DAVID FRIEDMAN AND LIBERTARIANISM: A CRITIQUE

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1. Introduction

There is not one philosophy of libertarianism, but rather there are two. One of them, the utilitarian, is predicated on the notion that the free economy tends to bring about that state of affairs which is preferred by all or at least most of its members; the one that maximized utility. The other school of libertarian thought is the deontological one. It is based on the non aggression principle (NAP), according to which no one may properly initiate violence against another person or his justly owned property. The latter is based upon homesteading and legitimate title transfers, such as those that emanate from free trade or gifts.

Friedman (1989) is clearly in the former camp, and attempts to show the advantages of this thesis over the latter. In his chapter 41, the main focus of the present critique, this author explicitly criticizes the deontological theory. Well, not that explicitly, in that he never once quotes or cites a single advocate of principled libertarianism. Rather, he attributes views to this perspective which are all but straw men and then proceeds to demolish them, at least to his own satisfaction. The present paper will attempt to defend deontological libertarianism against his unscrupulous attacks on it, and then return the favor by subjecting his own utilitarian libertarianism, to critical scrutiny. But there will be one difference in method between his procedure and ours. We will not insult his side of the debate by referring to hearsay evidence. Rather, we will do Friedman the honor of quoting directly from his published writings.[1]

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[1] According to Mill (1859):

Let us start. Friedman says: "One might even argue that to defend libertarian proposals on the grounds that they have desirable consequences, as I have done throughout this book, is not only a waste of time but a dangerous waste of time, since it suggests that one must abandon the libertarian position if it turns out that some coercive alternative works better." I accept this notion: Friedman's efforts are indeed a dangerous waste of time, but not for the reason he gives. Rather, this is the case if we substitute utilitarian for principled libertarianism, because the former is, plainly, incorrect. It is very weak,[2] and thus undermines the entire libertarian enterprise. However, Friedman's analysis is very valuable, very valuable indeed, if understood not as a substitute for deontological libertarianism, but as a complement to it. And this indeed is my assessment of his entire 1989 book. It is filled, for the most part, with wonderful, insightful, creative and perceptive examples of the benefits of liberty. But the notions of justice, rights, principles, are entirely missing from it.

> The greatest orator, save one, of antiquity, has left it on record that he always studied his adversary's case with as great, if not with still greater, intensity than even his own. What Cicero practised as the means of forensic success, requires to be imitated by all who study any subject in order to arrive at the truth. He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment, and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination. Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty. Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions.

My contention is that Friedman (1989), in refusing to cite actual advocates of deontological libertarianism, does not confront those who do their "very utmost for" this theory; he does not battle against these theories "in their most plausible and persuasive form." I shall not condescend to Friedman as he does to the theory I espouse. Instead, I intend to cite him in detail, so that I can confront utilitarian libertarianism in its "most plausible and persuasive form."

[2] As we shall see in section 3 of this paper.

2. Critique

2.1. Initiation of coercion

Friedman[3] starts off by attributing to "many libertarians"[4] the view that "it is always wrong to initiate coercion." I defy Friedman or anyone else to cite any reputable libertarian (*qua* libertarian) who ever published[5] anything of that sort.[6] One difficulty with the "always wrong" rendition of libertarianism is that it makes it out to be a branch of *morality*, and it is no such thing. It may well be *moral* to help old ladies across the street, and immoral to drink oneself into an alcoholic stupor, but none of this is at all relevant to libertarianism, properly understood. Libertarianism is a theory or a branch of *law,* not morality.

To show the difference, let us consider the libertarian case for becoming a Nazi concentration camp guard. Suppose that true-blue Nazis murder 100 innocent victims per week, and that this would occur no matter what our libertarian did. However, assume that it would be possible for our libertarian concentration camp guard to murder only 90 prisoners per week[7] while bringing 10 of them to safety every seven days. Would it be *moral* for him to do this? I argue yes. He will have saved 520 innocents from certain death within the year, at great risk to his own life. Not only were his actions moral, they were heroic. Then, the Nazi regime ends, and our libertarian concentration camp guard is brought before the Nuremberg Court. Will he be found guilty of murder? Of course he will. He murdered 90x52 = 4680 Jews, blacks, Gypsies, gays, Catholics, etc., in the course of the year, and thus deserves to be punished to the full extent of the libertarian *law.*[8] If these

[3] Unless otherwise noted, all quotes of Friedman will refer to this one work of his, 1989.

[4] Note, he mentions none by name, and offers no direct quotes. A most unscholarly procedure. For another, similar, attack on libertarianism that attributes all sort of views to unnamed advocates of this position, see Locke, 2005.

[5] Not said, in an offhand manner.

[6] I find it preposterous to attack a philosophy based upon such made up quotations from them. I cannot believe that Friedman would do any such thing to Marxism, or any other variety of interventionism or dirigisme. Why does he do it in this case one can only wonder.

[7] So as to demonstrate his bone fides, and not be killed by the other guars for dereliction of duty.

[8] What will be the likely fate of our hero? According to libertarian punishment theory (see fn. 22), his crime was not against society; it was, rather, an attack on the specific victims he murdered. The purpose of this theory is to force the criminal (our hero) to compensate the victims, or their heirs. If there is a single one of these 4680 people who wants him put to death, that is precisely what will take place, right after we pin a medal on

considerations do not establish a distinction, no, a chasm, between law and morality, then nothing will.[9]

2.2. Absolute control

Friedman's next attempt at stating the views of the philosophy he wishes to criticize is "Everyone has the absolute right to control his own property, provided that he does not use it to violate the corresponding rights of others." But, said so starkly, this rendition of libertarianism could be interpreted as opposition to exhaling, since in this way CO2 is placed into other people's bodies and their property, presumably without their permission. And, indeed, Friedman taxes principled libertarianism on precisely these grounds: "…the problem is that an absolute right to control one's property proves too much. Carbon dioxide is a pollutant. It is also an end product of human metabolism. If I have no right to impose a single molecule of pollution on anyone else's property, then I must get the permission of all my neighbors to breath. Unless I promise not to exhale." But this is silly. Libertarianism is a theory of *law*. And a basic element of law, in pretty much *any* of its emanations, is *de minimis:*[10] The law does not concern itself with trifles. It would be difficult to come up with anything more trifling than that. Had Friedman been interested in what a *real* libertarian theorist had to say about this issue, instead of constructing a straw man argument, he could have consulted Rothbard (1982), who addressed this issue as follows:

> … the best standard for any proof of guilt is the one commonly used in criminal cases: Proof 'beyond a reasonable doubt.' Obviously, some doubt will almost always persist in gauging people's actions, so that such a standard as 'beyond a scintilla of doubt' would be hopelessly unrealistic. But the doubt must remain small enough that any 'reasonable man' will be convinced of the fact of the defendant's guilt. Conviction of guilt 'beyond a reasonable doubt' appears to be the standard most consonant with libertarian principle.[11]

him for saving those 520 lives. It is only if all 4680 heirs see him for the hero he is, and forgive him for the murder of their family members, that he will escape punishment.

[9] Can Friedman object that I am playing fast and loose with him with the invention of this libertarian Nazi, creating weird examples out of the whole cloth that have nothing to do with libertarianism, in order to refute him on a post hoc basis? He cannot. I have a long paper trail of this sort of thing (Block, 2001B, 2002C, 2003B, 2004D, 2006B) albeit using Martians (the "mother" of all Nazis), not libertarian "Nazis," to this same end.

[10] http://en.wikipedia.org/wiki/De

[11] Rothbard (1982) was published long before Friedman (1989). Had the latter wished to confront a greater challenge than the view he attributes to "many libertarians" he could have mentioned the former. States Rushton (2000, 11) in this regard: "For more

Again, Rothbard (1982) writes as if he were anticipating this very objection of Friedman's (1989):

> …consider the case of radio waves, which is a crossing of other people's boundaries that is invisible and insensible in every way to the property owner. We are all bombarded by radio waves that cross our properties without our knowledge or consent. Are they invasive and should they therefore be illegal, now that we have scientific devices to detect such waves? Are we then to outlaw all radio transmission? And if not, why not?
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> The reason why not is that these boundary crossings do not interfere with anyone's exclusive possession, use or enjoyment of their property. They are invisible, cannot be detected by man's senses, and do no harm. They are therefore not really invasions of property, for we must refine our concept of invasion to mean not just boundary crossing, but boundary crossings that in some way interfere with the owner's use or enjoyment of this property. What counts is whether the senses of the property owner are interfered with.

Well, when human beings exhale, their product, CO_2, also, "cannot be detected by man's senses, and do no harm."

2.3. Super flashlights

Next, consider Friedman's complaint about libertarian law that it would prevent people from using flashlights or striking matches. He says:

> …whenever I turn on a light in my house, or even strike a match, the result is to violate the property rights of my neighbors. Anyone who can see the light from his own property, whether with the naked eye or a powerful telescope, demonstrates by doing so that at least some of the photons I produced have trespassed onto his property. If everyone has an absolute right to the protection of his

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detailed information on any of the topics in this Special Abridged Edition, please read the corresponding sections in one of the unabridged editions, which contain over 1,000 references to the scholarly literature, a glossary, complete name and subject indexes, and 65 tables and figures." Just so. Rushton wrote not one but two books on this topic he was addressing. One published in 1997, an unabridged one of 388 pages, and the other an abridged one of a mere 108 pages. He not unreasonably asks potential critics to respond to the former, not the latter. Were Friedman to take up the cudgels against Rushton, and employ the same method he utilizes against deontological or principled libertarians, he would not only ignore Rushton (1997), and also Rushton (2000); instead, he would inveigh against what "many (followers of Rushton) appear to believe." That contrary to fact conditional would be an intellectual disgrace.

> own property then anyone within line of sight of me can enjoin me from doing anything at all which produces light.

How does this author arrive at such a bizarre conclusion? He offers the famous continuum problem:

> If I fire a thousand megawatt laser beam at your front door I am surely violating your property rights, just as much as if I used a machine gun. But what if I reduce the intensity of the beam--say to the brightness of a flashlight? If you have an absolute right to control your land, then the intensity of the laser beam should not matter. Nobody has a right to use your property without your permission, so it is up to you to decide whether you will or will not put up with any particular invasion.

But this is a complete non-starter. Just because the colors of the rainbow, ROYGBIV blend into one another, does not mean we cannot distinguish extreme points at the end of this distribution, nor, even, all throughout it. Yes, orange and yellow are hard to tell apart where they overlap, but, surely, we all know the difference between these two colors; and this certainly applies to more distant relatives such as red and green.[12] Friedman should remember that principled libertarianism is a theory of *law*. Courts distinguish every day between exhaling and heavy pollution; between flashlights and "megawatt laser beams" which can burn down a house.[13] If this is all that Friedman can hurl at deontological libertarianism, he never lays a glove on it.

2.4. Probability of risk

There are more arrows in Friedman's quiver. His next line of attack it to apply this continuum problem not to specific property violations but to their probability or likelihood of occurring. He states:

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[12] For greater detail on the continuum fallacy from which Friedman is suffering, see Block and Barnett (2008).

[13] Statutory rape laws, too, admit of this continuum issue. We all know that a five year old girl cannot give consent to engage in voluntary sexual relations, while a twenty five year old woman certainly can. But what about the fifteen year old female? If yes, or no, then how do we deal with the fourteen or sixteen year old? Courts and political jurisdictions handle this problem every day in a not totally unreasonable manner. In the pure libertarian society, private courts (Benson, 1990, 2002; Friedman, 1979, 1989; Hoppe, 2001; Osterfeld, 1989; Peden, 1977; Rothbard, 1973A, 1973B, 1982, 1991; Stringham, 1998-1999; Tannehill and Tannehill, 1984; Wooridge, 1970) would function in much the same way, even through for Friedman, presumably, this too would be an argument against such a society.

