

## **A Critical Commentary on Block 2011: “David Friedman and Libertarianism: a Critique” and a Comparison with Lester [2000] 2012’s Responses to Friedman**

**J C Lester**

(As the text indicates in various places, a version of this essay is now a chapter in a book: Lester, J. C. 2014. *Explaining Libertarianism: Some Philosophical Arguments*. Buckingham: The University of Buckingham Press.)

### **Abstract**

*David Friedman posed a number of libertarian philosophical problems (Friedman 1989). This essay criticizes Walter Block’s Rothbardian responses (Block 2011) and compares them with J C Lester’s critical-rationalist, libertarian-theory responses (Lester [2000] 2012). The main issues are as follows. 1. Critical rationalism and how it applies to libertarianism. 2.1. How libertarianism is not inherently about law and is inherently about morals. 2.2. How liberty relates to property and can be maximized: carbon dioxide and radio waves. 2.3. Applying the theory to flashlights. 2.4. Applying the theory to the probability of imposed risks. 2.5. “Homesteading” or initial acquisition. 2.6 What is “essential” for a “true libertarian.” 2.7. Crime and punishment. 2.8. Extent of punishment. 2.9. The libertarian response to a madman with a gun. 2.10. How contradictions in rights are possible. 2.11. The draft. 3.1. Utilitarian libertarianism and “nose counting”. 3.2. How interpersonal comparisons of utility are possible and utility monsters are not a threat. 3.3. Why it is not utilitarian in practice to kill an innocent prisoner to prevent a riot. 3.4. Why David Friedman should not be forced to give up one of his eyes. 3.5. How utilitarians can be libertarians. Conclusion: a proper theory of liberty combined with critical rationalism offers superior solutions to Friedman’s problems. Appendix: replies to two commentators.*

### **Overview**

In *Escape from Leviathan* (2000) I discussed some problems that David Friedman posed for libertarian philosophy in his *The Machinery of Freedom* (1989).<sup>1</sup> In his “David Friedman and Libertarianism: A Critique” (2011)<sup>2</sup>, Walter Block has also responded to the same arguments in Friedman’s book. Professor Block is a leading Rothbardian libertarian who has answers to Friedman that are significantly different from my own. The purpose of this essay is to offer a critical commentary on Block’s responses to Friedman – following his subheadings, for ease of reference – and to compare it with my own very different theoretical approach (but with occasional elaborations).

### **“1. Introduction”**

Block begins, “There is not one philosophy of libertarianism, but rather there are two.” And he cites the “utilitarian” and the “deontological” types (1). I am very happy to bring Professor Block the good news that there is at least one other philosophy of libertarianism. For in addition to any

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<sup>1</sup> David Friedman was kind enough to say that some of my replies were “ingenious” but he declined either to concede or to contest them (private communication).

<sup>2</sup> Block 2011.

consequentialist philosophies (and I would not restrict these to utilitarianism, in any of its flavours) and any deontological philosophies (and I would not restrict these to the Rothbardian-Blockian one) there is also critical-rationalist libertarianism, which does not base libertarianism on anything at all. For this view applies Karl Popper's extreme fallibilist epistemology of critical rationalism. As this remains not well known, I shall begin by very briefly outlining both critical rationalism and how I take it to apply to libertarianism.

According to critical rationalism, no theory (or thesis, view, outlook, opinion, argument, proof, etc.) can ever rule out the possibility of a refuting counter-instance or counter-argument (including critical rationalism itself, of course). With our finite and fallible reasoning facing the infinite worlds of unknown matter and theories, we never know what we might have overlooked. Therefore, theories cannot be justified (or supported, grounded, founded, based, backed, established, proven, etc.). All theories remain conjectures (or guesses, assumptions, suppositions, and so forth). We are obliged to use some conjectures for practical purposes; and not always unrefuted conjectures.<sup>3</sup> But the only epistemologically useful thing we can do with conjectures is to criticize or test them as best we can. If we cannot refute them, then they remain conjectures – but they might well be true, of course.<sup>4</sup> If we can refute them, then we learn something new. Truth is what we are aiming at, but we can only hope to make progress by rejecting theories that appear to be false.

However, refutations are themselves conjectural. So no refutation is ever justified either. Fortunately, there is a crucial asymmetry between a justification and a refutation. A conjectural refutation is coherent. It makes sense to say, *if* this observed phenomenon is a black swan, *then* “all swans are white” is refuted. Or *if* this is a correctly derived inconsistency, *then* the theory from which it is derived is false. By contrast, a conjectural justification is incoherent. We could not observe all swans (everywhere and everywhen) being white. Nor could we prove the assumptions of an allegedly justifying argument without entering an infinite regress. It needs to be understood that much that is mistaken for ‘justification’ is actually an explanation,<sup>5</sup> or application, or defence, or test. These may often be true or useful, but they are themselves conjectures and usually incomplete.

How does this apply to libertarianism? It is a conjecture that it is desirable in normal practice to allow universal interpersonal liberty. Libertarians think that this conjecture is not refuted by any criticism. All we can do is try to defend it by answering the best criticisms that we can find – and those of critics of libertarianism (occasionally these overlap). What about rights? One *might* conjecture that rights to liberty are the best rights, and then consider criticisms. What about utility? One *might* conjecture that liberty is the main cause of promoting utility (in terms of the satisfaction of spontaneous preferences, in particular), and then consider criticisms.<sup>6</sup> I say “might” because neither of these views can support the universal theory of libertarianism and because a defender of libertarianism might offer different answers concerning rights, or utility, or whatever some specific criticism is about. The point is to attempt the possible (to refute the particular potential refutation somehow, e.g., “Genetic tests indicate that this alleged black swan is really a new species of goose”) and to avoid the impossible (to establish the universal conjecture, e.g., “Genetic tests show that every swan – everywhere and everywhen – is white”).

In addition to that outline, I ought to mention the type of liberty that I assume libertarians to be defending. It is a kind of interpersonal liberty. In particular, it is about people being unconstrained by

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<sup>3</sup> Newtonian mechanics are refuted but often useful approximations for practical purposes. The conjecture that people can fly by the power of thought alone, by contrast, appears to be refuted and not worth trying in any dangerous context.

<sup>4</sup> And either a theory or its negation must be true (assuming the logical law, or principle, of excluded middle).

<sup>5</sup> E.g., ‘Markets allocate resources efficiently by people bidding for them in proportion to their profitability, whether monetary or psychic’.

<sup>6</sup> This is called the “classical liberal compatibility thesis” in Lester [2000] 2012. See Chapter 5, p.76, fn 13.

other people's interferences, or invasions, or aggressions, or trespasses, or – as I prefer to theorize it – it is about the absence of proactively imposed costs, ultimately in a pre-property sense (more on this later).

Therefore, when Block asserts that his deontological libertarianism “is based on the non aggression principle (NAP)” (1), there are at least three possible problems. 1) This statement is fine as long as he means “based” only in an explanatory sense, but not if he means it in any kind of grounding or justifying sense. 2) He cannot be literally right to explain this as “no one may properly initiate violence against another person or his justly owned property.” For a thief need not use violence (e.g., when shoplifting: a shoplifter is not thereby a ‘violent criminal’, is he?). And libertarian police may legitimately initiate violence against a non-violent thief, if necessary. 3) Any actual theory of liberty is at best tacit.

