Natural Law and The Jurisprudence of Freedom

'For by the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserv'd, the safety of the Innocent is to be preferred.'[1]—John Locke

Frank van Dun

(Draft – Do not Quote)

In 'Against Libertarian Legalism'[2] I criticised Walter Block and N. Stephan Kinsella for their legalistic approach to law and their behaviourist approach to human action.[3] I focussed on their attempt to reduce 'libertarian jurisprudence' to a strict, quasi-mechanical application of the Rothbardian non-aggression rule. My paper was not intended to present an alternative theory of libertarian jurisprudence. It merely aimed to show that Block's and Kinsella's position ill accords with the 'Austrian' or praxeological analysis of the free market with which Rothbard's work is associated; and that it conflicts with common notions of morality and justice. Nevertheless, I added a rough sketch of a theory of natural law to give the reader some idea of the sources of my criticism.

In his long reply, Block rejects my criticism without making the slightest concession. That was no surprise because the reduction of libertarian jurisprudence to the rigid application of the non-aggression rule is a take-it-or-leave-it stance. Any concession would destroy its theoretical consistency. Because Block *defines* libertarianism as 'the non-aggression axiom; nothing more and nothing less'[4], he cannot but hold that any criticism of his position is an expression of anti-libertarian views or confusion and inconsistency on the part of a libertarian sympathiser. Block obviously places me in the latter category.

I am grateful for the opportunity to react to Block's reply but I shall resist

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[1] ***The Second Treatise of Government*, Chapter III, section 16, in Peter Lasslett (ed.), Locke, *Two Treatises of Government* (Cambridge Texts in the History of Political Thought, Cambridge University Press, Cambridge, 1988), p. 279.**

[2] ***Journal of Libertarian Studies*, Volume 17, No.3, 2002, …**

[3] **Walter Block, "Toward a Libertarian Theory of Blackmail", *Journal of Libertarian Studies*, Volume 15, No. 2, 2001, 55-88; N. Stephan Kinsella, "Against Intellectual Property", Ibid., 1-53.**

[4] **Block, "Reply to 'Against Libertarian Legalism'", …**

the temptation to go through it point by point.[5] Instead, I shall show that Block grossly misrepresents my views. In addition, in the spirit of *amicus Block, magis amica libertas*, I shall make some observations and suggestions that I hope will be helpful in developing sound libertarian jurisprudence. The task before us, after all, is to try to spell out the conditions under which people can live and work together in freedom. The foundations for such an undertaking can be found in the tradition of thinking about the natural law of the human world, even if one must acknowledge that not everything that goes under the name of natural law deserves to be retained. However, by itself, the non-aggression rule is not the key that unlocks the realm of freedom.

The non-aggression rule

Under the libertarian legal code, as Walter Block conceives it, if there is 'no equivalent to the initiation of violence against person or property, no libertarian law would have been violated.'[6] This is not unreasonable per se. Indeed, if one needs a succinct formula to give people a rough idea of libertarian thinking, such a statement often is adequate. However, Block assumes that it fully defines libertarianism.[7] For him, it expresses the supreme law of any libertarian society, its *dura lex sed lex*.[8]

Block thus makes aggression—initiating physical violence against or physical invasion of another's body or other material property—the single criterion for distinguishing between legal and illegal acts. True to his behaviourist approach, he does not consider questions of negligence or malicious intent. The only thing that matters is the fact that aggressive invasion or violence occurred or is about to occur.

To get a flavour of Block's preferred libertarian justice, consider this example: A man and his wife go mountain hiking. At one point they come to a

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[5] **At the time of writing this, I have not yet received Kinsella's comments.**

[6] **Block, "Reply to 'Against Libertarian Legalism'", p.59. He maintains (ibid. p.55) that 'people refrain from initiating or threatening violence against another person or his property' is *a necessary and sufficient condition* for 'people are free to do whatever they wish provided they respect everyone else's right to do the same'. That is not evident—and Block leaves us in the dark about why it should be.**

[7] **Block acknowledges that the Rothbardian non-aggression rule is the basis of 'the entire corpus of [his] work in legal and political philosophy.' (Block, "Reply to 'Against Libertarian Legalism'", ...) Kinsella is not so sanguine. In an e-mail to me, he wrote that he did not consider the non-aggression rule an axiom of libertarianism. Yet, the arguments in Kinsella, "Against Intellectual Property", consistently appeal to, and only to, that rule to determine what is 'legal' and what is 'not legal'.**

[8] **I shall have to say more about the notion of a libertarian society, its legal code and its relation to natural law. For now, I'll stick to Block's terminology without further comment.**

bridge over a ravine that looks rather shaky. They turn to a local man and ask whether the bridge is safe. The local man, who knows that the bridge will not hold a chicken, assures them it is safe. Minutes later, the couple lies dead at the bottom of the ravine covered with the debris of the bridge. By all accounts, the local man is responsible for the death of the hikers. Block, however, would say that he did nothing illegal. The man did not touch any member of the family. According to Block, in saying what he knew to be false, the man was merely exercising his right of free speech. Therefore he should not be held liable or punished. The couple was stupid to believe him—case dismissed! According to Block, a judge is supposed to treat the case exactly as if the couple had attempted to cross the bridge on the authority of an old guidebook for hikers. Moreover, anyone who used force against the man to make him pay compensation to the children of the hikers or to punish him for his callous act, would act illegally and be guilty of initiating violence.

