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Mixing Labor, Taking Possession, and Libertarianism:

Response to Walter Block*

Abstract

In his recent rejoinder to my paper Walter Block argues that only the Lockean labor-mixing theory of first acquisition is compatible with libertarianism. Block's claim is in turn directed against a position held by me in the said paper that it is the first possession theory of original appropriation that is a better fit for libertarianism. Upon reading Block's rejoinder and thinking intensely about this issue, in the present paper I agree with Block and disagree with my former self, accepting the view that it is indeed the Lockean labor-mixing theory that should be embraced by libertarians. This verdict is mainly motivated by the following arguments that I develop in detail in the paper: (1) no libertarian arguments against the labor-mixing theory seem to work, (2) the first possession theory is unable (contrary to the labor-mixing theory) to accommodate the idea of original appropriation tracking objective links between actors and

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things; (3) the labor-mixing theory better fits our intuitions about justice in property acquisition. However, in order not to make things too easy for Block, I also argue that there are some surprising and problematic consequences of adopting the labor-mixing account. I am fully prepared to accept them. The question is whether so is Block.

Keywords: libertarianism, homesteading, original appropriation, labor-mixing, first possession

1. Introduction

In the article *Libertarianism and Original Appropriation Homesteading: Response to Dominiak*[1] published in this journal, Walter Block argues that the position taken by me in the paper *Libertarianism and Original Appropriation*[2] according to which the superior libertarian theory of original appropriation is the first possession theory[3] (embraced to various degrees by such prominent libertarian scholars as *inter alia* Richard Epstein,[4] Hans-Hermann Hoppe,[5] Stephan Kinsella[6] and our own Norbert Slenzok[7]) rather than the Lockean labor-mixing theory[8] (espoused by such eminent libertarian authors as, for example, Murray

[1] Walter Block, "Libertarianism and Original Appropriation Homesteading: Response to Dominiak", *Studia z Historii Filozofii* 14 (2023): 121-142.

[2] Łukasz Dominiak, "Libertarianism and Original Appropriation", *Historia i Polityka* 22 (2017): 43-56.

[3] One can read in *The Digest of Justinian* that Gaius said: "What presently belongs to no one becomes by natural reason the property of the first taker." See *The Digest of Justinian*, book 41, section 1, item 3 (Gaius, *Common Matters or Golden Things, book 2*), transl. edited by Alan Watson (Philadelphia: University of Pennsylvania Press, 1985), vol. 4, 1.

[4] Richard Epstein, "Possession as the Root of Title", *Georgia Law Review* 13 (1979): 1221-1243.

[5] See, for instance: Hans-Hermann Hoppe, *From Aristocracy to Monarchy to Democracy: A Tale of Moral and Economic Folly and Decay* (Auburn: Mises Institute, 2014), 25-26.

[6] See, for example: Stephan Kinsella, *Against Intellectual Property* (Auburn: Mises Institute, 2008), 38.

[7] See Norbert Slenzok, *A priori wolności, a priori porządku. Filozofia społeczno-polityczna Hansa-Hermanna Hoppego a spory o podstawy libertarianizmu*, praca doktorska (Katowice 2020), 126-129.

[8] Writes John Locke: "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by

Rothbard[9] and Block[10] himself) is less compatible with the libertarian ethics and theory of private property rights than the alternative position. In what follows I would like to revisit the question of different libertarian theories of original appropriation and respond to Block's criticism by, perhaps surprisingly,[11] agreeing with this author and thus withdrawing my support for the first possession theory. However, adopting the Lockean labor-mixing theory of original appropriation will reveal, as I suspect, other dissimilarities between Block and myself as well as galvanize broader libertarian opinion concerning this fundamental topic.

The present paper is organized in the following way. Section 2 differentiates between the Lockean labor-mixing account and the first possession theory of original appropriation while providing evidence for the claim that there are indeed two distinct libertarian theories of first acquisition. Section 3 confronts and rejects arguments put forward in the libertarian literature against the Lockean labor-mixing theory, thereby building a *prima facie* case in favor of the said theory and its great proponent, Block, as well as against my former self, its unwary critic. Section 4 finally acknowledges my defeat to Block and gives some reasons for which libertarians should reject the first possession theory and accept the labor-mixing account. Section 5 tracks some surprising and

him removed from the common state Nature placed it in, hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others." See John Locke, *Two Treatises of Government*, Book II, § 27, edited by Peter Laslett (Cambridge: Cambridge University Press, 2003), 287-288.

[9] See, for example: Murray Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), 34, *passim.*

[10] See, *inter alia*: Walter Block, "Homesteading, Ad Coelum, Owning Views and Forestalling", *The Social Sciences* 3 (2008): 96-103; Walter Block, "Popsicle Sticks and Homesteading Land for Nature Preserves", *Romanian Economic and Business Review* 7 (2012): 7-13.

[11] Normally, I stick to my guns in my polemics with Block. See, *inter alia*, the following discussions: Łukasz Dominiak, Igor Wysocki, "Evictionism, Libertarianism, and Duties of the Fetus", *Journal of Medicine and Philosophy* (2023): 1-14; Łukasz Dominiak, "Libertarian Easements Revisited", *Ekonomia – Wroclaw Economic Review* 27 (2021): 27-35; Tate Fegley, Łukasz Dominiak, "Property Rights and Gun Control: A Reply to Block and Block", *Journal of Libertarian Studies* 25 (2021): 272-280; Łukasz Dominiak, "Must Right-Libertarians Embrace Easements by Necessity?", *Diametros: An Online Journal of Philosophy* 60 (2019): 34-51; Łukasz Dominiak, "The Blockian Proviso and the Rationality of Property Rights", *Libertarian Papers* 9 (2017): 114-128.

perhaps problematic consequences of the labor-mixing account and challenges Block as well as other libertarian friends of the Lockean theory to respond to them. Section 6 concludes.

