

<https://doi.org/10.19195/2658-1310.27.1.1>

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# Rejoinder to Dominiak<sup>1</sup> on the necessity of easements<sup>2</sup>

Date of submission: 1.06.2020; date of acceptance: 26.07.2021

JEL classification: K19

**Keywords:** libertarianism, easements, homesteading, property rights, Blockian proviso, positive rights

## Abstract

### Rejoinder to Dominiak on the necessity of easements

Dominiak (2019) agrees with the Blockian proviso: homesteading in a bagel or donut format is illicit, since it allows the owner to control land (the hole, the territory in the middle) with which he has not mixed his labor. Thus, a person who does so must open up an easement allowing outside homesteaders through his property, and into this so-far virgin land. But, this author claims this proviso of Block's does not go far enough. It should also be extended further, not only to incorporate the bagel format, but also in justification of easements through private property in emergencies, and so as to avoid entrapment. I strongly support Dominiak in his defense of the Blockian proviso against critics (Kinsella, 2007, 2009C) in the first part of his excellent paper, but find I cannot agree with this second contention of his. In short, Dominiak agrees with Block regarding easements in the bagel case, but wants to extend this concept to when property owners are encircled, and thus trapped. In my view, extending easements to cases other than the bagel is incompatible with libertarianism's emphasis on the sanctity of private property rights.

Certain positive rights (to, in this case, movement) are essential to Dominiak's argument. And these rights do not exist. Therefore, Dominiak's argument is unsound.

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<sup>1</sup> I am extremely honored that Kinsella (2007, 2009C) characterized my views as the "Blockian Proviso" and that Dominiak (2019) devoted his entire article to supporting this concept, only maintaining I did not carry through on it fully and sufficiently. Hey, John Locke and Walter Block; the names rhyme. And, ditto for the Lockean Proviso and the Blockian Proviso.

<sup>2</sup> I wish to thank two very helpful referees for helping me to significantly improve this paper. All remaining substantive errors and infelicities are, of course, my own responsibility.

Locke's (1689, Chapter 5, Section 27) homesteading theory is widely known in the literature:

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

Libertarians have been properly critical of this proviso.<sup>3</sup> It seems a tad too egalitarian to stop the homesteading process of turning virgin territory into owned property just because a bunch of Johnny-come-latelies will be left out in the cold; if you snooze, you lose, is my motto. The Lockean proviso has come under severe attack by libertarians. It specifies that homesteading as a justification for property rights only applies as long as “[...] there is enough, and as good, left in common for others” (Locke, 1689). But what happens then? It would appear that homesteading would grind to an abrupt halt, and the tragedy of the commons would be the order of the day. This would, at the very least, put paid to the libertarian goal of turning all the earth into private property.

In contrast, the Blockian proviso maintains that it is improper to homestead in the format of a bagel or donut. The difficulty arises in that the owner of property in this format will have control over the remaining land in the middle<sup>4</sup> without ever having mixed his labor with it, contrary to libertarian theory.

Dominiak (2019) is organized into four parts.<sup>5</sup> In the first two of them, he is broadly supportive of this Blockian proviso, and I shall have only superficial criticisms to make of these sections of his paper. But the last two parts of his paper are highly critical, not so much of this proviso itself, but of the failure to apply it even more broadly. The present paper is organized along the very reasonable lines of Dominiak's.

## 1. Introduction

Dominiak's explication of the controversial<sup>6</sup> Blockian Proviso is accurate.

<sup>3</sup> For a libertarian critique of the Lockean proviso, see Block, 2016; Gordon, 2011B; Hoppe, 1993; Kinsella, 2009A; Machan, 2009; Makovi, 2015; Rothbard, 1998, 244–245.

<sup>4</sup> The hole in the bagel or donut.

<sup>5</sup> Unless otherwise specified, all mention of him, or, of “the author” will refer to this one article, Dominiak, 2019.

<sup>6</sup> For a critique of the Blockian Proviso, see Dominiak, 2019; Kinsella, 2007, 2009C. For a defense of the Blockian Proviso: Block, 2010, 2016; Block and Nelson, 2015; Dominiak, 2017; Long, 2007A.

