

# THE POSSIBILITY OF THICK LIBERTARIANISM

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## Introduction

THE CENTRAL COMMITMENT of libertarianism is the Non-Aggression Principle<sup>1</sup> (henceforth NAP): the prescription that no one initiate force against the person or property of another (Rothbard, 2006, 27-53).<sup>2</sup> Aggression is defined as the initiation of force or nonconsensual crossing of a property boundary.<sup>3</sup> Therefore, if a boundary crossing is consented to, it is not aggressive. Likewise, if a boundary crossing is defensive, then it does not constitute an *initiation* of force, and it is therefore legitimate since it is not aggressive. There are no precontractual enforceable obligations in addition to

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<sup>1</sup> This is true, at least, of Austro-libertarianism: other approaches to libertarian political philosophy may emphasize different principles or claim different principles to be more foundational.

<sup>2</sup> In libertarian legal theory, the NAP may be viewed not as a moral constraint on individual action but as a constraint on law. The NAP being a restraint on individual action entails that it is also a restraint on law, but the entailment does not go the other way around. For the purposes of this paper I will refer to the NAP as a constraint on individual action, and therefore employ the language of moral and political philosophy rather than jurisprudence, in relation to the NAP.

<sup>3</sup> Where legitimate property rights are acquired by original appropriation or consensual transfer.

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the NAP.<sup>4</sup> Therefore, for the libertarian, the moral category of injustice is exhausted by the praxeological category of aggression.

There is an ongoing debate among libertarians about whether being a libertarian is constituted by a commitment to the NAP alone, or whether there are other moral and political commitments outside the NAP that libertarians qua libertarians ought to endorse. One way in which the latter position can be understood is that libertarianism is a “thick,” rather than “thin,” set of commitments insofar as when determining how to *apply* the NAP in the real world, one has to refer to considerations outside the NAP itself (Johnson, 2008a, 135-140; 2008b, 176).<sup>5</sup> Given that the different considerations one might draw upon will result in a different application of the NAP, they have moral and political consequences and are therefore subject to moral and political evaluation. The reasons we have for endorsing the NAP may also give us reasons to draw on certain considerations over others in applying the NAP in the real world.

Aggression is a praxeological concept, and as such, its instantiation in the real world can be deduced a priori from the instantiation of other praxeological concepts.<sup>6</sup> Wherever we observe a nonconsensual boundary crossing, we observe aggression. It is not an empirical generalization that nonconsensual boundary crossings are usually aggressive; rather, they are *necessarily* aggressive—simply because of the meanings of the words, they cannot fail to refer to aggressive acts. However, praxeological concepts do not apply themselves; we must employ interpretive understanding—*verstehen*—of the synthetic world in order to conceive of it praxeologically. *Verstehen* refers to a process of interpreting a person’s actions in light of the context in which they are performed and what that context tells us about the meaning the actor herself ascribes to her own actions. Since action is seen as *purposeful* behavior (Mises, 2007a, 11-13), understanding it means getting at its purpose, and that needs to be sought, in part, via the purposes ascribed to it by the actor herself. Successful *verstehen* makes another person’s actions intelligible, rational, and predictable to us—it allows us to categorize them

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<sup>4</sup> For a formal proof of why one cannot consistently endorse any rights in addition to the NAP, see Long (unpublished).

<sup>5</sup> There are other ways in which libertarianism can be viewed as a thick set of commitments, but here I am primarily concerned with what Johnson has referred to as “application thickness” (2008b, 176) and “thickness for application” (2008a, 135).

<sup>6</sup> Praxeological notions have objective features from which others can be derived a priori. For example, if we observe an *exchange* then we have also observed *consent*, for exchange without consent is *theft*—that is, not exchange at all.

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praxeologically (cf. Mises, 2007a, 49-50; 2007b, ch. 14; Hayek, 1948, 58-67; Geertz, 1973).

In this paper, I argue that the heterogeneity in the way in which real interpersonal conflicts can be interpreted means that in ambiguous cases, the particular interpretation—*verständnis*—we take will distribute benefits and burdens outside of the NAP itself. In order to apply the NAP in the first place we must privilege one *verständnis* over another, and this has decidedly moral and political consequences that we might, as libertarians, have reasons to judge favorably or unfavorably.

I will start by discussing the relation between praxeology and *verstehen* and go on to argue that in some ambiguous cases there is no such thing as a morally or politically neutral interpretation of real-world interpersonal conflicts. I then consider two separate cases, the first of which revolves around how we interpret *consent* and the second of which revolves around how we interpret the *initiation* of force. Where *A* has *B*'s consent, *A*'s crossing of *B*'s boundary does not initiate force and therefore is legitimate. Where *A* deploys force against *B*, this force is legitimate if *B* had already initiated aggression against *A*, since it is defensive; therefore it is not the *initiation* of force.<sup>7</sup> Since these two concepts have the capacity to transform boundary crossings from aggressions into legitimate acts, the way in which we interpret these praxeological notions is of particular importance. I will then go on to consider three objections before concluding.

