COMMENTS AND CRITICISM

THE IRRELEVANCE OF THE IMPOSSIBILITY
OF PURE LIBERTARIANISM[*]

In "The Impossibility of Pure Libertarianism" Braham and van Hees prove that four conditions on rights—completeness, conclusiveness, non-imposition, and symmetry—cannot be satisfied simultaneously. According to Braham and van Hees, these conditions are characteristic of what they call "pure libertarianism." Hence the thesis of their paper: Pure libertarianism is impossible.

Braham and van Hees do not define "pure libertarianism" except by claiming that a pure libertarian is one who endorses their four conditions. But presumably, if their proof is to have any relevance, at least some prominent libertarians must endorse their four conditions, and libertarianism as a philosophical position must in some way be committed to all the axioms. In this paper we demonstrate the irrelevance of Braham and van Hees's proof by showing that some of the most prominent libertarians do not endorse the completeness and conclusive conditions, and that there is nothing about libertarianism as a philosophical position that commits the libertarian to these two axioms. Indeed, we show that, more generally, there are strong reasons for libertarians to reject both conditions. In section I we introduce some key concepts from Braham and van Hees's argument. In section II we examine the completeness condition. In section III we examine the conclusiveness condition. There is a concluding section.

I. KEY CONCEPTS

Braham and van Hees start by describing the concept of a right, which is a prominent concept in libertarian philosophy. According to Braham and van Hees, "a right is a combination of one or more permissions and/or obligations of one or more individuals to adopt actions ('strategies') that fix certain features of the world ('outcomes')."[1] Let X be a set of feasible outcomes (that is, possible worlds). Let a "state of affairs" be a partial description of a feasible outcome/possible world. In other words, a state of affairs is a subset of X. For Braham and

van Hees, a right to A is an ability to fix a state of affairs such that A obtains. In other words, exercising a right to A narrows the set of feasible outcomes to the proper subset of X in which A obtains. For example, if a person exercises her right not to be murdered then she narrows the set of feasible outcomes to the set of possible worlds in which she is not murdered.

Some rights are proper subsets of other rights. Right R_1 is a proper subset of right R_2 if and only if (i) exercising R_1 fixes state of affairs S_1, (ii) exercising R_2 fixes state of affairs S_2, and (iii) S_1 is a proper subset of S_2. Here is an example. Assume that Jones has the right to go to Paris and the right to go to Lyon. He therefore also has the right to go to France, since both cities are in France. In this case the right to go to Paris is a proper subset of the right to go to France. It enables him to fix a state of affairs: the state of affairs in which he goes to Paris. But this is a proper subset of the state of affairs in which he goes to France. That set has (at least) two elements: (1) Jones goes to Paris and (2) Jones goes to Lyon. Therefore Jones's right to go to Paris is a proper subset of Jones's right to go to France. Following Braham and van Hees, call a right with no proper subsets an "atomic right."

A final key concept is that of a rights structure. A rights structure is "a description of all the permissions that all of the agents have and do not have."[2] Braham and van Hees argue—and we do not dispute—that rights in libertarian rights structures are co-possible. In other words, it is possible for all individuals to exercise their rights without violating anyone else's rights. With these key concepts in mind we can examine Braham and van Hees's conclusiveness and completeness conditions.

II. THE COMPLETENESS AXIOM IS IRRELEVANT

Braham and van Hees define the *completeness* axiom like this:

> The second restriction is that a libertarian rights allocation must be *complete*. This restriction is also implicit in Nozick's thought that individual choices—the exercise of rights—should take priority over collective choices. This means that at least for a Nozick-type libertarian we need to make sure that a rights structure offers each individual as many rights as possible. Hence, if a libertarian had to choose between two rights structures R and R' such that R' provides as many rights to everyone as R and at least one more right for one individual than does R, than she would choose R'.[3]

The idea here is that, when a libertarian is confronted with social system s_1 containing rights structure R and social system s_2 with rights structure

[2] *Ibid.*, p. 422.
[3] *Ibid.*, p. 426.

