

## OBJECTIONS TO THE LIBERTARIAN STEM CELL COMPROMISE

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### I. Introduction

BLOCK (2010) IS AN ATTEMPT TO APPLY libertarian private property and homesteading principles to the very vexing question of stem cell research. Should fertilized eggs be allowed to be destroyed during the process of subjecting them to research? I posit that these early stage fetuses are human beings, thus bearers of all rights, certainly including the libertarian right not to be aggressed against. How, then, can it possibly be justified to engage in physical violence against them? It is because if the demanders of these infants lose out to the suppliers in this “context,” they are in effect unwanted children, and, given that there are no positive obligations to keep any human being alive, the only question is how shall they die? I claim in Block (2010) that mercy killing can be (sometimes, rarely,) reconciled with libertarian principle for actual children; for fetuses, it is a question of which will give them a *better* chance of survival: being allowed to die outright, or, being experimented upon, which offers at least a slight chance of life.

May the parent actually kill the child in this case where no one else wants to take over guardianship responsibilities, or is he constrained by libertarian law to merely “allow the baby to die”? I answer in the positive, despite the seeming applicability of the libertarian law of non aggression against non aggressors, which is the basic premise of the entire philosophy. Assume that “allowing to die” means starving the newborn: no food, no water. Stipulate that this is an excruciatingly painful process, and that there is a painless alternative. My claim is that the non aggression axiom only applies to adults, not children. There, guardianship, the rule against child abuse,

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trumps this basic premise (children are a difficult subject for many philosophies, and libertarianism is no exception to this general rule). I take it that guardianship, the rule against child abuse, means that you must treat your ward in the best possible manner from his point of view. The uncaring parent, where there are no willing substitutes, is still the guardian; he still has an obligation to do what is in the best interests of the child. Well, precisely what is in the best interest of the child in this very extreme case? By stipulation, a quick and painless death is to be preferred, to one of long drawn out agony. Suppose you were the baby faced with this plight; which alternative would *you* chose, gentle reader? Those who wield the non aggression axiom of libertarianism in favor of allowing to die instead of actively killing are dropping the context of guardianship and its requirement of non child abuse, I contend.

One would think, at the outset, that this is an unfair competition: that the suppliers of fertilizers would win hands down; that they could create far more stem cells than the demanders would be able to adopt. But the homesteaders have an ace in the hole: within limits of course, the ability to refrigerate these fetuses, and thus keep them alive. It would not be much of a life, but it would by far beat the great likelihood of being killed outright.

The present paper is devoted to responses to several objections that have been launched at this libertarian analysis of the stem cell (and by extension, abortion) controversy.

## II. Objections

### 1. *Petri Dish*

Does this compromise thesis imply, in effect, that medical technicians would be allowed by law to create fertilized eggs in a petri dish?<sup>1</sup>

In my view, to create a human being in a petri dish does not violate the libertarian axiom of non-aggression. It is difficult to understand how anyone could think it does. Whether this act is “inherently wrong” is a moral issue, totally separate from libertarianism. Prostitution, pornography, addictive drugs, homosexuality may be immoral, but not a one of them violates this axiom, thus all should be legal.

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<sup>1</sup> I owe this objection to Marshall Fritz.

## 2. *Nazism*

Once the corpses were shoveled out from Dachau, should the Germans have simply disposed of the bodies? Would it not have been more efficient, once the corpses were available anyway, to make lampshades and soap out of them? ... your argument was not about mercy killing. It was about killing for the sake of “medical research.” We all agree that making soap out of Jews is appalling. Unfortunately, some of us do not see that making medicine out of slain children is (equally) appalling.<sup>2</sup>

I regard this as rather a hysterical objection, worthy of refutation only because this is a highly charged issue, and in such contexts even otherwise rational people are likely to lose their way.