### Applying Praxeological Concepts

The relations between the different general categories of action are, famously, *a priori* (Mises, 2007a, 30-71). If we know that *x* is an end, then we

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<sup>7</sup> An action can constitute an initiation of force without a physical boundary crossing having *yet*, necessarily, taken place (Rothbard, 1982, 127–145). The act of crossing a boundary may be constituted of several other, more basic actions, some of which, when identified in isolation, do not presume a physical boundary crossing but nonetheless constitute the initiation of a nonbasic action that does constitute a boundary crossing. For example, aiming a gun at someone is not a boundary crossing, in and of itself, yet it constitutes the initiation of a broader action that does constitute a boundary crossing. It is therefore legitimate to deploy defensive force against a person who is initiating an aggressive act before the boundary crossing has occurred. Proving intent on the part of the putative initiator of aggression plays a role in legitimizing the deployment of force against her and, as such, plays a role in transforming the defensive boundary crossing into a legitimate act rather than an act of aggression.

know—deductively—that some means is necessary to bring about *x*. Likewise, if *x* is preferred to *y* by agent *A*, then we know that, *ceteris paribus*, *A* will seek *x* prior to *y*.

Where aggression is defined as the nonconsensual crossing of a property boundary, the NAP tells us in advance all the actions that we may legitimately engage in. So long as we know where the property boundaries are<sup>8</sup> and we know what consent we have from third parties, we know all the actions that are legitimate for us to engage in. The objective and *a priori* nature of human action provides the basis for social coordination, in this sense, by telling us what is legitimate *ex ante*. However, it also serves this end

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<sup>8</sup> Since the NAP is centrally concerned with property (including property in the person), where property boundaries lie is also of central importance. Hoppe suggests that for this reason, embordering of property is a necessary condition for property acquisition, since without any objective, intersubjectively ascertainable borders there can be no certainty about when the NAP has been violated (Hoppe, 2006, 320; 327; 2010, 23–24). In this view, physical homesteading is a necessary postulate for the truth of the NAP.

This paper addresses issues surrounding how we interpret consent and initiation of force; however, appropriation is an equally important concept in applying the NAP. What counts as an act of appropriation (physically employing scarce means as an instrument of one's ongoing activities) is extremely contestable. Block (2008b; 98) and Kinsella (2009) suggest that the issue can be solved *comparatively*. Much in the spirit of David Schmidtz's comments on the matter (2005, 160; 2006, 208–215), they argue that having apodictic knowledge of the history of an object matters little for determining ownership *now*. Giving necessary and sufficient conditions for morally immaculate initial appropriation is not needed to guide our judgments about who has the *better* claim. I am sympathetic to this idea (and it may be one way to make the best ideas of Locke and Hume, respectively, compatible [cf. Zwolinski and Tomasi, forthcoming]). However, the comparison of claims will have to assess different, multidimensional criteria: is it more important that one act of putative appropriation took place before the other? Or that one involved harder work if the other involved a longer duration of work? What if one appropriator knew the other had planned to appropriate but distracted her so she could do it first? What if one of them cannot actually use all the property but intends to employ the very people she excludes from it? None of these questions can be answered by the NAP alone but depend upon a background of shared (or not!) understandings. I contend, with Kinsella (2009, n. 29), that the nature of the object in question informs what kinds of actions are sufficient to acquire an object. However, giving a characterization of the kind of thing an object is inevitably falls back on particular cultural understandings of the object and the kinds of things it is used for. My fishing in a lake might in fact exclude others according to one interpretation about what lakes are, whereas according to other interpretations, my fishing in the lake places no barrier to people swimming in it.

by telling us what actions were and were not legitimate *ex post*: once the objective facts are gathered, it can be deduced *a priori* whether a given action was legitimate or not (cf. Barnett, 1986, 302; Hoppe, 2004, 87). If we know that A did x with p; that p belongs to B; and that A had no consent from B to do x with p, then we know that A has violated the NAP and has therefore acted illegitimately. In providing a deductive basis for assessing what one may and may not do, the NAP makes social coordination between rational agents possible.

As a normative prescription, the NAP constitutes a prescriptive praxeology. While praxeology makes deductions from observed facts, the NAP introduces normativity and tells us, given what actions occurred, which ones were and were not legitimate: the NAP arranges the categories of praxeology into a normative order, so to speak. However, for praxeological reasoning to take place (“A did x with p; p belongs to B; A had no consent from B. Therefore A acted illegitimately.”), the facts of the matter need to be settled. Events in the world need to actually be understood as the praxeological events they are (“the observed physical motions of A’s body constitute x-ing rather than y-ing; the physical motions of B’s body did not constitute consenting to A’s x-ing”). Praxeology presumes an interpretation of the synthetic world as instantiating praxeological categories. Deductive reasoning cannot take place in a vacuum but rather is, as Gottlob Frege put it, “intermingled with having images and feeling” (1879, §154). We cannot merely conceive of action; we have to understand certain worldly events to be actions.

