

ARTICLES

Pandemic Policies, Public Domain, and Libertarianism: Response to Slenzok

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Universal antipandemic restrictions (UAPR), such as mask mandates and lockdowns, during the spread of COVID-19 have sparked a debate among libertarians about the proper role of governments in situations like these. There are even some anarchist libertarians who have found reasons why UAPR were justified or at least can be justified under certain circumstances. Others have vehemently argued against them. One particular argument holds that the public domain is rightfully owned by no one. It is a no-man's-land, and therefore nobody can rightfully dictate the conditions under which the public domain can be entered or used, and UAPR are thus unjustified. We take up the question of the juridical status of the public domain from the perspective of an ideal libertarian theory of justice. We show that it is not a no-man's-land by applying the accession principle derived from Rothbard's *The Ethics of Liberty*. We then argue that under current real-world conditions we need a nonideal theory of how to manage public property. We argue that the model of common property management, which would exist in a purely libertarian order, gives a suitable benchmark for assessing what the government could justifiably do in emergencies like pandemics. We apply our analysis to UAPR and argue that they are not generally unjustified but would take a very different form if our nonideal libertarian theory of common property management were followed.



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From an ideal anarchist-libertarian perspective, there can be no justification for universal antipandemic restrictions (UAPR) implemented by the state. Since the state itself is an unjust institution, anything its agents do in their capacity as agents of the state is unjustified as a matter of principle.¹ Libertarians who argue that UAPR are justified therefore have to either hold that the state is not necessarily an unjust institution or argue from the point of view of a nonideal theory of libertarianism. Block (2020, 2021), for example, must argue within the framework of a nonideal theory, for otherwise he could not at the same time stick to his anarchist convictions without contradiction. In fact, his opponents (Guenzl 2016; Slenzok 2021, 2023), too, must argue from the point of view of nonideal theory, for otherwise the argument would be rather short. The first two sentences of this paragraph are sufficient to bring the point across. It certainly does not require a back-and-forth between the authors.

However, nobody involved in the debate has yet explicitly made this distinction between ideal and nonideal theory (Rawls 1971, 8–9; Mills 2005, 165–84). The distinction is important because it provides context to understand the arguments better. Many debates of the type “the libertarian position on . . .” (Hornberger 2016) or “the classical liberal case for . . .” (Block and Futerman 2021) suffer from not explicitly drawing the distinction between ideal and nonideal theorizing. This usually is not the only weakness of the arguments, and it also does not necessarily undermine their potential merits. But acknowledging the distinction helps to clarify our view.

There is typically no *libertarian position* on any policy implemented by the state other than a principled rejection of that policy for the simple reason that it is a state policy. But that does not mean that in a purely libertarian world there would not be property-rights-respecting private arrangements that end up being, at least in some ways, similar to the state policy in question. In fact, for libertarians living in a statist world, it seems to be their best hope that states mimic with their policies what private individuals would do of their own accord within property-rights-respecting arrangements. Of course, there is some room for speculation on what people would do, but this is precisely the room left open for nonideal libertarian theory.

We begin our discussion by showing that Slenzok’s (2021, 2023) main argument against UAPR is fallacious from the vantage point of the ideal libertarian theory of justice that he himself claims to uphold. His argument rests on the idea that the public domain is best regarded as a no-man’s-land, rightfully owned by nobody. This is false. We then venture into nonideal theorizing to come up with a plausible approximation of what policies would best mimic voluntary private arrangements in the context of a pandemic. We

¹ There are arguments to be made for why a state agent who actively sabotages the state’s agenda can act justly.

conclude that some pandemic policies are justified from the vantage point of nonideal libertarian theory, but they would certainly look very different from what we have seen over the course of the COVID-19 pandemic.

Public Domain and Its Juridical Status: An Ideal Theory

Slenzok's (2021, 2023) contributions to the libertarian debate over COVID-19 pandemic policies are important in many respects but what is particularly consequential for libertarian theory, both ideal and nonideal, is his take on the juridical status of so-called public property (Slenzok 2024, 180–88).² As Slenzok himself makes clear, the question of the juridical status of the public domain influences not only the assessment of such policies as “introducing lockdowns, vaccine mandates, vaccine segregation, and so forth” but also “problems of immigration” to the effect that “pace Hans-Hermann Hoppe . . . the state also ought to repeal all anti-immigration laws” (Slenzok 2023, 298). The relation between the juridical status of public property and all such policies is perceptively identified by Slenzok as consisting in the following dependence of the latter on the former:

What makes the problems of immigration and UAPR symmetrical is the role played in the analysis of both by the question of ownership rights in the public domain. If, as my argument has it, the public domain is a no-man's-land (i.e., if no one has a claim-right to it), then everyone is free to traverse it irrespective of their health or citizenship status, provided that others' self-ownership rights are left intact. If, on the other hand, the public domain is truly a property owned collectively by victims of a state, chiefly its domestic taxpayers (Hoppe 2018, 46; N. S. Kinsella 2005), then the owners also have the right to stipulate the terms of its use. This encompasses both the health condition and the origin of users. (Slenzok 2023, 298)

