*Diametros* 16 (2019), 60: 34–51
doi: 10.33392/diam.1241

# Must Right-Libertarians Embrace Easements by Necessity?

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**Abstract:** The present paper investigates the question of whether right-libertarians must accept easements by necessity. Since easements by necessity limit the property rights of the owner of the servient tenement, they apparently conflict with the libertarian homestead principle, according to which the person who first mixes his labor with the unowned land acquires absolute ownership thereof. As we demonstrate in the paper, however, the homestead principle understood in such an absolutist way generates contradictions within the set of rights distributed on its basis. In order to avoid such contradictions, easements by necessity must be incorporated into the libertarian theory of property rights and the homestead principle must be truncated accordingly.

**Keywords:** right-libertarianism, easements by necessity, homestead principle, property rights, compossibility, Blockian Proviso.

Published online: 27 June 2019

## 1. Introduction

In the present paper, we confront the question of whether right-libertarians[1] must embrace easements by necessity. An easement by necessity is a right to traverse an-

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[1] In the context of the present paper, right-libertarians are understood in contrast to left-libertarians (even though both groups, as libertarians, intersect the traditional left-right axis as represented by the Nolan Chart, for example). In the literature of the subject, the distinction between these two theories is drawn along the lines of how they approach the issue of the ownership of external natural resources: "Left-libertarian theories of justice hold that agents are full self-owners and that natural resources are owned in some egalitarian manner. Unlike most versions of egalitarianism, left-libertarianism endorses full self-ownership, and thus places specific limits on what others may do to one's person without one's permission. Unlike the more familiar right-libertarianism (which also endorses full self-ownership), it holds that natural resources – resources which are *not* the results of anyone's choices and which are necessary for any form of activity – may be privately appropriated only with the permission of, or with a significant payment to, the members of society." Vallentyne (2000): 1. Similarly, John Cunliffe points out that "there are two broad traditions of libertarian thought: right-libertarianism and left-libertarianism. Debates engaging these traditions have centered on two key questions. The first of these concerns the nature of property rights in internal (i.e. personal) resources (e.g. mental or physical capacities) as against external resources. On this, both right-libertarians and left-libertarians

other person's estate in order to access some other land that is recognized by the law due to the fact that passing through the other party's property is the only way to gain such an access. It therefore does not require a contract or a custom to establish itself but is implied in specific circumstances and spatial relations between parcels of land. An easement "means that the owner or occupier for the time being of the servient tenement is legally bound either to forbear from excluding the owner or occupier for the time being of the dominant tenement from doing certain acts in relation to the servient tenement, or, as the case may be, to forbear, for the advantage of the dominant owner, from exercising over his own servient tenement certain ordinary acts of ownership […]," particularly, it means that "he may not prevent that neighbour from passing over his field."[2]

For right-libertarians who believe that transforming a virgin land vests its homesteader with the absolute rights of private property thereto, easements by necessity must seem highly suspicious, at least *prima facie*. As Murray Rothbard pointed out, libertarian theory of justice stems from two fundamental and uncompromising principles or rights: (a) "the *right of self-ownership*; and (b) the absolute right in material property of the person who first finds an unused material resource and then in some way occupies or transforms that resource by the use of his personal energy. This might be called the *homestead principle* – the case in which someone, in the phrase of John Locke, has 'mixed his labor' with an unused resource."[3] Easements by necessity, on the other hand, propose limiting the homestead principle by denying homesteaders, in specific circumstances, the absolute rights to the land they first found and transformed.

However, the absolute nature of the homestead principle and the private property rights that are acquired by homesteading the virgin land seems to generate problems of its own. One group of such problems is of particular interest to the present paper. This group involves what is sometimes called forestalling, that is, preventing both potential

agree. There is a shared commitment to private property in internal resources as expressed by the doctrine of self-ownership. The second question concerns rights over external resources. On this, right-libertarians and left-libertarians disagree sharply […] Right-libertarians argue that self-ownership allows unlimited private property rights in all external resources, whether natural or produced. Left-libertarians, in contrast, maintain that self-ownership and private property in artefacts must be combined with an initially egalitarian entitlement to raw natural resources." Cunliffe (2000): 1.

[2] Hearn (1883): 210.

[3] Rothbard (1974): 106. Incidentally, the homestead principle that vests the person who first mixes his labor with the – to quote Rothbard again (2002): 34 – "unused and uncontrolled by anyone, and hence *unowned*" land with absolute property rights, presupposes that this person starts with Hohfeldian liberties and powers to access and appropriate the land and that there are no valid claims against this person pertaining to the land on the part of the non-users. This assumption is another crucial tenet of right-libertarianism and, as suggested earlier (n 1 above), it differentiates this theory from left-libertarianism. Eric Mack aptly labeled such a set of liberties and powers "the natural right of property" and characterized it as "an original, nonacquired, right – possessed by each individual – to engage in the acquisition of extrapersonal objects and in the disposition of those objects as one sees fit in the service of one's ends […] an original, nonacquired right *not to be precluded from* engaging in the acquisition and discretionary disposition of extrapersonal objects." Mack (2010): 53–54. As it has been brought to our attention by an anonymous referee of this journal, recognition of this natural right of property by right-libertarians seems to play an important role in generating incoherencies analyzed in section 2 of the present paper. We will come back to this issue in due course.

owners from originally appropriating unowned land and actual owners from exiting or entering their respective estates by exercising one's absolute ownership of one's estate. As noticed by Robert Nozick:[4]

> 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.