Now, for some criticisms. I think Dominiak is misusing the phrases “right-libertarians” and “left-libertarians.” True, he cites Vallentyne (2000) and Cunliffe (2000) in support of this view of his, but there is a rather large literature, to which I subscribe, which uses these terms very differently. Here, thin and thick libertarianism is sharply contrasted with one another, not right and left libertarianism; that distinction is only secondary. The thin version thereof maintains that the basic building blocks of this philosophy are strictly limited to the non-aggression principle (NAP), coupled with private property rights based on initial homesteading of virgin land and, subsequently, all voluntary acts, such as buying, selling, renting, borrowing, gambling, and gift-giving. The thick libertarians do pay lip service to this foundation, but then add on all sorts of irrelevancies. For example, left wing thicksters require, in addition, that their adherents celebrate homosexuality, mixed marriages and egalitarianism, while the right wing supporters of thickism wish to exclude from society the very people who hold these views.<sup>7</sup> Accordingly, I shall translate Dominiak’s use of the phrase “right-libertarian” to the more correct, plain, old, ordinary, “libertarian,” e.g., thin libertarian, neither of the right nor the left.

Our author next quotes a passage from Nozick (2014), worrying about rich people trapping poor people inside their homes, by purchasing all the land surrounding the holdings of the latter, and not allowing them to enter if they are away, or exit if they are at home. I do not see this as a serious challenge to libertarian property rights theory. Block (2009, pp. 265–266, 283–284) attempts to resolve this issue with access insurance: no one would ever purchase any land were he not assured he could enter and exit on agreeable terms.<sup>8</sup> In this regard, I fear I must quarrel with this statement of Dominiak’s:

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<sup>7</sup> For advocates of left-wing thick libertarianism, see Gillespie and Welch, 2011; Johnson, 2008A, 2008B, 2013; Long, 2007B, 2008A, 2008B; Reisenwitz, 2013; Richman, 2014A, 2014B, 2014C, 2014D; Tucker, 2014; Vallier, 2013, 2014; Zwolinski, 2011. A right-wing thick libertarian is Hoppe (2001, p. 218). For critics of thick libertarianism, whether of left or right, e.g., supporters of thin libertarianism, see Albright, 2014; Block, Block, 2014A, 2014B, 2014C, 2015; Cantwell, 2014; Engel, 2016; Gordon, 2011A; Hornberger, 2014; Kinsella, 2009B; McCaskey, 2014; Montgomery and Block, 2016; Mosquito, 2014A, 2014B; Peterson, 2015; Rockwell, 2014; Sanchez, 2014; Smith, 2014; Vance, 2014; Wenzel, 2014A, 2014B; Williamson and Block, 2017; Woods, 2013. Dominiak is correct in associating left libertarianism with egalitarianism. He states: “Left-libertarian theories of justice hold that agents are full self-owners and that natural resources are owned in some egalitarian manner.” However, he conflates thin libertarianism with right-wing libertarianism. The two are very different. This, to be sure, is merely a verbal dispute, but, I think, it is important we all use the same language.

<sup>8</sup> This, admittedly, sounds a bit far-fetched. No one worries about any such thing at present, since government roads, streets, and highways make it impossible that anyone would ever be blockaded inside, or not allowed to access from outside, his own property. But in the pure laissez-faire capitalist society, the government would not provide this amenity (Block, 2009). Under such a system, it would be likely that the market would take this difficulty into account and obviate it.

[...] the encirclement can be seen as revealing a deep tension within the libertarian theory that exists between its two fundamental values, namely liberty and property. If exercising the property rights of one person may severely limit another person's movements, then it is problematic in what way libertarianism promotes individual liberty. If, on the other hand, the freedom of movement is granted even over the borders of people's rightfully homesteaded estates, then it is not clear in what sense libertarianism respects the private property rights.