However, Block leaves an opening. It would be legal to falsely accuse the man (or, indeed, any other person) of physically having pushed the hikers to their death. Punishing the man or making him pay for having caused the death of two people is illegal; falsely accusing him of doing what one knows he did not do is not only legal but also safe. Indeed, if it ever comes to light that the court made a mistake in condemning the accused, the judge (not those who made the false accusation) will have to pay compensation to the wrongly convicted person.

The spectre of 'mental aggression'

Why does Block focus on the single criterion of physical violence or invasion? Presumably because he wants to make it clear that he rejects the notion that in libertarian society the law will punish victimless crimes, enforce a particular moral code, or coercively impose a particular attitude or life-style. As he sees it, anyone who rejects his single criterion is logically committed to the position that there are victimless crimes and that it is the proper function of the law to enforce a particular morality or life-style. Consequently, because I reject his criterion of libertarian legality, he ascribes to me the view that "while indeed all physically invasive acts must be characterised as unjustified and prohibited by law, there is a second type of aggression, call it for want of a better word 'mental aggression', which should also […] be considered legally illicit."[9] That is not my view,[10] but I can understand that Block's single criterion leaves him no choice but to state that it must be. However, that only

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[9] **Block, "Reply to 'Against Libertarian Legalism'", …**

[10] **Already in my 1983 book *Het Fundamenteel Rechtsbeginsel* (Antwerp: Kluwer-Rechtswetenschappen) there is a full demonstration of the contradictions that result from assuming that giving offence ('mental aggression') is unlawful per se.**

indicates the inadequacy of his analytical framework. It certainly does not reveal an inconsistency on my part.

Block's criticism is based on what I had presented as 'the barest outline' of my theory of natural law. Apparently, he mistakenly believes that because, with his theory, the barest outline (the non-aggression rule) is the full theory (nothing more, nothing less), the same must be true of every other theory. That belief may explain but obviously does not justify Block's egregious misrepresentation of my position. Even if the position he ascribes to me is compatible with the 'barest outline' of natural law theory that I added to my comment, it does not follow that it probably is, let alone must be, my position. To make that inference is a fallacy. I do not object when Block says that the distinctions that I make are irrelevant in the perspective of the non-aggression rule. However, I must object when he suggests that in making those distinctions I have 'hijacked the ancient and honourable philosophy of natural law in behalf of… a very idiosyncratic personal political economic perspective.'[11]

Block's concept of 'mental aggression' covers phenomena as diverse as libel, blackmail, lying, making false accusations to the police, hate speech, inciting to riot, ordering one's followers to commit murder, shunning, boycotting, cutting 'dead', refusing to deal with, buy from, sell to, and so on.[12] He accordingly sums up my position by saying that I "seemingly, […] resort to the view that anything not 'nice' should be prohibited by law", going so far as to suggest that I claim that people have 'a right to feel good'.[13]

Clearly, Block believes that it is inconsistent, on the one hand, to prohibit libel, blackmail, making accusations that the accuser knows to be false, or inciting a riot, and, on the other hand, not to prohibit hate speech, shunning, boycotting, refusing to buy from or sell to a person. Indeed, in his simple scheme, all of those activities are of the same kind: those who engage in them do not actually invade another person's body or property. Therefore, according to Block, they have the same legal standing in libertarian society. No judge in such a society has right to treat them differently. A judge who sends to prison a gang-leader for inciting his henchmen to kill a person would be as guilty of a

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[11] **Block, "Reply to 'Against Libertarian Legalism'", … Here is a quote from Thomas Aquinas: "[Because] law regards the common welfare...there is no virtue whose practice the law may not prescribe." [However,] "human law is enacted on behalf of the mass of men, most of whom are very imperfect as far as the virtues are concerned. This is why law does not forbid every vice which a man of virtue would not commit, but only the more serious vices which even the multitude can avoid." *Summa Theologiae*, Iallae, Qu. 96, Artt. 3 and 2. Would Block place Aquinas outside the ancient and venerable tradition of natural law?**

[12] **Block, "Reply to 'Against Libertarian Legalism'", …**

[13] **Ibid. …, respectively …**

crime as a judge who orders the imprisonment of a housewife for not buying her bread from a particular baker.

I fully support Block's position with regard to lawful acts such as shunning, boycotting, refusing to deal with and the like, but not at all his position with regard to the unlawful types of activity that he mentions. Clearly, my criterion for distinguishing lawful and unlawful acts is different from Block's.[14] It does not fit the behaviourist canon that he derives from Rothbard, but that does not make it a source of inconsistency or a threat to anybody's freedom. It is firmly rooted in the distinction between order and disorder in the human world, which is basic to any realist philosophy of natural law.