The quandary that the possibility of forestalling creates for right-libertarians can be construed in at least two ways. First of all, 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. As pointed out by Frank van Dun, even if we admit, as right-libertarians do, that homesteading vests people with the absolute property rights to surround a given person on his estate, it would yet 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 prison (if he is on his property) or into an inaccessible resource (if he is not)."[5] However, whether it would be absurd or not obviously depends on the theory of liberty presupposed by right-libertarians. What this theory – rightly labeled by van Dun as "freedom as property"[6] – says is in turn made pellucid by Murray Rothbard: "We are now in a position to see how the libertarian defines the concept of 'freedom' or 'liberty'. Freedom is a condition in which a person's ownership rights in his own body and his legitimate material property are *not* invaded, are not aggressed against."[7] It is therefore clear that on this account of liberty it makes no sense (provided that the set of libertarian property rights is a set of compossible rights) to say that "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."[8] For

[4] Nozick (2014): 55.
[5] van Dun (2009): 226.
[6] Ibidem: 224.
[7] Rothbard (2011): 50.
[8] van Dun (2009): 224.

such a statement to function as a valid criticism of right-libertarianism, it has to be demonstrated that the libertarian theory of freedom as property is for some reason unsound and should therefore be jettisoned or replaced with a more adequate, usually pre-propertarian account. This is exactly the course taken by van Dun[9] and other thinkers,[10] who first argue that the libertarian idea of liberty as property is problematic and only then show that what is commonly or plausibly meant by freedom clashes with absolute property rights as construed by right-libertarians and indicated by the problem of forestalling.[11]

The second way in which this quandary can be construed is to see it as revealing incoherencies within the libertarian theory of property rights as it stands.[12] On this con-

[9] As van Dun points out, the libertarian theory of liberty as property, encapsulated in the non-aggression 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, we do not need a theory of 'freedom as private property' anymore than we need any other theory of 'freedom as something else.'" (2009): 229.

[10] The most influential criticism of the libertarian theory of freedom as property has so far been presented by G.A. Cohen in his seminal book *Self-Ownership, Freedom, and Equality*. The thrust of Cohen's criticism is that the libertarian idea of freedom is defined in terms of justice (property) while justice is in turn defined in terms of freedom, the whole process being question begging. Cohen writes: "Thereby Nozick locks himself inside a circle. For Nozick, there is justice, which is to say no violation of anyone's rights, when there is lack of coercion, which means that there is justice when there is no restriction on freedom. But freedom is then itself defined in terms of non-violation of rights, and the result is a tight definitional circle and no purchase either on the concept of freedom or on the concept of justice." (1995): 61. Arguments against Cohen and at the same time a defense of the moralized account of freedom see: Wertheimer (1989): 251–255.

[11] This way of looking at the problem of forestalling, as has been rightly pointed out to us by an anonymous referee of this journal, seems to be philosophically deeper and more profound than the second way, which is subjected to examination in the present paper because it tries to deal with the issue of forestalling or other lacunae on the level of the most fundamental and contested libertarian presuppositions concerning individual liberty. What is more, approaching the problem from this angle could also result in deeper and more stable solutions to possible gaps in the libertarian theory. This is all true. Yet, entering the debate over tenability of the libertarian theory of liberty as property would definitely require writing another paper. Applying the results thereof to the problem of forestalling, still one more. Thus, in the present text we consciously decided to take the libertarian theory of freedom as property as it stands and tried to show that even on these grounds the possibility of forestalling generates problems for right-libertarians. Let us mention, however, that we have already attempted to contribute to the debate on the plausibility of the libertarian theory of liberty as property – and at the same time to partly defend this theory against criticism – on another occasion: Dominiak (2018).

[12] An anonymous referee of this journal drew our attention to the problematic vagueness of our labeling a theory of property rights as 'libertarian' without solving the above-mentioned issue, that is, without providing a compelling libertarian theory of liberty. For to know whether a given theory of property rights is actually libertarian or not, we should know what plausibly counts as liberty and whether the property rights described by this theory promote or thwart it. This point seems valid to us. However, as we said in the previous footnote, in the present paper we take the libertarian theory of liberty as property as it stands (having discussed it elsewhere) and argue from this point on. It is nonetheless interesting to note – and which has been brought to our attention by the referee's thought-provoking point – that if one assumes this theory of liberty as property, then right-libertarianism ceases to be so much about liberty (construed differently than in terms of property) and starts to be more and more about private property. (Should the label 'libertarianism' then be abandoned, at least in the case of right-libertarianism, as a misnomer?) From this perspective 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.

strual, no attempt is made upfront to undermine or otherwise criticize the presuppositions of right-libertarianism. Quite to the contrary, it is to accept them, at least *arguendo*, and only then demonstrate that even from the internal, right-libertarian point of view, these premises might not secure the coherence of the theory and should therefore be revised. Specifically, it can be shown that in the case of forestalling, libertarian principles of justice (particularly, the homestead principle), due to their absolutist character, recognize given entitlements and at the same time fail to recognize them. For that reason, their demands should be relaxed. To show that the possibility of surrounding an individual poses such problems for right-libertarians even from their internal point of view and what sorts of measures must therefore be deployed to remedy this situation is the goal of our current inquiry.