I see no "deep tension" in libertarian theory here, let alone a logical contradiction in it, as hinted at by our author. In my view, there is simply no such thing, in this philosophy, as "freedom of movement." This is a positive, not a negative right, and under *laissez faire* capitalism, only the latter applies. If there is any such thing as "freedom of movement," this would play havoc with property rights; trespass would be allowed, at least in cases of emergency. But then we would have a conflict in rights, abhorrent to any coherent legal system, let alone a libertarian one.<sup>9</sup>

## 2. The problem of homesteading

I have no criticism whatsoever to offer regarding this section of Dominiak's paper. I appreciate his articulation of the Block Proviso. I go so far as to say his rendition of it is superior to even Block's own version, and he was the originator of it. In terms of clarity, depth, comprehension, and use of numerous examples, Dominiak's rendering is nothing less than absolutely magnificent.<sup>10</sup>

<sup>9</sup> According to that old saw, "If wishes were horses, then beggars would ride." Dominiak cites van Dun (2009) in support of this conflict thesis of his. For a rejection of Van Dun, see Block (2010). Our author also cites Cohen (1995) in this matter. For a refutation of the latter, see Torsell and Block (2019). I shall have more to say about this positive rights claim of Dominiak's in section 4 of the present paper. On the other hand, Dominiak almost appears to undermine his own "conflict" thesis when he writes: "[...] one can say that a theory of property rights is a libertarian theory not because it promotes liberty but because it invests individuals with private property rights in accordance with the principles of the self-ownership, homesteading and consensual transfer." How so? This is because he is now using "liberty" in a positive sense, to mean freedom of movement. But, here, he is taking this back, and clearly, and correctly, siding with property rights, not so-called "liberty." On the other hand, "self-ownership" is a bit of a problem, in that there is libertarian literature defending voluntary slavery. In the view of Boldrin and Levine (2008, 254): "Take the case of slavery. Why should people not be allowed to sign private contracts binding them to slavery? In fact economists have consistently argued against slavery — during the 19th century David Ricardo and John Stuart Mill engaged in a heated public debate with literary luminaries such as Charles Dickens, with the economists opposing slavery, and the literary giants arguing in favor." For more in this vein, see Andersson, 2007; Block, 1969, 1979, 1988, 1999, 2001, 2002A, 2003B, 2004A, 2004B, 2004C, 2005, 2006A, 2007A, 2007B, 2009A, 2009B; Frederick, 2014; Kershner, 2003; Lester, 2000; Mosquito, 2014C, 2015; Nozick, 1974, pp. 58, 283, 331; Steiner, 1994, pp. 232; Thomson, 1990, pp. 283–84. Had Dominiak said, instead, "initial self-ownership," all would have been well on this score. Perhaps this was no more than a typographical error on his part.

<sup>10</sup> I discern only one flaw in this entire section; he writes: "We would like to thank an anonymous referee of this journal for drawing our attention to this important ramification of our reasoning that we were oblivious to before reading her/his incisive comments." What is with the "her/his"?

### 3. The problem of landlocked property

In this section of the paper, Dominiak and I part company.

I shall quote substantially from his otherwise splendid essay to ensure there are no misunderstandings between us.

He starts off this section as follows:

Block focuses exclusively on the incompatibility between forestalling and the homestead principle and does not seem to appreciate enough the fact that the former also generates contradictions within the system of rights, he claims that the only function easements by necessity can perform in the libertarian law is to assure that all the land can be homesteaded.

Picture land laid out in the form of a bagel, or a donut, with a hole in the middle of it. We label the terrain outside of this territory as “C,” the bagel or donut itself as “B,” and the hole in the middle, which might itself contain several acres or more, as “A.” There are no helicopters, no bridges that can traverse area B, and no tunnels that can be placed underneath this land holding, B. May an investor properly homestead the land in the B formation? No. For then he would entirely control area A, without ever having homesteaded it, a contradiction to libertarian theory.

I certainly do see a contradiction, unless B allows an easement to C so as to be able to access A. Specifically, the contradiction to libertarian theory is that without such a traverse path for C, B will be controlling A, even though he never mixed an ounce of labor with that territory.<sup>11</sup> Yes, one reason, a justification for the Blockian Proviso, is that it allows every last jot and tittle of land to be privatized, at least potentially; surely a libertarian desideratum. But, also, this Proviso is predicated upon the state of affairs that were it not implemented, then there would indeed be a contradiction: B, without ever having laid a finger or toe on territory A, still controls it. This contradiction is not to be borne by the free enterprise system.