> A similar problem arises if we consider effects that are small not in size but in probability. Suppose I decide to play Russian roulette, with one small innovation; after putting one cartridge in my revolver and spinning the cylinder, I point it at your head instead of at mine before pulling the trigger. Most people, libertarian or otherwise, would agree that you have every right to knock the gun out of my hand before I pull the trigger. If doing something to someone (in this case shooting him) is coercive, then so is an action that has some probability of doing that something to him.
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> But what if the revolver has not six chambers but a thousand or a million? The right not to be coerced, stated as an absolute moral principle, should still apply. If libertarianism simply consists of working out the implications of that right, then it seems to imply that I may never do anything which results in some probability of injuring another person without his consent.
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> I take off from an airport in a private plane with a cruising radius of a thousand miles. There is some (small) probability that my instruments will fail, or I will fall asleep, or for some other reason I will go wildly off course. There is some probability that the plane, having gone off course, will crash. There are things I can do which will reduce these probabilities, but not to zero. It follows that by taking off I impose some (small) probability of death and destruction on everyone through whose roof I might crash. It seems to follow from libertarian principles that before taking off I must get permission from everyone living within a thousand miles of my starting point."

Here, Friedman launches not a knockout blow against libertarianism, but only demonstrates that he cannot distinguish between shooting a gun at someone and flying an airplane. How does he bring himself to such a pass? I suggest it is due to the gigantic philosophical weight he places on the word "absolute" in his statement concerning "absolute right to control his property." No libertarian has said that, at least not in print. Take away that one word, and the entire weight of Friedman's criticism disappears. Libertarians certainly have no problem with courts granting injunctions for clear and present dangers.

Again, we report on Rothbard (1982) as an antidote to Friedman's extremism:

> Only if the radio transmissions are proven to be harmful to Smith's person beyond a reasonable doubt should Jones's activities be subject to injunction. The same type of argument, of course, applies to radiation transmissions.

> Between tangible trespass and radio waves or low-level radiation, there is a range of intermediate nuisances. How should they be treated?
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> Air pollution, consisting of noxious odors, smoke, or other visible matter, definitely constitutes an invasive interference. These particles can be seen, smelled, or touched, and should therefore constitute invasion per se, except in the case of homesteaded air pollution easements. (Damages beyond the simple invasion would, of course, call for further liability.) Air pollution, however, of gases or particles that are invisible or undetectable by the senses should not constitute aggression per se, because being insensible they do not interfere with the owner's possession or use. They take on the status of invisible radio waves or radiation, unless they are proven to be harmful, and until this proof and the causal connection from aggressor to victim can be established beyond a reasonable doubt."

Once more Rothbard (1982) sheds light on this issue:

> When is an act to be held an assault? Frowning would scarcely qualify. But if Jones had whipped out a gun and pointed it in Smith's direction, though not yet fired, this is clearly a threat of imminent aggression, and would properly be countered by Smith plugging Jones in self-defense. (In this case, our view and the "reasonable man" theory would again coincide.) The proper yardstick for determining whether the point of assault had been reached is this: Did Jones initiate an "overt act" threatening battery? As Randy Barnett (1977) has pointed out:
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> "In a case less than a certainty, the only justifiable use of force is that used to repel an overt act that is something more than mere preparation, remote from time and place of the intended crime. It must be more than "risky"; it must be done with the specific intent to commit a crime and directly tend in some substantial degree to accomplish it."[14]

Airline travel, too, falls into this "range of intermediate nuisances," or in this case, risks, and would be handled in much the same fashion in the free society, as they are even at present, for the most part. Friedman to the contrary notwithstanding, libertarian theory is not vulnerable to his radical interpretation of "absolute."

It is invalid and improper to employ these continuum arguments, whether in terms of risk or severity of effect from a flashlight, against any

[14] For more on injunctions, the proper assumption of risk, etc., see Barnett, 1977; Block and Block, 2000; Evers, 1977; Higgs, 1994; Lemieux, 2001; Rothbard, 1982, pp. 135-136. Rothbard, 1982, addresses the proper use of injunctions for possible dangers on some half dozen occasions.

reasonable interpretation of libertarianism, one that certainly does not include "absolute" with the weight Friedman places upon it. Why? This is because *every* political philosophy faces this challenge, this author's beloved utilitarian libertarianism included, as we will see below in section 3. Friedman completely ignores the salutary role private insurance (Block, 1998; Hoppe, 1999, 2006; Murphy, 2002; Semmens, 1995) plays in avoiding not all dangers,[15] but many of them. No insurance company worthy of the name would insure an unskilled pilot, or any airport that allowed such goings on. Yes, if airplanes suddenly began falling out of the sky with great regularity, endangering everyone in Friedman's radius of 1,000 miles, this would *unduly* endanger all below. But then, no one would ride in them, no one would fly in them. How much regularity? This is problem, only, for scholars such as Friedman who interpret libertarianism in the absolutistic manner that he does. For the rest of the libertarian community, reliance on (hopefully) private courts[16] would suffice, leaving the non aggression principle, reasonably interpreted, intact and unscathed. Contrary to Friedman, one can still "…use rights arguments to draw clear conclusions about what should or should not happen."[17] Absolutely clear? No. Of course not. Only people who live in a dream world can expect that. But, for ordinary libertarians, the NAP is still operational and remains the bedrock of law.

2.5. Homesteading

Friedman next turns his baleful eye on homesteading. Here, he does at least mention John Locke, but as per usual his failure to directly quote any of his targets, such as that venerable philosopher, gets him into trouble once again. Friedman avers:

> John Locke, several centuries ago, suggested that we acquire land by mixing our labor with it, but he did not explain how, when I clear a piece of forest, I acquire not only the increased value due to my efforts but complete ownership over the land. How, in particular, do I acquire the right to forbid you from walking across the land--something you could have done even if I had never cleared it? Later libertarian theorists have suggested other grounds for establishing ownership in land, such as claiming it or marking its boundaries. But no one, so far as I know, has presented any convincing reason why, if land starts out belonging equally to everyone, I somehow lose my

[15] To be human, and alive, is to bear risk and uncertainty.

[16] Which Friedman (1979, 1989) himself certainly supports.

[17] Coupled with private property rights based on homesteading. See on this Block, 1990, 2002A, 2002B; Block and Yeatts, 1999-2000; Block vs Epstein, 2005; Bylund, 2005; Hoppe, 1993, 2011; Kinsella, 1996A, 2003, 2006; Locke, 1948; Paul, 1987; Rothbard, 1973A, 32; Rozeff, 2005A.