There is a world of difference between the mass murder that took place in the German concentration camps, and what is being advocated on libertarian grounds in the present paper, and in Block (2010). In the former case, innocent people were killed who not only were able to support themselves, but in those few cases of severe handicap, had others willing to take on this burden in their behalf. In the present case, in very sharp contrast, people (e.g., fetuses) will be killed (or allowed to starve to death in the libertarian perspective against which I have argued) only under very special conditions indeed. These are, first, that no individual or group in the entire world is willing to look after them and, second, that “looking after” includes willing to undergo the expense to maintain embryos in a frozen condition. This scenario, unlike the concentration camp reality that all too unfortunately occurred, is *exceedingly* improbable.

But if, somehow, this does take place, it will occur without any offense to the libertarian code of law. The same, of course, cannot at all be said about the Holocaust.

Etchison continues his objection:

Your response is feeble: In the case of the German camps the non-human (by the Nazis’ estimation, not by yours) soon-to-be-deceased might have had someone willing to take care of him, but the soon-to-be-deceased embryo *ex hypothesi* does not. Your position is that the right which *must* be acknowledged is that not of the person about to be killed, but of the person who might be willing to accept responsibility for him. In other words, the helpless have no rights, at least no more than do pencils. Your complaint against the Nazis is not that they killed human persons for reasons other than self-

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<sup>2</sup> This objection was made by Michael Etchison in personal communication.

defense, but that they neglected to auction off the right to adopt potential victims.

My reply is that there is a serious disanalogy between adult Jewish concentration camp victims and fertilized eggs. What the Nazis did the Jews was plain murder. In very sharp contrast, what the guardian did to the by-hypothesis millions of fertilized eggs he could not care for, while no one else in the entire world stepped forward to do so, was to give them a *chance* at life, albeit a very small one. This objection confuses positive obligations to be good Samaritans, of which there are none, at least for the libertarian, and negative obligations, the right of victims to be free of those who would initiate violence against them.

### 3. *Natural Rights*

Here is a response<sup>3</sup> from Jeff Herbener:

Rothbard's natural rights framework poses a formidable barrier to your thesis. Rights exist for each person by his nature as a human being and cannot be transferred to or exercised by another person without his consent. The (partial) exception, as you note (p. 5), is children in a state of immaturity. For them, parents, as their producers, have custodial rights. About these rights Rothbard (1998) wrote, in *The Ethics of Liberty* (p. 99, emphasis original), "So the parental property right must be limited *in time*. But it also must be limited *in kind*, for it surely would be grotesque for a libertarian who believes in the right of self-ownership to advocate the right of a parent to murder or torture his or her children." As with interpersonal relationships between any two persons, no guardian can have the right to aggress against his ward in any way or for any reason, even if he is a scientist conducting research beneficial to others. By accepting Rothbard's view that a guardian has only limited, custodial rights over his ward and not absolute rights (p. 6), as you say he cannot own his ward as he can a cow, you have set for yourself the difficult task of showing how it is possible for the guardian to have the right to kill, or to commit what appear to be other acts of aggression against, his ward.

As I understand it, your demonstration is that the rights the guardian has are those necessary to do what is in the better interest of the ward and that they would include killing, or otherwise aggressing against, the ward because it is in the better interest of the ward to die a quick and painless death, by his guardian's hand, instead of a prolonged and painful death, by his guardian's neglect.

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<sup>3</sup> Letter sent to the author, in 2006.

But the rights of the ward that the guardian has in custody are determined by the property relationship between them and not the guardian's view of moral conduct. You seem to be claiming that what the guardian decides the moral course of action to be confers upon him the right to so act. Rothbard (1998) rejected this view. He wrote, in *The Ethics of Liberty* (p. 152), "To sum up the application of our theory to extreme situations: if a man aggresses against another's person or property to save his own life, he may or may not be acting morally in so doing. That is none of our particular concern in this work. Regardless of whether his action is moral or immoral, by any criterion, he is *still* a criminal aggressor against the property of another, and the victim is within his right to repel that aggression by force, and to prosecute the aggressor afterward for his crime." And, even if your view could be squared with Rothbard's system, it would lead to the grotesque results Rothbard refers to in the quote above because it, in effect, transfers the ward's full ownership rights to the guardian. It would make aggression by a guardian against his ward a null set. Although you deny that such a principle is consistent with libertarian rights, your position would give the guardian the same rights over his ward as he would have over his cow.