The next quarrel I wish to engage in with our author is this statement of his: “As Kinsella rightly points out, ‘I see no special status of the unowned property; it’s just property someone would like to homestead.’” There are two difficulties here. First, Kinsella is just plain wrong in this contention of his, and Dominiak, errs too, in his support for Kinsella. There is indeed a “special status” for the land we are characterizing as A, the hole in the donut or bagel: B is controlling it, without ever having first set foot on it. Secondly, in saying this, Dominiak is going back on all the brilliant support he offered to Block’s thesis in the first two sections of his paper. There, he took Block’s side in his debate with Kinsella (Block, 2016); here, Dominiak all but reverses himself, without offering any explanation, let alone a sufficient one.<sup>12</sup>

Why be politically correct? This is the province not only of leftists, socialists and feminists, but also of left wing thick libertarians. For a critique of politically-correct language, see Block, 2000, 2006C.

<sup>11</sup> This is in addition to the goal of assuring homestead rights for all land; more on this to follow.

<sup>12</sup> I seriously wonder whether the word “rightly” constitutes a typographical error.

I find this statement of Dominiak's to be of great interest:

If traversing B's land were the only way for C to escape a deadly fire (not to homestead the virgin land), would it be permissible (or even inviolable) for B to prevent from entering his property? For Block who admits necessity easements only for the purpose of homesteading (the same as for Kinsella who rejects necessity easements altogether), this scenario turns into a pretty serious life-boat situation.

Our author's assessment of Block's likely reaction to the foregoing is highly accurate:

Notwithstanding this additional complication, Block would bite this counterintuitive bullet and argue, in accordance with the right-libertarian principle of non-aggression, that if B has a property right to his land, he also has a right to forcibly prevent C from entering his estate, whatever the reason (barring homesteading) C has for doing so. As we mentioned before, right-libertarianism construes all rights as property rights and all rights as absolute...

A few words are in order at this point to make the case in favor of "absolute" private property rights. Life-boat situations are often wielded into the fray in an attempt to undermine the libertarian emphasis on private property rights.<sup>13</sup> I will not content myself by saying that by definition they are extremely rare in real world situations. I go further. I attempt to take the bull by the horns and say that not only does the non-aggression principle (NAP) of libertarianism apply in all such life boat cases (a deontological claim), but that it also constitutes the last best libertarian hope for general prosperity and the maximization of economic welfare (a utilitarian claim).

Should a man be punished for stealing a loaf of bread to feed his starving child? This example pulls at our heartstrings; it cries out to the very heavens for a violation of private property rights. But, no. It might sound paradoxical, but it is not: there will be fewer starving children, far fewer, other things equal, in a society which deals severely with theft of any kind, for any purpose, even such a benign one, than one that does not.

This is a pretty weak, consequentialist or utilitarian argument. Let us stipulate that the man may steal without anyone, even the man who baked the bread, finding out. Would I countenance the property right violation now? My heart would go out to him, as a fellow parent, but insofar as libertarianism is concerned, from a deontological point of view, this parent committed a crime and should be duly punished for it.

Next consider this shot across the bows of the good ship Blockian Proviso:

[...] applying the Blockian Proviso just to the cases of precluding others from appropriating the un-owned land and denying easements by necessity to landlocked estates or people trapped on their own property seems inconsistent. If we properly identify reasons for applying the Blockian Proviso, "it could be generalized to some kind of 'necessity-easement' not limited to the homesteading case." Once we realize that not only forestalled homesteading but also landlocked property gener-

<sup>13</sup> For a libertarian response to such challenges, see Block, 2002B, 2004A, 2006B; Rothbard, 2004.

ates contradiction within the system of natural rights and that the only way to avoid it is to recognize the landlocked owner's right of easement, we will see that the Blockian Proviso can easily be extended beyond the homesteading case.

