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Libertarianism, Property Rights, and the COVID-19 Pandemic Policies

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ABSTRACT: The following paper presents a critique of libertarian arguments for the universal antipandemic restrictions (UAPR) imposed by governments with the advent of the COVID-19 epidemic. The purpose of the article is to formulate a libertarian case against such measures by demonstrating that UAPR contradict the libertarian nonaggression principle (NAP). After briefly reconstructing UAPR advocates' reasoning, I commence with a preliminary overview of property rights as underpinnings of the NAP as well as the nature of rights as such. On that basis, current antipandemic regulations are challenged in a twofold manner. First of all, emphasized is the fact that they partly extend to individuals' private property, which is evidently unacceptable from the libertarian standpoint. Second of all, it is demonstrated that the public domain represents a no-man's-land, to which no one has a legitimate property title that would bestow upon him a right to use it without the risk of being infected. Finally, the undesirable logical and practical ramifications of the libertarian support for UAPR are considered.

In his recently published article, a well-known libertarian philosopher, Michael Huemer (2020), has made an effort to demonstrate that libertarians are by no means dangerous extremists whose philosophy justifies obstruction of the measures launched by governments in order to counteract the COVID-19 pandemic. Alas, Huemer is not the only libertarian author who appears to embrace lockdowns or other restrictions at least to some extent

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(Olson 2020; Shapiro 2020), and such views are noticeably gaining in popularity among the libertarian general public. Walter E. Block (2020) presents an agnostic stance on the issue, according to which the soundness of a libertarian standpoint on antipandemic restrictions is contingent on empirical investigations concerning the virus' infectivity and severity.[1] Hence, in Block's opinion, no purely libertarian—i.e., strictly ethical—case for or against lockdowns and other antipandemic measures can be considered tenable, meaning that such regulations are in principle permissible provided the virus is dangerous enough. As this article will attempt to demonstrate, the exact opposite is the case. The libertarian COVID-19 controversy can indeed be resolved by means of deontological ethics relying on a priori reasoning. More specifically, it shall be argued that no universal antipandemic restrictions, i.e., policies applied nationwide (or by local governments), such as lockdowns, business shutdowns, restrictions on freedom of movement, and mask mandates, can be defended on libertarian grounds, for any such policy is fundamentally at odds with the cornerstone of the libertarian justice theory, i.e., with the nonaggression principle.

Attempts to substantiate this claim have already been made (Bagus 2020; Rockwell 2020), yet they are rather cursory and invoke solely Murray N. Rothbard's take on aggression, threat, and risk as a beacon in the current pandemic. Even though this research draws on Rothbardian tenets as well, the case made here does not merely reiterate them but rather applies them analytically. First of all, the paper offers an original, full-fledged property rights–based argument against UAPR. Second, the presented line of reasoning departs from Bagus and Rockwell at some crucial points. Unlike Philipp Bagus, who rejects UAPR by adducing Rothbard's view that citizens have "the right" to walk on the streets, here it is contended that UAPR are unjustifiable precisely because the citizenry has no such a right. In contrast to Rockwell, whose argument starts with Rothbard's views on the nature of threats, the case made here does not rely

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[1] In the same vein, Matt Zwolinski maintains that libertarians find themselves in theoretical gridlock vis-à-vis anti-COVID policies because of the inherent inability to resolve continuum questions that is allegedly characteristic of their philosophy (Boudreaux 2021). As will be demonstrated, even if libertarians really cannot resolve continuum problems, it has no bearing on the libertarian approach to UAPR. However, since Zwolinski's argument is rather sketchy and came in the form of a brief answer to a survey, I will focus on Block's case throughout.

on any contentious theory of risk and threat. This is because the question of the legitimacy of restrictions on individuals due to their particular risk exposure or actual contagion is not treated. Unlike Rockwell, who holds that literally no anti-COVID measures, including those directed against self-aware carriers, are justified, criticism of UAPR is the focus of this article. This is for two reasons. First, the burning problem which libertarians are being confronted with is the one of democratic governments assembling almost unprecedented powers in the wake of the epidemic, which some libertarian writers seem to willy-nilly (and unduly) accept. This frightening growth of the state has nothing to do with individual quarantining of persons carrying or being extraordinarily likely to carry deadly diseases. Justified or not, rulings of this sort do not entail subjugation of the entire populace by the state, as UAPR do. Second, pondering the problem of individual restrictions would necessarily require considering some theories of threat and (il)legitimate risk, which cannot be done here because of space limitations.

The article proceeds in the following order. In section 1, the arguments for UAPR raised by Huemer and Block are reconstructed. Section 2 provides a succinct exposition of the logical relations between the NAP and its underlying concept—private property rights. This conceptual framework sets the stage for section 3, which addresses the critical question of compatibility between property rights and the idea of UAPR. The last section examines some logical and practical corollaries of the libertarian arguments for UAPR and shows that if applied consistently, they would legitimize restrictions far more stringent than anything that has been witnessed thus far.

LIBERTARIAN ARGUMENTS FOR THE UNIVERSAL ANTIPANDEMIC RESTRICTIONS

Huemer commences with the entirely uncontroversial pronouncement that libertarianism, although committed to the NAP, does allow the use of physical violence in cases of self-defense against somebody else's aggression. Then he asks: "But what counts as aggression?" He answers: "Physically damaging someone's body without their consent is the paradigm case" (Huemer 2020). So far, so good. The problem arises as Huemer concludes:

> That's the core of the libertarian justification for disease-prevention measures. Any individual who is at risk of carrying a communicable disease, such as Covid-19, is posing a risk of physical harm to others when he interacts with them. If the risk is "unreasonable" (in light of the probability, magnitude, and reasons for imposing), then those under this threat would be justified in using coercion to protect themselves from the potential physical harm. Since individuals could justly do that, they can also delegate it to the state to do that (if you accept the state as legitimate in general). So that would be the justification for quarantining, restricting movement, requiring testing, etc. (Huemer 2020)

Such is the approach Huemer recommends to advocates for the minimal state (minarchists). Although in the latter part of his paper he offers certain speculations concerning measures by which a future stateless society would cope with pandemics, he unfortunately does not explain what stance libertarian anarchists should take toward UAPR here and now—as they are being imposed by the state. Admittedly, his argument includes a caveat that the right of the government to introduce any restrictions presupposes its right to exist in the first place. And yet, despite Huemer's own words, but per their internal logic, it stands to reason that even governmental UAPR, inasmuch as they are serviceable in suppressing the pandemic, ought to be supported by anarcho-capitalists as effective means of preventing aggression. More specifically, it follows from Huemer's statements that libertarian anarchists should continue to oppose the way the state finances its activity (that is, through taxation), yet cease to oppose the nature of this activity insofar as combating the pandemic is concerned, just as they do not object to the state police fighting murderers, thieves, and rapists.

