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Libertarian easements revisited

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Abstract

Libertarian easements revisited

In the present paper, I develop further my original argument for extending the Blockian Proviso to landlocked property. I use Walter Block's newest rejoinder as an opportunity to generalize my case for necessity easements. I argue that in order to attenuate various conflicts of rights, libertarianism should interpret its thesis that property rights are absolute in a less demanding way.

In the present paper, I generalize my original case for necessity easements (see Dominiak, 2019, 2017). I argue that, contrary to its promise to avoid all conflicts of rights,¹ libertarianism, with its emphasis on the absoluteness of property rights, sometimes generates such conflicts, and that when it does, this emphasis should be attenuated in order to render the libertarian theory more coherent and able to adjudicate between conflicting claims; that is, able to say what one ought to do on a particular occasion as a matter of rights.² Recognizing necessity easements is one way of doing it; limiting rights requirements exclusively to compensatory duties is another. They are all ways of releasing the following tension within the libertarian

¹ I use the phrase 'conflicts of rights' generically; that is, without discriminating between contradictions, contraries or proper conflicts between rights. On conflicts of rights see Kramer 2009.

² I owe my understanding of what the absoluteness of rights may consist of (that it may be strong or weak) to the first chapter of the excellent analysis by Kramer (2014). Although I do not quote explicitly from this work here, my argument is animated by Kramer's exquisite distinctions. I would also like to acknowledge the influence another work had on my thinking about absolute rights — Thomson 1990.

theory: B has the right that A abstain from doing x , C has the right that A abstain from doing y , but abstaining from doing x requires that A do y ; or this tension: B has the right that A abstain from doing x while the same B has no right that A abstain from doing y (so A has the liberty to do y), but A cannot do y without doing x , so it seems that B also has the right that A abstain from doing y (so A has no liberty to do y), etc. What ought A to do on such occasions as a matter of rights? I take it that unless libertarianism points to some definite answer here, it fails as a theory that is supposed (at least partly, that is, as far as rights are concerned) to guide our actions or, which comes to the same thing, as a theory that is supposed to identify a coherent set of rationally justified rights (which set cannot afford internal contradictions). Now, my point is that even if conflicts of rights cannot be entirely eliminated, they can still be rendered manageable, or rather, they simply are manageable, provided that we construe the absoluteness of libertarian rights in a less demanding way.

In what follows, I will use Walter E. Block's (2021) "Rejoinder to Dominiak on the necessity of easements" (all quotations below come from this rejoinder unless explicitly stated otherwise) as an opportunity to present my generalized view. Thus, I will confront Block's criticism of my last paper on easements specifically with an eye towards developing such a generalized view. Although there are many questions on which Block disagrees with me in what I wrote in my "Must right-libertarians embrace easements by necessity?", e.g. right- vs. left-libertarianism, self-ownership vs. initial self-ownership or even political correctness, here, I will focus only on the main issue: namely, whether landlocked property generates conflicts of rights and what to do with such conflicts. I will then try to generalize my argument for easements and apply it to other sorts of dilemmas, hoping that Block and others will find this strategy more stimulating. Since all of this will be done in the process of responding to Block's newest criticism, the manner of presenting my case will be somewhat less formal and more polemical than usual.

So, without any further ado, let me begin with easements. Block claims that necessity easements are justified only if landlocked area A is unowned. "For then he [an investor] would entirely control area A, without ever having homesteaded it, a contradiction to libertarian theory." However, if area A is homesteaded by C and yet landlocked by the investor's parcel so C cannot enter it — "[t]here are no helicopters, no bridges that can traverse area B, and no tunnels that can be placed underneath this land holding, B" — then the investor also "entirely control[s] area A, without ever having homesteaded it." How then can this pattern of appropriation be anything else than "a contradiction to libertarian theory"? Is it not the case that then the investor is "controlling A, even though he never mixed an ounce of labor with that territory"? After all, he and only he decides whether C can enter C's homesteaded area, A. Hence, it seems obvious to me that if there is "a contradiction to libertarian theory" when the landlocked area is unowned, there must also be "a contradiction to libertarian theory" when the landlocked area is home-

steaded, for also in this case, the investor, “without ever laid a finger or toe on territory A, still controls it.”

