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Abstract *The purpose of the present paper is to test this premise of no positive obligations against a challenging critique that can be made of it. To wit, abandonment of babies. That is, does the mother who abandons her baby have the positive obligation to at least place it "on the church steps", e.g. notify all other potential care givers of the fact that unless one of them comes forward with an offer to take in the infant, it will die? If so, then there is at least one positive obligation in the libertarian philosophy; if not, then, at least at the outset, the libertarian claim to be generally utilitarian must be greatly attenuated. At best, there would now be an exception to the previously impermeable principle of no positive obligations; at worst, one exception tends to leads another, posing the risk that the premise will be fatally compromised, which can undermine the entire philosophical edifice.*

Introduction

A basic premise of libertarianism (Cuzán, 1979, De Jasay, 1985, 1997; Friedman, 1980; Hoppe, 1989; Hummel, 1990; Kinsella, 1996a; Morriss, 1998; Rothbard, 1978, 1998; Skoble, 1995; Sechrest, 1999; Stringham, 1998/1999; Tinsley, 1998/1999) is that there are no positive obligations. No one is forced to contribute to charity. Good Samaritan laws mandating that people come to the aid of those in trouble (say, an unconscious person) are incompatible with libertarianism. To take an extreme case, there would be no law against refusing to toss a life preserver to a drowning man even if one could do so with minimal effort, and his death would occur otherwise. In this political philosophy, there are only negative obligations[1]. It is prohibited, and a punishable criminal offense, to initiate or even threaten violence against anyone or his justly acquired property.

As such, libertarianism is a deontological theory of law. Proper legal enactments are those that support this basic premise (e.g. prohibitions of murder, rape, theft, fraud, etc.) and improper ones are those in conflict with it (e.g. Good Samaritan laws, seat belt requirements, mandates that the rich be forced to help the poor through programs such as Aid to Dependant Children, welfare, subsidies to the poverty stricken, etc.).

However, libertarianism also claims to be at least broadly utilitarian; that is, at least in the view of its proponents, following this philosophy tends to lead to happiness for mankind, and to a greater degree than any other perspective,

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even those explicitly utilitarian. How can it be argued that the libertarian non aggression axiom will help people, when the paradigm cases (allowing people to drown, not helping an unconscious man) appear to move in precisely the opposite direction? We rely upon two things. First, the invisible hand insight of Adam Smith (1776/1965) that self interest, not public spiritedness, best promotes the common weal. And second, the fact that there are no legitimate interpersonal comparisons of utility on the basis of which one could scientifically conclude even that the interest of the drowning man in staying alive is more important than that of the passerby who refuses to spend but a moment on saving him (Rothbard, 1977).

The purpose of the present paper is to test this premise of no positive obligations against a challenging critique that can be made of it. To wit, abandonment of babies. That is, does the mother who abandons her baby have the positive obligation to at least place it "on the church steps", e.g. notify all other potential care givers of the fact that unless one of them comes forward with an offer to take in the infant, it will die? If so, then there is at least one positive obligation in the libertarian philosophy; if not, then, at least at the outset, the libertarian claim to be generally utilitarian must be greatly attenuated. At best, there would now be an exception to the previously impermeable principle of no positive obligations; at worst, one exception tends to leads another, posing the risk that the premise will be fatally compromised, which can undermine the entire philosophical edifice.

Property rights

In order to analyze the case of the mother abandoning her infant, we must hark back to the issue of property (for in the libertarian view babies are but a form of property)[2], how it gets to be owned in the first place, how it can be transferred, and how it can be abandoned. That is, since libertarianism defends "justly acquired property", not any old property rights, if we are to be thorough we must first delve into the theory of how man attains property in the first place. We will trace down the implications of property theory for children's rights in general, and then apply these to the question of abandoning children without notification.

The proper premise, we contend, is based on the Lockean-Rothbardian-Hoppean (see Locke, 1955, 1960; Rothbard, 1998, pp. 51-76; Hoppe, 1989, 1993) labor theory[3] of acquisition. Land, to start with the most basic element of non human property, is justly won by mixing one's labor with it: farming it, cutting logs on it, clearing away debris, putting in improvements such as paths, lighting, fences, etc. It is by imprinting one's personality on the land, in effect, that we come to own it; we do this though "blood, sweat and tears", sometimes, but mainly the middle mentioned bodily secretion just mentioned.