Block, in turn, argues that the legitimacy of UAPR, while obviously dependent on ethics, presupposes some notion of (un) acceptable risk, the determination of which is up to prudential adjudication rather than a priori propositions. Accordingly, UAPR's rightfulness hinges upon substantive medical insights that people, because the research is still in progress, do not have at their disposal yet. Finally, as those insights come from beyond the purview of the libertarian political theory, libertarians qua libertarians will never be able to resolve the problem at hand entirely on their own merits. Block (2020, 210–11) then scolds anti-UAPR libertarians such as Bagus, Rockwell, and Jörg Guido Hülsmann

(2020)[2] for venturing into areas in which they have no expertise whatsoever. In his own words:

> If all of us, symptomatic or not, constitute threats of what is in effect physical violence against innocent people, then quarantines are justified. But if this is not true, then they are not justified. And since we cannot know, qua libertarians, especially at the time of this writing, which is true, the most rational, and not for the first time, libertarian stance is that of agnosticism. My thought is that we really don't know the facts. Therefore agnosticism is the correct libertarian position. (231)

Let us note that although Huemer and Block eventually part company when it comes to proposing practical solutions (Huemer overtly embraces UAPR, while Block [207] remains an agnostic with a commonsensical inclination to oppose them, they proffer the exact same *normative* reasoning. Namely, both thinkers maintain that 1) for aggression to occur, the harm need not be certain; it suffices that the probability and scale of danger be high enough; 2) hence, the legitimacy of UAPR is a matter of degree. Should a virus be infectious and virulent enough, the state is in the right in instituting universal restrictions to prevent everyone from posing an illicit threat to everyone else. The only difference between Huemer and Block is, then, not of a principled but rather an empirical or prudential nature: whereas Huemer believes COVID-19 is dangerous enough to justify UAPR, Block surmises (though as a private person rather than qua libertarian theorist) it is not.

As will be demonstrated below, both philosophers are wrong. Moreover, in order to understand why, one need not attack the first premise of their reasoning. It may well be the case that aggression is sometimes a risk-continuum question. Also, at least for the discussion's sake, one can concede, as will be done in some points below, that individual vectors' freedom could be constrained pursuant to individualized rulings without thereby justifying UAPR. In point of fact, the grave fallacy of Huemer's and Block's arguments boils down to insufficient analysis of the structure of property rights that underlies the very concept of aggression.

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[2] Hülsmann's article has not been cited earlier, as it does not deal with the ethical facet of UAPR. It nevertheless offers sound economic, political, and epistemological arguments against them.

THE NONAGGRESSION PRINCIPLE AND PROPERTY RIGHTS

To say that the core of the libertarian theory of justice is the NAP is to say too little. The libertarian concept of aggression rests upon the notion of property rights: aggression is aggression against property rights (Hoppe 2016, 20). Writes Stephan Kinsella (2009, 180):

> The non-aggression principle is also dependent on property rights, since what aggression is depends on what our (property) rights are. If you hit me, it is aggression because I have a property right in my body. If I take from you the apple you possess, this is trespass, aggression, only because you own the apple. One cannot identify an act of aggression without implicitly assigning a corresponding property right to the victim.

The reliance of the NAP upon the concept of property rights was also explicitly stated in Rothbard's canonical formulation:

> The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the "nonaggression axiom." "Aggression" is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. (Rothbard 2006, 27)

The intimate connection between individual rights (and aggression against them) in general, on the one hand, and property rights, on the other, is not simply a dogma of far-right libertarianism of the Rothbardian school. Consider the well-known Isaiah Berlin's conception of negative liberty as "the area within which a man can act unobstructed by others" (Berlin 2002, 169). But what is that area? What is its nature? Where does it start and where does it end? Imagine A taking away B's briefcase. At first glance, it may seem that it is A who interferes with B's negative liberty. But what if B stole the briefcase from A first? If it is so, then, apparently, it is A whose negative liberty has been infringed upon, and what A is doing is nothing more than restoring the state of affairs wherein everyone enjoys his life without obstruction by others. In a word, the delineation of spheres of liberty that belong to you or me presupposes the distinction between mine and yours as such. This distinction is drawn with the aid of property rights (Dominiak 2016, 145).

More important still, in what follows, the argument will be set forth that UAPR are unjustified, as the purported victims of

virus carriers voluntarily assume the risk of being infected. The implicitly invoked concept of voluntariness also presupposes the idea of property rights. In view of that (Lockean) notion, a decision can be classified as a voluntary and binding one as long as the decision-maker's rights are not violated in making the decision.[3] A person offered a choice between "your money or your life" does act on a voluntary basis in the sense that he surrenders or resists upon his own volition.[4] However, the question of which voluntary actions are morally and legally relevant must too be preceded by determination of who has a right to decide what.

What are property rights? They are ultimate decision-making rights with respect to certain scarce goods that bestow upon their titleholder individual jurisdiction within a given domain, or—to borrow an apt expression from Herbert Hart—the status of a "small-scale sovereign" (Hart 1982, 183).[5] The establishment of property rights addresses the pervasive problem of interpersonal conflicts that arise by virtue the scarcity of goods. This allows for the emergence of intersubjectively ascertainable spheres of individuals' freedom (Barnett 2014, 29-41; Hoppe 2006, 332-333).

