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Forestalling, Positive Obligations and the Lockean and Blockian Provisos: Rejoinder to Stephan Kinsella*

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Abstract

Forestalling, Positive Obligations and the Lockean and Blockian Provisos: Rejoinder to Stephan Kinsella

The Blockian proviso mandates that no one precludes or forestalls anyone else in their land homesteading patterns such that they prevent them from homesteading virgin encircled land. Kinsella (2007, 2009A) takes issue with this position and likens it to the properly denigrated Lockean proviso. The present paper is an attempt to distinguish the two provisos one from the other, and defend the former from Kinsella's critiques.

What is the Lockean proviso? Let us allow "da man" to speak for himself on this issue. According to Locke (1689, emphasis added): "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by

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this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, *at least where there is enough, and as good, left in common for others*".

At least from the libertarian perspective there are serious problems not at all with the homesteading aspect of this insight, but rather with regard to the reservation thereof, the proviso, seen in italics. For the latter takes away practically all of the former. The goal of the free society is, presumably, to convert all of nature into private property. Homesteading, mixing labor with land, does this. But the proviso limits it. When there is *not* "enough, and as good, left in common for others", then, the process, presumably, ceases. As soon as this point is reached, homesteading, at least according to Locke, no longer justifies private ownership. There is no way, then, that the entire Earth can come under the rule of private property. For, surely, long before that time, there will not be left "enough, and as good".

Let us assume that mankind begins the process of homesteading. And let us divide all of the virgin land into ten deciles, the first is the best land, the last is the worst. Posit that people start the homesteading process with the finest territory, the top decile, and occupy all of it. Now, they are thinking of repeating the process with the second most fertile, or desirable decile. But, they are brought up short by the Lockean proviso. For, there is now *not* "enough, and as good", left in common for others. Why not? This is because the second decile is not *as good* as that which has already been homesteaded. Man is thus confined to a mere 10% of all the land on the Earth. And, if, instead, we divide up the surface of the planet not into deciles, but into hundredths, then human beings will be precluded from homesteading any more than 1% of it. And if we move to thousandths, or tens of thousandths, this proviso will more and more confine man to less and less. Nor is there any reason to stop this logical process when once the first square inch of territory is homesteaded. So, the Lockean proviso is a disaster for our species¹.

Kinsella (2007, 2009A) attempts a *reductio ad absurdum* of the Blockian proviso, likening the one to the other. Our contention is that there is all the world of difference between the two and thus that the fatal flaws of the Lockean proviso do not at all infect the Blockian version thereof. What, then, is the Blockian² proviso?

Imagine that land is settled according to a bagel, or a doughnut pattern, where A is the empty hole in the center representing virgin territory or un-homesteaded land, B is the area that is privately owned due to homesteading, and C is the zone where other people live on their own property. We assume there are no helicopters,

¹ This proviso has been excoriated by libertarian theorists (Hoppe 1993; Kinsella 2009; Machan, undated; Rothbard 1998, 244–245), and quite properly so.

² It is elaborated upon here: Block 1977, 1978, 1998, 2001, 2003, 2004, 2008, 2010A, 2010, 2011; Block and Whitehead 2005; Epstein vs Block 2005. For a critique of the Blockian proviso, see Kinsella 2007, 2009. For a defense of it: Long 2007A.

nor any technology able to tunnel under, or bridge over, B's³ holdings⁴. Thus, A is unoccupied, but in effect it is controlled by the owner of B. Mr. B, in effect, precludes the settlement of area A, without himself having homesteaded an inch of it.

What is the difficulty? One problem is that as long as B himself does not homestead this acreage, no one else can do so either, and it remains in a state of non-ownership. This, alone, is anathema to the libertarian ideal that all of the earth's surface should come under private ownership. It is impossible for A to fall into that category. B precludes anyone else from taking control of this area, while not doing so himself, either. In addition to not allowing all property to come under private ownership, this pattern violates yet another principle of libertarian homesteading: that no one may control land he himself has not homesteaded. Yet B does precisely this. B prevents the Cs from entering into, and homesteading territory A, and yet B is not the owner of A. Far from it, if anything is true, he is the exact opposite of the proprietor of A. He is preventing everyone from achieving that status.

