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## **Freedom and Property: Where They Conflict**

### **Freedom as property and the non-aggression principle**

Libertarian theorists like to trace social and economic problems to coercive, usually government-imposed or government-sanctioned interventions in the free market or restrictions on the exercise of the libertarian rights of self-ownership, private appropriation and use of material resources, and exchange by mutual consent. This sort of analysis of social and economic problems suggests, and is often meant to suggest, that in a situation where those rights are fully respected the problems would not arise or that they could and would be solved efficiently and peacefully by negotiation, mediation or arbitration. In other words, neither economic nor personal freedom is the cause of those problems; freedom is the condition for their solution.

This is fine as far as it goes—but how far does it go? As we shall see below, respect for the above-mentioned libertarian rights is not in itself sufficient to guarantee the freedom of every person. There may be cases where there is a conflict between claims on behalf of one person's freedom and claims on behalf of another person's private property. In such cases, the question arises which claims should prevail. Unquestionably, the libertarian answer should be: freedom before property. Unfortunately, many libertarians are reluctant to give up the conception of "freedom as property" that 1) serves them so well in their critiques of interventionism and collectivism and 2) underpins their notion that the law of a libertarian order is merely the rigorous application of the so-called non-aggression principle.

The logical link between "freedom as property" and the non-aggression principle is the definition of aggression as an invasion of another person's property for any purpose other than getting restitution of one's property from, or securing compensation for damages resulting from a previous aggression committed by, that person. Thus, according to the non-aggression principle, only aggressive invasions of another's property are unlawful and every act of any other kind is lawful. In practical terms, libertarian judges have no right to authorize interference with non-aggressive acts, and libertarian enforcement agencies have no right to enforce any unilateral prohibition or

restriction of such acts. However, if freedom is the supreme libertarian value, this will not do.

### **Hostile encirclement on libertarian Quasi-Earth**

For the sake of the argument, let us suppose that, somewhere in the universe, there is a planet—let us call it Quasi-Earth—that is in all physical respects like our own planet Earth. In particular, Quasi-Earth is populated by beings that are in all respects like us, except that they are all law-abiding libertarians. Thus, unlike us Earthlings, the Quasi-Earthlings 1) unconditionally respect every person’s rights of self-ownership, private appropriation of unowned resources, unrestricted non-invasive use his own property, and exchange by mutual consent, and 2) unconditionally abide by the non-aggression principle when it comes to dealing with interpersonal problems. In other words, there is no crime and every property owner is free to do with, to, and on his property whatever he likes provided his actions have no significant<sup>1</sup> physical effects on others or their properties. Consequently, there is no need for any political government and we may assume that states, if they ever existed over there, have long since withered away. In short, Quasi-Earth is the very model of a libertarian order according to the “freedom as property” paradigm. Nevertheless, it is easy to imagine how a person could lose his freedom because of non-invasive actions performed by others.

The most obvious case is encirclement. Suppose that every point on Quasi-Earth is privately owned by one or another individual person in such a way that every owner of a piece of the surface of Quasi-Earth finds that his property is surrounded by the properties of other persons, possibly by the property of a single other person. Because the inhabitants of that planet are very similar to us, we may expect that at least some people may find themselves surrounded by personal enemies or rivals or spiteful individuals who like to annoy or intimidate others. However, since they are all law-abiding people, they judiciously abstain from aggressive, invasive actions.

Clearly, a person’s ability to move himself or his goods beyond the confines of his own property without trespassing on the property of others depends on their willingness to grant him a right of way. However, nothing in the Quasi-Earthlings’ system of property rights obliges them either to grant him right of way or to permit third parties to cross their properties to reach his (if he has any). Consequently, because of a coincidence of decisions by his neighbours or because of an agreement among them, any person may find himself locked up on

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<sup>1</sup> I shall not discuss the problem of drawing a line between significant and insignificant effects, although it is obviously a pervasive practical problem. A libertarian order cannot be viable unless it recognizes that a few particles of smoke crossing the boundary between two properties are different from a thick cloud of black smoke, a faint smell is different from an unbearable stench, and so on.

his own property or prevented from dealing with others outside the circle of his immediate neighbours.

Because, according to the libertarian conception of freedom as property, denying a person access to one's property does not count as a crime, his neighbours must be assumed to remain within their rights if they act in this manner. They do not infringe his property rights. Moreover, they must be assumed to remain within their rights if they then go on to grant him a right of way on condition that he complies with their demands, however onerous or demeaning these may be. Nevertheless, it would be absurd to regard their actions as respectful of his freedom, if by refusing him a right of way they turn encirclement into imposed isolation and his property into a prison (if he is on his property) or into an inaccessible resource (if he is not). In addition, we should remember that on Quasi-Earth encirclement is the normal condition of any person. Thus, given the assumed similarities between our planet and that supposed ideal planet, we should consider the possibility that entire groups may be made to suffer imposed isolation.

