

## **AGAINST LIBERTARIAN LEGALISM: A COMMENT ON KINSELLA AND BLOCK**

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What follows is a comment on some of the arguments on intellectual property and blackmail presented respectively by N. Stephan Kinsella and Walter Block in their contributions to the *Journal of Libertarian Studies* “Symposium on Applications of Libertarian Legal Theory.”<sup>1</sup> While I am in broad agreement with most of what they say, there are some things with which I cannot concur. My reason for writing this comment, however, is not to express my disagreement on a few specific issues. After all, etching in the fine points of libertarian jurisprudence on blackmail or intellectual property is hardly a pressing need. Rather, I believe my disagreement on those small matters critically involves the very basis on which Block and Kinsella chose to erect their legal arguments. I am referring to their use of the so-called Rothbardian non-aggression rule as the foundation or axiom for libertarian jurisprudence.

According to Rothbard:

The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the “nonaggression axiom.” “Aggression” is defined as the initiation of the use or threat of violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.<sup>2</sup>

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<sup>1</sup>N. Stephan Kinsella, “Against Intellectual Property,” *Journal of Libertarian Studies* 15, no. 2 (Spring 2001), pp. 1–53; and Walter Block, “Toward a Libertarian Theory of Blackmail,” *Journal of Libertarian Studies* 15, no. 2 (Spring 2001), pp. 55–88.

<sup>2</sup>Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1978), p. 23.

The purpose of my comments is to explain why I think that this axiom is inadequate from a libertarian point of view. Accordingly, I shall not discuss intellectual property rights or blackmail as such, but will concentrate on those arguments of Kinsella and Block that most clearly reveal the weaknesses of their legal system, as I understand it.

After further introductory remarks, I shall first assess Kinsella's arguments against the legitimacy of trademark protection. I shall argue that, if pressed to their logical conclusion, they would make the very idea of a contractual order and therefore of a free market incoherent. I shall then turn to an appraisal of Block's arguments concerning libel and labour contracts. It is my contention that they lead to results that are incompatible with the requirements of freedom and justice that define the libertarian perspective on human relations. Like Kinsella's exposition, Block's discussion reveals an unpalatable legal formalism (or legalism). His treatment of libel abstracts from questions of personal responsibility in situations involving complex "social causation."<sup>3</sup> His treatment of labour contracts likewise abstracts from the real world situations alone in which contracts make sense. It seems to legitimise only a world in which every possible contingency must be covered by an explicit contractual stipulation. While such a world is perhaps a lawyer's paradise, it is arguably not the sort of place that a libertarian would cherish. Moreover, it is unclear whether it is even conceivable as a place where real human beings can live.

In the final section, I shall endeavour to show briefly where the so-called non-aggression axiom fits in a libertarian philosophy of law. I believe that an appreciation of its proper place will help us to avoid the mistakes of the libertarian legalism of our two authors.

### **NO NON-AGGRESSION AXIOM**

Non-aggression is an important and valid rule of libertarian jurisprudence. However, it is only so by implication, not because it is the defining axiom from which everything else is supposed to follow. Because the non-aggression rule is an implication of my philosophy of law, there is a whole range of issues with respect to which I reach

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<sup>3</sup>I use quotation marks around "social causation" because I am well aware that this is a very complex and tricky concept and because I do not intend to burden this comment with an investigation of that concept. I am claiming only that there is such a thing as one person causing another to do something without actually using compulsion or force to make him do it and without having him agree to a contractual obligation to do it.

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the same conclusions as those for whom it is *the* axiom of libertarian legal theory. On the other hand, because it is only an implication, its meaning and significance are to be determined within the context of the system of which it is a part.

I have no problem with the thesis that, in a libertarian legal order, no individual or group—least of all those who are engaged in the administration of justice—should aggress against any person or any person's property. Aggression, in the libertarian sense of the word, is the physical invasion of another person's domain without that person's consent and without lawful justification. As such, aggression is unlawful and should therefore be illegal in a libertarian legal order (because such an order is intended to be as true to law as is humanly possible). Nor do I have a problem with the thesis that violent border crossings are lawful and therefore legally permissible if and only if they are committed in self-defence, to bring a criminal to justice, or to exact restitution or compensation for an unlawfully inflicted harm. They are permissible to the extent that they are themselves compatible with the requirements of justice.

My differences with Kinsella and Block stem from the fact that it does not follow from those theses that defensive use of force is justified or lawful only in response to aggressive violent invasions of persons or property. It does not follow that *only* aggression against another person or his property is unlawful. There may be unlawful acts that are not invasions of a person's physical domain, yet justify the defensive use of force to prevent, stop, or exact compensation for such acts.<sup>4</sup>

To be sure, one may posit non-aggression as the axiom of a libertarian legal code. However, one can hardly maintain without further argumentation that no legal code can be libertarian if it does not start from that proposition. At any rate, I have yet to see a convincing proof that non-aggression is the only axiom that yields a coherent conception of justice. Besides, I have reasons—not just hunches—for believing that we shall never get such a proof. There is no inconsistency in the belief that force may be used lawfully in defence against unlawful acts that are not physical invasions of person or property. Yet Block and

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<sup>4</sup>Alternatively, one may broaden the concept of aggression to include acts that are non-invasive in the physical sense of the word, thereby changing the very meaning of the non-aggression axiom. However, I shall continue to use the word aggression in the traditional sense of a physically invasive, non-defensive use of force (violence) against another person or his property.

Kinsella proceed with their arguments on the supposition that such acts are not unlawful *because* they are not aggressions. Accordingly, they also suppose that the use of force in retaliation against such acts must itself be an aggression, and therefore unlawful. In their system of thought, the dichotomy of aggression and non-aggression coincides with the logical opposition between unlawful and lawful acts.

The libertarian notion of aggression is a broad one, and does not have any connotation of malicious intent or even conscious action. Even an unintentional, accidental, physical invasion of another's property may count as aggression. If my dog strays from my yard and kills one of your chickens, the non-aggression rule would apply. Something that belongs to me has physically invaded your domain without your consent and without lawful justification.<sup>5</sup> That invasion was

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<sup>5</sup>Since this is not a treatise on libertarian jurisprudence, there is no need to qualify this statement here. However, if it were asserted in the manner of libertarian legalism, it could be taken as a starting point for serious criticism of that position. I am sitting in my garden, enjoying a cigar. A few particles of smoke drift over the hedge into your garden. Is that an invasion of your property? Is it an invasion only if the particles reach your nose or eyes? On a too literal (legalistic) interpretation of "border-crossing" it would be an "invasion" in any case.