The rights of the ward that are held in custody by the guardian, however, are limited by the nature of their relationship. The guardian's rights are, as you put it, limited to those that permit him to "continue to homestead" the ward. Rothbard (1998), in *The Ethics of Liberty* (p. 97, emphasis original), argued that what limits the rights of a parent to his child (but not his cow) is that although "a newborn babe is in no natural sense an existing self-owner," he is, "a *potential* self-owner." A guardian, then, assumes only those rights of the ward that are necessary for him to exercise so that the ward comes to a state of full self-ownership. By bringing this development to an end, killing the ward fails to qualify as a right the guardian can assume. It seems doubtful, in fact, that he would have the right to arrest in any way the development of his ward toward full self-ownership, as would happen in the case of indefinitely freezing fertilized eggs.

Here is my reply to Herbener's objections. The claim that a guardian can "trump" his ward's rights sounds horribly unlibertarian at first blush, but really is not. Guardians justifiably do things of this sort all the time. Surely, no sensible person objects to spanking children, or forcing them to have a shot of penicillin or some such drug, when they are sick

I agree that the guardian is supposed to protect the child's rights. He is supposed to in effect put himself into the child's mind and ask, How would he like *his* guardian to treat *him*, were *he* somehow to find himself in such a helpless state? There is supposed to be some *verschtehen* (understanding)

going on here. So, I ask myself, if I were a fertilized egg, and Jones were my guardian, how would I want him to treat me? My position is a *very* precarious one. Jones is a good guy. He is wildly pro life. However, due to the fact *arguendo* that he has lost the “race” with those who are putting together fetuses, there are billions, no trillions, no quadrillions of fertilized eggs Jones is guarding. One of them is me. Jones can only refrigerate some millions of us. I’m just one of those that he cannot afford to refrigerate. As I say, I am in a *very* precarious position. There are *only* two options open to Jones, in treating me as his ward. One, Jones can simply let me die, un-refrigerated (I here assume that refrigeration is the only thing that will preserve my life, something I *very* much favor.) In this scenario, I am kaput, dead, gone, no more of precious me exists. The only chance I had at life is gone up in smoke, literally, as I wither away into dust. Or, two, Jones can give me over to those who would experiment on me. I *vastly* favor this option because here, in contradistinction to the other option, I have at least an infinitesimally small chance at life, as opposed to none at all.

I agree with the quote from Rothbard insofar as murder is concerned. But if Jones gives me (in my fertilized age stage of development) to the experimenters, it is *not* murder. It is the very *opposite* of murder. It is an attempt on Jones’s part in good faith to *preserve* me.

Now, take the torture part. Here, Rothbard is wrong, I contend. Or, more charitably, he did not anticipate the weird case now under discussion. Again, let us return to how I would want Jones to treat me if I were helpless. Again, I have two very, very stark choices. One, Jones can leave me to die, since neither he or anyone else on earth can afford to keep me alive, and/or wishes to do so. Two, someone can torture me, and then I will live thereafter. I don’t know about most people, but I would ask anyone who ever finds himself in this position of guardianship over me, where my only option is death or torture, I would ask, nay plead, “please torture me to save my life.” Of course, there are degrees and limits on this. If the torture will go on for, say, 70 years, and I’ll be alive for only one minute thereafter, then forget all about it. Let me die. On the other hand, if the torture will only go on for a few minutes (this is roughly the rape scenario I mentioned) then, please, bring on the torturers (or rapists). Heck, I would go for, even, a few weeks or months of torture (rape), if this was the only way to save my life. Don’t worry about my psychological health. I would rather be alive and mentally disturbed than dead. How about you, gentle reader? How shall I handle you if ever I find these fictional conditions reversed, and I am your guardian? Do you share my tastes for life?

