

## COMMENT ON DOLAN ON AUSTRIAN ECONOMICS AND ENVIRONMENTALISM

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*ABSTRACT:* We welcome Professor Dolan's (2014) contribution to Austrian economics, and the contributions of all economists associated with the Austrian school of thought to environmental issues. Although not an Austrian economist himself, Dolan has made more of a contribution to the praxeological school than perhaps any other non-Austrian economist. An expert in environmental economics, Dolan (2014) is an attempt to assess the Austrian contribution to this field. He finds it wanting. Sad to say, I must make the same assessment of Dolan (2014). My claim is that his misunderstanding of Austrian economics is only matched by his mischaracterization of free market environmentalism.

*KEYWORDS:* Austrian school, economics, environmentalism

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Professor Edward Dolan, a mainstream not an Austrian economist, is nevertheless a good candidate for the prize to be awarded to an outsider for the greatest contribution to the praxeological school. He did this by editing Dolan (1976), a very important bulwark of

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Austrian economics.<sup>1</sup> In Dolan (2014) our author once again enters into the deep and treacherous<sup>2</sup> waters of Austrian economics. This time he attempts to assess the contributions, if any, of praxeology to environmental issues. He does not find much with which to agree, and is quite forthright in rejecting this literature. The present paper is an attempt to defend Austrian economics against his many critiques of it.

Dolan (2014) starts off on the wrong foot, by announcing he will judge Austrian economics on the basis of three criteria:

- “Have Austrian economists addressed problems that people think are important?”
- Have they been able to offer proposals of practical value to economic policy, or is their work limited to pure theory?
- Do they offer unique solutions to economic problems, or just different ways of reaching the same results as the dominant paradigm?”

The first one is problematic. The answer is unclear. Praxeologists are well-known for studying issues such as banking, unemployment, inflation, socialism, etc. Surely, there are at least some people who think these are important. However, there are very few people who do. Most are concerned more with football, or boxing, or gardening, or poker or bowling or clothing or music.

So, do “people” think what Austrians do is important? It is difficult to know how to answer this. Suppose we were to ask this question of physicists, or botanists, or chemists or mathematicians, or other physical or social scientists. Such disciplines would also fail this criterion, if we take a head count. Would not a better criterion along these lines be: “have Austrian economists arrived at truth?” This, surely, is the question we should ask of other intellectual schools of thought, from whatever discipline. It is almost but not quite irrelevant what the masses of people think of our analyses.

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<sup>1</sup> Enquiring minds must be excused for wondering why a non-Austrian economist was chosen to edit this very important Austrian book, and who was responsible for this decision.

<sup>2</sup> It is deep and treacherous because it appears that Austrian economics is so easily misunderstood by non-Austrians such as Dolan.

The second one also presents difficulties. Economists, at least *qua* economists, do not “offer proposals.” They are limited to studying cause and effect. They pose and answer questions such as the following: If A occurs, will it lead to B? C is already in existence. What caused it? Economists may properly offer “if-then” statements: If you want to reduce unemployment for low-skilled workers, lower the level of or entirely eliminate the minimum wage law. If you want to increase unemployment for low-skilled workers, then introduce the minimum wage law and/or increase its level. But, to “offer a proposal” such as “introduce the minimum wage law and/or increase its level” or “lower the level of or entirely eliminate the minimum wage law” is surely beyond the scope of the economist, *qua* economist.<sup>3</sup> It takes him out of the realm of the value-free positive economics, and places him in the arena of normativity. Surely, we must distinguish between the normative and the positive.<sup>4</sup>

As to the third criteria, an objection can be made to the word “just.” Even were it true that Austrians reached identical conclusions about how the economy works as members of the mainstream paradigm, this would still be an important contribution. After all, it would serve as a check on our neoclassical colleagues in the dismal science, and one day we might diverge. But, in the event, we already have. Austrians dissent from the dominant paradigm in terms of their

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<sup>3</sup> Dolan (2014) accuses mainstream economists of “trying to maximize efficiency or social welfare.” Surely, some of them do, nay, most of them do, but when they engage in such activity they are no longer doing so as positive economists. They are entering the area of normative economics. Dolan unfairly condemns the entire “neoclassical approach” for this error. But, surely, there is at least one neoclassical economist who refrains from such confusion. Do not ask me to mention one, since this is indeed a common error on their part. Even if we cannot point to a single extant example, as a theoretical matter it is unfair to condemn all those who espouse the dominant paradigm because its basic principles do not necessarily lead in this direction.