The main thesis of the present paper is that easements by necessity must be incorporated into the libertarian theory of the property rights in order to avoid contradictions that can stem from the absolute nature of the latter in specific circumstances. Since right-libertarianism is a theory of natural rights, it cannot afford inconsistencies within the system of the rights that it identifies as just.[13] For natural rights are understood as "those claims a person has to legal enforcement that are justified, on balance, by the full constellation of relevant reasons, whether or not they are actually recognized and enforced by a legal system."[14] Yet, no claims can be justified and held "up to the unsparing and unyielding light of reason"[15] unless they are mutually consistent. Regardless of what the other characteristics of the natural property rights are, and which rights are actually rationally justified, one thing is beyond doubt: no system of rights that runs against the law of non-contradiction can be a system of rationally justified and therefore natural rights. As Hillel Steiner points out, "mutual consistency – or *compossibility* – of all the rights in a proposed set of rights is at least a necessary condition of that set being a possible one… Any justice principle that delivers a set of rights yielding contradictory judgments about permissibility of a particular action is unrealizable."[16]

While discussing the libertarian literature of the subject of easements by necessity, we will substantiate the above thesis by showing how specific spatial patterns of land appropriation can generate contradictions within the system of the property rights if these rights are deemed absolute. Accepting easements by necessity can help avoid

[13] It might be submitted that inconsistencies can also be avoided by ordering these apparently clashing rights hierarchically. Can such a solution be implemented or is it necessarily unavailable to right--libertarians? It is important to note that the same absolutist principle of homesteading which is criticized in the present paper as generating contradictions between the private property rights, precludes any hierarchy between these entitlements as well. If all rights acquired in accordance with the homestead principle are absolute, how could there be any hierarchy between them? A right cannot be an absolute (overtopping) one and at the same time overridden (non-overtopping) by some prevailing right or different moral consideration. On overtopping and non-overtopping rights see Kramer (2006): 337. For exactly the same reason, the libertarian property rights cannot be *prima-facie* rights or any other Popperian style conjecture-rights recognizable only insofar as no opposing requirements have been found refuting them. On absolute vs. provisional rights, particularly *prima-facie* rights, see Feinberg (1973): 73–75.

[14] Barnett (2004): 16.

[15] Rothbard (2002): 17.

[16] Steiner (1994): 2–3.

these contradictions. Particularly, we will argue that right-libertarianism must embrace easements by necessity in cases that involve homesteading of the virgin land as well as in cases of estates that are landlocked. We will proceed in the following order: in the first section below we will deal with problems that beset homesteading of the virgin land; in the next section we will focus on cases involving landlocked estates; in the last section we will discuss the reason given by Walter Block for limiting easements by necessity exclusively to the cases of homesteading.

## 2. The Problem of Homesteading

The most obvious scenario in which easements by necessity must be called upon to avoid contradictions within libertarian theory of the property rights is the case of forestalling potential owners from appropriating the unowned land. Imagine that person B homesteads a virgin piece of land in such a way that he leaves a parcel of it unappropriated and that other people can only access it by traversing B's property. If person C subsequently wants to homestead the unowned parcel, may B preclude C from traversing B's property and, thereby, from homesteading the parcel? This question seems to pose a vexing problem for the libertarian theory of justice in first acquisition according to which the process of homesteading vests the owner of the homesteaded land with the absolute right to exclude others from his property. For, if such an absolute right were granted in the case currently under consideration, then another right, also, would necessarily be recognized. It would be B's right to control the unappropriated parcel, specifically, to exclude potential homesteaders from the unowned land. However, the unappropriated land is by definition a land to which no one has yet acquired any rights. Hence, the recognition of B's right to control the unowned parcel would contradict the assumption that the parcel has been left unappropriated. To avoid the contradiction, B's right to exclude C from the homesteaded land cannot be absolute and C's easement over B's land must be recognized for the purpose of homesteading the unowned parcel.

To better appreciate the conundrum, consider the following mental experiment proposed by Walter Block:

> Picture a bagel (or donut) with a hole in it. Label the hole in the center as 'A,' the bagel itself as 'B' and the surrounding territory, lying outside of the bagel, as 'C.' Suppose that someone, call him Mr. B, homesteads the land depicted by B. Assume away any possibility of tunneling under, or bridging or flying a helicopter over this terrain, B. Mr. B, then, controls area A, without ever having lifted a finger in the direction of homesteading this land, A. Yes, as of now, Mr. B does not own A. But, under our assumptions, he can homestead this territory whenever he wants to do so. Mr. B and [*sic*] gained an untoward advantage, *vis-à-vis* all other potential homesteaders of A, who are now residing in territory C, and cannot reach A, without trespassing on B, Mr. B's property. This, I claim, is incompatible with the logic of homesteading.[17]

[17] Block (2010b): 4.