For what types of objects—according to the libertarian theory of justice—do property titles exist? First are bodies of acting subjects, i.e., subjects capable of conscious, purposeful behavior.[6] Property rights

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3 Writes Locke (1988, §§ 176):

> That the *Aggressor*, who puts himself into the state of war with another, and unjustly invades another Man's right, *can*, by such an unjust War, *never* come to *have a right over the Conquered*, will be easily agreed by all Men, who will not think, that Robbers and Pyrates have a Right of Empire over whomsoever they have Force enough to master; or that Men are bound by promises, which unlawful Force extorts from them. Should a Robber break into my house, and with a Dagger at my Throat, make me seal Deeds to convey my Estate to him, would this give him any Title?

4 To Hobbes (1997, 129), "liberty, or freedom, signifieth properly the absence of opposition," where "opposition" designates "external impediments of motion." By contrast, a person responding to a threat of physical violence meets no impediment of motion by virtue of being threatened. Thus, "a man sometimes pays his debt, only for fear of imprisonment, which, because no body hindered him from detaining, was the action of a man at liberty" (129–30). Let us note that the justice of the debt remains here beyond Hobbes' interest. What matters to him is that the debtor is not physically hindered from defaulting.

5 On the nature of property rights and individual jurisdiction, see also Barnett (2014, 47–50), Hoppe (1987, 67–96; 2021, 9–26)

6 On the concept of action, see Mises (1998, 11–29; and 2003, 24–37); and Weber (1978, 4).

thereto are called “self-ownership rights” (Rothbard 2006, 33–34).[7] External things are the second category. An actor can come to own them in four and only four ways: through original appropriation (homesteading), a voluntary transfer (e.g., an exchange, a gift, an inheritance, etc.), by producing them, or by means of compensation for wrongs suffered, i.e., for earlier infringements upon his rights.[8] It seems clear that the biggest role here is played by original acquisition, as the other means can be licit only provided that the parties in transfers and producers themselves have legitimate titles to the goods they make use of, the chain of transfers and productive activities being ultimately traceable to legitimate original acquisitions.

Finally, let us briefly explain what rights as such are. Of help here is the classical distinction of deontic logic between rights *sensu stricto* and liberties (Hohfeld 1919, 35; Kramer 1998, 7–59). A has a right to *x* if and only if B is duty bound to honor that right, with B standing for the set of all other persons. Were others not obliged to honor A’s right to *x*, A would have no such right. This is precisely what one has in mind speaking of rights. Property rights represent a model example of rights *sensu stricto*. If I have the ownership right in the keyboard on which I am typing at the moment, then everybody else is duty bound to abstain from violating this right by stealing or destroying my keyboard.

Meanwhile, A has liberty to do *x* if and only if he has no duty not to do *x*. In contrast to a right, a liberty does not entail others being duty bound to let A do *x*. Liberties of this type are also often referred to as "naked liberties," in contradistinction to "vested liberties," which represent instances of rights *sensu stricto* and are thereby backed by their correalitve duties (Steiner 1994, 76). As Randy E. Barnett (2014, 63) points out, “[W]hen liberties are naked, a person may be free to do as he wishes, but others are similarly free to interfere with his actions.” Let us imagine boxers entering the ring. What do they confer to each other by letting the opponent punch them? Clearly, these are not ownership rights in their bodies. If this were the case, both fighters would be obliged to neither block nor slip punches.

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[7] Rothbard’s definition of the NAP cited above is thus somewhat imprecise in that it misleadingly distinguishes between a person and property as if the latter denoted only external objects.

[8] This list can be found, either explicitly or implicitly, in the works of foremost libertarian thinkers of both the anarcho-capitalist and minarchist varieties of libertarianism. Cf. Hoppe (2016 26–31); Nozick (2001, 154–55); and Rothbard (1998, 29–96).

Indeed, what they confer by virtue of their self-ownership rights is the (naked) liberty to punch one another. That is to say, fighters extinguish the other party's duty not to punch, which in turn is a logical correlate of self-ownership rights.

PROPERTY RIGHTS AND COVID-19

Preliminary Remarks

The above presentation of the libertarian theory of justice, albeit somewhat dogmatic by necessity, was indispensable to demonstrate why UAPR cannot be logically reconciled with that theory.

At first glance, Block and Huemer's contention that potential virus carriers aggress against their fellow men seems quite plausible. One can hardly argue that people do not have a right to protection from germs. The point, however, is that this right is anything but unconditional. Its validity depends on the context, the normative framework of which is determined by the distribution of property rights. Let us ponder a trivial example. Doubtless, people do have a right to protection from battery. If anything represents a clear-cut case of rights violation, battery is it. And yet punching someone is not always a crime. As the owner of my body, I have a right to let someone punch it. I can also become engaged in an activity in which there is the risk of being hit. When participating in a boxing bout, I obviously do not give my rival permission to land a punch at will. On the contrary, I do my best to avoid his blows. However, knowing the basic rules of boxing, I voluntarily assume the risk of being punched. Provided that the duel is carried out fairly, all compensation claims on my part will be simply dismissed. The rightfulness of the fight stems from two premises. First, both my opponent and I agreed—by virtue of our ultimate decision-making rights with respect to our bodies—to have it. Second, the fight has been conducted according to rules approved by the owner of the venue (a gym or a sports arena).

Having established the importance of the property rights context in identifying cases of aggression, the problems of the pandemic and UAPR can finally be considered. As it is crystal clear that no one should be beaten without his consent, it is also crystal clear that no one should be involuntarily infected. Somebody who—being aware of his coronavirus infection—passes the virus to others, surely aggresses against their bodies. Arguably, if Block

and Huemer are correct in their treatment of rights violations as a risk-continuum question, the aggression occurs as soon as the self-aware vector nears others enough to make transmission possible. It could also take place, at least in some cases (e.g., persons who came into contact with an infected fellow and now qualify for quarantine), before the potential carrier's infection has been detected yet is highly likely. However, *even if* this is accepted for the sake of argument, it will not suffice to justify UAPR from the libertarian perspective. The problem lies in property rights.

The harm that is supposedly done by merely going outside or attending crowded places can be construed in a twofold manner. On the one hand, one might argue—and this is what Huemer and Block seem to be saying—that aggrandizing the pandemic risk amounts to a direct breach of others' self-ownership rights. Yet, other things being equal—i.e., the status of property where an interaction occurs being bracketed off—no one is forced to venture into areas where one can contract the virus. If you walk down a busy street or enter a grocery store, you do so at your own risk.