> right to walk on it as a result of your loudly announcing that it is yours.

There are numerous errors here. First, Locke is a relatively poor representative of libertarian homesteading theory. His "proviso" is not accepted by any principled free market libertarian.[18] Second, where oh where did Friedman get the pernicious idea that "land starts out belonging equally to everyone?" Not so, not so. It, rather, starts out *not* being owned by *anyone* since, at the outset, no one has yet *homesteaded* any of it. Third, no one ever "acquires the increased value" of *anything*. At least in the libertarian lexicon, of which Friedman seems ignorant, no one can own *value*. This is because (exchange) value is determined not only by owners, but by actual and potential *buyers* too. Rather, people can only own the things themselves that are valued, not these values themselves (Hoppe and Block, 2002). Fourth, there are no "libertarian theorists" who have ever "suggested … claiming … or marking … boundaries" as a way of establishing ownership. As is Friedman's usual wont in matters of this sort, he vouchsafes us no evidence for this assertion of his. If anyone indeed has made any such assertion, he is to that extent not a libertarian at all, certainly not of the Rothbardian persuasion, for this ownership claim is not based on *homesteading*. If mere claim could suffice, or "loudly announcing," anyone could validly claim ownership of the sun, the moon, the stars and the planets, without ever having to have left the earth and *mixed his labor with any of these other places*. As for boundaries, if I place a fence around a square mile of land, I own the periphery,[19] but not the inside of it.[20] Fifth, the whole point of ownership is to be able to legally forbid others from trespassing on one's own private property. How does Friedman "acquire the right to forbid (me) from walking across (his) land? By homesteading it, and thus coming to own it. How would Friedman determine property rights? Does he even accept ownership? He doesn't say.[21]

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[18] "The Lockean Proviso is a portion of John Locke's labor theory of property which says that though individuals have a right to acquire private property from nature, that they must leave 'enough and as good in common...to others.'" http://en.wikipedia.org/wiki/Lockean_proviso. Far better are Rothbard and Hoppe on this issue.

[19] How deep into this acreage is yet another continuum issue, already discussed.

[20] On bagel or donut theory, see Block, 1977A, 1978, 2001A, 2004C, 2008, 2010A, 2010B, 2011; Block and Whitehead, 2005

[21] However, David Friedman is a supporter of Ronald Coase (Friedman, undated). Therefore, he *opposes* all private property rights. See on this: Barnett and Block, 2005, 2007, 2009; Block 1977B, 1995, 1996, 2000, 2003C, 2006A, 2010C, 2010D; Block, Barnett and Callahan, 2005; Cordato, 1989, 1992a, 1992b, 1997, 1998, 2000; Fox, 2007; Hoppe,

2.6. Resource value

Friedman "concede(s) that the basis of property in unproduced resources such as land is shaky, and argue(s) that it does not matter very much, since only a small fraction of the income of a modern society is derived from such resources."

But why consider only "unproduced resources?" If this author embraces *ownership* in scarce resources, he then embraces libertarianism, and subjects himself to all of the continuum criticisms he has been launching at the principled libertarian perspective. Take, for example, that airplane that Friedman was previously flying around in. Its propeller, or jet engine, makes noise. Maybe he should not be allowed to fly it for that reason? How close may other airplanes come to it while he is flying?

Yes, land accounts for only some 10% of GDP in modern economies, but that percentage is still significant. In agricultural societies, even in the modern day, a much higher percentage is at stake. But we are not really concerned with the economic significance of issues. There are very few libertarian "Nazis" for example. As libertarian theoreticians, we are concerned with rightness and justice in law, not at all with how prevalent an issue is. Private property, moreover, is important in human beings, and labor, for those who concern themselves with this issue, comprises some 75% of the GDP. Without this, we could not analyze such issues as murder, rape, assault and battery, kidnapping, etc. After all, if people did not own themselves, these acts would not be criminal. No, for the true libertarian, private property rights are absolutely essential.

2.7. Crime and punishment

Next, Friedman subjects to criticism libertarian views on crime and punishment. He states:

> A criminal trial rarely if ever produces a certainty of guilt. If you jail (or fine) someone after concluding that there is a ninety-eight percent chance that he has committed a crime, there remains a two percent chance that you are violating the rights of someone who is innocent. Does that mean that you can never punish anyone unless you are a hundred percent certain he is guilty? If not, how in principle do libertarian moral principles tell you what degree of proof should be necessary for conviction and punishment?

2004; Krause, 1999; Krecke, 1996; Lewin, 1982; North, 1990, 1992, 2002; Rothbard, 1982, 1997B; Rozeff, 2005B; Stringham, 2001; Stringham and White, 2004; Terrell, 1999.

We overlook Friedman's continued confusion between morality and law. The answer to his challenge is simple: Those responsible for punishing criminals are themselves responsible if they violate the rights of an innocent man. The NAP is the bedrock of this philosophy, and cannot be blithely set aside. If a private defense firm initiates violence against a person they deem guilty, but who is later *proven* innocent, then the people responsible for this miscarriage of justice are themselves to be considered criminals, and be duly punished, to the full extent of the libertarian law. In Rothbard's (1973, chapter 6) view of this matter:

> There is one concession we might make to the police argument, but it is doubtful the police would be happy with the concession. It is proper to invade the property of a thief, for example, who has himself invaded to a far greater extent the property of others. Suppose the police decide that John Jones is a jewel thief. They tap his wires, and use this evidence to convict Jones of the crime. We might say that this tapping is legitimate, and should go unpunished: *provided,* however, that if Jones should prove *not* to be a thief, the police and the judges who may have issued the court order for the tap are now to be adjudged *criminals themselves* and sent to jail for their crime of unjust wiretapping. This reform would have two happy consequences: no policeman or judge would participate in wiretapping unless he was dead certain the victim is indeed a criminal; and the police and judges would at last join everyone else as equally subject to the rule of the criminal law. Certainly equality of liberty requires that the law applies to everyone; therefore any invasion of the property of a non-criminal by *anyone* should be outlawed, regardless of who committed the deed. The policeman who guessed wrong and thereby aggressed against a noncriminal should therefore be considered just as guilty as any 'private' wiretapper."