Unlawful acts, harm and liability

My position is that anyone who demonstrably suffers harm in consequence of an *unlawful* act in principle[15] is entitled to get (if necessary, by using force) restitution or adequate compensation from the person or persons who caused it. The same holds if there is a clear-and-imminent risk of demonstrable harm. Opening a bakery in a village where there already is one does not entitle its owner to compensation. Orchestrating a smear campaign that is intended to drive him out of business does entitle him, to the extent that his business losses can be traced to the campaign's lies and false accusations.

Note that I do not say that every unlawful act is 'punishable'. Nor do I say that an act of a kind that entitles the victim to restitution in cases where the act actually results in harm does so entitle the victim in cases where no harm occurs. Similarly, if one is threatened by an act that carries a clear-and-imminent risk of harm then one is entitled to intervene to stop it. If an act that in other respects is of the same kind does not carry that threat then one is not entitled to interfere with it.

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[14] **See "Against Libertarian Legalism", …. The distinction between lawful and unlawful is not the same as that between legal and illegal. Indeed, many legal codes are themselves unlawful, a fact no libertarian would want to deny. See Frank van Dun, "The Lawful and the Legal", *Journal des économistes et des études humaines*, Vol. 6, No 4, 1995, 555 – 579.**

[15] **Obviously, in particular cases there may be circumstances that weaken or even invalidate the plaintiff's claim. That is why cases must be decided on the merits of the charges and the defences made by the parties—and why judicial decisions are essentially different from administrative or bureaucratic applications of 'the rules'. Relevant considerations are whether something was or was not common knowledge among the parties, the nature of their relationships, the content of past communications among them, standards of care or maintenance, and so on. These things figure prominently in judicial deliberations. Note that in Block's interpretation of the non-aggression rule, judges not only may but should disregard them so as not be diverted from the one and only relevant question: 'Did the defendant physically invade or threaten to invade another's person or property?'**

Lying is an example. Telling a lie—as distinct from uttering a mistaken opinion or believing what in fact is a lie and passing it on as the truth one believes it is[16]—is unlawful. There is no right to lie. That does not make lying 'punishable' per se.[17] However, demonstrably harming a person by telling lies entitles the victim to compensation. Similarly, to harass a person maliciously, to subject him specifically to systematic 'mental torture' are unlawful actions that entail liability if they actually and demonstrably cause harm. On the other hand, making a person angry, saying something offensive or disturbing, or not being nice—these actions per se are not unlawful and do not harm a person. Per se, they are not 'punishable' nor do they entitle a person to compensation.

Harm, of course, is a matter of degree. So is intent. That means that there always is the possibility of a border case, where one person or judge competently and in good faith would and another would not find cause for liability. However, it is no reason to dismiss considerations of harm and intent from jurisprudence. Under the non-aggression rule too there are border cases. If a particle of smoke drifting into your garden constitutes an invasion of your domain then application of the non-aggression rule would stop the world. *Fiat justitia pereat mundus.* We do not want that, therefore we save the rule by saying that a particle of smoke is not invasive. Fine, but how many particles constitute an invasion? Is it just a matter of counting particles? Does the condition of your garden make a difference? Do the purposes for which you use it make a difference? Do your past actions and attitudes matter (as Kinsella's principle of 'estoppel'[18] would suggest)?

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[16] **For Block, to say something that is not true is to lie: 'Weathermen, too, lie, about half the time, and economists who predict the future course of the stock market…'. ("Reply to 'Against Libertarial Legalism'", …) He apparently has privileged access to what weathermen and economists know to be the case when they say that something else is the case.**
We have here another example of Block's legalism. A lie is a lie; a lie is a non-invasive act; all lies and all non-invasive acts are to be treated equally, regardless of circumstances or consequences. Jurisprudence apparently does not deal with facts about human persons and their relations. It deals with a limited set of verbal qualifications. Who needs judges when we simply can fill in a questionnaire and feed it to a human (or, perhaps preferably, electronic) robot to crank out a 'verdict'?

[17] **The 'per se' qualification should be familiar to praxeologists and Austrian economists. In conforms to their aprioristic analysis whereas the more commonly used 'ceteris paribus' does not. Jörg Guido Hülsmann, "Economic Science and Neoclassicism," *Quarterly Journal of Austrian Economics* 2, no. 4, 1999, pp. 3-20; Jörg Guido Hülsmann, "Facts and Counterfactuals in Economic Law," *Journal of Libertarian Studies* 17, no. 1, 2003, pp. 57-102.**

[18] **N. Stephan Kinsellla, "Estoppel: A New Justification for Individual Rights", *Reason Papers* No.17, 1992; Idem, "Punishment and Proportionality: The Estoppel Approach", *Journal of Libertarian Studies*, Vol. 12, No. 1, 1996.**

Harm also is a matter of kind. Libertarians—in fact, most people—agree that experiencing a negative feeling (for example when one becomes nervous or is upset) is not itself a harm. There is no demonstrable or measurable lesion, damage, structural impairment, or loss of value or reputation, only a subjective state of mind with no obvious causal connections to any particular type of action or event. In addition, many libertarians are inclined to say that only physical harm counts, not, say, financial harm. In many cases, there is good reason to make this distinction and to maintain that merely causing financial harm to a person does not entail liability. However, we should not allow it to block a jurisprudential investigation of the question whether causing financial harm is lawful per se.

