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UNJUST ENRICHMENT AND LIBERTARIANISM[1]

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Abstract
The present paper takes on the question of whether the doctrine of unjust enrichment is compatible with libertarianism. Despite Walter Block's recent arguments to the contrary, the paper argues that unless a gain is received in accordance with the libertarian principles of justice, it is without a basis and thus unjust. This fact alone proves that the concept of unjust enrichment is compatible with libertarianism. Besides, even though it is true – as Block claims – that forcing the recipient of an unjust gain to return it or pay for it involves positive duties and is therefore incompatible with libertarianism, the present paper argues that the practical consequences of this fact would be negligible, for compensatory schemes would develop on the free market anyway in justice-preserving steps.

Keywords: ill-gotten gains, unjust enrichment, libertarianism

Introduction

Libertarianism is a radical political philosophy which conceives of all rights as negative private property rights.[2] Accordingly, only violations of such rights are deemed impermissible under this uncompromising theory, the fact customarily referred to as the non-aggression principle (NAP): the only conduct that is forbidden is to initiate physical force against negative rights of another.[3] The upshot of this state of affairs is that many cases

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2 Thus, according to Hillel Steiner (1994: 94), "the traditional Lockean view — that all rights are essentially property rights — far from being merely a piece of bourgeois ideology, actually embodies an important conceptual truth" (Steiner 1994: 93) and so "all rights in a set of compossible rights may be regarded as property rights." Similarly for Jan Narveson (2001: 71), "[i]t is plausible to construe *all* rights as property rights." Finally for Murray Rothbard (1998: 113) "the concept of 'rights' only makes sense as property rights."

3 As pointed out by Rothbard (2006: 27): "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. Aggression is therefore synonymous with invasion." The exception is made for fraud. Thus, writes Robert Nozick (1974: 150): "The subject of justice in holdings

that are traditionally recognized as offences, torts, contractual breaches, or mixes thereof are not so classified by libertarians, the most notable example being offences committed by omission. On the other hand, the intuitive pull of such cases is sometimes so strong that libertarians simply cannot afford to ignore it and take great pains to explain why some of such occurrences would after all be forbidden by libertarian law.[4] In some other cases the intuitive pull might be not so strong but the internal logic of libertarian theory can be at stake and thus some accommodating strategy might nonetheless be advisable.[5] In still other cases incompatibility between libertarianism and traditional legal institutions might be seen as a virtue of libertarianism rather than a vice, with no need for any adjustment whatsoever.[6]

The alternative way of thinking about such incompatibilities is to investigate the contours of the stateless society. If there was no state and society were governed solely by the libertarian principles of justice, would such and such institution develop within this society in justice-preserving steps or not? First and foremost, would the state itself "arise from anarchy (as represented by Locke's state of nature) even though no one intended this or tried to bring it about, by process which need not violate anyone's rights?" (Nozick, 1974: xi) But also less spectacularly, would, for example, fractional reserve banking develop on the free market or be considered fraudulent?[7] Or would blackmail be actionable before law in the free society?[8] Or, still differently, would incitement to crime be a crime itself?[9] As pointed out by Robert Nozick (1974: 3), "[t]hese questions arise for political philosophy and for a theory explaining political phenomena and are answered by investigating the 'state of nature,' to use the terminology of traditional political theory."

In the present paper we would like to take on one of such questions, namely the question of compatibility between libertarianism and the institution of unjust enrichment. At first glance, the very idea of unjust enrichment seems totally alien to libertarianism, for the unjustly enriched party does not commit any act and so cannot be responsible for violation of libertarian negative rights. Indeed, in his recent publication, one of the most prominent libertarian thinkers, Walter Block, contended (Block 2019: 107) that libertarians should "reject the entire doctrine of 'unjust enrichment' as incompatible with libertarianism." The main reason for this incompatibility is supposed to be the fact that recognizing unjust enrichment "would involve positive obligations, anathema to the freedom philosophy." (Block 2019: 106)

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consists of three major topics. The first is the *original acquisition of holdings*… The second topic concerns the *transfer of holdings* from one person to another…. Under this topic come general descriptions of voluntary exchange, and gift and (on the other hand) fraud." And then Nozick (1974: 162) identifies the minimal libertarian state as "a state limited to protecting persons against murder, assault, theft, fraud, and so forth." By the same token, Rothbard (1998: 143) posits that: "Under our proposed theory, would fraud be actionable at law? Yes, because fraud is failure to fulfill a voluntarily agreed upon transfer of property, and is therefore implicit theft."