2.8. Extent of punishment

What about the extent of punishment in the libertarian society? Friedman has this to say about that issue:

> Once someone is convicted, the next question is what you can legitimately do to him. Suppose I have stolen a hundred dollars from you. If all you are allowed to do is take your money back, then theft is an attractive profession. Sometimes I am caught and give the money back, sometimes I am not caught and keep it. Heads I win, tails I break even.
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> In order to prevent theft, you must be able to take back more than was stolen. But how much more? When I raised that question once in a talk to a libertarian audience, I was told that it had already been

> answered by a prominent libertarian--you are entitled to take back exactly twice what is stolen. That was many years ago, but nobody yet has given me a reason why it should be twice. Two is a nice number, but so is three, and there may be much to be said for four, or ten, or a hundred. The problem is not to invent answers but to find some way of deriving them.

This is most disappointing. Who is the "prominent libertarian"? Enquiring minds want to know. Criticisms of this sort are alright for a bar-room debate. But they do not belong in a scholarly tome, such as the one under discussion. Did the "prominent libertarian" really say any such ridiculous thing? Friedman's straw man argument will not suffice, as he keenly sees. Taking back twice is unjust, and would constitute an open invitation to crime. Friedman certainly appreciates the latter point.

If I were surly, my response to Friedman would be, Rothbard (1998[1982]) has already written about it, seven years *before* your critique of this viewpoint. If you wish to see the justification for the "nice number" two, then go and read him. But I am not surly. I would very much like to convert Friedman to the one true faith of libertarianism, so I shall take great pains to respond, substantively, to his challenge.

Friedman's is not at all an accurate portrayal of libertarian (proportionality) punishment theory. When fully expounded, it consists not only of two teeth for a tooth,[22] but it also incorporates the costs of capture as well as compensation for scaring. Here is the real deal. Suppose I steal Friedman's airplane. The first "tooth" is that I must be made to give it back to him. The second "tooth" is that what I did to him must be done to me. Since I stole his airplane, I must give him one of mine; if I do not have any of my own, then I must pay him an amount sufficient for him to purchase one of equal value. That adds up to 2.0 "teeth", not 1.9 and not 2.1, and not, either "four, or ten, or a hundred"teeth. If, right after I did my evil deed I had a pang of conscience and went directly to the police, confessing my sin and

[22] In Rothbard's (1998, p. 88, ft. 6) view: "It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive* theory of punishment, a 'tooth (or two teeth) for a tooth' theory. Retribution is in bad repute among philosophers, who generally dismiss the concept quickly as 'primitive' or 'barbaric' and then race on to a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as 'barbaric' can hardly suffice; after all, it is possible that in this case, the 'barbarians' hit on a concept that was superior to the more modern creeds." For more on proportionality, see Block, 1999, 2002-2003, 2003A, 2003B, 2004A, 2004B, 2006; Block, Barnett and Callahan, 2005; Gregory and Block, 2007; Kinsella, 1996B; Olson, 1979; Rothbard, 1998, 88; Whitehead and Block, 2003.

telling of the location of Friedman's plane, then there are no costs of capture. However, if I compounded matters by hiding the airplane and trying to escape justice, and it took three years for the forces of law and order to find me, then I owe, also, compensation to all of those deputies duly appointed by the court to look for me and my stolen plane. But more. When I stole Friedman's aircraft I scared him. His sense of well being, his confidence of in living in a just society, was reduced. How can we compensate him for *that* loss?

By scaring me, too. How to do so? By saying "boo" to me? No. By forcing me to play Russian Roulette, where the percentage of bullets to chambers is proportional to the fright I imposed[23] not on David Friedman who is a very brave and courageous individual,[24] but on the average person. This will have the happy utilitarian effect of discouraging the Bill Gates's of the world from stealing. They can easily pay for the planes they rob, and even for search costs, but they will look upon the prospect of playing Russian Roulette with some dismay. If Gates were to steal Friedman's plane, the latter can allow the former to buy his way out of this scaring requirement, possibly for several billions of dollars. Now, I do not expect Friedman to embrace this theory. I suspect that as a utilitarian libertarian, his sense of poetic justice, of the attempt of the law to make the victim as "whole" as possible, has long ago atrophied. But, hopefully, he will at least admit that this more complete punishment regime will survive the criticism he makes of the straw man "prominent libertarian" he addresses. When we add in that the criminal must pay for the costs of searching for him, and compensation for his scaring of the victim,[25] we arrive at a truly draconian punishment system. The criminal who is caught will neither "win" nor "break even."

2.9. The madman

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

[23] How will this be determined? By private courts.

[24] When he first moved to New York City, he carried around a big stick for self protection.

[25] Forcing him to play Russian Roulette (Block, 2006B).

> Two questions now arise. The first is whether members of the crowd have a right to take the rifle and use it to shoot the madman. The answer of libertarian rights theory, as I understand it, is no. The owner of the rifle is not responsible for the existence of the madman, and the fact that his rifle is, temporarily, of enormous value to other people does not give them a right to take it."

This is the same scenario as depicted in the movie "Dr. Strangelove."[26] There, in order to save the entire world, someone had to shoot a soda dispensing machine. Don't ask, go see the movie, it is well worth it. One of the characters, someone very much in the David Friedman camp uttered, horrified, "But you can't do that! This is private property!" According to Friedman's (erroneous) theory of libertarianism, an advocate of this philosophy would indeed be precluded from using the misanthrope's rifle to shoot the madman. However, based on a correct understanding of this perspective, some hero would grab the gun and stop the madman in his tracks, by plugging him with this *stolen* firearm. Would he then owe a debt to the misanthropic shotgun owner? Yes, yes, of course. But it is very likely that any private court would go easy on this hero. Even if not, that is part of the job description of heroism: willingness to take a hit for the greater good. If we can contemplate a libertarian "Nazi" who kills innocent people, supporting someone who steals the shotgun from its rightful owner in order to save lives is not much of a reach.