<sup>4</sup> Dolan (2014) himself distinguishes between normative and positive *law*, but, unhappily, fails to apply this insight to economics. For example, he writes: “we will pay particular attention to the distinction between *normative* legal principles—the way the law should look if it is to serve the purposes of economic coordination and libertarian justice—and principles of *positive* law as actually practiced today.” See on this distinction between normative and positive economics: Barnett (1995), Block and Cappelli (2013), Rothbard (1960, 1997).

analysis<sup>5</sup> of socialism, central planning, anti-trust, welfare economics, the business cycle and a whole host of other issues.

Dolan (2014) would have been greatly improved had he distinguished between Austrian economics and libertarianism. He thinks that “the third component of the (Austrian) paradigm is that property rights are the (key) to resolving environmental problems.”<sup>6</sup> Nothing could be further from the truth. First of all, no economic school of thought, Austrianism certainly included, “resolves” anything. The dismal science *qua* dismal science is limited to exploring and explaining economic reality. Economists, but not in their official capacity, along with everyone else, may then *use* these findings to “resolve” things. But as value free social scientists, they are precluded from making public policy recommendations.

Secondly, while property rights are indeed the key to resolving environmental problems, this is a basic element of libertarianism, a normative pursuit, not economics, a positive one. Dolan (2014) favorably quotes Dawson (2011, 19) who says “The Austrian or libertarian policy must therefore be to privatise ‘climate change policy,’ repealing all existing climate change legislation....” In other words, Austrian economics and the libertarian political philosophy are synonyms. Anyone who says this or anything like this, whether it be Dolan or Dawson, is committing one of the most basic errors in all of social science. Yes, there are libertarian “policies”: those compatible with the non-aggression principle (NAP) and private property rights. But there are no, there can be no, Austrian “policies.”<sup>7</sup>

Our author now launches into his formal critique of libertarianism, not Austrianism, his views on this to the contrary notwithstanding, under the heading of three different challenges. We shall respond to them in the order mentioned by Dolan.

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<sup>5</sup> Note, I do not say “public policy recommendations.”

<sup>6</sup> Material in parentheses supplied by present author.

<sup>7</sup> Nor is this any slip of the tongue or the finger on the part of Dolan. He commits this error elsewhere. For example, he writes “Many Austrian writers have strong ideas about how property rights should be defined.” No, no Austrian writers, *qua* Austrian economists, have *any* ideas about this, strong or weak. Dolan (2014) cites Rothbard (1982) in this regard, but the latter, while certainly an Austrian economist, wrote that essay not as a value-free economist, but as a value-oriented libertarian.

## CHALLENGE NO. 1: THE INSTITUTION GAP

Dolan's first critique focuses on the libertarian theory<sup>8</sup> of justice in property titles. It is of course based on the Lockean-Rothbardian-Hoppean theory of homesteading.<sup>9</sup> In order to achieve just title to property, one must "mix his labor" with the virgin territory to be owned. Dolan objects to this crucially important element of libertarianism<sup>10</sup> on the grounds that it "would frustrate the efforts of conservationists like Ted Turner or environmental organizations like Ducks Unlimited who buy up millions of acres of critical habitat for the specific purpose of leaving it unused." My first reaction to this objection is: we need not be unduly concerned with Ted Turner and Ducks Unlimited. If they do not like this libertarian notion of awarding property rights to the first user of unowned areas, let them lump it. What possible criterion should be employed to determine who owns what other than this method? Should it be command? Here, the sovereign determines who shall own what property. But what right does the sovereign have to distribute property? Should it be claim? Then, whoever claims anything gets to own it. I hereby claim ownership of the sun, the moon, and the other planets in the solar system. Note how moderate I am: I do not lay claim to all heavenly bodies. An economist was asked: "How is your wife?" Came the answer: "Compared to what?" Even if the homesteading theory were imperfect in that it did not satisfy the crucially important desires of worthies such as Ted Turner and Ducks Unlimited, it is far and away the best possible method of dividing up land not yet used. Fortunately, however, we need not rely, solely, on these defenses of homesteading. Block and Edelstein (2012) show how we can have our cake and eat it too: how homesteading can be upheld, and also satisfy the fervent not-to-be-denied desires of the likes of Ted Turner and Ducks Unlimited to own totally virgin territory.

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<sup>8</sup> Not the Austrian economic theory; I shall not again mention this point.

<sup>9</sup> To mention the three authors who have made very significant contributions to this theory. For other explications and defenses of homesteading, see Block (1990, 2002a, 2002b), Block and Edelstein (2012), Block and Yeatts (1999–2000), Block vs. Epstein (2005), Bylund (2005, 2012), Grotius (1625), Hoppe (1993, 2011), Kinsella (2003, 2006), Locke (1690), Paul (1987), Pufendorf (1673), Rothbard (1973, p. 32), Rozeff (2005), Watner (1982).

<sup>10</sup> Not Austrianism; I know, I know, I promised, but I just can't resist.

