

VAN DUN ON FREEDOM AND PROPERTY: A CRITIQUE

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THE THESIS OF VAN DUN (2009)¹ is that there is a conflict between freedom and property rights, and that libertarians ought to side with the former. If not, people, many people, will likely starve to death by being trapped in their houses, unable to get out of them, or, caught outside of them, without the ability to return home. This is unjust, and hence unlibertarian, since such people will in effect be imprisoned, without being found guilty of any crime, indeed, without even having been accused of perpetrating any illegal action.

This sad state of affairs will come about (VD) asserts, if the libertarian emphasis on private property rights is fully implemented. How so? If the non-aggression principle (NAP) of libertarianism is adhered to, private road owners will be able to charge the veritable “arm and a leg” to homeowners for access and egress. These capitalists will thus be empowered to trap individuals in their homes, prevent them from returning there unless they pay large fees, and/or forbid such movement outright. The highway corporations would have every right to impinge upon the freedom to travel of their clients, since, in the libertarian society, all property, including roads, would be privately owned, and the proprietors of these vehicular passageways would have every right to charge price they wished, up to and including an infinite price, which would be equivalent to out right prohibition. They could engage

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CITE THIS ARTICLE AS: Walter E. Block, “Van Dun on Freedom and Property: A Critique,” *Libertarian Papers* 2, 4 (2010). ONLINE AT: libertarianpapers.org. THIS ARTICLE IS subject to a Creative Commons Attribution 3.0 License (creativecommons.org/licenses).

¹ Hence, VD.

in this sort of encirclement, or as I (Block, 2008) have characterized this problem, as “entrapment.”²

VD is a well written article. Hence, the author’s thesis is crystal clear, and there is little danger of misinterpretation. His vision of the Quasi-Earth, populated by creatures just like us, only they are all libertarians, is inspiring. His depiction of such a society is highly accurate as it focuses on the twin pillars of libertarianism: the non-aggression axiom or principle (NAP) and private property rights based on homesteading (Locke, Rothbard, Hoppe.) He states VD (224–25, footnote deleted):

Thus, unlike us Earthlings, the Quasi-Earthlings (1) unconditionally respect every person’s rights of self-ownership, private appropriation of unowned resources, unrestricted noninvasive use his own property, and exchange by mutual consent, and (2) unconditionally abide by the nonaggression principle when it comes to dealing with interpersonal problems. In other words, there is no crime and every property owner is free to do with, to, and on his property whatever he likes provided his actions have no significant physical effects on others or their properties.

However, I cannot fully buy my way into VD’s thesis. What obstacles stand in the way of our agreement?

1. Freedom

Although VD nowhere in his essay explicitly defines “freedom,” it is clear what he means by this, the right to come and go as one pleases. States VD (230):

there is need to have a “free movement” proviso regarding ownership of material resources, to the effect that the rights of a property owner do not include the right to deprive others of the possibility of moving between their own property and any place where they are welcome.

But this “freedom” is not at all the negative right not to have one’s person or property free from external aggression. Rather, it is the *positive* right, beloved of our friends on the left, to be able to utilize the property belonging to other people, for our own ends, without their permission.³ If freedom from hunger means the right to force other people to feed you at their expense, and

² Also see Kinsella, 2009.

³ For the incompatibility between libertarianism and positive rights, and thus for the contradictions in the latter, see Block, 1986; Gordon, 2004; Katz, 2009; Long, 1993; Rothbard, 1998.

freedom from nakedness implies the right to compel others to clothe you, again at their expense, then VD's freedom to travel, or his "free movement proviso" obligates others to make available to the recipient a "route" as part of a "right of way network" which includes "seas, (uninhabited or uncultivated land) and streets, roads, canals," and, presumably, highways, byways, roads, avenues, lanes and other vehicular traffic arteries.

But positive "rights" are not rights at all. Rather, they are a not so heavily concealed demand for (the use of) the property belonging to others. Just as the welfare recipient of food or clothes forces farmers, restaurant owners, grocers or tailors to feed and clothe oneself (or to finance this out of general tax revenues) so do those who demand freedom to travel intend to legally obligate route owners to subsidize their movement.