In the world according to Friedman, there is a conflict in rights, between the right of members of the crowd not to be killed, and the right of the misanthrope to the sole use and possession of his rifle.[27] But for the libertarian, there is no such thing (Rand, 1962). Whenever there is such a seeming conflict, one or both of the so-called rights is mis-specified.[28] Here, the misanthrope has a clear right to his gun, but the crowd does not at all have a "legitimate right … (not to be killed)." Rather, this latter so-called "right" is not a right at all. Instead, it is an aspect of wealth, or economic welfare. Of course, it is a most heinous rights violation for the "madman" to murder innocent members of the crowd, but that is another matter.

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[26] It is one thing for the writers of this movie to take unfair pot shots at economic freedom and private property rights. Hey, they are from Hollywood, they can't help doing just that. But, it is quite another thing for a supposed champion of liberty to resort to this sort of calumny.

[27] This assumes, erroneously, that Friedman supports the notion of "rights" in the first place. We have no evidence that this is at all true, and plenty, his attack on rights, that it is false.

[28] Rand (1962, ch. 12) states it beautifully: "Any alleged 'right' of one man, which necessitates the violation of the rights of another, is not and cannot be a right."

2.10. Contradiction in rights

According to Friedman, "One solution to this problem is to reject the idea that natural rights are absolute; potential victims have the right to commit a minor rights violation, compensating the owner of the gun afterwards to the best of their ability, in order to prevent a major one. Another is to claim that natural rights are convenient rules of thumb which correctly describe how one should act under most circumstances, but that in sufficiently unusual situations one must abandon the general rules and make decisions in terms of the ultimate objectives which the rules were intended to achieve….

> All of these positions lead to the same conclusion. Under some circumstances rights violations must be evaluated on their merits…"

Au contraire. There is no such thing as a "right to commit a … rights violation." Saying this is on a par with supposing square circles to exist. A right to violate a right is a veritable contradiction in terms. There is no "right" to seize this rifle. It is a violation of private property rights to do so. The (heroic) person who does so should be prosecuted to the full extent of the law, if justice is to be served, and this applies, too, to the man who shot the Coke machine in "Dr. Strangelove." Nor are rights "convenient rules of thumb" that can be abandoned. As to evaluating such situations based on their "merits," I will hold off comment on this until the next section, when we consider, and reject, Friedman's utilitarian version of libertarianism.

2.11. The draft

Friedman ends his attack on deontological libertarianism with an analysis of the draft. I will not discuss whether or not this practice can ever be "desirable." I leave that to the Friedmans of the world. Rather, I ask, can the draft ever be *just* under principled libertarianism? And I respond in the negative. It violates the NAP, therefore, per se, it cannot be compatible with libertarianism.

But suppose, just suppose, Friedman not unreasonably asks us,

> … a situation in which the chance of a soldier being killed is so high that a rational individual who is concerned chiefly with his own welfare will refuse to volunteer even at a very high wage. Imagine further that the percentage of the population required to defeat the enemy is so large that there are simply not enough patriotic, or altruistic, or adventure loving, or unreasonably optimistic recruits available; in order to win the war the army must also include selfish individuals with a realistic view of the costs and benefits to

> themselves of joining the army. Recruiters and preachers will of course point out to such individuals that 'if everyone refuses to fight we will be conquered and you will be worse off than if everyone volunteers to fight.' The individual will reply, correctly, that what he does does not determine what everyone else does. If everyone else volunteers, he can stay safely at home; if nobody else volunteers and he does, he will almost certainly be killed and if not killed will be enslaved.
>
> Under such circumstances, an army could be recruited without a draft by paying very high salaries and financing them with taxes so high that anyone who does not volunteer starves to death. The coercion of a tax is then indistinguishable from the coercion of a draft. While a libertarian may still argue that to impose either a draft or a tax is immoral and that he himself would refuse to do so, I find it hard to see how he can deny that, under the circumstances I have hypothesized, he would rather see himself and everyone else temporarily enslaved by his own government than permanently enslaved by someone else's."

I respond to this challenge in the same manner I did to Friedman's example of the misanthrope with the rifle, and the libertarian "Nazi." But first, I congratulate Friedman on posing such a strong challenge to natural rights libertarianism. Second, I say, given these unlikely circumstances, some hero would, should, come forth and impose a draft on the populace. After the war is over and we the good guys have won, we would first congratulate this draft imposer, then, hold a ticker tape parade in his honor,[29] whereupon we prosecute him to the fullest extent of the law for mass kidnapping. It may well be, just as it was in the case of the libertarian concentration camp guard, that no one will be willing to impose any punishment upon our hero. If so, he goes free with a chest full of medals. But, if not, if there is a single solitary hold out who wishing to have his pound of flesh, then our hero must pay the penalty, because he engaged in the criminal act of kidnapping (imposing the draft.) Suppose that all the people refuse to fight, and not a single hero steps forward to force them to do so. Then, that society deserves to be enslaved by the enemy.

3. Utilitarian libertarianism

3.1. Critique

Having defended principled libertarianism against Friedman's unwarranted attacks upon it, we now move to a critique of his own brand of

[29] He did save us from the proverbial fate worse than death, did he not?

libertarianism, the utilitarian variety. And, paradoxically, there is no better way to start this than with Friedman's own assessment of it. Friedman admits that his examples of the draft, the misanthrope, are a made up ones; he depicts extremely unlikely scenarios. He does so in order to embarrass libertarian theory. It is now time to turn the tables on this author, to stop playing defense, and go on the offense. Let us now critically examine his utilitarian version of libertarianism.

In section 2.10., supra, Friedman said this about the misanthrope and his gun:

> All of these positions lead to the same conclusion. Under some circumstances rights violations must be evaluated on their merits…

What, exactly, does he mean by "merits?" He is rather unclear as to what that could possibly be. Certainly, he gives us no indication as to how he would answer that question. Presumably, as a utilitarian, he would respond that the proper course of action in all the aforementioned examples is for society to do that which maximizes not liberty, but utility. This leads to nose counting. Since fewer people will lose utility (die) if the hero grabs, steals, the misanthrope's rifle and shoots the madman with it than if he does not, this course of action would presumably be justified in the utilitarian libertarian world view. But there are several key weakness in this perspective.