The logical implication of these considerations is that there would be no long, thin homesteading patterns either. Suppose someone wants to homestead 5000 square miles. May he do so in a plot stretching 10,000 miles long and one half mile wide, for example, in a very long thin strip stretching from Canada to Argentina or from Portugal to Irkutsk? No, he may not do so, for this pattern would also make it (all but) impossible for neighbors a mere half mile apart from each other to visit one another. More seriously, if there were masses of people on one side of this line, and virgin acreage on the other side, they could only with stupendous difficulty be able to homestead this empty land. In making this second type of proviso are we gratuitously adding on rules and regulations to basic Lockean libertarian homesteading theory? We are not, certainly not any more so than the first Blockian proviso regarding settlement in donut format. Rather⁵, we are ferreting out implications of the basic premise⁶.

³ I am now using "A", "B" and "C" to denote not only areas of territory but also the names of their owners. The distinction should be clear from the context.

⁴ Block and Block (1996) discuss this concept.

⁵ That is to say, we are not embracing anything on the order of thick libertarianism, where irrelevancies are added on to the basic premise of the Non-Aggression Principle (NAP). Rather, we are *deducing* further implications from the NAP, or in this case, homesteading. For advocates of thick libertarianism, see Gillespie and Welch 2011; Johnson 2013; Long 2007B, 2008A, 2008B; Reisenwitz 2013; Richman 2014A, 2014B, 2014C, 2014D; Tucker 2014; Vallier 2013, 2014; Zwolinski 2011. For critics of thick libertarianism, e.g., supporters of thin libertarianism, see Albright, 2014; Block, unpublished; Cantwell 2014; Gordon 2011; Hornberger 2014; McCaskey 2014; Mosquito 2014A, 2014B; Rockwell 2014; Sanchez 2014; Smith 2014; Vance 2014; Wenzel 2014A, 2014B; Woods 2013.

⁶ Does this mean that rectangles are disallowed and all property must conform to an exact square? Of course not. There is all the world of difference between a rectangle of 3 miles by two miles and the format in the text of 10,000 miles long and one half mile wide. But where is the point at which the rectangle becomes "too" long? It is impossible to answer this query, since it is based on solving the continuum challenge to which there is no solution. See on this Block and Barnett (2008).

One of the reasons we need the NAP, and libertarians are so intent upon explaining, understanding, defending, articulating this concept, is that we may live in peace and be clear on who has the right to engage in which activities. In similar manner, we also need private property, and rights thereof, for the same reason. Without it, it would be unclear, in the extreme, as to who had the right to plow which field, erect a building on which plot of land, etc. But, if people may homestead long thin strips of land, or in the bagel format, all this goes by the board. These provisos, then, follow from these basic principles and are not adventitious, gratuitous add-ons, as might be thought from a superficial examination of them.

There is yet another difficulty with the donut format. Consider the question posed by Kinsella (2007): “Is Fermilab’s Tevatron unlibertarian for encircling a plot of land (and presumably preventing access to it to minimize traffic vibrations interfering with the particle smasher’s operation)?” What is the size of this establishment? “The ring is 2 kilometers (1.2 miles) in diameter, 6.4 kilometers (3.9 miles) in circumference and encloses 314.2 hectares (776.3 acres)⁷”. This is not a particularly apt example, since the B, here, could make the claim that he is really homesteading the interior of the bagel since he needs that land to “minimize traffic vibrations⁸”. Let us then, instead, consider a hypothetical case where an equally sized amount of land in the donut shape were located out in the wilderness, far away from human habitation. Would the B be justified in homesteading land in that pattern? Kinsella would argue in the affirmative. He is not given pause by Long’s (2007A) brilliant insight that it is by no means clear that a circumference of 3.9 miles on the surface of a sphere such as the Earth “encloses” only a mere 776.3 acres. To be sure, that is *one way* of looking at the matter. However, there is an altogether *different way* of interpreting this situation, one that cannot give the critics of the Blockian proviso much comfort. And that is that this circumference *also* “encloses” the entire earth *minus* these relatively few acres. This point can more easily be seen if we expand and expand, and expand yet again the size of the B holdings. Suppose, now, that they encompass the equator of our planet, one mile north and south, but with a circumference of the entire earth, namely, 24,901 miles. If we again ask this question, which is internal to the equator, and which external, we have no unambiguous answer. But the same applies to the Tropic of Cancer or the Tropic of Capricorn. It is still ambiguous⁹ and, ditto, perforce to the smaller cir-

⁷ Source: <https://books.google.com/books?id=peDOBgAAQBAJ&pg=PT116&lpg=PT116&dq=6.4+km+circumference+equals+acres&source=bl&ots=eswRoBDJ09&sig=xnviwUDyMJRXg5IA2WgxHht2poc&hl=en&sa=X&ved=0CDAQ6AEwA2oVChMIn4CTvM6kyAIV2FyICh02-AM1#v=onepage&q=6.4%20km%20circumference%20equals%20acres&f=false>

⁸ This example is also not particularly apposite since the owner of the land in question is the government, and that would not occur in the purely libertarian society.