Our author instructs libertarians that the Fifth Amendment requires compensation for government takings, and yet U.S. courts have not upheld this requirement.<sup>11</sup> Dolan (2014) also waxes eloquent in criticism of libertarianism that “today’s courts are... (not) willing to stand up against the NSA.” He also upbraids libertarians for somehow not realizing that the bench does not support the NAP on “preponderance of evidence” versus “beyond a reasonable doubt” and on “negligence” versus “strict liability.”<sup>12</sup>

On the basis of all of this, Dolan presses his criticism; he accuses libertarians of being guilty of what Demsetz (1969) has called the “nirvana fallacy.” States the latter: “those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient.”

How can libertarianism be defended against these not very powerful denigrations? In several ways. First, it is just plain silly to think that libertarians fail to realize that actual courts do not uphold private property rights and the NAP. Unfortunately, Dolan (2014) does not offer any cites to the literature where libertarians claim we are now living in the fully free society. This criticism thus fails. With as much reason, Dolan might just as well have accused libertarians of thinking that modern courts have legalized all victimless crimes.

Secondly, Dolan (2014) completely misconstrues Demsetz’s (1969) very valuable nirvana fallacy. Let us first apply this to equilibrium. There are certain economic welfare benefits that pertain to equilibrium states, but not to the real world of disequilibrium. We of course never reach the evenly rotating economy, but we are always heading in that direction. That is, plan coordination is only fully realized in the imaginary construction of the evenly rotating economy. The mainstream economists seize upon this, and claim free enterprise to be a “market failure” since the real world economy does not possess these characteristics. Demsetz’s (1969) nirvana fallacy can put paid to this criticism of the free enterprise system.

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<sup>11</sup> Epstein (1985) will be glad to learn of this from Dolan (2014). See also Whitehead and Block (2002).

<sup>12</sup> Parenthetically, I must also object to Dolan’s (2014) use of the phrase “rent seekers” to depict corporate capitalists. For reasons in favor of rejecting this terminology, see Block (2000, 2002c).

Here is what Dolan (2014) says about perfect competition:

Austrians are quick to condemn neoclassical economists when they slip into nirvana mode. Consider the economics of antitrust. The traditional neoclassical approach has been to compare existing market processes with the ideal construct of perfect competition. Finding that the messy realities of the former fall short of the perfect efficiency of the latter, they declare a “market failure” and recommend a set of remedial laws and regulations. The Austrian approach instead, is to compare the messy details of real-world markets with the even messier institutions of real-world antitrust law and policy. (p. 202)

The problem with this, the disanalogy, is that while equilibrium has several undoubted beneficial aspects, the same cannot be said for “perfect competition.” Indeed, a case can be made that this type of industrial organization would be a disaster (Barnett, Block and Saliba, 2005). But even if we posit (contrary to fact conditional coming up), that perfect competition is ideal, is an aspect of nirvana, Dolan’s (2014) attempt to equate this with the supposed failure of libertarians to realize they do not now live in a fully free society cannot be maintained. In other words, Dolan is making the following argument: Libertarians<sup>13</sup> attack mainstreamers for setting up an ideal system, perfect competition, and then complaining that the real world does not live up to this bit of nirvana. But libertarians are guilty of the same exact fallacy. They set up an ideal system, courts that uphold the NAP, and then complain that the real world does not live up to that ideal.

Why does this fail? It flops because there is a relevant difference between the two complaints. That is to say, yes, there are two ideals: free enterprise courts for libertarians, and perfect competition (or equilibrium) for neoclassical economists. But when perfect competition (or equilibrium) fails to occur in the real world, the mainstream paradigm scholars blame this on market imperfections. They call for (more) government intervention in order to address this problem. Whereas in sharp contrast, libertarians do not at all favor more statism in the face of judges who would not know a private property right if it bit them in the nose; rather, they advocate the exact opposite, e.g., economic freedom. Here is

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<sup>13</sup> It is of course Austrian economists who do this, not libertarians.

another disanalogy. Libertarians are fully aware that current courts do not support private property rights, despite Dolan's (2014) claims to the contrary. There is no analogue in the other cases.

## **CHALLENGE NO. 2: THE PROBLEM OF ENVIRONMENTAL MASS TORTS**

Here is Dolan's (2014) opening salvo:

The property rights approach works best when the number of parties involved in environmental dispute are few and proximate. When they are many and remote, neither face-to-face bargaining nor common law litigation works well. Many of the most important environmental issues of our times fit this pattern, including urban smog, acid rain, ozone depletion, ocean acidification, and anthropogenic climate change. I will refer to this class of problems as *environmental mass torts*. (p. 204)

Our author employs a "hypothetical Vermont farmer, call her Nancy Norman," maintains that she would be unable to stop Midwestern power plants from harming her maple trees, and implies this would be unfair, uneconomic, problematic. Why? There are several reasons. Let us consider each in turn.