## “2. Critique”

### “2.1. Initiation of coercion”

Block is scathing about the fact that “Friedman starts off by attributing to ‘many libertarians’ the view that ‘it is always wrong to initiate coercion.’” Given Block’s subtitle and first sentence, I initially assumed “coercion” to be his target. I also made that assumption because what Block ought to be objecting to first and foremost here is, indeed, the expression “initiate coercion”. For just as with “initiating violence” this cannot be literally correct. A thief does not need to initiate *coercion* (force or the threat of force); and libertarian police often do need to initiate it. Instead, Block objects to the words “many libertarians” and “always wrong”. In particular, he tells us that “Libertarianism is a theory or a branch of *law*, not morality” (3). To make his point, Block supposes a “libertarian” who takes a job as a “Nazi concentration camp guard” in order to save many people (who would otherwise have been killed) even though he has to kill even more than he saves – “So as to demonstrate his bon[a] fides, and not be killed by the other guar[d]s for dereliction of duty” (footnote 7). Block says, “Not only were his actions moral, they were heroic.” But when he is “brought before the Nuremberg Court. Will he be found guilty of murder? Of course he will.” Though if the heirs of his victims forgive this “hero” he will escape punishment. Block asserts, “If these considerations do not establish a distinction, no, a chasm, between law and morality, then nothing will” (4).

It is interesting that Block appears to be a sort of utilitarian or consequentialist in some rather extreme matters of morals. But putting that curiosity aside, there are two main problems with his example. 1) It is, at best, not obvious that the “libertarian” guard has behaved morally by murdering some people in order to be able to save others. Many people would surely disagree – I am not convinced myself – and so the force of the point is weak. 2) The other Nazi guards were behaving in accordance with German state-law at the time. And, without going into details, the Nuremberg Court is problematic as an example of libertarian law in action. These add further points of confusion, at least.

Therefore, let us consider a simpler example. Someone takes a car without permission so that he can ram open the jammed doors of a burning office block and rescue the trapped occupants. The car is destroyed but the people are freed. Was his behaviour moral? I suspect that most self-identified libertarians would agree that it was. Did it flout libertarian law? Yes, because he stole and destroyed the car and now owes compensation to the car’s owner. So what does this show? It does not show that libertarianism is not about morals. It merely shows that morality and libertarianism can sometimes diverge in extremis. But that does not alter the fact that it is usually moral to respect libertarian law. Moreover, libertarianism is not a theory of what the law currently is anywhere. It is, at most, a theory of what the law *ought* to be. And thus libertarianism is partly a moral theory. More precisely,

however, libertarianism is an ideology. Therefore, it contains both factual and moral theses. Broadly understood, these theses are that liberty generally promotes human welfare and is moral. In fact, law does not need to be mentioned at all. And if a society were to comprise only libertarian people, then – in principle – there might not need to be any law (at least, if property rights are obvious enough). People would generally behave in a libertarian way – except for the occasional emergency where they would offer compensation afterwards. So much for the thesis that libertarianism is not about morals at all, but only about law. On the contrary, it is not inherently about law at all and it is inherently about morals (qua ideology<sup>7</sup>).

## “2.2. Absolute control”

Next Block considers Friedman’s assumption of “absolute” property rights, whereby Block quotes Friedman saying about carbon dioxide that, “If I have no right to impose a single molecule of pollution on anyone else’s property, then I must get the permission of all my neighbors to breath[e]” (4). Block’s response: “Libertarianism is a theory of *law*. And a basic element of law, in pretty much *any* of its emanations, is *de minimis*: The law does not concern itself with trifles.” As we have seen, libertarianism is not a theory of law, as such, and there might not even need to be laws in a libertarian society. However, one can advocate libertarian law – law based on libertarian principles – and I do so myself. And Block does quite well to cite the *de minimis* principle as a response to Friedman. It is not a hopeless response. Ultimately, though, it does not deal with the underlying philosophical problem – as we shall soon see.

Block then quotes Rothbard on this where Rothbard concludes, “Conviction of guilt ‘beyond a reasonable doubt’ appears to be the standard most consonant with libertarian principle” (4). I can only guess that Block means to imply that trifles cannot amount to guilt beyond a reasonable doubt. But that does not seem to add much. Block is more substantial when he cites Rothbard on “radio waves” where Rothbard argues

we must refine our concept of invasion to mean not just boundary crossing, but boundary crossings that in some way interfere with the owner’s use or enjoyment of this property. What counts is whether the senses of the property owner are interfered with. (5)

There are two main problems with this. First, radio waves are objectively invasive of other people’s property: they physically pass through human bodies and many other things. Therefore, this does not “refine our concept of invasion.” Instead, what it implies is that some invasions are to be allowed. Second, what counts cannot be “whether the senses of the property owner are interfered with” because a) trespassing would be acceptable as long as no “senses of the property owner are interfered with” (and most libertarians would not think that even undetected trespassing is acceptable); b) damage would be acceptable as long as no “senses of the property owner are interfered with” (and most libertarians would not think that even undetected damage is acceptable); and c) some ‘sense interferences’ need to be tolerated if liberty is to be maximized (more on this below).

So what is the correct libertarian response? It is to have a more refined theory of liberty. In fact, to have an explicit theory of liberty at all would be a start – many libertarians do not. I tend to say that people have interpersonal liberty to the extent that others do not proactively impose on them. But this is ultimately a pre-propertarian theory of liberty. And so in the event of new problems or clashes of liberty we can appeal to it to work out the best way to minimize any proactive impositions. It follows from this theory that people owning themselves is virtually always liberty-maximizing (because

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<sup>7</sup> A non-moral advocate of libertarianism is logically possible (e.g., for purely self-interested reasons).

proactive-imposition-minimizing). Similarly, ownership by use of unowned resources and after that by voluntary title-transfer is also almost always liberty-maximizing. I don't want to go into more detail than is needed here, so I will leave it at that for now.<sup>8</sup>

How does this apply to the two problems concerning carbon dioxide and radio waves? If I prefer not to have either your carbon dioxide or your radio waves objectively invading my property, including my body, then they do proactively impose on me to some small degree when they do so. But for me, or my agents, to prevent you from producing carbon dioxide or radio waves would proactively impose to a vastly greater extent on you (especially the prevention of your carbon-dioxide emissions). And the liberty-maximizing policy must be to prefer the lesser imposition. Moreover, the imposition on me is so trivial with radio waves that any compensation is too small to be economic to collect. While in the case of carbon dioxide, any compensation is cancelled out by my own, similar, carbon-dioxide production imposing on you. These, then, are the same practical outcomes as Block has here. However, now we have relatively clear theoretical explanations of how they are libertarian. Furthermore, the practical outcomes will not always be the same as Block's proffered solutions – as we shall see.

### **“2.3. Super flashlights”**

Block then quotes Friedman's argument that “absolute” property rights against invasion could prevent us from having any lights where the photons would trespass on the property of others, because there is no difference in principle between “a thousand megawatt laser beam” and “the brightness of a flashlight” (6). Block objects that “Just because the colors of the rainbow, ROYGBIV blend into one another, does not mean we cannot distinguish extreme points at the end of this distribution, nor, even, all throughout it” (6).

But Block's response is based on a misunderstanding. Friedman's point is not about the impossibility of distinguishing something that does damage from something that doesn't, because there is a continuum between them (which would be a version of the sorites paradox<sup>9</sup>). Rather, it is that absolute property rights could prevent things at the non-damaging end exactly as much as at the damaging end. And Friedman is absolutely right on that point. The correct answer to Friedman is that libertarian property rights are not absolute. They have to be modified where there is a clash with interpersonal liberty. And so, for instance, it proactively imposes on me significantly if I am not allowed to have ordinary lights on my property (or must have perfect blackouts). But it proactively imposes on you to a tiny degree that my photons objectively invade your property. So the lesser imposition must be preferred. And there will be no compensation due, either because the damages would be too small to collect or because of equivalent opposite “invasions” cancelling any claim.

### **“2.4. Probability of risk”**

Block next looks at Friedman applying similar arguments to risk. He cites Friedman's comparison between playing Russian roulette with someone else's head and flying a plane with a very small possibility that it might crash and kill people. Friedman thinks that imposing the risk of death, however small, on other people is incompatible with the “right not to be coerced, stated as an absolute moral principle” (7).

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<sup>8</sup> For a detailed account see Chapter 3 of Lester [2000] 2012.