R', where R' contains strictly more rights than R, the libertarian must prefer s_2 to s_1. This leads to two commitments. First, libertarians' most preferred outcome must be one in which persons have the most extensive logically possible scheme of rights. Second, as we move down a libertarian's preference ordering of social systems, these social systems must contain strictly fewer rights than the higher-ranked social systems. However, as we will show, most libertarians lack such preferences. Moreover, the structure of many libertarians' normative commitments likely prevents them from endorsing—and at any rate does not commit them to—completeness. As such, the impossibility proof is largely irrelevant.

We believe libertarians can be divided into the following three categories based on their normative commitments. These three categories do not *only* contain libertarians. People in these three categories are libertarians insofar as they endorse a scheme of rights that is quite extensive and thus falls within the admittedly fuzzy category of libertarianism. The three categories are as follows:

(1) The *only* relevant normative consideration when evaluating social systems is rights-based.
(2) *One of at least two* relevant normative considerations when evaluating social systems is rights-based.
(3) Rights-based considerations are relevant normative considerations *only insofar as they further* other, more fundamental normative considerations.

We now examine whether groups (1)–(3) endorse the completeness axiom.

Those in group (3) cannot endorse the completeness axiom. The reason why should be obvious. If the goal of a scheme of rights is to further some other, more fundamental normative consideration m then whether we end up preferring s_1 to s_2 will *not* ultimately depend on the content of R or R'. Rather, whether we prefer s_1 to s_2 depends on how s_1 and s_2 score according to metric m. To be sure, those in group (3) believe that the most preferred social system according to metric m will contain a scheme of rights that is quite extensive. Indeed, that is what makes those in (3) who are libertarians actually libertarians. However, there is no reason to think that the most preferred social system according to m will *always* contain the most extensive logically possible scheme of rights R'. For completeness to characterize those in group (3) this must be the case. Nor is there reason to think that as we move down the social-system ranking that has been ordered by m we will see fewer and fewer rights attached to the respective social systems. There must be some argument in support of these conclusions. Braham and van Hees give no such argument.

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Braham and van Hees might reply: those in group (3) are not actually libertarians. Here is a list of people in group (3) that we believe are libertarians. Loren Lomasky defends the scheme of rights Nozick starts out assuming.[4] To do so he argues that such rights are justified insofar as they allow us to further our projects. As a result, Lomasky is in group (3). Another person in group (3) is John Tomasi. Tomasi endorses libertarian rights because he believes they best satisfy Rawls's two principles of justice once we correctly understand what basic liberties are required to exercise our two moral powers.[5] Furthermore, David Friedman, who is an anarcho-capitalist, adopts a strong scheme of libertarian rights based on consequentialist considerations.[6] Finally, Douglas Rasmussen and Douglas Den Uyl endorse a strong scheme of libertarian rights because they believe that is required for human flourishing.[7] To show that these philosophers are committed to completeness, Braham and van Hees would need to argue that their fundamental normative considerations require completeness. They do not give this argument. And, absent this argument, Braham and van Hees's proof of the impossibility of pure libertarianism does not apply to Lomasky, Tomasi, Friedman, Rasmussen, or Den Uyl, who many believe are libertarians.

Those in group (2) also cannot endorse the completeness axiom. This is less obvious than was the case with group (3). After all, those in group (2) say that rights-based considerations are an equally important consideration when evaluating social systems as some other normative consideration(s) m. As such, why is it not the case that increasing the number of rights from R to R' as we move from s_1 to s_2 does not necessarily make s_2 more preferred than s_1? The reason why is this. Increasing a society's normative desirability is an NK optimization problem, not a straightforward optimization problem.[8] An NK optimization problem means that we are trying to maximize across N variables, which have K interdependencies. We claim that increasing a society's normative desirability means that we want to maximize across

[4] Loren Lomasky, *Persons, Rights, and Moral Community* (New York: Oxford University Press, 1987).

[5] John Tomasi, *Free Market Fairness* (Princeton, NJ: Princeton University Press, 2013). Tomasi calls himself a classical liberal rather than a libertarian, but most people, when they look at the scheme of rights Tomasi endorses, would classify him as a libertarian. We think of Tomasi as a libertarian.

[6] David Friedman, *The Machinery of Freedom: Guide to Radical Capitalism* (La Salle, IL: Open Court, 1989).