Some libertarians would argue that nothing in such a situation poses a threat to anybody's freedom. They would point out, for example, that the encircled person might tunnel under the adjacent properties or get a helicopter to fly over them.<sup>2</sup> However, such solutions are also available (if they are available at all) to people locked up in a regular prison—and it would be ridiculous to say that locking up a person in a prison does not deprive him of his freedom merely because he might have opportunities for making an escape. Moreover, the encirclement of a person could be three-dimensional, for example if some of the neighbours run mining operations under his property and others fill the airspace above it with antenna wires, power lines or weather balloons.

Other libertarians tend to belittle the problem with a general reference to the free market, noting, for example, that hostile encirclement is not without opportunity costs for those who practice it and that these costs will deter profit-maximizing individuals from engaging in the practice for any extended period. This argument is purely academic. First, we are not talking about people being excluded from one or a few bars or shopping malls but from the only means of access to their own property or to other places where they are welcome. Second, even if true, the argument only supports the proposition that, other things remaining the same, hostile encirclement *tends* to disappear over time. It does not support the proposition that it will ever actually disappear. Moreover, the reality is that profit-maximizing individuals often enough drift along with the prejudices of the majority

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<sup>2</sup> Thus, with respect to a related problem, Block, Walter, "Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock," *Journal des Economistes et des Etudes Humaines*, Vol. 8, No. 2/3, June-September 1998, pp. 315-326.

of the population in their area, no matter what these prejudices are, no matter whether they themselves share them. All too often, the “sovereign consumer” is a herd or a mob. Accepting for the purpose of economic analysis that “all values are subjective”, we should not expect market outcomes to be always and necessarily in support of objective libertarian ethical values, such as freedom. Thus, we should not underestimate the lengths to which some people are willing to go to pester or boycott others, especially when they are emboldened by the cheers and nods of sympathizers. Neither should we make light of the ease with which a thing such as a privately owned road can be turned from a mere revenue-generating commercial asset into a means for exercising unilateral control over others and their properties.

Still other libertarians have been known to blame the victim: anybody can know that there is a risk of being surrounded by unfriendly neighbours; therefore, one should know that it is unwise not to take precautions against this eventuality. This may not be an unreasonable stance on a planet such as ours, which is not a model libertarian order. Here, few properties are surrounded on all sides by other private properties and even fewer are at a great distance from unowned open or public space. However, on Quasi-Earth, all of the accessible space can be converted into private property or pass into the hands of another owner at any moment. So, what sort of precautions against unfriendly encirclement could any individual take? Does being the owner of a road or canal imply that one should never be able to convert one’s property to some other use, if the original owner of the road gave assurance of access to the first buyers or owners of the properties abutting it? Does having “guaranteed” access to a road imply that the road itself will remain connected to other roads, owned by the same or another road owner?

### **Freedom and property: conflicting claims**

Suppose a person complains about being isolated from the rest of the world by his neighbours’ non-invasive actions and presents his case to a judge. Which judge is closer to the libertarian spirit and more likely to contribute to conditions of peaceful co-existence? One who dismisses the complaint because the neighbours do not trespass on the property of the complainant, or one who is willing to hear the complaint and, if it turns out to be justified, willing to decide that the neighbours are under an obligation to grant a right of way to the complainant? One who merely looks at observable movements across property boundaries, or one who considers that the protection of property, however vital to the preservation of freedom it may be, is nevertheless only a means to freedom and not its fulfilment? Which argument is more likely to be universalizable? That property rights are sacrosanct, or that freedom is sacrosanct?

We have assumed that on Quasi-Earth respect for private property is universal. Therefore, those who happen to become victims of imposed isolation must be assumed to bear their lot with equanimity, peacefully withering away in their ghettos and enduring being exploited by others. Surely, this assumption is not particularly plausible. However, should we weaken it then we must envisage the possibility that isolated groups resort to violence to break out of their confinement and regain their freedom. Should we condemn their revolt as criminal? Would we? Is isolation by hostile encirclement a just cause for resorting to violence or war against those who impose and refuse to lift it?