Why limit this "right" to access routes? Trespass on other people's property might be necessary to move (VD, 230) "between their own property and any place where they are welcome," but it is hardly sufficient. Also required in the modern era are things like cars and tires to support them, and fuel to push them. If there should be "public space" for "routes" (VD, 231) should there not also be public financing for "rights" of way? And, if so, it would appear easy to reconcile a welfare system that provides automobiles and gasoline to all and sundry with the libertarianism that VD so obviously favors in other contexts.

Another difficulty arises with the phrase "any place they are welcome." Suppose that the person in question is so personally obnoxious (but is not a criminal nor insane) that there is no one else on the entire planet Quasi-Earth who would welcome him onto their premises. Then, it would appear, such a person has as fully lost his freedom as the man who VD (226) is "locked up in a regular prison." The implication of this is that there must be a sort of quasi affirmative action policy for such obnoxious people. Others must take him in, like it or not, if his "freedom" to move around is to be respected.

2. NAP and the Blockian proviso

According to VD (224): "... according to the nonaggression principle, only aggressive invasions of another's property are unlawful and every act of any other kind is lawful." But this characterization, while a very good first approximation, is not entirely correct. It reckons in the absence of what Kinsella (2007) has called the "Blockian proviso."⁴ What is this? It is an implication of the logical of homesteading. Part and parcel of this doctrine is

⁴ Also see Long, 2007.

the notion that it is illicit to control land that was *not* homesteaded. 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 (VD, 226) this terrain, B.⁵ Mr. B, then, controls area A, without every 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 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.⁶

Thus, it is not strictly correct to say that according to the NAP, only aggressive invasions of another’s property are unlawful, and every act of any other kind is lawful. In the bagel case, we have an exception to VD’s otherwise very well stated premise regarding the NAP. The a priori axiom of homesteading, the logical core of this principle, prevents Mr. B from engaging in his preferred homesteading pattern. If Mr. B want to own territory A, he must *homestead* it. He may not prevent others from so doing via his homesteading of B. There are no “savesies” or reserving theater seats or parking spaces for late arrivals. The homesteading rule should be, “first come, first served.”

If Mr. B wants to own only B, but not A, well and good. Let him then homestead B, and ignore A. But, he may not preclude others from so doing, such as Mr. A, who wants to homestead A, but cannot reach A (he is now stuck in C) because of Mr. B’s ownership of B. Mr. B *must* create a path through which Mr. A can travel to and from area A and C, right through B, so that Mr. A can mix his labor with A, thus homesteading A, *en route* to legitimately owning A.

This does not count as a nationalization or land grab or theft from Mr. B of the area that Mr. B must clear through his land, B, into order to set up this path for the would-be Mr. A. It stems, rather, from the fact that without

⁵ Also see Block and Block, 1996; and Block, 1998.

⁶ Hoppe, 2007, 66, discusses the a priori axioms of action and argumentation. What we have here with the bagel or the so-called Blockian proviso might better be called the a priori axiom of homesteading.

this access route bisecting B, Mr. B would be guilty of precluding, or forestalling.⁷

Suppose that Mr. B fully intends to homestead the entire area, A+B. He starts off by erecting a fence around the perimeter of B, thus, also, of course, enclosing A as well. At this point, however, he owns, only, the fence itself, plus a few feet on either side of it. He starts off homesteading at the southern end of B, working northwards, pulling out trees, crushing rocks, planting seeds. He works steadily every day. But, before he can bring this process to the northern end of B, passing through A, of course, some other person, Mr. C, breaks through the northern end of Mr. B's fence (on the ground that Mr. B is precluding and forestalling.) My claim is that as long as the size of B is "reasonable,"⁸ Mr. C is in the wrong. Mr. B is *in the process* of homesteading all of B (+A). He has staked it out. Mr. C is interfering with the process first begun by Mr. B.