This need not mean deductive reasoning consists simply in generalizing about sense data, as J. S. Mill believed (1874, 430); for example, deducing “2” from “1+1” is not simply an instance of having the feeling of observing two distinct apples forming a twosome. While it may be difficult or impossible for human beings to do arithmetic without using real sense data as placeholders for arithmetical concepts, it is not from the sense data themselves that the deduction takes place. It is not simply because we experienced a twosome of apples when we experienced one unitary apple next to another, but because the duplications of unities cannot be conceived of without conceiving of dualities. As Roderick Long puts it, “grasping a concept involves the possession of sensory images, but does not consist in the possession of such images” (forthcoming, 18, n. 27). Praxeology is *a priori*, but it presupposes

the instantiation of the categories of action it describes in the actual world, and moreover, our ability to recognize such instantiations as such.<sup>9</sup>

Ludwig von Mises held that the method by which we impute praxeological categories onto real-world events is by consultation with our own purposeful behavior (2007a, 26, 49). Our internal access to why we engage in certain kinds of activities in certain kinds of contexts allows us to empathetically recognize the structure of the actions of others by imputing meaning to their behavior. In order to infer that a person's body moving in a certain manner in a certain context constitutes choosing, intending, or consenting, for example, one must interpret their context, think what it would mean to us if we ourselves were in that context, and think why it might cause us to engage in these specific bodily motions (2007a, 26). Mises referred to this form of interpretive understanding as *verstehen* (2007a, 49-50)—borrowing the term from the hermeneutical tradition.<sup>10</sup> *Verstehen* can be defined as the process of conceiving of an action as having such-and-such a nature by understanding the meaning that is attached to it by either the actor herself, or the community of actors, in view of the context in which it is performed.

It is crucial that the character of human action be ascertainable by human reason—that *verstehen* be possible. If aggression is universally illegitimate, it must be the case that we are all capable of recognizing aggression; otherwise we will be unable to coordinate our actions with those of others in a morally appropriate way. As Randy Barnett points out,

the boundaries of protected domains [must be] ascertainable, not only by judges who must resolve disputes that have arisen, but, perhaps more importantly, by the affected persons themselves before any disputes arise. (1986, 302)

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<sup>9</sup> Mises claims that experience of human action presupposes praxeological knowledge, and vice versa (2007a, 40). Likewise, from a Wittgensteinian perspective, to have a concept is simply to be able to successfully identify its instantiation in the world (1958; 1983).

<sup>10</sup> For a modern, representative exposition of the hermeneutical method in social science, see Taylor (1971) and Geertz (1973). One of Mises's most important contributions to the philosophy of social science can be understood as noting the insufficiency of hermeneutics: "We must conceive, not merely understand" (2007a, 486); or, in other words, hermeneutical interpretation is a precursor to praxeological deduction.

This goes not only for property boundaries themselves (since knowing that a boundary has been crossed presumes knowing where the boundary lies) but also for the actions that constitute such crossings.

One insight of praxeology is that all human action has an objective and rational structure, so all persons capable of reason are capable—in principle—of identifying consent and identifying initiation of force. It may be more difficult the further removed one is from one's own cultural context, but it is always possible. F.A. Hayek had the following to say on the matter:

As long as I move among my own kind of people, it is probably the physical properties of a bank note or a revolver from which I conclude that they are money or a weapon to the person holding them. When I see a savage holding cowrie shells or a long, thin tube, the physical properties of the thing will probably tell me nothing. But the observations which suggest to me that the cowrie shells are money to him and the blowpipe a weapon will throw much light on the object—much more light than these same observations could possibly give if I were not familiar with the concept of money or a weapon. In recognizing the things as such, I begin to understand the people's behaviour. I am able to fit into a scheme of actions which "make sense" just because I have come to regard it not as a thing with certain physical properties but as the kind of thing which fits into the pattern of my own purposive action...

