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REPLY TO FRANK VAN DUN'S "NATURAL LAW AND THE JURISPRUDENCE OF FREEDOM"

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In his article "Natural Law and the Jurisprudence of Freedom," my friend and colleague Frank van Dun offers two options as my possible categorizations of his views: "anti-libertarian" or "confusion and inconsistency on the part of a libertarian sympathiser."[1] Given these two sharp alternatives, I choose the second, for I certainly do not consider him "anti-libertarian." To the contrary, I consider him one of the leading libertarian theorists of the present day. Nor do I see "confusion and inconsistency on [his] part." I should rather say that the two of us have different visions of libertarianism, and—I am sure I speak for both of us here—that we welcome this opportunity afforded us by *The Journal of Libertarian Studies* to further explore these important issues. Hopefully, together, we can get one small bit closer to the truth in this way.

Let me now turn to the specifics.

Van Dun states: "True to [Block's] behaviourist approach, he does not consider questions of negligence or malicious intent"[2] in distinguishing between legal and illegal acts. This is certainly true, because these are not crucial to the issue of whether a violation of libertarian principle has occurred. Rather, they are mitigating circumstances related to the level of punishment or compensation for a crime or tort.

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[1]Frank van Dun, "Natural Law and the Jurisprudence of Freedom," *Journal of Libertarian Studies* 18, no. 2 (Spring 2004), p. 32.

[2]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 33.

For example, whether I purposefully throw a rock through your window or accidentally hit a baseball to this same end, in *both* cases I must make good your loss, but the degree to which I must do so will be very different. As for negligence, I can be as careless as I wish. But if, as a result of my neglect of safety considerations, I cause physical harm to you or your property, I certainly must compensate you.

Van Dun offers the case of the man who lies to some hikers about the safety of a bridge.[3] Van Dun rejects my notion that such a man should not be held guilty of a criminal act, but his analysis implies either compulsory good Samaritanism or truth telling. Considering the first of these, suppose the man saw the couple approaching the bridge, but did nothing to stop them. They would be just as dead with his silence as with his lie. Would Van Dun consider the man who keeps his silence a murderer? If so, he would have a difficult time reconciling his position with libertarianism.

Now take the second option. Van Dun would appear to be taking the position that one must always tell the truth, otherwise one can be convicted of a crime. Suppose this author asks me what time it is, and I reply "92 o'clock," an obvious lie. Under what I take to be the libertarian code, I have so far committed no rights violation. Suppose Van Dun uses this lying "information" I supplied him to a bad end? I may be causally responsible for this, but, again, I am guilty of no crime under the libertarian legal code.

However, if Van Dun *paid* me for this information, e.g., the hikers *paid and therefore contractually obligated* the local yokel to tell the truth, then we would have entirely a different matter. Then he would be guilty of a contract violation that resulted in death, a very serious matter indeed. Van Dun's analysis implies a radical rejection of *caveat emptor*, not only for a buyer, but even for a beggar (which is, roughly, the role played by the hikers).

States Van Dun:

> Block's concept of "mental aggression" covers phenomena as diverse as libel, blackmail, lying, making false accusations to the police, hate speech, inciting to riot, ordering one's followers to commit murder, shunning, boycotting, cutting "dead," refusing to deal with, buy from, sell to, and so on.[4]

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[3]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 33.

[4]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 35.

I plead guilty to all of the above, *except* for "ordering one's followers to commit murder." This case alone on the above list, as I have been at great pains to elaborate, *would* constitute guilt under the libertarian order as I understand it. Thus, Van Dun is very much mischaracterizing my position when he maintains that:

> A judge who sends to prison a gang leader for inciting his henchmen to kill a person would be as guilty of a crime as a judge who orders the imprisonment of a housewife for not buying her bread from a particular baker.[5]

A gang leader does not merely *incite* his followers to criminal behavior, he *orders* them to do it, or *threatens* that if they do not, they will be visited with physical sanctions. Under the libertarian legal code, he would be guilty, in sharp contrast to the housewife.