Why is it incompatible with the logic of homesteading? According to Block, the sheer possibility that some land might remain unappropriated is "anathema to the libertarian ideal that all of the earth's surface should come under private ownership."[18] Additionally, Block also points out that "this pattern violates yet another principle of libertarian homesteading: that no one may control land he himself has not homesteaded."[19] Due to this incompatibility with at least two libertarian principles of justice, person B "may not be legally permitted to homestead in this pattern. Or, if he wishes to do so, he *must*, *he legally must*, allow access to a would-be homesteader of the empty land through his own otherwise legitimately homesteaded property."[20] As for Murray Rothbard, a person who "uses violence to prevent another settler from entering upon this never-used land and transforming it into use" is a "criminal aggressor,"[21] as for Block, the person is "guilty of the *crime*, in the libertarian law code, of preventing a person from homesteading unhomesteaded land."[22] The whole idea that forestalling violates the homestead principle and therefore that it is impossible to appropriate land in such a way as to preclude others from homesteading the unowned parcel has been called by Stephan Kinsella the "Blockian Proviso."[23]

There is, however, one more fundamental reason for embracing the Blockian Proviso, that is for denying B the absolute right to prevent would-be homesteaders of the unowned land from traversing his property and therefore for recognizing C's easement by necessity over B's land. As has been partly pointed out elsewhere,[24] granting B such an absolute ownership of the bagel-shaped land would result in a contradiction within the system of rights. How would it happen? If principles of justice in the initial acquisition allowed B to appropriate a virgin land in a shape of a bagel, then the hole-in-the-bagel plot of land would by definition remain unappropriated (as not mixed with B's labor whatsoever; note, again, that on libertarian grounds only resources that have been mixed with someone's labor can become private property) and B would have no rights pertaining to this plot (although B would have Hohfeldian liberties to enter, use or transform the plot and to enjoy fruits thereof). If the same principles allowed B to acquire the absolute ownership of the bagel-shaped land by homesteading it, then B would have a right that others do not enter his land. Yet, since traversing B's land is *ex hypothesi* the only way to access the unowned hole-in-the-bagel plot of land and, therefore, the only way to homestead it, B would also have a right that others do not enter and do not homestead the unowned land. The same principles of justice would, therefore, at the same time deny B any rights to the hole-in-the-bagel plot of land and recognize B's rights to this land. Specifically, B's right to exclusively control the hole-in-the-bagel plot of land or, what amounts to the same thing,[25] to exclude other people from this

[18] Block (2016): 29.
[19] Ibidem: 29.
[20] Block (2010a): 11.
[21] Rothbard (2002): 64.
[22] Block (2010a): 11.
[23] Kinsella (2007).
[24] Dominiak (2017): 120.
[25] Hillel Steiner writes: "Most dictionary definitions of 'possession' refer to either or both 'control' and 'exclusion of others.' But it's clear that, where the former is used, it is intended to be synonymous with the latter. That is to say, one *controls* (in the sense of *possesses*) a thing inasmuch as what happens to that thing – allowing for the operations of physical laws – is determined by no person other than oneself." (1994): 39.

land[26] would thereby be recognized and stacked upon B's liberties to use, abuse or enjoy the parcel in question and fruits thereof. And since according to right-libertarianism, "a property right is simply the *exclusive right to control a scarce resource*,"[27] let alone the exclusive right accompanied by the above-mentioned Hohfeldian liberties, this right would be B's property right to the hole-in-the-bagel plot of land – the plot of land never mixed with B's labor.

From the person C's point of view the same contradiction manifests itself in the following manner. Because B does not have any rights to the unowned hole-in-the-bagel plot of land, C by definition cannot have any correlative duties toward B in connection with this land. Specifically, C does not have a duty toward B not to enter the unowned land.[28] Since no duty not to do $\varphi$ is the deontic equivalent of a Hohfeldian liberty to do $\varphi$, then C's lack of a duty toward B not to enter the unowned land logically entails (and is entailed by) C's liberty[29] toward B to enter the land in question. Additionally, because B is the absolute owner of the bagel-shaped land, C has a correlative duty toward B not to traverse B's land, that is the bagel-shaped land. At first glance there is nothing incoherent about such a distribution of C's jural positions. C's liberty (no duty not to) toward B to enter the hole-in-the-bagel parcel does not seem to contradict C's duty toward B not to traverse B's bagel-shaped land because of a different content of these two positions. However, because – as assumed in the thought experiment[30] – traversing B's land is the

[26] As Thomas W. Merrill points out, "the right to control a thing, or if you will, the legal right to exclude others from a thing […] is an irreducible common denominator [of ownership]. Give people the right to exclude others from a thing and they have property; deny them the right to exclude others and they do not have property." (2015): 17.

[27] Kinsella (2009): 180.

[28] In our argument we draw on Hohfeld's analysis of fundamental legal conceptions according to which rights are logical correlates of duties, liberties (or privileges, for that matter) are correlates of no-rights, duties to do $\varphi$ are logical contradictions of liberties not to do $\varphi$, duties not to do $\varphi$ are contradictions of liberties to do $\varphi$ and rights are contradictions of no-rights. For an extensive presentation of the Hohfeldian framework see e.g. Hohfeld (1913), Kramer (2002).

[29] This liberty can also be viewed as one of the Hohfeldian positions that C originally enjoys, according to right-libertarians, by virtue of being vested with the aforementioned (n 3 above) natural right of property. As correctly noticed by an anonymous referee of this journal, right-libertarians could avoid contradictions discussed in this section (although not those discussed in the next section) by denying that there is any such right of property rather than by truncating the absolute character of the homestead principle and embracing easements by necessity, as suggested in the present paper. However, denying C the liberty to enter the unused land (and so to consequently mix labor with it) would amount to recognizing its jural opposite, namely the duty not to do it. This in turn would be tantamount to recognizing (at least some) correlative original claims of the nonusers to the natural external resources – a distribution typically welcome by left-libertarians. Hence, rejecting the natural right of property, although logically possible, does not seem to be a strategy available to right-libertarians for the substantive reasons.