⁹ Long (2007A) brilliantly makes this clear with a powerful quote from LeGuin (1974): “Like all walls it was ambiguous, two-faced. What was inside it and what was outside it depended upon which side of it you were on. Looked at from one side, the wall enclosed a barren sixty-acre field called the Port of Anarres. ... The wall shut in not only the landing field but also the ships that came

cumference of mere 3.9 miles [not clear]. Yet, this should bring Kinsella and other such critics of the Blockian proviso up short. Is he, and they, thinking comfortably that anyone who homesteads a small amount of land in the doughnut format can claim legitimate property title to an entire planet? This would appear to be a *reductio ad absurdum* that even Kinsella would have to acknowledge.

But this author has more arrows in his quiver. Kinsella (2007) states: “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?”

I appreciate the force of this argument, but there are several flaws in it. First, and perhaps most important, where are the roads, streets and highways? Surely, in a purely free society, A, B and C would have initially made provisions for getting from one place to another in this manner¹⁰. So much for each of them not being able to “visit” the others. Abstracting from that difficulty, Kinsella asks how it can be that when C dies¹¹, 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, at least not when there are others who covet it¹². This certainly should not occur as the result of one landowner blockading, preventing others from homesteading the empty parcel. Yes, this *sounds* awkward. When C was alive, there was no question of A trespassing on B’s land in order to reach territory C and homestead it. But, in the scenario offered by Kinsella, this is not at all shocking. It is readily deducible from basic libertarian premises. Now, with the death of C, there is suddenly unowned land. B does not want it; he only wishes to prevent A from having it.

down out of space, and the men that came on the ships, and the worlds they came from, and the rest of the universe. It enclosed the universe, leaving Anarres outside, free. Looked at from the other side, the wall enclosed Anarres: the whole planet was inside it, a great prison camp, cut off from other worlds and other men, in quarantine.”

¹⁰ For a bibliography attesting to the importance libertarians place on private streets and roads, see Anderson 2007; Beito 1988, 1989, 1993; Beito and Beito 1998; Benson 2005, 2007; Block 1983, 1996, 1998, 2009A, 2009B; Block and Block 1996; Butler 1982; Caplan 1996; Carnis 2001, 2003; Cadin and Block 1997; Cobin 1999; De Palma and Lindsey 2000, 2001; Foldvary 1994; Hibbs and Roth 1992; Klein 1990; Klein and Fielding 1992, 1993A, 1993B; Klein, Majewski and Baer 1993A, 1993B; Knipping and Wellings 2012; Lemennicier 1996; O’Toole 2009; Roth 1966, 1967, 1987, 2006; Roth and Butler 1982; Semmens 1981, 1983, 1985, 1987A, 1987B, 1987C, 1988A, 1988B, 1991A, 1991B, 1992A, 1992B, 1993, 1994A, 1994B, 1995A, 1995B, 1996A, 1996B; Staley and Moore 2009; Tullock 1996.

¹¹ and presumably leaves no heirs.

¹² According to an old aphorism: “Never suffer a witch to live!” The libertarian analog of this would be “Never suffer any virgin land to remain in that status” or “Never suffer the tragedy of the commons, which emanates from unowned land!”

Kinsella (2007) avers: “As best I can understand it, Block’s ‘forestalling’ conclusion seems to be incorrect. It would imply a general easement right over everyone’s property on behalf of everyone else if they ‘need’ that property to ‘get to’ some other property they want to be on. I see no special status of the unowned property; it’s just property someone would like to go homestead. If they can’t reach it, it’s not the fault of those who have this resource surrounded”.

Kinsella (2009) follows up: “In other words, after Rothbard, Hoppe (246, 410) and de Jasay (1997: 188, 195) have buried the Lockean proviso, Walter (Block) gives us a new one: the Blockian Proviso. The Lockean Proviso says that you may homestead an unowned good but only if ‘enough and as good’ is left for others — that is, if you don’t harm them by your homesteading action by making it more difficult for them to have a similar opportunity to homestead some goods of that type. Both Block and I would reject this. But the Blockian Proviso would say that you can only homestead property that is a potential means of access to other unowned resource so long as enough and as good access to the unowned resource remains available!”