First, if the Midwestern power plants polluted first, our girl Nancy is "coming to the nuisance." Thus, she should not win her case against them. But what is wrong with that? If Midwestern power plants indeed homesteaded the right to place pollutants into the air, homesteaded them in effect, then they would have the property right to continue to do so. If airports were there first, engaging in noise pollution, that is allowing airplanes to take off from and land on their property, then Dolan's argument would presumably shut them all down, if some Johnny-come-lately to the neighborhood objected. That is, the newcomer would be "coming to the nuisance" and would have no proper choice other than to accept the extant level of pollution.

Second, "Norman would have to prove actual damage. In any legal action, she would have to bear the cost of expert testimony regarding the science of acid rain, and would have to rebut defendants' testimony that some other agent, say a fungus, might be harming her maple trees. The testimony would have to establish



her contentions beyond a reasonable doubt." But what, pray tell, is wrong with that? If I accuse Dolan of stealing my car, I would have to prove this claim before any court, even an extant one, would award me damages. And proving this might be expensive to me. But surely Dolan would not want the court to compel him to pay me under any other circumstances. Why should Nancy not have to jump through the same type of hoop? The burden of proof properly rests with those who wish to overturn property titles, not the other way around.

Third,

Norman would have to sue each polluter individually, unless she could prove they acted in concert, which presumably they do not. She would have to prove strict causality, not just regarding the point that acid rain in general damaged her trees, but that each individual defendant contributed causally to the damage." (p. 205)

Now this is a far more serious complaint than the other two. Here, at last, there is a real problem, an important challenge put forth by Dolan for us to consider.

There are two responses that can be made by the libertarian who favors private property rights as a solution to this difficulty. On the one hand, consider a different kind of pollution, one emanating from automobiles. Each car, even with a catalytic converter, lets off an insignificantly small amount of toxin. It would be cumbersome in the extreme for Nancy or anyone else to sue them all. Each one could hide behind a *de minimus* defense. Rothbard (1982) offers the following solution:

While the situation for plaintiffs against auto emissions might seem hopeless under libertarian law, there is a partial way out. In a libertarian society, the roads would be privately owned. This means that the auto emissions would be emanating from the road of the road owner into the lungs or airspace of other citizens, so that the road owner would be liable for pollution damage to the surrounding inhabitants. Suing the road owner is much more feasible than suing each individual car owner for the minute amount of pollutants he might be responsible for. In order to protect himself from these suits, or even from possible injunctions, the road owner would then have the economic incentive to issue anti-pollution regulations for all cars that wish to ride on his road. Once again, as in other cases of the "tragedy of the commons," private ownership of the resource can solve many "externality" problems.

This nails it.<sup>14</sup> To be sure, not every case of what Dolan calls environmental mass torts can be handled in this manner. But, surely some of them can, preeminent amongst them roads and highways.

On the other hand, consider just how far extant law has deviated from what libertarian jurisprudence would be, based on private property rights and the NAP. Another quotation from Rothbard (1982) will make this clear:

In the classic case of *Holman v. Athens Empire Laundry Co.* (1919), the Supreme Court of Georgia declared: "The pollution of the air, so far as reasonably necessary to the enjoyment of life and indispensable to the progress of society, is not actionable."

But this sort of thing has been going on since at least as early as the 1870s (Horwitz, 1977). Polluters have been given a legal *carte blanche* since that time. Is it any wonder that firms have taken advantage of this lacuna in the law? Any company that kept its airborne garbage to itself when not required by law to do so would put itself at a disadvantage via its competitors.

Under proper libertarian law pollution would indeed be "actionable" as a trespass of soot particles. If so, then several effects helping out "Nancy" would come to fruition. Whenever the Nancy of the day was beset by dirt emanating from the local factory, she could have availed herself of a lawsuit. There, if she offered evidence buttressing her complaint, she would be granted damages and an injunction against such further incursions. Since she would have had to prove her case, there would have been an incentive for the market to promote environmental forensics. This would have led, via the "invisible hand," plants to use cleaner burning, albeit more expensive anthracite coal, rather than the cheaper but dirtier sulfur variety. Firms would have had more of an incentive to install smoke capturing or prevention devices in their chimneys, thus keeping more of this effluent to themselves, and allowing less to seep out to the Nancys of the world.