In his 'Property, Causality and Liability', Hans-Hermann Hoppe argues, partly on praxeological grounds, 'that not all physical invasions imply liability and, more importantly, that some actions are liable even if *no* overt physical invasion occurs.'[19] The argument is a criticism of Rothbard's theory of strict liability, which is based on his non-aggression principle. It runs parallel to my criticism of Walter Block. However, I would go a bit farther in emending Rothbard's position than Hoppe does.

Hoppe accepts at least one aspect of Rothbard's theory of strict liability: "the necessity of establishing *causation*, based on 'individualized evidence' rather than mere *probability* […]." About the other aspect, "defining harm as *physical* harm (rather than harm to the value of property or person)", Hoppe clearly has reservations. My position is that financial harm can be a cause of liability even in the absence of a physical invasion. Of course, I do not say that harm to 'the value of property or person' per se is a cause of liability. Changes in the value of one's property may come about in many ways, often without a hint of unlawful activity. They often are a consequence of normal, perfectly lawful transactions on the market, of changes in demand and supply.

However, one easily can give examples of changes in the value of property that are demonstrable consequences of unlawful actions that are liable 'even if no overt physical invasion occurs.' Think for example of an orchestrated campaign, intended to drive down the value of a person's land, perhaps with the intention of buying it at an artificially depressed price. As far as causality is concerned, those who orchestrate the campaign have a different position than those who, being fooled by it, withdraw their demand for the property and so are the immediate causes of its fall in value. It would not be improper for a judge to note the difference and assign liability to the primary albeit distant cause rather than the intervening immediate cause.

A counterfeiter is another example. Printing money-substitutes with one's own paper and ink and offering them in exchange for goods and services does

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[19] **Hans-Hermann Hoppe, "Property, Causality and Liability", forthcoming, …**

not constitute physical invasion. If the notes are made skilfully they will pass into general circulation and function as money just as well as genuine notes. Those who accept them in payment for their goods or services thereby are not victimised. Nevertheless, the counterfeiter causes inflation and so diminishes the value of the money-holdings of everybody else.[20] Applying Rothbard's definition in the way Walter Block advocates, we should hold that counterfeiting is not a punishable act and does not entail liability. Nevertheless, Block and Hoppe have argued that fractional reserve banking, which consists in bringing into circulation notes that appear to be backed by money but are not, is inherently fraudulent—and therefore, presumably, unlawful.[21]

I maintain that counterfeiting is unlawful, demonstrably causes harm (even if it is only harm to the value of property), and therefore entitles the victims to intervene, if necessary using violence, to stop it and, if possible, to get restitution or adequate compensation. This position is inconsistent with libertarianism as Block defines it, but is it inconsistent with the aim of safeguarding the freedom of innocent men and women?

Restitution, compensation, and punishment

Consistent with his abhorrence of punishing victimless crimes, Block is primarily concerned about treating innocent activities as if they were crimes. That implies prescribing punishments like confiscation of goods, imprisonment and the death penalty that would be serious invasions of person and property if they were not legal responses to a prior invasion.[22] At various points he suggests that I would throw people in jail for lying, not being nice, using offensive language, and so on. Of course, that is not what I would do, nor is it something that I would have to do merely because I reject the non-aggression rule as the alpha and omega of libertarian law.

The concepts of crime and punishment and tort and liability are important enough to warrant a brief statement—and it will be a brief statement only, there being no space here for an elaborate presentation that takes account of all kinds of complications at the level of particular cases.[23] What I do not specify as relevant in this short note is not necessarily what, in a fuller treatment, I

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[20] **L. Spadaro, "The Impact of Invasions of Property on Financial Crisis", in S.L. Blumenfeld (ed.), *Property in a Humane Economy* (Lasalle, Ill.: Open Court, 1974), p.141-160.**

[21] **H.-H. Hoppe, W. Block and J.G. Hülsmann, "Against Fiduciary Media", in *The Quarterly Journal of Austrian Economics* (Volume I, 1, 1998), p.19-50.**

[22] **This notion of punishment does not include 'punitive damages', which might be stipulated in a contract or be part of a settlement.**

[23] **Writing on jurisprudence is different from judging cases. The writer should not presume that he is the boss who will tell the judges (his servants? his employees?) which rules they should apply.**

should specify as irrelevant.

Punishment, in the sense that is relevant in discussions of law, implies depriving a person of his freedom—that is, the lawful use of his body and property. My starting point is that no person lawfully can be punished unless he has done something that gave another a lawful claim to his person—there being no innocent way in which a natural person lawfully can lose his freedom.[24] Clearly, the conditions under which it is lawful to punish a person are not the same as those under which it is lawful to demand restitution or compensation. The latter demand implies a claim *against* a person, not a claim *to* that person.[25]

If A wilfully or through his negligence demonstrably harms B then B is entitled to restitution or full compensation.[26] If necessary, he is entitled to use force to obtain it. However, when does this 'if necessary' apply? Surely, there is no necessity for the use of violence or force, if the person who caused the harm gives reliable assurance that he will make full restitution or pay full compensation. There is no necessity, if he reliably agrees to a procedure for selecting an assessor who will in good faith determine just what the other party is entitled to receive as restitution or compensation. Of course, what constitutes a person's 'reliable assurance' or 'agreement' must be determined on a case-by-case basis, taking into account all the relevant facts concerning that person and the particularities of the situation.