Now, according to Slenzok, there are four and only four ways in which ownership of resources can be acquired under libertarianism: “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” (Slenzok 2021, 286). This is the principal reason why Slenzok contends that “an interesting, ostensibly anarchist resolution . . . proposed by Hans-Hermann Hoppe [that] the public domain is the property of all taxpayers subject to expropriation for the purposes of its creation and maintenance . . . does not withstand criticism” (Slenzok 2021, 284). Instead, the conclusion that Slenzok is prepared to

² By juridical status of public property, we mean the status that public property has from the point of view of the ideal libertarian theory of justice.

derive from the above realization is that “the so-called public domain (or most of it) . . . is, roughly speaking, a no-man’s land, i.e., a land rightfully owned by nobody” (Slenzok 2021, 289).

To clarify our further discussion, it might be useful to summarize Slenzok’s argument in the following way:

- P_1 : There are only four methods of ownership acquisition (homesteading, consensual transfer, production, and compensation).
- P_2 : None of them applies to the state or the taxpayers vis-à-vis the public domain.
- C_1 : Therefore, neither the state nor the taxpayers own the public domain.
- P_3 : Unless the public domain is owned by the taxpayers or by the state, it is unowned.
- C_2 : The public domain is unowned (it is a no-man’s-land).

Slenzok’s argument is structurally valid. To debunk it, one would have to show that at least one of its premises is false. Premise P_2 seems uncontroversial. Premise P_3 might seem somewhat shaky but we do not have much to say about it. In what follows, our target will be premise P_1 . If it is false, C_1 and C_2 do not follow.

To see how premise P_1 falls apart under closer scrutiny, it is important to note that under libertarianism, victims of robbery do not lose titles to the stolen goods. As Murray Rothbard points out (1998, 51), “the aggressor has no right to claim any property that he has acquired by aggression,” and so “if a current title to property is criminal in origin, *and* the victim or his heir can be found, then the title should immediately revert to the latter” (Rothbard 1998, 57). Since the received libertarian view is “to consider taxation as robbery, and therefore government as a band of robbers” (Rothbard 2006, 62), the same logic applies to the tax money, and so neither does the state acquire any title to it nor do taxpayers lose it.

These basic libertarian truths are of course accepted by Slenzok himself (2021, 283), who goes even further in submitting that since “everything it [the state] possesses can be traced back to such acts of expropriation [as taxation and monopoly], it follows from the core principles of libertarian anarchist justice theory that the state holds no legitimate property titles in anything.” Moreover, Slenzok is also willing, and rightly so, to apply these truths to some types of public property, such as “areas directly taken away from rightful estate owners (in contradistinction to objects merely financed by taxpayers), as was the case, for example, during the collectivization conducted

by Communist regimes [whose land areas] obviously do have identifiable individual owners” (Slenzok 2021, 289–90). Now, it must have occurred to Slenzok that these land areas have since been transformed by “members and collaborators of the state and their victims” (Slenzok 2021, 289)—a fact that does not stop Slenzok from rightly contending that such areas “obviously do have identifiable individual owners” (Slenzok 2021, 290). However, the subsequent transformation of these areas clearly adds a new twist to the question of their ownership, for on what basis did these “identifiable individual owners” (Slenzok 2021, 290) acquire ownership titles to the transformed property if the transformation was made by other parties than themselves and outside of any contractual relationship with the taxpayers?

Consider a simple imaginary case. Suppose that in a commodity money system, the state builds a highway made of gold coins taxed away from the citizens. We submit—very much along the lines of Slenzok’s claim concerning collectivized land areas—that since the gold coins were “directly taken away from rightful . . . owners” (Slenzok 2021, 290), the transformed gold coins—that is, the golden highway, “obviously do have identifiable individual owners” (Slenzok 2021, 290)—that is, the taxpayers. Most importantly, this means that the highway is hardly “a no-man’s land” (Slenzok 2021, 289) despite the fact that none of the four methods of ownership acquisition enumerated by Slenzok governed its appropriation. Certainly, there was no highway (and so a fortiori there was no *unowned* highway) for the taxpayers to homestead before it was built by the state. Neither was there a transfer of rights to the highway from the previous owners to the taxpayers. Nor did the taxpayers produce the highway themselves. “Sure enough, domestic taxpayers did contribute to the erection of the [highway]” (Slenzok 2021, 286), but it was the state that actually erected it. And finally, Slenzok (2021, 286–89) is also right that pointing to compensation “does not seem promising either” (Slenzok 2021, 286), for compensation should both come from the estate of the wrongdoer (Slenzok 2021, 287) and match the loss suffered by the victims (Rothbard 1998, 80–89).