4 Probably the best example is the status of children under libertarianism. See Block (2004).

5 Easements can serve as an example here. On the problem of easements in libertarianism see Block (2010; 2016), Kinsella (2007), Nozick (1974: 55), van Dun (2009), Dominiak (2017; 2019; 2021).

6 See Block (2018a, 2018b).

7 On the problem of fractional reserve banking and libertarianism see, *inter alia*, Rothbard (2009: 805–811), Pérez & Bagus (2018: 11–22).

8 On the problem of blackmail and libertarianism see, *inter alia*, Block (2013), Rothbard (2009: 183).

9 On the problem of incitement to crime under libertarianism see Rothbard (1998: 81), Dominiak & Block (2017).

Against this contention we shall argue that (1) unless a gain accrues to a person in a way predicted by the libertarian principles of justice, such a gain is without a basis and thus unjust.[10] This fact alone constitutes a sufficient reason for rejecting Block's contention that the *entire* doctrine of unjust enrichment is incompatible with libertarianism. Moreover, we shall argue that (2) although forcing the recipient of an unjust gain to return his advantage or pay for it would indeed amount to imposing a positive duty on an innocent party and thus be incompatible with libertarianism, the internal logic of this political philosophy indicates that in cases of unjust enrichment restitutory mechanisms would nonetheless develop on the free market in steps that would not infringe anyone's rights.

The present paper is organized in the following way. Section 2 offers a preliminary argument to the effect that unjust enrichment would be recognized under libertarianism. The argument revolves around the idea that only advantages that are acquired in accordance with the libertarian principles of justice are advantages that have basis in justice, whereas all other gains lack such a basis and are, therefore, unjust. Section 3 directly confronts Block's arguments that the entire doctrine of unjust enrichment is incompatible with libertarianism. More specifically, considering cases put forward by Block himself, section 3 shows that (1) the concept of unjust enrichment is, as such, compatible with libertarianism; and that (2) despite the fact that forcing the recipient of an unjust gain to return it or to pay for it would indeed be incompatible with libertarianism, practical consequences of this fact would be negligible, for compensatory mechanisms would emerge on the free market anyway.

Pro Tanto Libertarian Case For the Doctrine of Unjust Enrichment

In order to properly introduce the question of incompatibility between the doctrine of unjust enrichment and libertarianism, consider first some textbook case of unjust enrichment. Suppose that B wanted to transfer $1000 to his creditor, A, as a matter of a loan repayment but he mistakenly, although excusably, entered an incorrect bank account number and the money went to a total stranger, C. Since B clearly did not want to make a gift to C nor was there any other legal tie between B and C (*condictio indebiti*), the law of unjust enrichment would normally deem C's enrichment baseless and thus unjust. As a result, it would burden C with a duty to return the money to B.

Now our claim is that C's enrichment would be equally baseless and unjust also from the libertarian point of view. The argument for this claim seems pretty simple. Traditionally, libertarianism recognizes four, and only four, methods of acquiring private property rights, that is, rights to exclusive control over scarce resources: (1) homesteading, that is,

10 Depending on the legal system, there are two approaches to the question of unjust enrichment. In principle, common law systems understand unjust enrichment in terms of unjust factors such as, for example, duress, so that enrichment that results from some such positive factor is deemed unjust. Civil law systems, on the other hand, conceptualize unjust enrichment in terms of absence of basis so that enrichment for which there is no legal ground such as, for example, a will, or a contract, is considered unjust. In the present paper we opt for the civil law vernacular of "baseless enrichment" (Dannemann 2009: 186) and gains "without basis" (Dannemann 2009: 204) because it seems to us to be a better way of articulating our central conviction that there are cases of enrichment that simply have no basis in any of the libertarian principles of property acquisition and are thus unjust. On the idea that common law should reject the unjust factor approach and instead adopt the civil law account of the absence of basis see Birks (2005), Dannemann (2009).