This *ceteris paribus* analysis is highly abstract, though. Interactions between agents occur in physical spaces that may or may not have an owner. Boxing bouts too are possible thanks to the courtesy of the ring's owner. Another option available for libertarian defenders of UAPR would be, then, to claim that UAPR protect people's self-ownership rights *indirectly*, i.e., by shielding them from vectors who infringe upon conditions of use rightfully determined with respect to a specific place. If a place has an owner, it is he who stipulates the acceptable degree of infection risk within his own territory, whatever that degree might be. His guests may either conform to his rules or leave his jurisdiction.

As is known, a huge fraction of restrictions which have recently been instituted applied to entirely private locations, whose owners are easily identifiable. Pubs, restaurants, temples, galleries, grocery stores, barbershops, tattoo studios, and a great deal of sports infrastructure—all these places are in the hands of private proprietors. It is, then, exclusively up to them to decide whether the risk is high enough to close their premises to customers or to introduce additional regulations. Members of the state apparatus have no say over those properties, which would be traceable back to acts of homesteading, exchange, production, or compensation. Thus, in foisting their rules of social distancing on private owners, agents of

the state become guilty of a blatant usurpation of power. Similarly, whoever voluntarily enters a store, a church, or a barbershop and is aware of an unfolding pandemic does so at his own risk, just as a boxer entering a ring or a nonsmoker willing to spend a night in a smoke-filled pub.[9] Needless to say, it is UAPR, not the lack thereof that violate the rights of private proprietors in the same way that boxing bans of the past and contemporary smoking bans do.

Things appear to get more complicated once we realize that a huge part of the space where social interactions occur is not in the hands of private proprietors. State forests, parks, sidewalks, streets, plenty of sports venues, etc.—constitute the so-called public domain, that is, areas the state has arrogated to itself. Is the state, then, entitled to impose UAPR at least within that area, thereby protecting citizens from the threat they did not accept on a voluntary basis? Such an approach would be rather troublesome combined with the endorsement of individuals' decision-making rights within their private domain. For example, eager consumers would be allowed to gather in a closed area during an event such as a concert without any limits regarding number and distance

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9 The principle of charitable reading dictates that I note that Huemer is not calling explicitly for restrictions covering private locations. He nevertheless endorses "quarantining, restricting movement, requiring testing, etc." as such. This, in the absence of any caveat with regard to public or private ownership, as well as in the face of the all-embracing character of actual lockdowns, justifies the suspicion that he favors restrictions irrespective of the ownership question. The same goes for Block's embrace of curfews as potentially acceptable means of containing epidemics. He writes: "

> In my view, such a scenario would be very rare, but counterexamples, unfortunately, readily come to mind. For example, our present pandemic. Let us stipulate, at least *arguendo*, that the COVID-19 disease is deadly, and easily contagious, but that this situation would only last for a week. We can even posit that all homeowners have sufficient food so that no one will starve for this duration. Then could such a requirement pass muster under the libertarian code? I maintain that it could (Block 2020, 214).

Admittedly, Block defines curfews as "a prohibition against anyone leaving their home" (213), which does not literally imply private facilities such as restaurants being shut down (one could go to a restaurant before the curfew begins and then wait there until it is over). And yet, in both ordinary and legal language as well as in the legislative practice of several countries during the present pandemic, "curfews" denote a prohibition against anyone *not being* at home, which does imply private businesses being forbidden from willingly admitting customers between these particular times.

between them, but then the police would be in the right to lock them inside, since as soon they set foot on the surrounding public sidewalk, they would aggress against all their fellow citizens (if not all mankind).

Happily, there is no need to embrace this rather outlandish view. The tacit assumption behind the libertarian support for UAPR in the public domain says, as we have seen, that people using state-owned areas do not assume the risk of getting ill as users of the private domain do. This central premise is false, though, for it would have to presuppose one's right to move within the public domain, which would be violated by people inflicting epidemic risk on others.

The Public Property Ownership Question

What kind of a right—*sensu stricto*, or a mere naked liberty—to move within the state-owned space do we all possess? The answer must be preceded by addressing another contentious issue: Who, if anybody, owns the public domain? It almost goes without saying that the state cannot be the owner. In light of the anarcho-capitalist political philosophy, the state is nothing but, in Rothbard's words, "a bandit gang writ large" (Rothbard 1998, 169), which obtains means of sustenance through coercive transfers of wealth (typically meaning taxation) and by holding a forcible monopoly over critical industries, especially lawmaking, law enforcement, and the judiciary. Since everything it possesses can be traced back to such acts of expropriation, it follows from the core principles of libertarian anarchist justice theory that the state holds no legitimate property titles in anything.[10]

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10 On a side note, this inquiry need not be useful for libertarian anarchists only. Even minarchist libertarianism should not be confused with a broader set of promarket philosophies and ideologies, e.g., with classical or conservative liberalism. Minarchism means a *minimal*, not just a *limited* government approach. It envisages the government providing its citizens solely with "the police, to protect men from criminals—the armed services, to protect men from foreign invaders—the law courts, to settle disputes among men according to objective laws" (Rand 1964). Thus, as Kymlicka (2002, 104) puts it, in a minarchist world, "there is no public education, no public health care, transportation, roads, or parks." And that is that. "No state more extensive than the minimal state can be justified" (Nozick 2001, 297). What follows from these programmatic statements with respect to the public property ownership question is that the only parcels of land the state can hold licitly are at best those assigned to the police, the military, and the law courts. All other "public" locations—educational and healthcare facilities, means of public

Who, then, really owns the land that the state merely arrogates to itself? An intriguing, ostensibly anarchist resolution for this conundrum has been proposed by Hans-Hermann Hoppe in his much-discussed attempt to justify libertarian criticism of unrestricted immigration. According to him, the public domain is the property of all taxpayers subject to expropriation for the purposes of its creation and maintenance. The state, as long as it exists, should therefore operate within the territory it currently controls as a trustee of taxpayers, trying to emulate actions that would presumably be undertaken by a private manager (Hoppe 2007, 137–70). With regard to the pandemic policy problem, this would entail—assuming, *arguendo*, the efficacy of UAPR as means of containing the pandemic—the state's introduction of *some* restrictions that would supposedly be imposed by private proprietors and administrators if the so-called public property were finally privatized.