[30] Note that within the thought experiment considered here, traversing B's land is not *contingently* the only way of access to the hole-in-the-bagel parcel. Quite to the contrary, it is construed as *necessarily* the only way of access. First of all, Block himself assumes all contingencies away because he does not want the libertarian theory to hinge for its plausibility on technological innovations: "Assume away any possibility of tunneling under, or bridging or flying a helicopter over this terrain." Block (2010b): 4. On another occasion Block also makes it clear that "we want to demonstrate that libertarian property rights theory can solve all such problems, at all time periods, and does not rely upon modern technology." Block, Nelson (2015): 665–666. Second of all, as noticed by van Dun, "the encirclement of a person could be three-dimensional," rendering all other access options physically impossible.

only way to enter the unowned parcel, then entering the unowned parcel entails (is the necessary condition of) traversing B's land. In turn, not traversing B's land, due to the rule of transposition, entails not entering the unowned parcel. Because C has a duty toward B not to traverse B's land, then by virtue of the deontic rule that *if* $\vdash p \rightarrow q$, *then* $\vdash OBp \rightarrow OBq$ (if p entails q, then if p is obligatory, then q is also obligatory),[31] C must have a duty toward B not to enter the unowned parcel. And *this* duty contradicts the assumed liberty (that is no duty not to) of C toward B to enter the unowned plot.

Note that C's duty toward B not to enter the unowned parcel is not created directly by the libertarian principles of justice in original acquisition. This duty is even assumed away by these principles and by the description of the thought experiment. For the homestead principle says that ownership of a virgin land can be vested only in the case of mixing one's labor with the land and B did not do it. Hence, it is posited that C has a correlative liberty to enter the unowned parcel. Yet, this duty is created by logical implication[32] and that might be the reason why it is not noticed by right-libertarians

(2009): 226. Then what? As rightly pointed out by Nozick, "the adequacy of libertarian theory cannot depend upon technological devices." (2014): 55. The very thrust of the thought experiment is therefore to examine the viability of the libertarian theory of property rights *without resorting to the ad hocness of technological solutions*. Hence, if there were any technological devices available to get into the virgin land without traversing B's property, then the way through B's property would not be the only way (and not the necessary condition) and the reasoning presented herein would not apply to this situation. What is not clear though – and we want to credit an anonymous referee of this journal for drawing our attention to this important inchoateness – is the question to whom and under which conditions such technological devices must be unavailable in order to render traversing B's land relevantly the only way of access? Must they be unavailable universally, for example, for humankind as such, or only for the person concerned? If the latter, should it count whether the person in question lacked these devices because she failed to make an effort to obtain them or because she did not succeed in obtaining them despite all reasonable attempts to do so? Dealing with these and similar questions would obviously merit at least another paper and so here we must set aside any comprehensive discussion thereof. For the time being let it suffice to say that, in this case, the same as in innumerous other cases discussed by right-libertarians, ultimately the judges would have to decide – the judges operating on the free market and accordingly constrained by its logic. But there is much more to this. The question of when a way is the only way falls into the category of ought-implies-can principle and specifically into a broader question of 'can' in which specific sense of 'can'. And here we are not in the dark. First of all, there is wide legal and philosophical literature on this theme – one of the most in-depth analyses of the topic, together with the extensive list of further readings, has been provided by Matthew Kramer (2006). Second of all, any residual vagueness (or to use Herbert Hart's words, any penumbra) of the possible answer might turn out to be its virtue. Among many reasons for this, one of them may consist in both justifying and accounting for the existence of sundry remedies due to the servient owner for recognizing easements over his estate in cases in which the only way of access is not the only way *simpliciter*. Having said that, the main point of our argument is purely formal: whatever right-libertarians understand by the only way of access, if a way is the only way of access, easements by necessity must be recognized or contradictions will result.

[31] To appreciate the import of the deontic rule in question, see how it works in more straightforward arguments. Walter Sinnott-Armstrong gives this example: "if I both mow and water your grass, I mow your grass, so, if it is obligatory for me to mow and water your grass, it is obligatory for me to mow your grass." (1985): 164. And in the same place he points out that "many arguments that seem obviously valid could not be justified without some rule like" that. What is more, without it "most of standard deontic logic must be reconstructed, and this is 'a large task.'" (1985): 164.

[32] Matthew Kramer points out that a right, or for that matter a duty, can be created in various ways. As he says: "Of course, if the exercise of a liberty-to-do-$\varphi$ is protected by a perimeter of rights so

pondering on the problem, neither in the bagel case, nor in the case of the landlocked land. However, if traversing B's land is the only way (the necessary condition) to get to the unowned parcel, then entering the unowned parcel entails traversing B's land. One can therefore conclude, replacing the antecedent of the reasoning with the consequent and negating both, that not traversing B's land entails not entering the unowned land. If now C has a duty not to traverse B's land, and C indeed has such a duty as it is clearly stated in the thought experiment, then by virtue of the aforementioned deontic rule, C also has a duty not to enter the unowned land. And this is where the contradiction lies.