Note that this applies regardless of the man's 'state of mind' in causing the harm. Whether he acted in good faith or not, with malicious intent or not, negligently or not, as soon as he can be counted on to make amends, no coercive force lawfully can be used against him. He remains a free person albeit under the obligation to make restitution or pay compensation.

Obviously, if he acted with malicious intent, wilfully and knowingly causing harm to the other party, he *ceteris paribus* owes more to his victim than if the

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[24] **This is an inference from the theory of natural law at which I hinted in my response to Block and Kinsella. See Frank van Dun, "Natural Law: A Logical Analysis", referred to in note 33 below. Also Idem, *The Logic of Law*, http://allserv.ugent.be/~frvandun.**

[25] **The fact that I owe you money means that you have an outstanding claim against me for the sum I owe you. It does not mean that I belong to you as your property (in which case you have a lawful claim to my person).**

[26] **In some cases, neither malicious intent nor negligence is necessary to entail liability. For example if, through no fault or negligence of my own, my dog escapes and destroys your precious flowerbed then there is no compelling reason to conclude that I am not liable. After all, it is my dog. There *is* a 'border-crossing', which as such is unlawful. If lightning strikes a tree in my garden and the tree falls on your glasshouse, the situation may be different because where lightning strikes, is an 'act of nature'. However, suppose that you had warned me beforehand that such an event might occur and I had not heeded your warning?**

harm was a consequence of his negligence or if it was only accidental. His *mens rea* is a relevant and aggravating fact of the case, if only because it ex ante raised the likelihood that harm would occur and rendered invalid any calculations of risk and adequate insurance that his victim might have made. However, his agreement to make full restitution blocks the possibility that his victims[27] imprison, torture or kill him or unilaterally take possession of his belongings. As long as he co-operates with the process of justice, he is immune from such actions because his victims only have a lawful claim for restitution or compensation *against* him; they have no claim *to* his person. Punishment, in the sense in which it implies taking a person and treating him as if he were a mere object or animal in one's possession, is out of the question.

The situation is different if the man who caused the harm refuses to make the restitution or pay the compensation that the court or the assessor determined in a regular process. He then wilfully holds on to something that has been ascertained to belong to his victims and refuses to hand it over to them. Only by getting him out of the way can they recover what is theirs. His victims have a lawful claim to his person because, metaphorically speaking, he has affixed himself to and made himself a part of their property. If he has murdered his victims and the latter have no designated heirs or successors then he nevertheless remains a part of their property, although it now has reverted to the status of a *res nullius* that can be homesteaded by anyone who wants it. Through his own act, he has made himself an outlaw. He has forsaken his right to be respected as a person.[28]

Similar considerations apply to 'bringing a person to court'. The use of violence to arrest a person and haul him before a court is not necessary if he agrees to a procedure for selecting a court that is satisfactory to him as well as the other party. It is not necessary to arrest and jail a person who gives assurance that he will not obstruct the course of justice, although conceivably he may agree to be kept in custody if in the circumstances of the case that is the only reliable assurance he can give. Contrast this approach, which is based on the presumption of innocence, with Block's 'libertarian legal system'. He does not appear to have much concern for the consent of the parties in activating a judicial procedure. A commercial 'defence agency' apparently

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[27] **The same applies to the victims' lawful successors, heirs, or representatives.**

[28] **If by 'homesteading' the victim's now ownerless estate the bona fide homesteader is assumed to make himself the lawful successor of the victim, he also gets the victim's right to act against the killer, as the case may be to get compensation or to punish. (This is an example of a *jurisprudential* argument for dealing with cases that under current practices are 'solved' by referring to the State's legal monopolies. The argument is consistent with Rothard's principles of self-ownership and homesteading and with respect for natural law.)**

decides unilaterally whether to act on an accusation (or on its own hunch) and whether to arrest and hold the accused until a court renders a verdict. Justice takes a second seat to entrepreneurial risk-taking.

My view is that no one may be thrown in jail or otherwise attacked in his person or property by way of punishment, who agrees to assist the process of justice or to make restitution or pay compensation to his victims. That is a far cry from saying that one can be thrown in jail or sent to the gallows merely for not being nice, as Block alleges I do.

Libertarian justice aims to make the victims of an unlawful act whole again, as far as this is possible under the circumstances. Punishment is not a primary objective.[29] Only those who wilfully place themselves outside the law of the human world forsake the right to be free from being held and treated as a non-person (that is, as someone else's property). Moreover, the right to receive restitution or compensation and the right to punish a person belong to his victims or their lawful successors (to whose property he has affixed himself). Those rights do not belong to 'society' or any 'defence agency' acting on its own behalf, although the victims or their lawful successors obviously may authorise such an agency to act on their behalf.