There are of course questions about the precise meaning of "mixing your labor with the land". How intensive does the farming have to be? One plant

every square foot, yard, meter, acre, mile? How many crops must be planted before ownership obtains? The answer that emanates from this perspective is Whatever is the usual practice in land of that sort. For example, in the relatively irrigated land east of the Mississippi, the farming must be more intensive; in the more arid land west of this river, less intensive. As to how long the homesteading process must take before full property rights are vested, this, too, is a social and cultural matter.

A similar process occurs with regard to people's ownership of themselves, of their own bodies as it were. In early baby hood, before consciousness arrives, we can hardly be said to own ourselves in any meaningful way; certainly, we have not yet "homesteaded" ourselves. But at around age two, and increasingly as time goes on, the baby gets a sense of its ownership over itself. It asserts this by, for example, refusing to be any longer kissed by loving parents whenever the latter wish to do so[4].

Yes, the homesteading justification for property ownership is not an apodictic airtight one. It is forced to rely upon local practice, the rulings of judges, etc., to buttress itself as to these specific details. In like manner, its answer to the question of how one comes to own virgin land whose main value lies in contemplation of it as is, cannot be accorded synthetic a priori status. For example, how does Niagara Falls pass from unowned to owned status? Any attempt to "mix one's labor" with it would decrease its value[5]. The answer is that the owner would place paths around it, enabling tourists and those who appreciate the beauties of nature to better enjoy this amenity. The thing itself remains unchanged, but, through the actions of the homesteader, he and perhaps more people are now able to enjoy it.

But if homesteading theory is not without its slight deviation from absolute perfection, these are as nothing compared to the alternatives to it. Rothbard (1978, p. 34) explains:

> If the land is to be used at all as a resource in any sort of efficient manner, it must be owned or controlled by someone or some group, as we are ... faced with ... three alternatives: either the land belongs to the first user, the man who first brings it into production; or it belongs to a group of others; or it belongs to the world as a whole, with every individual owning a quotal part of every acre of land.

The second alternative may be dismissed out of hand: why should a group of "others" have any rights to the land brought into an economic relation by the first user of it? Be these others the state, or passers by, or random thugs, the argument in behalf of their ownership of the land in question is clearly inferior to that of its first possessor. And, as to the third alternative, if there are six billion people, we would then each own one six billionth of every acre on earth. But this is nothing short of a recipe for absolute disaster, ending in the virtual starvation of everyone. Nothing could be done with any land, for it would be "difficult" in the extreme, to get six billion owners to agree to anything. The holdout problems, for one thing, would be insurmountable[6].

Rothbard (1978, p. 35) puts this matter into perspective:

> ... if a producer is not entitled to the fruits of his labor, who is? It is difficult to see why a newborn Pakistani baby should have a moral claim to a quotal share of ownership of a piece of Iowa land that someone has just transformed into a wheatfield – and vice versa of course for an Iowan baby and a Pakistani farm.

There is actually a fourth possibility, in addition to the first three categories mentioned by Rothbard. That is, rather than one, the homesteader owning the land, or two, other people, people other than the homesteader controlling it, or, even, three, that all of us possessing everything communally, there is the scenario where no one is able to attain it, thanks to the action of what we will now call the "forestaller".

Suppose that a person does not homestead a stretch of land but instead places a fence around it. In this scenario we stipulate that he "mixes his labor" only with that narrow strip of land upon which the fence rests, but to a sufficient degree in order to come to own it. What he has done, then, is to take possession of a narrow perimeter of land, surrounding property which he does not own, nor claim. In other words, he homesteads a very thin donut shaped parcel of land, which encircles property he neither owns nor claims. It is the contention of the present paper that this is not a legitimate homesteading scenario. The whole purpose of homesteading is to bring hitherto unowned virgin territory into private property ownership. A circle appearing on a globe divides the latter into not one but two parcels of land: that lying inside of the donut shaped area, and that lying outside of it. In the present case, we are assuming a perimeter that surrounds an area of one square mile. This would mean that the fenced land divides the earth into two parts, one, this square mile, and the other, the entire remainder of the earth's surface, apart from this one little area. As far as homesteading theory is concerned, the person who owns the donut shaped area has as much claim to the land on the one side of it as the other: namely, none at all. He has no claim to the land lying inside or outside of his fenced parcel, since, by stipulation, he did not mix his labor with any of it.