Murray Rothbard, however, wisely cut short such an interpretation by insisting that "property" is a praxeological, not a physicalist concept. Consequently, one's property is only in "means of action," not in things as such. Thus, the borders to be crossed by an invasive action are those that define what Rothbard called "the technological unit," the size of which "depends on the type of good or resource . . . and must be determined by judges, juries, or arbitrators who are expert in the particular resource or industry." See Murray N. Rothbard, "Law, Property Rights, and Air Pollution," *Cato Journal* 2, no. 1 (1982), pp. 55–100, especially p. 84.

That technological unit is something objective within the world of human action. It is not, however, a spatially delimited sphere with a single border where every physical process (electromagnetism, sound or shock waves, the movement of smoke, dust or water particles, bullets, cars, dogs, or people) turns into an invasion. One type of invasion of some physical space may not be an invasion of the relevant technological unit, whereas another type of invasion of that space may well be an interference with the unit. In any case, the distinction between property as a technological unit and some absolute spatial boundary leaves us with a question: Could there be an interference with the technological unit without there being an invasion of some physically delimited space? If that is the case, the non-aggression rule cannot play the role Block and Kinsella reserve for it. Amazingly, given that both authors

unlawful. I am responsible and liable for it, even if I neither foresaw nor intended nor in any way promoted any invasion of your property. You are entitled eventually to use force, if that should be necessary, to get the compensation that will undo as much as possible the harm you suffered from my unlawful border crossing.

## NO TRADEMARKS?

Even with the broad libertarian notion of aggression, we do not have a logical warrant for saying that nothing but physical invasion can be unlawful. Kinsella's paper on intellectual property rights provides a good platform for a discussion of that point, most clearly so at the very end where he makes the claim that "trademark law should give consumers, not trademark users, the right to sue trademark pirates."<sup>6</sup> Kinsella's argument, referring to two fictional hamburger chains (RothbardBurger versus LachmannBurger), has all the appearances of an insider's joke for Austrian economists, which perhaps was all that Kinsella intended.<sup>7</sup> Nevertheless, an outsider like me should be forgiven for considering it as an argument on trademark law. After all, it uses the same strategy as Kinsella's other arguments to dispose of the idea that the holder of the trademark (R-Burgers) is unlawfully harmed by the trademark piracy committed by L-Burgers. Kinsella writes:

It is difficult to see how this act of fraud, perpetrated by the Lachmannian on [the consumer], violates Rothbard's rights. The Lachmannian's actions do not physically invade Rothbard's property. He does not even convince others to do this; at most, he may be said to convince third parties to take an action within their rights, namely, to buy a burger from [him] instead of Rothbard.<sup>8</sup>

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are generally more than merely sympathetic to Rothbard, neither one refers to Rothbard's seminal exercise in applied libertarian legal theory.

<sup>6</sup>Kinsella, "Against Intellectual Property," p. 44.

<sup>7</sup>An author who claims to be a Rothbardian (or a Marxist or a Thomist) may be mistaken or he may willfully lie about the logical relations of his work to that of "the master." Surely, however, such an author is not in the same category as one that falsely claims to *be* Rothbard or Marx or Saint Thomas, or as one that falsely insinuates that the relevant master authorised or approved his work. The issue between LachmannBurger and RothbardBurger is, at best, analogous only to the latter type of misrepresentation. Is Kinsella suggesting that some Lachmannian economist is guilty of that?

<sup>8</sup>Kinsella, "Against Intellectual Property," p. 44.

Yet, it is also difficult to see how trademark piracy could violate the consumer's rights if it was not a violation of the trademark holder's right. According to Kinsella, the consumer supposedly is defrauded because the L-Burger chain misrepresented itself to the consumer. The latter therefore should have a right to sue the L-Burger chain for "fraud and breach of contract."<sup>9</sup> That is a strange conclusion, for it is not at all clear what contract L-Burger breached. The consumer presumably got what he paid for: a burger. If L-Burger acted within its legal rights under the Kinsella Code in using the R-Burger trademark, the consumer should know that a trademark carries no legally relevant information.<sup>10</sup> Kinsella's argument—the consumer thought he bought an R-Burger, but instead got a crummy L-Burger—is simply irrelevant. The consumer's expectations would have been equally frustrated if he had bought at R-Burger when, unbeknownst to him, that chain had hired another chef with the same tastes as his counterpart at L-Burger or had changed its production processes or suppliers. Should any of these things also constitute a violation of the consumer's rights?

In any case, a lawyer for L-Burger would argue that his client had legally opened his restaurant as an R-Burger look-alike, but never had forced a customer to come in. A customer who enters a commercial establishment takes his chances on what it sells. *Caveat emptor* and all that! Moreover, while his client had indeed dressed his restaurant up to make it look like Rothbard's, he had never in any contract given a guarantee that his establishment was part of the R-Burger chain. So what contract did L-Burger breach? A fancier lawyer would even have added that, if such a guarantee had been given, it would have no more standing under the legal code than the trademark itself. Indeed, if the trademark is no guarantee of the identity of a party in an exchange, why should anything else be?

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<sup>9</sup>Kinsella, "Against Intellectual Property," p. 44.

<sup>10</sup>In an article on contract theory, Kinsella writes that "detrimental reliance" cannot be a ground for contract enforcement. The reason is the circularity involved in saying that enforcement depends on reasonable reliance on a promise, when reliance on a promise must consider the enforceability of the contract to be reasonable. N. Stephan Kinsella, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003). Whether that argument is good or bad, it implies that buyers should not rely on trademarks until they have made sure that the legal code will enforce the expectations they have formed on the basis of such marks.

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Is there a fundamental objection to regarding a trademark as similar to a person's signature, his personal mark for purposes of trade and other forms of communication? I cannot see one. Even if there was a fundamental difference, it would still be the case that a person that forges another's signature—using his own ink, pen and paper—is not *by that act alone* invading another's rights. Nonetheless, his forgery *should* become legally relevant as soon as he starts using it to misrepresent himself to the world as the person whose signature he has learned to forge. However, under the Kinsella Code, we should say that F (the forger) does not invade any right held by O (the person that F pretends to be). As far as his relations with O are concerned, F's forgery is not legally relevant. Yet, Kinsella implies that F violates the rights of those with whom he enters into contractual relations. What rights? Forging another's signature is a legal-because-non-invasive action. Surely, if that is a direct implication of the Kinsella Code, then anyone who is subject to that code must know that a signature carries no legally relevant information.

F's pretence must have started before the other persons entered into any contractual relation with him. If F acted within his rights in the pre-contractual stage of negotiation, then he also acted within his rights in the contractual stage and thereafter as well.<sup>11</sup> If it is legal to present oneself as someone else, then for others it is *caveat emptor* all the way down the line. They made a contract with F-pretending-to-be-O, and so long as that pretender does not commit breach of contract, they have no cause for complaint.<sup>12</sup>

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<sup>11</sup>F, pretending to be O, signs a contract with Kinsella. The latter, just to be on the safe side, asks F to identify himself and F gleefully shows him his identity papers. As we should expect, they are identical to O's, except for the photograph and the fact that F has carefully produced them himself with his own printing equipment on his own paper. Alternatively, Kinsella asks F to sign a document, stating that he (F) is O and not someone else. F signs the document willingly—putting O's signature under it. It is perfectly legal for him to do so. F is no fool. He knows that signing the document or printing false identity papers is no more a physical invasion of anybody's property than is signing the original contract. Nor is he breaking any contract, because there was no contract before he signed. There is no more fraud (from the legal point of view) in the second instance of misrepresenting himself than there was in the first.