Just to make sure, Block argues that if the landlocked area A is unowned, there is “a contradiction unless B [the investor] allows an easement to C [a potential homesteader] so as to be able to access A.” Why? “For then he [the investor] would entirely control area A, without ever having homesteaded it, a contradiction to libertarian theory.” How would the investor control area A “without ever laid a finger or toe on territory A”? By being able to exclude C (and other persons) from territory A and by exercising this ability. I therefore take Block’s current argument to be roughly the following.

- (1) If B is able to exclude C from territory A, then B controls A.
- (2) B is able to exclude C from territory A.
- (3) Therefore, B controls territory A.
- (4) If B controls territory A without ever homesteaded it, B’s control is in contradiction to libertarian theory.
- (5) B controls territory A without ever homesteading it.
- (6) Therefore, B’s control is in contradiction to libertarian theory.
- (7) If B’s control is in contradiction to libertarian theory, the C should have an easement over B’s property (for homesteading purposes).
- (8) Therefore, C should have an easement over B’s property.

Now, notice that for this argument to work, it does not matter at all whether territory A is owned or unowned by C. In both cases, B would be able to exclude C from territory A — after all, A is a landlocked property — and so in both cases, B would control territory A. If territory A were owned by C, it would mean that C homesteaded it. Since it would be C who homesteaded territory A, it would follow that B did not homestead it. So, B would control territory A without ever having homesteaded it. Therefore, B’s control would be in contradiction to libertarian theory and C’s easement over B’s property should be recognized. So, I conclude about Block’s current argument that if there is an easement in the case of landlocked virgin area (as Block claims), there must also be an easement in the case of landlocked property (as I claim). And if accessing landlocked property without permission amounts to a trespass (as Block claims), then accessing landlocked virgin land must be a trespass, too.

It is clear to me that with his fancy donuts, Block spotted a very important thing indeed; namely, conflicts of rights that can be generated by libertarian theory (in this case, by the homestead principle of justice specifically), despite its promise to avoid any such conflicts. And Block’s reaction to his sad discovery was a proper one; that is, to propose a slight revision of the libertarian theory in the form of a very small cap put on the absoluteness of private property rights. So, after the Blockian Proviso enters the picture, the investor who mixes his labor with a virgin land in a bagel shape does not acquire absolute property rights in this parcel, but limited ownership burdened with a servitude. Now any potential homesteader of

the unowned center of the bagel may (is permitted to) traverse the investor's land in order to reach the virgin parcel and mix his labor with it. I like it. Before the Blockian Proviso, there was a conflict of rights: potential homesteaders had duties not to traverse the investor's property and they had liberty-rights to enter the virgin land, but since they could not enter the virgin land without traversing the investor's property, it followed that they also had no liberty-rights to enter the virgin land, which was a plain contradiction rightly identified by Block. After the Blockian Proviso, there is no such conflict of rights anymore; potential homesteaders no longer have duties not to traverse the investor's property. They have easements for homesteading purposes.

But this strictly analogous conflict of rights takes place in the case of landlocked property, and unless the Blockian Proviso is extended to such cases, a contradiction ensues. Thus, without the Blockian Proviso, the owner of the center of the bagel has a duty not to traverse the investor's property, and being equipped with a right to control his own center parcel, he also has a liberty-right to enter this parcel, but since he cannot enter it without traversing the investor's property, it follows that he has no liberty-right to enter his own center parcel. Supply the Blockian Proviso and the contradiction disappears: now the owner of the center parcel no longer has a duty not to traverse the investor's property; he has an easement. Or so I reasoned in my original paper (Dominiak, 2019).

Block opposes this reasoning by denying that property owners have liberty-rights to enter their estates (and as we will shortly see, Block suggests with his examples that what he means here are any owners, not only the landlocked ones). As he writes: "I diverge from my learned colleague on these points: '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.'" Yet, a moment of reflection suffices to realize that it is utterly uncontroversial to say that property owners have liberty-rights to enter their estates, for otherwise they would have duties not to enter their estates, which would be a silly thing to say about ownership.

