

## SOME REFLECTIONS ON THE ANARCHO-CAPITALISM OF FUTERMAN AND BLOCK

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Reading Futerman and Block is a bracing experience. Although their title suggests that they are primarily concerned with exposing a fallacy perpetrated by statisticians, their actual target is not so much a species of erroneous reasoning but an unreasonable attachment to an ideology.<sup>1</sup> That is, for Futerman and Block, statism is “the doctrine holding the government as a solution to virtually every problem.”<sup>2</sup> *A priori* statism is that same doctrine insulated from empirical refutation. For *a priori* statisticians, Futerman and Block say, “[t]he state’s multiple failures (under either complete socialism or modern interventionism) are almost completely ignored,”<sup>3</sup> and they collect amusing quotations from Noam Chomsky and others attempting to explain away the manifest failures of state socialism in the Soviet Union and elsewhere.<sup>4</sup>

Futerman and Block are right, of course, that a blind commitment to socialism is an important sociological phenomenon. Given that socialism has the unique distinction of being the only system of political economy that has been conclusively refuted in practice, its continuing hold on the minds of many, including many intellectuals, would be a psychological curiosity worthy of study in its own right even if socialism were not a danger to the material well-being of the human race and a serious threat to political liberty.<sup>5</sup> In coining the term *a priori* statism, therefore, Futerman

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1. Alan G. Futerman & Walter E. Block, *The Fallacy of A Priori Statism*, 49 STETSON L. REV. 73 (2019).

2. *Id.* at 73.

3. *Id.* at 74.

4. *Id.* at 75 n.13.

5. See generally JOSHUA MURAVCHIK, HEAVEN ON EARTH: THE RISE, FALL, AND AFTERLIFE OF SOCIALISM XIV–XVI (2d ed. 2019).

and Block have done the world a service in giving us a useful label for a pernicious doctrine.

### *I. FAMILIAR ARGUMENTS WITH FAMILIAR RESPONSES*

But skewering *a priori* statism is only the first item on Futerman and Block's agenda. Indeed, their article is largely an anarchist manifesto. Here, alas, I part company with them. I am a eudaemonist in morals in the Aristotelian-Thomistic tradition, and I think that, at least for people like us in our society, a eudaemonistic moral system supports a classical liberal state,<sup>6</sup> not anarchy. That is, a classical liberal state is more likely than the alternatives—including anarchy, even of the capitalist variety—to allow people to live good human lives, and that is pretty much all the normative justification such a state needs.

Recounting all the particular points in Futerman and Block's essay with which I disagree would be a large task and largely bootless. Despite their occasional claims to the contrary, Futerman and Block assert much more than they argue, and what they freely assert, anyone else can freely deny. This is clear if we look at some examples, such as the authors' treatment of market failures.<sup>7</sup> For example, Futerman and Block think that there are no market failures—none, ever.<sup>8</sup> But when it comes to making good on this extraordinarily strong claim, their arguments seem manifestly unequal to such a monumental task. Take the standard example involving pollution: when one person pollutes, he may generate costs, spread over a great many other people, that in the aggregate exceed the benefits that the polluter captures by polluting. If so, such pollution is thus inefficient and ought not occur. Nevertheless, because each person harmed is harmed only a little, and because finding and organizing all those harmed could cost more than the value of the harms suffered, those harmed by the pollution will never organize in order to bargain with the polluter not to pollute. In other words, since the transaction costs of a market transaction exceed the value of the transaction, no market transaction will occur, and the result will be inefficient polluting. Such arguments showing the existence of market failures have

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6. See Robert T. Miller, *Eudaimonia in America*, 232 FIRST THINGS, Apr. 2013, at 25, 28.

7. Futerman & Block, *supra* note 1, at 74 n.11, 84–88.

8. *Id.*

been made and accepted by the likes of Friedrich Hayek,<sup>9</sup> Ronald Coase,<sup>10</sup> Milton Friedman,<sup>11</sup> and Richard Epstein,<sup>12</sup> none of whom can plausibly be called a statist.