3.2. Weaknesses in utility theory

First, it sees utility as a cardinal, not an ordinal measure. That is, it buys into the notion that happiness can be measured, typically in the form of "utils." Now this is an assumption beloved of all mainstream neoclassical economists of which Friedman is one, but Austrian economic insights[30] have put paid to this hypothesis. There are measures of length, width, height, weight, speed, mass, etc., but none of enjoyment.[31] It is impossible to meaningfully say, "I value this pen at 8 utils; this sandwich at 16 utils. Therefore, I value latter at twice the rate of the former."

Second, Friedman's utilitarian libertarianism engages in interpersonal comparisons of utility (icu). If cardinal utility is nonsense, and it is, then icu is nonsense on stilts. Here, we must say something of the sort that Joe rates his shoes at 50 utils, and Mary her bicycle at 150 utils, and thus Mary values her

[30] Barnett, 2003; Gordon, 1993; Herbener, 1979; Rothbard, 1997A.

[31] There is a Journal of Happiness Studies (www.springer.com/social+sciences/well-being/journal/10902) but even it advertises itself as "An Interdisciplinary Forum on *Subjective* Well-Being" (emphasis added). This "subjective" means that there are no *units* of happiness. Hence, even here, utility is ordinal, not cardinal.

possession at thrice the rate as does Joe. If this isn't just plain silly, then nothing is.

Third, libertarianism of the utilitarian persuasion makes the assumption that all people have equal utility (otherwise, the utilitarian calculation would have to do more than count noses in Friedman's "madman" case.) That is, in the calculation of what acts are compatible with "libertarianism,"[32] every person is to be regarded as equivalent to every other, insofar as ability to enjoy life is concerned. If the misanthrope is allowed to keep his rifle, the madman will kill many people. If our hero steal this gun from him and shoots the madman, only the latter will die. Since the utility of the many outweigh that of the few or the one in this case, Freidman would aver that it would be "just"[33] for this act to occur.

But there is never any *reason* given to justify this assumption. It is merely blithely assumed to be correct. And, yet, it appears to go against common sense. We all know some people who are gourmets, and others for whom any meat and potato dish is equivalent to any other; indeed, to anything else. Then there are those who are wine connoisseurs, and others for whom quantity is the only consideration, and the sooner they are drunk lying in the gutter the better off they feel. Some individuals appreciate fine wine, food, poetry, the beauty of mathematics; they are cultured, in other words. Others are the very opposite. The facile assumption that all individuals have the same utility functions, can turn factors of production or consumption into equal amounts of utility is at best unproven. At worst, it would appear to be absolute nonsense.[34]

And, yet, this assumption is *crucial* to Friedman's entire philosophical edifice. For without it looms the objection of the utility monster. This worthy is a person who engages in mass murder, but of a rather special sort: he values the death of all human beings more than we, the rest of us, collectively, value our own lives. So, if he wants, and he does, he does, he can kill us all, and eat us (did I not mention that he is also a cannibal?) and Friedman cannot say him nay. For this utilitarian "libertarian" is obligated to support whatever course of action promotes not liberty, private property rights and the NAP which he rejects because of their "simplicity," but rather,

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[32] I place scare quotes around the word "libertarianism" when applying this terminology to the utilitarian version thereof, because of these many and serious drawbacks.

[33] We must follow this same procedure with words of this sort for the utilitarian "libertarians" since they really have no concept of rights or justice. All that they can favor is acts they think will promote, or better yet, maximize, human happiness.

[34] Of course, we can never *know* any such thing, since utility is ordinal, not cardinal, and icu are invalid.

whatever moves us in the direction of utility maximization. And, that can be attained in this case by allowing the utility monster to kill us all, one by one, and devour us.[35]

Alright, alright, this is an extreme example.[36] It is unlikely, no, impossible, that anyone can ever prove he is a utility monster.[37] So let us consider an example that is rather more realistic.

3.3. Innocent prisoner

The southern sheriff in 1910 is a good ol' boy of the to-kill-a-mocking-bird school. He has in lock-up a black man falsely accused of raping a white woman. The white mob outside the jail demands the prisoner in order to torture and then hang him. If the sheriff accedes to this demand, one innocent black man dies. If the jailer refuses, the mob will attack. The sheriff will kill half the mob, be murdered himself, and the black prisoner will still be lynched. What oh what should the sheriff do? The principled libertarian answer is very straightforward. Justice though the heavens fall! Millions for defense, not a penny for tribute! Wait until you see the whites of their eyes! Start shooting at the lynch mob, go down fighting, and the devil take the hindmost. To hell with utility. *Justice* uber alles.

The Friedmanite utilitarian "libertarian" will have to take the opposite tack, at least at first glance. If the sheriff holds true to the NAP, he will protect the innocent prisoner at all costs. Then half the mob will perish, no great loss since they all deserve[38] to die, but this lawman *plus* his prisoner will also perish. The Friedmanite "libertarian"[39] will be forced to calculate the utilities of all concerned. If they are all[40] equal,[41] he will have to support the clearly unjust second choice: the sheriff turns the innocent prisoner over to the mob.

[35] A different type of utility monster is one for whom the benefits of rape, to him, outweigh the costs of this NAP violating act, all in terms of utility. If this were the case, then Friedman, if he wanted to cleave to logical consistency, would have to support rapists of this type. See on this Block, 1996C.

[36] If Friedman can mobilize super duper flashlights, the necessity for a military draft and misanthropic rifle owners, I can resort to utility monsters.

[37] Of course, Friedman can never demonstrate that a given candidate has *not* achieved this status.

[38] Desert, too, would be a concept anathmetical to the utilitarian "libertarian."

[39] I just *love* placing scare quotes around this word

[40] He is precluded from ignoring the utilities of the mob on the ground that they violate the NAP. As seen above, Friedman rejects this simplistic notion.

[41] An assumption necessary to ward off the utility monster objection.