An interesting point in this connection is that, as we go from interpreting the actions of men very much like ourselves to men who live in a very different environment, it is the most concrete concepts which first lose their usefulness for interpreting the people's actions and the most general or abstract which remain helpful longest. My knowledge of the everyday things around me, of the particular ways in which we express ideas or emotions, will be of little use in interpreting the behaviour of the inhabitants of Tierra del Fuego. But my understanding of what I mean by a means to an end, by food or a weapon, a word or a sign, and probably even an exchange or a gift, will still be useful and even essential in my attempt to understand what they do. (1948, 65-66)

It is because human action has a constant structure across all cultural manifestations that it is, in principle, understandable, and social life is thus made possible. Again, Hayek has something to offer:

Just as the existence of a common structure of thought is the condition of the possibility of our communicating with one another, of your understanding what I say, so it is also the basis on which we all interpret such complicated social structures as those which we find in economic life or law, in language, and in customs. (1948, 76)

## Contested Concepts and Application Thickness

It is indeed possible for us to comprehend each other's actions and thus understand whether one person aggressed against another, but everything is subject to interpretation. We can all come to the same conclusions about whether aggression is constituted by the initiation of a nonconsensual boundary crossing, but we may not all agree on what acts count as boundary crossings because we *interpret* the actions that took place differently. While we all might agree on the *definitions*, we do not all agree on the *judgments*.<sup>11</sup> Categories of action, such as *consent* and *initiation*, are often much-disputed concepts. People enduringly disagree about the correct interpretation of certain actions. The concepts of consent and of initiation are of particular importance in legal inquiry because they stop boundary crossings from constituting aggression. Where *A* has *B*'s consent, *A*'s crossing of *B*'s boundary does not initiate aggression, and therefore it is legitimate. Where *A* deploys force against *B*, this force is legitimate if *B* had already initiated aggression against *A*, since it is defensive, and therefore not the *initiation* of force. Ascertaining whether consent was given and who initiated force is central to conflict resolution.

The moral morphosis that a boundary crossing undergoes if it was either consented to or provoked by prior initiation of force depends upon a particular *verständnis* of the events that took place. If a judge<sup>12</sup> interprets *A*'s actions as having constituted consent to *B*'s boundary crossing, then it must be concluded that *B* acted legitimately. Likewise, if a judge interprets *A*'s actions as having constituted the initiation of force, then *B*'s use of force (a boundary crossing) was legitimate.<sup>13</sup> The interpretation and judgment made in ambiguous cases has considerable moral import: it might result in a person being subject to legal action even when they believed themselves to be acting legitimately—that is, in accordance with the NAP. To be the person who

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<sup>11</sup> As Wittgenstein put it, "If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments" (1958, 88, §242).

<sup>12</sup> I use the word "judge" very broadly: any third party to a conflict who is charged with making a reasonably final determination of the case. I am not assuming the existence of any *particular* legal order here, only that there are persons or groups of persons who have the power to make reasonably final ex post rulings.

<sup>13</sup> At least insofar as it was defensive and either necessary to overpower or proportionate to the initial aggression, depending upon the details of one's favored view of self-defense.



bears the costs of heterogeneous *verstehen* is to bear a considerable burden.<sup>14</sup> The NAP does not apply itself; the judge “*must look*” (Van Dun, 2003, 81, emphasis in original) at what happened, interpret the events, *and then* deduce a judgment; the way in which she does this has considerable moral and political implications, as the forthcoming discussion of two paradigm cases aims to illustrate. While a judge can employ a putatively amoral or apolitical mode of reasoning in coming to her judgment, she cannot escape the inevitable moral and political import it has. As John Hasnas says, “there is no such thing as a normatively neutral interpretation... [L]aw is inherently political” (1995, 211-212).<sup>15</sup>

In what follows I will outline two paradigm cases—one revolving around the issue of consent, and the other revolving around the issue of the initiation of force. I argue that, in both, there are two possible interpretations that could be made, and that are both seemingly reasonable, but nonetheless have very different moral and political consequences. Since different interpretations have different moral and political consequences, considering which kind of interpretation ought to be taken is not ethically optional.<sup>16</sup> These moral and political consequences are outside those entailed by the NAP itself; in fact, they are a necessary condition for *applying* the NAP in the first place.

It is sometimes believed that libertarianism is only committed to the NAP and anything logically or causally entailed by it, and that anything else is entirely optional for the libertarian *qua* libertarian.<sup>17</sup> However, since different

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<sup>14</sup> This seems to fall under the category of what Miranda Fricker would call “hermeneutical injustice” (2007, ch. 7). From a libertarian perspective, however, it would be difficult to frame it as an “injustice” since injustice is seen as a violation of the NAP; because these burdens have to be allocated prior to applying the NAP, they look like they are *beyond* justice and injustice. Moreover, it is not clear that the burdens that are allocated are necessarily undeserved (as the two cases I discuss below illustrate), and for that reason I would be hesitant to call such a burden an injustice.

<sup>15</sup> I am thankful to an anonymous referee for directing me to this paper.

<sup>16</sup> I borrow the phrase “ethically optional” from Douglas B. Rasmussen and Douglas J. Den Uyl (2005, 83), and use it in a similar sense: they claim that from an individualist eudaemonist perspective concern for political frameworks is not ethically optional because it provides the conditions under which one can live a good life, though it is not constitutive of the good life. Likewise, concern for how we interpret ambiguous cases is not ethically optional because it provides the basis for which we apply the NAP, which is itself an ethical principle.