Not so easily, I fear. Not at all that easily. Au contraire, landlocked property generates no contradiction that I can see. I think the reason Dominiak takes this position is that he, along with Nozick, who he cites to this end, sees land settlement through the eye-glasses of present institutional arrangements. Namely, at present, government laws prevent any such entrapment; the fear is that without them, entrapment would presumably occur. But, let us allow our minds to range freely, and consider the situation that most likely would have developed had the state never been involved in streets and highways (Block, 2009). Would anyone ever have purchased, or settled in, or homesteaded any land whatsoever did he not have access insurance, or, at least, an iron-clad guarantee that no such event would ever befall him? Likely not. There would have been *private* streets, avenues, boulevards, highways that would have been connected to other such enterprises, the entire system of which would have obviated any such difficulty. The point is, this landlocked or trapped challenge to free enterprise is a red herring. It emanates from a lack of appreciation of the full free enterprise system. Now, suppose, there are a few people who neglect to assure themselves of access and exit to their homes; posit that they perish as a result. We then return to the bread stealing example. We should not be deterred by it, no matter how dramatic, if we wish to uphold the pure libertarian position.

Let us be more explicit about this: even in an ideal world without states, some people may choose not to have access insurance, or their insurance company may go bankrupt, or, for whatever reason, access insurance may not be provided by insurance companies. To Dominiak, it seems that, surely, in that world, a landlocked person still acts morally permissibly in crossing other people's property without permission if necessary to survive.

Well, yes, such a trapped person acts compatibly with saving his life and this is entirely compatible with some notions of morality. However, we are not herein discussing all of morality, only that sliver of it that discusses just law. And, the libertarian non-aggression principle (NAP) is very clear on this: trespass is a rights violation, *per se*. Let me attempt to launch a *reductio ad absurdum* against the Dominiak position. If it is justifiable for people to trespass in order to save their lives, what else might become compatible with libertarian law for this life-saving purpose? How about people who do not save for a rainy day? They are now going to starve (we abstract from private charity in all these cases), so government welfare programs would now be defensible on private property grounds. How about people who do not save for their old age? They are now going to starve, so government social security programs would now be defensible on private property grounds. How about people who do not make provision for themselves if they become unemployed? They are now going to starve, so government unemployment

programs would now be defensible on private property grounds. We could, in this manner, justify all sorts of other government programs, also fully incompatible with libertarianism: farm subsidies for farmers who go broke and might die of starvation; bailouts for businessmen who misallocate resources; rent controls for possibly starving tenants; tariffs to protect starving domestic industry; the list can go on and on.

Dominiak is far from finished lambasting the Blockian proviso for not going far enough. The next arrow in his quiver is this:

Imagine that person A originally appropriates a parcel of land in the wilderness. As the owner of the land, A has a right to possess and use the land. Since both possession and use presuppose ability to enter the land and “the Possession of land is lost” by “the possessor being prevented from coming on the land,” (sic) A also has a right to enter the land — a right that consists both of a liberty to enter and a claim-right not to be interfered with in doing so. If person B subsequently homesteads some other land in such a manner that A’s property becomes landlocked and the only way to access it that is available to A involves traversing B’s land, then recognizing A’s easement by necessity over B’s property is the only way to avoid contradiction in the system of natural rights. Otherwise, A would at the same time have a right to enter his land and a duty not to enter it. For if B were granted absolute ownership of his homesteaded land and, so, no easement over it were recognized, then A would be burdened with a correlative duty toward B not to traverse B’s property. However, because the only way to enter A’s property is to traverse B’s land, then A would also be burdened with a duty not to enter A’s property. Yet as the owner of his parcel, A by definition has a right to enter A’s land. There is therefore no difference between being precluded from accessing the unowned land and accessing one’s own property — contradiction ensues in both cases and easements must be called upon to avoid it.

I diverge from my learned colleague on these points: “As the owner of the land, A has a right to possess and use the land.” And this “A also has a right to enter the land.” Further, this: “as the owner of his parcel, A by definition has a right to enter A’s land.”