As this simple example suggests, there is likely some other method of property acquisition under libertarianism, over and above the four methods listed by Slenzok, that governed the acquisition of the highway by the taxpayers (and transformed collectivized land areas by the previous estate owners), and so premise P_1 of Slenzok’s argument is likely too hasty.

In fact, the standard literature on libertarianism often refers to three general ways of property acquisition: (1) original appropriation (homesteading), (2) contractual title transfer, and (3) rectification (N. Kinsella 2023, 15). It is the latter category of rectification that seems to be somewhat broader than what Slenzok calls compensation. It contains at least one other method of property acquisition that Slenzok has not thought of. This method is best construed as the libertarian version of the accession principle (Dominiak 2024). In this

article, however, we do not have to go into any systematic elaboration of this principle. It is sufficient to apply it to the question at hand and explain the exact process by which the taxpayers become owners of the components of the public domain built by the state, such as “sidewalks, parks, and highways” (Slenzok 2021, 286).

Coming back to our highway example, the first thing to notice is that the state must have lost the ownership title to whatever transformations it made regarding the taxpayers’ gold.³ The state agents have lost the ownership title to the fruits of their labor, so to speak, for otherwise the taxpayers could not have become the owners of the highway which embodies these transformations. Indeed, this fact is confirmed by Rothbard’s (1998, 59) parenthetical but very consequential remark that can be called the rule of aggressive accession:⁴

“It might be objected that the holder or holders of the unjust title (in the cases where they are not themselves the criminal aggressors) should be entitled to the property which they *added* on to the property which was not justly theirs, or, at the very least, to be compensated for such additions.” But then it follows by contraposition that if the holders of the unjust title who added something to the property of another are themselves the criminal aggressors—as “members and collaborators of the state” (Slenzok 2021, 289) are vis-à-vis the taxpayers—they are not entitled to what they added to the original property or to compensation for what they added, and so they are not entitled to the transformed property either. They lose their transformations to the owners of the original property. Thus, even if “members and collaborators of the state” (Slenzok 2021, 289) who built the highway initially had the title to their labor or to some other factors of production, they lost it to the taxpayers at the very moment in which they mixed these factors with the original property of the taxpayers—that is, the taxed gold.

Now, it is worth stressing that by Rothbard’s rule, the aggressors who transform the property of another person do not simply forfeit their rights to the transformations so that the victims have to now go and originally appropriate these transformations in order to acquire the title to the whole transformed property.⁵ Rothbard’s rule does not require, and rightly so, that

3 Slenzok might be willing to deny that the state had any title to anything to begin with. After all, he claims that “it follows from the core principles of libertarian anarchist justice theory that the state holds no legitimate property titles in anything” (Slenzok 2021, 283). Although this radical position would not change anything in our conclusion that the taxpayers ultimately own the highway, it would be going decidedly too far. We cannot see any reasons for denying the possibility that some state agents own at least their own bodies and so the labor produced by those bodies.

4 The following discussion of the aggressive accession as applied to the public domain is based on the arguments presented in Dominiak (2022, 2023, 2024).

5 This shows that the fact that the aggressors committed a trespass cannot explanatorily exhaust Rothbard’s rule of aggressive accession. Certainly, trespass results in forfeiture of some rights of the aggressors, but whatever these rights are, their forfeiture only means that they become extinguished, and so whatever they were protecting is now unowned. This is decidedly not enough to justify the victims’ title to the

the victims of aggression mix their labor with their own property to acquire it back, if you will, albeit in a different form, just because it was transformed by the aggressors. Quite the contrary: by Rothbard's rule, the aggressors lose their transformations directly. The transformations simply accede to the victims' property, constituting an increment in their juridical domain.

We submit that the best explanation of this direct and immediate accession of the aggressors' transformations to the victims' property is that the aggressors, besides undoubtedly committing a trespass on the victims' property,⁶ also could act in the victims' favor insofar as they voluntarily enlarge, improve, or merely transform the victims' property, knowing that it is not their property and that no remuneration was pledged to them for their work. This is why Rothbard talks here about "additions" or "improvements" (Rothbard 2011a, 363) to the victims' property rather than damage or destruction thereof, the latter type of changes being dealt with separately and unambiguously by the libertarian law of trespass and nuisance (Rothbard 2011a, 367–418). This is also why both common and civil law embrace the principle of fraudulent accession, which "treats those who expend money or labor upon the property of another, *knowing that they are doing wrong*, as volunteer servants or agents, and compels them *to lose what they thus expend*" (Silsbury v. McCoon, 3 N.Y. 379, 380 (N.Y. 1850)). And of course, the loss in question does not consist in these inputs returning to the commons, from where they would have to be brought back again by some act of original appropriation, but in bestowing them directly on the victims, for "he who *knows* the material is another's, ought to be considered in the same light as if *he had made the species in the name of the owner*, to whom also he is to be understood to have *given his labor*" (3 N.Y. 379, 380).