From early days of the U.S. until about 1870, these phenomena were actually taking place (Horwitz, 1977). But then, at the outset of the progressive period, the legal philosophy of *Holman* started

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<sup>14</sup> For the case on behalf of road privatization, see Block, 2009b.

to take root. If pollution was no longer actionable, this called a halt to environmental forensics, to meshes in chimneys, to cleaner burning fuels, etc. So, of course Nancy is in trouble nowadays. She can no longer sue those who trespass on her property. But posit that the earlier quasi-libertarian legal philosophy had prevailed uninterrupted until the present day. Suppose that modern technology were harnessed in the direction of enhanced and sophisticated environmental forensics, meshes in chimneys, cleaner burning fuels, etc. Then, Nancy's predicament would all but disappear.

The trouble with Dolan's analysis is that he looks at the modern world and finds it wanting. He blames this on free enterprise and private property rights. He does not seem to realize that present conditions are a function of the law, and legislation and court findings were not, to put it mildly, in favor of protecting property rights in pollution since at least the late 19<sup>th</sup> century. It is as if Dolan were to blame unemployment, inflation, the business cycle, poor housing conditions, etc., on the free enterprise system, when these difficulties actually emanate from phenomena such as minimum wages, unions, the federal reserve system, rent controls, etc.

Let us take another hack at this. Contrary to Dolan, there is no problem, no problem whatsoever, with specifying an ideal system, criticizing present reality on the ground that it does not measure up and working to rectify matters so that we make improvements toward the goal. In my own view, this all depends upon the case in point. That is, the "devil is in the details." It is the specifics that can be problematic. For example, the medical researcher posits a world in which there is no cancer. He notes that at present this dread disease afflicts people. He attempts to improve the situation through medical research. If anyone thinks this presents a difficulty, he should have his head examined. On the other hand, if this medical researcher is so filled with venom for cancer, so determined that no one shall die of this affliction, that he shoots all cancer patients in order that they not die from that malady, then there is indeed something rotten in Denmark. Or, consider a criminologist who wants to reduce crime, and notices that at present, this ideal situation has not yet been reached: there are still rights violations. If the means through which he wants to decrease criminal behavior is to legalize all drugs, then bless him. On the other hand, if he intends to achieve this goal by making

legal crimes such as murder, rape and kidnapping, then we are in great difficulties.

The problems with neoclassical economists regarding perfect competition are two-fold. First of all, it is by no means an ideal situation to have an indefinitely large number of firms in every industry, limited to selling homogeneous products. Worse, if anything, is their fetish to break up large corporations, simply because they are big, into teeny, tiny mom-and-pop firms.

A similar difficulty arises regarding equilibrium. This, too, is not an ideal situation, one toward which we should strive in the real world. Mises (1922) says the following about this concept:

To assume stationary economic conditions is a theoretical expedient and not an attempt to describe reality. We cannot dispense with this line of thought if we wish to understand the laws of economic change. In order to study movement we must first imagine a condition where it does not exist. The stationary condition is that point of equilibrium to which we conceive all forms of economic activity to be tending and which would actually be attained if new factors did not, in the meantime, create a new point of equilibrium. In the imaginary state of equilibrium all the units of the factors of production are employed in the most economic way, and there is no reason to contemplate any changes in their number or their disposition.

Posit, however, *arguendo*, that despite Mises's clear, concise and correct analysis, that for some reason it is "good" to move our present economic situation toward, or even to attain, equilibrium. Again, the means toward this end are crucial. One of the aspects of the evenly rotating economy is that there will be no profits earned. So, one way to make our economy congruent with equilibrium would be to ban profits at present. Needless to say, that would be highly problematic. But another way to achieve this end would be to ban all government laws such as rent control, tariffs, minimum wages, that retard our ability to act in a coordinated way with each other. That, of course, would be highly desirable.

Let us now return, finally, to the libertarian desire to see heaven on earth: a situation in this vale of tears where the NAP is no longer broken. To this end, the libertarian works to end all cases of murder, theft, rape, arson, kidnapping, etc. Why is this a problem, if all the means used, too, are also compatible with the NAP? It is clearly

not. Thus we can see Dolan's error. He falsely analogizes between the libertarian desire to promote peace and justice, and the goal of mainstream economists to impose perfect competition. Yes, in both cases an ideal situation is compared to an actual one, and the goal is to transform the latter into the former. But of this a valid analogy cannot be made. Just because it is unjust and improper to make the world safe for perfect competition via anti-trust legislation does not at all imply it is illicit for libertarians to try to shape the world in the direction of the NAP.

The problem rests not with trying to change reality so that it matches some ideal. It all depends upon how this is done, and which ideal we are talking about. In the libertarian view, imposing perfect competition violates the NAP. However, introducing the libertarian legal code is an unmitigated good. Dolan argues that because the imposition of perfect competition has all sorts of drawbacks, this must also pertain to installing the NAP as the law of the land. Nothing could be further from the truth.