Suppose the following: A travels to outer Mongolia, and then simply does not have the wherewithal to travel all the way back to home base. There is no such thing, at least not under libertarianism, for the owner of anything to be guaranteed to attain possession of the necessary funds. If he is far away from home, and lacks the means to do so, he simply has no such “right.”<sup>14</sup> Or, suppose A travelled away from home and then got a flat tire on this car. He still has a “right” to return, even though he cannot pay for a tire repair? Hardly. Similarly, if someone else complete-

<sup>14</sup> Is there a relevant difference between (1) somebody traveling to Mongolia without the means to come home and being provided those means (via the state) and (2) somebody passing through a “bagel” of encircling land to get to his property? In my view, there is a gigantic, stupendous difference, a relevant one, between the two scenarios. It is this: the first one involves a “positive right,” the second one does not. The only justification for the state subsidizing the traveler to Mongolia is that people have a right to travel, a non-sequitur for libertarianism. But in the second case, the bagel owner may not, at least not according to the Blockian proviso, homestead land in the donut formation. For, in so doing, he controls land he has not homesteaded, the “hole” in the donut, which is anathema to libertarian homesteading theory.

ly surrounds A's domicile with their own property, through entrapment by land, then, again, A has no such right to invade them, to attain his "right" to "possess and use" his own property. The burden of proof that he does, it seems to me, lies with our author. Not only has he not provided any such defense, he seems unaware of his logical obligation to do so. He rests content with the claim that A owns his property. Yes, he does. But, that does not give him the right to invade the territory legitimately possessed by others.

It will avail Dominiak nothing to rely upon

Frank van Dun [...] who proposed the 'free movement' proviso as a sort of easement promoting individual liberty at the expense of the demands of the property rights when they come into conflict with each other. As he pointed out, 'there is a need to have a "free movement" proviso regarding ownership of material resources, to the effect that the rights of a property owner do not include the right to deprive others of the possibility of moving between their own property and any place where they are welcome [...] freedom of movement implies that there are no significant or unreasonable man-made obstacles to moving about [...].

Van Dun creates this "right" out of whole cloth, with no rhyme or reason. The right to free access to one's property is on a par with the right to free food, clothing or shelter, all of which is radically incompatible with the private property rights of libertarianism. All of them, free movement included, rely on the violation of other people's property. This is justified in the bagel/donut case, only because B, the owner thereof, is exercising undue control over A. But this does not apply holus-bolus.

Let me attempt to wax eloquent about how unlikely it is that anyone will be able to "trap" anyone else, either into, or outside of, the latter's legitimately held property. Nozick (2014, 55), as mentioned by Dominiak, takes the opposite point of view:

The possibility of surrounding an individual presents a difficulty for a libertarian theory that contemplates private ownership of all roads and streets, with no public ways of access. A person might trap another by purchasing the land around him, leaving no way to leave without trespass. It won't do to say that an individual shouldn't go to or be in a place without having acquired from adjacent owners the right to pass through and exit. Even if we leave aside questions about the desirability of a system that allows someone who has neglected to purchase exit rights to be trapped in a single place, though he has done no punishable wrong, by a malicious and wealthy enemy [...], there remains the question 'exit to where?' Whatever provisions he has made, anyone can be surrounded by enemies who cast their nets widely enough. The adequacy of libertarian theory cannot depend upon technological devices being available, such as helicopters able to lift straight up above the height of private airspace in order to transport him away without trespass.

But Nozick is a philosopher, not an economist. He of course knows full well that supply curves slope in an upward direction, but he has not had this insight seared, deeply, into his very soul, as have the votaries of the dismal science. The more of something you buy, the higher its price tends to be. If you want to purchase everything, for example, all cows, or all tin, or all access around someone else's property, you are going to have to pay an indefinitely high price, not to say

an infinite one. In the free enterprise system, with private roads spread higgledy-piggledy all over the place, any small-holding will be surrounded by owners contractually obligated to allow the target access into and out of his home. So, the would-be entrapper will have to range wider and more widely still, until he reaches tens of thousands of square miles. We wish him the best of luck in this lunatic quixotic quest of his.