According to Van Dun:

> Relevant considerations are whether something was or was not common knowledge among the parties, the nature of their relationships, the content of past communications among them, standards of care or maintenance, and so on. These things figure prominently in judicial deliberations.
>
> Note that in Block's interpretation of the non-aggression rule, a judge not only may, but should, disregard them so as not to be diverted from the one and only relevant question: "Did the defendant physically invade or threaten to invade another's person or property?"[6]

It is amazing that so much miscommunication could occur between the two of us; I do not at all hold this view. I join with my colleague in stating that these are all important considerations. But they are not separate from the question of whether a physical invasion occurred or was threatened; rather, they are an integral part of this very question. If I shake my fist in my student's face during a lecture dedicated to elucidating what, precisely, is a threat, I should be very much aggrieved if he hauled off and shot me. I expect him to know, from the context, that I mean him no harm. But, if I shake my fist inches from the nose of an inebriated man in a darkened bar, I have only myself to blame when he uses extreme physical violence to protect himself. The very same physical act—shaking a fist near someone else's nose—can constitute or not constitute physical aggression, based upon the context.

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[5]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 36.

[6]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 36.

Yes, in a libertarian society, there is a need for judges to ferret out true aggression from the grey area or continuum of cases[7] where this is not clear. But libertarian theory, at least my version of it, is not compatible with a finding of guilty unless there is a threat or an actual uninvited border crossing. Lies and malicious harassment simply do not qualify, since by no stretch of the imagination can they constitute a threat or initiation of violence.

Van Dun claims that "demonstrably harming a person by telling lies entitles the victim to compensation."[8] Suppose that I write a negative book review of this author's next publication, and I lie through my teeth in this missive.[9] I may be found guilty of something or other by so doing, but certainly not in a libertarian society.

Van Dun writes:

> To harass a person maliciously and to subject him specifically to systematic "mental torture" are unlawful actions that entail liability if they actually and demonstrably cause harm. On the other hand, making a person angry, saying something offensive or disturbing, or not being nice are actions that *per se* are not unlawful and do not harm a person. *Per se*, they are not "punishable," nor do they entitle a person to compensation.[10]

I say this is a distinction without a difference, and that Van Dun is making this up as he goes along. "Harassment," "mental torture," "making a person angry," "saying something offensive," etc., are all synonyms for each other.

Van Dun goes so far as to claim that *financial* harm, not merely the physical variety, can properly serve as the basis for damages in law.[11] But this would appear to imply that people can own the *value*

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[7]Van Dun also recognizes the "border case." See Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 38. The best answer to his query regarding pollution in this regard is found in Murray N. Rothbard, "Law, Property Rights, and Air Pollution," in *Economics and the Environment: A Reconciliation*, ed. Walter Block (Vancouver, B.C.: Fraser Institute, 1990).

[8]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 37.

[9]However, I stand corrected by Van Dun's criticism of my claim that weathermen lie half the time. They are only mistaken. A lie is a purposeful telling of a falsehood.

[10]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 37.

[11]Van Dun, "Natural Law and the Jurisprudence of Freedom," pp 38–39.

of their possessions, not merely their physical embodiments.[12] It is difficult to see how this can be the case, especially in light of his concession that such changes can come about as a consequence of normal, perfectly lawful transactions on the market, of changes in demand and supply.[13]

Van Dun attempts a *reductio* against me on the ground that "printing money substitutes with one's own paper and ink and offering them in exchange for goods and services does not constitute physical invasion."[14] But this fails, for in my view there need not be an actual physical invasion; fraud, too, will do quite nicely as a violation of libertarian rights. Or, one can put this in another way, and maintain that fraud, as it results in an unjustified transfer of physical property from its rightful owner to the thief, does constitute a physically invasive crime. Whichever way one says it, counterfeiting does not constitute a case against my perspective.[15]

My debating partner offers a very interesting treatment of restitution, compensation, and punishment.[16] Unfortunately, he does not offer any specific cases, so I cannot reply to his views with any great confidence. However, there would appear to be nothing in his very eloquent treatment with which I disagree. Surely, there is a world of difference between an accidental tort and a purposeful crime, even when the same item is broken or stolen. Similarly, very different treatments must be accorded those who reliably agree to make restitution to their victim and those who refuse to do so. None of this makes any difference regarding whether the victim must be made whole, but the actual compensation must be different.