A last minor point in this section: I cannot see my way clear to agreeing with Dolan (2014) that there is any disagreement between Rothbard (1982) and Anderson (1989). The latter urges jail sentences for incessant polluters who drop garbage on other people's property whether in the macro sense (orange peels, egg shells, coffee grinds) or the micro (these types of things, but all ground up into dust). The former would agree, given that this was proven beyond a reasonable doubt. Does Dolan think Anderson would acquiesce to prison terms for the accused in the absence of any proof? Nothing I read in Anderson leads me to that conclusion. Anderson is no wild man watermelon, calling for jail sentences for those who exhale.

### **CHALLENGE NO. 3: BRINGING THE PRICE SYSTEM TO BEAR**

There is a difficulty in this section right at the outset: it is mislabeled. Dolan characterizes this as bringing *the price system* to bear; but what he really has in mind are not at all market prices. Instead, he is defending something very different: tradable emissions rights, emissions trading, pollution fees, taxes, etc.

If someone fails to distinguish between a market price on the one hand and tradable emissions rights, emissions trading, pollution fees, taxes on the other, it is highly problematic. For this is a most basic distinction. A price is an amount of money someone *voluntarily* gives up in order to attain a good or service. A commercial interaction where prices play a role is necessarily a non-coercive one. These other entities are at best semi- or demi- or quasi-prices. They do not occur in free markets, but rather under market-like circumstances. It cannot be denied that there are certain similarities between the two. Perhaps that is what has confused Dolan. But if we are to make sense of these phenomena, we must peer beneath the surface to the underlying reality, something not undertaken by this author.<sup>15</sup> We must sharply, maniacally even, separate in our minds what is agreed upon by all parties (prices) from what is not (taxes, government fees, etc.).

Dolan (2014) attempts to hoist Rothbard (1982, p. 77) by the latter's petard. He defines tradable emissions rights (TERs) markets as the purchase and sale of homesteaded,<sup>16</sup> and therefore legitimately owned rights to pollute. In other words, for this author, what is traded in a TER is something owned by the seller, under libertarian law. Let us allow Dolan (2014) to speak for himself on this matter:

An Austrian case for emissions trading follows naturally from Rothbardian homesteading of pollution easements. Rothbard (1982, p. 77) uses the example of noise pollution from an airport. At time T, he imagines, an entrepreneur sets up an airport in an open area with no one nearby to be bothered by the noise. The facility emits X decibels of noise into the surrounding unused airspace, thereby homesteading the right to X decibels. If someone builds a house nearby at time T+1, says Rothbard, they have no cause for action against airport, since they have "come to the nuisance." However, if the homeowner bought the property for a price that reflected ambient noise of X decibels, and at time T+2 the airport increases its noise emissions to 2X decibels, the homeowner would have a cause of action for 1 decibel of excess noise.

Rothbard specifies that the titles to pollution easements created by homesteading are transferable by sale, gift, or bequest. Furthermore,

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<sup>15</sup> For a critique of these socialist schemes, see McGee and Block, 1994.

<sup>16</sup> What happened to Dolan's (2014) previous critiques of homesteading, pray tell. Here, he relies on them fully.

they are separable, in the sense that it is permissible to sell them without selling the airport itself.

If purchases and sales of noise easements became frequent, some entrepreneur would no doubt set up an exchange to trade them in standardized units. Soon a fully developed, fully private emissions trading scheme would spontaneously emerge, with the supply of easements for each type of pollution capped by the number that had been legitimately homesteaded. Once population density increased to the point that no part of the relevant airspace or watershed remained unused, there could be no further homesteading and the caps would become permanent. (p. 209)

There are problems with this. First a minor one. I think there is a typo here. Dolan (2014) should have said “the homeowner would have a cause of action for 1X decibels of excess noise.” That is, “1X decibels,” not “1 decibel.” The major difficulty is that Rothbard is talking about emissions, noise in this case but it could have been soot, or smells, or anything else, that was *homesteaded*. That is, these rights were legitimately owned by the seller. But this is not at all what tradable emissions is all about. Rather there is no recognition in mainstream depictions of this phenomenon.