But suppose Dominiak, Nozick and Van Dun are correct in this fear of theirs.<sup>15</sup> They still have to overcome yet one more hurdle. Remember, if these worthies have their way, they will violate the private property rights of the entrapper; forcing him to allow an easement through his otherwise legitimately owned territory. So which entity is it that is already a trapper par excellence? Which one is the champion violator of private property rights? You move to the head of the class if you answered government. This organization constitutes the very abnegation of private property rights, at least from the point of view of anarcho-capitalism.<sup>16</sup> The point is, government already “traps” the citizenry in numerous ways. Not, of course, by not allowing them into or out of their property, but, rather, by seizing it entirely. There are eminent domain laws, income taxes, asset forfeiture procedures,<sup>17</sup> imprisonment for victimless “crimes,” the list goes on and on. So, which is worse, if only from the utilitarian perspective: embracing full property rights, and allowing the minute chance of someone being trapped, or resorting to the violation of property rights embodied in coercive easements, which can only be accomplished by the state apparatus?<sup>18</sup>

One more point. We are now in the midst of the life-boat objection to libertarianism. There is no difference, in principle, between trapping someone to death<sup>19</sup> and other such challenges to libertarianism. For example, consider the person who falls off the deck of his 20<sup>th</sup> story apartment, and is hanging on for dear life on a flagpole owned by someone five floors below, fifteen stories above ground level. According to the viewpoint I am challenging in this paper, this person, too, would

<sup>15</sup> After all, my arguments are only contingent, merely empirical. It poses no logical contradiction, akin to the square circle, or  $2 + 2 = 5$ , to posit that the entrapper has succeeded in his machinations.

<sup>16</sup> In the view of Rothbard (1973): “For centuries, the State (or more strictly, individuals acting in their roles as ‘members of the government’) has cloaked its criminal activity in high-sounding rhetoric. For centuries the State has committed mass murder and called it ‘war’; then ennobled the mass slaughter that ‘war’ involves. For centuries the State has enslaved people into its armed battalions and called it ‘conscription’ in the ‘national service.’ For centuries the State has robbed people at bayonet point and called it ‘taxation.’ In fact, if you wish to know how libertarians regard the State and any of its acts, simply think of the State as a criminal band, and all of the libertarian attitudes will logically fall into place.”

<sup>17</sup> Rothschild and Block, 2016.

<sup>18</sup> In my view, any ostensibly private court that imposed easements on property owners, apart from those involved in bagel situations, would be acting “governmentally,” e.g., criminally.

<sup>19</sup> If he cannot leave his home, he will die.

be “trapped” on the flagpole, and would thus have the right to move, hand over hand, on this “easement,” into his downstairs neighbor’s apartment, and then back up into his residence five floors above.<sup>20</sup> In contrast, I contend that this unfortunate person is a trespasser, and if the owner of the flag-pole shoots him for refusing to let go, she would not be a murderer.

Dominiak maintains that Block’s position amounts to a self-contradiction:

The problem with which Block’s theory cannot deal, however, consists in allowing conflicting rights to appear within A’s juridical repertoire. For if A’s landlocked land were not granted an easement over B’s property, then as it has been partly pointed out elsewhere, the following contradiction would result: Because C invited A on the land that is C’s rightful property, A’s usual duty toward C not to enter C’s land without an invitation has been thereby extinguished and A has acquired a liberty toward C to enter C’s property. At the same time, because B is not the owner of C’s land and therefore does not have any rights to C’s land, A by definition cannot have any correlative duties toward B in connection with C’s land, duty not to enter C’s land included. However, because B is the owner of the middle stripe, A has a duty toward B not to traverse it. Yet, since there is no other way for A to enter C’s land than to traverse B’s land, then again, via the aforementioned transposition rule and the deontic theorem according to which if  $\vdash p \rightarrow q$ , then  $\vdash OBp \rightarrow OBq$ , A also has a duty toward B not to enter C’s land.

And again:

Acceptance of easements by necessity would eliminate the contradiction by not recognizing A’s duty not to traverse B’s land for the purpose of entering or leaving A’s landlocked property to visit C (and so by not recognizing A’s entailed duty not to enter C’s land).