What are the size limitations on B (+A)? this issue is not unrelated to the one concerning how intensive or extensive must the homesteading be, in order to count as a justification of ownership. According to Rothbard (), this depends upon the culture, the common practices, the history of the area, and can legitimately vary depending upon these considerations. For example, the land is better watered, on average, and more fertile, east of the Mississippi, than west of it. Therefore, the tradition is likely to be a requirement of more intensive homesteading and farming east of this river than west of it. Similarly, the optimal size of the farm holding is likely to follow this pattern. For example, if Mr. B initially enclosed 160 acres in Louisiana, or 1600 acres in New Mexico, this would be far more reasonable than the reverse.⁹ If Mr. B somehow places a fence around the entire U.S., and then starts homesteading it, working from the south to the north as in our previous example, then Mr.

⁷ In like manner, a parent may not licitly hide a baby he no longer wishes to feed and care for in the back room of his house. That would be murder. If such a person wishes to give up his guardianship rights over the baby, well and good. He must then bring the infant to the hospital, or church, or adoption agency or in some other manner make it publicly known that he is renouncing his mentorship of the baby. He may not legally preclude or forestall others from adopting this child. Nor does this count as a positive obligation, anathema to the libertarian philosophy, and more than does compelling Mr. B to clear a path through B for the use of Mr. A. See on this: Block, 1977, 1978, 2001, 2004, 2008, forthcoming A, B, Block and Whitehead, 2005. I apologize for so heavily citing myself on this issue, and no one else. I do this only because I am unaware of other publications on this issue.

⁸ Rothbard (1982) discusses this.

⁹ For an analysis of continuum problems, see Block and Barnett, 2008.

C would be entirely justified in breaking through the fence, say, in North Dakota, and working south.

Let us now return to the case where Mr. B placed the fence around (a reasonable sized) B (+A). Only instead of working from the south to the north, he began at the perimeter fence, and worked his way inwardly, toward A. After a week or so, we may suppose that Mr. B had now covered the entire terrain, B, and was continuing inwardly to A. At this precise point in time, Mr. C breaks through already homesteaded land in B, and starts erecting a path toward A, on the ground that Mr. B is a forestaller of A. My point is that as long as Mr. B is in the process of homesteading the entire area A+B, has already planted his crops in B, then Mr. C is in the wrong.

How long should this process take? What are the time limitations? Again, it is a matter of context. It should depend upon custom, the terrain, history, etc. as in the case of the intensity of the homesteading. For example, 100 years is way too long. But Mr. B need not rush, and plant all of his 160 (or 1600) acres in one day either. It is another continuum issue as to precisely how much time Mr. B has at his disposal before it would be justified for he must build, or allow to be built, a path in B to allow Mr. A, or Mr. C to begin homesteading in area A.¹⁰

3. Imprisonment

It would appear that the analogy between the prisoner and the hemmed in landowner is not as strong as VD would have it. For one thing, it is illegal for the inmate to break out of his jail. If he does so, the forces of law and order will and properly so¹¹ apprehend him if they can, and compel him to return to his proscribed quarters. In contrast, in sharp contrast, it is not at all illicit for the house occupant to exit or enter his own premises. Yes, to be sure, he may not do so by trespassing on the “encircler’s” property. But, he may travel toward or away from his house in complete compatibility with the law if he does so by using a helicopter or tunneling (far enough below) under the surrounding terrain.

Secondly, we must enquire, carefully, into the history of the prisoner and the homeowner (or, renter.) If we are still on the Quasi-Earth where all are libertarians, it is difficult to see how there can be any inmates at all. If

¹⁰ It is more than passing curious that after mentioning this material in his footnote 7, VD ignores its implications for his own deliberations on “freedom.”

¹¹ Here, we are presumably talking about Quasi-Earth, where only criminals (there cannot be any) who violate the NAP are punished. Would that the actual earth could be run in this manner.

everyone obeys the NAP, no one, presumably, is guilty of any crime, and thus cannot be properly incarcerated. But, clearly, there is a jailbird here, so, I think, we must consider this as an exception to this rule. If the prisoner is in jail, there, justly, it is because he has committed a crime, is a flight risk, and is now being forced to labor to compensate his victim. Not so for the house owner. So, how comes he to be there in the first place? This is more than passing curious, much more so. For, at present, no one in his right mind would purchase a dwelling without carefully inquiring into the legitimacy of the property title being conveyed to him, and/or by purchasing title insurance and having that company guarantee against any difficulties in this regard.