One implication of the foregoing is that the donut owner cannot prevent others from crossing his property (in order to have access to the land he is in effect blockading). That is, under the donut configuration assumption, even though the owner has duly homesteaded every square inch of his holdings, he still cannot claim full ownership to it in its entirety, for him to be able to do so would imply that the land lying inside (or outside!) of this area can forever remain unowned. Just as physical reality abhors a vacuum, so to does libertarian homesteading theory abhor land which cannot claimed nor owned because of the land ownership pattern of the forestaller. This means that the owner of the donut shaped land must allow people at least a path across it so as to be able to homestead, on their own account, land that the forestaller has left unoccupied and unowned[7].

But does the owner of the donut shaped area have to notify others of the fact that there is a parcel of unowned land lying right in the middle of his own holdings? No. For to place this requirement upon the donut shaped land owner would be to impose upon him a positive obligation, and this, as libertarians, we are prohibited from doing.

Abandonment

Let us take another crack at this donut shaped land scenario from a somewhat different perspective. This time, we will assume not that the owner homesteads only a donut shaped parcel, surrounding unowned land, but rather, say, a solid holding of five square miles. Now, however, he wishes to abandon an interior area of one square mile, and to retain ownership rights over only the remaining donut shaped parcel. As we have seen from the previous analysis, he must now allow access through[8] the land he still owns; this follows from the fact that he has abandoned the central piece of his land, and if this is truly to be abandoned, it must now be homesteadable. If it is not, this violates the libertarian axiom to the effect that all land must in principle be available for ownership. Nor can the non owner be prevented from reaching ownership status through forestalling. But this interior piece of land can only be homesteadable if the owner of the donut shaped parcel allows other would be owners of his abandoned land access to this interior territory. If he does not allow them this access, he is guilty of the crime of forestalling.

What about notification? Must the man who wishes to abandon the interior portion of his land notify others of his act? Yes. And this follows not from any positive obligation whatsoever, but rather from the logical implication of what it means to abandon something. You cannot (logically) abandon something if you do not notify others of its availability for their own ownership[9]. At most, if yo u do not undertake any notification, you have not abandoned it, but rather are simply the absentee owner over it. Suppose you leave your old sweater in your closet. You never wear it any more. But you do not give it to the local Good Will organization, nor do you sell it, nor do you do anything with it except possibly contemplate it from time to time. Have you (truly) abandoned it? You have not. Instead, you are still the owner of it, and are (temporarily, for the moment, even for the rest of your life) not using it any more. You have, in a word, not yet succeeded in abandoning it. In other words, abandoning property is not something you can attain merely by wishing for it[10]; merely by no longer using it; merely by no longer exercising the tradition ownership rights over it. No. In order to succeed in fully or truly abandoning your property, you must take two steps: first, you must notify others that you have indeed abandoned your property, and second, you must not set up roadblocks preventing others from homesteading your now abandoned property. If you do not accord your actions with both of these requirements, it cannot be said of you that you have successfully engaged in an abandonment of your property.

The whole point of the exercise is to get virgin territory into the hands of people so that it can be used. The latter is ever so much more important than the former, so much so that as long a the former does not undermine the latter[11], it is no exaggeration to say that it almost doesn't matter how this is accomplished, as long as it is accomplished.

Abandoning land or goods without telling anyone about it is thus an undermining of this goal. For what is the point of having a theory of the process of converting unowned into owned property if it can all be made null and void through a choice such as abandonment. Therefore, just as forestalling is illegitimate since it undermines the process, so does this apply to abandoning property without notification. This is not a positive obligation. Rather, it is part and parcel of the rights/responsibilities of owning property in the first place. Just as the owner of the land donut has to allow physical egress through what would otherwise be considered his property since he would otherwise be engaged in land forestalling, so must he allow "mental egress" through the miasma of lack of information (e.g. he must notify someone (e.g. a land registry, title search (see Rothbard, 1998, p. 65) company) that he is abandoning land).