#### 4. *Chronicles Objection*

Fleming (2002) is not at all happy with the foregoing analysis.<sup>4</sup> In a very thoroughgoing rejoinder, he points to what he considers deep and abiding flaws in my views on stem cell research. I shall consider several of the points he makes, and respond. He begins by stating:

Block ... takes the novel position that recycling fetal parts for research and medicine is morally acceptable, so long as the “parents” (i.e., those who supplied the genetic material) are unwilling to rear the child and there are no other takers for the fetus.

The difficulty here is that nowhere in Block (2001) does the word “moral” appear. Very much to the contrary, my analysis is concerned solely with the position of *libertarian law* on stem cell research. Libertarian legal analysis is an attempt to discern what the law should be; although there are undoubted connections between the two, this is *not* to be conflated with morality. Fleming is particularly exercised about this issue, characterizing my views as “morally revolting,” “repugnant,” “horrifying.” I hate to say this, but, truth to tell, I really do share many of his sensibilities. For example, I am appalled, but not equally so, by, in addition to the aforementioned prostitution, pornography, addictive drugs and homosexuality, also such things as unkindness, disloyalty, lying, excuse making, tardiness, bestiality, incest and coprophagia (to be fully and totally disgusting). But this is all entirely irrelevant to the point at issue: to uncover what a just legal system would prohibit. For the libertarian, it involves *only* violations of the non-aggression axiom. None of these things (necessarily) do so. Therefore, all would be licit in a libertarian society. Level of disgust simply has nothing to do with the matter.

Fleming’s next foray is: “As a good libertarian, Block takes it as a given that we have no ‘positive obligations’ to other people except not to harm them deliberately.”

This is not correct. On the contrary, it would be fully legal in the libertarian society to purposefully harm people. For example, Rockefeller hates Smith. Every time Smith gets a job, Rockefeller bribes the latter’s employer to fire him. This is of course “deliberate harm” if anything is, and yet it would be perfectly legal under the libertarian code of law.<sup>5</sup>

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<sup>4</sup> He responds to Block, 2001, not Block, 2010. The former is a shorter version of the latter.

<sup>5</sup> Whether or not a Rockefeller could *succeed* in preventing Smith from working in this way is entirely a different matter; it is an issue in positive economics, not normative economics. Another example: a very attractive man, a sort of combination of Robert Redford and Clint Eastwood, hates Jones. Every time Jones tries to date a woman, this

This author also dissents from:

the ease with which human beings are equated with animals, not to mention the unproved assumption that human relations can be reduced to “homesteading.” In fact, the entire concept of homesteading requires us to regard human social life as consisting of unrelated individuals who find themselves on a frontier where there are no kinfolk, no laws, no customs—in other words, in a Lockean state of nature that has never existed

There are several flaws in this sally. First of all, I take great pains to *distinguish* the homesteading of a person and an animal. In the former case, all that can be “owned” is the right to continue to raise the child in a non-abusive manner. This is not at all so in the latter case. It would appear that the source of Fleming’s objection is that I mention cows and people in the same sentence. Second, it is a matter of supreme disinterest as to whether or not the libertarian legal code has “ever existed.” I readily concede that a situation of full and complete justice has never in history been completely fulfilled, and, knowing human beings, probably never will be. However, this does not make the quest for such Quixotic, or irrational. We must always aim at full justice, even if we never attain it; certainly, we are not precluded by this unhappy fact from even *discussing* it. Third, Locke did not at all favor a state of nature. He was, rather, an advocate of limited government.