[7] Douglas Rasmussen and Douglas Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, IL: Open Court, 1991).

[8] See Gerald Gaus, "Social Contract and Social Choice," *Rutgers Law Journal*, XLIII (2011): 243–76, at p. 258.

N variables relevant to normative evaluation (one of which is, by hypothesis, rights-based considerations), which have *K* interdependencies. This is opposed to increasing society's normative desirability being a straightforward optimization problem, where there are no interdependencies among the *N* variables.

There are good reasons to think that increasing society's normative desirability is an *NK* optimization problem, not a straightforward optimization problem. Suppose rights-based considerations are relevant to normative evaluation. Would giving some people more rights make society more normatively desirable? Perhaps, but the answer depends on whether this increase in rights affects other considerations relevant to normative evaluation. Suppose equality and opportunity are relevant to normative evaluation. What does this increase in rights do to equality? What does it do to opportunity? If increasing society's normative desirability just was a simple straightforward optimization problem then giving some people more rights would result in an unambiguously more desirable state of affairs. Yet this is not so. This implies that making society more normatively desirable is an *NK* optimization problem, not a straightforward optimization problem.

Since increasing a social system's normative desirability is an *NK* optimization problem those in group (2) cannot endorse the completeness axiom. To say that more rights is *always* better ignores the fact that rights-based considerations interact with other normative considerations *m* in an interdependent way. For it to be the case that more rights is *always* better it would have to be true that making society more normatively desirable is a straightforward optimization problem, where there are no *K* interdependencies across the *N* variables relevant to normative evaluation. But we have just argued that normative evaluation is not like this. That said, because those in group (2) are libertarians it follows they believe that, even with the interdependencies present, the most preferred social system will contain quite an extensive system of rights. Yet there is no reason to think, given the nature of the *NK* optimization problem those in group (2) face, that the most preferred system of social cooperation will contain the most extensive scheme of rights. But *even if* the most preferred social system had the maximal logically possible set of rights, there is no reason to think that as we move down the social system ranking we will see social systems with strictly decreasing schemes of rights in terms of their extensiveness. To assert this without argument is to not take seriously the general theory of the second best, which says that when one optimality condition fails to obtain in a model other conditions originally thought optimal might no longer be optimal. Braham and van Hees need to give some kind

of argument for why second-best considerations do not plague those libertarians in (2) in order for them to conclude that those libertarians in (2) endorse completeness.

Once again, Braham and van Hees might argue that those in group (2) are not actually libertarians. This would be implausible, because Nozick is in group (2), and Braham and van Hees take Nozick as the paragon libertarian throughout their paper. Nozick is in group (2) because he believes that there is at least one other normative consideration that is relevant besides rights, though he does not think rights derive *from* this other consideration. The other consideration is the avoidance of catastrophic moral horrors, and Nozick leaves it open that such horrors may trump rights-based considerations.[9] The fact that Nozick leaves open the possibility that rights may be violated to avoid catastrophic moral horrors implies that there are some normative considerations—namely, the avoidance of moral horrors—that matter along with rights. This means Nozick is in group (2). If social system s_2 with scheme of rights R' was guaranteed to lead to moral horrors whereas social system s_1 with scheme of rights R did not, where R' contains more rights than R, then it is plausible that Nozick would endorse s_1 with less extensive R over s_2 with more extensive R'. So Nozick does not endorse completeness.

We believe there are also prominent left libertarians in group (2). For instance, Michael Otsuka seems to believe that there are relevant normative considerations when evaluating social systems besides rights-based considerations. Consider this passage, where he compares Nozick's version of the Lockean proviso with his favored egalitarian version of the Lockean proviso:

> The egalitarian proviso has prima-facie plausibility for the following reason: One's coming to acquire previously unowned resources under these terms leaves nobody else at a disadvantage (or, in Locke's words, is 'no prejudice to any others'), where being left at a disadvantage is understood as being left with less than an equally advantageous share of resources. Any weaker, less egalitarian versions of the proviso would, like Nozick's, unfairly allow some to acquire greater advantage than others from their acquisition of unowned land and other worldly resources.[10]

We believe this passage implies that fairness and equal opportunity are relevant normative considerations for Otsuka. This puts him in group (2). We believe that were Otsuka confronted with social system

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[9] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 30n.
[10] Michael Otsuka, *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003), p. 24.

s_1 containing an extensive scheme of rights R that was also very fair and had very equal opportunity, and social system s_2 containing a slightly more extensive scheme of rights R' but, due to variable inter-dependency, was incredibly unfair and was incredibly unequal in terms of opportunity, he would choose s_1 over s_2. As such, we believe Otsuka cannot endorse completeness. By implication, Braham and van Hees's proof of the impossibility of pure libertarianism does not apply to Nozick and Otsuka, who many believe are libertarians.