Yet this hypothetical stance does not withstand criticism. In fact, it runs afoul of two fundamental theorems: one is the very core of the Austrian school's doctrine, and the other belongs to the realm of the libertarian justice theory. That Hoppe's claim is untenable from the economic standpoint can indeed be seen right away. Under his theory, the state is supposed to imitate the actions of private owners. What, then, is it actually supposed to do? To this question there can be no rational answer whatsoever, simply because one cannot know what private proprietors would do were they to recapture the state-claimed land. We do not even know the market distribution of property in land, not to mention the preference schedules of the owners. As regards combating the pandemic, we have no clue what their risk preference would be.[11] Generally speaking, in order for the outcome of market processes to be known, those processes must unfold to begin with. No governmental central planner could ever be capable of predicting and replacing them. If he were, there would be no need for the

transport, roads, parks etc.—are therefore outcomes of exploitative taxation and monopolization, and are owned by the government illegitimately.

[11] Of course, questions of ownership in land and actors' preferences on the unhampered market are interrelated. Since we do not know who the owners would be, we do not know their preferences either. Conversely, it is the preferences manifested in the marketplace that would determine the distribution of property in land itself.

market at all (Block and Gregory 2007, 32). Such is, briefly put, the Misesian theorem of the impossibility of economic calculation in socialism (Huerta de Soto 2010; Mises 2012; and Machaj 2018). True enough, a sort of educated guess can provide fairly reasonable expectations about what would *not* be done with the public domain by private proprietors and managers. For instance, it is obviously highly unlikely that highways would be used as gigantic cesspools. By the same token, there is every likelihood that private communities and landlords would not use total, long-lasting shutdowns as means of combating pandemics given the financial losses they would have to incur by doing so. The ability to formulate these kinds of predictions is nevertheless rather limited, usually confined to negative speculations concerning what would *not* be done. It is not known what exactly would be done with highways. And it is not known what methods would be chosen in the face of the COVID pandemic either. Although total lockdowns and curfews stretching over several months do not seem to be an option, it is not inconceivable that less costly UAPR such as mask mandates, selective restrictions of movement, mandatory testing, etc. would be introduced. Maybe they would, maybe not. Presumably, policies would differ from one location to another. There is therefore no knowing what a centralized or even a local government, operating within a territory whose privatization would divide it into multiple proprietary jurisdictions, should do to emulate decisions that of necessity are the subject of vague speculations.[12]

The conflict with the libertarian theory of justice is only slightly less vivid. Let us remember that under this theory there are four and

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12 Admittedly, Hoppe himself is as far from embracing UAPR as possible. In an interview given quite recently (Hoppe 2021), he unapologetically joins the ranks of anti-UAPR skeptics. In his opinion, the reaction of governments to the present pandemic is not only greatly overdone given the scale of risk but also highly inefficient in containing the blight. He also believes that the failures are due to the very nature of the centralized government and that private law (market anarchist) societies would do better thanks to the advantages of decentralization and private management. It is also difficult not to agree with him when he describes the feeling of seeing the state rapidly taking over all of social life as a "frightening, downright devastating realization." However, what Hoppe does not address at all is the ethical aspect of anti-COVID policies as well as the fundamental question of whether his own theory could not be possibly interpreted as prompting governments to "do something" with the pandemic just as it calls for governments to "do something" about mass immigration.

only four ways in which one may come to own external resources: through homesteading or, secondarily, by means of a consensual transfer, production, or compensation. None of these is the case for taxpayers and their alleged ownership in sidewalks, parks, and highways. Clearly, there has been no act of taxpayers' original appropriation or voluntary transfer of property with respect to the public infrastructure and land. What of production, then? Sure enough, domestic taxpayers did contribute to the erection of the state-claimed buildings, parks, roads, and highways. But does this actually bestow any property title thereto upon them? Not really. For in order for them to be deemed legitimate owners of the public domain, the following major premise would have to hold true: he who financially contributes to the production of a given good, automatically becomes its rightful owner. Yet this is certainly not the case. Such a title must be preceded by corresponding contractual arrangements. Otherwise, the institution of sponsoring would be unthinkable (Guenzl 2016, 161).

Perhaps due to these difficulties, another way to justify taxpayers' collective ownership of the public domain has been suggested by Kinsella. In his view, the expropriated taxpayers come to own state-claimed land by virtue of the fourth possibility mentioned above, i.e., by means of compensation for expropriation suffered (Kinsella 2005). This resolution does not seem promising either.

First and foremost, remedial claims are secondary means of acquiring ownership as they are executed by force in response to some prior infringement upon one's property rights. A remedy may consist in either restitution or compensation. In the case of restitution, property in question is simply restored from the aggressor to the legitimate owner. Strictly speaking, no new property title is thus created—the rightful owner simply regains possession of something that has never ceased to be lawfully his.[13] Since, as has already been shown, taxpayers—or, broadly speaking, victims of the state—never actually appropriated the public domain through acts of homesteading and consensual transfers, they cannot be given a right to it by means of restitution.

In the case of compensation—that is, when a prior encroachment is remedied with something else than what has been stolen,

[13] This is precisely why in the first section of this paper, I list compensation, not remedies in general, as a means of just appropriation.

damaged, or destroyed—a new property title does appear. Nonetheless, claims of a victim can extend exclusively to legitimate property of a perpetrator, something he temporarily takes into possession for the purpose of compensation without thereby violating anybody else's rights, or something he did capture with violation of others' rights but whose usage for remedial purposes will result in no further violation.[14] Because, as has been stated above, from the libertarian standpoint there is no way the state, by its very nature, can acquire and maintain anything except for (per minarchists) police, judicial, and military facilities without thereby violating someone's rights, there is also no way it can remedy its wrongs by conferring ownership in the public domain, while still exercising effective control over it.