Since right-libertarianism is a theory of justice that has the goal of identifying the rationally justified property rights, it cannot afford any contradiction within the postulated system of rights. Moreover, such a contradiction would be even more problematic for right-libertarianism than for any other theory of justice since one of the main tenets of this philosophy is an explicit endorsement of the conception of the private property rights as conflict-avoiding devices. As Hans-Hermann Hoppe points out, libertarianism espouses a "theory of property as a set of rulings applicable to all goods, with the goal of helping to avoid all possible conflicts by means of uniform principles."[33] The very purpose of property rights is "the avoidance of conflict regarding the use of scarce physical things"[34] or, as Kinsella puts it, "the fundamental social and ethical function of property

sweepingly that all physically possible ways of interfering with the doing of $\varphi$ are outlawed, then we can aptly say that a right-against-interference-with-the-doing-of-$\varphi$ exists – just as much as it would exist if it had been created *directly* (or by logical implication) via one or more authoritative decisions. This sort of situation will not very often arise, since a perimeter of rights will usually fall short of debarring all physically possible ways of interfering with the exercise of some liberty. Nonetheless, when *X*'s doing of $\varphi$ does indeed enjoy comprehensive legal protection by virtue of the cumulative shielding effects of some of *X*'s rights, we should agree that *X* holds a right-against-interference-with-the-doing-of-$\varphi$." Kramer (2002): 12.

[33] Hoppe (2006): 319.

[34] Hoppe (2012): 15. Let us remind ourselves that this apparently redundant formulation "scarce physical things" makes perfect sense on libertarian grounds. Obviously, there can be physical things that are not scarce, air in normal circumstances, for example. Both of us can at the same time use it in two different ways without running thereby into conflict (physical clash). My body, on the other hand, is normally a scarce physical thing. Both of us cannot use it at the same time in two different ways without clashing. It is important to note however that air, normally not scarce and yet physical, can become scarce if perceived as such and acted upon (by enclosing it, for example) by a human agent. Via such action a physical thing that otherwise is not scarce and not conducive to conflicts becomes scarce and conflicts over it become possible. Hoppe's point is that because such conflicts are possible (as they are only in the case of physical and at the same time scarce things), we need to introduce the private property rights in order to avoid them. Property rights are therefore normative devices called upon to countervail natural scarcity and consequences thereof. Intangible things, on the other hand, such as ideas, theories or patterns of words, provided they are not confounded with their physical media, are never scarce and can never become scarcities. Both of us can at the same time hold the same thought, espouse the same theory or can put our words in the same pattern without ever physically clashing thereby. Of course, you can use physical force against someone who wrote down the same words that you had written before and had not wished anyone to rewrite but you both can never clash simply by generating the same pattern of words (again, abstracting from the physical media used in the process). Thus, according to this branch of right-libertarianism, there should be no private property rights in intangibles, no intellectual property in the form of copyrights, trademarks or patents. Of course, copying and selling your novel under my name diminishes the value you can derive from your creation but so does starting competitive business in your line of tangible production.

rights is to prevent interpersonal conflict over scarce resources."[35] According to Hoppe, any "conflict-generating norms contradict the very purpose of norms."[36]

To avoid contradictions within the system of rights, right libertarianism must therefore recognize C's easement over B's property for the purpose of homesteading the unowned land or, in other words, to limit the extent of rights that B can acquire via homesteading and so by virtue of mutual entailment between rights and duties to acknowledge B's negative duty not to preclude C from appropriating the virgin land. Acceptance of easements by necessity eliminates the above-mentioned contradiction by not recognizing C's duty toward B not to traverse his land for the purpose of homesteading the unowned parcel (and so by not recognizing C's entailed duty not to enter the unowned parcel). It also does so by protecting C's resulting liberty (since no duty not to do $\varphi$ is the deontic equivalent of a liberty to do $\varphi$, not recognizing C's negative duty amounts to recognizing C's positive liberty) to traverse B's land with rights against B's interference with C doing so in order to avoid conflicts over the road. In consequence, although it is still true that because B does not have any rights to the unowned hole-in-the-bagel plot of land, then C by definition does not have any correlative duties toward B in connection with this land (specifically, C does not have a duty toward B not to enter the unowned land), it is no longer true that B is the absolute owner of the bagel-shaped land and so that C has a correlative duty toward B not to traverse his land. No, for the purpose of homesteading the unowned land C has an easement over B's property, that is C has a vested liberty to traverse B's land and B has a correlative duty not to prevent C from doing so. As a result, it is no longer the case that C does not have a duty toward B not to enter the unowned land and at the same time has a duty not to do it.

The extenuation of the absolute character of B's rights to exclude others from his property that is achieved by recognizing easements by necessity is then allowed only in the unusual circumstances in which traversing B's estate is the only way to access the virgin parcel. It extinguishes as soon as the unowned land becomes homesteaded[37] or when potential homesteaders gain alternative access thereto. Hence, an easement by necessity limits the absolute nature of the homestead principle and of rights that can be acquired via homesteading only to a minimal degree. Yet the job it performs at such a low price is invaluable – elimination of contradictions between property rights.[38]

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The question is, therefore, not so much about which action diminishes value but which infringes on rights. For more on the right-libertarian critique of intellectual property see Kinsella (2008).

35 Kinsella (2008): 29.

36 Hoppe (2012): 15.

37 Note that the virgin land in question can be homesteaded either by B or by C. In the first case, the easement simply extinguishes. Yet in the second scenario it must continue in order to avoid trapping the new homesteaders on their estate and creating the problem of landlocked property. 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.