Thus, both the taxpayers in our highway case and Slenzok's "rightful estate owners" of "areas taken away . . . during the collectivization conducted by Communist regimes" (Slenzok 2021, 289–90) are "obviously . . . identifiable individual owners" of the respective output properties on the same twofold basis. First, they never ceased to own the gold and estates that were stolen from them. Second, the state lost its title to whatever changes it made to these resources to the taxpayers and estate owners due to the fact that it voluntarily took up the work, knowing that these resources belong to other people and no reimbursement was promised to them for the service. For these reasons, the state's factors of production, instead of giving rise to the state's competing claim to the respective output properties, acceded to the

transformations. Of course, trespass might also result in incurring some compensatory duty on the part of the aggressors, but again, we agree with Slenzok (2021, 286–89) that resorting to compensation is not the best explanation of the victims' title, especially taking into consideration the fact that there is no guarantee that Rothbard's proportionality principle (Rothbard 1998, 80–89) would dictate acquisition of the transformations as the proportionate compensation.

⁶ Which again, is not enough to explain the accession.

victims' input domains without compensation—an explanation grounded in Rothbard's rule of aggressive accession, which only confirms what we (and, we hope, also Slenzok) knew on an intuitive basis.

Having established that, instead of being a no-man's-land, the golden highway would be the rightful property of the taxpayers, let us now apply the same reasoning to a much more realistic and important scenario in which the state, operating under today's fiat money system, collects the taxes from the citizens and then pays construction companies to build various public facilities, such as "buildings, parks, roads, and highways" (Slenzok 2021, 286). Such facilities unequivocally fall into Slenzok's category of "objects merely financed by taxpayers," which allegedly lack "identifiable individual owners" (Slenzok 2021, 290). There are two main reasons for which they are supposed to lack such owners.⁷ First, in contradistinction to the previously considered collectivized areas and golden highways, these facilities are only paid for with the stolen property rather than made of it. After all, they are "merely financed by taxpayers" (Slenzok 2021, 290). Second, they are so financed outside of any contractual relationship between the taxpayers and the producers. Thus, writes Slenzok (2021, 286): "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."

However, Rothbard's rule of aggressive accession, as it was reconstructed above, can easily deal with these cases. Neither must Slenzok's major premise be true, nor must the stolen property be physically embedded in the produced facilities, nor must certain contractual arrangements hold between the taxpayers and the producers in order for the former to be the rightful owners of the facilities. For, in virtually all cases of public facilities "merely financed by taxpayers" (Slenzok 2021, 290), the same aggressors as in the cases of collectivized land areas and golden highways considered above—that is, the state—voluntarily took up the work of employing the construction companies to produce the facilities, knowing that the money used for this purpose belonged to the taxpayers, who pledged no remuneration to the state for doing this work. Thus, the state's functionaries voluntarily worked

⁷ Another reason might be the difficulty in identifying the exact taxpayers who financed the exact piece of public property; however, this is an issue for a nonideal theory rather than the currently discussed ideal one, and we know anyway that the problem of tracking the exact right-holders besets the historical theory of property regardless of whether the property is common or private. At any rate, insofar as the ideal theory is concerned, it is also unclear whether any such tracking should even be attempted since all the taxpayers can equally justifiably be considered the common owners of all the public property in proportion to their net individual contribution.

for the taxpayers, acting in this respect as the taxpayers’ “volunteer servants or agents” (3 N.Y. 379, 380), who, via the employment of the construction companies, made a new “*species* [that is, the facilities] *in the name of the owner*” (3 N.Y. 379, 380) of the money and who therefore lost all the factors of production—acquired for this purpose and embedded in the facilities—to the taxpayers, without any compensation for their work. Simply put, the aggressors knew that the money was not theirs and that there was no reimbursement for the service of investing it. They decided to invest anyway. Now the fruits accrue to the money owners and no compensation is due for the investment service.

What about the construction companies? Should they keep their remuneration for building the facilities? If they knew that the money belonged to the taxpayers or otherwise were accomplices of the state, then they should lose their remuneration to the taxpayers on exactly the same basis as the state should lose the facilities. However, if they were, say, deceived or coerced by the state into building the facilities, then the question should be settled, at least initially, on slightly different grounds. For then, technically speaking, the companies would not waive their title to the factors of production, due to fraud or duress. But neither would the taxpayers waive their rights to the money. The only party that would lose its contribution to the taxpayers is the state. Thus, we would end up, at least initially, with a distribution in which the taxpayers keep the title to their money and possibly acquire some accessory claim to the facilities due to the state’s losing to them the title to whatever was its contribution to the production process, while the construction companies would keep the title to their factors and so acquire the principal claim to the facilities.