How do Futerman and Block respond to the pollution example? They say that “this sort of pollution constitutes an invasion of smoke particles,”<sup>13</sup> which is true of some, though not all, forms of pollution, and “governments have not treated this activity in that manner.”<sup>14</sup> Their point, I assume, is that at common law what we call pollution was treated as a so-called nuisance, not a trespass, which latter involves a physical invasion of another’s land.<sup>15</sup> The difference matters because courts routinely enjoin trespasses but enjoin nuisances only in a more limited set of cases.<sup>16</sup> For this reason, Futerman and Block conclude, governments “have supported and allowed such rights violations,”<sup>17</sup> presumably referring to those nuisance cases in which courts have *not* issued injunctions.<sup>18</sup>

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9. F. A. HAYEK, *The Road to Serfdom: Text and Documents—The Definitive Edition*, in 2 THE COLLECTED WORKS OF F. A. HAYEK 210 (Bruce Caldwell ed., 2007).

10. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

11. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 4 (3rd ed. 2002).

12. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 277 (1995).

13. Futerman & Block, *supra* note 1, at 85.

14. *Id.*

15. *E.g.*, EPSTEIN, *supra* note 12, at 276.

16. Futerman and Block do not avert to the point, but light is a physical phenomenon too, and so when I stand on my front lawn and am offended by the ugliness of my neighbor’s house, we can conceive of this as a physical invasion of my land by my neighbor: his house is sending ugly patterns of electromagnetic radiation across the boundary between our plots, and they are irritating my eyes. If we took Futerman and Block’s position seriously, I should be entitled to an injunction requiring my neighbor either to beautify his house to my taste or to block the view, also in a manner that does not offend my aesthetic sensibilities, since his fencing will be sending electromagnetic radiation my way too.

17. Futerman & Block, *supra* note 1, at 85.

18. As anarchists, Futerman and Block think we ought not have any courts, but they seem to imply that, if we must have courts, then those courts ought to enjoin all polluting, just as they enjoin all trespassing, since both involve a physical invasion of another’s land. As we will see below in discussing the doctrine of necessity, courts do not in fact enjoin quite all trespasses, but putting that aside, if courts did enjoin all instances of pollution, the results would sometimes be inefficient. That is, if the benefit of polluting exceeds the costs, and if those harmed by the pollution are many and dispersed, but each may enjoin the polluting, the result would likely be another market failure: because of high transaction costs and hold-out problems, the potential polluter could never successfully bargain with those harmed by the pollution to buy from them a right to pollute. This is an elementary application of the Coase theorem. See Coase, *supra* note 10, at 42; see generally DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 28–29 (2000) (theorizing that maximizing net benefit in a perfectly competitive market produces an efficient outcome). In reality, the legal distinction between trespass cases, in which the landowner can (usually) obtain an injunction, and nuisance cases, in which the landowner can do so sometimes but not always, is founded on transaction costs: in the

Regardless of how true this all is, it amounts to saying that the government, under the common law and before the era of environmental regulation, did a very imperfect job of stopping inefficient pollution. But even if this is true, *it is completely irrelevant*. Futerman and Block were supposed to show that there was no market failure, that is, that the market would stop all inefficient pollution. To show that the government has stopped some inefficient pollution, but not all, obviously does nothing to show that the market would stop it all. Unless, that is, Futerman and Block think that, whenever the government does anything imperfectly, this shows that the market can do it better. Such reasoning would be plainly erroneous, of course, as it involves a reversed version of the Nirvana Fallacy.<sup>19</sup>

Or take the case of public goods. The argument here is that some goods that are worth producing (that is, goods that provide benefits in excess of the costs of producing them) will not be produced by the market because, if such goods are produced at all, there is no cost-effective way to prevent people from enjoying them, regardless of whether they have paid for those goods. National defense is a standard example. If someone undertakes to build and maintain a navy to keep foreign enemies far from our shores, everyone living in the protected area benefits from this, whether they contract with the person supplying the navy or not. Hence, imagine some entrepreneur undertakes to sell naval protection services and starts soliciting people to buy his product. Say the price he offers is \$100 per year, and Schmatz would happily pay \$200 per year for the service. If naval protection services were like most goods, Schmatz and the entrepreneur would strike a deal and Schmatz would pay. But because of the nature of naval protection services, Schmatz may refuse to pay anything in the hopes that enough other people will sign up, for if they do, Schmatz will benefit from the entrepreneur's navy without paying a penny for

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trespass case, the would-be trespasser can (usually) bargain with the landowner at low cost in order to buy a right to enter the land, and so if she does not do so, this is very likely because the entry is inefficient (which makes an injunction an efficient remedy), e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160–61 (Wis. 1997), while in the nuisance case, the situation is much more complex because, depending on the facts, the transaction costs may be either high or low, and this means that sometimes the efficient solution involves an injunction, sometimes mere damages, and sometimes no remedy at all. See FRIEDMAN, *supra* note 18, at 28.

19. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969).

it. In other words, Schmatz may conclude that his best option is to try to freeride on the payments of others. Everyone, however, is in the same position as Schmatz, and if enough people adopt the freeriding strategy, the entrepreneur will be unable to cover his costs and will go out of business—and there will be no navy, even though it was a good worth producing. In any event, as long as at least one person opts to be a free rider, the amount of naval services supplied will be suboptimal. Again, it is a problem of transaction costs: because of the nature of the good supplied, if anyone receives the benefit, everyone does, for there is no cost-effective way of excluding those who do not pay for the benefit from enjoying it.

Futerman and Block are familiar with such arguments, but apparently think they can refute them by noting that they are “predicated upon excludability and rivalrousness.”<sup>20</sup> Excludability (more accurately, non-excludability) refers to the fact noted above that, if someone provides a public good, he cannot effectively exclude those who refuse to pay for it from enjoying the good (non-rivalrousness, which is less important in this discussion, refers to the fact that, when a person enjoys a public good, he does not thereby lessen its value to others—unlike, say, a bottle of Mouton Rothschild, which, when I drink it, you can’t).<sup>21</sup> It is true—indeed blindingly obvious—that arguments purporting to show that the market will not produce public goods are based on the idea that those goods are non-excludable, but how this fact somehow *refutes* those arguments is utterly mysterious. As far as I can see, Futerman and Block have said nothing at all to the point here.<sup>22</sup>

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20. Futerman & Block, *supra* note 1, at 85.

21. *Public Goods*, TYLER COWEN, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <https://www.econlib.org/library/Enc/PublicGoods.html> (last visited Sept. 9, 2019).

22. In note 69, Futerman and Block quote Rothbard dismissing as absurd an argument that three neighbors who want to form a string quartet should be permitted to force a fourth neighbor to learn to play and join their group. If Futerman and Block (and, for that matter, Rothbard) think this situation is analogous to one involving public goods, they have missed the key economic point entirely. As explained in the text, the benefits of a public good are non-excludable; the benefits of joining a string quartet (sharing in the fees the group charges, the sense of accomplishment one gains from playing well Hayden’s Emperor Quartet, etc.) are perfectly excludable: if you do not join the group, you do not enjoy the benefits. The cases are thus essentially different economically. More generally, with the string quartet, if the three neighbors who want to form the string quartet fail to convince the fourth neighbor to join voluntarily, this is the best evidence that the benefits of his joining do not exceed the costs; hence, his joining would be inefficient, and it would indeed be absurd to force him to do so. As noted in the text, however, with public goods the situation is different because a party may well find that the benefit to him of having the public good

I do not go into all this to show that Futerman and Block are necessarily wrong that there are no market failures involving pollution or public goods (though I believe they clearly are wrong about this). Rather, I am pointing out that the arguments they make are, at best, gestures at well-known arguments to which there are well-known responses. If these gestures do nothing to convince me—and I am one of the freest of free marketeers and an enthusiastic cheerleader for capitalism<sup>23</sup>—then it is nearly certain that they will not convince anyone who does not already agree with Futerman and Block’s anarcho-capitalism. That is why I said above that the essay is in the nature of a manifest. It rallies the troops, but it does not convert the unconvinced.

## II. SOME QUESTIONS ABOUT TRANSACTION COSTS

More generally, I think it worth reflecting how astonishing it would be if, as Futerman and Block insist, there are no market failures at all.<sup>24</sup> As I indicated above, a market failure occurs when there is a market transaction that produces net aggregate benefits and that will nevertheless not occur because the transaction costs involved in effecting the transaction exceed the net aggregate benefits produced. Now, market transactions always involve some transaction costs: we must search out the right party with whom to contract, negotiate with it, formalize an agreement, and then monitor the counterparty’s performance to make sure the party does what it promised to do.<sup>25</sup> All these things are costly.

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far exceeds the cost he is asked to pay for it and nevertheless decline to pay this price because he believes that others will agree to pay and he will be able to freeride on their payments—to enjoy the benefits of having the public good without paying for it. A person’s declining to pay for a public good and declining to join a string quarter (or, more generally, declining to buy any other private good) do not convey the same information.