<sup>9</sup> Briefly, if you remove a grain of sand from a heap of sand, at what point does it cease to be a ‘heap’ (from which word in Greek ‘sorites’ is derived)? It seems that there cannot be such a point. But if removing one grain always leaves a heap, then one grain alone is still a heap (moreover, removing that grain leaves a heap too). So there must be such a point.

Let us ignore both ‘coercion’ (as potentially confusing) and morals (as irrelevant to the real philosophical problem). We can then ask, is the imposition of a risk incompatible with libertarianism as absolute non-invasiveness? And the answer is, again, yes it is. But, rightly conceived, libertarianism is not about absolute non-invasiveness; it is about minimizing invasions. Where there is a clash, the lesser imposition is to be preferred and any significant compensation will be due. In the case of compulsory Russian roulette the proactive imposition is, to all practical intents and purposes, all one way: against the victim of the game. So this can be ruled out by libertarianism without weighing impositions against each other.<sup>10</sup> In the case of flying a plane, a weighing is more plausible. It does proactively impose on some people that they are at an extremely small risk of being hit by a falling plane. But that risk is probably too small to be worth suing for. It would proactively impose to a far greater degree if people were not allowed to fly by plane. Therefore, tolerating flying is liberty-maximizing (or proactive-imposition minimizing).

Block thinks that the problem is the word “absolute” (7). But that looks like a mistake. For “absolute” is only really used by Friedman for emphasis. In ‘non-aggression’, the prefix ‘non’ is itself an absolute. The real problem is that property-right aggressions (or invasions, or incursions, or trespasses, or impositions) must sometimes be allowed because clashes are inevitable. So the simple principle of non-aggression (or non-whatever) cannot be sufficient. Rather, it ought to be interpreted, in practice, to include minimizing aggression in the event of clashes. Put simply, ‘non-aggression’ is what liberty is, and ‘minimizing aggression’ is the practical libertarian policy. Block has no adequate theoretical solution here.

Rothbard is said to be right where he says, “Only if the radio transmissions are proven to be harmful to Smith’s person beyond a reasonable doubt should Jones’s activities be subject to injunction.” But that cannot be right, for there could be detectable but insignificant harm that is outweighed by the huge benefit of radio transmissions.

I conclude, therefore, that Friedman has put his finger on an important theoretical problem. The simple non-aggression principle is not “intact and unscathed”, as Block asserts (9). It has to be modified to deal with clashes. But once it is modified to include the minimization of aggressions (or invasions, etc.) then the problem is solved and the answer is clear in principle. We do not need to rely on Block’s relatively weak appeal to how it would be “reasonably interpreted” in practical situations.

## “2.5. Homesteading”

Block next takes Friedman to task over “homesteading”. He particularly objects to Friedman’s using John Locke as his target, for “Locke is a relatively poor representative of libertarian homesteading theory” (10). But then Block immediately asks “where oh where did Friedman get the pernicious idea that ‘land starts out belonging equally to everyone’?” However mistaken the idea is, and I agree that it is, it is famously repeated many times (the expression “in common” 29 times) in Locke’s *Second Treatise of Civil Government*, Chapter 5, “Of Property”, where the chapter begins, “God, as King David says (Psalms cxv.16), has given the earth to the children of men – given it to mankind in common.”

Block rejects, as a fabrication, Friedman’s account of “claiming ... or marking ... boundaries” or “loudly announcing that it is yours” as a way of establishing ownership (10). Instead, Block insists on “homesteading” (which potentially confusing expression I take to mean ‘initial acquisition’) and the

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<sup>10</sup> Strictly speaking, in all normal cases, allowing the use of other people’s bodies without their permission would be an immense proactive imposition on them. But not being allowed to do this would be a relatively trivial imposition. Hence self-ownership is derived from applying liberty as minimizing proactive impositions. But we no more need to try to weigh the difference than we need to weigh an elephant against an ant to determine which is heavier.

necessity that one has “*mixed his labor*”. So, having insisted that “Locke is a relatively poor representative of libertarian homesteading theory” (10) the only clue to “homesteading” we are given is Locke’s own labour-mixing theory: “when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property.” (Locke, *ibid.*)

Three questions to Block occur to me. 1) How does “homesteading” relate to a clear theory of *liberty* (for Block is supposed to be explaining *libertarianism*, which ought to have principles explicable in terms of liberty itself and not ad hoc additions)? 2) Why a “labor” theory of initial acquisition (it sounds as anachronistic and dubious as the labour theory of value)? 3) What if someone “homesteads” the sole natural water supply: in a drought, do others then have to pay whatever he chooses to charge or go without water? And I shall help Block by attempting to answer these questions.

1) The reason that initial acquisition (or “homesteading”) is libertarian is that it strongly tends to maximize liberty, i.e., minimize interpersonal proactive impositions (or, if one prefers, minimize interpersonal interferences, aggressions, invasions, initiated constraints, etc.). Without it we face the ‘tragedy of the commons’ whereby economizing is drastically curtailed because people cannot help being a nuisance to each other.

2) Labour-mixing is not a bad rule of thumb for initial acquisition. It usually works because when others, without our permission, take material things that we have made useful by our labours, then they thereby significantly interfere with our projects (and thus proactively impose on us). However, theoretically speaking, labour is completely irrelevant. If we simply start to use something that was previously unowned, then the imposed interventions of other people will be a constraint on our projects. No labour-mixing is necessary. It can be sufficient that we are using the resources in question. Of course, without somehow establishing boundary claims we are in a weaker position. For then it is often not clear what we are claiming or that there really is a pre-existing claim (rather than someone making a claim at that moment or even retrospectively). Consider Block’s assertion, “if I place a fence around a square mile of land, I own the periphery, but not the inside of it.” On the contrary, a fence might well suffice for the inside too. For I might have a use for keeping the land exactly as it is for a variety of reasons (as an investment, a beauty spot, a sacred grove, etc.). It would proactively impose on me to require me to mix my labour with it when that would be both irksome and reduce the value or even destroy it (maybe if a sacred grove or beauty spot). But, we may suppose, I do not significantly (anywhere near as much) interfere with, or proactively impose on, or initiate a constraint on, you in your projects by taking this place for myself. Strictly speaking, what is necessary is not *labour-mixing* but simply *using* (in whatever way) such that interventions would impose on us more than our ownership imposes on others. But in extremis things might be different, which brings us to 3.

3) It is generally true that allowing initial acquisition will minimize the extent to which people are a nuisance, interference, cost, etc., to each other. For if natural resources cannot be owned, then economizing – for one thing – is usually grossly interfered with. And I am not usually a greater obstacle to you by obliging you to find some other natural resources than the ones I am already using. On balance, initial acquisition (or propertising, as I sometimes call it) minimizes interpersonal imposed constraints. But what if someone were to “homestead” the sole natural water supply? This might not normally be a problem if there were other sources of water (collected from rain, or by desalinization of seawater, or imported, etc.). But what if there were a great drought and no other supplies were available? Then it is in principle possible that the, now monopoly, water-owner could impose more on other people by charging them high prices (or denying them water) than they could impose on him by requiring him to share the water. For he is, *ex hypothesi*, not the producer or the creator or – we may suppose – even the preserver, of the water itself (no matter how much labour-

mingling was involved). He is merely in the way of others who need that natural water supply. Therefore, the libertarian principle of minimizing interpersonal proactive impositions (or constraints, etc.) overrides his ownership. Such extreme situations are undoubtedly rare, but they illustrate two things. First, “homesteading” is not inherently libertarian. Second, the libertarian principle is ultimately pre-property. It should also be clear that extremely broad and uncontroversial interpersonal comparisons of proactively imposed *costs* are ultimately inevitable with libertarianism – not only in extremis, but also in ordinary cases. Otherwise, we cannot decide how to minimize proactive impositions when they clash. (I shall be returning to this issue later where Block deals with it in detail.)