<sup>17</sup> This is the impression one gets, for example, when reading Block (2010).

interpretations of events for the purposes of applying the NAP have different moral and political consequences, they are necessarily subject to moral and political evaluation. The reasons we have for evaluating one interpretation as morally or politically favorable over the other will be more or less consistent with our reasons for endorsing the NAP. Thus libertarianism, rather than being a “thin” set of commitments that do not need to be accompanied by any other moral or political commitments not entailed by the NAP, may be a “thick” set of commitments, at least in the sense described by Charles Johnson as *application thickness* (2008a, 135-140; 2008b, 176). Application thickness is the idea that there is coherence between the reasons we have for upholding the NAP as the paradigm of justice, and the reasons we have for *applying* the NAP in a certain way. The heterogeneity of *verstehen* therefore opens the possibility for libertarian thickism: for moral and political considerations not directly entailed by the NAP to be nonetheless tied up with it.

## Consent

Consider the case of an employer who fires his secretary for not having sex with him, when the contract<sup>18</sup> between the two does not explicitly state sexual favors are part of the job. Walter Block claims that, in such cases, as long as the employment contract contains no clause stating that the employee retains employment even if she refuses to have sex with her boss, it is lawful for the boss to fire her for refusing to do so, even if the secretary never knew of her boss’s expectation (2001, 65).<sup>19</sup> The idea is that the job the employee has agreed to do in exchange for salary, since it can only ever be partially

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<sup>18</sup> The discussion under this heading is based on the theory of contract Austro-libertarians typically endorse: the title-transfer theory (see Evers, 1977; Rothbard, 1998, ch. 19; Kinsella, 2003). However, it may well also apply to other approaches—I do not take the problem that I raise to *only* afflict the title-transfer theory of contracts.

<sup>19</sup> I assume when Block refers to an employee’s *being fired*, he means something like this: the period of time over which work is exchanged for wages that was mutually consented to in the original contract is shortened, thus revoking the employee’s right to wages even if she does the previously agreed-upon work. If by *firing* Block means merely the nonrenewal of an employment contract after wages have been paid for labor performed, then of course anyone can refuse to contract with another party for whatever reason without violating the NAP. However, being fired seems to imply more than the nonrenewal of a contract previously upheld—in ordinary usage it is typically the rescinding of the employment contract or the resorting to a clause in the contract that permits the duration over which work is paid to be reduced to a shorter period.

described in the contract, is subject to change at any moment according to the will of the employer. In other words, the employee's having sex with her boss was directly consented to because it was *implied-in-fact* (cf. Barnett, 1992, 827), even if the employee was unaware of this. However, the only way for it to be implied-in-fact and therefore consented to would be for the employment contract to constitute an agreement that wages be paid when *whatever tasks the employer decides must be done* are successfully completed. This is not—ex hypothesi—what the employee believed she was signing up for; she thought performing only the tasks actually outlined in the job description—namely, typical secretarial duties—would render her entitled to wages. Why should the boss's interpretation of what was agreed to, and not the employee's, be enforced by law? Even if the contract did not explicitly *preclude* dismissal for sex refusal, it also did not explicitly *require* sexual favors. When such ambiguities exist, the judge must interpret the actions that took place to determine what was in fact consented to by both parties, since it was not written in the contract.

For the judge to interpret an open-ended secretarial employment contract as including the requirement to have sex with the boss, unless stating otherwise, she would be placing a burden upon the secretary. For the judge to rule against the secretary would be to say that while the employee did not know what the expectation of her was, it was *her* responsibility to make sure the contract explicitly said she did not have to have sex with her boss.<sup>20</sup> On the other hand, for the judge to rule against the boss and require him to either pay the employee for the work she had hitherto completed, and pay her to continue working for the previously agreed-upon period of time would be to place the burden on employers who expect sex from their secretaries to make this expectation clear *ex ante*, probably by stipulating it textually in the contract. Whichever side the judge favors, she presumes a *default rule* to be at play that privileges one party to the contract over the other—no such rule is *ex hypothesi* in play—and if she does, she needs to provide justification.

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<sup>20</sup> Block implicitly favors this approach through his “free-to-fire rule” (Van Dun, 2003, 80–82), but he does not give much indication why. It cannot be based on a commitment to the idea that men should be able to have sex with women unless the latter explicitly communicate their nonconsent, given his remarks in Block (2001, 66, n. 29; 2008a, 13–16). If it is not because the employer is a man and the employee a woman that renders this judgment, it must be something intrinsic to the employer-employee relationship, perhaps a cultural or aesthetic attachment to the boss's social domination of the workplace—that “his rights to change the terms of the employment relation... are his by the grace of God” (Carson 2008, 261; 2010, 36). To this extent, Block defends a particular form of application thickness.