38 One could ask whether the same reasoning applies to cases other than parcels of land, to homesteading animals, for example. An anonymous referee of this journal suggested the following scenario. Suppose an unowned hare enters B's estate trying to escape hot pursuit. If traversing B's property is the only way for C, the hunter, to catch the hare and thereby to homestead it, does he have an easement over B's land? Although fully addressing such issues would require writing another paper, especially given the fact that the present one focuses exclusively on incoherencies generated by

### 3. The Problem of Landlocked Property

Since, in his criticism of bagel-shaped appropriations, 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.[39] As he says, "necessity-easement […] is entirely a function of ensuring that *all* territory will come under private ownership."[40] In all other cases, particularly when someone's land is landlocked so that he cannot exit it without trespassing, he is the one to blame and no easement by necessity should be granted to him. So, when people "want to go visit someone else and cannot get there without trespassing or if they are trapped on their own property, or prevented from returning home […], before anyone purchases any property, they will not only obtain title insurance, but also access insurance, to obviate just this sort of occurrence. If they fail to do so, they have only themselves to blame, and it is indeed 'tough luck' on them, as Kinsella asserts. This author and I are in entire accord on this matter."[41] Or, as Kinsella puts it: "Block would agree with me in this above example that A has no easement over B's property; that he can only visit C if B permits him to."[42]

However, it is difficult to accept that there is such a world of difference between being precluded from entering the unowned land in order to homestead it and being prevented from entering one's own property in order to enjoy it that it can account for granting easement by necessity in the first case yet not in the second. As Kinsella rightly points out, "I see no special status of the unowned property; it's just property someone would like to homestead."[43] Hence, applying the Blockian Proviso just to the cases of precluding others from appropriating the unowned land and denying easements by necessity to landlocked estates or people trapped on their own property seems incon-

peculiar spatial relations between parcels of land, suffice it here to say that in general the logic of homesteading seems the same in both cases: C has a natural, original, nonacquired liberty and power to homestead an unowned resource, being it a land or a hare; B, on the other hand, can have a right to exclude others from a given resource only if he acquired this right via proper steps, ultimately via labor-mixing procedure. Note also that Block himself uses the same reasoning in the case of homesteading an abandoned child who is imprisoned in the house of his wicked parents: (2004): 281–282.

[39] It might be argued against Block that limiting easements only to the case of homesteading is problematic also for another reason. 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 C 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. 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, overtopping or peremptory entitlements.

[40] Block (2016): 33.

[41] Ibidem: 33.

[42] Kinsella (2007).

[43] Ibidem.

sistent.[44] 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."[45] Once we realize that not only forestalled homesteading but also landlocked property generates 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.

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,"[46] 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.

Thus, restricting easements only to the homesteading scenario does not seem a tenable solution and gets Block's theory into trouble. To see how this occurs, consider the following thought experiment proposed by Kinsella:

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[44] The inconsistency in question seems to yield itself to investigation on more than only one level: 1) it seems inconsistent to recognize necessity easements for the purpose of homesteading and to reject them in the case of a landlocked estates; 2) also, the absolute property rights, as such, seem inconsistent with necessity easements. The present paper explores these two levels. Yet, one can also still inquire into another sort of inconsistency, the one between the absolute property rights and liberty conceived of, at least partly, in pre-propertarian terms. From this point of view easements by necessity might be seen as devices that assure more comprehensive advancement of liberty than can be afforded by the absolute property rights. It seems to us that this approach to the problem in question has been adopted by Frank van Dun, for example, 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 […] 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 of focusing their attention on the concept of freedom, forcing them to be much clearer and more explicit about their understanding of it." (2009): 230–231.

[45] Kinsella (2007).

[46] von Savigny (1979): 258.

> Let's imagine a rectangular island with 3 people: A, B, and C. B owns the middle stripe, A and C own the pieces on the ends. Suppose A wants to visit C. He has to cross B's property. He has a right to visit C, if C invites him, and if he has a means of getting there. But he has no means of getting there. So? I assume Block would agree with me in this above example – that A has no easement over B's property; that he can only visit C if B permits him to. But in Block's theory, if C dies, all of a sudden this confers to A an easement-over-B's-land! How can this be?[47]

First of all, limiting easements only to the case of homesteading compels Block to make a peculiar prediction about the conditions under which A trespasses on B's land. According to his theory, for A to trespass on B's property, weirdly enough, person C must be alive! As he himself admits, "this *sounds* awkward."[48] Yet it follows from the fact that in his theory easements are granted only for the purpose of homesteading the unowned land. So, when C's land is unoccupied due to C's demise, A's traversing B's land in order to homestead the unowned parcel does not constitute trespassing. If, on the other hand, C's land is owned, no easement is granted to A and A's traversing B's land amounts to trespass. The apparent awkwardness notwithstanding, Block seems to deal successfully with Kinsella's question about how this can be by resorting to the principle that no land should be left unappropriated. As he says: "Kinsella asks how it can be that when C dies, A can now seize and have an easement over B's land. But this follows ineluctably from the basic libertarian premise that no land is to be left unowned."[49]

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,[50] 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.

[47] Kinsella (2007).
[48] Block (2016): 31.
[49] Ibidem: 31. 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." Fortunately, not much in the current discussion depends on this obfuscatory formulation.
[50] Dominiak (2017): 122.

This duty is created by entailment, in the same way as in the bagel case. If traversing B's land is the only way (the necessary condition) to get to C's land, then getting to C's land entails traversing B's land. Via the transposition rule not traversing B's land entails not getting to C's land and A has a duty not to traverse B's land. Hence, by virtue of the above-mentioned deontic rule according to which, if action *p* entails action *q,* then if action *p* is obligatory, then action *q* is also obligatory, person A also has a duty not to enter C's land. And this duty contradicts the assumption that there is no such a duty.