## “2.6. Resource value”

Block quotes Friedman’s view that “the basis of property in unproduced resources such as land is shaky ... [but] ... it does not matter very much, since only a small fraction of the income of a modern society is derived from such resources.” Block insists that the fraction is irrelevant because “for the true libertarian, private property rights are absolutely essential.” (11) In light of what I have explained so far, I should like to amend this criticism thus: ‘for the true libertarian, the principle of liberty is absolutely essential, and the correct private property rights are derived from applying that principle to the circumstances.’

## “2.7. Crime and punishment”

Block quotes Friedman’s question: “how in principle do libertarian moral principles tell you what degree of proof should be necessary for conviction and punishment?” (11). Block replies,

The answer to his challenge is simple: Those responsible for punishing criminals are themselves responsible if they violate the rights of an innocent man ... the people responsible for this miscarriage of justice are themselves to be considered criminals. (12)

And then he quotes Rothbard at length to the same effect. That answer might be “simple” but it is not a direct answer to the question as to “what degree of proof should be necessary”. It answers the question obliquely, at best, if it means ‘convict and punish on *whatever degree of proof you like*, but you will stand to be convicted and punished as *criminals* if you are mistaken.’ However, that cannot be the right answer, for at least two reasons. First, some low degrees of proof would themselves flout the liberty of the accused person. Second, to duly convict and punish an innocent man who one honestly believes is almost certainly guilty would be possibly tortious but not criminal.

A more libertarian answer to Friedman and Block (and Rothbard) might go along the following lines. In the easy case, everyone involved, including the alleged criminal, will have contracted to accept the procedures of justice (whether beforehand or since the arrest) and any compensations that might be due in the event of errors. In this case, there will be a strong tendency for the market to produce an efficient outcome, all things considered. And that will include “what degree of proof should be necessary for conviction and punishment” (which might vary depending on the type of case<sup>11</sup>). In the difficult case, the alleged criminal pleads innocent and has not contracted to accept any procedure. What should the court do? Use its best libertarian procedures in good faith. Assume that it subsequently turns out that there has been a wrongful conviction and imprisonment. Then the innocent man is entitled to sue for full damages from the relevant organizations (which might or might not

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<sup>11</sup> For instance, a higher standard of proof might be required where execution is a possible sentence (as the punishment is so extreme and any mistake would be unrectifiable).

exceed what he would have been entitled to had he contracted in). However, it would be absurd to say that any policeman, judge, or jailer acting in good faith and using the best libertarian practices were thereby themselves criminals because of their mistakes.

## “2.8. Extent of punishment”

Block complains that

Friedman’s is not at all an accurate portrayal of libertarian (proportionality) punishment theory. When fully expounded, it consists not only of two teeth for a tooth, but it also incorporates the costs of capture as well as compensation for scaring. (13)

Block then elaborates a little and quotes Rothbard on the subject.

My main objection, as usual, is that Block’s reply provides no clear theoretical connection to liberty, and is somewhat arbitrary as a consequence. A more libertarian response would go along the following lines. Liberty is the absence of interpersonal proactively imposed costs (or some similar sort of formulation). Assume that someone proactively imposes on you. Then you are due, in order to rectify the imposition (as far as is possible, at least), full compensation (or restitution). This should aim to make you no worse off than you would have been (ignoring various counterfactual complications for the time being<sup>12</sup>). There are three main types of proactive imposition. 1) Where the imposition is accidental. 2) Where it is intentional (or reasonably foreseeable). 3) Where it is intentional (or reasonably foreseeable) and there is an attempt to escape rectification. I shall now explain these.

1) In the simplest case, for instance, the imposer breaks your window by an accident that amounts to a – non-criminal – tort. He, or his insurance company, pays you for rectifying the proximate damage done (the broken window) plus more for any inconvenience and associated reasonable expenses.

2) At the next stage, the imposer intentionally, or reasonably foreseeably, breaks your window. This amounts to a *criminal* act in libertarian terms. Accidental impositions are not crimes, unless due to gross negligence. But intentional, or reasonably foreseeable, impositions are crimes. If there was no attempt to escape rectification, then the full compensation will amount to the same as before plus an extra reasonable amount for any fear (as Block rightly mentions), or indignity (which Block overlooks), or any other additional imposition that you were caused. Presumably, the imposer could not be insured against committing a crime as it is a choice and not an accident. However, there is now an additional factor. Because the imposer treated your window as though it were his to break, you have the option of doing up to some price-equivalent damage to his property instead of taking the compensation. For that would not be a *proactive* imposition but a *reactive* one. Yet, unless you feel particularly vindictive, there would not seem to be much point. For what you could not do, in libertarian terms, is take full compensation and then enact retribution as well.

3) Suppose we add to 2 the attempt to escape detection. Now we need what I call the ‘risk multiplier’. Let us assume that one in ten people get caught for window-breaking. In addition to the proximate imposed cost of the crime, there is also now some cost of detection;<sup>13</sup> both of these being

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<sup>12</sup> For instance, suppose someone intentionally damages your property but accidentally helps you at the same time. Perhaps they break your window but thereby let out a dangerous build-up of gas. This benefit is probably best seen as your good luck. They still owe you for the broken window: the invasive act.

<sup>13</sup> The likelihood of capture and the magnitude of the crime will tend to limit how much expense is risked on detection. However, if too much is spent (perhaps by some obsessively vengeful billionaire), then it would itself go beyond libertarian rectification if it were all passed on to the criminal. The libertarian theoretical limit to

multiplied in proportion to the imposed risk that the criminal will probably escape. Consequently, if we do catch and convict a criminal, we are entitled as full compensation – in the case in question – to the proximate criminal compensation plus reasonable detection costs multiplied by ten. For that is the only amount that will compensate in full for the imposed cost of the risk, while not going beyond full compensation. However, where the damage from crime is insured against, the insurance company will quite possibly pay immediately for any proximate damage but then own the full risk-multiplier debt in case the criminal is caught (which the insurance company will likely encourage by various means). Thus crime would not be a good bet once we factor in the additional compensation costs of fear, indignity, detection, and any risk multiplier. However, the criminal is not being proactively imposed on. He is simply being made liable for the full damage that he caused. Moreover, the option to take some of the restitution in retributive form now becomes more practical. But how far the victim or the insurance company takes this would likely be a matter of contracts and business efficiency.

All this is only an outline of the libertarian view understood in terms of minimizing proactive impositions. I deal with various caveats, complications, and criticisms elsewhere.<sup>14</sup>

### “2.9. The madman”

Block cites Friedman’s example of the madman who

is about to open fire on a crowd; if he does so numerous innocent people will die. The only way to prevent him is to shoot him with a rifle that is within reach of several members of the crowd. The rifle is on the private property of its legitimate owner. He is a well known misanthrope who has publicly stated on numerous occasions that he is opposed to letting anyone use his rifle without his permission, even if it would save hundreds of lives. (14)

And Friedman suggests that “libertarian rights theory” does not permit people to take the rifle. But Block replies that

based on a correct understanding of this perspective, some hero would grab the gun and stop the madman in his tracks, by plugging him with this *stolen* firearm. Would he then owe a debt to the misanthropic shotgun owner? Yes, yes, of course. But it is very likely that any private court would go easy on this hero. (15)

I am inclined to go along with Block’s view as a practical solution, but in what way is it “based on a correct understanding of this perspective” (i.e., libertarian theory)? The part about owing “a debt to the misanthropic shotgun owner” seems to fit libertarian theory without a problem. But what about the rest? The idea that a “hero” simply flouts libertarian property rights for the greater good does not solve Friedman’s theoretical problem. Can we do better? One interesting possibility is libertarian consequentialism: maximizing the amount of liberty by whatever means necessary, including unlibertarian means. For the owner-flouting, shotgun-borrower would thereby be infringing liberty, but only in order to increase the amount of liberty by stopping the murder of innocent people. If liberty matters, then why not prefer such libertarian consequentialism? Libertarianism is never intended in this way in the literature, as far as I am aware. Problems with it are the same as with consequentialism generally. For instance, in less obvious cases how do we compare different people’s

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detection costs probably has to relate to what is normally regarded as economic. I cannot be more theoretically precise at the moment.