Surely, though, those in group (1) must endorse the completeness axiom. In our arguments concerning groups (2) and (3) we argued that these groups cannot endorse the completeness axiom given their nor-mative commitments. Because of the structure of their normative com-mitments, they cannot *always* say that more rights are better. Or if they can always say this then some argument must be provided for why this is true, because *prima facie* it seems false. We believe that some folks in group (1) *can* endorse the completeness axiom. However—and this might be surprising—there is no reason to think those in group (1) *must* endorse the completeness axiom. It is possible to believe that the *only* relevant normative consideration when evaluating social systems is rights-based and still prefer social system s_1 with scheme of rights R to social system s_2 with scheme of rights R', even though R' contains more rights than R.

Here is a possibility proof of this claim. Suppose one is a natural-rights theorist. Suppose one believes that natural rights are given by God. God gives us natural-rights scheme R, and says that the only thing that matters is that society protect R. Let there be scheme of rights R'. R' contains all those rights in R plus two more rights: the right to sell oneself into slavery and the right to kill oneself. God does not think we ought to have such rights.[11] A natural-rights theorist should thus prefer social system s_1 with scheme of rights R to social system s_2 with scheme of rights R', even though R' is more extensive than R, and *even though the only relevant normative consideration when evaluating social systems is rights-based*. We believe most libertarians in group (1) ground rights in a manner such that they reject complete-ness. Indeed, any natural-rights theorist who rejects the right to sell oneself into slavery seems to be in such a camp. This would include, for instance, Murray Rothbard.[12] So Braham and van Hees's proof

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[11] See John Locke, *Second Treatise of Civil Government*, chapter II, section 6, where he says that, though man be in a state of liberty, "he has not liberty to destroy himself."

[12] Murray Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), p. 135. Rothbard rejects the right to sell oneself into slavery because he does not believe it is actually possible to transfer one's agency to another person. Since the only limit Braham and van Hees put on rights is that they be co-possible, they should be fine with including a right to do something impossible in R'.

of the impossibility of pure libertarianism does not apply to Rothbard, who many believe is a libertarian.

In this section we proved this. Since Braham and van Hees include the completeness axiom as part of the definition of pure libertarianism their proof does not apply to those libertarians in groups (2) and (3) and need not apply to those in group (1). This includes—but is not limited to—Lomasky, Tomasi, Friedman, Rasmussen, Den Uyl, Nozick, Otsuka, and Rothbard, who many believe are libertarians. As such, it is not clear how much relevance the proof has for contemporary libertarian political philosophy.

III. THE CONCLUSIVENESS AXIOM IS IRRELEVANT

According to Braham and van Hees, another condition of pure libertarianism is *conclusiveness*: "[I]f all individuals exercise one of their atomic rights, then exactly one outcome will remain—there are no further choices to be made."[13] This statement of conclusiveness is ambiguous. Must it be that *exactly one* outcome will remain if individuals exercise *exactly one* of their atomic rights? We doubt it. Suppose there are two individuals. Jones exercises his right to eat an apple and Smith exercises his right to eat an orange. There are other things Jones and Smith might also do. So conclusiveness is violated because, after each has exercised exactly one right, there are further choices to be made. However, Braham and van Hees's formal statement of the condition does not seem to require exactly one atomic right to be exercised.[14] Thus we interpret the conclusiveness condition to require that, if individuals exercise *some* of their atomic rights, then exactly one outcome will remain.