Futerman & Block, *supra* note 1, at 85–86 n.69.

23. See Robert T. Miller, *Waiting for St. Vladimir*, 210 FIRST THINGS 37 (2011) (stating “the capitalist system has done more—much more—to improve the material conditions of mankind than all the corporal works of mercy performed by all the Christian saints throughout the ages” and thus “a foundational attack on capitalism is an attack on the material wellbeing of the human race and especially an attack on the poor, who have been most helped by capitalism”).

24. Futerman & Block, *supra* note 1, at 84–88.

25. Strategic behavior (e.g., holding out for a better price even though the price you have been offered is attractive to you) may also prevent some value-producing transactions from occurring, but not everyone thinks of the costs of strategic behavior as a transaction cost, and the point in the text goes through even if we abstract from the possibility of strategic behavior. See Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 225–27 (1990).

Sometimes these costs are low, sometimes high, but they are always positive. To assert that there are *no* market failures, ever, is equivalent to asserting that, for every potential market transaction producing aggregate net benefits, the transaction costs associated with that transaction are less than those aggregate net benefits. Since these costs and benefits depend on so many empirical factors—e.g., the number of parties involved, the information that parties have before they consider transacting, the available technological means, and so on, not to mention people’s subjective preferences—it seems obviously impossible to say, *a priori*, that the transaction costs associated with a transaction producing aggregate net benefits will *always* be less than such benefits.<sup>26</sup> Nothing in the nature of things requires this happy result, and so if things turned out this way, it would be the most incredible good luck.

Now, it is quite impossible to estimate such things precisely, of course, but it may help to put things in perspective to consider some rough numbers. Assume that there are six billion people on the planet, and at a given time every one of us has (without duplication) just one opportunity to enter into a transaction producing aggregate net benefits<sup>27</sup> (since these are *potential* transactions, not actual ones, and since we are talking about reallocations of resources generally and not just ones in which money changes hands, this number is surely an absurd underestimate; presumably, for each person there are hundreds or many thousands of such opportunities *every day*). If we assume that, for each such transaction, there is only one chance in a million that the transaction costs associated with the transaction exceed the benefits produced by it, then probability that this is true for all such transactions—the probability, that is, that there are no market failures—is:

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26. Futerman and Block maintain that at least some of their claims are true *a priori*. Thus, they write, “we, too, are making a claim ‘independent of experience’ . . . an *a priori* claim . . . that only *laissez faire* capitalism” will “lead[] to beneficial effects.” Futerman & Block, *supra* note 1, at 78. While I agree that capitalism (which, even in its *laissez faire* variety, usually assumes a state that protects property and enforces contracts) leads to beneficial effects, I think this is an empirical proposition, albeit one for which the evidence is overwhelming. I do not follow Futerman and Block’s argument that they somehow know that this proposition is true *a priori*. Perhaps I am just a hopelessly hidebound empiricist.

27. Transactions are always between two or more people, and it would overcount to consider the same transaction multiple times—once each from the perspective of each transacting party. This is the meaning of the parenthetical excluding duplication.

$$\left(\frac{999,999}{1,000,000}\right)^{6,000,000,000} = \frac{1.705318981}{10^{2,606}}$$

In other words, much less than 1 in more than  $10^{2,600}$  (by way of comparison, physicists estimate that there are at most  $10^{82}$  observable atoms in the universe).<sup>28</sup> There is thus simply no realistic chance that there are no market failures in the world.

Of course, the existence of market failures does not imply, without more, that we would be better off if the government stepped in to remedy such failures. Such an over-hasty conclusion is the Nirvana Fallacy,<sup>29</sup> which Futerman and Block rightly deplore.<sup>30</sup> Still, mentioning government here brings up an important point: namely, that different social institutions face different kinds of transaction costs. That is, when the market effects a transfer of resources from one party to another, the relevant transaction costs are those mentioned above—search costs, bargaining costs, monitoring costs, and so on—all of which are (at least generally) borne by the transacting parties. When government effects a transfer of resources, it too incurs transaction costs, but they are rather different: in the government's command-and-control structure, there are information costs involved in identifying a transfer of resources that would produce a net gain, the costs in effecting it by force, and the costs of errors. To revert to the pollution example, if we assume, as seems likely, that the great number of persons involved makes the market transaction costs so high that an efficient market transaction becomes impossible, then it might happen that the government could identify the transaction as one that would produce a net benefit and could mimic the market result by prohibiting the pollution that those harmed by it would pay the polluter to forgo if only they could transact with him at low cost. Just as it is an empirical question whether, for a given transaction producing net aggregate benefits, the transaction costs of effecting that transaction on the market are lower or higher than the net aggregate benefits, so too is it an empirical question of whether, for such a transaction, the transaction costs of the government's effecting it by operation of law (backed by force) are lower or higher than the benefits.