Such a state of affairs would, of course, be a far cry from the public facilities of Slenzok’s no-man’s-land. Quite the contrary, it would only mean that a different group of the state’s victims than the taxpayers who paid for the production process would become the principal claimants to the facilities. (But isn’t it very likely that construction companies which the state would be willing to defraud or coerce would also be the taxpayers in their own right?) Nevertheless, our contention is that this technically correct tracking of titles would establish itself as a just distribution only if the victimized construction companies abstained from exercising actual ownership over the taxpayers’ money (since the taxpayers do not exercise actual ownership over the facilities). If, on the other hand, the companies go and spend or otherwise enjoy the taxpayers’ money, it should be concluded that they already received their compensation for the factors of production and that the title to the public facilities should belong exclusively to the taxpayers. Since this is exactly what happens in reality, the taxpayers, in accordance with the principle of accession, should be the owners of the public facilities.

Although we could keep considering sundry variations on the above themes (for example, tracks in the forest trampled by bird watchers and hunters, roads built in places where local inhabitants have walked since time immemorial, etc.), we believe that we have made our point and can leave the rest to the reader's abilities to generalize and extrapolate. Our argument offers a clear and novel explanation of the reasons for which "an interesting, ostensibly anarchist resolution . . . proposed by Hans-Hermann Hoppe [that] the public domain is the property of all taxpayers subject to expropriation for the purposes of its creation and maintenance" (Slenzok 2021, 284) not only does "withstand criticism" (Slenzok 2021, 284) but also provides by and large the only correct libertarian solution to the question of the juridical status of the public domain. These reasons—the reasons for which the taxpayers are the common owners of the crucial public facilities—can be epitomized by what can be called the libertarian version of the accession principle, anchored in an inconspicuous but consequential remark made in passing by Rothbard in *The Ethics of Liberty*. This principle testifies to the fact that besides the four traditional libertarian ways of appropriation listed by Slenzok, there is also a fifth libertarian method of property acquisition—namely, accession—whereby the owner of the principal input becomes the owner of the accessory input and in consequence of the whole output property under the conditions outlined above. It also testifies to the fact that premise P₁ of Slenzok's argument—that is, the claim that there are only four methods of ownership acquisition under libertarianism—is likely untenable and so is its conclusion that the public domain is a no-man's-land.

Modeling Public Domain Management under Nonideal Conditions

The above rationale establishes the juridical status of the public domain under libertarianism. It can be classified as part of what John Rawls (1971, 8–9) called an ideal theory. If the legal title followed the juridical title instead of being imposed by the state in contravention to the latter, public facilities would by and large belong to their funders by virtue of the accession principle. This, however, is not the case in practice. Hence, what we need besides the libertarian ideal theory of just distribution is a nonideal theory that will tell us "how we are to deal with injustice" (Rawls 1971, 8) here and now where perplexed and unjust conditions cannot be corrected right away or be erased from history. From the libertarian point of view, the injustice and oppression that is the main concern stems from the existence of the state. The pernicious influence of the state on the formation of our property regimes cannot simply be expunged, nor can this institution be liquidated instantly. In a sense, we have to live with it, and so it would be good if we had some nonideal theory that would tell us what to do and what to strive for in these highly suboptimal circumstances. Thus, everything we are going to say from now on should be viewed as an exercise in libertarian nonideal theorizing. It

would be optimal if the state were disbanded, but since this scenario is not coming anytime soon, the question is, What is our second-best option, given that the state exists?

As we pointed out in the previous section, and as can be generalized further from what we said, from the ideal libertarian point of view a large part of the public domain is best construed as the common property of the taxpayers. In ideal conditions, a common property is either disbanded into several properties of its respective co-owners or managed and held in accordance with some model of common decision-making, depending on the character of the property in question. In this respect, one can point to such kinds of common property and models of management as, for example, concurrent ownership (tenancy in common, joint tenancy, and tenancy by the entirety), family property, entity property (for example, corporations, partnerships, common interest developments such as residential subdivisions, condominiums, cooperatives, and land trusts), fee simple estates, and life estates or leaseholds (Singer et al. 2014, 586–89, 659–753, 809–24). Taking into consideration the fact that the public domain is a very large space, that it has a significant component of land included in it, and that it has been funded by a very large number of taxpayers who are its rightful common owners, the model of common property management that best suits it seems to be some kind of entity property as instantiated by common interest developments such as residential subdivisions or condominiums, especially insofar as common areas (roads, hallways, auditoriums, parks, and playgrounds) of these establishments are concerned. Thus, to learn what could happen with the public domain if it were in fact under common ownership of the taxpayers, it is reasonable to look at the decision-making processes exercised in residential subdivisions or condominiums.

Based on an excellent analysis by Singer et al. (2014, 586–658), the following aspects of this decision-making model are worth stressing. The first aspect to notice is that the owners of the respective private units “share ownership of the common elements of the community” (Singer et al. 2014, 587). These are exactly these common elements (roads, parking lots, playgrounds, sport facilities, parks, etc.) of the establishments that interest us the most, for the public property is a clear analogy of these elements. Now, these common elements together with the rest of the establishments are erected by the developer, who “typically drafts the initial covenants or CC&Rs (conditions, covenants, and restrictions). . . . In buying their units, owners agree to abide by these covenants” (Singer et al. 2014, 587). The analogy here is that the taxpayers who erected public facilities—in contradistinction to taxpayers who only contribute to the maintenance thereof—act as the developer and have an exclusive say in setting the exact CC&Rs.