2. Are There Really Two Libertarian Theories of Original Appropriation?

Although in a majority of garden-variety situations mixing one's labor with an unowned resource goes hand in hand with taking it into first possession,[12] there are some rare cases such as, for example, celebrated *Pierson v. Post*[13] in which the two come apart and are played against each other in disputes about the just distribution of private property rights. The question in *Pierson v. Post* was, in a nutshell, about who should have ownership rights over a fox worn down by the plaintiff's (Lodowick Post) hound chase but intercepted and captured by the defendant (Jesse Pierson). As stated in the opinion for the court written by Daniel D. Tompkins, J. who twelve years later became the Vice President of the United States, plenty of pertinent ancient sources, such as famous Justinian's *Institutes* or reputable anonymous treatise on English common law composed during the reign of King Edward I Longshanks, *Fleta,* as well as many respectable authors such as Henry Bracton and Samuel von Pufendorf support, in one way or the other, "the principle, that pursuit alone, vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken."[14] On the other hand, Henry Brockholst Livingstone, J. who

[12] In his rejoinder, Block agrees with this claim, for he maintains that "a gold nugget or a diamond may be 'possessed' by placing them in one's pocket. All well and good so far, apart from the fact that bending down, grabbing such a relatively tiny object, and placing it in a pocket can also, without too much of a stretch of the imagination, be described as mixing one's labor with it." Block, "Libertarianism and Original Appropriation Homesteading": 123. Similarly, Kinsella believes that "the Lockean idea of 'mixing labor' with a scarce resource is relevant only because it *indicates* that the user has possessed the property (for property must be *possessed* in order to be labored upon)." Kinsella, *Against Intellectual Property*, 39-40. However, the present paper as well as the ruling in *Pierson v. Post* discussed below clearly deny Kinsella's parenthetical remark.

[13] Pierson v. Post, 3 Caines R. 175, 2 Am. Dec 264 (N.Y. 1805).

[14] Pierson v. Post, 177.

presented the dissenting opinion, referring to the customs of sportsmen and following to some extent the authority of an esteemed French jurist, translator and commentator of Hugo Grotius and Pufendorf, Jean Barbeyrac, pondered on the question of

> who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of the day, would mount his steed, and for hours together, '*sub jove frigido*,' or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?[15]

And answering it, Livingstone, J. approbatively mentioned a middle ground solution according to which

> if a beast be followed with *large dogs and hounds*, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with *beagles only*, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.[16]

Certainly, the longer the hot pursuit, the larger the dogs, the more sophisticated the weapon and the deeper the wound – the more labor is expended and mixed by the hunter with the chased fox. Thus, if principles of justice recognized a handsome amount of labor-mixing as an operative fact that vests the laborer with property rights, then no further capture, seizure or occupancy would be needed to establish ownership in the "animal, so cunning and ruthless in his career."[17] To the contrary, any subsequent taking of such a worn down and wounded beast, if performed by another than the pursuer himself (or his agent, for that matter), would boil down to an impermissible border crossing so "as to make any one a wrongdoer, who shall interfere and shoulder the spoil."[18]

[15] Pierson v. Post, 180, 181.
[16] Pierson v. Post, 182.
[17] Pierson v. Post, 180.
[18] Pierson v. Post, 182.

However, in the case at hand "[b]oth the court and the dissent assumed that the only proper mode of acquiring ownership of unowned things was taking possession of them,"[19] not mixing them with one's labor, and so what "followed was a dispute about the outer limits of the basic proposition,"[20] that is, whether first possession consists in actually capturing or killing the fox or only in chasing or wounding this "wild and noxious beast."[21] Now to *that* question, the better answer is, as it actually was, that Post did not do enough to take first possession of the fox. For if we follow the footsteps of a great German jurist who devoted the entire treatise to the question of the exact contours of possession, Friedrich Carl von Savigny, then we will see that "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"[22] and so that Post was hardly capable of excluding Pierson's dealing with the fox. After all, it was Pierson who captured the fatigued quadruped and thereby physically excluded Post's dealing with it, not the other way around. Thus, the court correctly opted for Pierson and rejected Post's claim for legal remedy.

Yet, this solution seems correct mainly due to the fact that in *Pierson v. Post*, as pointed out by Richard Epstein, "[t]he little question – what counts as taking first possession – received exhaustive attention" while "[t]he large question – why is first possession sufficient to support a claim for ownership – received no consideration at all."[23] For if the law recognized labor-mixing rather than first possession as the investitive fact, then the dissent would have been on better grounds. As I noted above, in such circumstances a case could have

[19] Epstein, "Possession as the Root of Title": 1224.
[20] Epstein, "Possession as the Root of Title": 1224.
[21] Pierson v. Post, 180.
[22] See Friedrich Carl von Savigny, *Treatise on Possession; Or the Jus Possessionis of the Civil Law*, transl. Erskine Perry (Westport: Hyperion Press, 1979), 2. Essentially the same understanding of possession is also offered by a prominent philosopher, Hillel Stiner, according to whom the notion of possession "refers to either or both «control» and «exclusion of others». But it is clear that, where the former is used, it is intended to be synonymous with the latter. That is to say, one controls (in the sense of possesses) a thing inasmuch as what happens to that thing – allowing for the operation of physical laws – is determined by no other person than oneself." Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell Publishers, 1994), 39.
[23] Epstein, "Possession as the Root of Title": 1225.

been made that by chasing the fox with large dogs – contrary to doing so only with small ones – or wounding it severely, the hunter thereby mixed enough of his labor with the beast to become its owner, even if he fell short of taking the animal into his possession. But regardless of the question of how strong such a case would have been, the bottom line of the entire discussion as far as my investigation is concerned is that labor-mixing and taking first possession do sometimes come apart and so that there are two distinct and competing theories of what can count as original appropriation.