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28. John Carl Villanueva, *How Many Atoms Are There in the Universe?*, UNIVERSE TODAY (July 30, 2009), <https://www.universetoday.com/36302/atoms-in-the-universe/>.

29. See Demsetz, *supra* note 19, at 1.

30. Futerman & Block, *supra* note 1, at 76–77.



In other words, a more moderate view of the facts suggests that, since the market and the government face rather different kinds of transaction costs, it is an empirical question whether, in a given kind of situation, the market transaction costs or the government transaction costs are lower. In my view, for the vast majority of goods and services, the market transaction costs are lower, and so the market should be left to produce such goods and services. Nevertheless, in a limited range of cases—such as cases involving public goods, large and diffuse externalities, or collective action problems—government sometimes has a transaction-cost advantage over the market and, in these limited cases, the relevant goods and services are more efficiently produced by the government. I realize, of course, that Futerman and Block will not agree with any of this, but if they want to convince people who are open to their arguments, they will need at some point to consider the problem of relative transaction costs. Until they do, I shall continue to think it wildly implausible that market transaction costs are *always* less than government ones and always less than the aggregate net benefits of the relevant transactions.

### III. QUESTIONS ABOUT UNSTATED AND UNACKNOWLEDGED PREMISES

This brings me to my most serious criticism of Futerman and Block's essay, namely, its reliance on what they call the non-aggression principle (NAP). They formulate the NAP as stating that "it is illicit . . . to threaten or initiate violence against innocent targets,"<sup>31</sup> but it is clear from their quoting Rothbard that they understand the NAP as prohibiting violence or threats of violence against both the person and the property of the innocent.<sup>32</sup> From this principle, Futerman and Block say, "the anarcho-capitalist position readily, and logically, follows."<sup>33</sup>

But from a single premise usually *very* little follows.<sup>34</sup> When an author claims that great things follow from modest

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31. *Id.* at 82.

32. *Id.* at 82 n.51.

33. *Id.* at 82.

34. In most formulations, Peano Arithmetic requires five axioms, whereas the Zermelo-Fraenkel axiomatization of set theory requires nine axioms. Eric W. Weisstein, *Peano's Axioms*, WOLFRAM MATHWORLD, <http://mathworld.wolfram.com/PeanosAxioms.html> (last visited Sept. 9, 2019); Eric W. Weisstein, *Zermelo-Fraenkel Axioms*, WOLFRAM

assumptions, what is usually happening is that the author is smuggling all the important premises into the argument, letting them do much of the work, and then pretending they are not there when they would become inconvenient for his argument. In my view, that is what Futerman and Block are doing here. The way they do it is by not defining the key terms in the NAP—terms like *initiate*, *property*, *innocent*, and *illicit*.<sup>35</sup> Until these terms are spelled out in detail, the meaning of the NAP is far from clear.

This is particularly easy to see with respect to the term *property*. In fact, the concept of property is remarkably uniform across time and cultures. Owning property in ancient Rome, in medieval Japan, and in contemporary America confers very much the same set of rights—generally, rights to use the item in question, to exclude others from using it, and to alienate it, as by selling it or giving it away.<sup>36</sup> But despite this uniformity, there are still some important differences across legal systems. For example, suppose a man owns a parcel of land. Does he also own the rights to minerals under the land as well? In the United States, he does; in most European countries, he does not.<sup>37</sup> Which is the right answer? Do Americans annex to “property” certain rights that are not included in that concept, or do Europeans butcher the concept and excise rights that properly belong to it? If we are to make sense of the word *property* in the NAP, we need to know, but of course, the NAP does not tell us.