<sup>12</sup>Kinsella could easily get out of this conundrum by adding to his code a rule stating that it is illegal to misrepresent oneself. However, that rule is no implication of the non-aggression axiom. Consequently, he would have to reconsider everything he wrote on intellectual property rights to check if it still

Let us disregard the perils of fictional hamburger chains. We can see that Kinsella's attack on trademark law endangers the very idea of a free market. The threat it poses to the meaning and the significance of a personal signature already made that clear—but there is more. Suppose O is the owner of an industrial lab that provides quality control services. His quality control label is proudly displayed by the producers of goods that passed O's rigorous testing. However, under the Kinsella Code, anybody can print similar labels and sell them to anyone who wants them. After all, there is no trace of a physical invasion of anybody's property in using one's own printing equipment and paper to produce and sell printed patterns. In this case, surely, the people who buy the counterfeit labels will not complain. They know they are buying mere pieces of printed paper. To their customers, they do not sell the labels, but their own products under their own name. Their customers have no contractual relations with the producer of the counterfeit labels. (Perhaps the labels do mislead some of the customers, but again, *caveat emptor!*)

Then there is the question of money, at any rate money substitutes such as bank notes. Under the Kinsella Code, it is not illegal *per se* to counterfeit bank notes. After all, they are only pieces of paper with a trademark on them. The counterfeiter produces sheets of paper that merely look as if they were issued by a bank—but in doing so, he is using only his own paper and equipment. No physical invasion of anybody's property here! Moreover, in using the notes to buy things, the counterfeiter need not give any guarantee concerning their genuineness or authenticity. If they are good imitations, who is going to question the validity of the notes anyway? And if someone raises the question, there is no doubt that the counterfeiter will produce a certificate of authenticity—just another piece of paper with marks on it—in no time. Finally, is the counterfeiter not as free to exchange his property for goods and services as any of his trading partners? Surely it is immaterial under the Kinsella Code that his property includes things that are stamped with a genuine bank's trademark and look like a bank note in other respects. Of course, the real bank might refuse to recognise the notes and to pay out specie to a person who

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holds in view of the more complex code. More importantly, as a legal theorist, he would have to make sure that there were no other rules waiting to pop up. To do that, he would have to withdraw from doing “applications of libertarian legal theory” and return to the philosophy of law that is the source of that theory.



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presented them at its counter. However, even if it knew the counterfeiter, the bank could not act against him, for anybody is at liberty to use its trademark. Neither, it seems, has any note holder a legal ground for making a case against the counterfeiter. He should have known that everybody legally is at liberty to use anybody's trademark.<sup>13</sup>

Clearly, with signatures, bank notes, and quality labels—trademarks all—rendered legally irrelevant, the free market under the Kinsella Code is bound to hold more surprises in store than even the staunchest libertarian is willing to bargain for. Of course, in the end, it may not make much of a difference. Mankind is an inventive species, and its experience with circumventing legal codes goes back a long time. Nevertheless, the absurdities of that particular code are so glaring that I can hope only that I have profoundly misunderstood Kinsella's case against property rights in trademarks.

A central argument in Kinsella's article is that

a system of property rights in "ideal objects" necessarily requires a violation of other individual property rights, for example, to use one's own tangible property as one sees fit. Such a system requires a new homesteading rule, which subverts the first-occupier rule.<sup>14</sup>

The argument certainly applies to patents. Under current legislation, a patent-holder may use institutionalised means of violence to prevent or stop another person from producing or doing anything that the patent legally protects. He does not have to prove that the other person committed an unlawful act, nor is it relevant that the other person can prove that he did not commit an unlawful act. However, with respect to trademarks, the argument is irrelevant. By identifying myself, I do not subvert anybody's right to use his property in any lawful way he wants. Nor do I interfere with his right to use his own property lawfully when I stop him from pretending to be me. True, he may be using his

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<sup>13</sup>Recently, Hans-Hermann Hoppe, Walter Block, and Jorg Guido Hülsmann wrote that issuing bank notes that are not fully backed by specie is an unlawful, fraudulent misrepresentation of money and should therefore be illegal. See their "Against Fiduciary Media," *Quarterly Journal of Austrian Economics* 1, no. 1 (1998), pp. 19–50. I do not know where Kinsella stands on the questions raised in that paper. However, his present discussion seems to imply that if anybody may duplicate a bank's trademark *ad libitum*, then certainly the bank itself may use its own paper and ink to multiply its notes as much as it wants.

<sup>14</sup>Kinsella, "Against Intellectual Property," p. 44; see also pp. 31–33.

own tangible property—paper, printer, and ink—to misrepresent himself as being me (or me as being him), but that is insufficient ground for holding that such misrepresentation is lawful. If the non-aggression axiom commits us to hold that it is lawful, that only proves that the axiom fails to distinguish properly between lawful and unlawful acts.

Kinsella has another important argument. He notes that intellectual property rights “create scarcity where none existed before.”<sup>15</sup> Again, this works well with patents, but it does not have any bearing on trademarks. When I use marks of identification, such as a signature and a trademark, I do not create an artificial scarcity. However, the counterfeiter or trademark pirate does create an artificial abundance—that is, the illusion of abundance—where no such abundance exists.

Let me sum up. The problem with Kinsella’s discussion is that it implies the reduction of the praxeological analysis of purposeful and meaningful human action to a behaviourist analysis of mere movements and signs. Under the Kinsella Code, I do not own my signature and I do not own my trademark. I do not have a legally relevant identity and cannot own any identification. I can only own pieces of paper and the ink that I have used to make marks on them. I leave it to Kinsella to wonder what that is supposed to imply about the status of self-ownership and title-transfer.

### LEGAL LIBEL?

Walter Block’s analysis of blackmail rests on the same interpretation of the non-aggression axiom as does Kinsella’s treatment of intellectual property, leaving it vulnerable to a similar critique as Kinsella’s. However, it brings to light certain other shortcomings of a legal theory that neglects to take praxeology seriously and opts instead for a behaviourist approach. Accordingly, I shall comment on it without reference to what I said about Kinsella’s analysis of trademarks.

Under the libertarian legal code, writes Block:

People would be free to do whatever they wished, without limits, except that they would have to respect everyone else’s right to do the same. They could do this if and only if they refrained from initiating or threatening violence against another person or his property.<sup>16</sup>

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<sup>15</sup>Kinsella, “Against Intellectual Property,” p. 23.