<sup>14</sup> See Lester [2000] 2012 Chapter 3, Lester 2011 Chapter 29, and the entries on “restitution” and “retribution” in Lester Forthcoming.

liberties? And how do we stop the undermining of liberty (the ‘moral hazard’) involved in allowing such comparisons (both by corrupt power and people not behaving prudently)? Libertarianism can itself be viewed as the right rules for rule (preference-)utilitarianism. So it would be odd not to have the same view with respect to liberty, i.e., rule-libertarian-consequentialism requires libertarian deontologism.

But what about very clear cases of exceptions such as the one in hand? I am inclined to give a similar answer to the one I gave to the similar problem that Vallentyne posed in his encyclopaedia entry on libertarianism (see Chapter 4). If someone flouts a libertarian rule but later pays full compensation to the victim of the flouting, then the infraction of libertarian deontologism has been fully rectified and so it has not been abandoned in favour of libertarian consequentialism. I can, of course, imagine all sorts of cases where we might want to abandon libertarian deontologism. But these thought-experiments do not impugn the practical advocacy of libertarian deontologism. If this is not exactly the right theoretical answer to Friedman, then it is at least superior to Block’s appeal to a liberty-flouting “hero”.

However, Block himself does give us a little more theory. For he continues that,

according to Friedman, there is a conflict in rights, between the right of members of the crowd not to be killed, and the right of the misanthrope to the sole use and possession of his rifle. But for the libertarian, there is no such thing ... Whenever there is such a seeming conflict, one or both of the so-called rights is mis-specified. Here, the misanthrope has a clear right to his gun, but the crowd does not at all have a “legitimate right ... (not to be killed).” Rather, this latter so-called “right” is not a right at all. Instead, it is an aspect of wealth, or economic welfare. Of course, it is a most heinous rights violation for the “madman” to murder innocent members of the crowd, but that is another matter. (15)

This passage is somewhat confused. A few brief points in response. 1) The “crowd”, i.e., each individual member, does have a “legitimate right ... (not to be killed)” proactively, i.e., murdered. What they do not have a libertarian right to is that some third party stops them from being murdered. 2) But if a third party does decide to save them in the way described, then there is a clash between their right not to be murdered and the gun-owner’s rights to the control of his gun. It is just that, in this example, the clash is not direct but only exists because of the actions of the third party. 3) It is probably slightly ideologically blinkered to restrict all legitimate rights to libertarian rights. For instance, a right to self-preservation (as famously defended by Hobbes) seems to be plausible to me. And we can easily imagine, at least in extremis, direct clashes between the right to self-preservation and libertarian property rights (for instance, the well-known examples of a hiker who breaks into a cabin to save his own life, and a falling man who manages to grasp onto a flagpole and seeks entrance to an apartment to save himself<sup>15</sup>). 4) Libertarian property rights themselves can clash, as we have

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<sup>15</sup> In response to these two specific examples, Block makes three key points against their advocates (I summarize considerably): 1) “If force is used to protect property rights, even deadly force, the owner is not guilty of the violation of any licit law.” 2) “We are invited ... to empathize with the flag pole hanger, and the hiker, not the respective property owners.” 3) “as long as these relatively rich ‘libertarians’ have enough money to keep themselves from dying from poverty, the logic of their argument compels them to give every penny they own over and above that level to alleviate the plight of the endangered poor.” Block 2003.

I respond briefly. 1) Grossly disproportionate and deadly force in defence of one’s property can itself proactively impose and thereby flout liberty (e.g., “I put landmines in my garden to deal with the trespassing of local children who use it as a shortcut”). 2) Proper consideration of both sides, in the examples given, suggests that deadly force is itself immensely more of an aggression against the persons of the hiker and the flagpole-hanger than their behaviours are aggressions. The fact that someone aggressed first, cannot mean that ‘anything goes’ in the name of ‘defence of private property’. 3) To assume that it is an illegitimate aggression to use

already seen in this essay. And when they do, it is the anterior pre-property principle of maximizing liberty (i.e., minimizing proactive impositions) that ought to be used to adjudicate the clash. 5) As partly explained by the foregoing points, all legitimate rights are more reasonably regarded as very strong prima facie rights rather than absolute rights. 6) None of this is to imply that compensation would not be due, even though one right had to give way to another. Of course, I could elaborate ad nauseam on all these points and deal with various criticisms. But I have already written about twice as much as Block's quoted passage, and we have the rest of his essay to deal with.

## **“2.10. Contradiction in rights”**

Block rejects Friedman's quoted conclusion that there can be a “right to commit a ... rights violation” (16). Block argues that “this is on a par with supposing square circles to exist. A right to violate a right is a veritable contradiction in terms”. But there is no “contradiction in terms” in the idea that some rights can trump other rights. A hierarchy of rights is perfectly conceivable. And so is the view that libertarian rights are very strong but prima facie. Moreover, both these views seem to be correct.

## **“2.11. The draft”**

Block quotes Friedman describing the circumstances of a hypothetical war with insufficient volunteer soldiers, no matter how high the pay, whereby even a libertarian “would rather see himself and everyone else temporarily enslaved by his own government than permanently enslaved by someone else's” (17). I should add that Friedman is supposing “a particularly vicious totalitarian government; if the conquest is successful we shall all lose most of our freedom and many of us will lose our lives” (Chapter 41). He is not supposing that this case for the draft is at all realistic: “The question is whether under any conceivable circumstances it could be” (Chapter 41).

Block's reply is that “given these unlikely circumstances, some hero would, should, come forth and impose a draft on the populace” and afterwards “we prosecute him to the fullest extent of the law for mass kidnapping.” But it is possible that “no one will be willing to impose any punishment upon our hero.” Finally, Block goes on to “Suppose that all the people refuse to fight, and not a single hero steps forward to force them to do so. Then, that society deserves to be enslaved by the enemy” (17).

It is easy to imagine a fantasy in which libertarianism would not be the best ideology. That said, it is not obvious that Friedman has a cast-iron example. Would it really be better to fight than to flee the country? Is a billion-dollar bounty not enough to have the leading political perpetrators assassinated? Etc. However, we could simply tighten the example to make it work. The point is that it implies nothing about the desirability of libertarianism as the best ideology for the real world, for which it is advocated. Block does not need to fear that Friedman's fantasy would count as a refutation of libertarianism and so think that libertarianism must somehow be shown to still apply. And he certainly does not need to add that, without volunteers or a “hero”, such a society “deserves to be enslaved by the enemy.” That is a gratuitously anti-libertarian remark analogous with, though far worse than, blaming a burglary victim for not having a burglar alarm, or a rape victim for wearing a short skirt.

## **“3. Utilitarian libertarianism”**

### **“3.1. Critique”**

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deadly force against minor self-preserving trespassing, simply does not logically imply that one is obliged to “alleviate the plight of the endangered poor.” From a libertarian viewpoint, one is not even obliged to help the hiker or the flagpole hanger: securing one's property from entry with locks, sturdy doors, etc., is fine. One is simply not able to shoot them or blow them up without becoming an aggressor oneself.

Block decides that it's time to "critically examine [Friedman's] utilitarian version of libertarianism" (18). He immediately objects that it "leads to nose counting." This appears to be a particularly weak version of the slippery-slope argument. It is redolent of the Puritan objection to love-making while standing: it could lead to dancing. In any case, this is otherwise better known as head counting, or, sans synecdoche, counting individual persons. This does not seem much of a criticism. Individuals are important, after all. However, Block asserts "there are several key weakness[es] in this perspective."

### "3.2. Weaknesses in utility theory"

Block's first main target is that utilitarianism "sees utility as a cardinal, not an ordinal measure" (18). He objects that "It is impossible to meaningfully say, 'I value this pen at 8 utils; this sandwich at 16 utils. Therefore, I value [the] latter at twice the rate of the former.'"