mixing one's labor with an unowned resource; (2) voluntary transfer, that is, receiving a resource from its owner in a way that does not defeat validity of the latter's consent; (3) production, that is, mixing one's labor with a resource one already owns and thereby improving or changing it; or (4) rectification of injustice, that is, taking rightful possession of the offender's property as a matter of compensation or punishment.[11] Generally speaking, no other way of acquiring exclusive control over scarce resources would have a basis in libertarian principles of justice or be legitimate.[12] Accordingly, since there is no libertarian principle of justice that could explain or provide a basis for C's gain, libertarianism should consider C's enrichment baseless and thus unjust. For clearly, the transfer of B's money to C was not effectuated in performance of the contract between B and C because it was supposed to be made in performance of the contract between B and A. Moreover, the voluntariness of B's transfer was anyway defeated by B's excusable mistake and so the property title could not pass to C.[13] Even more clearly, B's money was not due to C

11 Writes Nozick (1974: 151): "If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings. 1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding. 2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding. 3. No one is entitled to the holding except by (repeated) applications of 1 and 2... The existence of past injustice (previous violations of the first two principles of justice in holdings) raises the third major topic under justice in holdings: the rectification of injustice in holdings." By the same token, Steiner (1994: 251–252) points out that "there are only four ways for a person to acquire titles to things: (i) by his appropriating (not more than an equal portion of) unowned things; (ii) by his transforming other self-owned things into those things; (iii) by his having the title to those things voluntarily transferred to him by their owners; and (iv) by his having the titles to those things transferred to from their owners in redress for their having violated his rights." Also according to Rothbard (2009: 93), for resources to become someone's property, "they must first be obtained by individual actors in one of these ways... A man owns himself; he appropriates unused nature-given factors for his ownership; he uses these factors to produce capital goods and consumers' goods which become his own; he uses up the consumers' goods and/or gives them and the capital goods away to others; he exchanges some of these goods for other goods that had come to be owned in the same way by others. These are the methods of acquiring goods that obtain on the free market, and they include all but the method of violent or other *invasive* expropriation of the property of others." Now the fourth method would of course concern rectification of such invasive acts: since according to Rothbard (1998: 88) "the criminal must pay *double* the extent of theft: once, for restitution of the amount stolen, and once again for loss of what he had deprived another," the second part of this double payment would amount to appropriating the offender's property. Similarly, for Hoppe (2001: 121), "[w]ealth can be brought into existence or increased in three and only three ways: by perceiving certain nature-given things as scarce and actively bringing them into one's possession before anyone else has done so (homesteading); by producing goods with the help of one's labor and such previously appropriated resources; or by acquiring a good through voluntary, contractual transfer from a previous appropriator or producer." (Note, however, that Hoppe talks about wealth, not property rights here.)

12 An exception should be made for accession — but this is our original thesis elaborated on in our forthcoming paper.

13 As pointed out by Steiner (2019: 100), under libertarianism "it's the authentic consent of both the parties to an exchange that is commonly held to vindicate their respective titles to what they acquire from that exchange. In exchanging, each of them waives his/her right to what they transfer to one another, and each thereby acquires the right to what is transferred. For that waiver-generated transfer to be normatively valid — for the waiver to affect the transfer of the right in question — it is necessary that it be done *voluntarily*." Additionally, many libertarians believe that fraud defeats voluntariness of exchanges and so invalidates title transfers. According to Steiner, those libertarians are opposed to fraud specifically because they assume that it invalidates title transfers due to *ignorance* that it causes in the transferor: "In addition to being unforced and uncoerced, a further condition necessary for an action to be voluntary is assumed to be that it is not falsely informed, or what I'll simply call *ignorant* […]. The buyer's waiver, to be normally

as a matter of rectification of some previous injustice that B had committed. Neither was it homesteaded, nor produced by C. Hence, as far as libertarianism is concerned, there is no justice related basis that could explain or vindicate C's enrichment. Consequently, the advantage acquired by C at the expense of B was unjust.

Nevertheless, libertarianism, in contradistinction to our laws, is unwilling to burden C with a duty to return the unjust gain to B. The reason for this is that even though the advantage received by C was without a basis, it did not come about due to any wrongdoing of C. As pointed out by Block (2019: 106), "C is an entirely innocent person. He did not authorize any [action of B]…. To force him to pay B would involve positive obligations, anathema to the freedom philosophy." Indeed, under libertarianism all first-order rights are negative rights. This fact in turn entails that all first-order duties are negative duties too.[14] In such a case burdening someone with a positive duty to perform an action, for example, to make a bank transfer, would conflict with his negative rights and therefore infringe upon them, unless it were a second-order duty created *ex contractu* or *ex delicto*. Clearly, there was no contract according to which C was supposed to return the money to B. And Block's suggestion is that by receiving the advantage, C did not commit any violation either, allegedly due to the fact that B's first-order property rights were negative rights and as such could have been violated only by action and never by omission or being in a specific state.[15] Since C performed no action at all, he did not violate B's property rights, regardless of the fact that his enrichment had no basis in the libertarian principles of justice. Hence, forcing C "to pay B would involve positive obligations, anathema to the freedom philosophy." (Block 2019: 106)[16]

valid, must also be performed non-ignorantly. And the duplicity of the fraudulent seller is held to defeat that condition." (Steiner 2019: 100)