Things get worse. Suppose the minerals under the land are liquid in form, such as oil, so that when a landowner drills a well and starts pumping oil, he is also reducing the amount of oil under his neighbor’s parcel, for the oil flows from one place underground to another. Is he stealing his neighbor’s oil? If so, and if the neighbor may enjoin him, how can he possibly remove just his own oil? If he is not stealing his neighbor’s oil and the neighbor may not enjoin him, then the neighbor will have a strong incentive to dig his own oil well to grab as much of the oil as possible before it is all gone. The result, it is easy to show, is that people will dig an

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MATHWORLD, <http://mathworld.wolfram.com/Zermelo-FraenkelAxioms.html> (last visited Sept. 9, 2019).

35. Futerman & Block, *supra* note 1, at 82 & n.51.

36. See generally Max Radin, *Fundamental Concepts of the Roman Law*, 13 CALIF. L. REV. 207 (1924); John O. Haley, *Rivers and Rice: What Lawyers and Legal Historians Should Know About Medieval Japan*, 36 J. JAPANESE STUD. 313, 329–30 (2010).

37. Morgan Bazilian, Ascha Pedersen & Edmond Baranes, *Considering Shale Gas in Europe*, 3 EUR. ENERGY J. 37, 56 (2011).

inefficiently large number of oil wells. In the United States, such problems are handled by a process called unitization: the government steps in, makes all the landowners contribute their oil to a single fund, and then requires that the proceeds of the oil pumped from the ground be distributed among the owners in proportion to their holdings.<sup>38</sup> This is a sensible solution, but you cannot get it from the NAP (you also cannot get it without government intervention, but that is another story).

Or again, when a man owns some land, does he own the airspace above the land? At common law, a landowner owned everything from the center of the earth to the starry sky above, which meant that a landowner had a right to exclude from his land anyone or anything passing over it, and indeed there are some old cases in which Jones shoots an arrow clean over Smith's land and is found to have committed a trespass against Smith. But what happens when we invent commercial aviation? If the old common law notion of property is the right one, then Smith may prevent Delta Airlines from overflying his property at 39,000 feet just as much as he may stop Jones from shooting arrows over it at 10 feet. If this result stands, before Delta may fly one of its planes from New York to Los Angeles, it will have to bargain with many thousands of landowners across the entire North American continent, all of whom have incentives to hold out for large payments. Clearly, such a system is unworkable, and soon after the advent of commercial aviation, the U.S. Supreme Court held that, the old common law rule notwithstanding, henceforth a landowner would *not* own the airspace above his land to the starry sky above.<sup>39</sup> On the contrary, he owns only as much space above the land as he needs for the peaceful enjoyment of whatever he is otherwise lawfully doing on the land.<sup>40</sup>

Now, it is very important to understand the economics of this case. The old rule made sense in its time, because before there was commercial aviation, even if a landowner had little use for the air space many miles above the surface of his land, he had more use for it than anyone else did. He was the highest-value user of the airspace. Or again, the right to use the airspace had to belong to someone, and assigning it to the person who owned the surface of

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38. A.W. Walker, Jr., *Nature of the Landowner's Interest in Oil and Gas*, 17 MONT. L. REV. 27, 33 (1955).

39. *United States v. Causby*, 328 U.S. 256, 260–61 (1946).

40. *Id.* at 264.

the land below the airspace makes it very easy (that is, it lowers transaction costs) to determine who the owner is. After the advent of commercial aviation, however, the airlines became the highest-value users of the airspace. We could, of course, have required the airlines to purchase right-of-way easements from every landowner over whose land they might want to fly, but this process would have been enormously cumbersome. It would certainly have delayed the advent of commercial aviation for years, maybe decades. Instead, it being obvious that everyone (including the overflown landowners, for they too benefit from commercial aviation) would be better off if the airlines could overfly whatever parcels they may need to, the government in one fell swoop transferred the relevant rights from the landowners to the new highest-value users—the airlines. We have an excellent example here of a phenomenon first described by Demsetz: the rules of property law will change when the old rules become inefficient.<sup>41</sup>

What does the NAP say about all this? Does it embody one fixed notion of property, and if so, which one? How can you tell from the NAP whether a landowner owns the airspace above his land to the starry sky above or only so much of it as is necessary for the peaceful enjoyment of what he is otherwise lawfully doing on the land? Of course, the NAP says nothing about this, and so it is useless in settling such cases.