Moreover, if they did not have rights to enter, they would not have rights to possess or control their estates either, for there is no possession of land if one is prevented from entering it.³ And I take it to be equally uncontroversial that property owners do have original rights to possess or control their property, for if they did not have these rights, they would not have property rights at all, which would be a strange thing to say, taking into consideration the fact that they properly mixed their labor with previously-unowned pieces of land. And yet, Block disagrees even with this statement of mine: "As the owner of the land, A has a right to possess and use the land." As a reason, he gives us a series of hypothetical scenarios in which owners go travelling and cannot come back home because they got flat tires or do

³ Compare: "[T]he Possession of land is lost [by] the possessor being prevented from coming on the land" (Savigny, 1979).

not have money. Block believes that from the fact that they now lack the wherewithal to travel home, it does not follow that they have a right to such wherewithal. And I agree with this author. Under libertarianism, they do not have any such rights. But this is entirely beside the point. Notice that these scenarios were supposed to prove the non-existence of a very different right, namely the right that A has “[a]s the owner of the land” to his own land, that is, “a right to possess and use the land.” Now from the lack of rights to the wherewithal, it decidedly does not follow that these poor travelers also lack rights to possess and use their own home bases. For this inference to work needed are additional premises.

Thus, notice that in his insightful scenario with the bagel-shaped appropriation, Block himself stipulated that traversing another’s land is *the only means possible* by which one can reach the center of the bagel, and it is this very assumption that is doing the heavy lifting here. The poor homesteader literally cannot get inside the bagel in any other way than through another’s land. If he could get himself a helicopter, or a tunnel, or a good enough trampoline, giving him an easement on another’s property would indeed be in “a contradiction to libertarian theory.” Yet, this is exactly what our poor traveler can get himself. Perhaps not a helicopter (not many of us can afford such a luxury), but a tire repair in this or that shop does not seem to be *beyond possibility*, nor does a train ticket or a hitch for that matter. Travelling home from “outer Mongolia” without a penny might indeed be more demanding, but it is still nowhere close to an *impossibility*.

As I see it, there are at least three things that cause Block’s analogies to misfire. First, it is suggested in their very formulation (e.g. a flat tire) that there are various means available (after a bit of effort) to the poor traveler by which he can come back home, possibilities explicitly assumed away in the bagel scenario. Second, even if he really could not get himself any money to pay for any of these various means and literally no one could give him a lift or whatever, there would still be innumerable property owners whose money could make it possible for the traveler to access his home base, whereas in the bagel scenario, there is only one owner whose property is eligible for an easement. Third, none of these innumerable people does anything to make the poor traveler’s return impossible, whereas in the bagel scenario, it is a specific person who homesteads the land in a way that makes it impossible for the landlocked owner to access his property. And this is exactly this very person that should suffer the servitude. So, had Block made his flat tire (or any other) example perfectly analogous to his bagel case, I would indeed admit that although it is pragmatically (in the linguistic sense of the word) pretty weird, there should be some sort of flat tire easements. But he did not.

If Block still does not like what I am saying here, then perhaps he can be persuaded by the following generalization of the easement solution. Should the investor be compensated for giving easements to potential homesteaders and landlocked owners? I cannot see why not. After all, compensating owners for their land being trodden on by others seems like strengthening their ownership, not weakening

it. It seems like putting still a smaller cap on the absoluteness of private property rights. It seems more libertarian than no compensation at all. So, let me make my thesis more explicit and see whether now it is more palatable for Block: yes to necessity-easements for landlocked proprietors, but only with compensation to the servient owners.