14 On the correlativity between rights and duties see Hohfeld (1913).

15 C's possession of B's money is not an action but a state or condition in which C is. As pointed out by Friedrich Karl von Savigny ([1848] 1979, p. 2), "by the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded." By the same token, being a condition or a state as it is, possession of a thing cannot constitute any wrongdoing. Writes Michael S. Moore (1993, p. 20): "[P]ossession crimes are generally defined so that either an act (of acquiring possession) or an omission (to rid oneself of possession) are prerequisites to liability. Thus, it is not the *state* of possessing that is being punished, but either the act of taking possession, or (in the cases where the defendant comes into possession without doing anything) the omission to rid oneself of possession."

16 An anonymous referee of this journal rightly pointed out to us that the very idea that "the perpetrator of injustice, though stole someone else's wealth, is not obliged to do anything to return it to the rightful owner, and his only punishment is that he cannot do anything with the stolen wealth except keep it for himself" is a strange claim and that it justifies "the need to formulate principles of restorative justice" — something recognized long time ago by Nozick and thus something that "[p]erhaps the author(s) should recognize… too". Although we agree with the referee that it is indeed a strange prediction of the libertarian theory that the unjustly enriched has no duty to return the gain, we demur at the suggestion that it is strange because the unjustly enriched is the perpetrator of injustice or because he stole someone else's wealth. For to say so would be at least to beg the question against libertarians for whom perpetration of injustice can happen only by way of action and never by way of omission. Thus, the source of the strangeness is different, namely that for libertarians all positive duties are created only *ex delicto* (or *ex contractu*). Since the unjustly enriched did not commit any wrongdoing (again, because he did not commit any doing at all), he could not have incurred any positive duty to return the gain. All the same, his gain is without any basis in the libertarian principles of justice and so, in this sense, it is unjust. It is therefore this tension between the unjust state of affairs and the lack of remedial duties that is responsible for the strangeness of the libertarian doctrine. Now we agree with the referee that this tension might justify "the need to formu-

This of course creates some sort of paradox for libertarianism, for even though the $1000 still belongs exclusively to B, it may idly sit in C's bank account *ad infinitum* and there is nothing B can do about it. On the one hand, the $1000 did not cease to be B's rightful property and as such should still be controlled by B. In Hohfeldian[17] terms one can express this fact by saying that B has a liberty to control his $1000. On the other hand, since B's repossessing of the $1000 from unwilling C would involve violation of C's unforfeited rights (for example, by hacking into C's bank account or forcing C to return the money), it looks like B should not after all control his private property. Again, in Hohfeldian terms one can say that B has a duty not to repossess his $1000. However, since repossessing the $1000 is the only method by which B can regain control over it, then it follows – by way of the principle of closure under can[18] – that B has a duty not to control his $1000. This seems paradoxical, for B's duty not to control the $1000 contradicts B's liberty to control it.[19]

Nevertheless, consequences of this fact are much less radical than one might suspect judging from Block's (2019: 107) recommendation that libertarians "reject the entire doctrine of 'unjust enrichment' as being incompatible with libertarianism." For if C tried to do anything with B's money, for example, spend it or transfer it to another bank account, he would thereby violate B's negative property rights. After all, performing those operations, contrary to simply receiving, possessing, or omitting to return unjustified gains, would be doing things with B's private property that C would have no right to do and have a duty not to do. For example, since purchasing a good in exchange for B's money would involve performing an action with B's money that C would not have a right to perform (B did not transfer to C his *jus disponendi* over the money), C would thereby violate B's negative rights against interference with B's private property. By the same token, any action whatsoever performed by C with B's money would constitute its unauthorized appropriation[20] and violation of B's private property rights. Hence, although B's money could indeed sit idly in C's bank account without C thereby infringing upon B's negative rights (by virtue of C then not doing anything at all), the practical significance of this fact would be negligible.