<sup>16</sup>Block, “Toward a Libertarian Theory of Blackmail,” p. 55.

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If there is “no equivalent to the initiation of violence against person or property, [then] no libertarian law would have been violated.”<sup>17</sup>

I shall limit my comments on Block’s paper to two of the cases that he discusses. The first of these involves libel or falsely accusing another person of a crime.<sup>18</sup> Block quotes Murray N. Rothbard in support of his thesis that libel is not a crime according to the libertarian code:

Smith has a property right to the ideas or opinions in his own head; he also has a property right to print anything he wants and disseminate it. He has a property right to *say* that Jones is a “thief” even if he knows it to be false, and to print and sell that statement.<sup>19</sup>

That makes sense *if* we accept that *only* physical invasions of another’s person or property are unlawful.<sup>20</sup> Still following Rothbard, Block notes that there is no merit in the argument that to make a false accusation against a person is to ruin or damage the latter’s reputation. In fact, that often happens when the false accusation is made in public, for example in a newspaper or on radio or television. However, a person’s “reputation consists of the thoughts of many people about him . . . and thus cannot be owned by [him].”<sup>21</sup> Of course, that is true, but is it relevant? Is the relevant question really whether saying something about a person is a physical invasion of that person or his property? Or is the relevant question whether it is lawful to accuse a person

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<sup>17</sup>Block, “Toward a Libertarian Theory of Blackmail,” p. 59.

<sup>18</sup>I am willing to concede to Block what he says about gossip and spreading rumours. However, to accuse a person of a criminal (unlawful) act, knowing that the accusation is false, is to me a different matter.

<sup>19</sup>Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982), p. 126, quoted in Block, “Toward a Libertarian Theory of Blackmail,” p. 63.

<sup>20</sup>Block is less than consistent, however. In Block, “Toward a Libertarian Theory of Blackmail,” fn. 20, he further quotes from Rothbard, *The Ethics of Liberty*, p. 126: “[I]f your son is at sea where he cannot be reached, and I tell you that I am holding him captive and ask for funds to secure his release, this too, is an example of ‘mere’ speech constituting a criminal border crossing.” What border crossing? Do I not have a property right to *say* that I hold your son in my power, even if I know that to be false, and to print and sell that statement? I have not invaded—in fact, I do not even intend to invade—anybody’s property. If you foolishly believe otherwise, isn’t that your responsibility?

<sup>21</sup>Block, “Toward a Libertarian Theory of Blackmail,” p. 63.

of some crime, knowing that the accusation is false? Only by asserting that the non-aggression proposition is the axiom of any libertarian legal code can we dismiss the second question on no other basis than that we have an answer to the first.

While it is true that one cannot own one's reputation (that is, other people's opinions about oneself), it is also true that one can sell one's reputation. It happens all the time when businesses are taken over, in advertising campaigns, or when the retiring author of a comic strip sells the right to the continued use of his name to his successor. How can one sell what one does not own? The fact is that one cannot do so. But then in selling his reputation, a person is not selling other people's opinions about himself. He is selling a particular use of his name or trademark, which, like all other commodities, has market value because of other people's valuations and opinions. They are things he *can* own, Kinsella notwithstanding. However, that it is not unlawful for others to use his name or trademark in various ways does not mean that it is lawful for others to use those things in every way they want. Therefore, it is not a foregone conclusion that using another's name in making false accusations (against him or a third person) is *never* an unlawful act.

Block reveals how shaky his analysis is, even from a libertarian point of view, when he writes that, under the Block Code, making a false accusation is perfectly legal. Apart from the fact that making an accusation is only a non-invasive speech act, he notes that "in a libertarian world, each person is responsible for his own acts."<sup>22</sup> Again, that is unobjectionable in itself, but it does not follow that if an action consists of different parts, each of which is performed by different persons, the performance of one part completely exonerates those who performed an earlier part of the series. Yet, that is precisely what Block suggests in his discussion of the libeler:

If the police or the courts foolishly trust the [libeler's] statement [about his victim, and accordingly convict the latter for what he is falsely accused of], it is their responsibility. They will have engaged in an unwarranted border crossing, and, when the truth gets out, they will have to pay the appropriate penalty.<sup>23</sup>

As soon as the police or the courts enter the picture, the malicious informer is gone from it!

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<sup>22</sup>Block, "Toward a Libertarian Theory of Blackmail," p. 64.

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Several comments are in order here, apart from the obvious one that, by the time the truth gets out, irreparable damage may have been done. The victim or the “foolish” police and judges may be dead, for example. On the other hand, it would be irrelevant whether the accuser is still alive, as, under the Block Code, he would be safe in any case. By the time the truth comes to light, hundreds—even millions—of people may have contributed to the ruin not just of the innocent victim’s reputation but of his life and fortune. They may have come to accept the justice of the accusation and the ensuing conviction, or to feel so embarrassed by the events of the past that they no longer have any interest in the truth.

As for the other comments, first, we should not just consider the case where the police or the courts *foolishly* trust the libellous statement. They can be conned expertly, and, when they are, it is not self-evident that they should be punished for what was, after all, a job competently done. Should we conclude, then, that a person that has been accused falsely and framed adroitly should not expect justice under the Block Code?

We should not expect infallible police or courts, even under a libertarian code. Moreover, since Block rightly holds that the police and the courts should be unprivileged private institutions, he should—and, of course, does—know that providers of such valuable services would hedge against the risks involved in their profession. They certainly would insist on a clause in their contract to exonerate them for any mishaps that might occur despite their best competent efforts to serve justice. I am willing to bet that they would announce severe retaliation against anyone trying to use them under false pretences or for unlawful purposes. For that reason, surely, false accusations rarely will be made to well-established police or court-services. The providers of such services have to rely on good will, that is, on their reputation.

However, under the Block Code, it is apparently perfectly legal to attempt to ruin their reputation by making false accusations ‘in the court of public opinion’ (which does not operate under mutually agreed to contracts). Once such smear campaigns get under way, anything can happen. For example, there could be an opening for new entries into the market for judicial services. The newcomers presumably would want to establish credibility quickly by announcing their affinity to the current swings of public opinion. The established courts might feel that they could only survive by doing the same. Rather than courts with a reputation for judicial probity, we might see courts with a reputation

for being in tune with what people think and want. Is devolution into populism part of the libertarian deal?

Second, suppose the court acquits the victim of the false accusation. Do truth and justice prevail? Not under the Block Code! Even under that code, the criminal justice system presumably requires proof beyond the shadow of a doubt to convict a person. Thus, an acquittal still may leave the innocence of the accused person shrouded in doubt. So why should all those people who actually believed that the accused was guilty as charged suddenly give up their belief? Why should they leave him alone rather than give him the hell that they believe he so much deserves? How likely is it that the author of the false accusation would end his campaign of defamation merely because a court acquitted his target? Sometimes, under such circumstances, an acquittal is a worse fate than a conviction.