This reflects one motivation that, according to Braham and van Hees, underlies the conclusiveness condition. This motivation is that "rights should do all the work in determining the features of the world,"[15] which leaves no room for social choice mechanisms, such as governments, to do any work. They call this the "individualist minimum" motivation. They attribute this motivation to Nozick by citing the following passage: "Individual rights are co-possible; each person may exercise his rights as he chooses. The exercise of these rights fixes some features of the world. Within the constraints of these fixed features, a choice can be made by a social choice mechanism based upon a social ordering, if there are any choices left to make!"[16]

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[13] IPL, p. 425.
[14] IPL, p. 434.
[15] IPL, p. 425.
[16] Nozick, *Anarchy, State, and Utopia, op. cit.*, p. 166.

Braham and van Hees misread Nozick. Nozick is not endorsing conclusiveness in this passage. He is not saying that it is desirable that there be no social choice mechanism. He is not even discussing a libertarian rights structure. In this section of *Anarchy, State, and Utopia* Nozick is disputing Amartya Sen's characterization of rights in "The Impossibility of a Paretian Liberal."[17] Sen had given one minimal condition of liberal rights: the ability to determine the relative ranking of two alternatives in the social ordering. Nozick argues that this is an incorrect view of rights. On Sen's view, the domain of choice is given and rights enable persons to restrict permissible orderings of the elements of the domain. On Nozick's view, rights enable persons to restrict the domain of choice. By exercising a right persons remove elements from the domain of choice.

Nozick here is making an abstract point about how to model rights. It does not depend on the content of any particular rights structure. Nozick's claims about the nature of rights are compatible with a rights structure that is most un-libertarian. Nozick's claims are also compatible with a rights structure that is the empty set. If a given rights structure is empty then all persons' rights are co-possible: it is possible for all persons to exercise all rights as they choose since they have none. Moreover, every exercise of a right fixes features of the world and eliminates elements of the domain. But since there *are* no exercises of rights the domain is left entirely unrestricted, leaving all social decisions to the social choice mechanism. This is perfectly consistent with Nozick's claims about the nature of rights. So it is hard to see how Nozick's argument here even suggests the individualist-minimum motivation. We can find no other passage in *Anarchy, State, and Utopia* that suggests that Nozick endorses the individualist-minimum motivation, and Braham and van Hees do not point to one. We therefore conclude that there is no reason to believe that Nozick endorses the individualist-minimum motivation.[18] If their reason for adopting the conclusiveness axiom is to properly characterize Nozick's libertarianism then they have failed to do so.

[17] Amartya Sen, "The Impossibility of a Paretian Liberal," *Journal of Political Economy*, LXXVIII (1970): 152–57.

[18] Perhaps Braham and van Hees infer the individualist-minimum motivation from Nozick's "rhetorical flourish" (425) contained in the phrase "if there are any choices left to make!" This would not be a plausible inference. For one, it ignores the context of the passage: Nozick is not discussing the content of any rights structure. Moreover, even were Nozick discussing a libertarian rights structure, he would not be saying that a libertarian rights structure leaves no room for other choice mechanisms. He would merely be pointing out a trivial consequence of his analysis of rights, namely that *if* a libertarian rights structure were conclusive *then* there would be no choices left to make. This is not a statement of conclusiveness.

Braham and van Hees claim that libertarians have another motivation for endorsing conclusiveness. They claim that libertarians value the removal of the possibility of disagreement, and that conclusive rights structures remove the possibility of disagreement: "If a particular combination of atomic rights is compatible with different outcomes, then disputes may arise about which of those outcomes should be realized."[19] If conclusiveness holds, though, then these disputes cannot arise because the set of feasible outcomes is a singleton.

This argument is unsound. A rights structure specifies the set of rights that a person has. A person can *have* rights without *exercising* them. Thus simply instituting a conclusive rights structure does not guarantee that disputes will not arise. To avoid all disputes under a conclusive rights structure, persons must (a) know what their rights are and (b) exercise them. Conclusiveness implies neither (a) nor (b). Persons might have rights but not know that they have them. Or they might prefer not to exercise them. Thus they might fail to exercise a right that they have in order to create a dispute. So, conclusiveness of a rights structure does not guarantee the avoidance of disputes.