Now consider the doctrine of necessity in property law. Under this doctrine, a person is indeed permitted to enter on the land of another and make use of his things, even contrary to the expressed wishes of the landowner—if doing so is necessary to save life or limb.<sup>42</sup> Thus, in the famous case of *Ploof v. Putnam*,<sup>43</sup> Ploof and his family were sailing on Lake Champlain when a storm blew up.<sup>44</sup> Finding themselves in danger of drowning, they attempted to tie up on a dock owned by Putnam, whose servant prevented them from doing so and ordered them away.<sup>45</sup> Ploof's craft foundered and, although no one was killed, Ploof and his wife and children were injured.<sup>46</sup> The court held that Putnam had acted wrongly

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41. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967).

42. See *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

43. *Id.*

44. *Id.* at 188–89.

45. *Id.*

46. *Id.* at 189.

because Ploof had a right to tie up his boat on Putnam's dock for as long as the danger persisted (though Ploof would be liable for any damage to the dock that might result from his boat being there).<sup>47</sup> Now, this strikes me as an eminently sensible result, in accord with not only the ancient doctrines of the common law but also the principles of economic analysis,<sup>48</sup> the best moral philosophy,<sup>49</sup> and just the better angels of our nature. But what are we to make of this under the NAP? If we read the NAP literally, Putnam was entirely within his rights to eject the Ploofs, even if this meant that all the Ploof children would surely be drowned. If we are to avoid this absurd result, then the NAP is grossly incomplete: the word *property* in the NAP must be understood in such a way as to accommodate the doctrine of necessity.

Analogous examples will show that, to avoid other absurd results, a vast number of other property doctrines will have to be included in the NAP, such as doctrines about future interests, the default terms of leases, good faith purchasers for value, divisions of estates held in common, perpetuities and their limitations, and so on. The NAP, which Futerman and Block formulated in less than a dozen words,<sup>50</sup> will become as long as a treatise on property law. At that point, of course, it will have long lost its seemingly self-evident character and become a most debatable proposition. Indeed, that is part of the problem here: by stating the principle very abstractly, Futerman and Block make it appear practically undeniable,<sup>51</sup> and it *is* undeniable if it is understood as a *general* proposition. All the interesting and difficult cases, however, are the exceptions to the general proposition, and these Futerman and Block fail to state. Had they mentioned them, however, many of their other arguments would quickly collapse. Take their argument against taxation, which they think is a clear violation of

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47. *Id.*

48. The key economics points are that (a) while the danger persisted, Ploof—and not Putnam—was almost certainly the highest-value user of the dock, and (b) the exigent circumstances made the transaction costs very high and created a local monopoly for Putnam, the exploitation of which creates no social benefit. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 224–25 (8th ed. 2011).

49. See St. Thomas Aquinas, *Summa Theologiae*, NEW ADVENT, II-II, Q. 66, Art. 7, <http://www.newadvent.org/summa/3066.htm#article7> (last visited Sept. 9, 2019) (stating that, “if the need be . . . manifest and urgent,” as “when a person is in some imminent danger, and there is no other possible remedy,” then it is morally permissible for a person to succor the need “by means of another’s property, taking it either openly or secretly”).

50. Futerman & Block, *supra* note 1, at 82.

51. *Id.*

the NAP.<sup>52</sup> If, under the doctrine of necessity, a random stranger may take some of your property in exigent circumstances to save his life, why may not the government take some of your property by taxation to fund the military, which also saves lives, including perhaps your own? Maybe there is an answer to this, maybe not, but only if the NAP is an exceptionless, necessary truth—an illusion created by the way Futerman and Block formulate the principles—does taxation seem obviously wrong. Start admitting that the principle is subject to all kinds of exceptions and limitations, and the argument against taxation loses its intuitive plausibility.

Finally, consider the word *illicit* in Futerman and Block's formulation of the NAP: "it is illicit," they say, "to threaten or initiate violence against [the] innocent."<sup>53</sup> What does the word *illicit* mean here? Presumably it means *morally wrong*, but that only pushes the inquiry to a deeper level, for there are at least three major philosophical systems of morals, and they differ radically in how they understand the terms *right* and *wrong*. In utilitarianism, an action is right if it maximizes utility—that is, produces the greatest happiness of the greatest number—and wrong otherwise.<sup>54</sup> In Kantian or deontological systems, an action is right if it is done pursuant to a maxim that can be universalized in a certain way—in other words, a rule that a person can rationally will that everyone always act in accordance with; wrong actions are ones failing this criterion.<sup>55</sup> In eudaemonism, or virtue theory, human beings have a natural final end, and actions are right if they are properly ordered as means to this end and are wrong otherwise.<sup>56</sup> Do Futerman and Block understand the moral claim in the NAP in utilitarian terms, deontological terms, eudaemonistic terms, or some other way?