Admittedly, public opinion may go any way under any legal system. However, under the Block Code, the victim of a false accusation is not even permitted to defend himself against it in a regular way. The code does not permit him to challenge the authors of the false accusation to prove in a regularly conducted trial that they have enough incriminating evidence to make the accusation stick. Yet, that is an effective way to bring out the truth at an early date, for the falsely accused person is applying strong pressure (the threat of punishment or at least compensation for damages) to his accusers to reveal what they have. At the same time, he is giving a strong signal to public opinion: I am not afraid of those guys; I am willing to give them a forum in which *I* have to prove beyond a shadow of a doubt that they are frauds. Surely, one who is rightly accused of a crime is unlikely to provide such a forum to his accusers. Even if *they* fail to make their case, he must fear that enough of the truth may come out to draw the attention of more competent investigators.

Without the possibility of thus redeeming himself, the falsely accused person has no defence but to retaliate in kind—better yet, to get there first. As Hobbes put it: “And from this diffidence of one another, there is no way for any man to secure himselfe, so reasonable, as Anticipation.”<sup>24</sup> Just imagine what would become of commercial advertising if the Block Code would be implemented! The misinformation, mudslinging, and accusatory partisan “science” we now associate primarily with politicians, consumer advocates, and other irresponsible “non-profit” types would become a condition of commercial survival: *Accuso*,

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<sup>24</sup>Thomas Hobbes, *Leviathan* (Oxford: Clarendon Press, 1968), p. 95.

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*ergo sum*. Not to join the fray is then like insisting on being a lamb when everybody else is doing his best to be a wolf.

With everybody calling everybody a liar, people will soon become so distrustful that they will not believe any accusation, true or false. Assuredly, Block is right to suggest that that is effective protection against libel and the loss of reputation—but only because nobody can lose a good reputation in a situation where nobody has one (because nobody is trusted to have one). More importantly, the general acceptance of the idea that any accusation is probably false, is also the best protection for any kind of wrongdoing.<sup>25</sup>

Third, Block studiously refrains from saying that when the truth comes out, it is the person that made the false accusation who should be penalised. Indeed, that is the whole point of his discussion: making false accusations is legal. Nevertheless, when the truth comes out, we *know* that that person initiated the proceedings that led to the violent invasion of the innocent victim's life or property. Maybe the police's or the court's "foolishness" (if there was any) was a contributing factor, but it was not the main cause. Moreover, under Block's principle, it is not clear what the courts have to do with the matter in any case. The judge merely renders a verdict. If the people who run the jails or work the gallows foolishly trust the judge's words, isn't it their responsibility? Shouldn't they be the people who will have to pay the appropriate penalty, if and when the truth comes out? After all, being responsible for their own acts, they could have refused at any time to participate in the crime of punishing an innocent person. Instead, they actually carried out the punishment.

Here, too, Block is relying on Rothbard to push the responsibility (and the blame) for a complex action all the way down to the last person in the chain. "Inciting to riot," Rothbard writes, "is a pure exercise of a man's right to speak without being thereby implicated in a crime."<sup>26</sup>

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<sup>25</sup>There is, then, a serious risk of a slide into a "Hobbesian equilibrium" of generalised distrust or even paranoia. Any departure from that equilibrium is bound to be "self-correcting" because, under the Block code, it merely means that there is some amount of trust that can and will be abused. The guardians of libertarian legalism will point their finger at the trusting person and reprimand him for his complaints. After all, he has only himself to blame for trusting another person!

<sup>26</sup>Rothbard, *Ethics of Liberty*, p. 126, quoted in Block, "Toward a Libertarian Theory of Blackmail," p. 63.

One does not have to be a supporter of the fashionable anti-racism laws that are the paragons of political correctness in Europe today to see that Rothbard's position is no valid expression of a concern for justice and freedom. Such laws do infringe on vital liberties, not only on free speech, but what is wrong with them is precisely what is wrong with Rothbard's rule—both suffer from an obnoxious inability to recognise crucial real differences in real situations. Suppose a million individuals, each of them sitting alone in his room, read a phrase in a book filled with hate-speech. If any one of those readers were to get so excited by his reading that he would commit some gruesome crime, the author of the book would not be implicated. That very same phrase, shouted at the top of one's voice in front of an excited crowd of, say, fifty or five hundred people, is an exhortation that in the circumstances is meant—and is likely—to start the execution of a crime. The political correctness crowd assimilates the former to the latter situation and accordingly wants to persecute the author as well as the demagogue on the soapbox. Rothbard and Block assimilate the latter to the former situation and accordingly want to exonerate the agitator as much as the author. They are making the same mistake.

The "brain" of a violent gang is as much involved in its crimes as is the slow-witted henchman that actually rips out the door and throws acid in the victim's eyes—only more so. Hitler, Churchill, Roosevelt, Stalin, and their likes were not innocent practitioners of free speech at a time when a lot of their compatriots were blowing up towns and villages and people. The general who, in his search of scapegoats for a defeat, sends a handful of privates to the firing-squad is not exonerated by the fact that some other privates actually fired the shots that killed their convicted colleagues.

People have no difficulty finding differences where there are none, yet few are likely to believe a progressive lawyer who argues that, while his client admittedly did aim his gun at the victim and pulled the trigger, it was the bullet that killed the victim. "My client was only engaging in the legal activity of holding a gun and moving his limbs. People don't kill, bullets do. Let us ban ammunition." Ronald Reagan and Charlton Heston, experts at firing blanks, knew better. We should also know better than Rothbard and Block. It really does happen that generals and political and other leaders kill through their mastery of the use of the breathing kind of "live ammunition."

Libertarian legal theorists should not dissolve human action into merely behavioural components, assigning legal relevance only to the



last component (or shifting it only as far as formal contractual stipulations allow). If the man that performed the last part of a complex action by his act alone really exonerated all those who performed an earlier part, then he should also be the only one to receive credit for the completed action. Especially from libertarian legal theorists who also are eminent Austrian economists, we should not expect a theory that implies that only the worker who puts the finishing touch on a car before it is ready for sale to the final consumer is responsible for the whole machine. Of course, Block would say that this analogy is misplaced because the worker is under contract, whereas the rioters presumably were not under contract to the agitator. However, is it really only the fact that the worker is under contract that stands in the way of his claiming title to whatever the market is prepared to pay for the car?<sup>27</sup> Who should take credit for the poem: the blind poet, or his girlfriend who lovingly typed the manuscript (which she could have refused to do)? And if the blind poet really is the author of the poem, why should the rabble-rousing demagogue not be the author of the riots he incites?