Therefore, first of all, it seems that it is not the very concept of unjust enrichment that is incompatible with libertarianism. Rather, it is the idea of imposing positive duties on the beneficiary of unjust enrichment that clashes with this freedom philosophy and constitutes the reason for which Block (2019: 107) excessively urges libertarians to "reject the entire doctrine of 'unjust enrichment' as incompatible with libertarianism." Second of all, even though imposing such positive duties indeed conflicts with libertarianism, practical consequences of this fact seem insignificant, for any action whatsoever performed

late principles of restorative justice." However, formulating such principles in a way that would deal with, *inter alia*, cases of unjust enrichment, would require rather deep modifications in the libertarian theory of negative rights (so as to introduce some instances of first order positive rights and duties, e.g., a duty to return the unjust gain). Setting aside the question of whether such modifications would even be desirable or possible (without losing the identity of the *libertarian* theory of justice), our goal in this paper is much more modest. To wit, we would like to show — *contra* Block — that unjust gains would not pass under libertarianism even if we did not change anything in this doctrine.

17 On the Hohfeldian analysis of rights see, *inter alia*, Hohfeld (1913).

18 On the principle of closure under can see Sinnott-Armstrong (1987).

19 This is just another case of deadlocks created by libertarianism. Probably the most famous libertarian deadlock was identified by Nozick (1974, p. 55). On other cases of libertarian deadlocks see Block (2016), Dominiak (2017; 2019; 2021).

20 On the development of appropriation as a general offence against property in the context of more specific offences of larceny, embezzlement and fraud see Fletcher (2000, p. 9–10).

with the unjustly acquired advantage would constitute a property rights violation. Thus, it seems that libertarians do not have sufficient reasons to reject the *entire* doctrine of unjust enrichment. However, to see that more clearly, we should first carefully consider Block's recent arguments to the contrary.

Walter Block's Case Against the Doctrine of Unjust Enrichment

Block offers two arguments that are supposed to support his claim that libertarianism is incompatible with the doctrine of unjust enrichment. Both arguments proceed from imaginary cases that are supposed to elicit our negative reactions towards the idea of forcing the recipient of the unjust gain to return it or compensate for it. The first case that we would like to consider is the following:

> Suppose A steals a hunk of granite from B's quarry. Whereupon A carves a magnificent statue with that stolen material. The implication of "unjust enrichment" is that B may not have that particular piece of granite back from A because he, B, would be unjustly enriched. The value of the carved granite is so much greater than the raw granite of which B was robbed. Instead, A would only have to repay B for the value of the raw granite, plus the other libertarian aspects of punishment. This is clearly unjust, based on the libertarian philosophy. That particular rock belongs to B, and what A did to "improve" it is of no consequence…. But, we can go further than that and reject the entire doctrine of "unjust enrichment" as incompatible with libertarianism. Then, A must be compelled to return that specific carved rock. (Block 2019: 106–107)

The first problem with this case is that, contrary to Block's declaration, it does not concern the question of unjust enrichment but the question of proceeds of crime, specifically indirect proceeds of theft. Without entering into details here,[21] we know from Rothbard (1998: 59) that proceeds of crime should be forfeited by the offender and the improvement that the criminal adds to the property of another should accrue to the victim. As Rothbard (1998: 59) puts it:

> 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* to the property, which was not justly theirs, or, at the very least, to be compensated for such additions. In reply, the criterion should be whether or not the addition is *separable* from the original property in question.

By contraposition, holders of unjust titles that are themselves criminal aggressors should not be entitled to the property that they added on to the property of another. Although Rothbard does not give the reason for this verdict, we know from law of fraudulent accession[22] what is normally considered to be the reason. As we can read in *The Digest of Justinian* (41, 1, 7, 12), "if a person were to build with his own materials on someone else's site, he would make the building the property of the owner of the site, and if he knew that the site belonged to another, he would be treated as voluntarily parting with his materials." Thus, the offender should not be entitled to accessories that he added on to the property of another, for even though he knew that the property he was improving belonged to anoth-

21 We authored another paper devoted specifically to the question of compatibility between libertarianism and disgorgement of proceeds of crime. Hence, here we limit ourselves only to necessary comments.