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[12]For an argument against this contention, see Hans-Hermann Hoppe and Walter Block, "Property and Exploitation," *International Journal of Value-Based Management* 15, no. 3 (2002), pp. 225–36.

[13]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 39.

[14]Van Dun, "Natural Law and the Jurisprudence of Freedom," p. 40.

[15]I assume here, for argument's sake, that the counterfeiting occurs in a libertarian society in which the money is legitimate. When this assumption cannot be maintained, then a very different analysis of this act is warranted. See on this Walter Block, *Defending the Undefendable* (New York: Fox and Wilkes, 1991), pp. 93–104; cf. Robert P. Murphy, "A Note on Walter Block's *Defending the Undefendable*: The Case of the 'Heroic' Counterfeiter," *American Journal of Economics and Sociology* (forthcoming).

[16]Van Dun, "Natural Law and the Jurisprudence of Freedom," pp. 40–44.

In my own view, the axiom or aphorism "two teeth for a tooth" is operational here. If I purposefully steal your window, I owe you two of them. The first comes about because I must give you back your window. The second stems from the fact that what I did to you must in turn be done to me. If I, as perpetrator, immediately turn myself over to the authorities after committing this heinous crime, then there will be no costs of capture assessed against me. If not, there will be. Further, there is that little matter of frightening you. If I stole your window when you were not at home, thus scaring you only slightly, then, when I am forced to play Russian roulette, there will be many chambers and few bullets. On the other hand, if I came to you in the dead of night, tied you up, waved a gun in your face, then the very opposite obtains. In sharp contrast, if I am only guilty of accidentally hitting a baseball through your window, then I only owe you the first of these, the window itself.[17]

Whence springs this analysis? Is it engraved on stone tablets and given to us from Mount Libertarian? No, it is not. Rather, this is merely my own attempt to articulate the logical implications of the non-aggression axiom, coupled with the viewpoint that victims must be made whole, and that criminals must be punished.

Next, consider Van Dun's treatment of jurisprudence and the market for justice, and natural law and legal codes.[18] He turns this into an empirical issue over whether or not the "Block" legal code would be adopted by the free market courts.[19] All I can say is that if what

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[17]For more on the two-teeth-for-a-tooth theory, see Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1992), p. 94 n. 6; and Walter Block, "Libertarianism vs. Objectivism: A Response to Peter Schwartz," *Reason Papers* 26 (Summer 2003), pp. 39–62.

[18]Van Dun, "Natural Law and the Jurisprudence of Freedom," pp. 44–45, 45–50.

[19]In the course of this analysis, Van Dun comes to the rescue of the "sexually harassed secretary." In the libertarian society, there could logically be no such thing, since the occupations of secretary and prostitute would each be legal, and so would, perforce, a job that called for both services combined. For a further elaboration of this claim, see Roy Whitehead, Walter Block, and Lu Hardin, "Gender Equity in Athletics: Should We Adopt a Non-Discriminatory Model?" *University of Toledo Law Review* 30, no. 2 (Winter 1999), pp. 223–49; Roy Whitehead and Walter Block, "Should the Government be Allowed to Engage in Racial, Sexual, or Other Acts of Discrimination?" *Northern Illinois University Law Review* 22, no. 1 (Fall 2001), pp. 53–84; and Roy Whitehead and Walter Block, "Sexual Harassment in

these courts adopted eschewed the non-aggression axiom as the be-all and end-all of libertarian legal theory, as does Van Dun, then their claim to this honorific appellation would be to that extent weakened.

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.[20] If a bunch of sado-masochists wish to do things to each other on a voluntary basis that most normal people would look upon with abhorrence,[21] 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.

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the Workplace: A Property Rights Perspective," *University of Utah Journal of Law and Family Studies* 4 (2002), pp. 226–63

[20]I agree that Van Dun is not betraying his anarcho-libertarian convictions in making this point. However, I object to his use of the word "monopoly" in this context. As Rothbard has shown, monopoly is always and ever and necessarily so an aspect of Statism, not of the market. See Murray N. Rothbard, *Man, Economy, and State* (Auburn, Ala.: Ludwig von Mises Institute, 1993), chap. 10.

[21]The issue of children is ignored here as beyond our present scope.

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