The typical case is as follows. There are three firms, call them A, B and C, that together emit into the air and/or water 50 tons each of pollution, or 150 tons total. These emanations are trespasses onto the physical property and bodies (lungs) of innocent victims. Due to hockey stick considerations, the authorities have decided that 100 tons of such lawlessness is optimal. How to achieve this goal? In the bad old not TER method, called “command and control,” each firm would be legally required to cut back from 50 to 33.3 tons, and that would be the end of it. This order could be mandated in the form of a regulatory requirement or a very high tax on any emissions in excess of the 33.3 tons, it matters not which for our purposes. *There is not even a hint that these 150 or 100 tons emissions are justified on the basis of libertarian homesteading.* The new presumably good method, the one based on quasi-market principles (TERs), is to allow each of these three companies to purchase and/or sell rights to engage in pollution to their heart’s content. Possibly, there will be no purchases or sales, and each company will cut down its rate of emissions by one third. Or, one of them, A, perhaps with newer plant and equipment will decrease by 50 percent or more because it can do so relatively

cheaply, and B may stand pat, while C may even increase its tonnage, and pay A for this privilege of not only not having to cut but to actually increase its level of emissions.

The point is, Dolan (2014) is extrapolating from a case where the rights to emit noise, or whatever, was licitly owned, to one where it most certainly is not. Thus, his failure is to distinguish NAP violations from non-NAP violations. It cannot possibly be underestimated how important this distinction is. Without it, we might as well have markets in rape rights, or murder rights, or kidnapping rights, or theft rights. What we are talking about here is nothing less than a contradiction in terms on Dolan's part.

Next, Dolan (2014) considers pollution fees. States he on this matter:

Pollution fees are another way to inject prices artificially into a world where muddled property rights and imperfect courts prevent them from emerging spontaneously. I find that neoclassical economists tend to like pollution fees better than emissions trading, but for Austrians, they are probably an even harder sell. They object that pollution fees are a form of tax, and that all taxes are bad. Even so, that does not mean they are equally bad. (p. 210)

Obviously, this author should have mentioned libertarians, not Austrians, since only the latter, not the former, can say anything even remotely resembling the claim that "all taxes are bad." Libertarians, of course, must agree with Dolan (2014) that some taxes are worse than others. For example, an income tax of 5 percent is worse than one of 4 percent. But our author is not content with this truism. He goes further:

...the effects of pollution fees must be compared not with the operation of a nonexistent tax-free market, but with a situation in which pollution goes altogether unpriced. Whatever one's distaste for taxes, the latter situation is, arguably, even less congenial to economic coordination. (p. 210)

And here again we must agree with Dolan: it is difficult to say which is worse: a tax or allowing some to trespass pollutants onto other people's property. It all depends upon the extent of each. However, there is no reason to believe that these are the only realistic options. As we have seen in our criticism of Dolan above,



the market is indeed capable of not so much “pricing” of pollutants, but forbidding<sup>17</sup> them.<sup>18</sup>

Dolan (2014) now considers, and rejects, objections to TERs and pollution taxes. The first is the calculation objection: governments have no way of knowing the proper, efficient taxes, nor the optimal amount of pollution (150 tons in our example). He does so on the ground that libertarians “offer no institutionally practicable alternative” to the present system. Nonsense. Rothbard (1982) entirely fits this bill.<sup>19</sup> Second, he maintains that the proper comparison is between TERs and pollution taxes on the one hand, and “the current mish-mash of command-and-control policy, CAFE standards, ethanol blend ratios and the rest (which) is a mess.” But what about full free enterprise? Not some “nonexistent ideal of perfect enforcement of property rights,” but rather an actual system based roughly on the property rights system stemming from homesteading that was working until about the 1870s, coupled with advances in modern forensic technology. Is this free market system to be swept down the memory hole, merely because during the progressive period (Horwitz, 1977) it was jettisoned? Here, Dolan (2014) is making the mistake that might well be characterized as misplaced concretes: the government does not allow free enterprise to work, therefore market cannot be efficacious. Contrary-to-fact conditionals would appear to be beyond his ken.

Dolan (2014) next errs when he conflates two very different things. First is the undoubted fact that it is difficult, well-nigh impossible, for a court, any court, to come to a precise estimate of damages for contaminants that cause cancer. Second are the very well-founded critiques of Cordato (2004) and Carden (2013) to the effect that TERs are subject to the Austrian critique of socialist central planning. Dolan argues in effect that since the first is factual, and it is, we may safely ignore the second. Not so, not so. Our author argues in this manner because he really cannot appreciate that libertarian law can deal with what he calls environmental

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<sup>17</sup> Sue the road owner not the individual motorist; improvements in forensics technology.

<sup>18</sup> Well, illegitimate ones that have not first been homesteaded.