The words "impossible to meaningfully say" is a philosophical challenge. I think we might be able to make a sort of theoretical sense of cardinal utility, and make it objective too. We could imagine a brain scan or chemical test that showed the extent of a brain's pleasure centres firing or its serotonin levels. After a little calibration with the person's subjective experiences ("How do you rate this experience, positive or negative, from 1-10?") we could assign numbers to the different states that approximated to the degree of subjective utility and disutility. If consistent results were found over time, then even remote readings would match the person's subjective reports. Such a device would be a hedonometer, or a hedonimeter as the economist Edgeworth called it in his *Mathematical Psychics* (1881). It might even have practical uses as regards testing for pain or depression, possibly in a person appearing to be in a coma. However, suppose that such a device is not possible or, at least, insufficiently precise or consistent to function as cardinal. Then its impossibility would appear to be a contingent fact about the world – and one that might change – rather than relating to what one can "meaningfully say." As Karl Popper rightly observed, a statement is not meaningless because it cannot (currently) be tested (although it is metaphysical). What is not science is not thereby nonsense (and it might become testable science eventually, just as theoretical physics aims to do).

Block then goes on to object that Friedman's

utilitarian libertarianism engages in interpersonal comparisons of utility (icu). If cardinal utility is nonsense, and it is, then icu is nonsense on stilts.<sup>[16]</sup> Here, we must say something of the sort that Joe rates his shoes at 50 utils, and Mary her bicycle at 150 utils, and thus Mary values her possession at thrice the rate as does Joe. If this isn't just plain silly, then nothing is. (18)

Having constructed our hedonometer, we might go on to compare people. Of course, similar readings might not mean similar levels of utility. But there are ways to test for this. One such is what the person would do in order to achieve or avoid a certain reading on the hedonometer. But we do not need to pursue this line of enquiry. The point is that it is not "nonsense". It is simply not, currently, possible (though thought-reading brain scans are developing and something like this might become possible eventually). However, a far more important point is being overlooked here. We can and do make rough-and-ready interpersonal comparisons of utility all the time. If Joe were shoeless and Mary bikeless, then we might well judge that a pair a shoes for Joe would give him more utility than a bike would do for Mary. Or we might look at two different societies and say that the people living under an authoritarian regime are far less happy than the people living in a relatively libertarian society (and

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<sup>16</sup> Of course, this expression (as Block does not acknowledge) was coined by the arch-utilitarian Jeremy Bentham in relation to natural rights: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts." *Anarchical Fallacies* (1791-2).

such a general ICU seems to be both true and of practical importance). Of course, we would probably not bother to try to put a number to either of such comparisons. But they are interpersonal comparisons of utility, nonetheless. Block appears to imply that precise numbers are required for any kind of ICUs. But clearly they are not.

Block's third objection is "the assumption that all people have equal utility ... insofar as ability to enjoy life is concerned" (19). He complains that "there is never any *reason* given to justify this assumption. It is merely blithely assumed to be correct." A universal theory cannot be rightly criticized for lacking epistemological justification. However, a theory can be fairly criticized for being insufficiently explained. And that seems to be Block's point when he says that "it appears to go against common sense." Block goes on to compare "gourmets" and "wine connoisseurs" and the "cultured" with their opposites. And Block questions the "facile assumption that all individuals have the same utility functions." But, he is careful, if unwittingly comic, in quickly denying that "we can ever *know* any such thing [one way or the other], since utility is ordinal, not cardinal, and icu are invalid" (19, Fn. 34).

We can say several useful things in reply concerning "utility functions." 1) There is nothing in utilitarianism that precludes making allowances for people who are "gourmets" and "wine connoisseurs" and the "cultured". So, ironically, Block is erroneous in his facile assumption that utilitarianism involves the "facile assumption that all individuals have the same utility functions." 2) However, most people are not so radically different that broad utility-comparisons cannot be made. For instance, *ceteris paribus*, people who are starving, or in pain, or ill, or grieving, or homeless, or poverty-stricken are suffering more than people who are not any of these things, aren't they? It is dogmatic agnosticism to pretend that "It is impossible to meaningfully say." 3) Nothing follows from making this admission that is in any way a threat to (deontological) libertarianism. For (deontological) libertarianism withstands criticism as not clashing in practice with utilitarianism (primarily in the form of preference-utilitarianism). Or one can express this by saying that (deontological) libertarianism provides the rules for rule-preference-utilitarianism.

But Block continues that

this assumption is *crucial* to Friedman's entire philosophical edifice. For without it looms the objection of the utility monster ... who engages in mass murder, but ... he values the death of all human beings more than we, the rest of us, collectively, value our own lives. So, ...he can kill us all, and eat us.... (19)

Every theory is more like a floating boat than a grounded "edifice". But does the "utility monster" criticism clearly sink the boat of utilitarian theory? I first ought to mention, as Block does not, that the "utility monster" was, as far as I know, originally posited as a problem for utilitarianism by Robert Nozick.<sup>17</sup> As I am here engaged in defending my own philosophical response to Friedman, I next ought to outline – and elaborate on – my own replies to this type of criticism.<sup>18</sup> This is the argument that giving in to people with extreme utility functions of this kind, would inevitably result in a competitive evolution of such monsters with each new generation "out-wanting" the previous one. But they would not end up being any more satisfied than people originally were. In fact, they would almost certainly be more frustrated by their intemperance and lack of stoicism. And this is apart from the loss of utility of all the people who were destroyed along the way to this end state. Consequently, the right utilitarian thing to do is not to give in to people with intemperate emotions whenever they are found to exist.

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<sup>17</sup> Nozick 1974, 41.

<sup>18</sup> Lester [2000] 2012, 65, 69, 77, 159, 160.

Moreover, it seems plausible that humans have evolved to have just the sort of utility functions that maximize their survival and thriving – and hence maximize their utility.<sup>19</sup> The idea that this could be changed without detrimental consequences is, in effect, genetic central-planning that ignores the spontaneous order that human utility-functions are. It is a curious irony that the main error of both critics and advocates of utilitarianism is that neither of them gives proper consideration to long-term consequences.

However, *arguendo*, let us suppose that a utility monster could somehow be more sublimely satisfied than the whole of humanity put together (though I find it hard to make sense of that supposition: how satisfied could one utility monster be? And if one, why not two, etc.?). Anyway, in that fantasy world, then utility and liberty would diverge. But that is of no theoretical or practical significance as regards the congruence of liberty and utility in the actual world.

In footnote 35, Block suggests that, “A different type of utility monster is one for whom the benefits of rape, to him, outweigh the costs” to the victim (20). Again, the long-term consequence of allowing extreme utility functions to trump cannot be to maximize utility. This encourages, in defence or retaliation, the habitual – and eventually evolutionary – fostering of counterbalancing disutility in (potential) rape victims. It would be, in effect, an arms race of emotional intemperance. Utility could not plausibly be the winner.

Block is not entirely right that “this is an extreme example.” For very intemperate people, at least, already exist. So the option is already there to give in to them and thereby encourage such habits, and ultimately such evolved types of people. But courts should normally reject any defence that is based on the alleged presence of an extreme utility function in the accused person. Block thinks that it is “unlikely, no, impossible, that anyone can ever prove he is a utility monster.” On the contrary, we might “prove” (in the sense of test) the thesis in a variety of ways. One would be our hedonometer. Another would be seeing the extreme sorts of things that a person is prepared to do, including giving or receiving payment, to achieve or avoid some outcome. Consider the extreme behaviour of some users of hard drugs, for instance. Clearly they have temporarily made themselves into one kind of, relatively mild, “utility monster”. However, that is no good utilitarian reason to make them any less liable for any crimes they commit. It is, however, a good utilitarian reason to fully legalize their drugs. For that would promote both more utility and more liberty.

Now Block turns to an example that he thinks is “rather more realistic.”