However, CC&Rs are not set in stone. As the “owners may vote to amend the initial covenants, although a supermajority vote of between 60 to 75 percent is usually required” (Singer et al. 2014, 587), so all the taxpayers would likely be allowed to change the public property’s CC&Rs set by its developers by some supermajority vote. Now, the voting process in residential subdivisions and condominiums takes place within associations of all owners which are created by declarations stating CC&Rs. In turn, “these associations function like local governments, except that votes are not based on ‘one person-one vote’ but are based on property ownership. Only owners have voting rights; tenants and other family members are not entitled to vote; . . . and owners of more property . . . may have more votes” (Singer et al. 2014, 587).

This of course suggests quite straightforwardly that only the net taxpayers would have a say about the destination of the public property and each taxpayer’s voting power would reflect the size of his financial contribution. Additionally, the ways in which such voting by the members of the owners associations influences the character of the common property consist not only in directly changing or enforcing CC&Rs and being “empowered to promulgate bylaws or rules governing use of common areas” (Singer et al. 2014, 587) but also in selecting “the members of a board, called the board of trustees or board of managers, to manage the association’s common interests” (Singer et al. 2014, 587). Here, the analogy with the state seems particularly pertinent insofar as one could assess the democratic state’s policy concerning the management of public property unfavorably or relatively favorably depending on how close it follows what the board of managers does with regard to the common elements of residential subdivisions or condominiums and what such a board would do with regard to a given piece of the public domain if it were elected by the taxpayers.

Finally, it may help to say a few words about the content of CC&Rs as they pertain to the common areas of residential subdivisions and condominiums. In this regard, two remarks seem worth making. First, it is clear that specific types of common areas are established to serve specific purposes, and many activities are off-limits in these areas. For example, playgrounds are erected so that the owners’ and the tenants’ children can play safely in them. This normally means that, say, pets are not allowed on these premises. Similarly, gyms are established so that the owners can work out in them, and thus smoking or throwing birthday parties is typically banned in these spaces. For instance, in *Neuman v. Grandview at Emerald Hills, Inc.* (861 So. 2d 494, (Fla. Dist. Ct. App. 2003)), the court decided that the board’s rule forbidding religious services being held in the condominium’s auditorium otherwise devoted to owners’ gatherings does not violate the owners’ rights to assemble.

Second, it is equally clear that since even the private units should be maintained and used in a way that does not pose danger to other inhabitants, health hazards included, then a fortiori so should be the common areas, regardless of their specific purposes. Thus, for example, in the case *Fountain Valley Chateau Banc Homeowner's Association v. Department of Veterans Affairs* (79 Cal. Rptr. 2d 248, 251, 256 (Cal. Ct. App. 1998)), the court confirmed that the owners of the units should keep their dwellings in a “clean, sanitary, and attractive condition,” although it argued that requiring “an elderly veteran with Hodgkin’s disease to, among other things, ‘clear his bed of all paper and books’ . . . or donate all ‘outdated clothes that had not been worn in five years’” was going decidedly too far, especially given that “the fire department had inspected the premises and found that they did not pose a health or fire hazard” (Singer et al. 2014, 612).

On the other hand, as decided in *Scoggins v. Lee's Crossing Homeowners Ass'n* (718 F.3d 262, 272 (4th Cir. 2013)), when “the potential for personal injury is a relevant consideration,” the circuit judges adjudicating the question of a possible discrimination because of a handicap “join[ed] other courts that have recognized this principle” embedded in the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3604 (f)(9)), according to which nothing in the pertinent law “requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals.” Now, as these two remarks suggest, under this model of the common property management as applied to the public domain, the limitations on the use of public property likely set by the taxpayers might be quite extensive, albeit far from complete. With this in mind, we move on to the UAPR question.

Application of Nonideal Libertarian Theory to Covid Policies

During the COVID-19 pandemic, various far-reaching UAPR were implemented. As we suggested above, under a nonideal libertarian theory at least some of these measures could, under some circumstances, be justified. The first fundamental question, however, concerns where such measures can be applied in the first place. It is the question of the scope of UAPR. The principled libertarian answer under the nonideal condition of the existence of the state is that such restrictions can apply only to the public domain. From the libertarian vantage point, private property should not be restricted any further. In the case of private properties, such as restaurants, bars, stores, and medical practices, it is up to the property owners to decide what precautionary safety measures are adequate or not. Private property owners will attempt to maximize the value of their property. Insofar as this value depends on the heterogeneous safety preferences of others—for example, customers or clients, such as in the above-mentioned examples—private property owners will naturally try to find solutions that balance the satisfaction of these heterogeneous preferences. Possible externalities will naturally be internalized (Leeson and Rouanet 2021).