Why should we require libertarian judges to turn a blind eye to real processes of “social causation” when we know that advertisers, educators, politicians, and agitators are very much aware of them—and willing to use them for their purposes? It is not just in a libertarian world that each person is responsible for his own acts; it is true in every world. However, we should not take that as an excuse for disregarding the complex causal processes that go on in the real world, whatever legal code is in force. A libertarian judge has to confront the facts. Reality does not yield to theory. It is all right for a judge to remind a man charged with participating in a violent mob that he is responsible for his own actions, but only after he has determined what the man’s own *actions*—not merely his bodily movements—really were. If the man was forced (coerced, compelled) by another to participate, we have one sort of case. If he got paid to smash windows, we have another sort of case. If he was manipulated in any other way, surely we cannot just pretend that then everything was the same as if he was not manipulated in any way—and treat the manipulator as if he was just an innocent bystander.

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<sup>27</sup>In Block’s example of a false accusation, we should assume that the judges (being judges in a libertarian society) were under contract to the person making the accusation. Apparently, however, that circumstance does not protect them in Block’s view from being saddled with responsibility and liability for the whole mess created at the false accuser’s instigation.

A legal code that does not make allowance for the facts of the real world only serves the cause of injustice. Whether we like it or not, human beings are what they are. They are not angels and they can be manipulated. What benefit in terms of justice can we expect from a code that insists that skilful agitators, who are smart enough to stay clear of formal contracts and not to dirty their own hands, should be immune from legal sanctions? What benefit in terms of justice is to be derived from a code that insists that making false accusations is perfectly legal when we know that such accusations are extremely likely to cause innocent persons much harm and suffering? True, from a behaviourist point of view, making a false accusation is merely the non-invasive action of uttering certain sounds; but then, from that same point of view, shooting a person is only the non-invasive action of squeezing a piece of metal.

### **FREE TO FIRE?**

Let me briefly discuss another of Block's cases. "Should it be legal," Block asks, "to fire an employee who refuses to sleep with the boss?" His answer is an uncompromising *yes*. "It is always legitimate to fire an employee for any reason at all, at any time, assuming that there is no long-run contract in force precluding this option."<sup>28</sup> Let us admit this. Still, there is the question of damages. Are we really to suppose that in a libertarian world, a judge will be satisfied to quote Block in dismissing the case brought by a secretary against her employer who tried to blackmail her into sleeping with him? I do not think so.

In no world, whether libertarian or not, do labour contracts (or any other contracts) exist in a vacuum. Contracts are meant to facilitate human intercourse, not to replace the real world with a hermetically closed, artificial universe in which everything is governed by fully explicit rules (as in a board game, such as chess). Most contracts, indeed, are very simple agreements made by people who do not bother to insert clauses for every possible contingency that might arise. Even complex explicit contracts—such as those that are involved in organising a corporation—are unintelligible to anyone who is unfamiliar with the vast store of common experience, expectations, and presuppositions that the parties never made explicit. If ever the need for it arises, such things are brought into the open then and there. At that

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<sup>28</sup>Block, "Toward a Libertarian Theory of Blackmail," p. 65.

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moment, it may still transpire that there really was no agreement about those things, although all the parties to the contract thought there was. In most cases, however, the judges will not look kindly on attempts by any party to impose ex post some fanciful interpretation on one or more of those implicit background clauses that people reasonably could take for granted.

Any judge, therefore, must take seriously the important qualification to Block's free-to-fire rule, namely "that there is no long-run contract in force precluding [the option to fire an employee at will]." To do so, however, the judge must look not only at the explicit terms of the contract but also at the real situation in which the contract was made. That is where he will have to look if he wants to know what may be presumed to be a part of the contract even if it was not stated explicitly. The essential point is that he *must look* and not pull the facts out of his sleeve or the legal code. So what will the judge find? There is little chance that he will find that prospective employees expect and agree to dismissal at any time, for any or no reason at all. The judge cannot simply presuppose their agreement to that condition *as a matter of legal principle*. If he could do that, he could just as well turn the table. As a matter of legal principle, he would then declare, every prospective employer agrees never to fire an employee for whatever reason, unless he explicitly stipulates the grounds for dismissal in the labour contract.

I bet that even in a libertarian world, no judge will interpret the labour contract between the employer and the secretary in the way Block suggests. If Walter Block were a judge in a libertarian world, he would be out of business in no time if he thought a contract was a "text" and nothing more. The employer who tells his secretary that she should consider herself fired unless she agrees to sleep with him is trying to get her to do something she did not contract for. We must be in the realm of science fiction if we can safely assume that any person who takes on secretarial work understands that this involves satisfying the boss's sexual desires.

Suppose a worker is hired to lift crates that weigh twenty pounds each. After a while, his employer tells him that unless he agrees to lift crates that weigh fifty pounds each, he will be fired. If that is an offer to renegotiate the labour contract or else terminate it, no objection can be made. But it does not look like such an offer. It looks like an attempt to unilaterally change the explicit terms of the contract. If that is the case, a judge—especially, I should say, a libertarian one—will not just

consider that an employer is free to hire and fire at will. That rule is not the issue here. The issue is whether the labour contract implies that the employer can unilaterally change its terms without violating the contract he has with the worker.

Block's rule seems to imply that a labour contract imposes no restrictions on an employer who is smart enough to add "Or else you are fired" to every demand he makes. It seems to imply that every labour contract must be understood to contain an "anything goes" clause in favour of the employer. Now it might seem that if that were indeed the standard understanding imposed by the legal code, it would not matter, because people still would have the option to make explicit in their contracts whatever they want. However, that "Coasian move" would not change the fact that a person seeking employment would have to be virtually prescient about any demand the employer could make, if he is to know what he is committing himself to in signing a contract.

Rather than a consistent application and guarantee of the principles of freedom in the real world, Block's rule is truly a Lawyers' Guaranteed Employment Act. The mechanical application of the so-called non-aggression axiom that he favours would affect not only labour contracts but all other contracts as well. It would ensure that no person could get through the day without the assistance of an army of lawyers to draw up and revise contracts of unimaginable complexity. Your survival and fortunes in a libertarian world would depend on how smart your lawyers are compared to those of others. I am sure that is not what those who are drawn to libertarianism are bargaining for. Why try to escape from the labyrinth of regulation and red tape of statist societies if it only will land you in a maze of small print?<sup>29</sup>

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<sup>29</sup>The libertarian legalist's answer is, of course, that the regulations and the red tape are coercively imposed whereas the small print is freely agreed to. However, it is the libertarian legalist's code that compels you to devote all your resources to getting the small print right. If you don't, the application of that code will force you to do or accept things that you really did not contract for but simply did not foresee or expect. After all, the libertarian legalist will say, you should not trust anybody. If you are foolish enough to assume that others are trustworthy, you have only yourself to blame!