More specifically, redressing governmental aggression with services provided within the public domain would lead to a rather paradoxical situation. To wit, the state would still continue to extort taxpayers' resources, monopolize industries that taxpayers would be otherwise be able to patronize or relinquish on the competitive market, as well as prevent them from recapturing parcels of the "public" land precisely in order to compensate for crimes committed against them. In short, the state would redress its victims by means of what is exactly the reason for compensation in the first place. That would be analogous to a racketeer kidnapping a victim, taking away his wallet, and then, still in captivity, feeding him food purchased with his own money. True enough, it is far better to be kidnapped by a crook who cares about his victims' subsistence than by one who will starve them to death. And yet, however kind of the racketeer this would be, it has nothing to do with compensation. Nor would the act of kidnapping *automatically* bestow upon the victim ownership rights in the land where the kidnapper hid him or in land the kidnapper purchased with the victim's money or with the ransom received unless it is known that nobody else's property rights will thus be violated. The only

[14] The second scenario takes place when a convict performs forced labor for his victim. On forced labor as a remedy in the libertarian justice theory, see, for instance, Kinsella (1997, 633–35); and Rothbard (2016, 85–96). The third scenario can be illustrated by the example of a pickpocket who when brought to justice has already spent all the money he stole. Although he cannot return the money to his victims, he can possibly still rectify the harm done with the goods he bought thanks to his criminal activity should the injured parties (or security agencies and courts they patronize) see this form of compensation as fit.

thing the victim justly acquires *by default* in this scenario are means of subsistence delivered by the criminal. These are an analog to the state's services consumed by citizens every day, not to the whole domain wherein those services are provided.

Another reason why the state's provision of services to taxpayers cannot count as compensation is that "compensation" denotes a (remedial) transfer of property rights, i.e., decision-making rights, which—in the case of the state providing services to the taxpayers within the public domain—are not being transferred at all, as it is still the state, not the taxpayers, that makes decisions with respect to that domain. Interestingly, this point was made by Hoppe himself in his criticism of the purported "collective" ownership of means of production under socialism:

> In an economy based on private ownership, the owner determines what should be done with the means of production. In a socialized economy this can no longer happen, as there is no such owner. Nonetheless, the problem of determining what should be done with the means of production still exists and must be solved somehow…. Only one view as to what should be done can in fact prevail and others must mutatis mutandis be excluded…. In capitalism there must be somebody who controls, and others who do not, and hence real differences among people exist, but the issue of whose opinion prevails is resolved by original appropriation and contract. In socialism, too, real differences between controllers and noncontrollers must, of necessity, exist. (Hoppe 2016a, 36–37)

Illuminating is also Rothbard's well-known statement on the "myth of public ownership":

> Government ownership means simply that the ruling officialdom owns the property. The top officials are the ones who direct the use of the property, and they therefore do the owning. The "public" owns no part of the property. Any citizen who doubts this may try to appropriate for his own individual use his aliquot part of "public" property and then try to argue his case in court. (Rothbard 2009, 1277)

Furthermore, we should bear in mind that ultimately, there is no such entity as "taxpayers." In light of the libertarian ontological individualism, there are only individual taxpayers and victims, with all of them having distinct remedial claims that require distinct remedies. Thus, if the notion of the public domain as taxpayers' property were taken seriously, it would result in the emergence of irresoluble disputes with regard to the use of it. As Wiśniewski (2015) puts it, "[C]laims of all those who were expropriated for the

creation of the public domain come into immanent and permanent conflict with each other." In an intimate connection to the impossibility of the state emulating the market, it means that in the context of the pandemic various proposals regarding what to do to combat the disease can never be rationally decided upon as long as the state is still in play. In this respect, the idea of taxpayers being the true owners of the public space contradicts the very purpose of property rights as propounded by the libertarian theory of justice, which is conflict avoidance (Block and Gregory 2007, 37).

To sum up, the universe of moral agents living under state rule can be exhaustively divided into two sets: members and collaborators of the state and their victims.[15] Since neither group can be considered legitimate owners of the so-called public domain (or most of it), it follows that this domain is, roughly speaking, a no-man's-land, i.e., a land rightfully owned by nobody.[16] I say "roughly speaking" because, as aptly pointed out by Simon Guenzl (2016, 162), the so-called public domain consists partly of areas directly taken away from rightful estate owners (in

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[15] Fortunately, for the purposes of this paper there is no need to address the extremely complicated question of whether those sets are intersecting or mutually exclusive.

[16] This need not imply that the public domain is literally up for grabs, with anyone having as good a claim to it as anybody else. Come judgment day, a state's victims will arguably have to be prioritized as beneficiaries of privatization (Hoppe 2007, 121–36). It could even be—though the subject is intricate and I would rather not pass any peremptory judgment here—that until it comes, the public domain should be excluded from "disorderly" homesteading so that justice to victims' claims could someday be done (or individual victims themselves could somehow take what is theirs in the meantime). This is yet a far cry from the postulate that there be collective ownership in the entirety of public property for all taxpayers here and now. However, without the notion of such ownership, the idea of the state apparatus adjusting the level of infection risk within the public domain to the preferences of citizens is baseless. On a side note, "victims of the state" indeed typically refers to domestic taxpayers. But they are not its only victims—think of those who lost their homes and loved ones during wars waged by the US government. Who on earth can have a stronger claim for compensation from the US government than they? This is nevertheless yet another problematic facet of the Hoppean take on public property and Kinsella's argument for it. The theory clearly was not meant to grant Afghanis, Iraqis, or else Serbs the right to co-decide about America's immigration or antipandemic policies (on this argument, see Block and Gregory 2007, 34). Moreover, with regard to epidemics and other emergencies, this difficulty renders the Hoppean approach all the more conflict generating, since there are simply more individuals of different cultural backgrounds and in different life situations, whose risk preferences would have to be taken into account when deciding what measures should be employed.

contradistinction to objects merely financed by taxpayers), as was the case, for example, during the collectivization conducted by Communist regimes. Those areas obviously do have identifiable individual owners, and it is they who ought to decide what tools of suppressing the virus should be used within their domain.

Do We Aggress by Walking Down the Streets?