Babies

With this introduction, we are now ready to focus on the proper libertarian relationship between babies and parents. In effect, the mother "homesteads" the baby within her body, with a little initial help from the father[12]. Babies, of course, cannot be owned in the same manner as applies to land, or to domesticated animals. Instead, what can be "owned" is merely the right to continue to homestead the baby, e.g. feed and care for it and raise it[13].

States Rothbard (1998) in this regard:

> ... the parents – or rather the mother, who is the only certain and visible parent – as the creators of the baby become its owners. A newborn baby cannot be an existent self-owner in any sense. Therefore, either the mother or some other party or parties may be the baby's owner, but to assert that a third party can claim his "ownership" over the baby would give that person the right to seize the baby by force from its natural or "homesteading" owner, its mother.

Suppose, now, that the mother, or both parents, wish to abandon their baby[14]. Several options are open to them, consistent with libertarian theory[15]. For one thing, they can give their child up for adoption. They can do so for no financial compensation, or for pecuniary gain (Landes and Posner, 1978). But since they cannot give up more with regard to the baby than they did in fact own, it would be illegitimate for the new parents to mistreat the baby; had the original parents done so, they would have lost the rights to continue parenting it. For the only way to attain homestead rights to the child after giving birth to it is to bring it up in a reasonable manner. Were the parents to instead abuse their child, this would not at all be compatible with homesteading it. If so, they would lose all rights to continue to keep the child.

Here, it might be thought there is another disanalogy between homesteading land, or animals on the one hand, and children on the other. In the former cases, it might be argued, one can attain ownership through abuse, or by decreasing the value of it. That is, a man may come to own a deer by killing it, or a tract of land by burning down all of the trees on it. And, to some people, a live animal is worth more than a dead one, and wooded acreage more than the denuded version. But a basic premise of Austrian subjectivist economics (Barnett, 1989; Buchanan and Thirlby, 1981; Buchanan, 1969; von Mises, 1966; Rothbard, 1993) is that man acts so as to substitute a more preferred state of affairs for a less satisfactory one. If he burns woods, and kills a deer, we have no warrant to interpret this as anything but an improvement, despite the possible evaluations to the contrary of an outside observer.

For another thing, they could abandon the baby without choosing adoptive parents. That is, as long as they notify all and sundry of their intention to give up their rights to the baby, and do not prevent anyone else from homesteading the child, they have no positive obligation to keep it, or even to ensure that the baby is taken up by others.

Would it ever be possible, under libertarian law, for a baby to be abandoned by its parents, for there to be no other adult willing to care and feed it, and the baby be relegated to death? Yes. However, this could occur only under the condition where the entire world in effect was notified of this homesteading opportunity, no roadblocks were placed against new adoptive parents taking over, but not a single solitary adult stepped forward to take on this responsibility[16]. Since there are no positive obligations in the libertarian lexicon[17], it is logically possible for such a sad state of events to take place[18].

We now arrive at more intellectually challenging scenarios. First, suppose that the parents are willing to notify others of their impending abandonment of their baby, but set up roadblocks against anyone else taking over care of it. For example, they announce to the world that they are trying to set up a *reductio* to embarrass the libertarian philosophy. To this end they are going to leave the baby in his crib, and not feed or diaper him. To those who wish to adopt this baby they say: "The baby is in his crib. The crib is in our house. This house is private property: you cannot have access to it". Picture hundreds of would be caretakers surrounding these parent's house, all of them willing to adopt the baby, but she insists, based upon her property rights in this dwelling, that all of them stay out while the baby dies of starvation.

Does this *reductio* succeed? Not at all. Apart from the pragmatic fact that most others in society would severely boycott such a couple, there is the point that they would be guilty of forestalling the homesteading of property (e.g. the baby) which is no longer owned. This would be in direct and blatant contradiction to the libertarian homesteading theory which oversees the

bringing in to ownership of virgin territory, not the shielding of it from those who wish to homestead it.