## BACK TO BASICS

As I see it, the trouble with Kinsella's and Block's libertarian legal theory has its immediate roots in the elevation of the non-aggression rule to the status of the one and only axiom of legality. Physical aggression—initiation of violent, invasive action—against another person or his property most certainly is a paradigmatic case of unlawful action. I wholeheartedly admit that, for many purposes, the non-aggression rule will do. Nevertheless, it does not follow that such aggression is the *only* type of unlawful action, and therefore the only type that should be ruled out by a libertarian legal code. We can understand that in authorising the use of violence in the endeavour to combat any form of unlawful action or injustice, one wishes to err on the side of safety. However, bending over backward to make sure that the application of the legal code is not itself a source of injustice has its risks, as we have seen. I do not mean only the risk of falling over on one's back—which seems to be Kinsella's fate. Those who bend over backwards are just as likely to end up looking at the sky, which is not the place where most injustices occur. That, I think, is the problem with Block's discussion of blackmail.<sup>30</sup>

I am not going to take this opportunity to elaborate on the foundations of my philosophy of freedom and justice. However, I must say something so as not to leave the reader with the impression that all of the above comments are merely ad hoc.

A libertarian legal theory must be founded on a sound philosophy of law if it is to have any chance of holding its ground in serious intellectual debate. Block and Kinsella do not provide such a philosophy. They assume instead that it can be found in Rothbard's writings, especially *The Ethics of Liberty*. At any rate, they presuppose the validity of Rothbard's theory of law. However, in his *Ethics of Liberty*, Rothbard explicitly warned his readers that he himself was merely presupposing the validity of the theory of natural law and would not attempt “a full-scale defense of that theory.”<sup>31</sup> For that, he referred

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<sup>30</sup>Apart from Kinsella's and Block's articles, the “Symposium on Applications of Libertarian Legal Theory” published in the *Journal of Libertarian Studies* also has a contribution by James Ostrowski, “The Rise and Fall of Jury Nullification,” pp. 89–115. Although Block gives us no indication about the standing or even the possibility of trial by jury, *a fortiori* of jury nullification, we may well wonder how Block's legal theorems on libel and labour contracts would be dealt with by juries claiming the right to judge legal rules.

<sup>31</sup>Rothbard, *Ethics of Liberty*, p. vi.

to what unspecified “ethical philosophers” had “ably expounded and defended elsewhere.” There is, to be sure, a lot in the literature on natural law that should warm the heart and stimulate the brain of any libertarian. However, there is precious little (if any) evidence that it was only lack of logical acumen that kept the authors of the natural law tradition from discovering that a rigorous application of the Rothbardian non-aggression axiom would solve all questions of law. In any case, Rothbard presupposed many things in his exposé of applied libertarian ethics. I believe we have to take those presuppositions seriously. They provide the context within which the non-aggression rule can be applied properly.

Natural law is, of course, the place to start. It is unfortunate that most people by now have succumbed almost without reservation to the positivist delusion that “law” means “legal rule.” This makes it hard to give a sensible meaning to the expression “natural law.” It is hard to think of a rule—especially a rule of conduct—as something natural. However, the word “law” primarily means order, and order can be natural.<sup>32</sup> Even if we think only of the order of the human world, we can still make sense of the notion that there is a natural order of the human world.

An order is basically a system in which things can be distinguished clearly and systematically. A natural order, then, is a system in which things can be distinguished clearly and systematically on the basis of objective, natural qualities, properties and relations. Natural law, which is our concern here, is a system in which human agents can be distinguished clearly and systematically on the basis of their objective, natural qualities as different yet similar, separate yet interacting natural persons. In short, it is an order of natural persons.

The fundamental presupposition of the natural law approach is, of course, that it is possible to distinguish between any two human persons on the basis of their objective natural characteristics. The core of natural law theory—which will not become visible until we have weeded out the overgrowth of metaphysical and theological notions that has burdened it throughout the ages—is that the human world is in order so long as human beings respect the natural distinctions that define it. They are the distinctions that mark the boundaries between any two

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<sup>32</sup>See my article “The Lawful and the Legal,” *Journal des Economistes et des Etudes Humaines* 6, no. 4 (December 1995), pp. 555–79; also see my “The Logic of Law” (forthcoming).

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human persons, their bodies, actions, words and works. They are the distinctions that make it possible for us, at least in principle although not always in practice, to say of any body, action, word, or work, that it is this or that person's body, action, word, or work.

Thus, from the perspective of natural law, it is possible to classify *human actions of whatever kind*—not just those that can be fully described in physical terms—as either lawful or unlawful. The decisive criterion is whether, in performing an action, a human being does or does not respect those natural distinctions between himself and other persons, or between any two other persons. To put it differently, we can distinguish actions that maintain, strengthen, or restore the natural order from actions that cause confusion in the human world. Actions of the latter kind cause “war” (a Germanic word meaning confusion, the inability to distinguish one thing from another) and eventually the total breakdown of the order of the human world (“war” in the usual sense). Such an action makes it difficult, even impossible, to tell the innocent from the guilty, the debtor from the creditor, the real person from an impostor, or the voluntary participant from one who is forced, tricked, or manipulated into participating.

So far in this account, the concept of natural law theory is merely descriptive. As such, it does not tell us whether we ought to respect the natural order of the human world. One might conceivably accept its descriptive aspects yet maintain that we ought to have confusion, disorder, or chaos. Or one might hold that we ought to replace natural law with an artificial order—for example, a *utopia*—that is defined in terms of non-objective, subjective, or conventional, perhaps imaginary, and, at any rate, artificial distinctions. However, as far as a normative stance is associated with natural law theory, it is usually that people ought to respect the natural order of the human world. We need not go here into the question of how to justify that stance in rational terms.<sup>33</sup> It is enough to note that it implies that people ought to respect one another *as the natural persons they are*.<sup>34</sup> It does not imply that they ought to respect one another only as the ideal types they would have

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<sup>33</sup>I have dealt with that question in my book (in Dutch) on “The fundamental principle of law,” *Het fundamenteel rechtsbeginsel* (Antwerp: Kluwer-Rechtswetenschappen, 1982).

<sup>34</sup>Respecting a person is obviously not the same as esteeming that person. On the one hand, it is as easy to esteem a person (oneself or another) too much or too little as it is to demonstrate insufficient respect for a person. On the other, there is no way that we can respect a person (oneself or another) too much.

to be if they were ever to be admitted in one's favourite utopia. Neither does it imply that they are respectable only as mere physical bodies without any praxeological identity.<sup>35</sup> What it does mean is that we ought to be just.

Justice—that is, respect for natural law or the natural order of the human world—requires that we respect the natural distinctions among ourselves in everything we do or say. It certainly requires that we do not initiate physical violence against others and their works or property. It also requires that we do not unilaterally appropriate any part of another's identity, words, or actions, nor attempt to pass off our own actions and words as if they were really another's. Indeed, the latter requirement appears to be more basic than the first. Unless there is a clear distinction between you and I—and also between “I do or say” and “You do or say”—the distinction between “what you do or say to me” and “what I do or say to you” cannot be made.