What are the consequences that follow from this conclusion for the question of whether—to put it bluntly—there is a right to walk down the state-claimed streets, sidewalks, and squares? To wit, in order for taxpayers to have such a right *sensu stricto*, they would have to be their owners. However, as we have already seen, taxpayers are not the owners of these places. Thus, they have no right to stipulate the level of infection risk that will be tolerated in the public domain and force others to conform to their requirements. In reality, what taxpayers actually have is a naked liberty to move within the public domain. In other words, they are under no obligation not to move within it. But that is as far as it goes. Taxpayers have no right to free movement that would correlate with others being duty bound to let them do so. As Hillel Steiner (1994, 76) pointedly notices, "[A] naked liberty is interstitial to respective persons' rights, suspended in whatever action-space is left between them…. Naked liberties inhabit no-man's land."

With that in mind, where libertarian advocates for UAPR go wrong can finally be explained. Namely, since the public domain is largely a no-man's-land, it can be used based on the "first come, first served" principle. Being, like everyone, a potential carrier of the virus, I may simply enjoy a parcel of public land by sitting on a bench or having a walk. Anybody who enters the park after me voluntarily assumes the risk, taking the possibility of being infected into consideration. Again, his situation is no different from that of a boxer entering the ring.[17]

Let us summarize once again. People who walk down the streets exercise their (naked) liberty to do so. Once they find themselves in a given place, they have a right to occupy it, which stems from their self-ownership, for removing them from there under duress would

[17] This "first come, first served" solution is analogous to Rothbard's (1997) insights concerning the air pollution problem as well as the classical common law "coming to nuisance" doctrine, from which he drew.

have to involve a physical invasion against their bodies or a threat thereof. But when they gather, they put each other at epidemic risk, which they nevertheless voluntarily accept. Certainly, there might be exceptions to this scenario. To reiterate: if someone who is aware of his being infected approaches others without informing them about the danger, it may, *arguendo*, represent an act of aggression.

It is, however, by no means the case that mere going out, going out without a mask, or going out without a purpose allowed by the rulers constitutes aggression itself. Likewise, visiting marketplaces, pitches, playgrounds, forests, lakes, or whatever place subject to governmental control and where people gather on a purely voluntary basis does not represent aggression. The bottom line is that the risk of being accidentally infected is, in the time of the pandemic, an inherent part of being present in locations frequented by human beings. Thus, it is a risk that everyone attending them accepts. Stated more precisely, any degree of epidemiological risk that exists prior to one's appearance in a given location and is of publicly ascertainable nature must be regarded as licit. Such is the difference between the risk that all inflict upon themselves each time they enter locations frequented by other people whose disease status is undetermined and that inflicted by unsolicited interactions with malicious vectors or unsolicited and excessive—i.e., exceeding a level of risk that has been consciously accepted by the very act of venturing into a given place—interactions with the rest of the population. Simply put, when deciding—in the absence of any violation of my rights—to walk down a crowded street or a market square, I do know—on the basis of commonly available knowledge and sensual perception—that some people are already there and that the virus might be there with them, and I do choose to join them of my own will. Meanwhile, somebody's awareness of his being a carrier represents a mental state of his and is thereby not so perceptible, thus precluding voluntary consent on my part. Also, excessive contacts with those who walk up to me (in contrast to me walking up to them) might, *arguendo*, be seen as a breach of rights in certain circumstances and under some conception of the threat and unacceptable risk. Last but not least, the question of what someone actually accepts by going to this or that place is not solely a matter of physical priority and observational knowledge. It also hinges upon conventions available for their understanding (*Verstehen*). In our boxing bout example, when attacking first, the boxer does not commit aggression even if he jumps up and gives his

rival a blow while the opponent is standing still, for by taking part in the duel, both fighters implicitly accepted all the conventions of boxing, including that they should protect themselves at all times as soon as the first bell rings. Likewise, in circumstances that are known for close interactions between participants, implicit consent may encompass far more than what a naked eye observation would suggest. Someone who joins a typical disco party should not complain about somebody asking him to dance while not keeping the distance epidemiologists find appropriate.

Erroneous Metaphors

Before the argument is concluded, certain inadequate analogies must be debunked. These have been raised by Block to substantiate the claim that if COVID is deadly and infectious enough, wandering outside one's own apartment constitutes an immediate threat against others' bodies. Though mistaken, these analogies are in fact somewhat illuminating in the sense that properly thinking them through may help further clarify the position defended in this paper.

Writes Block (2020, 214): "Anyone venturing forth onto the streets would necessarily be violating the NAP. It is as if he is automatically shooting a gun at random or swinging his fists without being able to stop."

As regards the first counterexample, it goes without saying that people still have their self-ownership rights wherever they go unless they themselves extinguish their rights through voluntary arrangements or crimes committed. Assume, then, that someone really starts shooting his gun at random, having warned everybody likely to get within his range beforehand. Indeed,his warning is nothing other than a criminal threat of using physical violence against innocent persons. Further assuming that the land he operates on has not hitherto been homesteaded and thus belongs, like most public locations, to no one, he has no property title in the area where he indulges his crazy shooting exercise. Thus, he has no right to one-sidedly stipulate the terms of its use either. Nor is he at liberty to make others stay home under duress unless they themselves bestowed such a liberty upon him. His action fulfills, therefore, the property rights-based definition of threat. Namely, just as in a "your money or your life!" situation, the shooter is offering his victims an exchange of one thing they have a right to for another such thing (Block, Dominiak, and

Wysocki 2019, 19–25). That is to say, he demands that they either put *their* lives (bodies) in a danger they do not wish to, or refrain from moving *their* bodies the way they do wish to. To avoid misunderstandings, it should be noted that the verb "wish," despite its "mental" character, can in this context be easily translated into the conceptual framework of spatiotemporal objects and property rights thereto. Sure enough, people who try to avoid contracting the virus wish they could finally enjoy their lives with no fear of being infected, and lockdowns may, *arguendo*, contribute to this coming true. That wish is of no ethico-legal relevance, though. In light of the libertarian theory of justice, only those wishes count that are manifested in actual actions taking place on the first-come-first-served principle in a physical space to which property titles can be ascribed. People walking down the streets, potential carriers of the virus or not, are already physically there. They have already manifested their preference for that.[18] They walk, run, sit, stand, in a word—they already occupy some space. And so do germs that they carry. By contrast, the bullets in our hypothetical shooting scenario are not there yet.