Notice that now the difference between the landlocked owner exercising an easement with compensation to the servient owner on the one hand, and the landlocked owner committing the tort of trespass on the other, withers away unless one has a very expensive notion of the tort of trespass. So, if Block prefers the language of trespass to the language of easements (with compensation), then I am happy with that. And it seems that he does, for he says that according to NAP, the landlocked person traversing the land of his neighbor commits a trespass. If so, I am also ready to admit that the landlocked owner who traverses the investor's land without authorization commits the tort of trespass and ought to compensate the investor. But nothing more! Decidedly, he should not be prevented from traversing the investor's land or punished for doing it, for the landlocked owner has a justification for his act in the form of exercising *his* ownership rights. So, in a sense, I would agree with Block when he says that “[t]o 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” and to exercise his ownership rights. But the moral permission with which the landlocked person acts is not full permission, for it does not magically extinguish the investor's property rights; thus, the tort of trespass is committed nonetheless, and so compensation is due. However, despite the fact that the landlocked person is not fully permitted to traverse the investor's land (because compensation is due), doing it is not prohibited either, because the act of traversing the investor's land may be carried out undisturbed and the landlocked owner may not be punished for it.

Suppose that A is a captain of a ship belonging to B, and that he is transporting C's cargo to some faraway destination. While on the high seas, the vessel is caught in a storm. A knows for a fact that if he continues into the storm with cargo on board, the ship, some members of its crew and cargo will be lost to the sea, but if he jettisons the cargo, the ship and the crew will survive. What should A do according to libertarianism? If he drops the cargo, he will violate C's rights. If he continues into the storm with cargo on board, he will violate not only C's rights (because he will thereby navigate C's property straight into destruction), but also B's rights, plus the rights of some crew members. Apparently, we have another conflict of rights which libertarianism promised to avoid.⁴ So, judging from

⁴ Someone might want to deny that there is any conflict of rights here by arguing that A does not infringe on C's rights in either case because cargo destruction is unavoidable. Four things should be said about this reply. First, this reply might indeed be independently (of libertarian ethics) plausible, and if we accepted it, it would strengthen, not weaken, our case, for then we would straightaway acknowledge some sort of necessity easements in cases other than homesteading; “violation” of prop-

what Block says in his rejoinder, it seems that there is no answer to this question on libertarian grounds. Whatever A does, he is damned. Whatever he does, he is blameworthy. Or, paraphrasing Block: whatever he does, this captain “commits a crime and should be duly punished for it.” But “we should not be deterred by it, no matter how dramatic, if we wish to uphold the pure libertarian position.”

That is a failure, for it is obvious what A ought to do: he should jettison the cargo. Yet it does not mean that C’s rights are thereby automatically extinguished (that would be in “a contradiction to libertarian theory”). The fact that infringing on rights is what one ought to do on a particular occasion does not mean that such rights disappear. They are firmly in place. Accordingly, compensation for infringing upon these rights is due. However, only compensation. Decidedly, A should not be punished for doing what he ought to do, nor should he be prevented from doing what he ought to do. Equally decidedly, he does not commit a crime in any sustainable sense of that word by dropping the cargo. After all, crime is never what one ought to do, and throwing the cargo overboard is what A ought to do. Similarly, crime is something for which one is blameworthy, and no one is ever blameworthy for doing what one ought to do. So, it is not a crime, and A should not be punished. However, he should pay compensation to the cargo owner, C.

Now, it is obvious that continuing into the storm cannot be what A ought to do, for at least this reason that the cargo will be lost anyway, and moreover, he would violate the ship owner’s rights plus the rights of some of the crew members. And A would do all this knowingly, intentionally and without any reason, without any justification, for what could be the reason for sacrificing the cargo, the ship and the crew members instead of sacrificing only the cargo? So, to say that both courses of action are equally obligatory or permissible for A is obviously false. To say that A should do nothing is equally false, for by doing nothing, he would continue into the storm. And to say that libertarianism is too thin to answer such a question is a total surrender, for we are not asking here (yet) about thicker morality, but only about “that sliver of it that discusses just law”; that is, only about choosing between libertarian rights. Therefore, I conclude that if A decided to continue into the storm, he would thereby fail to do what he ought to do and instead do what is strongly impermissible for him to do: he would commit a crime, and thereby incur not only a duty to pay compensation, but also render himself liable to punishment, and if the crew (or anyone else) could prevent him from continuing into the storm,

erty rights would then be justified in those cases. But, second, this reply is not plausible as far as libertarian ethics is concerned, for there is at least one standard of liability under which A is responsible, namely strict liability: if A acted and caused property damage (which he did), then A is strictly liable. So, for my current purposes, I ignore this reply. Third, it is doubtful whether cargo destruction was really unavoidable. The captain could have easily avoided it, had he stayed at home. Four, I could easily come up with a case in which cargo destruction is not unavoidable in this sense, e.g. it is either the cargo or the ship and its crew that has to be sacrificed. For a similar case in which it was either dock or ship destruction that was at stake (see Minnesota Supreme Court, 14.01.1910).