Within this approach—which is admittedly presented here only in the barest outline—the non-aggression rule takes its proper place in a theory of justice. A just legal code seeks to be as close to the requirements of justice as is humanly possible. It does so by making as good and clear and systematic a distinction between lawful and unlawful actions as the circumstances allow. On no account should it evade the challenge of justice merely because it would be simpler to operate if it did not have to bother about certain aspects of reality that are perhaps more elusive than others. Disrespect of another person is without doubt

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<sup>35</sup>The approaches of natural law theory and Austrian economics are, in my view, linked by having the same subject: the human person as such, i.e., the acting, thinking, speaking, purposeful human agent. In that respect, both are resolutely anti-reductionist. Austrians resist the temptation to reduce economic phenomena to a system of equations built up out of disembodied quasi-mathematical functions. Just so natural lawyers resist the temptation to reduce the phenomena of human co-existence to a set-up of rigidly defined artificial legal persons (i.e., roles, positions, and, indeed, functions in a scheme of social organisation). Both concentrate on human beings and what they do—especially what they do to one another.

Admittedly, Austrian economics and natural law theory occasionally use such abstract concepts as “the citizen,” “the consumer,” “the producer,” “the criminal,” “the banker,” and so on. Nevertheless, they always are aware that real human beings drive the world. One, some, all, or none of those abstractions at one time or another may describe a natural or real person. However, that is so only because of the fact that only natural persons engage in politics, consume, produce, commit crimes, and handle money.



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easier to recognise in a physically invasive action than in a symbolic act such as misrepresenting oneself as another or another as oneself, but that does not mean that there is no injustice in the latter type of act.

I am quite sure that the natural law approach does not sanction patents or many other kinds of so-called intellectual property. It would leave much of Kinsella's analysis intact, but it would certainly anchor it in a solid foundation. A trademark pirate fails to respect at least one other person. Trademark piracy is unlawful even if it is not a physical aggression against any person or his property, because it is an unauthorised use or displacement of another's personal identity and integrity. It is unlawful and should be illegal to misrepresent oneself as another person (except in lawful self-defence against an aggressor), regardless of how many other persons are fooled by the pirate's attempt to sow confusion. In my view, it is lawful for the victim of such identity piracy to use any means it takes (including violence if that turns out to be necessary) to stop others from using counterfeit marks of his identity.

Likewise, the natural law approach does not destroy Block's theory of blackmail, but it does provide a useful analytical tool for making relevant distinctions. Surely, to say that most cases of blackmail are legitimate does not logically commit one to say that falsely accusing a person of a crime is legitimate. A blackmailer need not be confusing the law, but those who threaten others with libel or slander most certainly threaten to sow confusion in the human world. They do so without having the excuse of acting in self-defence or even in ignorance.

There is a distinction between information that is lawfully acquired and information that is unlawfully acquired. The blackmailer to whose defence Block may come legitimately is one who lawfully has acquired damaging information about another and offers that person the opportunity to contain the information at a price. Damaging information that has been acquired unlawfully is an altogether different case. Libel and slander, which do not rely on information no matter how it was acquired but on the misrepresentation of lies as information, are even more different. Using information that has been lawfully acquired does not violate anyone's rights, whether the information is damaging or not. It is no instance of a failure to respect others. Using information that has been acquired unlawfully presupposes a rights violation, again whether the information is damaging or not. It does imply a failure to respect at least one other person. However, the fabrication and telling of lies about a person *is* a violation of a person's identity and

integrity—a failure to respect him as who and what he is. It is so even if the fabrication of lies as such is not a physical invasion of any person or his tangible property. It is for the person about whom lies are told to decide whether to stop the liar in his tracks or not. It is immaterial whether the lies are damaging or beneficial to him. (Throwing mud or gold at a person is unlawful, but it is up to that person to decide whether to seek to stop the thrower from continuing his activity.)

Personal identity and integrity are the presuppositions of every personal right. They are part of every natural right of every natural person. Respect for persons implies respect for their identity and integrity as persons as much as it implies respect for their tangible property.<sup>36</sup> Does the requirement that we respect one another as the natural persons we are restrict our freedom? Is it a cause or inducement of injustice? I believe that those who answer such questions affirmatively assume a burden of proof that soon will leave them breathless. Libertarianism, as I understand and cherish it, should found its theories of legality on the natural law requirement of respect for persons. It should not be satisfied with its physicalist shadow—what remains of it after we have reduced persons to tangible property and praxeological relations among persons to physical relations among behavioural units. The primary philosophical objective of libertarianism is to restore natural persons to their rightful place in our understanding of, and thinking about, the human world. That objective implies a sustained attack on the rampant reductionism and the endless arrays of fictions, abstractions and arid formalisms that characterise so much of social, economic and legal

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<sup>36</sup>There are, of course, other aspects of the respect for persons that I have not discussed. Throwing rocks or shooting a gun at a person while making sure to miss him by an inch is unlawful. It is a clear indication of a failure to respect him as a person. Accordingly, in my view, it may be stopped without first having to inquire whether the “rules of the house” (or the street) where the throwing or the shooting takes place explicitly forbid such behaviour. I can hardly imagine that a libertarian judge would dismiss a case brought by a victim of such pestering, harassment, or intimidation with the remark that the defendant has the legal right to do anything short of physically invading another’s body or property. It is only when the place where the incident took place has a rule that explicitly allows throwing rocks or similar nuisances that the victim should acquiesce. The harassment alluded to in this note could easily escalate into mob rule (ochlocracy) which would be a serious impediment to freedom even if, miraculously, it always stopped at the point beyond which it would become actual invasive violence. Nobody looks forward to yet another world where skillfully managed terror tactics enjoy legal protection.

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science today. However, we should not overshoot our mark in the endeavour to prove the tautology that a world without violence is a world without violence. Unless my comments in this paper have been completely misguided, I think I have shown that restricting libertarianism to the enforcement of the non-aggression rule still leaves us with a world where freedom and justice do not mix.

Unless we want libertarianism to be another revolt against nature, we should consider that it is supposed to be about justice and freedom for real human beings. It is not about the installation of a mechanical rule that offers a golden opportunity for any scoundrel that knows “how to play the system.” Of course, there is a risk that a defence of one person’s freedom impinges upon the freedom of another. The natural order of the human world is not always as clearly detectable as we would like, and some people invest an awful lot of effort, money and time in obfuscating it as much as possible. However, to deal with that risk, we should go back to first principles. John Locke, not a philosopher for whom Block and Kinsella could have no sympathy, said it well: “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.”<sup>37</sup> As for me, I share Locke’s concern for the innocent much more than Block’s concern for the liberty of rogues to do whatever they can get away with, short of physically violating another person or his property.

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