This is Kinsella’s attempt to conflate the two provisos or, better phrased, show their similarities. Yes, of course, there are indeed parallels. Both concern land settlement, each involves the legitimacy of homesteading; it is even true that the two of them are “provisos” and that both involve the phrase “so long as enough and as good ... remains available”. But these are superficial kinships. On a more substantive level the two are polar opposites. The Lockean proviso *limits* homesteading. It maintains that once all the good land is taken up, it is illicit to homestead the remainder. As we have seen, this would *entirely* prohibit all land ownership, if we define “good land” narrowly enough. In very, very extremely sharp contrast, the Blockian proviso *extends* the conversion of unclaimed nature into private ownership. If taken to its extreme, every square inch of the earth will be made into private property. The tragedy of the commons will be entirely banished¹³. There could not be a more important *divergence* between the two provisos, and yet Kinsella is mired in their superficial similarities.

Kinsella states (2007) “... Block also seems to believe that if you own a circle of property and some people live in the territory inside the circle, you are ‘trapping’ them if you don’t let them use your property to ‘leave’ the circle. This comment seems to confirm my concerns about his view and how it could be generalized to some kind of ‘necessity-easement’ not limited to the homesteading case”.

This is a serious charge to make against a libertarian, since it implies the acceptance of positive rights, anathema to this entire philosophy. In this perspective, people only have negative rights; the right not to be murdered, the right not to be raped, the right not to be enslaved, the right not to be stolen from, etc. There is no

¹³ Ostrom (1990) rejects this concept. For a critique of her views on this subject see (Block 2011A; Jankovic and Block 2016).

such thing in this viewpoint as positive rights: the right to food, clothing, shelter, etc., which means, in effect, the right to seize other people's property when the person is hungry, naked, homeless, etc. To wit, in 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. Very much to the contrary, in Block (2009A) I make the case that in the truly free society, 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 (2007) asserts. This author and I are in entire accord on this matter. No, the "necessity-easement" has nothing whatsoever to do with positive rights. Rather, it is entirely a function of ensuring that *all* territory will come under private ownership, an entirely different matter.

However, positive obligations and the need for libertarians to eschew them do arise in this context. This comes about with regard to abandonment, but not of land; rather, of children. Suppose a parent refuses to feed her baby and leaves him to starve in a back room, where no one else can hear his pitiful cries as he dies. Must a libertarian accept such a horrid state of affairs, fearful of placing a positive obligation on the mother to either care for her infant or to see to it that someone else does, for example by bringing him to an orphanage, a shelter, a hospital or a church or synagogue? Not a bit of it, thanks, precisely, to the Blockian proviso, rejected by Kinsella. For, with this device we need not resort to invalid positive obligations to force this derelict mother to do her duty and see to it that the innocent child is saved, at least by someone else, if not her. We can accuse her, wait for it, of forestalling, or precluding, or preventing others from homesteading, not land, but this baby. We can have our cake and eat it too. We can insist that the law compels the mother to offer her unwanted baby to someone else; that she may not encircle the baby in her ownership¹⁴, and prevent others from taking on this role and, also, that no one may encircle land in such a pattern that prevents others from accessing unowned territory.

Nor is it a matter of any trade off. We are not giving up on land homesteading in order to save babies from such a plight. No. We are defending the Block proviso on land, which can stand on its own two feet, Kinsella to the contrary notwithstanding; we can *also* save the baby based on this perspective without resorting to any, horrors!, positive obligations incumbent upon the mother. This is a win-

¹⁴ Of course, one may own land, but not babies. However, one may own the guardianship rights over an infant. These rights continue as long as the child is cared for. If someone else comes along, say a rich man like Bill Gates and claims the baby on the ground that he can give him a better life than the poor mother, he may not seize this right from her; she "owns" it, and only loses it if she stops being a good guardian.

win situation for libertarian theory. By employing it, we are able to condemn this mother as a murderer without resorting to positive obligations. We are also able to ensure private property in land — *all* of it, even against those who would forestall others from homesteading parcels the former wish to remain unowned¹⁵. It will be interesting to see how commentators such as Kinsella who reject the Blockian proviso deal with the objection of the starving baby. One possibility is to maintain that infants simply don't have rights at all yet since they cannot assert them and are not quite let alone fully rational. But this is exceedingly abhorrant and anti libertarian. The same applies to sleeping people and the mentally handicapped, and yet, surely they have rights: as many and as powerful as anyone else's.