### “3.3. Innocent prisoner”

He gives a version of the well-known example of a sheriff, a prisoner, and a lynch mob. The sheriff

has in lock-up a black man falsely accused of raping a white woman. The white mob outside the jail demands the prisoner in order to torture and then hang him. If the sheriff accedes to this demand, one innocent black man dies. If the jailer refuses, the mob will attack. The sheriff will kill half the mob, be murdered himself, and the black prisoner will still be lynched. What oh what should the sheriff do? (20)

Block replies, “The principled libertarian answer is very straightforward ... Start shooting at the lynch mob, go down fighting, and the devil take the hindmost.” Well, say I, at least wait until they attack first: perhaps they might not. And why is the sheriff obliged, for libertarian reasons, to kill members of the mob and die himself when he knows the situation is hopeless?

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<sup>19</sup> For instance, pain will give immediate disutility. But those born unable to feel pain suffer physical damage and shortened lives.

Block continues: “The Friedmanite utilitarian ‘libertarian’ will have to take the opposite tack, at least at first glance. ... the sheriff turns the innocent prisoner over to the mob” (20). However, Block concedes that Friedman

does have a way to avoid this pitfall. ... If and when word of this gets out, horrid precedents will be set for the future. Lynch mobs will become emboldened. Prisoners will not trust lawmen to protect them. They will thus be less likely to surrender, and more likely to try to shoot their way out of being arrested, which means more deaths. Law and order will be brought into disrepute, and many more people will die than half of this particular one (relatively small) lynch mob, one innocent prisoner, and one sheriff doing his proper job. (21)

Exactly. This is not merely “a way to avoid this pitfall” but an entirely reasonable account of why this is the correct (rule-)utilitarian position. But Block is not satisfied, for

there are so many, many ways in which secrecy can be maintained. The world could end right after that monumental injustice took place. A magician could come along and interfere with the memory of the half of the mob that survived, plus any bystanders. This episode could, more realistically have taken place in an isolated area, with no children, where no one else would ever hear of this sheriff’s malfeasance, and all the surviving elderly members of the mob soon die. Or, we could suppose any of this to be true *arguendo*. (21)

Yes of course, *arguendo*, a clash between liberty and utility is possible in a fantasy. And it will even occur from time to time in reality. So what? The systematic practical congruence of liberty and utility is what matters. And this is good news: we humans can have the best of both worlds. And libertarians and utilitarians ought to be allies. However, one is a libertarian first and foremost if one holds that, in reality, it is vastly better to have a very strong presumption in favour of liberty that can only be overridden by other values in extremis.

#### **“3.4. The eyes have it”**

Next Block tackles one of the classic “body parts” criticisms of utilitarianism. He suggests that it would be utilitarian if David Friedman were “forced” to give up one of his eyes to someone who is blind. And as he has not done so voluntarily, “he fails to be a consistent utilitarian ‘libertarian’” (22).

Several responses. 1) To advocate an ideology for a society is not to commit oneself to trying to live by it personally – whether or not the ideology is adopted by a society. 2) If one were to try to live by it personally without social adoption, then one might well suffer the costs without enjoying the benefits. Why should that be an obligation only on a sincere advocate (a victim of the system) and no one else (the perpetrators of the system)? 3) There are obvious moral hazards in making transplants of eyes, etc., compulsory. People will not look after themselves with as much care. 4) Any serious attempt to make such things compulsory would quite possibly result in an armed struggle between the government and the people until the policy is abandoned after much disutility has been inflicted. 5) Most important of all, a far more utilitarian and libertarian practical solution in reality is allowing free markets in all body parts, including eyes.<sup>20</sup> Fantasy clashes between liberty and utility are of no theoretical or practical significance.

#### **“3.5. Anti market regulations”**

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<sup>20</sup> See Taylor 2005.

Block notes Friedman's "free market anarchist" credentials. But he objects that "Friedman bases his viewpoint on these matters on utilitarian, not deontological or principled libertarian grounds" (22). Consequently, "if the few winners from these dirigisme institutions count more heavily than the many losers, then ... This author would then be precluded from defending even these elementary and basic aspects of the free enterprise philosophy." And so Block asks "In what sense, then, can Friedman's views even be considered libertarian?"

And the correct reply must be that someone is a libertarian if he advocates universal interpersonal liberty. What more, or less, could be needed? And this Friedman does do (albeit with an implicit and approximate theory of liberty, as most libertarians have – including Block himself). Hence Friedman is a libertarian. One's motives for advocating universal liberty are a separate matter.

According to Block, though, Friedman is only a libertarian "if we posit equal utilities for all people, and ICU. We can demonstrate, based on these assumptions, that these interferences with the market hurt more people, and more seriously, than they help" (23). As we have seen, we don't need to "posit equal utilities for all people" to defend free-market conjectures. Moreover, Block is equating markets with liberty without any explanation as to their alleged identity. Nevertheless, both Friedman and Block do advocate liberty in their own implicit and confused ways. Of course, "Friedman simply has no warrant for these assumptions". Neither does Block for his. Assumptions don't need warrants. And warrants would be epistemologically worthless, in any case. So it is true that Friedman's "intellectual edifice ... is based on nothing at all." So is Block's. And so is everyone's. That is one consequence of critical rationalism's being the true epistemology. But as long as we are prepared to take criticism seriously, then there is the chance of discovering errors in our conjectures. And that is another consequence of critical rationalism's being the true epistemology.

#### **"4. Conclusion"**

Block finishes by upbraiding Friedman for not giving proper references and quotations. Instead, he "criticized what some libertarian or other said about something that Friedman overheard" (23). And Block somewhat harshly asserts that "Friedman's practice is a disgrace to good scholarship." However, he also then congratulates Friedman for "giving deontological libertarianism a good run for its money. There is no principled libertarian who can hold this position without being able to deal with Friedman's excellent, although mistaken, objections."

Yes, there is a difference between being a scholar and being a thinker – although they partly complement each other. And Friedman would have done slightly better to have more real quotations where possible. Block himself occasionally draws on philosophical literature without quotations or references. But I do not thereby impugn his scholarship. And I thank him for his stimulating, although mistaken, arguments. As we have seen, a proper theory of liberty combined with a critical-rationalist approach and various alternative assumptions can solve Friedman's philosophical problems in a far more convincing manner than the approximations and ad hoc additions of Rothbardism.

#### **Appendix: Replies to Two Commentators**

There were a couple of review responses to a submitted draft of this essay. After carefully considering them both, there appears to be no reason to significantly alter anything as a result. Nevertheless, it remains more than likely that the reactions of these two commentators will be similar to many potential readers. Consequently, it might be helpful to have brief replies to the comments here. They will be quoted in full and interpreted literally.

## **First commentator**

the paper reads like an arbitrary selection of unrelated topics. After reading the paper, I have no idea what it is trying to do and what its intended contribution is.

How these topics are related and the purpose of the essay is explained in the title. It is explained again in the abstract. It is explained yet again in the opening paragraph. And it is explained once more in the conclusion. There are also a few explanatory remarks throughout the essay.

Let me put it another way: I don't think this paper passes the "so what?" test. Let us say that Block's arguments are faulty. Why does it matter?

Why does it matter in a libertarian scholarly periodical that a leading libertarian's arguments are faulty? What could matter more in that context?

What is the significance of Block's errors?

If they are errors, then they cannot be used to explain and defend libertarianism against Friedman's philosophical problems and objections, as Block (a leading Rothbardian) intends.

Do they mean that utilitarian libertarianism can be rehabilitated? That deontological libertarianism is flawed? That critical rationalist libertarianism is a good alternative?

At various points in response to Block, the essay argues that utilitarianism does not systematically clash with liberty in practice. At various points in response to Block, it also argues that deontological libertarianism is best viewed as *prima facie* rather than as absolute. Consequently, it is argued, there is no need to take sides between consequentialism and deontologism in practice (rather than in far-fetched or unusual cases). However, it is argued, critical rationalism entails that it is impossible to base libertarianism on either of these, or anything else, and so it needs to be advocated as an unrefuted conjecture. All this is quite clear on any careful reading.