22 A general exposition of the doctrine of accession is offered, *inter alia*, by Merrill (2009), Lorenzen (1925), Stein (1972), Barker (1983), Zhang (2020), Wood (1721, p. 111–117). On fraudulent accession see, for example, *Silsbury v. McCoon*, 3 N. Y. 379 (N. Y. 1850).

er, and that no remuneration was promised to him, he nonetheless willfully expended his labor and resources on the property. As a result, not only his labor and materials attached to this property, but also his title to these factors of production passed to the owner of the invaded property.

By the same token, in Block's example A voluntarily transferred the title to his labor to B by choosing to mix his labor with B's hunk of granite whilst knowing that the rock belonged to B and that no remuneration was promised to him for his work. Since A knowingly and willfully expended his labor on the property of another, there was nothing in the circumstances that defeated the voluntariness of his actions. Neither force nor fraud was present. Nor was there coercion or ignorance. Hence, by voluntarily expending his labor on B's property, A thereby passed the title to his labor to B. It is, therefore, incorrect to say that "B may not have that particular piece of granite back from A because he, B, would be unjustly enriched, [for t]he value of the carved granite is so much greater than the raw granite of which B was robbed." (Block 2019: 106) B would not be unjustly enriched because his enrichment would have a basis in the libertarian principle of justice in transfer. B would have the title to the statue due to A voluntarily transferring the title to his labor to B. Since B already had the title to the stolen granite in the first place and since A also transferred the title to his labor to B, then it follows as a matter of logic that B acquired the title to the statue, that is, to the upshot of A's labor being mixed with B's hunk of granite.

All of this is of course nothing other than a different way of saying what we already knew due to a simple observation that Block's case was not an instance of unjust enrichment but an example of indirect proceeds of crime. Nevertheless, it will prove beneficial for our analysis of Block's second case – this time a true case of unjust enrichment – to remind ourselves that the reason for which criminal aggressors lose improvements that they add to the property of another is that they voluntarily transfer those advantages to their victims and there is nothing (no mistake, fraud, coercion, or force) that defeats the voluntariness of their actions.

Thus, another case of unjust enrichment considered by Block (2019: 106), unfolds in the following way:

> Suppose A hires B to paint his house. B shows up but accidentally paints C's house (A's neighbor). Under at least some interpretations of the law prohibiting unjust enrichment, B may sue C and make the latter pay for the paint job – maybe not the full price A had agreed upon, but some lesser amount, if the paint job actually increased the value of C's house (and if B made the error in good faith.) This conclusion is incompatible with libertarianism. C is an entirely innocent person. He did not authorize any painting of his house. The fact that B's paint job in some objective manner increased the value of his home is entirely beside the point. To force him to pay B would involve positive obligations, anathema to the freedom philosophy.

The first thing to note about this case is that indeed both civil law and common law would recognize – under the doctrine of accession – C's ownership of B's paint and labor. This verdict would be due to the fact that B's paint and labor are mere accessories to the principal thing, that is, C's house, as in the case – reported by *The Digest of Justinian* (41, 1, 26, 2) – in which "[i]f you dye my wool, the now purple wool nonetheless remains mine…; for there is no distinction between dyed wool and that which, falling into mud or mire, loses its original color" or as we can read in *Wetherbee v. Green*, a leading American accession case which adopts the disparity of value standard rather than the difference of species rule (22 Mich. 311, 320):

> When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it, – not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

Moreover, since B's paint and labor are not, in principle, separable from C's house, Rothbard would agree that ownership thereof should vest in C. For according to Rothbard, as we remember, if the improvers "are not themselves the criminal aggressors," (Rothbard 1998: 59) it is the separability rule that should govern the distribution of the improvements. Thus, if the improvements are separable, they should return to their manufacturer whereas if they are inseparable, they should accrue to the owner of the principal thing.[23] Since "B made the error in good faith" (Block 2009: 106) and his paint and labor are not separable from C's house, they should accede to the house. Hence, although for different reasons, civil law, common law, and Rothbardian libertarianism would concur with Block's verdict concerning ownership of B's paint and labor.