States Fleming:

Notice, too, the blithe indifference to facts of law in the treatment of his bovine metaphor. An animal coming out of nowhere is an uncommon experience, and children—whether the identity of mother and father is known—have two parents. In fact, the proper point of comparison is with calves that belong to the people who own the cow and the bull. Such calves are not at all open to homesteading, which would amount to rustling.

It is difficult, too, to know the source of this author’s claim that I cannot tell the difference between cattle “rustling” and the homesteading of unowned cows. A mystery. *Of course* the owner of the bull and the cow can also properly claim as his own private property the calf that emanates from their coupling. “An animal coming out of nowhere” may well be “an uncommon experience,” but this is precisely my point. How else to illustrate homesteading necessarily unowned property?

Nor can much sense be made out of this Fleming comment:

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super stud attracts her away from him. Jones just can’t get a date. Again, this would be purposeful harm, but legal, in a free society.



Libertarian theory, as Ludwig von Mises insisted, was a morally neutral science. Certain courses of action might well be regarded as suicidal, but ‘praxeology and economics do not tell a man whether he should preserve or abandon life.’ If some libertarians find the conclusions offensive, they might begin to reconsider the premises.

First of all, Mises never in his life wrote about “libertarian theory.” He published, very much to the contrary, material on *economics*, which is a *value free* discipline. Libertarianism, Fleming notwithstanding, in contrast, is not at all “morally neutral.” Rather, it concerns what the law *should be*, certainly an ethically tinged question. Moreover, libertarians would not at all “find offensive” the notion that people should strive to promote life. Indeed, my claim that human life starts with the fertilized egg, and not, much later, at birth, is part and parcel of this claim.<sup>6</sup>

There is an old joke that goes as follows: “Do you know the difference between a living room and a bathroom?” If response is “No,” the reply is: “Well, then, don’t come to my house.” In like manner I say to Fleming, is you cannot distinguish between normative and positive economics, if there is no difference for you between economics and ethics, between praxeological or Austrian economics on the one hand and the libertarian political philosophy on the other, then stay out of this entire realm of discourse. I speak in this regard of Fleming’s howler: “the Austrian/libertarian approach.”

Now, of course, there are many, such as, even, myself, who subscribe to both of these perspectives. But I also play handball and enjoy the music of Mozart. But to say that there is such a thing as a “handball/Mozart approach” is to enmesh oneself in a hopeless category mistake. Due to it, Fleming involves Mises of all people who never addressed anything even remotely related to this issue in his entire life, in my own views on stem cell research. We might as well drag in Mises into a (non existent) debate over helicopters.

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<sup>6</sup> Nor is this sadly mistaken conflation of libertarianism and economics on Fleming’s part a mere slip of the pen (well, a misplacement of the finger on the keyboard). For he repeats it: “libertarian economics is only an application of libertarian social and moral theory. Mises makes the point emphatically in the introduction to *Human Action*, a work which is widely regarded as the libertarian ‘bible.’” Let it be said, once and for all, loud and clear, Mises’s (1998) *Human Action* is not at all a “libertarian bible.” It is a “bible” all right (in the sense of a seminal work), but for Austrian economics, *not* libertarianism.

More to the point, Fleming then accuses me of playing fast and loose with murder. He states: “as we see in Professor Block’s case—they<sup>7</sup> have a rather narrow construction of harm that can exclude the death of innocent people.” But, as I have been at pains to say, this only applies to *very limited* circumstances: when there is no one in the entire world willing to support the life of these very young human beings—fertilized eggs. The remainder of this Fleming article consists of what appears to me to be an incomprehensible rant, and I shall not respond to it.