For a summary comparison of the jurisprudence of Block and Kinsella, on the one hand, and my own, on the other hand, I refer the reader to Appendix II.

Jurisprudence and the market for justice

There is a serious institutional problem with Block's and Kinsella's libertarian jurisprudence. It would seem that they agree that in a libertarian order there are no imposed monopolies, least of all in the fields of law-enforcement and adjudication. Nevertheless, they assume that law-enforcement and adjudication somehow will be guided exclusively by their non-aggression rule. Does this imply that they want to forbid anybody who does not commit himself exclusively to the non-aggression rule to start a law-enforcement or adjudication business? Alternatively, do they believe that law-enforcement and adjudication services that adhere to their rule will prove so superior that no competitors will be able to hold their ground against them?

What chance would a Block-approved court have in the market place, if it had to compete with courts that will protect people not only against 'invasive harm' but also against harm caused by rogues, skilful manipulators, and psychopaths for whom common decency and honesty count for nothing? Would a falsely accused person, a sexually harassed secretary, or the victim of

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[29] **The emphasis on restitution and compensation rather than punishment is common in the libertarian literature. It has been for a long time. See for example various contributions in John Hagel III, Randy Barnett (eds), *Assessing the Criminal, Restitution, Retribution and the Legal Process* (Cambridge, Mass.: Ballinger Books, 1977).**

an *agent provocateur* consent to have a Block-approved court try the case? I doubt it. Would a bona fide accuser, employer or public speaker refuse to have a non-Block Court try the case? No. So what business is left to the Block Courts? It is safe to conjecture that, if other courts were available, the Block Courts would end up doing little business or none at all. Rogues, skilful manipulators, and their likes might suggest using them, but their victims would not accept them. If the Block Courts nevertheless acted unilaterally in support of the Block-approved 'rights' of rogues then their verdicts systematically would be challenged and overturned on appeal.

Libertarian jurisprudence must take into account the institutional setting in which agents involved in the administration of justice, law-enforcement and personal protection services operate. In a libertarian world that setting is one of free competition. Block and Kinsella have as good a right as anybody else to compete in that market, but no more right than anybody else to forcibly prevent anybody of whom they do not approve from offering his or her services. Just as anybody else's, their jurisprudence must prove itself in the market for justice, not in bold and provocative statements.

However, how that market will develop and what sorts of firms or organisations will be active and successful in it—these are not problems of jurisprudence. Moreover, while general jurisprudence is an abstract intellectual exercise, it should not lose sight of the fact that it inevitably will be applied in a more or less dense cultural setting. Those who apply it in real cases must take into account the relevant traditions, customs, conventions, standards, and the like, if they are to understand at all what people do and say, and why they do or say it in one way or another.

Natural law and legal codes

Competition on the market for justice can take two forms. On the one hand, services for the administration of justice, law-enforcement and personal protection can compete on the open market, in the way bakers, butchers, and carmakers compete for customers and suppliers. Under this hypothesis, people buy particular services from those independent defence agencies that they deem most appropriate for their purposes. There is no reason why they should buy an exclusive complex package from a single provider. On the other hand, people may want to become members of an autonomous territorially delimited society or community where they intend to live and work.[30] Often a society of that kind will have an exclusive collective or communal *monopolistic*

[30] **See for example, Fred E. Foldvary, "Proprietary Communities and Community Associations", and Spencer Heath MacCallum, "The Case for Land Lease versus Subdivision", both in David T. Beito, Peter Gordon, and Alexander Tabarrok (eds.),** ***The Voluntary City: Choice, Community, and Civil Society*** **(Ann Arbor: The University of Michigan Press, 2002).**

arrangement for providing law-enforcement and conflict resolution services as well as zoning, sewage disposal, building and maintaining roads, distributing water, gas and electricity, and so on. Consequently, it will require its members to forsake the use of outsiders for those purposes. Obviously, it will have to compete for members with other societies, but it will do so by offering a complex take-it-all-or-you-are-not-welcome package deal.

If Block and Kinsella (and their followers) would constitute a 'proprietary community' of that kind, they could claim the owners' prerogatives of organising it as they want and refusing entry to anyone who does not agree with the arrangements they have made. There is no libertarian objection to their claim to exercise monopoly rights over their own land and property. Thus, supposing that they have their own country, they may stipulate that the non-aggression rule and only that rule is the supreme law of their society. However, how many and what kind of people would want to live there, is a moot question.

Block and Kinsella may call their arrangement a libertarian society or country if they want, but in the perspective of libertarianism as a philosophy of law it would have exactly the same standing as, say, a society committed to socialist or fascist principles or the doctrines of a religious sect. In a libertarian world, people are free to use their property as they see fit, provided they do not use it to cause unlawful harm to others and accept the principles of lawful association—voluntary membership and free or nearly free exit (at least for the children of members).[31] Subject to compliance with these conditions, people who want to combine their property to found a society or country based on whatever principles they fancy have the right to do so.