Private property owners can use the market price mechanism and profit and loss accounting to improve relevant trade-offs between convenience and safety, privacy and safety, or along other dimensions. Safety measures that are against customer preferences will result in reduced sales revenues and profits. Safety measures that are adequate from the point of view of the customers will at the very least reduce revenues and profits less and potentially even increase them. There can still be certain types of externalities according to standard neoclassical economics—in particular, cross-site externalities, as Leeson and Rouanet (2021) point out—but the justification for government interventions based on externalities is unacceptable in the first place (Rothbard 2011b; Mises 1998, 654–61; Hoppe 2006; Block 1983). Hence, there is no room for UAPR in the private domain from the vantage point of nonideal libertarianism that even takes the existence of the state for granted.

The implementation of UAPR is thus restricted to the public domain only. In cases of publicly owned sites, there are no private owners who make rational decisions through economic calculation in terms of profit and loss and through their own subjective value judgments about nonexchangeable aspects of human interaction (Rothbard 2009, 213–31). In the public domain, there is usually a lack of market exchanges to generate meaningful prices by which decision-makers can determine whether they act efficiently or not. There is a lack of market prices for inputs or outputs, as for example in policing (Fegley 2021), which makes the determination of profits impossible. Hence, other criteria are needed to make decisions. Where there are calculational problems in the private sector, owners assume the uncertainty by risking their property or the value thereof. If they want to act against economic efficiency, as determined by economic calculation, they can do so, but they have to accept a reduction of the market value of their property—that is, they at least implicitly have to pay for economic inefficiency. In the case of calculational chaos within the public domain, no individual acts as a bearer of residual uncertainty. Taxpayers that have a legitimate claim to the public domain are a collective group that bear the uncertainty related to the use and regulation of the public domain jointly. Decisions on how to regulate the public domain should therefore be in line with the preferences of the taxpayers. The public domain, where certain UAPR can in principle apply, can be subdivided into two types that we are calling the “nonessential public domain” and the “essential public domain,” respectively.

The Nonessential and the Essential Public Domain

The nonessential public domain refers to those areas over which the state claims dominion but where people need not go or are not otherwise forced to be, such as beaches, public woods, or other “recreational” areas. The essential public domain, in contrast, refers to state-claimed areas where one *is* at least

sometimes forced to be, such as courts, prisons, and city halls.⁸ This choice of terminology is not because we consider these particular areas to be essential to the public domain. They do not have to be part of the public domain and could be privatized in principle. The term “essential” is meant to indicate that entering these areas is unavoidable in many regular circumstances.

A genuinely libertarian antipandemic policy in the nonessential public domain is straightforward: there should be free access with no additional compulsory restrictions. The primary reasons for this are that (1) being nonessential, no one must assume the risk of being in these places and contracting disease; and (2) all negative externalities are internalized. That is to say, all those choosing to enter these spaces voluntarily assume the risks of doing so and consider the expected benefit to be greater than the expected cost. In this context, there are no “market failures” to be corrected through further intervention.

For the areas of the public domain that cannot be similarly avoided, precautions should be taken in reasonable proportion to estimated risks. What is considered “reasonable” and what level of risk is considered tolerable would have to be determined at the most local level. For obvious reasons, we cannot be specific about what restrictions would be implemented. They depend on the subjective preferences of taxpayers. In general, the principle of subsidiarity should be upheld, which makes possible a decentralized process of trial and error to discover what works under conditions of uncertainty.

Similar to how the operations of bureaucracies depend on the price structure generated by markets (Mises 1944), managers of the public domain are able to observe the practices of entrepreneurs operating in market settings that are subject to profit and loss. It is important that entrepreneurs are free to implement rules on their private property that govern interactions before, during, and after pandemics so that the competitive process enables discovery of what consumers deem to be the optimal trade-offs between values of safety and convenience. In this way, managers of the public domain are able to piggyback off the knowledge generated by the voluntary sector.

It is likely, however, that different subsets of consumers will have different preferences in different contexts (e.g., relatively young concertgoers, as opposed to relatively elderly bingo hall participants), and so managers of the public domain will have to use judgment to determine what market settings are most similar and applicable to that part of the public domain which they manage. It would not be unreasonable for there to be a bias toward the preferences of the more vulnerable populations since one’s presence in the essential public domain is coerced; as such, the value of convenience has

⁸ We are using “forced” here both in the narrower sense of being compelled under the threat of physical force and the broader sense of there being no legal alternative to accomplish certain ends.

already largely been compromised, so the value of safety and risk reduction might as well be preserved to the extent that this can be at a reasonable cost. However, under no circumstance should the restrictions on the public domain be more strict than those found in the private domain. For example, in the United States, many private schools stayed open while public schools were closed against the wishes of families of schoolchildren.