Let us conclude by considering, and rejecting, several other objections to the Blockian proviso provided by Kinsella (2007):

imagine a guy who owns an acre of land in Kansas. He's surrounded by a patchwork of millions of tracts of land owned by other private owners. Say he wants to go to France. The only way to get there is to get permission to cross over the property of thousands of others. What if none of them grant it? Then does he have an easement over any property he selects, even though he doesn't need it (he only needs a few). If he only has one easement-route, that seems arbitrary.

We have already dealt with this objection in a different guise. Our answer then, and now, is the private road industry. Entrepreneurs, in all likelihood, will set up streets, roads, highways, precisely in anticipation of the Kansan who wants to go to France¹⁶. Contracts will be made, presumably, in a manner such that very few people¹⁷ will be precluded from their usage. “[I]magine (that) the donut is owned by 100 people. Cross any of their tracts gets him in or out. Which one does he have an easement over?”

Our response: The same answer applies to the running back in football. He is faced with an entire defensive line; all of them are preventing him from reaching his goal, the end zone. Which of them shall he run through, over, between or around? The reply: anyone he chooses. He can select the weakest or the slowest, or, if he is into bravado — the strongest, biggest and fastest. They are all in a “conspiracy” to prevent him from “homesteading” some turf in the end zone and he has a right to challenge any or all of them. Similarly, if the B section of the doughnut is owned by 100 people, they are *all* preventing the would-be homesteader from reaching his goal: the A section, the “hole” in the bagel. He may demand access from *any* of these co-conspirators, *all* of whom are in violation of the Blockian proviso.

¹⁵ For an explication of how land can be homesteaded by “mixing labor” with it and still remain untouched by human beings as in a nature preserve see Block and Edelstein 2012.

¹⁶ If part of his trip is via the Atlantic Ocean, under libertarian law this too would be privatized (Block and Nelson (2016)), and the owners, at least some of them, presumably, would be more than happy to accommodate this traveler from Kansas.

¹⁷ Terrorists, murderers, etc.

Imagine a fully-owned planet. I want to fly to Jupiter. I can build a rocket, but I don't own enough land to place it on. I need a 100 acre tract to use as a takeoff pad. No one will sell me their land. Do I have a "rocketpad" easement on — someone's? — property? Otherwise, they're 'trapping' me here on earth.

Kinsella is no more being trapped by not having sufficient land for a takeoff pad than by lacking any other necessary factor of production. Suppose that this would-be traveler to Jupiter has 100 acres alright, but lacks a rocket ship, or sufficient fuel to power him to that gigantic planet, or enough food to last the entire journey. Is anyone guilty of "trapping" him here on the Earth? Of course not. A similar analysis applies to this very creative objection of his. People who will not sell him the land he needs for this voyage are no more trapping him than those who will not provide him, for a fee, with a rocket ship, fuel, food, or anything else he needs for his planetary trip.

Conclusion

It is true confession time. The reason I concocted the Blockian Proviso regarding land settlement was to deal with a very powerful objection to the libertarian insistence that there are no valid positive obligations. The dismissal of libertarianism, here, is based on the claim that the parent could starve the baby merely by not feeding it. This rankled. I had to come up with an answer, compatible with the libertarian limitation to negative rights, that would save that and all other such babies. My thought was that such a murderous parent was forestalling, or encircling, or encompassing that baby, preventing others from "homesteading" the rights to be the guardian of the infant, by caring for it and feeding it. Therefore, in not bringing the unwanted baby to the orphanage, the hospital, the church or synagogue, she was actually committing a crime. To compel her to do so, under force of libertarian law, was, thus, not to impose positive obligations on her. No, she was a criminal for not doing so in the first place. Then, I applied this insight to the homesteading of land. I think the latter application is a valid one, and can stand on its own, despite Kinsella's several, and brilliant, objections to it. But the real weakness of the Kinsella position, I aver, is — How does he deal with the starving baby objection to libertarianism, without employing what I am delighted he has called the "Blockian proviso?" If he has an answer to that conundrum, I would dearly like to become acquainted with it. And, even if he does, as I say, the Blockian proviso can stand on its own two legs insofar as land homesteading is concerned.

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