Freedom is not served by war, and neither is property. Just as aggressive violence threatens these values, acts that are prone to provoke violent reactions as well as wide-spread sympathy for those reactions among more or less distant observers similarly threaten the prospects for securing freedom and property, even if they are not in themselves ‘aggressions’, i.e. invasions of property. Human nature being what it is, we should not overlook the irritability and irascibility of the “human animal”. The principles of libertarian law should be entirely rational in the sense of being provably irrefutable “dictates of reason”.<sup>3</sup> Both in formulating and in applying them we should nevertheless be aware that in the rough-and-tumble of life the voice of reason has many competitors—and that some people know how to take advantage of that fact for the purpose of manipulating and provoking others to “fire the first shot”. In other words, we should not adopt the stance of other-worldly sanctimonious saints ignoring the pervasive causal, physical and psychological aspects of the human condition.

If, as many libertarians believe, freedom is a natural right then we should be clear about whether it entitles one to destroy the freedom of others if only in ways that do not involve direct interference with their property. If it does then freedom can hardly count as a fundamental value in the sense of political philosophy; if it does not then the non-aggression principle can hardly count as the basic principle of libertarian law. Either way, there seems to be something wrong with equating libertarian law with the rigorous application of the non-aggression principle.

That should not come as a surprise. The principle does not refer to freedom, only to property; it would be adequate as the axiomatic law of freedom only if ‘freedom and ‘property’ were synonymous—but they are not. To paraphrase Anthony de Jasay<sup>4</sup>, we do not need a theory of “freedom as private property” anymore than we need any other theory of “freedom as something else”.

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<sup>3</sup> This is the basic idea of Hans Hoppe’s ethical justification of capitalism in *A Theory of Socialism and Capitalism* (Boston-Dordrecht-London, 1989).

<sup>4</sup> See the essay “Justice as Something Else”, in Anthony de Jasay, *Justice and Its Surroundings* (Indianapolis, Indiana, 2002)

### **Restricting property rights in behalf of freedom**

There is a straightforward solution to the problems of hostile encirclement or imposed isolation. The usual statement of the rights of a property owner already indicates that these rights are not “absolute” in the literal sense of the word. There is an “external effects” proviso that libertarians have come to take for granted. Even from the perspective of the non-aggression principle, one does not have the right to do what one wants with, to or on one’s property. Such proprietary actions are within the law of a libertarian order only if they do not have significant physical effects on other persons or their properties.<sup>5</sup> The external effects proviso is necessary to link the concepts of property and freedom together into a plausible conception of an interpersonal order involving a multitude of diverse people inhabiting a world of scarce resources. However, it is still firmly within the “freedom as property” conception because it merely restricts the property rights of one person by invoking those of others.

As we have seen, the external effects proviso is not sufficient if it is intended to serve a libertarian purpose, i.e., to safeguard everybody’s freedom, rather than a proprietorial one. At the very least, it needs to be supplemented to guarantee every person<sup>6</sup> not only access to his own property but also a way to go from there to any other place where he is welcome. In short, in addition to the external effects proviso, there is 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. Of course, ‘deprive’ is too absolute for practical purposes: freedom of movement implies that there are no significant or unreasonable man-made obstacles to moving about.

Two logical points should be stressed here. The first is that if throwing an innocent person in a cell deprives him of his freedom then so does building a cell around him even on those occasions when one succeeds in doing so without touching him or his property. Thus, the free movement proviso appears implied in the very idea of freedom itself. The other point is that the new proviso no longer fits within the “freedom as property” paradigm. It is therefore likely to be controversial among libertarians—but at the very least, it has the merit

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<sup>5</sup> Unilaterally performing an action with significant physical effects on others or their properties is unlawful. I have argued elsewhere that certain non-invasive actions, such as misrepresenting [oneself as] another person and unilaterally changing the conventional meaning of the terms of a contract, should also be considered unlawful, if libertarian law is to serve its purpose of generating a viable order of human affairs rather than being a source of resentment, distrust and conflict. See my “Against Libertarian Legalism” (*The Journal of Libertarian Studies*, 2003, XVII, 3).

<sup>6</sup> Exceptions may no doubt be made, say, for criminals and the dangerously insane.

of focussing their attention on the concept of freedom, forcing them to be much clearer and more explicit about their understanding of it.

### **Thinking about public space in a libertarian order**

Assuming that the free movement proviso could be enforced, it would have the effect of steering the development and geographical arrangement of properties into the familiar pattern of a network of routes, trails and paths across open unowned space (for example, the seas, uninhabited, uncultivated land) and streets, roads, canals, and so on, connecting everyone's property with everybody else's. Let us use 'route' as a catchall term to designate any of the elements of this right-of-way network. It would appear that such a network is the most, perhaps even the only, efficient way for reconciling the rights of way demanded by the free movement proviso and the condition of exclusive control associated with private ownership.