Ordinarily, in the case of forestalling new ownership of land which has been abandoned, not allowing newcomers access to one's own property (the donut) for this purpose would be equivalent to land theft, and punished accordingly. But in the present case what is being shielded from homesteading is not land, but rather a baby. This would be equivalent to murder, and those responsible for be treated very severely[19].

Second, take the case where the parents who are abandoning the baby place no physical barriers against the entry of would be homesteaders of it to their home, but instead fail to notify anyone of their intention. Again, a similar result applies: the parents are guilty of murder.

Their position is an intellectually incoherent one[20]. They claim to be abandoning the baby, but, as we have seen from the case of the sweater considered above, they have succeeded in doing no such thing. Rather, they are in a situation with regard to the baby where it is still in their care, but they are not caring for it. That is the paradigm case of child abuse, a serious crime indeed, and if it persists until the death of the child they are guilty of murder also.

In order to be thorough and exhaustive, we may briefly mention the third option, where these "parents" both fail to notify of their baby abandonment, and also attempt to physically prevent others from taking over this job. Since either of these actions on its own would merit severe penalties, this would surely apply to the combination of both of them.

Conclusion

The libertarian argument is that baby abandoners do not have a positive obligation to notify others of their act; rather, this stems from what it means to abandon property, any property. The essence of the libertarian rejection of the *reductio*, when applied to physical property, is as follows: If you have a sweater in your closet, even one you don't use any more, you haven't abandoned it. If you have abandoned it, really abandoned it (are not just an absentee owner, or a stock piler, or a pack rat) then you have to (you are compelled by the laws of logic to):

- notify someone who will spread the word about this; and
- refrain from preventing others from homesteading it (e.g. setting up a blockade against their doing so).

This is a logical have to. That is, it is an apodictic certainty that upon pain of self contradiction you cannot really abandon property if you: tell no one of it; and prevent others from homesteading it. If you move away, without renouncing your claim, like the "tar baby" it sticks with you. If you return, even after an absence of decades, only to find "squatters" who have been using your

land in the interim, you still do not lose title. Absentee ownership is not an oxymoron in the libertarian lexicon.

This applies to babies no less than to sweaters or to land[21].

Notes

1. Rothbard (1998, p. 100) states: "... the very concept of 'rights' is a 'negative' one, demarcating the areas of a person's action that no man may properly interfere with. No man can therefore have a 'right' to compel someone to do a positive act, for in that case the compulsion violates the right of person or property of the individual being coerced".
2. Or, more exactly, states Rothbard (1998, p. 100), "... even from birth, the parental ownership is not absolute but (that) of a 'trustee' or guardian ...". It is important to emphasize that the property right the parent has is not over the baby, itself, but rather over the right to continue to raise it. As I am forcefully reminded by my Loyola University New Orleans colleague Bill Barnett, if this were not the case, then the parent would have the right to dispose of his "property" in any way he wished, up to and including killing it, or harvesting its "kidneys or liver or heart" (personal correspondence, dated May 17, 2001). Needless to say, this is not at all what the libertarian means by property rights in children.
3. This should not be confused with the Marxian labor theory of "value".
4. Things go downhill quickly when the baby learns the word "no".
5. But see text accompanying footnote 16 below.
6. The objection might be that all the owners would vote over the use of each parcel of land, the decision going to the majority in each case. This alone would constitute a practical difficulty of such enormity as to render the earth uninhabitable. Moreover, why should the present author, the duly constituted part owners of one six-billionth of all land on earth, agree to be bound by any majority? Another difficulty with this position is that it is impossible to vote for this or for anything else without standing on any land. But if the vote is to settle land ownership in the first place, then, all the voters, standing on presently unowned land, are acting illegitimately, and their ballots must be considered null and void.
7. This should be sharply distinguished from the squatter who cuts a path across someone's land, with his permission, and then later claims the right to continue using this path even over the objections of the owner. Under the libertarian legal code, the owner would not lose rights to his land in their entirety even though he gave permission to passers by to cut across a corner of his land.
8. We are assuming away the possibility of tunneling under, or building a bridge over, this donut shaped parcel of land in order to have access to it for homesteading purposes. On this latter phenomenon, see Block and Block (1996) and Block (1998).
9. According to the *Talmud*, before property can be considered abandoned, a public avowal to this effect must be made, either to a *Bet Din* (court) or to two qualified witnesses. See on this *Encyclopedia Talmudit* (1976, pp. 58-9). For the general concept of Hefker, or abandonment, or disowning, see *Encyclopedia Talmudit* (1976, pp. 49-98). See also Maimonides, Mishna, Nidarim, ch. 2, Halakha, 15. I owe this citation to Rabbi Lipa Dubrawski.
10. Property abandonment is in effect an honorific; it is not as easy as falling off a log. A person can try to abandon something, and not succeed in this task, unless he notifies people. How many people? This is a continuum problem, and libertarianism has no comparative advantage in answering this question. The *Talmud* calls for "two witnesses". But these people would have to spread the word many others, if not to the entire community, if the libertarian maxim is to be satisfied. Alternatively, only one person need be notified, for