I cannot see my way clear to agreeing with this charge. It is predicated on the notion that there is indeed a right to travel, out of, and into, one’s legitimately owned property. I have given reasons to counter any such “right.” Without it, there can be no such “contradiction.”

One last point in this section. Dominiak is guilty of a bit of an oversight. He quotes Block, in an artificially-truncated manner, as saying this,

Incidentally, it is important to note against Block that the idea “that no land is to be left unowned” hardly figures in the set of basic libertarian premises. Depending on the interpretation thereof, the alleged premise can even be read as imposing a positive duty on individuals to appropriate the unowned land. Certainly, Block would not welcome that. Whatever the reading, it should be clear that, according to right-libertarianism, individuals have Hohfeldian liberties to homestead the unowned land (the aforementioned right of property, for example — and this is the basic libertarian premise in question), not duties to do so, and, therefore, it is exclusively up to them whether to appropriate the land or not. Hence, there cannot be any libertarian premise ‘that no land is to be left unowned.’

However, the full quote from this essay (Block, 2016) reads as follows (emphasis now newly added): “But this follows ineluctably from the basic libertarian premise that no land is to be left unowned, *at least not when there are others who covet it.*” Therefore, Block is not at all guilty of claiming that unowned land is somehow incompatible with libertarianism. There is, after all, such a thing as

<sup>20</sup> For a defense of private property rights in this case, see Block, 2003A.

sub-marginal land, the discounted value of which is considered below the full costs of homesteading it. No one wants, for example, to go through the expense of mixing their labor with the furthest reaches of Siberia, or Alaska, or, for that matter, terrain on the Moon, Mars, and other planets, at least not given today's technology.

## 4. The problem of positive rights

Dominiak, to the contrary, notwithstanding, this so-called “right” to travel or to “move freely,” or “ability to enter,” call it what you will, is a veritable paradigm case of a positive right. It is equally sure that positive rights, all of them, without exception, are incompatible with libertarianism. Why? This is because they can only be fulfilled at the expense of someone else. In sharp contrast, libertarianism properly understood deals in negative rights: the right not to be molested, not to be raped, not to be murdered, not to be stolen from, etc. These rights impose an obligation on all others to refrain from murdering, stealing, raping, etc. In sharp contrast, positive rights obligate strangers to help those who supposedly have these rights. If X has a right to food, Y is obliged to feed X. Whereas, if X has a right not to be kidnapped, then Y must refrain from kidnapping X.

So, if X has a right to travel freely, this means that Y, Z, and others have an obligation to allow X access through their property. If that is not a positive right, correctly rejected by libertarians, then nothing is.

According to Gordon (2004), “Rights are negative: they forbid others from interfering with our life, liberty, and property.”

But Dominiak is having none of this. He writes:

What sort of positive act is, then, the servient owner required to perform in the case of an easement by necessity? It does not seem that there is any such act. Quite to the contrary, the servient owner is required to abstain from some positive acts, namely from acts that prevent the dominant owner from leaving or entering his property. What is more, the very definition of an easement by necessity says that easements “consist in forbearances; that these forbearances cast a duty upon the owner or occupier of the servient tenement” and that “duties which easements imply are duties of forbearance.” Clearly then, an easement by necessity is a negative right.

This statement is coherent if and only if the traveler has a right to enter and exit his holdings through the property of others in the first place. Stated Rothbard (1998) in his critique of Isaiah Berlin:

Thus, Berlin's fundamental flaw was his failure to define negative liberty as the absence of physical interference with an individual's person and property, with his just property rights broadly defined. Failing to hit on this definition, Berlin fell into confusion, and ended by virtually abandoning the very negative liberty he had tried to establish and to fall, willy-nilly, into the 'positive liberty' camp.<sup>21</sup>

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<sup>21</sup> For further critiques of positive liberty, or positive rights, see: Block, 1986; Gordon, 2004; Katz, undated; Long, 1993; Mercer, 2001; Selick, 2014; Williams, 2016. It is my contention that Dominiak is guilty of the same error as Berlin.

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