Clearly, then, as far as the internal affairs of a society are concerned, it can have any constitution, legal code and system of law-enforcement and adjudication that its founders or members decide to adopt. It may or may not allow free competition in any field, including law-enforcement and adjudication; impose censorship; permit its members to join or trade individually with outsiders or other societies or associations. These matters are of no concern to libertarian jurisprudence, if the right of property and the freedom of association and contract count for anything. However, it would seem unwise, even for a particular libertarian society, not to have some kind of monopolistic control over who will be admitted as or allowed to remain a member, and how members will regulate their social interactions. To put this differently, a particular libertarian society would do well to adopt a

[31] **These principles are rather unproblematic in most societies, but not in territorially delimited societies that have as their purpose the organisation of a community in which people live and work and mostly interact with others members of the community. In such societies 'exit' implies emigration or even secession, which are costly operations.**

monopolistic scheme of government, which probably will be some kind of 'minarchy'.[32]

In saying this, I am not betraying my anarcho-libertarian convictions. I am only saying that one should not confuse any particular social organisation ('society') with the convivial order of natural persons.[33] Nor should one confuse adherence to the promulgated legal code of a particular society with respect for the natural law of the human world. There may be any number of societies, each with its own legal code, but there is only one natural law. What makes the world libertarian is not that it is full of 'libertarian societies' but that no legal code supersedes the requirements of the natural law. That means that voluntary association and 'free exit' must be included in the constitution of any society. It also means that relations among natural persons (rather than positions within a social system) must be based on mutual respect for person and property. My argument against Block and Kinsella was that this respect requires more than abstaining from physical invasions.

Member-member and member-society relations within a particular society are fundamentally different from interpersonal relations among natural persons and relations between mutually independent societies. Whether a particular society styles itself libertarian, socialist, fascist, or whatever, its legal code immediately concerns only 'artificial persons'—that is to say, personified social positions, roles and functions such as 'President', 'Director', 'Treasurer', 'Member' (or 'Citizen'), 'Representative', 'Visitor', and so on. It affects human beings only in so far as they occupy positions or perform functions or roles within the social system defined by that code. In contrast, the relations among human beings as such, regardless of their membership, social position or function in this, that or any society, are not subject to a legal code. Those relations are the specific concern of the theory of natural law,

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[32] **Every organisation or society, from a simple club to a large firm or a large proprietary residential community, needs a government. That does not imply, however, that all human relations must or can be 'organised' or that people must join a particular social organisation. Minarchism presupposes and refers to a closed social organisation; anarchism refers to human relations in the convivial order (see note 33) where people live and act as free persons, regardless of their social affiliations and positions. 'Anarchistic society' is an oxymoron, 'anarchistic order of conviviality' a pleonasm.**

[33] **'Convivial' is a technical term in my writings. It contrasts with 'social'. I have taken to use the term 'convivial order' (from Latin *convivere*, to live together) to translate the Dutch 'samenleving' (literally living-together) and to avoid the ambiguity of the English 'society' (Dutch 'maatschappij'). For a sketch of the conceptual differences between the natural law of the convivial order and the artificial laws of particular societies (as defined by their legal codes), see Appendix I. Also, for example, Frank van Dun, "Natural Law: A Logical Analysis", in R. Cubeddu & A. Mingardi (eds), *Perspectives on Libertarianism*, Etica é Politica, Vol. 5, No.2, 2003. (Etica é Politica is an online journal).**

which is the order of natural persons as such. They are not social (or societal) relations but convivial relations.

Presumably, there are people who prefer not to join any particular society that offers, on a take-it-or-leave-it basis, a large and complex all-inclusive package of diverse services (various public goods, protection, insurance, legal representation, and the like) to its members. Even if it has constitutional guarantees regarding voluntary membership and free exit, such an arrangement may be unpalatable to many people. Moreover, with these guarantees in place, there is a good chance that any particular society will remain small or tend to split up as those who become dissatisfied with its comprehensive services and regulations leave. Although we conceivably may end up with a totalitarian world-society that legally regulates every aspect of life and work, for the moment we can still picture societies as local and limited structures, emerging from and then disappearing in the flux of human relations—like waves on the ocean.[34]

The likelier it is that people interact with others who are not subject to the same legal code (or in ways that are not regulated by their common legal code), the greater the scope for law-enforcement and administration of justice based on natural law. This is where libertarian jurisprudence comes into its own. It must deal with the problems of doing justice in cases where the parties are not members of the same society, subject to the same legal code. Its proper province is the convivial order of natural persons, not the organisation of any particular society.