Now each of these two distinct theories of original appropriation has been adopted by sundry libertarian scholars at different stages of their scholarly careers and in various degrees of intensity. For example, in his relatively late essay on the decline of political regimes, Hoppe apparently subscribes to the first possession theory:

> Everyone is, first-off or prima facie, presumed to be the owner — endowed with the right of exclusive control — of all those goods that he already, in fact, and so far undisputed, controls and possesses. This is the starting point. As their possessor, he has, prima facie, a better claim to the things in question than anyone else who does not control and does not possess these goods — and consequently, if someone else interferes with the possessor's control of such goods, then this person is prima facie in the wrong and the burden of proof, that is to show otherwise, is on him. However, as this last qualification already shows, present possession is not sufficient to be in the right. There is a presumption in favor of the first, actual possessor, and the demonstration of who has actual control or who took first control of something stands always at the beginning of an attempt at conflict resolution (because, to reiterate, every conflict is a conflict between someone who already controls something and someone else who wants to do so instead). But there are exceptions to this rule. The actual possessor of a good is not its rightful owner, if someone else can demonstrate that the good in question had been previously controlled by him and was taken away from him against his will and consent….[24]

On the other hand, in his earlier writings, Hoppe talks approbatively about the Lockean labor-mixing theory of original appropriation. For example, when characterizing acquisition of private property rights in the state of nature,

[24] Hoppe, *From Aristocracy to Monarchy to Democracy*, 25-26.

Hoppe says that "according to the central Lockean idea of natural rights which coincides with most people's natural sense of justice, private property is established through acts of homesteading: by mixing one's labor with nature-given resources before anyone else has done so."[25]

In turn, Kinsella explicitly and consistently throughout his writings distances himself from the Lockean labor-mixing theory of original appropriation by linking it with the otherwise problematic Randian creation account of rights and the notion – fiercely attacked in his publications – of intellectual property. Instead, Kinsella opts for the first possession or occupancy theory. As he points out:

> One reason for the undue stress placed on creation as the source of property rights may be the focus by some on labor as the means to homestead unowned resources. This is manifest in the argument that one homesteads unowned property with which one mixes one's labor because one "owns" one's labor. However, as Palmer correctly points out, "occupancy, not labor, is the act by which external things become property." By focusing on first occupancy, rather than on labor, as the key to homesteading, there is no need to place creation as the fount of property rights, as Objectivists and others do. Instead, property rights must be recognized in first-comers (or their contractual transferees) in order to avoid the omnipresent problem of conflict over scarce resources. Creation itself is neither necessary nor sufficient to gain rights in unowned resources. Further, there is no need to maintain the strange view that one "owns" one's labor in order to own things one first occupies. Labor is a type of action, and action is not ownable; rather, it is the way that some tangible things (e.g., bodies) act in the world.[26]

In sharp contrast, such libertarian scholars as Rothbard or Block straightforwardly embrace the default libertarian position, that is, the Lockean account of original appropriation. To give just one piece of evidence – as much broader support (especially concerning Block's position) is forthcoming in the discussion below – writes Rothbard:

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[25] Hans-Hermann Hoppe, *Democracy – The God that Failed* (New Brunswick: Transaction Publishers, 2001), 128.

[26] Kinsella, *Against Intellectual Property*, 38.

> By finding land resources, by learning how to use them, and, in particular, by actually *transforming* them into a more useful shape, Crusoe has, in the memorable phrase of John Locke, "mixed his labor with the soil." In doing so, in stamping the imprint of his personality and his energy on the land, he has naturally converted the land and its fruits into his *property.*[27]

Thus, I conclude that there are indeed two distinct libertarian theories of original appropriation: the classical libertarian position which adopts the Lockean labor-mixing account and somehow revisionary stance – drawing on common and civil law – according to which it is first possession that originally establishes private property rights to things.

3. What Is (Allegedly) Wrong With the Labor-Mixing Theory?

In the paper targeted by Block's rejoinder I discussed three main arguments against the labor-mixing theory of original appropriation: (1) intangibility argument, (2) indeterminacy argument, and (3) dependency argument. Indeed, these three arguments are more or less exhaustive of the criticism deployed in the libertarian literature against the labor-mixing theory and so can be presumed to be the only ones that actually speak to libertarians. Accordingly, in the present section I will try to reassess them in order to build a *prima facie* case in favor of the labor-mixing theory.

Beginning with the intangibility argument which has been put forward by Kinsella,[28] it boils down to the following syllogism:

(1) Only tangible things are ownable.
(2) Labor is intangible.

[27] Rothbard, *The Ethics of Liberty*, 34.

[28] As Kinsella, for example, points out: "Only tangible, scarce resources are the possible object of interpersonal conflict, so it is only for them that property rules are applicable." Kinsella, *Against Intellectual Property*, 35. Now labor is not a thing, rather it is "a type of action, and action is not ownable; rather, it is the way that some tangible things (i.e. bodies) act in the world." Kinsella, *Against Intellectual Property*, 38. And further: "Only scarce resources are owned. By losing sight of scarcity as a necessary aspect of a homesteadable thing, and of the first occupancy homesteading rule as the way to own such things, Rothbard and others are sidetracked into the mistaken notion that ideas and labor can be owned." Kinsella, *Against Intellectual Property*, 52.

(3) Therefore, labor is not ownable.

Now, clearly, the relevance of the intangibility argument is that it denies, while Locke and Lockean libertarians affirm, that by mixing one's labor with an unowned resource, the laborer joins *something that he already owns* to the resource and thereby establishes ownership of the resource as well.

There are, however, two problems with this argument. First of all, the distinction between tangible and intangible on which it draws is clearly superficial, if not outright prescientific. We know from physics that matter and energy are mutually translatable. Thus, even though normally intangible, energy is no less physical or no more spiritual than matter. From this point of view, labor is nothing else than matter of one's body transformed into energy. It is as much physical as one's material body, although it has a different, intangible form. Writes Steiner:

> Our bodies produce energy. They convert body tissue into energy, some of which gets expended in our acting…. [P]ortions of our expended energy are infused into parts of the external environment, transforming their features in various ways. Sometimes we claim these things for ourselves as the fruits of our labour.[29]

Hence, if one is able to own one's body, then there is no principled reason for which one should not also be able to own one's labor, or at least I am no aware of any such reason. Of course, it can be more difficult to measure or track labor expenditure than material borders of tangible property but this is at most only a technical complication, not a matter of principle.

