggression, rendering it self-referential. In referencing work done in the area of private defense agencies, I showed how none of the postulated systems avoid the ASR1. I discussed potential rejoinders, as well as its illicit claims to neutrality, and then worked out the implications of the NAR's abandonment. I would say that from here forward, anarcho-libertarians have a tremendous task ahead of them, one which I would not envy in the slightest. As of now, the consistent anarcho-libertarian is a pacifist until a new rule is developed, and the whole of anarcho-libertarian philosophy that relies exclusively on the NAR will have to be reconstructed from the ground up. Unless a persuasive rejoinder to the

⁴⁴ David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, (La Salle: Open Court Publishing Company, 1995), 128.

ASR1 is forthcoming, then I sincerely wish for the NAR to suffer the same fate as logical positivism.

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