Without the free movement proviso, under the "freedom as property" doctrine, routes would eventually be supplied as privately held property. This is what we should expect to see on Quasi-Earth, because we cannot very well imagine how a human civilization would function without such things as streets, roads and navigable waterways. However, the route owners would then have exactly the same rights as owners of the land, private houses or factories alongside the routes. They would have rights to exclude anybody for any reason or for no reason at all from using their property, to demand any price or service in return for a permission to use it even in the most innocuous ways and for the most harmless purposes, and to form cartels with the owners of nearby routes to strengthen their bargaining positions.

In short, without the free movement proviso, private ownership of routes would exacerbate the problem of hostile encirclement and the risk of exploitation of some by others. It would jeopardize the freedom of every other person and provide the route owners with a basis in libertarian law for imposing all sorts of requirements on anybody who wishes to make use of their property. It would set them up as prospective "lords" or rulers with an effective lawful power to control the movements and trades of other property owners located in the area served by their routes. Indeed, in the past, the king's "sovereign right" was based, among other things, on his self-proclaimed or perceived role as the provider of "peace" in public space: unowned land, rivers, roads, and the like, that were available for use by all of his subjects.<sup>7</sup> The free movement proviso thus undercuts one of the most frequently offered justifications for the existence of state-power, as it derives the status in law of public spaces entirely from every person's right of freedom rather than from the kings' taking possession of those spaces.

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<sup>7</sup> This was a major element in Jean Bodin's natural history of the genesis of "absolute sovereignty" (in his *Six Livres de la République*, 1576).

With the free movement proviso in place, the ownership of routes would amount to no more than quasi-ownership, a right to manage an asset to guarantee the inviolable right of way for every law-abiding person. Such quasi-ownership would presumably include the right to claim the residual or profit from the management of routes. It would certainly not include the right to restrict access to the routes for lawful purposes, unless the restrictions are for sound technical or safety reasons (e.g., limitations of weight, length and width of vehicles; transportation of explosive or poisonous materials; etc.), or unless the routes have become redundant and are no longer in use.

Note that the proviso does not exclude the construction of fully privately owned routes, the owners of which would have the full range of rights of exclusion and pricing that the owners of other types of property have. Such routes may be useful (and profitable) *additions* to the right-of-way network available under the free movement proviso. However, the proviso applies also to them. In other words, while permitted in a libertarian order, fully privately owned routes would not be allowed to break up the right-of-way network into disconnected segments, as this would constitute a violation of the free movement proviso and therefore the freedom of others.

The most important implication of the free movement proviso is the introduction or re-introduction into libertarian theory of the concept of public space as distinct from privately owned exclusive space. This is a neglected area in libertarian theorizing, in part because the conventional theory simply assumes away the existence of public spaces, except as sources of problems that would disappear without ill side-effects as soon as such spaces are “privatized”. Indeed, under the influence of the “freedom as property” conception, which does not recognize the free movement proviso, libertarian theorists are prone to endorse the position that in public spaces people should be allowed to do as they wish, as long as they do not assault or physically harm others. Inclusion of the free movement proviso, in contrast, would invite libertarians to consider the proper use of the right-of-way network (“public space”), which is freedom of peaceful movement, and the dangers of other uses, such as disseminating propaganda, provoking confrontations, and the like. Since travelers and users of the right-of-way network are not its owners, it is appropriate to ask just which liberties they can legitimately claim and which obligations they incur while “on the road”. Similar questions can be raised with respect to the quasi-owners or managers of the right-of-way network. The theoretical basis from which one should address these questions is, of course, the obligation to respect the freedom of movement of every person (more exactly, of every person who is not lawfully confined on account of his own criminal actions or his dangerous insanity).

There are, of course, other implications of the free movement proviso, e.g., concerning libertarian discussions of issues such as



migration, but my aim here is not to explore all of its ramifications; it is merely to draw attention to it and to suggest that it be seen as an integral part of the libertarian concept of ownership rights.

Obviously, the free movement proviso is a far-reaching restriction of the property right of route owners as it would be defined according to the “freedom as property” conception, but it is not an arbitrary restriction—in fact, it is rooted the idea of freedom, which is, or should be, the supreme libertarian value. Besides, the whole point of libertarian theorizing is to come up with a conception of an order of conviviality and cooperation in which people can enjoy their freedom and face the slings and arrows of life without having to worry that virtually every step they take requires them to agree to do another’s bidding.

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