Second, it is hardly obvious that only tangible things are ownable to start with. As famously pointed out by Rothbard, it is possible to become an owner of, for example, radio waves, which are clearly intangible. Thus, writes Rothbard, "Jones, who transmits a wave on, say, 1200 kilohertz, homesteads the ownership of that wave as far as it travels, even if it travels across Smith's property. If Smith tries to interfere with or otherwise disrupts Jones's transmissions, he is guilty of interfering with Jones's just property."[30] Now for

[29] Steiner, *An Essay on Rights*, 233.

[30] Murray Rothbard, "Law, Property Rights, and Air Pollution", in: Murray Rothbard, *Economic Controversies* (Auburn: Mises Institute, 2011), 399.

Rothbard the distinction that is in operation here and that renders Jones's border-crossing permissible, is the distinction between "visible and tangible or 'sensible' invasion, which interferes with possession and use of the property, and invisible, 'insensible' boundary crossing that do not and therefore should be outlawed only on proof of harm."[31] Accordingly, waves in question, even though intangible, are ownable, at least as far as Rothbard's libertarianism is concerned.

By the same token, one can learn that intangibles are ownable by looking at torts that can be committed under libertarianism. Thus, it seems perfectly reasonable to say that it is a tort under libertarianism to steal another's energy, for example, heat energy produced by another's oil. Now stealing oil energy cannot be identified with stealing the tangible oil itself, for the former can be performed without taking or even touching the latter. Since stealing another's energy can be reasonably deemed a tort under libertarianism and since according to libertarianism all torts are infringements upon property rights, then it should follow that energy, although intangible, can be owned.

Finally, it is not clear what critics of the labor-mixing theory mean when they say that labor is not ownable. For example, it makes sense to say that I own a right against being punched.[32] I own this right because I have enforcement powers over it, that is, I can waive it (for example, sell it) or demand its enforcement.[33] You, on the other hand, cannot waive or enforce my right. In this sense it is me, not you, who owns the right in question. To use Herbert Hart's[34] famous example, if you signed a contract with me in which you obligated yourself to take care of my elderly mother, then it is me, not my mother, who own or have a right to your performance. My mother does not have any enforcement powers over your correlative duty and so – at least as far as lib-

[31] Rothbard, "Law, Property Rights, and Air Pollution", 398.

[32] Compare Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 3-7, *passim.*

[33] See Herbert L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), 183-184; Hillel Steiner, "Working Rights", in: Matthew H. Kramer, Nigel E. Simmonds, Hillel Steiner, *A Debate over Rights* (New York: Oxford University Press, 1998), 239.

[34] See Herbert L.A. Hart, "Are There Any Natural Rights?", *Philosophical Review* 64 (1955): 180-182.

ertarianism is concerned[35] – she is not a right-holder in this situation. Rather, she is only a third party beneficiary of the right I own. Now even though a right is a moral status, not a tangible thing, it nonetheless seems to be perfectly ownable. Likewise, it makes sense to say that in the situation at hand it is not only the right to your performance that I own, but also your performance itself, although this time in a different sense. For it seems that I have a legitimate claim to your performance.[36] After all, if you do not take care of my mother, I can, for example, sue you for compensation. But how could I possibly have this compensatory remedy, unless I had a claim-right to your performance in the first place? In other words, *ubi jus, ibi remedium*.[37] Hence, I conclude that the intangibility argument does not work.

Turning thus to the indeterminacy argument, the most famous formulation thereof comes from Robert Nozick and it begins with the question of "why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?"[38] Then in order to illustrate the problem Nozick invites the reader to consider the following scenario: "If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"[39] Alternatively, as pointed out by Steiner,[40] it is clear that if I mix my labor with a thing that I already own, then I also own the resulting product. However, if I mix my labor with a thing, for example, with a piece of land, that is unowned, then the answer to the question of whether I thereby become its owner, "as we know only too well,

[35] I argued for the compatibilism between libertarianism and Will Theory in the following paper: Łukasz Dominiak, "Libertarianizm i teoria praw podmiotowych", *Athenaeum: Polish Political Science Studies* 59 (2018): 7-17.

[36] Those libertarians who are proponents of the title transfer theory of contracts might want to deny that labor contracts are binding. However, as I argued elsewhere, the title transfer theory of contracts is untenable and so is its upshot, that is, the contention that labor contracts are not binding. See: Łukasz Dominiak, Tate Fegley, "Contract Theory, Title Transfer, and Libertarianism", *Diametros: A Journal of Philosophy* 19 (2022): 1-25.

[37] On the so-called remedy principle see Matthew H. Kramer, "Moral Rights and the Limits of the Ought-Implies-Can Principle: Why Impeccable Precautions are No Excuse", *Inquiry: An Interdisciplinary Journal of Philosophy* 48 (2005): 312-327.

[38] Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishing, 1974), 174-175.

[39] Nozick, *Anarchy, State, and Utopia*, 175.

[40] Steiner, *An Essay on Rights*, 236.

is uncertain. For any claim, to the effect that its being infused with my labour makes this land mine, can be met with the counter-claim that, in so infusing the land, I was relinquishing my title to that labour."[41]

Now it is important to note that whereas Nozick's point is essentially about the indeterminacy of the labor-mixing method, Steiner's argument is decidedly more far-reaching, for it questions the ability of the labor-mixing procedure as such to generate property titles to unowned resources. Although a good reply to Steiner's criticism seems to be the one offered by Eric Mack that if one makes off with such an apparently unowned resource infused with my labor, then one will *nolens volens* make off with my labor,[42] I abstain from pursuing this discussion here, for the issue at stake is only a comparative one, that is, which of the two libertarian methods of the original acquisition is to be preferred over the other, assuming that unowned things can be appropriated to start with. Thus, focusing exclusively on Nozick's argument and the putative indeterminacy of the labor-mixing method, I can quite unrevealingly point to the fact that the very same problem besets the method of first possession, as it is well illustrated by the above discussion about *Pierson v. Post*. Another way of saying the same thing is to repair to the opening remark of the previous section that in a majority of cases mixing one's labor with an unowned resource quite obviously goes hand in hand with taking it into first possession and so any indeterminacy that characterizes the former, also bedevils the latter.[43] Hence,

[41] Steiner, *An Essay on Rights*, 235.