Perhaps Braham and van Hees intend to make a weaker claim, namely that the existence of a conclusive rights structure is the *best way* of ensuring the nonexistence of disputes even if it does not *guarantee* the nonexistence of disputes. This is possible, but they give no argument. Moreover, we doubt that this can be established *a priori*. It will depend on facts specific to the society. One important fact, for example, will be the extent to which persons exercise their rights. Take one extreme case: there exists a conclusive rights structure but nobody exercises any rights. The conclusive rights structure will settle no disputes. Some other decision mechanism, such as bargaining, is likely to settle at least one dispute.[20] Therefore, in this case, a social decision mechanism is superior to a conclusive rights structure. And this, we stress, is the limit case. We suspect that, in most societies, social decision mechanisms can solve more than one dispute. Let n be the number of disputes that a social decision mechanism in a given society can solve. Then, as long as the number of disputes that a conclusive rights structure settles is less than n, the libertarian solely concerned with settling disputes should prefer the social decision mechanism to the conclusive rights structure.

For a given society, it is an empirical question whether a conclusive rights structure or a social decision mechanism will settle more

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[19] IPL, p. 425.

[20] It might be thought that bargaining presupposes a conclusive rights structure. This is false on Braham and van Hees's account of rights. See IPL, p. 433.

disputes. It could be that, in most cases, a conclusive rights structure will settle more disputes than will a social decision mechanism, perhaps because there will be a high degree of rights-exercising. This is compatible with our argument. We are merely arguing that it is not a constitutive feature of libertarianism that disputes must be settled by rights structures alone. If we are correct then the argument from disputes provides no reason to believe that libertarians are committed to the conclusiveness condition, which is supposed to be a *general* condition on the nature of any pure libertarian rights structure. It cannot be a general condition if libertarians will sometimes prefer social decision mechanisms to conclusive rights structures, namely when social decision mechanisms are better at settling disputes.

More generally, it is hard to see why a libertarian must be committed to the claim that the exercise of rights should reduce the set of feasible outcomes to a singleton. Braham and van Hees do not discuss this, but here is one thought. Plausibly, a core libertarian commitment is that unconsented-to government interference is coercive and *pro tanto* illegitimate. Suppose there were two choices for narrowing the set of feasible outcomes to a singleton: (1) a conclusive rights structure, and (2) a non-conclusive rights structure supplemented by unconsented-to government interference. In this case, the libertarian should prefer (1).

We agree that, given this choice, a pure libertarian should prefer (1). However, the problem with this argument is that (1) and (2) are not exhaustive of all possible ways to narrow the feasible set of outcomes to a singleton. As Braham and van Hees point out, consensual agreements can narrow the feasible set of outcomes when a rights structure is inconclusive.[21] This suggests that there is another option for narrowing the set of feasible outcomes to a singleton: (3) a non-conclusive rights structure supplemented by bargaining. Unlike unconsented-to government interference, bargaining is not *pro tanto* illegitimate. It does not violate anyone's rights. So it is unclear why a pure libertarian should reject (3) as a means of narrowing the set of feasible outcomes. And if a libertarian can endorse (3) as a means of narrowing the set of feasible outcomes then libertarians do not endorse conclusiveness.[22] There are other ways possible outcomes can be narrowed down to a

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[21] IPL, p. 433.

[22] Braham and van Hees suggest that libertarians likely are open to consensual agreement as a means of narrowing the feasible set of outcomes given an inconclusive rights structure even though this "does not escape the impossibility" (433). We agree entirely. But Braham and van Hees do not show that any actual libertarian would not take recourse to consensual agreements in the first place, even ignoring the impossibility. Thus they do not show that the impossibility should trouble any actual libertarian.

singleton that do not involve coercive government and that are perfectly consistent with libertarianism. The conclusiveness axiom is compelling only if (1) and (2) are the only ways of narrowing down to a singleton. But this is false.

IV. A CONCLUDING SECTION

This paper argued that the proof of the impossibility of pure libertarianism is irrelevant. Two of the axioms—both necessary for the proof to go through—are under-motivated. Many libertarians do not accept either axiom. Libertarianism as a philosophical position more generally has good reasons to reject the axioms. By implication, libertarians should not lose any sleep over Braham and van Hees's proof.

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