However, the question is not so much of whether C should own B's paint and labor – because it is clear that they should accede to C's house and not the other way around – but whether C should enjoy this advantage without compensating B for his material and effort. After all, notwithstanding the fact that C did nothing wrong (actually, that he did nothing at all) in having the value of his house increased by B's paint job, his enrichment seems as baseless as the enrichment of the bank account owner considered in the previous section. Clearly, there was no original appropriation of B's paint and labor by C. Neither was there any contract between C and B by virtue of which C could have acquired property rights to B's paint and labor (there was a contract, but between A and B) – again, the voluntariness of B's actions was defeated by his mistake. Nor was there a violation of C's property rights

23 This rule in itself does not determine which thing is the principal thing. For example, if inseparable car tuning greatly exceeded in value the car itself, under the disparity of value rule it would be car tuning, not the car, which would be considered the principal thing. Then according to the separability rule, ownership of the improved car should vest in the improver, a solution that would most likely be rejected by Rothbard. On the other hand, it seems that if the principal thing were instead determined by the difference of species rule, then the car itself would be considered the principal thing. After all, the improved car seems to be the thing of the same species as the unimproved car. If now the separability rule were applied, then ownership of the improved car would vest in the car owner rather than the improver, a solution that would most likely be accepted by Rothbard. Interestingly enough, one might suspect that Block would reject both the disparity of value and the difference of species rules. For although the granite statue case considered above concerns a *mala fide* manufacturer (strictly speaking, a thief), Block presents it as a case of unjust enrichment, not proceeds of crime, and opts for returning the statue to the owner of the material. Thus, even though the magnificent statue is of a different species, and a much higher value, than the hunk of granite, Block would nonetheless give it to the owner of the material. In this respect Block's position resembles the one taken by the Sabinians in their dispute with the Proculians over *specificatio*. As we can learn from *The Digest of Justinian* (41, 1, 7, 7), "Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the materials should be owner of what is made from them, since a thing cannot exist without that of which it is made." This position, in turn, was probably due to adopting "the Stoic doctrine that the essence of a thing was the substance of which it was made, whereas the Proculians… followed the Aristotelian doctrine that what made a thing a thing was its form." (Stein 1972: 8)

so that C could claim B's paint and labor as a matter of redress.[24] And although civil law and common law would agree that ownership of accessories should vest in the owner of the principal thing, they would also agree that in the case of a *bona fide* improver (which B was) it should happen with a compensation to the improver.[25] Thus, there seems to be no basis on which C's enrichment could be justified.

Now some libertarians could try to deny that C's enrichment was baseless by invoking Rothbard's separability criterion according to which, in cases of inseparable, no compensation is owed to the owner of the accessory. But this response, paradoxically, would support the doctrine of unjust enrichment rather than prove its incompatibility with libertarianism. For if, contrary to fact, B's inputs were separable from C's house, then Rothbard's separability rule would recognize B's, not C's, property rights in these inputs. Thus, if they were separable and yet C retained them nonetheless, Rothbard's criterion would deem C's enrichment unjust. This, in turn, would prove that the concept of unjust enrichment is compatible with libertarianism and that Block (2019: 107) errs when he says that libertarians should "reject the entire doctrine of 'unjust enrichment' as incompatible with libertarianism." The only thing that would still be incompatible with libertarianism would be the suggestion that C should be forced to pay compensation or return the inputs to B because any such action "would involve positive obligations, anathema to the freedom philosophy." (Block 2009: 107) Nevertheless, practical consequences of this fact would be negligible, for C would be legally barred from doing anything with B's inputs and as far as they are attached to C's house, also from doing many things with the house itself.

But more importantly, it is difficult to say why Rothbard's separability rule should have any authority in determining compensatory interests in the first place. For suppose that B had a binding contract with C that C would pay B for his paint job. In such a case C would have a duty to compensate B for his paint and labor even if B's inputs were inseparable from C's house. Certainly, what would determine B's compensatory interests in this scenario would have nothing to do with separability or inseparability of his inputs. Instead it would be singularly dependent on C's contractual duty to remunerate B for his service. By the same token, if B made a gift to C, then C would owe B no compensation for the inputs, be they separable or inseparable. Rather, B's compensatory interests – or lack thereof – would be exclusively determined by what happened to B's title. Since B voluntarily transferred the title to C and C did not obligate himself to do anything in exchange, no compensatory interests would vest in B. Similarly, if C defrauded B's paint and labor, B would acquire compensatory interests vis-à-vis C even if B's inputs were inseparable from C's house. In this case it would be the involuntariness of B's title transfer that would be

24 There was no damage to C's property that B's actions caused. Quite the contrary, C's property was improved, its value increased, and C was enriched due to B's actions. But even if B's actions nonetheless constituted "so-called harmless trespass" (Feinberg 1984: 34–35) on C's property, it would still not follow that B's paint and labor should be forfeited as a matter of redress, for they would very likely exceed in value what would be due in damages for harmless trespass. At any rate, Block himself assumed that there was no violation of C's property rights.