[42] See Eric Mack, *John Locke* (New York: Continuum, 2009), 58-59. It seems to me that Mack's argument acquires additional strength when coupled with the observation that in order to validly waive the title to one's labor (or to any other property), the waiver must be voluntary. Unless the laborer voluntarily, one way or the other, relinquishes the title to his labor, his labor travels wherever it does, but the title thereto stays with the laborer. More on this topic later on. Incidentally, so much seems to be also acknowledged by Steiner himself: "[f]or that waiver-generated transfer to be normatively valid – for that waiver to effect the transfer of the right in question – it is necessary that it be done *voluntarily*." Hillel Steiner, "Asymmetric Information, Libertarianism, and Fraud", *Review of Social Economy* 77 (2009): 100.

[43] Still another way of driving home the same message is to point to the size of various treatises devoted entirely or partially to the question of the exact contours of possession. See, for example, von Savigny's treatise quoted above. Incidentally, von Savigny himself points out that "in inquiries into the nature of Possession, it is usual to commence with complaints as to the extraordinary difficulty of the subject. Some, indeed, have been so serious with their complaints, as to have been driven by it into a sort of despair." Von Savigny, *Treatise on Possession*, 1.

I cannot see any clear advantage of the first possession method over the labor-mixing one as far as their indeterminacy is concerned. Thus, I conclude that the indeterminacy argument does not work either.

Ultimately, there is the dependency argument put forward by Epstein according to which the investitive power of a worker's labor derives from the fact that he owns his body, which fact cannot in turn be derived – without running into infinite regress – from the investitive power of his labor. Needed is some other explanation of why the laborer owns his body. Now for Epstein this explanation is provided by the possession theory. It is due to the fact that the laborer possesses his body that he has ownership title to it. Thus, the labor-mixing theory turns out to be a dependent or secondary account of original appropriation and insofar as it presupposes the first possession theory of acquisition, it is also redundant in a sense that all property titles can be better and more parsimoniously explained by the first possession theory. As pointed out by Epstein:

> Why does labor itself create any rights in a thing? The labor theory rests at least upon the belief that each person owns himself. Yet that claim, unless it be accepted as bedrock and unquestioningly, must be justified in some way (leaving aside the question of to whom the justification must be made). The obvious line for justification is that each person is in possession of himself, if not by choice or conscious act, then by a kind of natural necessity. Yet if that possession is good enough to establish ownership of self, then why is not possession of external things, unclaimed by others, sufficient as well? The irony of the point should be manifest. The labor theory is called upon to aid the theory that possession is the root of title; yet it depends for its own success upon the proposition that the possession of self is the root of title to self.[44]

However, it is hardly obvious that possession fares any better than labor as the root of title to self. After all, for a big part of our lives we do not possess ourselves. Rather, we are originally possessed by our parents or guardians. Thus, if (first) possession were the root of title, then instead of being self-owners, we would be slaves of our parents. Which in turn boils down to saying that the first possession theory leads to the exact same paradox as the labor-mixing

[44] Epstein, "Possession as the Root of Title": 1227

theory. For as originally observed by Robert Filmer[45] and then methodically spelled out by Steiner,[46] the idea that we own the fruits of our labor pulls the rug out from under itself by undermining its own foundation, that is, the claim that we own ourselves. Following Steiner's[47] formulation, the so-called paradox of universal self-ownership springs from the labor-mixing theory in a pretty straightforward way:

(1) All persons are (originally) self-owners.
(2) All self-owners (originally) own the fruits of their labor.
(3) But all persons are the fruits of other persons' labor.
(4) Therefore, it is not the case that all persons are (originally) self-owners.

Now the bottom line is that the first possession theory carries no advantage over the labor-mixing theory as far as the paradox of universal self-ownership is concerned. For although in other terms, the first possession theory recreates the exact same conundrum:

(1) All persons are (originally) self-owners.
(2) All self-owners (originally) possess themselves.
(3) But all persons are (originally) possessed by other persons (e.g. parents).
(4) Therefore, it is not the case that all persons are (originally) self-owners.

Hence, after all, it seems to be the case that regardless of whether one opts for the labor-mixing theory or the first possession theory, the claim that all persons are (originally) self-owners has to be accepted – *pace* Epstein – "as bedrock and unquestioningly,"[48] at least as far as the derivation of property titles is concerned. Closing thereby the discussion about the alleged weaknesses of the labor-mixing account, I can thus conclude that the dependency argument does not tilt the scale in favor of the first possession theory either.

[45] See Robert Filmer, *Patriarcha and Other Political Works*, edited by Peter Laslett (Oxford: Basil Blackwell, 1949), 57.
[46] Steiner, *An Essay on Rights*, 244.
[47] Steiner, *An Essay on Rights*, 244.
[48] Epstein, "Possession as the Root of Title": 1227.