In the Quasi-Earth world depicted by VD, in addition to title insurance, there would also be *access* insurance. No sober individual would ever purchase a home without first ascertaining the access and egress rights (Block, 2009) that accompanied it. And/or, he would hire a professional insurance company to look into the matter, and guarantee him against any such goings on.

It is also strange that the homeowner should be in such dire straits as VD places him in, given the incentives of the road owners. Assume that the roadway was there in existence before the house was built. (It is difficult to see how the home could have been built in the first place without a road to bring wood, cement, glass, labor and other such inputs needed for construction.) So, here we have the firm that owns the thoroughfare, and, so far, there are no *houses* abutting it. Without such edifices, there can be precious little traffic, and hence profits for the corporation that owns the street.¹² Thus, the owner of the route would have every incentive to *encourage* homeowners to locate themselves on his street or avenue. How can he do so? But threatening to box them in, after they have made their land purchase from him, and are starting to build? Not very likely in any real world situation. Maybe things work differently on Quasi-Earth, but on *this* planet the route owner will maximize profits by contractually obligating himself *not* to act in the capricious manner we see in VD's objection to private roads.

¹² Yes, a limited access highway owner would not be faced with exactly this problem; motorists could transfer from each of their home cities that lie at the endpoints of the road to the other. But, even here it would be to the interest of the corporation owning the highway to encourage people settle on the abutting land. It would add to the traffic flows, and thus enhance the value of the roadway. Restaurants on the side of the road could serve travelers, and pay rent to the highway owner. In any case, private dwellings of the sort VD asks us to consider cannot be located on a limited access highway. If they were, it would no longer be a limited access facility.

Thus we do not even have to “think” about “public space in the libertarian order (VD, 231), let alone implement any such contrary to libertarian scheme. Nor do we have to (VD, 229) “adopt the stance of other-worldly, sanctimonious saints ignoring the pervasive causal, physical, and psychological aspects of the human condition.” Of course, the story VD tells is horrific. But, it cannot and does not arise from the operation of the free enterprise system. Like all road socialists (see Block, 1996), VD fails to appreciate the “magic” of the market.¹³

VD (232) condemns innocent road owners as “lords” or “rulers.” Nothing could be further from the truth. “Cartels” might be closer to the truth. But cartels are a legitimate part of the market (Rothbard, 2004) as any other form of business organization. And, in this case, they will have a very salutary role to play. For, suppose homeowner Mr. X, whose house is located on street X, wants to travel to his friend Mr. Y, who is located on avenue Y. The owners of these two thoroughfares will have to come to some sort of (cartelistic) agreement if they are both to have any hope of maximizing profits. The value of the property of each will be enhanced if there is an agreement between them to allow their respective clients, Mr. X and Mr. Y, to visit each other. They will have every incentive to allow this, nay, to encourage it. But the process will not stop there. For, what of avenue Z? It, too, has its client base, who can gain by being brought into this (cartel) agreement. And so on, with virtually *all* roadways¹⁴ agree to allow their clients access to the property of all the others.

Contrary to VD (227) we *should* “make light of the ease with which a thing such as a privately owned road can be turned from a mere revenue-generating commercial asset into a means for exercising unilateral control over others and their properties.” VD’s fears bespeak an unawareness of how free enterprise actually functions.

¹³ It sounds harsh to condemn VD in such a manner. And, certainly, VD is no socialist on a plethora of questions. Indeed, he is one of the leading libertarian theoreticians in the entire world. But, how else are we to characterize a scholar who rejects private roads on the ground that they are inhumane, will force innocent people into a life worse than that of prisoners (prisoners are at least fed; VD’s trapped homeowner on Quasi-Earth will die from lack of food.)

¹⁴ There may be a few gated communities who hold back.

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