

THE HUMAN BODY SHIELD

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A GRABS B TO USE as a shield; A forces B to stand in front of him, and compels him to walk wherever A wishes. A then hunts C in order to murder the latter by shooting him. C also has a gun. Is it legally permissible for C to shoot at A in self defense under libertarian law?¹ Were C to do so he would have to kill B, the innocent shield, in order to defend himself against the perpetrator, A. Assume that this tableau takes place on unowned property, so that the issue of the owner's rules does not come into play.

The first answer that comes to mind is that it is not. After all, B is a completely innocent person, and, seemingly, the non aggression axiom of libertarianism was meant to apply to cases precisely like this one. This axiom states that it is illicit to initiate aggression against any non aggressor, and B, by stipulation, is a non aggressor. There are no exceptions to this general rule. Thus, it is difficult to see how C shooting B to get to A can be reconciled with libertarianism.

This perspective is buttressed by the following assumption. Posit that B has a guardian angel floating just above him at all times. This heavenly creature is also armed. For some reason he is powerless against A, the real bad guy, but stands ready to plug anyone else, such as C, should the latter prove to be any threat to his client, B.

It would appear from these considerations that C, another entirely innocent person, is doomed, at least under libertarian law. If C cannot shoot back at A, A will murder C.

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¹ See on this Benson, 1989a, 1989b, 1990, 1993, 2001; Hoppe, 1993; Kinsella, 1992, 1995, 1996, 1997, 1998-1999, 2001; Rothbard, 1982.

In this scenario, either B or C must die, and the theory we have so far considered favors B, because, when we focus on only the two of them, B and C, and ignore A, it is C who “initiating” violence against B, and not the other way around.²

However, there is another theory that I contend also deserves to be characterized as libertarian, which leads to the opposite conclusion. I call this the theory of negative homesteading. In ordinary homesteading (Block, 1990; Hoppe, 1993; Locke, 1948; Rothbard, 1973, 32; Rozeff, 2005), or what we must now call positive homesteading to distinguish it from this newly introduced variety, it is the first person upon the scene who mixes his labor with the land or natural resource who comes away with the property rights in question. It is the first man who farms a plot of land, who becomes the rightful owner.

A similar procedure applies to negative homesteading, only here what gets to be “owned” is a negative, not a positive. This concept refers to some sort of unhappiness, not a benefit such as owning land. The ownership of misery, as it were, must stay with its first victim, according to this principle. He cannot legitimately pass it onto anyone else without the latter’s permission.

For example, suppose D is hit by lightning. He happens to have at his disposal a lightning rod of the sort that can pass on the voltage or electricity to another person, E. If D does so, E dies, while D lives. If D does not, if he keeps the lightning bolt to himself (we rule out the possibility that D can simply ground the electricity so that it does no harm), then D dies. Again, as in the ABC shooting case, we have a conflict between two innocent parties; only now the two parties are D and E, not B and C.

So, may D properly, according to libertarian law, dispose of the misery of the electric bolt to E? According to both the non aggression axiom and what I am now calling negative homesteading theory, he may not. For if D does, he is guilty of not one but two things. First, according to “classical” libertarian theory, to short circuit the process so that E instead of D dies from the bolt, would be to commit aggression against a non aggressor. That is, purposeful first-degree murder.

² Coase (1960) would maintain that B and C occupy a reciprocal relationship with one another; neither one threatens the other more than the other threatens the one. Coase would determine who has the property right to shoot whom, presumably, on the basis of which death would least reduce GDP. We shall not pursue this line of thought in the present paper, as it is irrelevant to libertarianism.

In contrast, if D keeps the voltage to himself, no libertarian law violation will have occurred, since the lightning cannot be blamed. Second, according to misery homesteading theory, since D was the first to be “attacked” by the bolt from the sky, he is the proper “owner” of it. He cannot pass it along to someone else without the permission of the latter.

Let us now return to the ABC shooting case. Who is the first homesteader of the misery? Who is the person whose rights were initially violated? Clearly, this is B, not C. A started off this scenario by grabbing B, placing him in front of him, and frog marching B off in the direction of C. As it is legally impermissible according to libertarian law for D to transfer his lightning bolt onto E, so too is it illicit for B to transfer to C the misery first imposed upon him, B, by A.

How is B doing this, pray tell? At first glance, B is doing nothing of the sort. Indeed, he is doing not much at all, playing, merely the rather inert role of shield. We may even assume he has been drugged into docility by A; that is why he is such a cooperative shield. The foregoing notwithstanding, B is indeed attempting to pass on his role of first victim onto C by in effect acquiescing in his guardian angel’s shooting of C.