4. Why Should Libertarians Reject the First Possession Account?

As pointed out in the introduction, in his rejoinder, Block criticizes me for embracing the first possession theory as the proper libertarian account of original appropriation. Block in turn subscribes to the Lockean labor-mixing theory as the only doctrine that is truly compatible with libertarianism. Although Block deploys many arguments against my position, the main blow, at least in my opinion, comes from this passage of his:

> [W]hat are we to make of "possessing" 100 acres of land? That territory would be way too large to place in a pocket. How, then, could a person "possess" such an acreage? By continually marching around on it with a gun? By placing a fence around it, and hanging "do not trespass" signs every hundred yards or so on this fence? One could then be said to possess the fence, and the signs, but, hardly, all the land in between. If one did so regarding the periphery of a large country, such as the US, China, Russia, or Brazil, would then one own the entire country, even though one had not come within thousands of miles of all of it? That would seem to be the highly problematic implication of this theory. In sharp contrast, mixing one's labor with a plot this size places no similar insuperable barriers.[49]

Indeed, as insightfully suggested by Block, possession, when it parts with labor-mixing, comes closer to a mere declaration of power than to building an objective, physical link between the possessor and the resource in question. Or in other words, possession is more about the relationship between the possessor and all other persons (who are excluded from controlling a resource) than about the relationship between the possessor and the thing possessed (although it is also about this). Thus, as pointed out by Steiner, the notion of possession "refers to either or both 'control' and 'exclusion of others'. But it is clear that, where the former is used, it is intended to be synonymous with the latter."[50] And similarly von Savigny underlines the fact that possession is a mere possibility of both being able to physically deal with a thing and to exclude others from any such dealing. As he explains "[b]y the possession of a thing,

[49] Block, "Libertarianism and Original Appropriation Homesteading", 123.
[50] Steiner, *An Essay on Rights*, 39.

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."[51] Or still in other words, von Savigny identifies "the mere power of defense as an element of the notion"[52] of possession.

Now the fact that possession is really about the ability or power to exclude others from a resource rather than about the effort put into transformation or production thereof or about attaching thereto something that already belongs to us, does not particularly well pump our moral intuition about the just property title distribution. This is certainly one sense in which Block legitimately complains about "the highly problematic implication of this theory."[53] And if someone wanted to respond to this by saying that first possession better tracks our intuitions about conflict-avoidance than does the labor-mixing theory – since it allows for property distribution to be based on objective links between actors and resources – then another sense of Block's complaint should immediately be brought to the fore. For if possession is really about the ability to exclude others, then in order to possess a thing it is not necessary to even touch it. Again, it is not necessary because it is sufficient to be able to exclude others from dealing with the thing in question while being merely able to physically deal with it oneself.

Thus, for example, as far as taking first possession of land is concerned, von Savigny instructs us that "[i]n order to acquire Possession it is only necessary to be *present on the land*, without performance of any other act thereon."[54] For what is sufficient to acquire possession in this case is that "whoever finds himself upon the land may not only, at that moment, do with it as he pleases, but may exclude from it every one else."[55] However, and crucially, as pointed out by von Savigny:

> [T]hese two powers [to do as one pleases and to exclude others] do not refer to the portion of ground only on which the person happens to be standing, but to the whole of the land, and, therefore, it is not the mere act of treading with the

[51] Von Savigny, *Treatise on Possession*, 2.
[52] Von Savigny, *Treatise on Possession*, 2.
[53] Block, "Libertarianism and Original Appropriation Homesteading", 123.
[54] Von Savigny, *Treatise on Possession*, 149.
[55] Von Savigny, *Treatise on Possession*, 149.

> feet which gives possession of the land, but presence upon the spot which enables him, not merely to walk over every individual portion of it, but to deal with it in any way he chooses at pleasure.[56]

This, of course, stands in a very sharp contrast not only with the Lockean labor-mixing theory, but also and more crucially with the belief of those libertarians who – like Hoppe and Kinsella – while declaring themselves friends of the first possession theory, are very keen on the idea (and rightly so) that original appropriation is all about building a physical, intersubjectively controllable and ascertainable link between appropriators and things appropriated. For again, it is important to highlight that at least some libertarian friends of the first possession theory are at the same time convinced that in order to acquire original property titles to tangible things, one must indeed establish such an objective, physical link between oneself and the things in question. As it seems, those libertarians crucially believe that the first possession theory guarantees that such a link will be established. Moreover, they also seem to believe that what is really doing the heavy lifting in the otherwise misconceived labor-mixing procedure is exactly the fact that this procedure allows for establishing such a link, even though it also muddies the waters by its entire labor-owning-and-mixing talk which in turn introduces superfluous and pernicious elements to the justification of property rights acquisition.

Thus, for example, Kinsella points out that "libertarianism can be distilled to a two-word summary: 'first possession' (or 'finders keepers' or 'first user')…. [T]he only valid means of acquiring title to property is to appropriate it from the state of nature by being the first user or possessor."[57] And as for the mistaken – in Kinsella's opinion – Lockean labor-mixing theory, he "would say that 'mixing your labor' is a way of determining how much land you did use or possess."[58] But besides being a proxy for the first use or first possession,

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[56] Von Savigny, *Treatise on Possession*, 149.

[57] Stephan Kinsella, "The Essence of Libertarianism? 'Finders Keepers,' 'Better Title,' and Other Possibilities", StephanKinsella.com, access 07.06.2023. https://www.stephankinsella.com/2005/08/the-essence-of-libertarianism/

[58] Stephan Kinsella, "Thoughts on Intellectual Property, Scarcity, Labor-ownership, Metaphors, and Lockean Homesteading", *Mises Wire*, access 07.06.2023. https://mises.org/wire/thoughts-intellectual-property-scarcity-labor-ownership-metaphors-and-lockean-homesteading

"the confused, over-metaphorical idea that you own your labor and 'therefore' you own things you mix your labor with"[59] should be rejected. The metaphor of "ownership-of-labor is neither necessary (I own land I homestead because I am *first*, and have the best claim to it, not because I own my labor) nor sufficient."[60] Yet, ultimately, "the 'first use' rule is merely the result of the application of the more general principle of *objective link*".[61] As further elaborated by Kinsella:

> [I]t is the concept of objective link between claimants and a claimed resource that determines property ownership. First use is merely what constitutes the objective link in the case of previously unowned resources. In this case, the only objective link to the thing is that between the first user — the appropriator — and the thing. Any other supposed link is not objective, and is merely based on verbal decree, or on some type of formulation that violates the prior-later distinction. But the prior-later distinction is crucial if property rights are to actually establish rights, and to make conflict avoidable. Moreover, ownership claims cannot be based on mere verbal decree, as this also would not help to reduce conflict, since any number of people could simply decree their ownership of the thing.[62]

However, in light of earlier explanations by von Savigny, it should be clear that no robust link is needed for successfully taking first possession of things. For example, in the case of immovables it is enough that one's "presence upon the spot"[63] is secured so it "enables him, not merely to walk over every individual portion of it, but to deal with it in any way he chooses at pleasure."[64] Certainly, this is a far cry from establishing any objective, physical link. But things only get worse for the first possession theory as far as the objective link is concerned. For, as pointed out by von Savigny, no physical link whatsoever is needed to take possession of land, that is, "it is not even necessary to *enter* upon the land; for, whoever comes sufficiently near to inspect the whole, has

[59] Kinsella, "Thoughts on Intellectual Property".
[60] Kinsella, Thoughts on Intellectual Property".
[61] Stephan Kinsella, "How We Come to Own Ourselves", *Mises Daily*, access 07.06.2023. https://mises.org/library/how-we-come-own-ourselves
[62] Kinsella, *How We Come to Own Ourselves*.
[63] Von Savigny, *Treatise on Possession*, 149.
[64] Von Savigny, *Treatise on Possession*, 149.

just as much power over it as if he had actually entered."[65] Which in turn can be generalized as even more problematic observation that:

> The essential fact in the acquisition of Possession is not bodily contact, but perception by the senses; and, as there are five senses, Possession may be acquired by each of them, for instance, *by sight*; thus, Possession may be acquired by a view, even though the property be ten miles off.[66]

This essentially puts an end to the entire idea that taking first possession of resources guarantees – in Hoppe's own words – "basing the assignment of an exclusive ownership right on the existence of an objective, intersubjectively ascertainable link between owner and the property owned."[67] As perceptively pointed out by Block in his rejoinder, "possession of anything much bigger than what you can stick in your pocket or hold in your hand is a non-starter. Certainly, that theory cannot be reasonably applied to land, whereas labor mixing clearly can." Accordingly, it seems that it is after all Block and Rothbard, and not the friends of the first possession theory (my former self included), who are right about the relative merits of the Lockean labor-mixing account vis-à-vis its first possession competitor.

5. Some Surprising Consequences of the Labor-Mixing Account

Even though libertarians do have good reasons to embrace the labor-mixing theory rather than the first possession account of original appropriation, they are quite often unaware of or unwilling to accept the consequences that this theory generates outside the context of original appropriation. In this section I would like to adumbrate some of these consequences and offer a few arguments supporting them.

[65] Von Savigny, *Treatise on Possession*, 149.
[66] Von Savigny, *Treatise on Possession*, 150.
[67] Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Auburn: Mises Institute, 2009), 23.

Thus, I take the following statements to be uncontroversial under the standard libertarian theory of justice:

(1) If person *B* consented to mix his labor with *A*'s input resource – for example, in exchange for wage or as a matter of favor done to *A* – then *A* acquires the unencumbered title to the output resource produced by these two factors of production.

(2) However, *A* does not acquire the unencumbered title to the output resource produced by mixing *B*'s labor with *A*'s input resource if *B*'s consent to mix his labor with *A*'s input resource is induced by *A*'s unlawful threats (for example, a classical Lockean dagger to the throat case). In such a case *B*'s consent is invalid (and thus only apparent) because it is involuntary. It is in turn involuntary due to being given under the unlawful pressure on *B*'s will (duress or coercion, if you will). Besides, it is important to note that in such a scenario the fact that *B*'s consent is invalid results only in the fact that *B*'s waiver of *B*'s title to *B*'s labor is void. In other words, although the title to *B*'s labor does not travel to *A* due to invalidity of *B*'s consent, *B*'s labor does so travel nonetheless as it physically attaches or mixes with *A*'s input resource. This fact effectively creates two initially valid claims to the output resource: *A*'s claim stemming from *A*'s property rights to the input resource (since *A* committed an assault, it can be presumed that *A*'s property rights and so the claim to the output resource might subsequently be forfeited as a matter of rectification of injustice; but such a result does not have to follow automatically[68]) and *B*'s claim stemming from *B*'s unwaived title to *B*'s labor now mixed with the output resource.

(3) Analogously, *A* does not acquire the unencumbered title to the output resource produced by mixing *B*'s labor with *A*'s input resource if *B*'s consent to waive the title to his labor in *A*'s favor is induced by deception or fraud.[69] In such a case *B*'s consent is invalid because it is involuntary. It is

in turn involuntary not due to *B* acting under threat but due to *B* acting in (non-willful) ignorance or mistake. Additionally, and similarly to the above elaboration, it is worth

[68] On the relation between nonconsensual labor-mixing and redress compare my forthcoming paper: Łukasz Dominiak, "Accession, Property Acquisition, and Libertarianism", *Diametros: A Journal of Philosophy*, forthcoming, 2024.

[69] On the reasons for which fraud invalidates title transfers under libertarianism and so should be illegal see my forthcoming paper: Łukasz Dominiak, "Free Market, Blackmail, and Austro-Libertarianism", *Philosophical Problems in Science*, forthcoming, 2024.

noticing that in this situation, even though the title to *B*'s labor does not travel to *A* due to invalidity of waiver, *B*'s labor does so travel as it physically mixes with *A*'s input resource. Thus, there are two claims to the output resource: *A*'s claim stemming form *A*'s property rights to the input resource (analogous presumptions to the above case apply) and *B*'s claim stemming from *B*'s unwaived title to *B*'s labor now attached to the output resource.