they would acquire the right to prevent him with force (and he would violate their rights if he in turn tried to prevent them from preventing him).

Notice that Block's "reductio ad absurdum against Dominiak's position" does not at all apply to cases such as landlocked property or throwing cargo overboard. Block suggests that:

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.

However, landlocked owners do not have easements "in order to save their lives," although they may exercise them also for this purpose. They have easements because otherwise, we would have an insurmountable conflict of rights which libertarianism promised to avoid and because, therefore, someone's property rights simply have to partly give. Thus, it is not about "all morality" concerned with saving people's lives and feeding them (under libertarianism, they do not have rights to be saved or fed), but only about "that sliver of it that discusses just law." Similarly, the cargo case is not about violating rights in order to abide by "some notions of morality", like the duty of a father to feed his starving children with stolen bread, or the duty of the government to provide for the unemployed (there are no such duties under libertarianism). It is about choosing between violating various libertarian rights and nothing else. So, there is a clear disanalogy between Block's reductions and cases of landlocked property and cargo. In the former case, there is no conflict of rights. In the latter case, someone's rights have to give. Now, what to do in such lifeboat cases? Contrary to the libertarian promise, there is a conflict of rights. What should we do? My answer: put a cap on the absoluteness of libertarian rights, give an easement and allow a breach, but with compensation. Conflicts of rights will not disappear completely, but they will be attenuated sufficiently.

Even if it is obvious that Block's reductions concerning weighing rights against notions of thicker morality do not apply to my cases — such as landlocked property or cargo dropping — in which libertarian rights clash with each other instead of clashing with notions of thicker morality, it might be worth the effort to investigate Block's reductions independently. So, Block asks after Aquinas: "Should a man be punished for stealing a loaf of bread to feed his starving child?" And he answers: "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." I disagree with Block that punishment is what libertarianism requires in this case. To be sure, the father did infringe upon the baker's rights by stealing the bread. As far as libertarianism is concerned, we cannot go along with Aquinas and say that in the case of necessity, the bread comes back to

the commons, and so there was no theft at all. Neither can we go along with Locke in his reasoning that the bread did not really belong to the baker in the first place, because while appropriating its factors of production, he had not left enough and it was good for others to appropriate. However, we have already seen that under libertarianism, infringing upon another's property rights does not necessarily justify punishment. In the case of landlocked property and dropping cargo, infringing on another's rights triggers only compensatory duties, not duties to punish. Can this reasoning be extended to the case of stealing bread?

Not directly. For under libertarianism, the starving child does not have a right to be fed by the father, and so there is no conflict of rights with the baker's property rights. Yet, I take it to be pretty uncontroversial that what the father ought to do in this case is to steal the bread. Unless we thought so, there would be no dilemma to start with. And there is a dilemma to start with. Unless Block thought so, there would be no good reason why his "heart would go out" to the father. And his heart goes out to the father. Moreover, I also take it to be uncontroversial that saving the child's life is a good much greater than leaving the baker's stock of bread intact — or alternatively, letting the child die is an evil much heavier than stealing a loaf of bread. So, it seems to me that the father has a ready justification for his action: the balance of evils. He committed a petty theft because that was necessary to avoid a great evil. He did what he ought to have done. Now, it would be both conceptually weird and morally unfair to hold him blameworthy for doing what he ought to have done. I therefore conclude that he should not be punished. However, because he infringed upon the baker's property rights, he should pay compensation to the baker. After all, the baker's rights are not only *prima facie* claims that disappear in the face of weightier considerations. They are absolute. But not as absolute as to condemn the father for saving his starving children.

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