Papers such as this need to take special care to not simply criticize, but to create.

This is an erroneous remark on two levels. First, there is nothing wrong with simply criticizing alleged errors by trying to show that they are errors: there is no moral or intellectual obligation to come up with a better alternative. Second, in each and every case an alternative theory is, in fact, offered – just as the essay says it will do.

Perhaps that is what the author intended to do with the references to critical rationalism, but this is unclear.

Critical rationalism is clearly explained and clearly applied where relevant. But it is offered as an alternative only to relevant parts of Block's replies to Friedman.

The reader is still left wondering what this paper is trying to add to our understanding.

As repeatedly explained throughout, in each case the essay seeks to show what is wrong with the Blockian/Rothbardian orthodoxy in response to David Friedman's problems and then seeks to offer a better, albeit heterodox, solution.

## Second commentator

This paper strikes me as rather random.

For ease of reference, as is explained, this essay replies to Block's points in the order in which he makes them. That is not random.

Block's papers tend to address many different topics, and his critique of Friedman is no different, coming across as rather disconnected. The problem is that because of this, the present paper critiquing Block is even more disjointed.

Block usefully and interestingly deals with a series of relatively "disconnected" issues in Friedman's famous and influential book. It is not a problem that they are "disconnected" and so it is not a problem that replies to them are similarly "disconnected". The reviewer does not explain how there is supposed to be a problem with having "disconnected" points. Is the idea that, in some way, an essay should always have a single unifying principle that applies to every point? If so, that is an error.

The section based on Block's introduction seems irrelevant. The arguments made in this section have nothing to do with Block's paper on Friedman.

The "section based on Block's introduction" is relevant because it contains important replies to crucial points that are initially made there by Block in his paper on Friedman. In any case, it is denying the manifest facts to say that they "have nothing to do with Block's paper on Friedman."

They are views Block expresses in many places, and which are conventionally held by other libertarians as well.

It is irrelevant that Block expresses these views "in many places." It is even more clearly irrelevant that they are "conventionally held by other libertarians as well." They are in his paper and it is legitimate to contest them.

As I read through the rest of the paper, I realized that this problem appears several times; many of Block's arguments are briefly and weakly presented in his paper on Friedman, whereas they are developed further and more coherently in other places (e.g. in Rothbard's works and Block's own writing).

There is nothing wrong with Block's replying to Friedman by outlining his views and giving references to more detailed discussions. And there is nothing wrong with someone replying to Block in a similar fashion.

I conclude that the specific project of this paper (a reply to Block's paper on Friedman) is misguided.

I conclude that the view that a published scholarly essay can have been written in such a way that any attempt to reply to it "is misguided" is misguided.

If the author wishes to establish critical rationalism as a viable alternative to others views,

The reply to Block is about a host of issues, as is Block's original article, and certainly not only about critical rationalism. It is, in any case, incompatible with critical rationalism to attempt to "establish" it.

or wishes to criticize others for unduly neglecting it,

The purpose is to point out that it exists and what it is. This will be interesting news for some people.

then the paper should be written as a stand-alone piece, not as a reply.

But the paper is clearly not about critical rationalism in particular. That is merely one issue.

By the way, Block's comment on the two types of libertarianism is a throw-away line, and should not be taken as a sustained argument.

Block means what he says, and contesting it is germane to the whole essay. The absence of sustained argument cannot make it irrelevant to mention a third option.

Further, when discussing critical-rationalist libertarianism, the author seems rather upset that Block has overlooked it.

On the contrary, as is explicitly and sincerely stated, "I am very happy to bring Professor Block the good news that there is at least one other philosophy of libertarianism." It seems the reviewer is "rather upset" by any mentioning of it, for reasons best known to himself.

Yet at the same time, the author does not supply the reader with much information about this strand of libertarianism.

Critical rationalism and how it applies to libertarianism is explained at what appears to be a suitable length in the context. Any interested readers are referred to additional reading (just as Block does himself).

The author can hardly object to Block overlooking critical rationalist libertarianism if that approach has few exponents or published works to advance it.

It is intellectually irrelevant whether a position has any exponents at all or any published works whatsoever. It is always relevant to point out a criticism. That is, of course, not to imply that Block is blameworthy for not having noticed it.

To put it bluntly, the argument comes off as conceited.

Such ad hominem are irrelevant to any argument, of course. But to explain an approach to libertarianism that Block has overlooked, and which is crucial to many of the succeeding arguments that answer him, is entirely relevant.

The author seems to simply be complaining that Block has neglected the author's own views, and that this is a very grave problem.

It is argued that Block's responses to Friedman's problems fail for all the reasons that are given, and then there is an argument for a better alternative in each case. Of course, the arguments that any

author puts forward must, in one sense, be *his* views. That is inevitable. Perhaps it would, in principle, be possible to excise any references to oneself. But just as Block refers – quite normally and relevantly – to his own views and works in replying to Friedman, so the essay refers to the author’s own in replying to Block.

I would hesitate in this comment if it were not for the fact that the author makes references to himself or herself throughout the text, awkwardly mentioned his or her own opinion, as if this were of intrinsic interest to the reader.

Just as Block does in his paper, of course, and just as this reviewer himself does – although both are also entirely proper and pertinent. In particular, however, the reviewer appears to have completely overlooked what the essay is explicitly about: it is a critical commentary and a comparison between Block’s Rothbardian responses to Friedman’s philosophical problems and the author’s very different theoretical responses. Therefore, the author can hardly fail to mention his own opinions.

How can the author declare (at the end of the paper) that critical rationalism is the true epistemology?

That one may assume anything is a rule of logic. However, the truth of critical rationalism was explained at the beginning of the essay. Why does the commentator simply ignore that explanation instead of attempting to fault it?

This is certainly not proven in the paper.

Of course it isn’t “proven”. That would be inconsistent with critical rationalism, as is clearly explained at the start of the essay.

Also, wouldn’t claiming its truth in some way establish it as more than a mere conjecture?

Of course not. As is explained in the essay, to assert something as true does not entail that it has been supported in any way. But if the reviewer wishes to disagree with critical rationalism, then why does he not attempt to fault the specific explanation given in the essay?

Even if this is not the case, the author ends by saying that there is no basis for libertarianism. But this is very different from saying that any basis for libertarianism is a conjectural one.

No it isn’t. A conjecture is not an epistemological basis. And, as critical rationalism explains, such a basis is neither possible nor necessary.

Perhaps I am misreading the author’s words, but the way the author phrases the conclusion make it sound more like epistemological nihilism.

Again, the commentator completely ignores the initial explanation of critical rationalism. To mistake critical rationalism for “epistemological nihilism” is philosophically ignorant. The conclusion does include the remark, “But as long as we are prepared to take criticism seriously, then there is the chance of discovering errors in our conjectures.” Such modest but hopeful fallibilism is clearly not “epistemological nihilism.”

Lastly, if none of these approaches is truly a basis for libertarianism,

Because, as is explained in the essay, there cannot be a “basis for libertarianism” or any other type of theory.

then why on earth should we care about Block or Friedman’s arguments?

Because, as is explained in the essay, the way to seek truth is to expose theories to criticism in the hope of eliminating error.

Why does Block’s view on innocent prisoners matter if his whole approach to libertarianism is wrong?

It is not completely wrong, as is stated in the essay. And it is illuminating to see exactly to what extent and how Block’s responses to Friedman are wrong. This is, after all, the repeatedly stated purpose of the essay.

Why does the author feel the need to critique minor points if the systems for which they are relevant must be rejected?

There is no “critique” in the philosophical sense of an immanent criticism; there are only specific criticisms. None of the issues discussed are “minor points.” There are no real “systems” here. And, in any case, a valid way to refute a general theory is to refute the consequences it implies (*modus tollendo tollens*).

### **Conclusion to Appendix**

As has been shown, none of either commentator’s criticisms has any force. Of course, this might have been different if the chosen commentators had some greater competence in philosophy or had, at least, read more carefully.

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