As we can see, therefore, the same sort of contradiction as the one that bedeviled forestalling potential homesteaders from appropriating the unowned land besets the case of landlocked estates. And again, the same remedy must be called upon. 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). That would in turn mean that A has a liberty to traverse B's land in order to enter or leave A's land and that liberty is vested in A's rights not to be interfered with in so doing. The extenuation of the absolute character of B's rights to exclude others from his property that would be achieved by recognizing easements by necessity would then be allowed only for the purpose of entering or leaving the landlocked estate and would extinguish as soon as another way of access would become available.

It should be clear, therefore, that neither the original Blockian Proviso which limits the conferral of easements exclusively to cases involving homesteading, nor Kinsella's theory that all necessity-easements are alien to libertarianism can deal successfully with the contradictions involved in cases of landlocked estates. The entire rejection of easements by necessity would mean that conflicts between rights would proliferate and beset all the cases of landlocked properties and at least some cases of homesteading. In turn, the original Blockian Proviso provides only partial solution to this problem by disposing exclusively of contradictions arising in the process of homesteading. Only extending the Proviso to the cases of landlocked estates and so recognizing easements by necessity also in these situations can offer more comprehensive remedy to the problem of conflicting rights.

## 4. The Problem of Positive Rights

What is then the reason for which Walter Block does not want to grant easements by necessity for the purpose of leaving or entering the landlocked property? Interestingly enough, it seems that his reluctance to accept such easements is based on a sort of misunderstanding, namely on a suspicious belief that an easement by necessity is a positive right which correlates with the servient owner's positive duty – "anathema to the libertarian philosophy."[51] Responding to Kinsella's criticism that the Blockian Proviso "could be generalized to some kind of 'necessity-easement' not limited to the homesteading case,"[52] Block points out that "this is a serious charge to make against a libertarian, since it implies the acceptance of positive rights, anathema to this entire philosophy […] in

[51] Block (2010b): 5.
[52] Kinsella (2007).

the present case, a 'necessity easement': people have a right to other people's property not only for food, clothing, shelter, medical care etc., but, also, if they want to go visit someone else and cannot get there without trespassing or if they are trapped on their own property, or prevented from returning home from another person's property, but cannot do either, again, without trespass."[53]

This indeed is a very peculiar way of understanding both positive rights, or, for that matter, positive duties, and easements by necessity. As Joel Feinberg points out, "a *positive* right is a right to other persons' positive actions; a *negative* right is a right to other persons' omissions or forbearances,"[54] or, in other words, "a right that another person not do something."[55] Correlatively, "for every positive right I have, someone else has a duty to *do* something; for every negative right I have, someone else has a duty to *refrain* from doing something."[56] 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.[57] 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."[58] Clearly then, an easement by necessity is a negative right.

Similarly, an attempt to argue that a necessity-easement is a positive right because it permits the dominant owner to use the servient property, is to confound a right with a Hohfeldian, jural liberty.[59] A right is always a claim to somebody else's actions or omissions. As Glanville Williams pointed out: "No one ever has a right to do something; he only has a right that someone else shall do (or refrain from doing) something. In other words, every right in the strict sense relates to the conduct of another."[60] A Hohfeldian liberty on the other hand always refers to the liberty-holder's actions or omissions. In the words of Matthew Kramer, "a liberty, by contrast, specifies some behavior in which the *liberty-holder* is free to engage (or behavior which the liberty-holder is free to avoid)."[61] The dominant owner is then clearly granted a Hohfeldian liberty to use the servient property, not a positive right to use it. As far as his positive rights are concerned, in the

[53] Block (2016): 32–33.
[54] Feinberg (1973): 59.
[55] Rainbolt (2006): 33.
[56] Feinberg (1973): 59.
[57] If someone wanted to argue that there might be some positive duties of performance binding the servient owner, e.g. a duty to take down the wall he erected to stop the dominant owner from traversing his estate, we should note that such duties could arise only due to violation of the negative duty not to forestall the dominant owner in the first place, e.g. by erecting the wall. Such duties are no different in kind than duties to stop currently occurring infringements or to pay compensation for a breach of contract – all accepted by right-libertarians.
[58] Hearn (1883): 211.
[59] Which should not be confounded with the descriptive, pre-propertarian liberty or with the liberty as property (both also referred to as freedom) that libertarians usually talk about.
[60] Williams (1956): 1145.
[61] Kramer (2002): 14.

pertinent respect he does not seem to have any. Accordingly, Block's reluctance to accept easements by necessity in cases of a landlocked property because they are positive rights also does not seem to have solid grounds.

## 5. Conclusions

In the present paper we confronted the question whether right-libertarians must embrace easements by necessity. Our main thesis was that such easements must be incorporated into the libertarian theory of property rights in order to avoid contradictions between them. As we argued above while discussing the literature of the subject, both cases that involve homesteading of the virgin land and cases of landlocked estates can generate inconsistencies in the system of property rights if these rights are deemed absolute. Easements by necessity remedy this problem by minimally extenuating requirements imposed by the property rights on non-owners in circumstances in which non-extenuated requirements could yield contradictions. At the same time, limiting easements by necessity only to the cases of homesteading neglects the fact that conflicts between rights can occur, also, when one's estate is encircled by another property or otherwise landlocked. What is more, the reason given in the literature for supporting this limitation does not seem to be tenable since it amounts to the rather idiosyncratic belief that easements by necessity are positive rights.

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