Let me attempt to put this into other words, since the active verbs cannot be entirely accurate, particularly if B is unconscious. We, the disinterested judges, are attempting to determine whether or not it is legitimate for B (or, rather, his guardian angel) to shoot C, or for C to shoot B, given that one or the other must die, *arguendo*. B’s case, if not B himself since he is now unconscious, is buttressed by the claim that for C to shoot him would be unjustified since were C to do this, it would constitute murder of an innocent man, B. However, when we look at this episode through the eyeglasses of negative homesteading, we arrive at a very different conclusion. Here, B is the first victim (of A) and, as such, he cannot be allowed to pass on his misery to C, the intended second victim of A. This misfortune could be passed on to C if we the independent judges rule in favor of B’s guardian angel shooting C in defense.

Here is an objection to the thesis I am defending. B is merely being held prisoner by A. In contrast, A is intending to murder C. So, there is something of a disanalogy between this example and the D, E lightning bolt case, where both are potentially threatened with death, not merely temporary kidnapping, as for B.

It cannot be denied that there is this difference between the two cases. But, is it a *relevant* difference? I think not. Let us make the best case for the opposition here and assume that after A perpetrates his dastardly deed upon C, he will allow B to go completely free. Still, if

C must meekly subject himself to being murdered by A with the (unconscious, and therefore innocent) support of B, then, B will have succeeded in passing off *enough* of his misery to spell the death knell of C. Change the D, E lightning case slightly. Suppose that D will die if directly hit by lightning, but, if D can pass it off to E through this transfer mechanism we are positing, E will undergo merely a severe case of sunburn which will keep him out of circulation for only a few days. May D *then* properly engage in what amounts only to a slight bit of assault and battery upon E in order to save his own life? Here, both the classical and misery homesteading versions of libertarianism give the same answer. In the first case, violence against non aggressors, however slight, is forbidden;³ in the second, the first homesteader of the unhappiness must keep it to himself.

Having fleshed out the bones of the negative homesteading theory, let us apply it, and also “classical libertarianism” to a second example.

In the case, the evil X (think Hulk or Godzilla) tosses innocent Y against Z. X uses Y not as a shield, but rather as a projectile, against his real enemy, Z. If contact between Y and Z is made, not Y but Z alone will die. X’s aim of Y at Z is too accurate, and the force with which Z propels Y against Z is so great, that Y is traveling too fast for Z to evade Y.

Both Y and Z are armed with pistols. Y may be moving too fast to Z to evade him, but, work with me on this, not so fast that either Y and/or Z cannot shoot each other. If Z shoots Y, Y will die, and be rendered harmless against Z. (Assume Z has a powerful enough bullet to make Y disappear, and thus be no threat against him).

May Z properly gun down Y? May Y shoot Z in self defense? What is the true defensive posture in this scenario? Again, we have two entirely innocent people, Y and Z, and one of them we posit must die as a result of the evil X, who is beyond our power to stop.

According to negative homesteading theory, Y is the first to be visited with the misery. Remember, X begins our tableaux by throwing Y at Z. Long before (well, before, in any case) Y reaches Z, Y’s rights have been violated by X, and Z’s have not yet been.

³ There is a complication here. Strictly speaking, libertarian cannot answer the question of whether or not it would be appropriate for D to commit assault on E to save his own life. It can respond to the issue of what should happen if he does. And the answer is that he would have to pay the ordinary penalty, whatever it is, for committing assault and battery. For a further discussion of this see Block, 2006.

Just as D could not properly pass on the electricity to E, in the same manner that we found in favor of C vis-à-vis B in the shield example, we now maintain it would be proper for Z to fire his weapon at Y, and illicit for Y to shoot back. Y cannot even fire back in self-defense, according to this theory, since this justification belongs entirely to Z, not to.

How would classical libertarianism handle this challenge? Differently. In this view, whoever shoots first is the aggressor. Y has no need to gun down Z. According to our assumptions, when and if Y impacts Z, only the latter will die. Y will escape, even, without bruises. Z, in sharp contrast, has every reason to plug Y. Y is in effect a human bullet or missile aimed at Z. Only by shooting Y can Z survive. So Z, the first shooter, is the aggressor and Y an innocent victim.

These are two very different results. I claim that negative homesteading is more true to the essence of libertarianism than what I have been characterizing as “classical libertarianism.”

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