Friedman, however, does have a way to avoid this pitfall. He can point to the implications of so cowardly and unjust an act.[42] If and when word of this gets out, horrid precedents will be set for the future. Lynch mobs will become emboldened. Prisoners will not trust lawmen to protect them. They will thus be less likely to surrender, and more likely to try to shoot their way out of being arrested, which means more deaths. Law and order will be brought into disrepute, and many more people will die than half of this particular one (relatively small) lynch mob, one innocent prisoner, and one sheriff doing his proper job.

But can my debating partner fully escape from this objection? No. This entire defense depends, crucially, on word of this horrendous scenario spreading. If the secret can somehow be confined in such a way so that none of these precedents are set for future behavior, then a purely utilitarian calculus implies support for turning the prisoner over to the mob. But there are so many, many ways in which secrecy can be maintained. The world could end right after that monumental injustice took place. A magician could come along and interfere with the memory of the half of the mob that survived, plus any bystanders. This episode could, more realistically have taken place in an isolated area, with no children, where no one else would ever hear of this sheriff's malfeasance, and all the surviving elderly members of the mob soon die. Or, we could suppose any of this to be true arguendo. In each of these cases, Friedman would have to support the clearly unjust, and un-libertarian action of turning over the innocent prisoner to his death at the hands of the lynch mob.

3.4. The eyes have it

What are the neoclassical economics of eyes? The neoclassical economics of eyes are as follows: there is increasing utility of eyes, but at a decreasing rate. When a person moves from no eyes (blindnesss) to one eye, he gains a gigantic amount of utility. At least 1000 utils, by my neoclassical calculations. This is the difference between being able to see, and a life with no vision. However, the second eye adds only 100 utils. It enables the individual to attain depth perception, which will help with driving, athletics, but no more. In terms of marginal utility of eyes, it is clearly decreasing. The first unit garners 1000 utils, the second, only 100.[43]

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[42] He could not characterize it as "unjust" of course.

[43] We know, then, that the first eye is exactly 10 times more productive of utility than the second. Remember, we are now deep in the bowels of mainstream economics, where such calculations are coherent.

David Friedman has two eyes. There are thousands of people on earth, if not millions, who have none at all. Therefore, as a good utilitarian "libertarian" I now advocate that this author be forced to give up one of these body parts to a deserving recipient. Yes, of course, coercing him to do this will violate his "rights," but for the utilitarian there are no such things, for reasons Friedman makes crystal clear in chapter 41 of his book. More important for Friedmanite "libertarianism" this forced transfer of ocular tissue will mean a clear gain, and of precisely 900 utils. Friedman full well knows that there are blind people. As a utilitarian, he cannot object to my calculations. And, yet, he *still* has two eyes! He has *not* given up one of them. Therefore, on his own grounds, he fails to be a consistent utilitarian "libertarian."

3.5. Anti market regulations

In his preface, Friedman opposes government interference with, or involvement in, "drugs—marijuana, heroin, or Dr. Quack's cancer cure, … seat belts… welfare programs … tariffs, subsidies, loan guarantees, urban renewal, agricultural price supports…" Also, presumably, rent control, minimum wage laws, zoning, foreign "aid," and hundreds of other regulations, and all government participations in the economy. As a free market anarchist, his would be as radical an opposition to *all* of statism as any. Well and good. He certainly gets no argument from me on any of these issues. I fervently support him on all of them. However, Friedman bases his viewpoint on these matters on utilitarian, not deontological or principled libertarian grounds. What is his argument against any of these violations of private property rights? Clearly, it is that there will be more losers than winners, that the many losers will lose more from each of them than the few winners will gain from any of them. He couples this with that old utilitarian bug a boo, that all people count equally in these sorts of utility calculations.

Friedman would admit that *some* people do benefit from rent control, tariffs, etc. This applies to at least some tenants, and members of "infant" industries. Minimum wage laws and drug prohibition, too, make some people better off than would otherwise be the case. Union members gain from the former, and the demand for police and prison guards are increases through the latter. It cannot be denied that *some* farmers are enriched by agricultural price supports, and the Department of Agriculture has numerous bureaucrats who, without these programs would have to seek productive employment. Protectionism "protects" the import substitution industries, the administrators in charge of these programs, the politicians who go on first class level junkets to exotic places, where they "negotiate" trade deals such as NAFTA and CAFTA. However, if the few winners from these dirigisme

institutions count more heavily than the many losers, then all bets are off insofar as Friedman's opposition to them should be concerned. This author would then be precluded from defending even these elementary and basic aspects of the free enterprise philosophy.

In what sense, then, can Friedman's views even be considered libertarian? It certainly can if we posit equal utilities for all people, and icu. We can demonstrate, based on these assumptions, that these interferences with the market hurt more people, and more seriously, than they help.[44] But Friedman simply has no warrant for these assumptions, none at all. His intellectual edifice in this regard is not based on a foundation of sand. It is based on nothing at all.

4. Conclusion

I did Friedman the honor of criticizing what he actually wrote. I cited his book, and gave exact and explicit quotes to his contributions to the literature. He could have followed this same traditional procedure. There were "prominent libertarians" who articulated in print the viewpoints he criticized long before he wrote his criticism. Rothbard, for example, has a long and intensive paper trail in this regard. But Friedman chose not to do this. Instead, he criticized what some libertarian or other said about something that Friedman overheard. I could have emulated Friedman in this method. I could have created straw men, too, based on what fans of his were purported to have said. How would Friedman have liked it if I had done precisely that? Not so much, I expect.

Friedman's practice is a disgrace to good scholarship. It reminds me of nothing as much as the basis upon which Lenny Bruce was found guilty of obscenity. Policemen were detailed to hear and take notes on his night club performances. Then they would report to the judge (paraphrase): "He said 'fuck.' And then he said 'shit.' And then he said 'fuck' again." Friedman should have done better than that, purely on procedural grounds.

As for the substance of his critique, I congratulate him on giving deontological libertarianism a good run for its money. There is no principled libertarian who can hold this position without being able to deal with Friedman's excellent, although mistaken, objections.

[44] Indeed, apart from the gigantic exception of "market failure," this would appear to be roughly the contribution of the economics profession.

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