As Kevin Carson observes, “it is impossible to define the terms of the contract exhaustively upfront” (2008, 260); therefore any ruling by an adjudicator that such-and-such terms were implicit in it places the burden upon the party that believed otherwise—to so rule is to privilege one party to the contract’s *verständnis* over the other’s and to thereby allocate burden and benefits respectively. Such an allocation cannot be determined from the perspective of the NAP alone, since what is at stake is how we determine what was contracted—what was consented to—in the first place, prior to any application of the NAP. The internal content of the NAP cannot tell us which is more appropriate; only other moral and political attitudes can.

The necessarily open-ended nature of employment contracts “gives rise to the contested nature of the workplace” (Carson 2008, 260) wherein both employer and employee honestly (and perhaps reasonably) have different ideas about what was agreed and what, therefore, the contract expresses. People hired as domestic cleaners are often disgruntled to learn that their employer expected them to do housework more generally, including tidying, washing up, and the like, when they do not consider this to be part and parcel of *cleaning*. Likewise, new parents may be disgruntled if their new nanny refuses to do housework outside what is required for providing childcare because they consider general housework to be part and parcel of *nannying*. Both interpretations of what is included in the roles of *domestic cleaner* and *nanny* are ones that people, even from the same time and place, could reasonably have. Where conflict cannot be resolved, a judge has to make a decision about the meaning implicit in their actions, even if those parties themselves did not intend to convey such meaning. According to Barnett, the libertarian theory of contract,

like a reliance theory, legally protects a promisee’s *reliance* on a promisor’s consent even in some instances where a promisor did not subjectively intend to be bound. (1986, 320)<sup>21</sup>

What instances these are will have decidedly moral and political import, and therefore there are moral reasons vis-à-vis these consequences to take one interpretation over the other. As libertarians, do we believe it is one’s responsibility to assume sex is expected, or do we believe it is one’s responsibility to explicitly obtain consent? The NAP tells us consent is necessary, but it cannot tell us on which occasions consent is actually given.

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<sup>21</sup> Although the libertarian (title-transfer) theory of contract is similar to a reliance theory in this respect, it is not itself a reliance theory.

### Initiation of Force

Consider a second case: a white man and a black man engage in a nonphysical conflict on the street.<sup>22</sup> Let us stipulate that they share equal responsibility for starting the dispute. The white man is from a middle-class, suburban part of a metropolitan area and the dispute takes place in a part of the city he *perceives* to be crime ridden, with a high rate of firearm ownership. The white man is carrying a concealed firearm, and the black man is not; however, neither of them knows whether the other has a concealed firearm, though the former suspects the latter does. The white man feels intimidated because he believes black people to be more violent than other people (even if he is not psychologically aware he has this belief, it is nonetheless embodied in his dispositions and guides his actions). The white man also feels vulnerable because he mistakenly believes a group of (also black) people up the street are his adversary's friends. The argument becomes increasingly heated, the black man takes a step toward the white man while reaching inside his jacket, and the white man draws his pistol and shoots his adversary. The white man, believing the black man to be reaching for a holstered gun, interpreted the black man's actions as an initiation of force, so he, in his mind, legitimately, shot the black man in self-defense.

In one sense, the shooter's response was reasonable. To someone with racial prejudice, this situation was highly threatening: there was the threat of being violently attacked, if indeed one imputes meaning to the actions of the other in the way a racist does.<sup>23</sup> If one adopts the relevant racial prejudice,

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<sup>22</sup> For the sake of argument, I am abstracting away from any property rules the two parties explicitly or implicitly consented to abide by vis-à-vis the street, in order to only deal with the issues surrounding the intent to aggress against person. In practice, streets (whether privately, commonly, or state owned) will carry *some* code of conduct beyond that which is precontractually presumed between two self-owners. Whatever this code of conduct is, however, will be subject to different interpretations as to how real-world conflicts pertain to it.

<sup>23</sup> I do not mean to say that racial prejudice is reasonable, only that the behavior is reasonable *in light of* prior racial prejudice. There may be grounds for saying that in acting upon a racial prejudice, the shooter acted irrationally, if we take the definition of rationality Long suggests: "To act rationally is to act in a manner appropriate to one's situation as one could and should have seen it," rather than "To act rationally is to act in a manner appropriate to one's situation as one actually sees it" (forthcoming, 53.). However, we would need to supplement this with the proposition that the shooter ought to have acted against his racial prejudice, and this requires additional moral and political considerations outside of the NAP in order to be maintained.