### 5. *Forestalling*

Here is an objection to the foregoing based on forestalling. Its author<sup>8</sup> states:

The author claims that a parent’s failure to notify the proper authorities that he intends to abandon a baby is “akin to forestalling.” But it is not clear why this would be. In forestalling a person takes steps to prevent another from homesteading. However, in simply failing to notify authorities no such positive steps are taken. As such, then, forestalling is an action, and failing to notify is an omission. To be sure, one could argue that morally there is no difference between acts and omissions, but this is not open to the author, for two reasons. First, he has identified libertarianism as a political, not a moral view—and rightly so in my opinion. Second, were he to collapse acts and omissions, a person’s positive obligations would start to loom large—and this, I take it, would be a result that he would wish to avoid. The author, then, has a choice to make. He can either claim that on the libertarian view persons have some positive obligations towards others (e.g., to notify authorities that they are going to abandon a baby). If this option is chosen he will have to give an account of how the scope of such obligations is to be delineated. Or else he must concede that no such notification is required—and this might make his view look rather odd indeed.

I am delighted with this intervention since it gives me the option to clarify. I maintain that I can have my cake and eat it too: neither give up on my contention that positive obligations are anathema to libertarianism, nor, miraculously, if I say so myself, withdraw my claim that the uncaring parent legally *must* engage in a public notification, *and* that this does *not* constitute a positive obligation. I regard this as the core of the entire paper (Block, 2010).

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<sup>7</sup> I am not sure of who the “they” refers to. It would make sense for this word to refer to libertarians, but for Fleming this might be economists, or, for all I know, handball players or Mozart lovers.

<sup>8</sup> Who shall remain anonymous.

Consider a person who homesteads land in a bagel configuration: he leaves open and un-homesteaded an area right in the middle of his circular land holdings. This area (the hole in the bagel) *arguendo*, cannot be reached by bridging over, or tunneling under (see Block and Block, 1996) the legitimately homesteaded land. It may only be reached by “trespassing” on the land that constitutes the meaty non-hole part of the bagel. But the entire reason *d’etre* of homesteading, at least in the libertarian view, is to bring *all* land, every last jot and tittle of it, out of the status of non ownership, and into that of private property ownership. What, then, of the hole in this particular bagel? It is an abomination to the entire theory. It is incompatible with the ethos of homesteading. Is the landowner who homesteads the bagel committing a transgression of omission or commission? It is not clear. These words, this distinction, does not unambiguously apply in the present context. All we need take from this example is that he may not legally be permitted to homestead in this pattern. Or, if he wishes to do so, he *must, be legally must*, allow access to a would-be homesteader of the empty land through his own otherwise legitimately homesteaded property. If he does not, he is guilty of the *crime*, in the libertarian law code, of preventing a person from homesteading unhomesteaded land. Allowing such access is *not* a positive obligation on his part. Rather, it stems from the very meaning of the concept of homesteading, libertarian style.

There is a direct analogy between the bagel homesteader and the uncaring parent who fails to notify anyone of the impending starvation of his child. Whereas the criminal homesteader prevents would be land owners from taking over the empty land in the middle of his holdings, the uncaring parent prevents would be caregivers from providing for the unwanted baby. It is *not*, thus, a positive obligation placed on the uncaring parent to notify others. Rather, this may be deduced, directly, from the very meaning of, well, not property, since children cannot be owned, but instead parenting or guardianship. Just as the bagel homesteader must allow people on his land who otherwise would have been considered trespassers, so must the uncaring parent allow access to the baby he no longer wishes to support (see Block, forthcoming—Terri Schiavo). This no more constitutes a positive obligation than does the access requirement placed on the bagel owner.

## *VI. Conclusion*

It is difficult to attempt to apply libertarianism to this very vexing topic. Undoubtedly, I have made some mistakes in this application. I am not aware of any, otherwise I would have already corrected them. It is my thought that the way libertarian theory can progress is to have a paper such as this one staking out an extreme argument, and then, hopefully, responses and

rejoinders will either correct it entirely or fill in the missing gaps. It is in that spirit that I offer this paper for your consideration. There are few if any more philosophically and even practically intractable issues than those concerning the beginning of human life, specifically stem cell research, the topic of the present paper, and also the not unrelated issue of abortion.

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