25 Thus, for example, under the Wetherbee standard courts assume two-step approach where: "In step one, the court assesses whether the improver acted in bad faith. If so, the owner of the original materials owns the improved product and does not have to compensate the improver. If not, the court moves on to step two and assesses the comparative value of the parties' competing interests in the product. Ownership of the new product is awarded to the party with the more valuable interest, who must compensate the other party for the value of the other party's interest." (Zhang 2020: 2384)

the single controlling factor. Since the title to B's inputs would not pass to C because of the involuntary nature of the transfer, B would still have legal interests in the inputs, regardless of the fact that the inputs would inseparably accede to C's house. Again, it would be the historical investigation into the question of whether B's title passed to C, not whether the resultant property is physically divisible or not, that would determine B's interests in the inputs. The latter inquiry could matter only for the question of what sorts of interests vest in B, property, or liability interests. At any rate, the bottom line is that Rothbard's separability rule does not offer much help for the libertarian opponents of the doctrine of unjust enrichment.

By the same token, in Block's original case of B mistakenly painting C's house, voluntariness of B's actions was compromised by B's excusable ignorance. In consequence, B's mixing his labor and paint with C's house could not result in a valid waiver of B's title to the inputs. Whereas B's labor and paint attached to C's house, the title to these accessories, instead of travelling to C, stayed with B. Optimally, the inputs should therefore return to B, their rightful owner. However, this solution is obviously impossible due to physical inseparability. Nevertheless, C's simply keeping possession of B's inputs without having the title thereto would amount to C's enrichment being baseless and thus unjust. In turn, compensating B for the accessories that cannot be recovered anyway – that is, transforming B's property interests into liability interests – would create such a basis and render C's enrichment just. Of course, the problem for libertarians consists in the fact that forcing C to compensate B would involve, as rightly pointed out by Block (2009: 107), "positive obligations, anathema to the freedom philosophy." Hence, unless C himself wanted to compensate B for the accessories that improved C's property, there would be no way to legally put an end to his unjust enrichment.

However, practical consequences of this fact would be rather negligible. For B would keep his property rights to the accessories despite their inseparability from C's house until C decided to transform B's property rights into B's liability interests by compensating B for the accessories. Now, since the accessories would be inseparable from C's house while B would be their owner, we are warranted in concluding that by irreversibly infusing C's house with his paint and labor, B would thereby acquire a claim to the painted house itself. Of course, B's claim to the painted house would not be particularly weighty. Yet, unless C wanted to have his property title to the house encumbered by B's trifling claim, the only sensible solution for C would be to pay B for his labor and paint. Otherwise he would be stuck with his newly painted house in pretty much the same way as the recipient of the mistaken bank transfer was stuck with another's money in the scenario considered in the previous section. Almost any action that C would like to perform with the house would result in a violation of B's rights, which only shows that despite there being no specifically libertarian remedy against unjust enrichment, a compensatory scheme would likely develop anyway in order to deal with cases which libertarian principles of justice identify as instances of gains without basis.

Conclusions

In this paper we undertook the question of whether the doctrine of unjust enrichment is compatible with libertarianism. As our point of departure, we took Block's analysis of this question offered in his recent paper *Libertarian Punishment Theory and Unjust*

Enrichment. According to Block, the doctrine of unjust enrichment is incompatible with libertarian ethics. Against this claim we proposed essentially two arguments. First of all, we showed that unless a gain is received in accordance with the libertarian principles of justice, it is without a basis and thus unjust. By showing it, we demonstrated that the very concept of unjust enrichment is not only perfectly compatible with libertarianism but that it is actually predicted by the libertarian theory of justice. Second of all, we agreed with Block that forcing the recipient of an unjust gain to return it or to pay for it would involve positive duties and in this sense be incompatible with libertarianism. However, this fact goes no distance towards showing – as Block wanted to show – that the entire doctrine of unjust enrichment is incompatible with libertarianism. Besides the very concept of unjust enrichment being compatible with libertarianism, the fact that forcing the beneficiary of unjust enrichment would indeed be forbidden by the libertarian principles of justice would have negligible practical consequences, for compensatory schemes would likely develop on the free market anyway.

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