Further, policies should be reviewed and revised at frequent intervals, given the lack of market pressure to change. Continued observation of trial and error taking place in voluntary settings should guide the policies of those in coerced public settings. Concomitant with the smooth operation of this market-based knowledge discovery is that disinformation from taxpayer-funded public health agencies be kept to a minimum. Ideally, such agencies are eliminated entirely.⁹

The distinction between the essential and the nonessential public domain is admittedly not as clear-cut as one would like it to be. Rather, there is a continuum, where some parts of the public domain can be considered more or less “essential,” depending on particular circumstances. For example, in some sense, one can argue that no one is forced to use a public road or public transportation. But are we not, in some other sense, forced to use it when we have to reach the next hospital during a medical emergency? So, there might be some room for the implementation of UAPR on roads, sidewalks, and public transportation, but these UAPR cannot reach the level of outright lockdowns that prohibit people from using roads and sidewalks altogether. This is so because such a drastic measure would also infringe on private property rights. As we have argued above, UAPR cannot apply to the private domain. Restaurants, cafés, bars, and other private businesses should be allowed to operate as they see fit. An outright lockdown of the public domain would be in plain contradiction to the ability of many private enterprises to go about their business freely since clients could not even get to those places, even if the private owners were happy to serve them.

There must therefore be a right of way through the public domain, just as no tenants in a private condominium can be locked in their apartments because the landlord forbids them to use the hallway (common area) to get outside. Individuals who have a right to be in a private area A as well as in a geographically separated private area B, where A and B are separated by the public domain, should have the right to traverse the public domain in some way; otherwise, private property rights are violated. There is some

⁹ Indeed, a major hindrance to the market discovery process in the case of COVID-19 was the fact that the public’s preferences were heavily influenced by taxpayer-funded disinformation campaigns and censorship of dissenting voices. It is impossible to say exactly how preferences would have otherwise developed without these malicious actors, but we can undoubtedly say that there would have been far fewer restrictions than those actually implemented. Indeed, the amount of interventionism in the medical field, including the licensing of physicians, that affected the dissemination of information related to COVID-19 and its treatment is too great to adequately explain here.

room to regulate the way in which the public domain can be traversed, just as a landlord can demand people wear clothes in the hallway, but an outright lockdown is decidedly unjustifiable.

Conclusion

The COVID-19 pandemic and the universal antipandemic restrictions implemented in response have sparked a lively debate among libertarians about appropriate political responses by governments in such situations. On the most basic level, a principled anarchist libertarian would have to argue, as in all other cases, that governments are not needed at all to cope with the problem. UAPR, as with any other state measure, are unjustified simply because the state itself is unjustified. This is the simple answer provided by an ideal libertarian theory of justice. However, the debate is usually not about an ideal theory. It is, in contrast, about arguing within the nonideal conditions of the real world in which the state exists and cannot simply be dismantled. These arguments therefore rely on nonideal libertarian theory. We have made this distinction explicit in this article.

We first showed that, from the point of view of ideal libertarian theory, the public domain cannot be considered a no-man's-land, rightfully owned by nobody, as argued by Slenzok (2021, 2023). By applying Rothbard's accession principle, we showed that most of the public domain is rightfully owned by taxpayers. The management and regulation of the public domain should therefore be in line with the preferences of the taxpayers. Just as any private owner might have a preference for certain safety measures concerning his private property and is free to implement those, certain safety measures might also be justifiable in the public domain. Under nonideal conditions, where the state manages the public domain, such management should resemble what we can see in private arrangements of collective property management, such as residential subdivisions or condominiums.

The scope of UAPR under nonideal conditions has to be restrained exclusively to the public domain. Private property should not be compromised any further from the point of view of libertarianism, even under nonideal conditions of state management. So, UAPR can in principle be justified under nonideal conditions, but they should apply only to the public domain. Private places, such as restaurants, bars, cafés, and medical practices, should be left to cope with potential safety risks as their private property owners see fit. Private property owners have strong incentives to manage their property so as to find the best trade-offs between safety and convenience from the vantage point of their clients.

In the public domain, where UAPR can in principle be justified, we have drawn the distinction between the "essential" and the "nonessential" public domain, the latter encompassing those areas where nobody has to go, such as public woods, parks, beaches, and other recreational areas. In those areas, no

UAPR are required, because all possible externalities are internalized by the free risk assessment and voluntary choices of people who decide to go there. They deem the expected benefits to be higher than the expected losses. In contrast, the essential public domain contains places where people are forced to go. UAPR that are in line with the preferences of the taxpayers are justified here, but they have to be implemented at the most decentralized level possible by respecting the principle of subsidiarity. Such a decentralized process of trial and error enables a discovery process of what measures are effective in a situation of uncertainty.

Lastly, we have argued that there is always a right of way that cannot be violated in the public domain. This implies that outright lockdowns are out of the question. If private property owners are allowed to do with their private property as they see fit, they also have to be allowed to get from one private property to another by traversing the public domain. There is some room for regulating the conditions under which people are allowed to traverse the public domain, but one cannot take away their right of way if the free use of private property is to be protected.

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