example if he is the editor of the newspaper or radio station which then broadcasts this information to all and sundry.

11. Rothbard (1998, p. 55) gives the example of the king of Ruritania who illegitimately and "arbitrarily parcels out the entire land area of his kingdom to the 'ownership' of himself and his relatives". This would be a paradigm case in point.

12. The implication of this is that the mother's rights far exceed those of the father, in any dispute between them as to the right to "own" the child, e.g. bring it up. In times of yore, the mother of the baby was evident to all concerned; not so the father. With the advent of genetic testing, this situation no longer obtains. Nevertheless, the homesteading theory would still give primacy to the mother, not the father, in that she did far more of the "work" of gestating the baby that did the father. Under the libertarian legal code, the "best interests" of the baby would not be paramount in determining custody. Even if it were somehow determined that the best interests of the baby consisted of being brought up by the rich father, not the poor mother, this factor would be ignored, in justice, due to her priority in homesteading. The only time the mother would not be given the baby to raise in a disputed custody battle would be if she were pronounced unfit to raise it (e.g. she was a child abuser, etc.)

13. Child abuse would of course constitute the very opposite of "raising" a baby, and would be met by loss of what would otherwise be the continual right to bring up the child until maturity. The precise definition of child abuse opens one up to continuum problems, the solution of which libertarianism has no comparative advantage *vis-à-vis* other positions.

14. For a brilliant libertarian defense of the right of the mother to abandon her baby see Evers (n.d.). See also Evers (1978).

15. For a libertarian analysis of abandoning the fetus, e.g. abortion, see Rothbard (1998, pp. 98-104). See also Block (1978, forthcoming).

16. This is of course is exceedingly unlikely, at least in the economically developed nations, since there are numerous churches, orphanages, adoptive agencies, who stand ready to support all unwanted children they cannot place with families.

17. The Canadian Robert Latimer killed his severely handicapped (cerebral palsey) daughter, Tracy, 12, by carbon monoxide poisoning (see *Report Newsmagazine*, 2001; *Vancouver Sun*, 2001). He was properly sentenced to prison insofar as he did not first determine that no other person on earth was willing to take on the trusteeship of this child.

18. An interesting question arises. Suppose there are no people willing to care for a baby. No one in the entire world. There are only two options: a quick mercy killing (which, we posit, someone is willing to do), or allowing it to die a lingering painful death. The libertarian position is clear: killing a human being without his permission is murder. This baby is too young to give any such permission. Killing it would thus be murder. As libertarians, we have no positive obligations to keep it alive, but may not kill it either. However, this would be a very special case, and, presumably, leniency could be accorded such a mercy killer.

19. On libertarian punishment theory, see Benson (2001), Bidinotto (1994), Evers (1996), Kinsella (1996a, b, 1998/1999) and Rothbard (1998).

20. To employ Kinsellian language, they are "estopped" from doing any such thing. See on this Kinsella (1996a, b, 1998/1999).

21. If it came to it, I would rather concoct an implicit contractual obligation that arises out of land ownership to notify of abandonment, than to concede that there is a positive obligation to notify, and I would prefer to do either than allow it to be legal that the mother could starve the baby without notification. Happily, it does not come down to this. As has been shown, libertarianism has a perfectly rational objection to the *reductio* against it launched by those who wish to embarrass this philosophy by demanding of it either that it agree to the legality of starving babies, or acquiesce in the notion of positive obligations.

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