From the point of view of natural law, we can place human relations on a scale between perfect order (pure conviviality) and complete disorder (outright war) to indicate the degree to which they are ruled by 'speech' rather than 'force'.[35] That is why we can identify the conditions of conviviality by inquiring which forms of interaction can be rationally defended in a face-to-face dialogue between any two persons, without contradicting or betraying their intention to prove their positions by rational or logical means.[36] Clearly,

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[34] **This goes for statist societies no less than for others. One only has to compare political maps of Europe at various moments in the twentieth century.**

[35] **John Locke, *A Letter Concerning*, (eds. J. Horton & S. Mendus, New York, Routledge, 1991), p.45: "There are two sorts of contests amongst men: the one managed by law, the other by force: and they are of that nature, that where the one ends, the other always begins." In nearly the same words, Cicero, *De Ira*, Book II, Chapter 31. See also, Ludwig Mises, Human Action (Chicago: Regnery, 1966), p. 195, 198.**
Speech (that is, argumentative solemn speech, which indicates commitment) is related to 'ius' (cf. 'iurare', to swear). The concept of speech (as against mere talk or babbling) is the nexus between the left-hand column of the table in Appendix I and the right-hand column of the table in Appendix II.

[36] **Frank van Dun, *Het Fundamenteel Rechtsbeginsel*, op.cit., chapter 3; Idem:**

‘I reserve [because I intend to use] the right to kill, torture or rob you of your possessions; to silence you; to harm or ruin you; to lie to you or to misrepresent your arguments’ is not a defensible position. As an argument in a dialogue, it is self-defeating because it denies what one has to suppose in order to use it as an argument. As a blunt statement, it merely indicates that one is not concerned with the difference between ‘speech’ and ‘force’, ‘argumentation’ and ‘manipulation’—in short, between conviviality and war.

As we can see, non-aggression is a condition of conviviality, but it is not the only one. No surprise here: ‘Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.’[37] There is no need for libertarians to reinvent law and truncate it in the process. It is their task to give it its full due and to show that a self-enforced monopoly of the means of violence and propaganda does not allow us to enjoy the full benefit of conviviality and lawful co-operation.

“Economics and the Limits of Value-Free Science”, *Reason Papers*, XI, 1986, 17-32. The qualification ‘face-to-face’ is not a mere embellishment. The argument here does not rest on a ‘model’ or an ideal-type of dialogue, which can be loaded with any ‘normative presuppositions’ one wants (à la Habermas or Gewirth), but on the analysis of the conditions that any two persons must meet and heed if they are to be able to argue seriously with one another at all.

[37] **Ulpianus, Digesta 1.1.10. (‘To live as an honest person; to harm no one; to allow every person his own.’)**

Appendix I
A comparison of natural and artificial law[38]

Natural order	Artificial order
Natural law To be discovered according to the objective differences among the natural 'given' elements of the natural order	Artificial law or Legal order To be stipulated by defining the artificial elements and their differences and interrelations that will constitute a particular artificial order
Natural persons Individuals that exist independently of any definition and that are objectively distinct and separate from one another (e.g. Walter Block)	Artificial persons Positions, roles or functions that exist only as part of an organisational scheme and that are and can do only what the defining rules say they are and can do (e.g. Harold E. Wirth Eminent Scholar Chair in Economics at Loyola University)
Convivial order Person-to-person relations	Social order Society, organisation, company, corporation, Church, State, etc
Freedom Characteristic of natural persons, 'rational, purposive agency'	Liberty Social status of full member, specifics vary from one legal order to another
Likeness being of the same natural kind	Equality having the same rank in an organisation
Ius Agreement between free and independent persons, regardless of social position or affiliation	Lex Legal rule, command issued from a superior position within an organisation to positions subordinated to it
Justice Respect for the natural order of persons, i.e. for freedom among likes	Legality Compliance with rules defining a legal order
Lawful What is respectful of the objective boundaries that distinguish and separate one person from another	Legal What is permitted by the legal rules of a particular legal order
Lawful property Natural property or lawfully acquired property	Legal property Allotment of means to be used according to the rules of the legal system
(Cf. Hayekian cosmos, catallactics)	(Cf. Hayekian taxis, economy; business administration)
(Cf. 'realist' Austrian economic analysis)	(Cf. 'formalist' Neo-classical analysis, model-building)

[38] **See "The Lawful and the Legal", *op.cit*. Note that in that paper the convivial order is referred to as 'inclusive society' and a social order as 'an exclusive society'.**

Appendix II
Libertarian jurisprudence[39]

Non-aggression rule	Natural law
Which actions are legal?	Which actions are lawful?
Every action that is not an aggressive use of force or violence against the person or property of another.	Every action that respects the conditions of conviviality (e.g. that does not treat a person as a non-person; one person as another; or one person's words, actions or property as those of a non-person or another person).
Which uses of violence against a person or his property are legal?	Which uses of violence against a person or his property are lawful?
a) To repel his aggression while it is in progress. b) To make him pay for the physical harm he has done to you or your property by his physical invasion of your domain.	a) To repel his aggression while it is in progress. b) To make him pay for the harm he has done to you or your property by his unlawful act, if and only if he refuses to make full restitution or pay full compensation.
What entitles one to restitution or compensation?	What entitles one to restitution or compensation?
Only physical harm and only if it is a demonstrable consequence of another's illegal act.	Harm that is a demonstrable consequence of another's unlawful act.
What entitles one to take / punish a person?	What entitles one to take / punish a person?
His being guilty of aggression against any other person or her property.	His refusal to separate himself from one's person or property.

[39] **This comparison only considers non-contractual relations.**