<sup>19</sup> Others who support Rothbard on this matter include: Block (1994, 1998, 2009a, 2011a, 2011b, 2012), DiLorenzo (1990), Horwitz (1977), Lewin (1982), McGee and Block (1994).

mass torts. His arguments on that score have been found wanting. The present mistake is but an implication of that one. Try this as a mental experiment. Assume that U.S. law and court decisions pre-1870, coupled with modern progress in environmental forensics, really could function adequately, at least as well as it did before that turning point in our history. Then, would Dolan (2014) be in a position to reject the contributions of Cordato (2004) and Carden (2013)? I contend that Dolan would then not be able to take on this perspective. Dolan (2014) underestimates the power of the argument put forth by Cordato (2004) and Carden (2013). Yes, the judge has no objective way to award damages. But the *market process*<sup>20</sup> can achieve objective prices; if they are the wrong prices, someone will lose profits and go bankrupt. True, only in equilibrium will the prices generated by the market be the ones that maximize utility of all participants in commerce. But, we are always and forever tending in that direction. In sharp contrast, the judge has no such market process working in his favor, at least not the one employed by the state apparatus.

Dolan (2014) makes a good point in his defense of TERs on the grounds that they do not compensate this victim of pollution. He offers a second-best argument: they are better for coordination purposes when the prices of emissions are raised without making the victim whole than when they are not raised and the victim is still not compensated. True enough. But, we must insist, libertarian law in a realistic setting is still preferable to the TER system in that it does both.

The last objection to TERs dealt with by Dolan (2014) is that they in effect support stolen property. Who is the theft from? Why, from the victims of pollution. They have had their property and their lungs inundated with trespassing dust particles. Who are the thieves? This is as readily answered: the trespassers. Why does our author reject this criticism? He sees this as a “legitimate objection”

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<sup>20</sup> Dolan’s appreciation of the market process is not as robust as it could be. Perhaps he could benefit from reading some of the Austrian literature on this subject: Boettke and Prychitko (1998), Cowen and Parker (1997), Ebeling (1985, 1990), Ekelund and Sauman (1988), Fink (1982), Foss and Mahnke (2000), Foss and Christensen (2001), Gordon (1995), Kirzner (1982, 1992, 1997), Lachmann (1976, 1977), Langlois (2001), Robertson and Yu (2001), Thornton (1994), Wagner (1989), Yeager (1986).

but still defends TERs on the ground that “proper design of the trading scheme could overcome it, at least in part.” But if this is a “legitimate objection” which can only be overcome in part by proper design,<sup>21</sup> why not reject TERs as socialistic (McGee and Block, 1994)?

## CONCLUSION

A fair summary of what appears above is that Dolan (2014) consists of a tissue of errors. Nonetheless, the Austro-libertarian community, I think, must be grateful to this author for his efforts to undermine the veracity of this school of thought. Why? Because these are important challenges. If we cannot answer them, we might as well pack up shop. Hopefully, Dolan (2014), plus the present response, will convince others who might be on the fence on these matters that the Austrian school of economics, and the libertarian political philosophy, are still going concerns. Who knows? Possibly Dolan himself might come to that precise conclusion.

Let me close with one substantive point, where Dolan (2014) does not appear to have done his homework. He says: “In my view, Austrian economists *qua* economists have to deal with climate change and the link in the spirit of ‘What if Chicken Little is right this time?’ That is, they need to propose solutions that *would* work *if* at some point real scientists persuade them that climate change is a real threat.” Obviously, the absolute last time this will be mentioned, Dolan confuses Austrianism and libertarianism; he should have posed this challenge to the latter, not the former.

In the event, he has been anticipated on this very point. This appears in Block (2012): Question: “...how can we solve the problem of global warming without infringing the property rights of the emitter?” Response (Block, 2012):

If we are still in *arguendo* mode, positing a vast polluter, then we are not at all violating his rights when we compel him to cease and desist. Hey, he is in effect a murderer. We stop him in self-defense, just as we would a guy running at us, screaming and brandishing a knife or gun.

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<sup>21</sup> “Proper design” would appear to be part of the Nirvana fallacy against which Dolan (2014) constantly inveighs.

In other words, if Chicken Little is right, and underarm deodorants,<sup>22</sup> aerosols,<sup>23</sup> refrigerants,<sup>24</sup> etc. really cause global warming, which in turn leads to cancer and other dread diseases,<sup>25</sup> then by gum and by golly, the libertarian would prohibit them at the point of a gun. Using these products would under these wild-eyed assumptions be akin to shooting howitzers up into the air, with no consideration of where they may land. But the point is, libertarians have already responded to this “spirit” called for by Dolan. And the answer is clear. Then, they would be NAP violations.

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<sup>22</sup> See <http://www.supergreenme.com/go-green-environment-eco:The-Dangers-of-Deodorants-How-You-Can-Be-Eco-Friendly-and-Still-Smell-Good>.

<sup>23</sup> See <https://www.google.com/webhp?q=aerosols+effects+on+global+warming>.

<sup>24</sup> See <http://www.beyondhfcs.org/pages/natural-refrigerants.php>.

<sup>25</sup> We are now *deeply* into *argumentum arguendo*.

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