The answer matters because, at least on some interpretations of the word *illicit*, the NAP would necessarily have exceptions. For

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52. *Id.* at 83–84.

53. *Id.* at 82.

54. I here elide the distinction between act-utilitarianism and rule-utilitarianism, as well as many more subtle distinctions. *History of Utilitarianism*, JULIA DRIVER, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 22, 2014), <https://plato.stanford.edu/entries/utilitarianism-history/>.

55. See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY, 37, 57 (Mary J. Gregor ed. & trans., 1996).

56. See *Ancient Ethical Theory*, RICHARD PARRY, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 4 (Aug. 13, 2014), <https://plato.stanford.edu/entries/ethics-ancient/#4>.

instance, if we interpret *illicit* in the NAP in a utilitarian way, then the NAP amounts to the claim that threatening or initiating violence against the innocent produces negative net utility. While this is very likely true *in general*, utilitarians famously say that no action is necessarily wrong—wrong always and everywhere—because, in the right kind of extraordinary circumstances, such an action will produce net positive utility.<sup>57</sup> Indeed, actions falling under the doctrine of necessity likely are just such cases with respect to the NAP. But if we understand the NAP in utilitarian terms, many of Futerman and Block's arguments against statist policies face grave new difficulties: for example, because of the declining marginal utility of wealth, a progressive income tax coupled with a system of redistribution may well produce positive net utility. So, far from being morally wrong, taxation might be morally obligatory. Something similar might follow if we interpret the NAP in eudaemonistic terms.

Futerman and Block often wield the NAP as a moral absolute,<sup>58</sup> and since the principle, taken in an absolute sense, cannot likely be justified on either utilitarian or eudaemonistic grounds, Futerman and Block are probably committed to interpreting the NAP in some deontological way. This may run into problems too, as even Kant allowed that the right to property was not absolute,<sup>59</sup> but we may put such issues aside. The main point is that, to provide any plausible basis for the very strong conclusions Futerman and Block draw from it, the NAP needs to be interpreted in some strong deontological sense. But then anyone who, like me, subscribes to a different moral system and does not accept this particular form of deontological moral philosophy will reject the NAP *ab initio*, even though such a person may accept a somewhat analogous principle formulated within a different moral system. Hence, even if Futerman and Block can deduce all their major conclusions from the NAP understood in deontological terms (something I continue to doubt), nevertheless once it becomes clear that one need accept this version of the NAP only if one accepts a highly debatable form of deontological moral philosophy, the answer to Futerman and Block becomes clear: anyone who does not

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57. See generally DRIVER, *supra* note 54.

58. Futerman & Block, *supra* note 1, at 82–83.

59. See Otfried Höffe, *Kant's Innate Right as a Rational Criterion for Human Rights*, in KANT'S METAPHYSICS OF MORALS: A CRITICAL GUIDE 71, 91 (Lara Denis ed., 2010).

accept some highly debatable philosophical premises need not accept Futerman and Block's anarcho-capitalist conclusions either.

#### IV. CONCLUSION

I said at the outset that I appreciated Futerman and Block's broadside against *a priori* statism, and given the unthinking interventionism and even outright socialism that is abroad in the land today, their piece is very timely. Despite my disagreements with the positive part of their program—the extraordinarily strong claim that market failures never occur,<sup>60</sup> the implied claim that government never has a transaction-cost advantage over the market,<sup>61</sup> and all the rest—my admiration for that broadside against the spirit of the age remains. True intellectuals follow their premises wherever they lead, and Futerman and Block undoubtedly do that. As I explained above, I have grave doubts about some of those premises, but I remain grateful to Futerman and Block for publishing this essay. The world is certainly more interesting with a few anarcho-capitalists running loose in it.

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60. Futerman & Block, *supra* note 1, at 74 n.11, 84–88.

61. *Id.* at 80–82.