one is more likely to understand an angry black man as a threat. To many racists, a black man stepping toward them in the context of a street dispute simply *is* an overt initiation of force—an aggressive act. If someone points a gun at you, it is legitimate for you to use lethal self-defense, even if it is later discovered the gun was not loaded, because pointing a gun is widely understood by “the reasonable man” to be an overt initiation of force (Rothbard 1982, 131). The burden is normally considered to be on the one wielding the unloaded gun to either not point it at anyone or make it clear it is unloaded. Just as the circumstances of someone running toward you wielding a bat determine whether it is an initiation of force (if you are a wicket keeper in a cricket match, then it is not aggression; if you are standing in the street, and you happen to know the bat wielder has vowed to kill you, it is), likewise for a racist, the fact that one’s adversary is a black man in a black neighborhood makes the act of reaching into his pocket an initiation of force. To require a person to refrain from self-defense when he *considers* himself in immediate danger would be to place a burden upon that person, one requiring them to see past their own implicit prejudices and to think twice before acting out of genuine (albeit misplaced or irrational) fear. It may be entirely legitimate to place this burden upon racist persons, but such a decision cannot be made in a moral vacuum, nor can it be made from the perspective of the NAP alone; rather, we must make this judgment in order to endorse any such an application of the NAP.

In another sense, the shooter’s response was *unreasonable*. Stepping toward someone and reaching into one’s inside pocket is an initiation of force simply because the person is black: the shooter *ought not* to have made such a judgment. Likewise, someone at a cricket match ought not to use pre-emptive force against a person running toward them with a bat, because they *ought* to take into account the context of the cricket match. It may be everyone’s responsibility to take into account the relevant circumstantial information that *ex hypothesi* does not include the purported aggressor’s race. To require a nonwhite person to make his nonviolent intentions more explicit than a white person’s has to, or else face the consequences of being assumed to act aggressively, would be to place a social burden upon that person—a palpably moral and political consequence of this particular application of the NAP.

Prior to applying the NAP, the judge must decide whether to place the burden of racial prejudice on the shooter or the one who was shot. One social understanding of what constitutes initiating aggression has to be privileged over its rival. Both men really did have a different *verständnis* of the situation and acted appropriately thereupon. The question is: *when ought one not act upon one’s understanding of things; when ought one interpret things differently?*

In the first case above, the moral questions the judge had to answer were these: in the context of a secretarial job, why should a woman have to make explicit her withholding of consent to having sex with her boss? And why should an employer of a secretary have to make explicit his stipulation that the job include sexual favors? In the second case, the judge has to answer these questions: why should someone who is genuinely fearful and genuinely perceives aggression be required to refrain from taking defensive action? And why should a black man have to make his lack of intention to shoot someone explicit, when, ordinarily, this is presumed? Perhaps these questions are easy to answer, but they cannot be answered by the NAP alone because they determine the very application of the NAP and as such have considerable moral and political consequences.

### Possible Objections

#### *The No-Such-Explanandum Objection*

It might be thought that, since the facts of the matter are in fact one way and not the other, the ambiguity in these cases is in the mind of the observer—it is only apparent and not real. While a judge might make one ruling rather than another, justice only permits one ruling—the correct one. Praxeology is not dependent on one person's *verständnis*. Just as a judge cannot decide that  $1+1=3$ , she equally cannot decide that an initiation of force was actually defensive or that an agreement was actually nonconsensual. The judge might rule however she sees fit, but that does not determine the facts of the matter. Therefore, when the adjudicator takes an ambiguous case one way rather than another, she does not determine ethical fact but rather attempts to track it (one would hope).

It is true that “ $1+1=2$ ” no matter what anyone says or believes, and it is true that an initiation of force is likewise not defensive, no matter what anyone, even a judge, says. However, the point here is not that sometimes the facts are hard to gather and that the adjudicator makes a judgment and in so doing *creates* some ethical fact about who ought to bear what burdens. Rather, the point is that even *with* all the facts, the meanings of actions *are* contested, and therefore we are inherently limited in the finality with which we can apply the NAP. The extent to which two parties have different notions of what constitutes consent, for example, is the extent to which we must place a burden upon one and a benefit on the other in order to apply the NAP (and count one as the aggressor and the other not, in the event of a conflict over their contract).

In most of parts of England it is not trespass to walk up a neighbor's path or driveway to knock on the door and ask some innocuous question or favor.<sup>24</sup> Everyone has tacit consent to do this; therefore such an action is not classified as trespass. But suppose a person moves to England from a war-torn country where nobody enters someone else's property unannounced. Upon arriving in her new home, a new neighbor comes over to welcome her to the street, whereupon she draws a weapon. This is either an act of self-defense against an initiation of force (according to the foreigner's *verständnis*) or an initiation of force (according to the local's *verständnis*). Which *verständnis* we ought to privilege requires a moral and political judgment. This is not like saying that sometimes one person thinks  $1+1=2$  and another person thinks  $1+1=3$  and we therefore have to choose one at the expense of the other. It is more like saying that sometimes one person thinks it is a *bag* of potatoes (which is charged at £1) and another person thinks it is a *sack* of potatoes (which is charged at £3): the judge has to decide who pays the costs of the conflict—who *ought* to have had a different *verständnis*.