Now I submit that what is doing the heavy lifting in these uncontroversial statements is (some articulation of) the following principle of justice as applied to labor:

(4) If performed by a competent title-holder, a title transfer is considered valid unless it is induced by an unlawful pressure on the title-holder's will or by the title-holder's non-willful ignorance or mistake.

I hereby challenge any libertarian who disagrees with me (Block?) about this principle to pinpoint a better explanation of the above (1)-(3) statements than the said principle (4).

At any rate, it is worth noting that (4) entails (5) which for some libertarians is indeed controversial.

(5) *A* does not acquire the unencumbered title to the output resource produced by mixing *B*'s labor with *A*'s input resource if *B*'s consent to waive the title to his labor in *A*'s favor is induced by *B*'s non-willful ignorance or mistake. In such a case *B*'s consent is invalid because it is involuntary and it is involuntary because it is ignorant or mistaken. At the same time, since *B*'s labor – in contradistinction to *B*'s title thereto – travels to *A*'s possession by being physically mixed with *A*'s input resource, two claims to the output resource spring into existence: *A*'s claim to the output resource stemming from *A*'s title to the input resource and *B*'s claim to the output resource stemming from *B*'s unwaived title to *B*'s labor now being attached to this resource.

Why is (5) controversial? Because it implies that *B* can acquire a claim to *A*'s property without the latter's consent, simply by virtue of attaching his labor to *A*'s property under conditions affecting voluntariness of *B*'s actions. For example, if *B* ignorantly mixes his labor with *A*'s marble (thinking perhaps that it belongs to *C* who contracted him for the job) without the latter's consent,

creating thereby a magnificent statue, then – *contra* Block[70] and Rothbard[71] – *B* will have a claim to the statue. As I argued in detail in other papers, this fact justifies recognizing another libertarian method of property acquisition, that is, the method of accession[72] and makes room within libertarianism for such doctrines – traditionally repudiated by libertarians[73] – as unjust enrichment[74] or disgorgement of indirect proceeds of crime.[75]

Before I conclude the present argument, two possible rejoinders seem worth preempting in this place. First of all, even though the above discussion answers this question to some extent, someone might want to press the query, in a somehow Nozickian way, of why a laborer who mixes his labor with another's property does not simply foolishly waste his labor rather than acquires a claim to the resulting product? Can't libertarians be committed only to the principle that mixing one's labor with an *unowned* resource vests the laborer with property rights, without at the same time committing themselves to a more controversial contention that labor-mixing carries with itself investitive powers also in other circumstances? A straightforward answer to this query is that if mixing one's labor with another's property were to by default result in the relinquishment of the title to this labor, then also a victim of fraud and threat would lose the title to his labor. Thus, this suggestion should, via *modus tollens*, be rejected. It is not the juridical status of a resource (whether it is owned or unowned) with which one mixes one's labor but the manner (voluntary or involuntary) in which one proceeds that determines what happens with the title to the labor.

Second, one might want to press the following doubt. What if instead of producing a magnificent statue, *B* destroyed *A*'s marble (for example, think-

[70] Walter Block, "Libertarian Punishment Theory and Unjust Enrichment", *Journal of Business Ethics* 154 (2019): 106-107.
[71] Rothbard, *The Ethics of Liberty*, 59.
[72] Dominiak, "Accession, Property Acquisition, and Libertarianism".
[73] See, for example, Block, "Libertarian Punishment Theory and Unjust Enrichment": 103-108. Murray Rothbard, "Justice and Property Rights", in: Rothbard, *Economic Controversies*, 363.
[74] Łukasz Dominiak, "Unjust Enrichment and Libertarianism", *Polish Political Science Review* 10 (2022): 1-13.
[75] Łukasz Dominiak, "Proceeds of Crime, Punishment, and Libertarianism", *Archiwum Filozofii Prawa i Filozofii Społecznej* 35 (2023): 20-33.

ing mistakenly that he was commissioned for the utilization of the stone)? Would it still count as labor-mixing and so vest *B* with a claim to the debris? Clearly, the intuitive answer is in the negative. However, the negative answer casts doubts on my interpretation of the labor-mixing principle (as vesting the laborer with rights even if he mixed his labor with another's property). For if my interpretation of the labor-mixing theory really predicts that *B* should acquire a claim to the debris and we know otherwise that he should not, then this time it is my interpretation that should, again via *modus tollens*, be rejected. And yet, my answer to this argument is that before we jump to such a conclusion, it is important to note that there are two, not one, possible ways out of this predicament. On the one hand, it is indeed possible to simply reject my interpretation of the labor-mixing theory and stick to a more traditional understanding thereof according to which labor vests the laborer with rights only in cases of mixing his labor with unowned resources. But on the other hand, it is also possible to question whether an unproductive or even outright destructive energy expenditure really counts as labor-mixing for the purposes of the libertarian theory of justice. Although the affirmative answer would be anathema to some libertarians, to me it is a much better answer than its alternatives. As an old philosophical saying has it, one person's *reductio ad absurdum* is another person's valid inference.[76]

6. Conclusions

In the present paper I used the opportunity created by Block to revisit the question of the libertarian theory of original appropriation. Upon reading Block's recent rejoinder to my old paper and thinking intensely about the problem of original appropriation, I changed my mind and agreed with Block that the Lockean labor-mixing account has the upper hand over the first possession account as far as the libertarian theory of original appropriation is concerned. Some of the reasons for this change of mind are: (1) no libertarian arguments

[76] I learned this adage from reading Michael S. Moore. See, for example, Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (New York: Oxford University Press, 2009), 26.

against the labor-mixing theory seem to work, (2) the first possession theory is unable (contrary to the labor-mixing theory) to accommodate the idea of original appropriation tracking objective links between actors and things; (3) the labor-mixing theory better fits our intuitions about justice in property acquisition. However, there are ramifications of the labor-mixing theory that might be difficult to swallow for some libertarians. Even though I believe that these ramifications should be very much welcomed by libertarians, I challenged those scholars, Block included, to speak their minds in this regard.

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