As for the "swinging fists" analogy, it is clear that one has neither a right nor a liberty to walk up to other passersby and punch them at will (or compulsively, should he really be unable to stop, as Block would like to have it), since they are shielded by their self-ownership rights. But provided that he is the firstcomer in a place in question, he can throw as many punches as he pleases. This is indeed analogous to the COVID situation, and there is nothing wrong with it. All in all, what is so wicked in doing shadowboxing in a no-man's-land? Does it make any difference whether one is a featherweight beginner or Deontay Wilder, probably capable of killing with a single bare-knuckled haymaker? According to Block's stance, it might make a difference. For as libertarians qua libertarians do not have any expertise in boxing, the libertarian theory of justice would have to stay mute on that matter as long as boxing experts and physicians are not consulted. Yet in reality, the libertarian theory does provide us with the answer. Exercising one's property right in one's own body, one is in the right to shadowbox wherever one wants unless somebody else's property rights come into play.

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[18] On the notion of demonstrated preference, see Rothbard (1956).

CONCLUSION

To sum up, universal antipandemic restrictions must be considered impermissible from the libertarian vantage point. They manifestly run counter to the NAP, for to prevent rights violations and be just, they would have to handle real rights violations in the first place. By contrast, the disease contractions UAPR address cannot constitute direct self-ownership rights violations so long as the pandemic situation is known and prospective complainants are latecomers. Further, such contractions do not represent indirect breaches of self-ownership rights either, because they do not involve violating anybody's right to determine an admissible contagion risk level for particular parcels of land. Stated more precisely, inasmuch as UAPR partly extend to private domains, they violate the NAP by encroaching upon their owners' property rights, for the state authorities have no legitimate jurisdiction over private locations. UAPR encompassing the public domain are illicit as well, since the land that the state has arrogated to itself is in reality a no-man's-land, in which nobody has a property title. Therefore, nobody has the right to stipulate the acceptable contagion risk level for that land either. That is, what people exercise in using the public domain is a naked liberty, not a right *sensu stricto*.

This line of reasoning may be easily undermined on grounds that it is insensitive to the needs of people from risk groups. However, libertarianism is not about compassion. It is about liberty embedded in the ethics of property rights. Vulnerable persons must do their best to avoid places where they can be exposed to infection. They also have the right to demand that those who visit them during isolation provide information about their health condition and risk exposure. But no more than that.

On the other hand, it is worthwhile to examine the logical and practical ramifications of the view that walking the streets during pandemics constitutes aggression in itself. Anti-COVID policies are usually discussed on the basis of value weighting. Policy-makers and opinion molders tend to decide how much safety can be afforded without ruining the economy or social fabric. From the libertarian perspective, such an approach represents an obvious nonstarter. An action either violates property rights and as such ought to be strictly forbidden, or it does not violate property rights

and as such ought to be perfectly permissible. *Tertium non datur*.[19] If I really aggress against the whole world by leaving my apartment, I commit a crime regardless of the purpose for which I leave. If the logic of property rights dictates that everyone be locked up at home, then everyone should be locked up immediately in spite of the possibility that some people have not yet hoarded supplies and will likely die. In such a case, everyone would have to stay isolated until further notice, whatever the circumstances. Of course, the very suggestion that the entire world population is being aggressed against when people leave their apartments and that everyone could be grounded even at the cost of starvation is glaringly nonsensical for both the libertarian and commonsensical minds. Yet this is exactly what follows from the proposition that were a blight severe enough, "anyone venturing forth onto the streets would necessarily be violating the NAP" (Block 2020, 214). There is no right without a remedy, and people under the viral "attack" have the right to self-defense. Moreover, state borders are purely artificial (from the ethical as well as the epidemiological point of view), and epidemics necessarily start somewhere, in a specific place, reaching other locations (and potentially the entire globe) through viral transmission only later. It then also follows from the libertarian pro-UAPR position that the actual victim of "aggression by leaving the apartment" could be each and every living person at any latitude.

Furthermore, Huemer and Block may be correct in positing that infringement of rights is sometimes a probability question, and thus a matter of degree. I then contend that, under a fairly reasonable conception of inadmissible risk, all arguments raised in favor of the current restrictions could equally well justify shutting the entire country down or at least imposing mask mandates in every cold and flu season. Although we already know that the

[19] One might counter that this contention applies solely to hard-core, natural rights–based libertarianism as expounded by Rothbard and his successors, including Block. Given Huemer's original, intuitionist, and nonabsolutist approach to libertarianism, a critic may say that his commonsensical stance appears to be immune to the polemic presented here. This objection misfires, though. Let us note that Huemer's point was not that UAPR do violate the NAP but should be embraced anyway in the name of some overriding good such as elderly survival or the very survival of the human race. Instead, Huemer argued that UAPR ought to be endorsed precisely because they accord with the NAP. On Huemer's intuitionist libertarianism, see his widely acclaimed *The Problem of Political Authority* (Huemer 2013).

seasonal flu is nowhere near as dangerous as COVID, it is still a very serious disease. It greatly impairs our well-being, generates substantial treatment costs, and for many debilitated people may end in demise. True enough, it does not follow logically that if contributing to a situation where one can get the coronavirus on the street is a breach of rights, then the same goes for contributing to a situation where one can contract the flu. But it might follow if one's notion of unacceptable risk were capacious enough, and the distinction between such a notion and that underpinning the support for anti-COVID measures is anything but clear cut. In short, were pro-UAPR libertarians right, lockdowns and other restrictions would have to be incredibly severe and, perhaps, extremely frequent, to an extent that even the most power-hungry politicians, the worst hypochondriacs, and the staunchest public health fanatics have never dreamed of.

So much for the ethical aspect of UAPR. There is nevertheless a crucial political dimension to them as well. Libertarians should be more aware than anybody else that governments tend to extend their prerogatives far beyond their original purview. If the distinction between those health threats that justify UAPR and those that do not is immensely hard to establish in theory, one should expect the state to use that ambiguity for the sake of its own expansion. Ratchet effects unfold time and again, even in the absence of any vague concepts (Higgs 1987). Hence, in embracing lockdowns or other present-day emergency measures, libertarian anti-COVID hawks bestow upon the government a blank check for further growth of the therapeutic welfare state.

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