### *Two Anarchist Objections*

#### 1.

It might be thought that where there is a free market in legal arbitration, judges who make decisions that are considered unfair would be weeded out by fairer judges. The economic democracy of the market would generate a more standardized interpretation of whose responsibility it is to go to greater lengths to understand the actions of others. This would provide a clear precedent upon which people can base their behavior. If it were the case that the market favored judges who consider labor contracts to entail that the employee does whatever the boss asks, lest they be considered to have failed to live up to their end of the contract, women who do not want to sleep with their employers would know they need to stipulate this in advance. Likewise, if the market favored judges who consider the actions of black men to be, *ceteris paribus*, more aggressive than those of others, black men would know they must go to great lengths to ensure their peaceful intentions are known.

While it may be the case that legal interpretation could be standardized by the economic democracy of the market, this does not diminish the moral and political consequences of interpreting ambiguous cases one way or the other, but rather shows how extensive those consequences could be in

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<sup>24</sup> I borrow this example from Kinsella (2004, 61).



shaping behavior and expectations. Women knowing they need to make their lack of consent explicit is a moral and political consequence, as is black men knowing they have to explicitly let everyone know they are not a threat.

2.

Hasnas (1995, 221-234) worries less about the indeterminacy of the letter of the law under a system of competitive legal-service provision (as opposed to a state monopoly) because he believes the market process would select judges who make rulings in a way that is most conducive to conflict resolution from the perspective of the litigants brought before them. Where there is no one-size-fits-all approach to law, the dangers of the political and moralistic decisions of judges are massively checked.

I do not doubt Hasnas is correct that, where free competition in legal services would diversify the kinds of judgments given, the dangers brought about by the moral and political nature of the judge's job would be diminished. However, the fact that the judge's job would nonetheless still not be politically neutral means thick considerations must inform how they interpret cases; it simply means there is a plurality of such interpretations.

*The Conventionalist Interpretation*<sup>25</sup>

One might believe that when ambiguous situations arise, the standard for application that ought to be appealed to is local convention: whatever the local community takes to be the correct interpretation is the one that ought to prevail in assigning legal responsibility. Thus, no moral or political reasoning need come into play: the judge need only make an anthropological observation and refer to established custom.

While it is true that a judge need not use moral or political reasoning to make her decision,<sup>26</sup> her judgment nonetheless has moral and political import: it distributes benefits and burdens that arise from contested understandings of human action. The thesis I defend is not that, at the psychological level, a judge engages in moral and political reasoning. I only mean her actions have moral and political consequences that, as such, call for

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<sup>25</sup> I am grateful to an anonymous reviewer for drawing my attention to this potential objection.

<sup>26</sup> Indeed, judges may consciously try not to employ moral or political considerations when considering ambiguous cases, but this does not affect the nature of the consequences of their conclusions (Hasnas, 1995, 207–212).

moral and political evaluation. A person can act amorally and nonetheless be subject to moral appraisal.

There may well be good moral reasons to use a conventionalist standard in ambiguous cases, since people have come to expect and mold their behavior around conventional understandings of action. However, the prevailing custom may be such that the way in which it distributes benefits and burdens is morally objectionable. For example, if the custom is that women are expected to have sex with their employers even when this is not expressed in the contract, this limits the economic opportunities of women, which may give moral grounds to reject the established custom. The fact that there are morally and politically serious outcomes of taking any particular *verständnis* over another means that, regardless of the mode of reasoning employed by the judge, the *verständnis* she takes is subject to moral and political evaluation. Furthermore, determining what the prevailing custom is may itself be a point of enduring disagreement; if so, reasoning beyond a simple deference to prevailing custom may be necessary.

## Conclusion

While it is an objective, intersubjectively ascertainable matter whether a boundary crossing occurs, a boundary crossing does not constitute an injustice per se: it has to be nonconsensual, and what kinds of acts constitute consent are often contested by the two parties to a given contract. Equally, what constitutes the initiation of a nonconsensual boundary crossing is often contested by the two parties to a given contract. Kinsella (2004, 61-62) argues that if he lends his car to his brother, his brother cannot drive to Canada to go on holiday for a month, and his brother knows this. However, not everyone has the same social understanding of certain communicative behaviors; indeed, this is the basis for much strife within personal relationships. However, when people with very different social understandings have interactions involving lethal violence or invasive use of their bodies, serious social conflict emerges, and judges must decide how to distribute the burdens of these ambiguities in our communicative behavior.

In evaluating which interpretation of events a judge ought to take, given the moral and political consequences of doing so, we come up against an array of moral reasons that may or may not be consistent with our existing moral commitments as libertarians. The question we are left with, then, is this: what moral reasons are there for endorsing the NAP, and what do these reasons imply about how we conceive of the workplace, sexual relations, racial prejudice, and a plethora of other ethical and political issues? Which

interpretations of events are more salient given the moral commitments that lead us to endorse the NAP?

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